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Accommodating Employees Who Have Family Obligations

What legal rights does an employee have?

Your receptionist is leaving early to pick up her kids from school. Your office manager is taking more time off than he's entitled to, to spend with family at the cottage. Your hygienist wants to change her schedule so that she can take care of her ailing mother. Where do you stand, legally? Are you forced to always and indefinitely accommodate your employees whenever they cite family obligations? Can you refuse? Can you sanction or even terminate them for their excessive absences?

The Law

Section 5(1) of the *Human Rights Code*, says that an employer cannot discriminate against an employee based on "family status." An employer has a legal duty to accommodate an employee who has parental or childcare obligations. But that duty is not absolute: an employer can justify discriminating against an employee by showing the discrimination was necessary in order to achieve legitimate work-related objectives, after having exhausted all reasonable measures of accommodation. This "duty to accommodate" obligates an employer to take adequate steps to explore what accommodation is needed and to assess accommodation options; an employer must then provide the accommodation necessary to allow the employee to participate fully in the workplace (e.g. by modifying duties or hours, etc.) up to the point of undue hardship.

Cases

The following cases help illustrate how the law has been applied.

In ***Devaney v. ZRV Holdings Limited***, 2012 HRTO 1590, the Ontario Human Rights Tribunal found that ZRV Holdings Limited (ZRV) had discriminated against Francis Devaney on the basis of his family status. Devaney, an architect for ZRV for about 27 years, was taking care of his ailing mother, which forced him to be late or absent from work. ZRV gave Devaney numerous warnings about his absences, but to no avail; Devaney's attendance record did not improve. ZRV ultimately terminated him. Devaney commenced a human rights complaint. The Tribunal sided with Devaney. It reviewed his attendance record and the circumstances in which his care for his mother actually precluded him from being able to meet his workplace attendance requirements; the Tribunal noted that these were not personal choices. In terms of ZRV accommodating Devaney, the Tribunal found no such evidence. Devaney was ultimately awarded damages for injury to his dignity, feelings and self-respect and ZRV was ordered to develop a workplace human rights policy and provide its staff with human rights training.

In ***Johnstone v. Canada*** (***Border Services***), [2014] F.C.J. No. 455, the Federal Court of Appeal found that the Canadian Border Services Agency (CBSA) had discriminated against Fiona Johnstone based on her family status. Johnstone, having returned from maternity leave, asked the CBSA to keep her on as a full-time employee and accommodate her schedule so that she could tend to her childcare responsibilities. Instead, she was offered a part-time position (with fewer benefits) pursuant to an unwritten CBSA policy. Johnstone reluctantly accepted the demotion, but commenced a human rights complaint. The Canadian Human Rights Tribunal, the Federal Court and the Federal Court of Appeal all found in Johnstone's favour. They reasoned that: Johnstone had two young children under her care, for whom she was legally responsible; she had made serious but unsuccessful efforts to secure reasonable alter-

native childcare arrangements, but to no avail; and the CBSA's scheduling policy for a regular full-time employee was so unpredictable in its hours that it would have interfered with Johnstone's fulfillment of her childcare obligations in a manner that was more than trivial or insubstantial. The CBSA had also made no attempt to accommodate Johnstone or inquire into her individual circumstances, choosing to rely on its unwritten blanket policy of demoting her if she could not accept the unpredictable schedule that came with being a full-time employee. Johnstone was ultimately awarded lost wages, $15,000 for pain and suffering, $20,000 for special compensation (because her employer had engaged in the discriminatory practice willfully and recklessly), and costs.

In ***Partridge v. Botony Dental Corp.***, [2015] O.J. No. 226, the Ontario Superior Court of Justice found that Botony Dental Corp. (Botony) had discriminated against Lee Partridge based on her family status. On her second day back from maternity leave, Lee Partridge (a hygienist and office manager at a dental practice) was presented with a significantly revised schedule, which required her to stay at the office until 6 p.m. (instead of 5 p.m.). For Partridge, this new arrangement was unsustainable: it required her to put in place a "complex set of childcare arrangements involving a number of extended family members and a neighbour, in order that she could be available to work until 6 p.m." She was ultimately fired and commenced a lawsuit, claiming discrimination based on family status. The Court sided with Partridge and noted that Botony was "unable to show that the hours that Partridge was asked to work were a *bona fide* occupational requirement or that she could not be accommodated without undue hardship." Applying the ***Johnstone*** decision, the Court found that the discrimination Partridge suffered was unjustifiable, "clearly did injury to her dignity, feelings and self-respect," impacted her financially, and arose from her employer's willful and reckless disregard of the law. Accordingly, the Court ordered Botony to pay $20,000 in damages. The Court noted that this award would act as a deterrent to employers who are "unwilling to accommodate childcare arrangements, except where legitimate, justifiable grounds exist for being unable to do so."

Conclusion

To help avoid a human rights complaint, when faced with a request for accommodation based on family status, an employer should:

- Confirm that the request is based on an employee's parental obligations or childcare responsibilities (i.e. that a parent or child is under the employee's care and supervision, and that the family obligation at issue engages the employee's legal responsibility of that parent or child).
- Recognize that the employee's family obligation must be beyond personal family choices and voluntary family activities (e.g. dance classes, extracurricular sports, family trips, etc.).
- Recognize that the employee's family obligation must form an integral component of the legal relationship between a parent and a child (e.g. a parent cannot leave a young child without supervision at home in order to pursue work, since this would constitute neglect and possibly even a criminal act).
- Research the availability of reasonable alternative solutions that would allow the employee to meet his or her family obligations.
- Review any workplace conduct, practices or rules that interfere with an employee's fulfillment of his or her family obligations in a manner that is more than trivial or insubstantial.
- Assess the extent to which accommodating the employee would adversely affect your dental practice.
- Provide ongoing training to team members on accommodation policies to help eliminate discrimination based on family status.
- Document everything!
- Consult an employment lawyer to come up with a solution that protects your rights and interests.

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