



McCarthy Tétrault *Advance*™  
Building Capabilities for Growth



## Beyond Disability – Accommodating Family Status and Religion

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# Duty to Accommodate – Family Status and Religion

- Refresher on the duty to accommodate
- Different approaches to family status discrimination across Canada
- Accommodating religious beliefs in the workplace
- Best Practices

# The Duty to Accommodate - Refresher

- British Columbia *Human Rights Code*
- *Canadian Human Rights Act*
  - prohibit an employer from discriminating in any term or condition of employment based on specific personal characteristics
    - includes family status or religion
  - unless the discrimination is based on a bona fide occupational requirement (“BFOR”)

# BFOR - Refresher

- A BFOR is a term or condition of employment which meets three requirements:
  - Adopted for a purpose rationally connected to the performance of the job;
  - Adopted in an honest and good faith belief that it was necessary to the work-related purpose; and
  - Reasonably necessary to the accomplishment of that legitimate work-related purpose.

# BFOR - Refresher

- To show that the standard is reasonably necessary, it must be impossible to accommodate the employee without undue hardship.
- Both the employee and, if applicable, the union must participate in the accommodation process.
- Employees are not entitled to insist on “perfect” accommodation.

# What is Undue Hardship?

- Stringent standard
- Some hardship or inconvenience is required – only if “undue” will obligation be discharged
  - Financial costs
  - Interchangeability of work forces and facilities,
  - Health and safety risks
- Misguided complaints about “special treatment” will not be considered

# Accommodating Family Status

- Family status is undefined in the Code and the Act
- Different approaches have emerged across Canada in different forums and jurisdictions

# Accommodating Family Status

- Limited Approach: “Serious” Interference with Substantial Obligations - BCCA
  - A prima facie case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee
    - *Campbell River and North Island Transition Society v. Health Sciences Assn. of British Columbia*, 2004 BCCA 260



# Accommodating Family Status

- Cases since *Campbell River*
  - *Evans v. University of British Columbia*, 2008 BCSC 1026: unable to find daycare following parental leave
  - *Sawchuk v. Hastings Entertainment Inc.*, 2008 BCHRT 407: arrangements for children for evening work
  - *Falardeau v. Ferguson Moving and others*, 2009 BCHRT 272: other caregivers while at work

# Accommodating Family Status

- Cases since *Campbell River*
  - *Brown v. PML and Whitman (No. 4)*, 2010 BCHRT 93: promise of permanent flexibility of working conditions for family care
  
  - *Christian Cavanaugh v. Sea to Sky Hotel et al*, 2010 BCHRT 209: assumptions made about ability to work due to childcare obligations

# Accommodating Family Status

- The Broad Approach: “Any Adverse Effect” - CHRT
  - A *prima facie* case for family status discrimination will be made out where the complainant can demonstrate that, as a result of an employer action or a change in the characteristics of family status, a conflict has arisen between his or her workplace and family responsibilities that has an adverse impact on any parental obligation.
    - *Hoyt v. Canadian National Railway*, [2006] C.H.R.D. No. 33 (Can. HRT)

# Accommodating Family Status

- The Broad Approach with Reservations
  - *Attorney General of Canada v. Johnstone*, 2013 FC 113
  - To demonstrate family status discrimination:
    - The childcare obligation must be one of substance;
    - The complainant must have tried to reconcile family obligations with work obligations; and
    - There must be an employment rule or condition that interferes with the employee's ability to meet a substantial parental obligation in any realistic way

# Accommodating Family Status

- The Broad Approach, applied under provincial human rights legislation
  - *Communications, Energy and Paperworkers Union, Local 707 v. SMS Equipment Inc.*, 2013, AB LA
    - Grievor was a single mom who worked rotating day and night shifts, requested straight day shifts
    - No partner or family to assist with childcare
    - “Obvious that the Grievor’s parenting responsibilities are extraordinary” and failure to accommodate was discriminatory

# Top Tips For Employers

- Identify the issues
- Assess the first two steps of the *Meiorin* test
- Don't jump to conclusions or rush to a solution
- Gather the right information
- Encourage the participation of the employee
- Consider all of the options and document the corresponding assessments
- Offer reasonable accommodation
- Follow up

# Accommodating Religion

- Focus on the individual's personal beliefs and not the religious dogma from which they stem
- *Syndicat Northcrest v. Amselem*, 2004 SCC 47
  - An individual is protected from discrimination of the basis of a religious belief or practice if the individual sincerely and genuinely believes the belief or practice is part of their religion, regardless of whether the belief or practice is actually mandatory or widespread in the religion.

# Accommodating Religion

- If a term or condition of employment or action is, on its face, discriminatory, the employer must show that it is a BFOR
- Accommodation means accommodating the employee's full exercise of his or her genuine individual religious beliefs
  - *Toronto Assn. for Community Living v. C.U.P.E., Loc. 2191*, 2005, ON LA
- The employee has a duty to cooperate
  - *Coast Mountain Bus Co. v. Canadian Autoworkers Union, Local 111*, 2004, BC LA



# Accommodating Religion

- What is an undue hardship when accommodating religious beliefs?
- *Boogaars v. Greater Victoria Hospital*, [1989] B.C.C.H.R.D. No. 8
  - Hospital operated on a continuous basis using a system of shift rotations
  - Very difficult to accommodate Ms. Boogaars by switching shifts

# Accommodating Religion

- May discharge duty to accommodate where there is:
  - A substantial decrease in safety
  - Inconvenience to the public as a whole; or
  - A high financial cost along with a corresponding decrease in efficiency

# Accommodating Religion

- Case Examples:
  - Shift-work or shift rotations: *Drager v. International Association of Machinists*, 1993, BCHRT
  - Health and safety concerns: *Pannu v. Skeena Cellulose Inc.*, 2000 BCHRT 56
  - Preaching: *Friesen v. Fisher Bay Seafood Ltd.*, 2009 BCHRT 1

# Top Tips for Employers

- Understand your employee's needs
- Understand your workplace
- Assess whether the rule meets the first two steps of the *Meiorin* test
- Don't jump to conclusions or rush to a solution
- Consider all of the options and document the corresponding assessments
- Offer reasonable accommodation
- Follow up

# Group Discussion

→ Scenarios

# Questions and Answers



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