



## Education Law eBulletin

A newsletter for educators

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### Employers' duty to accommodate employee family care obligations

Under the Ontario *Human Rights Code* (the "Code"), an employer has a duty to accommodate an employee with a claim on the ground of family status, which is defined as "the status of being in a parent and child relationship".<sup>1</sup> The law in Ontario on family status discrimination has been in flux in recent years leaving mixed messages for employers. A recent decision of the Ontario Human Rights Tribunal helps to bring some clarity and consistency in this area.

In *Linklater v. Essar Steel Algoma Inc.*,<sup>2</sup> an employee at a steel facility worked 12-hour shifts on rotation. The employee had joint custody of his child and a court order specifically set out his access schedule based on his work hours. The employee suffered a workplace injury and was no longer able to do the work required during the 12-hour shifts. As an accommodation, the employee was assigned to do office work, which also resulted in different shifts, fewer work hours and a loss to a wage premium that only employees on night shift receive.

The evidence demonstrated that at this time, the employee simply communicated to his employer that the change to his hours may affect the time he is able to spend with his children. The employee did communicate to his employer that he objected to the accommodated work and hours, claiming he wanted to remain on the 12-hour shifts for the money and for family reasons. The employee reluctantly worked the modified schedule doing office work.

The employee went to his union and the employer was then notified for the first time that the accommodated work will impact the employee's ability to see his children as set out in a court order regarding his custody access. The employer promptly scheduled a meeting with the employee to discuss accommodation options and it was eventually agreed that the employee could return to his 12-hour shifts once he obtained medical clearance to perform at least one of the tasks performed during the shift.

Prior decisions across several jurisdictions have previously placed a higher onus on an employee to prove discrimination on the ground of family status. The Tribunal confirmed that the legal test to be applied in a case of alleged family status discrimination is no different than in other discrimination cases under the *Code*. In addition, the Tribunal stressed the duty to cooperate in the accommodation process on the part of the employee:

An individual seeking an accommodation, in general, has the responsibility to communicate the need. It is true that in some cases a respondent may have a duty to inquire even where there has not been a specific accommodation request in situations

<sup>1</sup> s. 10 of the *Code*

<sup>2</sup> 2019 HRTO 273

where the respondent should have been aware that an accommodation may be required from the circumstances. See *Wall v. Lippé Group*, 2008 HRTO 50 (CanLII), at paragraph 80. Such situations, however, have primarily arisen where the reason no accommodation was explicitly requested was related to the applicant's disability.<sup>3</sup>

In the case at hand, the Tribunal found that the employee failed to properly advise his employer of his child care obligations and the interference he was experiencing as a result of the shift change. It was not enough that the employee simply said that the change may impact his ability to see his children (this is something that reasonably any employee may experience). In this case, the employer took steps to accommodate the employee once it became aware of the specific conflict with the court order regarding access to the employee's children. That was when the employer's duty to accommodate was triggered and it acted reasonably in the circumstances.

The employee also claimed that the reduction in his hours and the loss of the night shift premium with the accommodated work was discriminatory. The Tribunal disagreed and found that the employer provided the employee with an accommodation that was within his restrictions and he was paid for the work he performed. It was not disputed between the parties that the employee could not perform any of the work required by employees working the 12-hour shift.

Regarding an employer's duty to accommodate a request for accommodation made by an employee claiming family status under the *Code*, there are other decisions that are helpful in firming up when this duty arises. In a decision from the Northwest Territories<sup>4</sup>, an employee working at the City of Yellowknife requested to have her summer off in order to care for her autistic child. After previously granting her one summer off without pay for the same reason, the employer requested evidence from the employee regarding the unavailability of alternative childcare the next year she made the same request. The employer sought to accommodate the employee with evening and weekend hours but the employee refused. She supported the refusal with a medical note indicating that working evenings and weekends would negatively affect her son and her request for time off in the summer was medically necessary. The employee also provided a note from a summer camp indicating that they could not support her child and another doctor's note indicating that her child needs to be around individuals that he is close to and familiar with.

The adjudication panel (the "Panel") found that the employer discriminated against the employee when it refused to provide the employee with the second summer off. The Panel noted that the employer previously provided the employee with a summer off, it dismissed all the medical information that she provided, and the City failed to establish that working in the summer was a *bona fide* occupational requirement. The City appealed the decision but the appeal was dismissed by the Supreme Court of the Northwest Territories. The Court found that the Panel's decision was reasonable and commented that the "childcare obligations at issue were not ordinary childcare obligations... they were childcare obligations relating to a child suffering from a significant disability."<sup>5</sup>

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We welcome your comments and questions. Send them, and any updated contact information, to [jessica.koper@shibleyrighton.com](mailto:jessica.koper@shibleyrighton.com). If you wish to unsubscribe to this eBulletin, please send a blank e-mail to [christen.broadbent@shibleyrighton.com](mailto:christen.broadbent@shibleyrighton.com)

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<sup>3</sup> at paras 39

<sup>4</sup> *A.B. v. Yellowknife (City)*, 2016 CanLii 19718 (NT HRAP)

<sup>5</sup> *The Municipal Corporation of the City of Yellowknife and A.B. and The Northwest Territories Human Rights Commission*, 2018 NWTSC 50 at para. 54