NOVA SCOTIA
Human Rights Commission

Interpreting Family Status

Preferred Position

Child-rearing and caring for aging parents can place a burden on these caregivers that is deserving of protection, particularly given this work historically has been "women's work" and has been prone to being undervalued. Not every circumstance related to family status, however, will trigger protection under the Nova Scotia *Human Rights Act*. Family status is defined to mean "the status of being in a parent-child relationship."[1]

STAGE ONE: **Establishing Protection under the Act**
To trigger family status protection under in the Act for caregiving situations, a *prima facie* case must be made out on a balance of probabilities. The following three-part test is used:

1. The complainant fits the definition of being in a parent/child relationship as required by the Act.

2. There is a disadvantage (burden or loss of opportunity) connected to the demands of that parent/child relationship and to the institution's requirements.

3. This disadvantage arises from a "significant conflict" between the care-giving responsibility of the complainant and the institutional rule.

"Significant conflict" is determined by the amount or degree of *control* the complainant has over the care-giving situation:

The less control the complainant has over her/his particular care/giving responsibilities, the more significant the conflict with the institutional rule. The greater the conflict, the more likely it is protected by the Act. Loss of control, for example, may be:

- the terms of family access court orders;
- lack of family/extended support to assist with care;

[1] Nova Scotian *Human Rights Act*, R.S., c. 214, s. 3(h) [the "Act"].

- a unilateral decision by the employer to change work hours not previously agreed to by the complainant or without proper notice;
- serious illness or special needs of a child which makes regular childcare arrangements difficult to obtain;
- age of the child;
- systemic barriers facing the complainant (e.g., complainant may also be disabled);
- lack of choice in type or location of childcare.

STAGE TWO: Refuting or Accommodating a Family Status Claim

When an employee brings this "significant conflict" to the employer and shows that s/he needs accommodation due to the lack of control over the caregiving responsibilities, the employee must then consider reasonable accommodation, if possible.

FAMILY STATUS: Duty to Accommodate Childcare
Background Legal Research

(a) Relevant Legislative Provisions

Discrimination is defined in the Nova Scotia *Human Rights Act* (the Act)as:

> 4 ... a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

The prohibition against family status based discrimination in the Act reads:

> 5 (1) No person shall in respect of ...
> (d) employment ...
> discriminate against an individual or class of individuals on account of ...
> (r) family status...
>
> 3 (h) "family status" means the status of being in a parent-child relationship;

(b) Common Law: Family Status

The case law diverges substantially for parents with childcare needs in terms of the *prima facie* case of discrimination to be made out. The oft-quoted Court of Appeal case *British Columbia-Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260 states it should be a "serious interference" of a "substantial" parental duty:

> [39]... 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. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.

Although British Columbian cases[2] have reluctantly followed this appeal court decision, other jurisdictions have not adopted such a narrow definition of family status. The Federal Court in *Johnstone v. Canada* (*Attorney General*), 2007 FC 36[3] was critical of the strict definition given to family status, placing too high a burden on the complainant to prove discrimination:

> In my view, the concerns [expressed in *Hoyt*, below] are valid. While family status cases can raise unique problems that may not arise in other human rights contexts, there is no obvious justification for relegating this type of discrimination to a secondary or less compelling status....

In *Hoyt v. Canadian National Railway*, 2006 CHRT 33, the Canadian Human Rights Tribunal was also critical of the British Columbian approach. The adjudicator said there should not be a hierarchy of human rights, some of which get interpreted expansively while others, such as family status, get defined restrictively:

> With respect, I do not agree with the Courts' analysis [in *Campbell River*]. Human rights codes, because of their status as 'fundamental law,' must be interpreted liberally so that they may better fulfill their objectives....[citations omitted] It would, in my view, be inappropriate to select out one prohibited ground of discrimination for a more restrictive definition. (para. 120)

An Albertan human rights case, *Rennie v. Peaches and Cream Skin Care Ltd* (2006, unreported), also found there was *prima facie* discrimination in a situation where there was no child disability or a unilateral change in employment hours by the employer. Instead, the employee returned from maternity leave for her third child, at which time the previous care provider was no longer available. She therefore requested from her employer a change in her schedule with fewer night shifts. The adjudicator found that terminating her, rather than providing other shifts, was discrimination based on family status. The small-sized employer, however, would have suffered undue hardship to accommodate her and the claim was dismissed.

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[2] See *Stuart v. Navigata Communictions Ltd.*, 2007 BCSC 463 CanLII, and *Falardeau v. Ferguson Moving and others*, 2009 BCHRT 272 CanLII.

[3] See *Brown v. M. N. R., Customs and Excise* (1993), 19 C.H.R.R. D/39 C.H.R.T. for a request for day shifts due to babysitter constraints, denied by employer and found to be discriminatory; *McDonald v. Mid-Huron Roofing* [2009] O.H.R.T.D. No 1277 found a failure to accommodate a husband's time off to support his sick wife. See also a series of Canadian National Railway tribunal decisions on family status: *Seeley v. CNR* [2010] CHRT 23: *Richards v. CNR* [2010] CHRD 24 and *Whyte v. CNR* [2010] CHRD 22.