

AN UPDATE ON FAMILY STATUS DISCRIMINATION

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Attempting to balance life's many responsibilities can be difficult for anyone, and the stress involved in being a parent, child, spouse, and employee can be exhausting. Child and elder care responsibilities are often unpredictable, and the resulting absenteeism can be extremely frustrating for an employer. Absenteeism strikes at the very heart of the employer's residual right to manage its enterprise.

In the past, discrimination based on family status was rarely discussed and typically limited to the protection of women re-entering the workforce after a maternity leave. However, employee requests for accommodation based on family status are becoming more common and employers are becoming more aware of their obligations under applicable human rights legislation. However, the case law surrounding family status discrimination is less than clear.

Although family status discrimination is prohibited by human rights legislation across Canada, and the duty to accommodate employees with child or elder care responsibilities has long been recognized as part of an employer's duty to accommodate on the basis of family status, the question remains "How far do we cast the net?"

The recent decision of the Ontario Human Rights Tribunal (the "Tribunal"), *Devaney v ZRV Holdings Limited*, 2012 HRTO 1590, provided some clarification. Devaney was an architect with ZRV Holdings for approximately 27 years until the termination of his employment for cause in January 2009. Beginning in 2007, Devaney began spending less and less time at the office. ZRV insisted that Devaney, who was the lead for a major firm project, regularly attend the office during office hours. While there was no question that Devaney was absent from work on numerous occasions over a significant period of time, he took the position that he completed his workload remotely, with the aid of technology, in order to care for his elderly mother.

The Tribunal canvassed the broader test applicable to family status complaints established by the Canadian Human Rights Tribunal and the stricter test established by the British Columbia Court of Appeal; however, ultimately the Tribunal adopted a new test focusing on the distinction between the preferences and needs of employees with caregiver responsibilities.

The Tribunal concluded that in order for the applicant to establish a *prima facie* case of discrimination, the

applicant need only show that his employer's attendance requirements had an adverse impact because his absences from the office were required due to caregiving responsibilities. However, the Tribunal did note that if the applicant was merely choosing to provide care rather than it being a family responsibility, the applicant would not be able to claim family status discrimination.

The Tribunal concluded that the employer failed to engage in a dialogue with Devaney regarding his caregiving needs and as such failed "in its procedural and substantive obligations under the duty to accommodate". Devaney was awarded \$15,000 in general damages for injury to his dignity, feelings and self-respect.

What are the potential implications for employers? Although Devaney seems to shed some light on the test for family status discrimination, the law in this area continues to be unsettled. However, employers should always keep in mind some tips for dealing with discrimination:

- If a discrimination issue is suspected, initiate a meaningful dialogue to assess how best to accommodate the employee's needs;
- There is no one size fits all formula, each case must be assessed individually;
- Institute a discrimination and accommodation policy and ensure consistent enforcement; and
- Carefully document all accommodation discussions and the accommodation process.

For more information on this topic, please contact any member of McMillan's [Employment and Labour Group](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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