

Parents are People, too! Your Human Rights Protections In a Nutshell

By Richard B. Johnson, Employment and Human Rights Lawyer

I have noticed a wealth of discussion in the last several months regarding parents' rights at work. Much of this discussion centers around the way that the courts and tribunals are interpreting the Human Rights protections and, in particular, protections over family status and an employee's rights to accommodation for childcare.

Parents of all kinds, including birth parents, grandparents and adoptive parents, enjoy increasingly broad Human Rights protections over many aspects of parental life. We are protected from discrimination in the course of our jobs, when we attend to our childcare obligations and when we buy goods and services.

The law has undergone a great deal of development to make sure that all types of parents (adoptive, biological, foster, grandparent and other parenting arrangements) are protected.

One key statute that offers parents and guardians protection in BC is the *Human Rights Code*.

Human Rights Protections

The *Human Rights Code* prohibits discrimination in several aspects of British Columbians' lives. Discrimination generally means that you are treated negatively because of one of several "protected grounds" set out in the *Code* including race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, etc.

The protected grounds vary slightly depending on the area of life that is protected. However, the *Code* prohibits us from being discriminated against when, for example, we carry on our careers, purchase goods and services, and when we rent or buy a home.

My practice typically focuses on discrimination in the area of employment, where unacceptable treatment can range from employees being the subject of jokes and ridicule, to being passed over for a promotion or bonus, or being denied accommodations to care for our children or grandchildren.

The *Human Rights Code* does not specifically state that parents or grandparents must be protected from discrimination based on childcare obligations. However, the law has developed through the Courts and the Human Rights Tribunal to interpret and apply such protections under the heading "family status". This means that under certain circumstances, such as those set out below parents of all kinds have strong legal protections under the *Code*.

Pregnancy & Status as a Parent or Guardian

It is illegal to discriminate against someone because they want to start a family. For example, an employer cannot discriminate against a woman because she wants to or does become pregnant, or against a same sex couple that wants to start a family. Similarly, parents are entitled to time off of work because of pregnancy or parental leave. Pregnancy, maternity and parental leave are protected by the prohibition in the *Code* against discrimination based on several grounds including a person's sex, sexual orientation, family status or gender identity.

If a mom-to-be requires time off for medical complications due to her pregnancy or she takes maternity leave, her employer is required to accommodate that time off from work. The employer must also leave her position open for her return unless to do so would be unduly hard on the employer (which would be rare).

Likewise, the law protects the rights of parents of all kinds to take parental leave after a birth or adoption, and employers have to accommodate parental leave to the point of undue hardship.

Proving undue hardship by an employer is very difficult and most employers in BC would be hard-pressed to prove that it would suffer undue hardship in accommodating a maternity leave, parental or parenting-related medical leave.

Childcare Obligations

Accommodation of childcare responsibilities is another very important issue that has received significant attention from the Courts and Tribunals recently as they are called upon to define the rights of all types of parenting arrangements and how the Human Rights protections apply to those arrangements.

Specifically, the Courts and Human Rights tribunals have been called upon to address whether employers must accommodate employees' childcare obligations.

The BC *Human Rights Code* does not specifically touch on childcare obligations. Instead, the law has developed to clearly include childcare obligations within the protections over "family status" in the *Code*.

In 2014, the Federal Court of Canada distilled the legal test used to determine when an employer is required to accommodate an employee's childcare obligations. The test defined by the Court was as follows:

- 1) The child is under the employee's care and supervision;
- 2) The childcare obligation is required because the employee is legally responsible for the child; it is not simply a personal choice;

- 3) The employee has made reasonable efforts to meet his or her childcare obligations through reasonable alternatives, but no such alternative solution is reasonably accessible; and
- 4) The workplace rule at issue interferes with fulfilling the childcare obligation in more than a trivial or insubstantial way.

The analysis was heavily criticized because it obligated employees with childcare issues to take significant steps to find alternative solutions before requiring an employer to accommodate them (whereas people claiming accommodation for other issues such as physical disability are not required to go to such lengths before obtaining accommodations).

In 2016, the Ontario Human Rights Tribunal ruled in *Misetich v. Value Village Stores Inc.*, 2016 HRTO 1229, that employees should not be required to meet a more stringent test than those with other issues before being entitled to accommodation from employers.

Under *Misetich*, employees now just need to establish a "real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work" and then the employer will be required to accommodate. So long as the test is met, the structure of the family (whether birth or adoptive parent, guardian/grandparent, same-sex parents, etc.) is protected from discrimination.

In 2017 and 2018, the BC Human Rights Tribunal issued two particular decisions that show that the law in BC is moving in the direction of lowering the bar for those dealing with childcare obligations. Instead of requiring childcare providers to demonstrate that they face a "serious interference" with a "substantial parental or other family obligation" before their employer has to accommodate them, the developing law only requires that they establish that they fall within a protected ground and require accommodation for childcare duties. Then, the analysis effectively turns to what accommodations were reasonable, if any.

Most recently, it appeared that the law was going to be changing to lessen the burden on employees seeking accommodation for childcare obligations. In October of 2017, the BC Human Rights Tribunal issued a decision in *Suen v. Envirocon Environmental Services (No. 2)*, 2017 BCHRT 226, that a work transfer required by Mr. Suen's employer constituted a serious interference with a substantial parental or other family duty or obligation. As such, the Tribunal allowed his human rights complaint to proceed.

The employer applied for a judicial review of this decision, and the BC Supreme Court upheld the Tribunal's decision. Envirocon appealed the Supreme Court ruling to the BC Court of Appeal. In February of 2019, the Court of Appeal quashed the Tribunal's decision, which means that for the meantime at least,

parents and caretakers will continue to have to prove a serious interference with a substantial parental or other family obligation before an employer has to provide accommodation.

While this is a setback, it is expected that the law will continue to develop to create more equality in the test applied to family status/childcare obligations compared to other human rights grounds.

Summary

This is a very brief overview of some of the protections that are in place for the diverse types of parenting arrangements that we enjoy in BC. Despite the recent setback in the development of the law in this area, things are changing in very positive ways and addressing the historical parenting quagmire: whether to choose career or family.

Making employees choose between employment or family is no longer acceptable. It can actually be illegal to force employees to make that choice.

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