

## **Human Rights & the Family in Ontario**

### **Family Status Consultation Submissions of Canadian Manufacturers & Exporters**

#### **Introduction**

1. On May 12, 2005, the Ontario Human Rights Commission (“the Commission”) released its Discussion Paper “Human Rights & the Family in Ontario” focussing on the need to reflect on and raise awareness about the potential human rights issues surrounding family status and employment, access to services and housing.
2. The Commission has posed a number of consultation questions for consideration by stakeholders on the issues raised in the Discussion Paper. The Commission has requested submissions from stakeholders in response to the Discussion Paper in order to assist it in drafting a policy statement on discrimination on the basis of family status.
3. As an association representing employer stakeholders in the manufacturing and export industries, Canadian Manufacturers & Exporters Association makes the following submissions in respect of family status and employment.

#### **Expansion of the Protected Relationships**

4. The Ontario *Human Rights Code* defines family status as including only “the status of being in a parent-child relationship”. The courts have somewhat expanded that definition to also include the substantial parental or other family obligations imposed on the individual by virtue of that status.
5. The case law is unsettled respecting the scope of “family status”. It is our submission that the definition of family status as interpreted by the courts is not overly narrow but rather, achieves an appropriate balance between two potential extremes (the mere fact of being in a parent-child relationship versus encompassing extended family members).
6. There is no need to expand the definition and protection of “family status” in view of the current statutory entitlements afforded to all individuals in Ontario. Through the newly amended *Employment Standards Act, 2000*, the provincial Government provides emergency and family medical leave to all employees based on an expanded list of family members. Similarly, the federal Government recently passed legislation providing compassionate care leave under the *Canada Labour Code* and benefits under the *Employment Insurance Act* to

provide compensation to employees who are required to leave work to care for a terminally ill family member.

7. In the alternative, if the Commission decides to expand the definition of “family status” to include other familial relationships, the definition ought to be consistent with the *Employment Standards Act, 2000* emergency and family medical leave provisions. In that regard, the definition (and consequently protection under the *Human Rights Code*) should not extend beyond:
  - the employee’s spouse;
  - a parent, step-parent or foster parent;
  - a child, a step-child or foster child;
  - a grandparent, step-grandparent, grandchild or step-grandchild;
  - spouse of a child of the employee;
  - a brother or sister; and
  - a relative of the employee who is dependent on the employee for care or assistance.
8. Similarly, should the Commission decide to expand the definition of “family status” as set out in paragraph 7 above, protection only ought to extend to illness, injury, medical emergency, death or other urgent matter relating to the employee or person enumerated above in paragraph 7. Such limitations would be consistent with the emergency leave provisions in the *Employment Standards Act, 2000*.
9. It is our submission that the current definition of “family status” is adequate for the purposes of the *Human Rights Code*, as currently interpreted by the courts to include the substantial parental obligations imposed on an employee by virtue of his or her status as a parent. Although, as set out in the Discussion Paper, “family may mean many things to different people”, the current definition is a common factor to all cultures. An open concept of “family status” would, in the words of the Court of Appeal in *Campbell River*<sup>1</sup>, “cause disruption and great mischief in the workplace”.

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<sup>1</sup> *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, 2004 BCCA 260 (B.C.C.A.)

10. In the alternative, a definition consistent with the emergency leave provisions of the *Employment Standards Act, 2000* is sufficient to include broader familial relationships.
11. There must be a practical limitation on the scope of “family status”. To construe the concept of “family status” overly broadly would impose an obligation to accommodate on employers that would, in many cases, approach undue hardship.

### **The Duty to Accommodate**

12. Consistent with Commission’s own policies and Supreme Court of Canada case law, the duty to accommodate is a multi-party inquiry.<sup>2</sup> All parties to the employment relationship; the employer, the employee and the union, if applicable, have an obligation to participate and facilitate the reasonable accommodation of an employee’s needs related to family status.
13. The obligations placed on employers in respect of their duty to accommodate ought to be no different than the duty to accommodate applied in respect of cases of employees with disabilities. The required analysis under the *Human Rights Code* remains the same.
14. The extent of an employer’s obligation to accommodate an employee’s needs related to family status must be assessed on a case by case basis. So long as the employer has offered a reasonable accommodation, the employer should not have to prove undue hardship in respect of other potential forms of accommodation.
15. As in disability cases, it will depend on several factors, including the impact on the business operations; the cost associated with the accommodation; the size of the employer; health and safety risks, if any, associated with the requested accommodation; and conflict with the collective agreement, if applicable.
16. Accordingly, an employee is neither entitled to a perfect solution nor his or her preferred accommodation. The employer has an obligation to provide a reasonable accommodation that balances the employee’s needs in respect of family responsibilities against the needs of the business. A reasonable accommodation is one which arrives at a compromise that is least disruptive to the employer’s operation but still addresses the employee’s needs.

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<sup>2</sup> Ontario Human Rights Commission “Policy and Guidelines on Disability and the Duty to Accommodate” (November 23, 2000) ISBN No. 0-7794-0687-7 and *Board of School Teachers, School District No. 23 (Central Okanagan) v. Renaud*, [1992] 2 S.C.R. 970 (S.C.C.)

17. The mere fact that an employee has child care responsibilities does not oblige an employer to accommodate the employee.
18. With respect to child care or the care of another relative, it is only where compelling circumstances prohibit the employee from making the necessary arrangements to provide such care that a conflict arises between employment and family obligations which may require the employer to consider accommodation, short of undue hardship.
19. The employee has an obligation to assist in the accommodation process. In determining whether the duty to accommodate has been fulfilled, the conduct of the employee should be reviewed. The Supreme Court of Canada in the seminal decision in *Renaud* confirmed that where an employer initiated a reasonable proposal which if implemented would fulfill the duty to accommodate, the employee has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the employee causes the proposal to flounder, the complaint will be dismissed. The employee has an obligation to accept reasonable accommodation.<sup>3</sup>
20. For example, with respect to child or elder care arrangements, an employee ought to first canvas all of the options available to accommodate the family responsibilities on his or her own.
21. An employee ought to be expected to exhaust all possible avenues available to him or her that allow the employee to meet the family responsibilities without impacting the employer's business. For example, medical appointments for children ought to be made outside of working hours whenever possible and where not possible, accommodation by the employer would be provided on a case by case basis.
22. Where the employee refuses to consider self-help remedies (such as obtaining other child care services or finding a volunteer to switch shifts), the employer should not be required to provide any further accommodation.
23. Similarly, where a union refuses to facilitate a reasonable accommodation available under the collective agreement, the employer will have met its duty to accommodate and will not be in violation of the *Human Rights Code*. In some cases, the duty to accommodate may require the union and the employer to modify or ignore strict requirements in the collective agreement that stand in the way of otherwise reasonable and appropriate accommodation.

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<sup>3</sup> *Ibid.*

24. Employers should be entitled to use a “grocery list” or “menu of options” approach in accommodating employee requests for accommodation to address needs related to family status. The list of reasonable accommodations could include, but is not limited to, canvassing self-help remedies; finding a volunteer to switch shifts; scheduling “make-up time” or other scheduling changes; exhausting statutory entitlements such as emergency leave days or family medical leave days; using float days, lieu days including overtime where the overtime was optional, compassionate leave days or compressed work week days where applicable.
25. There can be no “hard and fast” rule on whether the duty to accommodate will always require an employer, for example, to schedule shifts around child care arrangements or the medical needs of a child or parent, or allow employees with children to adopt part-time hours or modified work schedules. Similarly, in some cases, it may be unreasonable for an employee to refuse to travel where such travel conflicts with parental obligations and such refusal may amount to a failure on the part of the employee to meet the duty to accommodate. In all cases, the individual circumstances will have to be assessed having regard to several factors, including whether the conflicting duty is a *bona fide* occupational requirement (BFOR), the nature of the business, the potential disruption caused and the cost of the potential accommodation. The circumstances of each employee must be assessed on a case by case basis.
26. As noted by the Commission in its Discussion Paper, absenteeism is extremely costly for employers. Accordingly, it is necessary for employers to be able to manage both culpable and innocent absenteeism for the purpose of attendance management programs. The administration of attendance management programs, however, is always subject to the employer’s duty to accommodate short of undue hardship. In this way, a balance is reached between the employer’s need to run an efficient business and the employee’s human rights.
27. Ultimately, the goal of accommodation is to find a practical solution that balances the family-related needs of the employee with the needs of the employer to run an efficient business operation.

### **Adequacy of Current Statutory Entitlements**

28. As briefly set out above in paragraph 6, the provincial Government provides emergency and family medical leave to employees based on an expanded list of family members through the newly amended *Employment Standards Act, 2000*. Similarly, the federal Government has recently legislated compassionate care leave under the *Canada Labour Code* and benefits under the *Employment*

*Insurance Act* to provide compensation to employees who are required to leave work to care for a terminally ill family member.

29. As pointed out in the Discussion Paper, since 2000, Ontario's *Employment Standards Act, 2000* requires employers with more than fifty (50) employees to provide up to ten (10) unpaid days of leave per calendar year for employees to attend to the death, illness, injury, medical emergency or other urgent matter related to an enumerated list of family members.
30. The recent amendments to the *Employment Standards Act, 2000* also include the provision of eight (8) weeks of unpaid but job protected family medical leave to provide care or support for terminally ill family members, where death is likely to occur within twenty-six (26) weeks. Ministry of Labour policy permits an employee to take multiple leaves up to a total of eight (8) weeks during the twenty-six (26) week period. This entitlement is in addition to the ten (10) emergency leave days provided to employees. Further, if the family member does not die within the twenty-six (26) week period, an employee is entitled to take another leave up to eight (8) weeks with supporting medical documentation. There is no limit on the number of times the family medical leave can be renewed so long as the required medical certificate is provided.
31. The family medical leave provisions are consistent with the *Employment Insurance Act* and *Canada Labour Code* amendments introduced by the federal Government providing compassionate care leave and compensation.
32. The *Employment Standards Act, 2000* already provides for pregnancy leave and parental leave up to one (1) year for female employees and parental leave up to thirty-seven (37) weeks for male employees. These leave provisions also extend leave to adoptive parents where "the coming of the child into the employee's custody, care and control [is] for the first time". The *Canada Labour Code* provides similar protection to federal employees.
33. Although there is no requirement on employers to provide for paid leave for pregnancy, parental or family medical leave, nor should there be, the legislation and common law already require employers to continue and protect seniority, length of service and all benefits and employer contributions during the period of the leave, including pension plans, life insurance, accidental death, extended health and dental plans.
34. The current federal and provincial statutory regime, along with the current definition of "family status", provide generous and comprehensive protection to employees with needs related to family status which interfere with their employment obligations. The legislative entitlements of employees also achieves

an appropriate balance of the employees' family obligations and the employer's business needs.

### **No Automatic Entitlement to Paid Leave**

35. As set out above, adequate statutory entitlements are provided by the provincial and federal governments to assist employees where family obligations conflict with their employment. An employee ought to be required to exhaust his or her statutory entitlements where leave from work is required to attend to family needs, prior to seeking further accommodation on the part of the employer.
36. It is only after such statutory entitlements as those discussed above in paragraphs 28 to 34 are exhausted that the employer ought to address the issue of whether leave ought to be provided with or without pay.
37. Consistent with recent religious leave case law from the Ontario Court of Appeal in *Tratnyek*<sup>4</sup> and the Federal Court of Appeal in *Richmond*<sup>5</sup>, there ought not to be any automatic entitlement to paid leave for needs relating to family status.
38. As in the religious leave cases, the employer's obligation ought to be limited to reasonable attempts to provide an employee with time off work *without a loss in pay*.
39. Where an employer can accommodate the employee's family related needs without undue hardship by providing the employee with time off, the employer should endeavour to do so. However, the employee does not have an automatic right to paid leave and where other reasonable accommodations exist which would avoid a loss in pay, it should not be necessary for the employer to prove undue hardship.
40. As set out above in paragraph 24, employers should also be entitled to use a "grocery list" or "menu of options" approach in accommodating employee requests for leave with pay to address needs related to family status. The list of reasonable accommodations could include, but is not limited to, scheduling "make-up time" or other scheduling changes; the use of float days; lieu days including overtime where the overtime was optional; compassionate leave days; compressed work week days where applicable; or self-help remedies.

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<sup>4</sup> *Ontario (Ministry of Community and Social Services) v. OPSEU (Tratnyek)* (2000), 50 O.R. (3d) 560 (C.A.)

<sup>5</sup> *Richmond v. Canada (Attorney-General of Canada)* (1997), 145 D.L.R. (4<sup>th</sup>) 622 (F.C.A.), leave to appeal to the S.C.C. denied October 16, 1997

## **Conclusion**

41. The concept of "family status" should not be construed overly broadly. Family status should be limited to being in a parent and child relationship and may include substantial parental obligations imposed on the individual.
42. While recognizing the inherent value of reaching a balance between work and family life, it is also necessary to recognize the practical implications of extending an employer's obligations beyond the current statutory and common law requirements.
43. The individual needs of an employee versus the legitimate business interests of the employer must be assessed on a case by case basis. Where reasonable accommodations can be provided without causing undue hardship to the employer, they should be provided. However, an employee is not entitled to a perfect or even his or her preferred solution so long as the accommodation offered by the employer is reasonable in the circumstances.

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