

STHI LEGAL NOTES

STEINBERG TITLE HOPE & ISRAEL LLP

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Employer's Duty to Accommodate & Child Care

...the freedom to choose to become a parent is so vital that it should not be constrained by the fear of discriminatory consequence.

(Canadian Human Rights Tribunal)

Balancing a family and a full time job can be tricky at best and all but impossible in certain situations. Two recent decisions of the Federal Court of Appeal shed light on the role that employers may have to play when confronted with their employees' family obligations.

The Facts

Fiona and her husband were both employed full-time by the Canadian Border Services Agency. Denise and her husband were both employed by the Canadian National Railway Company. At the relevant time, both couples had two young children.

Despite Fiona's extraordinary efforts to find child care, she was unsuccessful because of the wildly variable schedules of her husband and herself. Fiona sought accommodation from her employer by requesting a fixed schedule. The CBSA agreed to the fixed schedule but it required her to become a part-time employee and she lost many of her benefits and employment opportunities as a result.

Because of a shortage of workers in Vancouver, Denise, along with a number of other employees, were required by their collective agreement to go to Vancouver. Denise and her family

lived an hour outside of Jasper, Alberta. Despite her requests for information, she was never told how long she would have to stay in Vancouver, her location and shifts while there, nor what the housing arrangements were to be. Based on this lack of information, Denise refused to go to Vancouver because it was not feasible to make child care arrangements. CN fired Denise for failing to report to Vancouver.

Both Fiona and Denise submitted separate complaints pursuant to the Canadian Human Rights Act (because both the CBSA and CN are federal employers) alleging that their respective employers had discriminated against them on the prohibited ground of family status (section 3(1) of the Act). Both cases ultimately wound their way up to the Federal Court of Appeal, where they were heard by the same panel of judges and released on the same day.

The Meaning of Family Status

As a preliminary matter, the Federal Court of Appeal had to determine what the drafters of the *Canadian Human Rights Act* meant by *Family Status*. Although the CBSA argued that *Family Status* should be limited to the personal characteristic of whether or not one is part of a family or has a particular family relationship, the appellate court disagreed. Human rights legislation is to be given a large and liberal interpretation and therefore the Court concluded that *Family Status* incorporates parental obligations such as childcare, though not personal family choices, such as participation of children in extra-curricular activities.

A Two Part Test

Once the court found that *Family Status* extended to include such obligations as child care, it then set out a two part test to determine whether the complainants had been discriminated against.

As a first step, the complainant must establish a prima facie case of discrimination by showing:

In this issue

Protecting Your Creative Works. p. 2

The Last Word. p. 4

The articles in STHI Legal Notes are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.

see CHILD CARE on page 2

CHILD CARE continued from page 1

- i) that a child is under his or her care and supervision;
- ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice in particular that the child is not of an age to be reasonably expected to care for him or herself;
- iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and
- iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

The court further indicated that “deciding what specific types of evidence are required to meet all four factors of the above test ...in any given context will vary with the facts of each case, and is better left to be determined on a case-by-case basis.”

Once the employee has established a prima facie case of discrimination, the ball is sent to the employer's court.

As a second step, the employer must show that the discriminatory policy or practice is a bona fide occupational requirement and that those affected cannot be accommodated without undue hardship.

Application to Our Facts

In both cases, all the parties were in agreement that the couples had under their care and supervision two children who were toddlers for whom they were legally responsible.

With respect to Fiona, the Human Rights Tribunal, which originally heard the complaint, found as a matter of fact that Fiona had made serious but unsuccessful efforts to secure reasonable alternative child care arrangements. The Tribunal also found that the regular 56 day rotating schedule interfered with her child care obligations in a way that was more than trivial or insubstantial.

In Denise's case, the Tribunal found that CN's refusal to provide any information to Denise regarding her assignment meant that she could not make decisions about appropriate childcare and as a result taking her children to Vancouver became an unrealistic option. Finally, the appellate court found that asking Denise to move from Alberta to British Columbia to meet a work shortage interfered with her childcare obligations in a manner that was more than trivial or insubstantial.

As far as the second part of the test was concerned, neither the CBSA nor CN put forward any serious argument that

accommodating these two employees would have resulted in any undue hardship.

In the final result, the findings that the CBSA and CN had discriminated against their employees on the basis of *Family Status*, were upheld by the Federal Court of Appeal.

Both employers were ordered to cease their discriminatory practices against employees who seek accommodation on the basis of family status for the purpose of child care. Both women were compensated for their lost wages and benefits. Further, both were awarded \$15,000 for pain and suffering and \$20,000 for special compensation based on the fact that the employers had engaged in the discriminatory practice wilfully and recklessly.

The Lessons

Both of these cases were decided pursuant to the *Canadian Human Rights Act*. Therefore, they do not technically apply to employers not subject to this Act. Having said that, all employers should take the Federal Court of Appeal's findings in these cases to heart because the various provincial Human Rights Acts are quite similar to the Federal Act. The following are some of the lessons to be learned.

- 1 Family Status is a prohibited ground of discrimination.
- 2 Child care responsibilities are included within the notion of Family Status.
- 3 When an employee approaches an employer to discuss workplace accommodation for child care responsibilities, the employer needs to take this request very seriously.
- 4 Developing a policy around this issue is a good idea, however each situation must be examined on its own merits.
- 5 If accommodating an employee's request does not create undue hardship, an employer would be wise to work with the employee. In both of these cases, the employers simply chose not to accommodate despite their being no undue hardship and that they had made accommodations in other analogous situations. Their hardline position no doubt contributed to the reasons for the complaints being filed and definitely increased the damages award.

Remember, providing accommodation for an employee's child care issues is likely to be the exception not the rule. After all, the employee must make a concerted effort to find childcare. Such accommodation is not necessary for situations that have arisen due to the employee's personal choice, for instance a child's hockey schedule. Further, it is worth noting that in this particular case, both sets of parents not only worked for the same employer but they were all shift workers.

The Follow Up

see CHILD CARE on page 4

Protecting Your Creative Works

A story, an invention, a logo, a secret formula. These are all creations, referred to as intellectual property, that the government has deemed worthy of legal protection. In this article we will provide you with a brief overview of what is considered intellectual property and the tools provided by the law for protecting your creations.

There are four main types of intellectual property:

- Copyright
- Patent
- Trademark
- Trade secret

Copyright

Copyright protects works such as stories, screenplays, articles, music, performances, recordings, photographs, artwork, etc. A person who has created any of these types of work has the right to decide who, how, when and where they can be used or reproduced. It also allows you to stop the unauthorized use of your work. In addition, you can seek compensation for any profits you lose because of such unauthorized copying.

In this day and age of the Internet and the World Wide Web, many people may find that they have infringed on someone else's copyright. It is so easy to use photos, download music, or copy large sections of someone else's writings, but all of these things are likely to be considered a violation of the original owner's copyright.

Copyright exists as soon as the work is created. However, to aid in the protection of a copyright, it is best to register it with the Canadian Copyright Office. In Canada, copyright generally lasts for 50 years after the author or creator's death. At that point, the work becomes part of the public domain.

Patent

A patent protects an inventor's right to solely make, use, sell and licence the invention and specifically the plan or method for making the invention.

Unlike a copyright, which automatically comes into existence when the work does, a patent application must be registered with the Patent Office before it comes into being. If two or more people have invented essentially the same thing, it is whoever gets it registered first that will be granted the patent.

For a patent application to be accepted, the invention must be novel, non-obvious and useful. In other words, the invention must not have previously existed or if it did then it must have a new feature or method. The invention must require some special knowledge or technical skill. Finally, it must actually

work.

Generally speaking a patent will last for 20 years in Canada.

Trademark

A trademark is a recognizable sign, design or expression that is associated with a specific product or service. Examples include the Toronto Maple Leafs logo or Nike's *Just Do It* slogan. One of the keys is that the logo or slogan is uniquely associated with the particular company or product.

A trademark protects the goodwill or reputation of the company or product that it is affiliated with and allows you to prevent others from using it. One of the best examples is the International Olympic Committee's ability to licence the right to use the Olympic Rings for millions of dollars and why it so vigilantly protects its trademark.

Like copyright, it is preferable to register the trademark with the Canadian Intellectual Property Office.

Trade Secrets

A trade secret is information such as a code, formula, design or process that is valuable because it is secret; for instance the formula for Coca-Cola. These are protected not by any sort of registration but rather through confidentiality agreements, particularly in the context of employment.

If someone who has agreed to keep confidential a trade secret breaches that agreement, they may be legally liable for any financial harm that comes to the owner of the trade secret.

One of the important things to understand about all intellectual property, and particularly the registration of such, is that the government does not compensate you for an infringement or unauthorized use nor does it pursue the guilty. Instead, registration provides you with the proof that the work, invention or trademark belongs to you and allows you to sue the person who has violated your rights.

In some cases, it may not make financial sense to register a copyright or trademark or to apply for a patent. In other cases, it may be very important to pursue these options.

Our Intellectual Property Group will assist you with your trademark and branding strategies, secure your trademarks, and ensure that your marks are not being diluted or infringed upon. We represent numerous trade mark and brand portfolios in Canada, the United States and overseas. 

The Last Word

The Toronto real estate market continues to remain hot. Before you decide to buy or sell, especially if you are a first time home buyer, you need to do some homework. The following resources are a good place to start.

The Canadian Mortgage and Housing Corporation (CMHC), Canada's national housing agency, offers lots of good advice and tools including their mobile app: Ready Set Home, an article entitled Get House Smart and Make an Informed Decision, a variety of mortgage calculators and a homebuying video. Visit their website at www.cmhc-schl.gc.ca for all this and more.

[Buying, Owning and Selling a Home in Canada](#) by JoAnn Kurtz

If you are thinking of building a new home check out Tarion.ca who administers the *Ontario New Home Warranties Plan Act*, which outlines the warranty protection that new home purchasers are entitled to in Ontario.

It is also worth checking out the websites of the major banks, all of which offer a variety of tools to homebuyers.

Consumer Protection Ontario provides important information about choosing a real estate agent or broker, a builder and home inspectors: <https://www.ontario.ca/consumers/buying-home>

Our Real Estate Group provides a broad range of services in a wide variety of real estate transactions. We represent a diverse clientele in a variety of real property matters, from individual acquisitions and sales of residential properties to complex commercial real estate transactions. 

CHILD CARE continued from page 2

Finally, the following are a few factors to bear in mind when considering an employer's duty of accommodation of family status.

Dialogue

If an employee approaches you with a request for workplace accommodation begin a dialogue so that you have a good understanding of the employee's circumstances.

Work Together

It is important that both parties understand each others needs and that they work together to develop a strategy that will work for both.

Be Flexible

Be mindful that a one size fits all policy may not work. It is important to look at each case individually and to be flexible with your policy.

Paper Trail

Do not forget to document the conversations, the decisions and the reasoning for the plan that is implemented.

If you are being asked for accommodation in the workplace, whether for an employee's child care obligations or for another reason, we would be pleased to assist you in determining the extent of your obligations. 

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PRACTICE AREAS

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