

ACCOMMODATING PARENTAL DUTIES: THE NEW FRONTIER OF HUMAN RIGHTS

By J. Geoffrey Howard

Your store manager, Susan, has an autistic son. Yesterday, she came to see you and explained that a brand new therapy which may dramatically improve her son's social skills has become available, but only on Saturdays, when a parent must attend. Her husband also works Saturdays and cannot take their son. Susan has always worked Saturdays, which is the store's busiest day. Do you have to consider options for accommodating Susan? What if another employee, Becky, a single mother, says she cannot find daycare on Saturdays and wants that day off as well?

Your first reaction as the employer might be that these are "personal issues" that employees have to manage on their own, without employer assistance. The *Employment Standards Act* grants employees 5 days of "family leave" annually to cover child care needs but does not require such schedule changes to suit parental responsibilities. However, under what has been, until recently, a relatively obscure section of the *Human Rights Code* prohibiting "family status" discrimination, employers may now be required to provide "reasonable accommodation" of parental duties.

Exactly what kinds of parental duties trigger the "duty to accommodate" has been the subject of conflicting judicial interpretations. The legal debate focuses on how critical the parental duty needs to be before triggering the employer's duty to accommodate.

In a string of recent cases, the Canadian Human Rights Tribunal (the "Tribunal") has held that any legitimate inability to work due to a parental childcare obligation triggers the duty of the employer to consider possible accommodation options. Most recently, in *Hoyt v. CN*, the complainant was assigned different work to accommodate her pregnancy. The new job required her to work Saturdays when her husband was at work. Due to CN's delays providing the new work and schedule, Ms. Hoyt lost a place for her two-year-old at a "24/7" daycare. Despite calls to various babysitters, Ms. Hoyt was unable to find coverage for three Saturdays she was scheduled to work the new job. She asked to work Monday to Friday instead.

The Tribunal ruled that “family status” included the specific parental duty to care for a child when childcare was unavailable. CN had a pool of qualified workers who could have been called out to cover the three Saturdays. Because CN had not called any evidence to show it could not have conveniently allowed Ms. Hoyt to work other days and scheduled other workers to cover the three Saturdays, the Tribunal held that CN had failed to reasonably accommodate her childcare obligations and awarded her pay for the three missed days.

The *Hoyt* decision rejected a narrower interpretation of family status by the BC Court of Appeal in the *HSABC* case. In that case, the employer had decided to change the complainant counsellor’s shift from 8:30 - 3:00 to 11:30 - 6:00 in order to make her services available to a much larger number of clients. The complainant’s son suffered from a severe psychiatric disorder and his doctor stated that it was an “extraordinarily important” medical support for her son that she continue to be available to care for him after school, as she was able to do on her original work schedule.

The Court of Appeal started its analysis by noting that a broad interpretation of “family status” as incorporating all of the ever-changing medical and care needs of children on working parents would potentially impose an unworkable burden on employers. It concluded that only a change in workplace rules that constitute a “**serious** interference with an **important** parental duty” qualified as discrimination based on family status.

The Court of Appeal nonetheless found that the shift change did constitute serious interference with the important parental duty of the complainant to care for her son and referred the issue of whether arrangements to reasonably accommodate the complainant could be found back to the original arbitrator.

So what do these cases mean for Susan’s and Becky’s requests? Most BC employers are governed by the Court of Appeal’s decision. Under that more restrictive test, an employer is likely required to investigate ways of accommodating Susan, as her obligations to her son are more critical to his wellbeing. That discussion could include enquiring about the ability of Susan’s husband to change his work schedule to accompany their son to therapy. By contrast,

the Court of Appeal's analysis would appear to imply that the ordinary challenges of securing childcare faced by Becky do not trigger "family status" discrimination.

Ultimately, the Supreme Court of Canada will have to determine the scope of "family status" discrimination. Given that court's tendency to favour a liberal, pro-employee interpretation of human rights legislation, the broader approach applied by the Tribunal may ultimately prevail.

In the meantime, employers should seek legal advice before responding to requests for accommodation of employees' parental duties in order to avoid potentially expensive human rights complaints.