

## ***Human Rights and Equity: Frequently Asked Questions***

### **Accommodating Family Status in the Workplace**

Family status accommodation is an evolving area in workplace human rights law. This document provides ONA members with general answers to commonly asked questions about the employer's duty to accommodate an employee's family status. Specific advice should be sought from your Bargaining Unit Human Rights and Equity Representative, Bargaining Unit President or Labour Relations Officer.

#### **What is an employee's "family status?"**

The Ontario *Human Rights Code* protects employees from discrimination in employment on the basis of "family status." These protections are incorporated into ONA's collective agreements.

The *Code* defines "family status" as "being in a parent and child relationship." Common examples include parents caring for children (includes adoption, fostering and step parenting) and adults caring for aging parents or parents with disabilities.

Interpreted broadly, "family status" may include relationships with siblings or extended family members such as grandparents and grandchildren, aunts and uncles, and nieces and nephews, if these relationships resemble a parent-child relationship involving care, responsibility and commitment.

#### **When does the employer have a duty to accommodate an employee's family status?**

Accommodation of family status usually relates to the needs of an employee as a caregiver, i.e. arranging or providing childcare and/or eldercare.

Over the past several years, courts, arbitrators and tribunals have grappled with the issue of where the balance lies between work obligations and family care-giving responsibilities. Different legal tests have emerged in the case law for determining whether an employee is entitled to accommodation in the workplace when these care-giving responsibilities conflict with a workplace rule or requirement. As a result, it can be difficult for unions to advise their members about their rights.

Not all conflicts between a work requirement and an employee's childcare or eldercare obligations will trigger the employer's duty to accommodate. The bar for proving discrimination has been set relatively high. At a minimum, an employee must show interference with a substantial parental or familial obligation, as distinct from a personal choice or preference.

A substantial responsibility could be the need to provide medication to a child with a disability in the home when no other competent caregiver is available or to provide direct parental supervision to a child with severe behavioural difficulties when prescribed by the child's health care provider.

By contrast, adjudicators have found there is no discrimination when a work requirement conflicts with an employee's ability to escort his/her child to extracurricular activities, sports events, graduation ceremonies or a school concert.

Generally speaking, difficulties arranging ordinary or everyday child care have not been protected by the Ontario *Human Rights Code* unless there are exceptional circumstances either in terms of the nature of the child care required or the barriers faced in securing alternate care-giving arrangements. Occasional or periodic trouble finding a babysitter will not meet the threshold test for discrimination.

Also, an employee may have to show the work requirement poses a serious interference with the parental obligation, as opposed to a minor disruption or inconvenience. For example, an arbitrator has found the employer had a duty to accommodate when a change to an employee's work schedule interfered with a carefully-crafted child custody arrangement and would force the employee to alter that agreement.

The Federal Court of Canada has issued two decisions that appear to lower the bar for proving family status discrimination for employees in the federal sector. These decisions were affirmed by the Federal Court of Appeal. However, ONA members should be cautioned that Federal Court decisions are not binding on arbitrators in Ontario. ONA will be watching closely to see whether arbitrators choose to adopt the legal test used by the Federal Court or continue to apply different standards.

Until there is clarity from the courts in Ontario or the Supreme Court of Canada, it will be difficult to advise ONA members regarding the scope of their rights and the employer's obligations.

### **What are the employee's obligations?**

Regardless of how the work-family conflict arises, the employee must show that they have made efforts to find reasonable alternatives to meet their parental or familial obligations, and despite these efforts, there are no reasonable alternatives to a workplace accommodation.

### **What are the employer's obligations?**

If the conflict cannot be resolved by the employee, the employer must consider whether it can make adjustments to accommodate the needs of the employee. This could involve changes to work schedules, assignments, hours of work, travel requirements or granting a leave of absence, etc.

The employer must provide accommodation *to the point of undue hardship*. As with other types of accommodation, the assessment is based on a number of factors, including cost, health and safety requirements, size of the operation, interchangeability of the workforce, collective agreement provisions, and impact on the rights of other employees.

### **What are some examples of requests for family status accommodation?**

- An employee's spouse is deployed outside the country for a period of time and no adequate child care can be arranged at night. The employee has made reasonable efforts to secure child care through family members and other private arrangements. The employee requests to work no night shifts during this period.
- An employee's child is receiving treatment for severe behavioural problems and requires direct parental supervision after school in accordance with the treatment plan. The employee requests a work schedule of straight days for six months.

### **What if there are several options for accommodation?**

The employer's duty is to provide a *reasonable* accommodation. While an employee can identify a suitable accommodation, he/she cannot choose his/her accommodation or insist on his/her preference.

### **What is the process for requesting accommodation?**

- Contact your ONA representative as soon as possible for assistance and representation.
- Check whether the employer has a policy containing a process for accommodation requests.
- Provide a formal request to the employer identifying the family responsibility, the conflicting work requirement, the adverse effect on you/your family, and the steps you've taken to resolve the conflict. Your ONA representative will identify any additional information or documentation that should be provided to support the request.
- Union and employer representatives must ensure the privacy of any medical information regarding the employee or his/her child.
- Grievances may be filed on behalf of an ONA member where the employer fails to provide accommodation.

### **Where can I get more information and resources that can help?**

- ONA presentation, "The Duty to Accommodate Family Status in the Workplace" (found on ONA's website at [www.ona.org](http://www.ona.org), under "Human Rights and Equity/Teleconnects").
- ONA's *Human Rights and Equity Guide* (found on ONA's website under "Human Rights and Equity").
- Employer policies dealing with discrimination and workplace accommodation.
- ONA's hospital central collective agreement (found on ONA's website under "Quick Links").
- ONA Policy 14.7: Duty to Accommodate.
- Ontario *Human Rights Code*, Sections 5 & 10.

**Contact your Bargaining Unit Human Rights and Equity Representative, Bargaining Unit President or Labour Relations Officer for more information, advice and support.**