



What Constitutes Family Status Discrimination?

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Human rights legislation provides that individuals are entitled to be free from discrimination in employment, contract and services, based on certain enumerated grounds, family status being one of them. Family status is defined in Ontario's *Human Rights Code* as the status of being in a parent and child relationship. A recent arbitration decision is one of a number of recent decisions dealing with the issue of what constitutes family status discrimination in employment. This case demonstrates the dilemma faced by both employers and employees in determining the appropriate balance between work and family obligations and illustrates the type of conflicts between work and parenting obligations that rise to the level of discrimination for which accommodation must be considered by an employer. Finally, the case illustrates that an individualized review of the conflict must be undertaken by an employer to ensure compliance with human rights requirements.

In *IBEW, Local 636 vs. Power Stream Inc.*, an arbitrator was asked to determine if a change to work schedule unfairly discriminated against four bargaining unit employees on the ground of family status. In this case, employees were historically given the option of working one of two shift schedules under the collective agreement: a 10 hour/4 days per week schedule or an 8 hour/5 days per week schedule. As part of negotiations for a new collective agreement, the employer eliminated the employees' ability to choose between these two options and required the Union to choose one of the schedules. The Union asked its membership to vote and the majority of the Union's members selected working the 10 hour/4 day per week schedule. The change was then implemented by the employer. The four grievors' parental obligations differed and were impacted in varying degrees by the change to their work schedule.

With respect to three of these employees the evidence at the hearing revealed that they could no longer take their children to or from school on workdays, increasing the burden on their partners, and that they were not able to attend extra-curricular activities with their children as they had before.

The fourth employee's situation was more complicated due to the fact that he and his former partner had negotiated a joint custody agreement following the end of their marriage. Under the joint custody agreement, his 2 children lived with him on alternate weeks. Prior to the separation, this employee worked a 4-day 10 hour per day schedule, but switched to the 5-8 hour shifts to enable him to arrange for his children's care and deal with driving to and from daycare to pick them up.

This employee asked to continue to work the 8 hour shift schedule. This request was refused and the employee was then required to alter the joint custody arrangement. The children were transferred to a different school close to the mother's home and rather than live with each parent during alternate weeks, they stayed with their mother on weekdays and with their father only on weekends.

Four grievances were filed by the Union alleging that the employer's refusal to accommodate these varying parenting responsibilities constituted discrimination on the basis of family status.

The Arbitrator reviewed the change to the work schedule, the respective conflict that arose in each case between the work schedule and each employee's parenting obligations, as well as the steps taken by each employee to deal with the change. In the case of the first three employees, the Arbitrator determined that the new schedule did not seriously interfere with substantial parental obligations. In the case of the latter employee, however, the Arbitrator held that the employer had discriminated against the employee and that the employer did not determine whether the request for accommodation of his parenting responsibilities could be accommodated.

The Arbitrator discussed the duty of a parent to ensure appropriate care, health and safety of their children, but in the context of the fact that not every conflict between a work obligation and a parental obligation must be accommodated by an employer. In this regard, not every conflict of this nature will give rise to a finding of discrimination. In this case, the Arbitrator concluded that it was reasonable to expect spouses/parents to work together to split parenting duties so as to accommodate their workplace duties and that it was a "fact of life" that parents' work schedules may conflict with parents' ability to attend their children's extra-curricular activities.

In the context of the fourth employee's custody arrangement with his former partner, however, the Arbitrator determined that the change to the work schedule of the employee "materially disrupted [the] carefully crafted arrangement" by requiring the children to change school, and alter the prior custody arrangements. The Arbitrator continued:

The crafting of a custody sharing arrangement is a delicate matter which is to be encouraged. Such agreements are reached in circumstances in which children are subject to extra sensitivity and vulnerability. It is reasonable to conclude that a change in a workplace rule which forces parents to alter a carefully constructed custody agreement to their detriment in order to accommodate that workplace rule may be found to be discriminatory under s.5. I do not think it is an answer to the allegation of discrimination in these circumstances to suggest that the grievor should have moved...or hired private nanny care. He arranged his life to accommodate the previous schedule and he should not have been required to accommodate the new schedule in the manner suggested to deal with his substantial parental obligations without an inquiry as to whether the Employer could accommodate him. I therefore find and declare that by imposing the new four hour shift schedule..., the Employer violated s.5 of the HRC. I would note that the Employer is still protected from such a finding as it is not required to accommodate the grievor if that accommodation would result in undue hardship to the Employer. In this case undue hardship is not being claimed.

In conclusion, whereas "ordinary family obligations" are not covered by the right to be free from discrimination in employment on the basis of family status, a "serious interference" with "substantial parental obligations" may result in a finding of discrimination, where the employer has not adequately and directly assessed appropriate accommodation based on an individualized review of whether it is in fact possible to accommodate the employee short of undue hardship. ■