

Family Status Update: Employee's Obligation to Communicate

A recent Ontario Superior Court of Justice case, *Peternel v. Custom Granite & Marble Ltd., 2018*, provides useful guidance for employers seeking to understand the ever-evolving process of accommodating family status under human rights legislation.

Background:

The case involved an employee returning from maternity leave. Prior to her maternity leave, the employee's live-in mother provided childcare assistance when needed. When the employee began to discuss her return to work, she informed the Company that her mother no longer provided childcare assistance and that she had not secured before school care for her two older children. The employee requested the ability to begin work at 10:00am due to her inability to secure childcare prior to that time. The employer refused the employee's request, stating that the position required an 8:30am start time. The employee subsequently claimed that the Company discriminated against her by failing to accommodate her childcare responsibilities.

Tests:

The Court cited two tests to use when determining if discrimination based on family status has occurred. The first test requires that:

1. the child be under the employee's care and supervision;
2. the childcare obligation at issue engage the employee's legal responsibility for that child, as opposed to a personal choice;
3. the employee has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
4. the particular workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

The second test requires an employee to demonstrate that there is a negative impact that results in a real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work.

While the Court did not clarify which test should be used, both tests provide useful guidance in showcasing the type of factors that a court or tribunal may reference when determining whether a case for discrimination on the basis of family status has been established. If an employee can prove he or she has been discriminated against, the onus then shifts to the employer to prove the employee could not have been accommodated up to the point of undue hardship.

Decision:

Based on the above tests, the Court ultimately decided that the employer had not discriminated against the employee. The decision was based largely on the fact that the employee failed to provide the Company with adequate information relating to her accommodation request. Importantly, the employee failed to inform the Company that she had secured temporary before school care through a neighbour and that unless she were permitted to start her workday at 10:00am, even on a short-term basis, she would have to forfeit her daycare spots and would be unable to return to the Company on any terms. Furthermore, the Company offered the employee an alternative position that would have allowed her to start at 10:00am, which the employee failed to respond to.

Takeaway:

The case emphasizes the need for active and engaged communication between employees and employers in circumstances concerning accommodation requests. An employee must actively participate in the accommodation process by providing their employer with all of the information relevant to his or her accommodation request, and an employer must be willing to canvass available alternatives based on the employee's needs. While the Court didn't rule on whether the employer-suggested accommodation was reasonable, it must be remembered that employees are not entitled to perfect accommodation, only reasonable accommodation.

If you have any questions about accommodation or family status, please contact us to speak with an e2r® Advisor.