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BULLETIN

BCCA CLARIFIES TEST FOR FAMILY STATUS DISCRIMINATION

Local government employers will want to take note of the BC Court of Appeal's recent decision in *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*, 2023 BCCA 168 ("*Gibraltar*"), which expanded the scenarios in which an employer can be liable for family status discrimination in BC.

In *Gibraltar*, the BC Court of Appeal held that an employer can be liable for family status discrimination under s. 13(1) of the *Human Rights Code* (the "*Code*") even where there is no change to the employment terms. This decision clarified the existing state of the law, which some had interpreted as limiting family status discrimination to situations where the employer had changed the terms or conditions of employment.

To understand Court's decision and its implications, it's helpful to look back at the law on family status discrimination and the facts leading up to *Gibraltar*.

Law on Family Status Discrimination in BC before *Gibraltar*

The starting point for a claim based on family status discrimination is s. 13(1) of the *Code* which protects a person from employment-based discrimination based on, among other grounds, the person's "family status".

Gibraltar focused on the first stage of inquiry in a discrimination claim: proving *prima face* discrimination based on family status.

The current test for discrimination was first set out by the BC Court of Appeal in *Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260 (*"Campbell River"*). In that case, the Court found that *prima facie* discrimination based on family status could be proven by demonstrating the following:

1. There was a change in a term or condition of employment; and

2. That change resulted in a serious interference with a substantial parental or other family duty or obligation of the employee.

Although *Campbell River* had received criticism for being too restrictive in how it defined family status discrimination, the Court of Appeal confirmed in *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46 ("*Suen*") that the above test was still good law.

However, the circumstances of *Gibraltar* brought into focus the question of whether a "change in a term or condition of employment" (*i.e.,* the first branch of the *Campbell River* test) was required in order to show a claim for *prima facie* discrimination based on family status.

Situation in *Gibraltar*

We wrote about the facts in *Gibraltar* and the decisions of the BC Human Rights Tribunal (the "Tribunal") and BC Supreme Court in our newsletter from March 2021.

The employee and her spouse had worked the same 12-hour shift at their employer, which was located in a small community. After the birth of their first child, the employee sought a workplace accommodation that would change her and her spouse's work schedules to facilitate childcare arrangements. The parties were unable to come to an agreement and the employee filed a complaint to the Tribunal. In response, the employer filed an application to dismiss this complaint.

One of the employer's arguments for dismissal was that it had not changed the terms or conditions of the employment, as required under the *Campbell River* test. However, the Tribunal disagreed that *Campbell River* limited findings of *prima facie* discrimination to circumstances where an employer had changed the terms or conditions of employment. The Tribunal went on to conclude that the facts in this case, if proven, could establish *prima facie* discrimination and denied the employer's application to dismiss this complaint (*Harvey v. Gibraltar Mines Ltd. (No. 2)*, 2020 BCHRT 193).

The employer appealed the Tribunal's decision in *Harvey* to the BC Supreme Court arguing that, amongst other reasons, the Tribunal had erred in its interpretation of *Campbell River*. The Court agreed with the employer's position based on the Court of Appeal's reaffirming of *Campbell River* in the *Suen* case, but acknowledged that absent this previous case authority, it "…may well have shared the Tribunal's view that *Campbell River* does not stand for the proposition that a change in a term or condition of employment is necessary to establish prima facie family status discrimination" (*Gibraltar Mines Ltd. v. Harvey,* 2022 BCSC 385 at para 105).

BCCA's Decision in *Gibraltar*

On appeal, the Court of Appeal agreed with the Tribunal's interpretation that *Campbell River* did not limit the test for *prima face* discrimination to circumstances where the employer had changed the terms or condition of employment and set aside the lower court's decision.

The Court observed that an employer can equally discriminate by "not changing" a term or condition of employment in response to a change to an employee's family status. The Court also noted that the discrimination inquiry is concerned with the "the impact of the employment term on the employee, not the intention of the employer".

After clarifying the first branch of *Campbell River*, the Court went onto reaffirm the requirement of the second branch: a serious interference with a substantial parental or other family duty or obligation of the employee.

Takeaways

Bottom line, local government employers should be aware that the number of situations that could give rise to a family status discrimination claim have increased. A finding that an employer has changed the terms or conditions of employment is no longer required. *Prima facie* discrimination can occur where an employer refuses to change the terms or conditions of employment in response to a request for accommodation on the basis of family status.

However, it is important to remember that an employee must be able to show a serious interference with a substantial parental or other family duty or obligation of the employee and that a finding of *prima facie* discrimination does not mean that an employer will necessarily be liable for discrimination. The employer is not required to accommodate an employee if that accommodation results in an undue hardship to the employer.

In any event, local government employers may wish to consider accommodations for employees with families as part of its recruitment and retention strategies. This could include remote working/hybrid options, flexible hours of work, part-time working arrangements, and providing family care leave.

Carolyn MacEachern & Eman Jeddy