British Columbia Court Of Appeal Finds That Employers Can Discriminate Against Employees Based On Family Status Without A Change In Employment Terms

The recent British Columbia Court of Appeal decision in *British Columbia (Human Rights Tribunal) v Gibraltar Mines Ltd.*, 2023 BCCA 168 ("***Gibraltar Mines***") broadens the test for family status discrimination in BC, bringing BC in line with other Canadian jurisdictions.

History of Legal Requirements for Family Status Discrimination

In 2012, the Supreme Court of Canada set out a two-stage analysis for discrimination cases in *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61 ("***Moore***"):

1. First, the employee must demonstrate a *prima facie* case of discrimination. This means the employee must show that: (1) they have a characteristic protected from discrimination under human rights legislation; (2) they have experienced adverse impact or treatment; and (3) the protected characteristic was a factor in the adverse impact or treatment.
2. If the employee proves they have a *prima facie* case of discrimination, the second stage permits the employer to justify the discrimination, usually based on a *bona fide* occupational requirement that cannot be accommodated without undue hardship.

However, prior to *Moore*, the BC Court of Appeal addressed the issue of discrimination based on the protected characteristic of "family status" in *Health Sciences Assoc. of BC v Campbell River and North Island Transition Society*, 2004 BCCA 260 ("***Campbell River***"). The *Campbell River* test established by the BC Court of Appeal has been interpreted as requiring an employee to establish two factors to prove they have been discriminated against based on their family status:

- first, that the employer has made a unilateral change to a term or condition of employment, and
- second, that such change results in a serious interference with a substantial parental or other family obligation.

The *Campbell River* test has been criticized as focusing on changes initiated by the

employer, rather than on the employee's family status needs, and for creating a stricter test for establishing family status discrimination relative to other provinces and other grounds for discrimination.

However, in 2019, the BC Court of Appeal in *Envirocon Environmental Services, ULC v Suen*, 2019 BCCA 46[1] ("***Suen***") confirmed that the *Campbell River* test remains good law in British Columbia. We have previously posted about *Suen* and related decisions here, here and here.

Facts in *Gibraltar Mines*

Lisa Harvey and her husband both worked the same 12-hour shifts as employees of Gibraltar Mines Ltd. ("**Gibraltar**"). Upon returning from maternity leave in 2017, Ms. Harvey requested adjustments to her work schedule so her family could access childcare. Gibraltar refused the adjustments, but offered alternatives which were rejected by Ms. Harvey.

Ms. Harvey then filed a human rights complaint against Gibraltar, alleging that Gibraltar failed to accommodate her by denying her request and discriminated against her on the basis of a number of protected grounds, including family status. Gibraltar applied to dismiss Ms. Harvey's human rights complaint, arguing that her complaint had no reasonable prospect of success, in part because she had failed to satisfy the first step of the *Campbell River* test—it had not made any unilateral change to her employment.

The Tribunal Decision

In its decision indexed as *Harvey v Gibraltar Mines Ltd. (No. 2)*, 2020 BCHRT 193, the BC Human Rights Tribunal (the "**Tribunal**") permitted the claim of family status discrimination to proceed, while dismissing the other discrimination claims. The Tribunal held that, notwithstanding *Suen*'s recent confirmation of the *Campbell River* test, a "serious interference" entitling an employee to accommodation based on family status could be established even when there is no change to the employee's terms of employment. For further discussion of the Tribunal's decision, see our previous post here.

Judicial Review by the British Columbia Supreme Court

Gibraltar applied for a judicial review of the Tribunal's decision at the BC Supreme Court. Primarily, Gibraltar argued that the Tribunal's interpretation of *Campbell River* was incorrect, and that the Tribunal had therefore erred by failing to find that a precondition for *prima facie* family status discrimination was a change in the terms and conditions of employment.

The BC Supreme Court agreed. The judge held that it was bound (as was the Tribunal) by *Suen* and *Campbell River*, which required that an employee establish a change in the terms and conditions of employment before a finding of *prima facie* discrimination could be made.

The Court of Appeal Decision

The Court of Appeal agreed with the Tribunal that a change to the terms or conditions of employment was not necessary to establish a *prima facie* case of family status discrimination.

The Court found that the reference in *Campbell River* to "a change in a term or condition of employment" should not be interpreted as an exhaustive statement of the

applicable test. It noted that the complaints in both *Campbell River* and *Suen* had arisen from a change in the terms of employment. The Court held that in *Campbell River*, it had decided that: (1) family status included the responsibility for childcare arrangement, so long as the interference was serious and the parental duty was substantial; and that (2) a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or family obligation. The Court held that *Campbell River* should not be interpreted as holding that a change in a term or condition of employment was the only circumstance in which a *prima facie* case of discrimination could be established.

The Court then concluded that the wording of the *Human Rights Code* does not require a change in a term or condition of employment to trigger *prima facie* discrimination. It emphasized that human rights legislation, which is considered to be quasi-constitutional, must be given a broad and liberal interpretation. Therefore, neither *Campbell River* nor the *Human Rights Code* should be interpreted as restricting the protections afforded to employees.

Therefore, in *Gibraltar Mines*, the Court concluded that discrimination does not only occur when an employer changes the terms of employment. Both an employer's decision to change the terms of an employee's employment or an employer's decision not to change a term of employment to address an employee need could result in an adverse impact on an employee. Ultimately, "[t]he discrimination inquiry is concerned with the impact of the employment term on the employee, not the intention of the employer" (para. 73).

Key takeaways

This decision appears to resolve previous uncertainty regarding the requirements necessary to establish a *prima face* case of family status discrimination in British Columbia. While the Court has affirmed that *Campbell River* remains good law, it held that *Campbell River* should no longer be interpreted as requiring a unilateral change in employment terms by the employer as a necessary condition to family status discrimination. All that is required is a serious interference with a substantial parental or other family duty or obligations, which can arise both when employment terms change, or when they remain constant.

Effectively, *Gilbraltar Mines* has broadened of the test for establishing family status discrimination in British Columbia, rendering the law in British Columbia similar to that in other Canadian jurisdictions (although some inter-jurisdictional differences in establishing a *prima facie* case remain).

In light of this widened scope, employers must be cautious when assessing whether they have a duty to accommodate an employee's family status, even where there has been no change to the employee's terms of employment. This can be a difficult assessment to make and can result in significant consequences. Employers are advised to seek legal advice when an employee is requesting accommodation on the basis of family status.

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Footnote

1. Leave to appeal to SCC refused.

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