

Family Ties: How Nepotism Can Lead To Family Status Discrimination Claims



When it comes to Canada's various employment laws, one thing is certain: job candidates and workers should be dealt with on the basis of individual merit.

Nepotism in the workplace is the practice of favoring relatives or close friends for jobs, promotions or other professional opportunities. While generally frowned upon, there are no laws against nepotism. There are, however, laws against discrimination.

Employers may choose to proactively prevent any issues in the workplace relating to hiring family members with a well drafted anti-nepotism policy.

However, many employers lack these policies and remain unaware of their potential liability until faced with litigation following a termination.

Consider the following scenario: Employee A asks you to hire their family member. As a favour, you agree to find the family member a role (Employee B). Employee A then begins to have issues with performance and his/her attitude in the workplace begins to negatively impact your business. You have decided to terminate Employee A and Employee B at the same time because the relationship with Employee A has broken down and, accordingly, the favour has ended. Employee B will likely have a claim for discrimination based on family and/or marital status.

Defining Discrimination based on Family Status/ Marital Status

Simply put, discrimination based on Family Status/ Marital Status will likely be found when a workplace practice has the effect of limiting the conditions of employment, or employment opportunities, on the basis of a characteristic relating to an employee's family.

This definition does not prevent an employer from enacting an anti-nepotism policy.

Anti-Nepotism Policies are expressly permitted by the Ontario *Human Rights Code*

Section 24(1)(d) of the *Code* expressly permits employers to enact anti-nepotism policies disallowing any employment relationships with a particular individual who has a family or marital connection with an existing employee.

As stated by the Supreme Court of Canada in *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66 at para 41):

This section of the Code provides a defence for employers who discriminate on the basis of the relative marital or family status **in certain circumstances***, i.e., where an employer has a nepotism or anti-nepotism policy.

[* it is recommended to consult an employment lawyer when drafting/ enacting anti-nepotism policies, in certain circumstances claims for discrimination may still succeed]

Be forewarned, s. 24(1)(d) cannot be relied on in support of a decision to either terminate an employee or to refuse to renew a contract (see *Brown v. Fanshawe College of Applied Arts and Technology*, 2021 HRT0 154 at para 18).

That said, provided the employer is not federally regulated, employers are always free to dismiss on reasonable notice without cause, or to choose not to renew a contract, for any other non-discriminatory reason.

Terminating Family Members that were Hired as a Favour

Whether it is a client requesting the employer hire their son or daughter, or perhaps an employee requesting the employer hire their spouse – these “favours”, as mentioned in the Scenario above, may expose the employer to legal risk.

The law in Ontario is clear: **an individual cannot be terminated because of their association with their spouse or other family member.**

This is best illustrated by the following examples:

In *Giguere v. Popeye Restaurant*, 2008 HRT0 2, the Tribunal ruled that it was discrimination on the grounds of family status when Popeye Restaurant terminated the applicant’s employment because her common-law spouse was HIV positive. It is discriminatory to terminate an employee because of the particular identity of their spouse;

In *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, Mr. A’s employment was terminated by his Employer after Mr. A’s daughter and wife confronted and accused the Employer (uncle of the daughter) of child sexual abuse. The SCC held that the Employer’s automatic attribution of the wife and daughter’s behaviour to Mr. A reflects stereotypical assumptions about Mr. A that have nothing to do with his individual merit or capabilities. It is discriminatory to terminate an employee based on marital and familial affiliations.

The question that will be asked by the Ontario Human Rights Tribunal is *whether a prohibited ground of discrimination was a factor/reason (even if it was not the main factor/ reason) in the decision to dismiss the applicant.*

The Takeaway

The law is designed to protect workers. Once an individual is hired – that individual has rights in connection with their employment. This includes the right to equal treatment with respect to employment without discrimination because of ‘family status’ or ‘marital status’ – even if the individual was hired as a favour.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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