e2r Alert!

British Columbia: Clarification on the Test for Family Status Discrimination

As you may recall from our previous e-Alerts, there is no consistent test that is applied across Canada when it comes to family status discrimination. As such, some jurisdictions, including British Columbia, have developed their own test.

A recent BC Court of Appeal case, *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd., 2023*, provides clarification for employers in BC seeking to understand the test for establishing *prima facie (which means 'at first sight' or 'obvious')* family status discrimination.

Up until this point, the leading case in British Columbia was *BC Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society (2004, B.C. Court of Appeal)* which set out a test requiring that an employee establish two factors to prove discrimination on the basis of family status:

1. That the employer has made a unilateral change to a term or condition of employment, and
2. That such change results in a serious interference with a substantial parental or other family obligation.

This test has been criticized as being too strict and arguments have been made that family status discrimination claims should be analyzed in the same way as discrimination claims based on other prohibited grounds and not held to a higher threshold.

In the recent *Gibraltar* case, the complainant was scheduled to work 12-hour shifts. Her spouse worked for the same employer and also worked 12-hour shifts. After their child was born, the complainant requested a change to her work schedule to accommodate their childcare needs. When the parties could not agree on a suitable accommodation, the employee filed a human rights complaint alleging discrimination on the basis of family status.

Gibraltar Mines argued to dismiss the complaint as they had not made a unilateral change to her employment (per factor #1 above). However, the Tribunal permitted the

complaint to proceed to a hearing saying that a unilateral change was not necessary to establish *prima facie* family status discrimination.

Gibraltar Mines applied for judicial review arguing that the Campbell River test was not applied correctly, and the BC Supreme Court agreed. The Tribunal appealed the Supreme Court decision.

The BC Court of Appeal focused on the proper interpretation of the *Campbell River* test for establishing *prima facie* family status discrimination. The Court of Appeal agreed with the Tribunal – that a unilateral change to a term or condition of employment is not necessary to establish *prima facie* family status discrimination.

Key Takeaway
This decision seems to resolve the uncertainty around application of the Campbell River test and the requirements to establish *prima facie* family status discrimination.

In particular, the Campbell River test should no longer be read to **require** a unilateral change to a term or condition of employment by the employer as a condition to establish family status discrimination. Family status discrimination may now be established even when no change has been made by an employer.

As you can see, this remains a challenging area to navigate! As always, if you have any questions regarding a specific situation, please do not hesitate to reach out to speak with an e2r™ Advisor.