

SECTION: General

Effective date: September 2, 2015

SUBJECT: REASONABLE ACCOMMODATION: MARITAL OR FAMILY STATUS

Purpose:

This policy is intended to assist in the understanding and application of *The Human Rights Code* (“*The Code*”). Where there is any conflict between this policy and *The Code*, *The Code* prevails.

Context:

In determining whether reasonable accommodation of an individual’s marital status or family status has occurred, the Commission will consider the circumstances of each case. (see *Policy #I-6: Defining “Marital or Family Status,”* for guidance in understanding what constitutes a “marital or family status.”)

The Commission recognizes that childcare responsibilities are something that employers may need to reasonably accommodate depending on the needs of the caregiver within a marital status or family status relationship, and the circumstances of the employer. In *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 (“*Johnstone*”) at para 74, the Federal Court of Appeal clarified that this ground includes parental obligations which engage the parent’s legal responsibility for the child such as childcare obligations, as opposed to personal choices. (See also: *Canadian National Railway Co. v. Seeley* 2014 FCA 111).

Eldercare responsibilities within a marital status or a family status relationship have similarly been recognized as a caregiving responsibility that may need to be reasonably accommodated. (See, for example: *Canada (Attorney General) v. Hicks*, 2015 FC 599 and *Devaney v. ZRV Holdings Ltd.*, 2012 HRTO 1590.)

In all cases where someone is alleging that they have been discriminated against by way of their marital status or family status, the person must be able to prove that they have a need that triggers a duty to accommodate. In *Johnstone*, the Federal Court of Appeal clarified at paragraph 93:

...where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual’s legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable

efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

If a *prima facie* case of discrimination is made out, the Commission will apply the well-established test set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.* (1999), 35 C.H.R.R. D/257 (“*Meiorin*”) and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* (1999) 36 C.H.R.R. D/129 (“*Grismer*”) to determine if the discrimination is bona fide and reasonable, as follows :

1. The **procedure** employed by the respondent to assess whether the request for accommodation was appropriately managed will be considered. In particular, the Commission will examine what steps were taken by the respondent to search for and consider options for accommodation. Some of the questions that the Commission will consider in evaluating whether a respondent had in place a sufficient accommodation procedure are:
 - a. Have approaches to accommodation that do not have a discriminatory effect been thoroughly and honestly investigated by the respondent?
 - b. If alternative approaches were investigated and found capable of being implemented without undue hardship, why were they not implemented?
 - c. Was the Complainant provided with the opportunity to meaningfully participate in the accommodation process as an equal participant?
 - d. Have both the complainant and the respondent, fulfilled their obligation to share the burden of assisting in the search for possible accommodation?

2. The **substance** of the accommodation offered to a complainant will be considered . The Commission will examine whether it was reasonable to not accommodate the Complainant’s needs or whether the accommodation offered was reasonable. Some examples of reasonable accommodation of marital and family status are (these examples are not exhaustive):
 - a. offering alternative or flexible shift schedules or working arrangements to allow an individual leave from work to provide caregiving duties to children, or to an ill or aged spouse, partner or family member; and
 - b. ensuring that leave from work for child or elder care obligations is distinguished from other absences for the purpose of attendance management

3. Whether it would cause **undue hardship** to the respondent to provide the requested accommodation will be considered. The Commission recognizes that undue hardship involves situations where providing accommodation would place the viability of the respondent's operations in jeopardy. This could include, for example, exceptionally and unreasonably high financial costs or operational restructuring that would unreasonably change the nature of how the respondent functions.

The burden of proving that providing accommodation would cause undue hardship rests with the respondent. To meet that burden, the respondent must provide tangible evidence that undue hardship exists rather than relying on anecdotal or impressionistic assumptions. Respondents should expect to face some hardship when providing accommodation. It is only **undue** hardship that they cannot be expected to bear.

The Commission will assess complaints about the failure to accommodate needs based on "marital or family status" in accordance with the broad purpose of *The Human Rights Code*, and in particular the principle that individuals should have equal opportunity "to make for themselves the lives they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on family status" (*Johnstone* at para 98).

APPROVED BY:

"Yvonne Peters"

Chairperson

September 2, 2015

Date