CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY LAW BULLETIN NO. 300

FEBRUARY 27, 2013

EDITOR: TERRANCE S. CARTER

ELDER CARE AND FAMILY STATUS DISCRIMINATION ONTARIO RULING

By Barry W. Kwasniewski*

A. INTRODUCTION

With Canada's aging population, the care of aging parents or relatives has become an important societal issue. Because the care of aging relatives may require absence from the workplace, elder care responsibilities are also becoming an employment issue, with important human rights implications for employers, including charities and not-for-profit organizations. The recent decision of the Ontario Human Rights Tribunal (the "Tribunal"), *Devaney v. ZRV Holdings Limited*, 2012 HRTO 1590, confirmed that an employer's failure to reasonably accommodate an employee's elder care responsibilities may result in a finding of a unlawful discrimination on the basis of family status. This *Charity Law Bulletin* discusses this important decision and analyzes how it may affect Ontario employers.

B. THE FACTS

As a result of his termination resulting from what his employer perceived to be excessive absences, the employee, Francis Devaney, launched an application against his employer for breach of the Ontario Human Rights Code (the "Code"),[1] claiming that the termination of his employment constituted discrimination on the basis of family status. Mr. Devaney worked as an architect for ZRV Holdings Limited from 1982 until his termination in 2009. During his employment with the firm, Mr. Devaney worked his way up the

* Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters' Ottawa office and would like to thank Tanya L. Carlton, OCT, B.Sc. (Hons.), B.Ed., J.D., Student-At-Law, for her assistance in the preparation of this *Bulletin.*
[1] *Human Rights Code*, RSO 1990, c H-19 [*Code*].

corporate ladder, becoming an associate and project manager in 1988, then a principal in 2000. In 2007 and 2008 he was the Principal-in-Charge of a major project in Toronto.

Beginning in 2007, Mr. Devaney's attendance at the office declined as he cared for his aging mother. Mr. Devaney stated that although he never had an explicit discussion with his employer on his family situation, his team and the firm were aware of his responsibilities towards his ailing mother. Even though, due to his mother's declining health, the hours he logged in 2008 had decreased from those in 2007, Mr. Devaney testified that he had still spent numerous hours of overtime on the Toronto project, that he worked both from home and at the office, and did not receive any additional compensation for his overtime.

In July 2007, Mr. Devaney was informed that he was expected to be at the office between 8:30 and 5:00 each day. In April 2008, Mr. Devaney was again reminded about his expected attendance at the office and informed that his attendance would be reviewed on a monthly basis. He was also informed that "[i]f in a given month you are absent from the office during the hours of 8:30 am to 5:00 pm during any business day, without the approval of one of the partners, your employment will be immediately terminated for just cause,"[2] and that immediate correction was expected. Several emails were then sent back and forth between Mr. Devaney and his employer, with Mr. Devaney insisting that he was always available to his clients and employer, and that he had never missed any meetings.

In July and August of 2008, Mr. Devaney received further letters from his employer stating that he was not in full attendance during a majority of the previous months' work days and the firm expected "immediate and permanent correction."[3] The August 2008 letter also stated that due to his personal and family problems the firm had tolerated his absences for a long time, but they were not prepared to do so any longer. Also, the letter stated that the firm did not believe his excuses for his absences or that his claims to overtime were credible.[4]

In October 2008, Mr. Devaney's mother became entirely incapacitated and was hospitalized. After informing his supervisor of the situation, he was told "sorry to hear about your Mother. However, as I said before, work at home does not count – only work in the office."

[2] *Devaney v ZRV Holdings Limited*, 2012 HRTO 159 at 59 [*Devaney*].
[3] *Ibid* at 71.
[4] *Ibid*.

In December 2008, Mr. Devaney's mother was placed into a long-term care facility. Mr. Devaney informed his supervisor of the change in situation before the Christmas break. On January 9, 2009, Mr. Devaney was terminated for cause because of excessive absenteeism. The partners had determined before Christmas to terminate him, but had decided to wait until after Christmas break to inform him of their decision. Mr. Devaney asked the firm to give him another chance. In a letter dated January 12, 2009, the firm agreed to employ him on contract, but that he would no longer have the title of "Principal". As well, he would not be paid on salary but only for the full days in which he attended the office, and any work completed outside the office would not be compensated. The agreement was to be reviewed after three months, at which time the firm stated they would be prepared to extend the agreement and provide him with the Principal designation if he did attend work as required. Mr. Devaney declined the offer, as he felt that there was no indication that the employer would "accommodate his caregiving responsibilities".[5]

Mr. Devaney subsequently filed an application to the Tribunal, alleging discrimination on the basis of family status. Mr. Devaney did find new employment shortly after his termination, but continued with the application.

C. "FAMILY STATUS" DISCRIMINATION

The Code provides all workers in Ontario the "right to equal treatment with respect to employment without discrimination because of family status".[6] Family status is defined under the Code as "the status of being in a parent and child relationship."[7] The Code also provides the employee the right to "freedom from harassment in the workplace by the employer or agent of the employer or by another employee"[8] because of family status, and "no person shall infringe or do, directly or indirectly, anything that infringes" these rights.[9]

Family status discrimination cases have typically involved issues of women attempting to re-enter the workforce after a parental leave. However, employee requests for accommodation by way of absences or modifications to their working day due to elder came responsibilities are becoming more common. The

[5] *Devaney*, *supra* note 2 at 87.
[6] *Code*, *supra* note 1, s 5(1).
[7] *Ibid*, s 10(1).
[8] *Ibid*, s 5(2); "'harassment' means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" *ibid* s 10(1).
[9] *Ibid*, s 9

Devaney decision provides some clarification as to how the Tribunal will determine whether family status discrimination has occurred.

D. TEST FOR FAMILY STATUS DISCRIMINATION

The Tribunal reviewed the tests for family status discrimination as earlier established by the Canadian Human Rights Tribunal and the British Columbia Court of Appeal. However, the Tribunal decided not to apply either of the tests set out in those cases, but instead adopted a new test focusing on the distinction between the preferences and needs of employees with caregiver responsibilities.

The Tribunal concluded that in order for an applicant to make out a *prima facie* case of discrimination on the basis of family status, an applicant would be required to show that his or her employer's attendance requirements had an adverse impact on him or her because the absences from the office were required due to caregiver responsibilities. Importantly, the Tribunal also noted that if the applicant was merely choosing to provide care rather than it being a family responsibility, then the applicant would not be able to successfully claim family status discrimination.

The Tribunal stated at paragraph 117:

> "Each case must be determined based on its own facts and circumstances. Applying the above principles to the facts of the case at hand, I find that, in order to make out a *prima facie* case of discrimination on the basis of family status, the applicant must establish that the respondents' attendance requirements had an adverse impact on the applicant because of absences that were required as a result of the applicant's responsibilities as his mother's primary caregiver. I say "required" because I agree with the respondents that if it is the caregiver's choice, rather than family responsibilities, that preclude the caregiver from meeting his or her employer's attendance requirements, a *prima facie* case of discrimination on the basis of family status is not established: see *Wight, supra*. This approach is also consistent with the well-established principle that the *Code* requires the accommodation of *Code*-related needs, not preferences."[10] [citations omitted]

After setting out the appropriate test, the Tribunal engaged in a detailed examination of Mr. Devaney's personal circumstances and concluded that a high proportion of his absences were related to providing care to his ailing mother. In conclusion, the Tribunal ruled that the employer's strict office attendance

[10] *Devaney*, *supra* note 2 at 117.

requirements resulted in a *prima facie* case of discrimination on the basis of family status. The Tribunal also ruled that the employer failed to demonstrate that its strict office attendance requirements for Mr. Devaney were reasonably necessary, and it failed in its duty to reasonably accommodate his personal circumstances. The employer had an obligation to inquire into the caregiver responsibilities and explore what could be done to accommodate them, which the Tribunal held was not done.

In the result, the Tribunal awarded Mr. Devaney $15,000 in general damages for injury to his dignity, feelings and self-respect. The Tribunal also ordered that the employer develop a Workplace Human Rights and Accommodation Policy, and provide mandatory human resource/accommodation training to all members of the firm who had supervisory or human resource roles.

E. CONCLUSION

The *Devaney* decision represents an important development in the laws of Ontario with respect to discrimination on the basis of family status. For employers, including charities and non-profit organizations, the decision illustrates the need to be aware of the duty to accommodate employees who have various types of family responsibilities which may affect their employment. Employers should expect to see employee requests for accommodation relating to elder care arise more frequently as our population ages, and be prepared to respond to such requests.