

Executive Summary

Introduction

The British Columbia *Human Rights Code*, like all human rights statutes, prohibits discrimination in a variety of contexts, including employment, service or facility customarily available to the public, and tenancy,¹ where differential treatment is linked to a prohibited ground. The original list of grounds included race, creed, colour, nationality, ancestry and place of origin. The list has gradually been expanded over the years to include religion, marital status, family status, physical or mental disability, sex, sexual orientation and age.² Human rights statutes have existed in Canada for about fifty years, and early anti-discrimination laws can be traced back to the 1940s; however, the appearance of family status as a prohibited ground is relatively new. This ground first appeared in a Canadian human rights statute in 1981, and was added to the B.C. *Code* in 1992.

To date there has been little consideration of the ground of family status. This Study Paper aims to:

- Conduct a thorough review of legislation and jurisprudence in relation to the family status ground in Canada;
- Describe the issues and problems with treatment of the family status ground in B.C.;
- Develop scholarly research and analysis of issues relating to the family status ground;
- Foster discussion regarding the purpose and function of the family status ground in contemporary law and society; and
- Identify further questions for consideration to give effect to the notion of inclusive communities and respect for diversity of family configurations in B.C.

Section I is a general introduction. Section II situates the addition of family status within the development of human rights law in B.C. and Canada. The main part of the paper, section III, is a series of chapters that analyze the family status cases, covering decisions of courts, human rights tribunals and labour arbitrators. Section IV is comparative. It reviews international covenants and conventions relating to equality rights protection and family responsibilities, and describes approaches taken in human rights and employment law in other jurisdictions to address equality in the workplace vis-à-vis family relationships and responsibilities. This comparative review is intended both to explore what family status could mean, and identify alternative legal approaches for addressing discrimination based on family status. Section V summarizes the findings from our research, and concludes with questions that policy-makers will likely need to address. The

¹ The BC *Human Rights Code* provides protection against discrimination in accommodation, service or facility customarily available to the public, tenancy, employment, employment advertising, purchase of property, and membership in a trade union, employer's association or occupational association.

² Not every ground applies in every context. For example, family status is not a prohibited ground of discrimination in the context of purchase of property. Lawful source of income is listed as a ground exclusively in the section of the *Code* dealing with discrimination in tenancy premises, and criminal or summary conviction offence unrelated to the employment is listed as a ground exclusively in the sections dealing with employment discrimination and discrimination by unions and associations.

Appendices contain tables that summarize all the family status cases reviewed as part of this study, many of which are discussed in more detail in Section III.

The Meaning of Family Status and Family Status Discrimination

The meaning of family status is not obvious, and that the ground does not mean the same thing across Canada. In part, differences in approaches to family status reflect different statutory definitions of the term. In Canada, three approaches to defining family status exist. They can be placed on a spectrum according to breadth. At one end of the spectrum is the strict “parent-child relationship” definition. In the middle lies the definition of family status as the state of being “related by blood, marriage, or adoption”. The B.C. approach of including family status in the human rights law without a definition is at the opposing end.

These definitions of family status characterize what kinds of family relationships are included in the concept of “family status.” In B.C., decision-makers have treated the absence of a statutory definition as a rationale for interpreting family status broadly to capture many different family relationships. However, the differences found in the application of the family status ground across the country do not arise only from differences in the statutory definitions. The thorny question appears to be, what circumstances or behaviours are captured by the concept of family status discrimination?

The scope of family status discrimination has been carved out over the past two decades by human rights decision-makers. The review of reported decisions undertaken as part of this research project indicates that family status discrimination may involve disadvantage stemming from:

- i. *Inequality of benefits*: These decisions consider whether it is discriminatory to offer different or inferior benefits to biological versus adoptive parents, or birth fathers versus mothers, often in relation to parental or bereavement leave.
- ii. *Absence from the workplace due to maternity, parental or other leave*: These decisions consider whether discrimination occurs when a worker experiences a reduction in or curtailment of benefits, such as pay increases and retirement benefits, as a result of taking a leave to meet family obligations, usually in relation to caring for children.
- iii. *Facially neutral employment standards that may discriminate against parents with particular family responsibilities*: These cases consider whether discrimination results when particular family responsibilities (usually child care issues) make it difficult or impossible for an employee to meet standard terms and conditions of employment, where the employer is unwilling or unable to accommodate the employee. The cases deal with, for example, requests to convert to part-time employment, requirements to work evening or overnight shifts, changes to hours of work initiated by the employer, and requests for temporary changes to shift times and responsibilities during pregnancy.

- iv. *Discriminatory termination linked to family status*: These decisions often concern disputes as to whether termination was due to family obligations, or alternatively, performance or another legitimate business rationale.
- v. *Tenancy discrimination linked to young children*: Many of these cases concern a denial of rental accommodation due to family status, often because a prospective tenant has children or is a single parent.
- vi. *Discriminatory policy in relation to administration of public benefits*: These cases raise issues about whether publicly funded programs discriminate against people in certain family arrangements. Many cases address entitlement to income assistance by people in diverse family circumstances, such as under-age parents, adult children living with their parents, or parents with shared custody. A few cases consider entitlement of grandparents to foster parent support payments.
- vii. *Nepotism and anti-nepotism cases*: These cases consider facts involving preferential treatment of family members, or a denial of an opportunity due to policies prohibiting family members from working together.

While these categories reflect a diverse range of experiences, we found that the majority of family status cases deal with families struggling to maintain caregiving responsibilities. Over half of the cases arise out of employment as compared with, for example, tenancy or access to public services. Reported decisions provide examples of working parents who face difficulty in securing appropriate and affordable childcare compatible with long hours, overnight shifts and unpredictable schedules. Labour arbitrations illustrate barriers to accommodating the wish of new mothers to work part-time after maternity leave, and reveal the negative impact multiple parental leaves can have on long-term entitlement to employment benefits. Non-employment cases reveal the financial strain imposed on different kinds of caregivers: parents who provide long-term assistance to adult family members with disabilities; grandparents who assume primary care of their grandchildren when the biological parents are unable to take on that role; and low income families struggling to support three generations in one home when a youth becomes a parent herself. Collectively the cases illustrate challenges that various family responsibilities impose on contemporary families.

One of the unknowns at the outset of this project was the extent to which the family status discrimination cases reflect diversity in family circumstances. This Study Paper concludes that the cases lack diversity. Childcare related concerns dominate and most of the cases pertain to parent-child relationships. Few cases address challenges relating to care of aging parents or other adult family members. Few cases highlight families impacted by poverty or other grounds of discrimination, other than sex or disability.

The Jurisprudence: Campbell River and Beyond

In recent years, the meaning and scope of family status discrimination has become a source of uncertainty and controversy, particularly with respect to discrimination in terms and conditions of employment. Increasingly, labour arbitrators and human rights tribunals are faced with cases

involving allegations of family status discrimination arising out of circumstances where ostensibly neutral employment rules impose a disadvantage on employees with particular family responsibilities, usually in relation to child care.

Two divergent approaches to family status discrimination in the employment context have developed, with the more restrictive approach to family status discrimination originating in B.C. In *Health Sciences Association of B.C. v. Campbell River and North Island Transition Society*, the B.C. Court of Appeal fashioned the test of “serious interference with a substantial parental or family obligation” for assessing allegations of employment discrimination on the basis of family status. In contrast, the Federal Court Trial Division rejected the serious interference test as inconsistent with the most authoritative jurisprudence on the general test for establishing discrimination. The Federal Court criticized *Campbell River* for inappropriately creating a separate and more restrictive test for one ground of discrimination. This divergence in the application of the family status ground is one of the reasons this study was undertaken.

The decisions that rely on *Campbell River* tend to require that a worker’s family responsibilities must be extraordinary or unusual to ground a claim of family status discrimination. In many instances claims of family status discrimination have been rejected because the employee’s child was not disabled, even though the ground of discrimination alleged was family status, not disability. Patterns of interpretation require a complainant to establish that the disadvantage he or she experiences is unique and not a function of personal life choices, usually by providing medical evidence of a disability or special needs in relation to the family member requiring care. The idea that an experience of disadvantage cannot amount to discrimination only because the experience is too common or typical is problematic. Nowhere does human rights law admit that practices are more acceptable only because they are widespread.

The language of extraordinariness appears to be grounded in a concern to limit the scope of family status and protect against a flood of cases. If family status is characterized broadly to include all instances where work and family responsibilities conflict, then the number of potential cases would be limitless. Addressing the challenge of supporting workers with family responsibilities to maintain employment through human rights litigation places a heavy burden on the private sector to address discrimination that has its roots outside the workplace. Disadvantage that results from conflicts between work and family obligations is often not special or unique to one worker.

The line of cases following *Campbell River* appear to be raising the question, however indirectly, of whether family responsibilities’ challenges merit human rights protection. There is a sense in them that family responsibilities are too ordinary to have human rights significance.

Challenges of using the Human Rights Framework to Address Family Responsibilities Discrimination

The commonness of barriers to workers with family responsibilities remaining in the workplace does not render the barriers any less daunting. The potential prevalence of employment discrimination on the ground of family status does suggest, however, that human rights legislation may not be the ideal tool for addressing the challenge of creating more inclusive workplaces. The patterns of

disadvantage revealed by the jurisprudence on family status discrimination present social issues the system for dealing with human rights complaints does not have the capacity to address on its own. Although this may be true of all grounds, given the often system nature of discrimination, the family status cases underscores this reality in relation to family responsibilities discrimination.

First, the sheer volume of potential complaints, given the ubiquity of family caregiving obligations, speaks of a need for a more accessible and less costly forum for addressing disadvantage in the workplace resulting from family responsibilities. Due to aging demographics and the consequentially shrinking workforce, tensions between workplace and family responsibilities are likely only to increase in subsequent years.

Second, the human rights approach is individualistic, carving out individual remedies for particular complaints and grievances. This individualized approach places the burden on employers, unions and employees to address the question of social and community responsibility for the care of dependents and other family members requiring support, care or assistance. Such an approach can put strain on employers, including small employers who lack comparable resources to innovate and follow through on issues of inclusive workplace design. This rights-based approach also requires an individual to assert a violation in order to get a remedy: problems of access to justice thus present barriers to achieving inclusive workplaces. Reliance on human rights also results in a dynamic whereby social standards are effectively being created in a piecemeal fashion, without parliamentary input.

In the absence of alternatives for addressing issues in relation to family responsibilities, it is likely that people will continue to file human rights complaints and labour grievances in order to pursue accommodation of family responsibilities. The state of the law on family status discrimination, including the obligations placed on employers, would likely be surprising to many employers and workers, as well as others not versed in human rights law. However, there is authoritative jurisprudence to support the proposition that some instances where workplace and family responsibilities clash will give rise to a human rights violation.

There is a strong economic rationale for finding ways to support people to remain in the workforce and employers to accommodate workers who have family responsibilities. The desirable goals of employee health, satisfaction and retention point to a need for a less adversarial means than litigation for addressing the accommodation of family responsibilities in the workplace.

This paper does not advocate for a retraction or expansion of human rights institutions in B.C. Rather, it illustrates the reality that human rights institutions are being asked to address problems of inclusion in workplaces and communities and respond to the strain currently imposed on families to manage care. Human rights institutions do not have the capacity to address these challenges on their own, and in some instances, where problems are much larger than a single workplace and a single worker, human rights litigation may not be the ideal tool. Human rights litigation remains an important forum for raising issues of equality and inclusion. However, if there is a will to explore a more comprehensive response to the issues raised in the jurisprudence, law reform and policy development outside of the realm of human rights law is required.

This paper concludes with questions inviting a broader public discussion of changes outside the realm of human rights law to address family status discrimination and the promotion of inclusive workplaces in B.C. The questions outlined in the conclusion explore: (1) the development a family status discrimination policy for B.C.; (2) the reform of the B.C. *Human Rights Code* to clarify whether family responsibilities are protected; (3) the creation of workplace flexibility legislation for B.C.; (4) the social policy issues to address in relation to supporting the family responsibilities of British Columbians; and (5) the legal test for establishing family status discrimination.