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The Golden Years: The Aging Workforce and Human Rights Matters

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Overview

As the Canadian population ages, so does our workforce. Mandatory retirement programs have generally been outlawed (with few exemptions), and many Canadians now choose to work into their 60s and 70s for various reasons including: fulfillment, financial gains, longer life spans, lack of savings and failed pension plans.

Employers can significantly benefit by retaining and hiring older employees who may offer considerable knowledge, experience and insight, along with dedication and work ethic. All of these benefits are accompanied by a unique set of human rights considerations related to our aging workforce, including age discrimination and age related disability.

With respect to age discrimination, employees may experience ageism within an ongoing employment relationship, or when trying to secure a new job later in life. Older employees may feel like they are being forced to retire or may be passed up for deserved promotions on the unverified assumptions they will not be working too much longer. Older employees may also be targeted for termination, when they had intended to work for several years more. Persons seeking new jobs later in life may experience age discrimination during the recruitment process.

With respect to age-related disability, older employees may experience medical issues, and employers must accommodate age-related health issues in the exact same way that any other disability is accommodated. Some disabilities are far easier to accommodate than others. A defined physical limitation may be readily accommodated on a permanent basis by using an assistive device, whereas an invisible disability and/or cyclical disability may require a more flexible accommodation approach. For instance, an employee experiencing certain forms of arthritis may feel significant pain and require time off during flare-ups; however, the cyclical and sporadic nature of the required accommodation could present scheduling challenges. Far more challenging is understanding and accommodating a brain disorder (such as Alzheimer's disease or dementia). In such situations the employee may not even be aware of their own health issues, and the employer will be tasked with determining if any medical conditions even exist and if so, if such can be accommodated.

The aging population may also result in increased requests for family status accommodations, when children or relatives request time off to assist in the caregiving needs of their elders.

This article will explore some key human rights considerations and interesting case-law related to our aging workforce.

The Stats

As the Baby Boomers age, so does the Canadian population. One recent Statistics Canada article declared that in 2015, for the first time, there were more persons aged 65 years and older in Canada (16.1% of the population) than children aged 0 to 14 years (16.0% of the population). This same article stated that according to the most recent population projections, the percentage of persons aged 65 years and older will continue to increase and should account for 20.1% of the population on July 1, 2024, while the share of children aged 0 to 14 years should account for only 16.3%.[1] In short, our population is getting older and these shifting demographics will affect all facets of our society, including considerations within the context of the employment relationship.

The Abolishment of Mandatory Retirement

Over the last decade or so, the concept of mandatory retirement has been made illegal in most Canadian jurisdictions and in most contexts (with few exceptions). For instance, in 2006, Ontario's *Human Rights Code* was amended to protect all persons aged 18 and over against discrimination in employment on the basis of their age. This meant that employers in Ontario could no longer make decisions about hiring, promotion, training opportunities, or termination on the basis of an employee's age (i.e. forcing someone to retire at 65 years old).

Other Canadian jurisdictions have imposed similar protections. For instance, in 2012, federally regulated employees became protected against age discrimination after amendments to the *Canadian Human Rights Act* and the *Canada Labour Code* were brought into force to prohibit federally regulated employers from setting a mandatory retirement age. The only Canadian jurisdiction that appears to provide circumstances in which age discrimination may remain permissible is New Brunswick. The New Brunswick *Human Rights Act* contains exemptions to age discrimination when an age-related termination occurs as a result of the terms or conditions of any *bona fide* retirement or pension plan.[2]

Protection against age discrimination does not mean that employers cannot have retirement programs; however, it does mean that retirement programs cannot be mandatory. In some exceptional cases, employers may be able to defend mandatory retirement programs on the basis that such programs are *bona fide* occupational requirements (also known as "BFORs"). In order to establish a BFOR, employers must show that their mandatory retirement program:

- was developed in good faith;
- is rationally connected to the nature of the work; and

[1] Statistics Canada "Canada's population estimates: Age and sex, July 1, 2015". Retrieved from: http://www.statcan.gc.ca/daily-quotidien/150929/dq150929b-eng.htm

[2] *Human Rights Act*, RSNB 2011, c 171, s. 4(6)

- it would be impossible to develop a non-discriminatory program without undue costs or health and safety risks.[3]

Establishing a BFOR is difficult. Except in circumstances where mandatory retirement can be shown to be a BFOR, employment contracts, policies and/or collective agreements that contain such provisions will be unenforceable.

Outside of the context of mandatory retirement, there are a few decisions dealing with age as a BFOR, and such are useful to consider when discussing ageism. The cases appear to indicate that it is very difficult to establish that age is a BFOR. In *Canada (Human Rights Commission) v. Greyhound Lines of Canada Ltd.*,[4] the employer was unable to establish that its policy of refusing to hire new bus drivers over the age of 34 was a BFOR. The employer was unable to prove any relationship between age and stress to justify its policy. Similarly, in *Air Canada v. Carson*[5], the airline was unable to justify its requirement that all pilot applicants over the age of 27 have greater qualifications than younger applicants, on the basis of public safety concerns.

There are some exemptions in relation to mandatory retirement and age discrimination. For example, in Ontario, a judge can only remain in office until the mandatory retirement age of 75.[6] Also, different rules may apply in the context of a partnership rather than an employment relationship.

In relation to partnership, in 2014, the Supreme Court of Canada upheld a decision of British Columbia's Court of Appeal, wherein it was held a law firm could impose mandatory retirement on a partner at the firm. The decision in *McCormick v. Fasken Martineau DuMoulin LLP*,[7] involved a complaint by a partner at a law firm. He became an equity partner at his law firm in 1979. An equity partner has an ownership interest in the firm. In the 1980s, the equity partners voted to adopt a provision in their Partnership Agreement that required equity partners to retire as equity partners and divest their ownership shares at the end of the year in which they turned 65. After age 65, a partner could make individual arrangements to continue working as an employee or as a "regular" partner without an equity stake, but such arrangements are stated in the Agreement to be the exception rather than the rule. At the age of 64, the partner filed a complaint at the Human Rights Tribunal in relation to the rule, arguing it was in breach of human rights legislation. British Columbia's Human Rights Tribunal found that the agreement was in breach of British Columbia's *Human Rights Code*[8], on the

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[3] See: British Columbia (PSERC) v. British Columbia Government and Service Employees' Union, [1999] 3 SCR 3 (McLachlin)
[4] (1984), 6 C.H.R.R. D/2512 (Can. Trib.), affd 7 C.H.R.R. D/3250 (Can. Rev. Trib.), affd 8 C.H.R.R. D/4184 (F.C.A.).
[5] (1985), 6 C.H.R.R. D/2848 (Fed. C.A.).
[6] See *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 32(9)
[7] 2014 SCC 39
[8] [RSBC 1996] CHAPTER 210

premise that the partner was an employee and the *Code* applied. The law firm appealed, failing at the judicial review process, but was successful at British Columbia's Court of Appeal. At the Court of Appeal, there was a finding that the partner was not an employee and therefore the provisions of the British Columbia's *Human Rights Code*[9] did not apply. The Supreme Court of Canada agreed with that decision, noting that the partner had significantly benefited from the partnership agreement, including advantages relating to ownership and profit, and given the context of his relationship, he was not an employee.

The above cited decision indicates that there are certainly circumstances where human rights legislative protections from age discrimination may not apply, including in a partnership arrangement, which may not provide the same protections as an employment relationship. It also might be reflective of the fact that age discrimination concerns may not be taken as seriously as other types of discriminatory concerns. For instance, if that same partnership excluded women, or a particular religion or race, from joining, would the court have come to a different reasoning? Beyond employment relationships, contractual relationships (including partnership agreements) are subject to protections under human rights legislation. In this respect, while the partner was not an employee, in some jurisdictions, there could be a finding that a partnership agreement invoking mandatory retirement breaches human rights legislative protections by virtue of the discrimination in the contract.

Age Discrimination during Employment

Age discrimination or 'ageism' occurs when an individual is treated differently on the basis of his or her age. It could involve older workers or younger workers. It could involve comments or discriminatory actions. In relation to older employees, this may occur in various circumstances, which could include some of the following examples:

- A worthy employee is passed over for a promotion opportunity based on false assumptions about their age, capabilities and/or timing of their retirement
- An employee is repeatedly asked when he or she is going to retire
- An employee is stereotyped and asked if he or she 'has the energy' to do a particular task or role
- An employee is not provided equal growth or training opportunities
- An employee is not provided equal raises or bonus opportunities based on age-related assumptions
- An employee has age-related health issues that are not accommodated the same way as other health issues experienced by younger employees

[9] [RSBC 1996] CHAPTER 210

- An employee is terminated on the basis of age and/or for reasons linked to age (disability related leaves or false assumptions on the impact of age on work performance)

The Ontario Human Rights Commission's policy entitled: "Policy on discrimination against older people because of age" was formulated after extensive research took place, resulting in the following findings about age discrimination, as listed directly from the policy:

- Age discrimination is not seen as something that is as serious as other forms of discrimination despite the fact that it can have the same economic, social and psychological impact as any other form of discrimination.
- Society has accepted age-based criteria as a way in which to structure policies and programs and to make decisions about people in areas such as employment and services.
- Despite the fact that the population is aging, many aspects of society have been designed in a way that is not inclusive of older persons.
- Preconceived notions, myths and stereotypes about the aging process and older persons persist and give rise to discriminatory treatment.
- Age often works in "intersection" or combination with other grounds of discrimination to produce unique forms of disadvantage. For example, women experience aging differently than men and older persons with disabilities face compounded disadvantage.
- Employers, service providers and others with responsibilities under the Code are looking for more information and guidance on meeting their human rights obligations vis-à-vis older persons. A shortage of skilled workers in certain fields means creative strategies are being sought by employers to attract and retain older workers.[10]

The above policy suggests that although prevalent, age discrimination receives far less attention than other forms of discrimination (such as sexual harassment or racism); however, age discrimination protections remain equally important to consider, especially considering the fact that more persons in our population could be impacted over the next decade. Age discrimination can often be felt, yet it is often difficult to prove. It is important for employers and employees alike to better understand what constitutes age discrimination and how to prevent it.

Age Discrimination Allowed in the Provision of Benefits

Although employers cannot discriminate against an employee based on age, employers are allowed to provide differential treatment when it comes to the provision of certain benefits and insurance plans. Age based distinctions can be used as a basis to decline the provision of medical, dental and

[10] See the Ontario Human Rights Commission's "Policy on discrimination against older people because of age". Retrieved from: http://www.ohrc.on.ca/en/policy-discrimination-against-older-people-because-age

disability insurance benefits. Similarly, age-based distinctions under workers compensation legislation are excluded from human rights legislative scrutiny. This means employees are not protected in relation to age discrimination in the context of denying medical, dental, or other insurance related benefits based on age.

Ageism in Hiring & Firing

There is no specific age to define what constitutes an 'older employee'; however, employees in their 50s and 60s may experience situations where they feel they are being treated differentially based on their age. Ageism could result from stereotyping, and such circumstances will vary depending on the context. For instance, some industries or workplaces may value age and experience, whereas others may not. Also, often it is difficult to determine how old someone is by the way they look, therefore, the term 'older employee' is fluid and contextual, and does not allude to a specific age.

Many individuals wish to continue working into their 60s and 70s for various reasons, including: increased cost of living, increased life span, general interest, fulfillment, lack of savings and failed retirement plans. However, there is never any guarantee of indefinite employment, and employees could find themselves in circumstances where they have been terminated in their 50s and 60s, with a desire or need to continue working longer. Some employees may believe they were terminated as a result of their age, and although possible, it can often be quite difficult to prove. Employers certainly are allowed to terminate due to legitimate business interests or performance issues (as long as such are not linked to age and/or disability). The fact that an individual has been terminated at an older age, will not suffice to demonstrate there has been discrimination.

Canada's common law recognizes the fact that older employees may have a difficult time securing new employment after termination. For instance, when considering common law notice, the court will look at age, length of service and other relevant facts to determine how long such notice should be. An older employee may be awarded a much longer notice period than a younger employee with all other characteristics being equal, based on the recognition that the older employee will have a harder time securing new employment. This is the case, even in the context of shorter service employees. For instance, in *Dear v. Glamour Designs Ltd*,[11] an employee with 9 years' service who was terminated at the age of 66 was awarded 12 months' notice. In *Tetra Consulting v. Continental Bank of Canada*,[12] a 61 year old employee with 2 years' service was awarded 8 months' notice.

Employees who have long service and are terminated later on in life will similarly be entitled to lengthy notice periods. For instance, in *Markoulakis v. SNC-Lavalin Inc*.[13], a 65 year old civil engineer

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[11] 2015 ONSC 5094
[12] 2015 ONSC 4610
[13] 2015 ONSC 1081

with 40 years of service received 27 months' of notice. As such, when non-unionized employees are terminated at an older age, and without an enforceable contract, the courts will award lengthier notice based on age, and in part, based on the consideration of the fact it will be difficult to secure new employment. If employers are hiring older employees, it is advisable to request the employee sign an employment contract with a termination provision in order to avoid the potential lengthy notice periods that could be awarded at common law.

An employee who has been terminated may attempt to seek new employment and find difficulties resulting from age discrimination in the recruitment process. With respect to recruitment, employers in all Canadian jurisdictions are prohibited from asking for job applicant's age or birthday. Where such questions are relevant (for instance, for the administration of benefits), the employer can only ask for the information after making an offer of employment.

Although employers cannot ask for specific age, job applicants can still be prejudiced when providing graduation dates, employment history or by their physical appearance at an interview. Older employees may be subject to various stereotypes when trying to secure a new role later in life. Such stereotypes could include but are not limited to the following:

- The individual is 'too experienced' and/or will request too much compensation
- The company is looking for someone more energetic and committed to the role
- The company is looking for someone more junior and affordable
- The individual may not pick up on new technology
- The individual will not want to work too much longer

The above are just a few potential false assumptions that could sometimes prejudice an individual's ability to secure employment later on.

While age discrimination is often quite difficult to prove, there are some decisions in which job applicants successfully demonstrated that they were not awarded a job due to their age, and were then awarded damages based on same. For instance, in *Winsor v. Provincial Demolition and Salvage Ltd.*[14] the 55 year old complainant applied for a construction job and was told that his age was a factor in not being hired. The Board of Inquiry held that there was discrimination, the respondents were not present to put forward a defence and a BFOR defence was inapplicable.

In *Reiss v. CCH Canadian Limited*,[15] a 60-year old lawyer successfully argued that he was discriminated against in the recruitment process based on age. The lawyer had applied for a legal writing position

[14] [2000] NHRBID No. 1 (Nfld. Bd. Inq.)
[15] 2013 HRTO 764 (CanLII)

with a legal publisher, and on his initial application he left out some dates on his resume. The publisher followed up for such dates, which he provided, but he never received an interview. The lawyer had requested a salary rate considerably lower than market value. The publisher ended up hiring two more junior employees, one who quit after one-week and the other who took another role without accepting the position. The lawyer had followed up on his application and was advised that the publisher was considering "candidates that are more junior in their experience and salary expectation". The Human Rights Tribunal of Ontario found that the publisher's emails were misleading and incorrect, due to the fact that the junior candidates had actually requested greater salary expectations then the complainant. Further, the publisher's "communications to the applicant were tainted by age discrimination and that this had an adverse effect on the applicant."[16] The applicant/lawyer was awarded $5,000 in human rights damages. In this particular case, there was overt evidence of age discrimination; however, often there may not be such tangible evidence to support a meritorious age discrimination claim.

Age-Related Disability & the Duty to Accommodate

Employers are required to accommodate age-related disability exactly as legally required to accommodate any other disability or human rights protected ground. The "duty to accommodate" requires that employers (and unions, when applicable) make every reasonable effort to accommodate an employee who has a disability, to the point of undue hardship.

The Human Rights Tribunal of Ontario (HRTO) has found that the duty to accommodate includes two parts: (1) a procedural duty; and (2) a substantive duty. According to HRTO decisions, the procedural component requires that an employer take steps to understand the employee's disability-related needs and to undertake an individualized investigation of potential accommodation measures to address those needs. The substantive component of the analysis considers the reasonableness of the accommodation offered or the employer's reasons for not providing accommodation. It is the respondent (the employer) who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate the employee to the point of undue hardship.

Not all Canadian jurisdictions have adopted this two-part approach followed by the HRTO (considering both procedural and substantive duty) including, for instance: federally regulated employers[17] or provincially regulated employers in British Columbia[18]. In this respect, some Canadian employers may attempt to argue that there is no procedural obligation in relation to the duty to accommodate; however, failure to meet the procedural duty to determine an employee's needs, to

[16] *Reiss v. CCH Canadian Limited,* 2013 HRTO 764 (CanLII) at para. 108
[17] See for instance: Canada (Human Rights Commission) v. Canada (Attorney General), 2014 FCA 131 (CanLII)
[18] *Emergency Health Services Commission v. Cassidy*, 2011 BCSC 1003

consider accommodation possibilities and to attempt to accommodate an employee would likely make it difficult for an employer to prove that the employee could not be accommodated without undue hardship. As such, it would be unadvisable for employers in any Canadian jurisdiction to ignore the procedural duty. In sum, if an employer is going to decline an accommodation request, it should be based on evidence, and such evidence is acquired at the procedural stage of inquiry.

The Procedural Duty to Accommodation and the Duty to Inquire

In general terms, the procedural duty to accommodate requires the considerations, assessments and steps taken to respond to an accommodation need. With respect to the procedural component, age-related disabilities could potentially raise additional duties beyond the regular procedural obligation to inquire about an employee's disability related needs. For example, the Human Rights Tribunal of Ontario has recognized the "duty to inquire"; where an employer knows or ought to have known that an employee had a disability, there is a duty to inquire about same.[19] This may occur in circumstances where the employee has not disclosed any disability or requested accommodation. For instance, an employee experiencing memory loss, Alzheimer's disease or dementia may not be aware or able to self-identify and/or request accommodations; however, such circumstances may still require that the employer inquire if there are signals that the employee may be experiencing a medical condition.

Other Canadian jurisdictions have similarly recognized the duty to inquire.[20] The duty to inquire recognizes that those who experience certain disabilities may not disclose such issues or request accommodation, even when such accommodation may be needed. In this respect, employers are responsible for asking questions when appropriate. For instance, an employee may not be self-aware at the onset of a brain disorder, or may not feel comfortable disclosing age-related disabilities. An employer may notice declining performance, memory or attendance, and such situations warrant that employers engage in an inquiry to ensure the employee's performance based issues are not related to a disability. Failing to inquire could result in a finding that the employer has failed in the procedural duty to accommodate and has therefore breached applicable human rights legislation. For a more in-depth discussion on the duty to accommodate in the context of invisible disabilities, see previous Queen's IRC article entitled: "Invisible Barriers: Accommodating Mental Illness in the Workplace".[21] Once an employer has adequately inquired about an employee's potential medical conditions, the next step is to consider substantive requirement to accommodate when applicable.

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[19] See for instance: *Stewart v Ontario (Government Services)*, 2013 HRTO 1635 at paragraph 41, a decision considering the duty to inquire in the context of mental illness.

[20] *Mackenzie v. Jace Holdings*, (2012 BCHRT 376)

[21] Hudson, Deborah, "Invisible Barriers: Accommodating Mental Illness in the Workplace". Retrieved from: http://irc.queensu.ca/sites/default/files/articles/invisible-barriers-accommodating-mental-illness-in-the-workplace-by-deborah-hudson.pdf

The Substantive Duty to Accommodate and Undue Hardship

With respect to the substantive component (reasonableness of accommodation offer), once an employer is aware that there is a disability related need requiring accommodation, the employer must provide accommodation options. Where an employee can demonstrate he or she was discriminated on the basis of a disability (or any other protected ground), a decision maker (for instance, a human rights tribunal or labour arbitrator) will then consider the three part test first outlined by the Supreme Court of Canada's decision in *British Columbia (PSERC) v. British Columbia Government and Service Employees' Union*[22] ("*Meiorin*"), to determine if the discrimination is based on a BFOR. The three part test set out in *Meiorin* provides that the employer may justify the discriminatory standard by establishing on the balance of probabilities:

1. Has the employer adopted the challenged standard or practice for a purpose rationally connected to the performance of the job?
2. Has the employer adopted the standard in an honest and good faith belief that it is necessary to fulfil the work-related purpose? and
3. Is the standard reasonably necessary, in that it would be impossible to accommodate an individual employee without imposing undue hardship upon the employer?[23]

Reaching "undue hardship" is a very significant standard to meet. The Supreme Court of Canada has set out some significant aspects of the "undue hardship" test, providing the following non-exhaustive list of factors which an employer might rely to show undue hardship:

- Financial Cost
- Disruption of a collective agreement
- Problems relating to employee morale
- Interchangeability of workforce and facilities
- Size of the employer's operation
- Safety considerations[24]

An employer's legitimate operational requirements of the workplace is also another factor considered by decision makers. Numerous decisions have considered what amounts to "undue hardship" and the simple answer for employers is that it is a difficult (although not impossible) standard to meet. Employers are required to provide a flexible approach to accommodate. For instance, the application of an attendance policy should provide adequate flexibility to consider age-related disabilities that may impact attendance. Employers may consider offering older employees reduced workload and/or

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[22] [1999] 3 SCR 3 (McLachlin)

[23] *British Columbia (PSERC) v. British Columbia Government and Service Employees' Union* [1999] 3 SCR 3 at paragraph 54.

[24] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission),* [1990] 2 S.C.R. 489

part-time work if medically required. In relation to undue hardship and cost, any argument related to this would have to contain significant, quantifiable evidence.

The duty to accommodate requires an individualized approach for each situation, and employers are required to provide significant flexibility when accommodating all employees, including those with age-related disabilities. Some potential accommodation options for employers include, but are not limited to the following:

- Flexible scheduling (modified hours, late start times, part-time work, etc.)
- Modifying job duties
- Providing assistive devices (such as specialized chairs, desks, computer gadgets, etc.)
- Using technology

Employers are entitled to request medical information in relation to any accommodation requests. Further, there may be circumstances in which an employer notices a decline in an employee's performance without the provision of any accommodation requests. Such situations may be difficult but sometimes can require that the employer request the employee to attend his or her doctor to obtain information on current medical status and/or any limitations. These are difficult conversations and medical information requested should be substantiated based on noted occurrences, solely requesting prognosis (limitations) and not diagnosis.

Family Status Matters

Finally, in considering our aging population, we must also consider the impact on those involved in elderly caregiving. Employees are entitled to receive accommodation if required in order that they can assist in the caregiving needs of their parents. The Ontario's *Human Rights Code,* provides that:

- "family status" means the status of being in a parent and child relationship[25]

In Ontario, this can also mean a parent and child "type" of relationship, that may not be based on blood or adoption ties, but that is based on care, responsibility and commitment.[26] Similar legislative protections for family status apply across Canada.

Persons in parent-child relationships are protected on the basis of family status in the workplace, which may require that employers provide accommodations in order that an employee can assist in the elderly care of a parent.

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[25] *Human Rights Code,* R.S.O. 1990, c. H.19, s. 10

[26] See the Ontario Human Right's Commission's "Human rights and family status (brochure)" Available Online at: http://www.ohrc.on.ca/en/human-rights-and-family-status-brochure

The HRTO's 2012 decision in *Devaney v ZRV Holdings Limited*,[27] provided significant changes to the way in which family status accommodation would be viewed going forward, and in particular in relation to elderly care. The application was filed by an employee who worked as an architect for the Respondent/employer for 27 years. The employer terminated him alleging just cause, as a result of the employee's frequent absences from work, which the employee attributed to responsibilities in caring for his ailing mother. Aside from the absences, there were no apparent issues with his performance. The applicant filed an application, alleging discrimination in employment based on family status (in his case, elderly care).

Following a review of conflicting jurisprudence, the HRTO held that the test for *prima facie* discrimination required a finding that the employer's requirements (in this case, attendance requirements) had an adverse impact on the applicant's care-giving needs (as opposed to choices or preferences relating to care-giving). Based on this, the HRTO concluded that the employee had established a *prima facie* case of discrimination because the employer's requirement that the Applicant be in strict attendance at the office each day, regardless of his care-giving responsibilities, had an adverse impact on him.

In reaching this conclusion, the HRTO rejected an earlier line of cases which applied a higher threshold to cases of discrimination based on family status. The decision went on to highlight that procedural component in the duty to accommodate requires meaningful dialogue and assessment of human rights related needs. The HRTO concluded because the employer never engaged in a meaningful dialogue or made meaningful inquiries regarding the accommodation of the Applicant's eldercare responsibilities, they had failed to meet the procedural aspect of the duty to accommodate. As the HRTO stated:

> When a respondent is notified that an individual has Code-related needs, the respondent has a duty to make meaningful inquiries about the needs to determine whether or not a duty to accommodate exists
>
> …While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business…The duty to accommodate requires an individualized assessment of Code-related needs, including the possibility that there may be different ways to perform the job…[28]

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[27] 2012 HRTO 1590 (CanLII)

[28] Devaney v ZRV Holdings Limited, 2012 HRTO 1590 (CanLII) at paras 172 - 173.

In addition to the above, the HRTO found that the employer breached the substantive duty to accommodate by failing to establish that accommodating the Applicant's needs (i.e. allowing the absences) would have caused undue hardship. The Applicant was successful, and was awarded damages in relation to his claim, including $15,000 in human rights damages.

This decision is noteworthy in several respects. First, its recognition of elder care responsibility as falling under the ambit of "family status" has important consequences for the increasing number of people dealing with aging family members. Second, the decision places significant responsibility on employers to engage, work with and assess the needs of employees with family obligations.

Employers likely will see a rise in family status requests in relation to elderly care over the next few years. Examples of family status accommodation may include:

- Providing flexible scheduling and/or alternative work arrangements and
- Allowing employees to take leaves of absence to care for family members who are aging, ill or have a disability

It is important that employers review and consider family status accommodation requests and apply the duty-to-accommodate principles on a case-by-case basis as such situations arise.

Conclusion

Over the next decade, we will likely see a rise in age-related workplace issues. It is important for employers and employees to each understand their rights and obligations required by human rights legislation. Beyond legal rights, it is also important that all involved respect each other, and work towards creating a harmonious and dynamic working environment with the benefit of experience older employees can offer. All parties should be flexible and communicative for the best outcome for everyone involved!

About the Author

Deborah Hudson is a lawyer at Turnpenney Milne LLP. She represents both employees and employers in all aspects of workplace law, with a particular interest in human rights matters and employment related litigation. Deborah also provides in-house training on a variety of workplace issues.

Deborah graduated from the University of Windsor law school in 2007 and was called to the Ontario Bar in 2008. She commenced her legal career at a boutique management-side labour and employment firm where she worked between 2007 and 2015. From 2012 to 2013, Deborah worked in-house for a one year secondment with the human resources department of a significant Ontario municipality where she gained significant hands-on human resources experience involving both union and non-union staff.

Deborah has also authored and contributed to a number of publications touching on various labour relations and employment law matters. Deborah has previously published two articles for Queen's IRC: "Workplace Bullying and Harassment: Costly Conduct" in 2015 and "Invisible Barriers: Accommodating Mental Illness in the Workplace" in 2016. Deborah was a contributing author of the *Ontario Human Rights Code: Quick Reference – 2015 Edition*[29], *Accommodation Issues in the Workplace* (2014)[30], and *Halsbury's Labour Laws of Canada*.[31]

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[29] Jamie Knight et al, *Ontario Human Rights Code: Quick Reference*, 2015 ed. (Toronto: Thomson Reuters Canada, 2014).
[30] Jamie Knight et al, Accommodation Issues in the Workplace, (Toronto: Wolters Kluwer Limited, 2014).
[31] Jamie Knight et al, *Halsbury's Laws of Canada – Labour*, (Toronto: LexisNexis Canada, 2011).

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