

**The Modern Employer:  
Accommodating the 21<sup>st</sup> Century Workforce**

**Ryan Edmonds and Emily Shepard**

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## **Introduction**

In the modern workplace, an employer should be proactive about including and welcoming different types of people. Through policies, training programs, and open communication, an employer can anticipate and prevent potential discrimination claims in the workplace. More importantly, however, this proactive attitude can help an employer foster a positive work environment that boosts recruitment and retention and creates a more collaborative, innovative, and therefore productive workforce.

This paper will review three types of workplace diversity that have recently become more important in modern Canadian human rights law: employees with caregiving obligations such as childcare and eldercare; employees with different forms of gender identity and expression; and equality rights for aging employees. These issues have come to the surface in the workplace because of changes in Canadian families and social norms. To help employers respond to these changes, this paper will provide employers with information about how to act before these new types of discrimination claims develop in the workplace.

## **The Modern Employee: Diversity by the Numbers**

The modern employee is facing increased pressure both at work and at home. More parents are participating in the workforce,<sup>1</sup> and more couples are earning dual incomes.<sup>2</sup> At the same time, families continue to care for children, and an increasing number of working-age Canadians care for elderly relatives. Almost inevitably, a tension can develop between an employee's work obligations and his or her desire to care for family members and participate in family life.

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<sup>1</sup> From 1980 to 2005, the number of two-parent families working on a full-time basis increased from 15% to 32%. Over the same time period, the number of single mothers with a full-time schedule rose from 43% to 51%: Sébastien LaRoche-Côté, Philippe Gougeon and Dominique Pinard, "Changes in parental work time and earnings," Perspectives on Labour and Income, October 2009, vol. 10 no. 10, Statistics Canada Catalogue no. 75-001-X.

<sup>2</sup> From 1976 to 2008, the number of dual-earner couples rose from 1.9 million (43% of couples) to 4.2 million (68% of couples): Katherine Marshall, "The family work week," Perspectives on Labour and Income, April 2009, vol. 10 no. 4, Statistics Canada Catalogue no. 75-001-X.

Canadians are increasingly caring for elderly family members as the population ages. Most of those providing care to elderly relatives (57%) were employed in 2007.<sup>3</sup> Six in ten caregivers were providing for a parent or parent-in-law, and one in ten was providing for a spouse. Caregivers also included those outside of the close family circle, such as friends (14%), extended family (11%), and neighbours (5%).<sup>4</sup>

Canadians are also trying to balance work with childcare obligations. In 2008, most new mothers (85%) were working before they gave birth, and 80% of these women received some form of maternity or parental leave benefits. A small group of these women (20%) received a “top-up” from their employers to enable these women to take a longer leave. This top-up provided women with a significant incentive to return to work – nearly all women who received a top-up (96%) returned to the same employer.<sup>5</sup>

Increasingly, men are taking a paid parental leave to help care for young children as well: 20% of men took some paid parental leave in 2006, up from 3% in 2000.<sup>6</sup> Many men, however, also took other forms of leave to spend time with their newborn children, such as vacation time (21%) and unpaid leave (11%).<sup>7</sup>

While many younger employees struggle to manage caregiving obligations, many older employees are continuing to participate in the workplace. For the first time in 2013, the number of 55- to 64-year-olds is expected to surpass the number of 15- to 24-year-olds in Canada.<sup>8</sup> As a result, the number of workers per retired persons aged 65 or over is

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<sup>3</sup> Kelly Cranswick and Donna Dosman, “Eldercare: What we know today,” Canadian Social Trends, Winter 2008, no. 86, Statistics Canada Catalogue no. 11-008-X.

<sup>4</sup> *Ibid.*

<sup>5</sup> This is compared with 77% of women who received a regular maternity leave, and 46% of women with no benefits: Katherine Marshall, “Employer top-ups,” Perspectives on Labour and Income, February 2010, vol. 11 no. 2, Statistics Canada no. 75-001-X.

<sup>6</sup> Much of this increase can be attributed to the introduction of the Quebec Parental Insurance Program and the subsequent increase in Quebec fathers taking parental leave: Katherine Marshall, “Fathers’ use of paid parental leave,” Perspectives on Labour and Income, June 2008, vol. 9 no. 6, Statistics Canada no. 75-001-X.

<sup>7</sup> *Ibid.*

<sup>8</sup> Joe Friesen, “Retirees set to outnumber Canada’s youth for the first time,” *The Globe and Mail*, February 18, 2013.

expected to fall to 2 to 1 in 2031, from 5 to 1 in 2005.<sup>9</sup> In 2021, it is estimated that employees aged 55 and over will comprise 18-20% of the labour force.<sup>10</sup>

The composition of Canadian families is also changing. The proportion of married couples decreased from 2001 to 2011,<sup>11</sup> while the number of common-law couples is steadily increasing.<sup>12</sup> The number of male lone-parent families is also increasing at a significant rate.<sup>13</sup> The number of same-sex couple families increased 42.4% from 2006 to 2011. While most same-sex couples are common-law, the number of married same-sex couples nearly doubled from 2006 to 2011.<sup>14</sup>

As awareness of sexual diversity increases, it is likely that the number of openly transgendered and transsexual people in Canada will continue to rise. While precise statistics on trans populations in Canada are not available, a US study estimated that 1 in 24,000-37,000 men and 1 in 103,000-150,000 women identify as transsexual. Troublingly, of this population, a remarkable 40-60% is estimated as unemployed.<sup>15</sup> Those who do work are often earning less than the general population.<sup>16</sup>

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<sup>9</sup> Martel, Caron-Malenfant, Vezina, Bélanger, "Labour Force Projections for Canada, 2006-2031. In Canadian Economic Observer, Ottawa, June 2007, Statistics Canada, Cat.# 11-010, pp. 3-6, cited in Jean Pignal, Stephen Arrowsmith and Andrea Ness, "First Results from the Survey of Older Workers, 2008," November 2010, Statistics Canada no. 89-646-X.

<sup>10</sup> *Ibid.*

<sup>11</sup> The percentage of married couples decreased from 70.5% of census families in 2001 to 67% in 2011: Statistics Canada, "Portrait of Families and Living Arrangements in Canada," September 2012, no. 98-312-X2011001.

<sup>12</sup> The percentage of common-law couples increased from 13.8% of census families in 2006, to 16.8% in 2011: *Ibid.*

<sup>13</sup> From 2006 to 2011, male lone-parent families increased at a rate of 16.2%, while female lone-parent families increased at 6.0%. Female lone-parent families are still significantly more common: in 2011, 8 in 10 lone parents were women: *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> M.V. Lee Badgett, Holding Lau and Brad Sears, "Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination" [unpublished, 2007], The Williams Institute on Sexual Orientation Law and Public Policy at UCLA School of Law, online: <<http://www.law.ucla.edu/williamsinstitute/publications/Bias%20in%20the%20workplace.pdf>>.

While there appears to be no consensus on an exact unemployment rate, there is consensus that it is dramatically higher than the general population. For example, based on a survey of over 6,500 transgender people in the United States, the National Gay and Lesbian Task Force estimated a 20% unemployment rate. See Rea Carey, "Testimony of the National Gay and Lesbian Task Force Action Fund" (Prepared for the Committee on Health, Education, Labor, and Pensions of the United States Senate, 5 November 2009), online: <[http://www.thetaskforce.org/downloads/release\\_materials/enda\\_1109\\_testimony.pdf](http://www.thetaskforce.org/downloads/release_materials/enda_1109_testimony.pdf)>.

<sup>16</sup> 64% of trans people who were working when surveyed were earning less than \$25,000 USD per year: *Ibid.*

As Canadian society evolves, employers must also evolve to accommodate the different needs and identities of their employees. Three recent developments in human rights law illustrate how employers are now expected to accommodate employees' caregiving obligations, employees' gender identity and expression, and the needs of an aging workforce.

### **Legislative Overview: Employers' Human Rights Obligations**

All Canadian jurisdictions (provinces, territories and federal) have human rights legislation that governs the actions of employers. If an employer makes a distinction based on one of the enumerated grounds in the relevant human rights legislation,<sup>17</sup> an employee may bring forward a complaint of discrimination. This complaint may be based on the employer's actions or based on a discriminatory workplace standard.

In human rights law, all employers are under a duty to accommodate employees who fall under an enumerated ground. In order to meet its duty to accommodate, the employer must engage in a good-faith dialogue with the employee to investigate accommodation for his or her request to the point of undue hardship.<sup>18</sup> Undue hardship may be established if accommodation would have a negative impact on the employer's business interests, employee safety, workplace morale, or the rights of other employees (though this list is not exhaustive).<sup>19</sup>

The duty to accommodate is a multi-party duty, and is shared by the employer, the union (if any), and the employee. While the employer bears the primary burden, the employee must co-operate by providing sufficient evidence of the need for accommodation, assisting in the search for acceptable accommodation, and accepting reasonable offers of accommodation.<sup>20</sup>

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<sup>17</sup> For example, the Ontario *Human Rights Code* prohibits discrimination on the basis of "race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability." R.S.O. 1990, c. H.19, s. 1.

<sup>18</sup> *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

<sup>19</sup> *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489

<sup>20</sup> *Supra* note 18.

An employer will not be subject to the duty to accommodate, however, if it can establish that a discriminatory workplace rule, policy or standard is a *bona fide* occupational requirement. In order to meet this test, an employer must prove that it adopted the standard for a purpose that is rationally connected to job performance, it adopted this standard in an honest and good faith belief that it was necessary for job performance, and the standard is reasonably necessary to accomplish that legitimate purpose (which requires showing undue hardship).<sup>21</sup>

### **Accommodating the Modern Employee's Caregiving Obligations**

In the past, employers could expect employees to manage their caregiving obligations without interrupting the work week. Today, employers may be asked to accommodate employees' caregiving obligations by arranging for a shift change, extended leave, or other such arrangements.

Some human rights tribunals across Canada have recognized employees' caregiving obligations as a form of "family status," which is a protected ground under most Canadian human rights legislation. This is a relatively recent development in human rights law, and the courts have yet to pronounce a clear test for discrimination against an employee with caregiving obligations. The reasons for this are two-fold.

First, family status is defined differently in human rights legislation across Canada. In six jurisdictions, including Ontario, family status is narrowly defined as "being in a parent-child relationship."<sup>22</sup> In Alberta and Nunavut, however, family status includes all relationships by blood, marriage or adoption.<sup>23</sup> In British Columbia, Yukon, North West Territories, Manitoba, and the federal sphere, family status has no legislated definition,

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<sup>21</sup> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

<sup>22</sup> *Human Rights Code*, R.S.S. 1979, c. S-24.1, s. 2(1); *Human Rights Code*, R.S.O. 1990, c. H.19, s. 10(1); *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 3(h); *Human Rights Act*, c H-12, R.S.P.E.I. 1988, c. H-12, s. 1(1)(h 11); *Human Rights Code*, R.S.N.L. 1990, c. H-14, s. 2(e 1).

<sup>23</sup> *Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 44(1)(f); *Human Rights Act*, S.Nu 2003, c. 12, s. 1.

allowing human rights tribunals and the courts to define this ground.<sup>24</sup> In New Brunswick and Quebec, family status is not included as a protected ground. As a result of these differences, an employer in for example, British Columbia may have to accommodate an employee who is caring for an elderly aunt, while an employer in Ontario, however, would not have the same obligation because this relationship does not fall into the “parent-child” category.<sup>25,26</sup>

Second, case law has set out different standards for the types of caregiving obligations that an employer must accommodate. While the Supreme Court of Canada encouraged and adopted a broad meaning of “family status” in *B v. Ontario*,<sup>27</sup> this edict has not always been followed in the context of caregivers seeking accommodation. For example, the BC Court of Appeal encouraged a narrow standard to prove discrimination on the basis of a family obligation in *Health Sciences Association of B.C. v. Campbell River*.<sup>28</sup> While this test has not been expressly overruled, it has been rejected by some courts, particularly federal courts, in favour of a broad approach. Recent case law, however, indicates an attempt to strike a middle ground between these two approaches in order to balance an employee’s decision to care for family members with the employer’s workplace needs.

### ***A. Childcare***

Much of the struggle to define “family status” has occurred in the context of an employee’s childcare obligations. In *Campbell River*, a unionized employee grieved her employer’s decision to change her shift from 8:30 - 3:00 to 11:30 - 6:00. As a result of

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<sup>24</sup> *Human Rights Code*, R.S.B.C. 1996, c. 210; *Canadian Human Rights Act*, R.S.C. 1985, c. H-6; *Human Rights Act*, R.S.Y. 2002, c. 116; *Human Rights Act*, S.N.W.T. 2002, c. 18, *The Human Rights Code*, C.C.S.M. 1987, c. H175.

<sup>25</sup> The Ontario Human Rights Tribunal has adhered to a strict statutory definition of a “parent-child relationship.” For example, a grandparent-child relationship does not qualify: see *Fortier v. Child and Family Services of Timmins and District*, 2009 HRTO 979, reconsideration denied, 2010 HRTO 18.

<sup>26</sup> In jurisdictions such as Ontario where “family status” is narrowly defined in the legislation, a spousal care obligation could be considered a form of “marital status.” While this form of discrimination has not been developed in jurisprudence, there is some evidence that applicants are raising this argument at human rights tribunals. See *Fleck v. Academy of Learning-Cumberland*, 2012 HRTO 6 and *Bazinet v. Scott Petrie LLP*, 2013 HRTO 160.

<sup>27</sup> [2002] S.C.J. No. 67.

<sup>28</sup> 2004 BCCA 260 [*Campbell River*].

this change, the employee was unable to provide after-school care for her son, who had severe behavioural and medical problems. On judicial review, the court found that family status includes a parent's caregiving obligations, and that the employer had discriminated against the employee in this case. The court was concerned about over-extending human rights protection to all familial obligations, however, and so narrowly defined a *prima facie* case of discrimination on the basis of family status as "a serious interference with a substantial parental or other family duty of obligation of the employee."<sup>29</sup>

Two subsequent decisions at the Federal Court have directly rejected the *Campbell River* test. In *Johnstone v. Canada (Attorney General)*,<sup>30</sup> an employee requested fixed hours instead of rotating shifts in order to care for her new child. The employer agreed to the shift change, but required the employee to become a part-time employee to accommodate the request. The employee filed a human rights complaint for discrimination on the basis of family status, which was denied because it did not meet the "serious interference" test defined in *Campbell River*. On judicial review, the Federal Court returned the human rights complaint for redetermination because the test in *Campbell River* was too restrictive, and "relgat[ed] this type of discrimination to a secondary or less compelling status."<sup>31</sup>

More recently, the Federal Court sought to delineate a clearer approach to family status in *Canadian National Railway v. Seeley*.<sup>32</sup> In this case, an employee received notification that she would be transferred from Jasper to Vancouver to fill a shortage. Because the employee had two young children, she sent letters to her employer (CN) to ask about the terms of her transfer to determine whether she could continue to properly care for her children if transferred. CN did not respond to these inquiries and terminated the employee for refusing to accept the transfer. The Canadian Human Rights Commission found that CN had discriminated against the employee on the basis of family status. On judicial review, the Federal Court upheld the Commission's decision, and set out a more nuanced test for a *prima facie* case of discrimination based on family status:

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<sup>29</sup> *Ibid* at para. 39.

<sup>30</sup> 2007 FC 36.

<sup>31</sup> *Ibid* at para. 29.

<sup>32</sup> 2013 FC 117 [*Seeley*].

- a. Does the employee have a substantial obligation to provide childcare for the child or children? Is the parent the primary care giver, and does the obligation go beyond personal choice?
- b. Are there realistic alternatives available for the employee to provide for childcare?
- c. Does the employer's conduct, practice or rule put the employee in the difficult position of choosing between her (or his) childcare duties or the workplace obligations?<sup>33</sup>

While decided on a reasonableness standard and therefore not technically binding, this test finds some middle ground between the narrow and broad approaches by limiting protection to family obligations that are “substantial” and are not a matter of personal choice.<sup>34</sup> While the case law has not yet settled on one standard for a *prima facie* case of discrimination based on family status, the modern employer would be wise to at least engage in a dialogue with respect to the nature of the employee's obligation and availability of alternative caregiving.

### ***B. Eldercare***

In addition to childcare, human rights tribunals have recognized eldercare as an obligation that falls under the protection of “family status.” In *Devaney v. ZRV Holdings Ltd*<sup>35</sup> an employee was fired for leaving work regularly to care for his ailing mother. The employee claimed that the employer was aware of his obligation, and that he was able to work from home when necessary. The Tribunal found that the employer had discriminated against the employee on the basis of family status, and awarded \$15,000 in damages for injury to the employee's dignity.

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<sup>33</sup> *Ibid* at para. 78.

<sup>34</sup> For a discussion of the whether “personal choice” should play a role in judicial reasoning on family status cases, see the British Columbia Law Institute's paper “Human Rights and Family Responsibilities: Family Status Discrimination Under Human Rights Law in British Columbia and Canada,” BCLI Study Paper No. 5, September 2012.

<sup>35</sup> 2012 HRTO 1590.

The Tribunal engaged in an interesting discussion of the employee's choices to leave work to look after his mother. Instead of accepting the employee's eldercare obligation at face value, the Tribunal examined the nature of the employee's frequent absences to determine whether they were truly necessary. While most of the employee's absences were legitimate, as he was the primary caregiver for his mother and hiring a caregiver would have been "impractical," other absences were unnecessary. In particular, the Tribunal questioned the employee's decision to work from home while his mother was awaiting surgery, or visit her in the hospital during core business hours.<sup>36</sup> The Tribunal also faulted the employee for failing to properly communicate the nature of his obligation to his employer. This case shows that while the Ontario's "parent-child" restriction to family status can in fact encompass eldercare, at the end of the day, the Tribunal will still scrutinize the employee's role in the accommodation process.

While eldercare is a live issue in Ontario, the matter appears to still be in its infancy in BC. In *Baines v. 0781380 BC Ltd.*,<sup>37</sup> an employee had requested time off to care for her father, who had been hospitalized. As her father's health deteriorated, she requested additional time off by contacting her employer before her shift. The employee did not observe company policy when requesting this time off and as a result, the employer placed her on a mandatory one-month leave. The employee never returned to work. Without definitively ruling on an employer's eldercare obligations, the British Columbia Human Rights Tribunal found that these facts were sufficient to establish a possible claim of discrimination on the basis of family status.

### ***The Modern Employer's Response***

Given the current uncertainty around the meaning of family status discrimination, the modern employer should be proactive and cognizant of an employee's potential family obligations. For example, an employer should provide employees with advance notice of changes to employment and give employees the opportunity to respond. If an employee

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<sup>36</sup> *Ibid* at para. 148.

<sup>37</sup> 2011 BCHRT 266.

makes a request for accommodation because of a caregiving obligation, employers should be open-minded about the request.

The common theme from caregiving jurisprudence appears to be that, at the very least, employers should communicate with employees to better understand the nature of their familiar obligations – for example, whether the employee is the primary caregiver, and what times are most important for the employee’s caregiving responsibilities. On the one hand, if an employer fails to communicate at all with an employee about his or her request, the employee may receive additional damages when making a human rights complaint.<sup>38</sup> On the other hand, if the employee fails to reasonably consider his or her own resources, they may be faulted for not upholding their end of the duty to accommodate as well.

### **Accommodating the Modern Employee’s Gender Identity/Gender Expression**

Canadian human rights legislation has been amended over the years to reflect changing social values. For example, “sexual orientation” was not a protected ground of discrimination in the federal sphere until 1996. The most recent set of amendments aim to address discrimination against transsexual, transgendered, and perhaps other traditional gender non-conforming people, by adding “gender identity” and “gender expression” as prohibited grounds of discrimination.

To date, amendments have been enacted in four jurisdictions.<sup>39</sup> Legislation in Manitoba<sup>40</sup> and the North West Territories<sup>41</sup> bans discrimination on the basis of gender identity, while legislation in Ontario<sup>42</sup> and Nova Scotia<sup>43</sup> bans discrimination on the basis of both

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<sup>38</sup> For example, the employee in *Seeley* (*supra* note 21) was awarded \$20,000 because of her employer’s recklessness in disregarding her inquiries about accommodation.

<sup>39</sup> See Appendix “A” for a full list of which grounds are protected in human rights legislation across Canada.

<sup>40</sup> *The Human Rights Code*, C.C.S.M. 1987, c. H175 s. 9(2)(g).

<sup>41</sup> *Human Rights Act*, S.N.W.T. 2002, c. 18 s. 5(1).

<sup>42</sup> *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1.

<sup>43</sup> *Human Rights Act*, R.S.N.S. 1989, c. 214, ss. 5(1)(na),(nb).

gender identity and gender expression. If passed, Bill C-279 will add both gender expression and gender identity to the federal *Canadian Human Rights Act*.<sup>44</sup>

These legislatures have chosen not to define gender identity and gender expression, leaving the terms to be interpreted by human rights tribunals, arbitrators, and the courts. The Ontario Human Rights Commission's policy, which is not law per se, defines gender identity as "linked to a person's sense of self, and the sense of being male or female."<sup>45</sup> While gender expression has yet to be defined or even interpreted, it could be interpreted as an individual's external display gender through dress or habit, rather than the individual's internal identity.<sup>46</sup>

These amendments provide a clear basis for transgendered and transsexual individuals to claim discrimination. Without gender identity as a separate ground, transgendered and transsexual individuals have been forced to fit their claims into other grounds of discrimination, including sex, sexual orientation, and even disability. As late as 2012, the Ontario Human Rights Tribunal still considered "Gender Identity Disorder" to be a "disability" for the purposes of the Ontario *Human Rights Code*.<sup>47</sup>

Beyond human rights legislation, many collective agreements in unionized workplaces contain anti-discrimination provisions. As a limitation on management rights, these provisions require that the employer's workplace rules be fair and reasonable. Given the dearth of caselaw on gender expression as a protected ground of discrimination,

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<sup>44</sup> This Bill passed second reading on June 6, 2012. As of the date of writing, an amendment had been proposed to define "gender identity" and remove "gender expression" in order to gain Conservative Party votes: Bradley Turcotte, "Federal trans rights bill in the house Feb 27," *Xtra*, February 12, 2013. Online: [http://www.xtra.ca/public/National/Federal\\_trans\\_rights\\_bill\\_in\\_the\\_House\\_Feb\\_27-13152.aspx](http://www.xtra.ca/public/National/Federal_trans_rights_bill_in_the_House_Feb_27-13152.aspx)

<sup>45</sup> Ontario Human Rights Commission, "Gender Identity," online: <http://www.ohrc.on.ca/en/gender-identity>

<sup>46</sup> For a more thorough discussion of gender expression, see Ryan Edmonds, "Ontario's *Human Rights Code* Amendments: Deconstructing 'Gender Identity' and 'Gender Expression,'" December 2012, Ontario Bar Association, Sexual Orientation and Gender Identity Section, vol. 2 no.2.

<sup>47</sup> *XY v. Ontario (Minister of Government and Consumer Services)*, 2012 HRTO 726. For other cases on transgendered applicants claiming discrimination based on disability, see *Hogan v. Ontario (Minister of Health and Long-Term Care)*, 2006 HRTO 32; *Vancouver Rape Relief v. BC Human Rights*, 2000 BCSC 889; *Kavanagh v. Canada (Attorney General)*, [2001] C.H.R.D. No. 21; *Ferris v. Office and Technical Employees Union, Local 15*, [1999] B.C.H.R.T.D. No. 55; *Sheridan v. Sanctuary Investments Ltd.*, [1999] B.C.H.R.T.D. No. 43; *Mamela v. Vancouver Lesbian Connection*, [1999] B.C.H.R.T.D. No. 53.

employers should be mindful of this case law when considering what the scope of gender expression may entail.

For example, arbitrators have struck down workplace rules on the basis of reasonableness that prohibited males from having longer than collar-length hair,<sup>48</sup> males from wearing earrings<sup>49</sup> or facial jewelry in general,<sup>50</sup> and from having or not having facial hair.<sup>51</sup> While in the past an employer could justify such policies based on evidence of customer preferences,<sup>52</sup> in modern times, arbitrators have been less willing to accept this explanation when the policy is based on sex discrimination and sex stereotyping.<sup>53</sup> While not as a direct analogy to gender expression as a prohibited ground under human rights law, this shift in the arbitral case law is nonetheless indicative of changing societal attitudes amongst judicial decision-makers.

The rights of transgendered people in the workplace have been considered in relatively few human rights decisions.<sup>54</sup> One case, however, is a particularly egregious example of transgender employees' socio-economic vulnerability. In *Ferris v. OTEU*,<sup>55</sup> the employee (Ferris) suffered discrimination from both her union and her employer. The employee was biologically male, and had worked as a woman with the employer for 19 years. When co-worker complained that "a man was using the woman's washroom,"<sup>56</sup> the employer and the union treated this complaint as legitimate and conspired to remove Ferris from the workplace. Notably, the union held secret meetings about her under the guise of "accommodation," had the very person who filed the complaint be her union

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<sup>48</sup> *Empress Hotel* (1992), 31 L.A.C. (4th) 402 (McEwen).

<sup>49</sup> *Co-op Centre Ltd.* (1990), 17 L.A.C. (4th) 186 (Collier). The arbitrator not only claimed the prohibition on allowing men to wear earrings were unreasonable, but that it was also discriminatory as well.

<sup>50</sup> *West Lincoln Memorial Hospital* (2004), 126 L.A.C. (4th) 52 (Luborsky).

<sup>51</sup> *Waterloo (Regional Municipality) Police Services Board* (1999), 85 L.A.C. (4th) 227 (Knopf). Note that this was a blanket ban and was grieved on grounds unrelated to religious discrimination.

<sup>52</sup> See e.g. *Canadian Freightways Ltd.* (1995), 49 L.A.C. (4th) 328 (Korbin), where a survey of customer preferences was used to justify banning male office staff from wearing shorts.

<sup>53</sup> See e.g. *Thrifty (Canada) Ltd.* (2001), 100 L.A.C. (4th) 162 (Larson).

<sup>54</sup> For additional examples, see *Nixon v. Vancouver Rape Relief Society*, [2000] B.C.H.R.T.D. No. 32, overturned 2005 BCCA 601, leave denied [2006] S.C.C.A. No. 365; *Montreuil v. National Bank of Canada*, [2004] C.H.R.D. No. 4. For an academic opinion on why this may be the case, see Ryan Edmonds "Breaking Open the System: A Multi-Party Analysis of Gender Transitions as an Effective Industrial Relations Process" (2012) 31 Windsor Rev. of Legal and Social Issues 155.

<sup>55</sup> [1999] B.C.H.R.T.D. No. 55.

<sup>56</sup> *Ibid* at para. 25.

representative, and refused to file a harassment grievance against the employer. As a result of this treatment, Ferris relapsed into mental illness and was unable to work.

The Tribunal found that the employer and the union had discriminated against Ferris on the basis of both sex and disability. In coming to this conclusion, the Tribunal recognized the unique vulnerability of transgendered and transsexual people in the workplace:

“I accept that transgendered people are particularly vulnerable to discrimination. They often bear the brunt of our society's misunderstanding and ignorance about gender identity. In the context of the workplace, washroom use issues are often contentious and, in the absence of knowledge, sensitivity and respect for all concerned, can inflict a great deal of emotional harm on the transgendered person.”

Despite the serious emotional and economic harm experienced by Ferris, the Tribunal only awarded her \$6,000 for lost wages and injury to her dignity and self-respect.

### ***The Modern Employer's Response***

*Ferris* illustrates the importance of procedure, communication, policy enactment, and training to avoid unnecessary conflict and potential discrimination on the basis of gender identity and gender expression in the workplace. Because issues of transgenderism and transsexualism are relatively new in Canadian consciousness, some employers and unions may be prone to a knee-jerk reaction to these issues in the workplace. This is precisely the type of response that the modern employer should strive to avoid.

To avoid potential claims, the modern employer should anticipate issues that might arise from different expressions of gender in the workplace. For example, the employer should have a policy in place to accommodate the employees' choice of the men's or women's washroom. While employers have met their duty to accommodate by providing transgendered employees or clients with a private washroom in the past (often the “handicap” washroom), it is possible that employers will be held to a higher standard of

accommodation given the recent legislative movement to formally recognize this form of discrimination.

As an example of what types of accommodation might be appropriate, the Toronto District School Board's policy on washroom access anticipates the range of options an employee might prefer:

“Employees have the right to use a washroom that corresponds to their gender identity, regardless of their sex assigned at birth. Requiring employees to ‘prove’ their gender (by requiring a doctor’s letter, identity documents, etc.) is not acceptable. The employee’s self-identification is the sole measure of their gender. Where possible, schools will also provide an easily accessible all-gender single stall washroom for use by any employee who desires increased privacy, regardless of the underlying reason. However, use of an all-gender single stall washroom should always be a matter of choice for an employee. No individual should be compelled to use one due to continuing harassment in a gender appropriate facility. If possible, the provision of more than one all-gender washroom is encouraged.”<sup>57</sup>

In addition to washroom use, employers should also consider proactively adopting a policy on gender transitions in the workplace to ensure that all employees know they have a welcoming environment should they choose to “come out”. Such policies should cover an employee’s desire for confidentiality, a name change, a transfer, or medical leave for possible surgeries. This policy should also mandate sensitivity training for all employees during the transition process.

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<sup>57</sup> Toronto District School Board, “TDSB Guidelines for the Accommodation of Transgender and Gender Non-Conforming Students and Staff,” 2011 at p. 11. Online: [http://www.tdsb.on.ca/wwwdocuments/programs/gender\\_based\\_violence\\_prevention\\_\\_gbvp\\_/docs/FINAL%20TDSB%20Transgender%20Accommodation.pdf](http://www.tdsb.on.ca/wwwdocuments/programs/gender_based_violence_prevention__gbvp_/docs/FINAL%20TDSB%20Transgender%20Accommodation.pdf)

### **Looking Ahead: Equality Rights for the Aging Workforce**

Employers will encounter unique problems in workplaces with an increasing number of older employees. From the accommodation perspective, employers may need to consider more flexible workplace arrangements for employees who continue working past the traditional retirement age. For example, employers could consider allowing older employees to work fewer hours, work from home, or job-share with other employees. This would allow employers to retain the skills and experience of older employees while still complying with human rights legislation.

From a pension and benefit perspective, however, the road ahead is much less certain. For example, while the courts have already recognized that same-sex couples are entitled to pension benefits,<sup>58</sup> the aging workforce combined with modern family arrangements has created an interesting challenge in Ontario's pension laws. In *Carrigan v. Carrigan Estate*,<sup>59</sup> a pension plan member passed away before his retirement, leaving both a legal spouse and a common-law spouse. He had been separated from his legal wife for over a decade, and had lived with common-law wife for over nine years. Both claimed to be entitled to the plan member's pre-retirement death benefit as "spouses" under Ontario's *Pension Benefits Act* ("PBA").

The Ontario Court of Appeal held that the benefit should go to the plan member's legal wife. The Court reasoned that because the wording of the *PBA* excluded spouses who live "separate and apart," and common-law spouses by definition cannot live "separate and apart," the Legislature must have intended that only legally married spouses were entitled to this benefit. Leave to appeal to the Supreme Court of Canada is being sought in this case.

In terms of benefits, human rights and employment standards legislation currently permits otherwise unlawful distinctions in pension and benefits plans so long as that distinction is based on actuarial or *bona fides* grounds. For example, in a recent case, an

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<sup>58</sup> *M. v. H.*, [1999] 2 S.C.R. 3; *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429

<sup>59</sup> 2012 ONCA 736.

arbitrator recently held that a two-tiered benefit plan for older and younger employees was not unlawful, and that the legislation which permitted it was not unconstitutional.<sup>60</sup> While this may be the current legal landscape, the modern employer should recognize that this regime may come under heavy legal and/or lobby challenge in the future as the Canadian workforce continues to age.

### **Conclusion**

As Canadian society evolves, the modern employer must adapt to ensure that employees are treated fairly. Human rights law has recently evolved to prohibit discrimination against those who are caregivers to family members, and those with a non-traditional sense of gender identity. In addition, an ever-aging workforce continues to complicate the existing legal landscape. To maximize compliance and harness the associated benefits of a diverse and inclusive workforce, the modern employer should be proactive about these changes by enacting policies and training programs to create workplaces that are welcoming for everyone.

### **About the Authors**

*Ryan Edmonds is the owner of [Ryan Edmonds Workplace Counsel](http://RyanEdmondsWorkplaceCounsel.com), a boutique law firm that provides employment, human rights, and workplace investigation services to both employers and employees. Ryan can be reached at 647.361.8228 or [Ryan@TorontoWorkplaceCounsel.com](mailto:Ryan@TorontoWorkplaceCounsel.com).*

*Emily Sheppard is a Labour and Employment Lawyer practicing in Fasken Martineau DuMoulin LLP's Toronto office.*

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<sup>60</sup> *Chatam-Kent (Municipality) and O.N.A. (O'Brien)* (2010), 202 L.A.C. (4<sup>th</sup>) 1 (Etherington).