HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Francis Lyndon Devaney

Applicant

-and-

ZRV Holdings Limited and Zeidler Partnership Architects

Respondents

DECISION

Adjudicator:	Brian Eyolfson
Date:	August 17, 2012
File Number:	2009-02558-I
Citation:	2012 HRTO 1590
Indexed As:	**Devaney v. ZRV Holdings Limited**

APPEARANCES

Francis Lyndon Devaney, Applicant	)	Christopher McClelland and John Hyde, Counsel
ZRV Holdings Limited and Zeidler Partnership Architects, Respondents	)	Jeffrey B. Simpson and J. Bond, Counsel

INTRODUCTION

[1] The applicant, Francis Lyndon Devaney, worked as an architect with the respondent, ZRV Holdings Limited ("ZRV") from 1982 until his employment was terminated on January 9, 2009. ZRV is the holding company for the respondent, Zeidler Partnership Architects ("ZPA"). The applicant alleges that his employment was terminated as a result of the respondents unilaterally changing the terms of his contract, and not allowing him to maintain a flexible work schedule in order to care for his ailing mother. He alleges that this unilateral change resulted in a serious interference with a substantial family duty or obligation that he had towards his mother.

[2] On June 8, 2009, the applicant filed an Application, under s. 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination on the basis of family status, and association with a person identified by a *Code* ground, in employment. At the hearing, however, the applicant clarified that he was alleging discrimination on the ground of family status only.

[3] In their Response to the Application, the respondents submit that the applicant's employment was terminated for just cause, because of his persistent failure to regularly attend the office in the face of many warnings. They submit that, although the applicant referred to his caregiving responsibilities to his parent from time to time, he never sought formal accommodation of his work day, or adjustments of the requirements to accurately account for his attendance or any absences. The respondents deny that the applicant was subjected to discrimination in any form.

REQUEST FOR AN ORDER DURING PROCEEDINGS

[4] The applicant filed a Request for an Order During Proceedings ("Request"), seeking production of documents surrounding the decision to terminate his employment, including a document written by Mr. Eb Zeidler, one of the respondents' three senior partners. The Request was addressed on the first day of the hearing.

[5] In responding to the applicant's Request, the respondents submitted that all arguably relevant documents were produced, and that the document written by Mr.

Zeidler, after the termination of the applicant's employment, was not arguably relevant, and was covered by litigation privilege, as lawyers were already involved in the case.

[6] The applicant submitted that the letter was written to another senior partner, Mr. Munn, and not to counsel, and was written at a time when the applicant could have returned to employment with the respondents. I note that it appears from a document dated January 13, 2009, that an offer to re-employ the applicant on a contract basis remained open until January 16, 2009.

[7] The document in question is a memo from Mr. Zeidler to Mr. Munn, dated January 15, 2009, and copied to a third senior partner. The focus of the memo is the continuation of the respondents' involvement in a particular project, as well as the applicant's involvement in the project. While there is a reference in the document to "dealing with lawyers", and although it is by no means clear, the reference appears to be in relation to the particular project, rather than the termination of the applicant's employment. The memo is not directed to or copied to counsel. In the circumstances, it does not appear that litigation concerning the applicant's employment was contemplated or anticipated at the time the memo was written.

[8] A party relying on privilege must prove that the document in question was created for the dominant purpose of pending or reasonably anticipated litigation, or for the purpose of obtaining legal advice. See *Lastella v. Oakville Hydro Corporation*, 2009 HRTO 1806. Based on the evidence, I was not satisfied that the respondents had done so, and the document appeared arguably relevant to the issues in dispute. After considering the parties' materials and submissions, I granted the applicant's Request, and ordered the respondents to produce the document.

EVIDENCE

[9] The applicant testified at the hearing and called Locksley Wright, an associate of ZPA, and John Dawson, a lawyer, as witnesses. Andrea Richardson, a partner of ZPA, and Alan Munn, a senior partner of ZPA, testified on behalf of the respondents. The parties also submitted considerable documentary evidence.

Background

[10] The applicant graduated with a degree in architecture in 1981, and was hired by ZRV in 1982 and employed for approximately 27 years. He was licensed as an architect in 1986, and became an associate of the firm in 1988. He explained that associates are project managers and lead teams of people. As an associate, he was ultimately responsible to Mr. Zeidler.

[11] The applicant worked on a number of projects during his employment with the respondents, and in 2000 he advanced from being an associate to a principal in recognition of the contribution he made. In 2007 and 2008, the applicant was working primarily with his team as the Principal-in-Charge on a major project, the Trump International Hotel and Tower in Toronto (the "Trump project").

The Trump Project

[12] The applicant described the Trump project as a very large job for ZRV that was enormously complex. Mr. Zeidler was the senior partner on the project, and involved on a day-to-day basis. There were no other partners involved, other than Mr. Munn on an administrative level. The applicant testified that he obtained the project through a lawyer that he knew in 2001 or 2002.

[13] The applicant testified that as Principal-in-Charge on the Trump project, he negotiated the contract, delegated tasks, and had exclusive responsibility for client liaison. Commencing in 2005, the Trump project demanded all of his time. He testified that during his last year with the respondents, the project demanded 150% of his time, but that there were always other pursuits in terms of trying to get other work.

[14] The applicant explained that his client on the Trump project, one of the individuals who owned the development company, demanded that everything be done electronically. The applicant was the main contact person, and his client, who travelled often, would communicate exclusively with him. In 2008, his client frequently went to Moscow and would call or email the applicant at any time, and expected him to pick up the phone.

[15] The applicant testified that between 2006 and 2008 the Trump project was understaffed. It required ten people and there were six assigned to it. On limited occasions, there might have been seven. He testified that, in 2007, he put in 1000 hours of overtime. A "staff utilization print-out" for 2007 indicates that, in terms of production, the applicant had 1,570.5 regular and 1,097.5 overtime hours. In 2008, he had 1,336 regular and 410.5 overtime hours. He testified that his hours went down in 2008 because of his mother's declining health. He did not receive additional compensation for working overtime, which he testified he worked both at home and at the office. He testified that, due to the chronic understaffing of the job, the only way to complete the job was to put hours in and he did.

[16] Mr. Munn, one of the respondents' senior partners, testified that he was involved in some of the contract and fee discussions on the Trump project. It was Mr. Zeidler's project to start with, but Mr. Zeidler retired from the partnership in 2008. Mr. Munn testified that the firm relied on the applicant as a "point man" on the project. Mr. Munn testified that he felt that the applicant's overtime claims were vastly overstated.

[17] The applicant confirmed that his team on the Trump project was aware of his care giving responsibilities for his mother. He testified that, as with his client, he was available "24/7" to his team, and that they could contact him by phone, cell phone, email, or in person. The applicant also explained that he had software installed on his computer so that if he was at home, or anywhere he had his computer, and if someone called his extension, it would ring on his computer.

[18] Loxley Wright, a senior technical person and associate in the office, testified that at the time of the hearing he was still working on the Trump project, which he described as pretty big and extremely challenging. He confirmed that the applicant was in charge of the team and that they worked quite closely. He thought the applicant was very good at his job. He agreed that the applicant worked unconventional hours, including some evenings and weekends, which he testified he knew of because of emails and the odd phone call.

[19] Mr. Wright testified that he was aware the applicant was responsible for taking care of his mother, and was generally aware of her medical problems and issues. He met the applicant's mother once at her home in Burlington and she was sitting in a wheelchair. He was aware that the applicant lived in Burlington and that, on occasion, he would work from home. When asked if the applicant told him when he worked at home, Mr. Wright testified that he usually phoned in and they kept in touch. When asked if the applicant told him why he was at home, he testified that sometimes he would and that sometimes he had to take his mother to the doctor or his mother was not well.

[20] John Dawson, a lawyer specializing in municipal and development law, testified that he first started working on the Trump project around 2000 or 2001, and that the bulk of the work, for him, was completed in 2002/2003 and 2006/2007. He described it as a very challenging project.

[21] Mr. Dawson first met the applicant on a former project in the late 1990s or early 2000s, and then worked with him for an extended time on the Trump project. He also recommended the applicant for a subsequent project. Mr. Dawson testified that, after the applicant was brought into the Trump project, it started to gain momentum. He explained that the applicant was both the architect and took on a project management role, acting as a liaison to bring disciplines together.

[22] Mr. Dawson testified that his contact with the applicant was practically daily in 2002/2003 and, again, almost daily in 2006/2007. In cross-examination, Mr. Dawson confirmed that, based on his involvement in the project, he had much less interaction with the applicant after early September or late October 2007. He testified that the applicant was integral to the project and an integral part of the negotiating team with the project's neighbours, and described him as the "point person" throughout with very little input from anyone else. When asked if the applicant was good at this job, Mr. Dawson testified, "absolutely." Mr. Dawson explained that "year in and year out" this is what he does, that every project has an architect, and that with this very challenging project there was never a glitch or slow down on the architectural side. He testified that the

work was there, it was done, and it gave him a basis to move forward. He testified that the applicant was always the "number one" contact at ZPA.

[23] When asked if the applicant worked unconventional hours outside of "nine to five", Mr. Dawson testified that they had conversations at any time, and that earlier and later than nine to five they had conversations and meetings. He testified that in the business it is not unusual to have meetings at odd hours and weekends occasionally.

[24] Mr. Dawson was aware that the applicant was responsible for taking care of his mother, as the applicant had mentioned it. Mr. Dawson was also aware that the applicant worked at home on occasion, because the applicant would give him contact information on how to reach him if he needed to. He confirmed that the applicant would tell him that he was at home and how to reach him.

The Applicant's Caregiving Responsibilities

[25] The applicant moved to Burlington in 1996 and lived with his mother. He testified that his mother, who was 73 years old at the time, had osteoarthritis and osteoporosis. He described her condition as tremendously disabling. Before he moved to Burlington, his mother had broken both her ankle and her wrist.

[26] The applicant described his relationship with his mother as very profound. He explained that his father died in the 1960s when the applicant was 16 years old. His mother "stepped up to the plate" and took care of him and his younger brother and sister, and instilled in them care and respect for people and family. He testified that when his mother suffered health issues, he had the opportunity to step up to the plate and take care of her and he did.

[27] The applicant testified that, in the mid-1990s, his mother's disability increased. She could not pick up a glass of water, pour juice, or prepare food. Her bones were fragile and there was always a risk of breaking something. She used a wheelchair.

[28] The applicant testified that his mother had numerous operations. In mid-1999 she had a major operation with her vertebrae fused and two titanium rods placed in her back. She had a knee replacement in 2002 or 2003. She had another surgery approximately two years later and fell while she was in the hospital and fractured a vertebra in her back. In 2007 she broke her hip which was replaced in 2008.

[29] The applicant explained that between the mid-1990s and 2007, his mother's health was declining. In 2008, they renovated their bathroom, installing a hydraulic lift in the bathtub. He explained that, with some assistance, his mother could transfer herself to the toilet. Later in 2008, she ruptured her quadriceps tendon in her left leg which was the only one that worked. She was then entirely incapacitated. The applicant testified that he had to lift her from her bed to her chair and had to assist her with toileting. Because of the "ramp up" of her care demands, they got on a "crisis list" to get her into a long-term care facility. At the time, the crisis list was three months long.

[30] With respect to his caregiving responsibilities during the time that his mother was living at home, the applicant testified that he prepared her food, shopped and cleaned her clothes. He had assistance from time to time from his brother, although his brother could not assist during the mornings or day. The applicant testified that he took his mother to all her medical appointments, and any rehabilitation that was offered, and his brother would try to help. The applicant was the primary caregiver. With respect to outside assistance, he testified that the government provided one hour per day of home care and his brother would visit two to three times per week. Prior to his mother's hospitalization in November 2008 to have her quadriceps tendon fixed, they hired two people who came in the evenings, because of her full mobility impairment, and because he could not be there "24/7."

[31] After his mother's operation in December 2008, the applicant was notified that she was admitted into a long-term care facility. The applicant testified that, prior to the 2008 Christmas break, he told Mr. Munn that his mother had been accepted into a facility. In early January 2009, she was in a care facility in Burlington.

[32] The applicant testified that he continued to provide care to his mother and worked more than full-time hours. Through the 2000s, he availed himself of technology that facilitated his work from home. He used a notebook computer and cell phone and had VPN access. He could access the "Zeidler system", including all documents, anywhere in the world. In the first half of the 2000s he worked at home through the use of this technology. He testified that, during this time, he had no defined schedule. With respect to the Trump project, his client could email him or phone him from anywhere in the world at any time of the day or night and he would answer.

Attendance

ZPA's Toronto Office Manual

[33] The applicant was referred to ZPA's Toronto Office Manual dated July 30, 2003. The applicant testified that he never looked at it, although there does not appear to be any dispute that the Manual is maintained on the respondents' network or intranet.

[34] The Manual states that it forms part of the terms of employment with ZRV. It addresses a number of procedures, including hours of work, overtime, and personal time-off. With respect to work hours, it states that the firm operates on a flexible start and end time, subject to approval, with minimum regular core hours. The core hours are 9:30 a.m. to 4:30 p.m. The earliest start time is 8:00 a.m., and the latest end time is 6:30 p.m. The Manual states that "everyone is expected to be in the office or available at a project meeting during the core work hours or when a project meeting is scheduled." It also states that "if you are away from the office for any reason during core hours or will be later than your regular start time please let the receptionist know where you can be reached and when you will be back in the office." When asked if the employer wanted him in the office at certain times, the applicant testified that they wanted him to complete projects, and that he had a mother, a project, and 20 years of experience.

[35] The Manual also has a section on "Personal Time – Off" which states as follows:

> .1 The firm recognizes that from time to time irregular personal absences from work may occur as a result of personal situations. Absences from work that are

not vacation are considered Personal time – off. This may apply to unforeseen problems with childcare, eldercare, personal financial business or home emergencies. Personal time off must be offset by accumulated overtime or have time made-up on a pre-approved schedule.

.2 Chronic absences from work and unexplained personal – time off during core hours are grounds for termination of employment with cause.

.3 Generally Personal Time – off greater than 2 hours should be discussed with the Project Manager and prearranged with Office Management in advance. It is logged as indicated on time sheets.

.4 Personal time – off that has not been banked in advance, should be made-up with authorized overtime and work outside of core hours within the next pay period.

[36] The Manual also states that granting extended personal time off without pay is given entirely at the discretion of the partners after discussion with office management. The applicant testified that he never asked for personal time off without pay because of the demands of his job, and his dedication and loyalty. The applicant testified that providing him with time off would have helped with his mother's needs, but it would not have allowed him to complete the project.

[37] With respect to overtime, the Manual states that it must be authorized in advance by the project manager or department manager, whether it is paid or unpaid. Also, only authorized overtime will be paid or considered for future compensation of personal time off in lieu of payment. The applicant testified that he knew, initially, that if he worked overtime it had to be approved by a partner. He testified that, later, he was in charge of projects and he signed peoples' time sheets. He was asked if he was ever told that his overtime needed to be approved and testified, "no, absolutely not."

Records related to hours worked by the applicant and his attendance

The applicant's time sheets

[38] The applicant was referred to his time sheets for 2003 to 2008 inclusive. The time sheets show hours worked on each project on a particular day, but do not show start

and finish times. Entries for some dates on the time sheets are followed by comments. The applicant explained that employees recorded their own time, and he typically wrote the comments. For example, after the entry for October 11, 2004, there is a comment stating, "I typically will work at home in the eraly [*sic*] morning to avoid traffic and to assist my mother arriving at work for 10:00 a.m. +/- and leave the office somewhere in the arera [sic] of 6 – 8:00 p.m." The applicant testified that, at home, he would work into the night when his mother was asleep, or get up early to work.

[39] Other comments in the applicant's 2004, 2005 and 2006 time sheets include that: the applicant was absent, or partially absent, on approximately 16 days to take his mother to medical appointments; on approximately 11 days, the applicant worked at home due to his mother being ill or injured, or to care for her; on approximately 7 days the applicant worked at home, or left work early to work at home, while caring for or assisting his mother; on approximately 18 days the applicant worked at home in the morning, and left the office late in the evening, and no reason is indicated; on approximately 17 days the applicant worked at home in the morning to miss or avoid traffic; and, on approximately 19 days, and 2 partial days, the applicant worked at home and no reason is indicated.

[40] With respect to the applicant's 2007 time sheets, around March 23, 2007 the applicant worked at home to care for his mother as a result of her fall, spraining her shoulder and back/neck. On four other full days, and two afternoons, he worked at home due to his mother's ill health. On two days he was "in late morning" to avoid rush hour driving after caring for his mother early in the morning, and left the office late. On another morning, he cared for his mother and was in late and worked late. On two days, he was in late after a doctor's appointment for his mother, and for one of these days, he indicates that he worked late. On three days, he left work in the late afternoon to take his mother to medical appointments and he made up time thereafter. There are also approximately 3.5 days that the applicant worked at home and no reason is given.

[41] With respect to the applicant's time sheets for 2008, in January the applicant was in at 10:15 a.m. on two days as a result of caring for his mother. On one day in January

he worked at home to be available for his mother, and three other days in or around late January, he worked at home due to his mother's ill health. On two days in February, he worked at home due to his mother's health care needs. Again, in March, he worked at home on two days due to ongoing health issues with his mother requiring care, and on two other days to care for his mother. There are comments that he took his mother to the hospital in April and May, and he asks that time be subtracted from overtime. In August, his mother was in the hospital and he worked at home. In October, the applicant worked at home one day due to his mother's declining health, and on two other days he worked at home in the afternoon due to her health and declining health. On one day that he worked at home no reason is given.

[42] In addition to the above absences related to the applicant's mother, and absences for which no reason is given, there are other various absences indicated in the time sheets for reasons including the applicant's own illnesses and medical appointments, home repairs, and various meetings.

[43] The applicant testified that the above time sheets were in the ZRV "system". He was asked if there were any other ways he advised that he was caring for his mother. He testified the he made his team know and he would phone reception and tell Mr. Munn. He also testified that he told Mr. Zeidler when he would not be in the office and that Mr. Zeidler was aware of his ongoing care obligations.

The log

[44] Mr. Munn was referred to a large quantity of documents titled "ZPA STAFF ABSENTEE LIST & In/Out LOG" (the "log") for 2007, 2008, and early 2009. He explained that reception keeps a record of who is in and not in, and it is kept online so anyone can look at it. He explained that individuals inform reception if they are not going to be in. Mr. Munn testified that the purpose of keeping the records is so that people know if somebody is away on vacation, and that they are used occasionally to check people's time sheets.

[45] Mr. Munn also referred to "a pattern of attendance" going on for some time with the applicant, and testified that he asked that a specific record be kept. He was surprised how much the applicant was away from the office.

[46] Mr. Munn was also referred to additional copies of the applicant's time sheets for 2007 and 2008. Mr. Munn confirmed that the time sheets were completed by the applicant, and that handwritten notes on the time sheets are a comparison to the log, with discrepancies noted. Mr. Munn testified that the log did not match the applicant's time sheets on a number of occasions during this time period.

[47] Mr. Munn was also referred to 14 pages of notes that he described as a summary of the applicant's absences from the office, and information on the applicant's arrivals and departures from the office, as recorded by reception and taken from the log. The notes cover the time period of August 21, 2007 to January 6, 2009.

[48] For the time period of August 21, 2007 to April 12, 2008, the summary notes indicate that the applicant did not attend the office on 49 days and was absent for part of the day on 53 days. He worked at home on 22 days, and took 8 sick days and 2 vacation days. The applicant was also "not in" on 13 days; however, it appears that he and a number of others were expected to be "not in" for a week in March 2008.

[49] With respect to the 53 days that the notes indicate the applicant was not in full attendance, there are quite a few days that the applicant arrived late and some days that he left early, according to the log, but those days do not amount to 53. It appears that the 53 days may include approximately 17 days that the applicant was out of the office for part of the day for what appear to be work-related meetings. It is also not clear if the 53 days includes approximately 8 days that the applicant was away for part of the day for medical, dental, or other appointments. It also appears that if the applicant worked late, this would not have been recorded in the log.

[50] Mr. Munn confirmed that the days the applicant was not considered in full attendance included 3 days that the applicant was in meetings, vacation days and sick days. Mr. Munn testified that the applicant exceeded both his sick days and vacation

days. Mr. Munn also confirmed that the days the applicant was absent for part of the day, as recorded in the notes, includes days that the applicant came in late.

[51] For the time period of April 14 to July 30, 2008, the summary notes indicate that the applicant was not in full attendance on 64 of 77 working days. The applicant worked at home on 6 days, took 18 vacation days and 6 sick days, and was away one day for a medical appointment. According to the notes, the applicant was not in full attendance on 33 days and no reason was given for 8 of those 33 days; however, it appears from a review of the log that the applicant was not in full attendance on a total of approximately 25 days, including approximately 10 days for work-related meetings, 5 days on which he worked at home for part of the day, and 4 days for medical appointments.

Communications between the applicant and the respondents concerning attendance

[52] The applicant was referred to a letter addressed to him, from Mr. Munn, dated July 24, 2007. The letter begins as follows:

> It has been some time since we last discussed your attendance at the office. At that time I believe you agreed that you would attend the office at least from 8:30 to 5:00 each working day except when your attendance was required at a business related meeting outside the office.
>
> For a short time your attendance improved. However, you have slipped back into your previous attendance pattern of coming in late and leaving early. Many days you do not come in at all for a variety of stated reasons. An occasional day away from the office for personal reasons is reasonable. The number of days you have missed is not acceptable. I understand staff are fighting over your workspace as a place to park their bicycles.

[53] The letter continues to address, among other things, the applicant not returning from holidays when expected, failing to attend project meetings where he was expected, and claims of excessive overtime. The last two paragraphs of the letter state as follows:

> We have tolerated your absences for a long time in recognition of your personal and family problems. We are not prepared to tolerate this further.
>
> We expect immediate and permanent correction.

[54] The applicant testified that he was available "24/7". He explained that he tacked on a day or two at the end of his holidays and that he did it with notice. He denied failing to show at project meetings. He testified that he delegated authority, and confirmed that his team never complained about a lack of direct contact. He testified that he continued to have care giving responsibilities at the time, and that he tried to attend the office from 8:30 to 5:00 but he never gave up on his mother. The applicant testified that Mr. Munn never made any inquiries to him regarding the status of his family problems. He testified that he did not respond to the July 24, 2007 letter.

[55] Mr. Munn was asked about stating in the letter that the applicant failed to attend project meetings where he was expected. He testified that it was his understanding that on several occasions the applicant called team meetings and did not show up for them. He testified that he believed the applicant called a meeting on a Sunday and everybody showed up but the applicant did not. He described the applicant's attendance behaviour as "absolutely unique."

[56] In an email exchange between the applicant and Mr. Munn, concerning whether or not the applicant notified reception of his absence on August 7, 2007, Mr. Munn states, in part, as follows in an email dated August 10, 2007:

> As I stated before, effective, efficient management of you [sic] team requires your attendance at the office. As far as I am concerned the only time that counts it the time you spend in the office working with your team.

Mr. Munn testified that, at that point, given excessive absences from the office and excessive overtime claims, that the only time that should count was when the applicant was in the office.

[57] In an email dated August 16, 2007, the applicant requested a notebook computer for a member of the Trump team, "such that he may devote time at his home to O/T on Trump." The applicant explains that this individual's "family obligations with three young children understandably limit his ability to contribute O/T in the office environment however." In a responding email dated August 16, 2007, Mr. Munn asks that a suitable

laptop be arranged and states, in part, as follows: "While I strongly encourage **all** work to be done in the office there are occasional justifications for working at home."

[58] The applicant was referred to a letter to him from Mr. Munn dated April 16, 2008. In the letter, Mr. Munn indicates that he last wrote to the applicant about his attendance at the office on July 7, 2007, and that it was distressing to have to write on the same subject again. Mr. Munn states that the applicant agreed that he would attend the office at least from 8:30 to 5:00 each day except when his attendance was required at a business-related meeting outside the office. Mr. Munn reviews the applicant's attendance between August 21, 2007 and April 12, 2008, based on the log, and states that the applicant was not in full attendance on 56.6% of the working days during this time period. He also notes that they expect there were several more days where he was not in full attendance that were not recorded for a variety of reasons. Mr. Munn states that while there may be reasons for these absences, cumulatively, this rate of attendance is not acceptable. He also states that random checks of the applicant's time sheets indicate significant discrepancies.

[59] Mr. Munn continues to state in the letter that this is very demoralizing to the applicant's project team and the office as a whole, that the applicant's lack of attendance is glaring and everyone notices, and that his team is suffering from a lack of direct contact. He states that they expect immediate and permanent correction. The last three paragraphs of the letter state as follows:

> We have tolerated your absences for a long time in recognition of your personal and family problems. We are not prepared to tolerate this further. This is our second letter on this subject. There will not be another. We will be reviewing your attendance at the end of every month. If in a given month you are absent from the office during the hours of 8:30 am to 5:00 pm during any business day, without the approval of one of the partners, your employment will be immediately terminated for just cause, without further notice or any payment in lieu of notice.
>
> Lyndon, we are truly sorry that matters have reached this stage, however you have been spoken to as well as written to on this topic, you are a senior professional, and it should not be necessary for us to take such extraordinary steps to have you come in to the office on a daily basis.

> We trust this will be our final communication on this subject matter but, have no doubt, if you are not in the office when required, as stated above, your career and relationship with Zeidler Partnership Architects will be at an end, without any further notice to you or payment in lieu of such notice.

[60] The applicant testified that, by this time, in April 2008, his mother was in greater distress and there were greater demands on him. He testified that he understood Mr. Munn's reference to "family problems" to be a reference to his mother. The applicant was asked about the threat to review his attendance at the end of every month. He testified that Mr. Munn would stand in the lobby, look at his watch, and make invidious remarks. Beyond that, he did not know how formal it got. He testified that he suspected that he responded to the letter, but he did not remember.

[61] The applicant testified that it was ridiculous and ludicrous to be in charge of a $350 million project and to have to get partner approval to "go outside" or to a client meeting. He testified that he had a family obligation, and that he managed to care for his mother and deliver the project.

[62] Mr. Munn was referred to his letter to the applicant dated April 16, 2008 and confirmed he had a discussion with the applicant. When asked what the applicant said about his attendance, Mr. Munn could not recall.

[63] In an email dated April 16, 2008, in response to an email from Ms. Richardson regarding office renovations, the applicant stated that he had set up his home office. The applicant testified that it was a difficult environment to work in and it was his way of saying that they had to get something under control in the way of office renovations. Ms. Richardson forwarded the email to Mr. Munn, who provided the following response to the applicant on April 17, 2008:

> You can have an enjoyable retirement. In the meantime you will work at the office for the entire working day except when attending documented meetings. Your attendance of late has been entirely unacceptable.

[64] On April 17, 2008, the applicant responded to Mr. Munn, indicating that his remark to Ms. Richardson was intended as "a tongue and cheek comment". He also

raised a number of points regarding his attendance, including that he had done more than 12 interviews over the past few weeks, attended meetings, and in every instance informed reception and others as appropriate. He indicated that he remained available, always, "24/7 by cell" regardless of where he may be. He took issue with the "attitude expressed" and no acknowledgement of his 1003 unpaid hours in the previous year.

[65] On April 18, 2008, Mr. Munn responded to the applicant, stating, in part, that the applicant's chronic failure to attend the office continues to be glaring, and that "[f]rankly, it's a joke among the staff and the senior partners, particularly me, are the butt." Mr. Munn also stated that he had severe doubts about the applicant's overtime, and that the only time that can be verified as working time is the time the applicant spends at the office. He stated that availability on a cell phone does not count. Mr. Munn ended the email as follows:

> It is disheartening that someone with your skills, ability and potential has developed the attitude and work habits that you have. You committed to me eight months ago that you would be in the office every day from 8:30 to 5:00. That hasn't happened. For everyone's sake, especially your own, I would advise doing it.

[66] The applicant responded to Mr. Munn on April 22, 2008, stating, in part:

> My schedule begins at 06:30 am when I get up and assist my mother in rising, dressing and breakfast – I leave for the GO train at 8:15 am arriving at the office by approximately 9:20 am. I work through lunch and take the return GO train at 5:20 pm. I trust this meets with your approval.

The applicant testified that he would have passed this information on to Mr. Munn verbally on other occasions, but maybe not in as much detail.

[67] The applicant acknowledged Mr. Munn's reference to his commitment to be in the office and testified that, at the same time, he never said he would not care for his mother. The applicant denied that he was ignoring warnings from Mr. Munn, and testified that he was responding to a crisis situation with his mother. He stated that if it was physically possible to be there, he would, and that he still did the work.

[68] In cross-examination, the applicant testified that his April 22, 2008 statement regarding his schedule was in response to the email chain and was accurate on that day. He explained that the context was the letter he received from Mr. Munn approximately a week earlier, and that he was endeavouring to deliver on that, provided his mother's care did not require him.

[69] In an email exchange dated April 24, 2008, the applicant advises Mr. Munn that, as the principal caregiver to his mother, he must take care of her attendance at doctor's appointments, and that he has one that afternoon which means he will be out all afternoon, and the time will be made up or come out of his overtime. He indicates that if it is a "deal breaker", he will advise his mother to cancel. Mr. Munn responds that he has "reluctantly accepted" the applicant's absence for that day, and points out that, out of four days that week, the applicant had not fully attended two, and 50% is not adequate. Mr. Munn testified that he reluctantly accepted the absence because the applicant's attendance record had been so frustrating.

[70] In an email dated June 23, 2008, from the applicant to Mr. Munn regarding the Trump project, the applicant mentions that he is on vacation, but that he has had eight calls from the office and three calls from the client. Mr. Munn ends a responding email by telling the applicant to turn off his telephone and computer, which the applicant testified was not reasonable. He explained that it was also a time when Mr. Zeidler was ill and not in the office and the applicant was the most senior person on the project.

[71] The applicant was referred to an email dated August 20, 2008, from Mr. Munn to him regarding his attendance, with an attached letter dated August 18, 2008. The letter is similar in content to the earlier letters the applicant received from Mr. Munn dated July 24, 2007, and April 16, 2008. The letter addresses the applicant's attendance between April 14 and July 30, 2008, and states that the applicant was not in full attendance on 64 of 77 working days. The letter states that, again, they expect immediate and permanent correction. It states that they have tolerated his absences for a long time in recognition of his personal and family problems, and that they are not prepared to tolerate this further. It is noted that this is their second letter in addition to verbal cautions on this

subject. The letter adds, “we do not believe your excuses for absence or your claims of overtime are credible.” The applicant is advised that, under no circumstances, is he to work at home, and that only time spent working in the office will be recognized.

[72] Mr. Munn was asked what led to his August 18, 2008 letter being sent to the applicant. He testified that, rather than improving, the applicant’s attendance was deteriorating. Mr. Munn was asked if the applicant ever told him why, and testified that a variety of excuses were presented, including his mother’s health. Mr. Munn testified that the applicant did not ask for any special accommodation or treatment, and did not say he needed to take time off because of his mother.

[73] The applicant testified that he understood “family problems” in the letter as relating to his mother and emphasized that he continued to have caregiving responsibilities. The applicant responded to Mr. Munn in a lengthy email dated August 20, 2008. He begins by essentially questioning if he is being called a liar, and states that he put in over 1000 hours of overtime in the previous year, uncompensated. He states that over the last decade the firm owes him years in uncompensated overtime.

[74] Near the end of his email, the applicant states as follows:

> That I have the ongoing obligation in the care for my invalid mother who at 86 is still with me is a tribute to the firm’s prior support in my efforts to be available for her care while leveraging the technology we today have available in the delivery of my and our team’s responsibilities to the Trump development. Sadly, the effect is that rather than as you obviously believe, is the reality that the paradigm shift from the traditional office to the world of telecommuting (under whatever circumstance) means I work more now than ever before. Rather than being empowered and having the opportunity to do less or whatever may motivate one, it in fact gives the means to work more. This is exactly what happens when, in particular, a project is chronically understaffed – we, or I in this case continue to deliver by finding, somehow, the way to do it and that is by working long hours including the days I worked on my so-called vacation.

[75] In his penultimate paragraph, the applicant states that the contribution he has made to the office, including years of uncompensated overtime, together with no salary review of any sort in over 18 years, and the loss of his long-time relationship has cost

enough. He states that it will not cost him his mother. Mr. Munn responds by simply stating that they require he attend the office during normal business hours.

[76] With respect to the applicant's August 20, 2008 email, Mr. Munn testified that the applicant was addressing everything but "the issue", and would not recognize that attendance at the office is a normal part of any job.

[77] An email from Mr. Munn to the applicant, dated September 3, 2008, states:

> I understand from Ian that you have requested an I Phone. As you will be working exclusively from the office for the foreseeable future, you should have marginal need for a cell phone. There should be no requirement for e-mail capability. I will ask Ian to look into providing you with a new desktop computer as your current computer is four years old. This should deal with any speed concerns.
>
> Once your clients and associates come to realize that they can rely on reaching you at the office during normal working hours, any need for accessing e-mail outside the office will become moot.

The applicant testified that his client required his availability "24/7" and he uses an iPhone to this day. Mr. Munn testified that he was implying that there was no requirement for email capacity on a cell phone. He testified that if you answer emails outside of office hours you get emails outside of office hours. He also testified that the applicant's attendance was the main issue and he was not prepared to do anything that would exacerbate the situation.

[78] The applicant was referred to an "updated" email from him to Mr. Munn, dated October 9, 2008. The applicant explained that Mr. Munn responded in red within the text of his email. In his email, the applicant stated, "Sadly, my mother is declining and as such I had to work at home Tuesday." Mr. Munn responded, "I am sorry to hear about your Mother. However, as I said before, work at home does not count – only work in the office."

[79] Further along in the email, the applicant states that he is at a meeting on the afternoon of October 8 and that he must follow this with checking in on his mother in the

late afternoon. Mr. Munn responds, “See above.” The applicant also states that he must attend a meeting on the morning of October 9, and that from 3:00 p.m. onward, he must go back to Burlington for his mother. He advised that he would continue to work at home, and that, at all other times that week, he arranged for his brother to be “on hand” for his mother. Mr. Munn responds, “See above.” Mr. Munn notes that the applicant exceeded his sick day allocation by 10 days and his vacation day allocation. Mr. Munn’s last comment states, “During the month of September you failed to attend the office on any day for the 8:30 – 5:00 period (or equivalent) as required by the office manual. You are on very thin ice.” In responding, in turn, to Mr. Munn’s comments, on October 12, 2008, the applicant refers to having “a seriously ill mother”.

[80] Mr. Munn was asked about his responses to the applicant in another email exchange with the applicant dated October 12 and 14, 2008. In particular, Mr. Munn was asked about his statement to the applicant that he was not interested in the applicant’s “daily excuses.” Mr. Munn was asked if by “daily excuses” he meant health issues with the applicant’s mother. Mr. Munn testified that it was one of the excuses he gave and that he was trying to get the applicant focussed on attending the office. With respect to the applicant’s care-giving responsibilities, Mr. Munn testified that he was not suggesting that the applicant not do whatever he needed to do but he was hoping the applicant would participate fully in the business of the office.

Termination of the applicant’s employment

[81] On January 9, 2009, Mr. Munn gave the applicant a letter terminating his employment. In the letter, Mr. Munn stated that, despite his August 18, 2008 letter to the applicant, and the many warnings the applicant had been given, his attendance record continued to be “abysmal”. Notwithstanding the respondents’ position that the applicant’s employment was being terminated for just cause, the respondents advised the applicant that he would be provided with 34 weeks salary and benefits for 8 weeks.

[82] Mr. Munn testified that it was the consensus of the partners that the applicant’s employment be terminated. He testified that the partners made the decision before

Christmas, but decided to wait until after Christmas, and the termination occurred on the first day that the applicant was in after Christmas, January 9, 2009. This evidence was confirmed by another partner, Ms. Richardson, who was responsible for human resources for the respondents, and who attended the applicant's termination meeting.

[83] When asked if some of the reasons for the applicant not attending at the office were related to eldercare, or partially related to eldercare responsibilities, Mr. Munn testified that the applicant failed to attend the office as requested, and as he agreed to, and that he chose to take time off regarding his mother, and that was his choice. Ms. Richardson testified that the applicant's employment was terminated because, basically, he was not coming into work, and not letting them know of his plans to improve attendance.

[84] The applicant testified that he was in shock when his employment was terminated on January 9, 2009. Knowing that his mother's situation was desperate, and that they needed to pay for her care, he said "give me another chance."

[85] By letter dated January 12, 2009, the respondents offered to employ the applicant on a contract basis. The applicant would no longer have the designation of "Principal". In lieu of paying him salary, it was proposed that the applicant would be paid an amount for each full day he attended the office. Any work done outside the office would not be compensated. It was proposed that the arrangement would be reviewed at the end of 3 months and, if it had proven satisfactory, they would consider and advise him of the basis upon which they would be prepared to extend the arrangement, including again providing him with the designation of Principal. If the arrangement did not prove satisfactory, it would terminate at the end of 3 months.

[86] Ms. Richardson testified that the respondents made the contract offer to the applicant because the applicant said during the termination meeting that things could change because his mother was moving into a facility and it was a milestone. Ms. Richardson testified that they offered that the applicant could come back on contract because there had been no change in response to the respondents' many letters to him.

[87] The applicant did not accept the January 12, 2009 offer. He expressed concern about the message it would send to the community and the client. He confirmed that there was no indication that the respondents would accommodate his caregiving responsibilities going forward. Although, he also confirmed that his care responsibilities were reduced when his mother moved into a facility with 24-hour care. He testified that he would visit her as any family member or son would.

[88] Instead of accepting the respondents' offer of contract employment, the applicant accepted an offer of employment made by the CEO of the developer on the Trump project. Shortly after his employment was terminated he got a phone call from his client and he told him what happened. He started his new employment 4 to 5 weeks later. He explained that he has a bi-weekly verbal agreement until the end of the Trump project. He is a private contractor or consultant, not an employee, and does not have benefits. He is also no longer working as an architect. He is now the respondents' client and still works with them. He explained that he still counsels the respondents' employees on the job. They ask him questions as they did before. On the day he testified he stated that he received 8 emails from the respondents' employees while he was in the hearing.

[89] Mr. Munn described the January 12, 2009 offer as an attempt to accommodate the applicant. He testified that he consulted with the other partners, and that is all they would agree to. He had hoped the applicant would take it and assume full-time attendance in the office and become a full member of the team again. Mr. Munn testified that he thought the intention was that the applicant would have to attend for a full day to be paid. He testified that if the applicant were to say that he had to leave early to take his mother to a medical appointment, he did not know what they would have done, as they did not contemplate that. He also confirmed that, with that offer, the applicant would not have been compensated for work outside of the office, such as a call from a client at night. Mr. Munn testified that if everything was okay at the end of the three month contract period, the applicant could have been reinstated as an employee.

[90] On January 15, 2009, Mr. Zeidler sent a memo to Mr. Munn and the other senior partner, wherein Mr. Zeidler indicated, among other things, that the applicant was the

core person in their office on the Trump project and that the client was happy with the applicant's work. He stated that the applicant had been away from the office often because his mother was very ill. However, he understood that the applicant's mother had moved into a nursing home, so the applicant could spend more normal hours at the office. Mr. Zeidler suggested, therefore, for the sake of retaining the Trump project, that the respondents offer the applicant full-time employment and observe the situation going forward. Mr. Zeidler asked to be kept informed before further decisions were made.

[91] Mr. Munn testified that Mr. Zeidler had earlier expressed the views in his memo, but the partners were of the view, notwithstanding, that it was important that the applicant's employment be terminated. When asked if the respondents had considered offering the applicant full-time employment, Mr. Munn testified that they made "the offer", but it was conditional on the applicant attending the office.

ANALYSIS AND DECISION

Relevant *Code* provisions

[92] Sections 5, 9 and 11 of the *Code* provide as follows:

> 5.(1) Every person has a right to equal treatment with respect to employment without discrimination because of… family status.
>
> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of… family status.
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
>
> 11.(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[93] In s. 10(1) of the *Code*, "family status" is defined as "the status of being in a parent and child relationship", and "harassment" is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".

Assessment of credibility

[94] Some of the issues addressed in this Decision turn on my assessment of the credibility of the applicant and the witnesses. In assessing credibility, I am guided by the principles set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at paras. 356-357:

> …Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (…) Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken.

[95] I am also guided by factors considered by the Tribunal in *Cugliari v. Clubine and Brunet*, 2006 HRTO 7, at para. 26: the motives of the witnesses, the relationship of the witnesses to the parties, the internal consistency of their evidence, inconsistencies and

contradictions in relation to other witnesses' evidence, and observations as to the manner in which the witnesses gave their evidence.

Has the applicant established a *prima facie* case of discrimination on the basis of family status in employment?

[96] It is clear from the evidence that the respondents required the applicant to attend at the office certain hours, and terminated his employment on January 9, 2009 because of his failure to attend the office as required.

[97] As set out in Mr. Munn's correspondence to the applicant dated July 24, 2007, April 16, 2008, and August 18, 2008, the respondents required that the applicant attend the office at least from 8:30 a.m. to 5:00 p.m. each working day, except when his attendance was required at a business-related meeting outside the office. In October 2008 email correspondence between Mr. Munn and the applicant, Mr. Munn refers to the applicant failing to attend the office "for the 8:30 – 5:00 period (or equivalent) as required by the office manual."

[98] The applicant was also advised in Mr. Munn's April 16 and August 18, 2008 correspondence that if he was absent from the office during the hours of 8:30 a.m. to 5:00 p.m. during any business day, without the written approval of one of the partners, his employment would be terminated. His employment with the respondents was terminated on January 9, 2009. It is clear from the respondents' letter of the same date terminating his employment that the applicant's employment was terminated because of his failure to regularly attend at the office. Mr. Munn also confirmed in his evidence that the applicant's employment was terminated for not attending at the office.

[99] The question is whether the respondents' requirement that the applicant attend the office during certain hours, except when he had a business meeting outside of the office, and the respondents' ultimate termination of the applicant's employment for failing to attend the office as required, resulted in discrimination against the applicant on the basis of family status.

The parties' positions

[100] The applicant submits that he had significant eldercare responsibilities towards his mother when he moved in with her in 1996, as a result of her medical condition, and that these responsibilities, which continued until her death in October 2009, are included in the *Code* ground of "family status".

[101] More particularly, the applicant submits that during the decade after he moved in with his mother her health continued to deteriorate, and he had significant responsibilities as her primary caregiver. He occasionally received assistance from his brother, and although the government provided his mother with one hour of care per day, he submits it was insufficient to meet her care needs.

[102] The applicant submits that the term "family status" in the *Code* encompasses not only discrimination because a person is a mother, father, son or daughter, but discrimination connected to the identity and circumstances of an applicant's family member: see *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306, at para. 26. He also submits that all prohibited grounds of discrimination, including family status, must be treated equally: see *Seeley v. Canadian National Railway*, 2010 CHRT 23, at paras. 119-122.

[103] The respondents acknowledge that "family status" under the *Code* includes eldercare, and they do not dispute that the applicant's mother had certain medical issues. They submit, however, that they were not aware of the nature and extent of the applicant's mother's medical issues until the applicant testified at the hearing. They also submit that the applicant did not have eldercare obligations which triggered any duty to accommodate under the *Code*.

[104] Referring to the decision of the British Columbia Court of Appeal in *Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society*, [2004] B.C.J. No. 922 ["*Campbell River*"], the respondents submit that the applicant has failed to establish a *prima facie* case of discrimination based on family status. In *Campbell River*, the Court held as follows at para. 39:

> …Whether particular conduct does or does not amount to prima facie discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that a prima facie case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a prima facie case. [emphasis added]

[105] The respondents note that the decisions in *Hoyt v. Canadian National Railway*, [2006] C.H.R.D. No. 33, C.H.R.T., and *Johnstone v. Canada (Attorney General)*, [2007] F.C.J. No. 43, F.C., aff'd. on other grounds [2008] F.C.J. No. 427, F.C.A., set a lower test or threshold; however, the respondents urge the Tribunal to adopt the test or threshold as established by the British Columbia Court of Appeal in *Campbell River*.

[106] Referring to arbitral and tribunal decisions that follow *Campbell River, supra*, the respondents submit that special circumstances must be established in order to reach the threshold for family status discrimination, and that an interference with ordinary care giving responsibilities does not constitute *prima facie* discrimination based on family status: see *Coast Mountains School District No. 82 v. British Columbia Teachers' Federation*, [2006] B.C.C.A.A.A. No. 184 (Munroe), at para. 39, and *Falardeau v. Ferguson Moving (1990) Ltd. (c.o.b. Ferguson Moving and Storage),* [2009] B.C.H.R.T.D. No. 272, at paras. 31-32. They submit that, in order to establish a *prima facie* case of discrimination, the first consideration is whether or not difficulties with familial responsibilities, for example daycare arrangements, lie outside the experience of the vast majority of people: see *Alberta (Solicitor General) v. Alberta Union of Provincial Employees*, [2010] A.G.A.A. No. 5, at para. 56, ref'g to *Canada Post Corporation and Canadian Union of Postal Workers* (2006), 156 LAC (4th) 109 (Lanyon), at paras. 92-95.

[107] The respondents also submit that not every conflict between a work obligation and a parental obligation must be accommodated by an employer, and, more importantly, not every conflict should give rise to a finding of discrimination such that an

inquiry should be conducted over whether the employer should accommodate the conflict. They submit that to find discrimination in every such circumstance of adverse effect would freeze the employer's ability to act to meet its economic needs as virtually every action could have some negative effect on the parental duties of one employee or another: *International Brotherhood of Electrical Workers, Local 636 v. Power Stream Inc.*, [2009] O.L.A.A. No. 447 (Jesin), at paras. 54-58.

[108] The respondents also submit that if it is the caregiver's choice, rather than family responsibilities that preclude the caregiver from attending work, a *prima facie* case of discrimination on the basis of family status is not established: see *Wight v. Ontario (Office of the Legislative Assembly)*, [1998] O.H.R.B.I.D. No. 13, at paras. 309-311.

[109] The respondents submit that the applicant's caregiving responsibilities were identical to those of any ordinary caregiver, and there was no evidence that the applicant's mother had any special needs, or that the applicant was uniquely qualified to care for her. They submit that the applicant could have hired someone to provide care giving services to his mother, or he could have admitted his mother to a long-term care facility long before he did, but he chose not to. They submit that the applicant chose to spend time with his mother rather than attend the office as required by his employer, and that, while his devotion to his mother is laudatory, such devotion does not create a family duty or obligation protected by the *Code*.

[110] In reply, the applicant submits that, although the approach in *Seeley, supra*, should be adopted by the Tribunal over the approach in *Campbell River*, regardless of which approach is used the applicant has established a *prima facie* case of discrimination.

[111] The applicant also submits that the type of "ordinary" childcare obligation experienced by "the vast majority of people" referred to in the decisions relied upon by the respondents is the need of every parent to find somebody to watch their children while they are at work. The applicant submits that, in contrast, his situation involving his eldercare responsibilities cannot be described as "ordinary", as he was the primary

caregiver for his mother during a decade-long period when she suffered from a number of increasingly debilitating illnesses and injuries. Throughout that time he and his mother were the only residents of the home they shared, and his mother's medical needs were unpredictable and subject to change. He submits that he was not asking that he be allowed to work from home permanently, or even a majority of the time; he was simply asking that he be allowed to work from home from time-to-time as the situation required. He submits that the changing nature of his mother's medical needs, along with her clearly expressed desire to live at home and the availability of outside assistance, were all factors in the type of care she received. He submits that nothing in his evidence gave the impression that his eldercare obligations were simply a matter of choice or personal preference.

The appropriate test

[112] The applicant must show a *prima facie* case of discrimination. A *prima facie* case of discrimination is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer." *O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at 558-559.

[113] The *Code* defines "family status" in s. 10 as "the status of being in a parent and child relationship". The Supreme Court of Canada has held that "family status" in the *Code* is broad enough to encompass circumstances where discrimination results from the particular identity of the complainant's spouse or family member: *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, at para. 46, and *McDonald, supra*.

[114] In *B.,* the Supreme Court of Canada also reiterated the view that human rights legislation has a unique quasi-constitutional nature and ought to be interpreted in a liberal and purposive manner in order to advance the broad policy considerations underlying it: at para. 44. The Court also effectively held that additional burdens that the *Code* does not mandate should not be placed on those alleging family status discrimination: at para. 56; see also *Seeley, supra*, at para. 99. I also note, however,

that the Supreme Court of Canada has also clearly held that not every distinction in treatment is discriminatory: *R. v. Kapp*, [2008] 2 S.C.R. 483, at para. 17.

[115] In my view, there is no basis for establishing a higher test or threshold for family status discrimination, as opposed to discrimination on other *Code* grounds, and the approach of the Canadian Human Rights Tribunal in *Hoyt, supra*, and the Federal Court in *Johnstone, supra*, is more in keeping with the principle that the *Code* ought to be interpreted in a liberal and purposive manner in order to advance the broad policy considerations underlying it, than is the approach in *Campbell River*. See *B, supra*.

[116] In *Johnstone, supra*, at paras. 29 to 31, the Federal Court indicated that, while family status cases can raise unique problems that may not arise in other human rights contexts, there is no obvious justification for relegating this type of discrimination to a secondary or less compelling status. The Court added that to limit family status protection to situations where the employer has changed a term or condition of employment is unduly restrictive and wrong in law. With respect to requiring that a complainant establish a "serious interference" with his or her protected interests, the Court endorsed the view that the fact that an applicant is adversely affected by a respondent's policy is sufficient to establish a *prima facie* case of discrimination, and that applying a higher standard to the ground of family status would be an error.

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

Yeats v. Commissionaires Great Lakes, 2010 HRTO 906, at para. 54, and *Jeffrey v. Dofasco Inc.,* 2004 HRTO 5, aff'd *Ontario (Human Rights Comm.) v. Dofasco Inc. (No. 2)*, 2007 CanLII 41275 (Ont. Div. Ct.).

The applicant's circumstances

[118] In the present case, it is undisputed that the applicant's mother had various medical issues. The applicant gave fairly detailed evidence regarding his mother's condition which he described as tremendously disabling. He testified that, as the only person residing with his mother, he was her primary caregiver, and prepared her food, shopped for her, cleaned her clothes, and took her to her medical appointments. He also testified that his mother's health declined during the time that he lived with her, and that her health care demands increased in 2008, as compared to 2007. Further, in 2008 she ruptured a quadriceps tendon and became entirely incapacitated. Based on the applicant's evidence and the documentary evidence it appears that this happened in or around mid-October 2008.

[119] With respect to the applicant's absences from the office, the parties provided considerable documentary evidence, including the applicant's time sheets, the log and the summary notes of the log. I have carefully reviewed this evidence, and for reasons described below, I find that while these documents provide a picture of the applicant's absences, they do not provide a full or complete record of the reasons for his absences.

[120] To begin with, there are numerous references in the applicant's time sheets to the applicant taking his mother to medical appointments, and working at home because of her ill health and care needs. There are also a number of references to the applicant arriving at work late in the morning, or leaving work early in the afternoon, because of his mother's care needs and in order to take her to medical appointments.

[121] In considering the applicant's time sheets, I note that he testified that he recorded the hours he worked, and only "major instances" of his mother's care, and not necessarily where he worked. Where he arrives late or leaves early due to his mother's care, and it does not appear to be for the purposes of taking her to medical

appointments, he typically indicates that he worked at home. Where he does record that he worked at home for a day, or part of a day, and no reason is given, it is not clear if working at home was for reasons related to eldercare responsibilities.

[122] With respect to mornings, in particular, the applicant indicated in his time sheets in October 2004 that he typically worked at home in the early morning to avoid traffic and to assist his mother, arriving at work at "10:00 a.m. +/-" and leaving the office somewhere in the area of 6:00 to 8:00 p.m. In his email to Mr. Munn, dated April 22, 2008, the applicant explained that his schedule begins at 6:30 a.m. when he gets up and assists his mother in rising, dressing and breakfast. He then leaves for the GO train at 8:15 a.m., arriving at the office by approximately 9:20 a.m. He works through lunch and takes the return GO train at 5:20 p.m.

[123] I have some concerns with the applicant's evidence regarding his morning care responsibilities in that he also testified that they had one hour of home care in the morning, specifically to dress his mother, and that this home care began prior to 2008. It is by no means clear from the evidence what the applicant's care responsibilities were in the mornings, as compared to the support provided by home care, and whether the home care was sufficient. I note that the applicant submitted that one hour of home care was insufficient to meet his mother's needs.

[124] While the applicant's arrival times at the office are recorded in the log for 2007 and 2008, I note that records for many work days were not provided by the respondents. For example, there are approximately 70 work days in 2007 and 40 work days in 2008 for which no information is provided. In any event, according to the log information provided for 2008, on days that the applicant attended the office, and no morning meeting outside the office is recorded, it appears that he often arrived before 9:00 a.m., or between 9:00 and 10:00 a.m. On several days he arrived around 10:30 a.m., and on several other days he arrived later and no explanation is given. On a few other days he was late due to traffic. While the applicant did not describe a typical morning, or if there was a typical morning, in terms of his mother's care, his arrival times at work appear to vary considerably, at least on the dates for which the respondents

provided information. It is also not clear from the evidence whether and to what extent his late arrival times, where no reason is recorded in the log, may have been as a result of eldercare responsibilities.

[125] When asked about his absences recorded in the log, the applicant explained that the notes were based on a receptionist's comments, and that he would tell the receptionist why he was late, or phone if he was not in. The applicant was asked about a note for September 25, 2008, which indicated that he was in at 10:20 a.m. because he had to take his mother to a doctor's appointment, being the first and only reference to his mother in the notes for September 2008. He testified that continuing to repeat the obvious made no sense, referring to ten years of caring for his mother. Given the absence of any formal or recognized accommodation of the applicant's eldercare responsibilities, as addressed below, it is also not clear if the applicant would have advised the receptionist of the reason every time he was late, left early, or was absent due to caring for his mother.

[126] While I have no reason to doubt the general accuracy of the information in the log concerning when the applicant was in and not in the office, it appears that the accuracy of the reasons recorded in the log for any absences was dependent upon the applicant accurately informing a receptionist of the reason for his absence, including late arrivals and early departures, and the receptionist accurately recording that information.

[127] I note that of 15 days in 2007 that the applicant recorded in his time sheets that he was absent, or partially absent, for reasons related to his mother's care, including her medical appointments, these absences are, with one exception, reflected in the log; however, with respect to the reasons for the absences, the log does not mention that any of these absences are related to the applicant's mother's care. Similarly, between January 1 and mid-October 2008, the applicant recorded 18 absences, or partial absences, in his time sheets for reasons related to his mother's care. While these absences are generally reflected in the log, only one of these 18 absences recorded in the log reflects that the absence is related to the applicant's mother's care.

[128] There are quite a few other references (ie. approximately 18) in the log to the applicant being absent in 2008 for reasons related to his mother's care that are not recorded in the applicant's own time sheets. I note that all of these references, with the exception of one, appear to be recorded in handwritten notes, whereas the log is a typed record. Some of the typewritten notes for these dates refer to the applicant being absent for "personal" reasons. It is by no means clear who added the handwritten notes and when. As Mr. Munn testified that the log was available online so that anyone could look at it, it may be that personal reasons for absences were not entered into the electronic version of the document.

[129] Accordingly, while there are quite a few days in 2008 where the applicant is recorded in the log as being absent for reasons related to his mother's care, there are also many days in 2007 and 2008 where the applicant is recorded as arriving late, leaving early, and "working at home" or "not in", and no reason is given in the log. Sometimes there is mention of an appointment but it is not specific to the applicant's mother, such as on April 24, 2008, when the applicant also advised Mr. Munn by email that he had to take his mother to a doctor's appointment that afternoon. The log records the applicant as being absent in the afternoon for a doctor's appointment, but does not mention that the appointment is for his mother. The applicant also advised Mr. Munn by email that he had to attend at home on the afternoons of October 8 and 9, 2008, for his mother who was declining. The log records these absences, but there is no mention of the applicant's mother.

[130] The applicant's time sheets, on the other hand, suggest that at least some (ie. approximately 32) of the absences in the log where no reason is given, or the applicant appears to be absent for his own appointments, are actually related to the applicant's care of his mother. It is also not clear, therefore, to what extent other absences in the log that appear to be for the applicant's own appointments may actually be related to his mother's medical appointments.

[131] Having carefully reviewed and considered the evidence, it appears that, prior to mid-October 2008, the applicant's responsibilities to his mother required that he be

away from the office during core work hours on a number of occasions. There were times that the applicant took his mother to medical appointments during the day, and there were also times that he worked at home, when his mother was ill or particularly not well. Aside from absences simply due to the applicant's mother's "care", there are more than a couple of dozen absences recorded in the materials, for the January 1, 2007 to mid-October 2008 time period, that are for reasons related to the applicant taking his mother to medical appointments or caring for her when she was ill or injured. I find that, on these occasions, the applicant's care responsibilities to his mother required that he be away from the office during core hours.

[132] While the applicant testified that there were no reasons for his absences other than his mother's health, and that he tried to attend the office from 8:30 to 5:00 provided his mother's care did not require him, I do not accept that all of the applicant's many absences were necessary as a result of his eldercare responsibilities.

[133] With respect to mornings, in particular, while the applicant did specifically record in his time sheets that he was late a couple of mornings in 2008 due to caring for his mother, he was late on many occasions. Based on the evidence, I am not satisfied that all of the applicant's many late arrivals were truly required as a result of his eldercare responsibilities. As stated above, they had home care in the mornings in 2008, and while the applicant submitted it was insufficient, this is not clear based on the evidence provided at the hearing. In addition, the applicant refers in his time sheets to being late in the morning on a number of occasions to avoid traffic, and there are references in the log to the applicant being late on a few occasions due to traffic.

[134] I have also considered the respondents' submission that the applicant could have hired someone to care for his mother, and could have admitted his mother to a long-term care facility long before he did, but he chose not to. They submit that the applicant chose to spend time with his mother, rather than attend at the office as required.

[135] The applicant, on the other hand, described his mother as a very determined person who wanted to keep living in her home and did everything that she could to

continue doing so. He testified that, although her health was declining, she remained "cognitive". The applicant was very clear in his evidence that, prior to injuring her quadriceps tendon, his mother did not want to go into a nursing home. She wanted to stay at home. However, after she injured her quadriceps tendon she was entirely incapacitated, there was a "ramp up" in her care demands, and they had to hire two people because the applicant could not be there "24/7", and two people were needed to transfer her. At that point, they also got on a crisis list to get her into a long-term care facility. In my view, it would not be reasonable to conclude that, prior to this time, the applicant could have simply admitted his mother to a nursing home against her wishes.

[136] The evidence concerning the possibility of hiring someone to care for the applicant's mother prior to mid-October 2008 is less clear. When asked if they ever investigated hiring someone prior to this time to care for his mother during the day, the applicant testified that they did; however, he did not indicate when that was. He testified that his sister looked online, and that he primarily relied on his sister. He testified that his family did not have the resources. When asked if he ever raised the resource issue with Mr. Munn, or asked the respondents for assistance in paying for help for his mother, he testified that Mr. Munn was not interested in hearing about it, and that he did not ask Mr. Zeidler.

[137] At another point, the applicant was asked why he did not investigate "outside sources" to care for his mother after he received Mr. Munn's July 24, 2007 letter concerning his attendance. He testified that it was not necessary, he was capable of doing the job with technology, and he did the job. He also stated that he made a choice to care for his mother. He testified that he was also not able to be in the office when he worked in London. He reiterated that he took care of his mother and he did the job.

[138] In testifying that he made "a choice" to care for his mother, the applicant appears to be saying that he made a commitment to care for his mother and that he thought he could both care for his mother and do his job with the available technology. The applicant also submitted that he and his mother were the only residents of the home that they shared, and that her medical needs were unpredictable and subject to change.

He submitted that he was simply asking that he be allowed to work from home from time-to-time as the situation required. The applicant submitted that his situation was different from the situation of an employee who fails to take steps to make arrangements for a child's care at the end of the school day which is an entirely foreseeable and predicable scenario.

[139] Although the applicant testified that his family did not have the resources to hire someone, it appears that they did so after mid-October 2008. In the circumstances, while I accept the applicant's assertion that his mother's needs were unpredictable and subject to change, I am not satisfied that the applicant could not have obtained assistance, at least with respect to the more routine aspects of his mother's care. As such, I am not satisfied that the applicant was truly required to be absent from the office on many occasions that he was absent to care for his mother, such as many occasions when he arrived late or left early due to his mother's care.

[140] I note that the applicant did not clearly explain in his evidence why he was personally required to take his mother to her medical appointments, and care for her when she was otherwise ill or injured. I accept, however, that the applicant was the primary caregiver for his mother, having limited family assistance, and that it was more likely than not impractical to hire someone to be available for his mother's unpredictable illnesses and injuries, and to attend various medical appointments with her. As such, I have found only that a few more than a couple of dozen absences from the office during core hours, for the January 1, 2007 to mid-October 2008 time period, that were due to the applicant taking his mother to medical appointments, or caring for her when she was ill or injured, were required as a result of his eldercare responsibilities. I do not accept that the other absences were required as a result of these responsibilities.

Mid-October 2008 to January 9, 2009

[141] With respect to the time period of mid-October 2008, when it appears that the applicant's mother ruptured her quadriceps tendon, until the applicant's employment was terminated, there are approximately 13 explicit references in the log to the applicant

being absent for reasons related to his mother. On approximately 10 of these days, the applicant does not attend the office at all. There are 7 other absences, or partial absences, related to things such as being at the hospital and meetings with a doctor, a rehabilitation facility and a nursing home. Further, the respondents' summary notes of the log refer to approximately 18 additional absences, or partial absences, related to the applicant's mother, where the log does not record the absence as being related to the applicant's mother for 13 of these absences, and log records for the remaining 5 days were not provided. The summary notes indicate that the applicant was absent for reasons including his mother being sick, and meetings with a nursing home and a rehabilitation facility. In my view, the discrepancy between the log and the summary notes with respect to the reasons recorded for the applicant's absences also raises concerns regarding the reliability of the recorded reasons for absences in the log for this time period and more generally. In any event, there are approximately 38 absences for reasons related to the applicant's mother that are recorded for this time period.

[142] The applicant testified that his attendance between October 2008 and the termination of his employment was affected by his mother's health and his caregiving responsibilities. He testified that her care needs were greater during this time. The applicant was referred to the summary notes, and testified that he believed it was after Thanksgiving (October 13, 2008) when he took his mother to the hospital for a ruptured quadriceps. He testified that it was a number of days before she had surgery, and she was at home awaiting surgery, but by October 29 she was in the hospital. The summary notes indicate that the applicant left work early on October 16 because his mother was sick. He is then "not in" on 7 days, including five days that his mother was sick, and one day because he was at the hospital until 5:00 a.m. After this, the applicant left work early on October 29, indicating that his mother was in the hospital awaiting surgery.

[143] While it is not clear if the applicant's mother had more than one surgery, there is a note for December 2, 2008, indicating that she had surgery and the applicant would be working at home. There is a note for November 25 indicating that the applicant called to say his mother was scheduled for surgery the next day so he would be working at home on November 25 and 26. He was also referred to a note for November 28 stating

that he was “going home to move his mother from hospital to nursing home”. He testified that it did not happen at that time. A note for December 1 indicates that the applicant’s mother was in the hospital and was not stable so he would be working at home. On December 3, the applicant was not in and left a message saying he was not sure what was going on with his mother so he would take the rest of the week off as vacation. On December 9 the applicant was not in, and said he had an appointment at a nursing home in the afternoon and would work at home in the morning. On December 12, he was in at 9:45, indicating that he had been at the nursing home.

[144] It is also not clear from the evidence if the applicant’s mother was in the hospital throughout November and December or if there were times that she was at home during this period. The applicant could not recall if his mother was in the hospital from October 29 to November 17. There is a note for November 14 indicating that the applicant was not in, and that his mother had a bad night and he was staying at the hospital. It is also clear from the notes that the applicant’s mother was in the hospital on November 28 and December 1. On January 5, 2009, the applicant advises that his mother had a heart attack the night before and was in the hospital, and, on January 6, that she might be getting out of the hospital that afternoon so he was working at home.

[145] Whether or not the applicant’s mother was in the hospital during this entire time period, the applicant appears to have been absent, or partially absent, on approximately 20 days during this time because his mother was unwell or awaiting surgery. He sometimes indicates that he was working at home on these days and for 3 of these days he indicates that he will take vacation. He was also absent, or partially absent, on approximately 11 days that he had meetings with doctors, a nursing home, and a rehabilitation facility. On a few of the days that he had meetings regarding his mother’s care, he works at home for the remainder of the day. He was also late arriving, or left early, on approximately 4 days to attend the hospital.

[146] Based on the evidence it appears that the applicant’s responsibilities in relation to his mother increased significantly during this time period, after she ruptured her quadriceps tendon. The applicant testified that his mother was entirely incapacitated,

and they got on a crisis list to get her into a long-term care facility. They also hired two people, because of having to transfer her, who came in the evenings. In relation to his mother's care during this time period, the applicant testified that he stayed at home as much as he could.

[147] I find that the applicant's mother's care needs that required his involvement increased significantly during this time period and required that the applicant be absent from the office on several days when his mother was at home. As a result of his mother's condition, the applicant was also required to attend numerous health care related meetings, including meetings with doctors and a nursing home, during the respondents' core hours; however, it is not clear why on some days the applicant had such meetings he worked at home for the remainder of the day, and I do not find that working at home on these days was required.

[148] It also appears that there were days that the applicant did not attend the office, sometimes indicating that he was working at home, when his mother was particularly not well or awaiting surgery in the hospital. In my view, it is understandable, and I accept, that the applicant would be required to work at home to be closer to his 85 year old mother, who was presumably in a hospital in Burlington, when she was having a particularly bad day in terms of her health, or about to undergo surgery. On the other hand, it is not clear that such circumstances existed on all of these days that the applicant was absent and his mother was in the hospital. It is also not clear from the evidence why the applicant needed to be absent during core hours on other days to attend the hospital.

[149] In cross-examination, it was suggested to the applicant that there were no care responsibilities when he visited his mother in the hospital. He agreed, but testified that they do not care for people the way you like. When asked if he could go in the evening to visit her, he testified that he would go when she was awake. When asked if he could not figure out how to visit his mother outside of business hours, he testified that he had the means - the technology – and could work from far away. He added it was okay when it suited the respondents, but not when he was caring for his mother (the applicant

testified that he worked on a project in London, England, for five years, and maintained contact with a team working on the project in the respondents' Toronto office through the use of technology, which he continued to use after the project ended).

[150] I find that, during this time period, the applicant's responsibilities in relation to his mother required that he be away from the office on quite a few occasions, such as several days when his mother was injured but at home, and for the purposes of attending approximately 11 meetings related to his mother's health care. I also accept that the applicant's caregiving responsibilities required that he be absent from the office on several days that his mother was particularly unwell or awaiting surgery. In my view, however, not all of the applicant's absences during this time period appear to have been necessary as a result of his eldercare responsibilities.

Conclusion with respect to a *prima facie* case

[151] Having carefully considered all of the evidence, I find that the applicant had a number of absences from the office, both before, and particularly after, mid-October 2008, that were required due to his family circumstances involving care for his mother. In particular, the applicant had eldercare responsibilities that sometimes required that he be away from office during the time that he was expected to attend, as set out above, and his responsibilities in relation to his mother increased significantly after mid-October 2008. Because of these responsibilities, the applicant could not comply with the respondents' attendance requirements on a number of occasions.

[152] I find that absences related to the applicant's eldercare responsibilities were included in the absences that Mr. Munn referred to in his letters to the applicant dated July 24, 2007, and April 16 and August 18, 2008, wherein Mr. Munn states, among other things, that the respondents have tolerated his absences for a long time in recognition of his personal and family problems, and they are not prepared to tolerate this further.

[153] In his April 16 and August 18, 2008 letters to the applicant, Mr. Munn also warned the applicant that his employment would be terminated if he was absent from

the office any business day between the hours of 8:30 a.m. and 5:00 p.m. without the approval of one of the partners. Mr. Munn also advised the applicant, in an email dated October 9, 2008, that he was "on very thin ice" in relation to not attending the office, and it is clear that the applicant's employment was ultimately terminated for absences. In his January 9, 2009 letter to the applicant, terminating his employment, Mr. Munn stated that, despite his August 18, 2008 letter to the applicant about his persistent failure to regularly attend at the office, and many warnings, the applicant's attendance record continued to be "abysmal". In his January 9, 2009 letter to the applicant, Mr. Munn also stated that the applicant's attendance record for the last three months was enclosed. Ms. Richardson also confirmed that the applicant's employment was terminated because he was not coming into work.

[154] I find that the applicant's employment was terminated based on absences, a significant portion of which were required due to his family circumstances. I find, therefore, that the applicant's family care requirements were a significant factor in the respondents ultimately terminating his employment. I have also found, as set out below, that the respondents were aware that the applicant had eldercare responsibilities. In all of the circumstances, I find that, given the applicant's care responsibilities to his mother, the respondents' requirement that the applicant be in strict attendance at the office each day had an adverse impact on the applicant, as he was expected to be in the office during certain hours each day regardless of eldercare requirements that he had, and his employment was terminated based on absences, a significant portion of which were required due to his family circumstances. I find, therefore, that the applicant has established a *prima facie* case of discrimination on the basis of family status.

[155] In coming to this conclusion, I note that it is not necessary for the applicant to prove that all of the absences that were counted against him by the respondents were necessary as a result of his eldercare responsibilities. Indeed, I have found above that many of the applicant's absences were not family-status related within the meaning of the *Code*. The extent to which absences unrelated to the applicant's *Code*-related needs were also a factor in the respondents' actions may, however, be relevant to determining an appropriate remedy, if any, to which the applicant may be entitled.

[156] In the circumstances, the onus shifts to the respondents to establish that their attendance requirements for the applicant were "reasonable and bona fide" within the meaning of s. 11 of the *Code*, including by proving that the respondents could not have accommodated the applicant's *Code*-related needs without incurring undue hardship.

The duty to accommodate

[157] In *McDonald, supra*, the Tribunal explained the duty to accommodate as follows, at paras. 29 to 31:

> A respondent is not required to accommodate past the point of undue hardship, and sometimes, little or no accommodation may be possible. However, the person with a duty to accommodate must make a real effort to accommodate *Code*-related needs. Accommodation is a collaborative process: the person with a duty to accommodate has a duty to actively seek the information he or she needs, and must be prepared to consider and explore the possibilities. The person requiring accommodation must also cooperate in the attempt to find suitable accommodation.
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> The Supreme Court of Canada has accepted that the duty to accommodate has both a substantive and procedural component; see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1, 1999 CanLII 652 (S.C.C.) (hereafter "*Meiorin*"), and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868, 36 C.H.R.R. D/129, at paras. 22 and 42–45. To meet the procedural part of the duty to accommodate, the respondent must take adequate steps to explore what accommodation is needed, and to assess accommodation options. That involves obtaining all relevant information about the applicant's situation, at least where it is readily available. See *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC), 2008 CanLII 39605 (ON S.C.D.C.)
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> In *Lane v. ADGA Group Consultants Inc.,* 2007 HRTO 34 (CanLII), 2007 HRTO 34 (CanLII) the Tribunal held that failure to meet the procedural dimensions of the duty to accommodate — the duty to inquire and assess — is a form of discrimination in itself because it denies the affected person the benefit of the prohibition against discrimination, and a proper search for accommodation. The *ADGA* decision was confirmed on appeal: *ADGA Group Consultants Inc. v. Lane*, *supra*.

[158] In *Baber v. York Region District School Board*, 2011 HRTO 213, the Tribunal described an employer's duty to accommodate as follows, at para. 94:

> Once the duty to accommodate has been triggered, the respondent employer has both procedural and substantive obligations. Procedurally, the employer has an obligation to take the necessary steps to determine what kinds of modifications or accommodations might be required in order to allow the employee to participate fully in the workplace. The substantive duty requires the employer to make the modifications or provide the accommodation necessary in order to allow the employee to participate fully in the workplace, such as by modifying duties or hours of the workplace itself, as the case may be, up to the point of undue hardship.

The duty to accommodate procedurally

[159] In the present case, the applicant testified that, in addition to Mr. Zeidler, Mr. Munn and six others on the Trump project team knew about his caregiving responsibilities and his mother's health. He testified that Ms. Richardson was also aware of his caregiving responsibilities because he told her about them in conversation. He testified that he both told and wrote Mr. Munn about it. He explained that, in some cases, it was anecdotal, and, in other cases, an explanation for him doing work remotely.

[160] Mr. Munn was asked about many references to the applicant's mother being sick in the summary notes and if he thought to approach the applicant about his mother's health. He testified that the applicant's pattern of absences had gone on for so long, there was a constantly changing pattern of excuses, and it was difficult for them not to be sceptical. He testified that the applicant did not see the need to come to them and say that his mother's health had deteriorated significantly and that he needed to take time off. Mr. Munn testified that any time the applicant was confronted about his attendance, he became very belligerent. He testified that the applicant did not request special accommodation, but failed to attend, and said he "had to do this or that" or take care of his mother. Mr. Munn testified that it was never a request, rather it was "I'm telling you."

[161] Mr. Munn was asked about his July 24, 2007 letter to the applicant wherein he stated that they had "tolerated" the applicant's absences for a long time in recognition of his personal and "family problems" and that they were not prepared to "tolerate this further." With respect to his reference to "family problems", Mr. Munn testified that he was aware the applicant's mother was in need of some assistance and care, but the extent of that was not exactly clear. In cross-examination, Mr. Munn confirmed that, at the time, he was aware the applicant had eldercare responsibilities. When asked what he expected the applicant to do with those responsibilities, Mr. Munn testified that he assumed the applicant would find arrangements. At another point, when asked how taking time off would help if the applicant's mother was sick for a decade, Mr. Munn testified that, in the beginning, the problem was not as severe, but it became more severe over a period of time.

[162] The reference to tolerating the applicant's absences in recognition of his personal and family problems was repeated in Mr. Munn's April 16 and August 18, 2008 letters to the applicant. Mr. Munn testified that they felt the applicant was abusing the system and the flexibility they give senior employees to adjust their working conditions. Mr. Munn testified that if the applicant had not had family and personal problems, he would have had no justification and they would have acted sooner. In recognition of his personal and family problems, and long service, they tolerated, but at some point, flagrant abuse of the system could not be allowed to persist.

[163] It is clear from Mr. Munn's evidence that he was aware that the applicant had eldercare responsibilities. In addition, there are numerous references in the applicant's time sheets to the applicant taking his mother to medical appointments, and working at home on days that his mother was ill, and because of her ill health and care needs. Further, the applicant advised Mr. Munn in an email on April 24, 2008 that, as the principal caregiver to his mother he must take care of her attendance at doctor's appointments. In an email to Mr. Munn dated August 20, 2008, the applicant refers to having the ongoing obligation in the care of his mother and refers to the firm's prior support in his efforts to be available for her care. In email correspondence to Mr. Munn in October 2008, the applicant advised that his mother was declining and he had to

work at home one day, that he had to attend home two afternoons because of his mother, and that he had a seriously ill mother.

[164] Ms. Richardson testified that she knew the applicant had eldercare responsibilities, but did not know the extent of his responsibilities until they met in January 2009. She testified that she was surprised when the applicant said he advised all of them about that because she never had that information. She also testified that she knew from Mr. Munn that there was some association with the applicant's mother, and other things, that kept him out of the office, and she understood "family problems", as referred to in Mr. Munn's letters to the applicant, to be the applicant's mother.

[165] Ms. Richardson testified that all the partners were aware from Mr. Munn's description that the applicant was away from the office for various reasons, not all to look after a family member, but that some of the reasons were to look after his mother. She testified that they did not discuss eldercare responsibilities as they never received a "submission" from the applicant. At another point she testified that she knew about the letters that were sent to the applicant, but never received a request for accommodation from either Mr. Munn or the applicant.

[166] Ms. Richardson was referred to the applicant's August 20, 2008 email to Mr. Munn, copied to the partners, wherein he referred to having the ongoing obligation in the care of his mother, and the firm's prior support in his efforts to be available for her care while leveraging technology. Ms. Richardson remembered reading that, but testified that when the applicant says "care for mother", she did not really know, as this gives her no notion of what he needs or what is involved. She testified that the applicant is describing what he is doing in terms of technology, and not what his eldercare responsibilities are. She did not really understand what he was doing. She knew he was involved in some care for his mother, but she did not know what. She testified that they have people who are "specific" and they make a request. She stated that in his email, the applicant is telling them what he is doing, and thanking them for the past, but not making a request. She testified that she would have expected the applicant to have said what he was doing and what he needed to accomplish that.

[167] The applicant testified that the respondents never asked for medical documents for his sick days, nor did they ask to see his mother's medical records. He testified that, prior to the termination of his employment, he was not asked about his home care responsibilities or arrangements, and he was never asked by the respondents for any documents regarding his mother's care or his accommodation needs. He also testified that the respondents never asked him what they could do to help with his accommodation needs.

[168] Mr. Munn confirmed that if an employee needs accommodation, typically, his practice is to wait for them to come to him. He testified that it is one thing to know an employee has a sick spouse or parent, and another to know they require accommodation. He described it as a personal issue, and testified that it is not their place to pry, unless the employee brings it to their attention.

[169] With respect to the applicant's mother being ill, Mr. Munn testified that he did not doubt what the applicant said. He confirmed that he never asked for medical records, and testified that he did not need proof, that it was private and personal information, and he would not ask for that. He also confirmed that he did not make any inquiries. Mr. Munn testified that the applicant never suggested that he could not come in because of care obligations. Rather, on several occasions, the applicant said he could make arrangements to attend the office during core hours, but he was absent from the office for a number of reasons, not all because of his mother.

[170] At another point, Mr. Munn was asked if there was any consideration of a "middle ground" such as the applicant working at home a certain number of days or part days. Mr. Munn testified that the applicant agreed he would be in the office from 8:30 to 5:00 each day, but if he had said he could be in the office at certain times and not others, Mr. Munn presumed they would have made some effort to accommodate. When asked if he did not suggest it, Mr. Munn testified, "why would we", as the applicant said he would be in 8:30 to 5:00.

[171] In my view, based on the evidence, the respondents clearly failed with respect to the procedural dimensions of the duty to accommodate. I find that the respondents were aware that the applicant had eldercare responsibilities affecting his attendance. Rather than seek reasonable and relevant information from the applicant regarding his needs related to his mother's care, the respondents simply continued to insist that the applicant attend the office from 8:30 a.m. to 5:00 p.m., or some equivalent. For example, in an email dated October 9, 2008, the applicant advises Mr. Munn that his mother was declining and he had to work at home one day. In his October 10, 2008 response to the applicant, Mr. Munn indicates that he is sorry to hear about the applicant's mother; however, work at home does not count. Mr. Munn indicates that during the month of September, the applicant failed to attend the office on any day for the "8:30 – 5:00 period (or equivalent) as required by the office manual" and that the applicant is "on very thin ice." Further, Mr. Munn was asked about his statement to the applicant, in his October 14, 2008 email, that he was not interested in the applicant's "daily excuses", and confirmed that health issues with the applicant's mother was one of the excuses the applicant gave.

[172] In the circumstances, being aware that the applicant had eldercare responsibilities affecting his attendance, the respondents had a duty to consider and explore the possibilities of accommodating the applicant's needs related to his eldercare responsibilities. 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: See *Robdrup v. J. Werner Property Management*, 2009 HRTO 1372, at para. 28. I find that the respondents failed to do so. While the applicant had many absences, it does not appear that the respondents took any steps to determine if his absences were required due to his eldercare responsibilities. Based on all the evidence, the respondents did not engage in any dialogue whatsoever with the applicant concerning his needs related to his eldercare responsibilities and the possibility of accommodating those needs. See *Duliunas v. York-Med Systems Inc.*, 2010 HRTO 1404, at para. 75.

[173] I note that the Supreme Court of Canada has explained that "[t]he search for accommodation is a multi-party inquiry" and that there is "a duty on the complainant to assist in securing an appropriate accommodation." See *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at para. 43. The Supreme Court also explained that this does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. 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. See *Renaud*, at para. 44. 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: See *Simpson v. Commissionaires (Great Lakes)*, 2009 HRTO 1362, at paras. 36-40.

[174] In the present case, the respondents submit that the applicant did not keep them apprised of his mother's health situation, nor did he communicate any need for accommodation. First, as set out above, the applicant did inform the respondents on a number of occasions of his eldercare responsibilities. Second, the respondents never asked the applicant about his responsibilities in relation to his mother's health, and stated that they were not interested in hearing about such "excuses". Third, while I agree that the applicant never made a formal request for accommodation, the respondents were aware that the applicant had eldercare responsibilities affecting his attendance, thereby giving rise to a duty to accommodate. Nevertheless, it is unfortunate that it appears from the evidence that neither the applicant nor the respondents, as professionals, ever initiated a meaningful dialogue in relation to accommodating the applicant's eldercare responsibilities. Accordingly, I find that the respondents infringed the applicant's rights under the *Code* by failing to meet the procedural aspect of their duty to accommodate the applicant's *Code*-related needs.

The substantive duty to accommodate

[175] The Supreme Court of Canada has held that once an applicant establishes that a rule is *prima facie* discriminatory, the onus shifts to the respondent to prove on a balance of probabilities that the discriminatory rule has a reasonable and *bona fide*

justification. In order to establish this justification, a respondent must show that:

> i. it adopted the standard for a purpose rationally connected to the performance of the job;
> ii. it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
> iii. the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
>
> *Meiorin, supra*, at para. 54.

[176] The applicant alleges that the respondents unilaterally changed the terms of his contract, in not allowing him to maintain a flexible work schedule in order to care for his mother. He alleges that the ability to work from home was a material implied term of his employment relationship over the eight to ten years prior to the termination of his employment. He alleges that he had worked closely with Mr. Zeidler who had always supported him and allowed him to develop a flexible schedule in order to meet his responsibilities both at home and at work.

[177] The applicant testified that, although there was no formal process or policy, he was accommodated by ZRV through his relationship with Mr. Zeidler, who was aware of his familial obligations. He testified that he had no defined schedule. In his August 20, 2008 email to Mr. Munn, he refers to the firm's prior support in his efforts to be available for his mother's care while using technology.

[178] The applicant alleges that ZPA did not voice any concerns with his performance until Mr. Ziedler became ill in November 2007, which resulted in Mr. Munn becoming more involved with the day-to-day operations of the firm. It is clear from the evidence, however, that the applicant received a written warning from Mr. Munn on July 24, 2007, copied to Mr. Zeidler. Mr. Zeidler was also copied on Mr. Munn's August 10, 2007 email to the applicant, wherein Mr. Munn stated that the only time that counts is the time the applicant spends in the office. Ms. Richardson confirmed that Mr. Zeidler was in the office when the "first letter" was sent, and it was her understanding that he expected

people to be in the office and that he wanted them there as much as possible. The applicant also testified that it was not until late 2007 that Mr. Zeidler became ill and was away from the office. An email dated November 27, 2007, refers to Mr. Zeidler not being in the office at that time. With respect to the July 24, 2007 letter, the applicant also agreed that there was a change in what his employer was expecting of him.

[179] While it is clear from the respondents' own evidence that they "tolerated" the applicant's absences for a long time, in recognition of his personal and family problems, I also note that Mr. Munn's July 24, 2007 letter to the applicant states that it has been some time since Mr. Munn and the applicant last discussed the applicant's attendance at the office. Mr. Munn testified that he discussed attendance with the applicant on several occasions over the previous ten years, and that the applicant was never exempted from core hours, which are referred to in ZPA's 2003 Office Manual.

[180] While I do not accept that the applicant was previously accommodated by having no defined schedule, it appears that Mr. Munn's July 24, 2007 letter to the applicant marked a change in the respondents' approach to the applicant's attendance, and was followed by an increased monitoring of his attendance. He began to receive written warnings that if he did not attend as required, his employment would be terminated, and there is no evidence that the applicant ever received a written warning in relation to his attendance prior to this time. His employment was ultimately terminated on January 9, 2009. Although the applicant was also told that work at home would not count, it appears that the respondents never made any deductions to the applicant's salary when he worked at home.

[181] In any event, the respondents have the burden of demonstrating that accommodating the applicant would have resulted in undue hardship. With respect to undue hardship, the Supreme Court has emphasized that "some hardship is acceptable; it is only 'undue' hardship that satisfies this test." See *Renaud, supra*, at p. 984. For the reasons that follow, I do not find that the respondents have established that accommodating the applicant would have resulted in undue hardship as prescribed by s. 11 of the *Code*. In these circumstances, I need not determine whether or not the

respondents' attendance requirements concerning the applicant - that he attend the office at least from 8:30 a.m. to 5:00 p.m. each working day, except when his attendance was required at a business-related meeting outside the office - were rationally connected to the performance of his job, and adopted in good faith.

[182] First of all, as I have found, the applicant's eldercare responsibilities required that he be away from the office on a number of occasions during the time that the respondents expected he attend at the office, and were taken into account in the decision to terminate his employment. His responsibilities in relation to his mother increased significantly after mid-October 2008, and her condition then required that he be away from the office on quite a few occasions during the time that he was expected to attend. I have not accepted, however, that all of the applicant's absences, including many absences prior to mid-October 2008, were necessary as a result of his eldercare responsibilities. To be clear, the respondents' duty to accommodate is with respect to *Code*-related absences only.

[183] With respect to undue hardship, Mr. Munn testified that, although they have the ability to connect to the office remotely and do that at all times, they find it increasingly important that people are there during core hours. In an email to the Toronto office dated April 17, 2008, Mr. Munn reiterated office policy that everyone was required to be at the office with their team and indicated that working in any other location, such as home, is counterproductive. Mr. Munn testified that his firm believes that people working in a team need to work together, and that for core hours when the team is active at the office, his view is that people have to work together and interact "face to face". Ms. Richardson also testified that it is important to be "face to face", and that they do not have arrangements with employees where they work at home on a regular basis.

[184] In addressing the applicant's attendance in his July 24, 2007, and April 16 and August 18, 2008 letters, Mr. Munn repeats that it is very demoralizing to the applicant's project team and the office as a whole, that the applicant's lack of attendance is glaring and everyone notices, and that his team is suffering from a lack of direct contact. He

refers to a void left by his absence being filled with conflicting instructions and indecisiveness, and that his team needs leadership that it is not getting.

[185] Mr. Munn also testified that it was his understanding that on several occasions the applicant called team meetings and did not show up for them. The applicant denied failing to show at project meetings, and testified that he delegated authority. Mr. Munn's evidence that the applicant called team meetings and did not show up for them on several occasions was hearsay evidence. As such, without direct evidence, I am not prepared to find that the applicant failed to attend team meetings that he called where he was expected to attend.

[186] Mr. Wright testified that when the applicant worked at home he could usually reach him by email or phone, and he had the applicant's cell phone number. He testified that, in his opinion, the applicant working at home did not have a substantially negative effect on the team. On the other hand, Mr. Wright testified in cross-examination that when the applicant worked at home there were times when they could not get in touch with him. He agreed that there may have been some problems because the applicant was not in the office, and testified that there were some complaints.

[187] Mr. Dawson testified that he could not recall any element of frustration of not being able to get in touch with the applicant, that his responses were "first rate", and that there was never any problem reaching him at home. Mr. Dawson also clearly confirmed his view that the applicant was good at his job and testified that the work was done.

[188] Ms. Richardson testified that the partners knew the applicant had skills in project management, but were increasingly annoyed that he was not in the office with them. She did not question the applicant's commitment to the job, and that he was a really good contact for the client on the Trump project. She also did not question his commitment to architecture, and ability to handle complexity and project management. She did, however, question his commitment to the firm and the partnership. Mr. Munn confirmed that he had a high opinion of the applicant's skills and abilities.

[189] Although the applicant testified that during 2007 and 2008 there were no complaints from either his team, or his client, regarding absences, or an inability to reach him, it appears from Mr. Wright's evidence that when the applicant worked at home he could usually reach him but there were times that he could not. There was no evidence, however, drawn to my attention, that the applicant was ever told there was a problem reaching him at home or that there was ever a complaint of any kind that the applicant could not be reached at home. Mr. Dawson also clearly testified, and I have no reason to doubt, that he never had any problem reaching the applicant at home.

[190] I accept that there may have been some problems because the applicant was not in the office, but no details of any problems were given by Mr. Wright. While in his letters to the applicant, Mr. Munn repeatedly referred to the applicant's attendance as demoralizing, and stated that his team was suffering from the lack of direct contact, Mr. Munn did not testify with respect to any problems that the applicant's absences were creating for his team at the hearing. Ms. Richardson testified that the partners were increasingly annoyed that the applicant was not in the office with them, but did not testify about any morale issues.

[191] As the Tribunal explained in *McDonald, supra*, at para. 36, the Supreme Court of Canada has confirmed Tribunal jurisprudence that states that employers cannot rely upon beliefs or impressionistic evidence in establishing undue hardship. See for example *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, 1982 CanLII 15, 132 D.L.R. (3d) 14 (S.C.C.) at para. 21, and *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., [2007] 1 S.C.R. 650, 59 C.H.R.R. 276, 2007 SCC 15 (CanLII), at para. 226.

[192] In the circumstances, I accept that the applicant's absences may have caused some problems for his team, as Mr. Wright testified. In my view, however, there is insufficient evidence to establish that accommodating the applicant's *Code*-related absences would have resulted in undue hardship within the meaning of the *Code*. Beyond the rather bald assertions in Mr. Munn's letters to the applicant, there does not appear to be any evidence that was drawn to my attention describing any problems that

the applicant's absences, which include when he was working at home, were actually creating for his team or others at the office. In fact, Mr. Wright testified that the applicant working at home did not have a substantially negative effect on the team. In my view, therefore, there is insufficient evidence to establish that accommodating the applicant's limited number of *Code*-related absences would have created problems for his team or others at the office amounting to undue hardship within the meaning of the *Code*.

[193] In my view, based on the evidence, the respondents' primary concern with the applicant's absences from the office appears to be one of morale. As the Tribunal also explained in *McDonald, supra*, at para. 42, it is not clear that morale in the workplace can be considered in assessing undue hardship under the *Code*, as s. 11 prescribes "considering the cost, outside sources of funding, if any, and health and safety requirements, if any":

> The factors to be assessed are spelled out in section 11, and the applicable principles of statutory interpretation suggest that nothing other than those factors and any regulatory provisions be considered. Morale in the workplace has been suggested as a factor in assessing "reasonable accommodation" by the Supreme Court, for example in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, 1990 CanLII 76 (SCC), [1990] 2 S.C.R. 489, 12 C.H.R.R. D/417. However, that decision and others were based on the human rights legislation of other jurisdictions, which are differently worded. As noted more recently by the Supreme Court in *Meiorin*, *supra*, at para. 63, and confirmed in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000* (SCFP-FTQ) (2008), 63 C.H.R.R. D/301, 2008 SCC 43 (CanLII), 2008 SCC 43, at para. 12, "[T]he various factors are not entrenched, except to the extent that they are expressly included or excluded by statute."

[194] In the circumstances of this case, assuming, without finding, that morale is a relevant factor in assessing undue hardship within the meaning of s. 11 of the *Code*, I nevertheless remain of the view that there is insufficient evidence to establish that accommodating the applicant's *Code*-related absences would have resulted in undue hardship within the meaning of the *Code*. While I accept that the applicant's absences may have caused some problems with morale, again, beyond some rather bald assertions in Mr. Munn's letters and emails to the applicant regarding morale, there

does not appear to be any other evidence drawn to my attention describing how the applicant's absences, including when he was working at home, affected workplace morale.

[195] I also note that, with respect to taking morale into account in assessing undue hardship, the Supreme Court of Canada held in *Renaud, supra*, at para. 30, that "objections based on attitudes inconsistent with human rights are an irrelevant consideration." In the present case, Mr. Munn stated in an email to the applicant on April 18, 2008, that the applicant's chronic failure to attend the office continued to be glaring, and that it was a joke among the staff. In his July 24, 2007 letter to the applicant, Mr. Munn stated that he understood that staff were fighting over the applicant's workspace as a place to park their bicycles.

[196] As I have found above, the respondents failed to consider and explore the possibilities of accommodating the applicant's *Code*-related needs related to his eldercare responsibilities. In addition, Ms. Richardson testified that the respondents do not have a written human rights or anti-discrimination policy, or a formal accommodation policy. Lastly, while the applicant testified that his team on the Trump project was aware of his care giving responsibilities for his mother, it is not clear if the staff that Mr. Munn refers to in his correspondence to the applicant included individuals who were aware that the applicant had eldercare responsibilities.

[197] Moreover, the respondents' evidence concerning undue hardship is based on all of the applicant's absences, many of which were not *Code*-related. The respondents would not have run afoul of the *Code* had they insisted on the applicant's attendance in all circumstances, except where absences were required because of eldercare. In my view, there is no evidence that accommodating only those absences that were required due to the applicant's eldercare responsibilities would have resulted in any undue hardship to the respondents. The violation of the *Code* arises because of the respondents' blanket insistence that no absences, except when attendance was required at a business meeting outside the office, were acceptable, and their failure to distinguish between *Code*-related and other absences. The respondents' justification for

failing to accommodate, which focuses on the applicant's overall attendance, does not show why they could not have accommodated the applicant's *Code*-related absences.

[198] In assessing undue hardship in the present case, I have also considered that it appears undisputed that, shortly before the termination of the applicant's employment, he had advised them that his mother had been accepted into a nursing home. The applicant testified and confirmed in cross-examination that his mother went into a nursing home at the beginning of January, prior to the termination of his employment, and that he told Mr. Munn prior to Christmas 2008 that she had been accepted.

[199] Ms. Richardson testified that they were talking about terminating the applicant's employment very seriously in late November 2008, but that it mattered what the applicant was going to do up to the last day. She also testified that she became aware in late December 2008 that the applicant's mother had been accepted into a facility, and when they met with the applicant in January 2009 he said that was occurring. She testified that the applicant said things could really change because of that, it was a milestone, and things could be different. His employment was nevertheless terminated.

[200] I find that, at or around the time that the applicant's employment was terminated, his mother entered a nursing home, and that the respondents were aware that the applicant's mother had been accepted into a nursing home prior to terminating his employment. While the applicant's responsibilities in relation to his mother increased significantly around mid-October 2008, for an approximately two and a half month period, it appears that his care responsibilities to his mother were changing significantly at or around the time that his employment was terminated, with his mother moving into a facility. The applicant confirmed that his care responsibilities were reduced when his mother moved into a facility, as she clearly had 24-hour care, and Ms. Richardson acknowledged that the applicant told her and Mr. Munn when they met with him to terminate his employment that he said that things could really change because of his mother moving into a facility. Accordingly, it appears that the particular accommodation that the applicant required in late 2008 was coming to an end at or around the time that the respondents terminated his employment, and the respondents were aware of this.

[201] Lastly, although Mr. Munn disputed the number of hours that the applicant claimed to have worked overtime, the respondents did not appear to dispute that the applicant performed his job, despite his absences from the office, which included times that the applicant worked at home.

[202] In the circumstances, I accept that the applicant's absences may have caused some problems for his team and with morale. Again, I note that I have not accepted that all of the applicant's absences were necessary as a result of the applicant's eldercare responsibilities. I find, however, that the respondents have not established that accommodating the applicant's *Code*-related absences, which included more than a couple of dozen absences between January 1, 2007 and mid-October 2008, and quite a few absences after mid-October 2008 until the applicant's mother entered a nursing home, would have resulted in undue hardship. Consequently, I find that the respondents have failed to meet both the procedural and the substantive components of the duty to accommodate.

The contract offer

[203] The applicant also submits that he was subjected to discrimination when, after terminating his employment, the respondents offered to engage him on a contract basis. The respondents, on the other hand, submit that the alternate offer was a form of accommodation which the applicant refused.

[204] I have already found that the respondents subjected the applicant to discrimination contrary to the *Code* when they terminated his employment and failed to accommodate him. In so doing, I have considered the respondents' offer to employ the applicant on a contract basis as part of the factual matrix surrounding the failure to accommodate the applicant and the termination of his employment.

[205] I do not agree with the respondents' submission that the offer to employ the applicant on a contract basis was a form of accommodation. The offer came after the applicant's employment was terminated, and after he asked that he be given another chance. The evidence does not support the contention that the offer was a form of

accommodation. The offer was for an initial 3-month term, and the applicant would no longer have had the designation of "Principal." Mr. Munn testified that if the applicant were to say that he had to leave early to take his mother to a medical appointment, he did not know what they would have done as they did not contemplate that. In view of this evidence, there is no indication that the offer was designed to, or would have, accommodated the applicant as required by the *Code*.

Was the applicant subjected to harassment on the basis of family status within the meaning of the *Code*?

[206] The applicant submits that the respondents infringed his right to freedom from harassment in the workplace, contrary to s. 5(2) of the *Code*, by accusing him of misrepresenting time he spent working from home, threatening to terminate his employment if he was unable to comply with their requirements regarding attendance at the office, and refusing to provide him with an iPhone. The respondents deny that the applicant was subjected to any harassment within the meaning of the *Code*.

[207] I have already found that the respondents failed to accommodate the applicant, contrary to the *Code*, when they continued to categorically insist that he attend the office from 8:30 a.m. to 5:00 p.m., rather than seek information from him regarding his needs related to his mother's care. I do not find, however, that warning the applicant that his employment would be terminated if he did not attend at the office as required, constitutes "harassment" within the meaning of the *Code*.

[208] The applicant acknowledges that it was not on its face discriminatory for the respondents to attempt to manage his attendance. Further, it seems to me that warning or disciplinary communications in the workplace would be, by their very nature, unwelcome to their recipients. In my view, the question is whether or not the respondents' warnings to the applicant were known, or ought reasonably to have been known, to be unwelcome to the applicant as vexatious within the meaning of the *Code*. In my view, in the particular circumstances of this case, while no doubt distressing to the applicant, I do not find that a reasonable person would find the respondents' warnings

regarding the applicant's attendance at the office to be "unwelcome" as "vexatious" within the meaning of the *Code*.

[209] I am also not persuaded that the respondents harassed the applicant by accusing him of misrepresenting the time he spent working from home. While Mr. Munn questioned the applicant's overtime claims, the evidence does not support a finding that this was linked to the ground of family status.

[210] Lastly, I do not see how not providing the applicant with an iPhone could amount to harassment within the meaning of the *Code*. Accordingly, the applicant's claims that he was also subjected to harassment within the meaning of the *Code* are dismissed.

Summary

[211] I find that the respondents subjected the applicant to discrimination on the basis of family status when they failed in both the procedural and substantive aspects of their duty to accommodate the applicant short of undue hardship, and terminated his employment. The respondents thereby violated the applicant's right to equal treatment and freedom from discrimination on the basis of family status, contrary to sections 5(1) and 9 of the *Code*. The respondents are jointly and severally liable for this violation.

REMEDY

[212] The Tribunal's remedial powers are set out in s. 45.2(1) of the *Code*, which provides, among other things, the power to order monetary compensation and restitution for loss arising out of the infringement, including compensation and restitution for injury to dignity, feelings and self-respect. The Tribunal may also direct any party to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with the *Code*.

[213] The applicant seeks monetary compensation for the intangible harm caused by the infringement of his rights under the *Code*, an additional 36 weeks of salary, compensation in respect of employee benefits, and future compliance remedies.

Injury to dignity, feelings and self-respect

[214] Prior to section 45.2(1) of the *Code* coming into force, the Tribunal had identified the relevant criteria to be used in assessing the appropriate award of damages to compensate for the infringement of rights enumerated in the *Code* which have an intrinsic value and for mental anguish. See *Sanford v. Koop*, 2005 HRTO 53. Although the remedial provisions of the *Code* no longer refer to "mental anguish", the Tribunal has found the criteria developed in previous cases helpful in determining the appropriate damages for injury to dignity, feelings and self-respect. See *S.H. v. M(…) Painting*, 2009 HRTO 595, and *Hughes v. 1308581 Ontario*, 2009 HRTO 341. The Divisional Court, in *ADGA Group Consultants Inc. v. Lane*, (2008) 295 D.L.R. (4th) 425, held that the following are among the factors that Tribunals should consider when awarding general damages: humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment.

[215] In addressing relevant factors in determining damages for injury to dignity, feelings and self-respect, in particular cases, the Tribunal provided the following comments in *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, at paras. 52-54:

> (…) The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 (CanLII), 2009 HRTO 940 at para. 16 (CanLII).
>
> The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end

> of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII), 2005 HRTO 53 (CanLII) at paras. 34-38.

[216] In the present case, the applicant testified that the respondents' treatment had a devastating effect on him. He testified that he gave his entire working career to the firm, and that he had no respite or sanctuary at the office, or from the care of his mother. He said it was utterly draining, but he still delivered the project, and testified that he could not begin to communicate the emotional drain of the last 2 years.

[217] With respect to the termination of his employment, in particular, the applicant testified that, professionally, he is not an architect any more, and his reputation is permanently harmed in the community. He testified that he gets calls and people ask him where he is and he has to re-live the story again. He testified that the harm done is something that he cannot recover from. He queried where, at age 58, he could find another 30 years to work in a firm and devote himself as he did. He also queried who was going to hire him at the end of his current project. Ms. Richardson testified that when the applicant's employment was terminated he expressed some shock, dismay and concern, and was distressed.

[218] Based on the evidence, I accept that the applicant suffered a considerable loss of self-respect, dignity and confidence. He worked for the respondents for approximately 27 years, which was essentially his entire career, before his employment was terminated. I have found that he was subjected to discrimination on the basis of family status when the respondents failed in both the procedural and substantive aspects of their duty to accommodate the applicant, and terminated his employment. I also note that the respondents failed to accommodate the applicant over an extended period of time. On the other hand, I note that the applicant had many absences which I have not accepted were *Code*-related, and it appears from the evidence that the applicant, as well as the respondents, never initiated a meaningful dialogue in relation to accommodating his eldercare responsibilities.

[219] In all of the circumstances, I consider an award of $15,000 to be appropriate compensation for the impact of the discrimination, including the failure to accommodate the applicant, on his dignity, feelings and self-respect. This amount is consistent with awards in other failure to accommodate and termination of employment cases in which there is evidence of significant personal impact. See *Duliunas, supra*, at para.101.

Other compensation

[220] The applicant confirmed that the respondents paid him until January 16, 2009, plus an additional 34 weeks. He testified that his client with the Trump project offered him employment a week after his employment was terminated and he started his new employment 4 to 5 weeks later. He testified that he earns $8000.00 more per year than he did with the respondents, but he does not have bonuses, benefits, holidays, or sick time. He is able to claim expenses with his new employer that he was not able to claim with the respondents.

[221] In my view, the evidence does not support the applicant's claim for a further 36 weeks salary and compensation for benefits which he values at $3,000 per year. In my view the applicant mitigated his losses when he began employment directly with his client on the Trump project at a higher salary level, where the difference in salary was greater than the lost benefits. I also note that the applicant testified that, since his last day with the respondents, he had not sought out any other employment until the end of November 2010.

Compliance with the *Code*

[222] The applicant asks that the respondents be ordered to, at their own expense, establish and implement a comprehensive, written anti-discrimination, anti-harassment and accommodation policy, and hire a human rights consultant to provide a mandatory training program about human rights and, in particular, the duty to accommodate, for all staff and managers.

[223] Ms. Richardson testified that, in August 2008, she became the first partner responsible for human resources, but that she has not taken human rights training. Mr. Munn was not aware of anybody having human rights training, including the office manager previously responsible for human resources.

[224] Ms. Richardson also confirmed that the respondents do not have a written human rights or anti-discrimination policy, or a formal accommodation policy. She testified that, informally, one could email her with a request.

[225] In my view, the respondents could benefit from developing a human rights policy that addresses the duty to accommodate, and from training on the policy. I find that it is appropriate in the circumstances to order that the respondents develop a human rights policy, and implement training on the policy, as set out below.

ORDER

[226] The Tribunal orders as follows:

1. Within 30 days of the date of this Order, the respondents shall pay the applicant $15,000.00 for injury to dignity, feelings and self-respect;

2. Pre-judgment interest is payable on the above amount from January 9, 2009, to the date of this Decision, in accordance with the *Courts of Justice Act*. Post-judgment interest is payable on any amount not paid within 30 days of the date of this Decision in accordance with the *Courts of Justice Act*.

3. Within 120 days of the date of this Order, the respondents shall, at their own expense:

   (i) develop and implement a workplace human rights (anti-discrimination and anti-harassment) policy, that includes the duty to accommodate in the workplace, and distribute the policy to all partners and staff.

   (ii) provide a mandatory human rights training program about human rights and, in particular, the duty to accommodate, for all partners and staff who perform supervisory and/or human resources functions.

4. Within 130 days of the date of this Order, the respondents shall confirm to the applicant's representative that the steps set out in paragraph 3 of this Order have been complied with.

Dated at Toronto, this 17th day of August, 2012.

"signed by"

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Brian Eyolfson
Vice-chair