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EMPLOYMENT + LABOUR LAWYERS

Human Rights in Employment

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Purposes of Human Rights Law

- Individuals should have equal opportunity and access to participate in society, including employment, without being hindered by discrimination
- Individuals should have their needs reasonably accommodated to be able to meaningfully participate



Why is Discrimination Prohibited in Employment?

“Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.”

- Supreme Court of Canada



BC Human Rights Code

An employer may not:

- i. refuse to employ, or continue to employ, a person, or
- ii. discriminate against a person regarding employment or a term of employment,

based in whole or in part on a protected ground.



Discrimination

- Obligation not to discriminate applies:
 - During hiring (pre-screening, interviews, evaluation);
 - During employment (terms, wages, harassment by co-workers); and
 - At time of termination



Protected Grounds (BC)

- Race
- Colour
- Ancestry
- Place of origin
- Political belief
- Religion
- Criminal conviction unrelated to employment
- Sex (includes pregnancy)
- Sexual orientation
- Marital status
- Family status
- Physical disability
- Mental disability
- Age
- Gender identity or expression



Proving Discrimination

- Test for discrimination:
 - Does the individual have a protected characteristic?
 - Has the individual suffered an adverse impact or consequence?
 - Is there a connection between the adverse impact and protected characteristic?
- If the answer to all is “yes”, the employee has proven “*prima facie*” discrimination and the employer must justify its conduct



What is Adverse Impact?

- Broad and includes:
 - Termination or discipline;
 - Failure to hire;
 - Adverse change in terms of employment;
 - Harassment/ bullying/ name-calling; or
 - Inability to meet workplace standard or expectation, including attendance



Connection between Adverse Impact and Protected Characteristic

- Not enough to show that have protected characteristic and that experienced bad treatment
- Must be a connection or nexus between characteristic and bad treatment or between characteristic and impact
- Protected ground need only be one factor in treatment to be discrimination
- No intention to discriminate necessary
 - Although an intention to discriminate could be a factor in damages awarded



Defence to Discrimination

- An employer may justify *prima facie* discriminatory conduct if there is a *bona fide* occupational requirement (BFOR) or *bona fide* justification (BFRJ) for the conduct or rule
- The burden is on the employer to show that a BFOR or BFRJ exists
- The duty to accommodate arises in this context



Bona Fide Occupational Requirement

- Was the standard or rule adopted for a purpose rationally connected to the job?
- Did the employer adopt the rule in an honest and good faith belief that it was necessary to the fulfillment of a legitimate work-related purpose?
- Is the rule reasonably necessary to the accomplishment of the legitimate work-related purpose in the sense that it is impossible to accommodate the claimant without undue hardship?



Consequences for Breach

- Cease and desist orders
- Orders that an opportunity be made available, e.g. a particular position awarded
- Orders that an accommodation be implemented
- Orders for Human Rights training for employees
- Reinstatement is technically available, but this is very rare
 - Damages are almost always ordered instead of reinstatement



Consequences for Breach

- Monetary damages:
 - Injury to dignity
 - Awards have ranged from \$0 to \$176,000 (although no statutory maximum)
 - Most awards are currently \$20,000 or less, but the amounts are increasing significantly
 - Lost wages
 - Can be up to the date of decision, which may be several years
 - Subject to mitigation
 - Not necessarily limited by “common law” entitlements



Consequences for Breach

- Monetary damages:
 - Other expenses flowing from the breach
 - Hearing expenses, such as experts
 - Counselling and other medical expenses
 - Mitigation expenses such as costs incurred to search for new work
- Legal fees for pursuing the complaint are generally not compensable
- Costs are only awarded for poor conduct during the complaint



Hiring

- Cannot refuse to hire someone based in whole or in part on prohibited ground unless BFOR established
- To avoid allegations of discrimination in hiring:
 - Define job requirements in writing
 - During interviews, ask questions about the candidate's skills and abilities
 - Avoid personal questions related to protected grounds (e.g., age, marital status) unless it relates to a BFOR



Discipline and Termination

- Cannot terminate or discipline an employee based in whole or in part on protected characteristic
- Tricky, but more common situation: where employee has a protected characteristic and employer wants to terminate or discipline for non-discriminatory reasons
 - Make sure the reasons for the discipline are well-documented and communicated
 - Ensure that there is proof that other employees with similar conduct have been treated consistently



Duty to Accommodate

- Employers must make changes to the workplace to reasonably accommodate an employee with a need for such change due to a protected characteristic so long as the accommodation does not impose undue hardship
- Not a free-standing obligation; only arises when an employee would otherwise experience *prima facie* discrimination
 - For example, cannot meet a workplace standard in whole or in part because of a disability



What is a “Disability”?

- A physiological state that:
 - is involuntary;
 - has some degree of permanence; and
 - impairs the persons’ ability, in some measure, to carry out the normal functions of life.
- Could be mental or physical, hidden or obvious
- Includes a “perceived disability”



Mental Health

- Not truly invisible
- Shows up in the workplace as changes in:
 - Performance
 - Absenteeism
 - Personal appearance
 - Sick days
 - Sociability
 - Response to new tasks or situations



Substance Use Disorder

- Many people use substances with no issues (i.e., alcohol, marijuana)
- Substance use becomes problematic when it starts to interfere with people's functioning at home and at work



When is the Duty to Accommodate Triggered?

- A request from an employee for an accommodation due to a protected characteristic; or
- “Constructive notice” of an employee’s need for accommodation due to the circumstances



Constructive Notice

- If the circumstances raise a possibility that an employee has a disability, employer has a “duty to inquire” with the employee prior to imposing adverse consequences such as discipline
- For example:
 - Employee with stellar attendance record starts missing significant time with no explanation;
 - Co-workers complain an employee smells like alcohol at work; or
 - Previously calm employee begins having emotional outbursts at work



Employee Obligations

- The duty to accommodate is a “two-way street”
- The employee and union must participate in the process by:
 - Discussing proposed accommodations with the employer;
 - Providing adequate medical or other information to the employer so the employer can evaluate employee’s needs and suitable accommodations
- Failure of employee to participate may disentitle the employee to any accommodation or relief from culpable consequences for conduct
- Failure to participate is not disciplinary



Duty to Accommodate

- Employers do NOT have to:
 - Create a new job;
 - Pay the same wage for a new position, if the new position would not ordinarily require that wage;
 - Tolerate excessive absenteeism or chronic poor or non-performance;
 - Keep an employee in a position where he/she cannot perform essential duties; or
 - Accommodate a “personal choice”
- Employees are entitled to “reasonable” accommodation, not perfect or preferred accommodation



What is “Undue Hardship”?

- Duty to accommodate ends when the employee has been reasonably accommodated or the employer would experience undue hardship
- Undue hardship is a very high threshold
 - Impossibility is not the test, but it is close to it
- Key factors in assessing undue hardship include:
 - Financial cost;
 - Impact on a collective agreement;
 - Problems of employee morale;
 - Interchangeability of the workforce and facilities;
 - Size of employer’s operations; and
 - Safety
- Depends on the size and means of the employer
- Undue hardship requires proof



Emerging Issues: Family Status

BC (HRT) v Gibraltar Mines Ltd., 2023 BCCA 168

- The BCCA revised the test for discrimination on the basis of family status in BC
- Requires the complainant to establish:
 - (1) a conflict between their work requirements and family obligations;
 - (2) their family status includes a substantial parental or other duty or obligation; and
 - (3) they have suffered a serious adverse impact arising from a term/condition of employment and their family status is a factor in the adverse impact



Emerging Issues: Family Status

BC (HRT) v Gibraltar Mines Ltd., 2023 BCCA 168

- A substantial parental or other duty or obligation is **more** than ordinary family responsibilities
- For example:
 - attending to the needs of a child with a major psychiatric disorder **would** amount to a substantial parental obligation
 - desiring to remain close to home, when one's work requires extended periods of time away **would not** amount to a substantial parental obligation



Emerging Issues: Gender Identity

Nelson v Goodberry Restaurant Group Ltd dba Buono Osteria and Others, 2021 BCHRT 137

- Jessie Nelson is a non-binary, gender fluid, transgender person who uses they/them pronouns
- Employed for 4 weeks – during that time, persistently referred with she/her pronouns and gendered nicknames like “sweetheart”, “honey” and “pinky” by bar manager
- Employment terminated after they asked management to stop bar manager’s behaviour



Emerging Issues: Gender Identity

Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria, 2021 BCHRT 137

- *“Like a name, pronouns are a fundamental part of a person’s identity. They are a primary way that people identify each other. Using correct pronouns communicates that we see and respect a person for who they are. Especially for trans, non-binary, or other non-cisgender people, using the correct pronouns validates and affirms they are a person equally deserving of respect and dignity.”*
- *•“As Jessie Nelson explained in this hearing, their pronouns are “fundamental to me feeling like I exist”. When people use the right pronouns, they can feel safe and enjoy the moment. When people do not use the right pronouns, that safety is undermined and they are forced to repeat to the world: I exist.”*



Emerging Issues: Gender Identity

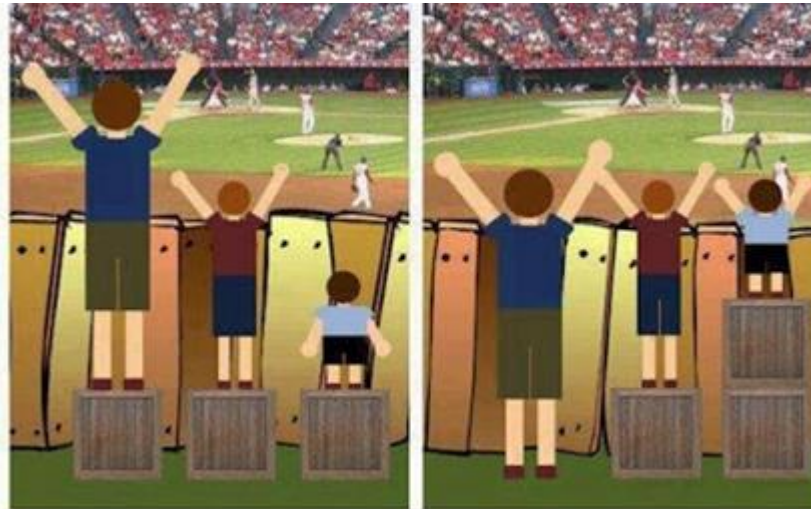
Nelson v. Goodberry Restaurant Group Ltd. dba BuonoOsteria, 2021 BCHRT 137

- Gender identity factor in termination
- A global award of \$30,000 to Jessie for injury to their dignity, feelings, and self-respect
- Employer ordered to implement a pronoun policy and mandatory training for all staff and managers about diversity, equity and inclusion



Emerging Issues: Affirmative Action

Miller v Union of British Columbia Performers, 2020 BCHRT 133





Emerging Issues: Affirmative Action

Miller v Union of British Columbia Performers, 2020 BCHRT 133

- Ms. Miller identified as a cisgender and heterosexual woman and self-described herself as being bi-racial and presenting as white
- She was a member of the Union of BC Performers (UBCP) and a writer
- The UBCP had advertised a writing workshop for members that included a statement at the top reading, “preference will be given to indigenous, LGTPB+ and diverse Members.”
- Ms. Miller filed a complaint alleging that by expressing a preference for the listed groups, the UBCP had discriminated against her



Emerging Issues: Affirmative Action

Miller v Union of British Columbia Performers, 2020 BCHRT 133

- The UBCP filed an application to dismiss the complaint, which was successful
- Tribunal confirmed that “not every distinction between protected groups is discrimination,” stating “it is not discriminatory to make distinctions when their purpose, and effect, is to promote substantive quality.”
- Ms. Miller applied to the court for a review the decision – the court denied her application



Emerging Issues: Indigenous Identity

- Added as a protected ground of discrimination on November 25, 2021
- Dedicated screening process for complaints filed by people who self-identify as Indigenous
- Indigenous parties may request an Indigenous mediator and Indigenous dispute resolution models
- *Smallboy v. Grafton Apparel*, 2021 BCHRT 15



Tribunal Update

- The BC Human Rights Tribunal is incredibly backlogged and there are extreme delays in all stages
- Between April 1, 2022 and March 31, 2023:
 - 2,624 new complaints filed, with 211 being related to Covid-19
 - 76% permitted to proceed past screening stage
 - Fiscal year closed with 5,396 active cases
 - 452 mediations, with 262 resolutions
 - 59 dismissal applications, with 31 dismissals
 - 28% of cases closed through withdrawal/abandonment
 - 23 final decisions, with only 5 dismissing the complaint



Tribunal Update

- Current timelines:
 - Respondents receiving complaints 12-18 months after filing of complaint
 - Tribunal currently deciding applications to dismiss filed in ~ January 2021
 - Hearings for complaints filed later than 2020 adjourned for rest of 2023
 - Mediations available in December 2023 and January 2024
 - Some hearings being scheduled for 2024 largely for complaints filed in 2021
 - Tribunal is limiting the length of hearings and special permission is required to schedule hearings of more than 2 weeks



Tribunal Update

- Complaint statistics:
 - 32% regarding disability (physical and mental)
 - 29% regarding ethnicity
 - 13% regarding sex
 - 8% regarding family/marital status
 - 1% regarding age
 - 12% other grounds
 - 50% of complaints relate to employment



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