HUMAN RIGHTS ISSUES ENCOUNTERED ON THE TERMINATION OF EMPLOYEES

Elizabeth J. Forster
Blaney McMurtry LLP
416.593.3919
eforster@blaney.com

INTRODUCTION

The *Human Rights Code* contains protection for all employees against discrimination because of a number of enumerated grounds. This protection applies not only during a person's employment but upon their termination.

Employers do not avoid their obligations to employees under the *Human Rights Code* by offering "generous" severance packages upon termination. Notwithstanding the offer and acceptance of the severance package employees are still free to file a complaint with the Human Rights Commission if they feel their rights under *Human Rights Code* have been violated.

It is therefore important to have a good basic understanding of the rights of employees under the *Code* to avoid Human Rights complaints.

THE HUMAN RIGHTS CODE

The *Human Rights Code* contains the following protections for employees:

s.5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

s.5(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 race, ancestry, place of origin. colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap.

s.7(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

s.7(3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(b) a reprisal or a threat of reprisal for the rejection of a

> sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person. 1981, c. 53, s.6.

WHAT DOES DISCRIMINATION MEAN?

The *Human Rights Code* does not define discrimination. The term has however been defined by the courts. The Supreme Court of Canada in the case of *Andrews v. Law Society (British Columbia),* [1989] 1 SCR 143 defined discrimination as:

> ... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages upon such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

A distinction made between employees upon a prohibited ground may constitute discrimination contrary to the *Code* even though it is unintentional. For example discrimination may result from a corporate policy which appears on its face to treat all employees the same, but which in fact has an unjustified detrimental effect on a particular individual or group of employees which share one of the personal characteristics listed in S.5 of the *Code*.

KINDS OF DISCRIMINATION

Discrimination can be either overt or constructive. Constructive discrimination is defined in the *Code* as:

> S.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;
>
> (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.

S.11(2) The Commission, the board of inquiry 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.

The Supreme Court of Canada has imposed a strict test for undue hardship and has held that an employer must almost go so far as to establishing bankruptcy before undue hardship will be found.

GROUNDS OF DISCRIMINATION

Some of the grounds of discrimination are specifically defined in the *Code*; others have been defined by case law. Still other have still not received any statutory or judicial interpretation.

It is important to be aware of the existing definitions of the prohibited grounds of discrimination.

The following is a list of the prohibited grounds of discrimination and their definitions where available:

1. Race and Colour:

Race and colour are two of the personal characteristics that are not defined in the *Human Rights Code*. However, from an examination of academic writing and scarce judicial commentary on the topic, it appears that the important aspect of this ground of discrimination is what the offending party perceived regarding the person suffering from discrimination. Such was the approach adopted in the Manitoba case of *Dakota Ojibway Tribal Council v. Bewza* (1984), 5 C.H.R.R. D/2155 (Man. Bd of Inquiry) in which a Human Rights Board of Inquiry stated:

> What is to be determined is whether or not the Respondent discriminated in a prohibited fashion against an individual or group of individuals because the Respondent perceived the person or persons as belonging to a certain racial or ethnic group. Whether or not the party or parties discriminated against objectively did belong to such group is or ought to be immaterial.

There is no indication that the personal characteristic of "colour" adds anything to the prohibition of discrimination based upon race.

2. Ancestry:

Ancestry is another term that has been defined in the case law rather than in the *Human Rights Code*. In the case of *Cousens v. Nurses' Association (Canada)*(1980), 2 CHRR D/365 (Ont. Bd of Inquiry) ancestry was defined in the following way:

> The term "ancestry" is here interpreted to mean family descent. In other words, one's ancestry must be determined through the lineage of one's parents through their parents.

3. Place of Origin:

Place of origin is also not defined in the *Human Rights Code,* but it has been cited in cases where the complainant who is a Canadian citizen has suffered discrimination regarding employment based upon the place where they originally have come. For example, in the case of *Rajput v. Watkins and Algoma University College*(1976 Board of Inquiry, unreported), a Canadian was born and raised in Pakistan and was denied re-employment at a college. The employer cited a desire not to have all three members of a department being from Pakistan. This was found to constitute discrimination based upon place of origin, as no reference to his race or colour was mentioned in the course of the complainant being denied continued employment.

4. Ethnic Origin:

Ethnic origin also lacks a definition under the *Human Rights Code* and it has also not been defined in any human rights decisions thus far. However, academic commentary has defined ethnic origin as relating to membership or association with a group that is characterized "by specific social cultural or religious practices, carried on in a largely traditional way". Ethnic origin perhaps lacks a legal definition because in human rights cases it is most often coupled with ancestry, race, or place of origin.

5. Citizenship:

Citizenship has not been defined under the *Human Rights Code*, but it refers to the person being a "citizen" of a country in the strict tense of the word. A person's citizenship of a particular nation is properly defined by the domestic law of that nation. This is in contrast to the term "nationality" which is broader than citizenship and may include persons as nationals of a nation who are not legally citizens of that particular nation.

6. Creed:

This personal characteristic has been expressed in other Canadian human rights legislation as "religion". It is not defined in the *Human Rights Code*, but was defined in 1977 by an Ontario Board of Inquiry in the case of *Ishar Singh v. Security and Investigation Services* by citing the definition from the Oxford dictionary:

> ... an accepted or professed system of religious belief: the faith of a community or an individual, especially as expressed or capable of expression in a definite formula.

The Board went on to say that, for the purposes of human rights protection, the definition of creed may go beyond the dictionary definition to include practices or customs that are associated with a person's creed. Examples of such practices are observance of a particular sabbath day and the wearing of religious attire.

7. Sex:

Although not defined in the *Human Rights Code*, sex has been clearly defined by the courts for human rights purposes as meaning a person's gender. However, the definition of sex discrimination has been expanded in subsection 10(2) of the *Code* to provide:

> S.10(2) The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

8. Sexual Orientation:

Sexual orientation has not been defined in either human rights legislation or in court or tribunal decisions. However, it has been made clear that discrimination on the basis of sexual orientation is distinct from sex discrimination and does not properly fall under the grounds of family status or marital status. It appears that the conventional definition of sexual orientation, as referring to whether a person is heterosexual or homosexual, is what is meant by sexual orientation in human rights legislation.

9. Age:

For the purposes of discrimination in employment, "age" is defined in the *Human Rights Code* to mean an age that is eighteen years or more and less than sixty-five years.

10. Record of Offences:

"Record of Offences" is defined in S.10 of the *Code*:

S.10 "record of offences" means a conviction for,

(a) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or

(b) an offence in respect of any provincial enactment.

11. Marital Status:

"Marital status" is defined in S.10 of the *Code*:

S.10 "marital status" means the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage.

12. Family Status:

"Family status" is also defined in S.10 of the *Code*:

S.10 "family status" means the status of being in a parent and child relationship.

13. Handicap:

S.10 of the *Code* also defines handicap:

S.10 "because of handicap" means for the reason that the person has or has had, or is believed to have or have had,

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,

(b) a condition of mental retardation or impairment,
(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
(d) a mental disorder, or
(e) an injury or disability for which benefits were claimed or received under the *Workers Compensation Act* ("a cause d'un handicap")

AREAS OF CONCERN ON DISMISSAL OF EMPLOYEES

Obviously it is a violation of the *Code* to dismiss employees based upon the prohibited grounds of discrimination set out in the *Code*.

Often an employer will have more than one reason for dismissing an employee. Frequently several factors, other than the one which is discriminatory, may play a part in the decision to terminate an employee. The courts have made it clear that as long as one of the reasons for termination is based upon a discriminatory ground, the dismissal is contrary to the *Code*.

Human rights tribunals have, in addition often found a discriminatory basis for termination in cases where the reasons for termination appeared on their face to have nothing to do with a prohibited ground of discrimination

The following are some examples of less overt or constructive discrimination on the termination of an employee which have been found to be violations of the *Code*.

1. Race and Colour:

The dismissal of an employee based even in part on that person's race will contravene the *Human Rights Code*. However, less obvious are cases in which an employer fails adequately to address and prevent racially-based harassment in the workplace and this omission leads to a racially harassed employee being disciplined or dismissed.

For example, in the case of *Uzoaba v. Correctional Services of Canada* (1994), 94 CLLC 17, 021 a black Classification Officer at a prison was persistently harassed over a six year period by inmates based upon his race and colour. The employer, having known about the harassment, failed to discipline any of the inmates who were harassing the complainant or to take any other measures to deal with the harassment. In addition, the employer refused to consider the complainant's requests to be transferred to employment in another institution. The employer decided that the complainant should no longer work with the inmates and the complainant lost his employment. The Tribunal found that the employer was liable for discrimination based upon its failure to act to prevent racial harassment of the employee and to deal with past acts of racial harassment of the employee.

In *Gannon v. Canadian Pacific Ltd.* (1993), 93 CLLC 17, 016, the complainant was dismissed from employment because of insubordination, but that insubordination consisted of his retaliation to the persistent racial harassment to which he was subjected. The employee's dismissal was found to have been the direct result of the discriminatory treatment he had received from his co-workers. The employer was found to be vicariously liable for the harassment committed by its employees based upon the failure to take reasonable steps to put a stop to it.

2. Ancestry, Place of Origin, Ethnic Origin:

Dismissal of employees may be challenged on these grounds based upon dismissal of a person due to characteristics associated with that ethnic background, place of origin or ethnicity. For example, in the case of *Wong v. Ottawa (City) Board of Education*, (1994), 95 CLLC 145 027 a complainant of Chinese ethnicity was declared surplus to the needs of the school when he was transferred to another school while a less qualified teacher of the same subject was kept on at the school. One of the criteria considered in choosing to declare the complainant surplus was that he did not spend as much time doing committee work as the other teacher. The fact that he spent much extracurricular time helping his students with their studies was not considered. The Board found that the school administrator had discriminated by not taking into account the Chinese viewpoint that emphasizes academics in education rather than social activities.

3. Creed:

The most common complaints of discrimination based upon a person's religious beliefs or creed have arisen in situations where an employer attempts to enact a policy requiring individuals to work on a particular day of the week and this day is considered a day of rest by a person or persons based upon their religious beliefs. In such cases, the discrimination is not intended but, rather, it is an adverse effect of a policy that is intended to apply to all employees equally. In such cases, the courts have required to show that the policy is a *bona fide* occupational requirement or qualification or, in other words, that they have implemented such a policy for good business reasons and not intentionally to discriminate against a person because of their religion.

Then, the employer must show that it has been unable to accommodate the differing religious beliefs of the complainant without undue hardship by, for example, creating an exception in the policy for persons unable to work on a particular day for religious reasons. This was the test set out in the case of *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 DLR (4th) 417. In that case, an employee refused to work, on an Easter Monday for religious reasons and was dismissed. The Supreme Court of Canada found that the employer could have accommodated the employee's religious beliefs without undue hardship by giving him that day off and thus found that the dismissal of the employee was discriminatory.

Discrimination based upon creed also arises when a person cannot comply with dress requirements for a job because of his or her religious beliefs. Such was the case in *Bhinder v. Canadian National Railway Co.* (1985) 17 Admin L.R. 111, where the complaint arose out of the

employer's safety policy requiring hard hats to be worn. The complainant refused to comply because the wearing of anything on his head but a turban contravened his religious beliefs and he was dismissed from employment. The court found that this policy had a discriminatory effect and that, although the policy was put in place for a valid safety reason, the employer could have accommodated the complainant without undue hardship by creating an exception for him.

4. Sex:

Intentional sex discrimination is common in the context of dismissal from employment. It frequently happens when the employer unreasonably believes that a particular workplace is improper or too dangerous for women and dismisses female employees on that basis. Such was the case in *Chris Bruton and Helen McInnis v. M.H.G. International and William Colborne*, (1983) 4 CHRR D/1173. In that case, two industrial nurses had their employment terminated by the employer who then proceeded to hire a less qualified male to replace them. A significant reason for the terminations was found to be that the manager did not like having female nurses on the job site. This was found clearly to constitute discrimination on the basis of sex.

Discrimination on the basis of sex can include the dismissal of a person based upon pregnancy. Most often, discrimination on the basis of pregnancy has occurred when the employer has refused to take reasonable steps to accommodate a woman who requests a change in her working arrangements based upon being pregnant. For example, in the case of *Emrick Plastics v. Ontario*, (1992), 90 DLR (4th) 476 a woman's request to be reassigned from spray painting duties to packing duties within a manufacturing plant was refused even though she had been advised by her doctor that spray paint fumes could harm her unborn baby. Instead, the employer put her on an involuntary leave of absence until her baby was born. The court found that this constituted discrimination on the basis of sex.

There have been several cases in which a complainant has been, in effect, forced from a job by sexual harassment and has been given a remedy under the *Code* based on sex discrimination. In the case of *Janzen v. Platy Enterprises* (1989), 59 DLR (4th) 352 two female restaurant employees were sexually harassed by their supervisor and were subjected to abuse from the supervisor and the manager after they complained about the harassment. This treatment continued to the point where the employees felt there was no alternative but to quit their jobs. The Supreme Court of Canada made it clear that where sexual harassment leads to an employee quitting or being dismissed and the employer has failed to take reasonable actions to prevent or stop the harassment, then the employer is liable for discrimination on the basis of sex.

5. Sexual Orientation:

Dismissal of an openly homosexual employee based in part on the disruption caused by the discriminatory reaction of employees to her presence has been found to be discrimination on the basis of sexual orientation. This was the situation in *Waterman v. National Life Assurance Co.of*

Canada (No. 2), (1993), 18 CHRR D/176 where an openly lesbian complainant was dismissed in part because management felt that her presence in the company "was a disturbing factor" regarding the work environment. It was found that because one of the considerations in the dismissal was the fact that the complainant was a lesbian, the dismissal was discriminatory on the basis of sexual orientation.

6. Age:

Probably the most common circumstance involving age discrimination involve mandatory retirement policies requiring employees to retire at a certain age. As was stated above, "age" is defined under the *Human Rights Code* as any age between 18 and 65. Thus mandatory retirement policies providing for retirement at age 65 or later are not discriminatory.

However, any mandatory retirement policy providing for retirement prior to the age of 65 is likely to be found to discriminate on the basis of age. It is then incumbent upon the employer to justify its actions in imposing an earlier retirement age. In the case of *Large v. Stratford (City),* (1995), 128 DLR(4) 193 the complainant, an officer with the Stratford police force, was forced to retire at age 60 by a policy of mandatory retirement for police officers. The court found that this policy was on its face discriminatory, but it was upheld as was done without the intent to discriminate and was aimed at enforcing valid occupational requirements. There was much evidence brought forward about the decline in physical fitness and capacity that occurs in most people after the age of 60 and the fact that such a decline makes police work especially difficult for most of those over the age of 60. In addition, it was noted that the policy was adopted at the request of the police officers. The retirement policy was therefore upheld.

Employers wanting to impose a mandatory retirement age of earlier than 65 must be able to justify it based upon evidence regarding the necessity of such an early retirement policy.

7. Record of Offences:

This has not been a common ground for discrimination complaints in Ontario. One example was the case of *Re Lancaster* (1986), 10 CCEL 249 which involved a complaint by a Zellers employee that he had been dismissed from employment when his employer found out that he had been dismissed from previous employment at another Zellers store for theft and had been convicted of theft. The complaint was dismissed, however, because the Board found that the loss prevention policy of the store dictated that they not employ persons who had previously been dismissed due to theft. It was not based upon whether those persons had been convicted of theft and thus it was not discriminatory on the basis of record of offences.

8. Marital Status and Family Status:

Complaints have been brought for discrimination based upon marital status where an employee has been fired because his or her association with his or her spouse has been seen to interfere with the employee's ability to properly do his or her job.

A further example of this type of discrimination was in the case of *Broere v. W.P. London and Associates Ltd.* (1987), 8 CHRR D/4189 where an employer discriminated on the basis of marital and family status in dismissing an employee who was a mother because of an assumption that a mother of an infant would be less dedicated to her job and to long-term employment with the company than employees without children.

9. Handicap:

In the context of dismissal, complaints have arisen where an employer has a policy of dismissing employees for innocent absenteeism of a certain length of time and an employee is dismissed because he or she has required time off due to an illness or accident. In *Ontario Nurses' Association v. Etobicoke General Hospital* [1933] OJ No. 1266, there was a clause in the nurses' collective agreement which deemed anyone who missed more than 24 months of work due to illness or disability to be automatically terminated. An arbitrator's decision upholding the complainant's termination after she missed 23 months due to illness was overturned as being patently unreasonable because it allowed discrimination on the basis of the complainant's handicap.

Injuries or illnesses which are short-lived are not considered to be handicaps under the *Human Rights Code*. In the case of *Ouimette v. Lily Cups* (1990), 12 CHRR D/19 an employer's policy of dismissing employees where they missed more than two days of work regardless of the reason was found not to discriminate against a complainant on the basis of handicap where that person had missed a few days of work due to influenza.

Discrimination complaints have often arisen under this heading where an employer refuses to continue to employ someone after he or she has been injured because it erroneously and unreasonably believes that the person's disability will prevent him or her from doing the work. For example, in *Belliveau v. Steel Co. of Canada,* (1983), 9 CHRR D/5250 a worker wished to return to work after his doctor said that he had recovered from an injury sufficiently to return to work. The employer refused to continue to employ the complainant. The employer was found to have discriminated on that basis. An employer still does have the right to dismiss an employee where a handicap does in actuality render him or her incapable of performing the work required of them and no other jobs are available which the employee is capable of performing. Such was the finding in *MacNeill v. Canada (Attorney General)* (1993), 20 Admin LR (2d) 168 where an employee was fired from his warehouse job because he was unable to do any heavy lifting after an accident.

Where an employer feels the need to dismiss the employee because the employer believes that the employee's handicap, whether mental or physical, renders them incapable of performing the job properly, the employer risks a finding of discrimination against it if it does not try to accommodate the employee's handicap or find alternative employment that the employee can

handle in spite of his or her handicap.

For example, in the case of *Boucher v. Canada Correctional Services* (1988), 9 CHRR D/4910 the complainant suffered from nervous depression that was related to the extreme stress of his employment as a correctional officer. He was eventually dismissed from employment because he was considered no longer able to work as a correctional officer. The employer was found to have discriminated against the complainant because it had not endeavoured to place the complainant in available alternative employment that was less stressful.

AVOIDING HUMAN RIGHTS COMPLAINTS ON DISMISSAL

Proper planning is always important when conducting the termination of an employee. Before conducting the termination you should consider the following issues:

1. Is it possible that any of the prohibited grounds of discrimination form even a small part of the decision to terminate this employee?

2. If the termination is based upon the employee's conduct, is the conduct in any way a response to discriminatory conduct by other employees?

3. If the termination is based on absenteeism, could it possibly be related to a religious practice, family status or disability?

4. If the employee being terminated is at all disabled:

    (a) is it possible that the employee can receive treatment so that he become employable again?

    (b) is there strong medical evidence to suggest the employee will never return to the workplace?

    (c) if there is no medical evidence to suggest the employee will never return to the workplace, can the employee return and either perform modified work or another job?

    (d) are there any policies in place either written or unwritten which make it difficult for this employee to perform their job?

5. A thorough exit interview should be conducted of every departing employee to ensure that discrimination or sexual harassment does not form part of his/her reason for leaving or, is not seen by the employee as a ground for the termination.

6. Try to ensure that employees sign a Release upon termination (unless the termination is for

just cause). Although the employee cannot release the employer from a violation of the *Code,* he can acknowledge that he has not been discriminated against under the *Code.*