



HUMAN RIGHTS in the WORKPLACE 101 and the DUTY TO ACCOMMODATE

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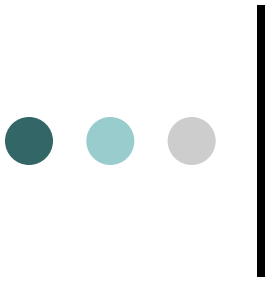
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Aboriginal Human Resource Council



AGENDA

1. Human Rights Law - Overview
2. Human Rights Complaint Process
3. Duty to Accommodate
4. Case Studies



1. Human Rights Law - Overview



What is Human Rights Law?

Human Rights Legislation

- establishes a general right in all employees to be free from discrimination in employment on the basis of the prohibited grounds



Which Human Rights Law?

Governing Legislation:

- Provincially-regulated entities are governed by the B.C. *Human Rights Code*
- Federally-regulated entities are governed by the *Canadian Human Rights Act*.
 - Also the *Employment Equity Act* and the *Equal Wage Guidelines*.



BC Human Rights Code Purpose

- foster a society in B.C. where there are no impediments to full and free participation in the economic, social, political and cultural life of B.C.
- promote a climate of understanding and mutual respect where all are equal in dignity and rights
- prevent discrimination prohibited by the Code
- identify and eliminate persistent patterns of inequality associated with discrimination prohibited by the Code
- provide a means of redress for those persons who are discriminated against contrary to the Code.



Canadian Human Rights Act Purpose

...principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on [prohibited grounds]

● ● ● | Application of *Human Rights Code/Act*

- For *Human Rights Code/Act* to apply, the impugned activity must:
 - Engage a prohibited ground
 - Within a specific area

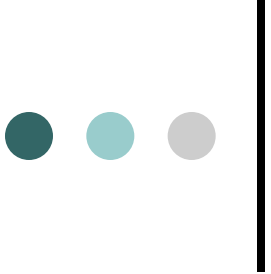




Prohibited Grounds *

- race
- colour
- ancestry
- place of origin
- political belief
- religion
- marital status
- family status
- physical disability
- mental disability
- sex
- sexual orientation
- age
- unrelated criminal conviction

* Grounds from BC *Human Rights Code* are similar across jurisdictions.



Areas (BCHRC)

- Employment
- Employment Advertisements
- Wages*
- Membership in unions or associations
- Services
- Tenancy
- Purchase of property

* Federal jurisdiction includes equal wage provision (s.11) and Guidelines Respecting the Application of s. 11 and Prescribing Factors Justifying Different Wages for Work of Equal Value.



Prohibited Discriminatory Conduct in Employment

Canadian Human Rights Act

- Section 7. It is a discriminatory practice, directly or indirectly,
 - (a) to refuse to employ or continue to employ any individual, or
 - (b) in the course of employment, to differentiate adversely in relation to an employee,
- on a prohibited ground of discrimination.



Employment Equity Act

- Purpose is to ensure that federally regulated employers provide equal opportunities for employment to the four designated groups: women; Aboriginal peoples; persons with disabilities; and members of visible minorities.
- The Act requires that employers identify and eliminate employment barriers for designated group members that result from the employer's employment systems, policies and practices.
- The goal is to institute positive policies and practices and make reasonable accommodations so that the representation of persons in designated groups in the employer's workforce reflects their representation in the Canadian workforce.
 - The Canadian Human Rights Commission is responsible for ensuring compliance with the Act.
 - The Commission conducts audits to determine whether employers meet the statutory requirements of the Act.



Prohibited Discriminatory Conduct in Employment

The British Columbia *Human Rights Code*

s13 (1) *A person must not*

(a) Refuse to employ or refuse to continue to employ a person, or

(b) Discriminate against a person regarding employment or any term or condition of employment because of: ...

... [any of the prohibited grounds]

Duty to Accommodate

- If a provision in the workplace can be seen as discriminating against an employee on one of the proscribed grounds, the employer has a duty to accommodate that employee to the point of “undue hardship”





Proving Discrimination

- Proving discrimination
 - If an employee can show that any part of a decision made by the employer with respect to their employment was based on one of the prohibited grounds, the employer can be found to have *prima facie* discriminated against the employee
- Where *Prima Facie* Discrimination:
 - Employer may defend conduct as a *bona fide* occupational requirement (“BFOR”).



The Only Defence = BFOR

- *Prima facie* discriminatory circumstances are not unlawful where the conduct is based on a *bona fide* occupational requirement” (“BFOR”)
 - s.13(4) *Human Rights Code*
 - s.15(1)(a) *Canadian Human Rights Act*



B.C. *Human Rights Code*

- s.13(4): Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement



Canadian Human Rights Act

- Section 15 provides a number of exceptions to discriminatory conduct, including:

15. (1) It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement,



Establishing a *BFOR* Defense

IF

- Claimant can establish that a standard is discriminatory on its face

THEN

- Respondent must prove - on a balance of probabilities - that the discriminatory standard is a BFOR or has a *bona fide* and reasonable justification



The *Meiorin* Test for a BFOR

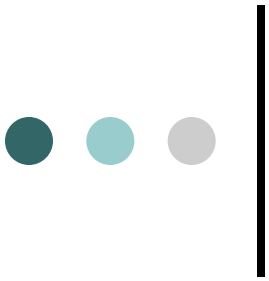
***B.C. (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3**

- 1) Standard adopted for a purpose or goal rationally connected to the performance of the job
- 2) Standard adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose
- 3) Standard is reasonably necessary to the accomplishment of that legitimate work-related purpose



LIABILITY

- Vicarious Liability
 - An employer may be held liable for the acts or omissions of an employee acting in the course of his or her employment
- Personal Liability
 - Individual managers are routinely named along with corporate respondents in human rights complaints and have damages found against them



2. Human Rights Process



HUMAN RIGHTS TRIBUNALS

- There are Human Rights Tribunal's in each jurisdiction that have broad remedial powers to address breaches of the legislation
- Tribunal has the ability to do anything which it believes ought to be done to achieve compliance with the legislation





Human Rights Tribunal Complaint Processes

- Federal Jurisdiction
 - Commission/Tribunal
- Provincial Jurisdiction
 - Direct Access – BC; Ontario
 - Commission/Tribunal – other provinces



Complaint Process - Federal

- Two level system:
 - Canadian Human Rights Commission
 - Canadian Human Rights Tribunal

Commission historically lengthy process.

- When complaint is filed it will be sent to the Respondent.
- Parties may make submissions on preliminary issues such as whether complaint is trivial or made in bad faith, or whether complaint is within the Commission's jurisdiction - including the 1 year time limit for filing.
- Where alternative redress procedure is available, the Commission will ask the complainant to first try that process.
- Where a Complaint within the jurisdiction of the CHRA is accepted the Complaint is usually initially referred to mediation.



Complaint Process - Federal

- If the case cannot be resolved through mediation the Commission will investigate further.
- Once investigated by Commission, the Investigator writes a report (recommends dismissal or referral to hearing)
- Parties then have 30 days to respond to the Commission report and reply to other sides response.
- Commission then decides whether to dismiss or refer to hearing
- Where referral to Tribunal, Commission represents complainant.
- Hearing similar to provincial tribunal processes regarding requirements for witnesses and evidence and order of the proceeding.



Canadian Human Rights Act

Section 67

- In 2008, s. 67 was Repealed, 2008, c. 30, s. 1; Assented to June 18, 2008.
 - S.67 exempted the *Indian Act* from the *CHRA* provisions.
 - In effect, s. 67 shielded the provisions of the *Indian Act* and any decisions made or actions taken by First Nations governments and the federal government, made under or pursuant to the *Indian Act*, from application of the *CHRA*.
- Bill C-21 provides a 3 year transition period for application of the repeal to First Nation governments.
- Application of *CHRA* is immediate to federal government.



Complaint Process BC

BC Human Rights Tribunal

- Direct Access to Tribunal
 - Ontario also has direct access system.
 - Differs from other jurisdictions which continue to have commission/tribunal structure.
- Tribunal receives complaints; resolves complaints; adjudicates complaints.
- Complainant responsible for carriage of complaint.
- Complainant/Respondent directly engaged throughout.



Complaint Process BC ...

Significant Steps in Process:

1. Complaint
2. Response
3. Application to defer or dismiss complaint
4. Mediation – early settlement meeting
5. Hearing



Complaint Process BC ...

Complainant:

- Time limit to file complaint is within 6 months of the last alleged instance of the contravention
- Form of complaint is on complaint Form 1 provided by Tribunal
- Tribunal will screen complaint for compliance of form and jurisdiction
- Tribunal will notify Respondent of accepted complaint.



Complaint Process BC ...

2 alternative Streams:

- Standard (most usual)
 - Proceeding Schedule from Tribunal to set dates for:
 - Settlement meeting (not mandatory)
 - Pre-Hearing Teleconference
 - Hearing
- Case managed
 - Considering novelty of issue, complexity, likelihood of settlement, number of participants, etc.



Complaint Process BC ...

Respondent

- Tribunal will deliver complaint and schedule for submissions to Respondent(s).
 - Time for response usually about 35 days.
 - Extension if early settlement meeting set.
- May apply to defer or dismiss complaint.



Complaint Process BC ...

Mediation

- Either party can request settlement meeting
- Early settlement meeting usually prior to filing response (will delay filing of response)
- Can occur at any time, including mid-hearing.
- Can be confidential, without prejudice, resolve all issues.



Complaint Process BC ...

Tribunal may dismiss all or part of complaint without a hearing, if the Respondent proves one of the following:

- a) Tribunal does not have jurisdiction [s.27(1)(a)]
- b) Even if the facts in the complaint are true, there would be no violation of the Human Rights Code [s.27(1)(b)]
- c) There is no reasonable chance of success [s.27(1)(c)]
- d) Proceeding would not benefit the alleged victim or would not further purposes of the Human Rights Code [s.27(1)(d)]
- e) Complaint was made for improper motives or bad faith [s.27(1)(e)]
- f) Another proceeding appropriately dealt with the complaint [s.27(1)(f)]
- g) Complaint is out of time [s.27(1)(g)]



Complaint Process BC ...

HearingDisclosure

- Complainant deliver particulars of remedy sought and copies of relevant documents – within 60 days of stream
- Respondent deliver response to remedy sought and copies of relevant documents – within 30 days of complainant disclosure

.....Witnesses

- Complainant delivers list of witnesses to Respondent at least 60 days before hearing
- Respondent delivers list of witnesses to Complainant at least 30 days before hearing.
- Expert witnesses summary/report at least 60 days before hearing [see Rule 33]



Remedies

Tribunal has broad remedial powers, including:

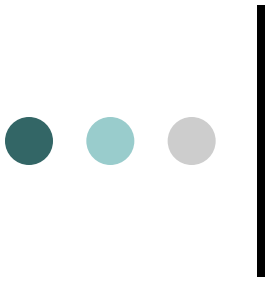
- Cease and refrain
- Declaration
- Steps or Programs to address discrimination
- Providing what was denied
- Lost Wages
- Expenses – including actual legal fees
- Compensation for injury to dignity, feelings, and self-respect.
- Interest



Costs

Tribunal may also order costs:

- Where a party engaged in improper conduct during the course of the complaint; and/or
- Where a party contravened a rule, decision, order or direction of the Tribunal.



3. DUTY TO ACCOMMODATE



The Former Distinction

- Two Types of Discrimination
 - Direct Discrimination
 - Adverse Effect Discrimination
- Duty to Accommodate arose only in cases of adverse effect discrimination



The *Meiorin* Approach

- B.C. (Public Service Employee Relations Commission) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3
 - Did away with the direct vs. adverse effect distinction
 - established a new test for when to find a BFOR
 - applies to all claims of discrimination



The *Meiorin* Approach

IF

- Claimant can establish that a standard is discriminatory on its face

THEN

- Respondent must prove - on a balance of probabilities - that the discriminatory standard is a BFOR or has a *bona fide* and reasonable justification



Facts in *Meiorin*

- B.C. government established minimum physical fitness standards – including an aerobic standard – for its forest firefighters
- Meiorin – a female firefighter – failed to meet the aerobic standard, and was dismissed



Meiorin

- Most women, owing to physiological differences, have lower aerobic capacities than men
- No evidence that the aerobic standard was necessary for satisfactory performance of work



Formulation of Three-Step Test

- Conventional approach required a human rights tribunal to categorize discrimination as either “direct” or “adverse effect”
- Supreme Court of Canada set out to simplify the then “conventional approach to applying human rights legislation in the workplace”
- To determine whether a *prima facie* discriminatory standard is, to use the language of the *Code*, a *bona fide* occupational requirement ...



The Three Step Test

- Step One:
 - The employer adopted the standard for a purpose or goal rationally connected to the performance of the job.



The Three Step Test

- Step Two:
 - The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and



The Three Step Test

- Step Three:
 - The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose



The Bottom Line...Sort Of

- 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.



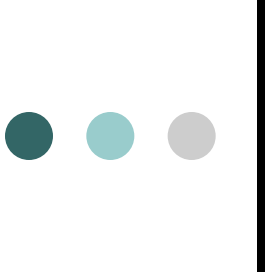
The Newest Gloss

- The test is **not whether it was impossible** for the employer to accommodate the employee's characteristics. The employer **does not have a duty to change working conditions in a fundamental way**, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.
 - *Hydro-Quebec* 2008 SCC 43



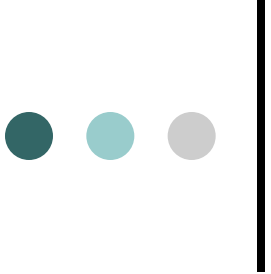
Hydro-Quebec 2008 S.C.C. 43

- Grievor had numerous physical and mental chronic medical issues
- During the last 7.5 years of employment she missed 960 days of work
- A main difficulty was that her personality disorder resulted in deficient coping mechanisms which caused difficulties in work relationships



Hydro-Quebec

- Employer adjusted working conditions over the years
 - Light duties
 - Assignment to different positions
- Absent since February of 2001
 - GP recommended she stop work indefinitely
 - Psychiatric assessment indicated could not return to work without continued absenteeism
- Employment terminated July 2001



Hydro-Quebec

- Termination on basis of inability to work on a “regular and reasonable” basis and no improvement in attendance was expected
- Termination was grieved



Hydro-Quebec - Arbitration

- Grievance dismissed
 - Termination permissible if at time of termination employee is unable to work steadily and regularly for the reasonably foreseeable future
 - Conditions suggested for return to work would constitute undue hardship
- Upheld by Quebec Superior Court



Hydro-Quebec – Que. C.A.

- Overturned decision
 - Employer did not prove that it was impossible to accommodate the characteristics of the Complainant's disabilities
 - Past absences should not have been taken into account as DTA should have been assessed as of the time of decision to terminate



Hydro-Quebec – S.C.C.

- *“The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.”* (para. 14)
- Test is NOT whether it is impossible to accommodate...



Hydro-Quebec – S.C.C.

“The test is not whether it was impossible for the employer to accommodate the employee’s characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work.” (para. 16)

- *proof of undue hardship may “take as many forms as there are circumstances.”*



The Questions

- Were alternative, non-discriminatory approaches investigated?
- If alternative, non-discriminatory approaches were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?



The Questions

- Must all employees meet a single standard in order for the employer to accomplish its legitimate purpose or could standards reflecting individual or group differences and capabilities be established?
- Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?



The Questions

- Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? *i.e.*, the employee(s)? the union?



Accommodation Process

- Process of accommodation is important
- In *Rozon*, 2000 BCHRT 15, Complainant granted damages of \$800. The Employer failed to consider all possible accommodations even though the Tribunal agreed with the Employer's conclusion that accommodation was impossible



Accommodation Process

- Employee should advise employer of necessity for accommodation; employer does not have to guess
- Caveat may be in cases where a disability manifests itself in behaviour which is so bizarre that employer will be deemed to have knowledge of disability



Accommodation Process

- For disability cases, an employer can require employee to provide detailed medical evidence with respect to the disability, including any and all restrictions (*HEABC* [2006] B.C.C.A.A.A. No. 162 (QL))
- Armed with that information, the employer must engage in a thorough investigation of all the possibilities for accommodation



Accommodation Process

- Employer must involve the union, if a union exists
- Employer will not be required to displace other employees, or to create new position, or add staff to the complement



Accommodation Process

- Employers may be required to make a considerable financial investment in accommodation on a case-by-case basis
- Employer must give due consideration to safety issues, to morale issues of fellow workers and to the public in accommodation efforts



Accommodation Process

- Accommodation efforts based on impressionistic evidence will not be sustained
- Employer may want to consider working with other professionals [*e.g.*, health and legal professionals] in determining appropriate accommodation



Accommodation Process

- Sometimes the following are considered to facilitate accommodation of disability:
 - Functional capacity evaluation (FCE)
 - Independent medical examination (IME)
 - Work site occupational assessment
 - Job demand analysis — collecting and interpreting ergonomic, physical and environmental requirements of a job



Accommodation

- Common steps to consider, particularly to accommodate disability:
 - Modifying workstation
 - Providing special equipment
 - Providing additional training
 - Rescheduling shifts
 - Removing more taxing parts of job
 - Bundling tasks
 - Reduced hours
 - Tolerating some absenteeism



Duty to Accommodate

What the employer ordinarily does NOT have to do:

- Create a new position.
- Displace other employees
- Remove essential characteristics of the job



Duty to Accommodate

Key Principles

- Accommodation is a significant human rights obligation
- Multi-party Inquiry – Employer, Employee, Other Employees, Union



Duty to Accommodate

Employer:

- The primary responsibility rests with the employer because it has the ultimate control of the work place



Duty to Accommodate

- Accommodation involves differential, *highly individualized* treatment
- Each case demands a subjective, fact-based assessment
- All possible accommodations need to be considered and assessed (*Grismer*, [1999] 3 S.C.R. 868)



Requires an Employer to:

- Learn about and carefully consider the capabilities and/or limitations of an individual employee (or class of employees)
- Thoroughly review the workplace and workplace standards to discern what modifications might be made to permit an individual employee (or class of employees) to work productively in the employer's operation



Duty to Accommodate

Employee:

- The employee is to participate in the accommodation process.
- Where disability is a ground in issue, the employee must participate by providing medical evidence where requested and accepting reasonable accommodation offers



Duty to Accommodate

Union:

- The union is to co-operate with the accommodation process
- Collective agreement provisions are to be respected but are not conclusive
 - *Renaud*, [1992] 2 S.C.R 970



Undue Hardship

- Continually developing area of law and subject of debate in both principles involved and the practical application.
- Various grounds of discrimination engage different considerations:
 - Disability of the employee is a matter of degree
 - Religion, Age, Sex, consider other factors
- Hardship on the employer is a matter of degree.
- Each case will ultimately turn on its facts



Undue Hardship Factors

- Key factors in assessing undue hardship include:
 - Financial cost
 - Impact on a collective agreement
 - Problems of employee morale
 - Interchangeability of the work force and facilities
 - Size of employer's operations
 - Safety

Alberta Dairy Pool (SCC, 1990)



Undue Hardship

Financial Cost

- Cost is a factor tied to the size and viability of the enterprise
- Impressionistic evidence of increased expense will generally not suffice: *Grismer*, SCC
- Cost of the accommodation must be related to the impact of the operation as a whole: *Miele v. Famous Players* (2000 BCHRT 5)



Undue Hardship

Impact of Collective Agreement

- Disruption of the workings of a collective agreement should come only as a last resort to facilitate duty to accommodate
- Where employer moved junior disabled employee out of the machine shop and accommodated by overriding senior employee's rights, arbitrator found breach of the collective agreement; not reasonable to implement easiest accommodation possible if it impacted on the rights of other employees:
 - *Bayer Rubber Inc.*, (1997). 65 L.A.C. 4th 261



Undue Hardship

Employee Morale

- Employer must distinguish between concerns of legitimate rights and concerns based on stereotypical or discriminatory reactions: *Renaud*
 - “Objections of employees based on well grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration.”



Undue Hardship

Employee Morale

- Seventh Day Adventist sought an apprenticeship which would involve a schedule requiring him to work on the Sabbath.
- He sought accommodation which would allow him to work a different schedule.



Undue Hardship

Employee Morale

- Arbitrator found that the reaction of other employees was relevant. The employees impacted had all expressed disinterest in switching shifts. The crew size was relatively small, and it would create detriment to other employees to have to work the Friday night shift for the grievor *Canadian Forest Products* (1995), 50 L.A.C. 4th 164



Undue Hardship

Safety

- Issue is whether there is a safety, risk to other employees, as well as to the employee seeking an accommodation
 - In *Pannu v. Skeena Cellulose*, 2000 BCHRT 56 the complainant worked as a recaust operator, which required him to wear an SCBA during emergency evacuation procedures



Undue Hardship

Safety

- BCHRT agreed with employer that emergency procedure was developed to ensure maximum safety
- Recaust operator was the most knowledgeable in the event of an emergency



Undue Hardship

Safety

- Assigning less experienced people the responsibility to deal with an emergency, would increase the safety risk to all employees



Undue Hardship

Safety

- *Shuswap Lake Hospital v. BCNU* [2002] B.C.C.A.A.A. No.21 (QL)
 - Grievor was a nurse with bi-polar affective disorder who was refused a return to work
 - Employer relied on safety concerns for grievor and for patients



Undue Hardship

Safety: (cont'd)

- Arbitrator found that the standard for patients was reasonable safety, not absolute safety, and that to insist on a guarantee of no relapse was discriminatory
- Employer had not led evidence to establish serious or unacceptable risk to patient safety
- Employee to be allowed to work on conditions



Undue Hardship

Safety:

- *Kemess Mines Ltd.*
 - Employee diabetic who suffered renal) failure, had catheter in and out of peritoneal cavity
 - Employee worked at a mine in British Columbia in remote location
 - Employer not willing to allow employee to return to work because of safety concerns (peritonitis)



Undue Hardship

Safety: (cont'd)

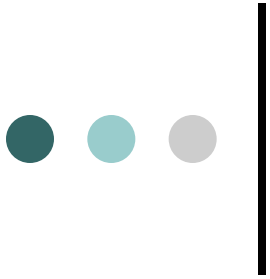
- Arbitrator found that employee should be allowed to return to work on conditions
- In terms of safety, the issue was whether a person with a disability is willing to assume the risk in circumstances where there is risk to his own health or safety



Undue Hardship

Safety: (cont'd)

- Employee must be fully informed of the risks that he is undertaking
- With that information, the employee is to be given the final determination as to whether he is willing to accept the risk



4. CASE STUDY SESSION



QUESTIONS?

