

CAUT Equity Conference

February 10, 2023



555 Richmond Street West, Suite 1200
Toronto, Ontario M5V 3B1

Susan Ursel
Ursel Phillips Fellows Hopkinson LLP
Toronto, Ontario

Ontario Human Rights Code- The Rights

Employment

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, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Harassment in employment

(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, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Ontario Human Rights Code- The Rights

Harassment because of sex in workplaces

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

Sexual solicitation by a person in position to confer benefit, etc.

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.

Ontario Human Rights Code- The Rights

Vocational associations

6 Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

Ontario Human Rights Code- Constructive Discrimination

Constructive discrimination

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. R.S.O. 1990, c. H.19, s. 11 (1).

Idem

(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. R.S.O. 1990, c. H.19, s. 11 (2); 1994, c. 27, s. 65 (1); 2002, c. 18, Sched. C, s. 2 (1); 2009, c. 33, Sched. 2, s. 35 (1).

Idem

(3) The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. R.S.O. 1990, c. H.19, s. 11 (3); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 2 (2); 2009, c. 33, Sched. 2, s. 35 (2).

Ontario Human Rights Code- Disability Discrimination

Disability

17 (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability. R.S.O. 1990, c. H.19, s. 17 (1); 2001, c. 32, s. 27 (5).

Accommodation

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person 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. R.S.O. 1990, c. H.19, s. 17 (2); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 3 (1); 2006, c. 30, s. 2 (1).

Determining if undue hardship

(3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations. 2006, c. 30, s. 2 (2).

Ontario Human Rights Code, Definitions

10 (1) “equal” means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination; (“égal”)

“harassment” means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome; (“harcèlement”)

Ontario Human Rights Code, Definitions

10 (1) In Part I and in this Part,

“age” means an age that is 18 years or more; (“âge”)

But Note:

Age sixty-five or over

15 A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment.

Ontario Human Rights Code- Definitions

10 “disability” means,

(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, includes diabetes mellitus, epilepsy, a brain injury, 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 other animal or on a wheelchair or other remedial appliance or device,

(b) a condition of mental impairment or a developmental disability,

(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 insurance plan established under the *Workplace Safety and Insurance Act, 1997*; (“handicap”)

Ontario Human Rights Code- Definitions

10 “family status” means the status of being in a parent and child relationship; (“état familial”)

“marital status” means the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage; (“état matrimonial”)

“spouse” means the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage. (“conjoint”)

Ontario Human Rights Code- Special Programs

14 (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

Application to Commission

(2) A person may apply to the Commission for a designation of a program as a special program for the purposes of subsection (1).

....

(10) For the purposes of a proceeding before the Tribunal, the Tribunal may make a finding that a program meets the requirements of a special program under subsection (1), even though the program has not been designated as a special program by the Commission under this section, subject to clause (8) (b).

- ***See the balance of this section for the processes involved***

Ontario Human Rights Code- Citizenship

16 (1) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law.

Idem

(2) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence.

Idem

(3) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions.

Ontario Human Rights Code- Contracts of Insurance

22 The right under sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of age, sex, marital status, family status or disability, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and *bona fide* grounds because of age, sex, marital status, family status or disability.

Ontario Human Rights Code- Benefits in Employment

25 (1) The right under section 5 to equal treatment with respect to employment is infringed where employment is denied or made conditional because a term or condition of employment requires enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer, that makes a distinction, preference or exclusion on a prohibited ground of discrimination.

Ontario Human Rights Code- Benefits in Employment

(2) The right under section 5 to equal treatment with respect to employment without discrimination because of sex, marital status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the *Employment Standards Act, 2000* and the regulations thereunder.

(2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder.

Ontario Human Rights Code- Benefits in Employment

(3) The right under section 5 to equal treatment with respect to employment without discrimination because of disability is not infringed,

(a) where a reasonable and *bona fide* distinction, exclusion or preference is made in an employee disability or life insurance plan or benefit because of a pre-existing disability that substantially increases the risk;

(b) where a reasonable and *bona fide* distinction, exclusion or preference is made on the ground of a pre-existing disability in respect of an employee-pay-all or participant-pay-all benefit in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer or in respect of a plan, fund or policy that is offered by an employer to employees if they are fewer than twenty-five in number. R.S.O. 1990, c. H.19, s. 25 (3); 2001, c. 32, s. 27 (5).

Compensation

(4) An employer shall pay to an employee who is excluded because of a disability from an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and the employer compensation equivalent to the contribution that the employer would make thereto on behalf of an employee who does not have a disability.

The Code and Benefits- the *Talos* case

Talos v. Grand Erie District School Board, 2018 HRTO 680 (CanLII)

High school teacher's health and dental benefits cut off after age 65 though he kept working

HRTO found it could read down the Code provisions that would otherwise permit such discrimination, s. 25(2.1)

HRTO found that

- The denial of benefits and *Code* protection to workers aged 65 and older was *prima facie* discrimination based on age under s. 15 of the Charter
- The denial creates a disadvantage between two groups of workers with employer-sponsored benefits: those 64 and under, and those 65 and over
- While the provision in the Code might have a pressing and substantial objective, and that objective was rationally connected to the distinction in the provision, it was not minimally impairing of the right- there were other ways to deal with this issue- and therefore it was not a reasonable limit under s. 1

Life Insurance Benefits- the YUFA Case

York University v. York University Faculty Association, 2021 CanLII 31520 (ON LA)

The issue was whether the post-65 form of life insurance for working professors ended at age 71, or when they terminated full time employment even if after age 71

The arbitrator found the life insurance benefits continued past the age of 71 if the professor was working full time, notwithstanding that the pension plan said that retirement had to occur at age 71. The collective agreement definition of retirement was termination of full-time employment and the pension plan definition did not govern