Law Society of Ontario | Barreau de l'Ontario

12th Human Rights Summit

CO-CHAIRS

Shana French
Sherrard Kuzz LLP

Rani Khan, Counsel and Legal Manager
Human Rights Legal Support Centre

December 5, 2023

CLE23-0120301-D-WEB

Law Society of Ontario | Barreau de l'Ontario

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Library and Archives Canada
Cataloguing in Publication

12th Human Rights Summit

ISBN 978-1-77345-781-9 (PDF)
ISBN 978-1-77345-782-6 (Hardcopy)

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CO-CHAIRS: **Shana French,** *Sherrard Kuzz LLP*

Rani Khan, Counsel and Legal Manager, *Human Rights Legal Support Centre*

December 5, 2023
9:00 a.m. to 4:00 p.m.
Total CPD Hours = 5 h Substantive + 30 m Professionalism
+30 m EDI Professionalism

Donald Lamont Learning Centre
Law Society of Ontario
130 Queen St. W.
Toronto, ON

SKU CLE23-0120301-A-REG

Agenda

9:00 a.m. – 9:05 a.m. **Welcome**

Shana French, *Sherrard Kuzz LLP*

Rani Khan, Counsel and Legal Manager, *Human Rights Legal Support Centre*

9:05 a.m. – 9:55 a.m.	**Major Case Law and Tribunal Update** Melissa Mark, Research Counsel, *Human Rights Legal Support Centre* Stephanie Ramsay, *Mathews, Dinsdale & Clark LLP* Jeanie Theoharis, Associate Chair, *Human Rights Tribunal of Ontario*
9:55 a.m. – 10:05 a.m.	**Question and Answer Session**
10:05 a.m. – 10:55 a.m.	**Issues that Arise in Workplace Investigations, Including Implicit Bias, Credibility Assessments, etc.** (30 m e) Gita Anand, *Sherrard Kuzz LLP* Alex Battick, *Battick Legal Advisory* Nitin Pardal, *Pardal Legal & Consulting Services*
10:55 a.m. – 11:05 a.m.	**Question and Answer Session**
11:05 a.m. – 11:25 a.m.	**Break**
11:25 a.m. – 12:10 p.m.	**Post-Pandemic Fallout and Its Impact on Human Rights Practice** Ellen Low, *Ellen Low & Co.* Jacqueline Luksha, *Hicks Morley LLP*
12:10 p.m. – 12:20 p.m.	**Question and Answer Session**
12:20 p.m. – 1:20 p.m.	**Lunch**

1:20 p.m. – 2:05 p.m.	**Addressing Conflicting Human Rights – The Analytical Framework** Reema Khawja, Senior Counsel, Legal Services and Inquiries, *Ontario Human Rights Commission* Allyson Lee, *Sherrard Kuzz LLP* Simone Ostrowski, *Whitten & Lublin LLP*
2:05 p.m. – 2:15 p.m.	**Question and Answer Session**
2:15 p.m. – 2:50 p.m.	**Human Rights in Sports** Melissa Knox, Barrister & Solicitor Craig Stehr, *Gowling WLG (Canada) LLP* Jennifer White, *SportSafe Investigations Group*
2:50 p.m. – 3:00 p.m.	**Question and Answer Session**
3:00 p.m.– 3:20 p.m.	**Break**
3:20 p.m. – 3:55 p.m.	**Artificial Intelligence and its Intersection with Human Rights** (30 m Ⓟ) Nicole Heelan, Employment Services Lead, *ClearyX* Dr. Stephanie Kelley, Assistant Professor of Management Science, Sobey School of Business, *Saint Mary's University,* Halifax, Nova Scotia (Remote) Robert Richler, *Bernardi Human Resource Law LLP*
3:55 p.m. – 4:00 p.m.	**Question and Answer Session**
4:00 p.m.	**Program Ends**

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12th Human Rights Summit

December 5, 2023

SKU CLE23-01203

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TAB 1A

12th Human Rights Summit

Remedies Awarded by the Human Rights Tribunal of Ontario – November 1, 2022 to October 31, 2023

Melissa Mark, Research Counsel
Human Rights Legal Support Centre

Stephanie Ramsay
Mathews, Dinsdale & Clark LLP

December 5, 2023

cpd

HRLSC | Human Rights Legal Support Centre

CAJDP | Centre d'assistance juridique en matière de droits de la personne

Remedies Awarded by the Human Rights Tribunal of Ontario – November 1, 2022 to October 31, 2023

This chart was prepared by Melissa Mark, Human Rights Legal Support Centre, for the Law Society of Ontario's 12th Human Rights Summit, December 5, 2023.

I. DISCRIMINATION IN EMPLOYMENT					
DECISION	**FACTS**	**HELD**	**GENERAL DAMAGES**	**SPECIAL DAMAGES**	**NON-MONETARY /PUBLIC INTEREST REMEDIES**
a. BASED ON DISABILITY					
Valiquette v. BPM Enterprises Ltd. (Tim Horton's), 2023 HRTO 53 **HRLSC Representation**	The applicant was 61 years old and had worked for the respondent for over 18 years when her employment was terminated on November 3, 2017. She alleged the termination was due both to her age and to the work modifications she needed to accommodate her restrictions and limitations arising from her knee and shoulder injuries. The applicant testified that she had provided the respondent with a note from her doctor on November 3, 2017 that stated she had a number of restrictions in relation to bending, twisting, kneeling or reaching below or above the waist. The note also stated the applicant may need breaks and should be allowed to work at her own pace. The respondent terminated the applicant's employment within a few hours of receiving the note. The General Manager wrote on the applicant's medical note: "Effective Nov. 3/17 @2:30 pm termination. Inability to do duties. Guaranteed EI cause it's not her fault." The respondent denied any discrimination, arguing the applicant's employment was terminated without cause because she was medically incapable of performing the essential duties of her job, even with accommodations up to the point of undue hardship. The General Manager testified that after reading the note he believed the applicant could no longer do the job because she was unable to serve coffee or work the drive-thru, which he believed were essential tasks. The applicant also asserted the General Manager advised her	Application upheld in part. Member Burstyn dismissed the allegations of discrimination with respect to age but upheld the application on the ground of disability. It was not disputed that the applicant's disability was the reason for the termination of her employment, given the respondent's position it fired the applicant because it could not accommodate her without undue hardship. Member Burstyn found the respondent did not meet its duty to accommodate the applicant's injuries as it did not make sufficient inquiries for information regarding the applicant's disability-related needs or undertake any meaningful accommodation dialogue with the applicant. Given the respondent's failure to conduct the necessary inquiries, it was not in a position to argue that it could not provide accommodation to	**$20,000**	**$15,290 for lost wages**	

	that she was not eligible for accommodation because her injury was not work-related. The General Manager denied that he said this to the applicant but the statement was consistent with the respondent's Sick Day Policy, which stated that management could not modify work for any non-work related injury and any employee unable to perform their full duties due to such an injury should consider going on a sick leave. The applicant testified that it was extremely upsetting to lose her job with the respondent after 18 years of employment. She did not look for alternative employment after being terminated by the respondent. She had knee replacement surgery on June 26, 2018 and shoulder surgery on June 26, 2019. She requested $25,000 in general damages and lost wages to the date of her 65th birthday, April 12, 2021.	the point of undue hardship. In determining the appropriate amount of general damages to award, Member Burstyn noted the termination of employment had a serious impact on the applicant given her age and length of employment with the respondent. Member Burstyn awarded the applicant lost wages from the termination of her employment to the date of her first surgery. Although she did not look for alternative employment, it was unlikely she would have been able to find a new job given her age, medical restrictions and impending surgery. As such, Member Burstyn found it was not appropriate to reduce this award based on her failure to mitigate. She declined to award further lost wages, finding it was speculative that the applicant could have ever returned to work given her subsequent shoulder surgery and the fact she had not worked at all since her job with the respondent.			
***Rojas v. MMCC Solutions Canada aka Teleperformance Canada*, 2023**	The applicant has autism spectrum disorder. He was hired by the respondent on July 8, 2019 as a Customer Service Representative through an organization that assists individuals with disabilities find employment.	Application upheld. VC Silva found the applicant's unchallenged evidence established that the respondent failed to consider	**$10,000**	**$25,480 for lost wages** **$5,096 for lost health**	**The respondent was ordered to train all managers on disability-based discrimination and the**

HRTO 350	On August 15, 2019, the applicant was called into a meeting with the respondent's Director of Human Resources. He was advised that allegations had been made against him regarding his behaviour and conduct towards his co-workers and an internal investigation would be conducted into the complaints. He testified that he was not given any details about these complaints and was not given the opportunity to respond to the allegations made against him. Another meeting was held on August 28, 2019, where the applicant was advised the investigation found he had violated the respondent's harassment policy because he made his co-workers and customers feel uncomfortable. He was then handed a termination letter stating his employment was immediately terminated for cause. The applicant denied behaving inappropriately but argued that if he did then his lack of awareness was related to his disability. As such, the applicant asserted, the respondent should have discussed the complaints with him, his mother or the referral agency and should have considered the potential role his disability may have played in the alleged misconduct before deciding to terminate him. The applicant requested general damages in the amount of $50,000, as well as special damages to compensate for lost wages and health benefits for 12 months. The applicant also sought a letter of apology from the respondent and an order that the respondent undergo training on disability-based discrimination and the duty to accommodate. The respondent did not file a Response or participate in the proceeding before the HRTO.	the applicant's disability prior to terminating his employment. Based on the applicant's evidence, the respondent failed to employ any progressive discipline. Also, if they did conduct an investigation into the complaints against the applicant, that investigation was fatally flawed as they did not inform him of the allegations against him or give him an opportunity to respond to them. The decision does not set out the analysis for the remedial awards but notes the incident had a profound impact on the applicant's physical and emotional wellbeing.		**benefits**	**duty to accommodate employees with disabilities**
***Zameel v. ABC Group Product Development*, 2023 HRTO 533**	The applicant was hired by the corporate respondent on April 3, 2017 as IT Operations Manager. The personal respondent was the Vice President of IT for the corporate respondent. The applicant was involved in a motor vehicle accident on	Application upheld. VC Daud found the timing of the termination gave rise to a strong inference that the applicant's disability was a	**$30,000**	**$50,000**	**The corporate respondent was ordered to:** • **Provide the**

	October 6, 2017. As a result of his injuries from the accident, he went on sick leave until October 14, 2017. The applicant testified that he was using heavy pain medications upon his return to work that made him drowsy and resulted in him working at a slower pace than usual. He alleged he advised the personal respondent on several occasions that he had not been feeling well since the accident and believed it would be beneficial for him to work part-time for a period to allow him time to heal. The applicant continued to have limitations arising from his injuries and applied for part-time STD leave on November 21, 2017. The applicant provided the respondents with a medical note that stated he needed modified work hours and duties due to chronic back and shoulder pain. The applicant testified he advised the personal respondent on November 27, 2017 that he had applied for STD. The following day, November 28, 2017, he was given a termination letter. He alleged the personal respondent told him, with respect to the termination, that "it's not working out" and referred to delays in the applicant's projects. The applicant argued the personal respondent did not consider that some of his projects had been delayed because he had to wait for project funding approval, which was beyond his control, and that he was unable to complete one project because of his injuries. The respondents argued the applicant's employment was terminated solely due to his significant performance issues that were present throughout the duration of his employment. Although no formal discipline was ever issued against the applicant, the personal respondent alleged that he made informal attempts to coach the applicant. The decision to terminate, according to the respondents, was made on November 15, 2017 and was in no way connected to the applicant's disability. The applicant denied there were any issues with his work or that he had ever been advised of any concerns regarding his performance.	factor in the respondents' decision to terminate his employment. The respondents had insufficient evidence to establish the alleged performance issues they cited as the reason for the termination, as there were no written warnings, performance reviews or performance improvement plans. Also, the respondents were aware of the applicant's disability and need for accommodation at the time the decision to terminate was made. The respondents made no effort to accommodate the applicant, other than referring him to STD. Based on these findings, VC Daud held the termination of the applicant's employment was a violation of the *Code*. The applicant's remedial requests are not set out in the decision, aside from a request for one year of lost wages, which was granted. VC Daud found the facts warranted an order requiring the personal respondent and the corporate respondent's Human Resources department to undergo training to better understand their obligations under the *Code*, as well as an award of general damages that would compensate for the impact to the applicant.			**applicant with a letter of reference** • **Provide the applicant with an amended ROE, using Code "K" as reason for termination** • **Require the personal respondent and all Human Resources staff to complete the Ontario Human Rights Commission's "Human Rights 101" online eLearning course.**

b. BASED ON SEX, INCLUDING PREGNANCY					
***A.B. v. Paquette*, 2022 HRTO 1356**	In her application to the HRTO, the applicant claimed that the respondent, who was her supervisor, drugged and sexually assaulted her and that her former employer, Cooksville Hyundai, failed to address a complaint she made about the assault. The respondent was criminally charged with respect to the assault. In his guilty plea, he admitted to the majority of the allegations against him set out in the applicant's HRTO application. The respondent filed a Response with the HRTO and participated in mediation but did not appear at the hearing and was noted in default. The HRTO ordered that a separate hearing would be held with respect to the allegations against the respondent and proceeded to hear evidence on the allegations against Cooksville Hyundai. In *AB v. 2096115 Ontario Inc. c.o.b. as Cooksville Hyundai*, 2020 HRTO 499, the HRTO upheld the applicant's allegations against Cooksville Hyundai. VC Letheren found that Cooksville Hyundai had failed to properly address the applicant's complaint and the investigation it conducted had been inadequate and unreasonable, resulting in a poisoned work environment for the applicant. Cooksville Hyundai was ordered to pay the applicant $55,000 in general damages, as well as $2,904 in special damages to compensate for the difference in wage between the job she held with Cooksville Hyundai and the position she took with another employer to avoid having to continue working with the respondent. At the hearing held in relation to the allegations against the respondent, the applicant testified about the trauma that the respondent's actions inflicted on her. She led medical evidence to support that she developed PTSD and a substance use disorder as a result of the assault. The assault also impacted her relationships with her family and her career. These effects were exacerbated by having to continue working with the respondent after the assault, who acted as though nothing had happened.	Application upheld. Given the respondent's guilty plea, Member Sand found the respondent sexually harassed and assaulted the applicant, in violation of s. 5 and 7 of the *Code*. Additionally, the respondent's actions contributed to the poisoned environment she experienced in Cooksville Hyundai. Member Sand acknowledged the profound impact the assault had on the applicant, which was worsened by the poisoned environment she had to work in afterwards. She noted, however, that the applicant did not share the same vulnerabilities as the applicants in *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107 ($200,000) or *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675 ($150,000). Instead, she found this matter was comparable to *AM v. Kellock*, 2019 HRTO 414, ($75,000) due to the power imbalance between the parties and the severity of the injury caused to the applicant. VC Sand declined the applicant's request for lost wages, finding it speculative and not borne out by the facts. She awarded the applicant	**$75,000**	**$1,680 for therapy costs**	

	The applicant sought an order for $150,000 in general damages as compensation for the egregious impact the respondent's actions had on her dignity, feelings and self-respect, as well as $136,350 in special damages, to compensate for wages lost due to this impact. She also requested special damages to compensate for therapy she has already received as well as $11,400 for an additional 52 therapy sessions.	special damages to compensate for prior therapy sessions but did not make any further awards given the applicant's current treatment was covered by OHIP.			
***Kendrick v. Canadian Air Specialists Incorporated*, 2022 HRTO 1441**	Soon after the applicant started working for the respondent as a booking agent on February 1, 2017, she advised the respondent that she was pregnant with her second child. She started her maternity leave on July 28, 2017 and was planning on returning to work on July 4, 2018. The applicant testified that when she contacted the respondent in June 2018 to make arrangements regarding her return to work, the respondent told her that her hours would be changed. She had previously worked 8:30 a.m. to 5 p.m., Monday to Friday, but her hours were now to be Monday to Thursday noon to 8:30 p.m., Friday 9:30 a.m. to 2:30 p.m., and Saturday 9:30 a.m. to 3:30 p.m. The applicant had made childcare arrangements in accordance with her previous hours and could not accept the hours the respondent offered to her. She requested that she be returned to her previous schedule. The applicant alleged the respondent refused this request and stated they were not sure there was a position for the applicant to return to. Her health benefits were cancelled shortly afterwards with no explanation from the respondent. The applicant stated that she had no choice but to resign, as she could not work the hours proposed by the respondent due to the difficulty of securing childcare for evenings and weekends. She was able to secure alternative employment on July 24, 2018, which paid $10,000 less annually than her position with the respondent. The applicant's request for general damages is not set out in the decision but it is indicated that the applicant sought special damages to	Application upheld. Member Nichols found the applicant's evidence established the respondent failed to return her to her pre-maternity leave position and terminated her health benefits before the end of her leave. This was discrimination based on the ground of sex, as it related to her pregnancy. Member Nichols also found the applicant had experienced discrimination on the basis of family status, when the respondent refused to accommodate her request to reinstate her previous schedule due to her childcare obligations. There is no analysis provided on the general damage award made. Member Nichols granted the applicant's request for special damages to compensate for the wage differential but found there was insufficient evidence to order the remaining requests.	**$15,000**	**$9,464 for lost wages**	

	compensate for the shortfall in her income due to the wage differential between what she earned in her current job and what she would have earned had she returned to work with the respondent. She also requested damages to compensate for the loss of vacation pay and health benefits. The respondent did not file a Response and did not participate in the proceeding before the HRTO.				

***Cybulsky v. Hamilton Health Sciences*, Merits: 2021 HRTO 213; Remedy: 2023 HRTO 346**	The applicant is a cardiac surgeon. From the time she started working as a resident for the respondent in 1990 to the time period subject to her HRTO application, she was the only female cardiac surgeon in the respondent's Cardiac Surgery Service [CSS]. She was appointed as the Head of the CSS in July 2009 and was the first female head of a cardiac surgery service ever appointed in Canada.
	
	In January 2014, the respondent's Interim Surgeon-In-Chief, Dr. Reddy, initiated a review of the CSS, on the basis of "grumblings" he had heard regarding discontent with the applicant's leadership. He appointed Dr. Flageole, the respondent's Chief of Pediatric Surgery, to conduct the review.
	
	As part of this review, the applicant met with Dr. Flageole on May 9, 2014. During this meeting, the applicant mentioned her concerns that the issues raised with her leadership could result from the fact that she is a woman leading a team of men. She cited social science research showing that women leaders are often not liked or admired by others and are viewed as less competent, by both men and women, for traits and behaviours seen as positive in male leaders, such as assertiveness and directness. This, she noted, would arguably be compounded here by her position as a woman leader of a male-dominated department.
	
	Dr. Flageole concluded her review and prepared a final report, which included a number of concerns regarding the applicant's leadership of the CSS. Some who were interviewed by Dr. Flageole referred to the applicant as a "bully" who
		Application upheld. In the Merits Decision, VC Letheren held that Dr. Flageole's report was discriminatory as Dr. Flageole never turned her mind to the impact that the context of the applicant as a female leader in a male-dominated workplace could have on the results of her review. She also found that the failure to consider this potential for bias in the conclusions contained in the report, even though the applicant raised this issue several times, had an adverse impact on the applicant that was directly related to her gender.
		
		The respondent had a duty to ensure the review was conducted in a manner that would factor in the issue of gender into the assessment of her leadership of the CSS. Dr. Stacey's reliance on the report in his decision to post the applicant's position further extended the effects and
			$20,000	**$6,500 for loss of stipend for one year**	**The respondent was ordered to:**
					
					• **Attach a copy of the Tribunal's decisions to any copy of the 2014 review in the respondent's records**
					
					• **Consult with an expert on gender discrimination and leadership to:**
					
					  ◦ **ensure gender bias is accounted for when conducting leadership performance evaluations**
					
					  ◦ **provide education on gender discrimination to all physician leaders**

	micromanages individuals in the CSS "like a mother telling her children what to do". One group of individuals interviewed stated they strongly believed the applicant should not be in a leadership position. The report noted there were also members of the CSS who thought the applicant was an excellent leader, stating she was fair and responsive to the needs of her team. The applicant met with Dr. Reddy to discuss the report on July 7, 2014. She again raised her concerns during this meeting that it was necessary to consider the conclusions in the report within the context of her being a women leader in a male-dominated field. Dr. Reddy stated he believed that Dr. Flageole would acknowledge this, even though it was not included in her report. Dr. Flageole testified, however, that she disagreed with the applicant's assertions regarding women leaders being disliked and judged more harshly than men. She insisted that gender was not a factor in the review, or in any of the criticisms of the applicant by members of the CSS, because the issue of gender never came up in her interviews. Dr. Stacey was appointed Surgeon-In-Chief in August 2014. He had never worked with the applicant before. He was provided a copy of Dr. Flageole's report on September 9, 2014 and met with the applicant the same day. Dr. Stacey stated he would meet with her on a regular basis to provide guidance on the leadership of the CSS but these meetings did not occur. On September 16, 2015, Dr. Stacey advised the applicant he was going to post her position as the Head of CSS because of feedback he had received regarding friction in the CSS with her as the leader. He told her he believed the department needed someone with "a different set of skills" to lead the group. The evidence at hearing established one of the key reasons for Dr. Stacey's decision to post the position was the contents of Dr. Flageole's report. After learning of Dr. Stacey's decision, the applicant wrote a	impact of this initial discrimination. Even though there may have been other legitimate factors considered in his decision, the prohibited ground need only be a factor for the action to be found as discriminatory. The existence of other factors would be relevant with respect to remedy, however. VC Letheren held the duty to investigate did arise in this matter, despite the absence of a formal complaint of gender discrimination. She found that the applicant's email to Ms. Hastie was sufficient to trigger the duty to investigate, given Ms. Hastie's role as the respondent's Human Rights and Inclusion specialist. The failure on the part of Ms. Hastie, or anyone employed by the respondent, to follow up on the applicant's concerns that gender bias played a significant role in the respondent's assessment of her leadership of the CSS constituted as a breach of this duty and was an additional violation of the *Code*. In the decision on remedy, Member Burstyn found there was no comparable case that supported the amount of general damages requested by the applicant. She did note,			• **provide education on the relationship between gender discrimination and leadership to all employees responsible for investigating claims of discrimination.** • **Ensure that its process for handling claims of discrimination is transparent and incorporated into its policies that are made available to all employees.**

	letter of complaint to Dr. McLean, the respondent's Executive Vice President and Chief Medical Executive. In that letter, she wrote that she had not received any coaching or mentoring on leadership skills from Dr. Stacey and he had never conducted a performance evaluation of her. Dr. McLean responded that he had forwarded the complaint to the respondent's Human Rights and Inclusion specialist, Jane Hastie, as well as the Director of Medical Affairs. On December 10, 2015, the applicant emailed Ms. Hastie asking to meet with her. In her email, she included a summary of the incidents later set out in her HRTO application, concluding with her belief that these incidents have occurred because she is a woman leading a male-dominated department. Although the two women did briefly correspond, they never met and no further steps were taken with respect to the applicant's complaint. Dr. Stacey posted the applicant's position on May 6, 2016. The applicant did not apply for the position. She left her position with the respondent, and the practice of cardiac surgery altogether, at the end of August 2017 and started law school in September 2017. The applicant argued that her gender was a factor in the way she was treated by the respondent. This was denied by the respondents, who argued there were legitimate, non-discriminatory reasons for the review of the applicant's leadership and the decision to post her position. The respondent also took the position that the applicant's email to Ms. Hastie did not constitute as a formal complaint of gender discrimination that would give rise to the duty to investigate. The applicant requested $30,000 in general damages. She did not seek lost wages, as she decided to leave the respondent on her own accord and embark on a new career, but she did request special damages for the loss of the annual stipend she would have earned for the three remaining years she should have held the position of Head of the CSS.	however, that the conduct was objectively serious, as it related to the employment of a long-term, high-level employee, and the impact on the applicant was clearly substantial, given it resulted in her abandonment of the practice of cardiac surgery. These findings warranted a substantial award, though not as high as that sought by the applicant. Member Burstyn granted the applicant's request for special damages to compensate for the loss of her stipend for one year. She declined to award further damages given the applicant's decision to leave her position with the respondent and change careers. With the exception of an order requiring the respondent to attach a copy of the HRTO's decisions to any copy of the 2014 review, Member Burstyn declined the applicant's requests for non-monetary remedies: • The HRTO has repeatedly declined to order apologies due to potential freedom of expression concerns • Ordering the respondent to make a public statement about the findings made			

	The applicant also requested a number of non-monetary remedies, which included that the respondent be ordered to: • Provide a written apology • Add an attachment to any copy of the 2014 review that refers to the HRTO's decision and states the review cannot be relied on with respect to the applicant's leadership • Amend its public statement about the HRTO decision to include a mention of findings made against the individuals involved • Inform its physicians of the findings and remedies ordered by the HRTO • Refrain from making any comments of any nature about the applicant's leadership.	against specific individuals would be punitive, which is not an appropriate goal for a *Code* remedy • The respondent's staff have already been advised of the HRTO's decisions so no further order is required to ensure awareness • A remedial order prohibiting comment was beyond the scope of the findings of discrimination made by the HRTO. Instead, Member Burstyn found it more appropriate to order public interest remedies designed to promote future compliance with the *Code* with respect to the duty to investigate.			
***An v. Liu*, 2023 HRTO 675**	The applicant was a new immigrant to Canada when she applied for the lab technician position posted by the respondent. She had been working on an assembly line for several months but she had a degree in chemistry and was seeking a position more in line with her area of study. The applicant was married but her husband lived in China during the time period subject to the application. She also had family living in Toronto. The position the applicant applied for was for a mining company in a remote community in Northern Ontario. The respondent had placed the posting on a website used by the Chinese Canadian community. He explained to the applicant he was in charge of the lab and he hoped to hire someone of the	Application upheld. VC Gananathan found that it was clear from the applicant's evidence that the respondent had repeatedly engaged in a pattern of vexatious behaviour that he knew was unwelcome. She held that the respondent's conduct violated sections 2, 5, 7(1) and 7(2) of the *Code*, as sexual harassment with respect to accommodation and in the workplace. The respondent also breached section 7(3) of the	**$50,000**		

	same background as him as it would make communication much easier. The respondent helped the applicant apply for the job, revising her resume and giving her the questions and answers for the interview and required exam. She had a brief interview with the Manager of the employer and was hired shortly afterwards, starting October 17, 2013. The respondent also arranged for accommodations for the applicant, in a basement apartment of a house owned by one of his colleagues. The respondent moved into the basement shortly after the applicant did and slept in a separate bedroom. He insisted on collecting the rent from the applicant himself. The applicant alleged that from the start of her employment the respondent warned her about possible lay offs in the lab. She claimed he stated that she would be first in line for lay-off because she is the newest employee, but he had the power to help her keep her job. In late October 2013, the respondent began making inappropriate sexualized comments to the applicant. He insisted the company told him he must find a local girlfriend because he was returning to Toronto too often. He commented he interviewed a younger woman for the applicant's position but did not hire her because she already had a boyfriend. She would continually remind him that she was married and they must maintain a purely professional relationship. In November 2013, the respondent's behaviour escalated to include inappropriate touching, at home and work. The applicant would repeatedly reject the respondent's advances to no avail. This culminated in a sexual assault in the applicant's bedroom at the beginning of December 2013. The respondent later emailed her apologizing for the assault and asking for forgiveness. She responded by asking him to treat her with respect, which angered him. She alleged that he subsequently made false claims related to her performance to the employer, which resulted in the termination of her	*Code* by making repeated solicitations and advances towards the applicant and orchestrating the termination of her employment as reprisal for her rejection of those advances. VC Gananathan noted the applicant in this matter was particularly vulnerable at the time, as a new immigrant with limited English proficiency and knowledge of the Canadian legal system. She found the respondent had orchestrated the applicant's hiring and shared housing arrangements with the intention of pursuing a sexual relationship with her. He exerted exceptional power over her working and living conditions, which was exacerbated by the applicant's isolation from her family while living in a remote northern mining community. The applicant's vulnerability and the significant power imbalance between the parties was similar to those present in the decisions awarded the highest level of general damages by the HRTO: *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107 ($200,000); *NK v. Botuik*, 2020 HRTO 345 ($170,000); and. *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO			

	employment in January 2014. She claimed that when she asked her Manager why she was being fired, he directly cited the respondent's complaints about her performance. The applicant testified she did not believe she could report the respondent's conduct to either her employer or her landlord, given that he was in charge of the lab and the landlord was his friend. Her husband was in China and could not help. She felt totally isolated, ashamed and helpless. She though Canada was a fair place, where such injustice does not happen, and believed it was unfair for her to lose her job after working so hard for the employer. She developed depression and was unable to work for 9 months. She requested $50,000 in general damages as well as compensation for lost wages. The applicant filed her HRTO application against both the employer and the respondent but subsequently settled with the employer. The matter proceeded against the respondent, who did not participate in the proceeding before the HRTO.	675 ($150,000). VC Gananathan acknowledged, however, that the respondent's conduct was not as egregious or prolonged as in those decisions, which warranted a lower amount. She ultimately awarded the amount requested by the applicant. She declined the request for special damages to compensate for lost wages, as those losses could not be attributed to the respondent.			
c. BASED ON SEXUAL HARASSMENT, SOLICITATION					
***A.B. v. Paquette*, 2022 HRTO 1356**	See analysis in "Sex" section, above.				
***K.L. v. Ko*, 2023 HRTO 385**	The applicant immigrated from Korea to Canada in 2013 for school. The respondent was the applicant's manager at a job she started on February 27, 2017. The applicant alleged that from the beginning of her employment, the respondent would make inappropriate sexualized comments towards her. She stated she attempted to make it known to the respondent that she did not welcome his comments. On March 16, 2017, the respondent called the applicant into his office for a meeting. When she arrived, she advised she was not feeling well because of a chemical cleaning agent that had been used in the building that she was having a reaction to. He	Application upheld. Member Lamers found the respondent's conduct clearly constituted sexual harassment and solicitation, in violation of sections 5, 7(2) and 7(3) of the *Code*. With respect to remedy, Member Lamers noted that the respondent's conduct, though exceptionally serious, was	**$42,500**		

	offered to give her a massage, which she objected to. He became persistent and she eventually relented. He started first by massaging her arms and back but then proceeded to touch her legs, genitals and breasts while repeatedly making sexualized comments. The applicant was initially in shock but was eventually able to escape the respondent's office. The following day, the applicant reported the assault to the employer and the police. The employer conducted an investigation and terminated the respondent's employment. The police arrested the respondent and charged him with sexual assault, for which he was subsequently convicted. The applicant's last day of work was April 3, 2017. She filed her HRTO application against both the employer and the respondent but subsequently entered into a settlement with the employer. The matter proceeded against the respondent, who failed to file a Response and did not participate in the proceeding before the HRTO. The applicant requested general damages in the range of $50,000 and $75,000 and an order that the respondent undergo human rights training. She provided clinical notes from two medical professionals which showed an aggravation of a pre-existing panic disorder that subsided to previous levels by August 2017.	confined to a one-month period. The impact on the applicant's mental health was also relatively short-lived. As such, the range of damages proposed by the applicant was found to be too high. As for the public interest remedy requested, Member Lamers declined to grant to award given that he had already been fired and criminally convicted.			
***An v. Liu*, 2023 HRTO 675**	See analysis in "Sex" section, above.				
***Sharpe-McNeil v. Swaby*, 2023 HRTO 872**	The applicant was 22 years old when she worked with the respondent, who was her team leader and in a position of authority over her. The applicant alleged that the respondent regularly and repeatedly made sexualized comments and advances towards her, despite her making it known his comments were unwanted. The respondent's conduct culminated in a sexual assault in the	Application upheld. VC Daud held the applicant's evidence supported a finding that the respondent had sexually harassed and solicited the applicant. VC Daud found the applicant's	**$55,000**		

	workplace, during which the respondent pinned the applicant against the wall and forcibly kissed her while she tried unsuccessfully to fight him off. She reported the assault to both her employer and the police, which resulted in the respondent entering into a peace bond. The applicant testified that the assault had a lasting impact on her. She reported experiencing depression and having nightmares. Even 5 years after the assault, she still found it difficult to trust people and continued to be frightened around men. Her brother corroborated this evidence in his testimony about the impact the assault had on his sister. The respondent did not file a Response and did not participate in the proceeding before the HRTO. The applicant originally named her employer and two additional individuals as respondents but she reached a settlement with them on the day of the hearing. She sought an award of $55,000 in general damages against the respondent.	remedial request was appropriate. He noted the range of damages awarded by the Tribunal in sexual harassment and solicitation cases ranged from $12,000 to $200,000, with this case falling within the middle of that spectrum. Although the applicant was exceptionally vulnerable and the respondent's conduct was objectively serious, there were fewer incidents occurring over a shorter time frame than the decisions at the higher end of the spectrum.			
d. BASED ON CREED, RACE, COLOUR, ETHNIC ORIGIN, PLACE OF ORIGIN, ANCESTRY, CITIZENSHIP					
***Seargeant v. Give and Go Prepared Foods Corp.*, 2022 HRTO 1446**	The applicant, who identifies as Black, was placed on the night shift with the respondent through an employment agency. Work was assigned on a first come, first served basis and a work placement was not guaranteed. The applicant testified she always arrived early to increase the possibility she would be selected. On February 10, 2021, the applicant arrived early and was successful in securing a work placement. 20 minutes into her shift, the line leader, Mandi, removed the applicant from her placement and sent her back into line. The applicant alleged that Mandi gave her placement to someone who arrived after her but was the same colour and race as Mandi. This allegation was supported by the evidence of one of the applicant's co-workers.	Application upheld. Member Lamers found the applicant had been discriminated against on the basis of race and colour, in both the denial of placements by Mandi and the termination of her assignment with the respondent for not being "the right fit". The termination was also found to be reprisal, given that it was the day after the applicant complained about Mandi to the On-Site Manager and the fact there was no evidence to support any alleged performance concerns	**$15,000**		**The respondent was ordered to ensure its managers and supervisors complete the Ontario Human Rights Commission's "Human Rights 101" online eLearning course.**

	The applicant alleged that she confronted Mandi about her removal. Mandi told her she was simply following her supervisor's orders. When the applicant stated she would bring this up with Mandi's supervisor, Mandi returned the applicant back to her previous placement. The following day, the applicant again arrived early hoping to secure a placement. She alleged that she was again bypassed for placement by Mandi in favour of workers who were the same colour and race as Mandi. The applicant did not receive a placement and was sent home. The applicant reported her concerns about Mandi to the On-Site Manager for her employment agency. The On-Site Manager confirmed that the applicant advised her of her issues with Mandi and that she subsequently escalated the applicant's concerns to her direct supervisor. The On-Site Manager spoke with Mandi about the applicant's allegations. She stated Mandi provided several explanations regarding directions from her supervisor and issues with the applicant's performance. The On-Site Manager testified she was not aware of any issue with the applicant's performance or punctuality. On February 16, 2021, the respondent asked the On-Site Manager to terminate the applicant's assignment due to performance issues. The On-Site Manager's evidence was that she was told the applicant was not "the right fit". The applicant was offered another assignment at a different location operated by the respondent. She worked two shifts but felt so uncomfortable there that she declined further placements there. She requested general damages in the range of $15,000 to $20,000 and special damages to compensate for lost wages. The respondent did not file a Response and did not participate in the proceeding before the HRTO.	justifying termination. With respect to remedy, Member Lamers noted there was little evidence presented on the impact that these incidents had on the applicant or on her efforts to find new employment. Given this, he found it appropriate to award general damages at the lower end of the range requested by the applicant. He declined to make any award for lost wages, noting the applicant had the opportunity to fully mitigate her loss by continuing with the second assignment with the respondent. Although no public interest remedies were requested by the applicant, Member Lamers found it appropriate to order human rights training for the respondent's managers and supervisors.			

***Matheus v. McCann*, 2023 HRTO 77** **HRLSC Representation**	The applicant is from Ecuador and is a food processing engineer, with a masters' degree from McGill University. He was 28 years old when he was hired by the corporate respondent, a food processing company that produces liquid sweeteners. The applicant alleged that shortly after starting work with the corporate respondent on July 4, 2016, he was repeatedly harassed by the personal respondent (the owner of the corporate respondent) on the basis of his race, ancestry and place of origin. The personal respondent would make disparaging comments about Ecuadorians, stating they were lazy and only want to get paid without doing any work. During a disagreement the two men had, the personal respondent told the applicant that he could go back to where he came from. The applicant also alleged the personal respondent made comments related to his age, stating he was too young and stupid to know what he was taking about. The applicant wrote a formal complaint letter to the personal respondent on December 1, 2016 which set out his concerns regarding the treatment he had received and expressly cited the *Code*. The applicant alleged that when he gave the personal respondent the letter, the personal respondent said: "I knew you were that type of person. If you want to play that game, let's play that game." Two weeks later, the applicant's employment was terminated. The respondents disputed the applicant's allegations of harassment and reprisal but gave conflicting answers as to the reason for the termination of his employment. The personal respondent testified that he fired the applicant due to poor performance but the ROE the applicant was provided stated he had quit, which left him ineligible for EI benefits. The applicant sought a total of $40,000 in general damages as well as special damages to compensate for his lost wages. He testified he was able to secure alternative employment on January 23, 2017 but at a lower wage than what he received with the respondent. He sought full wage loss for his period of	Application upheld. VC Doyle accepted the applicant's version of events and found he had experienced harassment based on race, ancestry, place of origin and age. The harassment was sufficiently persistent and serious that it created a poisoned work environment for the applicant. She also found the termination of his employment was reprisal for his complaint about the personal respondent's conduct. VC Doyle acknowledged that the personal respondent's conduct was objectively serious but, given that the applicant was able to secure alternative employment within a month, she believed the subjective impact on the applicant was not as significant as that in decisions awarding general damages in the range the applicant was seeking. Regarding the request for special damages, VC Doyle found it was unlikely the applicant's employment would have continued much longer given the conflict between the applicant and personal respondent. She awarded the applicant damages to compensate for his period of unemployment plus five months of wage differential.	**$20,000**	**$8,761.15 for lost wages**	**The corporate respondent was ordered to retain an expert to develop a human rights and anti-harassment policy.** **The personal respondent was ordered to complete the Ontario Human Rights Commission's "Human Rights 101" online eLearning course.**

	unemployment and an additional amount to compensate for the wage differential between his current and previous position for one year. He also requested that the HRTO order the personal respondent to complete the Ontario Human Rights Commission's "Human Rights 101" online eLearning course and require the corporate respondent to develop an anti-discrimination, anti-harassment and accommodation policy which contained an appropriate complaint mechanism.	VC Doyle found the applicant's public interest remedies to be appropriate given the findings made against the personal respondent and the fact the corporate respondent did not have any human rights policies.			
e. BASED ON FAMILY STATUS					
***Kendrick v. Canadian Air Specialists Incorporated*, 2022 HRTO 1441**	See analysis in "Sex" section, above.				
f. BASED ON AGE					
***Valiquette v. BPM Enterprises Ltd. (Tim Horton's)*, 2023 HRTO 53** **HRLSC Representation**	See analysis in "Disability" section, above.				
***Matheus v. McCann*, 2023 HRTO 77** **HRLSC Representation**	See analysis in "Creed, Race, Colour, Ethnic Origin, Place of Origin, Ancestry, Citizenship" section, above				

***Banning v. KA Gas and Variety Store*, 2023 HRTO 821**	The applicant had worked for the respondent as a cleaner for over 20 years. The applicant alleged that sometime in March 2020 the respondent advised her that she was "getting too old" to do her job. After this statement, the applicant alleged her hours were reduced until her employment was eventually terminated. On the ROE the respondent issued, the reason given for termination was "Other" and in the comment box was written: "…workload was getting too much, commented that may be she was getting too old for this". The applicant requested 3 years of lost wages, to compensate her for her period of unemployment. The respondent did not participate in the proceedings before the HRTO.	Application upheld. VC Daud found that the applicant's evidence, in the absence of any explanation from the respondent, supported a finding that her employment had been terminated due to her age. VC Daud granted the applicant's request for lost wages, in addition to an award for a moderate amount of general damages.	**$5,000**	**$8,319.66 for lost wages**	
h. BASED ON REPRISAL					
***Seargeant v. Give and Go Prepared Foods Corp.*, 2022 HRTO 1446**	See analysis in "Creed, Race, Colour, Ethnic Origin, Place of Origin, Ancestry, Citizenship" section, above				
***Matheus v. McCann*, 2023 HRTO 77** **HRLSC Representation**	See analysis in "Creed, Race, Colour, Ethnic Origin, Place of Origin, Ancestry, Citizenship" section, above				
II. DISCRIMINATION IN HOUSING					
DECISION	**FACTS**	**HELD**	**GENERAL DAMAGES**	**SPECIAL DAMAGES**	**NON-MONETARY /PUBLIC INTEREST REMEDIES**
a. BASED ON DISABILITY					

***Scocchia v. Sokol*, 2022 HRTO 1418** **HRLSC Representation**	On June 17, 2019, the applicant met with the respondent to view one of the respondent's rental units. Upon reviewing the respondent's lease, the applicant learned the respondent required his tenants to be responsible for snow removal. The applicant had limited mobility due to a work-related back injury and was medically unable to shovel snow. The parties agreed the topic of snow removal was discussed during their meeting, but they disputed the contents of that conversation. The applicant alleged that when he told the respondent he was unable to perform this task, the respondent yelled at him and told him he would not rent the apartment to him. The respondent denied there was any altercation and testified he simply explained he expects his tenants to shovel snow as he cannot do so due to his age and health. The respondent alleged the applicant indicated he did not want to rent the apartment because he would be expected to be responsible for snow removal. The applicant testified that his interaction with the respondent had a devastating impact on him. He was unable to find an apartment comparable to the one offered by the respondent and ultimately rented a much smaller unit that did not have laundry facilities like the respondent's building did.	Application upheld in part. Member Mounsey did not find the respondent refused to rent to the applicant due to his disability. She found the respondent's evidence with respect to the meeting between the parties to be more credible and did not accept the applicant's testimony that the respondent aggressively confronted him and told him he would not rent to him. Member Mounsey did find, however, that the snow removal requirement included in the lease was discriminatory as it created a barrier for potential tenants with disabilities like the applicant. It was clear from the evidence provided by both parties the requirement had an adverse effect on the applicant, as it prevented him from becoming the respondent's tenant because of his disability. The provision was also in violation of the *Residential Tenancies Act* and was thus void and unenforceable.	**$1,500**		**The respondent was ordered to:** • **Remove the snow removal provision from his standard lease agreement for all future tenancies** • **Cease advising prospective tenants they will be responsible for snow removal**
b. BASED ON SEX, INCLUDING PREGANCY					
***An v. Liu*, 2023 HRTO 675**	See analysis in "Employment, Based on Sex" section, above.				

c. BASED ON SEXUAL HARASSMENT, SOLICITATION					
***An v. Liu*, 2023 HRTO 675**	See analysis in "Employment, Based on Sex" section, above.				

III. DISCRIMINATION IN GOODS, SERVICES OR FACILITIES

DECISION	FACTS	HELD	GENERAL DAMAGES	SPECIAL DAMAGES	NON-MONETARY /PUBLIC INTEREST REMEDIES
a. BASED ON DISABILITY					

***NJ v. Granite Club*, 2022 HRTO 1455**	The applicant has autism spectrum disorder [ASD]. He is mostly non-verbal, with limited functional speech and delayed response. He was 17 at the time of the incidents set out in his HRTO application. The applicant and his family have been members of the respondent club since 2008, when he was six years old. He visits the club 4-5 times a week and regularly uses the men's locker room while there. The applicant did not testify at the hearing given his difficulties with verbal communication, particularly in stressful situations.
	
	On February 10, 2020, the applicant was at the respondent club in the men's locker room when he encountered another club member, Andrew Gage. Gage testified he had placed his gym bag on the bench between the two rows of lockers. The applicant was a few lockers down from Gage, on the same side of the bench. Gage turned away to face his locker. When he turned back, he saw the applicant going through his belongings in his bag on the bench. He asked the applicant what he was doing but received no response. Gage continued to confront the applicant in a raised voice.
		Application upheld. VC Gananathan found Gage had misinterpreted the interaction he had with the applicant. Although the applicant did inappropriately touch Gage's personal belongings, VC Gananathan found the applicant had not been aggressive towards Gage. Instead, the applicant had been proceeding though his usual routine in the locker room when Gage placed his belongings in the applicant's usual spot. The noises and gestures Gage interpreted as aggressive and sexualized were instead the self-soothing behaviours of a 17 year old with ASD in response to the disruption of his routine by an adult displaying verbally threatening behaviour towards him.	**$35,000**	*Amount not specified in decision – compensation for membership fees paid to respondent and another club during time period subject to the caregiver requirement*	**The respondent was ordered to:**
					
					• **immediately revoke the requirement that the applicant be accompanied by a caregiver while in the locker room**
					
					• **provide the applicant with:**
					
					  ◦ **A designated locker and digital lock**
					
					  ◦ **A designated bench to place his belongings**

	At this point, the applicant proceeded to undress. Gage testified the applicant was "aggressive" towards him. Gage claimed the applicant had an angry look on his face and was clearing his throat like he was about to spit on him. He stated the applicant was gesturing with his hands as though he was "fondling himself". The applicant then walked past Gage and exited the locker room, towards the showers, without further incident. Gage filed a complaint about the incident with the respondent via email later that evening. The applicant's mother and expert witnesses provided evidence about "stims", repetitive soothing behaviour used by people with ASD to self-regulate, particularly when upset or anxious. His mother testified the applicant regularly twirls and shakes his hands and makes noises when stimming. Although the applicant did not testify, Gage confirmed in his testimony that he had seen the applicant in the locker room on many occasions and noted he followed the same routine on every occasion, going to the same place in the locker room and spreading his belongings out on the same bench. Staff of the respondent contacted the applicant's mother the following morning and advised her that her son would now be required to have a male attendant with him if he wished to use the men's locker room. Alternatively, they proposed that she could supervise him in the barrier-free changerooms. The applicant's mother attempted to explain the situation was likely a misunderstanding related to the applicant's stimming behaviours. The respondent stated a caregiver was required as they can not control the perceptions or tolerance of their members. The applicant's mother advised that the applicant had been using the men's changeroom independently for some time and requiring him to now have a caregiver would hinder his independence and development. She made several suggestions on possible alternatives that could resolve the situation while maintaining the applicant's independence, but the respondent refused to consider them.	VC Gananathan found the applicant was capable of independently using the locker room and experienced adverse treatment with respect to the club's imposition of the caregiver requirement. The respondent did not meet its procedural duty to accommodate, as it jumped directly to a risk analysis and did not consider what options were available to meet the applicant's needs. The only option they considered was the one put forward by Gage, that the applicant no longer be allowed to use the locker room unsupervised. The respondent was also unable to establish that the proposals offered by the applicant would have constituted undue hardship, so VC Gananathan found the respondent had breached the substantive portion of the duty to accommodate as well. VC Gananathan found the amount of general damages requested by the applicant to be appropriate, given the substantial impact on the applicant and his unique vulnerability as a minor with a disability. She noted that general damage awards in the social area of services tend to be far lower than what was awarded here but this was not a single incident of a service provider refusing service. Instead, there			• **Signage on the designated locker and bench that introduces him as a person with ASD and outlines his specific communication needs.** • **Create designated locker areas for members with disabilities in all locker rooms, with built-in digital locks** • **Develop and implement a complaints, investigation and dispute resolution policy for members and staff that is in compliance with the *Code*.** • **Provide training for all staff and board of directors on the duty to accommodate people with disabilities** • **Post *Code* cards in**

	The applicant's parents testified that the respondent's actions had a serious impact on the applicant's emotional and physical well-being. The applicant had been a member of the respondent since childhood and his regular visits to the club were an important part of his daily routines. The respondent's imposition of the caregiver requirement curtailed his independence, confidence, and social and emotional development. The applicant requested $35,000 in general damages. He also sought an amount in special damages to compensate for the membership dues paid to the respondent during the time period subject to the caregiver requirement, as well as the fees paid to another club the applicant attended at that time. With respect to non-monetary remedies, the applicant requested that the respondent be ordered to immediately revoke the caregiver requirement and put in place several accommodations to assist him in using the locker room independently, including designating a specific locker and bench for his use, as well as use of a digital lock and signage to make other members aware of his disability-related needs. The applicant also sought an order that the respondent be ordered to develop and implement a dispute resolution policy.	was a long-standing relationship between the parties, thus leading to a far greater impact on the applicant that warranted a higher award. VC Gananathan also granted the applicant's request for special damages, although the amount awarded was not specified in the decision, as well as an order related to a dispute resolution policy and implementation of the accommodation the applicant was seeking. VC Gananathan also made several additional public interest remedies orders, related to training, development of barrier-free spaces in all locker rooms and the posting of *Code* cards, noting such orders would promote inclusion for all members of the respondent club.			**all areas of the club**
NP v. Peterborough Driving School, 2023 HRTO 60	The applicant was born with a physical deformity on his right hand. His index finger and thumb were noticeably shortened, and he had no movement in his fingers on his right hand. He has adapted to use his right hand without any impediment. He was 17 years old when he enrolled in a driving training certification program provided by the respondent. After completing the 20 hour in-class portion of the program, the applicant had his first of ten in-car sessions on February 14, 2019. The lessons were taught by the owner of the respondent. At the end of the first session, the owner told the applicant	Application upheld. VC Gananathan found the owner imposed the OT requirement on the applicant arbitrarily, as the applicant had no difficulties driving. The owner provided no evidence that it was a "standard procedure" required by the MTO. There was also no evidence led that there was any concern the applicant could not operate a vehicle safely, justifying such a requirement here. As such, VC	**$15,000**	**$791 for cost of training** **$4,020 for increased cost of insurance**	

	that he had done well but that he would have to undergo an independent assessment with an Occupational Therapist [OT] before being allowed to complete the remaining in-car sessions. The applicant did not complete the remaining sessions of the respondent's program because of this requirement. He instead proceeded directly to taking his test with the MTO and was successful in receiving his G2 licence. He passed with no restrictions and was not asked to complete an OT assessment beforehand. He has subsequently worked as a Zamboni driver and skyjack operator with no difficulties. The owner's evidence on the need for an OT assessment was that it was "standard procedure" for anyone who has a physical difference that may impact their ability to drive. This assertion was contradicted by the applicant's mother's evidence that the MTO advised her there was no such requirement, as well as the fact the applicant received his licence without undergoing such an assessment. The applicant testified that being denied the opportunity to complete the respondent's program delayed his ability to get his licence and increased his car insurance, as a 10% discount is provided to those who complete the program. He stated the owner's actions impacted his independence and his dignity and self-worth, in relation to a disability he has worked hard to overcome. He sought special damages to compensate for the training sessions he was denied as well as the increased insurance costs.	Gananathan concluded the respondent had discriminated against the application on the basis of his disability. With respect to remedy, VC Gananathan agreed with the applicant that he was entitled to special damages to compensate for the sessions he was denied and the increase in insurance costs he was required to pay due to the respondent's actions. It is not specified in the decision whether the self-represented applicant asked for general damages. Regardless, VC Gananathan found it appropriate to award a moderate amount to compensate the applicant for the violation of his *Code* rights, noting the impact the respondent's actions had on him and his identity as a vulnerable minor with a visible disability.			
***Powell v. Ontario (Solicitor General)*, 2023 HRTO 345** **HRLSC Representation**	The applicant has Type I diabetes and is insulin dependent. She must monitor her blood sugar levels several times throughout the day and takes two types of medications to control her levels. Both the applicant and her doctor testified about the symptoms of a hypoglycemic incident, which can include combativeness, loss of control of bladder and bowels, severe confusion, difficulty walking and slurred speech. They both also confirmed the applicant has experienced	Application upheld in part. Member Lamers found the applicant did not establish on a balance of probabilities that she had any substantive disability-related needs for medical treatment. It is unknown what her blood sugar levels were	**$2,000**		**The respondent was ordered to retain an external consultant with expertise in human rights to conduct a review of its policies, procedures and**

	hypoglycemic unawareness episodes before, where she is not aware she is experiencing low blood sugar levels. The applicant's doctor confirmed that consumption of alcohol can trigger a hypoglycemia episode up to 24 hours after consumption. On the evening of August 18, 2018, the applicant and her spouse, William Wright, had an altercation in their home. Wright noted the applicant had been drinking that evening. Wright ultimately called 911 to report he had been the victim of a domestic assault. Three police officers, Shapiro, Thorpe and Gale, arrived at the residence. Gale did not testify at the hearing but his notes were entered into evidence and confirmed he was advised by Wright the applicant had diabetes and required medication. There was also a notation that confirmed Wright's testimony that he advised her behaviour may be a result of low blood sugar levels. Shapiro concluded the applicant was intoxicated and was the aggressor in the altercation. Shapiro placed the applicant under arrest and took her into custody. Gale and Thorpe left the scene shortly after midnight and had no further involvement in the matter. It was not in dispute that the applicant advised Shapiro about her disability during the booking process. It was also undisputed that Wright brought the applicant's insulin and blood testing instruments with him to the police station when he arrived at the station around 1:30am to provide a witness statement but Shapiro did not provide them to the applicant until she was released at 5:50am. All of the evidence provided at hearing established the applicant was calm and cooperative throughout her detention and made no request at any time for her glucose monitor or medications. At 8:10 am on August 19, 2018, the applicant tested her blood sugar levels and received a normal reading. She concluded, given that she had not taken her nighttime insulin,	during her detention and the applicant did not experience any apparent symptoms of hypoglycemia. Member Lamers did find, however, that the respondent had sufficient knowledge of the applicant's disability that it had a duty to inquire as to whether the applicant needed access to her glucose monitor and insulin. He stated that Shapiro should have immediately provided the applicant with an opportunity to check her blood sugar levels once the glucose monitor was in his possession. The failure to make any effort to determine the applicant's medical status during her detention was found to be a breach of the respondent's procedural duty to accommodate the applicant's disability. Given that Member Lamers only upheld a portion of the application, related to the procedural duty to accommodate, the amount of general damages awarded was much lower than that requested by the applicant. Member Lamers was not satisfied there was any particular psychological or emotional impact caused by that breach, which was limited to a period of less than four hours and was further impacted by the applicant's failure to inform the			**protocols related to screening of individuals entering custody to ensure compliance with the *Code*.**

	that she had experienced a hypoglycemic episode the previous evening. She testified that on past occasions when she had failed to take her nighttime insulin her morning readings were much higher. Her doctor was not able confirm this and stated it was impossible to determine her blood sugar levels during her detention based on her reading the following morning. The applicant sought $30,000 in general damages and an additional amount of $5,250 in special damages to pay for counselling. She also requested that the respondent be ordered to retain an external consultant to review its policies and procedures with respect to individuals in custody who have diabetes and provide a diabetes education training program.	respondent of her disability-related needs or request any accommodation and the applicant's decision to delay testing until she arrived at home. Member Lamers denied the request for special damages, finding an award for future counselling was speculative, but granted the request for an order for a policy and procedure review by an external consultant. He declined to order the training requested by the applicant, leaving it to the consultant to determine whether such training is required.			
***Robinson-Cooke v. Ontario (Community and Social Services)*, 2023 HRTO 1133** **HRLSC Representation**	The applicant is an ODSP recipient who has a number of physical and mental disabilities. She requires the support of a service dog in order to be able to live independently, particularly with respect to managing her PTSD symptoms. After obtaining and training a dog to meet her specific needs, the applicant applied for an additional benefit provided by ODSP intended to cover the costs of feeding and maintaining a service dog [the Guide Dog Benefit] but was denied because her dog was not trained by a facility accredited by Assistance Dogs International [ADI]. The applicant challenged this denial, providing medical documentation from her physician establishing her need for the dog, and information related to the training and certification her dog had received, but the respondent refused to reconsider the denial. Evidence was led at the hearing to establish that it was not possible for the applicant to obtain a service dog trained by an ADI-accredited facility that met her particular disability-related needs:	Application upheld. Member Nichols found the denial of the benefit was discrimination based on the ground of disability. The applicant's disabilities were a factor in the denial of the benefit, as it was not possible for her to obtain a dog trained by an ADI-accredited facility because of her particular disability-related needs. Member Nichols held the respondent could not rely on section 14 as the applicant was an individual for whom the program was designed: she was an ODSP recipient that had disability-related needs for which a service dog could provide support. She	**$20,000**	**$5,040 for lost benefits**	**The respondent was ordered to:** • **review process in other provinces where there is an alternative to the existing ADI related limitation and work towards adopting a similar process.** • **consult with relevant disability support organizations, mental health agencies and persons with**

	• Individuals in Ontario can only obtain ADI-trained dogs for certain disabilities. • There are no ADI-accredited facilities that train dogs to assist with multiple disabilities. • ADI-trained dogs for mental health disabilities such as PTSD are only available for veterans and first responders. • There are no ADI-accredited facilities that will certify self-trained dogs. The respondent argued the denial was not discriminatory as it was due to the lack of specialized training for the dog and not based on the applicant's disability. The respondent also argued that the benefit was exempt under section 14 as a special program. The applicant requested $25,000 in general damages plus special damages to compensate for the loss of the benefit from the time she applied for it in March 2016. She also sought extensive public interest remedies, including: • a declaration that the GDB Policy discriminated against her on the basis of disability, • a direction that the respondent immediately cease applying the restrictive ADI requirement, • an order that the GDB Policy be amended to provide for reasonable accommodation, • an order that the respondent take reasonable steps to publicize the changes to the GDB Policy.	also found the respondent could not rely on the defence of undue hardship set out in section 11, as there was no evidence led to support that changing or amending the GDB Policy to allow for the accommodation of persons with certain disabilities, particularly mental health disabilities, would amount to undue hardship. With respect to the applicant's remedial requests, Member Nichols found them to be reasonable. As part of her orders, she required the respondent to review the certification process used in other provinces for determining eligibility for similar benefits. She also ordered the respondent to consult with relevant agencies and individuals in its review and to consider in particular the appropriate process for individuals requiring dogs for mental health disabilities that are not veterans or first responders.			**disabilities to ensure the review process is inclusive** • **research an appropriate process for identifying a way to provide service dogs to persons whose primary or sole disability need is a mental health disability and who are not veterans or first responders** • **determine what alternative arrangements can be implemented as soon as possible to ensure access to the GDB for individuals who cannot currently obtain such accommodation** • **advertise the new policy to all current ODSP recipients and the general public once it is adopted.**

b. BASED ON SEX, INCLUDING PREGNANCY					
***Leach v. Ontario (Solicitor General)*, 2023 HRTO 1339**	The applicant alleged two breaches of the *Code* with respect to her interactions with the Ontario Provincial Police [OPP]. The first alleged breach related to her attempts in May 2018 to make a report about several disturbing phone calls she had received. She called her local OPP detachment on May 2 and 3, 2018, requesting that she receive a call back so that she could make her report. When she did not receive the callback she requested, the applicant attended the office in person on May 4, 2018. She alleged she was advised the Sergeant was informed of her request for a callback. She believed his failure to call her back was reprisal for previous HRTO applications she had filed against both him and the OPP. The Sergeant testified that the reason he did not call the applicant back was because he was mistakenly informed by the dispatcher that she had not requested a callback. The second alleged *Code* breach related to an interview with the OPP on June 13, 2018 about a sexual assault the applicant wished to report, which she alleged constituted discrimination on the basis of sex: • The applicant requested that she be interviewed by a female officer, in accordance with the *Victims' Bill of Rights, 1995*, S.O. 1995, c. 6, but the interview was conducted by a male officer. A female officer was present during the interview but she took notes and was not involved in the questioning. • The applicant alleged the line of questioning she was subjected to regarding her behaviour and the clothing she wore, as well as the male officer's behaviour during the interview, made her feel invalidated and disrespected. • The male officer refused to provide the applicant with any information regarding the Crown Attorney's decision not to lay charges, despite her being entitled to this information under the *Victims' Bill of Rights*.	Application upheld in part. Member Nichols dismissed the applicant's allegations of reprisal, given the evidence that the Sergeant had not been informed the applicant had requested a callback. The applicant's allegation of discrimination based on sex was upheld. Member Nichols found the evidence regarding the two interviews showed the applicant experienced adverse and differential treatment during her police interview in comparison to the interview that the same officers had with G.B.: • With the applicant, the male officer expressed his doubts regarding the allegations the applicant made. He directed the applicant to sit in a specific chair and refused her request to sit in a different chair. He sat directly across from her. His body language gave the impression that he did not accept the applicant's allegations. • In contrast, the male officer greeted G.B. with a cordial handshake, commented on the number of "false calls" they receive, and suggested G.B. consider filing a	**$10,000**		

	Videotapes and transcripts of the interview the applicant had with the respondent, as well as the interview conducted with the individual she accused. G.B., were admitted into evidence. The applicant sought $105,000 in general damages, arguing that amount was necessary to restore her to the position she was in before her interactions with the respondent. She mentioned conflict with family and neighbours and experiencing homelessness and feeling fearful in her community. She also argued such a sum was necessary to allow her to live in a home like the one she previously resided in and to rent a studio to allow her to resume her hobby of making art.	defamation of character claim against the applicant. These observations, in addition to refusing the applicant's request for a female interviewer and failing to provide her with any information she was entitled to under the *Victims' Bill of Rights*, led Member Nichols to find the applicant had experienced discrimination on the ground of sex. Member Nichols rejected the applicant's arguments on remedy. There was no evidence to support a finding that the respondent should be held liable for the applicant's lack of housing and personal conflicts. She also noted the interaction between the parties, though serious, was brief in duration.			
c. BASED ON CREED, RACE, COLOUR, ETHNIC ORIGIN, PLACE OF ORIGIN, ANCESTRY, CITIZENSHIP					
***The Estate of Jamaique Rose v. Osaka Japanese Cuisine Ontario Inc.*, 2023 HRTO 1014**	In July 2019, the two applicants, who are both Black women, went to the respondent restaurant for lunch. When they received their bills, they noticed an additional service charge was added to the cost of their meals. The applicants inquired about the charge and were advised by the respondent's staff the 10% service charge was mandatory for all customers. The applicants asked other customers, all of whom were not Black, if they had received the same service charge on their bill. They alleged they were the only patrons in the restaurant at that time that were required to pay the charge.	Application upheld. Member Mounsey found there was sufficient evidence to support an inference that the applicants' race, as the only Black women in the restaurant at the relevant time, was a factor in the adverse treatment they experienced while at the respondent restaurant. In determining the appropriate amount of general damages to	**$10,000 to be split between the two applicants.**		**The respondent was ordered to:** • **retain an expert to develop a human rights policy and a complaints and investigation procedure** • **ensure all staff complete the**

	The applicants then spoke with the Manager regarding the discrepancy between their bills and that of the other customers. They alleged the Manager printed them new bills which still included the service charge. When the applicants continued to express their concerns, the Manager became angry and yelled at them to leave the restaurant. They were provided with no further explanation regarding the charge. They applicants paid their bills and left the restaurant. The respondent's owner testified that an automatic gratuity was their standard practice and a common one in the industry. She testified that it was not mandatory for the customer to pay it and staff would often remove the charge for "regular customers". There was no written policy regarding the service charge and it was left to the discretion of staff. The owner could not provide evidence regarding the particular interactions between the applicants and her staff as she had not been at the restaurant that day and was unable to determine who had been involved. She did not dispute that the service charge had been applied to the applicants' bill and not to other customers.	award, Member Mounsey noted that, although this was a single incident of short duration, it was a serious one and subjected the applicants to public humiliation in front of the staff and other customers at the restaurant. This warranted an award that appropriately redresses the seriousness of the respondent's conduct. Member Mounsey also found it appropriate to order several public interest remedies, given the respondent's lack of knowledge regarding its obligations under the *Code*.			**Ontario Human Rights Commission's "Human Rights 101" online eLearning course** • **place *Code* cards at its entrance and in the bar, kitchen and staff room.**
***A.A. v. Vilma Canizalez*, 2023 HRTO 1353** **HRLSC Representation**	Ab.A. identifies as a Muslim man with brown skin. At the time of the incidents set out in his HRTO application, he was a recent immigrant to Canada from Pakistan. His son, A.A., was born in Canada in 2010. On May 29, 2019, Ab.A. accompanied A.A. to school. While Ab.A. was speaking with A.A.'s teacher, the respondent, who was employed as an Educational Assistant at A.A.'s school, told A.A. to take off his hoodie as he was frightening other children. Ab.A. spoke to the respondent about her concern with A.A.'s hoodie. He then walked towards the school and told the respondent he would speak with the school administration. Ab.A alleged the respondent stated as he was entering the	Application upheld. VC Nichols found the applicants' version of events to be more credible than that provided by the respondent, particularly as it was supported by the police report and principal's investigation report. She held there was sufficient evidence to support an inference that A.A. and Ab.A's race, colour, creed and ethnic origin were factors in the respondent's treatment of them. VC Nichols found the applicants'	**$5,000 to Ab.A.** **$1,000 to A.A.**		**The respondent was ordered to complete the Ontario Human Rights Commission's "Human Rights 101" online eLearning course.**

	school: “We have rules here. If you don’t like them, go back to your country.” After Ab.A. entered the school, the respondent called the police to report that Ab.A had threatened her. Ab.A. reported the incident to the principal, who advised there was no new or specific rule that prohibited the wearing of hoodies at school that would warrant the respondent confronting A.A.about his hoodie. He then went to his workplace, where he was contacted by the police in response to the respondent’s complaint. The school conducted an investigation into the incident, which upheld Ab.A’s allegation regarding the comment the respondent made to him. Ab.A did not learn of the results of this investigation until two and a half years after it was provided as part of a settlement with the school board. The respondent denied the allegations, stating that she herself is racialized immigrant to Canada. She claimed the issue with A.A.’s hoodie was that it was zipped up to cover his face and had a white skeleton on it, which was scaring the other children. This was disputed by the applicants, who led evidence that the hoodie was plain black and was not covering A.A.’s head and that A.A. had speech-related disabilities that prevented him from engaging with other children. The respondent testified that Ab.A aggressively confronted her after she approached A.A. about his hoodie and that she had the right to call the police against Ab.A. as she had felt threatened by him. She denied making the discriminatory statement attributed to her and could not explain why the investigation report confirmed that she did say it. A.A. no longer felt safe at the school the respondent worked at so he transferred to a different school shortly after the incident. Ab.A testified that he found being contacted by the police to be exceptionally distressing, as a relatively new immigrant who had not yet achieved citizenship. They	remedial requests to be appropriate. Although the respondent had already experienced financial consequences due to her actions, as a result of being suspended without pay following the principal’s investigation, this did not eliminate the Tribunal’s obligation to ensure proper compensation for the applicants.			

	requested general damages in the amount of $5,000 for Ab.A and $1,000 for A.A., as well as an order that the respondent be required to undergo human rights training.				
d. BASED ON SEXUAL ORIENTATION					
***AA as Represented by their Litigation Guardian TA v. Burlington Training Centre*, 2022 HRTO 1361**	The applicant was 9 years old at the time of the incidents that were the subject of his application to the HRTO. He and his father, TA, were members of the respondent sports facility. It was known by the respondent's staff and the other facility members involved in these incidents that TA was in a same-sex relationship. The applicant attended a summer camp program with the respondent in July 2018. One day, the applicant kissed one of the other boys in the program on the cheek. The camp counsellor advised TA of the incident and mentioned the father of the other child was a police officer and might be angry about the boy's interaction with the applicant. TA spoke with the applicant about the incident and explained it was not appropriate to kiss everyone on the cheek like they do with friends and family at home. The following day, TA received a call from the police, advising the father of the other boy had pressed charges against the applicant for sexual assault. TA explained to the police officer that there was a misunderstanding, and that the applicant was simply replicating affectionate behaviour he had seen at home towards friends, with no sexual connotations. TA informed the officer during a follow-up call that he believed the other parent contacted them because they are a gay family. The police investigation concluded that the interaction was merely playful and friendly, and no sexual assault took place. Another interaction between the applicant and the other boy occurred on September 8, 2018, when the applicant patted him on the head. When TA picked up his son that day, he was advised the father of the other boy was furious and called the	Application upheld. VC Gananathan found that it was common knowledge amongst the respondent's staff and members that the applicant's parents were gay. The applicant's behaviour was mischaracterized based on homophobic stereotypes. He was singled out for sanction for innocuous behaviour because of his perceived sexual orientation and his association with his gay parents. The termination of the applicant's membership was grossly disproportionate to the applicant's behaviour, which supported a finding that the grounds of sexual orientation and association were a factor in the decision to terminate without any further investigation. VC Gananathan found a moderate award of general damages was appropriate, given the impact the incident had on the applicant. As a minor with an intellectual disability, he was exceptionally vulnerable. The loss of access to his friends and activities he enjoyed was profound. The discrimination was aimed at the applicant's identity	**$10,000**		**The respondent was ordered to:** • **Post *Code* cards in prominent locations around the gym, including the reception area, staff rooms and the gym rooms.** • **Require the owner of the respondent and all staff to complete the Ontario Human Rights Commission's "Human Rights 101" online eLearning course.**

	applicant a "pervert" and "predator". TA later received an email from the respondent's manager, advising the applicant's membership would be revoked due to "safety issues". When TA pressed further, the manager became defensive and stated that it was a "business decision" from the owner. The respondent's owner testified that she was not aware the applicant's parents were in a same-sex relationship. She spoke with her manager about both incidents but did not conduct an investigation or speak to any other staff about the applicant. She explained the gym has a "hands-off" policy and it was clear after the second incident that the applicant could not comply with that policy. TA testified the applicant was distraught that his membership was revoked. He cried and could not understand why he was singled out for punishment. He was sad he could no longer see his friends anymore. TA testified they have not been able to find another gym that offers the same programs as the respondent and they have been reticent about trying new programs, fearful of a similar experience. The applicant requested $25,000 in general damages as compensation. The applicant argued in closing that the respondent had acted in a manner that increased his legal costs, which should be considered in any monetary award made. The applicant also asked for special damages for reimbursement of gym membership fees as well as public interest remedies including human rights training and the posting of *Code* cards.	and family, in a manner which could have a long-lasting impact on his self-identity. VC Gananathan declined to consider the applicant's legal costs in determining the appropriate monetary award, given the HRTO does not have the jurisdiction to award costs.VC Gananathan also declined to award any special damages, finding there was insufficient detail provided regarding either the amount requested or the rationale for the request itself. She did find it appropriate to grant the applicant's request for public interest remedies to ensure future compliance with the *Code*.			
e. BASED ON REPRISAL					
***Leach v. Ontario (Solicitor General)*, 2023**	See analysis in "Sex, including Pregnancy" section, above.				

HRTO 1339					
f. BASED ON ASSOCIATION					
***AA as Represented by their Litigation Guardian TA v. Burlington Training Centre*, 2022 HRTO 1361**	See analysis in "Sexual Orientation" section, above.				
IV. DISCRIMINATION IN CONTRACTS					
DECISION	**FACTS**	**HELD**	**GENERAL DAMAGES**	**SPECIAL DAMAGES**	**NON-MONETARY /PUBLIC INTEREST REMEDIES**
a. BASED ON CREED, RACE, COLOUR, ETHNIC ORIGIN, PLACE OF ORIGIN, ANCESTRY, CITIZENSHIP					
***Pierre v. X Tile and Renovations*, 2023 HRTO 520**	The applicant, who immigrated to Canada from St. Lucia in 2008, identifies as a Black man of St. Lucian heritage. He operates a small landscaping and construction business. The applicant alleged that in November 2019 the corporate respondent contracted with him to work on a residential landscaping project. He dealt directly with the personal respondent, who is the owner of the corporate respondent. After the work was complete on November 24, 2019, the applicant contacted the personal respondent to inquire about payment. He alleged the personal respondent sent him a series of aggressive text messages, in which the personal respondent called him a "monkey", "retarded" and a "mutt".	Application upheld. VC Dawson found the personal respondent's treatment of the applicant violated the *Code*. The terms he used towards the applicant were demeaning and discriminatory. His threats to call the police perpetuated anti-Black stereotypes of young Black men as criminals. VC Dawson granted the applicant's remedial requests. She also found it appropriate to	**$4,300**	**$3,200**	**The personal respondent was ordered to complete the Ontario Human Rights Commission's eLearning Module "Call It Out: Racism, Racial Discrimination and Human Rights"**

	The personal respondent texted that he called the police because of the applicant's "crackhead moves". The applicant responded that he believed that the personal respondent was being racist but the personal respondent did not apologize or change his tone. The applicant alleged the personal respondent then changed the terms of payment. The original agreement was for payment in cash but the personal respondent insisted on an invoice and HST number. The applicant testified that he never received any payment from the respondents for his work. The applicant stated that his interactions with the respondent was the "worst day" of his life. He was out of work for several months afterwards because of the impact on his confidence and self-identity. He reported that he still has difficulties working with white people for fear of being treated the same again. He asked for a total of $7,500 in monetary damages, $3,200 for loss of income for four weeks and $4,300 for general damages. The respondent did not file a Response and did not participate in the proceeding before the HRTO.	order the personal respondent to complete training on racial discrimination, even though this remedy was not requested at hearing by the applicant.			

V. CONSENT ORDER

DECISION	ORDER
Rahman v. Access Alliance Multicultural Health and Community Services, 2022 HRTO 1472	The Tribunal made the following order, on consent of the parties: • The Application as against Access Alliance Multicultural Health and Community Services and Axelle Janczur is withdrawn. • Access Alliance Multicultural Health and Community Services shall provide the applicant with an updated letter of reference as per the terms of the minutes of settlement. • Access Alliance Multicultural Health and Community Services shall have its Executive Director complete the Ontario Human Rights Commission's Human Rights 101 training module within 30 days.

***Porter v. Crouse*, 2023 HRTO 972**	The Tribunal made the following order, on consent of the parties: • The Application is dismissed with prejudice.
***Indigenous Police Chiefs of Ontario v. Ontario (Solicitor General)*, 2023 HRTO 1071**	On the joint motion of the parties, the Tribunal made the following order: a. WHEREAS the Indigenous Police Chiefs of Ontario ("IPCO") commenced an Application before the Tribunal on January 29, 2020, on behalf of members of Akwesasne Mohawk Police Service, Anishinabek Police Service, Lac Seul Police Service, Nishnawbe Aski Police Service, Rama Police Service, Treaty Three Police Service, UCCM Anishinaabe Police Service, and Wikwemikong Tribal Police Service alleging discrimination on the basis of unequal pay, benefits, and pension eligibility provided to uniform and civilian members; b. AND WHEREAS the parties to the Application participated in mediation-adjudication sessions which took place from December 14 to 16, 2022, and January 5 to 6, 2023, and signed Minutes of Settlement on January 31, 2023: 1) The Application in respect of members of Anishinabek Police Service, Lac Seul Police Service, Nishnawbe Aski Police Service, Rama Police Service, Treaty Three Police Service, UCCM Anishinaabe Police Service, and Wikwemikong Tribal Police Service is resolved and fully disposed of. 2) The Application in respect of members of Akwesasne Mohawk Police Service has been resolved in respect of the claims for the provincial retention incentive and service pay. 3) The parties agree that the Application in respect of the pensions for IPCO Indigenous Services Officers and civilian members of the Akwesasne Mohawk Police Service is ongoing, and Ontario will work with IPCO, Akwesasne Mohawk Police Service, and the Mohawk Council of Akwesasne (as required) to create a separate process for discussion of pension benefits for these members, recognizing the uniqueness of the police service in terms of its provision of policing services in Ontario and other jurisdictions, and the location of its headquarters outside of Ontario. The parties agree to work towards a resolution of this Application in relation to pension issues for the Akwesasne Mohawk Police Service through this separate process.
***Langstaff v. Native Child and Family Services of Toronto*, 2022 HRTO 1316**	On the joint motion of the parties, the Tribunal made the following order: • The applicant made allegations of discrimination which were denied by the respondent. • The applicant does not retract the allegations. The respondent does not admit to any discrimination. • The applicant and respondent have entered into Minutes of Settlement, which include a full and final release by the applicant of the respondent related to this Application, and the parties have agreed to keep the contents of the Minutes of Settlement confidential between themselves on the terms set out in the Minutes of Settlement. • By entering into the Minutes of Settlement, the parties have agreed to full and final resolution and the final disposition of the Application.
Escudero v. KCare Service Limited operating as	The Tribunal made the following order, on consent of the parties: • The Application is dismissed.

***Canadian Tire Store No. 194*, 2023 HRTO 1458**	

VI. CONTRAVENTION OF SETTLEMENT

DECISION	FACTS	HELD	REMEDIES
***A.C. v. Toronto Catholic District School Board*, 2023 HRTO 787**	The applicant confirmed the respondent had hired an Equity Advisor and paid the funds required by the Minutes of Settlement [MOS] but argued the other terms of the settlement were either significantly delayed or not complied with at all. The MOS required the respondent to write a letter of regret to the applicant, which was to be delivered to the applicant in person by the Director of Education at a meeting to be scheduled no later than November 30, 2018. A Zoom meeting was eventually scheduled with the minor applicant, his parents and the Director of Education on June 5, 2020 but no written or verbal apology was provided by the Director during that meeting. After further requests by the applicant's parents, the Director finally emailed the applicant an apology letter on August 17, 2021. In its response to the contravention application, the respondent acknowledged the terms of the settlement had not been complied with but cited extenuating circumstances, including their legal counsel taking a medical leave, the Director's retirement and the COVID-19 pandemic. After the respondent failed to attend the CMCC scheduled in the matter, the Tribunal proceeded to make a decision in the absence of the respondent.	Application upheld. Member Nichols found the MOS had clearly been breached and did not accept the respondent's excuses for its failure to comply. The apology letter sent three years after the date the MOS was executed was insufficient to compensate for these breaches. Although the applicant did not make any specific requests with respect to remedy, Member Nichols noted the emotional harm the breaches cause to the minor applicant. This, she found, warranted an award of general damages to compensate the applicant for the harm arising from the breach.	**The respondent was ordered to pay the applicant $1,000 as general damages.**
***Leek v. Paramed Inc.*, 2023 HRTO 919**	The applicant alleged the respondent breached the MOS by failing to provide a letter of employment within 30 days. The respondents did provide the applicant with the letter but one	VC Simon agreed the MOS had clearly been breached but, given the minor delay before it was rectified, the breach was *de minimus* and	**No remedy awarded**

	month after the deadline set out in the settlement. The applicant requested $2,000 in general damages for the breach, citing the stress she experienced trying to obtain the letter and wages she could have earned had the letter been received on time.	did not warrant any remedial order. Although it was reasonably foreseeable that a delay in providing a letter of employment could negatively impact the applicant's search for new employment, VC Simon found the applicant's evidence on this point to not be credible.	
***Eaton v. Corporation of the Town of Iroquois Falls*, 2023 HRTO 1012**	On October 14, 2021, the parties settled an application filed with respect to the lack of accommodation for the applicant's hearing impairment at the respondent's Town Council meetings. In his contravention application, the applicant alleged the respondent breached the following terms of the MOS: 1. By December 31, 2021, the Respondent shall provide a memorandum to all Councillors reminding them to turn on their microphone and to make best efforts to raise the microphone to their mouth when speaking at Council meetings. 2. At all Council meetings following the delivery of the memorandum, the Respondent shall remind Councillors at the beginning of each Council meeting to turn on their microphone and make every effort to speak into the microphone when speaking at Council meetings. There was no dispute the respondent failed to distribute the memorandum as required by the MOS, as it was not delivered to Councillors until February 7, 2022. The respondent also did not deny that the second term was breached at its January 2022 meetings and that a written reminder to Councillors was not included in meeting agendas until its February 28 meeting. The respondent asserted the terms have been fully complied with at every meeting since February 28, 2022. The respondent also led evidence that new audio technology was installed in its meeting room that eliminated the need for	Application upheld in part. VC Simon found the respondent had breached the MOS by failing to distribute the memorandum by December 31, 2021 and failing to remind Councillors to make every effort to speak into the microphone at the 2022 meetings prior to February 28. She declined to make any remedial award with respect to these breaches as they were due to human error, as opposed to disregard for the settlement, and were rectified as soon as possible after the error was discovered.	**No remedy awarded**

	Councillors to speak directly into the microphone.		
***L.C.C. v. M.M.*, 2023 HRTO 1138**	M.M. entered into a settlement of their HRTO application against their former employer, L.C.C., and L.C., a former co-worker. The MOS included the following: • a confidentiality clause, prohibiting M.M. from disclosing the terms of the MOS to anyone other than immediate family, legal and financial advisors or as required by law and requiring them to respond to any inquiry regarding the HRTO application as simply stating that the matter had been resolved, • a non-disparagement clause, through which all parties agreed to refrain from any public comments about the opposite party "…that are untrue, defamatory, disparaging, or derogatory, or acting in any manner that would be likely to damage the opposite party's reputation in the eyes of customers, regulators, the general public, or employees…", • a "liquidated damages" clause, which required M.M. to repay L.C.C. all funds paid to them under the settlement if either the confidentiality or non-disparagement clause were breached. 16 months after entering into the MOS, L.C.C. discovered that M.M. had posted on their LinkedIn profile: "To all those inquiring, I have come to a resolution in my Human Rights Complaint against [the applicant corporation] and [the individual applicant] for sex discrimination." L.C.C. took the position that this statement breached the confidentiality and non-disparagement clauses of the MOS. L.C.C. and L.C. contacted M.M. several times to request the statement be taken down, which M.M. did not do until after receiving the contravention application. M.M. disagreed that there had been any breach of the MOS, arguing the statement was not untrue, did not disclose any of the terms	Application upheld. Member Inbar held that it could not have been within the intention of the parties to interpret the confidentiality clause as allowing for the public statement posted by M.M. online. A "plain language" reading of the term would limit disclosure of the resolution of the matter to those who directly inquire about it. Even if such an interpretation were to be supported, the inclusion of L.C.C. and L.C.'s names in the comment, as well as the reference to "sex discrimination" went beyond what would be allowed by that term. As such, Member Inbar found that M.M. breached the confidentiality clause. Similarly, Member Inbar found M.M. had also breached the non-disparagement clause. Publicly making a statement that included the names of L.C.C. and L.C. in conjunction with allegations of "sex discrimination" had the potential to damage their reputation, which the non-disparagement clause was designed to prevent. The fact the statement may have been true, which would defend a claim of defamation, did not assist M.M. as the non-disparagement clause prohibited more than simply untrue statements. M.M.'s refusal to remove the statement upon request, forcing L.C.C. and L.C. to proceed with a contravention application, showed a blatant disregard for the settlement process. Member Inbar found it appropriate to enforce the liquidated damages clause, as it had been agreed to by the parties and was not, in her opinion, punitive towards M.M. The breaches went to the heart of the settlement.	**M.M. was ordered to repay L.C.C. all funds paid to them under the settlement**

	of the MOS and did not disparage L.C.C. or L.C. L.C.C. and L.C. requested that the liquidated damages clause be enforced, such that M.M. be required to repay the amount that had been paid to them under the MOS. M.M. disagreed, arguing the clause was punitive.	Reputational harm and loss of confidentiality are almost impossible to fully rectify but repayment of the settlement funds would put L.C.C. and L.C. back in the position they were in prior to the settlement, which made it an appropriate remedy.	
***Estate of Mahmoud Eid v. University of Ottawa*, 2023 HRTO 1360**	The applicant alleged the respondent breached the following clause of the MOS: > The Department of Communication within the Faculty of Arts at the University of Ottawa shall undergo implicit bias, anti-harassment, and anti-discrimination training by a trainer external to the university, and mutually agreed upon between the parties, within 365 days of the date of the MOS. The respondent asserted that the training had been completed by the one year deadline but agreed it had not been done by an external consultant. The requirement for the training to be done by someone external to the university had not been communicated to the Department due to the retirement of counsel who negotiated the MOS on behalf of the respondent. The applicant also argued the clause was breached because the training was only provided to full-time faculty and staff. The respondent explained that part-time professors are not ongoing employees and are not considered to be part of the Department, which is why they were not included in the training. Finally, the applicant argued the training the respondent did provide was too short to sufficiently address the subjects required by the MOS and that the respondent had breached the confidentiality clause by advising staff the training had been mandated as part of a human rights settlement. The applicant requested $10,000 to compensate for the	Application upheld in part. Member Ghanam found it was clear the respondent breached the requirement that the training be provided by an external consultant. She did not find it to be a breach to limit the training to full-time faculty and staff only, as the purpose of the training was to target the potential for discrimination in the selection and promotion process within the Department, which the part-time faculty is not involved in. Member Ghanam did not find any further breaches of the MOS. She found the content and format of the training was reasonable in the circumstances, given the challenges posed by COVID, and the reference to the settlement in the staff email about the training did not identify the applicant and was included to stress the importance of attending the training. With respect to remedy, Member Ghanam noted that the one breach she found was neither *de minimus* nor significant and had minimal impact on the applicant given that the respondent had provided training in line with the terms of the MOS and in a timely manner. She recognized, however, that the breach did result in some injury to dignity, as well as stress caused by the need to proceed with a contravention application to ensure compliance with the settlement. This warranted an additional award of general	**The respondent was ordered to:** • **ensure any full-time faculty and staff who have not yet received the external training attend the APUO Employment Equity program** • **Pay $1,000 in general damages to the applicant**

	breaches they alleged had occurred. The respondent argued that, if any breach did occur, it was *de minimus* and no remedy should be awarded.	damages, though far more modest than what was requested by the applicant.	

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TAB 1B

12th Human Rights Summit

Major Case Law and Tribunal Update – Case Summaries

Major Case Law and Tribunal Update Cases and Practice Direction Links

Melissa Mark, Research Counsel
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Human Rights Tribunal of Ontario

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Human Rights Tribunal of Ontario

December 5, 2023

cpd

Law Society of Ontario – 12th Human Rights Summit
Major Case Law and Tribunal Update – Case Summaries

Superior Court and Divisional Court

Stomp v. 3M Canada, 2023 ONSC 5180 (CanLII), https://canlii.ca/t/k07vg

Overview: ONSC dismisses motion to strike constructive dismissal claim alleging breaches of the *Human Rights Code.*

Facts: Mr. Stomp was employed by 3M from over 20 years. In August 2020, Mr. Stomp left work on a medical leave of absence after suffering a heart attack, fall and head trauma.

Mr. Stomp returned to work in February 2021 on a gradual return-to- work basis. In his statement of claim, Mr. Stomp alleged that upon his return, he was subjected to a "poisoned and toxic work environment" and that 3M failed to accommodate his disability. Mr. Stomp argued that there were no efforts by his manager to provide reasonable accommodation, even after he had discussions with him about his workload and how he was unable to keep up due to his mental and physical state, and his recurring heart arrhythmia.

Mr. Stomp ultimately resigned in January 2022, arguing that he was constructively dismissed. He plead that his employer's inactions, and poisonous and discriminatory behaviour, constituted its intention to no longer be bound by the contractual obligations owed to him.

Mr. Stomp commenced a constructive dismissal action against 3M, which also claimed that 3M breached the *Human Rights Code* (the "Code") by failing to accommodate him.

3M brought a motion to strike the claim in its entirety, on the basis that it disclosed no reasonable cause of action under Rule 21.01 of the *Rules of Civil Procedure*. 3M argued that the Code grants exclusive jurisdiction over human rights claims to the Human Rights Tribunal of Ontario (the "HRTO"). 3M further argued the claim disclosed no reasonable cause of action on the basis that there is no independent duty to accommodate.

Decision: The Ontario Superior Court of Justice explained that the test to dismiss a claim under Rule 21.01(1)(b) is, assuming the facts as stated in the statement of claim can be proved, whether it is plain and obvious that the statement of claim discloses no reasonable cause of action. An action ought only to be struck in the case that it is certain to fail, because it contains a "radical defect."

The court then went on to explain that s. 5 of the *Code* provides for a right to equal treatment in employment without discrimination on the grounds enumerated in the Code, which includes disability. The *Code* also grants an employee the right to freedom from harassment in the workplace based on disability. The Court referred to its authority, under s.46.1 of the *Code* to award damages where it finds that a party to a proceeding has infringed the rights of another party to a proceeding under the Code.

The court found that, although it may have drafted the statement of claim differently, "it is not plain and obvious" that it disclosed no reasonable cause of action. The statement of claim clearly laid out a claim for constructive dismissal, as it asserted a series of acts that, taken together, showed that 3M no longer intended to be bound by the contract. Those series of acts

included 3M's failure to accommodate Mr. Stomp's disability (i.e. the failure to accommodate was evidence of the constructive dismissal).

Additionally, the court noted that the key allegation in the statement of claim was that 3M created a poisoned work environment that was untenable for Mr. Stomp to work in. The fact that the workplace was "poisoned" because of a breach of the *Code* did not alter the overall nature of the constructive dismissal claim. This action was not an action solely founded on a breach of the *Code*. Accordingly, the key allegation was about the termination of Mr. Stomps employment agreement.

The court noted that the duty to accommodate in the *Code* is inextricably bound with disability. Therefore, an allegation that an employer has failed to accommodate is another way of alleging that the employer has discriminated based on disability. As long as the clam is connected to an independent cause of action, just as it was connected to a constructive dismissal claim here, it is within the court's authority. Accordingly, the court dismissed 3M's motion to strike Stomp's claim and awarded Mr. Stomp costs in the amount of $7,500.

Williams v. Vac Developments Limited, 2023 ONSC 4679 (CanLII), https://canlii.ca/t/k08jp

Overview: Successful anti-SLAPP motion dismissing employer's counterclaim alleging harm caused by media coverage of allegations of wrongful dismissal, anti-Black racism and workplace harassment.

Facts: Mr. Williams was a qualified Aerospace Sheet metal mechanic who was laid off from his job at Vac Developments Limited. The Company advised that the layoff was due to COVID-19.

Despite the company claiming COVID-19 as the reason for the layoff, Mr. Williams felt the layoff was due to him asking for police to be called after multiple escalating racially motivated-threats against him. He was later permanently laid off without any settlement or statutory benefits.

Mr. Williams stated that he experienced incidents of disturbing anti-Black graffiti, including a noose being drawn on his company locker. He experienced racist comments, death threats, and the sabotaging of machines on which he worked. On one occasion, racist graffiti that threatened the plaintiff's life was quietly taken down before he could see it. The police were not called. Mr. Williams was only made aware this incident after a co-worker showed him a photo. Mr. Williams felt unsafe in the workplace, and could not understand why the graffiti had been removed without any opportunity for the police to investigate.

Mr. Williams, following his layoff, contacted CTV News to express his concerns about the Company's failure to appropriately address workplace racism. The Company declined to comment. CTV ran article naming the Company and quoting Mr. Williams. The article quoted a number of studies citing employees' fear of reprisal as stopping them from reporting racism.

Mr. Williams issued a Statement of Claim seeking his entitlements under the *Employment Standards Act, 2000*; six months of pay in lieu of reasonable notice; $100,000 in damages for breach of the Code, and $20,000 in bad faith damages. The company counter-claimed against Mr. Williams for defamation, claiming approximately $1.5 million in general damages for injury to reputation, loss of customers and business, and punitive and aggravated damages.

Mr. Williams moved to dismiss the counterclaim, arguing that it was strategic litigation attempting to limit expression of matters of public interest (i.e., a SLAPP action). The court first

reviewed the test for an anti-SLAPP motion, as discussed by the SCC in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22.

1. First, the plaintiff employee bears the onus of proving that the proceeding initiated against him arises from an expression relating to a matter of public interest.

2. Second, the defendant employer bears the onus of demonstrating that the proceeding has substantial merit, and the plaintiff employee has no valid defence.

3. Third, even if the claim has substantial merit and there is no valid defence, the court must consider whether the harm likely to be suffered by the defendant employer as a result of the plaintiff employee's expression is sufficiently serious that the public interest in permitting the defendant's counterclaim to continue outweighs the public interest in protecting the expression, i.e. s the harm sufficiently serious that the alleged SLAPP action should continue?

The company conceded that the expression related to a matter of public interest.

As such, the analysis moved to determining whether the counterclaim had substantial merit and whether Mr. Williams had a valid defence. In general, a defamation action will have substantial merit if the plaintiff can satisfy the following three elements:

(i) the words complained of are published;

(ii) the words complained of refer to the company (or plaintiff); and

(iii) the words complained of would lower the party's reputation in the eyes of a reasonable person.

The court found that the first two elements were met. However, the court found that third element of the test was not met.

Decision: The CTV article highlighted the issue of underreported anti-Black racism in the Canadian workplace, using the plaintiff's recent experience as an example. The court reasoned that if a reasonable person read the article, the company's reputation would only falter with respect to whether the company acted appropriately upon discovery of anti-Black racism in its workplace. The main issue was that the company declined to comment in the CTV article. Any damage to its reputation would have been minimized by the company stating that it does not tolerate racism and that the matter was under police investigation.

Additionally, the company could not provide any evidence that it had lost money as a result of the article. The company's failure to meet the third element of the test for defamation permitted the court to grant the plaintiff's motion and to dismiss the company's counterclaim.

The court concluded the public interest overwhelmingly favoured the protection of the plaintiff's expression. Further, the Court found that the company's counterclaim for $1.5 million in damages was disproportionate and without foundation. The court commented that:

> *Unidentified damages for assumed reputational harm to a corporation that has not suffered any actual financial loss two years out from the incident cannot outweigh the harm that would arise from interfering with an expression of public interest as significant as anti-Black racism in the workplace.*

***Osmani v. Universal Structural Restorations Ltd*., 2022 ONSC 6979 <https://canlii.ca/t/jtg7t>**

Overview: ONSC considers the tort of human trafficking for the first time and orders employer to pay $185,000 for constructive dismissal, Code violations, and the torts of battery and assault.

Facts: Osmani was born in Albania but spent a number of years in Italy before immigrating to Canada in 2017. He initially began working "under the table" for Universal Structural Restorations Ltd. [USRL] in December 2018. He obtained Temporary Foreign Worker status in February 2019.

Osmani alleged that throughout his employment with USRL, he was bullied, harassed and humiliated by his supervisor, De-Almeida. Osmani had previously worked with De-Almeida at a different company in 2017. Osmani alleged De-Almeida would repeatedly call him a "fucking Albanian" or "stupid Albanian". He would taunt Osmani in relation to his immigration status and would threaten to send him back to Albania, which Osmani feared as he working without a proper permit at that time. He claimed De-Almeida would hold his power to deport Osmani over his head, calling Osmani his "bitch" and telling him "I have your balls in my hand…".

This treatment continued after both men joined USRL, with De-Almeida still acting as Osmani's supervisor. Before Osmani received his work permit, while he was still working "off the books", De-Almeida would cash Osmani's paycheck for him and give him cash for his wages, while keeping $300-400/week for himself. Osmani thought this was standard and did not object.

On December 18, 2018, De-Almeida assaulted Osmani at work. In a meeting to determine work assignments, in front of his co-workers, De-Almeida punched Osmani in in the causing permanent damage. Osmani subsequently required surgery to remove one of his testicles. Osmani reported this incident to USRL management. He was briefly placed under another supervisor but was soon returned back to De-Almeida's team. Osmani was never informed of any investigation or corrective actions. De-Almeida continued to routinely insult Osmani at work, commenting that he would now "take care" of Osmani's wife since Osmani had to have a testicle removed.

On May 8, 2019, Osmani fell off a ladder at work. USRL staff left him on the ground, refusing to call an ambulance out of fear of a WSIB claim. Finally, two staff members took him home. Osmani experienced extensive injuries and did not return to work until September 2019. De-Almeida did not speak to Osmani for some time after his return as he was angry that Osmani initiated a WSIB claim. They began working together again in January 2020. De-Almeida resumed his repeated harassment of Osmani, commenting that he would punch Osmani's remaining testicle and then "take care" of his wife. Osmani quit his job with USRL in February 2020.

Decision: In his claim to the Ontario Superior Court of Justice, Osmani requested $50,000 as compensation for the violation of his rights under the Code. Osmani alleged that Mr. De-Almeida violated sections 5(1), 5(2) and 7(2) of the Code by engaging in discrimination and harassment based on the *Code* grounds of race, ancestry, place of origin, ethnic origin, citizenship, and sex. Further, he argued that USRL violated section 5(1) of the *Code* by failing to conduct a proper investigation into this conduct and was also vicariously liable for Mr. De-Almeida's conduct[1].

The Court found De-Almeida's treatment of Osmani constituted harassment under the *Code*. USRL did not conduct an appropriate investigation into Osmani's complaint about the assault and De-Almeida's conduct towards him and created a poisoned work environment for Osmani, in

[1] *Osmani v. Universal Structural Restorations Ltd*., 2022 ONSC 6979 at para. 425.

which he had to continue working under the direct supervision of his harasser. The Court ultimately found the amount requested by Osmani was appropriate:

> [443] **In this case, I am satisfied that damages of $50,000 are appropriate.** Mr. Osmani was a vulnerable employee whose stay in Canada was connected to his employment at USRL. He was subjected to humiliating and degrading conduct by his supervisor. His employer did precious little to investigate and stop the behaviour. The conduct lasted for over one year. The impact of the discrimination and harassment on Mr. Osmani's mental health was significant and long lasting.

The amount of damages awarded by the Court in this matter appears to be a high-water mark for *Code* remedies awarded in civil claims pursuant to section 46.1 of the *Code*. It is also likely at the top of the range of what the HRTO would have awarded him had he proceeded by way of an HRTO application. Race and ancestry have historically not been awarded damages of this level by the HRTO. It is possible the high damage award can be attributed to the additional allegations of sexual harassment, which have traditionally been the source of the higher awards in Court.

City of Toronto v. Canadian Union of Public Employees, 2023 ONSC 2122 (CanLII), https://canlii.ca/t/jwkct,

Overview: ONSC dismisses employer's application for judicial review that reversed a grievor's termination, finding that his behaviour was "reprehensible" but not racially motivated.

Facts: Michael Rushton was a municipal standards officer with the City of Toronto. He initially lost his employment because of an accident at Centennial Park on June 16, 2020. The incident occurred during the COVID-19 pandemic when city-wide restrictions were in place. Two Black women (the "complainants") were exercising in Centennial Park, which was closed to the public. The complainants and others had entered Centennial Park through an open gate. When Mr. Rushton saw that the park was being used, he tried to confront other individuals leaving through the south gate. He then drove to the north gate, where two teenaged soccer players and the complainants were climbing over the gate.

The complainants filed a complaint with the City. They complained that Mr. Rushton (1) told them they could be shot for trespassing; (2) demanded to see the complainants' identification and not the identification of the two white teenagers; and (3) attempted to record the complainants' licence plate number after telling them they were "free to go."

The City hired an external investigator, who concluded that Mr. Rushton's conduct towards the complainants violated the Code and the City's *Human Rights and Anti-Harassment / Discrimination Policy*, and failed to serve the public in accordance with the values set out in the City's Public Service By-Law. The City terminated Mr. Rushton's employment. Mr. Rushton's union filed a grievance challenging the dismissal. At arbitration, the arbitrator concluded that although the City had established cause for discipline, he was unable to find that Mr. Rushton's misconduct was racially motivated. He substituted a 30-day suspension for the discharge.

The City sought judicial review of the arbitrator's decision on two primary bases:

1. That he applied the incorrect test for discrimination by requiring proof of racial motivation; and
2. That the award lacked transparency, intelligibility and justification in how the arbitrator treated critical evidence before him.

The City alleged that Mr. Rushton "singled" the complainants out and treated them differently from the soccer players in a manner that constituted anti-Black racism and/or harassment.

Decision: The court did not find it necessary to determine whether the City officially took the position before the arbitrator that Mr. Rushton's actions were racially motivated. The arbitrator never stated that motivation was a required element for a finding of discrimination. The central issue before him was not to determine whether discrimination had occurred in any form, but whether the City had cause to terminate the grievor's employment.

The court reviewed the arbitrator's analysis in regard to the three allegations of differential treatment: the "trespass and shoot" comment, the request for identification, and obtaining the complainant's license plate. The court noted that although it was open to the arbitrator to infer from all the circumstances that race was a factor in Mr. Rushton's treatment of the complainants, he did not do so. Overall, the City had not demonstrated exceptional circumstances that would allow the court to interfere in the arbitrators circumstances.

The arbitrator found that the evidence showed that Mr. Rushton made the "trespass and shoot" comment in the presence of the women and the soccer players, and was wearing sunglasses, so it wasn't clear at whom he was looking at. In addition, the women were climbing over a fence when Mr. Rushton spoke, so they may not have been able to assess where the comment was directed. The arbitrator also believed Mr. Rushton's statement that he asked the soccer players for identification as well. The arbitrator noted that although the women may have thought he only asked for their identification, each of the witnesses presented slightly versions of events.

Additionally, the Arbitrator found that while the evidence indicated that Mr. Rushton tried to record the women's license plate, the soccer players didn't have a car, so that couldn't be considered differential adverse treatment.

The court also found that the arbitrator's award did not lack transparency, intelligibility, and justification. The arbitrator considered the different versions of the incident, explained his reasons and found, on a balance of probabilities, that although Mr. Rushton's conduct was reprehensible, it was not racist as alleged by the City. The court held that the City had not identified exceptional circumstances that would justify it engaging in a reweighing of the evidence. The application for judicial review was therefore dismissed.

Gardener v. Abell Pest Control Inc., 2023 ONSC 2026 (CanLII), https://canlii.ca/t/jwg37

Overview: Divisional Court orders reinstatement of HRTO application dismissed due to delay

Facts: Gardener arrived at the office of the HRTO around 4pm on August 29, 2019 intending to file her HRTO application in person. She had to file her application with the HRTO that day to meet the one-year timeline for filing applications as set out in section 34(1) of the *Code*.

She had an electronic copy of her application, on a USB stick, but needed a paper copy of the document to file it in person at the HRTO office. The HRTO provided her with access to a computer and printer but, due to technical issues, she was unable to provide a paper copy of her application until 5:20 pm. The HRTO staff refused to accept the application. Due to a family emergency, she was unable to attend the HRTO office again until September 5, 2019.

In ***Gardener v. Abell Pest Control Inc.***, 2022 HRTO 278, the HRTO had dismissed Gardener's application due to delay, because she missed the deadline for filing set out in the *Code*. The

HRTO found she did not have a good faith reason for the delay. This dismissal was upheld by the HRTO on reconsideration: ***Gardener v. Abell Pest Control Inc*.,** **2022 HRTO 794**. Gardener then filed an application for judicial review of both HRTO decisions.

Decision: The Court agreed with Gardener that the HRTO decisions were unreasonable. The Court held that the HRTO should have found the application had been filed on time, given Gardener's efforts on August 29, 2019. Alternatively, the HRTO had the discretion to accept the application after 5pm. The Court, with respect to the appropriate remedy, substituted its own decision for that of the HRTO. The Court declared that Gardener's application was timely and should be allowed to proceed through the HRTO's process.

Ontario Court of Appeal and Other Jurisdictions

***Imperial Oil Limited v. Haseeb, 2023 ONCA 364 (CanLII),* <https://canlii.ca/t/jx9x2>**

Overview: Court of Appeal restores HRTO decision that requiring job applicants to be permanently eligible to work in Canada was discriminatory on ground of citizenship.

Facts: Muhammad Haseeb ("Haseeb") applied for an entry-level engineering position at Imperial Oil ("Imperial"). One of the requirements of the position was to establish proof of Canadian citizenship or permanent residency. Haseeb did not meet this requirement but represented during the recruitment process that he was eligible to work in Canada on a permanent basis.

Haseeb received a conditional offer on the basis that he had to provide that he was permanently eligible to work in Canada. Haseeb eventually disclosed he did have Canadian citizenship nor permanent residency. He explained that he was an international student and on graduation he would be issued a three-year post graduate work permit. The work permit would allow him to work in Canada on an unrestricted basis, which would lead to permanent residency status. Imperial withdrew the conditional offer on the basis that Haseeb did not meet the job requirements.

Haseeb filed a complaint with the HRTO alleging discrimination on the basis of citizenship.

Decision: The Court of Appeal agreed that Imperial directly or indirectly discriminated against Haseeb based on the prohibited ground of citizenship. The tribunal's ruling was restored on the basis that the Divisional Court erred in applying the reasonableness standard. In its decision, the Court conducted a *de novo* reasonableness review of the Tribunal decision. The Tribunal found that although the policy carved out an exception for permanent residents, the fact that the policy discriminated against *some* non-citizens because of their citizenship was sufficient grounds for a finding of *prima facie* discrimination. Imperial was also ordered to pay the costs of the appeal to the appellant in the amount of $15,000, inclusive of disbursement and applicable taxes.

Gibraltar Mines Ltd. v Harvey, 2022 BCSC 385 (CanLII), <https://canlii.ca/t/jn1gx>

Overview: BCSC revisits its test for family status discrimination

Facts: Lisa Harvey and her Husband both worked the same 12-hour shift at Gibraltar Mines. Ms. Harvey was employed as a welder at Gibraltar Mines and her husband was a journeyman electrician. In 2017, Ms. Harvey had a baby and took maternity leave. When Ms. Harvey returned to work, she and her husband asked for a reduced workday to facilitate childcare. The company refused, but offered staggered hours, which the Harvey's replied it would harm their family life.

Ms. Harvey filed a human rights complaint alleging she was discriminated against based on family status. Ms. Harvey alleged that the company did not provide her with reasonable accommodation, so she could meet her childcare and family responsibilities when she returned after her leave.

The Tribunal assessed the issue whether the Harvey's discrimination claim met the threshold to require a response from the employer. At the time of the alleged discrimination, the Tribunal relied on the test for family status discrimination established in *Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260 ("*Campbell River*").

The Cambell River test required the complainant to prove two conditions.

1. there was a change in a term or condition of employment by the employer; and

2. that resulted change resulted in a serious interference with a substantial family duty obligation.

The BC Supreme court was asked to clarify the legal test for family status discrimination. The court considered whether an employee can only prove discrimination on the basis of family status when their employer changes a condition of employment.

Decision: The Court of Appeal explained that the *Campbell River* test was incorrect. The Court of Appeal determined that even in the absence of a change in a term or condition of employment, an employer may be found to have discriminated on the basis of an employee's family status. The Court of Appeal revised the test for family status discrimination. Under the new test, in order for the complainant to prove family status discrimination under the Code, they must prove:

1. they suffered an adverse impact arising from a term or condition of employment; and

2. the term or condition amounted to a serious interference with a substantial family obligation.

This case overturns the *Campbell River* Decision. The decision outlines that even when an employer has made no change to the terms or conditions of employment, a change in the employee's family circumstances may now give rise to a claim of family status discrimination. The Court of Appeal granted the appeal, set aside the judgment of the chambers judge on judicial review, and remitted the case back to the Supreme Court for consideration of the remaining issues raised in the judicial review proceeding.

Other Jurisdictions

Hale v. University of British Columbia Okanagan (No. 5), 2023 BCHRT 121
<https://canlii.ca/t/k0gpj>

Overview: BCHRT finds UBC discriminated against former student by failing to properly address her sexual assault complaint against a fellow student.

Facts: Stephanie Hale was a first-year engineering student at UBCO when she was sexually assaulted by EP, a fellow student. For the following three years, she continued to attend classes with EP, despite experiencing PTSD. In her fourth year, she took a medical leave. While on leave, Ms. Hale began the process of "pressing charges" against EP through the University's process for investigating allegations of non-academic misconduct, known as the "NAM process".

Throughout the NAM process, Ms. Hale raised concerns about its procedure and its impact on her as a survivor of sexual assault. UBCO attempted to address some of those concerns within the confines of the NAM process, but ultimately took the position that there was nothing further it could do to address Ms. Hale's concerns. Ultimately, Ms. Hale determined it was not safe for her to participate in the final NAM hearing. The University proceeded without her. At the conclusion of the hearing, the NAM committee, composed of UBC students with minimal relevant training, determined that there was insufficient evidence to conclude that EP had committed the assault.

Ms. Hale filed a human rights complaint alleging that the NAM process was not a reasonable response to her allegations and amounted to secondary victimization. She alleged that in failing to reasonably respond to her allegations and restore her to a discrimination-free learning environment, UBCO discriminated against her based on her sex and disability.

Decision: The Tribunal agreed with Ms. Hale and found that UBCO did not establish that the NAM process was reasonably necessary to ensure a procedurally fair process for disciplining students accused of sexual assault and a safe learning environment for all students.

The Tribunal held that for UBCO to have justified the NAM process in Ms. Hale's circumstances, it must have proved that any adverse impacts connected to the process were *bona fide* and reasonably justified such that there was no discrimination. To do so, UBCO was required to prove:

1) It was acting for a purpose rationally connected to its function as a post-secondary institution;
2) It was applying standards adopted in good faith, in the belief they were necessary for the fulfilment of the purpose; and
3) The standards were reasonably necessary, in the sense that UBCO could not accommodate Ms. Hale without incurring hardship.

Despite the Tribunal finding that the NAM process had a purpose rationally connected to the University and that it was adopted in a good faith, UBCO failed to justify its actions at the third step. The Tribunal took issue with University's position that it was not required to reasonably accommodate Ms. Hale after learning that she would not be attending the hearing. The Tribunal also disagreed with UBCO's position that it was not required to have a discussion with Ms. Hale about how she may be able to return to school notwithstanding the outcome of the hearing. The Tribunal held that UBCO failed to justify why it was reasonably necessary to apply the NAM process to Ms. Hale's allegations of sexual assault to achieve its legitimate purposes of a safe learning environment and a procedurally fair process for a student facing discipline.

RR v. Vancouver Aboriginal Child and Family Services Society (No. 6), 2022 BCHRT 116 **<https://canlii.ca/t/jtb17>**

Overview: Complainant receives BHRT's second highest injury to dignity award in case against Vancouver's Child Protect Agency. Complaint alleged discrimination based on race, in that its decision about Complainant's ability to parent were based on stereotypes and assumptions.

Facts: RR was an Afro-indigenous woman and single mother of five children, one of whom had passed away and three of whom had complex needs. RR identified as being an inter-generational survivor of residential schools with disabilities stemming from trauma. In 2016, Vancouver Aboriginal Child & Family Services Society (VACFSS) apprehended RR's four children and for nearly three years retained custody over the children and regulated RR's access to them. RR filed a human rights complaint alleging that VACFSS based its decision about her ability to parent on

stereotypes about indigenous single mothers and assumptions about her mental health and addictions. RR alleged that instead of supporting and accommodating her, VACFSS separated and disconnected her from her children.

Decision: The Tribunal found in favour of RR and held that VACFSS' decision to retain custody and restrict RR's access to her children was based on stereotypes about her as an Indigenous mother with mental health issues, including trauma and conflict with the child welfare system. Instead of operating under a trauma informed approach, VACFSS responded to RR with escalating assertions of power and control, reducing and suspending her access to her children, limiting her communication with their caregivers, and unfairly prolonging their time in care.

In choosing to award RR the Tribunal's second highest injury to dignity award to date, the Tribunal noted a few important things. First, the Tribunal was not satisfied that there was a reasonable basis to conclude that the children were in need of protection during the period in which they were in VACFSS' care. Likewise, the Tribunal noted that even if there were child protection concerns present, the pre-requisites demanded by VACFFS from RR for the return of her children were not reasonable. In particular, the Tribunal took issue with VACFSS insistence that RR participate in residential trauma treatment and a parental capacity assessment.

Given the extreme impact of discrimination faced by RR, the Tribunal concluded that an award of $150,000 was appropriate. The Tribunal noted that a states removal of underage children engages a parent's rights under the *Charter*. The Tribunal stressed that child welfare practices today are still an ongoing threat to reconciliation efforts and the rights of Indigenous individuals. The Tribunal noted the discrimination was extreme in nature in that it took place over the course of two years. The Tribunal stated that the discrimination faced by RR "struck to the core of RR's psychological integrity and identity as a parent, causing her to question the value of her life."

Churchill v Newfoundland and Labrador English School District, 2023 CanLII 16071 (NL HRC) ***https://canlii.ca/t/jvxrm***

Overview: NL HRC finds school district failed to accommodate deaf child with cerebral palsy by failing to provide accommodations addressing his needs, causing severe development delays.

Facts: The Complaint was filed on behalf of Carter Churchill by his parents, who alleged that their deaf son, who also had cerebral palsy, was not receiving the appropriate support and accommodation at school. Prior to arriving in the school system, Carter, who was non-verbal, was recommended to learn American Sign Language (ASL) by his medical team. The initial complaint filed was with respect to the lack of support implemented by the school district to address Carter's communication needs and to further his development of language skills necessary to engage with the school curriculum. However, the Commission's subsequent investigation into the Complaint led the Churchill family to learn that the district's roaster of Itinerant Teachers of the Deaf and Hard of Hearing (ITDHH) had previously raised concerns with the district regarding the insufficient level of service being provided to students like Carter, and the severe language delays they were observing in their students. Consequently, the Churchill's then alleged that the district's failure to address the ITDHH's concerns, constituted a further act of discrimination.

Decision: The Commission ruled that the school district had failed to provide reasonable accommodation for Carter Churchill and discriminated against him during the 2016 to 2020 school years (i.e., from kindergarten to grade three). In particular, the Commission found that the accommodations provided to Carter during this period were not directed towards addressing his needs and were therefore unreasonable. Likewise, the Commission noted that systemic issues

within the district during this time clearly caused children with special needs to exhibit severe language delays. The effect of these language delays led to Carter being socially isolated, deprived of opportunities for learning and hindered his development of vital social skills. The level of accommodation provided to Carter was insufficient for him to have any meaningful access to the education typically by the district. The School District therefore failed to fulfil its mandate.

In failing the procedural aspect of the duty to accommodate, the Commission noted that the district failed to properly consider all the available information regarding Carter's needs. In particular, the Commission noted that despite the district following a clear process for the development of individual education plans for students like Carter, it still failed to take seriously the issues raised by the ITDHH and their subsequent proposals to address those problems.

At the substantive level, the Commission held that the district should have concluded much sooner that the level of accommodation required by Carter was not possible in a mainstream classroom with hearing students. Instead, the district forced Carter to remain in a classroom unsuited to his needs, until he reached the fourth grade, at which point, his severe language delay required intensive intervention. While the Commission noted that the district properly accommodated Carter from grade four onwards, this was done too late.

The Commission awarded the Churchill's general damages totalling $95,000.

Major Case Law and Tribunal Update

Cases and Practice Direction Links

Melissa Mark, Research Counsel, *Human Rights Legal Support Centre*

Stephanie Ramsay, *Mathews, Dinsdale & Clark LLP*

Leah Simon, Vice Chair, *Human Rights Tribunal of Ontario*

Jeanie Theoharis, Associate Chair, *Human Rights Tribunal of Ontario*

1. **Mehedi v. Mondalez Bakery, 2023 ONSC 1737**
https://www.canlii.org/en/on/onscdc/doc/2023/2023onsc1737/2023onsc1737.pdf

2. **Heath-Engel v. Seneca College, 2023 ONSC 5441**
https://www.canlii.org/en/on/onsc/doc/2023/2023onsc5441/2023onsc5441.pdf

3. **Wu v. City of Toronto and Toronto Ombudsman, 2023 ONSC 6192**
https://www.canlii.org/en/on/onscdc/doc/2023/2023onsc6192/2023onsc6192.pdf

4. **Practice Direction on Jurisdiction**
https://tribunalsontario.ca/documents/hrto/Practice%20Directions/Jurisdiction.html

Law Society of Ontario | Barreau de l'Ontario

TAB 2A

12th Human Rights Summit

Family Status and its Application to Remote Work

Ellen Low
Ellen Low & Co.

December 5, 2023

Family Status and its Application to Remote Work

Human Right Summit 2023

Ellen Low & Nora Chahine

Ellen Low & Co.

December 5, 2023

Pursuant to the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 (the "Code"), individuals are entitled to be free of discrimination and to receive accommodations up to the point of undue hardship in their employment on the basis of family status.

The Code defines family status as "being in a parent and child relationship." Therefore, the Code ground of family status protects parents caring for children (whether the relationship is established by blood, fostering or through step-parenting), and younger individuals caring for aging parents or relatives with disabilities. Although the ground of family status protects and is most often raised with respect to an individual's caregiving responsibilities, at this time, the Code's definition of family status does not extend to protect extended family members (e.g., aunts, uncles, nieces and nephews).

1. Tests and Approaches to Family Status

a. Federal

On May 2, 2014, the Federal Court of Appeal released *Johnstone v. Canada Border Services Agency*, 2014 CHRT 28 ("*Johnstone*"). Johnstone confirms that the threshold to show *prima facie* discrimination on the basis of family status is no higher than that for all other grounds of discrimination.

The Federal Court of Appeal set out the following four-part test to establish discrimination on the basis of family status relating to childcare accommodation, which requires a claimant to demonstrate that:

1. a child is under his or her care and supervision;
2. the childcare obligation at issue engaged the claimant's legal responsibility for that child, as opposed to a personal choice;
3. the parent made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
4. the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

b. Ontario

In *Misetich v. Value Village Stores Inc.* 2016 HRTO 1229 (CanLII) ("*Misetich*"), the Human Rights Tribunal of Ontario ("HRTO") examined the case law dealing with alleged family status discrimination since *Johnstone*. The HRTO found that prior decision-makers inconsistently applied the longstanding test for finding discrimination and, in doing so, set a higher threshold for finding discrimination based on family status than for other forms of discrimination. The HRTO concluded

that the Federal Court of Appeal's formulation of the *Johnstone* test, which requires applicants to demonstrate that their caregiving obligations engage a "legal responsibility", imposes an unduly onerous burden on applicants and is especially unworkable in the context of eldercare.

In its analysis, the HRTO set out the following steps when evaluating whether or not there has been discrimination based on family status in the employment context:

1. The employee will have to do more than simply establish a negative impact on a family need. The negative impact must result in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work.

2. Assessing the impact of the impugned rule must be done contextually and may include consideration of other supports available to the applicant. This is different than requiring the applicant to self-accommodate. Rather than the applicant bearing the onus of finding a solution, the extent of other supports available to the applicant for his or her family-related needs will be part of the overall assessment.

3. Once the applicant establishes that there has been *prima facie* family status discrimination, the onus will shift to the employer to establish that the applicant cannot be accommodated to the point of undue hardship. It is at this stage that the employee will have an obligation to cooperate with the employer and engage in the accommodation process.

Numerous applications are being dismissed summarily for failing to point to any evidence, beyond a subjective belief, that there is a link between the applicant's protected characteristics and the adverse impact suffered. The employee is not expected to exhaust or consult all self-accommodation avenues before a finding of discrimination can be made under the Code, but as the approach to family status discrimination involves a contextual analysis, the employee's ability to reasonably self-accommodate is a relevant factor in the overall assessment of whether they participated appropriately in the accommodation process with their employer.[1]

c. British Columbia

In 2005, the British Columbia Court of Appeal established a legal test to show family status discrimination in *Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260 ("*Campbell River*"). *Cambell River* essentially established that family status discrimination only occurred when a change in working conditions or terms of employment resulted in a serious interference with a substantial parental/family duty or obligation.

To add additional complexity, adjudicators and commentators queried how the test for *prima facie* discrimination set you by the Supreme Court of Canada applies. In *Moore v British Columbia (Education)*, 2012 SCC 6 ("*Moore*"), Justice Abella held that an employee has been discriminated against if:

[1] *Espinoza v. The Napanee Beaver Limited*, 2021 HRTO 68 at para 95-97.

1. The complainant shows a *prima facie* case of discrimination, by showing that:
   a. They have a protected characteristic under the relevant human rights statue;
   b. They suffered an adverse impact; and
   c. The protected characteristic was a factor in the adverse impact.

2. In the context of employment law, once a *prima facie* case of discrimination is shown, discrimination will be proven if the employer is unable to show that the discrimination is justified as a *bona fide* occupational requirement.

While this test has been widely used throughout the country, some adjudicators have found that it was not appropriate method to assess an instance of alleged family status discrimination.

Specifically, there has been concern that any interference with an employee's obligation to their family would constitute family status discrimination. There was concern that *prima facie* cases of discrimination would arise out of the regular and ordinary operations of business, and that it would be difficult for employers to operate under this burden. Some have argued that the *Moore* test is therefore unworkable for circumstances of family status accommodation.

The following passage from a Nova Scotia Arbitration, *International Union of Elevator Constructors, Local 125 v. Otis Canada,* 2013 CanLII 82163 (NS LA) summarizes these concerns:

> It strikes me as problematic to say that *any* adverse impact on the obligations attendant upon family status establishes a *prima facie* duty to accommodate. For example, I would not expect that an employee who has children was entitled to insist, via the duty to accommodate, that the employer provide day care at the work site or elsewhere. Being in a family carries with it certain basic personal obligations and costs that the employee must in ordinary course shoulder him- or herself. The basic burdens and obligations common to most parents cannot ***necessarily*** be shifted onto the employer by way of a duty to accommodate ***simply because*** the obligations of work have an adverse impact however slight on the employee's family obligations. To say that would be to say that family status always trumps the obligations of work, and always triggers a duty to accommodate to the point of undue hardship. Such a result strikes me as unworkable. In my view it is this conceptual difficulty that continues to animate the debate over the proper test, a debate being carried out between and amongst arbitrators, human rights tribunals and the courts. [emphasis in original]

Given these concerns, some adjudicators sought to add additional requirements to show a *prima facie* case of family status discrimination. This has led to multiple competing tests which are inconsistent and often conflict with each other causing confusion. Adjudicators faced with arguments of family discrimination must do their best to work through the different tests and assess for themselves which standard should be applied.

The *Campbell River* test had become one of the more commonly applied throughout the country and many used it as a response to the concerns outlined earlier that the *Moore* test was too broad. This decision tool place prior to *Moore* and in it the Court found that to show *prima facie* case of family status discrimination, an employee needs to show:

(a) a change in a term or condition of employment imposed by an employer; (b) which results in serious interference with a substantial parental or other family duty or obligation.

This additional element of the test where an employer must have changed a term or condition of employment has been used by subsequent adjudicators as a way to address the conceptual difficulties with family status discrimination. The *Campbell River* principle continued to be applied post-*Moore*, for example in *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46.

The British Columbia Court of Appeal recently re-examined the *Misetich* approach and upheld the applicability of the *Campbell River* test in *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*, 2023 BCCA 168 (CanLII). That case began as a BC Human Rights Tribunal case involving an employee who requested changes to her work schedule so that she could access childcare. The employer refused to make those changes and she brought a complaint before the BC Human Rights Tribunal alleging discrimination on family status.

Based on the principle from *Campbell River*, the employer had not changed a term or condition of employment – it had in fact refused to make a change. Accordingly, a *prima facie* case could not be made out under a narrow interpretation of *Campbell River*. The Tribunal chose not to use the *Campbell River* principles however and found that the acts of the employer constituted *prima facie* discrimination regardless of whether they had actively changed working conditions or not. The Employer successfully had the decision reversed on this point at judicial review and the matter was appealed to the British Columbia Court of Appeal ("BCCA").

The BCCA sided with the Tribunal and decided that *Campbell River* should not be interpreted narrowly. It held that *Campbell River* did not stand for the principle that a change in employment terms or conditions was a requirement to establish family status discrimination. It is one of the ways in which a *prima facie* case of discrimination can be established, but not the only way.

The BCCA then amended the *Misetich* approach and ruled that the purpose of human rights legislation requires a broad interpretation of family status, favouring a test based on the *Moore* decisions from the Supreme Court of Canada in 2012, as follows:

> 101 […] To put this test in terms of Moore, to establish *prima facie* adverse impact discrimination as a result of a conflict between work requirements and family obligations, an applicant must establish that [i] their family status includes a substantial parental or other duty or obligation, [ii] that they have suffered a serious adverse impact arising from a term or condition of employment, and [iii] that their family status was a factor in the adverse impact. (numbering added)

The BCCA noted that this interpretation aligns the principles from *Campbell River* with the broad and general principles from *Moore* and established that discrimination based on family status would be assessed in the same manner as the other characteristics that are protected by human rights legislation.

The *Gibraltar Mines* decision could reduce some of the uncertainty associated with family status discrimination claims in Canada. The BCCA's rejection of the limiting nature of its previous precedent will likely put an effective end to adjudicators needing to consider whether to adopt the

Campbell River approach. That will be one less potential approach that could be used in these types of cases.

The rejection of the *Campbell River* principles seems to be taking place throughout the country. In Ontario, it was found that family status must be treated the same as all protected grounds, and therefore applied the Moore test without the qualifier established by *Campbell River* (*see* *Ananda v. Humber College*, 2017 HRTO 611).

2. Application to Remote Work – Case Law

a. *Hydro Ottawa Limited v. International Brotherhood Of Electrical Workers (IBEW), Local 636*, 2020 CanLII 77939 (ON LA)

The employer implemented a work from home schedule. Employees alternated between working at home and in the office, weekly. Employees without childcare arrangements were required to use vacation credits or unpaid leave rather than working from home.

The employer expressed concern that some employees did not work well from home, that they have the rights to implement a work schedule as they saw fit, and that working at the office is good for the employees' mental health and company morale, but there were not evidence on file that the employee's in question did not work well at home, nor did any of the employees' in question had any mental health issues because of working from home remotely.

The Arbitrator held that the union established *prima facie* discrimination and the employer failed to demonstrate that the rule was a *bona fide* occupation requirement, as no evidence was produced by the employer to prove that the work schedule was related to a legitimate work purpose.

The Arbitrator further held that there was no evidence to substantiate a claim that it was impossible to accommodate the grievors without negative economic impact. In the alternative, the union met the *prima facie* test set out in *Johnstone*. The use of unpaid leave or vacation credits was not a reasonable accommodation.

3. Practical Hypotheticals

a. A parent who works on a hybrid basis wishes to work from home indefinitely based on family status so that they can pick up their 7-year-old from school

Creating a flexible and inclusive workplace benefits all employees and can help employers hire, retain, and get the best possible performance from employees. Pursuant to the *Code*, employers have a legal duty to accommodate based on a person's family status. The goal is to allow employees equal benefit from and participation in the workplace to the point of undue hardship.

Accommodation is a shared responsibility. Everyone involved should share relevant information and explore solution together.

Here, firstly, it would be important to assess what changed in the circumstances to be able to propose appropriate accommodations. While the employee would prefer to work from home, employees are not entitled to their preferred accommodation. The Employer could evaluate if the schedule of the parent can be changed slightly to accommodate the parent in picking up their child while working in office. The Employer could ask if the employee inquired about whether after-school care is available for in-office days.

b. A single parent of a child with a disability is frequently asked to pick up their child from school because of behaviours associated with their child's disability. Eventually, their employer set a meeting due to their "persistent absenteeism".

It is all too easy to consider individual caregiving needs as isolated personal issues. An employee seeking reduced work hours or a flexible schedule to attend the needs of their children may easily be viewed as simply expressing their personal preferences regarding balancing their various responsibilities. Viewed in the broader light of the disadvantage faced by caregivers, these "one-off personal issues" may be seen in a different light. In assessing requests for accommodation based on family status, organizations should consider whether systemic barriers may exist within their own organization, including the inclusiveness of its policies, procedures and decision-making practices.

In determining whether a rule, factor, or requirement significantly interferes with a caregiving responsibility, it is important to take into account whether adequate social supports and services are available for the individual to resolve their caregiving needs without accommodation. For example, workers who find that there simply are no adequate childcare available may need accommodation from their employers in terms of shifts. Both the adequacy and availability of supports should be taken into accounts: caregivers should not be required to place their loved ones into situations of significant risk of physical, emotional, or psychological harm in order to meet the needs of their employer.

c. An employer's attendance policy states that any employee absence during a three-month probationary period is cause for termination. A new employee's parent has a serious fall. They take two days off from work to attend to them at the hospital and to arrange supports for their return home. Upon their return to work, they are dismissed because of their violation of the attendance policy.

It is common for persons with family care responsibilities to find that their responsibility to provide care for family members requires absences from work. Such absences may be very short but frequent or much lengthier. Absences may be planned or may arise as emergencies. It is a legitimate goal for employers to ensure that employees are able to reliably and effectively perform their duties. Employers are entitled to manage absenteeism. However, rigid attendance

management programs and absenteeism policies that do not take into account the needs of persons with caregiving responsibilities may discriminate on the basis of family status.

4. Conclusion

The correct "test" for family status discrimination will depend on jurisdiction. In federally regulated workplaces, the *Johnstone* test will apply. In Ontario, Courts have applied both the *Johnstone* test, as well as the approach set out in *Misetich*. Note that in *Misetich,* the HRTO specifically rejected the "*Johnstone* test". This was confirmed in *Espinoza v. The Napanee Beaver Limited*, 2021 HRTO 68, whereby the HRTO confirmed that the *Misetich* Approach is the go-to test for family status cases at HRTO. It is unclear whether Ontario Courts will follow suits, considering the *Johnstone* test was adopted by the Ontario Court of Appeal in *Partridge v. Botony Dental Corporation*, 2015 ONCA 836. Both labour arbitrators and the Superior Court of Justice have considered both the *Misetich* and *Johnstone* tests together in analyses. Notably, the Divisional Court acknowledged that *Misetich* and *Johnstone* provide two separate lines of authority in Ontario's family status discrimination analysis, the Divisional Court declined to clarify which line of authority should prevail in Ontario.[2] To be on the safe side, it is advised that legal practitioners should incorporate both the Johnstone test and the *Misetich* Approach into their legal analysis, when circumstances permit.

5. Checklist

- As a person with family status needs: Tell you employer what your family status-related needs are, with supporting information as needed, and help explore possible solutions;
- As an employer: Accept requests of accommodation in good faith. Ask only for needed information and keep this information confidential. Find a solution as quickly as possible, and in many situations, cover the costs, including any expert opinion or documents needed.
- Employers should ensure that employees are asked for detailed information about their family status obligations in order to engage in the accommodation process;
- Employers can also identify what accommodation in the workplace might be possible and assist their employees in identifying resources and support in the community;
- Be mindful of both procedural and substantive obligations with respect to accommodation and the accommodation process
- Determine if the employee's accommodation request:
    - Engages the ground of family status;

[2] *Peternel v. Custom Granite & Marble Ltd*, 2019 ONSC 5064 (Div. Ct.) at para 32.

    - If so, if the request is based on a personal choice in caregiving or *bona fide* lack of alternative options; and
    - Even if not, commit the assessment above, to writing, to show a serious consideration of the accommodation request;

- Keep in mind that what is appropriate for one employee will not work for another, there is unfortunately no 'one size fits all' response to this;

- Before implementing blanket policies or rules, consider the potential impact to family status and whether the role is a *bona fide* occupational requirement*;*

- It is possible that some accommodation requests cannot be met, and counsel should be consulted about whether or not the point of undue hardship has been reached;

- Practically, do a case-by-case assessment, and keep good notes. If the employee does file a Form 1 Complaint you will want your employer client to be a position to show what was done to consider the request, the communication with the individual employee, and a rationale for the decision.

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TAB 2B

12th Human Rights Summit

Update on COVID-related Human Rights Cases in Employment

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December 5, 2023

Update on COVID-related Human Rights Cases in Employment

LSO's 12th Human Rights Summit – December 5, 2023

Lauri Reesor, Hicks Morley and Stevie Gellatly, Student-at-Law, Hicks Morley

1. Introduction

COVID-19 ("COVID") has produced unique challenges in the employment context.

Since 2020, employers have imposed various workplace policies around physical distancing, masking, testing, and vaccination. These policies have evolved over time as the pandemic and public health requirements and guidance also evolved.

Particularly for vaccination, workers may be subject to workplace health policies that impact their rights and interests. As a result, employers have to balance the rights and interests of an individual employee against their duties to protect the health and safety of their workplace communities. In some cases, those duties will tip the scales, as described by Arbitrator Doucet in *Bailey v New Brunswick Power Corporation*[1]:

> …the obligations placed on the Employer to protect the health and safety of all its employees and clients and to contribute to the health of the whole community outweighs the privacy, bodily integrity and financial interests of the employees who do not want to be vaccinated, notwithstanding the difficult situation that those employees might find themselves in.

In the employment context, COVID-related human rights cases have largely focused on exemptions to workplace vaccine policies. The cases summarized below therefore focus on vaccine exemption and accommodation requests.

Timing, the specific language of the workplace policy, the type of industry, and the circumstances of the workplace itself will impact whether a particular COVID-related policy is reasonable, and whether discipline flowing from contravention of that policy is also reasonable. Reasonableness is assessed based on the

[1] *Bailey v New Brunswick Power Corporation*, 2023 CanLII 2832 (NB LA) (Doucet) at para 109.

circumstances that existed at the time the policy was implemented.[2] Case law to date is clear that non-compliance with an otherwise reasonable vaccination policy, such as a refusal to be vaccinated unsupported on medical or human rights grounds, can be the subject of discipline. Responses to refusals to vaccinate can include placing the employee on a non-disciplinary unpaid leave of absence or discipline up to and including terminating their employment in some cases.[3] Additionally, the threat of discipline itself as a result of non-compliance with an otherwise reasonable vaccine policy is not considered "reprisal" under the *Human Rights Code* (*Code*).[4]

In all the cases summarized here, the policies themselves are found to be, or are treated as, reasonable and the focus of the analysis is on human rights accommodation.

Vaccine exemption/accommodation requests are usually either disability- or creed-based; however, the prevailing exemption requests so far dealt with by adjudicators in the case law have related to creed.

When assessing a creed-related exemption request, decision makers across Canada will apply the analysis from *Syndicat Northcrest v. Amselem.*[5] As described by the Supreme Court of Canada in *Amselem*, protected beliefs under the ground of "creed" in human rights codes are those that have "a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith."[6]

As described in the Ontario Human Rights Commission's "Policy on preventing discrimination based on creed," the following characteristics are often relevant when determining if a belief system is a creed under the *Code*. A creed:

- Is sincerely, freely and deeply held
- Is integrally linked to a person's identity, self-definition and fulfilment
- Is a particular and comprehensive, overarching system of belief that governs one's conduct and practices

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[2] *Ibid* at para. 74.

[3] See *Central West Local Health Integration Network v Canadian Union of Public Employees*, Local 966, 2023 CanLII 58388 (ON LA) (Goodfellow) at para 154; *Lakeridge Health v CUPE, Local 6364*, 2023 CanLII 33942 (ON LA) (Herman) at paras 167–186.

[4] See *Porter v York Region District School Board*, 2022 HRTO 1186; *Saunders v Swiss Chalet Restaurant 1206*, 2022 HRTO 936; *Human Rights Code*, RSO 1990, c. H. 19 [*Code*].

[5] 2004 SCC 47 [*Amselem*].

[6] *Ibid* at para. 46.

- Addresses ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a Creator and/or a higher or different order of existence

- Has some nexus or connection to an organization or community that professes a shared system of belief. [7]

In Ontario, though "creed" may in limited circumstances include non-religious beliefs, the concept of "freedom of choice" or "individual choice" itself has not been found to be a "creed" protected from discrimination by the *Code*, as these secular beliefs do not have a sufficient nexus with a community of belief, and generally lack an overarching systemic component.[8] Similarly, if a grievor or applicant's primary basis for vaccine objection is scientific or political, their exemption request will likely be unsuccessful.[9]

In some circumstances, a grievor or applicant may have multiple reasons for their exemption request. Where secular and religious beliefs intermingle, but the creed-based beliefs are still sincerely held and are central to the opposition to vaccination, then there is more risk (if substantiated) for a finding of creed-based discrimination.[10] However, where the religious grounds are just a "pretext" for opposition to vaccines on non-religious grounds, then discrimination is not made out and no accommodation would be required.[11]

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[7] Ontario Human Rights Commission, "Policy on preventing discrimination based on creed" (17 September 2015) online: <https://www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed>.

[8] See *Oulds v Bluewater Health*, 2023 HRTO 1134; *Ortiz v University of Toronto*, 2022 HRTO 1288.

[9] See *International Brotherhood of Electrical Workers (System Council No. 11) v Canadian National Railway Company*, 2023 CanLII 44118 (CA LA) (Clarke) [*International Brotherhood*].

[10] See *Wilfrid Laurier University v United Food and Commercial Workers Union*, 2022 CanLII 120371 (ON LA) (Wright).

[11] *International Brotherhood*, *supra* note 9 at paras 98 and 111.

2. Key Takeaways

- COVID-related exemption and accommodation requests will generally engage the protected grounds of disability and creed, with creed being the most commonly disputed cases.

- Non-compliance with an otherwise reasonable COVID policy, such as a refusal to be vaccinated, unsupported on medical or human rights grounds, can be the subject of discipline.[12]

- The threat of discipline itself as a result of non-compliance with an otherwise reasonable vaccine policy is not considered "reprisal" under the *Human Rights Code*.[13]

- Though creed can sometimes include non-religious beliefs, "freedom of choice" and "individual choice" are not protected beliefs under the *Human Rights Code*.[14] Similarly, scientific or political objections to compliance with COVID policies will not be considered a creed.[15]

- Where secular and religious beliefs intermingle, but creed-based beliefs are still central to vaccine opposition, then creed-based discrimination may be found,[16] but where religious grounds are just a "pretext" for opposition on secular grounds, then discrimination is not made out.[17]

The following vaccine-related cases largely deal with exemptions on the grounds of creed, except for *Chesher v The Regional Municipality of Niagara*, which centred on the protected grounds of sex and disability relating to pregnancy.[18]

United Food and Commercial Workers Canada, Local 175 v Highbury Canco Corporation is the sole case noted here on the protected ground of disability in relation to a mask phobia. In that case, the employer could not accommodate the grievor short of undue hardship due to the safety risk a maskless employee would impose on other employees in a close-quarters production environment.[19]

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[12] See *Central West Local Health Integration Network*, *supra* note 3 at para 154; *Lakeridge*, *supra* note 3 at paras 167–186.

[13] See *Porter* and *Saunders*, *supra* note 4.

[14] See *Oulds* and *Ortiz*, *supra* note 8.

[15] *International Brotherhood*, *supra* note 9 at paras 98 and 111.

[16] See *Wilfrid Laurier University*, *supra* note 11.

[17] *International Brotherhood*, *supra* note 9 at paras 98 and 111.

[18] 2023 HRTO 50.

[19] 2023 CanLII 55400 (ON LA) (Kugler) [*United Food*].

3. Case Summaries

i. Sex

***Chesher v. The Regional Municipality of Niagara*, 2023 HRTO 50 (20 January 2023)**

- An increase in testing due to the decision not to vaccinate is not discrimination.

An applicant claimed that she did not receive the COVID vaccine due to her attempts to get pregnant. She then alleged that she experienced discrimination from her employer based on sex and disability due to her attempts to become pregnant because she was required to comply with a policy of increased COVID testing as an unvaccinated employee.

The Human Rights Tribunal of Ontario (Tribunal) found that while pregnancy and the protected ground of sex were factors in the applicant's choice not to be vaccinated for COVID, the applicant failed to provide anything that would even show an inference regarding her assertions of adverse treatment. The applicant had been more frequently tested for COVID because she chose not to be vaccinated, not because she was trying to conceive. The application was dismissed.

ii. Disability

***United Food and Commercial Workers Canada, Local 175 v Highbury Canco Corporation*, 2023 CanLII 55400 (ON LA) (Kugler) (21 June 2023)**

- Disability was established, but the employer was unable to accommodate the grievor's mask phobia short of the point of undue hardship.

The employer operated a large food production facility with hundreds of employees. The employer instituted masking and distancing policies in the early part of the pandemic. The grievor had a mask phobia that prevented her from complying with wearing any face covering for any period of time. When it was clear that her disability prevented her from complying with the mask policy, the employer stopped scheduling her for shifts.

The employer's mask policy complied with direction from a Ministry of Labour Inspector. The reasonableness of the policy was not disputed. Accommodation was the central issue.

The employer offered accommodation where the employee could wear a face shield for part of her day and a mask only in public areas. The union and grievor declined this accommodation.

The union argued that the employer could have adjusted scheduling, could have the grievor enter and exit by a different doorway than other employees, and could have her use a less busy lunchroom and washroom. The union said the employer took the position that "no risk was tolerable" and that this was an unreasonable "exacting standard."

The arbitrator considered the evidence regarding the organization and physical layout of the workplace, noting that while some of the roles identified by the grievor and union would have reduced interaction with other employees, the roles could not have totally isolated the grievor, and therefore could not have fully addressed the health and safety risks presented by an unmasked employee.

The arbitrator found that the requirement to wear a face mask under the policy was a reasonable and *bona fide* occupational requirement and that the employer satisfied its procedural and substantive duty to accommodate. "[T]he Employer was doing its best to protect the health and safety of its employees in these chaotic and ever-evolving circumstances" and in the unique context of the workplace and the changing pandemic, the employer could not accommodate the grievor's disability short of undue hardship. After the mask policy was lifted in March 2022, the grievor was returned to work.

iii. Creed

a. No Creed-Based Discrimination Found

> **United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5319 v Securitas Transport Aviation Security Ltd., 2023 CanLII 91854 (NS LA) (Ashley) (23 September 2023)**

- Concerns about maintaining purity of the blood are not based on religious belief/creed but are secular/medical in nature.

The employer implemented a vaccine policy in September 2021, with a deadline in November 2021 for all employees to be fully vaccinated with two doses or be placed on administrative leave. Information was provided to employees regarding possible exemptions on medical and religious grounds.

The grievor applied for a religious exemption based on being Romanian Orthodox. He said that his primary objection to the vaccine was "the way they test the vaccine, and sometimes the things that are used to comprise the vaccine can be a variety of things… generally used in vaccines that people such as me would object to putting in their bodies, and this one being so new, we don't know what effects it will have long term or short term."

The employer sought information on these claims from its medical consultant, who provided information that contradicted the grievor's views on fetal cell lines and the content of vaccines. The employer learned that two vaccines did not use

fetal cell lines in production – Pfizer and Moderna. The employer also looked for information on the views of the Catholic and Romanian Orthodox churches, and neither had publicly put forward opposition to COVID vaccines.

The grievor provided a further statement on the content of the vaccines, and that in his religious view, "we view the body as a temple; the spirit comes from god, and the blood is the life force and the blood must remain pure at all times – it's one of the central pillars of life." The employer provided the grievor with information on the Romanian Orthodox church encouraging vaccination and how the vaccines did not contain fetal cells. The grievor responded that most people in Romania opposed vaccination.

The arbitrator found that "the Grievor's reasons for not taking the vaccine, essentially, because of his concerns about maintaining purity of the blood, is not based on religious belief, but is secular/medical in nature" and the grievor failed to establish a nexus between the practice/belief and the decision to refuse the COVID vaccine. Further, the grievor's belief was not connected to a religious text or article of faith. The grievance was dismissed.

International Brotherhood of Electrical Workers (System Council No. 11) v Canadian National Railway Company, 2023 CanLII 44118 (CA LA) (Clarke) (15 May 2023)

- Even in situations where religious and secular objections mix, the religious objection cannot simply be a "pretext" for secular objections. The requirement of sincerity of belief is fact-specific: someone cannot make a bare claim that they are religious based on the grounds from other cases.

Canadian National Railway Company (CN) announced a vaccine policy with a deadline of November 1, 2021 in accordance with federal policies, noting that it would consider medical or religious exemptions. The employer took a "wait and see" approach to discipline, meaning that employees would be placed on unpaid leave until they provided proof of vaccination, the pandemic abated and public health authorities downgraded the risk, or the pandemic became prolonged and there was no indication of a safe return to work for unvaccinated employees. In the third case, CN reserved the right to potentially terminate the employment of unvaccinated employees.

The grievor refused to be vaccinated and sent the employer a template letter from Action4Canada that indicated the employer was "unlawfully practicing medicine by prescribing, recommending, and/or using coercion to insist employees submit to the experimental medical treatment for Covid-19, namely being injected with one of the experimental gene therapies commonly referred to as a 'vaccine.'"

After the vaccination deadline, the grievor was placed on unpaid leave. Several days later, the grievor provided a Religious Exception Request Form that described his religious beliefs as preventing him from "experimenting on my body

with untested and unsafe drugs, vaccines and medical procedures when the risks of said procedures outweigh the illnesses or diseases or medical conditions that they are supposed to prevent or hinder," from "being coerced into doing things against my will," and requiring him to "honour the sanctity of human life including pre-natal human life and therefore protect unborn children from medical experimentation in the production of some vaccines."

The employer denied the exemption request, noting that "personal choice not to be vaccinated" was not a choice that required accommodation.

The grievor followed up with further communication that noted there were no "long term studies" of the vaccine to establish safety, and indicated the "ever increasing evidence of many short term ailments and serious adverse reactions including death from getting these experimental injections that have also been scientifically proven that they do not prevent the spread of SARS-COV 2, nor do they prevent the person from getting the virus."

Prior to the hearing of the grievance, CN's vaccine policy was found to be reasonable in another arbitration decision, especially considering the effect absenteeism would have on CN's provision of essential goods across Canada and the disruption a testing regime could cause. Further, CN's policy was compliant with federal public health orders.

The focus of the analysis was therefore on the accommodation request. The arbitrator reviewed case law on situations where secular and religious beliefs intermingle, but the religious grounds are still significant. The arbitrator also reviewed grievances where the religious grounds are just a "pretext" for opposition to vaccines on non-religious grounds. The grievor's beliefs fell into the latter category, as the exemption request and follow-up he provided largely focused on the "experimental" nature of the vaccine and an opposition to coercion for medical treatment, and evidence about efficacy and side effects.

The grievor did provide new evidence during the hearing, such as a baptismal record and private Christian school diploma, but these were not sufficient to ground a religion-based opposition to vaccines. The grievance was dismissed.

***Oulds v. Bluewater Health*, 2023 HRTO 1134 (31 July 2023)**

- Application not based on creed: beliefs on "individual choice" and "autonomy" lacked clarity on any systemic component, relationship to human existence/life/death, or any nexus with a community of belief.

The applicant alleged that they were discriminated against when their employer instituted a mandatory vaccination policy and terminated the applicant's employment for failure to comply. The Tribunal sent a notice of intent to dismiss requiring the applicant to identify their creed within meaning of the *Human Rights Code* and explain how it interferes with the ability to be fully vaccinated.

The applicant argued that they had a "creed belief that 'the Covid-19 vaccine alters in some fashion all, or some of a person's genetic material, Code, make up, of all or part of their body, or bodily systems,'" and that "they cannot take any medication that alters or instructs DNA, RNA, or molecular structure."

Additionally, she identified that her creed included: "the right to bodily autonomy, being central and integral to the individual; as a spiritual person, the belief that the Creator made us perfect, and not to alter one's body unnecessarily; as a spiritual person, their belief that the Creator will protect them; their belief that an individual's private life, medication, treatments, and infections they may have, should be kept as private as possible; and that faith can be flexible and is not strictly regulated or tenented [sic]."

The Tribunal noted that the "concept of autonomy and individual choice does not meet the definition of creed," and though the applicant may have sincerely held beliefs, those beliefs lacked an overarching systemic component or a "nexus to any organization or community with a shared system of belief." While references to a "Creator" may be evocative of the being's believed influence over life, the applicant's submissions did not note how their creed addressed the question of human existence, nor contemplate life or death.

The application was dismissed on the basis that the Tribunal does not have jurisdiction over a claim unrelated to the *Code*.

***Ortiz v. University of Toronto*, 2022 HRTO 1288 (28 October 2022)**

- Creed not made out: "individual choice" and "informed consent" not a protected creed belief. Application dismissed.

A university employee alleged they were discriminated against on the basis of creed when the university denied their exemption to its mandatory vaccine policy.

The Tribunal found that the applicant's creed – of "individual choice" and "informed consent and personal autonomy in medical decision making" – lacked an overarching systemic component, did not address the question of human existence or that of a Creator, did not contemplate life and death, and did not form a nexus to any organization or community with a shared system of belief.

As a result, the Tribunal determined that the applicant had failed to establish that "informed consent and personal autonomy in medical decision making" fell within the meaning of creed under the *Cod*e. The Tribunal dismissed the application as the Tribunal does not have jurisdiction over a claim unrelated to the *Code*.

***Bailey v New Brunswick Power Corporation*, 2023 CanLII 2832 (NB LA) (Doucet) (11 January 2023)**

- It is not discrimination to put someone on leave for failure to follow a reasonable policy, and mere opposition to a reasonable policy is not a protected human right.

Multiple grievors were put on unpaid leave in November 2021 for failure to either confirm their vaccination status or failure to get vaccinated by the employer's vaccination policy deadline. The grievors were invited back to the workplace in March 2022 when the policy was lifted.

The grievors argued the unpaid leave of absence was unjust discipline and violated the collective agreement and the *Canadian Charter of Rights and Freedoms*.[20] The grievors argued the vaccine policy was unreasonable. The grievors claimed that the policy was based on the unproven supposition that the unvaccinated are "infected" with the virus and are the main vectors of infection at the workplace.

The arbitrator found the employer had the right to implement the vaccine policy under the management rights clause, the employer had organized its operations to comply with government directives, and that the "reasonableness of such a policy should be assessed based on the circumstances that existed at the time it was implemented and not at the time when the grievance was filed or at the time of the hearing of the grievance." The policy was therefore found to be reasonable.

The arbitrator noted that the right to oppose vaccination did not exempt employees from the obligation to follow the reasonable policy adopted by the employer, and this obligation to follow the policy does not itself constitute discrimination. Accordingly, there was no breach of the *Charter* or the relevant human rights legislation, and the grievances were dismissed.

***Porter v. York Region District School Board*, 2022 HRTO 1186 (30 September 2022)**

The school board implemented a mandatory vaccine policy that required the applicant to disclose their vaccine status to teach on the supply list. The applicant alleged that the requirement to disclose private medical information was a breach of the *Code*, and that their loss of employment due to their choice not to disclose their vaccination status amounted to reprisal.

The Tribunal noted that the applicant had lost their employment as a result of not providing proof of vaccination, per the mandatory vaccination policy, not as a

[20] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

result of any discrimination. The failure to provide information was not itself a *Code*-protected ground.

The Tribunal dismissed the application on the grounds it did not allege discrimination on an enumerated ground protected under the *Code* and did not meet the test for reprisal.

> ***Saunders v. Swiss Chalet Restaurant 1206*, 2022 HRTO 936 (28 July 2022)**

An employer had COVID screening measures in place in the workplace. The applicant argued that there was an implicit threat of reprisal for non-compliance with the screening measures, and actual reprisal when they were terminated from employment after refusing to submit to the measures put in place.

The applicant did not note any *Code*-related reason for the reprisal and there was no evidence of discrimination.

The applicant lost their employment because they did not perform their duties in accordance with the policy, not because they were discriminated against. The Tribunal dismissed the application.

b. Creed-Based Discrimination Found

> ***WestJet and ALPA (Unpaid Vaccination Leave of Absence), Re*, 2023 CarswellNat 272**

- Substantive duty to accommodate met by providing six months of unpaid leave of absence where no other reasonable options available.

Canada implemented a federal vaccination mandate. A Swoop Airlines pilot refused to get vaccinated due to religious beliefs and requested an accommodation. The religious basis for the request was accepted without issue, but Swoop would not provide the pilot's preferred accommodation, which was to continue flying as a pilot while unvaccinated, but to be COVID-tested regularly. The pilot was also prepared to consider alternative positions at a reduced rate of pay, but there were no other realistic non-flying options available. Swoop determined that a reasonable accommodation would be to put the pilot on an unpaid leave of absence for six months.

The arbitrator found that Swoop did not engage in a meaningful tri-partite collaborative process involving the union and the pilot to search for accommodation options. However, because there were no other reasonable options available to Swoop to accommodate the pilot with non-flying duties that would have kept him actively employed, and given the health and safety requirements of pilots, Swoop had complied with its substantive duty of accommodation.

The federal sector has no independent procedural duty to accommodate, and the grievance was therefore dismissed.

***Island Health v United Food & Commercial Workers Local 1518*, 2023 CanLII 2827 (BC LA) (Doyle) (6 January 2023)**

- A public health order did not bar options available to accommodate the grievor.

The Public Health Officer (PHO) of British Columbia issued an order that all hospital and community health employees must be vaccinated by October 26, 2021, or they would be ineligible to work.

Island Health employees were placed on unpaid leaves of absence and then terminated when they did not comply with the policy. The employer said that they would consider an individual's request for accommodation if the employee had a plan to become vaccinated, but if they did not have a plan to become vaccinated, the employer said they did not have the authority under the PHO's order to allow the employee to work. There was an option to extend unpaid leave in compelling circumstances, but the employer would deny requests for religious exemption where the employee had no plan to be vaccinated.

One grievor objected to the use of fetal cell lines in vaccine production and their purported connection to abortion and to "toxic substances" contained in vaccines. She also held religious beliefs prohibiting the use of modern medicines, cigarettes, and alcohol. The arbitrator found her beliefs to be sincerely held and protected under the relevant human rights legislation.

The arbitrator found that the employer had failed to reasonably accommodate the employee. Notably, there was no requirement that her local church be opposed to the vaccine, but merely that the grievor believed that avoiding the vaccine was required by her religion.

The arbitrator also found that the PHO's order did not require unvaccinated employees to be terminated and allowed for remote work or a leave of absence in human rights accommodation circumstances. The grievor was reinstated with no break in service.

***Wilfrid Laurier University v United Food and Commercial Workers Union*, 2022 CanLII 120371 (ON LA) (Wright) (16 December 2022)**

- Even if they were not the only source of objections to the vaccine, objections to vaccines due to the use of fetal cell lines and their purported connection to abortion, as well as beliefs prohibiting putting substances into the body, may be creed-connected.

Wilfrid Laurier University instituted a vaccine policy in October 2021. One grievor provided several pages of information on her religious exemption request, basing

it largely on her Christian faith and beliefs around abortion and issues with the use of fetal cell lines in vaccine production. She also provided information on her beliefs around "Bodily Autonomy under the Charter of Rights and Freedoms," that "'experimental gene therapies' cannot be mandated," and described the pandemic as a fraud she called "the Great Deception." Her exemption request also contained template language prepared by Action4Canada. She gave evidence that though she preferred an exemption based on the constitutional grounds she raised, it would be "ok" to get a religious exemption.

The other grievor produced similarly detailed information with bible verses and explanations of her relationship with God, though did not explicitly identify herself as a Christian until later in the process. The other grievor did not provide alternative secular explanations for her exemption request.

Both grievors identified that their bodies belonged to God and taking the vaccine could defile the "temple" of their bodies and run contrary to their relationships with God. One grievor explained that "she has a strong conviction against putting vaccines into her body and she believes that to go against that conviction would be sinning against God."

The arbitrator found that both grievors had sincerely held beliefs that were a factor in their decisions not to get vaccinated, though religious beliefs might not have been the only factor.

The grievances were remitted back to the parties to determine whether the grievors could have been accommodated to the point of undue hardship.

***British Columbia Rapid Transit Company Limited v Canadian Union of Public Employees, Local 7000*, 2022 CanLII 100817 (BC LA) (Noonan) (13 October 2022)**

- Employers should not conduct a "religious inquisition" into an employee's beliefs in relation to a creed-based exemption.

The employer instituted a vaccine policy in October 2021 with a vaccination deadline in December 2021.

The grievor submitted a religious exemption request based on his Ukrainian Orthodox religious beliefs. He advised the employer "that his 'sincerely held religious belief is the basis that permits to healing the body in natural way using prayer, meditation, exercises and alternative medical treatments.' He said that he did not object to alternative medical treatments such as homeopathy, aromatherapy, massage therapy, acupuncture, or chiropractors."

In the accommodation inquiry, the employer had pressed the grievor on which kinds of medications he might not object to, based on his religious beliefs, noting that he could provide a note from his physician on his history of medications/treatments. The employer was found to have conducted the kind of

"religious inquisition" cautioned against by the Supreme Court of Canada in *Amselem.*[21] However, the grievor did provide a note from his physician that he had not been vaccinated previously and did not use any drug-based treatments.

The arbitrator found that there was significant evidence that the grievor had never been vaccinated or inoculated and that his religious beliefs were "the driving force, not only in relation to the issue of vaccinations, but also in relation to how he lives much of his life." The requirement that the grievor be vaccinated to maintain employment "required him to either violate his sincerely held religious beliefs by being vaccinated or being held out of his job and suffering the consequences that accompany that."

The grievor was found to be entitled to accommodation, back pay, and human rights damages.

***Public Health Sudbury & Districts v Ontario Nurses' Association*, 2022 CanLII 48440 (ON LA) (Herman) (7 June 2022)**

- Appeared to be the first decision considering the impact of mandatory COVID vaccination policies on the grounds of creed.

The grievor was a public health nurse. The employer introduced a COVID vaccine policy for all public health employees with a final vaccination deadline, after which unvaccinated employees would be placed on unpaid leave unless they had a valid exemption.

The grievor requested a religious exemption based on her Roman Catholic beliefs, specifically around abortion. She was a member of a more orthodox Latin Mass community who oppose contraception and abortion and support what the community refers to as "natural law."

The arbitrator noted that there were some parts of the grievor's testimony that posed challenges to the sincerity of her belief that getting a COVID vaccine violated her religious beliefs, including being skeptical of vaccines and opposed to getting vaccinated before she had any knowledge that the vaccines had any connection to fetal cell lines. The grievor did not inquire about whether other medicines she and her family used were derived from research using fetal cell lines. She had also previously administered vaccines derived from fetal cell research to patients but took no issue with that.

Despite these inconsistencies, the arbitrator found that the grievor's religious opposition to the COVID vaccines was credible and sincere, as she had demonstrated that she was a devout member of the Latin Mass, and she could be opposed to the COVID vaccines for more than one reason, in addition to her

[21] *Amselem*, *supra* note 5 at para 52.

religious beliefs. The grievor was entitled to a creed-based exemption and reasonable accommodation.

The employer subsequently filed an application for judicial review, which was dismissed as premature given that the decision considered only whether the grievor could establish a *prima facie* case of discrimination and did not address whether the employer could have accommodated the grievor to the point of undue hardship: *Sudbury and District Health Unit v Ontario Nurses' Association*, 2023 ONSC 2419.

c. Policy Issues Around Accommodation

***Trillium Health Partners v Canadian Union of Public Employees, Local 5180*, 2023 CanLII 2826 (ON LA) (Steinberg) (23 January 2023)**

- Using a progressive discipline approach that was paused when a human rights accommodation request was submitted was not an inconsistent application of a vaccine policy, but instead showed that the employer was appropriately responding to its human rights duties and obligations.

Trillium Health Partners (the Hospital) developed a vaccine policy for all staff and volunteers with a deadline to declare vaccine status by October 20, 2021. Accommodation requests could be submitted. The Hospital worked through the accommodation requests over a period of time and refused all but one. While an employee's accommodation request was pending, no actions were taken against them, though they were COVID-tested regularly and had to wear PPE at work.

Those who did not comply with the policy were issued progressive discipline in accordance with any previous disciplinary action on their record, including those who had their accommodation/exemption requests denied and then still refused to get vaccinated. At some point, the Omicron variant became such a staffing issue that the Hospital faced an "exceptional existential crisis" and paused the policy.

The union brought a policy grievance alleging that the employer applied different discipline to different employees for identical behaviour, meaning that it applied the policy inconsistently. For example, one employee who did not comply with the policy was terminated in November 2021, while his spouse, who had filed an accommodation request, was not terminated until March 2022.

The arbitrator found that the effects of the progressive approach to discipline, the impact of delay due to the assessment of human rights-based exemptions, and the impact of the Omicron pause did not represent inconsistent applications of the policy. Particularly with the human rights applications, the employer was exercising its duties to adequately investigate the request. The policy grievance was dismissed.

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TAB 3A

12th Human Rights Summit

Competing Human Rights Scenario

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December 5, 2023

COMPETING HUMAN RIGHTS SCENARIO

PART ONE

A parent of a transgender child complains that a school board did not make any statement marking March 31, International Transgender Day of Visibility.

The parent argues that since the school board made statements in late March and early April recognizing Easter, Holi, and Purim, the board favours religious communities and discriminates against the LGBTQ+ community.

PART TWO

The next year, the school board makes a statement recognizing the importance of the Transgender Day of Visibility and saying it stands with the trans community "during these difficult times."

A group of employees whose religious beliefs are that gender is binary and immutable complain that this statement infringes their religious rights because it purports to speak on their behalf and also suggests their beliefs are harming trans students.

PART THREE

Would the analysis be different if the statement went further and said that as part of the board's ongoing commitment to reducing barriers and supporting trans and non-binary members of its community, it has introduced a policy that students can use the pronouns of their choice and that this must be respected by staff, other students, and educators at the board?

PART FOUR

In response to concerns raised, the school board trustees decide it is appropriate to discuss the new pronoun policy at a meeting among educators and other staff members.

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TAB 3B

12th Human Rights Summit

Cases since OHRC Competing Rights Policy

Ontario Human Rights Commission Competing Rights Framework

Reema Khawja, Senior Counsel, Legal Services and Inquiries
Ontario Human Rights Commission

December 5, 2023

Cases since OHRC Competing Rights Policy

Service animal cases/Competing disability rights

2017 BCCA 342 (CanLII) | McCreath v. Victoria Taxi (1987) Ltd. | CanLII

J.F. v. Waterloo Catholic District School Board, 2017 HRTO 1121 (CanLII)

2021 QCTDP 12 (CanLII) | Commission des droits de la personne et des droits de la jeunesse (Huard et une autre) c. Karimi | CanLII

2022 CanLII 82025 (NL HRC) | Sears v Memorial University Of Newfoundland | CanLII

See also this resource from ARCH Disability Law: ARCH Disability Law Centre | Focus: The Law of Service Animals in Ontario

Cases about LGBTQ2+ rights/freedom of religion/freedom of expression

S.L. v. Commission scolaire des Chênes 2012 SCC 7 (CanLII), [2012] 1 SCR 235

2017 ONCA 893 (CanLII) | E.T. v. Hamilton-Wentworth District School Board | CanLII

Law Society of British Columbia v. Trinity Western University, 2018 SCC 32 (CanLII), [2018] 2 SCR 293

Trinity Western University v. Law Society of Upper Canada, 2018 SCC 33 (CanLII), [2018] 2 SCR 453

Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse), 2021 SCC 43 (CanLII)

N.B v. Ottawa-Carleton District School Board, 2022 HRTO 1044 (CanLII)

Gillies v Bluewater District School Board, 2023 ONSC 1625 (CanLII)

Hansman v. Neufeld, 2023 SCC 14 (CanLII)

Ontario Human Rights Commission Competing Rights Framework

STAGES	ANALYSIS	LEGAL PRINCIPLES
Recognizing rights	1. What are the claims about?	- No rights are absolute - No hierarchy of rights - Rights may not extend as far as claimed - Consider full context and constitutional values - Look at extent of interference - Core more protected than periphery - Aim to respect both sets of rights - Look for" constructive compromises" or "accommodations" - Statutory defences may restrict rights of one and give rights to another
	2. Do claims connect to legitimate rights?	
	3. Is there more than a minimal interference with each right?	
Reconciling rights	4. Is there a solution that allows enjoyment of each right?	
	5. Is there a next best solution (compromise/accommodation) for one or both rights?	
Making decisions	If a decision is necessary, must be consistent with human rights law, legal, principles, OHRC policy.	

For more information, please see the Ontario Human Rights Commission's *Policy on Competing Human Rights*:

http://www.ohrc.on.ca/en/policy-competing-human-rights
http://www.ohrc.on.ca/fr/politique-sur-les-droits-de-la-personne-contradictoires

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TAB 3C

12th Human Rights Summit

Competing Rights – Recent Case Studies (2021 to 2023)

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December 5, 2023

cpd

Competing Rights – Recent Case Studies (2021 to 2023)

By Simone Ostrowski, Partner, Whitten & Lublin

The general public are quite aware of human rights as a legal concept. "Human rights" are all over the news. Not long ago, transgender issues were hot topics. Before that, the #MeToo movement highlighted the unique struggles faced by women in the workplace. During the pandemic, there was ample debate about the proper scope of religious, medical/disability, and exemptions from mandatory COVID-19 vaccination policies.

In this context, it is not surprising to see many legal cases involving conflicting human rights. This paper will discuss some recent and interesting case law regarding competing rights from 2021 to the present.

1. *Martis v Peel Condominium Corporation No 253*, 2021 ONCAT 110

The Applicant in this case, Ms. Martis, had son with a medical requirement for an emotional support animal. He acquired a dog that, when fully grown, would weigh between 60 to 70 pounds. However, Ms. Martis' condominium corporation, PCC253, had a no pets rule, and wanted to impose a 25-pound weight restriction on any animal on the property.

Ms. Martis brought an application to the Condominium Authority Tribunal about the weight restriction on her son's support animal.

PCC253 argued that it needed to accommodate other residents, including residents who objected to dogs on grounds that are also protected by the Ontario *Human Rights Code* (the "*Code*"), such as medical issues or religious reasons.

The Condominium Authority Tribunal agreed that the way in which PCC253 set its 25-pound weight limit lacked transparency. However, the Tribunal also appeared to see Mr. Martis' specific dog choice as a preference that did not require accommodation:

> [36] Mr. Martis would obviously prefer that the dog he has selected be accommodated. Both parties quoted from the *Ontario Human Rights Commission Ableism Policy* ("OHRC Ableism Policy"). The OHRC Ableism Policy contains a highly relevant distinction between a need for an accommodation and a preference for a particular outcome. At page 34 of the OHRC Ableism Policy, it states, "At the same time, human rights case law makes it clear that the purpose of the *Code* is to accommodate a person's needs, not their preferences." This statement is supported by the case law cited as authority for it.

> [43] PCC253 has offered a reasonable accommodation for Mr. Martis' needs for an emotional support animal. Mr. Martis has not established that he needs a heavier dog. PCC253 is not obliged to accommodate his preference for a specific dog when the dog exceeds the weight requirement that PCC253 has established and when that weight requirement was set to balance other Code-related needs.

Ms. Martis' application was dismissed.

The takeaway from this case is that complying with human rights laws and providing accommodation thereunder involves having <u>needs</u> accommodated, *not* preferences or choices. Accommodations may not be ideal or exactly what an individual wants, but that does not necessarily lead to a finding of a failure to accommodate or other human rights violation.

2. ***Tamo v Metropolitan Toronto Condominium Corporation No. 744 et al*, 2022 ONCAT 40**

In this case, the Applicant, Dr. Tamo, brought an application before the Condominium Authority Tribunal because her condominium corporation ("MTCC 744") was failing to enforce its prohibition on pets.

MTCC 744 had a policy stating that no animals would be kept or allowed in any unit. However, MTCC 744, allowed another owner, Teryn Clancy, to have a dog as an emotional support animal. That owner had applied for the dog as a disability exemption, and MTCC 744 granted her request.

The Applicant stated that she had a disability in the form of severe allergies to dogs, and mental distress related to the presence of Ms. Clancy's dog. She stated that one of the reasons she chose to live in MTCC 744 was its prohibition on pets. She requested that MTCC 744 immediately and permanently remove Ms. Clancy from the condominium, which was an extreme remedy.

MTCC 744 stated that it had a duty to accommodate Ms. Clancy's disabilities and doing so did not create undue hardship for the Applicant.

The Condominium Authority Tribunal held that MTCC 744 did not fail to accommodate the Applicant's disability or that she suffered undue hardship, largely because she failed to provide evidence about her needs:

> [64] Although the Applicant argues that she requires accommodation of her disability from MTCC 744, she has not participated in the accommodation process. I am satisfied that MTCC 744 met its duty to accommodate by repeatedly requesting information from the applicant about her needs. The Applicant, unfortunately, did

> not respond to these requests and her failure to participate in the process has effectively prevented MTCC 744 from considering and meeting her accommodation needs.

The Condominium Authority Tribunal appeared to base its opinion on the fact that the Applicant had not established, through medical evidence, that she was suffering from significant allergy symptoms related to the presence of Ms. Clancy's dog, Murphy, specifically:

> [94] The medical reports from the Applicant's doctors establish that she experiences allergy symptoms related to dogs. The evidence has not, however, proven in a clear and convincing way that the Applicant is experiencing allergy symptoms related to the presence of Murphy or that she is experiencing severe and life-threatening symptoms related to his presence. Consequently, I do not find that the accommodation of Ms. Clancy's disability by MTCC 744 has caused undue hardship to the Applicant.

This decision highlights the importance of an accommodation-seeker cooperating fully in the accommodation process. Cooperation in this context includes responding to reasonable requests for information from the accommodation-provider, and providing information that specifies why a particular accommodation is necessary.

The Applicant's failure to cooperate in the accommodation process in this case justified a finding that Ms. Clancy's disability needs received preference over the Applicant's stated needs. Presumably, Ms. Clancy had provided sufficient evidence to MTCC 744 of her disability needs, whereas the Applicant had not.

In competing rights cases where the competing rights are difficult to reconcile, like this one, a party's failure to provide proper evidence of their need for accommodation leads to an easy preference for the other accommodation-seeker (who, presumably, has provided sufficient evidence of their accommodation needs).

As well, the Applicant appeared to exaggerate her allergy symptoms in a way that made her lose credibility before the Condominium Authority Tribunal. In the end, her symptoms were not enough to establish undue hardship.

3. *Sears v Memorial University Of Newfoundland*, 2022 CanLII 82025 (NL HRC)

The Complainant, William Sears, was a student at Memorial University with a hearing disability. He requested that his professor, Dr. Panjabi, wear an FM Transmitter on her person, known as a "phonic ear", as an accommodation. Dr. Panjabi refused on religious grounds as it would cause significant disruption to her spiritual balance.

By way of background, there was a similar incident in 1996, after which Dr. Panjabi and the university signed an agreement that would not have the professor forced to wear a phonic ear, alternative accommodations would be used if needed, and that any hearing-impaired student registered in her courses would be informed of the agreement.

Mr. Sears was not informed of this beforehand, and found himself in class where he asked Dr. Panjabi to wear the phonic ear. She refused, offered alternatives, but Mr. Sears refused those and walked out.

The Newfoundland and Labrador Human Rights Commission's Board of Inquiry examined the competing rights at issue and found that Memorial University had failed to accommodate Mr. Sears:

> [68] I am satisfied MUN's subsequent efforts to address the deficiencies in its policies and to identify alternatives to the FM Transmitter were appropriate and reasonable. As such that I will not order further policy change on the facts before me.
>
> [69] Unfortunately these changes came too late for Mr. Sears. I have concluded that MUN failed to take appropriate steps to engage Mr. Sears as well as Dr. Panjabi in a proper accommodation process. It is clear to me that Mr. Sears was deeply affected by the incident and feels strong emotions from these events to this day.

Dr. Panjabi's religious exemption could continue, according to the Board, so long as others were accommodated properly.

The fact that Mr. Sears fell through the cracks of Memorial University's agreement with Dr. Panjabi, was not informed beforehand of it, and the stress of his interaction with Dr. Panjabi, justified him receiving $10,000 in general damages.

This case should encourage parties responding to accommodation requests (e.g. employers, schools, etc.) to be proactive in their accommodation processes. Even if the responding parties' efforts were reasonable, trying to reconcile competing rights after an individual has already suffered damage may not protect the party from liability. Sometimes the damage is already done.

4. *KC v Sylwia Krupa*, 2023 HRTO 718

The Applicant, KC, was a minor and a student at a Polish Saturday school, who was beat up by an older student. The Respondent was the principal of the Polish Saturday school.

The Applicant sought to have the offending student removed from the Respondent's school in order to accommodate his disability, which he characterized as the physical and psychological consequences of the assault. The Applicant provided medical evidence that he suffered ongoing symptoms of anxiety, bad dreams, and fear of returning to school.

The Applicant's doctor testified at the hearing but admitted that she did not diagnose the Applicant with any mental health disability nor prescribe medication for his conditions.

The Human Rights Tribunal of Ontario held that the Applicant did not have a disability as defined under the *Code*. However, even if he did have a disability, the Tribunal held that Applicant failed to prove that it was not accommodated by the Respondent's school:

> [57] I accept that there is sometimes a conflict of rights between parties based on their *Code* grounds for example between sexual orientation and some religious beliefs. Such a determination would require a careful and well thought out balancing of these conflicting rights to ensure that one group's rights are not impinged in the protection of another, or that it is justified in the circumstances. To illustrate this point, a respondent may remove allergens such as peanut butter or perfumes from an environment, but such accommodations do not impinge on the fundamental rights of others for example to an educational service.
>
> [58] In this case, the only accommodation ever sought by the parents was the removal of the offending student from the School or classroom. The personal respondent's offer to move the applicant to another class was not accepted because they testified that it would not guarantee that the applicant would not encounter him in the hallway. In fact, the applicant's parents appear to take the position that even during online school, the applicant may be exposed to seeing the other student on the screen, and for that reason they did not allow the applicant to participate in online school.

There was a balancing of the Applicant's right to have his potential disability accommodated versus a "fundamental [right]…to an educational service" of the offending student, at paragraph 57.

This decision suggests that, just as in the *Tam* case above, an accommodation-seeker who requests an extreme remedy – such as that a party with competing rights be banned from the workplace or premises – will likely not be granted and may make the accommodation-seeker appear less sympathetic from a decision maker.

5. ***Amir and Siddique v Webber Academy Foundation*, 2020 AHRC 58**

The Applicants, Farhat Amir and Shabnam Nazar, were Muslim students at a non-denominational private school in Calgary, Alberta.

The school had a policy against the performance of any religious practice on its premises and did not provide space for prayers on campus. The school offered to let the students leave the campus during school hours in order to perform their prayers.

The school recognized that the *Alberta Human Rights Act* contained a right to religious accommodation, but those rights were circumscribed by its *Canadian Charter of Rights and Freedoms* ("*Charter*") right to religious neutrality. The school submitted that the state could not compel a non-denominational or secular school to accommodate religious practices, prayers or prayer spaces, and to do so would be to violate the principle of state neutrality in matter of religion.

The Alberta Human Rights Tribunal sided with the Applicants largely on the basis that they were only looking for a quiet place to pray, and not to publicly interfere with the non-denominational character of the school:

> [203] In this case, the evidence supports a finding that the school or members of the school community genuinely believed that the school was non-denominational or secular and wanted it to remain that way. The school itself is non-denominational in that it is not connected with any particular denomination and has no religious affiliation. The school is a secular institution in that it is not controlled by any religious authority. The school does not permit instruction with respect to any particular religion and its focus is on academic excellence. There are no educational or classroom activities dedicated to religion and but for the exceptions made to accommodate the dress requirements of certain religions and a Christmas tree in the lobby, there are no on-campus activities related to religion. There are no on-campus activities dedicated to religion.
>
> [204] I find that this is a belief and practice that has a nexus with conscience and religion.
>
> [205] However, the evidence does not support a finding that this belief or practice was or would be interfered with by allowing students to pray in a private, quiet space. As counsel for Alberta submitted, this is not a case where the complainants wanted to perform their religious activities publicly, they were not intent on recruiting converts and this was not a case where a religious group sought to provide instruction with respect to religion.
>
> [214] In this case, the *Act,* by prohibiting discrimination on the basis of religion and by requiring the accommodation of religious differences, does not in any way promote or discourage one belief or non-belief at the expense of any other. The state does not seek to require Webber Academy to allow religious activities on its campus regardless of the circumstances. In this case, the legislation requires the respondent

> to accommodate the complainant's request for a quiet, private place to pray in the same way it provides such places for persons with anxiety and in the same way that it allows exceptions to its dress code for religious and cultural reasons.

The school was found to have violated the Alberta *Human Rights Act*, and each student was awarded $18,000.

In this case, there was a balancing of a right to freedom of religious expression versus freedom *from* religious expression. The fact that the Applicants' expression of religious beliefs would not significantly impinge on the school's non-denominational reputation by limiting such expression to private spaces seemed to be paramount. Others in the school would not be required to see the Applicants' religious activities, in contrast with, for example, an unvaccinated employee attending a workplace and potentially subjecting other employees to a heightened risk of disease.

Law Society of Ontario | Barreau de l'Ontario

TAB 4A

12th Human Rights Summit

Inclusion of Gender Diverse Athletes in Sport – Links & Resources

Melissa Knox, Q. Med
Barrister & Solicitor

December 5, 2023

Inclusion of Gender Diverse Athletes in Sport – Links & Resources

Melissa N. Knox, B.A. (Hons), J.D. Q. Med
Barrister & Solicitor

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Canadian Centre for Ethics in Sport (CCES)

- Transgender Women Athletes and Elite Sport: A Scientific Review [2022]
- Developing and Implementing a Trans Inclusion Policy (webinar) [2019]
- Creating Inclusive Environments for Trans Participants in Canadian Sport [2016]
- CCES Trans Inclusion Policy Guideline (webinar) [2016]

Canadian Women & Sport (CWAS)

- Canadian Women & Sport and the CCES Oppose World Rugby Ban of Trans Women (open letter) [2020]
- Position Statement: Trans Inclusion in Sport [2017]
- Working with LGBTQ Athletes & Coaches A Practical Resource for Coaches [2017]

International Olympic Committee

- Framework on Fairness, Inclusion and Non-discrimination on the basis of gender identity and sex variations

International Sport Federations

- International Powerlifting Federation: Policy Statement for Transgender Athletes [2023]
- Union Cycliste Internationale: The current knowledge on the effects of gender-affirming treatment on markers of performance in transgender female cyclists [June 2022]
- World Athletics: Eligibility Regulations for Transgender Athletes [March 2023]
- World Rugby: Summary of Transgender Biology and Performance Research [Oct 2020]

United Nations

- Policy position by United Nations Special Procedures mandate holders in relation to the protection of human rights in sport without discrimination based on sexual orientation, gender identity, and sex characteristics [Oct 2023]

Law Society of Ontario | Barreau de l'Ontario

TAB 4B

12th Human Rights Summit

Current Issues in Canadian Safe Sport Investigations

Jennifer White
SportSafe Investigations Group

December 5, 2023

cpd

Current Issues in Canadian Safe Sport Investigations

Jennifer M. White, B.A., LL.B., LL.M
SportSafe Investigations Group

For: 12th Annual Human Rights Summit
Law Society of Ontario

December 5, 2023

Introduction

It feels as though over the past few years almost every sport in Canada has had allegations of misconduct or human rights violations levelled against it. Whereas previously, certain sports were known to have particular problems, now it seems as though each week a different sport has been revealed as being problematic. Prospective sport participants (or their parents) are looking at safety records first before enrolling in or spending money on a sport that they are interested in.

What is Prompting this Wave of Allegations in Canadian Sport?

There are a lot of reasons why Canadian sport is currently having their 'Me Too' moment: timing, media attention, increased societal awareness of what constitutes appropriate behaviour, new progressive policies and the access to third party complaint systems that allow complainants to bring forward their concerns to someone outside the local sport association or regional club.

In my lens as a safe sport investigator, the most significant reason for this recent surge is that for a long time we turned a blind eye to human rights violations in sport. Athletic accomplishment and participation in sport is revered in our society. We have been taught for so long that sport is healthy and that high performance in sport is the ultimate achievement. Up until recently, we were willing to accept that there may be some

behaviour transgressions or unsavoury actions in order to put athletes on the podium or to provide athletes with the opportunity to participate. It was all worth it as long as we were winning.

Once the 2017 #MeToo movement became a watershed moment, it was only time before athletes, coaches, sport administrators and parents (past and present) came forward with their own harrowing tales of what was actually going on behind closed doors. As social media has spread the knowledge of what is and what is not appropriate behaviour to the far corners of our country, to the small gyms and arenas in remote communities, individuals have felt empowered to speak up about their own negative sport experiences and how this has impacted their lives.

How are Sports Investigations Different from Regular Workplace Investigations?

Sports investigations have many similarities to workplace investigations:[1]

- Just like in workplace investigations, the parties and alleged misconduct in sport investigations vary from file to file. The allegations may be from athlete to athlete, from trainer to coach, from coach to athlete, from referee to athlete parent, from coach to team administrator, etc. There may be issues of gender, race, or simply two individuals who cannot get along. There may be serious safe sport allegations of sexual harassment or assault, sexual exploitation or grooming and boundary

[1] A number of these similarities and differences were discussed in my Association for Workplace Investigators (AWI) paper, *"From the Boardroom to the Locker Room: Why Workplace Investigators Should Get to the Start Line of Sport Investigations," AWI Journal, June 2023, page 16.* https://cdn.ymaws.com/www.awi.org/resource/resmgr/files/awi_journal_/awi-journal-2023-06.pdf

transgressions of minors. This is the same type of variety that is seen in workplace investigations.

- There are complex power imbalances inherent in sport, similar to workplace conflicts, that are difficult to see and untangle.
- Both workplace and sport investigations require a focus on providing procedural fairness to all participants. The relevant policies or legislation do not always provide a scripted process and this means that the investigator is having to make judgment calls along the way that ensure procedural fairness.
- In both workplace and sport investigations, it has usually taken a very long time for the complainant to come forward, and they are dealing with feeling that they had somehow acquiesced to the behaviour by not speaking out right away. Just as many people need a job and will stay in a bad situation to pay the bills, many athletes will stay in a bad sport situation because they really love the sport.

The largest differences that I see in sports investigations compared to workplace investigations are that:

- Many of the sport investigations involve children. This means that there are often parents who are involved (they may be complainants as well) and resulting complexities around interviewing minors and evidentiary concerns.

- Many sport investigations are historical in nature. This may be related to the fact that many recipients of the harassing behaviour are children at the time of the events and don't realize the magnitude or the impact of the behaviour until they are adults. There is often more of an emotional attachment to the sport than there is to a workplace; complainants realize that if they report the behaviour, they will be polarizing themselves with the sport that they are passionate about. An athlete's peak sport career is much shorter than their working career and they may choose to delay reporting the behaviour until they have retired from the sport.

One particularly challenging aspect of the fact that many of the investigations are historical is that while it may have been acceptable for coaches twenty years ago to punish athletes by running sprints or doing public team weigh-ins, these standards are no longer acceptable practices to the next generation of athletes. This means that a coach who has used these tactics, potentially with great performance success and accolades, may now find themselves being investigated for this same behaviour.

- The athlete and sport performance-cycle often adds a different consideration to sport investigations. There are often critical annual or seasonal competitions and of course the four-year Olympic or Paralympic cycle. Often, when there is an upcoming important sporting event, harassing or inappropriate behaviour will be tolerated so that the complainant can make it through to the next event without having the investigation taking up mental performance space. It also means that if a sport or a team does well at an event, the preceding poor behaviour is overlooked or forgotten; the ends (the wins) justify the means (the harassing behaviour). This means that complaints are often delayed, the behaviour is seemingly condoned and the impact to the complainant is compounded.

- The administrative regime in sport is only recently getting up to speed on how to deal with harassment in their sector. Whereas workplaces and human resource professionals have many years of legislated requirements relating to harassment (it's been fourteen years since Bill 168 came into play in Ontario), this is still relatively new in the sport sector. Certainly, sport administrations relies largely on a volunteer workforce who may not understand the fiduciary responsibilities of their roles. In my view, this means that they do not always understand the importance a true, third-party investigation and are reluctant to pay for a thorough and professional independent investigator. The policies in sport are often weaker than employment policies in terms of penalty or process, although the impact of harassing behaviour is equally, if not more, devastating.

The US Safesport Code (with limited application to US Olympians and Paralympians) first came into play in 2017 and the first run of the Canadian policy, the Universal Code to Prevent and Address Maltreatment in Sport (the "UCCMS"), was first published only four years ago, in 2019.

What are Some Practical Tips for Conducting Sport Investigations?

- You will likely have to explain the process over and over to participants and administrators. The sport system in Canada is complex and participants are likely unfamiliar with how the policies or sport administration hierarchy applies to them. When somebody signed up for a sport as a participant or volunteer, they are likely unaware of the complex sport infrastructure and reporting lines that they are a part of: there can be university, club, sport district, provincial, national, international and universal codes of conduct or policies that apply. Investigators need to understand the process and policies themselves so that they can explain it clearly to participants.

- You will likely have to find witness contact information on your own. The sporting network is a much less formal than a work environment; there is no human resources department that can provide tombstone employee information. Interactions are more likely to have been in person and things like email addresses are not known. Sometimes, witnesses are only known by their first name. This means that the only way to find people is through social media or word of mouth.

- Be prepared to have to sell the process to participants. There is usually no obligation for people to participate in sport investigations. Many sport participants are afraid to participate as they worry that it will affect their season or relationships with coaches or local associations. Many prospective witnesses have moved on from the sport and may not want to be brought back into the fold. Many of the administrative roles in sport are volunteer and they can easily walk away if they are uncomfortable with an intervention.

- Complainants will often waver on whether to continue participating. Many safe sport complaints are filed with very little information and participants are surprised that they will have to provide much more to an investigator. Complainants may change their minds about participating when it becomes clear that more evidence is required. Ensuring that you provide a trauma-informed process of retrieving this information will contribute to their willingness to continue participating.

- Be prepared to conduct interviews outside of regular work hours. For obvious reasons, participation in a sport process falls down the time priority list after people's work and family commitments.

- Your written report is the most important part of the process. This last tip is not unique to sport investigations, but it is critical that the investigator's report is clear in what the findings are as well as what the process was to get there. There may be many eyes on this report and it is critical that the investigator writes the report so that anyone who picks up the report understands the steps taken and how the decision was made. Investigators need to understand at the outset who will get

copies of the report (parties? local sport association? regional sport association?) but should always write the report presuming that it may at some point end up in the public domain. Do not allow a poorly written report to overshadow an otherwise excellent and procedurally fair investigation process.

Where Do We Go From Here?

Current human rights investigations can prompt significant change to the future of Canadian sport. We can use the findings in these investigations to develop policies and standards for acceptable treatment in sport at the international, collegiate, national and local levels. We can shift prioritizing a podium win at all costs to a win that is in line with human rights expectations and acceptable behaviours.

In my view, local amateur sport is where the biggest need for independent, third-party investigations is needed. As the saying goes, "there are a lot of dark corners" in local sport organizations, where maltreatment often goes unnoticed or unchecked. Amateur sport organizations are often running on shoestring budgets by volunteers who may not understand the fiduciary or ethical responsibilities of their roles and whose primary focus is building the club membership and advancing the sport that they love.

Canadians' love for our athletes and sport at all levels will endure. With the right policies and procedures in play we can ensure that every sport participant's path, whether it be to the top of the podium, or to a local facility to join in a sport that they love, has been taken with our human rights in check.

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TAB 5A

12th Human Rights Summit

Regulating the Use of AI in Hiring: A Snapshot of Ontario & NYC!

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Reviewed by:
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December 5, 2023

cpd

Regulating the Use of AI in Hiring: A Snapshot of Ontario & NYC!
Submission by: Nicole Heelan (ClearyX)
Reviewed by: Dr. Stephanie Kelley (Saint Mary's University)
Submission for: The Law Society of Ontario -12th Human Rights Summit

Artificial Intelligence ("AI") is changing the hiring process as businesses increasingly turn to AI to improve hiring efficiency. Businesses deploy AI with varying degrees of involvement in the hiring process – some use AI solely for initial intake and resume screening, while others use it throughout the entire process from screening to final decision-making. The possibility of bias (and, in some cases, the demonstrated existence of bias) in AI systems creates concern because of employers' growing reliance on these tools. In the past few years, there has been increased pressure for government implementation of "guardrails" to protect citizens and, in the case of the legislation we will consider today, employees specifically.

Proposed Ontario Legislation

On November 6, 2023, the Government of Ontario announced (the "Press Release") that it will be introducing amendments to the *Employment Standards Act*, *2000*, ("ESA") in the form of Bill 149 (the "Bill") which, among other things, will require an employer to disclose if they use AI in the hiring process. If the Bill passes, Ontario will be the first jurisdiction in Canada to require employers to disclose the use of AI in the hiring process. In the Press Release, the Government of Ontario notes that, in "February 2023, Statistics Canada reported that close to seven per cent of all businesses in Ontario were planning to adopt AI over the next 12 months." Given the rapid growth of AI, it is easy to foresee that the number of businesses using AI in Ontario for their hiring process will grow exponentially.

On November 14, 2023, the Government of Ontario published the Bill which provides additional colour to the Press Release. With respect to the regulation of AI in the hiring process, the Bill reads as follows:

Use of artificial intelligence

8.4 (1) Every employer who advertises a publicly advertised job posting and who uses artificial intelligence to screen, assess or select applicants for the position shall include in the posting a statement disclosing the use of the artificial intelligence.

This proposed amendment to the ESA carves out "publicly advertised" postings, so only those employers who publicly advertise a job posting will be subject to this proposed law. Proposed Section 8.4(1) of the Bill will apply to both employers and prospective employers because the Bill amends the definition of employers to include prospective employers. Finally, the Bill notes that the regulations will define the term "Artificial Intelligence" leaving the parameters of the definition unknown at this time.

New York City's Local Law 144: An Example to the South

In November 2021, New York City passed Local Law 144 ("NYC Law"), which serves as an example for future laws, as it was the first known legislation impacting the use of AI in the workplace in the United States. The NYC Law took effect on January 1, 2023, but enforcement was stayed until July 5, 2023. The NYC Law prohibits employers from using AI tools that substantially assist or replace discretionary decision-making processes unless: (1) the AI tool(s) underwent a bias audit within one year before its use, and (2) the employer provides notice to candidates of use of the AI tool and offers an alternative method if desired.

The annual bias audit must calculate the candidate selection rate and impact ratios of sex, ethnicity, and race and intersectional categories of sex, ethnicity, and race. Critically, an independent auditor (unaffiliated with the employer and the AI tool) must conduct the bias audit to protect the requirement that it be an impartial evaluation. Employers must publish the results of the bias audit on the employment section of their website.

The NYC Law is more ambitious than the Canadian Bill because it aims to ensure that AI tools are consistently audited for bias and allows prospective employees to opt for alternative methods of hiring that do not rely on AI systems. As it stands, Ontario's proposed amendments do not go beyond the mere disclosure of the use of AI in hiring, with no mention of bias audits or alternative options. That said, Ontario's legislative drafters had the benefit of the proposed Canadian federal *Artificial Intelligence and Data Act* ("AIDA") when drafting the Bill, so perhaps they tailored it accordingly with the knowledge that AIDA will require employers to deploy AI in a manner that identifies, assesses, and mitigates the risks of harm and bias. Regardless, it is early days (as of the date of writing, the Bill was carried in the first reading) and we do not yet know whether the Bill will pass in its current form, with significant revisions, or at all.

What to Keep in Mind?

When considering legislation with little precedent, it is important for lawyers to keep several factors in mind:

Interplay with Existing Laws: Although this is the first specifically designed AI employment law in Ontario (and Canada) it needs to interact with existing laws that, due to their breadth, may capture the use of AI in hiring including, among others, the *Ontario Human Rights Code*.

Interplay with Forthcoming Laws: In addition to the interplay with existing laws, lawyers should consider how emerging laws, specifically those geared towards AI, including AIDA, will interact with the Bill.

The Ambiguity of the term "AI": There is no one, single accepted definition of AI. It varies depending on the jurisdiction and the regulator, among others. As of the date of writing, we do not know the parameters of the Government of Ontario's definition of AI as the Bill outlines that "Artificial Intelligence" will be defined in the regulations. It is possible that the Bill's

definition of AI could be different than AIDA's definition, resulting in different compliance responsibilities under each legislation. We do know that the European Union has adopted the Organisation for Economic Co-operation and Development definition of AI in their AI Act, so this could be a direction that Canada follows.

Take Stock of Your Hiring Practices: Ahead of this Bill becoming law, it is an opportune time to evaluate your hiring practices, including whether you are using AI at any stage. Given that AI is undefined in the Bill, undertake this task with a broad approach as to what may be considered AI. Lawyers should, where appropriate, alert their clients to this forthcoming legislation and encourage their clients to review the use of AI in their employment process.

Finally, lawyers must stay current on AI legislative/policy developments. By staying abreast of developments in AI legislation and policy - an area for which there is little precedent - lawyers will be better positioned to advise their clients through this period of change.

Appendix

Press Release:
https://news.ontario.ca/en/release/1003758/ontario-to-require-employers-to-disclose-salary-ranges-and-ai-use-in-hiring

Bill & Additional Press Release:
https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-149

https://news.ontario.ca/en/backgrounder/1003820/working-for-workers-four-act-2023

NYC Law:
https://www.nyc.gov/site/dca/about/automated-employment-decision-tools.page

AIDA Companion Document:
https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act-aida-companion-document

European Parliament- AI ACT- Legislative Train Schedule
https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-regulation-on-artificial-intelligence

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TAB 5B

12th Human Rights Summit

Removing Demographic Data Can Make AI Discrimination Worse

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December 5, 2023

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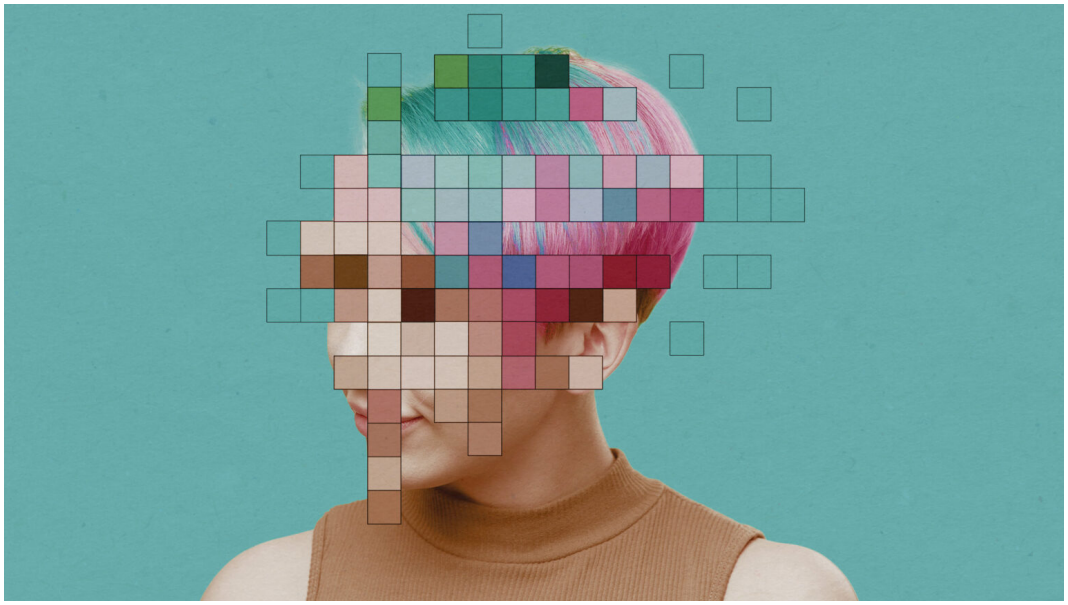
Harvard
Business
Review

AI And Machine Learning

Removing Demographic Data Can Make AI Discrimination Worse

by Stephanie Kelley, Anton Ovchinnikov, Adrienne Heinrich, and David R. Hardoon

March 06, 2023



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Summary. A recent study su ests that denying AI decision makers access to sensitive data actually increases the risks of discriminatory outcome. That's because the AI draws incomplete inferences from the data or partially substitutes by identifying proxies.... **more**

Decisions about who to interview for a job, who to provide medical care to, or who to grant a loan were once made by humans, but ever more frequently are made by machine learning

(ML) algorithms, with eight in 10 firms planning to invest in some form of ML in 2023 according to New Vantage. The number one focus of these investments? Driving business growth with data.

While data can come in many forms, when focused on generating business growth a firm is usually interested in individual data, which can belong to customers, employees, potential clients, or almost anyone the organization can legally gather data on. Data is fed into ML algorithms which find patterns in the data or generates predictions — these outcomes are then used to make business decisions — generally about who or what to focus business efforts on.

While investment in ML algorithms continues to grow and drive greater business efficiencies — 30% or more, according to a recent McKinsey report — the use of ML models and individual data does come with some risks, ethical ones to be specific. The World Economic Forum cites unemployment, inequality, human dependency, and security amongst its top risk of using artificial intelligence and ML, but by far the biggest ethical risk in practice is discrimination.

The Biggest Risk

To be sure, unjustified discrimination by firms has always existed. Discrimination of historically disadvantaged groups has led to the formulation of several anti-discrimination laws, including the Fair Housing Act of 1968 and the Equal Credit Opportunity Act of 1974 in the United States, and the European Union Gender Directive. The lending space, in particular, has been a ground for discriminatory treatment, up to the point that discrimination in mortgage lending has been viewed as one of the most controversial civil rights topics.

Historically, in hopes of preventing discriminatory decisions, sensitive data, such as individual race, gender, and age has been excluded from important individual decisions such as loan access, college admission, and hiring. Whether sensitive data has been excluded in line with anti-discrimination laws (such as the

exclusion of race and gender data from consumer non-mortgage loan applications in the United States due to the Equal Credit Opportunity Act) or a firm's risk management practices, the end result is the same; firms rarely have access to, or use sensitive data to make decisions that impact individuals — whether they are using ML or human decision makers.

At first glance this makes sense; exclude individual sensitive data and you cannot discriminate against those groups. Consider how this works when determining who to interview for a job, first with human-based decision making. A human resources expert would remove the names and genders of applicants from resumes before analyzing candidate credentials to try to prevent discrimination in determining who to interview. Now, consider this same data exclusion practice when the decision is made with a ML algorithm; names and genders would be removed from the training data before it is fed into the ML algorithm, which would then use this data to predict some target variable, such as expected job performance, to decide who to interview.

But while this data exclusion practice has reduced discrimination in human-based decision making, it can create discrimination when applied to ML-based decision making, particularly when a significant imbalance between population groups exists. If the population under consideration of a particular business process is already skewed (as is the case for credit requests and approvals) ML will not be able to solve the problem by merely replacing the human decision maker. This became evident in 2019 when Apple Card faced accusations of gender-based discrimination despite not having used gender data in the development of their ML algorithms. Paradoxically, that turned out to be the reason for the unequal treatment of customers.

The phenomenon is not limited to the lending space. Consider a hiring decision-making process at Amazon which aimed to use a ML algorithm. A team of data scientists, trained a ML algorithm on resume data to predict job performance of applicants in hopes of streamlining the process of selecting individuals to interview.

The algorithm was trained on the resumes of current employees (individual data), with gender and names removed, in hopes of preventing discrimination, per human decision-making practices. The result was the exact opposite — the algorithm discriminated against women, by predicting them to have significantly lower job performance than similarly skilled men. Amazon, thankfully, caught this discrimination before the model was used on real applicants, but only because they had access to applicant gender, despite not using it to train the ML algorithm, with which to measure discrimination.

The Case for Including Sensitive Data

In a recent study published in *Manufacturing & Services Operations Management* we consider a fintech lender who uses a ML algorithm to decide who to grant a loan to. The lender uses individual data of past borrowers to train a ML algorithm to generate predictions about whether a loan applicant will default or not, if given a loan. Depending on the legal jurisdiction and the lender's risk management practices, the lender may or may not have collected sensitive attribute data, such as gender or race, or be able to use that data in training the ML algorithm. (Although our research focuses on gender, this should not diminish the importance of investigating other types of algorithmic discrimination. In our study, gender was reported as either woman or man; we acknowledge gender is not binary, but were restricted by our dataset.)

Common practice, as we noted above, whether it be for legal or risk management reasons, is for the lender to not use sensitive data, like gender. But we ask instead, what might happen if gender was included? While this idea may come as a shock to some, it is common practice in many countries to collect gender information (for example, Canada and countries in the European Union) and even to use it in ML algorithms (for example, Singapore).

Including gender significantly decreases discrimination — by a factor of 2.8 times. Without access to gender, the ML algorithm over-predicts women to default compared to their true default rate, while the rate for men is accurate. Adding gender to the ML algorithm corrects for this and the gap in prediction accuracy for men and women who default diminishes. Additionally, the use of of gender in the ML algorithm also increases profitability on average by 8%.

The key property of gender data in this case is that it provides predictive power to the ML algorithm.

Given this, when gender is excluded, three things can happen: 1) some amount of predictive information directly tied to gender is lost, 2) unfair gender discrimination that may be introduced in the process cannot be efficiently controlled or corrected for and 3) some portion of that information is estimated by proxies — variables which are highly correlated with another, such that when one variable, such as gender, is removed, a series of other variables can triangulate that variable.

We find that proxies (such as profession, or ratio of work experience to age) can predict gender with 91% accuracy in our data, so although gender is removed, much gender information is estimated by the algorithm through proxies. But these proxies favor men. Without access to the real gender data the ML algorithm is not able to recover as much information for women compared to men, and the predictions for women suffer, resulting in discrimination.

Proxies were also a key factor in the discrimination in Amazon's hiring ML algorithm, which did not have access to gender, but had access to various gender proxies, such as colleges and clubs. The ML algorithm penalized the resumes of individuals with terms like "women's chess club captain" and downgraded graduates of all-women's colleges because it was trained on a sample of current

software engineering employees, who, it turns out, were primarily men, and no men belonged to these clubs or attended these colleges.

This is not only a problem with gender discrimination. While our research focuses on gender as the sensitive attribute of interest, a similar effect could occur when any sensitive data with predictive value is excluded from a ML algorithm, such as race or age. This is because ML algorithms learn from the historical skewness in the data and discrimination could further increase when the sensitive data category has smaller minority groups, for instance, non-binary individuals in the gender category, or if we consider the risks of intersectional discrimination (for example, the combination of gender and race, or age and sexual orientation).

Our study shows that, when feasible, access to sensitive attributes data can substantially reduce discrimination and sometimes also increase profitability.

To understand how this works, refer back to the lending situation we studied. In general, women are better borrowers than men, and individuals with more work experience are better borrowers than those with less. But women also have less work experience, on average, and represent a minority of past borrowers (on which ML algorithms are trained).

Now, for the sake of this stylized example, imagine that a woman with three years of work experience is sufficiently credit-worthy while a man is not. Having access to gender data the algorithm would correctly predict that, resulting in the issue of loans to women with three years of experience, but denying them to men.

But when the algorithm does not have access to gender data, it learns that an individual with three years of experience is more like a man, and thus predicts such an individual to be a bad borrower and denies loans to all applicants with three years of experience. Not only does this reduce the number of profitable

loans issued (thus hurting profitability), but such a reduction comes solely from denying loans to women (thus increasing discrimination).

What Companies Can Do

Obviously, simply including gender will improve the number of loans granted to women and company profitability. But many companies cannot simply do that. For these, there is some light at the end of the tunnel, with several new artificial intelligence regulations being enacted in the coming few years, including New York City's Automated Employment Decision Tools Law, and the European Union Artificial Intelligence Act.

These laws appear to steer clear of strict data and model prohibitions, instead opting for risk-based audits and a focus on algorithm outcomes, likely allowing for the collection and use of sensitive data across most algorithms. This type of outcome-focused AI regulation is not entirely new, with similar guidelines proposed in the Principles to Promote Fairness, Ethics, Accountability, and Transparency from the Monetary Authority of Singapore.

In this context, there are three ways companies may in future be able to work gender data into ML decision making. They can 1) pre-process data before a ML algorithm training (e.g., down sampling men or up sampling women) so that the model trains on a more balanced data, 2) impute gender from other variables (e.g., professions, or a relationship between work experience and number of children), and 3) tune model hyper-parameters with gender, and then remove gender for model parameter estimation.

We found that these approaches significantly reduced discrimination with minor impact on profitability. The first approach reduces discrimination by 4.5-24% at the cost of a small reduction in overall loan profitability of 1.5-4.5%. The second reduces discrimination by nearly 70% and increases profitability

by 0.15% respectively, and the third reduces discrimination by 37% at the cost of about 4.4% in reduced profitability. (See our paper for more details.)

In some cases, and if these other strategies are not effective, firms may find it better simply to restore decision rights to humans. This, in fact is what Amazon did after reviewing the discrimination issues with its hiring AI software.

We encourage firms, therefore, to take an active role in conversations with regulatory bodies that are forming guidelines in this space, and to consider the responsible collection of sensitive data within the confines of their relevant regulations, so they can, at minimum, measure discrimination in their ML algorithm outcomes, and ideally, use the sensitive data to reduce it. Some firms may even be permitted to use the data for initial ML algorithm training, while excluding it from individual decisions.

This middle ground is better than not using the sensitive data at all as the aforementioned methods can help to reduce discrimination with minor impact, and sometimes even an increase, in profitability. In time, and as more evidence emerges that sensitive data can be responsibly collected and used, we must hope that a framework emerges that enables its use.

SK

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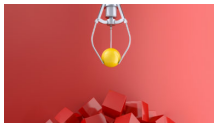
What Do We Do About the Biases in AI?



How AI Can Help Companies Set Prices More Ethically

Law Society of Ontario | Barreau de l'Ontario

TAB 5C

12th Human Rights Summit

AI Tip Sheet

Robert Richler
Bernardi Human Resource Law LLP

December 5, 2023

bernardi
Human Resource
Law LLP

“I’m afraid I can’t recommend that severance package, Chris”: AI and Employment Law for HR Professionals – Tip Sheet

What is Generative AI?

A type of artificial intelligence used to create content such as text, images, audio, code and videos based on information that the user inputs through prompts. Examples: ChatGPT, Bing Chat, DALL-E.

Benefits of AI

AI-powered tools and solutions can help HR municipal professionals mitigate risks, automate repetitive tasks and streamline HR processes.

Uses:

- brainstorming
- summarizing information
- providing support to clients
- research, translation and learning
- generating images for promotions
- writing and editing non-confidential documents and emails
- coding tasks, such as debugging and generating templates

Be Aware

Be aware of AI risks such as “hallucinations”, biases and discrimination, outdated information, lack of data protection, privacy and transparency as well as other legal and ethical considerations.

AI Best Practices

Create and enforce an AI policy at your organization. Always have human review. Create an AI use training program or module. Identify content that is created with or involves interacting with AI. Evaluate your current programs that use AI for any biases. Research AI tools before using them to ensure they are accountable and secure.

Robert Richler

Education
B.A. Hons. Psychology Queen's University
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Rob, a partner at Bernardi Human Resource Law LLP, leads the firm's employment law team. He practices employment law, conducts workplace investigations and performs HR training for employers. Rob frequently advises organizations on responsible AI integration in their human resource areas and has been a frequent presenter on the subject.

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TAB 6

12th Human Rights Summit

Issues that Arise in Workplace Investigations, Including Implicit Bias, Credibility Assessments, etc. – Case References

Alex Battick
Battick Legal Advisory

December 5, 2023

Issues that Arise in Workplace Investigations, Including Implicit Bias, Credibility Assessments, etc.

Alex Battick, *Battick Legal Advisory*

Case References:

Evolution of Legal and Social Acceptability

Levi Strauss & Co. v Workers United Canada Council, 2020 CanLII 44271

https://www.canlii.org/en/on/onla/doc/2020/2020canlii44271/2020canlii44271.html?resultIndex=1

Credibility in an Investigation

Faryna v. Chorny, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 at pages 356-57:

https://www.canlii.org/en/bc/bcca/doc/1951/1951canlii252/1951canlii252.html?resultIndex=1

"...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…"

Reliability in an Investigation

R. v. Morrissey, (1995) 97 C.C.C. (3d) 193 (Ont. C.A.) at page 205:

https://www.canlii.org/en/on/onca/doc/1995/1995canlii3498/1995canlii3498.html?searchUrlHash=AAAAAQAJTW9ycmlzc2V5AAAAAAE&resultIndex=1

"Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that

testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable."