FTR Now

HRTO Clarifies the Scope of Employer and Service Provider *Code* Obligations

Date: April 13, 2015

Two recent decisions from the Human Rights Tribunal of Ontario ("HRTO") provide helpful guidance on the scope of employer and service provider obligations under the *Human Rights Code* ("*Code*"), including the proper scope of the duty to accommodate and the question of who may bring a *Code* application.

In this *FTR Now*, we review these decisions and their practical implications for employers and service providers.

THE *CODE* DOES NOT REQUIRE CHANGES TO EMPLOYEES' ESSENTIAL DUTIES

In the recent decision Pourasadi v. Bentley Leathers, argued by Hicks Morley's Jodi Gallagher Healy, the HRTO clarified that the duty to accommodate under the *Code* does not require employers to change the essential duties of their employees' jobs.

In this case, the Applicant served as a Store Manager at a Bentley Leathers' ("Bentley") retail store in Thornhill, Ontario. Approximately 65-70% of her job included sales and customer service work. The remaining 30-35% involved duties such as merchandising, display, housekeeping, and operational matters such as employee training and development.

A number of years after becoming employed with Bentley, the Applicant suffered a work-related injury for which she received WSIB benefits. As a result of this incident, the Applicant suffered from restrictions that prevented her from performing certain duties required by her job, including assisting customers. Notwithstanding her injury and ongoing restrictions, the Applicant was able to continue working full-time due to the accommodations that Bentley gratuitously provided, including scheduling a second employee to work with the Applicant for a number of years. Eventually, Bentley determined that it could no longer offer these modified duties to the Applicant, and further that no other accommodations were available to enable her continued employment with Bentley. The Applicant was therefore referred to a WSIB work-transition program, and her employment with Bentley was terminated.

The Applicant took the position that Bentley failed to accommodate her workplace injury, and

therefore that her termination from employment violated the *Code*. While the Applicant conceded early that the *Code* did not require Bentley to schedule a second employee in the store to perform her duties, at the hearing, she asserted that Bentley ought to have allowed her to: (a) defer certain of her duties and responsibilities to other employees; and (b) require customers who need assistance to return to the store at another time to be assisted by other Bentley employees.

The HRTO reviewed the scope of Bentley's duty to accommodate the Applicant's workplace injury. Referencing the Supreme Court of Canada's seminal decision in *Hydro-Quebec*, the HRTO noted at paragraph 28 that,

"[T]he duty to accommodate may require arranging an employee's workplace in a way that enables the employee to perform the essential duties of his or her work. **However, it does not require permanently changing the essential duties of a position or permanently assigning the essential duties of a position to other employees. The duty to accommodate also does not require exempting employees from the essential duties of their position**" [emphasis added].

The HRTO held that it was an essential duty of the Store Manager position that the Applicant be able to assist customers, and that she be able to do so whenever such assistance was required. Notwithstanding that the Applicant may have been able to assist customers "most of the time," the Applicant could not assist customers whenever there was a need for it. Therefore, she could not perform the essential duties of her position.

The HRTO held that the accommodations requested by the Applicant would not have enabled her to perform the essential duties of her job. Instead, the Applicant was seeking to be exempted from performing the essential duties of the Store Manager position, which the HRTO confirmed is not required by the *Code*. More specifically, the HRTO confirmed that the duty to accommodate did not require that Bentley permit the Applicant to tell customers that, if they needed assistance outside of her restrictions, they must return to the store at another time to be assisted by other Bentley employees.

STANDING TO COMMENCE A HUMAN RIGHTS APPLICATION

In order to have standing to commence a human rights application under the *Code*, an individual's *Code* rights must be impacted by the alleged discriminatory conduct. While in most cases an individual's standing to commence an application will be apparent on the face of the application itself, in other cases it may be less obvious. Recently, the HRTO released an important decision clarifying what is required in order to have standing to commence an application under the *Code*.

The case, R.C. v. District School Board of Niagara and Eden High School Spiritual Life Centre, concerned the activities of the District School Board of Niagara (the "Board"), and in particular

those applicable to Eden High School ("Eden"), a public school operated by Board. The Applicant, an adherent of Secular Humanism, was a parent of a student who attended another high school operated by the Board (i.e. not Eden).

The Applicant asserted that, by "showing a preference for Protestant Christianity," the Board violated his right under section 1 of the *Code* to be free from discrimination on the basis of creed with respect to the provision of services. More specifically, the Applicant alleged that the Board violated the *Code* by: (1) operating Eden, which he alleged was perceived by many in the community to be a Christian school; (2) allowing students at Eden to participate in extra-curricular activities of a religious nature; and (3) organizing student "home builds" with the charity Habitat for Humanity.

At the hearing, the Board (represented by Hicks Morley's Michael Hines), argued that the Applicant lacked standing to commence an application under the *Code* because his personal rights were not affected by the conduct complained of in the Application. The Applicant did not himself attend Eden, nor did his child.

As a result, neither were exposed to any form of discrimination on the basis of creed. Importantly, neither the Applicant nor his child ever made a request that comparable Secular Humanist services be made available for students either at Eden or at the school attended by the Applicant's child. Since there was no denial of services, the Board asserted that the Applicant and his child suffered no disadvantage as a result of the manner in which the Board operated Eden. In any event, the Applicant did not seek to bring the Application on his child's behalf.

The HRTO agreed with the Board, and held that the Applicant's rights under section 1 of the *Code* were not engaged by the conduct alleged to be discriminatory in the Application. As the Applicant had no "direct personal legal interest" in the operation of Eden or the Board's partnership with Habitat for Humanity, he lacked the legal standing required to commence an application under the *Code*. In order to have standing to bring an application, an individual's personal rights under the *Code*, or the rights of the individual(s) on whose behalf the Application is commenced, must be engaged by the allegedly discriminatory conduct. The *Code* does not grant "public interest standing." As the HRTO explained at paragraph 34 of its decision:

"Whether the applicant characterizes himself as a 'taxpayer' or a 'citizen' or a 'member of the community' is in my view of no moment. **The *Code* permits individuals to enforce their own rights, not to complain about matters occurring in their communities that do not involve them.** In any event, […] **being a 'citizen, resident or taxpayer' does not convey private interest standing on an individual"** [emphasis added].

Importantly, the Board also provided clarity on the issue of perception. The Board found that the Applicant's "perception" that the Board had engaged in inappropriate activities was not a proper basis upon which to determine standing. While the *Code* protects against discriminatory treatment,

it does not protect against perceptions of discriminatory treatment, which may or may not be accurate. In order to have standing to bring an application under the *Code*, an Applicant must be able to demonstrate that his or her own rights under the *Code* were personally impacted by actual conduct allegedly perpetrated by the respondents.

The Applicant in this case did not make allegations of improper conduct by the Board that impacted his own *Code* rights, and so his Application was dismissed by the HRTO.

IMPLICATIONS

The HRTO has provided helpful guidance to employers and service providers in determining the proper scope of their duties under the *Code*, including their duty to accommodate. It has also clarified that the scope of the *Code's* protection in terms of who may properly commence an application alleging discriminatory conduct. Employers and service providers are reminded that their duties under the *Code* are not endless, but rather are limited with respect to both content or application.

For further information on these decisions, please contact Julia Nanos at 416.864.7341 or your regular Hicks Morley lawyer.
