

## Reaching Out

### Reaching Out – Ninth Edition

**Date:** November 2, 2015

Dear Friends,

It has been an eventful few months since our Spring Edition of *Reaching Out*. With the playoff run by the Blue Jays and the federal election behind us, we are pleased to provide the Fall Edition of *Reaching Out*.

[Allison E. MacIsaac](#) reviews current challenges related to gender identity and gender expression in the workplace, in light of the 2012 amendments to the Ontario *Human Rights Code* to include “gender identity” and “gender expression” as protected grounds and increasing public awareness.

On a related note, [Njeri Damali Campbell](#) discusses some of the factors employers should consider when responding to human rights complaints in the workplace. Her article will assist you in reviewing your existing policies and procedures and ensuring that they are up-to-date.

Paul A. Migicovsky examines the recently announced implementation details for the Ontario Retirement Pension Plan, scheduled to come into effect on January 1, 2017. While the recent election of a majority Liberal federal government may result in a focus on expanding the Canada Pension Plan, until that time, Paul’s article provides helpful information on the proposed implementation of the ORPP.

Finally, [Edward J. O’Dwyer](#) reviews the expanded definition of worker, further to 2014 amendments to the *Occupational Health and Safety Act*, which now includes unpaid learners. This is a category of individuals who might often provide services to Social Services clients, and it is important for you to be aware of your obligations to them.

We hope that you find this newsletter help informative and helpful. We would be pleased to respond to any questions you have or any suggestions for further topics in upcoming issues.

[Michael S. Smyth](#)

Editor

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## GENDER IDENTITY AND GENDER EXPRESSION IN THE WORKPLACE: CURRENT CHALLENGES

By: [Allison E. MacIsaac](#)

Does your workplace dress code allow all forms of gender expression? Does your workplace have a gender-neutral

washroom facility?

Given recent legislative and increasing public awareness, gender identity and gender expression have become the new “hot topics” in human rights and workplace law. In this article, we provide an overview of the new accommodation challenges faced by employers dealing with gender identity and gender expression issues.

In 2012, the Ontario *Human Rights Code* (“Code”) was amended to include “gender identity” and “gender expression” as protected grounds. The Ontario Human Rights Commission subsequently issued a policy addressing discrimination arising from gender identity and gender expression – the *Policy on preventing discrimination because of Gender Identity and Gender Expression* (“Policy”).

While the Policy does not create freestanding legal obligations, it can be considered by the Human Rights Tribunal of Ontario in any proceeding and employers should therefore be well aware of its terms.

## THE MEANING OF “GENDER IDENTITY” AND “GENDER EXPRESSION”

Gender identity is an individual’s personal understanding of their gender, which may be similar or different to the sex they were assigned at birth.

Gender expression recognizes the ways in which individuals present their gender to the world, which may be contrary to the anatomical sex they had at birth.

The Policy provides additional guidance on the subject and includes the following related definitions:

**Sex** is the anatomical classification of people as male, female or intersex, usually assigned at birth.

**Trans** or **transgender** is an umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms. It includes but is not limited to people who identify as transgender, trans woman (male-to-female), trans man (female-to-male), transsexual, cross-dresser, gender non-conforming, gender variant or gender queer.

**Gender non-conforming** individuals do not follow gender stereotypes based on the sex they were assigned at birth, and may or may not identify as trans.

**“Lived” gender identity** is the gender a person feels internally (“gender identity” along the gender spectrum) and expresses publicly (“gender expression”) in their daily life including at work, while shopping or accessing other services, in their housing environment or in the broader community.

## CURRENT ISSUES

Despite the growing acceptance of the trans community in society, workplace rules, policies and day-to-day practices continue to lag behind and represent a potential liability for employers.

Persons experiencing gender identity and gender expression issues are vulnerable, particularly in the workplace. Accordingly, employers are obligated to ensure that employees are protected in the workplace. A case in point is *Vanderputten v. Seydaco Packaging Corp.*<sup>[1]</sup> An employee who had a history of discipline for insubordination and angry outbursts came out as a trans woman. In preparation for surgery, she began dressing as a woman. The company told her that she would be treated as a male employee until she presented legal or medical documentation attesting to her gender status. She was further threatened with termination when she asked some of her female co-workers to share their experience with respect to their breasts and menstrual cycles.

The employee was dismissed following an altercation with a co-worker who called her a “faggot”. The Human Rights

Tribunal of Ontario determined that the conduct of the employer constituted a violation of the *Code*, and awarded the employee \$22,000 in damages and unpaid wages to the date of the hearing.

Similarly, in *Salsman v. London Sales Arena Corp.*<sup>[2]</sup>, a manager of a local market made discriminatory comments towards multiple transgendered women, referring to them as “cross dressing” and being “guys dressed up as girls.” The manager then made comments on the radio that the market was a “family market” and he referred to the employees as “these people.” The women were awarded between \$5,000 and \$20,000 as general damages for the breach of the *Code* for injury to dignity and self-worth.

## ACCOMMODATION OF GENDER EXPRESSION AND GENDER IDENTITY AT WORK

Gender identity is highly personal in nature and will vary significantly between employees. As such, employers must be sure to address employees’ lived gender identities on a case-by-case basis. There is no “one-size fits all” approach. However, we provide the following “best practices” to assist employers in being compliant with the *Code*:

- **Review human rights policies.** Gender identity and gender expression should be included as protected grounds in your harassment and discrimination policies.
- **Review workplace violence and harassment policies.** Workplace violence and harassment policies should clarify that gender-based violence, which includes violence against trans persons, is prohibited in the workplace. Policies should clarify that gender-based violence and harassment include the following prohibited behaviours:
  - comments that ridicule or demean people because of their gender identity or expression;
  - behaviours that are designed to reinforce traditional gender norms;
  - a refusal to use someone’s self-identified name or pronoun;
  - “outing” or threatening to expose someone as trans; and
  - jokes or commentary about a person’s physical characteristics.
- **Review the dress code.** Assess your existing dress codes to eliminate gender specificity. Absent a bona fide occupational requirement, dress codes should be uniform as between males and females so that employees are able to dress in a manner that conforms with their gender identities.
- **Be proactive.** All employees, including managers and supervisors, should receive training on workplace violence, harassment and discrimination. This training should include training on gender identity issues, even if there are no trans persons currently employed.
- **Accommodate.** The Policy provides that trans people have the right to use washrooms and changing facilities that match their lived gender identity. Consider accommodations that would permit trans employees to access corresponding gender-specific washrooms and change rooms.
- **Use employees’ chosen names.** In addition to physical accommodations, employers should accommodate employees’ chosen names and pronouns (they/their, he/she, him/her, or zhe/ze/hir) in all communications, including records, ID cards, email accounts, and workplace directories.
- **Communicate appropriately.** Gender identity is extremely personal and dynamic. In many circumstances, it will be necessary and appropriate to ask for input from the employee so that the employer can better understand the nature of the need(s), including how the individual would like to be addressed, and other accommodations that may be required. Employers should not avoid the topic where discussion is necessary to determine appropriate accommodation, and they must be sensitive and respectful in these discussions.
- **Protect privacy of personal information.** Information that relates to a trans person’s sex, gender identity or medical history should only be collected where relevant and necessary. It must be stored in secure filing systems and kept confidential and private. Review document retention and access policies to ensure they protect sensitive and confidential records of trans persons.

Gender identity and gender expression may, at first, be confusing because society is accustomed to viewing gender as “a clear-cut characteristic”. The key to a successful outcome is to ensure that all persons, including trans persons, are treated with dignity and respect in accordance with their gender identity. Communication and awareness is critical to creating workplaces that are tolerant and accommodating of all persons.

# RESPONDING TO HUMAN RIGHTS COMPLAINTS IN THE WORKPLACE: HOW DOES YOUR ORGANIZATION MEASURE UP?

By: [Njeri Damali Campbell](#)

Most, if not all, employers are aware of the potential liability they face should they fail to adequately investigate complaints made against them under the Ontario *Human Rights Code* (“Code”). In this article, we provide you with an overview of general principles and a checklist that will help your organization respond appropriately to complaints and thereby minimize potential risk.

Generally, the *Code* provides employees with the right to a workplace free from discrimination and harassment<sup>[3]</sup>. Employers have a corresponding duty to take reasonable steps to investigate discrimination and harassment allegations made by their employees<sup>[4]</sup>. The obligation arises once an employer becomes aware of complaints of discrimination or harassment based on the prohibited grounds in the *Code*, regardless of whether the allegations are raised by the complainant or another employee<sup>[5]</sup>.

## BEST PRACTICES FOR HANDLING HUMAN RIGHTS COMPLAINTS

In *Laskowska v. Marineland of Canada Inc.*, the Human Rights Tribunal of Ontario set out a three-part analysis to determine whether an employer has responded to a human rights claim with reasonable diligence<sup>[6]</sup>. Human rights and labour arbitration cases since then have provided additional guidance for employers.

### 1. ORGANIZATIONAL AWARENESS OF DISCRIMINATION AND HARASSMENT

An organization that dedicates the necessary time and resources to enhance employee awareness about discrimination and harassment in the workplace can avoid costly litigation in the future. As a starting point, your organization should have a current discrimination and harassment policy, an effective process for handling complaints and regular training for all employees. Consider whether your organization meets the following expectations.

#### *Requirements of a Discrimination and Harassment Policy (“Policy”)*

- The Policy should contain clear, easy to understand guidelines on when and how to respond to complaints. It should designate who is responsible to act.
- The Policy should be current. Any organizational materials that reference excerpts from the Policy must also current.
- The organization should regularly evaluate whether employees are aware of the Policy and whether they know their compliance obligations under it<sup>[7]</sup>. Effective communication of the Policy is key.

#### *Complaint Process*

- The Policy should contain a tailored step-by-step complaints process, beginning with the awareness of a complaint and ending with the restoration of the work environment.
- The complaints process should be responsive to feedback from employees about its effectiveness at addressing discrimination and harassment.

#### *Discrimination and Harassment Training*

- Discrimination and harassment training should include modules that are customized to specific departments within the organization. The training should consider unique circumstances that may give rise to additional risks or training needs.
- The training program should provide guidance on how employees ought to respond to complaints of discrimination,

regardless of their place in the organization's hierarchy[8].

- The organization should keep a current record of employee attendance at discrimination and harassment training sessions. New employees, or employees who are transferred into senior positions, should be provided with appropriate training in a timely manner.

## 2. POST-COMPLAINT RESPONSES TO ALLEGATIONS OF DISCRIMINATION AND HARASSMENT

An effective policy, complaints mechanism or training program are only as good as their use within the organization. Does your organization take allegations of discrimination and harassment seriously by taking action quickly, compassionately and completely? How would your organization's response to complaints appear to an outsider? Consider the following in relation to your organization.

### *Pre-Investigation*

- The Policy's complaints process should begin immediately after a concern is raised. A delayed response to an allegation will reflect negatively on your organization.
- Members of the response team should co-ordinate communications among themselves and be aware of the progress of the investigation.
- Complainant(s) and respondent(s) should be treated with professionalism and sensitivity. Members of the response team should provide reasonable updates to the parties and respond to the parties' inquiries in a timely manner[9].

### *Investigations*

- Discrimination and harassment investigations should directly address the substance of the complaint. Every allegation must be thoroughly investigated. All relevant witnesses should be interviewed.
- All employees involved in discrimination and harassment investigations should take "in the moment" notes of relevant occurrences. These notes should include not only the content of what was said, but what procedural steps were taken along the way.
- Conclusions should be drawn based only on the evidence that emerges in the investigation. Investigators should not fill in the gaps[10].
- Investigations should be conducted by individuals with an appropriate level of knowledge about the organization's obligations under the *Code* and the specific issues involved. Third party investigators, or subject-matter experts, should be retained where necessary.

## 3. RESOLUTION OF THE COMPLAINT AND RESTORATION OF THE WORKPLACE

Restoring the working environment at the conclusion of an investigation is just as important as a properly conducted investigation. Allegations of discrimination and harassment, whether proven or not, impact not only the parties, but also other employees in the workplace. Does your organization take appropriate steps to 'close the loop' with the parties involved as well as other affected employees? Consider the following.

### *Restoring a healthy workplace*

- Return-to-work transition plans should be put in place for the parties involved in the issue. These plans consider whether the complainant and respondent can continue working together, or if alternate arrangements are necessary.
- While maintaining confidentiality, managers should communicate the conclusion of an investigation to the parties[11] and witnesses[12] where appropriate.
- The organization should follow up with the parties, especially the complainant[13], in a timely manner to determine whether they have, in fact, been returned to a harassment and discrimination-free workplace at the conclusion of an investigation.
- Members of the response team should share the appropriate amount of information about the investigation's

conclusions; however, they should be mindful that the parties are not entitled to know specific details of the actions taken against the respondent, the nature of the discipline or requirements imposed, as may be applicable<sup>[15]</sup>.

## ARE YOUR POLICIES AND PROCEDURES UP TO SPEED?

There is no expectation that an organizational response to harassment and discrimination will be perfect<sup>[16]</sup>. Nor is there a “cookie-cutter” way to investigate or respond to allegations of discrimination and harassment<sup>[17]</sup>.

Your organization’s obligation is to consider discrimination and harassment complaints seriously and to reasonably respond. The steps taken may vary depending on the nature of the complaint. Remember that the violation of the *Code* rests in the failure to provide employees with a workplace free of discrimination and harassment, which may be caused by the failure to investigate allegations<sup>[18]</sup>. To minimize the risk to your organization, make sure that the appropriate employees have turned their minds to the considerations above.

## THE ONTARIO RETIREMENT PENSION PLAN

By: Paul A. Migicovsky

Studies suggest that only 35% of Ontario workers are members of a workplace pension plan. Concerned over inadequate levels of savings and income in retirement, the Ontario government announced its intention to create a province-wide pension plan, the Ontario Retirement Pension Plan (“ORPP”), in its 2014 Budget. The ORPP, scheduled to come into effect on January 1, 2017, is the first mandatory registered pension plan of its kind in the country.

### WHO MUST BE ENROLLED IN THE ORPP?

Following a phase-in period, by 2020 the government aims to enroll all Ontario workers between ages 18 and 70 who are not members of a “comparable workplace pension plan” in the ORPP, subject to a minimum annual earnings threshold which has yet to be determined. Employers and employees will each be required to contribute 1.9% on annual earnings up to \$90,000 (based on 2014 dollars), for a combined total of 3.8%. As such, the ORPP will have a direct impact on payroll costs in the coming years.

### WHAT IS A COMPARABLE WORKPLACE PENSION PLAN?

In order to be considered a comparable plan (in which case its members are exempt from the ORPP), a plan must be a registered pension plan that meets certain minimum thresholds:

- defined benefit (“DB”) registered pension plans will need to meet accrual thresholds. For example, an annual benefit accrual rate of at least 0.5% in an earnings-based DB plan will be considered a comparable plan
- defined contribution (“DC”) registered pension plans will need to meet contribution thresholds. For example, in earnings-based DC plans, a minimum 8% contribution rate is required and the employer will be required to contribute at least half of such contributions (i.e., 4% of earnings)
- hybrid registered pension plans (plans that include DB and DC components) will also need to meet accrual/contribution thresholds in order to be considered comparable.

The government is still considering exemption thresholds for multi-employer pension plans and other types of pension plans.

It is important to note that group registered retirement savings plans (group RRSPs) and deferred profit sharing plans (DPSPs) will **not** be considered comparable plans. If you maintain a group RRSP or DPSP for your Ontario employees, they will be required to participate in the ORPP. In other words, you will be required to contribute 1.9% on employees’ earnings (up to \$90,000) toward the ORPP and employees will be required to contribute the same amount, in addition to any group

RRSP or DPSP contributions.

If you maintain a comparable registered pension plan and some Ontario employees do not participate in the plan because: (i) the plan is voluntary, (ii) certain groups of employees are ineligible to participate (e.g., casual employees), or (iii) there are waiting periods before joining the plan, these employees will also be required to participate in the ORPP unless and until they commence participation in your comparable plan. This will result in different payroll and administrative obligations for these employees.

Now is the time to closely examine your existing pension and retirement plan arrangements to assess whether they qualify as a comparable plan, what parts of your Ontario workforce will be subject to the ORPP and whether you want to make any changes to your existing plan(s) in light of the ORPP. Of course, in most unionized workforces, such changes will likely need to be negotiated.

## WHEN IS THE ORPP BEING IMPLEMENTED?

The ORPP will be implemented in four waves, beginning on January 1, 2017. Ontario employers will be contacted starting in early 2016 to confirm their existing pension plans and coverage. Contributions will be phased-in as follows:

- Wave 1 – Large employers (500 employees or more) without a workplace registered pension plan as of August 11, 2015. Contributions will start at a reduced rate on January 1, 2017 and reach the full combined 3.8% contribution rate by 2019.
- Wave 2 – Medium employers (50 – 499 employees) without a workplace registered pension plan as of August 11, 2015. Contributions will start at a reduced rate on January 1, 2018 and reach the full combined 3.8% contribution rate by 2020.
- Wave 3 – Small employers (50 or fewer employees) without a workplace registered pension plan as of August 11, 2015. Contributions will start at a reduced rate on January 1, 2019 and reach the full combined 3.8% contribution rate by 2021.
- Wave 4 – Employers with a registered pension plan on August 11, 2015, whether or not it is a comparable plan under the ORPP. The full combined contribution rate of 3.8% will begin on January 1, 2020.

## WHAT'S NEXT?

We have already published a number of *FTR Nows* which discuss the ORPP. More information on the ORPP is expected from the Ontario government over the coming months. We will keep you apprised of these changes in upcoming *FTR Nows* and other firm publications.

## EXPANDED DEFINITION OF “WORKER” UNDER OHSA CREATES NEW CHALLENGES

By: [Edward J. O'Dwyer](#)

An expanded definition of “worker” under the *Occupational Health and Safety Act* (“OHSA”) was enacted by Bill 18, the *Stronger Workplace for a Stronger Economy Act, 2014*, which received Royal Assent in November 2014. In addition to persons who perform work or supply services for monetary compensation, the definition of worker now includes:

- secondary school students who perform work or supply services under authorized work experience programs, even if they do not receive monetary compensation;
- a person who performs work or supplies services under a program approved by a college, university or other post-secondary institution, even if he or she does not receive monetary compensation;

- a trainee who meets the conditions of section 1(2) under the *Employment Standards Act, 2000*; and
- any other prescribed person.

## EFFECTS OF THE CHANGE

The expanded definition of worker is a significant change for organizations that have traditionally utilized unpaid secondary school students through the Cooperative Education Work Experience Program, Project-based Learning Program, Specialist High Skills Major or Ontario Youth Apprenticeship Program, and/or unpaid post-secondary school students through student placements, internships or student practica.

The change to the definition of worker to include the above classes of unpaid learners means that employers now owe these unpaid learners the same duties owed to workers. This includes the obligation to provide information, instruction, and supervision. The change also means that persons appointed to oversee an unpaid learner's training will now be a "supervisor" under the *OHSA*.

It is important to note that volunteers are not included in the new expanded definition of "worker." As such, individuals who work for no monetary payment of any kind and do not fit in any of the categories above are still not covered by the *OHSA*.

## PRACTICAL STEPS TO ENSURE COMPLIANCE

In light of the expanded definition of worker, organizations that wish to continue to utilize unpaid learners are advised to:

- treat unpaid learners like any other worker with respect to health and safety;
- incorporate unpaid learners into health and safety programs;
- provide unpaid learners with all mandatory training (however, consideration can be given to excluding unpaid learners from activities that would require additional training);
- consider the current relationship between unpaid learners and mentors in light of the fact persons who become supervisors must be provided with the required resources, assistance and training; and
- consider reducing the number of persons overseeing unpaid learners to constrain who becomes a "supervisor".

The expanded definition of worker will create challenges for organizations which have traditionally utilized unpaid learners. However, putting a process into place that ensures compliance with *OHSA* will assist organizations which wish to continue to utilize unpaid learners.

For more information about unpaid interns and volunteers in the workplace, see our *Reaching Out* articles of November 2014, "[Unpaid Interns: Proceed with Caution](#)" and November 2013 "[The Legal Implication of "Volunteers" in the Workplace.](#)"

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[1] 2012 HRTO 1977 (CanLII)

[2] 2014 HRTO 775 (CanLII)

[3] *Human Rights Code*, RSO 1990, c H.19 at ss. 5(1)-(2).

[4] *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII). For a review of the relevant case law pertaining to human rights investigations, see "Investigating Complaints of Harassment and Discrimination" by Jacqueline J. Luksha in the Sixth Edition of *Reaching Out* (July 2014).

[5] *Naidu v. Whitby Mental Health Centre*, 2011 HRTO 1279 (CanLII) at para. 191

- [6] For the Tribunal's discussion on the duty to investigate and associated liability, see *Sutton v. Jarvis Ryan Associates Inc.*, 2010 HRTO 2421 (CanLII) at paras 130-134.
- [7] *Renfrew County and District Health Unit and OPSEU, Local 487* (Correia), 118 C.L.A.S. 54, 241 L.A.C. (4th) 388 at para. 90.
- [8] *Moore v. Ferro & Company*, 2015 HRTO 1006 (CanLII) at para. 40.
- [9] *Supra* note 5 at para 99.
- [10] *Ibid* at para 102.
- [11] *Toronto Community Housing Corp. and Toronto Civic Employees' Union, Local 416, CUPE (Bower), Re* 113 C.L.A.S. 119, 228 L.A.C. (4th) 111 at para 254.
- [12] *Dodds v. 2008573 Ontario Inc.*, 2007 HRTO 17 (CanLII) at para 44.
- [13] *Baisa v. Skills for Change*, 2010 HRTO 1621, 2010 at para 72.
- [14] *Hamilton (City) and ATU, Local 107 (B. (A.)), Re*, [2013] O.L.A.A. No. 371, 116 C.L.A.S. 169, 236 L.A.C. (4th) 28
- [15] *Supra* note 11 at para. 73.
- [16] *Supra* note 2 at para. 60.
- [17] *Steel v. Johnson Controls Automotive Canada LP* 2015 HRTO 564 (CanLII) at para 80.
- [18] *Scaduto v. Insurance Search Bureau*, 2014 HRTO 250 (CanLII) at paras. 75-82; *Falodun v. Andorra Building Maintenance Ltd.*, 2014 HRTO 322 (CanLII) at para. 63.
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