Reaching Out

Reaching Out – Eleventh Edition

Date: June 29, 2016

Dear Friends:

We are pleased to provide the 2016 Summer Edition of *Reaching Out*.

Njeri Damali Campbell of our Toronto office provides a summary of one of the first decisions of the Human Rights Tribunal of Ontario interpreting the ground of "gender expression" in the *Human Rights Code*. The Tribunal dismissed an individual's claim that his employer's "clean shaven policy" discriminated against him on the basis of gender expression because he was not allowed to keep his goatee.

Vincent M. Panetta of our Kingston office reviews a significant decision of the Workplace Safety and Insurance Appeals Tribunal dealing with the issue of chronic mental stress in the workplace. The decision will be of particular interest to those employers who employ workers engaged in inherently stressful positions working with children or adults who may be in distress from time to time.

Elizabeth D. Winter of our Toronto office and Siobhan M. O'Brien of our Ottawa office, review a recent decision of the Supreme Court of Canada dealing with the issue of whether notes and discussions that take place *in camera* by a Board of Directors may be exposed in the course of legal proceedings.

Finally, we provide a quick hit update on a decision of the Ontario Court of Appeal which upheld a finding of the Human Rights Tribunal of Ontario that an employer must reinstate an employee who had been terminated over 10 years earlier (at the time of the Tribunal decision).

We hope that you find these articles interesting and helpful. As always, if you ever have any suggestions for future articles, please do not hesitate to let us know.

Wishing you all a happy, safe and productive summer.

Michael S. Smyth

Editor

In this Issue:

Human Rights Tribunal Rules That Man's Goatee Not Protected by the Ontario *Human Rights Code*

By: Njeri Damali Campbell

The Human Rights Tribunal of Ontario (Tribunal) recently issued one of the first decisions interpreting the ground of "gender expression" in the *Human Rights Code* (*Code*). In *Browne v. Sudbury Integrated Nickel Operations*, Hicks Morley lawyer successfully argued that the "clean shaven policy" adopted by an employer to protect employees against the potential exposure to gas, fumes, and dust did not constitute discrimination on the basis of gender expression or sex.

Just the Facts

The employer operated a mining, milling and smelting company and required that employees comply with its "clean shaven policy". The policy prohibited employees from having beards that interfered with the wearing of a respirator mask but it also contemplated reasonable accommodation on the basis of religion, disability and any other grounds under the *Code*.

The Applicant, a 19-year employee, alleged that the policy was discriminatory on the basis of his gender expression. He wore a goatee at some points during his employment and in particular as part of the Movember movement which encourages men to wear mustaches (not goatees) in support of men suffering from prostate cancer. As it happens, a mustache, when neatly trimmed, was not prohibited by the "clean shaven policy". The Applicant testified that he had tried wearing a mustache in college and it just did not "look right" on him, so he preferred a goatee.

When asked by his employer whether he intended to abide by the policy, the Applicant replied that his compliance was unlikely, because the policy was discriminatory. In response, the Applicant was encouraged to "re-think" his actions. He did. He reported to work clean-shaven, then filed a human rights complaint.

The Tribunal did not Split Hairs

Few cases in the Tribunal's case law explain the *Code*'s protections under the ground of "gender expression". Accordingly, such attempts have largely relied on the Ontario Human Rights Commission's *Policy On Preventing Discrimination Because of Gender Identity and Gender Expression* (Policy).[1]

Given the lack of precedents, Vice Chair Mark Hart held a preliminary hearing to determine, in part, whether a man's decision to grow a particular type of facial hair is capable of being protected under the *Code* on the basis of gender expression, as well as an additional ground, sex. "Sex" has been included as a ground of discrimination since 1972. Prior to the addition of "gender expression" and "gender identity" as prohibited grounds, complaints of discrimination related to gender expression were encompassed by the ground of sex. Based on a review of the case law related to sex, the Tribunal concluded:

Wearing a beard or other facial hair is a matter of style or grooming, and is not a matter of sufficient social significance to warrant protection under human rights legislation, once again absent any connection to a matter of religious observance or perhaps a different protected ground other than sex.[2]

With that conclusion, the Tribunal turned to its examination of the protections afforded to applicants under the new ground of "gender expression".

The Bald Truth about Gender Expression

"Gender expression" and "gender identity" were added to the *Code* in 2012 in order to respond to the severe social, economic and historical disadvantage experienced by transgendered and gender non-conforming individuals.

The Tribunal noted that the Applicant was neither transgender nor gender non-conforming. Rather, the Applicant was a cis-gender man, meaning that his self-identity was male and he was "born as a man". The Tribunal held that interpreting

"gender expression" broadly to extend protection to the right of men to grow beards "would do violence to the important and fundamental purposes sought to be achieved by human rights legislation." The Tribunal concluded that the employer's "clean-shaven policy" only affected the Applicant's interest in his grooming choices, not his gender expression.

However, the Tribunal foreshadowed the possibility that the ground of "gender expression" could, in different circumstances, extend beyond the interests of transgender and gender non-conforming individuals. It also commented that in other circumstances, for example in the case of religious observance, a cis-gender man with a beard could attract *Code* protection.

Practical Tips for Employers

Browne v. Sudbury Integrated Nickel Operations has some important takeaways for employers:

- **Review dress codes and policies related to masks and/or grooming.** It is a good practice to clarify that these policies are subject to the duty of accommodation under the *Code*. Individuals responsible for the administration of the policies should be knowledgeable about the scope of the "gender expression" protection.
- **Update your human rights and harassment policies.** Ensure that "gender expression" and "gender identity" are included in any lists based on the prohibited *Code* grounds.
- **Explain the meaning of "gender expression" to supervisors and managers.** "Gender expression" is primarily intended to protect the interests of transgender and gender non-conforming people. While *Browne v. Sudbury Integrated Nickel Operations* does not mean that cis-gender employees will never be protected under the *Code*, it confirms that the fashion and grooming choices of cis-gender men are not *Code*-protected rights.
- **Investigate human rights complaints comprehensively.** When responding to human rights complaints, consider whether *Code* grounds other than those raised in the complaint have been triggered. Since the Tribunal will add additional grounds of discrimination where it deems appropriate, it is a good practice to ensure that your organization's response adequately addresses the key human rights issues.

Hicks Morley's Human Rights practice group will keep you informed of the evolution of "gender expression" and "gender identity" in the Tribunal case law.

Should you require more information about the duty of accommodation in respect of transgender and gender non-conforming employees or for training on "gender expression" and "gender identity" please contact Njeri Damali Campbell at 416.864.7018, Michelle C. Folliott at 416.864.7028 or your regular Hicks Morley lawyer.

WSIB and Mental Stress Claims

By: Vincent M. Panetta

The Workplace Safety and Insurance Appeals Tribunal (WSIAT) has released an interesting and significant decision (*Decision No. 665/10*) that deals with the issue of chronic mental stress in the workplace.

The worker was a child protection worker (CPW) employed by a Children's Aid Society (CAS) in Ontario. The worker had been employed by the CAS for 17 years at the time he made a claim to Workplace Safety and Insurance Board (WSIB) for lost time benefits arising from a psychological disability he suffered as a result of executing his regular CPW functions.

The worker had been a CPW for 10 years when he took approximately 10 weeks off as a result of being upset by a particular case. When he returned to work he applied for and obtained a lateral transfer to the job of resources manager or resources worker. In this capacity he recruited, assessed and monitored foster parent homes and their suitability for placement of children. The worker claimed there was a great deal of stress associated with the increased number of foster parent homes in the early 2000s and that over the years he found the increased workload demands cumulatively stressful. He took a four week holiday in the summer of 2005. When he returned to work he stated he was experiencing increasing stress and overall

anxiety and had trouble sleeping and concentrating. On a number of occasions he had to leave work early due to panic attacks that came on during meetings. On October 25, 2005 he left work because of a panic attack and never returned.

The worker applied for long-term disability benefits and eventually received a lump sum. He applied for Canada Pension Plan disability benefits in 2009 and was accepted.

The worker had also filed a compensation claim in July 2006 on the basis that his psychological disability was the result of cumulative and chronic stress. In an earlier decision, WSIAT found that he did not suffer from "an acute reaction to an unusual and objectively traumatic event" as required by the *Workplace Safety and Insurance Act* (*Act*) and therefore there was no entitlement to benefits for mental stress. WSIAT then determined that, but for the limiting provisions of the *Act* (subsections 13(4) and (5)), the worker would have a valid claim to WSIB benefits.

In this decision, the worker challenged the constitutionality of the limiting provisions of the *Act* on the basis they violated the *Canadian Charter of Rights and Freedoms* (*Charter*) and the *Human Rights Code*. The WSIAT determined that the application of the limiting provisions would in fact result in substantive discrimination against the worker and therefore violated the guarantee provided by subsection 15(1) of the *Charter.* The provisions could not be saved by section 1.

The WSIAT found that the worker's psychological disability could only be attributed to the stressors he experienced at work as a CPW. The worker did not have any conflict with his Supervisor or have any disciplinary issues. He did not have any unusual stressors at home, and there was no evidence of a pre-existing condition. The WSIAT determined that the general stress of his work (which was not out of the ordinary for a like position) and the evidence of a large amount of turnover in the child protection field entitled the worker to WSIB benefits. It also concluded that there was a causal relationship between his employment stresses and his resulting emotional breakdown, and that this was a discernible relationship, independent of personal non-compensable factors.

The WSIAT took pains to emphasize that chronic mental stress cases where the evidence does not support a finding that the work made a significant contribution to the mental disability should not succeed.

This decision is unique since it is a finding that a CPW who is engaged in an inherently stressful position is entitled to WSIB benefits. There was no evidence of unusual or traumatic events which led to the worker's disability. Instead, he was employed in recruiting, assessing and monitoring foster parent homes, which most CPWs regard as a less stressful and more desirable position.

The decision will certainly raise some concerns for those employers who employ workers engaged in inherently stressful positions whether they are working with children or adults who may be in distress from time to time. However, all employers need to be cognizant of the stressors in the workplace. The decision also reinforces the need to ensure that appropriate systems are in place to monitor and assist employees in stressful positions, including providing appropriate support.

We will continue to monitor the situation to see if the government introduces new legislation to address chronic mental stress, or if the WSIB amends its Operational Policy Manual.

The Supreme Court of Canada Speaks on *In Camera* Sessions

By: Elizabeth D. Winter and Siobhan M. O'Brien

On March 18, 2016, the Supreme Court of Canada issued *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval* (*Laval*), a significant decision about the examination of a school board's Executive Committee members regarding their *in camera* deliberations that led to a teacher's dismissal. The Court held that the executive committee members could be compelled to testify.

The impact of this decision for school boards was discussed in our March 30, 2016 School Board Update. In addition to its

immediate significance for school boards, the decision also serves as a cautionary tale for social service agencies which report to a Board of Directors. It is an important reminder for Directors that the substance of discussions that initially occur "behind closed doors" may be exposed in the course of future legal proceedings.

Facts

A Québec school board, the Commission scolaire de Laval (Board), had to decide whether to end its contractual relationship with an instructor on the basis that the instructor had a serious criminal record for which he had not yet received a pardon. "B" was employed as a vocational training instructor and was subject to a collective agreement. The Québec *Education Act* contains a scheme for verifying criminal records in relation to employees whose criminal records are relevant to their job functions for their board. In 2009, B's principal asked him to send a written declaration describing his criminal record to the human resources department.

B indicated in his declaration that he had been convicted of a variety of weapons and drug charges during the 1980s and 1990s and that he had applied for a pardon, which he expected to obtain within a few months of the declaration. The Director of Human Resources was of the opinion that the instructor's record was relevant to his job functions, but according to the *Education Act*, the final decision had to be made by the Board's Executive Committee.

The Executive Committee then held a special meeting to determine whether B's criminal record was relevant to his functions, and if so, whether to cancel his employment contract. B attended the meeting with a Union representative. The Executive Committee began the meeting partially *in camera*, meaning the public was excluded, and heard from B. The Executive Committee then excluded B and his representative from the meeting and deliberated on B's judicial record *in camera.* After deliberating, the Committee, sitting in public, adopted a resolution to terminate B's employment contract.

The Union grieved B's dismissal. It opened its case by summoning three members of the Board's Executive Committee who had been present for the *in camera* deliberations. The Board objected to the testimony, arguing that the motives of the individual members were irrelevant and that the members should be shielded from testifying about the deliberations. The Union argued that the testimony was relevant and necessary to the proceedings.

The Supreme Court of Canada Decision

The issue before the Supreme Court of Canada was whether the Union could examine members of the Board's Executive Committee on their *in camera* deliberations regarding B's dismissal. The Court had to consider whether two principles were relevant to the case at hand: the principle that the motives of a legislative body are "unknowable" and the principle of deliberative secrecy. Further, if the testimony was allowed, the Court would have to consider what, if any, limits would apply to the testimony.

Were the motives of the Executive Committee "unknowable"?

Based on prior Supreme Court case law, the Board argued that the actual motives of any public board that makes any decision through collectively-reached written resolutions are simply unknowable. The Board submitted that, unlike courts, the *reason*s for their chosen course of action did not have to be reduced to writing. All that mattered was the ultimate decision. Consequently, any subpoenaed testimony regarding reasons would be of no value. Giving this decision possible implications outside the public sector, the Board argued that the principle that motives are "unknowable" must apply to every public body, as well as to every private body.

The Supreme Court disagreed. Justice Gascon, writing for the majority, stated that the traditional avoidance of adjudicative inquiries into "unknowable" motives was limited to public acts of a *legislative* nature. In the case at hand, the Board was acting in its role as a private employer when the Executive Committee adopted a resolution to dismiss B from his teaching position under a procedure set out in a collective agreement. Generally, the dismissal of public sector employees is governed by contract and employment law and not by public law relating to governmental functions. The Court found that the

arbitrator's decision that he needed to know the substance of the *in camera* deliberations in order to determine whether they had been "thorough" was reasonable.

Were the motives of the Executive Committee shielded by the principle of deliberative secrecy?

The Board further argued that the members of the Executive Committee, when legally deliberating *in camera*, were shielded by the principle of deliberative secrecy and thus could not be compelled to testify about those deliberations.

Again, the Court disagreed. Deliberative secrecy was held to be a core principle of *judicial* independence that shields *judicial* decision-making processes from review by other branches of government. While this principle extends to administrative *tribunals*, it does not extend to every administrative entity that is required to perform decision-making functions.

In the case at hand, the Board was acting as an employer when it made the decision to dismiss B from his employment and was not acting as a quasi-judicial decision-maker. The principle of deliberative secrecy did not apply.

Conclusion

The substance of discussions that initially occur legally "behind closed doors" may be exposed in the course of future legal proceedings. This can include, at a minimum, demands for the production of minutes and individual notes taken at *in camera* meetings, and may go so far as to compel the testimony of committee members and others in attendance.

Laval serves as an important reminder that what happens in the boardroom may not ultimately stay in the boardroom. Boards of Directors will need to govern themselves with this consideration in mind.

For more information on this decision, please contact Siobhan O'Brien at 613-369-2111 or your regular Hicks Morley lawyer.

Quick Hit: Appellate Court Affirms Reinstatement of Employee after 10+ Years out of Workforce

The Ontario Court of Appeal recently upheld a decision of the Human Rights Tribunal of Ontario (Tribunal) that serves as a stark reminder of the potential risks to employers for failing to comply with their obligations under the *Human Rights Code* (*Code*).

The Applicant had developed a generalized anxiety disorder arising from the responsibilities and personal liability associated with her position of Supervisor, Regulated Substances, Asbestos with her school board employer. She went off work and received long-term disability benefits for a two-year period. Attempts to return to work were unsuccessful and her employment was eventually terminated. She then filed a human rights complaint arguing that the employer failed to accommodate her disability. The Tribunal agreed, stating that the employer "failed to actively, promptly and diligently canvas possible solutions to the applicant's need for accommodation," constituting discrimination on the basis of disability. In a subsequent decision on the appropriate remedy to be awarded, the Tribunal rejected the employer's argument that it would be unfair to order reinstatement in light of the length of time that had passed (ten years at the time of that decision). It stated that employers should be aware that "reinstatement is always an option in human rights cases." The employer was also ordered, among other things, to provide for compensation for lost wages and to pay $30,000 for injury to dignity, feelings and self-respect.

The Tribunal's decision was upheld on judicial review. A further appeal to the Court of Appeal by the employer was also dismissed. That Court held, among other things, that the remedies decision was reasonable. The passage of time is not, in itself, determinative of whether reinstatement is appropriate. Here, the Applicant's relationship with the employer "was not fractured and the passage of time had not materially affected her capabilities."

This case highlights the potential breadth of remedies that may be available where an employer fails to comply with its

obligations under the *Code*. Employers should undertake diligent and thorough efforts when considering whether there is the ability to provide modified or alternate positions for employees with medical restrictions and be aware that an adjudicator may review such efforts.

For a detailed discussion of the decision, please see our *FTR Now* of June 3, 2016 *Appellate Court Upholds Significant Remedy Decision of the Human Rights Tribunal of Ontario*.

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[1] For further reading on this issue, Hicks Morley lawyer Allison MacIsaac discussed recent case law, the Policy and related considerations in “Gender Identity and Gender Expression in the Workplace: Current Challenges”, published in the Ninth Edition of *Reaching Out*.

[2] *Browne v. Sudbury Integrated Nickel Operations*, 2016 HRTO 62 (CanLII) at para 33.
