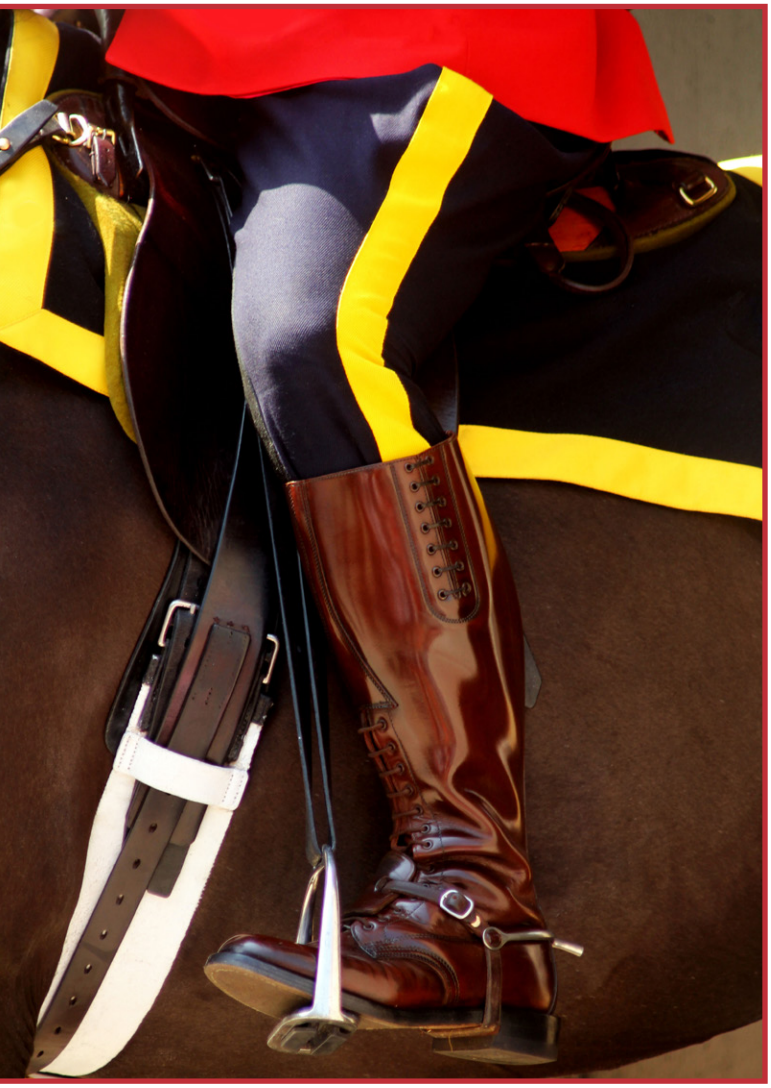
MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers



The decision serves as a timely reminder that a seemingly neutral workplace policy, adopted in good faith, can still have an unintended, discriminatory impact and lead to liability for an employer.

When can a neutral workplace policy be discriminatory?

In the Supreme Court of Canada's recent decision - *Fraser v Canada (Attorney General)*[1] - the court ruled that a pension plan implemented by the Royal Canadian Mounted Police ("RCMP") discriminated against female officers with children.

The decision serves as a timely reminder that a seemingly neutral workplace policy, adopted in good faith, can still have an unintended, discriminatory impact and lead to liability for an employer.

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The RCMP's job sharing program

In 1997, the RCMP developed a job sharing program, designed in part to address the historic disadvantage faced by female RCMP officers unable to work full-time hours due to childcare responsibilities. The program permitted two or three employees to share the duties and responsibilities of one full-time position, reducing their individual hours of work. The program benefitted both the officers and RCMP which used the program to respond to staffing shortages.

An issue arose regarding pension credits. An officer enrolled in the program was prohibited from buying back full pension credits for the period of time at issue. By contrast, an officer with reduced hours of work for other reasons (such as an unpaid leave of absence or a suspension without pay) was given the option to buy back full pension credits.

When this distinction in the pension plan became known to the officers, they initiated an application against the RCMP, alleging the distinction had a disproportionate and negative impact on women, contrary to the equality rights under section 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). The evidence in court demonstrated that most officers in the job sharing program were women with children and, during certain years, all employees were women who enrolled for childcare-related reasons.

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The RCMP pension plan was discriminatory

Both the application judge and Federal Court of Appeal dismissed the application on the basis the officers did not receive inferior compensation when compared to those on an unpaid leave and, further, any alleged adverse treatment was due to the officers' *choice* to enrol in the program. The RCMP further argued that the job sharing program was ameliorative in that it supported women in the workplace. In other words, the laudable intention of the program should protect it from attack.

In this case, the denial of pension entitlements for officers enrolled in the job sharing program had a disproportionate impact on female officers who were not allowed to buy back pension credits in the same way as officers whose hours were reduced for other reasons.

The Supreme Court of Canada disagreed with the lower courts, particularly with the notion that unequal treatment could not result from circumstances caused by an individual's personal choice. In this case, the denial of pension entitlements for officers enrolled in the job sharing program had a disproportionate impact on female officers who were not allowed to buy back pension credits in the same way as officers whose hours were reduced for other reasons.

As for the RCMP's good intentions, these were acknowledged, but did not save the program from scrutiny. The Supreme Court held that discrimination may result from a seemingly neutral policy if that policy has a disproportionate and negative impact on members of a protected group.

In other words, intent to discriminate is not a requirement to establish a claim of discrimination.

Takeaways for employers

Although the Supreme Court of Canada's decision examines discrimination under section 15(1) of the *Charter*, it is equally relevant for a private sector employer subject to human rights legislation. In all cases, there are steps an organization should take to reduce the risk of a successful discrimination claim:

- Review all workplace policies to consider if the application of a policy may have a discriminatory impact.

  For example, a policy that requires an employee to be clean shaven may be neutral on its face (pardon the pun), but may have a discriminatory impact if facial hair is tied to a religious belief. Similarly, a pay or benefit policy may have a discriminatory impact if it treats differently an employee on leave or reduced hours for reasons related to a protected ground (*e.g.,* pregnancy, family status, disability, *etc.*)

- Consider how a policy that may have a discriminatory impact can be modified, if required to accommodate an employee.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or, if you are not yet our client, any member of our team.

[1] *Fraser v. Canada (Attorney General)*, 2020 SCC 28

DID YOU KNOW?

Nearly two-fifths **(36.5%)** of Canadian businesses laid off at least one employee since the beginning of the pandemic. Of those businesses, roughly two-thirds **(64.3%)** reduced their workforce by at least **50%**. **Statistics Canada**

Your employee works outside your home province - what are your legal obligations?

Zack Lebane
Articling Student

As remote work becomes increasingly common, a question we are often asked by employers is, "will the employment laws of my home province continue to apply if my employee moves out of province, whether at my request or on their own?"

In this article, we use Ontario as the home jurisdiction. However, similar considerations apply in other Canadian jurisdictions. If you have a question about another jurisdiction, give us a call.

Overview

In evaluating this question, an employer must consider several pieces of legislation and sources of law. These include:

- Employment Standards
- Human Rights
- Occupational Health and Safety
- Workers' Compensation
- Common Law

Employment Standards Act, 2000 (Ontario) *("ESA")*

Section 3(1)(b) of the *ESA* states that the act applies to an employee if work performed outside Ontario is "a continuation of work performed in Ontario".

To determine whether work is a *continuation*, the Ontario Labour Relations Board ("OLRB") considers factors such as: where an employee physically works (including the employee's "base"), the frequency of travel to and work in Ontario, the duration of time spent in Ontario and whether the employment contract requires the employee to return to Ontario following the conclusion of the arrangement.

In one decision, a software developer for an employer in Ontario entered into a work-from-home agreement which required him to return to a traditional workplace on four-weeks' notice. The employee subsequently moved to British Columbia and continued to work from there. After being recalled to Ontario, the employee considered himself terminated and applied to the OLRB for termination pay under the *ESA*. The OLRB found the *ESA* did not apply as the employee never physically worked in Ontario, and carried out his work from his home in British Columbia. He had not even been to Ontario for 28 months and his job required no "back and forth" between the two provinces.[1]

Human Rights Code (Ontario) *("Code")*

The *Code* may apply if there is a "sufficient connection" between the substance of the employee's application and the province of Ontario. The Human Rights Tribunal of Ontario will consider factors such as the employer's place of business, the employee's residence, usual place of business, terms of employment and where the work was performed.

In one decision, the Human Rights Tribunal found there was not a sufficient connection and the *Code* did not apply where the employer had offices in Ontario and the employment contract was entered into in Ontario, but the work was performed outside Ontario and the events giving rise to the human rights complaint occurred outside Ontario.[2]

Occupational Health and Safety Act (Ontario) *("OHSA")*

An employer whose worker is assigned to work temporarily outside of Ontario may still have a duty under the *OHSA* to "take every precaution reasonable in the circumstance for the protection of the worker" (s.25(2)(h) of the *OHSA*).

In one decision, an Ontario worker was temporarily assigned to work in British Columbia. The OLRB found the worker was covered by both section 25(2)(h) of the *OHSA* and British Columbia's health and safety legislation. Despite the fact the work was performed in British Columbia, the OLRB found section 25(2)(h) of the *OHSA* still required the Ontario employer to take every precaution reasonable in the circumstance for the worker's protection.[3]

One thing to note: The *OHSA* does not apply to work performed in a private residence. As such, if a remote worker works from their private residence, the *OHSA* may not apply.

Workers' Compensation

An Ontario resident worker who is covered by the WSIB is automatically covered for up to six months (or longer on application) for work outside Ontario.

A non-resident worker in Ontario must have a "substantial connection" with Ontario to be covered by the province's workplace safety and insurance regime. If a worker works in Ontario for 11 or more days in a year, this is likely to establish a substantial connection.

Employers should consult the appropriate workers' compensation legislation in the jurisdiction in which the remote employee works to determine if the employer must register in that province.

Common Law

For a matter to fall under a province's jurisdiction, the party who seeks to invoke that jurisdiction must establish it through express language in the employment contract or, in the absence of such language, by demonstrating a real and substantial connection between the matter and the province.

In one decision,[4] the employees in a wrongful dismissal claim all resided in and were paid in British Columbia. Nevertheless, the British Columbia Court of Appeal held British Columbia lacked jurisdiction over their claims because the employment contracts were entered into in Alberta, work was performed in Northwest Territories, and the contracts were breached in Nunavut.

Implications for Employers

If an employee moves to another province, whether independently or at the request of the employer, the employer may find itself bound to the legislation of the province where the employee now resides. This can have significant implications, which is why an employer with remote workers should consult with experienced employment law counsel, including about whether it makes sense to restrict permanent relocation outside of the home province.

To learn more and for assistance, contact a member of the Sherrard Kuzz LLP team.

[1] *Zhang v IBM Canada Ltd,* 2019 CarswellOnt 13721 (OLRB).
[2] *Arquette v Stuart Olson Northern Ventures Inc,* 2020 HRTO 103.
[3] *Escudero v Diversified Transportation Ltd./Pacific Western Group of Companies,* 2015 CanLII 50878 (OLRB).
[4] *Marren v Echo Bay Mines Ltd.* 2003 BCCA 298 (Donald, Huddart, Mackenzie JJA), leave to appeal refused 2004 CarswellBC 452 (SCC).

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

BLURRED LINES:

When personal interests become an employer's business

Leading a workplace during a global pandemic is difficult enough. Toss in the challenges of managing performance and productivity remotely, COVID fatigue, and a tsunami of misinformation circulating through social media, and it's easy to throw your hands in the air. But don't. Instead, join us as we discuss the following topics:

1. Privacy, Productivity and Work-from-Home

- Can an employer use surveillance or other monitoring to manage remote work and related productivity?
- What are the key components and considerations for a remote work policy?
- Can an employer discipline an employee for low productivity or non-compliance with an employer policy, when the employee works from home?

2. Refusal to Wear Personal Protective Equipment

- An employee refuses to wear PPE:
  i. Can an employer require medical documentation to support the employee's refusal?
  ii. If the reason is medical, must the employee be allowed to work in the workplace without the PPE?

3. Freedom of Expression and COVID-19

- Can an employee be disciplined or terminated for:
  i. Engaging in behaviour outside of work that increases the risk they may contract COVID-19?
  ii. Expressing "unpopular" or "dangerous" views about COVID-19 outside or inside of work (*e.g.,* about masks or vaccination)?

DATE: **Wednesday, February 24, 2021; 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
REGISTER: **Here by Friday, February 19, 2021.**

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