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Vaccines, Masks, and Human Rights: A Singular Belief is not a Protected "Creed" or "Religion"

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In response to mask and vaccine mandates arising from the COVID-19 pandemic, some employees claimed their personal belief system prevented them from wearing a mask or becoming vaccinated and that this should receive protection under human rights legislation.

As these cases continue to trickle through courts and tribunals, employers can take comfort in knowing that human rights tribunals across Canada have thus far been clear that a personal choice or secular belief is not a protected "creed" or "religion", and there is no duty to accommodate based on those choices or beliefs. The Ontario Superior Court also recently held that Ontario's "vaccine passport" legislation was constitutional and did not violate freedom of religion under the *Canadian Charter of Rights and Freedoms*.[1]

Let's unpack this a bit further.

"Religion", "Creed" or something else?

As a starting point, human rights tribunals cannot consider a general allegation of unfairness; a complaint must relate to a specific, legislated protected ground such as sex, sexual orientation, colour, marital status, family status, etc. Every Canadian jurisdiction protects against discrimination based on "religion" or "creed" or both:

- British Columbia, Alberta, and the federal legislation – "religion"
- Manitoba, New Brunswick, Nova Scotia, and Prince Edward Island – "religion" and "creed"
- Saskatchewan and Newfoundland and Labrador – "religious creed" and "religion"
- Ontario – "creed"
- Quebec – freedom of "conscience", "religion", "opinion", and "expression"
- British Columbia, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland also protect political beliefs or opinions.

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Religion-based complaints

As we noted above, to succeed, a complainant must be able to show how their claim of discrimination is grounded in a religious or creed-based belief, not merely a personal or secular belief.

For example, the British Columbia Human Rights Tribunal rejected a complaint in which the applicant argued he believed it dishonoured God to cover his face with a mask. However, the applicant was unable show his objection to mask-wearing was grounded in a sincerely held religious belief, rather than a general disagreement with mask-wearing[2]

Similarly, the Human Rights Tribunal of Ontario rejected a religion-based complaint because the applicant, a self-identified Christian, was unable to identify an objective Christian precept against mask-wearing.[3]

Creed-based complaints

Creed is not defined in any legislation but is understood to be broader than, and inclusive of, religion. According to the Human Rights Tribunal of Ontario a creed must:

- be sincerely, freely, and deeply held
- be integrally linked to a person's identity, self-definition and fulfilment
- be a particular and comprehensive, overarching system of belief that governs one's conduct and practices
- address 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
- have some nexus or connection to an organization or community that professes a shared system of belief.[4]

A singular belief is therefore not a creed.

For example, in *Ortiz v University of Toronto,*[5] an applicant argued his creed was "individual choice" and a political belief system that encompassed "informed consent and personal autonomy in medical decision making." The Human Rights Tribunal of Ontario rejected that argument, noting:

> the concept of individual choice (and its application, in this case, to choose not to be vaccinated) does not meet the definition of creed. Accepting that the applicant's belief may be sincerely, freely, and deeply held and accepting that it may even be linked to the applicant's identity and self-definition, there is no basis on which I could determine that it meets the other criteria required to be considered a creed.
>
> I note that the applicant's creed lacks an overarching systemic component. I also note that it does not address the question of human existence or that of a Creator, nor contemplate life and death. I further note that it does not form a nexus to any organization or community with a shared system of belief.
>
> In the circumstances of this case, I find that the applicant has failed to establish that "informed consent and personal autonomy in medical decision making", even if they are sincerely held beliefs, falls within the meaning of creed under the Code. Accordingly, the Application does not fall within the Tribunal's jurisdiction and must be dismissed.[6]

That being said, the Human Rights Tribunal of Ontario has cautioned against using only "Western" or "mainstream" standards of religion or creed, and has recognized certain spiritual beliefs as a creed, such as Falun Gong, a modern "Chinese popular religion" founded in 1992.

Political opinion-based complaints

In one published decision, the applicant argued his "political belief" meant he could not be required to be vaccinated or mask. The British Columbia Human Rights Tribunal disagreed, ruling the protected ground of political belief does not exempt a person from following a provincial health order or rule.[7]

Takeaway for employers

It is likely that these types of cases will continue to be litigated across Canada, both related to and independent of the COVID-19 pandemic. For now, employers can take comfort in knowing that a singular belief or personal choice is neither a creed nor a religion for the purposes of human rights legislation and there is no duty to accommodate based on those beliefs or choices.

To learn more or for assistance responding to a claim of discrimination, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com

[1] *Harjee v Ontario,* 2022 ONSC 7033.
[2] *The Worker v The District Managers* 2021 BCHRT 41.
[3] *LL v Dollarama Inc.*, 2022 HRTO 974.
[4] *Ortiz v University of Toronto*, 2022 HRTO 1288 at para 10.
[5] *Ibid.*
[6] *Ibid* at paras 14-16.
[7] *Complainant obo Class of Persons v John Horgan*, 2021 BCHRT 120.

DID YOU KNOW?

The Government of Ontario recently announced enhancements to the training requirements for working at heights, including additional learning outcomes and requirements for personal protective equipment, as well as initiatives to promote social inclusion and anti-racism. For more information, contact Sherrard Kuzz LLP.

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Being Bad on Purpose: Why Subjective Intent Matters When Terminating Employment for Just Cause

When clients wish to terminate for cause, there can sometimes be confusion about the difference between 1) "just cause" under the common law and 2) "wilful misconduct" under Ontario's *Employment Standards Act, 2000* ("ESA").[1]

In Ontario, for an employee to lose their minimum entitlements to notice and severance pay under the ESA, they must have intentionally participated in an act or course of conduct detrimental to the workplace or that fundamentally alters the relationship of trust between employer and employee. By contrast, just cause does not require an intentional act on the part of the employee.

As such, it is possible for there to be just cause to dismiss an employee under the common law – disentitling the employee to common law reasonable notice – but not wilful misconduct under the ESA – in which case, the employee may still be entitled to statutory notice and severance.

Generally, an employee's statutory entitlements are less than their entitlements under the common law. However, a long service employee can still create considerable liability for an employer even under the ESA.

It is therefore important for employers to appreciate the difference between just cause and wilful misconduct, and plan accordingly.

The Common Law – "Just Cause"

Just cause is misconduct that is sufficiently serious that it strikes at the heart of the employment relationship. It can be a single act or several acts, and a court will consider the surrounding context to determine whether dismissal is a proportional response. Significantly, as noted above, just cause does not require the employee to commit an intentional act.

In *Hucsko v A O Smith Enterprises Limited*,[2] the Court of Appeal for Ontario found that sexual harassment of a coworker, coupled with a refusal to apologize and participate in sensitivity training, constituted just cause under the common law. The court found the failure to accept the opportunity to remediate and show remorse resulted in an irreparable breakdown in the employment relationship. The court noted:

> … the core question … is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. … [t]he sanction imposed for misconduct is to be proportional — dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature of the misconduct[3].

The ESA – "Wilful Misconduct"

To disentitle an employee to notice or severance under the ESA, an act must be, "wilful *misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer*". In other words, the actions of the employee must be intentional, in that the employee engaged in conduct they knew or ought to have known to be serious misconduct. Here, the test is subjective, and intent is key.

In *Render v. ThyssenKrupp Elevator (Canada) Limited*,[4] the employee was dismissed after striking a female co-worker on her buttocks. The trial judge found the incident caused a breakdown in the employment relationship that justified dismissal for cause.

The Court of Appeal found the employer had just cause to dismiss the employee under the common law, but the misconduct did not meet the ESA standard of "wilful misconduct, disobedience or wilful neglect of duty". As such, the employee remained entitled to his ESA minimum entitlements.

Significantly, the Court of Appeal held that "wilful misconduct" requires more than what is required to satisfy just cause under the common law. It requires that an employee deliberately do something they know or ought to know is wrong.

Referring to an earlier decision of the Ontario Superior Court,[5] the Court of Appeal noted:

> … Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not meet the standard. Rather, the employer must show that the misconduct was intentional or deliberate. The employer must show that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It is, to put it colloquially, being bad on purpose[6].

Takeaways for Employers

The first takeaway is to appreciate the difference between just cause under the common law and wilful misconduct under employment standards. The key distinction is whether the employee's actions were intentional.

The second takeaway is to plan accordingly. Of course, gathering the facts and knowing an employee's intent at the relevant time is easier said than done. Moreover, the fact-specific nature of a just cause analysis makes it difficult to predict how a court will evaluate an employee's conduct.

To help mitigate risk, the third takeaway is to reach out to your legal counsel *before* deciding to terminate employment. This will ensure you understand the case that must be met and have an opportunity to plan accordingly. Terminating employment without careful analysis and planning can lead to a far more complicated and expensive litigation.

To learn more and for assistance contact any member of the team at Sherrard Kuzz LLP

[1] O. Reg. 288/01, s 2(1)
[2] *Hucsko v. A O Smith Enterprises Limited*, 2021 ONCA 728
[3] *Ibid* at para 33
[4] *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310
[5] *Plester v. Polyone Canada Inc.*, 2011 ONSC 6068
[6] *Ibid* at para 55

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