MANAGEMENT COUNSEL
Employment and Labour Law Update

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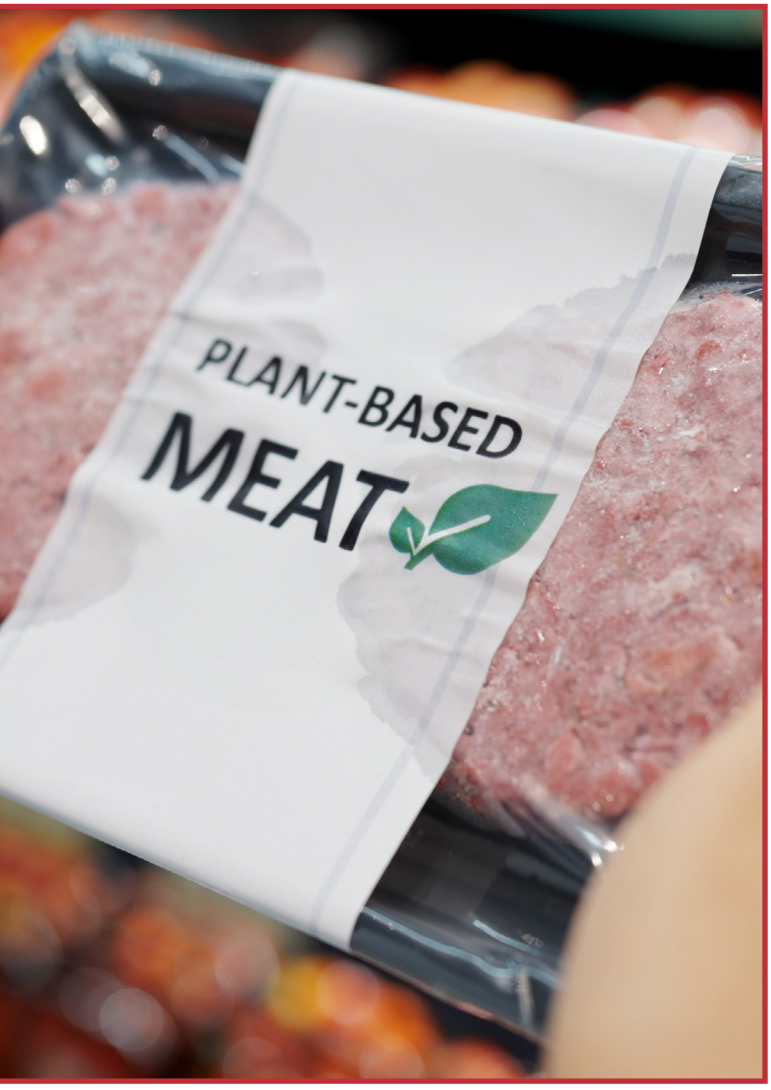

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April 2024 Vol. XXIII No. 2

What is Protected Under Human Rights Legislation? Veganism is not protected, caste is

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Human rights tribunals across the country are grappling with what is – and more importantly what is not – discrimination under human rights legislation. A human rights tribunal cannot consider a general allegation of unfairness; a complaint must relate to a specific, legislated protected ground such as creed or religion, sex, sexual orientation, ancestry, race, family status, *etc.*[1]

In our August 2023 newsletter, we discussed how a singular belief regarding vaccination or masking is not a "creed" and thus not a protected ground. In line with those decisions, the Ontario Human Rights Tribunal (the "Ontario Tribunal") recently confirmed that ethical veganism is also not a creed and thus not a protected ground of discrimination.

On the other hand, a recent decision from the British Columbia Human Rights Tribunal (the "BC Tribunal"), and a policy statement from the Ontario Human Rights Commission (the "Ontario Commission"), provide that discrimination on the basis of caste is an intersectional form of discrimination because caste can be covered under a combination of race, ancestry, ethnic origin, creed and/or family status.

Ethical veganism is not a creed

In *Knauff v Ontario (Natural Resources and Forestry)*,[2] the applicant claimed his employer was required to accommodate his dietary restrictions because his ethical veganism was protected based on creed. The applicant's dietary restrictions were not related to religious belief. The applicant described himself as sincerely committed to making informed choices and decisions to avoid supporting animal-reliant industries and to prevent the killing of animals.

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The Ontario Tribunal found ethical veganism is not a creed because ethical veganism only provides "general philosophical observations" but does not "address the existence or non-existence of another order of existence and/or a Creator."

While a creed need not be a religious belief, it still must 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. In this case, the applicant failed to provide the Ontario Tribunal with evidence that ethical vegans derive spiritual fulfillment from their practices and beliefs.

Caste-based discrimination is prohibited

In both British Columbia and Ontario, caste-based discrimination has been recognized as discrimination under human rights legislation, and it is likely other provinces would follow suit should the issue arise in those jurisdictions.

In *Bhangu v Inderjit Dhillon and others*,[3] the BC Tribunal found that the use of a derogatory comment toward the applicant in reference to his caste was discriminatory. The BC Tribunal held the applicant's caste fell within the protected ground of ancestry:

> Mr. Bhangu's ancestry involves him being a person from the Slur caste. I treat the term ancestry, in its most basic form, as relating to a person's biology, as can be measured through their DNA or genetic make up, and which is passed down from one generation to the next through reproduction. Mr. Bhangu provided uncontested evidence that his family and ancestors are all from the Slur caste.

The BC Tribunal held the applicant's caste also fell within the protected ground of race:

> Mr. Bhangu's race involves him being a person from the Slur caste. I treat the term race as a social construct within which a person or group labels another person or group based on their physiological appearance, their social, cultural, and political make-up, their legal status in society, and other personal attributes. … Mr. Bhangu provided evidence regarding the social, political, and legal status aspects of others labelling him as a member of the Slur caste group.

The Ontario Commission recently released the *OHRC's Policy position on caste-based discrimination*[4] (the "Policy"). Ontario Commission policies are not binding on the Tribunal but are generally relied upon and adopted by Tribunal decision makers. Under the Policy, caste discrimination is prohibited under existing grounds in the Ontario *Human Rights Code*[5] including ancestry, creed, colour, race, ethnic origin, place of origin and/or family status. The Commission defined "caste system" as:

> a social stratification or hierarchy that determines a person or group's social class or standing, rooted in their ancestry and underlying notions of "purity" and "pollution." It is a traditional practice based in the political, social, cultural and economic structures of some cultural or religious communities and the societies in which it is practised.

An individual may experience caste-based discrimination in employment if they are denied a promotion, assigned less desirable job duties, restricted from certain occupations, or harassed because of perceptions about caste.

At present, there is limited case law in Ontario dealing with caste-based discrimination. However, in *Parikh v Staples Canada ULC*,[6] an interim decision, the Ontario Tribunal found that allegations of caste-based discrimination could amount to a *prima facie* case of discrimination.

In *Parikh*, the applicant alleged his supervisor said people of the supervisor's caste should advance before people of the applicant's caste. The Ontario Tribunal found this allegation, if proven, could have a reasonable prospect of success. Thus, the Tribunal did not dismiss the allegation on a preliminary basis. The Tribunal dismissed other allegations as having no reasonable prospect of success because they had no air of reality or because they were not related to a protected ground of discrimination.

Takeaway for employers

Human rights-related caselaw is always evolving, and it's important for employers to remain as current as possible. Given the developing law on caste-based discrimination, employers may consider updating their human rights policies, procedures and training materials to recognize and address this.

To learn more and for assistance, contact Sherrard Kuzz LLP.

[1]Discrimination based on 17 different personal attributes – called grounds – is against the law under the Ontario *Human Rights Code*. The grounds are citizenship, race, place of origin, ethnic origin, colour, ancestry, disability, age, creed, sex/pregnancy, family status, marital status, sexual orientation, gender identity, gender expression, receipt of public assistance (in housing) and record of offences (in employment).
[2]2023 HRTO 1729.
[3]2023 BCHRT 24.
[4]Ontario Human Rights Commission, *OHRC's Policy position on caste-based discrimination* (26 Oct 2023).
[5]RSO 1990, c H.19.
[6]2021 HRTO 62.

DID YOU KNOW?

In a recent decision, the Superior Court of Ontario affirmed that in civil litigation (including employment cases) there is only one standard of proof - balance of probabilities - even if dishonesty or fraud is alleged: "*There is nothing that makes the proof required in an employment law case, even one with serious allegations of misconduct, any different from any other civil case.*" Plaintiff's counsel had argued that the standard should be closer to the criminal standard of beyond a reasonable doubt.
[Lagala v. Patene Building Supplies Ltd, 2024 ONSC 253 citing *F.H. v. McDougall*, 2008 SCC 53]

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Is an Employment Agreement Worth the Paper On Which It's Written?

It often appears the answer is 'no,' but it doesn't have to be. In fact, an employment agreement remains one of the few tools available to an employer to limit liability in the context of termination.

Absent a properly drafted and implemented employment agreement, a terminated employee may claim entitlement to compensation (including benefit coverage, continued stock vesting, *etc.*) for a period intended to approximate the time it will take them to secure comparable employment. This period, referred to as the 'reasonable' or 'common law' notice period, is invariably considerably longer than the minimum termination notice period to which an employee would be entitled under provincial employment standards legislation (the "ESA").

The delta between the statutory minimum entitlements under the ESA (notice or pay in lieu of notice, severance pay and benefit continuation) and common law notice entitlements for the same employee is often significant, leading to threatened claims, litigation and often substantially increased costs for the terminating employer.

However, as many employers have learned the hard way, considerable care must be taken in both drafting and executing an employment agreement and, even if termination language may have passed muster at one point in time, subsequent court decisions may mean the language needs to be fine-tuned to remain enforceable.

Here are three of the most common missteps employers need to avoid when using an indefinite term employment agreement:[1]

1. **Attempting to limit termination entitlements to the statutory minimum.**

Courts, particularly in Ontario, are exceptionally creative in their approach to interpreting 'ESA minimum' termination language, frequently finding the language unenforceable, in which case common law reasonable notice will apply. In that case, the employer will owe considerably more to a departing employee than anticipated.

Does this mean employers should abandon termination provisions altogether? Absolutely not! However, it does mean employers should consider moving away from 'ESA minimum only' termination language, as courts are increasingly likely to find this language void.

Significantly, avoiding 'ESA minimum only' termination language doesn't mean termination entitlements automatically revert to the common law measure of notice; there is a lot of room between the ESA minimum and common law. Provided the termination entitlements meet or exceed the ESA minimum (not only on hire, but into the future), there is flexibility in how termination entitlements accrue and at what point they are capped. For instance, an agreement could provide for one week of notice, plus an additional two weeks per completed year of service, with a maximum of 52 weeks upon termination without cause. Ultimately, a court is more likely to enforce a termination provision that provides for more than the ESA minimum, which can still provide an employer significant cost savings.

2. **Failing to ensure an employment agreement is signed in advance of starting work.**

An employment agreement is a contract like any other; there must be an offer of employment, acceptance of that offer and an exchange of 'consideration' of something of value. In the context of employment, that 'something of value' is the job in exchange for the employee's labour. However, if the employee already has the job prior to signing the employment agreement, the required consideration for entering into the contract is absent. This means if, down the road, the employer wants to rely on the termination provision in the agreement, the employee may argue they are not bound by the termination provision because it (the agreement) wasn't signed before they started work.

This is an easy fix. Put into place a system to ensure any employment agreement is provided at least one week before the employee is scheduled to start work (including training) and ensure the signed agreement is returned before their first day.

...considerable care must be taken in both drafting and executing an employment agreement and, even if termination language may have passed muster at one point in time, subsequent court decisions may mean the language needs to be fine-tuned to remain enforceable.

3. **Failing to properly limit vesting of equity entitlements on termination.**

Many stock option plans or grant agreements contemplate vesting ending on an employee's last active day of employment. However, if an employee's employment is terminated without cause, language like this may be unenforceable. For instance, in Ontario an employee is entitled to be treated as though they are actively employed, for all purposes (including vesting), for the minimum notice period under the ESA. Any language that purports to stop vesting prior to the end of the ESA minimum notice period is considered an attempt to contract out of the ESA and will not be enforceable.

Bottom line

Ultimately, employment agreements really are worth the trouble. However, employers need to be mindful of these pitfalls which can be avoided with careful attention to language and a consistent, systematic approach.

If it's time to refresh your employment agreements, equity plan or grant document language, contact any member of the Sherrard Kuzz LLP team.

[1]Our colleague, Sarah MacKay Marton, recently addressed pitfalls (and how to avoid them) in the use of fixed term employment agreements *in our November 2023 Newsletter*.

MANAGEMENT COUNSEL

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

Workers' Compensation and Human Rights

How and when they intersect

Workers' compensation and human rights often intersect, causing no end of confusion and, sometimes, angst for employers. Join us as we unpack and discuss:

1. **Workers' Compensation and Human Rights**
   - Overview of basic obligations
2. **Intersection of Workers' Compensation and Human Rights Decisions**
   - Jurisdictional issues
   - Procedure for parallel cases
   - Impact of a decision in one forum on the other forum
3. **Return to Work**
   - Re-employment obligations and discrimination
   - Suitable work and accommodation
   - Frustration of contract
4. **Possible Pitfalls and Practical Tips**

DATE: **June 4, 2024, 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 May 31, 2024.**

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