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EMPLOYERS' ADVISOR
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Human Rights Protection for Ethical Veganism?

The last few years have seen something of a push toward extending human rights protection to strongly held personal belief systems on the basis that many such personal belief systems, while not necessarily based on religion, constitute part of an individual's "creed".

Consider ethical veganism, where at least four different types of ethical vegans can be identified:

1. A Jain follower, who is vegan for religious reasons;
2. A practicing Christian who sees veganism as a religious duty;
3. A Christian who is vegan, but is a vegan for secular moral reasons relating to animal welfare; and,
4. An atheist who is a vegan for strictly secular moral reasons.

Which of these are granted human rights protection? Is veganism which finds its roots in religion any different, from a human rights perspective, than that which derives from secular morality?

Historically, the concepts of "creed" and "religion" have been somewhat synonymous when it came to assessing whether a particular lifestyle or belief system warranted human rights protection. Indeed, human rights legislation in provinces like Saskatchewan and New Brunswick extend protection to "religious creed", and with the notable exception of Alberta and British Columbia, most other provinces refer to "creed" in the same breath as concepts like "religious association", "religious belief" and "religious association".

But what exactly is "creed"? What does it include?

For starters, adjudicators across the country have accepted a wide variety of subjectively defined religious and spiritual beliefs within the meaning of "creed", including: Aboriginal spiritual practices; Wiccans; Hutterian Bretheren; Raelians; and Practitioners of Falun Gong. On the other hand, political beliefs are not (yet) considered part of someone's creed, though several provinces expressly extend human rights protection to political beliefs.

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Unfortunately, in the case law adjudicators have been reluctant to provide any definitive, authoritative definition of "creed". Instead, they have tended to favour assessing these claims on a case-by-case basis.

In December 2015, the Ontario Human Rights Commission ("the Commission") released an updated policy on preventing discrimination based on creed, adopting a general description of creed as being a non-religious belief system that "substantially influences a person's identity, worldview and way of life".

In assessing whether a belief system is a creed under the Ontario *Human Rights Code* (the "Code"), the Commission has identified a number of specific characteristics. According to the Commission, a creed:

- Is sincerely, freely and deeply held;
- Is integrally linked to a person's self-definition and spiritual fulfillment;
- Is a particular, comprehensive and overarching system of belief that governs one's conduct and practices;
- Addresses 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; and,
- Has some "nexus" or connection to an organization or community that professes a shared system of belief.

Further, the Commission suggests that if uncertainty still exists after considering the above criteria, the overall purpose of the Code and statutory human rights law more generally should be considered.

As Commission policy is neither law nor binding precedent, the law in Ontario does not yet grant human rights protection to ethical veganism. But if law and policy makers are unable to decide or agree on what is intended by the word "creed", what does that mean for employers?

How is an employer to know if an employee's vegan lifestyle triggers human rights protection? How is an employer to know how deeply those beliefs are held? Is a "subjective sincerity" test enough? What questions can be asked? What answers are adequate?

Given that the duty to accommodate has both a substantial and a procedural aspect, responding to employee requests for accommodation based on beliefs and lifestyle choices is a potential mine field, and as such should not be summarily dismissed. Accordingly, any response to an employee's request for accommodation should be carefully considered.

Severance and "Continuous" Employment in the Event of a Sale: BC Court of Appeal Recent Pronouncements

The BC Court of Appeal recently addressed the issue of severance entitlements, following the sale or acquisition of a business as a "going concern".

The case of *Hall v. Quicksilver Resources Canada Inc.*, 2015 BCCA 291, involved a 24-year employee working at a pulp mill owned by Catalyst. When the mill was decommissioned in 2011, he was the only employee remaining on site.

Catalyst later sold the site to Quicksilver for use as a liquefied natural gas plant. Quicksilver offered Mr. Hall employment in May 2013, but not before Mr. Hall had signed a "severance" agreement with Catalyst that included, among other items, "a lump sum payment equal to 14 months' salary".

While the final version of the agreement did not use the term "severance", the evidence was that Mr. Hall had requested removal of the word and the parties continued to call the payment "severance" in subsequent correspondence. Quicksilver terminated Mr. Hall's employment without cause in February 2014 and paid him one week's wages in lieu of notice. Mr. Hall commenced a proceeding against Quicksilver, alleging wrongful dismissal.

At trial, Mr. Hall was awarded 18 months' notice, on the assumption that Mr. Hall's employment had been "continuous" and that he had a "unique set of job skills" that had assisted Quicksilver in the transition.

Catalyst's payment to Mr. Hall of 14 months' salary was viewed as a "retention bonus" at trial, largely on the basis that Catalyst had removed the word "severance" from the agreement on Mr. Hall's request.

The Court of Appeal, however, was unanimous in overturning this decision. Although the agreement with Catalyst did not refer expressly to "severance", the substance of the agreement and the surrounding circumstances all suggested that the payment was indeed severance. The substance of the parties ' discussions did

not indicate that they intended the payment to be something different.

An important factor in the analysis was the parties to the agreement. Quicksilver was attempting to rely on the agreement executed between Mr. Hall and Catalyst. Madam Justice Newbury, for the Court of Appeal, noted that if the legal proceeding had been between Mr. Hall and Catalyst, the evidence of the parties' subjective intentions might not have been admissible. Parties who form an agreement and reduce it to writing are generally entitled to rely on the express terms as written.

Further, the Court of Appeal referred to the principles that normally relate to the sale or acquisition of a business. Where a purchaser acquires a business as "a going concern", the employment contracts of continuing employees have an implied term providing credit for years of past service for the purposes of notice of termination, *unless* the contracts contain a contrary express term.

Mr. Hall's contract of employment with Quicksilver had been silent as to notice of termination. However, the Court of Appeal distinguished Quicksilver's circumstances from this general proposition, noting that Catalyst's pulp mill had been decommissioned and ceased operation long before – thus, Quicksilver did not acquire a business as "a going concern".

On the period of notice Quicksilver owed to Mr. Hall, the Court of Appeal concluded that the appropriate period "in cases involving short periods of employment and skilled employees who are in their forties" was generally around two to three months. The fact that the employee has a "unique" skill set that assists the employer was not a factor to be considered. The trial judge's order for 18 months' notice was set aside and judgment was granted to Mr. Hall for damages in lieu of three months' notice.

The key messages for employers include:

1. The importance of clearly written agreements outlining the full details of the agreed-upon terms and conditions, particularly when hiring an employee who may have the ability to argue that past service with another employer applies to the new employment relationship.
2. The sale of an asset, without the sale of a business as "a going concern", may not always give rise to an implied agreement regarding "continuous" employment. It is generally a best practice for the parties involved in such a negotiation to come to an express understanding on employment obligations.
3. The fact that an employee has highly specialized skills that may assist a subsequent employer does not necessarily entitle that employee to increased notice of termination.

Managing Sick Leaves While Ensuring Continuity of Operations: From (Costly) Unilateral Decisions to Best Practices

Employers and human resources professionals know that managing sick leaves is one of the most frustrating and complicated aspects of managing the workplace.

The recent judgment of the Ontario Superior Court in *Cloutier v Q Residential LP Corp*, 2015 ONSC 4431 serves as a warning to employers with an interest in balancing an employee's medical leave with the ongoing requirements of the business, and expressly limits the measures employers can take in the circumstances.

Cloutier was hired in 2003 as Resident Manager for a management company. In 2009, shortly after a new company took over management operations, Cloutier was promoted to Property Manager. Her title was later changed to Regional Manager, Operations.

Despite these advancements, Cloutier experienced difficulties with her immediate supervisor, and made several complaints to the President that Cloutier's supervisor was treating her improperly and acting rude. Cloutier further alleged that the President failed to properly investigate the complaints.

By December 2012, Cloutier's health deteriorated to the point that her family physician determined that she was unable to continue working. In late December 2012, Cloutier ultimately provided the company with a medical note confirming that she was not able to work and would be going on sick leave.

In March 2013, the President attended at Cloutier's home to discuss a return to work to the Resident Manager duties she had previously been hired to do. The proposed change would

be accompanied by a reduction in salary from $75,000 to $40,000 annually.

Shortly after this meeting, and believing that an agreement had been reached, the company changed Cloutier's duties and reduced her salary to $40,000. Cloutier denied that any agreement had been reached, and asserted that she was in no condition to agree to a change in position, given her fragile mental health.

Underlying these negotiations and unbeknownst to Cloutier, the company had hired another full time, permanent Regional Manager only a few weeks after Cloutier had gone off work.

The Court held Cloutier had been constructively dismissed by the actions of the company. In reaching its decision, the Court specifically noted that by the time the company proposed that Cloutier return to the role of Resident Manager, the company had already hired her permanent replacement, had no equivalent position available for her, and no proposal was made to offer Cloutier equivalent employment elsewhere within the organization. Indeed, the only option presented to Cloutier was a return to the Resident Manager position, which had less responsibility and a significantly reduced rate of pay.

While the circumstances in *Cloutier v Q Residential* should serve as a warning to employers attempting to balance the continued operation of their business with an employee's medical leave of absence, it does not mean employers are unable to effectively, and efficiently, manage both. Employers would be well advised to consider some best practices when managing sick leaves, including:

- Maintaining regular written communications with the employee;
- Providing clear expectations about the requirement to promptly report any change in condition, the need for timely updates, the expected frequency and quality of medical documentation, and the expectation that the employee follow their treating physician's recommended treatment plan;
- Document any discussions with the employee about the suitability of assigned tasks, requests for accommodation, and other non-medical issues which may be causing points of resistance;
- Prepare, follow and update an individual accommodation plan which sets out the employee's current medical limitations, anticipated duration of limitations, and accommodations (including approved time off) to be provided by the employer;
- Secure regular updates from the employee's treating physician if limitations continue, even if a third party (e.g. LTD insurer) is involved;
- Address any deficiencies in the medical information by asking if you have enough information to assess what duties might be suitable or what adjustments could be made; and
- When arranging for coverage, ensure that those providing coverage are not assigned to the employee's position on a permanent basis, unless it has been confirmed that the employee will not be able to return to that position.

Unfortunately for the employer in the *Cloutier* case, the company unilaterally determined, without medical information, that Cloutier needed a reduced role. Had the company taken steps to obtain information regarding the nature of Cloutier's absence, its anticipated duration, and any limitations or accommodations Cloutier would require to facilitate a timely return, it could have potentially avoided this adverse judgment, while simultaneously managing its day-to-day operations during Cloutier's absence.