Human Rights Issues 7

LEARNING OUTCOMES

After completing this chapter, you will be able to:

- Explain what constitutes discrimination under both the BC *Human Rights Code* and the *Alberta Human Rights Act*.
- Identify the key features of these statutes, including prohibited grounds and areas of discrimination.
- Understand the distinction between equal pay for work of equal value and employment equity.
- Outline the remedies available to complainants under these statutes.
- State the requirements of human rights legislation during the hiring process, including how they relate job advertisements, applications, and interviews.
- Understand the human rights issues raised by pre-employment testing, including medical and drug and alcohol testing.
- Understand the implications of human rights legislation during the course of employment, including the duty to accommodate disability, religion, sex, and family status.
- Explain the concept of undue hardship.
- Understand when on-the-job drug and alcohol testing is justifiable and when it is not.
- Outline the employer's obligations with respect to workplace harassment, sexual harassment, and sexual solicitation.

Understanding Discrimination and Human Rights Complaints

There was a time when even the most blatant forms of discrimination were legal in Canada. Under the common law, stores could refuse service, landlords could refuse housing, and employers could refuse to hire individuals for whatever reason they chose, including race, gender, or marital status. However, over the past 60 years, every jurisdiction in Canada has enacted human rights legislation that prohibits discrimination in key social areas, including employment, services (such as stores, restaurants, hospitals, and schools), and accommodation (housing).

Human rights requirements are a key consideration during the hiring process, and they continue to play a central role throughout the employment relationship. Human rights legislation in Alberta and British Columbia (BC) requires an employer to maintain a workplace that is free from discrimination and harassment. It must make all employment decisions, including those related to hiring, training, transfers, promotions, apprenticeships, compensation, benefits, performance evaluations, discipline, layoffs, and dismissals, on a non-discriminatory basis.

Unlike the *Canadian Charter of Rights and Freedoms* (Charter), which applies only to government actions (a topic that was discussed in Chapter 1), provincial human rights statutes apply to the actions of individuals and corporations as well. Moreover, the scope of human rights law has been steadily expanding.

Alberta's first comprehensive human rights legislation was passed in 1972 with the *Alberta Bill of Rights*. A companion piece of legislation, the *Individual's Rights Protection Act* (IRPA), was passed at the same time. The *Alberta Bill of Rights* was intended to protect citizens of the province from governmental abuse of power. The IRPA, however, was an indication of the province's new commitment to eradicating discrimination. The Act was passed as primacy legislation, meaning that it takes precedence over any other provincial legislation (unless specifically stated otherwise). The IRPA also required that a human rights commission be created to educate the public, promote human rights, and administer the law. It was the first legislation in Alberta that specifically outlined prohibited grounds of discrimination and initially protected primarily visible minorities. The IRPA has been amended several times. It became the *Human Rights, Citizenship and Multiculturalism Act* in 2000, and in 2010 it became the *Alberta Human Rights Act*. The Alberta Act prohibits discrimination in employment on 15 grounds.

BC introduced its first human rights legislation, the *Human Rights Code* (the BC Code), in 1973. The current version of the BC Code came into force in November 2018. Like the Alberta Act, it is primacy legislation, so if there is a conflict between the Code and any other provincial legislation, the Code prevails (s 4). It prohibits discrimination in employment on 15 grounds (if physical and mental disability are counted as separate grounds), but with a couple of differences from the Alberta Act. Amendments to the BC Code in 2016 added gender identity and expression to the list of protected grounds.

What Constitutes Discrimination?

The term "discrimination" is not defined in the *Alberta Human Rights Act* or given a single definition in the BC *Human Rights Code*. Its meaning has, however, been addressed by the courts. Initially, courts interpreted it to mean an intentional act of exclusion—for example, the placement of an advertisement specifying that individuals of a certain ethnic background need not apply. This overt type of discriminatory behaviour—also known as "direct" or "intentional" discrimination—is easy to identify.

However, many acts of discrimination are hidden or even unintentional: for example, policies or practices that on their face are not intended to discriminate but which have a discriminatory effect on individuals or groups. In older cases, courts did not apply human rights law to such cases of indirect or unintentional discrimination. In the 1970s and 1980s, however, courts began to recognize more indirect forms of discrimination and to provide remedies even when there was no intent to discriminate. The courts have developed a three-part test to establish a ***prima facie*** case of discrimination. The leading case for this general test is *Moore v British Columbia (Education)*, which sets out the test at paragraph 33. The test may be paraphrased as follows:

prima facie
evidence that, as it first appears, is sufficient to prove a proposition or fact, though it may still be rebutted

1. the complainant has a characteristic protected from discrimination by the human rights legislation;
2. the complainant experienced an adverse impact with respect to their employment; and
3. the protected characteristic was a factor in the adverse impact.

Once a complainant has provided enough evidence to prove each of these three elements, it is up to the employer to prove that its policy, practice, or conduct is justified. If it cannot do so, the court finds discrimination and provides a remedy.

systemic discrimination
the web of employer policies or practices that are neutral on their face but have discriminatory effects; also called "institutional discrimination"

FYI

Systemic Discrimination: What Is It?

Systemic discrimination (also called "institutional discrimination") is one of the more complex and subtle forms of indirect discrimination. It refers to the web of employer policies or practices that are neutral on their face but have discriminatory effects. For example, a company may have a culture that encourages informal mentoring through sports-related activities that take place after working hours. Employees with disabilities or whose family responsibilities make it more difficult for them to participate after hours may be less successful at building internal networks as a consequence. This in turn could affect performance evaluations and opportunities for promotion.

The existence of systemic discrimination is sometimes identified through numerical data. For example, data may show that there are few women in high-level positions in a particular advertising firm compared with the representation of female executives in the labour force in general.

FYI

Key Features of Human Rights Legislation

1. Human rights legislation applies to both the private and the public sector and to the conduct of individuals. Unlike the Charter, its application is not limited to the actions of government.
2. Discrimination in employment is prohibited on numerous grounds, which are similar but not identical in Alberta and BC:

Alberta	British Columbia
race	race
religious beliefs	religion
colour	colour
gender	sex
sexual orientation	sexual orientation
physical disability	physical disability
mental disability	mental disability
age	age
ancestry	ancestry
place of origin	place of origin
marital status	marital status
family status	family status
gender identity	
gender expression	
source of income	
	political belief
	conviction of a criminal or summary conviction offence that is unrelated to a person's employment

3. To infringe human rights legislation, it is not necessary to intend to discriminate.
4. The effect of an employer's action or rule matters as much as the intent. The employer has a duty to accommodate the special needs of protected individuals or groups unless doing so would create undue hardship for the employer.
5. No one can contract out of human rights legislation. For example, the negotiated terms of a collective agreement are void if they do not comply with the legislation.
6. Human rights legislation provides for civil remedies, such as ordering an employer to compensate employees for lost wages or mental suffering, or ordering it to change its employment policies. It does not provide for criminal penalties, such as imprisonment.
7. Human rights legislation is quasi-constitutional in that if there is a conflict between its provisions and those of another provincial statute, its requirements prevail.
8. Human rights legislation applies to every stage of the employment relationship, from recruitment through to termination.

Overview of Alberta's and British Columbia's Human Rights Legislation

The Preamble and Purpose of the Legislation

The *Alberta Human Rights Act* opens with a preamble that sets out the spirit and intent of the legislation. As with most provincial human rights statutes, the preamble was inspired by the United Nations 1948 *Universal Declaration of Human Rights*, which recognizes the "inherent dignity and … equal and inalienable rights of all members of the human family" and provides for equal rights and opportunities without discrimination to create a climate of understanding and mutual respect.

The Alberta preamble states:

> WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world;
>
> WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation;
>
> WHEREAS multiculturalism describes the diverse racial and cultural composition of Alberta society and its importance is recognized in Alberta as a fundamental principle and a matter of public policy;
>
> WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all Albertans should share in an awareness and appreciation of the diverse racial and cultural composition of society and that the richness of life in Alberta is enhanced by sharing that diversity; and
>
> WHEREAS it is fitting that these principles be affirmed by the Legislature of Alberta in an enactment whereby those equality rights and that diversity may be protected.

In BC, these basic principles are laid out in section 3 of the BC *Human Rights Code*, which defines the purpose of the legislation as follows:

> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
> (c) to prevent discrimination prohibited by this Code;
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

The preamble to the Alberta Act and section 3 of the BC Code do not contain specific legislative requirements. However, they can affect the interpretation of the legislation. Where an issue is ambiguous, and the legislation doesn't provide clear direction, courts and tribunals often use these introductory statements as an internal aid to guide interpretation of the statutes.

remedial legislation
legislation that exists to right a societal wrong, not to allocate blame or punish an offender

The scope of human rights protections is interpreted quite liberally in both provinces because of the preamble and purpose, and also because both statutes are considered **remedial legislation**. This means that they exist to right a societal wrong, not to allocate blame or punish an offender. In employment cases, courts and tribunals have consistently affirmed that such remedial legislation should be interpreted "in a broad and generous manner," with any uncertainty in the meaning of a provision resolved in favour of the employee. Accordingly, the emphasis is generally on conciliation and compensation for the victims. An employer who violates an employee's human rights may be required to alter its policies or practices, may be subject to a public declaratory order that they have violated human rights, or may be ordered to pay restitution to an individual who files a complaint against it, but there are no criminal penalties such as imprisonment.

Areas Covered

The statutes of both provinces provide that everyone has the right to be free from discrimination in five main areas of social activity:

1. publications and notices;
2. goods or property, services, accommodation (housing), and facilities;
3. tenancies;
4. employment practices, including equal pay, and advertisements; and
5. membership in trade unions and occupational associations.

The legislation also protects those who file a human rights complaint from retaliation through what are known as "anti-reprisal clauses." Such clauses are meant to give individuals the comfort to raise concerns and complaints without fear of discipline, termination, or other employment-related consequences.

Although employment is only one of the five areas covered by the legislation, the majority of complaints arise in the employment context. In 2017–18, 79 percent of the complaints in Alberta were related to employment (Alberta Human Rights Commission, 2019), and for the period 2018–19, 61 percent of the complaints in BC were related to employment (BC Human Rights Tribunal, July 2019, at 23). The term "employment" has been interpreted broadly to include full- and part-time employment; contract work; temporary work; probationary periods; and, in some cases, volunteer work.

Prohibited Grounds of Discrimination in Employment

Section 7 of the Alberta Act provides that every person is entitled to equal treatment with respect to employment, without discrimination on the basis of race, religious

beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, or sexual orientation. Prior to 2009, sexual orientation was not named as a specific ground in the Act. The addition of sexual orientation to the Alberta legislation was the result of a Supreme Court decision that determined Alberta's legislation was in and of itself discriminatory because it failed to protect an identifiable group that is frequently subjected to prejudice (see the discussion of *Vriend v Alberta* in Chapter 1).

Section 13 of the BC Code lists the grounds of discrimination related to employment. They overlap with the Alberta grounds, with some differences. The BC statute does not include source of income as a ground of employment discrimination, but it does include political belief and conviction for a criminal or summary conviction offence unrelated to a person's employment.

Each of the prohibited grounds is considered below. Because the BC Code does not define the grounds it lists, the information here is based on definitions from section 44 of the Alberta Act (these are designated with an asterisk) and supplemented with descriptions from the Alberta Human Rights Commission (2018). The following descriptions include some illustrative cases from BC and point out grounds that the BC Human Rights Tribunal and courts have interpreted differently from Alberta or other jurisdictions.

The Alberta and BC statutes both identify a few statutory exemptions that, in limited circumstances, expressly allow discrimination. For example, section 7(3) of the Alberta Act and section 13(4) of the BC Code make an exemption for bona fide occupational requirements (BFORs). Similarly, section 11 of the Alberta Act allows flexibility to interpret facts on a case-by-case basis. If a person or organization that contravened the Act can show that the contravention was "reasonable and justifiable in the circumstances," the Alberta Human Rights Commission will allow the discriminatory conduct to continue. The BC legislation does not have a comparable provision. However, it exempts non-profit social organizations that serve a protected group (s 41) and employment equity programs designed to help disadvantaged individuals or groups (s 42). (Exemptions are discussed more fully below under the heading "Exemptions: Where Discrimination Is Allowed.")

1. *Race*. Race is not specifically defined in the BC or Alberta legislation but can be considered as a group of people who are related by a common heritage. It can also be related to other grounds, such as colour, place of origin, or ethnic origin, and may include language as an element of the complaint.
2. *Religious beliefs*. This ground protects people from discrimination on the basis of their religion or faith. The Alberta Act and the BC Code prohibit one person from attempting to force another to accept or comply with a particular religious belief or practice. The legislation may also require an employer to take positive measures, such as allowing breaks for prayer at certain times. Religious beliefs and practices are protected, even if they are not essential elements of a particular religion, provided they are sincerely held. The Alberta Act also specifically recognizes that religious beliefs include "native spirituality."

3. *Colour*. Colour means the colour of a person's skin. Discrimination on the ground of colour may encompass racial slurs, jokes, stereotyping, and verbal or physical harassment.
4. *Gender*. Discrimination on this ground extends to male, female, and transgender individuals, as well as gender identity and gender expression. It also protects women who are pregnant. It is the ground cited in sexual harassment cases. The Alberta Human Rights Commission (2018) states that the term "transgender" refers to people who identify as transgender or transsexual and refers to the Ontario Human Rights Commission's definition of gender identity, which states:

> Gender identity is linked to a person's sense of self, and particularly the sense of being male or female. A person's gender identity is different from their sexual orientation. … People's gender identity may be different from their birth-assigned sex, and may include:
>
> > Transgender: People whose life experience includes existing in more than one gender. This may include people who identify as transsexual and people who describe themselves as being on a gender spectrum or as living outside the gender categories of "man" or "woman."
> >
> > Transsexual: People who were identified at birth as one sex, but who identify themselves differently. They may seek or undergo one or more medical treatments to align their bodies with their internally felt identity, such as hormone therapy, sex-reassignment surgery or other procedures.

In BC, the term "sex" is used instead of "gender." Although tribunals and courts in BC and Alberta have interpreted "sex" to prohibit discrimination against transgendered people, calls by transgender advocates for an explicit reference to transgender and gender-variant people in the legislation became louder in 2015, culminating in the BC government adding gender identity and gender expression to the BC Code in 2016. The BC Human Rights Tribunal (October 2019) defines gender identity and gender expression as follows:

> Gender expression is how a person presents their gender. This can include behaviour and appearance, including dress, hair, make-up, body language and voice. This can also include name and pronoun, such as he, she or they. How a person presents their gender may not necessarily reflect their gender identity.
>
> Gender identity is a person's sense of themselves as male, female or both, in between or neither. It includes people who identify as transgender. Gender identity may be different or the same as the sex a person is assigned at birth.

The first time the BC Human Rights Tribunal rendered decisions relating to the ground of gender expression and gender identity was in 2018.

CASE IN POINT

Discrimination Based on Sex

Morrison v AdvoCare, 2009 BCHRT 298

Facts

Morrison was a male registered care aide who applied to work in a residential care home on two occasions. AdvoCare refused to hire him. Despite several phone calls from Morrison, AdvoCare indicated that it had a confidentiality policy and could not divulge its reasons to him. The company continued to advertise for aides with the same qualifications as Morrison. The AdvoCare manager responsible for interviewing applicants indicated that the company did not hire new graduates without related experience. However, a review of hires that occurred during the same period showed that a number of new graduates were hired without related experience. Morrison was as qualified as (or more qualified than) the successful applicants. No males were hired during that period. There was also conflicting testimony about Morrison's interview and references. The manager who interviewed Morrison stated that she noted several "red flags" during the interview. She further testified that she felt harassed by Morrison's follow-up calls, although she did not pass along his requests for information to anyone more senior.

Relevant Issue

Whether the employer's refusal to hire the complainant constituted discrimination on the basis of sex.

Decision

The BC Human Rights Tribunal found that Morrison was not hired because of the employer's stereotypical sex-related assumptions that he was aggressive and therefore not suitable for the job. In its decision, the Tribunal raised questions about the employer's exaggeration of minor performance concerns and inconsistencies in its hiring documentation, including a "red flag" guide that tells interviewers: "trust your gut!" Although the employer did not intend to discriminate, intention need not exist for discrimination to occur. Morrison was awarded $3,150 in lost wages, $3,773 for gas and lodging, and $5,000 for injury to dignity, feelings, and self-respect.

The *Morrison* case is particularly helpful for two reasons. First, the Tribunal addressed the conflicting testimony issue common in discriminatory hiring cases. Citing *Faryna v Chorny*, the Tribunal stated:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. … [T]he real test of the truth of a story of a witness in such a case must be its harmony with … [that] which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (at para 8)

Second, the Tribunal applied the following test for establishing a *prima facie* (on the face of it) case of discrimination in the hiring stage:

> In an employment complaint, the complainant usually establishes a *prima facie* case by proving:

1. that the complainant was qualified for the particular employment;
2. that the complainant was not hired; and
3. that either
   a. someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (sex, religion, race, etc.) subsequently obtained the position, or
   b. the employer continued to seek applicants with the complainant's qualifications. (at para 117)

This test comes from the leading BC decision of *Oxley v British Columbia Institute of Technology*, which adapted the "*Shakes* test" from Ontario (*Shakes v Rex Pak Limited*) for *prima facie* discrimination in the employment context and the federal "*Israeli* test" for a discriminatory refusal to hire (*Israeli v Canadian Human Rights Commission*).

5. *Disability*. In the Alberta legislation, both physical and mental disability are extensively defined in section 44 of the Act. A physical disability is any degree of physical disability, infirmity, malformation, or disfigurement that is caused by injury, birth defect, or illness. This includes, but is not limited to, epilepsy, paralysis, amputation, lack of physical coordination, visual impairment, hearing impediment, speech impediment, or reliance on a service dog, wheelchair, or other assistive device. Tribunals have also found that weight can be a physical disability. Mental disability is defined as any mental, developmental, or learning disorder, regardless of the cause or duration of the disorder.

   It is also generally accepted that employers cannot discriminate on the basis of a "perceived disability." For example, in a case about the Canada Border Services Agency's refusal to hire an overweight BC man, the Canadian Human Rights Tribunal held that the employer had discriminated against a worker on the basis of "perceived obesity"—even though his weight was not a real physical disability, since it had no effect on his ability to do the job (*Turner v Canada Border Services Agency* [2014]).

   Both provinces recognize that there will be situations where the nature of a disability prevents an individual from performing a job. Section 7(3) of the Alberta Act and section 13(4) of the BC Code indicate that an employer may make an employment decision that is discriminatory, provided that the decision is based on a BFOR. For example, neither statute would require an employer to hire a blind school bus driver, because sight is a fundamental ability necessary to perform the job. Minor, temporary illnesses such as the common cold or flu are not considered disabilities (see e.g. *Goode v Interior Health Authority* [2010]).

6. *Marital status*. Marital status is defined as being married, single, widowed, divorced, separated, or living in a conjugal relationship outside marriage. It is particularly relevant in the area of spousal, pension, and survivor benefits. Prior to the revisions in 2009, the Alberta Act defined marital status as "being married, single, widowed, divorced, separated or living with a person of the

opposite sex in a conjugal relationship outside marriage" (emphasis added). This clause, like the exclusion of sexual orientation discussed above, was corrected to align the Alberta legislation with federally protected rights to same-sex marriage, as set out in the federal *Civil Marriage Act* and supported as constitutional in the Supreme Court of Canada's 2004 decision in *Reference re Same-Sex Marriage*.

7. *Ancestry*. Ancestry means belonging to a group of people with a common heritage.
8. *Place of origin*. Place of origin refers to a country or region of birth, including a region in Canada.
9. *Age*. In Alberta, age is defined in the Act as 18 years or older. Therefore, anyone over 18 can make a complaint based on this ground. For example, the Alberta Act protects a 19 year old who is denied a position because of negative stereotypes about teenagers as well as a 57 year old who is rejected because he does not "fit the company's youthful image." Anyone under the age of 18 can file a human rights complaint on any ground *except* age. Before January 2018, age was not a protected ground in the areas of goods, services, accommodation or facilities, and tenancy. Exemptions still exist for age-restricted condominiums, cooperative housing, and mobile home sites that existed prior to January 1, 2018, as well as for seniors-only housing and programs that provide benefits to minors or senior, such as reduced bus fares.

   In the BC Code, age-based discrimination is prohibited for anyone 19 years of age or older. An employee under the age of 19 may still make a discrimination complaint based on another prohibited ground, such as race or disability.
10. *Family status*. In Alberta, family status is defined as "being related to another person by blood, marriage or adoption" (at para 44(1)(f)). The BC Code does not define family status.

    Family status is a quickly evolving area of human rights law with multiple cases coming before the courts from varying jurisdictions. The struggle has been to develop a common test to determine when family status discrimination has occurred. The *Johnstone* case, described in the Case in Point box "Discrimination Based on Family Status" later in this chapter, illustrates the ongoing evolution of the jurisprudence.
11. *Source of income*. Source of income is defined in the Alberta statute as "lawful source of income" (at para 44(1)(n)). This ground is intended to protect individuals whose source of income might attract social stigma—for example, recipients of social assistance, disability benefits, or seniors' supplements. Income that is not a source of stigma is not covered by this section of the Act. The BC Code does not include source of income as a ground of discrimination in the area of employment.
12. *Sexual orientation*. This ground protects people based on a person's actual or presumed sexual orientation, which can include homosexual, heterosexual, or bisexual. It is particularly relevant in the area of spousal, pension, and survivor benefits. It includes protection from differential treatment on the basis

of a person's actual or presumed sexual orientation. BC added sexual orientation to the list of prohibited grounds of discrimination in 1992, the same year it added family status. As noted above, the Alberta government added sexual orientation in 2009.

13. *Criminal record.* The BC Code does not allow employers to discriminate against someone because they have "been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person." As with other grounds, there is an exemption for BFORs under section 13(4). One issue that arises is whether an employer may refuse to preserve the employment status of an employee who is unable to work because they are serving a prison sentence. There have been a number of cases where employees have alleged discrimination in the latter situation if the employer has been unwilling to hold their jobs for them until they are released. This argument was rejected by the BC Court of Appeal in the 2000 decision *BC Human Rights Commission v BC Human Rights Tribunal*. In its decision the Court cited the *obiter dicta* (commentary apart from the main decision) of the trial court judge, who said:

> 53. The intent of the legislation is to protect persons convicted of criminal offences unrelated to employment from the stigma attaching to the fact of conviction or record of conviction preventing the person from either continuing in their present employment or obtaining new employment.
>
> 54. The legislation on its face does not support the view it was intended to preserve the employment status of a person who is absent from work to serve a sentence of incarceration imposed because of their intentional criminal conduct. (at para 24)

Criminal record is not listed as a ground of discrimination in the Alberta Act.

Additional Grounds of Discrimination

Equal Pay for Equal Work

In addition to the grounds of prohibited discrimination listed in section 7, the Alberta Act protects individuals in the area of equal pay under section 6. When employees of any sex (male, female, or transgendered) perform the same or substantially similar work, they must be paid at the same rate. Furthermore, the employer is not allowed to reduce another employee's salary to meet the requirements of the legislation. The BC Code has a similar provision in section 12, although section 12(3) states that a wage difference between employees of different sexes that is based on a factor other than sex is permissible, provided that the factor reasonably justifies the difference.

The requirement to provide equal pay for equal work has existed for over 55 years, but before this requirement it was common for men and women to receive different rates of pay even when they were performing the same job.

To fall within the equal pay for equal work protection, the work of one employee must be substantially similar (but need not be identical) to the work of another. For example, male and female cooks working in the same restaurant must receive the same rate of pay, subject to the exceptions set out above, even though one makes salads and the other makes desserts. Similarly, a retail clothing store cannot reasonably argue that its female and male sales assistants receive different rates of pay because they work in separate sections of the store and therefore do different jobs. Section 12(2) of the BC Code specifies that "the concept of skill, effort and responsibility must … be used to determine what is similar or substantially similar work."

To prove a violation of the equal pay for equal work provisions, there is no need to show that an employer intended to discriminate. The law applies wherever women and men perform similar work but receive different rates of pay for reasons other than the exceptions noted above.

As with other standards under the BC Code or the Alberta Act, equal pay for equal work is enforced by the individual's filing of a complaint with the BC Human Rights Tribunal or the Alberta Human Rights Commission (though BC employees have the option of filing a claim in court). Although historically female employees have benefited most from equal pay laws, both men and women may file complaints.

What Is Equal Pay for Work of Equal Value?

Pay equity, or "equal pay for work of equal value," is a relatively recent concept that requires employers to compare totally different jobs and ascertain whether they are equal in value. The only jurisdictions in Canada that impose comprehensive compliance obligations on employers to achieve pay equity are those that are federally regulated and employers in Ontario and Quebec under their respective *Pay Equity Acts*. The federal *Pay Equity Act* was introduced in October 2018. It requires employers in the federal sector with ten or more employees to undertake a pay equity review and analysis to ensure they are providing equal pay for work of equal value. The Act requires that employers establish a pay equity plan that includes (1) an analysis of gender predominance of job classes, (2) estimates of the value of work performed by each job class, and (3) a comparison of pay between predominantly male and predominantly female job classes of similar value.

Neither the BC Code nor the Alberta Act actually uses the term "equal pay for work of equal value." Instead, BC uses the term "for similar or substantially similar work" (s 12(1)) and Alberta uses the wording "the same or substantially similar work" (s 6(1)). In both provinces, a comparison is made between the value of the jobs, not their content. Neither have assessment and planning requirements like those in the federal *Pay Equity Act*.

Pay equity arose from the concern that equal pay for equal work laws would never be able to achieve gender equality because, typically, men and women did not perform substantially similar work. Historically, women have tended to occupy a small number of relatively low-paying jobs collectively known as the "pink collar ghetto." Pay equity is premised on the idea that these jobs are poorly paid *because* they are primarily performed by women. In other words, the labour market has consistently

undervalued jobs dominated by women. For example, parking lot attendants, who are usually men, are paid more than childcare workers, who are usually women.

The purpose of pay equity, therefore, is to reduce the wage gap between men and women by requiring employers to compare the underlying value of jobs performed predominantly by men with those performed predominantly by women. Pay for female-dominated jobs is then based on their value in relation to the value of male-dominated jobs, rather than on the value assigned to them by the labour market. This can be a challenging task, and the process required by the legislation is necessarily technical and complex.

IN THE NEWS

The Battle Starts at the Top: How Canadian Companies Can Close the Gender Pay Gap

Recently, female faculty members at the University of British Columbia, the University of Guelph and McMaster University received $3,000/year raises after salary audits at the universities found they were being paid less than their male colleagues.

Efforts such as these are praised as Canada's gender wage gap remains relatively unchanged from year to year. "The notion of [patriarchy] is so pervasive throughout our values and culture, and it also shows up in policies, programs and laws … it's not an easy thing to overcome and it will take a long time," said Anil Verma, a professor of industrial relations and human resource management at the Rotman School of Business. "The good news is that we're making progress."

But progress is slow. Canadian women earn 84 cents for every $1 earned by men. For women who are Indigenous, living with a disability, racialized, or newcomers to Canada, the gap is even larger.

Leadership commitment is the key to closing the gender pay gap according to Verma.

"The battle starts at the top," he notes. "The leader of the organization has to send a clear message through communication and through action to demonstrate that this is an 'equal opportunity' company."

Once leadership is on board, employers should speak with their employees on an individual level. Human resources departments responsible for recruitment, hiring, training, performance appraisal, and compensation can be key partners.

Charlotte Yates, provost and vice-president at the University of Guelph, says that a major barrier to closing the pay gap is that bias most often creeps in incrementally, not explicitly. This may include bias related to career arcs for women who may have different family and social obligations. It also includes assumptions about what leadership looks like.

"For example, the characteristics we think are successful, tend to also … be male characteristics. More aggressive, more assertive, more likely to say 'I'm the right person for this,'" says Yates. Women are less likely to behave in these ways, and the impact on pay equity is surprising.

SOURCE: Adapted from Collie, 2019.

employment equity addresses the broad social problem of the underrepresentation of certain groups of people, such as visible minorities and people with disabilities, in most workplaces, especially in better-paid and higher-level jobs

Employment Equity

Although the two terms are often used interchangeably, **employment equity** is not the same as pay equity. Employment equity addresses the broad social problem of the underrepresentation of certain groups of people, such as visible minorities and people with disabilities, in most workplaces, especially in better-paid and higher-level jobs. Neither Alberta nor BC has legislation that addresses employment equity. However, BC has legislation that addresses it indirectly: section 42 of the BC Code

protects voluntary employment equity programs from claims of discrimination (see below under the heading "Exemptions: Where Discrimination Is Allowed").

In 1986, the federal government enacted the *Employment Equity Act*, which requires large federally regulated employers to implement employment equity programs in their workplaces. Although this federal Act is not covered in the current textbook, under the Federal Contractors Program provincially regulated companies with 100 or more employees that contract with the federal government for business worth $1 million or more must commit to implementing employment equity and are encouraged to seek additional information on the employment equity requirements contained in the program.

FYI

Strategies for Making Workplaces More Inclusive

Organizations that are most successful with employment equity link the full participation of designated group members to their business strategy. The following is a sampling of strategies that diversity award-winning employers in Canada have adopted:

1. partnering with outside organizations to find job candidates who are hard to reach through traditional recruitment strategies;
2. holding equity-awareness sessions for recruiters;
3. publishing and displaying recruitment materials in a variety of languages;
4. providing tools to help employees with disabilities;
5. surveying employees on whether they are treated respectfully and fairly at work;
6. recognizing candidates who have obtained their qualifications and experience in non-traditional ways;
7. building diversity training into management/supervisory preparation, including a training program on bias-free interviewing;
8. focusing on retaining employees from designated groups by incorporating a diversity component into their succession planning program;
9. hosting leadership seminars and networking breakfasts for senior-level female and minority employees; and
10. providing paid internships to people with disabilities.

Discrimination Through Reprisal

The *Alberta Human Rights Act* provides that people have the right to enforce their rights under the Act without reprisal. An employer may not retaliate against someone for making or attempting to make a complaint under the Act; giving evidence or participating in a proceeding under the Act; or assisting in any way with an investigation, settlement, or prosecution. The Act also prohibits anyone from making frivolous or vexatious complaints that are motivated by malice. British Columbia's legislation similarly provides parties with protection from "retaliation" after attempting to assert their rights under the BC *Human Rights Code* (s 43). Providing protection from reprisals for exercising rights under the legislation is important. Without this protection, it is likely that many legitimate complaints would go unreported out of fear of the consequences an employee might face.

Discrimination Not Covered by the Alberta Act or BC Code

To engage the protection of the Alberta Act or the BC Code, the discriminatory treatment *must be based on one of the prohibited grounds*. Although the grounds of prohibited discrimination are numerous and broadly defined, they are not exhaustive. Someone who is discriminated against on the basis of a ground not covered, such as social status, cannot file a complaint under the Act or the Code. Similarly, discrimination on the basis of physical appearance, for example, does not infringe the Act or the Code unless it touches on a prohibited ground, as would be the case if an employer discriminated against a person who wears a nose ring for religious reasons or who has a perceived disability that has more to do with appearance (e.g., weight in the *Turner v Canada Border Services Agency* decision mentioned above).

The prohibited grounds of discrimination in other provinces are similar but not identical to the grounds in Alberta and BC. For example, some provinces, such as Quebec, prohibit discrimination on the basis of assignment, attachment, or seizure of pay. Others do not include all the grounds found in Alberta; for example, neither BC nor Ontario includes source of income as a prohibited ground of discrimination in the area of employment.

Exemptions: Where Discrimination Is Allowed

The right to be free from discrimination in employment on the basis of the grounds discussed above is not absolute. The BC Code and the Alberta Act set out exemptions where even intentional discrimination is permissible.

Unlike the legislation of some other jurisdictions, the Alberta Act identifies very few specific exemptions. Instead it relies on the general defences to discrimination found in sections 7(3), 8(2), and 11 of the Act. Sections 7(3) and 8(2) allow an employer to discriminate in advertising, interviewing, or hiring if the reason is a BFOR. Section 11 allows discrimination as long as it is "reasonable and justifiable" in the circumstances. For example, a fitness club may hire only male attendants to work in the men's locker room. However, in such instances, the employer must consider whether accommodation could be made to enable a woman to work in the position. If working in the men's locker room is a minor part of the job, it should be determined whether the job could be redefined to eliminate that element and thus accommodate a female candidate.

Section 7(2) of the Alberta Act also contains special exemptions on the grounds of age and marital status for bona fide retirement plans, pension plans, or employee insurance plans. This allows insurance organizations to opt out of providing employees over a specified age with a pension or insurance plan and allows them to offer different plans to employees who are single rather than married. However, the age-based discrimination currently allowed in Alberta may soon come under fire. An Ontario Human Rights Tribunal decision in *Talos v Grand Erie District School Board* ruled that age-based distinctions in pension, benefit, and insurance plans for employees aged 65 and older are a violation of the Charter. The ruling stated that denying protection to workers aged 65 and older without regard to individual circumstances devalues the contributions of older workers and entrenches the

stereotype that their labour is worth less. The Tribunal further held that this type of age discrimination could not be justified because there was actuarial evidence that it was not cost prohibitive to provide coverage to older workers and the decision to exclude them was arbitrary and not within a reasonable range of choices.

Similar to the Alberta Act, the BC Code allows employers to discriminate on any of the grounds listed so long as the employer's "refusal, limitation, specification or preference" is based on a "bona fide occupational requirement" (s 13(4)). The BC Code also allows certain organizations to grant "preference" to members belonging to "an identifiable group or class of persons." These identifiable groups or classes match the categories of persons discussed above with three exceptions—family status, sexual orientation, and conviction for an offence are not included. The exemption is granted where the organization has "as a primary purpose the promotion of the interests and welfare" of that identifiable group or class of persons and is "not operated for profit" (s 41). An obvious example of this is an agency that provides relief counselling to sexually abused women and hires only female staff.

Special (Affirmative Action) Programs in British Columbia

Section 42 of the BC Code permits discrimination in the case of persons disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability, or sex. Under this exemption, an employer may implement a special program to relieve or promote people who typically suffer from employment discrimination on the basis of those prohibited grounds. The Code identifies this special program as an **employment equity program**. For example, where the employer has a bona fide affirmative action program to hire someone from a First Nations background, the employer may discriminate in favour of people who fall within that category. This provision is consistent with sections 6(4) and 15(2) of the Charter.

employment equity program
a special program to relieve or promote people who typically suffer from employment discrimination on the basis of prohibited grounds

Making a Human Rights Complaint

Provincial human rights tribunals have responsibility for accepting, screening, mediating, and deciding complaints made under the applicable human rights legislation. An employee who wants to file a claim of discrimination or harassment may obtain an application form from the website of the Alberta Human Rights Commission and BC Human Rights Tribunal. In both Alberta and BC, complaints should be filed within one year of the alleged discriminatory incident. Complaints in Alberta are assessed for completeness and to ensure the Alberta Human Rights Commission has jurisdiction before they are sent to the respondent, who is required to respond within a specified period. If the Commission does not have jurisdiction, the complaint has no prospect of success, or if it was filed for improper motives it may be dismissed at this stage. The BC Human Rights Tribunal similarly will review whether the complaint is filed within the statutory timeline and sets out alleged discrimination pursuant to the BC Code before notifying the respondent.

If a complaint is not dismissed at this earlier stage by the Alberta Commission or the BC Tribunal, there is normally an attempt to settle the dispute before going to a

hearing. If conciliation is not successful through informal settlement discussions or mediation (a service provided by the BC Tribunal), a case management meeting is held and the parties prepare for a hearing.

A human rights hearing is quite similar to a hearing in the court system. The parties present documentary evidence and call, examine, and cross-examine witnesses. They may be represented by lawyers if they wish. The case is heard by a panel (also called a tribunal). The panel generally follows similar rules about the types of evidence it accepts, although it has more latitude than a court because the parties involved are often unfamiliar with courtroom processes and standards. Hearings are generally open to the public, although they may be heard privately if requested and if the panel feels there is good reason.

At the end of a hearing, the panel may give an oral decision, but will also provide a written decision at a later date. Decisions from human rights panels have the same force and effect as a court decision. If either party is unhappy with the outcome of their case, they can file for a reconsideration of the decision by the panel. This option is only available in limited circumstances. For example, a party may apply where there are new material facts or evidence that could not reasonably have been obtained earlier or where the decision is in conflict with established jurisprudence and it involves a matter of public importance.

Human rights complaints that arise from a matter covered by a collective agreement are usually heard by an arbitrator under the grievance procedure of the collective agreement, rather than by a human rights panel, although there is nothing that prevents an individual from filing a complaint against an employer under both jurisdictions. The human rights process may be put on hold while the grievance proceeds to prevent the same matter from being decided in two separate forums, but it may be revived afterward if the complainant is unhappy with the result. An employee covered by a collective agreement may also file a human rights complaint against their union.

Although human rights panels are not courts of law, some basic principles regarding civil proceedings still apply. Here are some things to keep in mind:

- Both sides must be given notice of the proceedings and must be given an opportunity to be heard before the decision is made. Hearings can proceed without the attendance of an affected party if notice was given and the party failed to show up.
- The complainant bears the initial burden of proof—that is, they must be able to show that discrimination occurred, after which point the respondent has the burden of showing that the discrimination was a BFOR or that its duty to accommodate would have caused undue hardship.
- The burden of proof is the lower civil standard of "proof on a balance of probabilities," not the criminal one of "proof beyond a reasonable doubt."
- In BC, there is no automatic right to appeal the panel's decision. A party must have valid grounds to have the decision reviewed by the BC Supreme Court. In Alberta, the Act includes the right to appeal to the Court of Queen's Bench. Higher courts generally have three options on appeal. They may confirm the panel's decision, reverse or alter the decision and order specific remedies, or remit the matter back to the panel for reconsideration.

Remedies

Section 32(1) of the Alberta Act allows a human rights tribunal to dismiss a complaint that is without merit. However, if a complaint does have merit (in whole or in part), the tribunal may order the respondent to:

- cease the discriminatory policy or behaviour;
- refrain from engaging in the same or similar discriminatory acts in the future;
- award the complainant any opportunities or privileges that were lost as a result of the discrimination (e.g., a tribunal may order that a complainant be reinstated to their position or be given a promotion that was denied);
- compensate the complainant for any or all wages, income lost, or expenses incurred because of the discrimination; or
- take any other action the tribunal considers proper to place the complainant in the position they would have been in but for the discrimination.

The tribunal may also order either party to pay the other for a portion of the costs associated with the proceeding.

In BC, the remedies are very similar. Additionally, the BC Code specifically allows the panel to order an employer to adopt and implement an employment equity program and to make a declaratory order, which can consist of a public statement confirming an employer's wrongdoing. Section 37(2)(d)(iii) enables the panel to order compensation to the complainant for "injury to dignity, feelings and self-respect." Nothing in the Alberta legislation prohibits a tribunal from making similar orders. It is not uncommon for Alberta tribunals to award between $10,000 and $15,000 in damages for hurt feelings or injury to dignity and self-respect. In BC, awards for injury to dignity have usually been in the same range and, generally, it has been understood that the de facto ceiling for injury to dignity awards was in the range of $25,000 to $35,000 until recently. In 2016, the BC Court of Appeal upheld an unprecedented award of $75,000 for injury to dignity in a case of discrimination on the basis of disability (*University of British Columbia v Kelly*). Subsequently, in *Araniva v RSY Contracting (No 3)*, the BC Tribunal awarded $40,000 for injury to dignity in a sexual harassment case (amounting to discrimination on the basis of sex). The Tribunal acknowledged that damages awards in previous comparable cases had been in the range of $22,500 to $25,000 but expressly endorsed an upward trend in damages awards:

> Ultimately, however, I do not find that the comparison with these cases undermines Araniva's claim. Those cases are now several years old. Since they were decided, the BC Court of Appeal has upheld an award of $75,000: Kelly. The trend for these damages is upward. (at para 145)

Unless there is a human rights element to a civil action, a human rights claim may only be made through the administrative system of human rights commissions and tribunals, or through grievance arbitration for unionized employees. There is no

independent tort of discrimination under the common law (as held by the Supreme Court of Canada in the 1981 case *Seneca College v Bhadauria*); discrimination is a matter for human rights legislation. The BC Court of Appeal more recently applied the *Bhadauria* ruling when it held that there is no violation of the Charter in the requirement that "[a]ll human rights complainants [must] bring their complaints under the *Code* and before the Tribunal" rather than being allowed to go directly to the courts with a discrimination claim (*Gichuru v The Law Society of British Columbia* [2014]).

However, if an employee's claim of discrimination or harassment is part of a civil lawsuit, such as a claim for wrongful dismissal, the employee is usually not allowed to pursue a parallel human rights claim with a tribunal. In such cases, an employee has the option of either going to court and including the discrimination claim as part of the wrongful dismissal lawsuit or filing an application under the human rights legislation of the appropriate jurisdiction. The employee can file in both legal avenues, to ensure deadlines are met, but a decision by one adjudicative body will prevent the case from being heard by the other.

Human Rights Issues in Recruitment, Selection, and Hiring

It has been said that the selection process is probably responsible for more discrimination than any other area of employment practice. At the hiring stage, assumptions, often subconscious, about certain groups of people and their abilities can come into play. Recruiters are required to make decisions quickly based on information in a job application form and one or two interviews. Unspoken assumptions and first impressions lend themselves to subtle forms of discrimination. Indeed, tribunals sometimes find a "subtle scent of discrimination" that permeates certain workplaces and amounts to a violation of human rights (see e.g. the BC case of *Morrison v AdvoCare* [2009] and the federal case of *Turner v Canada Border Services Agency* [2014], mentioned above).

To protect themselves, employers should document all decisions made at each step of the hiring process and include the reasons for each decision. Clear and careful documentation, prepared at the time a decision is made, provides an employer with a credible basis to defend against allegations that the decision was made on discriminatory grounds. The Act is infringed even if a discriminatory ground is only one of several reasons for an employment decision.

The following is a discussion of the human rights issues raised at each step of the recruitment, selection, and hiring process.

Essential Requirements of the Job

An employer should ensure that a job description is current and accurately reflects the employer's needs and expectations. Particular duties or structures that made sense when the job was last filled may have changed in the interim.

The employer should review the job carefully to determine which requirements are essential for the job. Interpretation of BFORs would rely on an analysis of job duties. Only essential duties should be considered in deciding whether or not someone is capable of performing a job.

Job duties or requirements that are both essential and relate to a prohibited ground of discrimination should be scrutinized carefully. For example, requiring a driver's licence for a job that does not entail a lot of driving would unnecessarily bar a candidate who is unable to obtain a driver's licence because of physical disability, and therefore could infringe the Act. On the other hand, if the job involves a lot of communication with the public, it is reasonable to require fluency in English, but it is unacceptable to discriminate against someone who speaks English with a non-Canadian accent. (Although language is not a prohibited ground of discrimination, it is directly linked to other grounds, such as place of origin.)

Where an essential job requirement negatively affects a person or group on the basis of a prohibited ground of discrimination, an employer has a duty to accommodate the individual or group unless this causes **undue hardship**. The undue hardship standard was established in 1999, when the Supreme Court of Canada issued the watershed decision of *British Columbia (Public Service Employee Relations Commission) v BCGSEU* (known as the *Meiorin* case). Meiorin was a firefighter and long-serving employee who lost her job when her employer implemented a new physical fitness test as a bona fide occupational qualification. Although the *Meiorin* case occurred in the context of an ongoing employment relationship, the approach established by the court is important to employers during recruitment, testing, selection, and hiring.

undue hardship
occurs if accommodation creates "onerous conditions," "intolerable financial costs," or "serious disruption" to the business

CASE IN POINT

Three-Part Test Established for Justifying Discriminatory Rule

British Columbia (Public Service Employee Relations Commission) v BCGSEU, [1999] 3 SCR 3

Facts

Meiorin was a forest firefighter who had performed her job in a satisfactory manner for three years when her employer, the BC government, implemented a new policy under which all firefighters were required to pass a series of fitness tests. A team of researchers at the University of Victoria had designed the tests using a sample group of participants that consisted of many more men than women. To measure aerobic capacity, the test required employees to run 2.5 kilometres in 11 minutes or less. Meiorin tried to pass this part of the test on four separate occasions, but her best time was 49 seconds over the 11-minute limit. As a result, the government terminated her employment as a forest firefighter.

Relevant Issue

Whether Meiorin's termination amounted to discrimination and thus violated British Columbia's human rights legislation.

Decision

The Supreme Court of Canada found that the rule was discriminatory because Meiorin was able to show that the aerobic requirement screened out more women than men on the basis of their differing physical capacities. The issue was whether the discriminatory rule or standard could be justified. Reversing previous case law, the Court ruled that there should not be separate categories of discrimination: direct

and constructive (adverse impact). Whatever form discrimination takes, job rules or qualifications that detrimentally affect people or groups on the basis of a prohibited ground of discrimination should be subject to the same analysis. The Court established a three-part test to determine when a discriminatory rule or qualification is justifiable. To successfully defend a discriminatory standard or rule, the employer must:

1. demonstrate that a *rational connection exists* between the purpose for which the standard was introduced and the objective requirements of the job;
2. demonstrate that the standard was *adopted in an honest and good-faith belief* that it was necessary for the performance of the job; and
3. establish that the standard was *reasonably necessary* to accomplish that legitimate work-related purpose. To establish this, the employer must show that it was *impossible to accommodate* employees who share the characteristics of the claimant without imposing undue hardship on itself.

The employer met the first two tests but failed the third one. It was unable to prove that the aerobic standard was reasonably necessary for a forest firefighter to perform the job safely and efficiently or that accommodation was impossible without undue hardship.

Under the third part of the *Meiorin* test, a discriminatory standard will be found reasonably necessary, and therefore justified, only if the employer can show that it was impossible to accommodate the individual or group negatively affected by the rule without suffering undue hardship. This is a very high standard for an employer to meet and one that requires it to consider differing needs when setting or creating a standard or rule. However, this does not mean that an employer must show that it is *impossible* to accommodate the individual or group at all. In its 2008 *Hydro-Québec* decision, the Supreme Court of Canada clarified the third part of the *Meiorin* test. It confirmed that the test is not whether it is impossible to accommodate, but whether it is impossible to do so *without undue hardship*. This simple caveat provided a much-needed clarification that the high standard of "impossibility" was limited by the concept of undue hardship. *Hydro-Québec* has already been applied in dozens of human rights cases in BC and Alberta.

Furthermore, the question of reasonable accommodation should be taken into consideration *from the beginning as part of setting the rule or standard*. In *Meiorin*, the BC government should have developed standards of aerobic fitness that recognized the different capacities of women and men and established requirements accordingly. The Court suggested some factors that might be determinative when assessing whether the duty to accommodate has been met:

1. Did the employer investigate alternative approaches that do not have a discriminatory effect, such as individual testing?
2. Were there valid reasons why alternative approaches were not implemented? What were they?
3. Can the workplace accommodate different standards that reflect group or individual differences and capabilities?
4. Can legitimate workplace objectives be met in a less discriminatory manner?
5. Does the standard ensure that the desired qualification is met without placing an undue burden on those to whom it applies?

6. Have other parties who are obliged to assist in the search for accommodation (e.g., the union representing an affected worker) fulfilled their roles?

Use of Employment Agencies

Sometimes employers use employment agencies to hire people temporarily. These workers are often referred to as "temps." In some situations, the agency remains the employer.

In BC, employment agencies are specifically identified in section 13(2) as having an obligation not to refuse to refer a person for employment on any of the 15 grounds of discrimination listed in section 13(1). An "employment agency" is defined in section 1 of the Code as including "a person who undertakes, with or without compensation, to procure employees for employers or to procure employment for persons."

In Alberta, employment agencies are not addressed specifically. However, human resources managers need to be aware that employment agencies are subject to the conditions of human rights legislation in the same way that employers are. Employers cannot ask, and employment agencies cannot accept or act on requests, to hire people on the basis of preferences related to prohibited grounds of discrimination. For example, an employer cannot legally ask an employment agency to send only "young blondes" to fill a position. An employment agency that accepted this directive would also be in contravention of the Act.

To ensure that it is not implicated in any discriminatory practices, an employer should include a term in its contract with the employment agency that requires the agency to comply with all human rights requirements. Similarly, the agency should make it clear that it will not accept or act on discriminatory directions.

Advertising a Job

Many jobs are filled through advertisements. It is the intention of both BC and Alberta human rights statutes that an employer consider many qualified candidates in the early part of the recruitment process so that suitable candidates are not eliminated inadvertently. This intention affects both where and how a position is advertised, as well as the contents of the advertisement.

Where and How Is a Job Advertised?

Jobs are often advertised informally, using internal postings or "word of mouth." The human rights problem with such informality is that it tends to perpetuate the current composition of the workforce. For example, if most of the current employees come from a certain ethnic background, filling the position by internal posting or word of mouth may perpetuate the ethnic status quo.

It is not illegal to advertise by word of mouth or in an ethnically based community paper, but this approach creates some risk. If there is a subsequent complaint about discrimination, an employer's hiring practices may affect a tribunal's view of the case. Broadly based advertising is best because it provides access to the largest

pool of applicants. Senior or highly skilled positions may need to be advertised over a larger geographic area than other jobs.

Contents of Advertisements

Section 8(1) of the Alberta Act is very clear about what may be included in a job ad as well as the interview process. It provides as follows:

> 8(1) No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant
>
> (a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

Section 11 of the BC Code is less detailed. It just prohibits advertisements from "express[ing] a limitation, specification or preference as to" any of the grounds listed in section 13 (except for prior offences), unless there is a BFOR.

Advertisements should not contain qualifications that directly or indirectly discourage people from applying for a job on the basis of a prohibited ground of discrimination. An advertisement should be geared to the qualifications and skills required for the position.

Advertisements should always use non-discriminatory language when describing a job. For example, gender-neutral words, such as "sales clerk" (rather than "salesman") or "server" (rather than "waitress"), should be used. Reference to preferred applicants as "mature" and descriptions of an employer as having a "youthful" culture tend to exclude candidates on the prohibited ground of age.

Employers should also avoid qualifications that, while not obviously biased, tend to touch on a prohibited ground. For example, if the advertisement states that Canadian experience is preferred, a qualified candidate whose work experience is largely outside Canada might be deterred from applying. This is related to the prohibited ground of place of origin. Previous work experience may be canvassed at the application and interview stage to the extent that it is relevant.

The BFOR exemption applies to the BC and Alberta rules for advertisements. Sometimes an essential job duty unavoidably touches on a prohibited ground. For example, a school bus driver needs a special driver's licence. This requirement may be stated in the advertisement even though it bars applicants who are unable to obtain such a licence because of a disability. But employers must make sure they state the essential job requirements rather than refer to personal characteristics. For example, where strenuous physical work is necessary, the advertisement should state that "heavy lifting is required," rather than that "the applicant must be physically fit." An advertisement can indicate that an employer is an equal opportunity employer or that candidates from diverse backgrounds are encouraged to apply.

Job Applications

Section 8(1)(b) of the Alberta Act prohibits employers from requiring job applicants to furnish any information regarding protected grounds. The Act thus expressly prohibits questions on an application form that directly or indirectly classify candidates by prohibited grounds. The intent is to avoid discouraging potential applicants from applying by creating the impression that they would not be acceptable.

Appropriate questions are limited to establishing the applicant's name, address, education, and previous employment history. The purpose of the job application form is to gather information on job qualifications and skills and to avoid eliciting information that directly or indirectly excludes individuals on non-job-related grounds. Table 7.1 provides examples of requests and questions that are recommended or should be avoided because they directly or indirectly touch on prohibited grounds. This list is not exhaustive.

TABLE 7.1 Recommended Guide for Pre-employment Inquiries

Unless there is a valid, job-related reason that constitutes a bona fide occupational requirement, employers should follow the guidelines below.

Common Question Areas	Recommended	Not Recommended
Gender, marital status, family status	Availability for shift work, travel, etc.	Plans for marriage, family, child care; any inquiries specific to gender or marital status (including common law relationships) or family status
Race, colour, ancestry, or place of origin	Legally permitted to work in Canada?	Place of birth, citizenship, racial origin, next of kin
Name	Previous names, only if the information is needed to verify the applicant's past employment or education and to do a reference check	Maiden name; "Christian" name; reference to origin of name; being related to another person by blood, marriage, or adoption
Languages	Ability to communicate in any language specifically required for a job	Other languages when not required in a specific job
Photographs	In rare situations such as modelling and entertainment	Requesting photographs (these can reveal race, gender, etc.)
Clubs or organizations	Membership in professional associations, clubs, or organizations; hobbies or interests, as long as they are job related	Specific inquiries about club and organization memberships that would indicate race, colour, religious beliefs, ancestry, or place of origin
Age	Old enough to work legally in Alberta or BC?	Specific age of applicants who are 18 years or older, including retirement information
Height and weight	Describing job duties that require heavy lifting or other physical requirements	Minimum/maximum height and weight requirements/stipulations

(Continued on next page.)

TABLE 7.1 Recommended Guide for Pre-employment Inquiries (Continued)

Common Question Areas	Recommended	Not Recommended
Disability	Indicating the job offer is contingent upon a satisfactory job-related medical examination to determine capability to perform the duties as outlined	General disabilities, limitations, present or previous health problems, workers' compensation claims or sick leave or absence due to stress or mental or physical illness
Smoking	Indicating the successful applicant will be required to work in a non-smoking environment	Asthmatic or permanent respiratory conditions that may be affected by smoke
Source of income	Job-related information such as former employment	Inquiries unrelated to the specific job to be performed
Education	Educational institutions attended; nature and level of education achieved	Inquiries about religious or racial affiliation of educational institution
Religious beliefs	Availability for shift work, travel, etc.	Inquiries about specific religious holidays observed by the applicant, customs observed, religious dress, etc.; requiring applicants to provide recommendations from a church or religious leader

Note: Once an offer of employment has been made and accepted, an employer may request photographs or other personal information for the purpose of employee identification, for tax purposes, or for the administration of benefits. The employer must handle and store the information in a secure manner to avoid possible or perceived misuse of the information.

SOURCE: Adapted from Alberta Human Rights Commission, July 2017.

The BC Code does not expressly deal with application forms or job interviews, and the BC Human Rights Tribunal does not have a guide to questions that should or should not be asked by employers. However, on a claim under section 13 of the Code, the Tribunal treats interview questions and application forms as evidence of discrimination in the hiring process—where the questions relate to prohibited grounds.

Job Interviews

As noted above, the BC Code is silent on what can or cannot be done or asked at a job interview. But any perception on the part of a job applicant that they were discriminated against would be sufficient grounds to file a complaint under the Code. The Alberta Act imposes the same restrictions at the job interview stage as it does for job application forms and advertisements.

However, the job interview process poses unique human rights challenges, and everyone who participates in the process should be knowledgeable about human rights requirements. For example, when meeting a candidate, an interviewer may be tempted to chat informally to create a relaxed atmosphere. During such a conversation, information may be elicited that touches on a prohibited ground. For example,

a job candidate may comment about family pictures displayed in an interviewer's office. The interviewer should refrain from eliciting information regarding the candidate's family, even though it would be normal to do so in polite conversation. Even if the information is elicited without intent to discriminate, it may raise questions about whether the candidate's family status played a part in the eventual hiring decision. A candidate who is not hired could file a claim of discrimination and an employer would need to expend time and effort in responding to it.

The interviewer should resist any urges to form subjective impressions or observations that relate to prohibited grounds. The interviewer should also be conscious of human rights issues when placing notes on the interview file that are intended to help them remember a particular candidate. From a legal point of view, notes referring to "an older guy with a slight lisp" or a female candidate wearing a "tight rainbow sweater" will not be helpful.

There are several ways to limit the potential for human rights problems arising from the interview. These include the following:

1. *Accommodate disabilities*. If a job applicant is unable to attend an interview because of a disability, an employer must accommodate the candidate so that they have an equal opportunity to be interviewed.
2. *Have a standard set of questions and evaluation criteria*. Standardizing an interview keeps it on track and avoids the perception that candidates were treated differently on the basis of a prohibited ground. Using a standard evaluation rubric with descriptions of good, adequate, or poor responses also decreases the likelihood that raters will base their evaluations on factors not relevant to performance of the job.
3. *Use interview teams*. Teams allow interviewers to compare impressions and can reduce the impact of individual biases. If a candidate subsequently alleges discrimination, there are several people to recall what took place during the interview. There should be at least one interviewer knowledgeable about the position being offered.
4. *Beware of prohibited grounds*. An interviewer should not ask questions that relate to a prohibited ground unless the elicited information can legally form the basis of a hiring decision. If a response cannot be used in making a hiring decision, the employer takes a risk in asking it. The candidate may perceive that the information played a part in the decision not to hire and it may be difficult to prove otherwise.

   There is some debate about whether an interviewer should raise the issue of physical ability to perform the job at the interview stage. If the disability is obvious and relevant to the essential requirements of the job or if the candidate raises the issue, the employer should discuss the disability and possible accommodations. Otherwise, the candidate may get the impression that the employer has no serious interest in understanding how they can perform the job. However, if the disability is not obvious or is not raised by the candidate, it is probably safer for the employer not to introduce it. Once the employer is aware of the disability, an unsuccessful candidate could allege

that the information played a part in denying them the job. It has been suggested that issues of accommodation should be discussed only after a conditional offer of employment is made unless the candidate requests accommodation at the interview stage or the disability is obvious (Ontario Human Rights Commission, 2008).

Generally speaking, a job applicant is under no obligation to voluntarily disclose during an interview a medical condition that qualifies as a mental or physical disability.

Similar considerations apply to discussions about the accommodation of religious practices. For example, if the position requires that the successful candidate work Friday nights and Saturdays, the employer would be wise not to discuss the candidate's availability for those shifts because this could elicit information concerning a prohibited ground. Even if shift work is an important part of the job, an employer is obliged to accommodate an employee unless accommodation would create undue hardship. Therefore, there is little to be gained by raising the issue during the interview stage and risking a discrimination claim unless accommodation is virtually impossible because of the employer's size or hours of operation. If accommodation is virtually impossible, it could be raised at the interview because the employer can justify its discriminatory rule under the three-part *Meiorin* test.

A final point to note is that, whether it is at the time of receiving a job application or resumé, during the interview, or after the interview, an employer should be cautious about automatically screening out applicants on the basis that they are overqualified for the position (Miedema & Hall, 2006, at 39). As shown in the following case of *Sangha v Mackenzie Valley Land and Water Board*, rejecting an applicant who is an immigrant because he is "overqualified" may be found to be discrimination on the basis of national or ethnic origin.

CASE IN POINT

Is Overqualification a Valid Reason Not to Hire?

Sangha v Mackenzie Valley Land and Water Board, 2006 CHRT 9, judicial review allowed, 2007 FC 856

Facts

Sangha had a PhD in environmental science and extensive work experience in this field. After he immigrated to Canada from India, however, he was unable to get a job in keeping with his employment background. Desperate to find a job in his field, he applied for one of four entry-level environmental positions advertised by the employer, Mackenzie Valley. Although Sangha was one of the best-qualified candidates, the employer's interview team decided he was unsuitable because he was overqualified for the position. The team felt he would be easily bored with the job and leave as soon as he found something better, and they already had a problem with high turnover. When Sangha found out that he did not get the job, given his credentials and how well he believed the interview had gone, he filed a complaint of discrimination based on race, national or ethnic origin, colour, and religion.

Relevant Issue

Whether rejecting a job candidate who is an immigrant on the basis that he is overqualified is contrary to the *Canadian Human Rights Act*.

Decision

The Canadian Human Rights Tribunal found that Sangha had been discriminated against on the basis of national and ethnic origin. The Tribunal noted that on the face of it, the employer's hiring process was non-discriminatory and neutral. There were no questions that touched on personal characteristics, such as race, colour, national or ethnic origin, religion, or age, and the interview was conducted professionally. However, relying on expert testimony at the hearing, the Tribunal found that the experience of applying for a job for which one is overqualified is disproportionately an immigrant experience. Visible minority immigrants are disproportionately excluded from the higher levels of the job market because of barriers to employment at this level. They therefore seek employment at lower echelons where their qualifications exceed the job requirements. The Tribunal held that "thus a policy or practice against the hiring of overqualified candidates affects them differently from others to whom it may also apply" (at para 202). As such, it is *prima facie* discriminatory.

Sangha was awarded $9,500 for pain and suffering. However, his request for compensation for three years' worth of lost earnings ($55,000 per year) and for an order that Mackenzie Valley hire him when a position became available was denied. In the Tribunal's view, Sangha had not established that his being hired was more than just a "mere possibility" had there not been discrimination. However, on appeal, the Federal Court found that Sangha had in fact shown that there was a "serious possibility" that he would have been hired but for the discriminatory overqualification standard. It therefore sent the decision back to the Tribunal for reconsideration as to the appropriate remedy.

Other cases alleging age-based discrimination related to an "overqualification" standard have also been filed (see e.g. *Yue v District of Maple Ridge* [2008] and *Reiss v CCH Canadian Limited* [2013]).

An employer is justified asking questions that appear discriminatory only when there is a BFOR. In BC, there are two other circumstances where an employer may ask questions about protected grounds: (1) where the employment pertains to a special service organization under section 41, or (2) where the employment is part of an employment equity program under section 42.

Conditional Offers of Employment

Once an employer has made an offer to a candidate, it is appropriate to gather information that would be forbidden in earlier stages of the recruitment process. The following are examples of information that should be requested only after an employer makes a conditional offer:

- a copy of a driver's licence, which contains information such as date of birth;
- a work authorization from immigration authorities, which contains information regarding date of arrival in Canada;
- a social insurance card, which may contain information regarding immigration status;
- a transcript or copy of professional credentials, which often indicate place of origin; and
- requests for medical examinations or health information necessary for pension, disability, superannuation, life insurance, and benefit plans, all of which may indicate physical disabilities (Ontario Human Rights Commission, 2008).

Pre-employment Medical or Fitness Examinations

Medical tests to determine a candidate's ability to perform the essential duties of a job should take place only after a conditional offer of employment is made and only if there is no other reasonable way for the employer to determine the applicant's ability to do the job. The examination must be directly relevant to the job as well as objectively necessary and appropriate. For example, a back X-ray may be appropriate for a job that involves heavy lifting but not for a managerial job. The results cannot be used to disqualify a candidate unless they directly undermine the candidate's ability to perform the essential duties of the job. Even then, the employer is obliged to accommodate the employee unless this would create undue hardship.

If medical testing is required, all candidates must be tested; employers who test only certain candidates may be vulnerable to allegations of discrimination. The results of medical tests must be maintained in confidential medical files, separate from human resources files, and accessible only to qualified medical personnel.

Where medical testing is appropriate, candidates should be so notified at the time that an offer of employment is made. Arrangements must be made for the competent handling of test materials and for keeping them properly labelled and secure at all times. Test results should be reviewed with the employee by the physician.

Pre-employment Drug and Alcohol Testing

Human rights legislation throughout Canada considers alcoholism and drug dependency to be forms of disability and therefore prohibited grounds of discrimination (see "On-the-Job Drug and Alcohol Testing," below). As a result, workplace alcohol and drug testing is quite restricted in this country. Pre-employment testing is where someone is not yet employed and is seeking employment. Post-employment drug and alcohol testing is discussed later in this chapter. However, such testing continues to be an important issue, especially in workplaces that are safety sensitive or that are affiliated with companies operating in the United States, where such testing is far more common. In the view of Canada's human rights commissions, drug and alcohol testing is risky during recruitment and before hiring. The best advice for most employers, including those in BC, is to not attempt such tests, since there is a strong chance they will be seen as discriminatory attempts to screen out applicants with dependency disabilities. Further, pre-employment drug testing does not measure current impairment, and pre-employment alcohol testing, while measuring impairment at the time of testing, does not predict a candidate's ability to perform the essential job requirements. It is, therefore, difficult to justify its potential discriminatory effect.

However, from the perspective of the Alberta Human Rights Commission, testing, in and of itself, is not prohibited. What does concern the Commission is what happens afterward. If there is discrimination based on a real or perceived disability, if there is a failure to accommodate a dependence disability, or if the employer has a policy that discriminates against employees with drug or alcohol dependence, the Commission may act to remedy the violation. For example, if an employer tests an

applicant *before* or *after* offering employment, the test comes back positive, and the employer withdraws the offer or refuses to hire that applicant, it will look a lot like discrimination to the Commission. Alternatively, if an employer tests an applicant, the test comes back positive and the employer (1) checks to see whether the positive test is the result of a dependence disability and if it is, then (2) identifies ways to accommodate to the point of undue hardship, it will look a lot less like discrimination.

At this point, the Alberta Human Rights Commission continues to follow its reasoning in the *Kellogg Brown & Root* (*KBR*) case described below.

CASE IN POINT

Perceived Disability in Pre-employment Drug Screening

Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Company, 2006 ABQB 302, rev'd 2007 ABCA 426, leave to appeal to SCC refused, 2008 CanLII 32723

Facts

Chiasson was hired as an inspector (a safety-sensitive position) at the Syncrude plant in Fort McMurray. He was told that his employment was conditional on passing a pre-employment drug test. He took the test, began work, and was on the job for nine days when the test results came back indicating that there were THC metabolites (residual effects of marijuana use) in his urine. He was summarily dismissed. Chiasson filed a complaint with the Alberta Human Rights and Citizenship Commission claiming that he was discriminated against on the basis of a perceived disability. Chiasson stated he was a recreational marijuana user, his use offsite did not affect his work, he had never had a safety incident, and he did not have a disability. Furthermore, his performance on previous jobs had been evaluated as superior to excellent.

Relevant Issue

Is mandatory pre-employment drug testing *prima facie* discrimination on the basis of a real or perceived disability? If it is discrimination, can it be justified?

Decision

The Alberta Human Rights and Citizenship Commission dismissed the case in June 2005 on the basis that Chiasson did not suffer from any real or perceived disability, and therefore no discrimination had occurred. In an interesting reversal, the Court of Queen's Bench reviewed the case and held that the company's screening policy had the effect of creating a class of people (those who tested positively for drug use) and systematically discriminating against them. Because dismissal was the automatic and absolute sanction for failing the test, the policy also had the effect of discriminating against both individuals with an actual disability (addiction) and those perceived to have a disability (recreational users).

The Alberta Court of Appeal subsequently reversed the Queen's Bench decision and restored the Alberta Human Rights and Citizenship Commission decision. The Court of Appeal held that the drug testing policy did not perceive that those who test positive have a drug dependence (disability). Instead, the policy treats those who test positive as being a safety risk in a dangerous workplace. The Court went on to discuss the link between casual drug use and lingering impairment that could create a safety hazard. It compared the drug testing policy to a policy prohibiting consumption of alcohol before a truck driver gets behind the wheel. The Appeal Court's decision does not remove perceived disability from the prohibited grounds of discrimination, nor does it give the all-clear to KBR's drug testing policy. But because there was no actual or perceived disability in this case, it chose not to determine whether the pre-employment policy would be discriminatory if a disability did exist. Unlike the Commission, the Court did not consider arguments about whether the policy would satisfy the duty to accommodate branch of the test for a BFOR. Leave to appeal to the Supreme Court of Canada was denied.

Some pages have been omitted.
Sample partial chapter for review purposes only.

KEY TERMS

employment equity, **228**
employment equity program, **231**
poisoned work environment, **277**
prima facie, **217**
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sexual harassment, **275**
sexual solicitation, **279**
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REVIEW AND DISCUSSION QUESTIONS

1. Azar worked as a nurse for five years in various temporary positions for the same employer. She applied for a temporary position that was available from September 2020 to June 2021. Before the hiring decision was made, Azar advised the employer that she was pregnant and expected to commence her maternity leave in February 2021. Although she was the most qualified applicant for the job, the employer awarded the job to someone else. Azar filed a complaint with the Alberta Human Rights Commission.
   a. What is the alleged ground of discrimination?
   b. In your opinion, did the employer contravene the BC *Human Rights Code*? Explain your answer.
2. Monique applied for a position as a cashier at a cafeteria. The employer's dress code requires employees to be "neatly groomed in appearance" and to avoid displaying body piercings or tattoos. The employer refused to hire Monique because she wears a nose ring. Monique filed a complaint with the Alberta Human Rights Commission.
   a. What is the alleged ground of discrimination?
   b. In your opinion, did the employer contravene the *Alberta Human Rights Act*? Explain your answer.
3. Kimberley was assigned male at birth but started living as a woman at age 29. Following her sex-reassignment surgery, Kimberley experienced physical and emotional abuse in a relationship, and she was referred to an organization that assists battered women. Several years later, she responded to an advertisement for volunteers at a rape crisis centre. Being a woman was stipulated as a job qualification. During the training session, someone identified her as transgender, based solely on her appearance, and Kimberley was asked to leave. Kimberley filed a complaint with the BC Human Rights Tribunal.
   a. What is the alleged ground of discrimination?
   b. In your opinion, did the employer contravene the BC Code? Explain your answer.
4. Joe applied for a position in a daycare centre. The centre refused to interview him because it thinks that parents would be uncomfortable with having a man take care of their young children. Joe filed a complaint with the Alberta Human Rights Commission.
   a. What is the alleged ground of discrimination?
   b. In your opinion, did the employer contravene the Alberta Act? Explain your answer.
5. During his job interview, Zhou mentioned that he was recovering from an addiction to cocaine. The employer refused to proceed with the interview because the position being applied for was in a safety-sensitive area. Zhou filed a complaint with the BC Human Rights Tribunal.
   a. What is the alleged ground of discrimination?
   b. In your opinion, did the employer contravene the BC Code? Explain your answer.
6. The employer interviewed a number of candidates for a position in a nursing home that involves lifting patients and other physically demanding work. One of the candidates, Joan, had limited mobility in her arm, which was obvious at the interview. The employer did not address the issue, and the interview was brief. Joan was not hired and filed a complaint with the Alberta Human Rights Commission.
   a. What is the alleged ground of discrimination?
   b. In your opinion, did the employer contravene the Alberta Act? Explain your answer.
7. Joe has a medical degree from a university outside Canada. He applied for a position as an orderly because his degree is not recognized in Canada. The employer refused to give him the job because she felt that he was "overqualified" and would leave as soon as he found a position more in keeping with his education. Joe filed a complaint with the BC Human Rights Tribunal.
   a. What is the alleged ground of discrimination?
   b. In your opinion, did the employer contravene the BC Code? Explain your answer.

8. Human rights legislation in Canada was intended to end discriminatory practices in five social areas. It has been argued, however, that it has not been very effective. Critics have asserted that racist and sexist employers have found ways to circumvent the law. Discuss whether Canada's human rights laws have achieved their objective of eliminating discrimination. If they have not, how could they be made more effective?
9. Increasingly, employers are using social networking sites to find out more information about job candidates in the hiring process and basing their hiring decisions in part on this information. Is this a smart move or a human rights trap? What are some of the upsides and downsides of this approach?
10. Sarah, a salon owner, operates a trendy salon in Calgary. She advertises for a stylist. Nia calls in response to the ad and seeks an interview. At no time does Nia mention that she covers her head for religious reasons. Nia attends the interview, which lasts only ten minutes. During the interview, Nia makes it clear that she will not remove her headscarf while at work, and Sarah tells her that in that case, she cannot hire her. Sarah has a policy requiring all stylists to show their hair. She doesn't allow baseball caps or other hats to be worn by staff because, in her view, a stylist's hair is her "calling card" and that of the salon. As a result of Sarah's reaction to her headscarf during the interview, and the ultimate decision not to offer her the job, Nia files a human rights complaint alleging discrimination. She's been turned down by numerous salons, and she's tired of it. Sarah says she's a small salon, and the costs of responding to this complaint will put her into financial ruin. Assume that you are a member of the human rights tribunal deciding this case. On the basis of the *Alberta Human Rights Act*, what would your decision be? Support your conclusions.
11. Is it a violation of the BC Code for an employer to require proficiency in English?
12. McCormick was an equity partner at a prestigious law firm in BC. As per the terms of the partnership agreement, he was due to retire during the year in which he turned 65. When he and the firm were unable to reach an agreement that would allow him to work beyond this age, he filed a complaint with the BC Human Rights Tribunal alleging age-based discrimination. The law firm challenged the Tribunal's jurisdiction on the basis that McCormick was a partner, not an employee, of the firm. The BC Court of Appeal agreed: unlike a corporation, a partnership is not a separate legal entity. Therefore, McCormick, as a partner, could not be an employee of the partnership because he cannot employ himself.

    If this fact situation occurred in Alberta instead of BC, would the result likely have been different?
13. Can an employer have a "non-smokers only" hiring policy? Discuss.
14. You've just started your new job as human resources manager at a retail chain that sells teen clothing. A supervisor calls you with a question. She's been getting complaints from a couple of employees that other employees are speaking with each other during work hours in a language other than English (even though they speak English well). They say it's rude and makes them feel left out of the conversation. The supervisor is wondering if she can insist that all employees speak English during working hours. What advice should you give the supervisor?
15. Although weight discrimination is one of the most common forms of discrimination in the workplace, weight is not one of the prohibited grounds under Alberta or BC human rights legislation. Should it be added?
16. Mary was hired by Good Value Shop in 2012. She has suffered from and been treated for depression most of her life. Mary is seen as a difficult employee: her supervisor describes her as short-tempered, manipulative, and disruptive. One behaviour that is particularly resented by her manager is her habit, after receiving directions from a manager, of checking with other managers and co-workers in the store to see if those directions are being consistently applied. In 2020, Mary goes off work on stress leave for depression. The supporting documentation sent to the disability insurance provider makes it clear that her depression relates to her work situation. It indicates that several friends and co-workers have quit due to stress, she has had four different managers in less than two years, and there is frequent bullying and verbal abuse by managers. When she returns to work two months later, she continues with the behaviour that had most upset her supervisor: questioning instructions and checking with other managers to see if they are being consistently applied. Her supervisor repeatedly tells her not to do this, but she continues. As a result, her employment is terminated for insubordination, four months after she returned from stress leave. In your opinion, has the employer infringed the BC Code? Explain your answer.

17. Your employer intends to deny a 64-year-old female employee a training opportunity that is available to everyone else in her department because "she won't be around long enough to use the new information." How would you advise the employer?
18. Your employer is a religious person who seeks your opinion about displaying religious symbols in the workplace. What advice can you offer?
19. Your employer tells you that he's heard that a supervisor in the purchasing department made a pass at two employees at the company picnic. What should the employer do? Why?
20. You are an employer who wants to reinstate an employee who left work with a back injury. However, it's a small workplace and the only job that the employee can perform is one created out of all the "light duties" of the other six jobs. This would require the other employees to perform all of the heavier duties, which might lead to injury. What should you do to meet the requirements of the legislation in your province?
21. Your employer tells you of a major productivity project that will begin shortly and take six to nine months to complete. Under normal circumstances, he would assign the project to the operations manager, but she is seven months pregnant and will be on maternity leave for most of the project's duration. How would you advise your employer about the human rights issues involved?
22. An employee who has been on maternity leave calls you to say that she will need more flexibility in her schedule when she returns to work because of childcare needs. How should you respond?
23. Two employees, Joseph and Sean, have come to you complaining about verbal harassment on the job. Both employees are fundraisers for AIDS research, and several of their co-workers routinely tease them about being gay. How would you advise them? What steps would you advise their employer to take?
24. Your co-worker comes into your office Monday morning very angry. She tells you that she is tired of her Uncle Miguel always favouring his nephews over his nieces. At a family gathering on the weekend, he gave each of his nephews $1,000 but gave nothing to his nieces. She wants to know if she can lodge a complaint against her uncle by filing an application under human rights legislation. How do you advise her?
25. Julio, a supervisor, continually harasses and ridicules George, who works in his department. No one else in the department believes that Julio's criticisms of George are justified. It appears to them that Julio simply does not like George for a personal reason. Can George file a human rights application? Give reasons for your answer.
26. Datt had worked for McAdams Restaurant for 23 years (taking orders, cleaning) when she came down with a skin condition on her hands that was made worse by frequent hand washing. She took several short-term disability leaves but her condition always worsened after she returned to work. McAdams said that frequent hand washing was necessary to maintain acceptable sanitary conditions, to meet both government regulations and its own hygiene policies. For example, the restaurant has a timed system where a timer sounds each hour, and all crew members and the manager must wash their hands. Datt's doctor reported that she could not perform any job requiring frequent hand washing but there were duties she could perform, including cash, some food preparation, and some cleaning. However, the disability benefits provider told Datt she would not be able to return to work because "restaurant work was not good for her" and offered her a three-month job search program. McAdams terminated her. Datt filed a human rights application.
    a. Did Datt have a disability?
    b. Was this a case of *prima facie* discrimination?
    c. Did the employer have a duty to accommodate Datt, and if so, did it fulfill that duty up to the point of undue hardship? Explain your answer.
27. Linda was a sales rep whose job involved a lot of driving. After she was diagnosed with cataracts and told that within two years she would be legally blind, her employer advised her to apply for disability leave. Although her vision did deteriorate over the next few years, it was not as severe as the original prognosis, so she wrote to her employer asking to return to perform light duties or take on part-time work. The employer indicated nothing was available. Several months later, Linda's disability benefits were terminated, as she was deemed capable of returning to work in some occupation. Although her employer was notified of the change and of Linda's wish to return to work, it took no action. Four years later, Linda filed a human rights complaint. The employer argued that it had relied on information from the disability benefits provider indicating that she was unable to perform the available jobs.

    Do you think Linda's complaint will be successful? Explain your answer.

28. Clara was hired on a four-month fixed-term contract to perform crisis response work, including responding to calls from area hospitals to assess and provide support for persons who presented as being in crisis. She was terminated after eight weeks in the position because, the employer alleged, she was unable to perform essential parts of the job. For example, she was unable to respond quickly to verbal and non-verbal clues commonly found in individuals who are in crisis. Before her termination, the employer had raised its performance concerns, and Clara told them she was taking medication for epilepsy and among its side effects was an occasional difficulty with words and delays in completing tasks. However, when asked by the employer if she needed accommodation, Clara had said there was no need. When her performance did not improve, despite several poor performance reviews and a final written warning, the employer terminated her contract. Clara grieved her dismissal.

Do you think Clara's complaint will be successful? Explain your answer.

29. Tiana has been acting strangely at work and it appears to be alcohol related. However, she denies that she has a drinking problem. Does the employer have any responsibility to accommodate a disability that the employee denies?

30. David was a machine operator in a cheese factory. After confiding in a colleague that he had had a brief affair with his supervisor's ex-wife, several co-workers began picking on him by making negative comments. This lasted over two years. Despite numerous complaints to his supervisor who witnessed some of these insults, nothing was done. Despite the employer's zero-tolerance harassment policy, when the employer's human resources department became aware of David's allegations, it launched only a superficial investigation: it did not ask who the perpetrators were or gather facts about the specific allegations. It accepted the supervisor's view that it was not a serious problem. After his lawyer's offer to the employer to meet to discuss the matter further was rejected, David filed a lawsuit alleging constructive dismissal based on the employer's failure to provide a harassment-free environment. The Court agreed, finding that in light of both the nature of the comments made and the length of time they continued, it was reasonable for David to leave his job. It awarded him 12 months' notice (a year's worth of compensation).

What lessons does this case hold for employers?

31. Angry that her supervisor had disciplined her for calling him a "dirty Mexican" at work, Danielle posted about the incident on her Facebook page. The supervisor heard about the postings and filed a human rights complaint against Danielle (but not the employer).

a. What is the likely legal basis for the supervisor's application?

b. Can statements made on Facebook, or in any other social media forum, be considered "harassment in the workplace"?

c. Given that the employer was not a party to the proceedings, what would be an appropriate remedial order (i.e., remedy)?

32. A mailroom clerk's employment was terminated after the employer conducted a brief investigation of a sexual harassment complaint made by an employee of its cleaning subcontractor. The alleged misconduct included blowing the cleaner a kiss and sometimes grabbing her buttocks when he caught her alone; this had gone on for five years. The mail clerk grieved his termination, alleging that while the incidents had occurred, they had been consensual. He also pointed to his six years of service, his clean disciplinary record, and testimony from another cleaner that he had stopped his objectionable behaviour with her as soon as she had demanded it (by showing him her fists). The complainant had also indicated that she did not necessarily want the mail clerk to lose his job; she simply wanted an end to the harassment. In this situation, what do you think would be an appropriate remedy?

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