

Human Rights and the Duty to Accommodate: *Primer for Employers*

Tools 2015

November 25, 2015 1:35 to 3:00 p.m.

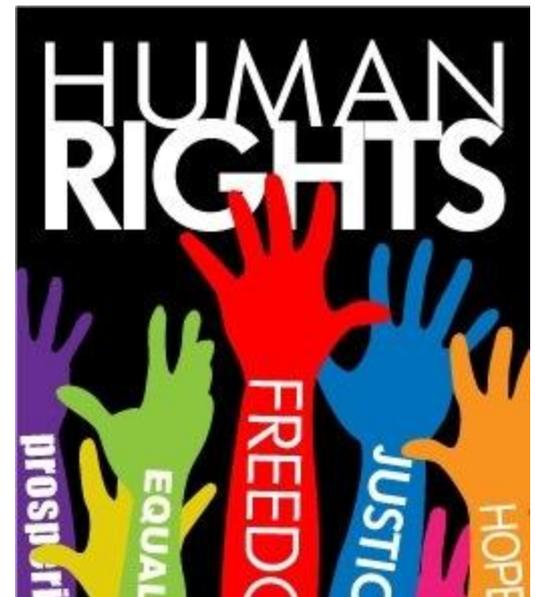
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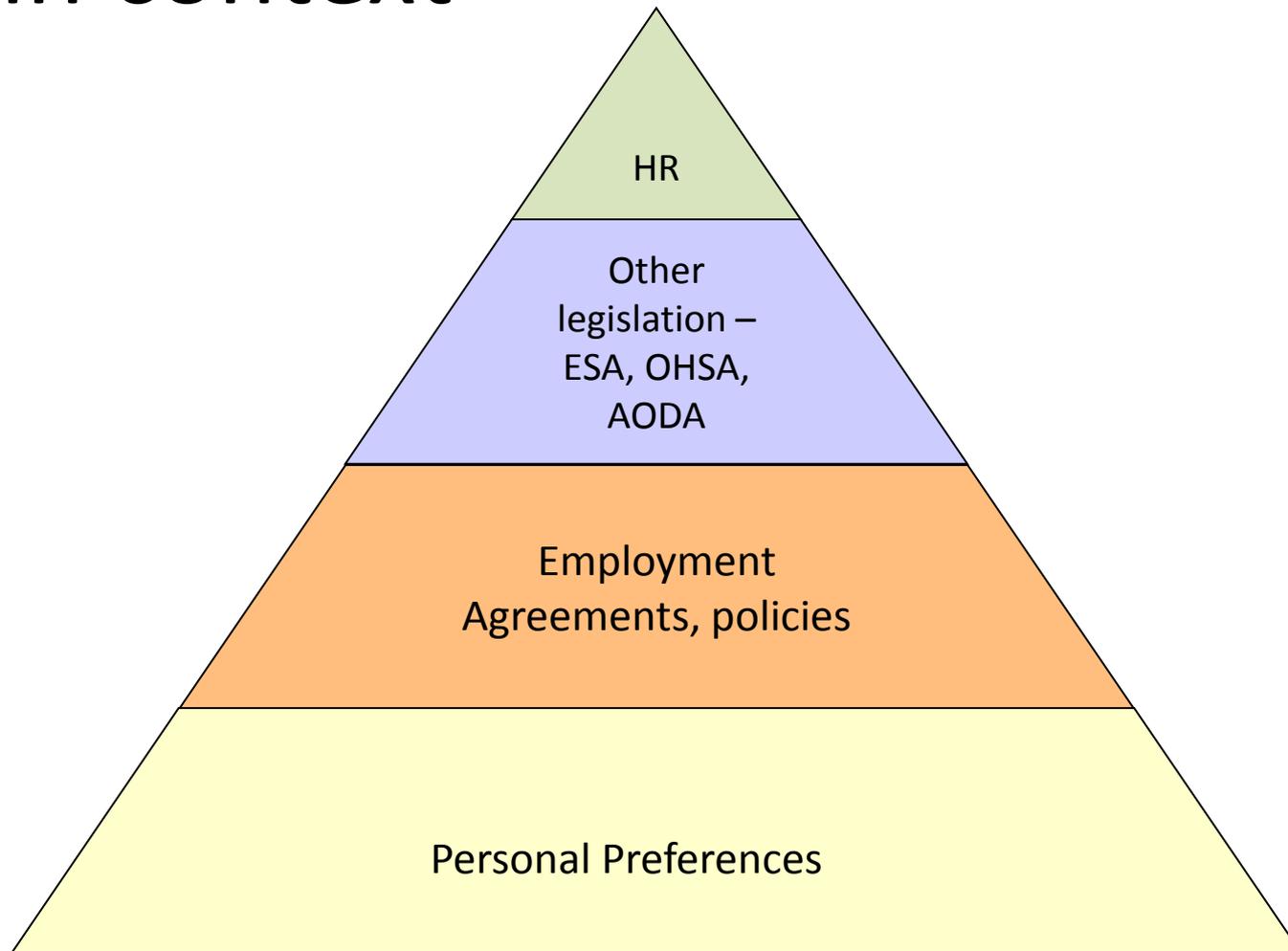
What do Human Rights mean for employers?

- It always means that human rights issues are considered – recruitment, hiring, training, promotions, holidays, hours of work, dismissal ...
- It may mean that employers provide some things for some employees that they don't provide to others
- It probably means that sometimes the employer gets accused of being unfair
- It may mean that people use human rights language when they are talking about their personal preferences
- It definitely means that people do not know the details of accommodation
- And it absolutely means that employers needs to be educated about human rights and promote human rights concepts in their organizations

Overview

1. Human Rights Legislation
2. The Duty to Accommodate
3. Competing Human Rights
4. Case studies
5. Resources

HR in context



1. Human Rights Legislation

- Applies to a number of different relationships
 - Service, goods and facilities – section 1
 - Accommodation - section 2
 - Contracts – section 3
 - Employment – section 5
- Protected grounds under the *Human Rights Code*



Protected grounds

- race
- ancestry
- place of origin
- colour
- ethnic origin
- citizenship
- **creed (*i.e* religion)**
- sex
- sexual orientation
- age
- marital status
- family status
- **disability**
- gender identity
- gender expression
- the receipt of public assistance (housing only)
- record of offences (employment only)

Setting job requirements

- Job requirements must be
 - reasonable
 - made in good faith – “bona fide occupational requirement”
- Test for bona fide requirement?
 - Purpose is rationally connected to doing the job
 - Good faith belief it is necessary to fulfil work-related purpose
 - Reasonably necessary to accomplish work-related purpose – cannot accommodate people with the characteristic

2. Duty to accommodate

Principles for Accommodation

- accommodate needs to respects dignity, to the point of undue hardship
- no set formula for accommodation – unique needs, consultation with the person involved
- take responsibility and show willingness to explore solutions to treat people respectfully and with dignity
- comply voluntarily

Who does what?

- Role of employee requesting accommodation
- Role of employer receiving the request
 - entitled to know?
 - entitled to say to the requester?
 - entitled to say to others?

Undue Hardship

Undue Hardship is a very high threshold –
considering:
– cost (including external sources of funding),
– health and safety
and nothing else.

Undue Hardship - Cost

Employer expected to minimize costs

- Distribute costs across the entire budget
- Phase in accommodation
- Investigate tax deductions
- Establish a contingency fund
- Use creative and less expensive design solutions
- Explore outside sources of funding

Undue Hardship – Health and Safety

What can the employer consider when thinking about health and safety?

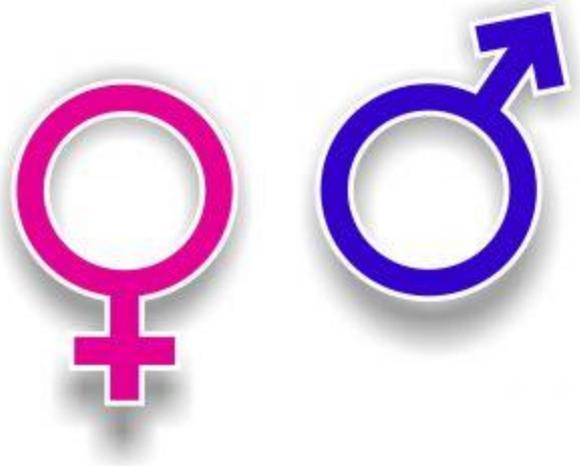
- Nature of risk
- Severity of risk
- Probability of risk
- Scope of risk

Undue Hardship

What cannot be considered?

- Employee “knew office was inaccessible” when she accepted the job
- Employee preferences
- Resentment from other employees
- “that’s not fair” – employee morale
- Business interests
- Collective agreements
- Inconvenience

3. Competing Human Rights





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Competing rights principles

- No rights are absolute
- No hierarchy of rights
- Rights may not extend as far as claimed
- Consider context
- Look at extent of interference
- Core or right protected more than its periphery
- Respect both sets of rights

The Policy Framework

Stage One: Recognizing competing rights claims

Stage Two: Reconciling competing rights claims

Stage Three: Making decisions

Stage One: Recognizing competing rights claims

Step 1: What are the claims about?

Step 2: Do claims connect to legitimate rights?

- (a) Do claims involve individuals or groups rather than operational interests?
- (b) Do claims connect to human rights, other legal entitlements or *bona fide* reasonable interests?
- (c) Do claims fall within the scope of the right when defined in context?

Step 3: Do claims amount to more than minimal interference with rights?

Stage Two: Reconciling competing rights claims

Step 4: Is there a solution that allows enjoyment of each right?

Step 5: If not, is there a “next best” solution?

Stage Three: Making decisions

Decisions must be consistent with human rights and other law, court decisions, human rights principles and have regard for OHRC policy

At least one claim must fall under the Ontario *Human Rights Code* to be actionable at the Human Rights Tribunal of Ontario

How should we use the Policy?

1. Follow the 3 stage framework
2. Write down what you did
3. Solve the problem using the framework
4. Use your notes to defend against a human rights application if you get one
5. Assign someone responsibility for dealing with competing human rights issues
6. Have a HR policy or By-law



Case study 1

Jolanta works as a college instructor. She is visually impaired and uses a guide dog to get around. She teaches in Early Childhood Education. She is the most junior instructor and therefore always gets stuck teaching the evening courses.

Paola had children young – before going to college - but once her children are in school, she is determined to have a career that will ensure a better life for her children. Her mother cares for her children in the evenings while she at school. She enrolls in the ECE program at Humber College. Paola has a severe allergy to dogs.

Paola is assigned to Jolanta's evening course. She arrives on the first day, sees the guide dog, and immediately goes to the office. She complains to the administrator on duty that she cannot be in the class because of her allergy. She presents a doctor's note.

What are the human rights issues? What should the college do?



Case study 2

Gwen lives in a shared apartment with two other women, all of whom receive support services from a support worker, Andrea. Gwen has recently been diagnosed with terminal liver cancer. To ease the end of life symptoms, her doctor has prescribed medical marijuana. She smokes as she needs to, but at least three times a day.

Andrea has complained that the pot fumes affect her ability to do her work; she is concerned too about the long-term effects of it on her health and the health of the other women living there. She asks to be transferred.

What are the human rights issues? What should the agency do?



Case study 3

Billie volunteers to answer the phones at a settlement organization to help with the influx of calls related to Syrian refugees. Billie has for many years lived as a woman although is physically male.

Originally a Christian organization, it now has a broader base.

Jean was one of the founders of the organization and still volunteers one day/week. She complains that it makes her uncomfortable and offends her spiritual beliefs that Billie attends work wearing traditionally female clothing.

What are the human rights issues? What should the organization do?



Case study 4

Edgar has been active on a housing co-op Board and committees for twenty years. He recently left the Board because of his term limit but he had continued to volunteer in the office from time to time. The new Board has retained a new property management company with a different approach to member involvement in the office.

Edgar is not happy with the new direction. He delivers letters to the on-site property manager, Agnes, daily and sends emails to her head office complaining that she is incompetent. Worse, he puts information on his website that is very critical of Agnes and of the property management company. He says that he's being discriminated against by the property management company because he isn't getting to do the things that he used to do.

The property manager is upset about this and complains to the Board of the Co-op and to her employer.

What are the human rights issues? What should the Board and her employer do?

4. Resources

- Ontario Human Rights Commission
www.ohrc.on.ca
- <http://www.ohrc.on.ca/en/human-rights-work-2008-third-edition>
- Canadian Human Rights Commission
www.chrc-ccdp.ca/eng
- Your lawyer
- Our blog www.ilercampbell.com

Things to take away with you:

1. Rights issues arise all the time
2. Not all rights are Human Rights
3. Use available resources
4. Document, document, document...
5. Not all rights are equal but no rights will always trump other rights
6. Facts matter
7. Respect all view points
8. Act quickly to resolve issues before they become problems
9. Be creative and flexible
10. Human rights protection is a good thing!



Questions –
you likely have some!

