

# Human rights – Case law update

Presented by: Andy Pushalik and Stefanie Chimienti

May 25, 2018

# Agenda

- 1. What's happening at the Human Rights Tribunal of Ontario?**
- 2. The latest on:**
  - a) Drug and alcohol policies**
  - b) Workplace harassment**
  - c) Personal liability for workplace harassment**
  - d) Moral damages vs. human rights damages**
  - e) Independent medical examinations**

# The HRTO – A statistical snapshot

	2016-2017	2015-2016	2014-2015
Applications Received	3,585	3,357	3,259
Cases Reactivated	22	18	28
Cases Closed	2,880	3,234	3,179
Active Cases at Year-End	4,696	3,242	3,101
Case Processing Time (days)	333	326	338

# The HRTO – A statistical snapshot

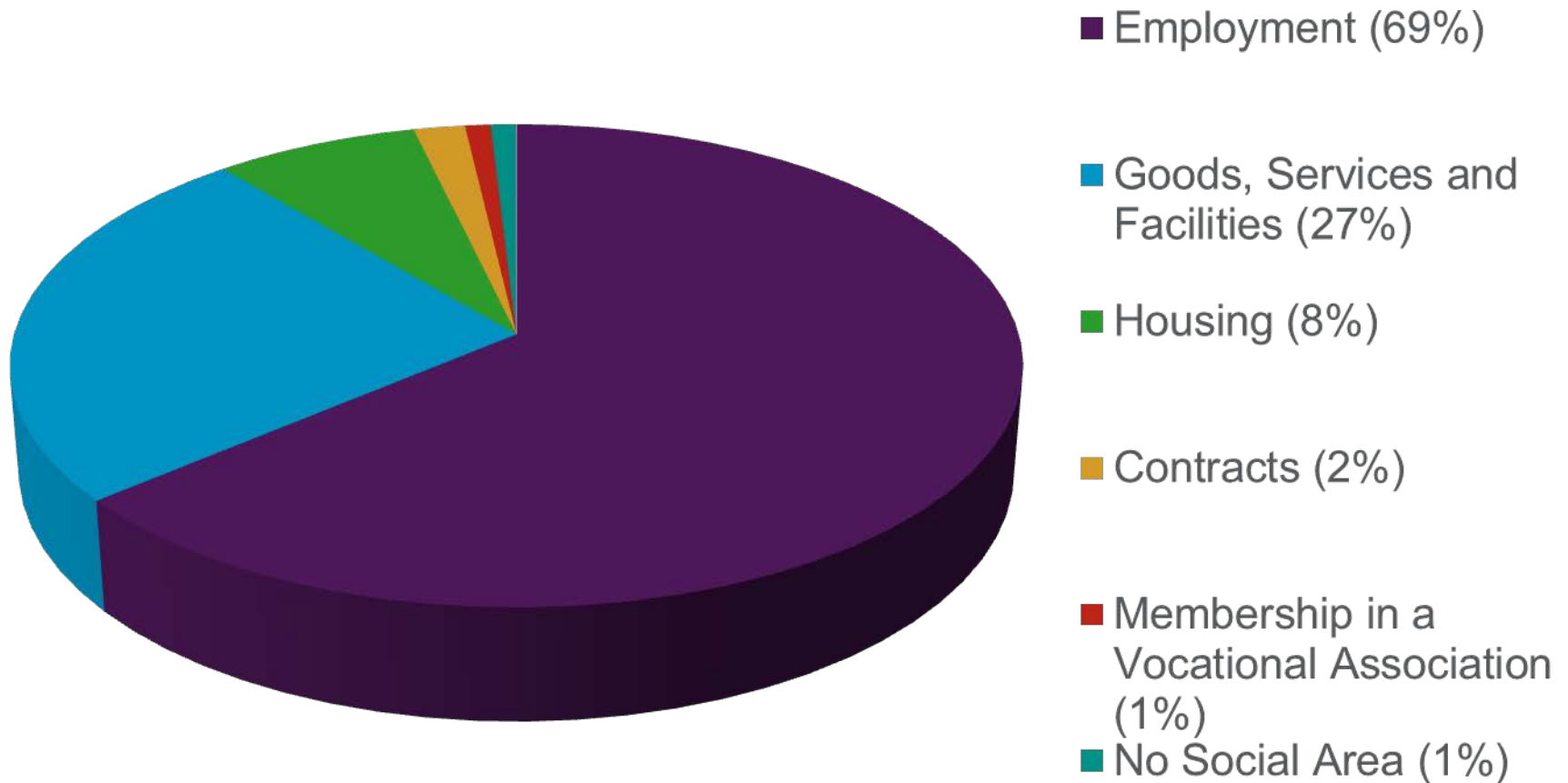
	2016-2017	2015-2016	2014-2015
Final Decision on the Merits	87	113	110
-Discrimination Found	30	39	43
-Discrimination not Found	57	74	67

# The HRTO – A statistical snapshot

	2016-2017	2015-2016	2014-2015
Mediations held	1,376	1,584	1,459
Settled at Mediation	58%	58%	59%

# The HRTO – A statistical snapshot

## Percentage of applications by ground under the Code



# The HRTO – A statistical snapshot

## Percentage of applications by ground under the Code

**\*\*Many applications claim more than one ground, so the totals exceed 100%**

- Disability (55%)
- Reprisal (23%)
- Race (21%)
- Colour (16%)
- Age (12%)
- Ethnic Origin (15%)
- Place of Origin (12%)
- Family Status (10%)
- Ancestry (10%)
- Sex, Pregnancy & Sexual Harassment (17%)
- Sexual Solicitation or Advances (4%)
- Sexual Orientation (4%)
- Gender Identity (5%)
- Creed (6%)
- Marital Status (5%)
- Association (4%)
- Citizenship (4%)
- Record of Offences (2%)
- Receipt of Public Assistance (1%)
- No Grounds (2%)

# Do employers have a right to take proactive steps to mitigate risk through alcohol and drug policies?

*Stewart v Elk Valley Coal Corporation, Cardinal River Operations and Alberta Human Rights Commission (Tribunal), 2017 SCC 30*

- The “no free accidents” rule - encouraged employees to disclose any addiction to them before a workplace accident occurred.
- Stewart was involved in a workplace accident, and subsequently tested positive for cocaine. Elk Valley terminated Stewart’s employment pursuant to the workplace policy.
- Stewart argued that he was addicted to cocaine, and that denial was a symptom of addiction. He claimed this prevented him from disclosing his addiction to Elk Valley, and as such, his disability was a factor in his termination, violating section 7 of the Alberta Human Rights Act.
- The Alberta Human Rights Tribunal found that Stewart was not terminated for his addiction: he was terminated for breaching the policy, and his addiction was not a factor in the decision to do so.



# Do employers have a right to take proactive steps to mitigate risk through alcohol and drug policies?

*Stewart v Elk Valley Coal Corporation, Cardinal River Operations and Alberta Human Rights Commission (Tribunal), 2017 SCC 30*

- The Court held that the mere existence of an addiction is not enough to substantiate a prima facie case of discrimination when an employee breaches a workplace policy.
- A prima facie case of addiction must be made out by establishing, on the evidence, that the employee in question did not have the capacity to comply with the policy at the time of the breach, due to their addiction.
- The majority did not find a prima facie case of discrimination, so they did not consider whether Stewart was reasonably accommodated
- They found that the mine was a “safety sensitive” environment, and as such the appeal should be dismissed to preserve the deterrent effect of the policy

# Does it matter whether the workplace harasser and victim are not in an employment relationship?

*British Columbia Human Rights Tribunal v Edward Schrenk, 2017 SCC 62*

- Mohammadreza Sheikhzadeh-Mashgoul (“S-M”) was employed as an engineer on a job site. He worked for Omega Associates Engineering (“Omega”), alongside employees of Clemas Construction Ltd (“Clemas”). Omega had some supervisory control over Clemas employees.
- Edward Schrenk, an employee of Clemas, repeatedly harassed S-M on the job site. S-M complained to Omega, who in turn informed Clemas. Schrenk was removed from the job site, but was still involved in the project. Schrenk then sent S-M two unsolicited, derogatory emails. Omega informed Clemas of this, and Schrenk was subsequently dismissed from his employment.
- S-M filed a complaint against Schrenk at the British Columbia Human Rights Tribunal. He alleged he was discriminated against on the basis of religion, place of origin and sexual orientation.

# Does it matter whether the workplace harasser and victim are not in an employment relationship?

*British Columbia Human Rights Tribunal v Edward Schrenk, 2017 SCC 62*

- Schrenk argued that Section 13(1)(b) of the British Columbia Human Rights Code was not applicable in this case, because he was not S-M's supervisor or employer, and did not have any economic authority over S-M. As a result, he argued that the British Columbia Human Rights Tribunal did not have jurisdiction over this issue.
- **Held**
- The Tribunal did have jurisdiction over the matter and found that Section 13(1)(b) applied to Schrenk.
- A broad and purposeful approach must be taken with regard to interpretation of the Code, in order to further the Code's purpose of preventing discrimination.
- It is not only the employer who is in a position to discriminate against employees.

# Does it matter whether the workplace harasser and victim are not in an employment relationship?

*British Columbia Human Rights Tribunal v Edward Schrenk, 2017 SCC 62*

- To determine whether discriminatory conduct has a sufficient nexus with the employment context, the Tribunal should consider:
  - 1) Whether the respondent was integral to the complainant's workplace
  - 2) Whether the impugned conduct occurred in the complainant's workplace
  - 3) Whether the complainant's work performance or work environment was negatively affected

The above factors are not exhaustive and their relative importance will vary with the circumstances

# Are employees personally liable for discrimination in the workplace?

## *Phillip v Andrews*, 2018 HRTO 28

- Sharon Phillip (“S”) and Leslie Andrews (“L”) were both employed by the same organization.
- On November 11th 2014, L used the “N-word” in their place of work, and S, who identifies as Black, protested this behaviour.
- Although the comment was not directed at her, S sought compensation for injury to dignity, feelings and self-respect from both the company she worked for, and L.
- S settled with her company, but pursued action against L

# Are employees personally liable for discrimination in the workplace?

*Phillip v Andrews*, 2018 HRTO 28

- **Held**
- In some circumstances, an individual who has caused the discrimination may be personally responsible even if the employer is also liable.
- Ontario Human Rights Commission v Farris, 2012 ONSC 3876: The fact that a corporate respondent may also be jointly and severally liable for the conduct of employees is not a basis to insulate the employees from personal liability.
- Whatever liability would have applied to the company had the applicant not chosen to settle, can be applied to L.

# Are employers exposed to both moral damages and human rights damages?

## *Doyle v Zochem Inc*, 2017 ONCA 130

- Melissa Doyle (“M”), worked for Zochem Inc. for 9 years. She was the only woman working in the plant, and had been frequently sexually harassed by the plant maintenance manager.
- On July 14th 2011, M reported the harassment to Wrench, her supervisor.
- M was terminated without cause on July 19th, 2011.
- The trial judge found that her termination was most likely a result of her gender and sexual harassment complaint.
- Zochem claimed that M’s termination decision had already been made a month in advance, and that the sexual harassment report had no bearing on the decision to terminate.
- Doyle sought compensation for the manner in which she was terminated and for her sexual harassment claim.

# Are employers exposed to both moral damages and human rights damages?

*Doyle v Zochem Inc*, 2017 ONCA 130

- **Held**
- Moral Damages of \$60,000 awarded based on:
  - The one-day, meaningless investigation into the sexual harassment complaint
  - Zochem's intention to replace her with a man to take care of "gender issues"
  - Zochem's misleading statements about giving her a chance to "improve" despite already having made the decision to terminate
  - Zochem's instructions to employees to "dig up dirt" on M to substantiate her termination
  - The cold, brusque manner of the termination and the "take it or leave it" package
  - Zochem's message to M that she was being "irresponsible" towards Rogers, her harasser
  - Unjustified denial of short-term disability benefits



# Are employers exposed to both moral damages and human rights damages?

*Doyle v Zochem Inc*, 2017 ONCA 130

- **Held**
- Human Rights Damages of \$25,000 based on:
  - The brevity of the investigation into M's sexual harassment claims
  - The lack of a trained investigator
  - Failure to implement compliance procedures
- Moral damages were awarded for the manner of dismissal, while Human Rights damages were awarded for loss of the right to be free from discrimination
- The awards compensated M for different interests in law, therefore the awards did not overlap

# When can an employer request an independent medical examination?

## *Bottiglia v Ottawa Catholic School Board and Human Rights Tribunal of Ontario, 2017 ONSC 2517*

- Bottiglia passed over for the Director of Education position
- Bottiglia felt distraught, betrayed, and upset by this decision. This event triggered depression which led to his extended absence from work. He began his leave of absence on April 16, 2010.
- In September 2012, the OCSB requested an independent medical examination (“IME”) due to a number of concerns. The concerns of the OCSB included the significant and unexpected changes in Bottiglia’s stated ability to return to work, and whether Bottiglia’s return to work was premature and based on the imminent expiry of his accumulated paid sick days.

# When can an employer request an independent medical examination?

*Bottiglia v Ottawa Catholic School Board and Human Rights Tribunal of Ontario, 2017 ONSC 2517*

- Bottiglia refused to attend the IME due to concerns about the information provided in the request letter sent to the independent medical examiner by his employer.
- Bottiglia argued that the letter had prejudiced Bottiglia by misrepresenting the reason why he left the workplace and by implying that his return to work was motivated by his paid sick days expiring.

# When can an employer request an independent medical examination?

*Bottiglia v Ottawa Catholic School Board and Human Rights Tribunal of Ontario, 2017 ONSC 2517*

- **Held**

- The Court held that in certain circumstances, an employer will be justified in requesting an IME as part of the duty to accommodate imposed upon employers under the Ontario *Human Rights Code* (section 17(2)).
- The certain circumstances include when the employer has a reasonable and bona fide reason to question the adequacy and reliability of the information provided by its employee's medical expert.

# Thank you

The logo for Dentons, featuring the Chinese characters "大成" followed by the word "DENTONS" in a bold, sans-serif font, all contained within a purple arrow-shaped graphic pointing to the right.

Dentons Canada LLP  
77 King Street West  
Suite 400  
Toronto, Ontario M5K 0A1  
Canada

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