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# UNITED WAY OF PEEL REGION

Mississauga – March 22, 2005

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## Employment Issues For Non-Profit Organizations

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**Part 1: Hiring and Interview Screening  
Protocols for Non-Profit Organizations**

**Introduction**

A properly conducted hiring process is critical not merely as a means to finding a suitable candidate,

but also,

for protecting employers from being held liable for transgressing any of the provisions existing in law

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**The Ontario Human Rights Code  
("Code") and the Ontario Human Rights  
Commission**

- The Ontario Human Rights Commission (OHRC) is the regulatory authority in charge of ensuring the implementation of the Code.
- Generally speaking, the OHRC is of the view that the only legitimate consideration determining an applicant's suitability for employment is his/her job qualifications.

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- To facilitate this objective, the OHRC issues guidelines, including a sample application form, which is intended to guide employers so as to avoid breaching any of the provisions contained in the Code – available at [www.ohrc.on.ca](http://www.ohrc.on.ca)

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**The Ontario Human Rights Code**

**Section 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability.**

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**Section 23(1) The right under section 5 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.**

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**Section 23(2) The right under section 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.**

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**Prohibited Grounds of Discrimination**

As of the time of this presentation, the following are prohibited grounds of discrimination for employment:

- Race                                   ⊆ Sexual Orientation
- Ancestry                               ⊆ Age
- Place of Origin                       ⊆ Record of offences
- Colour                                   ⊆ Marital status
- Ethnic Origin                         ⊆ Same-sex partnership status
- Citizenship                           ⊆ Family status
- Creed                                   ⊆ Disability
- Sex

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**Prohibited Questions on Applications**

A question is categorically prohibited if it concerns the following:

- Race (e.g. physical characteristics or requests for pictures, etc)
- Creed (e.g. religious affiliation, holidays and customs observed, etc)
- Sex (e.g. Mr., Mrs., Miss., Ms.; insurance beneficiary, etc)
- Sexual Orientation (e.g. marital status, insurance beneficiary, etc)

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- Marital Status (e.g. marital status, maiden/birth name, etc.)
- Family Status (e.g. marital status, children or dependents, etc)
- Disability (e.g. health, handicaps, medical history, medications, etc)

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**Section 23(3) Nothing in subsection (2) precludes the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination of such ground is permitted under this Act.**

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**Permissible Questions on the Application**

The OHRC does, however, permit the following questions:

1) **Citizenship/Place of Origin/Ethnic Origin**

- Are you legally entitled to work in Canada?

2) **Record of Offences**

- Have you ever been convicted of a criminal offence for which a pardon has not been granted?

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3) **Age**

- Are you 18 years of age or older and less than 65 years of age?

The above three examples demonstrate that legal discrimination does not constitute a contravention of the Code

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**Practically Speaking:**

**In practice this means that:**

- 1) **When advertising for employment, or when conducting interviews employers must ensure that they are in compliance with the Code.**
- 2) **Employers must be careful that they do not inadvertently breach the provisions of the Code.**

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- 3) **Employers should have employment policies in place and established to assist human resources personnel to ensure that they are not engaging in hiring practices that are in violation of the Code.**

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**Part 2: Termination of Employees**

- 1) **Structuring a fair and effective severance package.**
- 2) **Just cause.**

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• Upon an employee’s termination, the Employment Standard Act 2000 (ESA) imposes statutory obligations on employers with respect to notice and severance.

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• The length of notice that is required to be given to an employee is determined by an employee’s length of service as follows:

Length of Service Requirements	Notice
- 3 months but less than 1 year	1 week
- 1 year but less than 3 years	2 weeks
- 3 years but less than 4 years	3 weeks
- 4 years but less than 5 years	4 weeks
- 5 years but less than 6 years	5 weeks
- 6 years but less than 7 years	6 weeks
- 7 years but less than 8 years	7 weeks
- 8 years or more	8 weeks

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• In addition to statutory notice or notice pay under the ESA, if an employee has an annual payroll in excess of 2.5 million or more than 50 employees are terminated within a 6 month period due to the permanent discontinuance of all or part of an employer’s business, affected employees will be entitled to severance pay.

• An employee with 5 or more years service will be entitled to one week’s severance pay per year of completed service and a pro-rated amount for a partial year of service to a maximum of 26 weeks pay.

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- The ESA outlines the statutory minimum requirements imposed upon employers with respect to notice.
- Implied Term – reasonable notice.

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An employer structuring a severance package should ask the following questions:

- 1) What is the reasonable notice period?
- 2) Should the package be structured by providing, working notice, a lump sum payment, periodic payments or some combination of these elements?
- 3) What payments and benefits would the employee have received if reasonable notice had been provided (remuneration, benefits)?
- 4) How likely is the employee to obtain alternative employment and what can the employee expect to earn during the reasonable notice period?

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Costing the severance package – how much is reasonable?

**Bardal v. Globe and Mail (1960), 24 D.L.R. (2d) 140**

- “There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment having regard to the experience, training and qualifications of the servant”.

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• The four Bardal factors are:

- 1) Length of service
- 2) Age
- 3) Position
- 4) Availability of similar employment

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• Other factors affecting notice period

- Inducement – where an employee is induced to leave otherwise secure employment with promise of career advancement, increased responsibilities or greater pay.
- Bad faith discharge – concerns the manner in which a termination is carried out.

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• Is there a formula for determining the reasonable notice period?

- No set formula
- Consider other similarly situated employees to see what the courts consider to be a reasonable notice period.

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**• Is there a minimum or maximum notice period?**

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**• Severance Package – what to include:**

- 1) Equivalent of salary**
- 2) Benefits and Pensions**
- 3) Perks**
- 4) Other – Outplacement Counselling**

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**• How to structure the severance package:**

- 1) Working notice.**
- 2) Lump sum payment upon termination.**
- 3) Periodic payments (salary continuance).**

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**Duty to Mitigate**

The general rule is that an employee is entitled to be put back into the same position the employee would have been in, if they were permitted to continue in employment to the end of the reasonable notice period.

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**OVERVIEW**

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- Termination based on “just cause”:
  - Common law principle of reasonable notice applies in the majority of cases.
  - There are exceptions to the common law principle for example “just cause”.

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**Port Arthur Shipbuilding Co. v. Arthurs**  
 (1967), 62 D.L.R. (2d) 342 at 348 (Ont.C.A.), rev'd 70  
 D.L.R. (2d) 693 (S.C.C.)

**“If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties, or prejudicial to the employer’s order in a matter of substance, the law recognizes the employer’s right summarily to dismiss the delinquent employee”.**

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**McIntyre v. Hockin** (1889, 16 O.A.R. 498 (C.A.)  
 at p. 501

**“the causes which are sufficient to justify dismissal must vary with the nature of the employment and the circumstance of each case. Dismissal is an extreme measure, and not to be resorted to for trifling causes. The fault must be something which a reasonable man could not be expected to overlook, regard being had to the nature and circumstances of the employment”.**

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- Onus on employer to prove “just cause” on a balance of probabilities.
- Requires more than employer’s subjective dissatisfaction with the employee.

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• Most common grounds of “just cause”:

- 1) Neglect of duty
- 2) Dishonesty
- 3) Theft and fraud
- 4) Conflicts of interest
- 5) Misconduct
- 6) Incompatible personality
- 7) Incompetence
- 8) Disobedience
- 9) Insubordination

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McKinley v. BC Tel. [2001] 2 S.C.R. 161 (citation)

- Employers must demonstrate that:
  - 1) The act was in fact an act of dishonesty/theft, misconduct, etc.; and
  - 2) The nature of the act and the context in which it was committed actually gave rise to a breakdown of the employment contract.

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**Overview and Concluding Comments**

- 1) “Just cause” is a ground for the employer to terminate an employee without providing the employee with reasonable notice.
- 2) “Just cause” is not an easy hurdle to achieve.
- 3) Obtain legal advice prior to terminating an employee for “just cause”.

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