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Language Protection in the Human Rights Sphere

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Cases Considered:

Caron c Alberta (Chief Commissioner, Human Rights Commission), 2013 ABQB 13, and *Chieriro v Michetti*, 2013 AHRC 3.

The *Caron* language rights saga discussed in previous posts on ABlawg (see here) continues, as the next development in his continuing litigation was recently released by the Court of Queen's Bench of Alberta. This post will discuss that decision, as well as a recent decision of the Alberta Human Rights Tribunal, *Chieriro v Michetti,* 2013 AHRC 3, which also raises issues about the protection of language-related rights.

Mr. Caron was a seasonal worker for Edmonton's Department of Transportation and Streets and in a complaint to the Alberta Human Rights Commission, he alleged that his co-workers subjected him to discriminatory treatment and that his employer, the City of Edmonton, terminated his employment for discriminatory reasons. After the former Chief Commissioner of the Alberta Human Rights Commission upheld the Director's dismissal of Mr. Caron's complaint as too trivial to justify a public tribunal hearing, Mr. Caron filed a judicial review application seeking to quash the Commissioner's decision. Mr. Caron's complaint is based on section 7(1) of the *Alberta Human Rights Act,* RSA 2000, c A-25.5 ("*AHRA*"), which does not allow an employer to refuse to employ or continue to employ (section 7(1)(a)) or discriminate against any person in regards to employment (section 7(1)(b)) based on numerous protected grounds. The two grounds that Mr. Caron based his claim on are that of place of origin and ancestry because of his background as a Québecois. Mr. Caron alleged that he was called numerous offensive names throughout his employment with the City of Edmonton. The insulting names included "Frenchie," "Chretien," and "Gil". These are the comments that ultimately led Mr. Caron to his claim that he suffered from harassment at his workplace, which created an oppressive environment to work in.

In her decision, Justice M.T. Moreau could not determine what had led the Commissioner to decide that these terms were not offensive or significant enough to warrant a hearing. As a result, this lack of explanation in the Commissioner's reasoning led Justice Moreau to hold that the Commissioner's decision failed to meet the reasonableness standard. The Commissioner's decision was quashed and the matter has now been returned to the current Commissioner to reconsider the allegations, but only in regards to section 7(1)(b) of the *AHRA*. We will now have to await a further decision by the Commission in regards to the narrowed issue surrounding section 7(1)(b) of the *AHRA* and whether it should proceed to a tribunal hearing.

In previous litigation, Mr. Caron made challenges regarding the lack of French language protection in Alberta, particularly regarding the language in which laws are enacted (see here and

here) and the lack of availability of French language proceedings under the *AHRA* (see *Caron v Alberta (Human Rights and Citizenship Commission)*, 2007 ABQB 525). In the latter decision, it was held that Mr. Caron was able to address the court in French during the judicial review proceedings because of section 4(1)(b) of Alberta's *Languages Act*, RSA 2000, c L-6. Mr. Caron was also granted an interpreter based on section 14 of the *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (*Charter*), which states that a person has a right to an interpreter in proceedings in which they do not understand or speak the language being used. Although it seems that there is some level of language protection via other legislation, what is the extent of the protection of language in human rights legislation?

Historically, in Canadian jurisdictions like Alberta where language is not a protected ground in human rights legislation, tribunals and courts have protected language vicariously through other grounds such as ancestry or place of origin. The Ontario Human Rights Commission has gone a step further and developed a policy that describes the approach that their courts and tribunals are to use in regards to language-based human rights claims (see here). Although the Alberta Human Rights Commission does not have a similar policy in place, based on the jurisprudence relating to language and human rights discrimination in Alberta, they seem to follow a similar method. The Ontario Human Rights Commission explains that there is an inevitable link between a particular language that is spoken or an accent that a language is spoken in and grounds like ancestry, ethnic origin or place of origin.

There are numerous types of cases that have come forward regarding language in a variety of areas including services, although the majority of them are in the employment context. An example of a case in the services area is one of Mr. Caron's previous litigation matters. As previously mentioned, Mr. Caron was granted an interpreter for his human rights judicial review hearing, but was denied an order to get the records and related files translated into French (see *Caron v Alberta (Human Rights and Citizenship Commission)*, 2007 ABQB 200). If language was included as a protected ground then the court may have been forced to grant an order requiring all of the records and related files to be translated for his use. This would be quite an extensive and demanding task to be placed on tribunals and courts as well as a potentially dangerous precedent to set for future litigants.

An example of a human rights claim related to language in the employment area is the case of *Dhamrait v JVI Canada*, 2010 HRTO 1085, 70 CHRR D/373, (*Dhamrait*) where two employees were told by their supervisor that they should be speaking English, not Punjabi during their lunch break. In this case it was found that even though language was not a protected ground in Ontario's human rights legislation, it can be a proxy indicator of discrimination based on race, ethnicity or place of origin (at para 64). The Tribunal was able to make this connection by stating that the employees speaking Punjabi were not able to express themselves in their native language which placed a burden on them based on their race and ethnic background. In the case of *Saadi v Audmax*, 2009 HRTO 1627, (*Saadi)*, a ban on speaking French within the office was put in place. A Muslim woman, Ms. Saadi, brought a complaint of discrimination based on race, colour, ancestry, place of origin and creed. The Ontario Human Rights Tribunal found that because the Muslim woman's first language was not French nor was it a language she spoke at a high level, that the ban on the use of French did not constitute a proxy for racial discrimination (at para 39). The distinguishing factor between these two cases seems to be that in *Dhamrait* the claimants were able to show an inability to express themselves because they were being suppressed from speaking their first language, instead of a language that was neither their first language nor one they even spoke at a high level like in *Saadi*.

Interestingly, these sorts of language-based claims do not only arise in situations where people can or cannot speak a certain language, but also where individuals speak a language with a particular accent. The claimants tend to be less successful at claiming discriminatory treatment when their employment positions include a significant amount of communication with other individuals (*Gajecki v Surrey School District (No. 36)* (1989), 11 CHRR D/326 (BCCHR)) and more successful in circumstances where speaking a particular language plays a minor role (*Dhaliwal v BC Timber Ltd* (1983), 4 CHRR D/1520 (BC Bd of Inq)). Much of the claimants' success or lack of success in their claim depends on the ability of the employer to justify their actions.

Although these cases were heard in other jurisdictions, the approach in Alberta is very similar. In the recent case of *Chieriro v Michetti*, 2013 AHRC 3, there is discussion by the Tribunal about discrimination on the basis of race, ancestry, place of origin and religion. During Mr. Chieriro's employment, he was told that "…you need to use proper Canadian English. You need to speak like someone who is in Canada, not like someone who is in Africa" (at para 25). Although this is just one example of how Mr. Chieriro was subjected to discriminatory behaviour, these are some clear and direct references to the way in which Mr. Chieriro spoke. As it turns out in this case, the language-based claim was not necessary as there were other circumstances in which Mr. Chieriro had been directly discriminated against based on place of origin or ancestry. Whether or not a claim like this would be successful solely based on the language-related argument is an interesting question. If speaking to clients or customers was a regular part of his job, and if there had been any complaints regarding the accent in which Mr. Chieriro spoke English, these would likely be significant factors in answering this question. While it is an interesting question to debate, it was not discussed in detail in the case at hand as there was plenty of other evidence based on enumerated grounds that the Tribunal used in coming to its decision in favour of finding discrimination against Mr. Chieriro.

Although in the two recent Alberta decisions neither Mr. Caron nor Mr. Chieriro ultimately tested language protection in the human rights context, there will undoubtedly be cases around the corner that will continue to determine when and how claimants can be successful in language-related claims under the *AHRA*.