

Bona fide job requirement or just a convenience?

Hiring male to clean men's washrooms was easy for employer but passing over female was discrimination

By RONALD MINKEN

An Ontario employer learned the difference between a bona fide occupational requirement and something that is simply beneficial after it was found to have discriminated against a female employee when it passed her over for a position when it was easier to hire a male.

The Ontario Divisional Court recently shed some light on discrimination in the workplace in *Great Blue Heron Char-*
ity Casino v. Ontario
(Human Rights Commis-
sion). Specifically, the court found bypassing an employee for a position because of her sex was a case of prima facie discrimination.

Employer's policy was to hire men to clean men's washrooms

The female employee was hired part-time by the casino to clean the women's washrooms. One month later, a male employee who cleaned the men's washrooms quit and the casino filled the full-time position with another male employee. This was in accordance with the casino's workplace policy of workers only cleaning the bathrooms of the same sex because they had to be cleaned while still open to patrons. Because of this policy, the female employee was not considered for the position. Claiming discrimination on the basis of sex, the female

employee filed a human rights complaint.

The tribunal found there was a prima facie case of discrimination on the basis of sex because the female employee had not been considered for the full-time housekeeping position vacated by the male co-worker because she was a woman.

Employer didn't investigate other possibilities for cleaning washrooms

"There was no evidence to show the (employer) canvassed any alternatives to replacing a man with a woman and carrying on the same as before, considered whether washroom cleaning could be done in any other way or considered whether alternatives could have been implemented without undue hardship," the tribunal said.

As a result, the tribunal found the casino did not prove having the housekeeper for the men's washroom be male was a bona fide occupational requirement. The casino appealed this decision to the Ontario Superior Court of Justice.

The court reviewed the facts of the case and the tribunal's decision and allowed the appeal in part. However, it agreed with the tribunal's finding of discrimination.

"It was reasonable for the tribunal

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CASE IN POINT: Foreign workers often the first to go

WHEN EMPLOYERS look to cut staff, foreign workers are often first on the chopping block, and employers often must agree to this condition to receive government approval for hiring them. However, there are several considerations which must be considered when the axe falls.

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Simple preference not necessarily an occupational requirement

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to reach the conclusion it did on the basis of the evidence before it, particularly in light of the stringent burden of proof," the court said.

The findings in *Heron* demonstrates that employers cannot hire an individual for an employment position based on her sex unless it can be proven the employee's sex is a bona fide occupational requirement. If this cannot be proven, the employer may be found to have committed prima facie discrimination by ruling out other potential employees because of their sex.

Although *Heron* has shed light on the subject of workplace discrimination, there are still reasons for employers to be unsure of where the line is between discrimination and legitimate job requirements. Determining whether a form of discrimination is prohibited or whether it is a bona fide occupational requirement depends on the specific circumstances and facts that appear in each individual case. This makes it difficult for both an employer and an employee to know whether an act of discrimination in the workplace is permitted or not.

Despite this shortcoming, the decision in *Heron* is one that both employers and employees should pay attention to. In order to ensure they have not discriminated against their employees, employers need to be aware of the fact that even though a certain preference to one sex for a certain position will be more beneficial for the company and its patrons, such a preference is still discrimination and will not automatically be considered a bona fide occupational requirement simply because of the benefits it provides.

Difference between job requirement and employer's preference

In *Heron*, the employer was discriminating against employees by only considering male employees to clean the men's washroom and female employ-

ees to clean the women's washroom. Such a finding of discrimination may be frustrating for many employers, especially when they consider how the patrons of the casino may react to someone of the opposite sex cleaning the washroom while it is in use. Nonetheless, an employer's desire to make their patrons feel comfortable should not be achieved at the employee's expense if a reasonable compromise can be reached. The employer must ensure it achieves the best situation for their customers while making sure all of their employees are treated equally and not discriminated against for the benefit of the company and customers. This position was laid out by the tribunal and court in *Heron* when they stated different possibilities for cleaning the washroom should have been investigated by the casino which would not have discriminated against any employees.

Similarly, employees should be aware of what is contained in the notion of workplace discrimination. As the court in *Heron* contemplated, not being considered for an employment position because of one's sex is not

always considered prohibited discrimination. If it is a bona fide occupational requirement for the position, then such discrimination is permitted. However, if there is no such requirement for the position, then the discrimination is not permitted no matter how minor it may be or how beneficial it is for either the employer or its customers. ■

For more information see:

■ *Great Blue Heron Charity Casino v. Ontario (Human Rights Commission)*, 2008 CarswellOnt 5228 (Ont. Div. Ct.).



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MORE CASES

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On Dec. 12, 2004, a Coffee Time franchise store owned by Jolin Groups caught fire. Smoke from the fire got into the restaurant next door, owned by Toshi Enterprises, and caused enough damage that the restaurant had to close for three days to repair it. Toshi sued Coffee Time for damages for lost business and repairs.

The trial judge found Coffee Time exerted a number of controls in the franchise agreement with Jolin which characterized an employer-employee relationship. However, the Superior Court of Justice disagreed, finding it was a typical franchise agreement that allowed Jolin to hire and fire its own employees, maintain its own business

and tax records, make its own operation decisions and own the store's assets. As a result, Jolin was an independent contractor and Coffee Time did not exercise control over the franchise's business.

Because of Jolin's independence, the Superior Court said, Coffee Time could not be found vicariously liable. Coffee Time had no control over Jolin's business or the conditions leading to the fire.

"The lack of control exercised by Coffee Time over Jolin vitiates the policy rationale for imposing vicarious liability in the circumstances," the court said.

The court also found Jolin couldn't be held responsible for the fire because the cause was unknown and there was no evidence of negligence by Jolin. Toshi's claim for damages was dismissed. See *Toshi Enterprises Ltd. v. Coffee Time Donuts Inc.*, 2008 CarswellOnt 5954 (Ont. S.C.J. (Div. Ct.)). ■