Employee Rights On Redundancy – Avoiding Discrimination In Organizational Restructuring

When job redundancies arise in an organization, whether as result of a merger, restructuring, or downsizing, employers need to remain aware of duties under human rights legislation, such as the *Ontario Human Rights Code*.

To meet these expectations, an employer's decision regarding which employees will lose their jobs can not be tainted in any way by discriminatory decision-making. For example, if terminations are being decided on the basis of poor performance, it could be considered discriminatory if accommodated employees are included – where their lower performance is tied to their limitations due to disability. To ensure fairness and avoid discrimination, employers should aim to eliminate positions, as opposed to individuals, and relate the decision-making process to the goals of the business restructuring. When making termination decisions, employers should also rely on objective criteria, such as employee job performance (not associated with a protected characteristic), as opposed to subjective criteria, like "flexibility" or "willingness to adapt." For example, the Human Rights Tribunal of Ontario (HRTO) has found an employer discriminated on the basis of age when it used "career potential" as a factor in assessing which employees it would terminate for redundancy.[1]

Human rights issues may also arise when an employee's position is designated redundant while the employee is on a disability-related leave from work. While the employer may have economic reasons for terminating the employment, eliminating a position while an employee is on leave may give the perception that the decision was based on discriminatory factors. If the redundant employee brings a complaint, the employer will have to demonstrate that no part of its decision to terminate the redundant position was related to a ground of discrimination that is protected under the *Code.*In these cases, detailed record-keeping is very important in establishing non-discriminatory reasons for the termination. For example, in a case last year, a complaint was brought to the HRTO alleging that the complainant was terminated from her employment because of her disability. The employer in that case was able to demonstrate that it had started restructuring six months before the onset of the employee's illness, and successfully defended against the complaint. The HRTO ultimately accepted that the termination was based on legitimate business reasons and dismissed the complaint accordingly.[2]

Ultimately, employers are entitled to make the best business decisions for their

organizations, which may include downsizing or eliminating redundant positions. However, these decisions must occur within the parameters of any applicable human rights legislation and be provably non-discriminatory.

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