

“No Sticker For You!”: A Uniform Trumps The Right To Wear A Rainbow Sticker, Tribunal Rules



Employers and workplace investigators face a continually-evolving understanding of “discrimination” under the Ontario *Human Rights Code* (the “*Code*”). In recent years, the case law has recognized that discrimination can occur in a wide variety of forms, often subtle and indirect.

However, a recent Ontario Human Rights Tribunal decision, *Zanette v. Ottawa Chamber Music Society (Ottawa Chamberfest)* (“*Zanette*”),¹ also acknowledged that the concept of discrimination is not without its limits, and that not every difference in treatment will breach the *Code*.

Case Background

The facts in *Zanette* were largely undisputed. The applicant was a longtime volunteer for Chamberfest, a not-for-profit music charity. While volunteering at an event, he displayed a rainbow sticker on his name badge; his employer asked him to remove the sticker, citing a violation of the Chamberfest dress code, and the applicant ultimately removed it. It was not disputed that the rainbow sticker is a symbol of the 2SLGBTQ2+ community (referred to in the decision as “the community”), nor that the applicant was a member of, and an advocate for, the community. Given that the parties largely agreed on the facts, there were also no credibility issues to consider.

At issue was whether Chamberfest’s request for the applicant to remove his sticker amounted to discrimination based on sexual orientation, gender identity, and/or gender expression.

Analysis and Decision

In assessing whether the applicant was discriminated against, the Tribunal applied the following seminal test for discrimination:²

1. Was the applicant part of a protected group under the *Code*?
2. Was the applicant subjected to adverse treatment?
3. Was the applicant’s *Code*-protected characteristic a factor in the adverse treatment?

The first two elements of the test were satisfied, given that the applicant, as a member of the community, was part of a protected group, and was subjected to adverse treatment in being asked to remove his sticker.

However, for the following reasons, the Tribunal found that the third element of the test was not satisfied; specifically, it was not found that the applicant's adverse treatment was due to his membership of the community.

The Tribunal first found that the request to remove the sticker was made due to Chamberfest's uniform policy, which was applicable to all volunteers. The Tribunal found no evidence to suggest that this policy was arbitrarily applied to the applicant because of his sexual orientation, gender identity, or gender expression. Accordingly, the Tribunal did not find that direct discrimination had occurred.

The Tribunal considered whether the request to remove the sticker amounted to indirect discrimination (also called constructive or adverse effect discrimination). Indirect discrimination can occur where a requirement, policy, or rule that is neutral on its face has the effect of excluding or disadvantaging a protected group. However, the Tribunal also noted that differential treatment, on its own, will not automatically amount to discrimination under the *Code*. Rather, the differential treatment must "result in arbitrariness or create a disadvantage which limits opportunities, perpetuates prejudice and stereotyping, or fails to recognize pre-existing disadvantage."

The Tribunal did not ultimately find that indirect discrimination had occurred, for the following reasons.

First, Chamberfest's uniform policy did not allow for alterations of any kind on either the uniform or the name badge, regardless of the content of the alterations. There was also no evidence to suggest that Chamberfest ever allowed any alterations to its name badges in practice.

Second, the purpose of Chamberfest's policy against alterations to its name badges was to protect its brand from any incursion (and accordingly, to avoid making arbitrary and *Code*-related decisions regarding what alterations ought to be permitted). The evidence did not indicate that *Code*-based grounds were factors in Chamberfest's decision-making.

Lastly, and perhaps most importantly, the Tribunal did not find that displaying a rainbow sticker was an essential element of being a member of, or an advocate for, the 2SLGBTQ2+ community. This is in contrast to another case, cited by the applicant, in which the respondents at a school denied the applicants' access to a private space for the purposes of praying.³ The Tribunal in that decision held that the respondents' actions amounted to religious discrimination, given that daily prayers were an essential element of the applicants' religious beliefs, and those beliefs were protected by the *Code*. However, in the case at hand, it was not found that wearing a rainbow sticker was an essential practice that was protected by any *Code* grounds.

Key Takeaways for Employers and Workplace Investigators

With increasingly diverse workforces, employers are often required to balance many competing interests: namely, the policy requirements of their organization, with the *Code* protections available to its employees. This case therefore provides helpful guidance about the limits to *Code*-based discrimination.

When assessing whether a particular policy or practice amounts to discrimination,

employers and workplace investigators may wish to consider the following:

- **What is the rationale?** Is there a legitimate, non-discriminatory business reason for the policy or practice?
- **Is there consistency?** Has the policy been applied equally to all employees?
- **What are the effects?** Consider the ultimate effects of differential treatment that may result from the policy or practice. Namely, will it create a disadvantage, perpetuate a stereotype, or limit opportunities for a protected group? Alternatively, will the differential treatment impact an integral characteristic, belief, or practice of that protected group (such as in the above-referenced case regarding praying in schools)?
- **Was the protected ground a factor in the differential treatment?** It has been long held that it is not necessary to prove an intent to discriminate, nor does the protected ground need to be the sole reason for differential treatment. Rather, discrimination is established if, on a balance of probabilities, the protected ground was simply a factor in the differential treatment.

While discrimination continues to be a complex topic, Zanette provides valuable insight on how organizations can respect the *Code*-protected rights of their employees, while still adhering to internal policies and practices.

Footnotes

1. 2024 HRT0 998.

3. *Peel Law Association v. Pieters*, 2013 ONCA 396.

3. *Amir and Siddique v. Webber Academy Foundation*, 2020 AHRC 58, upheld in *Webber Academy Foundation v. Alberts (Human Rights Commission)*, 2023 ABCA 194.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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