Pronouns Are Not Preferences: Human Rights Tribunals Weigh In On Pronoun Use In The Workplace



The rights and freedoms of trans people[1] currently dominate certain news cycles, and for good reason. The American Civil Liberties Union is tracking 118 anti-trans health care bills in the U.S., along with a variety of trans athlete bans, public accommodation bans, and education gag orders about gender identity and expression.[2] Here in Canada, we are experiencing a surge of anti-trans hate,[3] including increasingly intense protests against drag story times across Ontario.[4]

Anti-trans sentiments are not new to Canada, but openly trans people are increasingly questioning what protections are afforded to them in society generally, and in the workplace specifically. In this blog, I discuss two insightful human rights tribunal cases regarding unacceptable workplace conduct related to trans people in the workplace. Specifically, the impact of failing to use proper pronouns.

EN v. Gallagher's Bar and Lounge, 2021 HRTO 240 ("*Gallagher's Bar*")

Gallagher's Bar is a 2021 decision[5] in which *the* Human Rights Tribunal of Ontario (the "HRTO") found that an employer discriminated against three employees on the basis of their gender identity, gender expression, and sex by misgendering them and refusing to use their proper pronouns. Each of the three applicants worked at Gallagher's Bar and Lounge and used they/them pronouns. The applicants specifically requested that the bar's owner, their employer, use their proper pronouns, but he would not. He also used an anti-trans slur when he spoke to customers about the applicants, and in so doing, "outed" the applicants, which caused them to fear for their safety.

When the owner was confronted by the applicants about his misgendering, he denied doing so and did not appropriately address the matter. Rather than dealing with the applicants' concerns, for example, through an investigation, the owner trivialized the issue and "insinuated that the applicants were being oversensitive about his improper use of their pronouns." The HRTO described the owner's response as "shocking and hurtful."

The HRTO found that the owner discriminated against the applicants because of their gender identity, gender expression, and sex. The HRTO found that by misgendering the

applicants and by using incorrect pronouns, the bar owner subjected the applicants to adverse treatment in their employment, and awarded significant damages, in addition to lost wages.

This decision confirms that employers must use proper pronouns, and that employers must take employees' concerns seriously regarding discrimination and harassment. A failure to address such concerns, for example by investigating such matters, could lead to significant legal issues and liability.

Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria and others, 2021 BCHRT 137 ("*Goodberry*")

Goodberry is also a 2021 decision in which the British Columbia Human Rights Tribunal ("BCHRT") found that an employer discriminated against a former employee in the course of their employment on the basis of gender identity and gender expression because of a failure to use proper pronouns and the use of gendered nicknames. The complainant was a former employee of the Buono Osteria restaurant who used they/them pronouns. The complainant shared their pronouns with the general manager and had informed him about the importance of being properly gendered. The general manager followed this direction and corrected staff who used incorrect pronouns. The bar manager, however, refused to use the correct pronouns; he used incorrect pronouns and gendered nicknames, such as "sweetie" and "honey." Although both the executive chef and the general manager spoke to the bar manager about his behaviour, he continued using incorrect pronouns. Following a heated dispute with the bar manager about his persistent misgendering, the general manager ultimately terminated the complainant's employment, leading them to file a human rights complaint with the BCHRT.

The BCHRT awarded significant damages to the complainant and ordered the employer to implement a pronoun policy and mandatory diversity, equity, and inclusion training. The BCHRT framed proper pronoun usage as a "basic obligation" and "not an 'accommodation'." That is, trans people should expect to have their gender identities and gender expression respected without having to ask for an accommodation. The BCHRT also found that the employer failed to investigate and respond to the discriminatory conduct after the bar manager refused to use the complainant's correct pronouns.

In its decision, the BCHRT stated, **"Like a name, pronouns are a fundamental part of a person's identity. They are a primary way that people identify each other. Using correct pronouns communicates that we see and respect a person for who they are."**

The principles outlined in the *Gallagher's Bar* and *Goodberry* decisions are significant for workplace investigators who investigate gender-based discrimination allegations. Both decisions send a clear message that gender identities or gender expressions communicated by employees must be respected. The key takeaway is that using proper pronouns is not an accommodation, it is a basic right and is a fundamental part of a person's identity. While neither Ontario nor British Columbia human rights legislation specifically refers to misgendering or the incorrect use of pronouns as a form of discrimination, these decisions confirm that misgendering and incorrect pronoun usage may constitute adverse treatment amounting to discrimination in the workplace.

As investigators, we know that most workplace harassment policies prohibit conduct which respondents "know or reasonably ought to have known to be unwelcome." Where the evidence establishes that the complainant or others informed the respondent that their actions were not welcome, and they nonetheless continued the behaviour, it may be relatively easy to find that the respondent knew that the employer's policy prohibited the behaviour. The analysis can become more difficult and nuanced where

the respondent says that they did not realize that their conduct was unwelcome or inappropriate. In such cases, the behaviour itself may provide an answer, such as physical violence or intimidation, yelling, or use of discriminatory slurs. But other conduct such as playful name calling or swearing, when both parties commonly use foul language with each other, have fewer clear answers and require thorough analysis.

The *Gallagher's Bar* and *Goodberry* decisions suggest that correct pronoun and name usage falls squarely within the "reasonably ought to have known to be unwelcome" category. That is, employees and managers should reasonably know that incorrect pronoun and/or name use is unwelcome behaviour and more akin to yelling than swearing in a workplace where foul language is commonly used by all parties.

Footnotes

1. I use the terms "trans" throughout this blog as an umbrella term encompassing transgender, gender non-conforming, non-binary, gender fluid, and gender queer people.

2. "Why and How Trans Hate is Spreading" (April 27, 2023), online (podcast): ACLU <https://www.aclu.org/podcast/why-and-how-trans-hate-is-spreading>

3. Andrea Bellemare, Kit Kolbegger, and Jason Vermes. "Anti-trans views are worryingly prevalent and disproportionately harmful, community and experts war" (November 7, 2021), online: CBC News <https://www.cbc.ca/news/canada/anti-transgender-narratives-canada-1.6232947>

4. See, for example : Isha Bhargava, "Supporters outnumber protesters at drag queen storytime in Woodstock, Ont." (March 16, 2023), online: CBC News <https://www.cbc.ca/news/canada/london/supporters-outnumber-protesters-at-drag-queen-storytime-in-woodstock-ont-1.6781291>; Brent Lale, "Female biker group steps in to protect drag queen story time in Parkhill, Ont." (April 29, 2023), online: CTV News <https://london.ctvnews.ca/female-biker-group-steps-in-to-protect-drag-queen-story-time-in-parkhill-ont-1.6377062>; and Colette Derworiz, "Drag community gets support at public library story times after escalating protests" (April 10, 2023), online: The Star <https://www.thestar.com/news/canada/2023/04/10/drag-community-gets-support-at-public-library-story-times-after-escalating-protests.html>.

5.For a more in depth look at this case, see my colleague's blog: Alison Griggs, "Pronouns in the workplace" (July 12, 2022), online: RT Insights <https://rubinthomlinson.com/pronouns-in-the-workplace/>.

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