



# Employment Law

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## Does Human Rights Law Discriminate?

Several years ago, we surveyed our students. Ninety-three of them said all forms of discrimination were illegal and bad. This is, sadly, one of the great misunderstandings of our time.

To *discriminate* is to simply choose between more than one alternative. By far, most of our choices each day involve discriminating between alternatives. It is necessary to discriminate in order to survive. Not long ago, to have *discriminating* taste or judgment was to possess a valuable gift. The verb *discriminate* has taken on a meaning that is almost always negative in our culture. But only that extremely narrow band of discrimination which the law has deemed to be illegal is wrong.

This column considers another misconception about the prickly and near-sacred topic of discrimination in employment. Could it be that our human rights anti-discrimination legislation is itself discriminatory?

All Canadian jurisdictions have passed human rights legislation. No employer may make any job-related decision with regard to any employee (or prospective employee) that is based on certain personal characteristics.

These lists of personal characteristics are called *prohibited grounds of discrimination* in employment. In the United States, the same lists are called *protected classes*. If the personal attribute is on the list, the employer must be blind to it. One cannot consider that attribute in any decision unless the attribute can be clearly demonstrated to relate objectively to the job. For example, if fire fighting requires extraordinary physical strength to do the job, fire departments might justify fitness testing that disproportionately screens out disabled, elderly, or female prospects. Likewise, safety concerns in a construction site might override religious beliefs if the worker will not wear a hard hat.

Alberta's statutory list is typical: race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, and family status. British Columbia's list adds political belief and criminal conviction. Ontario's list includes citizenship, creed, and record of offences.

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These attributes are expressed in exclusive terms, as a closed category, in the legislation. Attributes not on the list were presumably *permitted* grounds of discrimination. However, the Supreme Court of Canada has added prohibited grounds to the list — even if the legislature has purposely decided against including it — to protect *historically disadvantaged* groups. For example, the Court has read in *sexual orientation* as a prohibited ground of discrimination in all legislation.

No employer advertisements may stipulate a favour or disfavour that relate to any of these attributes nor can it ask any questions about the attributes in an interview. The only exception is where they relate to *bona fide* job requirements. Complaints are free. They go to the Human Rights Commission and sanctions for these human rights violations can be broad.

Equality through non-discrimination is a social construct, given effect through law. The model which Canada has chosen to use is the *prohibited grounds of discrimination* framework. It is thought to provide more specificity and efficacy than simply to legislate that *everyone is equal before and under the law*. However, one might ask whether the list of prohibited grounds of discrimination is itself discriminatory.

We believe that the three independent and essential criteria for inclusion in *the list* of legislated prohibited grounds are:

- *visibility* of the attribute — if an employer cannot see the attribute in an employee without being told about it, the employer cannot consider that attribute favourably or unfavourably with respect to that employee. This explains the reference to *visible minorities*. One cannot discriminate on the basis of something one does not know;
- *permanence* and powerlessness over the attribute — there are many personal qualities that an employer can see but which the employee could easily, and would be reasonably expected to, change. For example, one might have poor personal hygiene, a bad taste in fashion, or suffer from chronic tardiness. These can all be changed. One cannot, or would not be expected to, change one's race, gender, or religion to get or retain a job; and
- *reasonable likelihood that the attribute will be taken into consideration*, positively or negatively, in decision-making about an individual. Freckles and left-handedness are visible and permanent but they are not attributes that an employer would normally discriminate upon.

All three criteria must be present to rationally justify inclusion in the list of prohibited grounds of discrimination.

If we compare the current lists of prohibited grounds of discrimination against

# Another Viewpoint

these three criteria, we will find some which do not warrant being there. For example, ancestry, place of origin, ethnic origin, and race seem unnecessarily duplicative. In contemporary multicultural Canada, is one's *ancestry* or *place of origin* really visible and a factor in employment decisions compared to race or ethnic origin? Is sexual orientation visible? What about religion? In Ontario, why are *citizenship* and *record of offences* not relevant in every employment? One might argue that they should be permitted grounds of discrimination.

More problematic are the personal attributes which meet all three tests but which are not on the list. These include height, looks, personality, body type, intelligence, shyness, obesity, and ideology. People are advantaged and disadvantaged on these grounds every day, and such discrimination is entirely legal. Should we not in equal portion care about these others that suffer invidious discrimination for attributes that they also cannot change?

If short men, for example, want to be formally protected from discrimination in the legislation, they would have to mount a political campaign to have the legislation amended to include height as a prohibited ground of discrimination in each jurisdiction, or to convince the Supreme Court that they have been historically disadvantaged. Both recourses are extremely time consuming and expensive. There is unlikely to be sufficient data or public sympathy for them to succeed. Yet we know that attributes such as short height (especially for men), shyness, intelligence, body type, and unattractive looks are factors which, intentionally or subconsciously, are measured against employees every day.

Social engineering sometimes leads to absurd results. Since all human beings are different in so many ways, a complete list would be logically infinite so as to include every human attribute. Any list prescribing some prohibited grounds is theoretically unsound. Ultimately it would be more fair, and less discriminatory, to declare that all individuals are equal before and under the law and leave it at that.

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