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EVANGELICAL CHRISTIAN ORGANIZATION ACCOUNTABLE FOR DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION, TRIBUNAL HOLDS

The Ontario Human Rights Tribunal has held that a religious service organization, Christian Horizons, discriminated against a lesbian employee when it treated her adversely because of her sexual orientation. As a term and condition of employment, the organization required employees to sign a Doctrinal Statement and a Lifestyle and Morality Statement which, in part, prohibited homosexual relationships. The Tribunal decided that this requirement did not fall within the "special employment" provisions of section 24(1) of the Human Rights Code, which carves out an exemption for religious organizations from the obligation to afford equal treatment with respect to employment under section 5 of the Code.

The Facts:

Funded by the Ontario Ministry of Community and Social Services, Christian Horizons, a not-for-profit corporation which self-identified as an Evangelical Christian ministry, had as its primary purpose the provision of care and support for individuals with developmental difficulties.

Central to Christian Horizons' vision were articles of faith expressed in a Doctrinal Statement which all Board members and employees were required to adopt and sign. Similarly, employees were required to adopt and sign a Lifestyle and Morality Statement which, in part, prohibited homosexual relationships.

Connie Heintz, a devout Christian, commenced employment with Christian Horizons in 1995 as a support worker at a community living residence in Waterloo, Ontario. During her employment with Christian Horizons, she became aware of her sexual orientation as a lesbian. In 1999, she confided to two of her co-workers her new awareness of her sexual orientation and subsequently she became involved in a same-sex relationship with an individual who was not an employee at Christian Horizons. When confronted by her supervisor, Heintz did not deny she was a lesbian nor did she deny that she was in a same-sex relationship.

At a meeting between Heintz and her supervisor, in April 2000, Heintz testified that she was told that she would have to find alternative employment as a result of her non-compliance with the Lifestyle and Morality Statement. Heintz also testified that she was offered "counseling," which she believed was an effort to try to change her sexual orientation. In June 2000, Heintz's supervisor received an occurrence report from one of Heintz's co-workers to whom she had confided her sexual orientation. Within the report were allegations of abuse by Heintz towards a resident. At the time of the occurrence, Heintz was not informed of the allegations made against her.

Following the allegations of abuse, Michael Alemu, Administrator of District Services, West Region, held a number of one-on-one meetings with the staff at the residence in which Heintz was employed. The purpose of the meetings was to discern any conflicts, issues, disagreements or disputes that were affecting the program. Following these interviews, Alemu established a formal inquiry regarding the abuse allegations, and Heintz was suspended with pay pending the investigation. The results of the investigation were inconclusive, although Heintz received a disciplinary letter for her behaviour during the staff interviews carried out by Alemu, at which she expressed her concern about the unfair manner in which he was conducting his inquiry and allegedly stated that the organization was "biased and hypocritical." Following her suspension, Heintz returned to work on July 12, 2000, but by the end of August 2000, she testified that she was so stressed that she was unable to perform her job effectively. On August 28, 2000, Heintz went on medical leave and on September 22, 2000 she resigned from her employment with Christian Horizons.

On January 22, 2001, she filed a complaint with the Ontario Human Rights Tribunal, claiming that she had been discriminated against on the basis of her sexual orientation with respect to employment in violation of sections 5(1) and 9 of the *Human Rights Code*.

The Arguments:

The Commission and Heintz argued that Heintz was terminated from employment because of her sexual orientation, and that the requirement that all employees sign the Lifestyle and Morality Statement breached the *Code*. They submitted that the manner in which Heintz was treated, after she disclosed that she was a lesbian, also constituted discrimination on the basis of sexual orientation.

Christian Horizons conceded that the Lifestyle and Morality Statement discriminated on the basis of sexual orientation. However, it maintained that it fell within the "special employment" provisions of section 24(1)(a) of the *Human Rights Code*, which provides:

The right under section 5 to equal treatment with respect to employment is not infringed where

(a) a religious, philanthropic, educational, fraternal or societal institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment.

The Decision:

Tribunal Chair Michael Gottheil upheld the complaint. He determined that Christian Horizons violated sections 5(1) and 9 of the *Code* and further, that section 24(1)(a) did not apply to the employer.

After reviewing "special employment" provisions in Quebec's *Charter of Human Rights and Freedoms* as well as British Columbia's *Human Rights Code*, Gottheil stated that the approach to be taken with respect to section 24(1)(a) required an organization to "bring itself within the class of organizations ... to which that section applies ... It must also establish it is primarily engaged in serving the interest(s) of persons identified by one of the prohibited grounds of discrimination and it seeks to restrict employment to persons similarly identified. Then, and only then, can it rely on a claim that the qualification is justified by the nature of the employment."

Gottheil considered four elements in the section 24(1)(a) analysis: 1) Was Christian Horizons a religious organization? 2) Was Christian Horizons primarily engaged in serving the interests of persons identified by their creed? 3) Did Christian Horizons employ or give preference in employment to persons similarly identified? and 4) Was the qualification (the restriction in employment to persons similarly identified by creed) a reasonable and *bona fide* qualification because of the nature of the employment?

With respect to the first question, Gottheil noted that the fact Christian Horizons defined itself as an Evangelical Christian organization was not determinative. However, factors such as the characteristics of the organization's membership (i.e. people of Christian faith), the long-standing Doctrinal Statement, the conduct of meetings which commenced with devotionals and prayers, and religious dedication services held when new programs were opened, persuaded Gottheil that Christian Horizons was a religious organization. This determination was not altered by the fact that Christian Horizons was a social service agency which received its funding from the Ontario Ministry of Community and Social Services.

Gottheil discussed the second and third questions in the section 24(1)(a) analysis together. He held that "creed" does not have to be restricted to a particular denomination, stating: "Creed' has been held to be synonymous with 'religion', and has included trans-denominational organizations." He added: "What identifies a creed is a set of sincerely held religious beliefs and practices. These beliefs and practices need not be based on the edicts of an established church or particular denomination." Gottheil concluded: "Christian Horizons identifies as a community of individuals who are called to minister to persons with developmental difficulties. It sees itself as a community of Christians, but it is distinctive; it is a community of Christians who are prepared to adopt and live by the Doctrinal Statement and the Lifestyle and Morality Statement. Those statements set out the tenets of faith of the organization and its faith beliefs. Christian Horizons seeks to restrict employment to persons who are identified by their willingness to adopt and sign those Statements. Those statements define the creed."

With respect to the third question in the section 24(1)(a) analysis, Gottheil noted that Christian Horizons employed or gave preference only to persons "similarly identified" by a common creed. In so finding, Gottheil acknowledged that Christian Horizons restricted employment to those individuals who were prepared to adopt and sign the Doctrinal and Lifestyle and Morality Statements.

In Gottheil's view, the second question in the section 24(1)(a) analysis was difficult to answer. Rejecting the finding in *Parks v. Christian Horizons* (No. 1) (1992), 16 C.H.R.R. D/40, in which a Board of Inquiry had determined that Christian Horizons was primarily engaged in serving two sets of interests – the Evangelical Christian interests of its founding and current members and the interests of the residents and their families – Gottheil found that the "primary object and mission of Christian Horizons is to provide care and support for individuals who have developmental difficulties, without regard to their creed." Further, he determined that "[t]he primary undertaking of Christian Horizons, the operation of community living programs, has as its main purpose, the provision of residential support services for persons of disabilities regardless of their faith background.... [T]he Ministry does not fund Christian Horizons as a Christian service provider. Christian Horizons does not give preference to individuals coming from Christian families."

Indeed, the evidence demonstrated that the residents came from a range of Christian and non-Christian faith backgrounds and that those who lived at Christian Horizons did not necessarily do so because of the faith beliefs of the organization. Regarding the second question, Gottheil therefore concluded: "Christian Horizons has not established [that] it meets the second element of section 24(1)(a). I accept that, as a religious organization, it provides opportunities for persons who identify as Evangelical Christian to come together to live out a deeply felt religious calling, either as members, volunteers or employees, and in this way the organization serves the interests of persons identified by a common creed. But the totality of the evidence, whether viewed subjectively or objectively, and a plain reading of section 24(1)(a), does not support a finding that Christian Horizons is *primarily* engaged in serving the interests of persons who are adherents to its articles of faith as expressed in the Doctrinal Statement and the Lifestyle and Morality Statement." [emphasis added]

Gottheil considered the third question in the section 24(1)(a) analysis even though he had answered the second question in the negative. Within this inquiry, Gottheil examined whether the qualification (the restriction in employment to persons similarly identified by creed) was a reasonable and *bona fide* qualification because of the nature of the employment. He did not accept that the requirement for employees to sign the Lifestyle and Morality Statements was a reasonable and *bona fide* qualification due to the manner in which it developed. He held: "In adopting the qualification, no real effort was made to examine whether the requirement was in fact reasonably necessary or whether the employment could be performed without the discriminatory restrictions."

In analyzing whether the Lifestyle and Morality Statement was a reasonable and *bona fide* qualification, Gottheil reviewed the two-part test used in special employment cases which was first articulated in *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 ("*Etobicoke*"), which requires an employer seeking to bring itself within the "special employment" exception to demonstrate (i) that the requirement has been imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved; and (ii) that it is related in an objective sense to the performance of the employment concerned, in that it is "reasonably necessary" to the performance of the job.

In adopting this test, Gottheil rejected the notion that the three-part test in *Meiorin* has displaced the traditional approach in "special employment" cases set out in *Etobicoke*, noting that "the objective element of the *bona fide* and reasonable test consistently used in special employment cases is more stringent, requires greater scrutiny, and invokes a more detailed analysis than the first step of the ... approach proposed in *Meiorin* [requiring an employer to show that the standard or requirement has been adopted for a purpose rationally connected to the performance of the job]. Not only must the qualification be rationally connected to the nature of employment in a general sense, but it must be objectively 'appropriate' and 'reasonably necessary' to the performance of the job." Gottheil concluded: "In every case in which a court or tribunal has considered a special employment provision, and was called upon to consider whether a qualification was '*bona fide* and reasonable,' it has had reference to the two-part test articulated in *Etobicoke*. In my view there is no basis for adopting a less stringent objective test."

Applying the *Etobicoke* test, Gottheil acknowledged that Christian Horizons satisfied the subjective part of the *Etobicoke* test: it sincerely and honestly believed that the qualification was necessary for the performance of the employment. With regard to the objective element of the

Etoibicoke inquiry, Gottheil found: "There is no evidence [that] Christian Horizons ... turned its mind to whether any of the particular provisions of the Lifestyle Statement were reasonably necessary, in an objective sense, given the objects of the organization, the nature of the services being provided, and the duties of the particular positions." In reaching his conclusion that the final stage in the 24(1)(a) analysis was not met, Gottheil wrote: "An employer must engage in a meaningful process to consider whether the qualification is 'appropriate' and 'reasonably necessary' given all the circumstances. Otherwise, there is no balancing of rights. There is only the trump by one set of rights based on an assertion that it is necessary to discriminate."

After concluding that Christian Horizons was not exempt under section 24(1)(a) of the *Code*, Gottheil explored whether Christian Horizons created or permitted a poisoned work environment or otherwise discriminated against Heintz. In this regard, he concluded that Heintz's rights were violated as a result of the work environment and the manner in which she was treated once her sexual orientation came to light. Gottheil found three bases for such discrimination: "a) Suggesting Ms. Heintz seek counseling in order to effect 'restoration'; b) Creating or permitting a poisoned work environment in which rumours and discriminatory attitudes were allowed to pervade the workplace, and taking no steps to remedy the harmful effects on Ms. Heintz; c) Acting on discriminatory views in matters of human resources."

With regard to the Tribunal's remedial powers in a discrimination case, Gottheil made the following observations: "[T]he purpose of the *Code* is remedial, not punitive. Orders should provide fair and effective remedies for the victims of discrimination. In addition, the *Code* has a purpose to eradicate discrimination and remove discriminatory barriers and policies. In this regard, remedies should be crafted in a way to best ensure the discrimination will not reoccur and the underlying policies or behaviour that resulted in discrimination are removed. Human rights remedies can also have an important educational value, both for the parties to a complaint, and for the broader public." He further stated that, "[i]n order for remedies to be fair and effective, they must be tailored to the particular facts of the case.... [T]he remedy must flow from the violation that has been found and must be designed to further the remedial purposes of the *Code*."

Under the category of personal remedies, Gottheil distinguished between general damages and special damages. Regarding general damages, Gottheil declared: "These awards should not be so low as to trivialize the violation or amount to a 'licence fee' to discriminate.... Awards should focus on the effect of the discrimination on the complainant. No evidence of malice is required although the existence of an intention to discriminate may impact on the seriousness of the violation and the harm suffered by the complainant." For the violation resulting from the imposition of the Lifestyle and Morality Statement, Gottheil awarded \$8,000 in general damages. He concluded that the discrimination was "serious and harmful." Gottheil noted that he considered awarding a higher amount in general damages but part of the stress suffered by Heintz was as a result of her "own crisis of faith." As a consequence of the poisoned work environment created or permitted by Christian Horizons, Gottheil ordered \$10,000 in general damages. A further amount of \$5,000 was awarded for mental anguish caused by actions that were "willful and reckless."

As for special damages, Gottheil pointed out that "a complainant is entitled to be compensated for monetary losses suffered as a result of the breach." Acknowledging that complainants have a duty to mitigate their losses, Gottheil reviewed Heintz's employment record following her resignation from Christian Horizons. He then awarded Heintz compensation for all wages and benefits she would have received from September 23, 2000 (i.e. the date she resigned) to July 12, 2002 (i.e. the date she commenced full-time work), less any monies she received elsewhere during that period. Both pre-and post-judgment interest were also awarded.

With respect to public interest remedies, Gottheil noted that such orders should be "broad, creative and effective." He further stated that, "where a remedy will be effective in achieving equality and the protection of human rights, human rights tribunals should not hesitate to make orders that require significant policy or operational changes, the adoption of particular programs, or measures that carry a heavy price tag. The object of the remedial order is to remove discrimination in a real, meaningful, effective and timely way." Considering the remedy in relation to the poisoned work environment, Gottheil ordered that Christian Horizons adopt an anti-discrimination and anti-harassment policy, as well as a training program regarding human rights issues. In regard to Christian Horizons' discriminatory qualification, Gottheil ordered that it cease and desist from imposing the Lifestyle and Morality Statement as a condition of employment.

Comment:

The Human Rights Board of Inquiry (a predecessor to the Tribunal) ruled in *Parks v. Christian Horizons (No. 1)* (1992), 16 C.H.R.R. D/40 (unreported) that Christian Horizons did not fall within the special employment exemption in the *Code* because "it did not consistently apply lifestyle standards, nor were those standards clearly communicated to individuals when they were hired." In response, the organization subsequently required all employees to agree to lifestyle standards as a part of their contract of employment. Despite this fact, Gottheil found in this case that Christian Horizons failed to show that it had "turned its mind to whether any of the particular provisions of the Lifestyle Statement were reasonably necessary, in an objective sense, given the objects of the organization, the nature of the services being provided, and the duties of the particular positions."

In Gottheil's review of the special employment cases where organizations have been successful in bringing themselves within the exemption, he noted a number of common themes in the jurisprudence:

First ... most deal with religious schools where the persons served (students and families) were all adherents to the creed of the organization, and the purpose of the organization was religious indoctrination, education and formation. Second, the job of the employee to whom the qualification applied was to carry out the religious indoctrination, education and formation. Third, the organizations were either private, or publicly funded religious schools which enjoyed Constitutional protection.... [Also,] ... there is typically an identity between the characteristics of the members of the organization and the characteristics of the individuals who are served by the organization.

These decisions adopt a narrow interpretation of s.24(1)(a) of the *Code*. This reading of what amounts to a statutory exception, Gottheil explains, is in keeping with the anti-discrimination purpose of the legislation:

The legislation allows a distinction in employment, which would otherwise be discriminatory, in order to facilitate and enhance service to, or promote the welfare of, a particular group or population, not to permit an organization to employ only members of its own community.... An employer must engage in a meaningful process to consider whether the qualification is 'appropriate' and 'reasonably necessary' given all the circumstances. Otherwise, there is no balancing of rights. There is only the trump by one set of rights based on an assertion that it is necessary to discriminate.

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