Workplace Rights: A Guide to the PEI *Human Rights Act* for Employers and Employees

Prince Edward Island
Human Rights Commission

HUMAN RIGHTS
DROITS DE LA PERSONNE

Commission des droits de la
personne de l'Î.-P.É.

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Workplace Rights: A Guide to the PEI *Human Rights Act* for Employers and Employees

Introduction

The Prince Edward Island *Human Rights Act (the "Act")* protects the inherent dignity and worth of every human and provides for equal rights and opportunities free of discrimination. The *Act* prohibits discrimination in employment on the following grounds: age, association, color or race, creed or religion, ethnic or national origin, criminal conviction, family status, marital status, physical or intellectual disability, political belief, sexual orientation, source of income, sex (including pregnancy and sexual harassment) and having filed a complaint or given assistance under the *Act*.

It is advantageous for an employer- employee relationship and thus an enterprise to be free from prejudice and discrimination. An effective workplace is developed and maintained by an employer's efforts in providing equal access to employment opportunities and equitable treatment for all in the workplace.

This guide is published by the PEI Human Rights Commission to increase awareness of human rights issues pertaining to employment according to the PEI *Human Rights Act*.

The information outlined in this booklet is intended to act as a general and educational reference for employers and employees on key areas of concern in the protection of human rights and dignity for all in the workplace.

Part I: The PEI *Human Rights Act*: Employer and Employee Rights and Responsibilities

Employee's Rights

Employees are entitled to a workplace that preserves their human dignity and is free from discrimination and harassment, and a workplace where each employee's abilities, rather than inabilities, are the focus. Employees are entitled to be considered on an individual basis and not to be excluded because they belong to a particular group.

Employees have the right to a positive work environment which enhances open dialogue concerning the needs of employees and employment policies that strive to accommodate these needs.

Specifically, the PEI *Human Rights Act* prohibits the following forms of discrimination in employment.

Section 6.1 Refusing to employ, or continue to employ an individual based on a discriminatory ground (i.e. hire, promote, dismiss.)

Section 6.1 (a) Placing terms or conditions on employment that are discriminatory (i.e. religious holidays, harassment, poisoned environment)

Section 6.3 Advertising for a job that excludes or only includes certain groups

Section 7 Paying different rates of pay for equal work based on a discriminatory ground

Exceptions

Section 6 (4)(a) and 14 (1)(d) A genuine occupational qualification

Example: A server at a licensed restaurant must be of legal provincial drinking age (19 in PEI).

Section 6 (4)(c) When special government programs are designed and put in place to promote the welfare of certain groups.

Example: Youth Employment Programs

Employee Responsibilities

Employees have the responsibility to an employer to be punctual, and to behave in a respectful and productive manner which meets and exceeds the requirements of the job description outlined by the employer.

Discrimination in Pay

The PEI *Human Rights Act* states that an employer shall not discriminate between employees by paying one employee less than another for substantially the same work requiring the same level of education, skill, experience, effort and responsibility, and is performed under similar working conditions. When the jobs are "substantially the same," the employer must pay the same rate of pay without regard to age, sex, or any other prohibited ground of discrimination.

Exceptions

- Seniority System: Employees who have been employed with the employer longer or have more experience may receive higher pay.
- Merit System: Employees may be rewarded for their work through a pay raise.
- Quantity or Quality system: Wages may be based on the quantity or quality of production or measure of performance.

Employer's Rights

Employers have the right to set clear definitions of job descriptions and the requirements and qualifications of employees in fitting a particular job description, and business priorities. An employer also has the right to hire the most qualified person for the job regardless of the grounds of discrimination outlined in the Prince Edward Island *Human Rights Act*.

A positive work environment is one which embodies principles of mutual respect for diversity and equitable treatment for all. The development of this type of positive work environment should be a cooperative effort between the employer and employee in respecting one another's rights. If both sets of rights are pursued in a genuine, conscientious, and active manner, the goal of creating a positive work environment characterized by mutual respect and equality may be better achieved.

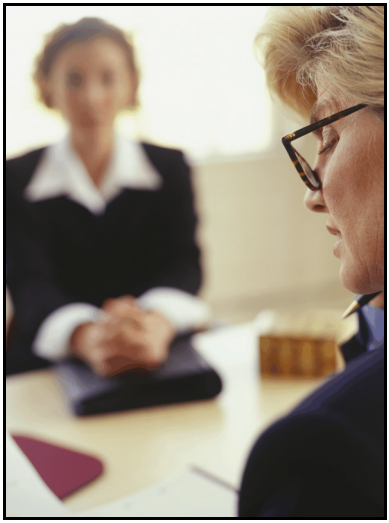
Employer Responsibilities

An employer has comprehensive responsibilities, including:

- a work environment that permits open communication and dialogue
- duty to accommodate
- policies and policy implementation plans to enhance workplace rights such as a sexual harassment policy
- equal pay for equal work
- awareness of legislation which pertains to employment (i.e. *Employment Standards Act*, the *PEI Human Rights Act*)

These responsibilities will be discussed further throughout this guide.

Part II: Employment Hiring and Recruitment



Effective Interview Guidelines

Employers must understand that in order for the employment recruitment process to be free of discrimination, employment advertising, interviews, or other considerations in hiring, or promotion must be based solely on a person's qualifications and not on a discriminatory ground. Therefore, questions that indicate a preference on a prohibited ground in the pre-employment interview process are contrary to the PEI *Human Rights Act*. However, after an individual is hired, some of these questions must be asked for informational and administrative purposes.

Additionally, it is important to note that sometimes an employer is entitled to ask questions regarding the discriminatory grounds outlined in the *Act*. For instance, the job description may be attached to a genuine occupational qualification (See page 15).

Additionally, if the employment is related to a specific government program which is in place to facilitate and promote the welfare of individuals from certain groups, employers are entitled to ask questions to determine an individual's eligibility.

The following are guidelines indicating the types of questions which may or may not be asked during the employment recruitment and post-employment pursuant to the PEI *Human Rights Act*:

Age

Age discrimination or ageism is when a person is treated differently due to his or her age. The PEI *Human Rights Act* does not dictate an upper or lower limit on the protection of age discrimination.

- An employer may not ask a person's birth date or age unless it is specifically related to a genuine occupational qualification of the job. For instance, an employer may ask if a person is of legal age to work within PEI, as well as if a person fits the legal age to serve alcohol in PEI.

Association

Discrimination based on association means a person is being discriminated against because of his or her affiliation with people who share characteristics of those protected by the other grounds set out in the *Act*.

- An employer may not ask or refer to a potential employee's affiliation with any individual or group identified by the other grounds of discrimination.

Race or Colour

Discrimination based on race or physical characteristics of a particular race, such as the colour of another's skin, is discrimination.

- An employer may not ask for photos to be attached to an employment application when doing so would identify a person as being associated with certain racial group or colour.

Ethnic or National Origin

A person's ethnic and national origin relate to characteristics such as birthplace, language, race, culture, religion, or other shared cultural characteristics.

- Inquiries about place of birth, nationality, race, color or citizenship are inappropriate interview questions.
- An employer may ask if a person is legally entitled to work in Canada.

Sex or Gender Identity (Including Pregnancy and Sexual Harassment)

This ground relates to an individual's biological sex as well as gender identity. The *Act* protects against discrimination based on society's expectations of how women or men "should" dress, behave, or act, and includes protection for people who are transgendered, transsexual and two-spirited.

- An employer may not advertise for a particular employment opportunity based on a preferred gender (or any other relation to a discriminatory ground)
- An employer may not ask if you are pregnant, have children or plan to have a family.
- An employer may not harass or bully you due to your gender or pregnancy.

Creed or Religion

An individual's belief in a particular faith or shared belief system is protected under the PEI *Human Rights Act*.

- An employer may not ask or imply inquiry into an individual's religious affiliation.

Criminal Conviction

Discrimination based on criminal conviction is a protected ground under the *Act* and as such protects individuals in the area of employment. An employer may not refuse to employ a person due to their status as being once convicted of a summary or criminal offence.

- An employer may not ask about, refuse to employ or infer questions regarding a person's status as being convicted of a criminal offence unless the offence is specifically related to the job duties.

Example: A person with a driving conviction may be refused employment as a truck driver but not as a chef.

Family or Marital Status

Family Status relates to an individual's status of being related to someone whether biologically or through adoption. Marital Status is if an individual is married, single, widowed, divorced, or in a common-law relationship.

- An employer may not ask or imply inquiry into an individual's personal, marital status regarding being married, single, widowed, divorced, separated or living with a person of the opposite or same sex in a conjugal relationship.
- An employer may not ask questions relating to an individual's family status or if an individual is planning on having a family.

Physical or Intellectual Disability (Including Addiction and Drug and Alcohol Testing)

A physical or intellectual disability may result from an injury, illness, or birth defect. Under the PEI *Human Rights Act*, addiction to drugs and alcohol is also considered a disability due to its long term and dehabilitating effects. (See page 18).

- An employer may not ask about a specific diagnosis of a condition in an interview as it has no bearing on whether the individual is qualified for the particular job. As such, a potential employee has no duty to report specific medical conditions during the recruitment process.

- If the individual is hired based on merit and qualifications, it would then be appropriate to communicate medical conditions to the employer so the employer may accommodate the needs of the employee.

- An employer may not ask for an alcohol or drug test to be taken by a potential employee unless there is a genuine occupational requirement related to the job duties. (See pg. 16 on Disclosure of Medical Information).

Political Belief

Political belief is belief in a particular political ideology or affiliation with a political party registered under Section 24 of the *Election Act* (i.e. Liberal, Conservative, NDP, Green, etc.)

- An employer may not ask about an individual's political belief or affiliation with a political party or organization.

Sexual Orientation

Discrimination directed towards a person due to the sex which that individual finds physically or sexually attractive is protected under the *Act*. This ground protects individuals who identify with forms of sexual orientation including homosexuality, bisexuality and heterosexuality.

- An employer may not question, imply inquiry or refer to an individual's sexuality or the gender that individual finds physically or sexually attractive.

Source of Income

Source of income refers to where or how an individual obtains their income and usually refers to people receiving income from social assistance, Canada Pension or Employment Insurance.

- An employer should not inquire into the current source of income of the prospective employee unless there is a specific program in place designed for the welfare of certain groups.

Summary

An employer must recruit and hire an individual based on his or her qualifications and not whether they identify as or are associated with any of the protected grounds or characteristics covered under the PEI *Human Rights Act*. If an employer asks or implies inappropriate and discriminatory questions at the pre-employment stage, the employer is open to a complaint under the PEI *Human Rights Act*.

However, in a post- employment situation where an individual has been hired on the basis of qualifications and what they offer to the job, the employee is encouraged to communicate any medical condition that they require accommodation for to an employer.

During employment, if an employee identifies as belonging to, or sharing some of the characteristics outlined by the protected grounds within the Prince Edward Island *Human Rights Act*, it is the duty of the employer to accommodate the individual, to the point of undue hardship.

Example:

Alex is hired for a job in a fast paced serving position at a local restaurant. He was recently diagnosed with anxiety disorder yet neglects to communicate this to his employer. Shortly after, Alex experiences an anxiety crisis at work and is not able to return to work for several days. Alex's employer contacts him and Alex explains that he has a mental health condition. After knowing this information, Alex's employer schedules Alex for counseling sessions with the Employee Assistance Program.

If Alex had communicated his medical condition to his employer upon being hired, accommodation could have been provided to him. It is the duty of the employee to request the accommodation required and to provide the necessary medical notes.

Part III: Human Rights Employment Issues

Duty to Accommodate and Undue Hardship

Is it the responsibility of an employer to accommodate the needs of individuals protected by the Prince Edward Island *Human Rights Act* to the point of "undue hardship." To accommodate an employee may mean specific changes to the workplace environment, policies, and standards. It is the responsibility of the employee to request the accommodation required.

It is important for the employer to create an open communication policy. Such an environment encourages discussions between employer and employee regarding the accommodation of the employee's needs and how these needs may be met.

Although an employer has an obligation to provide reasonable accommodation, such accommodation is circumstantial and should be addressed on a case to case basis.

The following is a list outlining possible cases of accommodation which includes but is not limited to:

a. Granting time off work for religious holidays
b. Granting time off work for a parent to accompany a child to an appointment (e.g., medical, dental)
c. Modifying the workplace environment to accommodate an employee who uses a wheelchair
d. Modifying job description of employees to fit their abilities
e. Transferring an employee to a more suitable position
f. Offering rehabilitation programs or granting the time off for an employee to attend such programs

Undue hardship may be described as an action that would extend the employer's duty to accommodate to the point of an unreasonable burden on the employer. Some examples of undue hardship may include but are not limited to:

a. The accommodation affects safety and health concerns of the enterprise
b. The accommodation affects morale of other employees in the workplace
c. The accommodation affects the financial viability of the enterprise
d. The accommodation contravenes the collective agreement

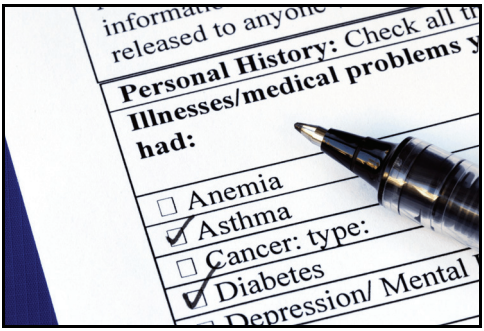
Ultimately, it is the employer's responsibility to prove the existence of undue hardship as a result of providing accommodation to an individual.

Exception

Accommodation may only be denied to an employee if a rule, standard, or practice within the workplace is based on a genuine occupational qualification. A genuine occupational qualification is a requirement necessary to perform the duties of the job correctly and safely. As such, an employee would have to meet this standard in order to fulfill the basic job duties. For instance, you must be 16 years of age or older to obtain a provincial driver's licence under the PEI *Highway Safety Act*.

Failure to accommodate an employee based on his or her needs as outlined in the *Act*, which is not justified by a genuine occupational qualification, is considered a direct contravention of the PEI *Human Rights Act*.

Disclosure of Medical Information in the Workplace



The process by which an employer obtains and responds to disclosed medical information of employees is a contentious matter which requires serious and complementary workplace policies to be developed and implemented in order to preserve human rights in the workplace.

An important factor is an employee's right to privacy. Due to the private nature of some psychological and physiological conditions, such conditions must not be divulged at the expense of an employee.

An employer does not have an unconditional right to full disclosure of an employee's medical situation. An employer may only request information as it relates to the specific job of the employee. An employer may not request medical information which is not employment related as it is a violation of the employee's privacy.

It is an employee's right to explicit confidentiality concerning the disclosure of private medical information. Therefore, an employer is not permitted to release medical information to anyone other than authorized staff who need it for a specific purpose. Any other communication of medical information is considered a violation of the employee's right to privacy.

It is an employer's right to be provided medical information from an employee's physician if the medical information concerns the accommodation of specific needs of an employee such as specific treatment plans which necessitate changes in the workplace in order to accommodate.

Drug and Alcohol Testing

Dependence on drugs or alcohol is a chronic, long term, and sometimes recurring illness. As such, substance abuse is covered under the PEI *Human Rights Act* under the ground of "physical and intellectual disability." Therefore, people with substance abuse/addictions are entitled to accommodation to the point of undue hardship.

When an employee has a substance abuse problem/addiction that is affecting job performance, the duty to accommodate still applies. Accommodation usually means an employer granting an employee leave to seek treatment and allowing them to return to the same position without discrimination. Accommodation does not however, include the employer allowing a worker to be on the job while under the influence, or continuing to employ an employee who refuses to seek treatment for his or her addiction.

The PEI *Human Rights Act* does not contain specific provisions concerning drug and alcohol testing in employment as this area of human rights is still developing. However, recent decisions have determined that it is a serious matter which must be addressed. Random drug testing is prohibited under human rights law. Yet, if there is a genuine occupational qualification related to the job, such as in safety sensitive positions, drug and alcohol testing may be permitted.

Part IV: Harassment and Bullying

Harassment

Harassment may be described as the unwelcome presence of comments and offensive jokes or pictures, to unwelcome physical contact in the workplace. Most human rights laws, including the PEI *Human Rights Act*, only cover harassment if the unwelcome behaviour can be linked to a prohibited ground of discrimination. The most common form of harassment that is covered under human rights law is sexual harassment. Under human rights law, sexual harassment is considered discrimination based on sex. Harassment can also be based on other grounds of discrimination, such as sexual orientation, race, age, physical or intellectual disability.

Consider this scenario:

> Sarah is Muslim and chooses to wear the niqâb (a veil which covers the face). Her office coworkers repetitively tease and berate her due to her apparel. Sarah is hurt by this behaviour as she finds it insensitive and intolerant. As such, it is affecting her confidence and work productivity and may be contrary to the *Human Rights Act*.

Consider this scenario:

> Ben is working in an office where his female colleagues are constantly making sexual jokes and references. He is not included in the jesting and it is not directed towards him. He finds the joking crude and offensive.
>
> Ben may be experiencing sexual harassment in his workplace. Although he is not the target of the jokes and references, these inferences created a poisonous and uncomfortable working environment for Ben.

What is considered significant in harassment complaints is not the intent of the alleged harasser but the effect the harassment has on the individual or group suffering from the harassment. Therefore, it is important to create a workplace environment based on mutual respect.

On PEI, the *Employment Standards Act* requires every employment agency to develop and make public a Sexual Harassment Policy. This allows employees the opportunity to see what measures are in place in order to report any sexual harassment grievances. Many employers are now including bullying or personal harassment in their Workplace Harassment policies.

Bullying

Workplace bullying is a type of abusive harassment which is comprised of (usually) repetitive, hurtful and intimidating behavior from one group or person to another. Bullying can be of either a psychological or physical nature.

Bullying in the workplace creates an uncomfortable work environment for the target of the bullying and may have drastic long term effects on the person as well as on an employer. Some of these effects may include:

a. negative emotional health
b. low employee morale
c. high turnover and training costs
d. low productivity
e. increase in absenteeism
f. damage to the public image of the employer/employment agency
g. violence

If bullying cannot be tied to a prohibited discriminatory ground, this means that the act of bullying is not covered by the PEI *Human Rights Act*. However, this behavior should not be taken lightly and should be discouraged because it creates the same negative environment for all in the workplace. Employers are encouraged to have policies in place to deal with these situations.

Part V: Contacting the Commission

If you require more information, you can contact the Prince Edward Island Human Rights Commission.

In Person:
53 Water Street, Charlottetown, PE

By Mail:
PEI Human Rights Commission
PO Box 2000
Charlottetown, PE C1A 7N8

By Telephone:
1 (902) 368-4180 or Toll Free in PEI only 1-800-237-5031

By Fax:
1 (902) 368-4236

By Email:
lbuell@peihumanrights.ca

Visit our Website:
www.peihumanrights.ca

Notes

The Prince Edward Island
Human Rights Commission
is an independent body.
The Commission investigates, attempts
to settle and make rulings on complaints
of discrimination that fall under the
PEI *Human Rights Act*.
The Commission is also mandated to develop
a program of public information and education
in the field of human rights.

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