Emerging Issues in Human Rights and Employee Benefits

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Human Rights and Employee Benefits

Overview:

1. Scope of the Human Rights Code
2. Insurance-related sections of the Code
3. Historic types of complaints
4. Emerging (or continuing) areas of complaint
5. Strategies
6. Questions
Scope of the *Human Rights Code*

*Human Rights Code*

- Quasi-constitutional legislation
- Paramount to other provincial legislation (unless other Code or Act is specific)
- Legislates protection from discrimination in the provision of services, the right to contract and in employment
- Prohibited grounds under the *Code* are race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability
The *Human Rights Code*

Insurance-Related Provisions

- Section 3 - prohibits discrimination in contracts (including insurance contracts)
- Section 5 - prohibits discrimination in employment (including employee benefit plans)
- “Group insurance” is defined at Section 10 as a single contract of life or life and disability insurance which insures a number of persons
- Section 11 - prohibits adverse effect discrimination
The Human Rights Code

Insurance-Related Provisions

- Section 22 - restrictions in insurance contracts (provides what is often described as a “defence” or “exemption”)

- Section 25 - restrictions in employment (another defence or exemption to discrimination)
The Human Rights Code

“Defences” or “Exemptions”

Section 22 - Restrictions for insurance contracts, etc.

The right under Sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of age, sex, marital status, family status or disability, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than employer, or life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and bona fide grounds because of age, sex, marital status, family status or disability.
The Human Rights Code

“Defences” or “Exemptions”

Section 25 - Employment

(1) The right under Section 5 to equal treatment with respect to employment is infringed where employment is denied or made conditional because a term or condition of employment requires enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer, that makes the distinction, preference or exclusion on a prohibited ground of discrimination.
The Human Rights Code

“Defences” or “Exemptions”

(2) The right under Section 5 to equal treatment with respect to employment without discrimination because of sex, marital status or family status is not infringed if plan complies with the Employment Standards Act, 2000.

(2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed if plan complies with the Employment Standards Act, 2000.
The Human Rights Code

“Defences” or “Exemptions”

(3) The right under Section 5 to equal treatment with respect to employment without discrimination because of disability is not infringed,

a) where a reasonable and *bona fide* distinction, exclusion or preference is made in an employee disability or life insurance plan because of a pre-existing disability that substantially increases the risk;

b) ... on the ground of a pre-existing disability in respect of an employee, ... that is offered by an employer to employees if they are fewer than 25 in number.
The Human Rights Code

“Defences” or “Exemptions” - Summed Up:

- Section 22 - auto, life, accident, sickness or disability, group insurance (not part of an employment situation) may make distinctions based on age, sex, marital and family status or disability, if distinctions are reasonable and bona fide.

- Section 25 - employee group insurance plans based on age, sex, marital status or family status do not offend the Code if they comply with the Employment Standards Act, 2000.
The Human Rights Code

Defences” or “Exemptions” - Summed Up:

- Section 25(3)(b) - group insurance plans for employee groups with fewer than 25 members may make distinctions based on disability, provided that the distinction is reasonable and *bona fide* and made on the ground of a pre-existing handicap.

- Section 25(3)(a) - employee disability or life insurance contracts may make distinctions based on disability if the distinction is reasonable and *bona fide* and based on a pre-existing handicap that substantially increases the risk.
The *Human Rights Code*

Reasonable and *Bona Fide* Test

- **Reasonableness** - an otherwise discriminatory practice is “reasonable” if:
  - it is based on a sound and accepted insurance practice (the practice was adopted for the purpose of achieving the legitimate business objective of charging premiums commensurate with risk); and
  - there is no practical alternative
The Human Rights Code

Reasonable and Bona Fide Test

- *Bona Fides*

  - practice is adopted honestly;
  - in the interests of sound and accepted business practice; and
  - and not for the purpose of defeating rights under the Code
Types of Complaints

Historic Types of Complaints

- Differential benefits coverage to pregnant employees (sex, includes pregnancy)
  - group insurance policy providing benefits would not be paid during pregnancy leave
  - discriminatory or not?
Types of Complaints

- Differential benefit based upon sex contravened the *Code*

- *London Life v. OHRC*
Types of Complaints

Historic Types of Complaints

- Differential treatment of benefits coverage for same-sex partners
  - distinction in insurance plan denying same-sex cohabiting couples benefits offered to heterosexual couples
Types of Complaints

- violated right to equal treatment
- employer and insurer both liable
- *Clinton v. Ontario Blue Cross*
Types of Complaints

Historic Type of Complaints

- Differential benefits to employees on leave for disability
  - nurses on unpaid leave of absence for disability did not accumulate seniority and had to pay 100% of premiums under benefit plan
  - discriminatory or not?
Types of Complaints

- benefit premium payment not discriminatory (and not adverse effect discrimination either) because requiring employees to work for compensation was *bona fide* occupational requirement

- denial of seniority accumulation was discriminatory

- *ONA v. Orillia Soldiers Memorial Hospital*
Types of Complaints

Historic Type of Complaints

- Denial of LTD benefits
  - exclusion clause in group policy for LTD denied benefits to employee who received treatment during 90-day period prior to insurance being effective
  - allegation that the policy discriminated on the basis of disability
- discriminatory or not?
Types of Complaints

- not discriminatory because such clauses are reasonable in the insurance industry and there are no practical non-discriminatory alternatives (s. 25(3)(a) of the Code)

- *Thornton v. North American Life*
Types of Complaints

Historic Type of Complaints

- Distinction between mental and physical disabilities
  - In case of mental illness, LTD benefits would be cut off after 2 years unless person was institutionalized
Types of Complaints

- Plan based upon stereotypical assumptions and is not reasonable and *bona fide* ground for differential benefits

- *Gibbs v. Battlefords*

- Once the decision has been made to offer benefits, those benefits must be provided in a non-discriminatory manner (*Brooks v. Canada Safeway Ltd.*).
Emerging Issues

Denial of STD/LTD/Other Benefits

- Tribunal recognizes that there may be distinctions under a benefit plan linked to disability and this might not be discriminatory (See Zaki v. Ontario, 2011 HRTO 1797)

- Tribunal not an appeal body for such determinations
Emerging Issues

Denial of STD/LTD/Other Benefits

- Generally, there is recognition that eligibility criteria may be established so long as not discriminatory or applied discriminatorily.

- However, Tribunal may find discrimination in benefit programs if policies, practices or considerations are based upon prohibited grounds irrelevant to the decision made.
Emerging Issues

Denial of STD/LTD/Other Benefits

- Additional requirements for medical documents, etc., from individuals with certain illnesses (i.e. stress or anxiety claims; scent sensitivities)

- Denial of STD benefits to individual with mental illness when individual subsequently qualifies for LTD benefits (suggestion that there is differential treatment between those with physical versus mental illnesses)

- In such cases, Tribunal considers evidence of nexus between the conduct or distinction and the protected ground
Emerging Issues

Employer as Insurer - Self-Insured Benefits

- Principles of reasonableness and *bona fides* will be equally applicable to employers who self-insure STD or LTD
- Not only must there be proper administration
- Care must be taken to ensure eligibility requirements are not discriminatory
Emerging Issues

Policy Exclusions for Pre-Existing Condition(s)

- Purpose = protect insurer from individuals who join an employer in order to obtain protection for an anticipated health issue
- Typical clauses limit coverage for some period of time for any condition for which person received treatment
Emerging Issues

Policy Exclusions for Pre-Existing Conditions

- Ontario’s Human Rights Commission has highlighted some areas of concern.

- What if person sees doctor during the exclusionary period for minor issue which later becomes diagnosed as a symptom of a pre-existing condition?

- OHRC has queried whether the seriousness of the condition should be known or diagnosed during the exclusionary period before coverage in order to deny benefits.
Emerging Issues

Policy Exclusions for Pre-Existing Condition(s)

- Does section 22 of the Code provide a “defence” to such practices or for such policy language?
- Is the distinction, exclusion or preference made on reasonable and *bona fide* grounds?
- How are reasonable and *bona fide* grounds proven?
  - may not be enough to say that it is a standard industry practice
  - evidence, including actuarial evidence, relating to risk may need to be called at a hearing
  - are there practical alternatives?
Emerging Issues

Life Insurance and Place of Origin

- Is it discriminatory to deny additional life insurance coverage or life insurance coverage to individuals likely to travel to locations that are listed as dangerous by DFAIT?

- Does such a distinction adversely impact certain individuals?
Emerging Issues

Age and Differential Benefit Coverage

- Age was once defined as 18 to 65 under the Code
- Amended to 18 and older
- Opened up potential claims relating to age, including in respect of benefits and differential coverage based upon age-based distinctions, exclusions or preferences
Emerging Issues

Age and Differential Benefit Coverage

- In *Byers v. Fiddick’s Nursing Home Ltd.*, 2012 HRTO 952, a 50 year old employee alleged she was not offered LTD benefits package because of her age whereas other younger employees in same position had received the LTD plan.
- Tribunal found this to be discriminatory.

- In *Burrows v. United Association of Plumbers & Pipefitters Local 463*, 2011 HRTO 2215, pension plan provided that employee could transfer pension funds at age 55, but in doing so loses LTD coverage.
- Not discriminatory because loss of coverage due to voluntary transfer of funds from pension plan and not due to age.
Strategies

- Review plans and policies for compliance with the *Code*
- Review administration of plans and policies
- Consider potential adverse impacts based on *Code* grounds
- Are distinctions, preferences and exclusions justifiable within meaning of *Code*
- Evidence to justify otherwise discriminatory distinctions or exclusions
Questions?