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Litigating in the New Human Rights Regime in Ontario

The 6th Annual Emerging Issues in Employment Law Seminar

Presented by:

The Hamilton Law Association

January 15, 2009

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LITIGATING IN THE NEW HUMAN RIGHTS REGIME IN ONTARIO

In June of 2008, a new regime for the protection and enforcement of rights under the *Human Rights Code* (the *"Code")* in Ontario came into effect. The changes under the new regime are substantial. This paper will review some of the more important changes, both procedural and substantive.

"Realigned" Roles and Responsibilities Of The Commission and the Tribunal

Under the new regime, the roles and responsibilities of the Ontario Human Rights Commission (*"OHRC")* and the Human Rights Tribunal of Ontario (the "*Tribunal")* have been "*realigned".* The rationale behind this change is encapsulated in the following statement made by the Province's Attorney General in April 2006:

> *"A modernized Ontario Human Rights Commission would become a stronger champion of human rights, focusing on the prevention of discrimination, while the Human Rights Tribunal of Ontario would be given greater powers to resolve individual disputes fairly, quickly and effectively."*

The most fundamental change pertains to the manner in which complaints under the *Code* are handled. Previously, all complaints were received and investigated by the OHRC. Any complaints that were not resolved through the OHRC's investigation and mediation procedures, and which otherwise were determined by the OHRC to warrant further action, were referred by it to the Tribunal for a hearing. Only a small fraction of the complaints received each year by the OHRC were referred by it to the Tribunal. Rather, the vast majority were resolved through the course of the OHRC's investigation and mediation processes.

Under the new regime, the Tribunal's function does not change. That is, it remains a quasi-judicial decision-maker that continues to hold hearings arising from complaints arising under the

Code. However, while its role and function remain unchanged, its caseload will increase dramatically. The latter is a consequence of the fundamentally altered role of the OHRC - under the new regime, the OHRC no longer has any responsibility for receiving and investigating complaints. Rather, **all** complaints (which are referred to as "*Applications"* under the new regime) now are filed directly with the Tribunal, bypassing the OHRC entirely.

Consistent with the statement above by the Attorney-General, the OHRC's role under the new regime is focused upon the prevention of discrimination and the promotion of *"a culture of human rights in the province"*. In order to fulfill this mandate, the OHRC is empowered to conduct public inquiries, to initiate its own applications before the Tribunal, to intervene in proceedings at the Tribunal and to *"focus on engaging in proactive measures to prevent discrimination using public education, policy development, research and analysis".*

Section 35 of the *Code*, which deals with Applications initiated by the OHRC, is as follows:

> s. 35 (1) *The Commission may apply to the Tribunal for an order under section 45.3 if the Commission is of the opinion that,*
>
> *(a) it is in the public interest to make an application; and*
>
> *(b) an order under section 45.3 could provide an appropriate remedy.*

Section 45.3 of the *Code* states as follows:

> *45.3(1) If, on an application under section 35, the Tribunal determines that any one or more of the parties to the application have infringed a right under Part I, the Tribunal may make an order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.*

(2) For greater certainty, an order under subsection (1) may direct a person to do anything with respect to future practices.

PROCEDURE BEFORE THE TRIBUNAL

(a) Limitation Period

Under the new regime, every Applicant is entitled to have his or her Application proceed to a hearing. Pursuant to s. 34(1) of the *Code,* the time limit for filing an Application is now 12 months (previously, it was six months). However, pursuant to s. 34 (2) of the *Code*, the Tribunal will permit an Application to be filed beyond the 12 month period if it is satisfied that the delay "*was incurred in good faith and no substantial prejudice will result to any person affected by the delay*".

(b) *Legal Representation*

Applicants are free to proceed either with or without legal representation. A new resource available to Applicants seeking legal assistance is the *Human Rights Legal Support Centre.* The *Centre* is an independent agency that is funded by the Ontario Government through the Ministry of the Attorney General and which operates under the direction of a board of directors. It should be noted that the *Centre* offers free legal assistance **only** to Applicants.

(c) Rules of Procedure

In June 2008, the Tribunal issued *"Rules of Procedure"*. The Rules, as well as the Forms referred to therein, are available on the Tribunal's website. The following is a brief overview of some of the rules.

(i) ***Forms - Application, Response, Reply***

An Application is commenced by the Applicant completing a *"Form 1"* and filing it with the Tribunal. The information that the Applicant must provide when completing the Form includes the following:

- the alleged grounds of discrimination;
- details of the alleged incidents, their impact upon the Applicant and the remedy sought;
- a list of documents that are *"important to"* the Application that the Applicant has or that the Applicant believes the Respondent has or that the Applicant believes a third party has;
- a *"confidential"* list of witnesses.

The Tribunal will forward the Form 1 to the Respondent, but without the list of witnesses included. The Respondent then has 35 days to file a *Response* (i.e., *Form 2)*, which form mirrors the requirements of Form 1. The Applicant in turn can file a *Reply* (i.e., *Form 3*), where appropriate, within fourteen days of receiving the Respondent's Form 2 from the Tribunal.

(ii) ***Disclosure of Documents***

The new Rules call for complete documentary disclosure. Pursuant to Rule 16.1, every party must deliver to every other party, *"not later than 21 days after the Tribunal sends a Confirmation of Hearing to the parties",* a list of all "*arguably relevant"* documents in their possession, together with copies thereof. However, if a party claims privilege over any document, it need not provide a copy of it to the other parties, but must include it in the list of

documents, together with a description of its nature and the reason for claiming privilege. Pursuant to Rule 16.2, each party must deliver to each other party, not later than 45 days prior to the first scheduled day of hearing, a list of documents upon which the party intends to rely, together with a copy of each such document. Pursuant to Rule 16.3, the party also must file the list, together with copies of the documents, with the Tribunal at least 45 days before the first scheduled hearing date. If a party fails to list and produce a copy of a document in accordance with the aforesaid rules, the party may not *"rely on or present"* such document, except with permission of the Tribunal.

(iii) ***Disclosure of Witnesses***

Rule 17 deals with the disclosure of witnesses. Pursuant to Rule 17.1 every party must deliver to every other party and file with the tribunal *"not later than 45 days prior to the first scheduled day of hearing"*, a witness list that includes *"the name of every witness, including expert witnesses, the party intends to present to the Tribunal."* Pursuant to Rule 17.2 the list must also include a brief statement summarizing each witness' expected evidence. Rule 17.3 requires that a copy of an expert witness' report, or a full summary of proposed evidence, plus such witness' curriculum vitae, be included with the witness list. Pursuant to Rule 17.4 *"no party may present a witness whose name and summary of evidence was not included in a witness list delivered and filed in accordance with Rules 17.1 and 17.2 or present an expert witness if material has not been delivered and filed in accordance with Rule 17.3, except with permission of the Tribunal."*

(iv) ***Dispute Resolution***

The Tribunal has committed to dealing with Applications expeditiously and has stated that its goal is to ensure that an application is resolved (and therefore, the hearing, if any, completed and the ensuing decision rendered) within one of year of its filing. To assist it in achieving this goal, the Tribunal has been given broad rule-making power. Pursuant to s. 40 of the *Code*, the Tribunal shall dispose of applications "…*by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications*." Pursuant to s. 41 of the *Code*, the Tribunal rules are to be liberally construed in order "*to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it".*

These Rules give the Tribunal the power to control the proceedings to a very large extent.

The Tribunal's *Rules of Procedure* include the following:

> ***Rule 1.6*** *The Tribunal will determine how a matter will be dealt with and may use procedures other than traditional adjudicative or adversarial procedures;*
>
> ***Rule 1.7*** *In order to provide for the fair, just and expeditious resolution of any matter before it the Tribunal may:*
> *……*
>
> *(j) determine and direct the order in which evidence will be presented;*
>
> *(k) on the request of a party, direct another party to adduce evidence or produce a witness when that person is reasonably within that party's control;*

(l) permit a party to give a narrative before questioning commences;

……..

(q) on the request of a party, require another party or other person to provide a report, statement, or oral or affidavit evidence;

Rule 18.1 *The Tribunal may prepare and send the parties a Case Assessment Direction where it considers it appropriate. The Case Assessment Direction may address any matter that, in the opinion of the Tribunal, will facilitate the fair, just and expeditious resolution of the Application and may include directions made in accordance with any of its powers in Rule 1.6 and 1.7.*

Rule 18.2 *At the hearing parties must be prepared to respond to any issues identified in the Case Assessment Direction and to proceed in accordance with the directions set out in the Case Assessment Direction.*

A pre-hearing assessment involves an adjudicator identifying the main issues for the hearing, any common ground between the parties, any procedural issues that need to be decided prior to the hearing and what witnesses should be called. The pre-hearing assessment can simply be a review of the case file by a member of the Tribunal or a case conference with the parties. Either way, a Case Assessment Direction as described in Rule 18.1 will be issued.

Mediation can be requested by the Applicant on Form 1. If the Respondent also requests it on Form 2, a mediation session will be scheduled with a member of the Tribunal. The member will meet with the parties and attempt to work out an acceptable solution. Rule 15.2 requires all parties and their representatives to sign a confidentiality agreement before mediation commences.

Applications, or issues within Applications, may be dealt with by means of summary hearings, conference calls and hearings. A summary hearing might be held where there are issues of jurisdiction, where another body has already dealt with the facts or where the Respondent did not respond but the Applicant still wishes to make submissions in person. A conference call are likely to be rare but might be used to determine next steps where information in the Application or Response is not clear.

(v) ***Preliminary Objections***

It is no longer possible for a Respondent to make a preliminary objection and thereby avoid filing a Response, as had been the case under the old section 34 of the *Code*. However if the Respondent believes that a civil action has already been commenced seeking a remedy based on the alleged human rights violation, that a complaint has already been filed with the Commission under the old system on substantially the same facts or that a full and final release has been signed by the Applicant, the Respondent may file a Response requesting dismissal of the Application and only include its contact information and a copy of the court action, complaint or release. The Tribunal may then contact the Applicant for comments about the request to dismiss. The parties will be provided an opportunity to make submissions before an Application is dismissed.

Pursuant to section 34(11) of the *Code*, a person may not make an Application [under s. 34 (1)] if:

(a) a civil proceeding has been commenced in which the person is seeking an order under s. 46.1 of Code and the proceeding has not yet been finally determined or withdrawn; or

(b) where a court has finally determined the issue of whether there was an infringement of a right under the Code or the matter has been settled.

If the Tribunal decides not to dismiss the Application, the Respondent must then file a complete Form 2.

The Tribunal may also, in its discretion pursuant to section 45.1 of the *Code* and Rule 22, dismiss the Application if another proceeding (other than a court proceeding) such as a union grievance or a hearing before another board has appropriately dealt with the substance of the application. This can be brought to the Tribunal's attention on Form 2, but the Form must still be completed in full. Similarly, the Respondent can request a deferral of the application if such a proceeding is in progress (see section 45 of the *Code* and Rule 14). The Tribunal, for instance, may defer an Application pending the outcome of another legal proceeding.

(vii) ***Appeals***

There is no appeal procedure under the *Code.* However, pursuant to section 45.7(1) of the *Code*, a party to a proceeding before the Tribunal may request that the Tribunal "*reconsider its decision in accordance with the Tribunal rules*". Additionally, pursuant to section 45.7(2) of the *Code*, the Tribunal may reconsider its decision upon its own motion. Pursuant to Rule 26, a party seeking a reconsideration must file its request within 30 days of the date of the Tribunal's decision.

Pursuant to Rule 26.5, a Request for Reconsideration will not be granted unless the Tribunal is satisfied that:

(a) there are new facts or evidence potentially determinative of the case that could not reasonably have been obtained earlier;

(b) the party seeking reconsideration was entitled to notice of the proceeding but did not receive notice through no fault of its own;

(c) the decision or order in question is in conflict with established jurisprudence or Tribunal procedure and the reconsideration involves a matter of general or public importance;

(d) other factors exist that, in the opinion of the Tribunal, outweigh the public interest in the finality of Tribunal decisions.

As previously noted, the Tribunal itself may initiate the reconsideration of one of its decisions. Pursuant to Rule 26.9, the Tribunal may reconsider a decision on its own initiative where it considers it *"advisable and appropriate to do so".*

(viii) ***Judicial Review***

Judicial review is severely constrained under the *Code*. Section 45.8 of the *Code* states that decisions of the Tribunal are final and that they shall not be altered or set aside in an application for judicial review unless the decision is *"patently unreasonable*".

(ix) ***Stated Case***

Section 45.6 (1) of the *Code* provides the Commission with a right to apply to the Tribunal to have the Tribunal state a case to the Divisional Court. The right under Section 45.6 (1) is

available in regard to a final decision or order in a proceeding in which the Commission was a party or an intervenor. Further, the decision or order must be one that the Commission believes "*is not consistent with a policy that has been approved by the Commission under section 30 [of the Code]".* However, an application under Section 45.6 (1) is subject to the approval of the Tribunal. Section 45.6 (2) states that "*if the Tribunal determines that the Commission's application relates to a question of law and that it is appropriate to do so, it may state the case in writing for the opinion of the Divisional Court upon the question of law*." The parties to the stated case are the parties to the original proceeding. Within 30 days of receipt of the Divisional Court's decision, any party to the stated case may apply to the Tribunal for reconsideration of the original decision.

EXPANDED ROLE OF THE COURTS

A very important change under the new human rights regime pertains to the jurisdiction of the courts in regard to matters involving alleged breaches of the *Code*. Section 46.1 (1) of the *Code* is the key provision in this regard and is as follows:

> *46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:*
>
> 1. *An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.*
> 2. *An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.*

Another significant change is that the $10,000 cap upon "general damages" under the old regime has been eliminated. Accordingly, neither the Tribunal nor the courts are constrained by the *Code* in regard to the amount they might award for such damages.

Pursuant to section 46.1 (1) of the Code, a court may make an award of monetary compensation, including compensation for *"injury to dignity, feelings and self-respect".* Pursuant to section 46.1 (2) of the Code, a court also may issue an order directing the party who infringed the right *"to make restitution to the party whose right was infringed, other than through monetary compensation…, including restitution for injury to dignity, feelings and self-respect".* As it has been long- established that the Tribunal has the power to order the reinstatement of a dismissed employee whose rights have been infringed under the Code, then presumably the courts now also have that power. It remains to be seen whether the courts actually will be prepared to order reinstatement.

However, there is a very significant limitation upon the jurisdiction of the courts in regard to matters alleging breaches of the *Code.* Section 46.1 (2) provides as follows:

> *46.1(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I"*

In other words, a party is entitled to have an alleged breach of the *Code* addressed directly by a court, but only in circumstances where the party has an underlying cause of action that is independent of any rights under the *Code.*

SOME ADDITIONAL COMMENTS

The Tribunal's power to closely supervise how a hearing proceeds likely will increase the importance of "putting your best foot forward" in the Application or Response, since presumably that is where the Tribunal is going to look when making some of these decisions. Therefore it would seem important that nothing should be left out of these documents. If the Tribunal is going to dictate which witnesses will be called, then a party is well-advised to indicate with some clarity in its Application or Response which witnesses will provide what evidence and how such evidence will impact its case.

As for the question of forum, it remains to be seen whether damage awards issued by judges will vary in significant manner from damage awards issued by the Tribunal. It will be interesting to see whether judges will be more conservative in their awards compared to human rights "experts" appointed to the Tribunal.

Finally, it seems that with this new regime, there will be an increase in the amount of litigation involving alleged breaches of the Code. With all Applications now being filed with the Tribunal, and with the Tribunal apparently committed to dealing with Applications in an expeditious manner, Applicants are likely to be more inclined than they were in the past to pursue remedies under the Code. As well, the above-described expansion of the jurisdiction of the courts to deal with human rights matters also is likely is to result in more litigation in this area.