

**A NEW ERA: ONTARIO'S REFORMED HUMAN RIGHTS SYSTEM IS IN EFFECT****INTRODUCTION**

On June 30, 2008, a revamped human rights system was introduced to replace the previous 46-year-old regime that had faced harsh criticism for its notorious delays and backlogs. While a human rights complaint under the old regime could take four to five years to move through the process, under the new system, the Human Rights Tribunal of Ontario (the "Tribunal") has set a goal of having a hearing completed within a year of receiving an application. The most significant features of the new human rights system are addressed below.

**The Role of the Commission**

One of the primary changes under the new system will be a "direct access" approach, whereby applications will be filed directly with the Tribunal. The Human Rights Commission (the "Commission") will no longer be involved in processing individual applications in the normal course and will no longer have carriage of individual human rights applications.

The Commission's new mandate will be to focus primarily on proactive measures to prevent discrimination and to address systemic issues that have a broad impact on communities and groups. While the Commission will not be involved in individual applications as a matter of course, it will still play a role in examining employers' practices, as its broad public inquiry powers will allow it to investigate any business, sector, industry, or service provider by gathering documents and questioning witnesses. Furthermore, the Commission will have the power to bring its own applications to the Tribunal where to do so is in the public's interest. From time to time, the Commission may also intervene in or conduct inquiries into individual applications.

**The Human Rights Legal Support Centre**

The newly created Human Rights Legal Support Centre (the "Centre") will provide information, support, advice, assistance, and legal representation to applicants with respect to the infringement of human rights. The degree of legal support to be provided to applicants remains unclear and will likely be dictated by funding constraints. Respondents will remain responsible for securing their own legal representation.

**Human Rights Damages and Civil Proceedings**

Under the new system, courts will have the unprecedented ability to award both monetary and non-monetary remedies to a plaintiff for injury to dignity, feelings and self-respect arising in the context of a legal proceeding, such as a wrongful dismissal claim. This could expose employers to greater liability in wrongful dismissal claims. Furthermore, there is a risk that courts will interpret their ability to order non-monetary restitution as authorizing them to order reinstatement in wrongful dismissal matters.

### **Multiple Proceedings**

Employees will not be permitted to bring an application before the Tribunal if they have already commenced a civil proceeding that includes a claim for the same human rights infringement. Furthermore, the Tribunal may defer an application pending the outcome of another legal proceeding, such as a labour arbitration.

### **Limited Ability to Argue for Dismissal on a Preliminary Basis**

Employers will no longer be able to assert that an application should be dismissed on a preliminary basis by arguing that it could be more appropriately dealt with under a collective agreement. The Tribunal's ability to dismiss an application on a preliminary basis is now limited to circumstances in which "another proceeding has appropriately dealt with the substance of the application." The circumstances in which the Tribunal may find that another proceeding has resolved the substance of the human rights claim are not clear at this time.

The Legislature has also removed the possibility of arguing that an application ought to be dismissed because it is trivial, frivolous, vexatious, or made in bad faith, as was previously permitted, and the time-limit for bringing an application has increased from six months to one year.

### **Rules of Procedure and Disclosure Issues**

The new Rules of Procedure feature specific timelines for pleadings and the pleadings forms will require applicants and respondents to provide significantly more information at first instance than before. Additionally, in advance of a hearing, the parties must disclose all arguably relevant documents in their possession as well as witness lists and will-say statements.

### **Transitional Period**

Between June 30, 2008 and December 31, 2008, the Commission will continue to deal with existing complaints that remain in its inventory. During this time, complainants may elect to voluntarily transfer their complaints to the Tribunal, in which case an expedited procedure will apply. The expedited procedure will feature mandatory mediation and a case resolution conference, through which the adjudicator will finally determine the matter.

The case resolution conference will be an informal process that will give the adjudicator broad powers to direct the process, including the ability to question parties, their representatives or witnesses and to define or re-define the issues.

Given the apparent procedural limitations, it is possible that this expedited procedure will be vulnerable to claims that it constitutes a denial of natural justice. Significantly, respondents have no say in whether a complaint is transferred into this expedited process – this decision rests entirely with complainants.

After December 31, 2008, the Commission will lose all of its powers to process complaints. Complainants will have a further six months to elect to have any cases remaining in the Commission's inventory transferred to the Tribunal.

## **CONCLUSION**

The new human rights system will have a significant effect on employers who will likely face a substantial increase in human rights litigation before the Tribunal and the courts, as well as more costly damages awards for human rights infringements. Employers may also face inquiries and applications brought by the Commission in fulfillment of its public policy role, separate from individual employee applications. Most of the changes appear to empower employees and make it easier for employees to sustain human rights applications, while making it more difficult and expensive for employers to respond to such applications.

In response to this new regime, employers will have to ensure that they have effective human rights policies in place that are regularly reviewed and updated, along with procedures to address human rights issues that arise in the workplace in a proactive and consistent manner. This will allow employers to minimize the potential for increased risks and liabilities associated with human rights infringements, while maximizing their ability to comply with Commission policies and directives.

Given the very detailed pleadings forms, tight timelines and disclosure obligations that have been implemented, employers will have to react without hesitation when served with an application, in order to respond in a timely manner, gather the necessary documentation and identify potential witnesses.