

**UPDATE ON  
THE HUMAN RIGHTS TRIBUNAL OF ONTARIO**

**PETER J. THORUP**

**BONNEA CHANNE**

This paper is for general discussion purposes and does not constitute legal advice or an opinion.

For legal advice regarding your particular circumstances, please contact us.

## TABLE OF CONTENTS

INTRODUCTION.....	1
THE HUMAN RIGHTS PROCESS .....	1
Application, Response and Reply .....	1
Request to Intervene .....	2
Intervention by the Ontario Human Rights Commission.....	2
Preliminary Technical Objections .....	2
PRE-HEARING PROCEDURES .....	3
Mediation.....	3
Disclosure of Documents and Witnesses .....	4
THE HEARING AND AFTERWARDS .....	5
Procedural Issues .....	5
Remedies .....	5
Re-consideration of a Final Decision .....	6
CIVIL PROCEEDINGS.....	6
CONCLUSION .....	9

## INTRODUCTION

On June 30, 2008, the amendments to the Ontario *Human Rights Code* (the “*Code*”) took effect, signalling the transition to a new human rights system. The new system was designed in the hopes of increasing accessibility and operational efficiency. All claims of discrimination must now be filed directly with the Ontario Human Rights Tribunal (the “Tribunal”). Under this “direct-access” model, the Tribunal expects that the number of complaints, now referred to as “applications,” will increase from 100 to 150 per year to approximately 3000 per year.

With this expected increase in the volume of human rights applications, the new system has also introduced changes aimed at addressing and resolving these applications in a timely manner. The Tribunal is now mandated under section 40 of the *Code* to adopt practices and procedures which “offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications.” Pursuant to this mandate, the Tribunal has adopted new “Rules of Procedures” applicable to human rights applications filed on or after June 30, 2008.

This paper will provide an overview of the human rights procedure and processes under the new system.

## THE HUMAN RIGHTS PROCESS

### **Application, Response and Reply**

A human rights claim is commenced by filing with the Tribunal a completed Application (Form 1) or Application on Behalf of Another Person (Form 4). Under the new system, the time limit for filing a claim has been extended from 6 months to 12 months. As such, an applicant must file the application within 12 months of the date on which it is alleged that discrimination occurred.

Once an application is accepted by the Tribunal for processing, the Tribunal will send a copy of the application to the named respondent. Within thirty-five (35) calendar days, the respondent must respond to the application by filing with the Tribunal a completed Response (Form 2). The Tribunal will then send a copy of the response to the applicant.

Applicants and Respondents are required to provide more information on their respective application and response forms than what was required under the old system. Both parties must list the witnesses and

documents that they believe are important to their case and must also list documents that are needed but are in the possession of other individuals.

At this stage, witness information is confidential and is only revealed to the Tribunal. Before a copy of the response or application is sent to the other party, the Tribunal will remove information regarding witnesses.

Employers that are named as respondents will be required on the response form to answer questions relating to whether the applicant had already brought his or her human rights concerns to the employer's attention, whether the employer conducted an investigation and whether there are any human rights policies in place. Respondents must also respond to both the allegations raised in the application and the applicant's requested remedy.

Within fourteen (14) days after the response is sent to the applicant, the applicant may submit a Reply (Form 3) to any new matters raised in the response. The reply must be delivered to the Tribunal and the other parties.

### **Request to Intervene**

A person or organization may request to intervene in a case by submitting a Request to Intervene (Form 5) to the Tribunal and delivering a copy to all parties. Under the Rules of Procedure, the Tribunal may allow the person or organization "to intervene in any case at any time on such terms as the Tribunal may determine." The applicant and respondent have an opportunity to respond to a Request to Intervene.

### **Intervention by the Ontario Human Rights Commission**

Under the *Code*, the Tribunal is permitted to disclose copies of applications and responses to the Ontario Human Rights Commission (the "Commission"). The Tribunal may permit the Commission to intervene in an individual application "on such terms as the Tribunal may determine having regard to the role and mandate of the Commission." The Commission may also intervene as a party to an application if the applicant consents to the intervention.

### **Preliminary Technical Objections**

A respondent may request the Tribunal for early dismissal of an application in the following situations:

- A claim based on the same facts has been filed in civil court, requesting a remedy based on the alleged human rights violation;
- A complaint was filed with the Ontario Human Rights Commission based on the same, or substantially the same, facts as the application;
- The applicant signed a full and final release with respect to the same matter; or
- Another proceeding has in whole or in part appropriately dealt with the substance of the application.

The former section 34 grounds for early dismissal (such as delay or covered by a collective agreement) are no longer express statutory grounds for dismissal or deferral.

The Tribunal may ask the applicant for comments about the Respondent's request to dismiss. The Tribunal will provide any other parties with the opportunity to make submissions before making a decision on whether to dismiss the application.

A party may also request the Tribunal to defer an application if the substance of the application is part of another type of proceeding, such as a grievance procedure or a hearing before the Workplace Safety and Insurance Board. The Tribunal may defer the application until the proceeding has resulted in a decision.

An application may be dismissed if the application is outside of the jurisdiction of the Tribunal. The Tribunal may do so on its own initiative or at the request of a respondent. An application may fall outside the jurisdiction of the Tribunal if, for example, the application does not relate to an alleged violation of the *Code*. The parties may be requested to file written submissions to the Tribunal in respect of a respondent's request to dismiss or the Tribunal's own intention to dismiss.

## **PRE-HEARING PROCEDURES**

### **Mediation**

Under the new system, mediation is not mandatory. The parties may indicate on the application or response form, whichever one applies, if they agree to participate in mediation. If both parties agree, the Tribunal will schedule a mediation session. In addition, regardless of whether the parties

initially indicated they wanted to participate in mediation, after filing an application either party may make a request for mediation, or the Tribunal may offer mediation to the parties.

Parties are required to sign a confidentiality agreement before commencing mediation. Matters raised during mediation may not be raised before the Tribunal or in other proceedings, unless the parties consent to it.

If the parties are unable to reach a settlement at mediation, the application will proceed to the hearing stage. The Tribunal will send the parties a Confirmation of Hearing. Prior to the hearing, parties will be directed to complete additional steps, as discussed below, within a specified timeline.

### **Disclosure of Documents and Witnesses**

The parties are required to disclose documents and witnesses to each other. Specifically, within twenty-one (21) days after the Tribunal sends the Confirmation of Hearing, the parties are required to exchange a list of all arguably relevant documents in their possession, along with a copy of the document contained on the list. If an arguably relevant document is privileged, the party must describe the nature of the document on the list and why it is privileged but need not provide a copy to the other party. A party must disclose all relevant documents that are helpful and unhelpful to the party's case. This is an onerous task. Employers should diligently review all files relating to the human rights complaint for documents that have a semblance of relevance and should bring such documents to the attention of their counsel.

Forty-five (45) days prior to the hearing, parties must provide each other and the Tribunal with a list of the documents that they intend to rely upon. Accordingly, a party only needs to list those documents that are helpful to their case. At this stage, as the parties have already provided each other with all arguably relevant documents in their possession, a party should already have a copy of the document that the other side intends to rely upon. Each party, however, must provide the Tribunal with a copy of the documents that they intend to rely upon.

In addition, within forty-five (45) days of the hearing, the parties are required to deliver to each other and file with the Tribunal a list of all witnesses they intend to present at the hearing. The parties must also provide "witness statements" summarizing the evidence that each witness is expected to give. Although the Tribunal's Rules of Procedure states that witness statements are to be brief, the Tribunal, on its own initiative or at

the request of the other party, may direct a party to submit a more detailed witness statement if the Tribunal finds that the witness statements are lacking in sufficient detail. A party that fails to list a witness and deliver a statement for that individual will not be permitted to present that witness at the hearing, except with the Tribunal's permission.

Employers should prepare their list of witnesses and witness statements well in advance of the due date for delivery and filing. It will generally be necessary to interview the proposed witnesses in preparation of the witness statements.

It may be necessary to have the Tribunal issue a summons to witness to secure the attendance of a witness at the hearing. Generally, the Tribunal will execute a summons to witness at the request of a party. Respondents should arrange for any required summons to be executed and served well in advance of the hearing.

## **THE HEARING AND AFTERWARDS**

### **Procedural Issues**

Parties may request the Tribunal to address certain procedural issue relating to how the hearing, referred to as the "Case Resolution Conference," will be conducted. This includes narrowing or determining the main issues, determining what facts are undisputed, determining which party will present its case first, and the order in which witnesses will be called. Although such preliminary issues ought to be addressed in advance of the hearing date, the Tribunal may not deal with such issues until the commencement of the actual hearings, which is extremely inefficient and frustrating.

### **Remedies**

The Tribunal continues to possess broad remedial powers to address breaches of the *Code*. The Tribunal has the authority to award such remedies as damages for lost wages, damages to compensate for the right not to be discriminated against, reinstatement and promotion, as well as to order the implementation of policies, procedures and training. The Tribunal also has the authority to award damages for mental distress. Under the old system, an award for mental distress was limited to \$10,000. Under the new system, there is no longer a monetary cap on the amount of damages that can be awarded for mental distress.

### **Re-consideration of a Final Decision**

Parties may request the Tribunal to reconsider its decision within thirty (30) days of that decision. The circumstances under which the Tribunal will grant a request for reconsideration, as specified in the Rules of Procedure, are as follows:

- when there are facts or evidence that could potentially be determinative of the case have come to light and those facts or evidence could not have reasonably been obtained earlier.
- when the party seeking reconsideration was entitled to receive notice of the proceeding or hearing but, through no fault of its own, did not receive such notice;
- when the decision or order which is subject of the reconsideration request is in conflict with established jurisprudence or Tribunal procedure and the proposed reconsideration involves a matter of general or public importance; or
- when other factors exist that, in the opinion of the Tribunal, outweigh the public interest in the finality of Tribunal decisions.

The Tribunal may also reconsider a decision on its own initiative, if the Tribunal considers it advisable and appropriate to do so. Parties will be notified of the Tribunal's decision to reconsider.

Where a Tribunal refuses a party's request for reconsideration, or if a party is dissatisfied with the decision rendered by the Tribunal after reconsideration, the party may seek judicial review of the decision at the Ontario Divisional Court. Parties seeking judicial review will be required to establish, that the Tribunal's decision was "patently unreasonable," a high threshold established under section 45.8 of the *Code*.

### **CIVIL PROCEEDINGS**

As a result of the 2008 amendments to the *Code*, Ontario courts now have the power to determine in a proceeding if a party's rights under Part I of the *Code* have been infringed and award a remedy for the infringement. Subsection 46.1(1) of the *Code* states as follows:

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.

The *Code* also makes it clear that an alleged violation of the *Code* does not, by itself, create a civil cause of action. Subsection 46.1 (2) states as follows:

Subsection (1) does not permit a person to commence an action solely on an infringement of a right under Part I.

To claim a remedy for a *Code* violation in the courts, a plaintiff must assert some other cause of action, such as wrongful or constructive dismissal. The alleged *Code* violation, however, may arise from the same set of facts that are pleaded to support the main cause of action.

The addition of section 46.1 to the *Code* is therefore consistent with the Supreme Court of Canada's earlier ruling that a breach of the *Human Rights Code* does not create an independent tort of discrimination at common law: *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181. However, the addition of section 46.1 has made it clear that in the context of another civil proceeding, courts in Ontario have the power to award a remedy where the *Code* has been violated.

The remedial powers of the courts are stated in subsection 46.1 (1), *supra*. Specifically, a court may award monetary compensation to a plaintiff whose rights under the *Code* have been infringed, including compensation for injury to dignity, feelings and self-respect. A court may also order a non-monetary award, namely “restitution for injury to dignity, feelings and self-respect.”

It is unclear how the courts will interpret and apply their power to order “restitution” under the *Code*. The Supreme Court of Canada has stated that “the word ‘restitution’ implies that something has been given to someone which must be returned or the value of which must be restored by the recipient”: *Peel (Regional Municipality) v. Canada* (1992), 98 D.L.R. (4<sup>th</sup>) 140. “Restitution” has also been considered by the Tribunal under the former *Code*, which provided the Tribunal with the power to direct a party to make restitution where a Code infringement had been found. In *Fuller v. Daoud* (2001), the 40 C.H.R.R. D/306 (Ont. Bd. Inq.), the Tribunal considered the definition of “restitution” and stated the following:

... Restitution is an equitable remedy. That restitutive power allows the Board to restore a complainant to her or his original position before the loss or injury occurred; or to place a complainant in the position he or she would have been in, if the breach had not occurred. Restitution includes the act of restoration including restoring anything to its rightful owner; the act of making good or giving the equivalent for any loss, damage or injury one sustains; or indemnification. Restitution may take on different forms depending on the nature and legal context of the breach (see Black's Law Dictionary, 6th ed.).

In *Wedley v. Northview Meadow Co-operative Homes Inc.* (2008), 65 C.C.E.L. (3D) 292, the Tribunal observed that pursuant to its power to order restitution,

...Tribunals have ordered both personal remedies, such as promotion or reinstatement in employment, and public interest remedies, such as the establishment of workplace anti-discrimination policies and staff training.

While it is not uncommon for the Tribunal to order personal remedies such as reinstatement, courts have traditionally refrained from ordering that a plaintiff be reinstated to his or her employment. At this point, it is uncertain how the courts will apply its power to order non-monetary restitution under section 46.1 of the *Code*. It is likely that individuals seeking non-monetary personal remedies as well as public interest remedies will pursue their human rights claim through the Tribunal process rather than the courts. However, in respect of individuals that are seeking only monetary awards, employers may expect a claim for damages for any alleged violation of the *Code* in a civil claim for wrongful or constructive dismissal.

An individual is prohibited under subsection 34(11) from filing an application to the Tribunal in respect of a *Code* violation under the following two circumstances:

- a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or
- a court has finally determined the issue of whether the right has been infringed or the matter has been settled.

An individual who has commenced civil proceedings for wrongful or constructive dismissal would not be prevented from filing an application to the Tribunal if the individual does not also claim civil damages for an alleged *Code* violation. Similarly, a plain reading of subsection 34(11) indicates that an individual is not prevented from filing an application to the Tribunal where his or her wrongful dismissal claim has settled and the individual did not claim civil damages for a breach of the *Code*. Employers may ensure that individuals who have settled their wrongful dismissal actions do not subsequently commence an application to the Tribunal by having the individual sign a comprehensive and carefully worded release at the time of settlement.

## CONCLUSION

Under the new system, employers will likely experience an increase in the amount of human rights proceedings before the Tribunal. Similarly, wrongful or constructive dismissal actions may now include a claim for a civil remedy in respect of an alleged human rights infringement.

