Ontario Human Rights Review

Submissions of

The Canadian Association of Counsel to Employers (CACE)

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On the Ontario Human Rights Review

Introduction

The Canadian Association of Counsel to Employers (CACE) is a national association of management lawyers Formed in 2004, CACE now has over 400 members from across Canada who are in private practice and who work in-house for government and private-sector employers. CACE is the only national organization of management labour and employment lawyers. It has members who work for a significant majority of employers in every sector of the economy. All CACE members must dedicate a majority of their practice to matters pertaining to labour and employment law. CACE draws upon the shared experience and expertise of its members to address legal issues affecting Canadian employers though the work of its advocacy committee, which has a mandate to participate in significant legal and policy developments in the federal sector and in each province.

The present document constitutes the written submissions of CACE on the legislatively mandated review of the Ontario Human Rights system.

CACE would like to begin by expressing its appreciation for the opportunity to be involved in the review process. It is extremely important to encourage all those who have participated in the human rights process in Ontario to express their views and to offer suggestions for improvement. The promotion of a culture of respect for human rights is essential to the well-being of Canadian society. Public consultations about how to put that value into practice give Canadians a sense of ownership. It is, of course, essential that all those who have taken the time to express their views, see those views reflected in the Final Report, in some way.

These submissions are divided into three main sections which cover four main areas: (1) the Human Rights Tribunal of Ontario; (2) the power to grant legal costs; (3) the Ontario Human Rights Commission; and, (4) the Legal Education and Support Centre.

1. The Human Rights Tribunal of Ontario

The amendments to the Ontario *Human Rights Code* (the "***Code***") were intended to provide quicker and more "direct" access to the Ontario Human Rights Tribunal (the "**HRTO**" or "the Tribunal") by removing the role of the Ontario Human Rights Commission (the "**OHRC**") in the application/complaints process. The HRTO states that its primary role is to "provide an expeditious and accessible process to assist parties to

resolve applications through mediation, and to decide those applications where the parties are unable to reach a resolution through settlement."[1]

In CACE's submission, the Tribunal has become unable to fulfill this primary function to provide expeditious and accessible justice as a result of the high volume of applications it receives and the lack of (or insufficient use of) effective screening mechanisms to weed out applications that are without merit. In addition, the lack of authority to award costs to the successful party results in a pyrhic victory for many. We provide our suggestions as to how to deal with these problems below.

Fairness and Access to Justice

Each human rights application that comes before the Tribunal is different. Applications vary in terms of the degree of complexity, the number of parties, the quantity of documents, the strength of the allegations, the extent of legal representation and support, the sophistication of the parties and many other factors. However, the need for attention to the fairness of each proceeding remains the same regardless of those factors. As the Federal Court of Canada stated in *Galan v. Canada (Citizenship and Immigration),* quasi-judicial decisions cannot be made on an assembly line; each case is case is unique and requires reflection, patience, active listening and an open mind.[2]

In CACE's view, the Tribunal is clearly making an effort to provide procedural fairness and sound decision-making in each and every case that comes before it. The quality of the adjudication that is conducted before the Tribunal and the quality of the decisions rendered is generally very good. The Tribunal's response to some requests for interim orders, such as those to remove personal respondents, is good.

The procedural fairness that is accorded to the parties both before and during the hearing is also very good. Some of our members have noted the thoughtful and appropriate interventions made by Vice-Chairs in hearings involving self-represented applicants. Although the Vice-Chairs were required to be more directive in the way they handled the hearing because of the applicants' unfamiliarity with the process, respondent counsel felt that the Vice-Chairs did not, in any way, compromise the fairness of the hearing. This is commendable.

Unfortunately, however, it appears that the Tribunal lacks the resources to deal with the high volume of applications it receives. As a result, mediations do not usually occur until a year after the pleadings have been filed and then it is an additional one to two years after that until the hearing takes place. Then, additional time elapses before the decision is rendered. This often results in a delay of three years or

[1] Taken from the HRTO's website at: http://www.hrto.ca/hrto/?q=en/node/1

[2] 2007 FC 749, at para. 1.

more before a decision is rendered in a matter. In addition, there is no response from the Tribunal to many requests for interim orders (including an acknowledgement of receipt) for very long periods of time, which causes some anxious parties to make repeated requests in an effort to prompt a response from the Tribunal.

The delays involved in processing and determining applications have a significant effect on the perceived fairness of the proceedings. Trite though it may be to quote the old adage, it must be nevertheless be said: "Justice delayed is justice denied". Respondents and their employees who face serious allegations of discriminatory conduct find themselves under the cloak of suspicion for years. This has a profoundly negative effect on many individual's reputations, careers and personal well-being. It also affects business interests and reputations. Moreover, delays in hearing an application can cause significant prejudice to the parties as lengthy delays can affect document retention and witnesses' memories. In CACE's submission, it is manifestly unfair to make parties wait three years or more to have a complaint resolved.

Therefore, CACE urges the provincial government to dedicate the resources needed to improve the timeliness of the Tribunal process. This does not necessarily mean that additional resources need to be dedicated to the "human rights" budget line. Rather, it may mean a reallocation of spending priorities so that more resources are committed to the early examination, management and resolution of applications.

Dedicate More Resources to Early Resolution and Case Management

The Tribunal would do well to reallocate resources to an early meeting with the parties to attempt to resolve the matter, or at the very least, to determine a fair and expeditious process that responds to the unique circumstances in each case. The option of early resolution, especially before written submissions are made, can avoid entrenchment of positions.

If, for example, early mediation was offered within the first two months of receiving the application, the chances of resolving the matter would likely be enhanced, as the parties would not have had time to become entrenched in their positions. As indicated above, it is usually about a year after the application is filed before a mediation is held.

Generally speaking, the Ontario members of CACE have found the mediation process to be quite frustrating. Understandably, given the shortage of resources, only a half day is dedicated to the mediation session. As a result of the short time frame, the Tribunal practice would appear now to be to forgo the exchange of "stories" by the parties and to start right into the negotiations. In our experience, little is gained by completely removing the opportunity for the parties to talk to one another. When the relationship is ongoing, the parties really need this opportunity to attempt to repair the damage that has been done. Even when there is no ongoing relationship, the parties invariably need a chance to talk about what happened. There is real value in hearing the other party recount what he or she thinks happened. This

should not be foregone in the interests of getting a quick deal. In fact, in our experience, the less the parties speak with one another, the less likely it is that the matter will be successfully resolved.

The skills of the Tribunal members who mediate cases vary greatly. Some are skilled at dealing with differences, and can give the parties a realistic and helpful appraisal of the strengths and weaknesses of their case, and other members are not as skilled in these areas. Some have the interpersonal and negotiation skills needed to broker a deal, and others clearly do not. More needs to be done to improve the quality of the mediation experience.

Thought should also be given to the different styles of mediation that are appropriate in each case, and members should be trained to respond to the signals they receive from the parties that certain mediation approaches will work best. For example, there are times when evaluative mediation is appropriate. When the parties' expectations of the likely outcome are distorted and this is affecting their evaluation of the offers being made, it may be appropriate to move to a more evaluative approach. When the parties will be required to continue relating to one and other in the future, strong interest-based mediation skills are required.

In addition, CACE is of the view that the quality of a mediation suffers greatly when it is conducted by phone. Although there may be some cases in which it is possible to conduct a telephone mediation, it is generally not an effective use of time.

In more complex cases, CACE suggests that a full day, interest-based mediation with a skilled mediator would be appropriate. This would give the parties the time that they need to work through the difficult issues and would make successful resolution more likely.

In the event that the mediation is unsuccessful, the member could be tasked with conducting a case management meeting on the spot to decide how the case will be run. Parties should be advised before they attend the mediation that they must come prepared to make submissions on how to make the process fair and expeditious in the event that the matter is not resolved through mediation. Having just acted as a mediator, the member will be in the best position to make decisions about the way the case should proceed. If that member is not the member to hear the merits of the case, there is no risk that information obtained during the mediation will affect the outcome of the application.

During the case management meeting, the member should be prepared to schedule the filing of materials if there are preliminary requests for interim orders to be made. He or she must educate the parties about the appropriate use of requests and the parties' obligations with respect to disclosure, will-says, and other issues. The member can also indicate if he/she thinks that the matter could be appropriately resolved by way of a summary hearing under Rule 19A.

At present, it would appear that the Tribunal is not making sufficient use of the summary hearing process. It could be that it is not apparent upon first reading an application that the matter would lend itself to a summary proceeding. However, after a mediation session this may be clearer. If mediations were held within the first two months of the filing of the response to the application, there is a greater likelihood that the Tribunal would be able to resolve the applications, either through mediation or summary procedures, than as it stands now. Presently, by the time they attend the mediation, the parties have had a year to nurse their grievances and are often in no mood to settle or agree to a summary hearing.

Scheduling Hearings

For complex matters, there must be some consideration given to scheduling hearings for more than three days in a row, as is currently done. When hearings are not concluded within three days, the scheduling of subsequent days of hearing sometimes reaches far into the future. Again, this contributes to the unfairness of a process where justice seems forever delayed. When it is apparent, after a failed mediation, that the matter will take longer to resolve than three days, the member should be able to recommend to the Registrar that the appropriate number of days be scheduled. He/she might even be able to canvass dates among the parties while conducting the post-mediation case management meeting.

Additional Grounds for Dismissal of All or Part of an Application

In CACE's submission, the HRTO should be given more tools to dispose of unmeritorious, unfounded and frivolous applications at an early stage and before the HRTO expends significant resources processing the application.

This could be done by amending the *Code* to include additional grounds upon which the HRTO may dismiss all or part of an application without a hearing, such as those in S. 27(1) of the British Columbia *Human Rights Code* (the "**B.C. *Code***") and S. 27.1(1) of the Saskatchewan *Human Rights Code* (the "**Saskatchewan *Code***").

The B.C. *Code* provides that the British Columbia Human Rights Tribunal (the "**BCHRT**") may dismiss all or part of a human rights complaint if the BCHRT determines that:

- the acts or omissions alleged in the complaint or that part of the complaint do not contravene the B.C. *Code* (s. 27(1)(b));
- there is no reasonable prospect that the complaint will succeed (s. 27(1)(c));
- proceeding with the complaint or that part of the complaint would not benefit the person, group or class alleged to have been discriminated against (s. 27(1)(d)(i));

- proceeding with the complaint or that part of the complaint would not further the purposes of the B.C. *Code* (s. 27(1)(d)(ii)); or

- the complaint or that part of the complaint was filed for improper motives or made in bad faith (s. 27(1)(e)).

Section 17.1(1) of the Saskatchewan *Code* has similar provisions which provide that the Chief Commissioner may dismiss the human rights complaint where:

- the best interests of the person or class of persons on whose behalf the complaint was made will not be served by continuing with the complaint (s. 27.1(1)(a));

- the complaint is without merit (s. 27.1(1)(b));

- the complaint raises no significant issue of discrimination (s. 27.1(1)(c));

- the complaint is made in bad faith or for improper motives or is frivolous or vexatious (s. 27.1(1)(e));

- there is no reasonable likelihood that an investigation or further investigation will reveal evidence of a contravention of this Act (s. 27.1(1)(f)); or

- having regard to all the circumstances of the complaint, a hearing of the complaint is not warranted (s. 27.1(1)(g)).

An amendment of the *Code* to include similar provisions would enable the HRTO to dismiss many of the unmeritorious, unfounded and frivolous human rights applications currently before it. This would in turn enable the HRTO to provide a more expeditious resolution of meritorious human rights applications.

Access Fees

The introduction of a filing fee may deter the filling of unmeritorious, unfounded and frivolous applications. CACE recognizes, however, that such a fee could also impede access to the HRTO by applicants with meritorious claims but limited financial resources. Fees in the Small Claims Court system in Ontario are modest and range between $75 and $145 to commence an action. We recommend that fees be charged along the lines of the Small Claims Court guidelines, including costs associated with respondents. In order to address the possibility that fees may act as a barrier to access, the HRTO could establish criteria for waiving the fee in cases where requiring it would prevent access.

Alternatively, the HRTO could charge a fee later in the process or for additional filings. For example, the HRTO may wish to consider charging a fee to set an application down for hearing. In the experience of

CACE's members, until mediation, many applicants, especially those who are unrepresented, have unrealistic expectations particularly with respect to the amount of damages they are likely to be awarded if they are successful. Providing an additional incentive for applicants to reconsider proceeding after they have gained a better understanding of the strengths of their application during mediation might reduce the number of questionable applications scheduled for hearing.

In addition, the HRTO may wish to consider charging a fee for each additional named respondent. Our experience is that the naming of individual respondents where a corporate respondent is named frequently lengthens the proceeding and impedes timely resolution. The naming of individual respondents results in embarrassment and stigmatization of these individuals who are often subsequently removed by the HRTO but only upon the respondents filing a request for an order during a proceeding. A fee for each additional named respondent may provide an incentive for applicants to more carefully consider which individuals should truly be named in their application resulting in a significant reduction in the resources of the HRTO being used to deal with requests for orders to remove individual respondents. This approach is currently used in Small Claims Court.

HRTO Forms

In our view, the HRTO forms are unwieldy and repetitive. For example, the HRTO forms do not readily provide for multi-party responses. Where an application names a corporate respondent and several individuals, it may be less cumbersome for the form to allow respondents to file one response for all named respondents than to file a response for each individual respondent.

In addition, in our view, the requirement that important documents be listed in the HRTO application and response forms is unnecessary and premature. It may significantly increase the costs and provides no apparent value to the process. Document production does not occur until later in the proceeding and additional lists must be produced at that time which would seem to be sufficient.

Several sections of the HRTO forms are repetitive. For example, in HRTO Form 2, Question 11 - Knowledge of the Events and Question 12 - Disability and Employment elicit the same type of information required in Question 9 - Responding to the Allegations. The HRTO may wish to consider listing the information sought in Questions 11 and 12 in the description under Question 9 - Responding to the Allegations.

The HRTO Website & Registry Staff

In our experience, the HRTO's website is generally useful and user friendly. Counsel has also found the HRTO's registry staff to be helpful and courteous.

2. The Power to Award Costs

One of the important features of Ontario's human rights model is that it strives to provide access to justice to our most vulnerable citizens. Innovations have been instituted to minimize costs and barriers of proceedings and the complaint process. Despite these very important efforts, hidden costs exist that are not addressed in the current model. In particular, respondents can be at a considerable disadvantage due to the financial impact of a complaint.

Too often complaints are made vexatiously, or with no substantial grounds. Employers, especially smaller employers, undertake costs that are considerable in responding to and defending such complaints. Proceedings with self represented complainants often take longer, and require more time and effort on the part of respondents. During the first three quarters of 2011 69% of complaints involved self- represented complainants. The potential costs and operational impact of decisions on businesses, and the complexity of the law in this area, lead respondents to retain lawyers and other experts. For smaller businesses, such costs cannot be easily borne. The naming of individual respondents, when the proper respondent is a business, also increases costs, with individuals often having to get their own legal representation and advice.

CACE is supportive of the idea that access to justice should guide the processes of the Tribunal, but there should be greater balance in shouldering the costs. Reasons for costs vary, and there is a careful balance required regardless of how costs are approached. CACE recommends that your consultation include an in-depth dialogue on this issue involving joint meetings with a range of interveners, including employers and their legal counsel.

3. The Human Rights Commission of Ontario

CACE members do not have sufficient information to provide detailed comments on the role of the Ontario Human Rights Commission ("the Commission") in the new system. In our experience, the Commission has no apparent involvement or impact in applications. Similarly, CACE is unaware of any impact that the Commission has had on human rights education among employers in Ontario. This in itself is worrisome when one considers that CACE members act for many large, medium and small employers throughout Ontario. Who would know better than CACE as to whether the work of the Commission is having an impact in the Ontario employment world?

4. The Human Rights Legal Support Centre

The Human Rights Legal Support Centre has repeatedly identified in its Annual Reports that its resources (approximately $5.6 million revenue in 2009-2010) are insufficient to fulfill its current broad informational support and representational mandate. The Centre stated in its 2008-2009 and 2009-2010 Annual Reports that it is unable to provide an appropriate level of service to those who contact the Centre seeking

information about human rights, legal advice about discrimination or legal assistance in filing an application to the Tribunal. In 2009-2010, the Centre was only able to respond to 57% of the telephone inquiries to its intake lines and provided representation to 100 fewer new applicants than in the previous year. In response, the Centre changed its service model to provide more legal assistance through inquiry staff rather than lawyers, having applicants prepare their own applications and accepting retainers later in the complaints process at the mediation or hearing stages. The Centre also adopted eligibility criteria for providing legal support services. The Centre's Strategic Plan 2011-2013 recognizes an ongoing gap in the Centre's ability to both respond to intake calls and deliver legal services.

Given the significant gap between the Centre's overly broad mandate and its resources, combined with the under resourced circumstances of the Tribunal, CACE recommends that the government consider revamping the Centre's mandate. This might be done in a number of ways. For example, one might consider whether the Centre should limit its role to providing support to litigants as opposed to legal representation. If this was done, CACE would recommend that the Centre consider offering its services to small businesses. Small businesses experience significant fiscal constraints which make it almost impossible for them to muster the resources needed to defend against human rights complaints. It seems only fair that the Centre also offer support to small businesses.

Another possibility to revamp the mandate of the Centre would be to implement more stringent eligibility criteria for accepting cases that focus on the merits of a complaint, rather than other factors. The Centre's existing eligibility criteria provide a wide-ranging numbers of factors that may be taken into account in determining whether the Centre will represent an applicant, without clear ranking or priority identified amongst them. In order to prevent the expenditure of scarce resources on frivolous or unmeritorious applications, the merits of a complaint should be the overriding factor taken into consideration when the Centre decides if a client is eligible to receive services.

Lastly, CACE recommends that the Centre's mandate be amended to expressly refer to the value of mediated resolutions that address the needs of both parties to a complaint, and that all of the Centre's staff receive alternate dispute resolution training on an ongoing basis. Our members have encountered Centre lawyers who either have not managed their client's expectations about the outcomes of mediation, or seem unfamiliar with varying mediation styles and approaches.

Conclusion

CACE is of the view that significant reforms of the current human rights system are necessary to ensure that the system is fair, efficient and accessible. The current situation has become intolerable; the length of time it takes to resolve an application is no shorter than it would be through the court system. The one-size-fits-all approach to resolving applications must be abandoned in favour of an approach that focuses on early resolution and hands-on case management. In addition, the issue of the Tribunal's authority to

award costs is an important one that warrants further discussion; the cost of litigating human rights matters is considerable and has a real impact on the fairness of and access to the Tribunal process. Finally, the role and mandate of the Ontario Human Commission and the Human Rights Legal Support Centre must be reviewed. The work of these bodies may not be achieving the desired goals.

CACE is grateful for the opportunity to make this submission and thanks the reviewer for taking the time to study these issues carefully.

Respectfully submitted by *Karen A. Jensen*, Member of the CACE Human Rights Committee, on behalf of the **CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS**

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