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Code changes, case law affect workplace grievances

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For Law Times

An air of uncertainty has been cast over the litigation of labour and employment law actions that raise human rights issues to establish inequality and discrimination in the workplace.

Over recent years, the backlog at the Ontario Human Rights Commission has prompted lawyers to recommend clients take their human rights arguments to court, introducing complaints in wrongful dismissal actions to obtain extra damage awards.

A staggering $500,000 in punitive damages awarded a terminated employee in *Keays v. Honda Canada Inc.* by the Ontario Superior Court of Justice in March 2005 as redress for the employer's breach of the duty to accommodate under the Ontario Human Rights Code has, say lawyers, fuelled the trend to seek civil remedies through the courts rather than the Human Rights Commission.

The Supreme Court of Canada's 1997 decision in *Wallace v. United Grain Growers Ltd.* — which penalized the employer for engaging in bad faith to the tune of $15,000 in damages on top of a year's salary severance — opened the door for punitive-based claims.

The Supreme Court's *Seneca College v. Bhadauria* has mandated human rights grievances be determined under human rights codes, and not as a tort in the courts.

"The Supreme Court of Canada has said . . . that you cannot sue civilly for a breach of the Human Rights Code. However, since the *Wallace* case, courts have been using employer breaches of the code for grounds for Wallace and punitive damages," says Howard Levitt, a labour and employment lawyer at Lang Michener.

"Employee lawyers, since *Wallace*, have actively sought evidence of bad faith or unfairness to inflate their clients' claims and human rights, it's a favourite tactic."

The trend was tempered somewhat by Ontario Superior Court Justice Randall Echlin's 2004 decision *Yanez v. Canac Kitchens*, which admonished plaintiff's counsel for claiming *Wallace*-type damages in too many cases, clarifying that such high awards should be limited to blatant bad faith behaviour.

Bill 107's proposed amendments to the Ontario Human Rights Code recognizes code-driven damage claims and provides courts jurisdiction where an alleged violation is part of another cause of action.

Levitt says *Canac Kitchens* — which didn't reduce the plaintiff's severance despite the admonishment — could set the stage for a judicial backlash.

"Justice Echlin, in *Canac Kitchens*, said that unjustified allegations of unfair conduct can lead to reduced severance," says Levitt. "Moreover, in my view, allegations of racism [for example] are so serious that a court can punish an employee who makes them without a reasonable basis, by punishing them in costs in the same way that unjustified allegations of fraud are punished in the courts."

So if how one should argue code-based grievances for damage awards in court seems uncertain, bill 107 offers no clarity.

Rather, ambiguous wording in its framework could see single grievances litigated more than once, says Erin Kuzz, a partner at Toronto labour and employment boutique firm Sherrard Kuzz LLP.

She points to the provision under the bill's controversial s. 41 that empowers the tribunal to dismiss a grievance without a hearing or decide to proceed. One of the criteria the tribunal considers is whether a matter has been appropriately dealt with in another proceeding, such as arbitration.

"It almost reads that you have to wait until after the arbitrator has issued a decision and seems to almost reserve the right of the tribunal to say, 'Was it really dealt with appropriately there? Mmmm no, so let's hear it all over again,'" Kuzz says.

Ambiguous wording in new law's framework could see single grievances litigated more than once, says Erin Kuzz.

"Under the Labour Relations Act, labour arbitrators have the power — and in fact the obligation — to interpret and apply human rights law," she notes.

"So the issue we're talking about is that if bill 107 is put into place as currently written, we could end up in a situation where we're having litigation of a human rights-related issue at a grievance arbitration because somebody alleged part of the reason they were terminated was a violation of the Human Rights Code. But we could also be facing litigation of the same issue at the tribunal," even if a settlement is reached at arbitration.

Kuzz says that for both employers and employees, this erodes the finality afforded under the current regime.

Plus, it could require employers to expend resources preparing a defence in the event the complaint is brought to the tribunal, only to see it dismissed at the gates.

"One of the big things for people who practise in the area of labour relations is finality," she says. "Both parties are willing to go in and duke it out in whatever forum is appropriate, but they also want to know that wherever they're duking it out or settling it, they're only doing it once."

Israel Balter, an associate at Lang Michener's employment law practice in Toronto, agrees. "The difficulty is the lack of finality. Employers should be able to reasonably rely on any settlement that they enter into."

Balter is referring to both s. 41 and the commission's new guide to termination releases, which he says could encourage complaints by acting as a road map for employees to take action months after termination.

"What the employer is required to do, according to this guide, is ask the employee if they've been subjected to a human rights violation . . . otherwise the employer is deemed to have contracted out of the Code," Balter says.

"So this is not helpful because it basically creates so many opportunities to reopen disputes that should otherwise be considered resolved." LT