EMPLOYMENT LAW

Ontario human rights regime gets passing grade

System isn't in crisis but that's no excuse for complacency, says Pinto report

BY SHANA FRENCH AND GERALD GRIFFITHS

Amendments to Ontario's Human Rights Code came into effect in 2008 amid great optimism. They revamped the model for adjudicating human rights disputes with a view to streamlining the process.

Three years after the amendments' implementation, Andrew Pinto, a partner at Pinto Wray James in Toronto, was asked by the province to conduct a review. He provided 34 recommendations in a 233-page report he submitted to the attorney general in November.

Pinto "did not find a system in dysfunction, so no radical new approach is proposed." But he did find "a human rights system that is working better but faces some important and urgent challenges."

The system is not in crisis but that should not be an excuse for complacency, he says.

While some of the amendments have improved the human rights system, significant issues remain, including that employers continue to be victims of baseless, lengthy and costly applications. Ultimately, more needs to be done to eliminate these applications and increase the system's efficiency.

The following is a review of the code amendments and Pinto's recommendations.

How has the system changed?

Prior to the amendments, complaints were filed with the Ontario Human Rights Commission, which processed, mediated and investigated complaints. Following a sometimes lengthy investigation, the commission determined whether to forward the complaint to the Ontario Human Rights Tribunal, which then adjudicated the complaint and determined whether the code was breached.

The 2008 amendments removed the commission's gatekeeper function to create a direct access model where complaints (now called applications) are filed directly with the tribunal. The commission focuses instead on developing policies, providing information and promoting code compliance. The commission can also still initiate and intervene in an application before the tribunal but, in practice, rarely does so. Instead, in light of the commission's reduced role in processing applications, the amendments created the Human Rights Legal Support Centre (HRLSC) to provide applicants with free advice, support and representation.

Is the new system effective?

Previously, complaints were subject to significant delays. On average, it took about 27 months for the commission to decide whether to refer a case to the tribunal and almost five years for the tribunal to issue a decision from the time of filing. Today, the time between filing and a decision is an average of less than two years.

Reduced lag time may be attributable to several factors, including the introduction of a summary hearing procedure that empowers the tribunal to dismiss an application if there is "no reasonable prospect of success," as well as court decisions that have further affirmed the tribunal's power to dismiss an application if its subject matter has been dealt with in another administrative proceeding — even if that proceeding was not grounded solely on a code-based violation.

Improved procedures and techniques adopted by the tribunal also seem to have helped. These include adjudication, mediation and "active adjudication," where tribunal adjudicators exercise greater control over the proceeding, as through adjudicator questioning of witnesses or narrowing the issues in the application.

But the delays are still too long and often key witnesses have left their employment by the time a hearing takes place.

Furthermore, while applications move more quickly through the system, the HRLSC is overwhelmed. Pinto's report indicates it can take four months for potential applicants to even meet with the HRLSC regarding their applications.

As a result, many applicants are not represented and may not receive advice regarding the quality of their application, increasing the number of baseless applications being filed. This lack of advice has also likely contributed to an increase in the number of personal respondents being named where it is not appropriate. The results have been an unnecessary waste of resources.

Report recommendations

The report makes a series of recommendations to resolve the system's deficiencies. These include encouraging the tribunal to further improve on the hallmarks of its success, such as continuing to offer mediation (but trying to schedule it earlier in the process) and promoting further active adjudication by the tribunal.

Pinto also calls for the reintroduction of duty counsel to assist unrepresented litigants at the tribunal. A duty counsel program was briefly introduced in Toronto, whereby a HRLSC lawyer was available to assist applicants, particularly in mediations. A significant increase in the mediation success rate with legal counsel involvement suggests the utility of this recommendation.

Practically speaking, an unrepresented applicant will often have unrealistic expectations about the prospect for success at the tribunal and the value of awards, which makes early resolution a remote prospect.

Simple procedural changes proposed by Pinto may also help reduce the number of inappropriately named personal respondents. For example, to improve application forms, personal respondents should be required to explain why an individual should be personally named in an application.

Giving the tribunal the power to mandate that losing parties pay the other party's legal fees may also dissuade frivolous applications. However, Pinto's report does not recommend granting the tribunal the power to award costs, calling instead for further research as to whether a costs regime should be instituted.

Perhaps most troublingly for employers, the report suggests adjudicators increase damage awards to encourage more applications.

While many employers would welcome a cost regime in the hopes of dissuading baseless claims or offsetting expenses related to defending frivolous applications, there is a concern that allowing for cost recovery would discourage legitimate applications and impede access to social justice.

Perhaps most troublingly for employers, the report suggests adjudicators ought to depart from established precedents to increase damage awards in order to encourage more applications under the code.

Pinto also makes a series of recommendations aimed at encouraging more human rights applications. These include a call for the removal of the obligation to disclose witnesses and key documentation at the initial stages of the application process on the basis this requirement is too onerous.

But this may see parties failing to consider the strengths or validity of their case, further encouraging baseless applications.

The report also calls for changes to the remedies issued by the tribunal, such as having adjudicators explain why they chose not to issue a "public interest award" requiring a respondent to take action in response to a violation.

It is difficult to predict which of Pinto's recommendations, if any, will be implemented by the Ontario government. But problems do remain in the number of baseless applications and improperly named personal respondents.

While few yearn for the gatekeeper days of the commission, steps must be taken to screen out baseless applications. There is also the thorny issue of costs, with no reasonable resolution in sight.

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