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Ontario's human rights regime: No 'crisis' nor reason for 'complacency'

Pinto Report finds Ontario's revamped human rights system is working but there's still room for improvement

BACKGROUND

The report card is in

THE PROVINCE of Ontario made a big move five years ago when it changed its whole human rights regime and how human rights complaints were made. The changes were a response to a bogged-down system that was taking too long to process and hear complaints.

As part of the changes, a review of the new regime was planned after five years. That review — the Pinto Report — was released last fall. Employment lawyers Shana French and Gerald Griffiths examine what the report found and what we can expect going forward.

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AMENDMENTS to the Ontario Human Rights Code came into effect in 2008 amid great optimism, revamping the model for adjudicating human rights disputes with a view to streamlining the province's human rights. The amendments also contemplated a review of the new human rights system three years after its implementation.

Lawyer Andrew Pinto was appointed to conduct this review and in November 2012 reported back with 34 recommendations for improving the system. In summary, Pinto "did not find a system in dysfunction so no radical new approach is proposed. Instead, (Pinto) found a human rights system that is working better but faces some important and urgent challenges." That Pinto did not declare the system in crisis should not, he warned, be an excuse for complacency.

From an employer's standpoint, in practice, while some of the code amendments have improved the human rights system, significant issues remain, including the fact 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.

How has the system changed?

Prior to the amendments, complaints under the code 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 adjudicated the complaint and determined whether the code was breached.

The 2008 amendments removed the commission's "gate-keeper" function to create a "direct access" model where complaints — now called applications — are filed directly with the tribunal rather than the commission. The commission still exists, focusing instead on developing policies, providing information, and promoting compliance. The commission may 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 in applications under the code.

How effective has the new human rights system been?

Complaints under the previous model were subject to significant delays. The Pinto Report revealed on average, it took about 27 months for the commission to decide whether to even refer a case to the tribunal and almost five years on average for the tribunal to issue a decision from the time of filing. Today, the time between filing an application and a decision being issued has been cut in half to an average of less than two years.

Reduced lag time may be attributable to several factors, including the introduction of the summary hearing procedure which empowers the tribunal to dismiss an application where there is "no reasonable prospect of success." Additionally, decisions of the Ontario Divisional Court in *College of Nurses of Ontario v. Trozzi* and the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v. Figliola*, affirmed the tribunal's power to dismiss an application where 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 increased its efficiency. These include adjudication, mediation and "active adjudication," where tribunal

CASE IN POINT: HUMAN RIGHTS

Time from application to decision reduced from 5 years to 2

adjudicators exercise greater control over the proceeding such as through questioning of witnesses or narrowing the issues in the application.

Yet, while significantly more efficient, the system's delays are still too long and often key witnesses have left their employment by the time a hearing takes place.

Furthermore, while applications now move more quickly through the system, the HRLSC is overwhelmed. The Pinto Report indicated it can take some four months for a potential applicant to even meet with the HRLSC. As a result, many applicants are not represented and may not receive advice regarding the quality of their application, further 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 to do so. The results have been an unnecessary waste of resources and delay.

The Pinto Report recommendations

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

Pinto also called 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. The significant increase in the mediation success rate with legal counsel involvement — from 65 per cent to 85 per cent —suggests the wisdom of this recommendation. Practically speaking, an unrepresented applicant will often have unrealistic expectations about the prospects for success and the value of awards, which makes early resolution a remote prospect.

Simple procedural advancements proposed by Pinto may also assist in reducing the number of inappropriately named personal respondents. These include proposals for improved application forms requiring, for example, that personal respondents provide an explanation as to why an individual should be personally named in an application.

Providing the tribunal with the power to require losing parties to pay the other party's legal fees may also dissuade frivolous applications. However, Pinto refused to recommend granting the tribunal the power to award costs, calling instead for further research as to whether a costs regime should be instituted. 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 a cost recovery mechanism would discourage legitimate applications and impede access to social justice.

The Pinto Report also made a series of recommendations aimed at encouraging more human rights applications. Perhaps most troubling for employers, the report suggested adjudicators ought to depart from established precedents to increase damage awards.

The report also included 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. However, taking away this obligation may encourage parties to fail to consider the strengths or validity of their case, further encouraging baseless applications.

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

What's next?

It is difficult to predict which of Pinto's recommendations, if any, will be implemented by the provincial government or when. The report found,generally the changes to the human rights system have been a positive development and there is no immediate need to rectify any significant problems.

Still, problems do remain in the number of baseless applications and improperly named personal respondents, tying up the resources of both respondent employers and the system itself. While few yearn for the tedious "gatekeeper" days of the commission under the old system, additional steps must be taken to screen out baseless applications. There is also the thorny issue of costs, which remains unresolved with no reasonable resolution in sight. CELT

For more information see:

- *College of Nurses (Ontario) v. Trozzi*, 2011 Carswell 11514 (Ont. Div. Ct.).
- *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 CarswellBC 2702 (S.C.C.).

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