

The Gatekeeper: Ontario Court of Appeal rules Human Rights Commission can refuse to refer complaint to Tribunal if settlement offer is rejected

The Ontario Human Rights Commission receives complaints of alleged discrimination. It then investigates those complaints and attempts to settle them. When it cannot settle a complaint, it may decide to refer the matter to the Ontario Human Rights Tribunal. The issue in *Losenno v. Metroland Inc.* (October 11, 2005) was whether the Commission can decline to refer an otherwise valid complaint to the Tribunal merely because the complainant rejected a settlement offer from the respondent. The Ontario Court of Appeal has held that it can.

The complainant in the case was a disabled employee who asserted that the accommodation offered by the employer was insufficient. The Commission investigated the complaint and an investigation officer prepared a case analysis recommending that the complaint be referred to adjudication by the board of inquiry (now called the Tribunal). The employer made further submissions that mentioned its offer to settle the complaint, and a second case analysis was prepared recommending that the complaint not be referred because of the adequacy of the settlement offer. The second analysis, like the first, assumed that the complainant's allegations were true.

The complainant argued that the Commission had no jurisdiction to consider the settlement offer but the Commission decided not to refer, based on its view that the offer was reasonable and that it was one that the complainant could reasonably expect to receive if the matter proceeded to the Tribunal. The complainant applied to the Divisional Court for judicial review but was unsuccessful. He then appealed to the Court of Appeal.

COURT: COMMISSION CAN CONSIDER OFFERS TO SETTLE

The provision at issue in the case was subsection 36(1) of the *Human Rights Code*:

"36. (1) Where the Commission does not effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, the Commission may refer the subject-matter of the complaint to the Tribunal."

The Court noted that there are two prerequisites for the exercise of the Commission's discretion to refer: the referral procedure must be appropriate and the evidence must warrant an inquiry. Here, because there was no issue of the adequacy of the evidence, the only question was whether referral was "appropriate".

The complainant relied heavily on the following statement by the Ontario Court of Appeal in *Payne v. Human Rights Commission* to assert that the only criterion the Commission could consider in its decision was the sufficiency of the evidence:

"As I see it, the only legitimate factor to be considered by the Commission in the exercise of its discretion is whether there is any merit in the complaint. If the Commission were to base its decision on some extraneous factor, the court would intervene on judicial review."

The Court rejected the complainant's contention that this statement meant that anything other than the sufficiency of the evidence was an extraneous factor and stated that the issue in the case was whether the refusal of the settlement offer went to the merit of the complaint or was extraneous to it. With this in mind, the Court considered the proper interpretation of subsection 36(1).

THE ROLE OF THE COMMISSION

The Court noted that the Code made numerous references to the Commission's role in effecting settlements and that this indicated that the Code should be interpreted in a manner that encourages parties to make reasonable settlement offers. Moreover, the Code ought not to be interpreted in a way that would encourage parties to take obstinate and unreasonable positions. On the other hand, the Court observed, it is important that complainants not be coerced into entering into inadequate settlements for fear that they would otherwise lose their rights.

The Court then pointed to the Commission's gate keeping function, noting that the Commission is not required to investigate every complaint that is brought to its attention and that it has the responsibility to decide to refer complaints to adjudication. Recognition of the Commission's role in encouraging settlement and determining eligibility for adjudication does not lead to disadvantage for complainants, as the Commission has the capacity to distinguish between adequate and inadequate settlement offers:

"[T]he Legislature has clearly provided the Commission with a statutory mandate to encourage settlement and to act as a gatekeeper. At the same time, I recognize the importance of protecting the rights of vulnerable and disadvantaged complainants. But, recognizing the right of the Commission to consider offers to settle does not necessarily further disadvantage these complainants. The Commission is independent of the parties and the state. The refusal to refer an assumed meritorious complaint in this case was not just because there had been an offer to settle but because there was a reasonable offer to settle that was consistent with the Code and because the complainant could not expect to achieve a better result before a board of inquiry. By applying its expertise, the Commission can protect a complainant from being pressured into accepting an improvident settlement."

Accordingly, the Court held that the Commission can refuse to refer a complaint to the Tribunal if a complainant rejects an adequate settlement offer.

In Our View

The Court arrived at its conclusion despite evidence that human rights statutes in other provinces include express provisions that give commissions the discretion to refuse to refer complaints when a fair and reasonable settlement offer has been rejected. The complainant's argument was that the absence of any such provision in the Ontario Human Rights Code meant that there was no legislative intention to grant the Commission this discretion. The Court rejected this argument, holding that the other conclusion that could be drawn was that the other provinces did not view giving Commissions the power to consider settlement offers when they decide whether or not to refer complaints to adjudication as

inconsistent with human rights.

For further information, please contact [Lynn Harnden](#) at (613) 940-2731.

For more news about recent developments in Employment and Labour Law, and for information about how our firm can assist you, please visit <http://www.emondharnden.com/>