

Ontario's new human rights system under Bill 107

Date : September 1, 2008

On June 30, 2008, the remaining Bill 107 amendments to the Ontario *Human Rights Code* came into effect. This marked the full implementation of the overhauled *Code* and its new system for human rights in Ontario. In addition to giving Ontarians direct access to the Human Rights Tribunal of Ontario, the amended *Code* provides a new mandate for the Ontario Human Rights Commission and creates the Human Rights Legal Support Centre. The new *Code* also enhances the remedial provisions for the Human Rights Tribunal and introduces new civil remedies for *Code* infringements.

THE NEW SYSTEM

Readers of Focus will recall that the new human rights system provides complainants with direct access to the Human Rights Tribunal (see "[Ontario introduces 'direct access' model for human rights process](#)" on our Publications page), thereby removing the role of "gatekeeper" previously played by the Ontario Human Rights Commission. The Commission will now embark on the new role of advocating for human rights and educating the public. The Commission will also research, analyze and promote human rights issues.

The new role of the Commission is defined by limiting the investigative and prosecutorial powers previously held by the Commission. Under the previous *Code*, the Commission would investigate complaints and decide whether to refer complaints to the Tribunal. Where the Commission referred a complaint to the Tribunal, the Commission would generally assume carriage of the complaint at the hearing.

Under the amended *Code*, an individual who believes his or her rights have been infringed must now apply directly to the Tribunal for a remedy. The Commission still has the authority to involve itself in complaints by filing or intervening in applications. But it may only do so in cases where it is in the public's interest to do so. The filing or intervention must be consistent with the Commission's new role and mandate.

The reduced investigative and prosecutorial role of the Commission generated considerable criticism because of a concern that the complainants would have to investigate their own claims and represent themselves, or obtain legal representation before the Tribunal. These burdens are intended to be addressed by the newly-created Human Rights Legal Support Centre which will provide legal services province-wide to individuals who believe their rights have been infringed. The Centre is established as a corporation which is independent from, but accountable to, the government.

The Human Rights Legal Support Centre is funded by the government. It operates outside of Legal

Aid Ontario. Unlike Legal Aid, the Centre's services are available to everyone, regardless of income. The legal services the Centre will provide to complainants are:

- legal assistance in completing applications to the Tribunal;
- assisting in assembling documentation;
- assisting applicants to negotiate resolutions to their disputes, without having to file applications to the Tribunal; and
- offering substantive legal advice and assistance at the mediation and adjudication stages of the Tribunal process.

EXPANDED REMEDIAL PROVISIONS OF THE TRIBUNAL

In addition to the Commission's new role, the amended *Code* enhances the remedial provisions of the Tribunal. Under the old regime, if the Tribunal determined that a right had been infringed, it could order restitution, in both monetary and non-monetary forms, for losses flowing from the infringement. Where the infringement was found to be willful or reckless, the Tribunal could award compensation for mental anguish only up to \$10,000.

Under the new legislation, the Tribunal may still order both monetary and non-monetary compensation for losses flowing from the infringement. However, effective June 30, 2008, the Tribunal is specifically empowered to award monetary compensation for "injury to dignity, feelings and self-respect." The limit or "cap" on mental distress damages of \$10,000 has been removed. The requirement to prove that the violation was willful or reckless has also been removed. The ability to award monetary compensation for injury to dignity, feelings and self-respect, coupled with the removal of the requirement that the violation be willful or reckless, should make it easier for applicants to obtain monetary compensation for an infringement of their rights.

CIVIL REMEDIES FOR *CODE* INFRINGEMENTS

Prior to the amendments, the *Code* did not provide any civil remedies for discrimination or harassment. In practice, the *Code*'s former procedure had the effect of precluding civil actions based solely on claims of discrimination. The Canadian courts never recognized discrimination as an independent tort. Therefore such claims were confined to the process provided for in the *Code*. Dismissed employees who alleged a violation of the *Code* were required to make such arguments as the basis for another type of claim, for example for *Wallace* damages in a wrongful dismissal suit.

Although the amended *Code* still does not permit civil actions based solely on a human rights infringement, and continues to require such claims to be coupled with another cause of action, the new regime now specifically provides for civil remedies for human rights infringements. The courts are empowered to:

- make an order directing the party who infringed the right to pay monetary compensation for losses arising out of the infringement, including compensation for injury to dignity, feelings, and self-respect; and/or
- make an order directing the party who infringed the right to make restitution, other than through monetary compensation, for losses arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

In Our View

The amended *Code* provides that in a civil proceeding a court may, amongst other things, make an order for restitution, other than through monetary compensation. This broadly worded provision breaks new ground for the courts as they will be required to make restitution orders for *Human Rights Code* infringements. Although it remains to be seen how the courts themselves will interpret this open-ended language, it nevertheless has been suggested that in wrongful dismissal cases such orders for restitution could potentially include reinstatement.

For further information, please contact [Raquel Chisholm](#) at (613) 940-2755.