

## **“Five Years Later: The Application of the *Human Rights Code* Today”**

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On June 30, 2008, the *Human Rights Code Amendment Act, 2006* came into full force in the Province of Ontario. The amended *Human Rights Code* (the “Code”) sought to address numerous shortcomings of the prior human rights enforcement system.

Over the course of the last five years, there have been some successes, particularly with respect to efficiency. For cases that proceed to a full hearing on the merits, it now takes, on average, 16.5 months from the initial application filing date to get to the first hearing date.<sup>1</sup> Prior to the amendments, it took, on average 47.6 months to get to a Tribunal hearing.<sup>2</sup> Also, in 2011-2012, for the first time, the Tribunal was able to close more cases than it opened. This trend has continued in early 2012-2013.<sup>3</sup>

While the new *Code* strived to create a more efficient and effective forum in which to deal with discrimination complaints, it has created new challenges for respondents, the vast majority of which are employers, including the following:

- a) Increased damage awards, including punitive damages;
- b) Increased limitation periods; and
- c) Increased deference to Tribunal decisions by appellate courts.

In addition, the last five years has resulted in a variety of Tribunal decisions clarifying and arguably expanding employer’s Code-related duties. This paper focuses on two topical issues: the duty to inquire and parental status.

### **The Former System: Where Have We Come From?**

Under the former human rights regime, the Ontario Human Rights Commission (the “Commission”) had sole responsibility for advancing human rights in Ontario. Not only was the Commission given the power to receive, investigate, mediate and dispose of human rights complaints, but it also served a vital role by providing human rights related research and education initiatives for the general public. Perhaps most importantly, the Commission provided services that allowed parties, in many instances, to bring a dispute to a mutually agreeable conclusion before having to engage in the formal adjudicative process before the Ontario Human Rights Tribunal (the “Tribunal”).

In essence, under the former system, the Commission acted as the “gatekeeper” for the Ontario human rights system: when an individual made a complaint, it was received by the Commission. The Commission would then investigate the complaint with an aim of ultimately disposing of it, through either a) facilitating a settlement, b) dismissing the

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<sup>1</sup> Andrew Pinto, *Report of the Ontario Human Rights Review 2012*, (Toronto: Queen’s Printer for Ontario, 2012) at page 41.

<sup>2</sup> *Ibid*, at page 43.

<sup>3</sup> *Ibid*, at page 40.

complaint outright, or c) referring the case to the Ontario Human Rights Tribunal for a formal hearing on the merits.

Under the old regime, only a very small percentage of cases made it to the Tribunal stage. In the five years prior to 2008, on average, approximately 6% of cases completed by the Commission were referred to the Tribunal.<sup>4</sup>

There was a concern that the Ontario Human Rights Commission's discretionary decisions were being unduly influenced by administrative, political and fiscal considerations.<sup>5</sup> In response, the Commission's "gatekeeper" functions were eliminated. The Commission no longer investigates, assesses, and attempts to settle complaints. It no longer makes determinations with respect to which complaints are referred to the Tribunal and which are dismissed.

### **The New Regime**

The primary change is that under the new model, the Tribunal is now responsible for dealing with all complaints in the province. Whereas previously the Commission would, for all intents and purposes, assume the role of human rights arbiter; under the new system, the Commission's focus is on proactive efforts to promote and ensure human rights compliance throughout the province, and to eliminate systemic discrimination.

Applicants are now provided direct access to the Tribunal, which receives applications directly from the applicants, rather than only those vetted by the Commission. The Tribunal is responsible for processing the application, offering mediation services and, if the application remained unresolved, adjudicating the application.

The *Code* now requires that Adjudicators be selected through a competitive process and have experience, knowledge or training with respect to human rights law and issues, an aptitude for impartial adjudication, and applying alternative adjudicative practices and procedures.<sup>6</sup>

When the Tribunal receives an application, it ensures that the application form is complete and that the application is within its jurisdiction. The Tribunal then serves the application on the respondent. The respondent has 35 days to file a response to the application.

Under the old system, the Commission could dismiss a complaint without a hearing (particularly where the complaint was frivolous, vexatious, or made in bad faith) however, the *Code* does not give the Tribunal the same power. Rather, according to section 43(2), an application cannot be disposed of without giving the parties an opportunity to make oral submissions. As well, the Tribunal is required to render written reasons for every decision.

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<sup>4</sup> *Ibid*, at page 9.

<sup>5</sup> *Ibid*, at page 17.

<sup>6</sup> *Human Rights Code*, RSO 1990, C H.19, s. 32(3) ("Code").

In other words, if the application is properly filled out and ostensibly within the Tribunal's jurisdiction, the respondent will have to request a summary hearing to show that there is no reasonable chance of the applicant's success in order to dispense with a frivolous application.<sup>7</sup>

## **Implications of the New Regime: Causes of Concern for Employers**

### **Penalties: Increased Monetary Damages**

The amendments to the *Code* have changed the approach to remediation.

Under the former system, section 41(1)(b) provided that the Tribunal could order a party that infringed section 9 to make restitution, including in the form of monetary compensation, for any loss arising out of an infringement. Moreover, where the respondent willfully or recklessly infringed a complainant's rights, the Tribunal could order monetary compensation for mental anguish, up to an amount not exceeding \$10,000.

The *Code's* amendments included the following:

- a) Unspecified compensation for losses arising out of the infringement of a protected right;
- b) Removal of the \$10,000 limit on damages for mental anguish;
- c) Provision for orders of restitution (other than through monetary compensation);
- d) The Tribunal may order a respondent to do anything that the Tribunal believes the respondent ought to do to "promote compliance" with the Act; and
- e) Provision for the civil courts to order monetary compensation.<sup>8</sup>

In addition, the human rights regime now includes a potential punitive fine, up to \$25,000, to punish parties who violate the Act.<sup>9</sup> These punitive measures may have wide-ranging repercussions, as even those persons who have only indirectly and unintentionally violated the *Code* may now be subject to a punitive fine.

In short, the *Code* does not contain any limitations as to the amount of monetary compensation and/or restitution for intangible injuries such as damage to one's dignity, feelings and self-respect.

#### **a. Non-Pecuniary Damages**

The Tribunal typically applies two criteria to assess claims for mental anguish for Code violations: the objective seriousness of the conduct and the effect on the applicant.

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<sup>7</sup> Human Rights Rules of Procedure, Applications under the *Human Rights Code* Part IV, RSO 1990 c H.19 as amended, rule 19A.

<sup>8</sup> *Supra* note 6 at s. 45.2 and s. 46.1.

<sup>9</sup> See section 46.2(1) which states "Every person who contravenes section 9 or subsection 31(14), 31.(8) or 44(13) or an order of the Tribunal is guilty of an offence and on conviction is liable to a fine of not more than \$25,000".

With respect to the seriousness of the conduct, dismissal is considered quite serious. The Tribunal has also noted that losing long-term employment is typically more harmful than losing a new job and will often result in a higher award for mental anguish.

There is a wide range of awards for Code-related discrimination with respect to employment. The average awards for termination of employment are between \$12,000 and \$20,000. However, in some cases, the Tribunal has awarded up to \$45,000 in general damages to applicants whose employment has been terminated for a discriminatory reason.

At the high end of the spectrum are decisions such as *Lane v. ADGA Group Consultants Inc.*<sup>10</sup> In *Lane*, the applicant was dismissed by the respondent 8 days after he started working with the company. His employment was terminated after he informed his supervisor that he suffered from bipolar disorder and warned her that his behaviour in the workplace should be monitored. The employer argued that it dismissed the applicant because he was not capable of performing the essential functions of the job for which he had been hired.

The Vice-Chair awarded \$45,000 in non-pecuniary damages. This award was upheld by the Divisional Court.

#### **i. Potential Future Increases**

Section 57 of the *Human Rights Code* required that three years after the amendments came into effect, a review of the changes would be made. In November 2012, an independent report was delivered to the Attorney General of Ontario making numerous recommendations.<sup>11</sup>

The Report states that while the range of damage awards has increased, it had not increased as much as anticipated. The Report recommends that damage awards should see a further significant increase:

“...there appears to be a widening gap between the Tribunal’s insistence that human rights awards should be meaningful, and the actual monetary compensation that is awarded in most instances. In order for Tribunal awards to be meaningful, I recommend that the Tribunal **significantly increase** the range of damages that are awarded to successful applicants. [emphasis added].”<sup>12</sup>

It has yet to be seen whether this recommendation will be followed.

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<sup>10</sup> 2007 HRTO 34

<sup>11</sup> *Supra* note 1.

<sup>12</sup> *Ibid* at page 73.

## **b. Pecuniary Damages**

It is important to note that pecuniary damages, including loss of income damages, loss of benefits, and out-of-pocket expenses for items such as job search costs, are also awarded in human rights cases and often exceed the awards granted for mental damages.

The Tribunal has explicitly rejected the argument that the common law principles underlying “reasonable notice” ought to apply when calculating compensation for loss of income under the Code.<sup>13</sup> Therefore, the length of employment is not a consideration when assessing loss of income awards. The Tribunal has stated that the concept of “reasonable notice” and the manner in which that principle is generally applied to deny or limit compensation to probationary/short-term employees, is not the legal test for calculating compensation for lost income under the Code.

The test the Tribunal applies involves an evaluation of the impact of the respondent’s conduct on the complainant’s ability to earn a living. Therefore, where an employee is unable to find work and demonstrates adequate mitigation efforts, the Tribunal will award loss of income awards, even for *very* short term employees, including probationary employees.

Therefore, prior to terminating the employment of any employee, including a probationary or short term employee, employers ought to consider whether or not there is a potential human rights claim and seek legal advice.

### **Limitation Period Issue**

Under the former system, complainants had six months to file a complaint, unless the Commission was satisfied that the delay was incurred in good faith and that no substantial prejudice would result to any person affected by the delay.

Under the *Code*, however, a complainant now has one year to pursue their cause of action unless the Tribunal is satisfied that the delay was incurred in good faith and that no substantial prejudice would result to any person affected by the delay.

The implications of this extension of time were significant. As complainants now have twice the available time to consider and prepare their application, they are able to bring more thorough and complete allegations with supporting evidence.

Conversely, respondents to these applications have only 35 days to provide a completed response form.<sup>14</sup> Therefore, respondents would be well advised to proactively maintain thorough records and supporting documentation with regard to incidents that could potentially lead to human rights related complaints. It is important to note, in this regard, that the response form required by the Tribunal requests copies of the

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<sup>13</sup> *Supra* note 10.

<sup>14</sup> *Supra* note 7, rule 8.1.

employer's human rights related policies, the employer's complaint process and a list of important documents.<sup>15</sup>

Fortunately, in dealing with requests that applications be considered outside the one-year limitation period, the Tribunal has set a "fairly high onus" on applicants to provide a reasonable explanation for the delay, while recognizing that there will be legitimate circumstances, often related to the human rights claim itself, that justifies exercising its discretion.<sup>16</sup>

## **Potential Current Issues of Concern for Employers**

### **a. Duty to Inquire**

The Supreme Court of Canada has held that an employee seeking accommodation for a disability is under a duty to disclose sufficient information to her employer to enable it fulfill its duty to accommodate. However, current decisions have shown that an applicant at the Human Rights Tribunal of Ontario will not be held to a high standard of clarity in communication.<sup>17</sup>

Many employers were under the misapprehension that if an employee did not request accommodation, that they were insulated from a claim of discrimination.

However, when an employer knows, or ought to know, that an employee has disability-related needs, the respondent has a procedural duty to make meaningful inquiries about the disability-related needs to determine whether or not a duty to accommodate the individual exists.<sup>18</sup> Insufficient time and effort spent on this procedural obligation followed by a "rush to judgment" that results in employment termination has been recognized as a failure to accommodate, and therefore a form of disability discrimination.

One of the emerging issues over the last few years is the extent of an employer's duty to inquire with respect to an employee's disability. This arises particularly in the cases of mental health related disabilities.

Some of the relevant jurisprudence with respect to the duty to inquire has emerged from British Columbia. While certainly not binding on the Ontario Tribunal, Tribunal cases from various jurisdictions, including British Columbia, are often considered persuasive in matters heard in Ontario and cited with approval in Tribunal decisions.

In a recent B.C. Human Rights Tribunal decision, *MacKenzie v Jace Holdings*,<sup>19</sup> the applicant's employment was terminated as she was curt, abrupt, manipulative, exhibited

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<sup>15</sup> Response to an Application under Section 34 of the Human Rights Code (Form 2), Q. 13.

<sup>16</sup> See e.g. *Couture v City Housing Hamilton*, 2013 HRTO 406.

<sup>17</sup> *McLean v DY 4 Systems*, 2010 HRTO 1107.

<sup>18</sup> See e.g. *Robdrup v J. Werner Property Management*, 2009 HRTO 1372.

<sup>19</sup> 2012 BCHRCT 376.

mood swings and irritability, refused to take responsibility for her performance, and was insubordinate at times.

The complainant suffered from depression for much of her life and ended up taking a two month “stress leave.” However, upon her return to work, neither her, nor her doctor identified or sought any particular accommodation for depression or mental health issues. The employer was not alerted by the applicant to anything further that they needed to do to make her employment successful.

The Tribunal noted that although the store knew generally that the applicant had taken stress leave, it “did not review her behavior and seek to determine whether there was any component of her behavior that could be explained by her mental health.”<sup>20</sup>

The manager admitted knowing that the applicant was on medication, but denied knowing the applicant suffered from a depressive illness. The Tribunal made a finding of fact that management did know that the applicant suffered from depression by the time the applicant’s employment was terminated.

The Tribunal held that while it is *normally* the responsibility of an employee to communicate the nature of the disability to the employer, where the employer has “*reason to suspect that a medical condition may be impacting the employee’s ability to work*”, its failure to make inquiries regarding the employee’s health prior to taking steps that adversely affect the applicant’s employment situation, may constitute discrimination.<sup>21</sup>

Ultimately the Tribunal concluded that management was aware of the applicant’s mental health issues and made no effort to determine how the applicant’s disability affected her work performance and whether or not accommodation was required:

“Thrifty’s had a duty to inquire into whether the behavior exhibited by [the applicant] was due to her mental disability and whether she required any accommodation. They did not fulfill that duty. Thrifty’s dismissed [the applicant] because of behavior she exhibited; particularly mood swings, irritability and being manipulative which was consistent with her diagnosis of adjustment disorder and depression...Any issue of *bona fide* occupational requirements and any accommodation of Ms. Mackenzie’s disability cannot be answered until the duty to inquire has been fulfilled.”<sup>22</sup>

The applicant was awarded over \$17,000 in lost wages and \$5,000 for injury to dignity.

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<sup>20</sup> *Ibid* at para. 18.

<sup>21</sup> *Ibid* at para. 31.

<sup>22</sup> *Ibid* at para. 50.

In an earlier Ontario case, *Wall v. Lippé Group*,<sup>23</sup> the respondent employer had knowledge of an event which had occurred in the workplace which was traumatic to the applicant, knew that she was distraught and seeking medical assistance, and knew that she had requested leave on the advice of her doctor.

The Tribunal concluded that the respondents had a duty to inquire further into these circumstances prior to terminating the applicant's employment:

“If this was not sufficient to put them on actual notice that Ms. Wall was suffering from a disability, at the very least, it placed on them the onus to inquire further and precluded any defence based on ignorance of Ms. Wall's condition...As stated in other cases dealing with the test for establishing a *prima facie* case of discrimination, the question is whether the respondents knew or ought reasonably to have known that the complainant was suffering from a disability. For those purposes, there is **no absolute requirement that a complainant communicate the nature of the disability to her or his employer.**”<sup>24</sup>

The applicant was awarded \$15,000 in non-pecuniary damages and over \$12,000 for loss of salary.

However, there have been several cases explaining when the duty to inquire is not triggered.

In *Rezaei v University of Northern British Columbia and another (No. 2)*,<sup>25</sup> the applicant claimed that the University decided not to renew his appointment, on the basis of mental disability. The applicant's employment was terminated because he disruptive, inappropriate, and made unfounded and unsubstantiated allegations against the chair of his program.

The University claimed that during the applicant's employment, neither the University nor the applicant himself knew he suffered from a disability. The applicant claimed that the University ought to have known that he had a disability, for several reasons, including his behaviour, which he claims ought to have put the University on notice to investigate whether he might suffer from a mental disability.

The Tribunal held that no party had directed its mind to whether the applicant suffered from a mental disability. The question remained whether there was a duty to inquire into this possibility.

The Tribunal provided the following reasons:

“...in the particular circumstances of this case, the University's emphasis on the lack of change in Dr. Rezaei's behaviour over time is misplaced.

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<sup>23</sup> 2008 HRTO 50.

<sup>24</sup> *Ibid* at para. 80.

<sup>25</sup> 2011 BCHRT 118.



Unusual behaviour repeated over time may still, in appropriate circumstances, create a duty to inquire as to the presence of a disability. **What is of more significance is the question whether, while his behaviour might have been disruptive to the operation of the department, and less than collegial, it was such a departure from the ordinary norms of human behaviour that it should have alerted the University or the Association to the possible presence of a mental disability.**<sup>26</sup>

Ultimately, the Tribunal held that the applicant's claim had no reasonable prospect of success. There was nothing that was so far out of the norms of communication, or so indicative of distress, as to have put the employer on inquiry with respect to whether or not the applicant's behaviour was affected by mental disability.

The Tribunal did caution:

“This decision should not be understood as determining that unusual behaviour, which may turn out to be related to an unsuspected, undiagnosed disability, will never trigger a duty on an employer or a union to inquire into that possibility.”<sup>27</sup>

Another example of a case where there was no duty to further is *Matheson v. School District No. 53 (Okanagan Similkameen) and Collis*, which was a preliminary decision on whether to dismiss the complainant's application.<sup>28</sup>

In that case, the applicant alleged that she had a history of panic attacks, anxiety and depression. She had never disclosed these conditions to her employer, beyond telling them that she suffered from “stress.”

The Tribunal acknowledged that

“[s]ometimes, circumstances will be established which will put an employer under a duty to inquire whether an employee has a mental disability, in which case the failure to inquire may result in a finding of discrimination.”<sup>29</sup>

The Tribunal held that resigning, then quickly rescinding her resignation due to “high stress” caused by her employer's investigation of her performance issues, was insufficient to put the employer on an inquiry into whether or not she might be suffering from a disability.

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<sup>26</sup> *Ibid* at para. 49-50.

<sup>27</sup> *Ibid* at para. 76.

<sup>28</sup> 2009 BCHRT 112.

<sup>29</sup> *Ibid*, at para. 8

As explained, the extent of the procedural duty to inquire is particularly difficult in cases where the disability relates to mental illness. In mental health cases, employees may be unwilling to disclose their disability due a fear of being stigmatized.

The extent of the duty to inquire must also be considered in the context of an employee's right to privacy. Medical information is private information and an employee cannot be compelled to provide medical information to an employer.

It is advisable to seek legal advice prior to terminating the employment of an employee known, or suspected to be physically or mentally disabled. If you suspect that the duty to inquire may be triggered, it is also advisable to seek assistance in drafting correspondence to the employee in order to ensure that you will satisfy your duty to inquire as well as respect the employee's right to privacy. Remember, employers have no right to specific diagnoses of employee medical conditions, and diagnoses should never be requested.

Discrimination on the basis of disability accounts for over 50% of all applications filed at the tribunal each year. Given the rise in workplace absenteeism resulting from mental illness, we expect that the accommodation of mental illness, and the duty to inquire into possible accommodation needs, will become the focus of many more complaints in the future. The *extent* to which employers have a duty to inquire is still up for debate.

#### **b. Family Status: Childcare and Eldercare**

The prohibition of discrimination on the basis of family status has been part of the Code since 1982. Nonetheless, the breadth of an employer's obligations with respect to family status remains unclear.

In Ontario, family status is defined in the Code as "the status of being in a parent and child relationship." It does not encompass other family relationships.<sup>30</sup>

In an earlier case interpreting family status, the British Columbia Court of Appeal held that for a *prima facie* case of discrimination to be made out, a change in employment terms must result in a "serious interference with a substantial parental or other family duty."<sup>31</sup>

However, the Ontario Human Rights Tribunal set out a broader test last year in *Devaney v. ZRV Holdings Limited*<sup>32</sup> whereby the Tribunal held that any genuine inability to work due to family care responsibilities places a duty on an employer to investigate the basis for the request for accommodation and consider how accommodation will be achieved.

In *Devaney*, the applicant's employment was terminated because of his persistent failure to regularly attend the office. The applicant had been spending increasingly less

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<sup>30</sup> *Supra* note 6, s. 10(1).

<sup>31</sup> *HSABC v Campbell River & North Island Transition Society*, 2004 BCCA 260.

<sup>32</sup> 2012 HRTO 1590.

time at the office, despite the fact that he was the lead for a major project. His employer insisted that he attend the office during office hours. The applicant admitted that he was absent many times, but stated that he completed his work remotely, in order to care for his ailing mother. The employer took the position that the applicant had chosen to take time off to care for his mother and he could have hired someone to assist her.

The Tribunal concluded that in order for the applicant to establish a *prima facie* case of discrimination, the applicant need only show that his employer's attendance requirements had an adverse impact because his absences from the office were required due to caregiving responsibilities. **However, the Tribunal did note that if the applicant was merely choosing to provide care rather than it being a family responsibility, the applicant would not be able to claim family status discrimination.**

The Tribunal held that in order to make out a *prima facie* case of discrimination on the basis of family status, the applicant must establish that the respondents' attendance requirements had an adverse impact on the applicant because of absences that were required as a result of the applicant's responsibilities as his mother's primary caregiver.

The Tribunal also held that the applicant's employment was terminated based on absences, a significant portion of which were required due to his family circumstances. The Tribunal found, therefore, that the applicant's family care requirements were a significant factor in the respondents ultimately terminating his employment and awarded the applicant \$15,000.

In *Callaghan v. 1059711 Ontario Inc.*,<sup>33</sup> the applicant was denied a promotion from clerk to store manager, in part, due to her limited availability to work evenings and weekends as a result of her child care obligations.

In addition, the Tribunal found that while the employer viewed availability requirements as a critical business requirement, the employer failed to give any thought or consideration to the issue of accommodation. The respondents did not give any serious consideration to whether the applicant could meet the requirements of the position with suitable childcare arrangements, nor did they give her an opportunity to investigate the availability of alternate childcare arrangements.

In *Lue v. Pantorama Industries*,<sup>34</sup> the applicant missed a number of shifts as a result of her children contracting the flu and being unable to go to daycare. At the time, she was a probationary employee who had worked for the company for 5 weeks. Her employment was terminated because management felt that she was unreliable. She was awarded \$20,000 in damages.

In *McDonald v. Mid-Huron Roofing*,<sup>35</sup> shortly after the applicant was hired he advised his employer that his spouse was pregnant and was having health complications. The

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<sup>33</sup> 2012 HRTO 233.

<sup>34</sup> 2011 HRTO 2307.

<sup>35</sup> 2009 HRTO 1306.

applicant attended several of his wife's appointments and took full or partial days off work on approximately fourteen occasions. Then, once his son was born, he took one week off. The applicant was warned that when he returned he should not take any more time off.

On the day he was fired, the applicant was scheduled to work, and his newborn son was scheduled for a medical appointment. The applicant testified that his wife called him at work to tell him that she had "passed out" and had to go to the hospital. She asked the applicant to take the baby to his appointment. The applicant's employment was subsequently terminated for excessive absences.

The Tribunal held that given his family status (he had no extended family that could assist), the refusal to allow the applicant the time away from work needed for his son's medical appointment had an adverse effect on the applicant.

That adverse effect can only be justified under the *Code* if the respondent can establish that the requirement was "reasonable and bona fide". The Tribunal held that the absences caused inconvenience and frustration, as well as some expense for the employer. However, the Tribunal held that this was not sufficient to constitute "undue hardship."

The applicant was awarded \$20,000 for intangible harm and \$3,500 for loss of wages.

Recently, the media reported widely on a decision by the Federal Court.<sup>36</sup> This case was an appeal of a Canadian Human Rights Tribunal decision. The applicant asked her employer, the Canada Border Services Agency, to provide her with a full-time, fixed day shift so that she could manage her childcare. Fulltime employees at CBSA were expected to work a rotating shift schedule. CBSA was willing to provide her with a part-time fixed shift, but not a full-time shift.

The Court agreed with the Tribunal that family status was not limited to the identification of relationships, but also included the needs and obligations flowing from those relationships, including childcare obligations. The Federal Court held that a *prima facie* case is made out where the impugned rule "interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way."<sup>5</sup> In this case, the rotating shifts, interfered with the applicant's ability to fulfill her parental obligations.

While this is a federal and not a provincial decision, *Johnstone* like *Davey*, suggests that human rights jurisprudence is expanding the protection afforded by this ground.

### **Continuing Concern: Costs**

The Tribunal does not currently have the power under the *Code* to order unsuccessful parties to indemnify successful parties for the legal costs they incurred. Most provinces do permit some form of costs order against complainants in human rights matters. It is

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<sup>36</sup> *Attorney General v. Johnstone*, 2013 FC 113.

only Ontario, New Brunswick and the federal human rights tribunal that have no provisions with respect to costs awards.<sup>37</sup>

This is particularly troublesome given that the Tribunal may not dispose of an application that is within its jurisdiction without giving the parties an opportunity to make oral submissions.<sup>38</sup>

Therefore, in order to dispense with a meritless application, a respondent must bring an application for a summary hearing to determine whether or not the application has a reasonable prospect of success and therefore whether or not the Tribunal should dismissed the application. Therefore, in even the most frivolous of cases, legal fees will be incurred in order to dispense with the application.

The aforementioned Report recommended that Ontario maintain the status quo with respect to costs for now, but ought to immediately study the potential benefits and drawbacks of the introduction of a costs regime. Therefore, it appears as though the implementation of a costs regime is likely some time away.

### **Moving Forward: Reducing Exposure Through Internal Processes**

The Tribunal now receives approximately 3,000 new applications a year.<sup>39</sup> The Tribunal statistics indicate that employment is cited in 76% of applications. There are many steps that employers ought to take in order to proactively prevent claims and prepared for the defence of a future claim.

#### **Protected Grounds**

The applicable protected grounds of the Code should be, at a minimum, set out for employees together with definitions, where applicable. The protected grounds of the Code, applicable in the employment context are as follows:

- Age
- Creed (religion)
- Sex (including pregnancy and breastfeeding)
- Gender Expression and Gender Identity
- Family Status (such as being in a parent-child relationship)
- Marital Status (including the status of being married, single, widowed, divorced, separated, or living in a conjugal relationship outside of marriage, whether in a same sex or opposite sex relationship)
- Disability (including mental, physical, developmental or learning disabilities)
- Race
- Ancestry
- Place of origin
- Ethnic origin

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<sup>37</sup> *Supra* note 1, at page 162.

<sup>38</sup> *Supra* note 6, s. 43(2)1.

<sup>39</sup> *Supra* note 1 at page 41.

- Citizenship
- Colour
- Record of Offences (criminal conviction for a provincial offence, or for an offence for which a pardon has been received)
- Association or relationship with a person identified by one of the above grounds
- Perception that one of the above grounds applies.

### Developing Internal Policies, Procedures and Programs

As set out in the Commission's Guidelines On Developing Human Rights Policies and Procedures,<sup>40</sup> a complete internal strategy to prevent and address human rights issues in the workplace should include:

1. A barrier prevention, review and removal plan
2. Anti-harassment and anti-discrimination policies
3. An internal complaints procedure
4. An accommodation policy and procedure
5. An education and training program

An effective strategy will include all of these elements. Each element, in turn, will be reviewed below.

### Barrier Prevention, Review and Removal

It is unacceptable, under the *Code*, to create structures and systems within the employment environment that create barriers by ignoring the needs of employees as they relate to the *Code's* protected grounds. A barrier review should be conducted that assesses:

1. The physical accessibility of the organization's workspace. This should include consideration of potential barriers created for persons with sensory, environmental or intellectual disabilities.
2. The organization's policies, practices and decision-making processes. Formal and informal practices such as recruitment, compensation, training, promotion and termination should be reviewed for any potential impact on *Code's* protected grounds. A common barrier is a lack of formal, articulated policies and procedures which can lead to differential treatment even where such is unintentional.
3. The overall culture created within the organizational structure. This will include the organizations informal social atmosphere, communication networks, decision-making strategies and other aspects of the overall internal culture that may marginalize or exclude employees based on the *Code's* protected grounds.

### Anti-Harassment and Anti-Discrimination Policies

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<sup>40</sup> Revised by the Commission: January 30, 2008, available online: <<http://www.ohrc.on.ca>>.

By specifically describing standards and expectations for employee behaviour, these policy statements will make it clear that harassment and discrimination will not be tolerated and that violations will be taken seriously by the organization. As harassment is one specific manifestation of discrimination, employers may choose to issue specific policy statements individually addressing discrimination based on race, gender, sexual orientation etc.

An effective policy statement on harassment and discrimination will include a clear statement of the organization's commitment to creating and maintaining a respectful workplace free from discrimination. The statement should set out the organization's objectives and expected principles and standards of behaviour. It should also set out the protected grounds as defined by the Code and previously described (see above) as well as defining specific relevant terms (e.g. discrimination, harassment, sexual harassment, poisoned work environment etc.). As well, it should address the specific application of the policy with consideration to the various types of workers in the organization (temporary, part-time etc.), the potential sources of harassment (suppliers, clients, management etc.) and the extent of the protection (e.g. while off-site during work-related activities).

Finally, comprehensive human rights policies should clearly set out the various roles and responsibilities and expectations of the organization's members, including the procedure by which employees may raise human rights concerns.

### Complaint Resolution Procedures

A complaint resolution procedure should be in place to provide a clear, fair and effective process to receive and resolve potential complaints. At a minimum, the procedure should ensure that complaints are taken seriously, are acted upon promptly and that decisions/actions taken by the organization are effectively communicated to the parties.

An effective resolution procedure will contain the following elements:

- Access to information and advice;
- Access to and information regarding steps that could be pursued under the *Code*;
- A planned approach to respond to both direct and indirect complaints (those coming from the person experiencing discrimination and those coming from a witness to discrimination);
- A method of ensuring that those registering complaints may do so without fear of reprisal;
- A plan for instituting dispute resolution procedures;
- A clear approach to investigation of a complaint that ensures impartial, timely and fair investigation of all relevant issues;
- A form of representation for both parties, if the parties so choose (union stewards, designated colleagues etc.);
- A process to document all aspects of the complaint resolution procedure;
- A guarantee of privacy and confidentiality;

- A clearly articulated plan of what steps should be taken depending on the various potential outcomes of a complaint; and
- Clear channels of open communication with all parties to a complaint at all steps during the resolution procedure

### Accommodation Policy and Procedures

Under the *Code*, employers are required to accommodate the needs of their employees, as they relate to the protected grounds, up to the point of 'undue hardship'. It is as important that the process of accommodation be as respectful of the employees' dignity as the accommodation itself is. A respectful and effective accommodation policy will include:

- a statement of the organizations commitment to accommodation
- an outline of the policies objectives
- the scope of the application of the accommodation procedure
- an explanation of the procedure for requesting specific accommodation
- a statement of respect for the privacy and confidentiality of those seeking accommodation
- an articulated understanding that accommodation will have different meanings determined by an individual's given circumstances
- a process to monitor the effects of accommodation attempts over time to evaluate the ongoing effectiveness

Undue hardship occurs where the pragmatic considerations of providing a certain type of accommodation make it an unreasonable expectation on the employer. According to the Commission, the only relevant factors to consider in assessing undue hardship are cost, outside sources of funding and health and safety concerns. The standard to show undue hardship is high and the burden for showing such will rest on the accommodation provider. Additionally, where an accommodation is determined to constitute undue hardship, the employer still has an obligation to implement a more reasonable form of accommodation, if one is determined to exist.

### Education and Training Programs

Arguably the most fundamental step in creating a work environment free from discrimination is the implementation of timely and appropriate human rights training for all employees. An effective training program will help to foster a culture of tolerance and respect within an organization and can help to eliminate human rights issues by addressing their source. An effective training program will educate employees on the general ideas and concepts that underline the provision of human rights, on the specific provisions and protections afforded by the *Code* and on the specific policies and procedures developed within the organization to address human rights related issues.



## **Conclusion**

In short, the Tribunal's application of the *Code* over the last five years has created challenges for employers, including increased damage awards, increased complaints (under both the human rights regime and the civil courts), and increased limitation periods. In addition, employer's procedural and substantive duties seem to be ever expanding.

These challenges require a proactive approach to developing internal policies and procedures with an aim towards fostering a workplace culture of mutual respect and minimizing liability exposure for employers.

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