



FOCUS ON LABOUR RELATIONS AND EMPLOYMENT LAW

Bill 107: Sweeping Human Rights Changes Affecting Ontario Employers



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The Human Rights Code Amendment Act, 2006, became law last December and is partly in

force. The Act introduces sweeping changes to the human rights system in Ontario, affecting not only the speed and manner of complaint adjudication, but also exposing employers to broader and more onerous remedies.

The Current ("Gatekeeper") System

Currently, the Human Rights Commission receives, mediates, investigates and assesses all human rights complaints in the province. Complaints must be filed within six months of the date a violation of the Human Rights Code (the "Code") is alleged to have occurred.

The commission has the discretion to extend this deadline under some circumstances or it may refuse to deal with a complaint it deems should be dealt with under another piece of legislation in which it lacks

jurisdiction. It may also reject complaints it determines are frivolous, vexatious or brought in bad faith. When a complaint proceeds and is not successfully resolved at mediation or otherwise, the commission conducts an investigation, which typically involves the review of relevant documents and the interview of witnesses. At the end of the investigation, the commission decides whether the facts warrant referral to the Ontario Human Rights Tribunal for hearing.

This "gatekeeper" function of the commission has historically resulted in chronic congestion and protracted delay of complaints. It is not unusual for complaints to take up to five years—in some cases as long as a decade—from the time they are filed to a decision by the tribunal.

The New "Direct Access" System

Under the new system, the "gatekeeper" function will be eliminated. Individual complaints will be filed directly with the tribunal, which will process and hear them.

The commission will focus more on its "public interest" responsibilities: investigating human rights issues;

intervening in matters before the tribunal; initiating its own applications before the tribunal; and reporting to the people of Ontario regarding the state of human rights in the province. This system of "direct access" to the tribunal is expected to process complaints much faster.

Human Rights Support Centre

Changes to the system also include the creation of a new, publicly funded, Human Rights Support Centre, which will provide services throughout the province, including advice, assistance and representation for complainants in relation to applications to and hearings before the tribunal.

The Most Significant New Rules

Under the new system of adjudication, complaints will have to be brought within a year of a single event, or the last of a series of events. This deadline is more generous than the previous one, and can be extended in cases where the delay is incurred in good faith and results in no substantial prejudice. The tribunal may conduct inquiries to collect evidence before holding a

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hearing. It has the power to enter lands and premises without a warrant; to request the production of documents or other things deemed relevant to the investigation; it may question persons on relevant matters and take photographs, video recordings or other visual or audio recordings of the interior or exterior of a place.

The old cap of \$10,000 on awards of damages for "injury to dignity, feelings and self-respect" will be lifted, and penalties of up to \$25,000 may now be imposed for "general violation of the *Code*." In other words, the mere fact there has been a breach of the *Code*—aside from any monetary loss or other damages suffered as a result of the breach—may occasion a penalty of as much as \$25,000.

Effect on Wrongful Dismissal Litigation

At present, an employee cannot sue an employer for a breach of the *Code* and must go to the commission and then the tribunal to seek a remedy. While the court can consider breaches of the *Code* in determining whether punitive or aggravated damages are warranted, it will not make an award based solely in respect of a breach of the *Code*. Under the new system, where the court in wrongful dismissal cases finds that there has been a breach of the *Code*, it will now have the power to make both monetary awards of compensation for losses arising from such breach (including compensation

for injury to dignity, feelings and self-respect), and "non-monetary" awards of restitution. It's thought this "restitution" power may be used by the court to make orders of reinstatement to employment in appropriate cases. This power of reinstatement was not available to the court in the past. The result will likely be a swell of wrongful-dismissal litigation involving allegations of violations of the *Code* and seeking new and expanded remedies to which employers have not been traditionally exposed.

When Do the Changes Become Effective?

The date these changes come into effect has yet to be proclaimed. In the meantime, we do know that the following transitional provisions will apply. For six months after the changes come into force, the commission will continue to deal with unresolved complaints filed under the old system. At any time during this six-month period, a complainant may abandon his or her old complaint and make a new application to the tribunal, which will then be governed by the new provisions of the *Code*. If the merits of old complaints have not been dealt with by the commission by the end of the six-month transitional period, and the complaint has not been withdrawn or settled, complainants will have an additional six months

within which to make a new complaint, which will then will be governed by the new provision of the *Code*.

We will keep clients and readers informed as more information comes available on when the new *Code* will become effective.

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