



Torkin|Manes BULLETIN

Torkin Manes Cohen Arbus LLP
Barristers & Solicitors
151 Yonge Street, Suite 1500
Toronto, ON M5C 2W7
Tel: 416 863 1188
Fax: 416 863 0305
torkinmanes.com

FEBRUARY 2007

FOCUS ON LABOUR RELATIONS AND EMPLOYMENT LAW

The Human Rights Code Amendment Act, 2006: Employers Beware!



Irv Kleiner

Amendments to the Ontario Human Rights Code, enacted last December, have the potential to

change the landscape of how wrongful-dismissal cases are litigated.

The changes mirror an approach adopted by the Supreme Court of Canada *Wallace* decision requiring that employers act in good faith when terminating employees. The *Wallace* decision allowed a court to find that an employer did not demonstrate good faith towards a terminated employee, and assess additional damages in favour of the employee. The *Human Rights Code Amendment Act* similarly provides the court with an additional basis upon which to compensate terminated employees in wrongful-dismissal suits.

Before the new legislation, people alleging discrimination under the *Code*, were required to seek relief at the Ontario Human Rights

Commission. The courts could consider *Human Rights Code* violations only in assessing punitive or aggravated damages in a wrongful-dismissal case, but could not award damages for discrimination per se.

Under the amendments to the *Code*, if a human-rights complaint is brought as part of a wrongful-dismissal action, the court has the powers of the Human Rights Tribunal to make monetary awards for discrimination and, non-monetary remedies such as reinstatement of a terminated employee, or requiring a former employer to provide a positive letter of reference, or to post retraction notices, or notices of apology in a workplace in which a *Human Rights Code* violation occurred.

It is likely that damages in wrongful dismissal litigation will no longer be based solely upon "reasonable notice" but can also now include claims for damages under the *Human Rights Code*, when discrimination is established.

For example, a dismissed employee who has been unable to find another job for, say, three years, and who also

alleges discrimination under the *Code*, could recover damages to compensate for the full three years of lost salary even though the duration of employment with the offending employer was brief.

Under the common law, reasonable notice is generally based upon a dismissed employee's age, length of service, and position of employment with the former employer. The conventional criteria for determining reasonable notice will now become less of a factor when it can be established that there has also been discrimination in violation of the *Code*.

Employees continue to have the option to file *Human Rights Code* complaints with the Tribunal, as well as a wrongful-dismissal action in the courts, as long as they do not directly seek human-rights damages in the courts.

One advantage of going through the courts instead of the Human Rights Tribunal, includes the fact that a successful litigant can be awarded costs, which are not available through the Tribunal. In addition, using the courts to pursue

(Continued on reverse)

Employers Beware! (cont'd.)

Human Rights Code remedies in a wrongful-dismissal action, provides a litigant with the ability to have access to the discovery process and to require production of documents that might help advance this kind of complaint.

Changes to the *Code* include a new complaints process which will result in claims being made directly to the Ontario Human Rights Tribunal instead of to the the Ontario Human Rights Commission. Under the previous process, the Commission would receive a complaint, attempt to mediate the complaint, and if the complaint remained unresolved, it would be referred to the investigative branch of the Commission. Only after the investigative stage, would a complaint be referred to the Tribunal for a formal hearing. The new process is intended to expedite the processing and disposition of a complaint.

The Commission may intervene in an application if it believes it is in the public interest to do so. It may also inquire into any matter, or bring its own independent application before the Tribunal.

There may be an increase in the number of complaints because the time limit for filing a complaint has been extended to a year from the previous six months, and the Tribunal's power to dismiss an application without a hearing is now more restricted.

The *Act* also introduces a Legal Support Centre that will provide legal and other support services to complainants regarding all facets of a complaint that is made to the Tribunal.

Finally, the amendments to the *Code* have removed the monetary limitation on damages for mental

anguish, and have provided for unlimited monetary damages for compensation and restitution while also allowing the potential for punitive fines of up to \$25,000.00 for each violation.

For further information about the new amendments to the *Ontario Human Rights Code*, contact any member of our Labour Relations and Employment Law Group.

Irv Kleiner is head of our Labour Relations and Employment Law Group and deals exclusively with management-side labour relations and employment law. He represents public- and private-sector employers in a number of industries and conducts labour negotiations on behalf of unionized employers.

Irv can be reached at 416 777 5403, or ikleiner@torkinmanes.com

The issues raised in this release by Torkin Manes Cohen Arbus LLP are for information purposes only. The comments contained in this document should not be relied upon to replace specific legal advice. Readers should contact professional advisors prior to acting on the basis of material contained herein.