

Amendments to Human Rights Code

Ruben R. Goulart

Bill 107 (the “Bill”), An Act to Amend Human Rights Code, results in a number of procedural changes to the human rights system. In addition, the scope and amount of damages are being changed. As an employer, there are many steps that can be taken to prepare for the new system.

Bill 107

The Bill received royal assent on December 20, 2006. The Bill is not in effect yet but once the effective date is known, there will be a six-month transition period to allow the transition from old model to the new model.

The Bill changes the powers and procedures of the Ontario Human Rights Commission and Tribunal by replacing the old model with a new model where the latter has a focus on providing direct-access to the Tribunal. The changes are aimed to streamline the complaint procedure and make the system more efficient and cost-effective for the complainants.

Procedural Changes

Under the old model, a complainant would first make a complaint to the Commission who could either decline to deal with the complaint under s. 34 of the Code or investigate the complaint. After investigation, the Commission could refer the complaint to the Tribunal, at which point the adjudication process would begin. The entire procedure would normally take years.

Under the new model, the role of the Commission is changed from being the gatekeeper and investigator of complaints to one of developing policies, initiating inquiries and applications, and conducting reviews. Under the new model, the applicant, (“complainant” has been replaced with the word “applicant”) makes an application to the Tribunal. The Tribunal must provide the parties with an opportunity to make oral submissions and must provide written reasons before an application can be finally disposed of. The new model assures that every applicant gets an opportunity to tell his or her story.

Further a Legal Support Centre is established, with the mandate to provide legal services to applicants with bringing applications, Tribunal hearings, applications for judicial review, and among other things, enforcement of Tribunal orders. Under the new model, the limitation period of bringing an application has been extended from six months to one year.

The efficiency of the new model will be determined by the rules and procedures the Tribunal would set and follow and by how much more funding the new model would get from the government.

Remedies under the New Model

Among other significant powers, the Tribunal has the authority to award damages to the applicants that are not even requested by the applicants compared to the current practice whereby the Tribunal awards damages that are specifically requested by the complainant.

The \$10,000 cap on mental anguish is eliminated, as is the requirement for the applicant to show that the respondent “willfully or recklessly” engaged in conduct to successfully claim damages for mental anguish. These changes may have the net effect of increasing the amount of mental anguish damage awards by the Tribunal.

Civil Claims and the Code

Another significant addition to the Code is the enactment of s. 46.1 whereby a court in a civil action may order monetary compensation for an infringement of a right in the Code. However a civil claim cannot be solely based on an infringement of the Code. An applicant is barred from bringing an application to the Tribunal for the same infringement where a civil action is also commenced and s. 46.1 of the Code is being relied on.

Unionized Employers and the Code

Section 45.1 of the Code authorizes the Tribunal to dismiss an application if “the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.” How the Tribunal will interpret this section of the Code remains to be determined but this section nevertheless defers a lot of discretion to the Tribunal. It may lead to multiplicity of proceedings for unionized employers. Historically the Commission has referred complaints arising in a unionized environment to the grievance procedure. But under the new model, the requirement to allow every applicant an opportunity to make oral submissions combined with s. 45.1 will technically allow an applicant to commence an application with the Tribunal and bring forth a grievance simultaneously.

Steps For Employers

The changes to the Code may essentially have a net effect of increasing the number of applications due to the longer limitation period, combined with the legal resources provided by the Legal Support Centre. In face of such changes, employers need to be proactive and implement changes to ensure they are in compliance with the Code, and have appropriate procedures in place to investigate complaints, should they arise.

Employers should re-evaluate their workplace policies and procedures to ensure compliance with the Code. Such policies and procedures should have mechanisms for dealing with complaints within the organization. Where a complaint is made within the organization, the employer has a responsibility to investigate the complaint. Investigating complaints properly has become more important since the Commission will not be playing this role anymore and the Tribunal will most likely look to the employer to fill in this gap. Lastly, employers should train their managers, supervisors and employees about policies and procedures to ensure that everybody in the workplace knows about them and understands that the employer will be implementing them.

Ruben Goulart practices labour and employment law, and is the practice leader for the Labour and Employment Law Group at Keyser Mason Ball, LLP