WeirFoulds LLP

Human Rights Update – Dealing with Applications at a Preliminary Stage

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Applications under the *Human Rights Code* ("***Code***") present a real risk for employers and an important avenue of redress for employees. Proceedings before the Human Rights Tribunal of Ontario ("**HRTO**") are less formal, may be more accessible for employee-applicants, and may present a broader range of remedies than an action in the courts, including the possibility of reinstatement.[1] However, like any legal proceeding, there is a range of methods by which a hearing before the HRTO may be dismissed at a preliminary stage. This article provides a brief introduction to some of the most important means of disposing of applications without having to prepare for a costly and time-consuming full hearing.

Timeliness

As in any proceeding, the first issue to consider is always the relevant limitations period. An application must be made "within one year after the incident to which the application relates" or with respect to a "series of incidents", within one year after the last incident in the series.[2]

The HRTO may also accept late applications if "the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay".[3]

The HRTO has been reluctant to hold that most delays in filing applications meet the "good faith" standard. Not making inquiries regarding one's rights, or a desire to consider other forums of redress, are generally not sufficient to meet the test.[4] However, in the case of disabled employees, employers should be aware that an inability to seek redress due to one's disability may found a claim of good faith delay.[5]

HRTO case law regarding the term "series of incidents" raises a risk that employers may have to address allegations that reach back beyond the one-year period. The HRTO has held that if there has not been more than a year between each relevant incident, a claim can reach back a number of years.[6] Claims that reach back in time based on a "series of incidents" are not constrained by statutory language regarding "good faith" or prejudice.

Deferral or Dismissal Due to Parallel Litigation and Settlement

The *Code* also contains provisions that allow the HRTO to defer an application.[7] The HRTO has emphasized that decisions with respect to deferral are considered on a case-by-case basis, but deferral has been commonly granted where there are parallel administrative employment proceedings, such as proceedings under the *Workplace Safety and Insurance Act*[8] or the *Employment Standards Act*.[9]

Deferral is useful because it reduces the possibility of duplicative litigation and helps the parties focus on resolving their dispute. More useful still is the HRTO's ability to dismiss applications where "another proceeding" previously had "appropriately dealt with the

substance of the application".[10]

The HRTO has not been entirely consistent in when it would dismiss applications. But, decisions under the *Workplace Safety and Insurance Act*[11] and the *Employment Standards Act*,[12] grievance proceedings[13] and even settlement agreements[14] have all founded dismissals.

Parallel Civil Proceedings

Rather than going before the HRTO, an applicant may instead seek to remedy a breach of the *Code* by way of a civil action. Section 46.1 creates a civil remedy for violations of the *Code*, allowing the court to order compensation or restitution orders where the court finds there was a breach of the *Code*. Section 46.1, however, does not permit a plaintiff to bring a civil action **solely** on the basis of a breach of the *Code*; a s. 46.1 claim must be brought as part of a civil action alongside other viable causes of action.[15]

An employee alleging a *Code* violation, then, must elect whether to seek out a remedy for the alleged breach in court or before the HRTO. Section 34(11) of the *Code* bars applications before the HRTO where there is active civil litigation in which the applicant is seeking remedies for breach of the *Code*, applications where the issue of infringement was determined by the court, or where the civil action that addressed an allegation of infringement was settled. The HRTO will apply s. 34(11) to dismiss an application even if s. 46.1 has not been explicitly pleaded in the civil action; the HRTO has barred applications as long as the *Code* is the basis for an element of the damage claim.[16] An application, however, will not be dismissed in the face of parallel civil litigation based on the same facts that does not make a claim flowing from an alleged *Code* violation, though the application may be deferred until the civil action based on the same fact situation is dealt with.[17]

Summary Hearings

The HRTO, in the summer of 2010, introduced a new method of dealing with applications. Respondents may request that a summary hearing be held in order to dismiss an application on the ground that it has "no reasonable prospect of success". The HRTO may also order that a summary hearing be held of its own accord (in the latter case the HRTO will generally order a summary hearing be held in lieu of the respondent putting in a complete response). Such proceedings can focus on:

1. whether the allegation can be reasonably considered to be a *Code* allegation; or
2. whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him or her can show a link between the event and an alleged prohibited ground under the *Code*.[18]

The first form of request is focused on events where, on its face, there is a factual link between the event and the applicant's characteristics (such as disability), but applying the law to the facts clearly indicates that the *Code* has not been breached.

The latter form of request is focused on events where there is no link between relevant characteristics caught by the *Code* and the conduct at issue. Complaints that make broad allegations of "unfair treatment" are an example of a type of application ripe for dismissal under this second form of request.

A summary hearing is attractive because:

1. the application will be dealt with more quickly;
2. summary hearings are not subject to the costly and time-consuming disclosure and document exchange rules that would apply to a hearing; and
3. a summary hearing is a flexible procedure that can be tailored to address and dispose of the key issues in dispute, such as matters of law, without having to engage in tangential factual issues. Often the HRTO holds summary hearings by way of a

teleconference based on submissions from the parties. This is in contrast to a full hearing, which is a trial-like process that requires putting forward evidence through the examination of witnesses.

Often a request for summary hearing can be put in at the same time as a response; in applications where a request for summary hearing is warranted, the substance of the response and the request is likely to be quite similar.

The HRTO Procedure with Regard to Preliminary Matters

Unless the application falls within the dismissal provisions in s. 34(11), a respondent must put in a **full** response to any application. However, the HRTO's response form includes sections for requesting deferral or dismissal pursuant to s. 45.1 of the *Code*. Furthermore, as applications are sent to the HRTO and reviewed before delivery to respondents, the HRTO may, as a preliminary screening mechanism (though this is fairly rare), order the parties to provide preliminary submissions on procedural issues such as timeliness, deferral or dismissal on a preliminary basis without requiring that the respondent put in a full response. The HRTO will notify respondents as to how they should respond to any given application. Generally, in order for a respondent to dismiss an application on a preliminary basis, the respondent will have to put in a full response and then (or simultaneously) deliver and file a Request for Summary Hearing.

Conclusion

Like any litigation, an application before the HRTO can be a difficult process. Before being fully drawn into the hearing process, consider if the matter can be addressed at a preliminary stage without the need to go to a full hearing. It is particularly important to be aware of all litigation that is related to the application. Another important factor to consider is that costs of the proceeding **cannot** be recovered from the losing party at the HRTO, an important distinction from the court process (a feature that makes the HRTO perhaps especially attractive for employees).[19] If a matter is not dismissed at a preliminary stage, the only alternatives are to reach a settlement (it should be noted that two-thirds of applications are dealt with by way of settlement) or to undertake a full hearing, which includes expensive document production obligations.

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1. For an example of a decision where the HRTO ordered reinstatement of an employee whose termination was deemed to be discriminatory, see *Kreiger v. Toronto Police Services Board*, 2010 HRTO 1361.

2. *Human Rights Code*, s. 34(1).

3. *Human Rights Code*, s. 34(2).

4. HRTO adjudicators often rely upon the test set out in *Miller v. Prudential Lifestyles Real Estate*, 2009 HRTO 1241 at paras. 24-25, which emphasizes that applicants must meet a "fairly high onus" to meet the good faith standard.

5. As in *Lutz v. Toronto (City)*, 2010 HRTO 769 and *Kelly v. CultureLink Settlement Services*, 2010 HRTO 977.

6. A fairly recent example of such an analysis can be found in *Robinson v. United Steelworkers*, 2010 HRTO 2498.

7. *Human Rights Code*, s. 45.

8. See *Dhunsi v. J.T. Bakeries*, 2010 HRTO 540.

9. See *Calabria v. DTZ Barnicke*, 2008 HRTO 411, which has been relied upon by adjudicators in many decisions deferring applications.

10. *Human Rights Code*, s. 45.1.

11. See *Berisa v. Toronto (City)*, 2008 HRTO 246.

12. *Chen v. Harris Rebar*, 2009 HRTO 227.

13. See *Touseant v. Thunder Bay (City)*, 2010 HRTO 759.

14. See *Nolan v. Vale Inco*, 2010 HRTO 1758.

15. *Human Rights Code*, s. 46.1(2).

16. See *Beaver v. Dr. Hans Epp Dentistry Professional Corporation*, 2008 HRTO 282.

17. See *Free v. Magnetawan (Municipality)*, 2010 HRTO 1236.

18.The HRTO has usually applied the analysis in *Dabic v. Windsor Police Service*, 2010 HRTO 1994, when it sets out a test for dismissal in a summary hearing.

19. On the availability of costs, see *Dunn v. United Transportation Union, Local 104*, 2008 HRTO 405.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035