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Labour & Employment Law in Canada

A Newsletter on Canadian Labour and Employment Law
for American Practitioners and Employers

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LITIGATING AND ENFORCING HUMAN RIGHTS IN CANADA

The twenty-five years since the *Canadian Charter of Rights and Freedoms* came into force have seen a huge increase in human rights complaints and litigation by employees against their employers. While it did not create obligations as between employer and employees, the *Charter* gave human rights law a far higher profile in Canada. Just as in the United States, the workplace in Canada is an increasingly common location for disputes concerning human rights.

While many of the substantive legal rules and concepts applied to human rights disputes in the Canadian workplace will be familiar to American practitioners, the administrative and judicial means of dealing with such disputes differ considerably between the two countries. This newsletter will highlight some of these important differences.

EXCLUSIVE PROVINCIAL JURISDICTION IS THE GENERAL RULE

The Canadian constitution¹ divides jurisdiction over employment and labour law, including human rights in the workplace, between the federal and provincial governments. Each level of government has exclusive jurisdiction over certain industries. In marked contrast to the American situation, the fact that an employer's goods or services enter into interprovincial or international

commerce does not give the federal government jurisdiction over it in Canada. Thus, about 90% of Canadian employees come under the exclusive jurisdiction of the province where they work for purposes of human rights legislation. Federal jurisdiction extends only to employees in comparatively few – though highly important – sectors such as banking, telecommunications and interprovincial or international transportation. ►

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The result is that most employers with employees in more than one province are subject to different human rights legislation in each one. This potential complication is reduced by the general similarity in the human rights legislation of all Canadian jurisdictions and the fact that federal legislation does not apply in any way to provincially regulated employers.

ENFORCEMENT MODELS

All but one of the jurisdictions in Canada have a similar enforcement model for human rights complaints.

A human rights commission investigates complaints brought to it and may either dismiss them or refer them for a hearing before a quasi-judicial human rights tribunal. These commissions are headed by commissioners, who are named by the federal or provincial cabinet (depending on the jurisdiction) for relatively short (3-5 years is common) periods. Day-to-day operations are in the hands of permanent civil servants. Human rights statutes and judicial decisions give commissions jurisdiction over complaints of breaches of human rights statutes to the exclusion of the courts. In all but one jurisdiction in Canada, the commission controls access to the human rights tribunal; complainants cannot file complaints with a tribunal, the commission must refer a complaint to it.

British Columbia is the exception to this model. In 2003, its human rights commission was abolished and complainants under its legislation have had direct access to the human rights tribunal since that time.

Both commissions and tribunals throughout Canada have made increasing use of alternative dispute resolution (ADR) and mediation in recent years to reduce the number of cases going to formal adjudication. In some jurisdictions, mediation or ADR efforts by either the commission, tribunal or both are required before a complaint is sent to a hearing.

Tribunals are staffed by persons named for relatively short periods (3-5 years) by the federal or provincial cabinet. Members need not be legally trained, but often are in

practice. A single member most commonly hears a complaint, though particularly complex or important cases may be heard by a panel of three. Unlike, for example, labour relations boards, human rights tribunals are not “representative”; appointments to them are not required to balance complainant, respondent and neutral interests.

Tribunal proceedings have tended to become more elaborate in the larger Canadian provinces and in the federal forum as the factual and legal issues before tribunals have become more complex. Pre-hearing documentary disclosure is now required in some jurisdictions as a matter of routine. At the hearing itself, witnesses are called and examined, then cross-examined, by the parties and documents introduced into evidence. Hearings are less formal overall than before the courts and the normal rules of evidence may be applied in a somewhat looser fashion. The burden of proof has been stated by the Supreme Court of Canada to be the normal civil one of proof on a balance of probabilities by the complainant,² but there is some controversy and confusion in the case law over whether a shift in the legal burden of proof takes place if a complainant succeeds in making a *prima facie* case.

A decision rendered by a tribunal becomes legally binding on the parties. Should the decision not be complied with, a party can file it with the superior court in the relevant jurisdiction for enforcement as a judgment of that court. Enforcement proceedings can include execution of an order to pay money or contempt proceedings if the tribunal has ordered a party to do or refrain from doing some particular action.

Damages awards are the most common form of relief granted by tribunals in cases arising from employment. An employee whose complaint is found to be justified will normally be awarded full compensation for any salary and benefits lost as a result of the discrimination. Damages may also be awarded for loss of self-esteem or other forms of mental suffering. Aggravated or punitive damages may be available, depending on the jurisdiction, in the case of deliberate or egregious conduct. As administrative tribunals, human rights tribunals have no inherent powers to grant

relief, so the exact scope of the remedies they can grant depends on the wording of the statutory provisions creating them.

Aggravated or punitive damages awards in Canada are modest by American standards, ranging up to about \$20,000. Some highly important decisions in the federal jurisdiction have established that in mass “systemic” equal pay claims involving thousands of individuals who were not intentionally discriminated against, no such damages should be awarded in any event because such “systemic” discrimination did not give rise to the individualized mental distress which aggravated or punitive damages are meant to address.

Tribunal decisions may be judicially reviewed by the courts. Factual findings by tribunals will only be set aside if they are patently unreasonable, but courts generally use a less demanding standard of review for findings of law or mixed fact and law.

LABOUR ARBITRATORS

Unionized employees have a practical alternative to the often very lengthy process of investigations by human rights commissions. Collective agreements now typically include a non-discrimination clause prohibiting discrimination on the same grounds as the jurisdiction's human rights legislation or may incorporate by reference the grounds listed in human rights legislation. In such cases, arbitrators can deal with complaints of discrimination as being breaches of the collective agreement. Labour relations legislation in some jurisdictions, such as Ontario, also expressly gives arbitrators power to apply human rights legislation in resolving grievances under collective agreements. Moreover, the Supreme Court of Canada³ has held that, as a general rule, arbitrators hearing grievances can apply human rights legislation where necessary to fully deal with the matter before them.

Such hearings take place according to the usual grievance arbitration practice. Witnesses testify orally and are subject to cross-examination, and documents are tendered in evidence. Pre-hearing disclosure obligations are largely governed by the terms of the collective agreement.

Grievance arbitrators' powers where grievances have a human rights component can vary in detail depending on the jurisdiction and the collective agreement, but will invariably include the power to order reinstatement of a dismissed employee and compensation for any lost wages or benefits. Other forms of relief, such as orders requiring an employer or fellow employees to take specific action (removing sexually explicit materials from the workplace, for example) are normally available as well.

In all Canadian jurisdictions, grievance arbitrators' awards are legally binding on the employer, the employee and the union as soon as they are rendered. Awards can be filed in the superior court of the relevant jurisdiction and are then enforceable as a judgment of the court using the court's usual processes.

Arbitrators' decisions are subject to limited judicial review, though courts may use a standard of correctness or of reasonableness when the decision turns on the interpretation of an outside statute such as a human rights act.

COURTS

In terms of volume of cases, the courts are the least important forum for resolving human rights disputes in first instance. The Supreme Court of Canada has held that an allegation of a breach of a human rights statute does not constitute a common law cause of action,⁴ so that non-unionized employees must rely on the complaint mechanisms set up in human rights statutes. Unionized employees will almost always be required to grieve under their collective agreements rather than bring actions in the courts.

But there are circumstances where an employee may claim damages in the courts for acts which are contrary to the relevant human rights legislation. These will arise where an employee can characterize conduct which is a breach of the relevant human rights statute as also amounting to an independent actionable wrong and claim damages for that wrong. The most usual example of this situation is where an employee sues for wrongful dismissal, an action for breach

of contract. Canadian courts will award punitive damages in such actions if the defendant's conduct, in addition to being a breach of the contract, is also an independent actionable wrong.⁵ Using this reasoning, an employee may claim punitive damages where the employer's breach of the employment contract in wrongfully dismissing him involved discriminatory acts by the employer. The Supreme Court of Canada has held that this is indeed the case where the employer's conduct is sufficiently "harsh, vindictive, reprehensible and malicious".⁶

How this potential for asserting what are in substance claims of discriminatory acts prohibited under human rights legislation can work out in practice is illustrated by the Ontario Court of Appeal's recent decision in *Keays v. Honda Canada Inc.*⁷

Keays had been employed by Honda for about fourteen years. He had been repeatedly absent, on both a short and long term basis, with what was diagnosed by his personal physicians as chronic fatigue syndrome. The company had come to doubt the reality of Keays's condition and required him to meet with its occupational medicine specialist who, Keays was informed, was of the view that Keays should be attending work on a regular basis. He refused and was dismissed for insubordination.

The Court of Appeal upheld the finding that Keays had been wrongfully dismissed. The Court also found that Honda's conduct in ultimately refusing to consider reasonable accommodation of Keays's disability was discrimination contrary to Ontario's human rights legislation. Honda's refusal to "give genuine recognition to [Keays's] disability" and to "seek in an open-minded, unbiased and good faith way" means of reasonably accommodating it justified the imposition of punitive damages. Both courts also relied on essentially these same facts concerning Honda's conduct which were found to be discriminatory as the basis for also increasing the amount of reasonable notice to which Keays was entitled under the rule in *Wallace v. United Grain Growers Ltd.*⁸

This case law will permit employees who can show that the manner of their dismissal involved conduct amounted to a

breach of human rights legislation to claim punitive damages with a good prospect of success. And there are no statutory limits on the amount of punitive damages courts may award.

The result in *Keays* itself, though, indicates that punitive damages on the scale sometimes be found in the United States are not currently in prospect in Canada. The trial judge had awarded \$500,000 in punitive damages; the majority in the Court of Appeal reduced this to \$100,000.

MULTIPLE FORUMS

A final element in the litigation of employment-related human rights matters in Canada is the increasing use of multiple forums. A unionized employee may file a grievance and a complaint with the human rights commission covering essentially the same facts. A non-unionized one may bring a wrongful dismissal action and a human rights complaint. Neither courts, nor grievance arbitrators, nor human rights commission have been very receptive to arguments that proceedings in one forum should be stayed pending their resolution in another. Proceedings in more than one forum can thus be a useful additional means of increasing pressure on an employer; a human rights commission investigation, after all, is not at the complainant's expense. ■

1 *Constitution Act*, ss. 91, 92.

2 *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536.

3 *Parry Sound (District Social Services Administration Board) v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157.

4 *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181.

5 *McKinley v. BC Tel*, [2001] 2 S.C.R. 161.

6 *McKinley v. BC Tel*, fn 5, though the court there held that the facts before it were not such as to justify an award of punitive damages.

7 *Keays v. Honda Canada Inc.* (2006), 82 O.R. (3d) 161 (C.A.).

8 [1997] 3 S.C.R. 701.

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HEENAN BLAIKIE'S LABOUR AND EMPLOYMENT LAW PRACTICE

Since its inception in 1973, Heenan Blaikie has become one of the leading law firms in the country. With our outstanding track record in labour and employment, business law, litigation, taxation, intellectual property and entertainment law, we deliver comprehensive legal advice and innovative business solutions to clients across North America and abroad from our offices in the major Canadian business centres of Montreal, Toronto, Calgary and Vancouver, as well as in the national capital of Ottawa and regional centres.

Heenan Blaikie has not expanded through massive mergers. Over the years, we have grown progressively by attracting and retaining top calibre professionals, ensuring that each new member of the team embodies the culture of dedication to excellence that has made the firm's reputation. Today the firm is 425+ lawyers strong and still growing steadily.

Labour and employment law has been a core practice area at Heenan Blaikie since the firm's beginning. This is reflected in Heenan Blaikie's having the largest management-side labour and employment practice in Canada. The practice is a national one and collaboration between offices in particular files or specialized practice areas is frequent.

Heenan Blaikie brings innovative, imaginative and practical solutions to business problems in areas of labour relations, employment law and, increasingly, human rights law. Our lawyers regularly appear before all levels of courts in Canada, and represent clients before labour relations boards, human rights tribunals, workers' compensation boards, collective agreement arbitrators and statutory adjudicators in both federal and provincial jurisdictions. Heenan Blaikie often represents clients in collective bargaining. We are also active in developing policies and strategies for clients to foster compliance with employment-related laws to minimize client risks in the event of litigation. These practice areas are complemented by Heenan Blaikie's representation of employer organizations in government relations at both the national and provincial levels.

Members of the firm are active in teaching and writing, and our publications *Canadian Labour and Employment Law for the U.S. Practitioner* (BNA Books) and *Quebec Labour and Employment Law: Frequently Asked Questions* (Carswell) are widely used as reference guides by legal and human resources practitioners.

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