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management labour and employment law

Human Rights Complaints

What do You do When You Get One?

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In most jurisdictions, the impact of Human Rights legislation and case law has had an increasingly significant effect on employers in all sectors, both public and private.

In Canada, each province has jurisdiction over enacting human rights and employment law statutes, except if the employer's undertaking is a national or international enterprise such as a railway or airline. Education employers are invariably governed by provincial legislation in each of the various provinces.

Many of the provinces have somewhat similar employment and human rights legislation. Looking at Ontario as an example, there was a patchwork of various pieces of human rights legislation dating back to 1944.

In the early 1980's, the Ontario provincial government brought in more modern and consolidated human rights legislation, after looking at the American models. Notwithstanding that some of the provincial research focused on the American systems, the result was that the Ontario human rights legislation was often more difficult for Canadian employers, although to date, the size of the monetary remedies in the Canadian jurisdictions have been far less than some of the publicized or notorious human rights cases in the United States.

Under the Ontario human rights legislation, and essentially all other human rights legislation in Canada, the statutes prohibit discrimination or harassment because of particular grounds, listed and defined in the statute. Under the Ontario *Human Rights Code*, as an example, the statute does not purport to prohibit discrimination or unfairness generically, but rather prohibits discrimination "because of" certain identified grounds including "race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability".

The statute more specifically defines some of those prohibited grounds. For example, age is defined as being 18 years or older, whereas up until a number of years ago, it was defined as being between 18 and 65 which previously allowed for mandatory retirement at age 65. That is no longer the case.

The term "disability" formerly referred to as "handicap" is very broadly defined in Section 10.1 (a) of the Code as follows:

> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

The very broad definition of "disability" has been increasingly relied upon in challenges by teaching and non-teaching staff as well as students and their parents or guardians. For teachers, it is almost to the point of an epidemic that family physicians are prescribing that their patient cannot teach more than 7 or 8 pupils for example.

Another increasing area of controversy is the scope of "family status" which is dealing with the area of preferred working hours or shift, given the needs or desires of parents. The case law has created much controversy. The "family status" protection is no longer viewed as extending protection to parents with children with special needs. Indeed, some parents have tried, unsuccessfully, to date, to argue that they require accommodation in their hours of work or days of work in order to take their son or daughter to a sports tournament.

Where Human Rights Issues are Litigated

The vast majority of the employment litigation, including in the education sector, invariably involves some element of human rights.

In Canada, due to case law from the Supreme Court of Canada ("the *Weber*" jurisprudence) human rights issues involving unionized teaching and non-teaching employees must be dealt with under any applicable collective agreements, even though those collective agreements may be somewhat silent on the human rights issues.

Arbitrators appointed under collective agreements are becoming very knowledgeable and adept at dealing with human rights issues as part of their duties as contractual arbitrators.

In most Canadian jurisdictions, there will be a government funded system or tribunal that allows for individuals to file human rights complaints, although many of the tribunals attempt to "download" their obligations to arbitrators where the complainant or applicant is a unionized employee.

All of the Canadian jurisdictions have the concepts of constructive or systemic discrimination whereby intent is not highly relevant but rather whether the impact of a particular decision or policy has a disproportionate impact on a group protected.

Another litigious area is the scope of the employer's duty of accommodation which, under most of the Canadian jurisprudence, is described as requiring accommodation to the point of "undue hardship". Anecdotally, it appears that employers in Canada face a broader and more onerous obligation to prove undue hardship than their American counterparts. Business impracticality or inconvenience is not a defence.

It is increasingly common for human rights disputes to arise in the education context whether the case involves demands for different, better or special individual education plans for children or reacting to sexual misconduct by staff in a school. These cases tend to attract the attention of the media, placing education employers in an unenviable position. Even if the media were to provide a balanced report, the employer is typically unable to respond in any significant way because of privacy obligations.

What To Do When You Get An Application

Typically, if the complaint or Application has been filed with the Human Rights Tribunal in a particular jurisdiction, there will be specific time limits for providing a fulsome written response. Failure to respond with timely and sufficient particulars may disentitle the respondent employer from introducing otherwise helpful or relevant evidence at a subsequent hearing.

This leads to the obvious suggestion that expedition is important. Even though superintendents, managers and administrators in the education system have increasingly onerous and broad obligations, they somehow have to find the time to investigate and react in detail to complaints. This will involve meeting with witnesses, reviewing documents and past practices, seeking legal counsel, determining whether conflicts of interest exist, updating senior administration or elected officials and preparing detailed written "on the record" responses.

Human rights cases become all the more challenging when the complainant is not represented by a union or by legal counsel with experience in the area.

As a general observation, it is in the interests of Canadian school boards to deal with these human rights challenges involving unionized employees under the collective agreement procedures. Typically, arbitrators selected or appointed under those collective agreement provisions are experienced, knowledgeable and generally well respected. The arbitration process also will involve one or more opportunities for "off the record" mediation.

It is generally beneficial for any employer, private or public sector, union or non-union, to have publicized and easily understood harassment or human rights complaint policies and procedures that allows the employer to receive these types of complaints, investigate them promptly and determine if there indeed has been any type of arguable human rights violation or improper treatment of an employee.

Employers will be subject to unfair "second guessing". Even though senior administration officials have numerous other pressing obligations, it is necessary for them to somehow find the time to investigate these pending or current issues in a timely way with an experienced investigator. In very sensitive cases, it is often recommended to retain an experienced and truly independent individual which entails significant cost.

While the existence of these internal complaint mechanisms do not present an absolute bar to an individual complaining to the government tribunal, it ultimately serves the employer's interests and all stakeholders' interests in having a very effective and objective system for investigating complaints. It is quite common for an investigation to perhaps determine that no precise human rights claim or issue exists, but nevertheless, reveals certain employment or supervisory practices which need to be addressed, including education of one or more managers on their method and styles of dealing with staff.

Managers and administrators without significant experience should be cognizant of the realities of human rights litigation and the potential risks associated with that area. It is an area where administrators acting in good faith are subject to unfair public second guessing and criticism. Administrators, particularly those who are newer to their roles, should never hesitate or delay in reaching out to colleagues, mentors or experienced legal counsel.

Conclusion

As arbitrators, litigants and tribunals become more "creative" in developing their complaints or the jurisprudence, it will be increasingly important for employers and their management staff to understand the very broad nature of the human rights protections available to individuals in any type of employment, public or private sector. The litigation is becoming increasingly complicated and therefore expensive with even greater uncertainty.

The better educated the supervisory and management group is, the better the employer will be to put forward a *bona fide* defence. Development and implementation of internal complaint procedures will enable employers to respond to complaints before they become unmanageable and hopefully will allow administration to deal with pressing or unfair situations internally, minimizing the prospect of notorious media attention and the increasingly expensive costs of an adversarial human rights legal dispute.