FTR Now

Pinto Report on Ontario Human Rights Review Released

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On November 8, 2012, the Ontario government released the long-awaited "Report of the Ontario Human Rights Review 2012" (the "Report"), which reviews the changes made to the Ontario *Human Rights Code* (the "Code") in 2008. Andrew Pinto, author of the Report, sets out several recommendations with respect to streamlining the existing system. This *FTR Now* reviews a number of those recommendations and their potential implications for employers and service providers.

BACKGROUND

In 2008, amendments to the Code substantially changed the human rights system in Ontario. Through the new "direct access" model, complaints (now "Applications") are filed directly with the Human Rights Tribunal of Ontario (the "Tribunal") rather than through the Ontario Human Rights Commission (the "Commission") for determination as to whether a matter should be referred to the Tribunal. The Code amendments made other significant changes. The role of the Commission was fundamentally altered and its new role was to "identify and promote the elimination of discriminatory practices." This public education role included the development and delivery of public education programs on promoting awareness, understanding and compliance with the Code, and policy development. A Human Rights Legal Support Centre (the "Centre") was also established to provide advice and assistance to Applicants in respect of their Applications to the Tribunal.

The genesis of the Report is found in section 57 of the Code, which required the government to appoint a person three years from the effective date of the Code "to undertake a review of the implementation and effectiveness of the changes resulting from the enactment of the [Code]," to conduct public consultations in so doing, and to report back to the responsible Minister. As Mr. Pinto states in the Report, his mandate was not to review the entire system of human rights in the province, but to "focus on the extent to which the *current* system is delivering against universally desirable objectives such as access to justice, transparent adjudication, timely disposition of cases, and the elimination of systemic discrimination" (Report, page 4).

THE REPORT AND ITS RECOMMENDATIONS

In summary, the Report essentially finds that the process is effective and accessible. However, the Report (over 200 pages in length) makes 33 recommendations to further improve Ontario's human rights regime.

Set out below are a number of recommendations of interest to employers and service providers:

Improper Naming of Personal Respondents

Noting that the unnecessary naming of Personal Respondents can add to the complexity of a case and "can act as a roadblock to the resolution of the dispute," the Report recommends that steps should be taken by the Tribunal to reduce the inappropriate naming of Personal Respondents (Recommendation 2).

Publication of Settlements

Human Rights Applications are frequently settled through mediation at the Tribunal. The Report notes that information relating to these mediations is not currently available, and that the "process of capturing and publicizing mediation and settlement information on an anonymous basis would enhance the profile of mediation as a viable means of resolving human rights disputes" (Report, page 6). Recommendation 7 therefore proposes that the Tribunal should publicize (in a manner that

guarantees parties' anonymity) information relating to the terms and conditions of settlement achieved at mediation.

Active Adjudication

"Active adjudication" refers to the Tribunal's power under subsections 43(3)(a) to (f) of the Code, which prescribe rules allowing the Tribunal to conduct hearings in a flexible manner. Through the review process mandated by section 57, it became apparent that stakeholders felt the Tribunal was not "using its flexible or active adjudication powers *enough*." Recommendation 8 proposes that the Tribunal "should make greater efforts to promote active adjudication at its hearings."

Quantum of Damages

The Report states that there is a "widening gap" between the Tribunal's view that awards should be meaningful and the actual monetary compensation awarded. It recommends that the range of damages to successful Applicants should be "significantly increased" (Recommendation 10).

Intervention by the Commission

The Report is critical of the Commission's failure to remain an active participant in litigation at the Tribunal. It recommends that the Commission more frequently pursue the initiation of Applications and interventions at the Tribunal (Recommendation 20).

Public Interest Remedy

Recommendation 11 states that "In cases where discrimination is found but a public interest remedy is not ordered, the Tribunal should provide some explanation in its reasons for decision." The Report notes that it is often unclear why a public interest remedy was not ordered in these cases and therefore the Tribunal "should not remain silent in its reasons for decision" on this point: the requirement to provide reasons would give greater transparency to the Tribunal's position on this issue.

Duty Counsel

Recommendation 18 proposes that Centre Duty Counsel services should be made available to assist Applicants at mediations, in particular in light of the number of self-represented Applicants who may have "unrealistic expectations" of what can be achieved at a mediation, thereby reducing the likelihood of settlements.

Costs

The Tribunal's Rules do not currently provide the power to order an unsuccessful party to pay the legal costs of the successful party. The Report states that while the issue of costs is a significant one, at present there is an absence of "empirical evidence" on the effect a costs regime would have upon the system. Accordingly, the Report recommends that the government "investigate and publicly release a report in a timely manner on the merits of a costs regime for the Tribunal based on empirical data and policy considerations" (Recommendation 33).

IMPLICATIONS FOR EMPLOYERS AND SERVICE PROVIDERS

It is clear that many of the recommendations proposed would streamline existing processes, a welcome development for those who participate in Ontario's human rights processes. The issue of costs remains a live issue and one which has significant implications for both Applicants and Respondents.

The Report's recommendation that the Commission actively re-engage in litigation at the Tribunal is a recommendation that may be a cause for concern for Respondents: the addition of a third party to an Application would likely increase the complexity of defending against that Application. The Report's suggestion that damage awards be increased is equally troubling.

However, it remains to be seen is just how many of these recommendations the government is prepared to adopt. Hicks Morley will be monitoring the government's response to the recommendations and will update you accordingly.

For further information about the potential impact of any of these recommendations, please contact your regular Hicks Morley lawyer.

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