Case In Point

HRTO and Developments in the Law of Reconsideration

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Organizations which have experience litigating matters at the Human Rights Tribunal of Ontario (the "Tribunal") are likely aware that unsuccessful parties often utilize the Tribunal's "reconsideration" process to attempt to overturn those decisions. While the Tribunal regularly issued reconsideration decisions, it was quite rare for it to grant a reconsideration request. However, recent decisions suggest that the Tribunal may now be inclined to use this power more often. While it is laudable that the Tribunal is prepared to reconsider inequitable outcomes, one issue of concern to parties going forward is the extent to which the Tribunal will be willing to revisit its own established jurisprudence.

In Garrie v. Janus Joan Inc. the Tribunal granted the Applicant's Request for Reconsideration. The Applicant had claimed that her developmental disability was a factor in her termination and that the Respondent employer discriminated against her by providing differential wage payments for disabled employees ($1.25/hour) and for non-disabled employees, both of whom generally performed the same tasks. In its initial decision, the Tribunal found that the employer had discriminated against the Applicant in the termination of her employment; however, the Tribunal found that the employer's practice of paying the Applicant less than non-disabled employees was not a "continuing contravention" and therefore was beyond the one year limitation period in section 34 of the *Human Rights Code* (the "*Code*").

Although this was the first time it had considered the issue of whether a wage differential constituted a "continuing contravention" of the *Code*, the Tribunal relied on its established jurisprudence to find that the test for continuing contravention had not been met. However, a three-member reconsideration panel of the Tribunal (the "Panel") stated that the Tribunal has generally been inconsistent in its application of the test for determining whether there has been a "series of events" as articulated by the Ontario Divisional Court in *Visic v. Ontario Human Rights Commission*. The Panel stated that there was a need for guidance and clarification on this test.

The Panel reviewed the Tribunal's jurisprudence and clarified the principles that should be applied in the application of the test, including, for example, whether the incidents involved "fresh steps" taken by the parties that would give rise to a separate allegation of discrimination. It concluded that the ongoing wage differential was a "series of events" and that the last incident of discrimination was the Applicant's last pay period. It found that the Application had been filed within one year of the last pay period, and was therefore timely. The Panel declined to make a determination on the merits or any remedy, stating it would provide further direction regarding the proceeding.

The Tribunal's willingness to reconsider its established jurisprudence is not confined to *Janus Joan*. This past spring lawyers from Hicks Morley acted as counsel in a consolidated preliminary hearing involving several police departments, the purpose of which was to determine whether the new public complaints process of the *Police Services Act* constituted a "proceeding" for the purposes of section 45.1 of the *Code*. The Tribunal's existing jurisprudence had clearly established that the old public complaints process was a "proceeding" and at least one Tribunal decision had found that the new process also constituted a "proceeding." Despite this established jurisprudence, the Tribunal determined that it needed to hold a special preliminary hearing before a three-member panel to consider the issue again. To date, the Tribunal's decision has not been released.

More recently, in *Britton v. General Motors of Canada*, the Respondent employer filed a Request for Reconsideration from a decision of the Tribunal which found the Respondent liable for not only the actions of its employees, but also for the actions of the police and paramedics. The Applicant, who had epilepsy, had suffered a seizure at work and was told by the nurse to wait at the nursing station so she could call an ambulance. He indicated he wanted to get home to recover and was travelling with his carpool, so he would be escorted. However, the nurse contacted security and when the applicant attempted to leave the workplace, he was restrained by security guards and then by paramedics. The Applicant was eventually handcuffed by police

and led away. The Tribunal found that the Applicant was entitled to monetary compensation for injury to his dignity, feelings, and self-respect and ordered the Respondent to pay $10,000.

The Respondent's reconsideration request was granted. The reconsideration adjudicator found that the Tribunal's initial decision improperly relied on the actions of third parties in determining both liability and remedy. As the Tribunal had not made any finding that the relationship between the Respondent and the third parties was captured by section 46.3 of the *Code*, the Respondent could not be held liable for the actions of the paramedics and police officers. The adjudicator indicated that a re-hearing would be scheduled.

It is unclear at this time whether these decisions are indicative of an emerging trend. While the reconsideration decisions in *Janus Joan* and *General Motors* overturned unfair results, employers and service providers must be able to confidently rely on the authority of the Tribunal's established jurisprudence and the finality of the Tribunal's decisions. We will continue to monitor the Tribunal's approach to requests for reconsideration, to see if the recent exercise of the reconsideration powers in these cases was exceptional based on their particular facts, or a sign of things to come.