OCTOBER 2012

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Employment Update

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"A recent decision of the Human Rights Tribunal of Ontario has clarified the policy of the Tribunal when dealing with the issue of timeliness."

HRTO ENFORCES ONE YEAR TIMELINE TO BRING APPLICATION: IS THIS GOOD NEWS FOR EMPLOYERS?

Mark E. Geiger

A recent decision of the Human Rights Tribunal of Ontario has clarified the policy of the Tribunal when dealing with the issue of timeliness. Section 34(1) of the *Human Rights Code* provides that an application must be brought within one year of the last of a series of incidents to which the application relates. Section 34(2), however, gives the Tribunal the discretion to extend the deadline if two conditions are met. First, the Tribunal must be satisfied that the delay was incurred 'in good faith'; second, it must find that there was no substantial prejudice to anyone affected by the delay.

In *Audrey Chen v. Toronto Police Service*, the Tribunal dealt with a case involving an individual represented by the Toronto Police Association (the "TPA"). The TPA filed a grievance in March 2007 and pursued a grievance on behalf of Ms Chen arising from a set of incidents which occurred in 2007 and continued into 2008. The allegations related to an alleged poisoned work atmosphere as a result of the Grievor's race, ethnic origin and sex.

The TPA actively pursued the matter through the grievance procedure and a conciliation that concluded with a settlement offer to the Grievor in November 2010. The Grievor did not accept the settlement offer. The TPA subsequently refused to proceed with the arbitration of the dispute.

Ms Chen then elected to file an application with the Tribunal in late November 2011, well past the one year mark after the incidents at issue.

In a decision released this month, the Tribunal dismissed the application as untimely. The Tribunal found that the delay was not incurred in 'good faith,' relying upon previous decisions that maintained the obligation to bring a complaint within the year notwithstanding other means to settle the dispute were being actively pursued.

This approach is opposite to the one which had been taken by the Ontario Human Rights Commission when it had carriage of complaints. In its decisions and policies, the Commission advised complainants to only bring a complaint when other procedures dealing with the substance of the complaint had been exhausted. In fact, Ms Chen relied upon the fact that she had obtained exactly this information from the Commission's website in September 2009. The Tribunal did not accept this evidence and found that her delay was not incurred in good faith. In other words, Ms Chen ought to have made the application while the grievance was still pending, or lose her right to do so.

EMPLOYMENT UPDATE

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At first blush this result seems beneficial to employers, especially those that are unionized. Under the *Ontario Labour Relations Act*, all disputes regarding the application, interpretation or administration of the collective agreement must be resolved by arbitration. A dispute that, in any way arises from the collective agreement - which the Chen grievance clearly did - is required to be dealt with by way of arbitration. But, a union is not obligated to take every grievance to arbitration. As in this case, the union can decide not to proceed to arbitration as long as that decision does not amount to a breach of the duty of fair representation. Here, the TPA took the grievance, proceeded through the various steps, went to conciliation and only then decided to go no further, likely determining, for *bona fide* reasons, that proceeding with the grievance to arbitration was not in the overall interest of the bargaining unit.

For this reason, it appears that any grievor would be well advised to bring an application to the Tribunal within the one year deadline *even if* that individual's grievance on the same matter is being dealt with under a grievance procedure or other proceeding other than one under s. 46.1. (Section 46.1 allows a court to grant relief for violations of the *Code* so long as the matter is brought in conjunction with another claim over which the court has jurisdiction. In such circumstance, an individual is precluded from bringing an application to the Tribunal alleging the same infringement).

While the employer can then apply to the Tribunal to request a deferral of the application pursuant to s. 45 of the *Code*, the *Chen* decision, and others like it, are likely to encourage a multiplicity of proceedings, rather than discourage them. ■

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