

Evolving legal standards for employers:
Regulation and compliance

Human Rights Tribunal of Ontario

Presentation by:
Mark Hart, Vice-Chair

What does the Human Rights Tribunal do?

- resolve claims of discrimination and harassment brought under the Ontario *Human Rights Code*
- conducts its processes in a way that is fair, just and expeditious
- act in accordance with its core values

Core Values

- **accessibility**
 - physically - not create barriers to people who seek to participate effectively in our processes
 - functionally - process is understandable, fair and relevant, whether or not the parties are represented by a lawyer
- **fairness**
 - decisions based on the facts, law and merits of the case
- **transparency**
 - clearly established procedures and decisions made in an open way, with substantive reasons that are clear, concise and understandable
- **timeliness**
 - resolutions will be reached and decisions made in a timely way, so that delays do not frustrate the objects of the Code
- **opportunity to be heard**
 - application within jurisdiction will not be finally determined without giving the parties an opportunity to make oral submissions.

How does the Tribunal resolve claims?

- **Filing:** A claim of discrimination or harassment can be brought to the HRTO by filing an application
- **Mediation:** The HRTO resolves applications by helping the parties settle the claim through its mediation process
- **Hearing:** If the parties do not agree to mediation, or mediation does not resolve the application, the HRTO holds a hearing to decide the application
- **Decision-makers:** impartial and neutral with experience, knowledge and training in human rights law and issues

How do you begin the process?

- process begins when a person files a completed application form
- application form can be downloaded from the HRTTO's website or obtained by contacting the HRTTO
- completed form can be dropped off, mailed, faxed or e-mailed to the HRTTO or filed directly through the HRTTO's website

When should an application be filed?

- within one year of the date on which discrimination is alleged to have occurred
- if there was more than one discriminatory event, the application should be filed within one year of the last event
- applications filed after one year are not permitted unless the HRTO finds that there was a good reason for filing late and that the delay will not negatively affect other people involved in the application

What information is asked for on the application form?

- **identify respondents** who you believe are responsible for the human rights violation claimed
- **provide detailed first-person account** of the situation that led to the claim
- **answer questions** on the form that include:
 - in what area and on what grounds do you believe your rights were infringed?
 - what happened that makes you feel that you were discriminated against?
 - what do you want to have happen in response to your application?
 - do you want to see any changes in policies or practices?
- **list important witnesses and documents** related to the application that the you have on-hand
- **ask for any relevant documents** that other people have and that you need in order to prepare your case

How does the respondent find out about the application?

- the Tribunal sends each respondent a copy of the application as soon as it is accepted for processing
- in most cases, the application will be sent to the respondent within a week
- the Tribunal removes information about the applicant's witnesses from the application form
- if the applicant has asked to be contacted through an alternate contact, the applicant's personal contact information will also be removed

How does the respondent answer the application?

- **use response form** to respond to the issues raised in the application
- **file within thirty-five (35) days**
- **answer questions** on the response form that include:
 - did the applicant tell you about the human rights concern?
 - did you investigate?
 - do you have a human rights policy?
 - what is your response to what the applicant says happened and the applicant's proposed remedy?
- **list important witnesses and documents** that you have on-hand, and have the opportunity to list relevant documents that other people have and that you need to prepare your case

Does the applicant have a chance to reply to the respondent's information?

- the applicant has a chance to reply to the respondent's information
- the Tribunal will send the applicant a copy of the response form and ask the applicant to reply to any new matters raised
- the Tribunal will not send information about the respondent's witnesses to the applicant

How does the HRTO assist the parties to resolve the application?

- in the application and response forms, the parties are asked if they want to participate in mediation to try to resolve the application
- if the parties agree, the Tribunal will schedule a mediation session
- mediation is always a voluntary process
- if the parties have no interest in trying mediation, the application will go directly to the hearing stage

What happens at mediation?

- disputes are mediated using an active listening approach
- parties will have an opportunity to tell the mediator what happened and what they would like to see done about it
- the mediator will also ask the parties questions and help them to explore a fair resolution of the matter

What happens at mediation?

- the mediator does not decide for the applicant or respondent, but will give both parties the opportunity to find a resolution to the situation that is satisfactory to both sides
- if the parties settle the case in mediation, the Tribunal will issue an order disposing of the application and the Tribunal's file will be closed

What happens before the hearing?

- the parties receive a Confirmation of Hearing which tells them the date and location of their hearing
- within 21 days, the parties are required to exchange all arguably relevant documents with each other
- 45 days prior to the hearing, they must tell each other and the Tribunal about relevant documents they want to use at the hearing and about any witnesses they intend to call to give evidence at the hearing

What happens at the hearing?

- **a hearing is a legal proceeding** and the parties are expected to attend prepared to present their case through evidence (witnesses and documents)
- **adjudicator plays an active role** in the hearing process with the goal of ensuring the fair, just and expeditious determination of the merits of an application
- **procedure may vary** depending on the nature of the case, the issues in dispute and the parties involved

What is the role of the adjudicator?

- **adjudicator can adopt non-traditional methods** in order to best focus on the human rights issues in dispute and reach a decision
- **adjudicator may make determinations**, through consultation with the parties, about
 - what the main issues are
 - what facts appear to be undisputed
 - how to structure the hearing
 - the order in which witnesses will testify
- the parties will always be able to make submissions before a determination on procedure is made

What is the role of the adjudicator?

- the adjudicator has the power to
 - question witnesses, parties or representatives
 - limit the evidence or submissions on any issue
 - limit a party from presenting multiple witnesses to testify about the same facts in issue
- at the same time, the adjudicator is a neutral decision-maker and cannot take responsibility for identifying and leading evidence
- it is up to each party to bring forward evidence to support its respective position

What can a hearing adjudicator decide?

- after a hearing, the HRTO adjudicator will consider all the evidence and submissions in reaching a decision
- once the decision is made, a copy of the decision with reasons will be sent to the parties
- the adjudicator can find that discrimination or harassment occurred and can order a remedy for the applicant or can decide to dismiss the application

What can a hearing adjudicator decide?

- a remedy could be a monetary award or an order that the applicant be given an opportunity to return to work, for example, with appropriate accommodation
- the respondent may be ordered to correct the discriminatory situation, to develop policies or hold training sessions for staff
- the adjudicator may also order actions to promote future compliance with the *Code*

Human Rights Legal Support Centre

- offers human rights legal services to individuals throughout Ontario who believe they have experienced discrimination
- provides legal assistance in completing applications to the Tribunal
- assists applicants in assembling supporting documentation
- assists applicants to negotiate a resolution of their situation without the necessity of having to file an application to the Tribunal

Human Rights Legal Support Centre

- after an application is filed at the Tribunal, offers substantive legal advice and assistance at the mediation and adjudication stages of the Tribunal process
- through duty counsel, provides summary legal services to applicants attending mediation sessions at the Tribunal who are not represented by a lawyer or paralegal agent

Ontario Human Rights Commission

- acts to prevent discrimination and promote and advance human rights in Ontario
- has the power to:
 - engage in proactive measures to prevent discrimination using public education, policy development, research and analysis
 - initiate its own applications
 - intervene in proceedings at the Tribunal
 - conduct public inquiries

Interim Remedies

- Rule 23 of Tribunal's Rules provides power to award an interim remedy
- recently addressed in *TA v. 60 Montclair*, 2009 HRTO 369 (CanLII)
- the power to award interim remedies should focus on furthering the remedial objectives of the *Code*
- not a power to be exercised only where the applicant will suffer irreparable harm in the sense that damages could not provide adequate compensation

Interim Remedies

- not sufficient for applicant to simply assert a particular urgency in obtaining the ultimate relief, or that they may suffer financial hardship if an interim remedy is not provided
- question is whether an interim remedy is necessary to facilitate and ensure the Tribunal is able to award a complete, appropriate and effective remedy at the end of a hearing, should a violation of the *Code* be found

Interim Remedies: Required Criteria

- does the Application appear to have merit?
 - Is there an arguable case and is the claim not frivolous or vexatious?
- does the balance of harm or convenience favours granting the interim remedy requested?
 - will the harm the applicant will suffer if the request is not granted outweigh the harm to the respondent if the request is granted
- is it just and appropriate in the circumstances to grant an interim remedy?
 - is the request necessary to further the remedial purposes of the *Code* and is it fair in all of the circumstances

Interim Remedies: Evidentiary and Procedural Requirements

- parties required to serve the Request for Interim Remedy and Response to the Request directly
- evidence is received by way of signed declaration
- cross-examination on the declarations is not generally permitted
- the Tribunal may schedule a hearing, but may decide the Request based only on the written materials filed by the parties
- as a result, the Tribunal relies on the parties to provide full and complete materials in support of their respective positions

Interim Remedies: Evidentiary and Procedural Requirements

- it is critical for the parties to provide sufficient evidence through signed declarations from persons with first hand knowledge of the facts being alleged
- failure to comply with this requirement may result in the Request being dismissed outright, or in the Tribunal deciding there are insufficient facts to support the Request
- where the Tribunal decides to hold an oral hearing, the Tribunal member may question the parties or counsel in order to obtain further information necessary to determine the Request

Expedited Hearing

- expedited hearing process available where the circumstances of an application “require an urgent resolution of the issues in dispute” (Rule 21.1)
- where the Tribunal decides to expedite a proceeding, it may do so by
 - abridging time limits
 - scheduling early dates
 - taking any other steps it deems appropriate

Expedited Hearing

- an applicant requesting that his or her matter be expedited must identify urgent circumstances that may affect the fair and just resolution of the merits of the application and the harm that may result if the request is denied
- for a request to expedite to be granted, the applicant must demonstrate that the circumstances are truly urgent, requiring the resolution of the human rights dispute in a particularly rapid manner as compared with the time required to complete the Tribunal's regular process
- *Weerawardane v. 2152458 Ontario Ltd.*, 2008 HRTO 53 (CanLII), at para. 9

Expedited Hearing: Examples

- request to expedite granted due to applicant's pregnancy, and the impact of delay on benefits during parental leave
 - *Martinez v. 2012342 Ontario* 2009 HRTO 111
- request to expedite granted where applicant had serious health issues
 - *Cymbalisty v Wal-Mart Canada* 2009 HRTO 454
- request to expedite granted where child out of school which may have significant consequences for his development
 - *Griffitsh v. Toronto District School Board* 2009 HRTO 545
 - but see *Mitchell v. TDSB*, 2009 HRTO 654

Expedited Hearing: Examples

- a delay in filing an application may be a factor in refusing to expedite
 - *Visic v Elia Associates* 2008 HRTO 443
- financial stress due loss of employment will generally not be a reason to expedite
 - *Stoppa v. Arbor Memorial Services* 2009 HRTO 375
- fact that respondents do not oppose request to expedite does end inquiry; Tribunal not satisfied that potential for reinstatement would be lost, so request refused
 - *Russell v Georgina (Town)* 2009 HRTO 466