Avoiding Workplace Discrimination: A Guide for Employers and Employees

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Introduction

All human rights cases must find the origin of the case in the relevant human rights statute. Each jurisdiction in Canada has a statute setting out the definition of what human rights are protected and how the case may be pursued. You should focus on precedent cases from within your own jurisdiction if possible and, if not, then use precedent cases from other jurisdictions.

You should be aware of the dramatic remedies available under human rights law. The following cases are vivid examples of the powerful nature of the remedy available in this manner:

- **A woman in Calgary, a victim of sexual harassment, recovered more than $800,000 in her claim against her employer, in the City of Calgary v. CUPE Local 38, 2013.**

- **A 2012 decision in Alberta, Walsh v. Mobil Oil,** allowed for a total damage award of $656,920 because of adverse treatment due to gender and retaliation.

- **In a 2013 case against the City of Hamilton, an award was made by the Ontario Human Rights Tribunal of eight years back pay of**
$420,000 plus reinstatement due to the employer’s failure to accommodate the applicant’s disability by allowing for a return to work following her disability. The sum of $30,000 was awarded to compensate for the applicant’s injured feelings. The time clock for the lost income claim continues to tick pending the appeal made by the employer.

- An award of a potential ten-year income loss was made in 2001 by the Canadian Human Rights Tribunal due to discrimination on account of gender in McAvinn v. Strait Crossing Bridge Ltd.4

The Federal Court of Appeal has recently confirmed that “family status” protections of human rights codes also cover child-care responsibilities.

Most cases referenced in this publication include links in the footnotes to the full text of the decision which is a free public service database available at www.canlii.ca.

Some of the earlier cases are not available electronically. They are usually reported as Canadian Human Rights Reporter (CHRR) with a volume and page number. These cases are not available anywhere on the Internet apart from buying an expensive subscription. The reporting series can be found at most law libraries at the local courthouse where you will regrettably need to either borrow the reporting service or photocopy or scan the case.

If there is an unreported case you wish to use, enter the name of the case in the search function of the public service database and you will likely find other decisions which reference it, which you can then use at a hearing.

Human rights remedies are very different and much more powerful than the usual employment law cases that are brought in civil court by an employee. To understand the differences, we should first take a look at what the basic employment law remedies offer, as distinct from a human rights complaint. Then we can understand the differences and why, for the most part, a human rights case has far more impact.

We need to keep in mind a very simple concept: Not every case of unfair treatment or termination in the workplace leads to a human rights complaint. There are many cases in which a person can be treated very unfairly at work, even abusively, but there will be no human rights case possible. To succeed in a human rights complaint, there must be conduct of the employer which is in violation of the relevant human rights code of your provincial, territorial, or federal jurisdiction.

1. Wrongful Dismissal
Wrongful dismissal (also known as wrongful termination or wrongful discharge) is considered a breach of the employment contract. Some of the areas that can cause a wrongful dismissal include discrimination, retaliation,
an employee’s refusal to commit an illegal act, and the employer not following the company’s own termination procedure.

Let’s discuss what are considered the “normal” claims an employee can make when terminated, where there is no human rights complaint raised. In a typical employment law civil case, the trigger point will be a termination of employment.

The usual employment law principles require payment or notice to be provided to a person who has been terminated:

**Statutory severance pay**: This is a minimum payment or, alternatively, working notice, which must be given by an employer to an employee on termination of employment without cause. This sum is set by the relevant provincial, territorial, or federal statute and typically is quite modest. In Ontario, for example, the notice period after three months of employment, is one week and continues as a week per year up to eight weeks maximum. Ontario’s statutory payments, unlike other jurisdictions, become comparatively generous, once the payroll exceeds $2.5 million annually for persons employed for more than five years.

**Common-law wrongful dismissal claim**: Presuming that there is no written contract of employment, the common law or judge-made law, will require the employer to provide advance working notice or, in its absence, the employee can claim his or her earnings that would have been earned in this notice period. This is commonly called a “wrongful dismissal” action.

The amount of notice will be shaped by the individual circumstances in question. The notice period may be as short as the statutory minimum, which is unusual, or as long as two years, for a long-term senior executive.

The statutory severance will reduce the common-law claim, as will any alternate income earned in this notice period. To enforce the common-law claim, the employee must start a case in a civil court. The employer may defend the claim based on an argument of just cause. Suffice it to say in this brief summary, that cause is difficult to prove.

If there is an employment contract which defines the severance sum or notice to be provided to the employee, this will define the claim by employment law concepts on termination.

A human rights case will be able to be pursued without regard to the limiting features of the employment contract, even if the agreement is silent on human rights issues. For example, a contract which allows the company to terminate the employee without cause on the payment of six months’ salary, this six-month clause will not be a limiting defence to a claim for compensation under a human rights claim.
2. Human Rights Violation
A human rights violation includes discrimination based on sex, gender, age, national origin, sexual orientation, religion, marital and family status, pardoned criminal convictions, and medical handicaps (or conditions). The Act also specifies that women and men should receive equal pay for work that is of equal value. Human rights cases most often fall into two broad categories: sexual harassment and discrimination.

2.1 Remedy by proof
Let’s presume that you can make a claim for a human rights violation. You then need to determine the type of remedy which you may be awarded by the human rights tribunal.

There are three basic types of relief that may be ordered as direct compensation to you as the complainant:

- **Damages for injured feelings.**
- **Lost income, past and occasionally future.**
- **Reinstatement.**

There may also be a public interest award, which is not directed to you personally, but rather directed to the common interests of society and other employees of the company. The important points to note for the present moment are the following:

- **Your claim for income loss is not determined based on wrongful dismissal employment law concepts, but rather on the principle of “make whole,” which is usually more generous. (See Chapter 7 for more information.)**
- **You may be awarded reinstatement, a remedy which is foreign to wrongful dismissal actions, and one which is very powerful.**
- **Your claim for reinstatement can be used to support a claim for lost income to the date of the hearing and when refused, can also be used to support your argument for a prospective income loss beyond the date of the final decision (as was the case in the sexual harassment claim against the City of Calgary, which is mentioned in the Introduction).**

Apart from a direct award to the complainant, there can also be a public interest remedy, such as a requirement to post human rights literature in the workplace, mandatory human rights training for the employer, or orders of a similar remedial nature.

In some jurisdictions, such as Ontario, if a company does business with the government but commits a human rights violation, the company
will be in breach of its contract. This will allow the government to terminate that contract without compensation to the wrongdoer. This can be a tremendous risk to an employer and also gives a lot of incentive to the company to settle the case privately without a public hearing. Settlements typically have a confidentiality provision which means you cannot reveal the terms of resolution. Also, lawyers always include a term which says that the fact of the settlement is not a legal admission of wrongdoing by the company. This provides a strong impetus to an employer with a government contract in hand to settle the case.

2.2 Remedy without proof

You can bring the following types of human rights claims and recover financial compensation even though the main human rights complaint may fail:

Failure to investigate: The employer has an obligation to take reasonable steps to review the alleged offensive behaviour and determine the merits of the claim. In Ontario, the failure to do so will result in an award of financial compensation in favour of the complainant, even if your substantive claim of a human rights violation fails.

Reprisal: Similarly, should the company treat you adversely due to your decision to file a complaint, a remedy may follow, even where you do not succeed in the main complaint of unfair human rights treatment. Where the reprisal involved a termination, you may claim relief for injured feelings, lost income, and reinstatement.

The statute recognizes that it is inherently unfair for an employer to retaliate against you for exercising your protected legal rights as long as you are doing so in good faith and not inventing a fake case.

Failure to co-operate in the investigation: In certain jurisdictions, such as BC and Nunavut, the statute allows for a costs order to deter improper conduct. Nunavut allows such an order to be made against a party which attempts to impede the investigatory process, which is also independent of the success on the main issue.
This chapter will help you understand what the differences are between self-employment and contracted work. Another consideration is whether or not the incident qualifies as a human rights code violation when the situation occurs outside the workplace.

1. Are You Considered a Self-Employed Contractor or an Employee?

To show jurisdiction of the human rights code, you must be able to show an employment relationship, which is a requirement of all human rights statutes. Human rights laws offer many forms of protection such as housing and public services, but what we are looking at here are only employment-related human rights issues. The great majority of human rights cases are employment related.

There is no definition of “employment” in the human rights codes in Canada so the tribunals have interpreted the term for the purposes of human rights law. Some jurisdictions do state in the statute what the term includes, as opposed to offering a concrete definition. You will see the basic impact of the interpretation given by the precedent cases is that there has
developed a very liberal assessment of what qualifies for an employment relationship.

You should also be aware that other determinations of self-employment or independent contractor status for other legal purposes such as income tax, or employment insurance, have been determined to be of no consequence to the human rights tribunal.

Some statutes may offer a statement which allow for a mandatory inclusion of certain relationships, such as personal service contracts. My view is that this provision does not conclusively define employment but rather states what must be included in the word’s meaning.

The Canadian Human Rights Act contains such a provision, which states that “employment” includes a contractual relationship by which an individual provides services personally.

The federal legislation applies only to federally regulated industries such as banking, telecommunications, radio and television stations, cable businesses, interprovincial transportation businesses, port authorities, railroads, First Nations businesses, federal Crown corporations, and similarly situated businesses. The fact that a company may be incorporated under federal law, as opposed to provincial, does not mean that it is covered by federal law.

The following defines the provincial and territorial definitions of employment or contract workers:

- The British Columbia statute does not define “employment” exclusively by its terms, but states that it includes principal and agent, where a substantial part of the agent’s services relates to the affairs of the principal.

- Alberta defines employees as people who work under an employer-employee contract of service while contractors work under an independent business.

- The law of Northwest Territories has a similar term which states that employment includes a contractual relationship for the provision of personal services.

- Nunavut’s statute contains an inclusionary term which allows for protection to work that is paid or unpaid.

- Saskatchewan does not define employment. It does state that the term “employee” includes a person engaged pursuant to a limited term contract.

- Manitoba offers no definition of employment, nor does it offer inclusionary terms, as is the case in Quebec, New Brunswick, Newfoundland and Labrador, and Yukon.
Nova Scotia and Prince Edward Island both state that the term “employer” includes a person who contracts with a second person for services to be performed wholly or partly by another person.

The following cases are from Ontario but there is every expectation that they will be used in other jurisdictions to interpret the concept of employment.

• Payette v. Alarm Guard Services (Dimouski):¹ The company argued that Ms. Payette was a contractor, not an employee, and for that reason, could not use the remedy under the code.

• The Ontario Human Rights Tribunal continued that the distinction between contractor and employee was not relevant with respect to the application of the code, given a “purposive, functional approach to determining the test of employment.” The employer’s submission accordingly failed.

• A similar conclusion was reached in Sutton v. Jarvis Ryan Associates,² also a decision of the Ontario Human Rights Tribunal. The complainant used a management corporation through which she billed the respondent, a firm of chartered accountants for her services as a bookkeeper. The company similarly defended the case by arguing that she was not an employee.

• The Tribunal noted that human rights statutes must be given a liberal interpretation to allow its remedial intent to receive a full application:

  • [95] The Supreme Court of Canada has consistently held that human rights statutes across Canada should be given a fair, large and liberal interpretation to advance and fulfill their purposes of preventing discrimination against identifiable protected groups.

The Tribunal continued to state that the protections of the Code include more than the traditional employer-employee relationship. This is an important concept which you should note in the event your apparent relationship may not fit neatly into what may be expected in a normal employment relationship. Here are the words of the Tribunal:

  • [97] As the Board of Inquiry stated in Payne v. Otsuka Pharmaceuticals Co Ltd., 2001 CanLII 26231 (ON HRT), 2001 CanLII 26231 (ON H.R.T.)³

Section 5(1) does not state that “no employer shall deny equal treatment to an employee.” Indeed, there is no definition of “employment” in the Code. Rather, section 5(1) involves discrimination “with respect to

employment.” “Equal treatment with respect to employment without discrimination” includes more than the traditional employer-employee relationship. In Canada (Attorney General) v. Rosin (1990), 16 C.H.R.R. D/441, the Federal Court of Appeal, in upholding the decision of the Canadian Human Rights Tribunal, stated at D/449:

Remembering the broad and liberal interpretation that must be taken to this type of legislation … [C]ourts have interpreted the words [i.e., “employ” and “employment”] broadly, finding employment relationships to exist in this context where in other contexts they might not have so found.

In this particular case, the complainant was dependent on the company for her work assignments, use of the facilities, setting her fee for clients, and the supervision of work done by firm members. The employer’s argument that the claimant lacked the status of an employee accordingly failed.

2. Events in the Context of Employment but Happen Outside the Workplace

Apart from showing an employment relationship, you must also show that there is jurisdiction of the human rights board by showing that the alleged offence took place within the context of the employment relationship. For example, if you were sexually harassed by your boss, and that conduct took place outside the work environment, the tribunal must be convinced that the alleged offence was somehow connected to the employment context and not independent of it. You may be able to show that there was a promise of a promotion or a raise made at a restaurant which would be good enough to show an employment connection.

If the accused person was a coworker or held a more senior position in another department and the event took place outside of any employment context, it may be difficult to assert that this was employment related.

If there is no conduct which is part of the employment relationship, there would be no possibility of using the human rights code for a remedy.

There is case law on which you can rely to show that just because something happened outside of the office, due to this fact alone, does not mean that it is not within the employment relationship.

The Ontario Court of Appeal in its 2001 decision of Simpson v. Consumers Association of Canada⁴ dealt with the issue of conduct which did not take place in the immediate workplace, but rather in locations beyond the physical premises of the office. This was not a human rights complaint but a civil lawsuit brought by Mr. Simpson against his employer. The company defended the case by arguing just cause for dismissal, based on allegations of conduct of sexual harassment committed by Mr. Simpson.

The company’s defence at the trial was not successful. The employer appealed successfully and the trial decision was set aside. The claim was

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dismissed on appeal as the employer had proven just cause for dismissal, based on the conduct of the plaintiff sexually harassing employees of the company.

One of the questions considered by the Court of Appeal was the issue that certain of the alleged misconducts took place at locations external to the office premises. The company accordingly needed to prove that the abusive conduct was connected to the employment relationship, even though the events took place outside of the physical premises of the normal business environment.

Three of the events alleged against the plaintiff took place at company meetings or retreats held at hotels which were business meetings but included a social component. The fact that such events occurred after the completion of business meetings did not mean, the Court determined, that such conduct was outside the workplace and hence external to the employment context.

The Court also considered an event which took place at the plaintiff’s cottage. Again, this was seen as work related. Staff had been present at the cottage because the plaintiff was on vacation and his advice was required on certain timely business issues. Following the work assignment, the staff was invited to remain and recreate.

The bigger picture which comes from this decision is that a work relationship is not one confined to the office or business premises, but rather a broad contextual view is taken to determine whether the event was work-related or not. The same test will apply to human rights cases.

A similar issue arose in *Sutton v. Jarvis Ryan Associates*, which was a 2010 human rights case in Ontario, where the alleged offensive conduct took place at a firm retreat in South Carolina. The Ontario Human Rights Tribunal found that there was jurisdiction as the event was again work-related.

The British Columbia Supreme Court came to the same view in *van Woerkens v. Marriott Hotels of Canada Ltd.*, a 2009 decision, in which the questioned behaviour took place at an after-party in a hotel room following the employer’s holiday party, in this instance in a hotel owned by the defendant, and attended by employees and spouses.

The Nova Scotia Human Rights Board of Inquiry also found that a barbecue event was similarly sufficiently connected to employment to allow for jurisdiction to be found in the 2005 decision of *Davison v. Nova Scotia Construction Safety Association*.

In 2012, the Ontario Human Rights Tribunal found in *Taylor-Baptiste v. Ontario Public Service Employees Union* that comments made in cyberspace may well fit into the category of workplace communications.
but in this instance concluded that the communication in question, which was a blog, was intended as a discussion between union members and was not caught by the definition of workplace. For this reason, the complaint could not proceed.