

Employment Law - News & Views

The “return” of Human Rights issues, and other things that go bump in the night

While human rights issues recently made the headlines, they have never gone out of style. Smart employers have incorporated a human rights litmus test into their operations, to ensure that decisions taken can stand up to later scrutiny. Remember, the courts, human rights commission investigators and other Monday morning quarterbacks can and will review your decisions to ensure compliance with legislative requirements, which includes human rights obligations.

Employers who ignore the Ontario Human Rights Code run the risk of protracted and expensive investigations into their practices by the Human Rights Commission. A human rights officer can investigate not only conduct that is complained of, but may also initiate an investigation into other areas of your operation.

It is proactive to ensure that processes are in place that will avoid an employee needing to complain in the first place. If, despite your efforts, a complaint does occur, those processes will help to mitigate corporate and personal liability and establish that the company was acting with diligence to avoid breaches of the Code.

Meiorin vs. B.C.

The Supreme Court of Canada, in the headline-making case of a British Columbia fire fighter, confirmed that a “one size fits all” standard, which bears no relationship to individual job requirements, will not be sufficient to disqualify an applicant from a particular job. A female fire fighter, Tawney Meiorin, who had been employed for several years with the British Columbia Ministry of Forestry as a fire fighter, was later disqualified from the position when she failed several attempts to run 2.5 km in 11 minutes.

The Supreme Court concluded that Meiorin had been discriminated against due to gender. The fitness test which she was expected to pass did not take into account the different physical and aerobic capacity of females. More importantly, the test could not convincingly be proven to be related to the actual physical requirements of the fire fighter job. It was also noted that the applicant had been a successful fire fighter, passing the necessary tests to be initially qualified and achieving positive job evaluations for the two years she held the job.

Lessons Learned:

Some media comment, not all that well informed, has focused on the alleged requirement by the Supreme Court to lower the standards to assist a so-called disadvantaged group. I do not agree that the Court’s decision should be read in such a politically-charged manner. Rather, the lesson to be learned from this decision is that tests designed to measure applicant suitability for a position must be demonstrably and objectively related to the position and its particular requirements. Tests must also take into account individual characteristics as opposed to attempting to force-fit all applicants into a “one size fits all” standard. As we know, “one size fits all” in fact usually does not.

Employers thus need to consider and objectively measure individual characteristics, strengths and weaknesses when determining suitability for any position. And, really, is there anything new in that? Employers have been again reminded by the Supreme Court that they must justify actions and decisions taken in regards to their employees. The diligent employer likely has nothing to fear and indeed much to gain from the process.

Pritchard vs. Ontario (Human Rights Commission) and Sears Canada Inc.

An important decision which did not garner much headlines is Pritchard v. Ontario (Human Rights Commission) and Sears Canada Inc. This Ontario Divisional Court decision concluded that the Human Rights Commission was wrong to have twice dismissed Pritchard’s complaints of sexual discrimination, harassment and termi-

RICKETTS, HARRIS LLP

nation by way of reprisal. The Court ordered the Commission to proceed to investigate Pritchard's complaint.

Relevant Facts:

In 1996, Pritchard, after she complained of sexual harassment and discrimination, alleged Sears terminated her in reprisal for her complaints. At the time of her dismissal Pritchard was offered payment of her Employment Standards minimum amounts, plus two weeks additional salary, for a total of \$9,321.21 in exchange for her signing a release.

Sears allowed Pritchard a week to consider the offer. During that week, Pritchard spoke to a lawyer who requested an extension of time from Sears to further consider the offer. Sears agreed to allow four additional days, only, for further consideration. Ultimately Pritchard signed the release, which provided for a release of:

“any claims relating to her employment including any claims for severance or termination pay under the Employment Standards Act or claims under the Human Rights Code”.

The release further provided that Pritchard had obtained independent legal advice or waived her rights to such advice.

Almost six months later, Pritchard filed her human rights complaint. Sears subsequently requested the Commission not deal with the complaint, as the subject matter of the complaint was “trivial, frivolous, vexatious or made in bad faith”.

The Commission agreed that it would not deal with the complaint because Pritchard had signed a full and final release when she was provided with her severance package. Pritchard sought reconsideration of this decision by the Commission, however the Commission upheld its original decision not to investigate her complaint.

Pritchard then brought an Application for Judicial Review to which, upon reflection, the Commission attempted to consent (thus reversing its previous decision not to investigate the complaint). Sears, however, did not consent to Pritchard's attempt to seek judicial review of the Commission's decision. The Divisional Court, however, granted Pritchard's Application, set aside the decisions of the Commission and referred the matter back to the commission for a full investigation.

Reasons for the Decision:

The Court's conclusions for their decision are as follows:

“In deciding that the filing of a human rights complaint shows bad faith after the complainant has signed a release, absent evidence of duress that is defined to exclude economic duress, the Commission improperly fettered its discretion... undoubtedly, in some cases, an employee who has accepted a sum of money in exchange for a release of claims against a former employer, including human rights claims, would be acting in bad faith in subsequently turning around and filing a human rights complaint. However in other cases, the facts may show that the employee misunderstood the significance of the release, or received little or no consideration for it beyond statutory entitlements under employment standards legislation, or was in such serious financial need that he or she felt that there was no choice but to accept the package offered. To take the approach that there is bad faith whenever a human rights complaint is brought after signing a release risks ignoring the context within which a particular complainant has signed the release and denying access to the investigative procedure under the Human Rights Code without assessing the complainant's individual moral blameworthiness in pursuing the complaint”(emphasis added).

The Court emphasized that Pritchard was not allowed the time requested by counsel to determine her rights and also notes that Pritchard “did not receive a significant amount of money beyond her employment standards

entitlement”.

Lessons Learned:

1 It is important to allow a reasonable amount of time, and to provide reasonable extensions where warranted, to ensure that the parties have access to legal advice and thus fully understand the consequences of the release they are required to sign. In this case, particularly once legal counsel for the complainant had requested additional time, such additional time should have been provided.

2 The court certainly seized upon the small amount of the settlement and particularly noted that the complainant only received two weeks pay over and above the minimum Employment Standards which Sears was, in any event, obligated to provide. If one is asking the other side to give up something, they must receive something significant, or at least sufficient, by return.

3 The importance of a functioning internal complaint process to address all issues of workplace harassment is driven home by this decision. The goal is to resolve such matters before they become contentious. If employers have an internal investigative procedure, which need not be complex but which must be supervised by someone who has the confidence of the employees, then it is far less likely that someone will go “outside” and seek third party assistance. Just having a procedure described in the company policy manual is not enough. The internal complaint procedure must be understood and must be seen to bring about satisfactory results.

4 Unless the employer is sure of its case, attempts to play “hard ball” can blow up in the employer’s face. The negative publicity and costs, not to mention the lost management time fighting a rear guard action over years, makes it even more important to be proactive so that these types of situations can be avoided.

5 Finally, release language, though not specifically addressed in this decision, is very important. Arguably, for Public Policy reasons, one is unable to contract out of human rights. However, in a release the employee can acknowledge that he or she has not been subject to any discriminatory conduct and that his or her human rights have not been violated. A statement along these lines can assist should a complaint subsequently be filed and investigated.

A Little (very little) Humour

On the lighter side, it is still important not to embellish or fabricate a resume! Yet, so many do. In the case of *O’Donnell v. Bourgault Industries Ltd.*, the Alberta Court of Queens Bench concluded that the company was entitled to dismiss O’Donnell for cause for misrepresenting his qualifications on his resume. A further justification for the dismissal involved the employee’s attempt to receive reimbursement from two sources for his relocation expenses.

It seems that, despite whatever changes in employment law there are, lying and cheating can still be enough to support a dismissal for cause (though remember, nothing is ever carved in stone!). Though I make no comment on his acumen, Mr. O’Donnell certainly did not lack “chutzpah” as demonstrated by his risking everything by going all the way to trial!