

Human rights costs growing concern

Awards have potential to far exceed wrongful dismissal: Lawyer

BY SARAH DOBSON

WITH AN “EXPLOSION” in human rights complaints and human rights tribunals awarding legal fees to complainants, employers should be as concerned about human rights complaints as wrongful dismissal actions, according to one human rights and employment law lawyer.

“These decisions coming down are quite substantive, they’re quite broad-based and I get the impression that the remedies are going to continue to increase,” said Mike Weiler, associate counsel at Boughton, a law firm in Vancouver. “If you get caught in the quagmire of one of these cases, it can become very costly.”

The most common complaints are related to employment, with discrimination involving mental and physical disabilities leading the way. But family status, religious beliefs and race are often cited.

“All of a sudden, you take a hard-nosed stand in these cases, you can get hurt in that aspect,” said Weiler. “So there’s many reasons why respondent employers have to be careful before they get on and say, ‘We’re not going to pay.’”

The 2009 *Senyk v. WFG Agency Network* case in British Columbia is a good example, he said. A woman off on long-term disability for two years was subsequently sent a dismissal email by her employer, WFG Agency Network. But the employer failed to discuss Senyk’s situation with her, or give her notice, so the tribunal found there was discrimination.

She was awarded \$35,000 in damages for injury to dignity, much higher than similar awards in the past which tended to be in the \$5,000 range, said Weiler. And many people must wait two years before they get a hearing, which can add up to a lot of lost wages.

WFG was also ordered to pay all of Senyk’s reasonable legal fees and expenses. The tribunal followed a previous Canadian Human Rights Tribunal decision in *Mowat*, which said it had the authority to award legal fees.

However, the Federal Court of Appeal overturned the *Mowat* decision, saying it had no authority to make such an award under the Canadian Human Rights Act. And in April 2010, the Supreme Court of Canada granted leave to appeal the Federal Court of Appeal decision, so the law in B.C. is unclear on this issue, said Weiler.

‘Potentially crippling’ costs

But if human rights tribunals have the authority to award legal fees to successful complainants, employers “will be subject to potentially crippling cost awards in addition to other damages which may, in many cases, far exceed the costs of wrongful dismissal and other court actions,” said Weiler. “That may encourage more complainants to a hearing.”

The litigious aspect is evident in another B.C. case in 2010 (*Brown v. PML and Wrightman*) that saw an employee — who alleged discrimination on the basis of sex and family status after a maternity leave — receive \$20,000 after 15 days of hearing, six lawyers and a 259-page decision, he said.

‘Americanization’ of damages

Sweeping changes to human rights legislation and left-leaning adjudicators directed to interpret remedial legislation in a broad, inclusive manner should leave employers concerned, according to Daniel Lublin, a partner at the employment law firm Whitten & Lublin in Toronto.

The rulings are very employee-favourable, he said, citing a case involving hairdresser Jessica Maciel who was fired after one day of work but was awarded \$25,000 for lost wages, benefits and punitive damages by the Ontario Human Rights Tribunal because she was terminated for being pregnant.

“They’re trying to send a message in Ontario by doing jackpot awards,” he said. “There is certainly a push on the tribunal’s part to make big awards where discrimination is found, as a preventative measure.”

The award had little or no relationship to Maciel’s actual losses, he said, and there’s a bit of Americanization going on, with crazy and outrageous awards.

“The broad panoply of potential damage awards for human rights violations considerably increases the scope and unpredictability of human rights litigation before provincial tribunals,” said Lublin in a web post.

British Columbia and Ontario no longer have human rights commissions, providing instead direct access to the human rights tribunals. Taking away the commission's screening job was done because many felt it was biased in favour of complainants, said William Black, a professor at the University of B.C. in Vancouver specializing in human rights.

"It now means there's nobody to screen out complaints so there are more hearings in B.C.," he said, and possibly Ontario.

It's tough to say whether that change has meant more unfounded complaints, said Weiler, but better representation means more issues are going to arise.

"If the tribunal is challenged by complainants who are well-represented, you're going to see more cases that are either settled successfully in favour of the complainants or are taken by the tribunal," he said. "The balancing act is the tribunal does have mechanisms to knock out cases before a hearing."

In civil court cases, the losing party pays a component of the winner's legal costs. But in the human rights regime, employers must generally pay their legal costs, no matter the outcome, said Lublin.

"If this case is just frivolous or brought in bad faith to simply smear your employer's name because you're unhappy with how you were let go, or whatever the case may be, you can drag them around for a while and at every step throughout the process, the tribunal — at least in Ontario — is trying to get you to settle the darn thing," he said. "There's nothing to dissuade the angry person from proceeding in that manner rather than regular court."

Also problematic for employers is the Human Rights Legal Support Centre in Ontario, said Lublin. Set up with the direct-access system two years ago, it helps claimants going before the tribunal. But the group also sends out emails relating employee-friendly cases of discrimination, he said.

"That never happened before. Employers had to contend with putting up with a human rights complaint or application but now you have the negative publicity of the support centre sending out copies of the decision and commentary about it."

Not all bad news

However, there is some good news for employers. Of the 1,188 complaints that were closed with the B.C. Human Rights Tribunal in 2008-2009, 31 per cent were not accepted (meaning they were rejected because the tribunal did not have the jurisdiction or the complaint was filed out of time) while 35 per cent were settled, 17 per cent were dismissed, 16 per cent were withdrawn or abandoned and only one per cent went to a full hearing and were successful.

While the lack of a screening process can be a drawback for employers, not all cases go to a full hearing as a preliminary hearing allows respondents to argue a case isn't valid, said Black. There has also been a strong push for mediation, so the majority of cases are settled.

"That is one advantage of direct access," he said. "The commissions sometimes were felt by respondents not to have the kind of clout that would lead to a settlement."

The number of complaints in B.C. has grown slightly but not exponentially, said Black. And while there has been the "occasional, headline-grabbing big award, most HR awards are relatively modest," he said.

MORE CHANGES ON THE HORIZON

Provincial alterations to human rights

Saskatchewan: The province is considering letting provincial courts handle human rights cases rather than the human rights tribunal. Currently, the Saskatchewan Human Rights Commission investigates complaints and can send them on to the tribunal for a hearing.

Having the government-funded commission become an adjudicator would not be a good thing for employers, said Daniel Lublin, a partner at the employment law firm Whitten & Lublin in Toronto.

"From a human rights perspective, the commissions are always more biased and predisposed to very liberal interpretation of human rights laws."

Complainants could lack legal representation and respondents could see legal costs that are higher than going before tribunals, said William Black, a professor at the University of B.C. in Vancouver.

"It would be a big step in the wrong direction for everybody."

Newfoundland and Labrador: The province has proposed changes to its Human Rights Code while also increasing the efficiency of the complaints process of the Human Rights Commission.

Under the Human Rights Act, 2010, grounds for discrimination would include pregnancy, source of income, disfigurement or criminal conviction. The act would also allow for regulation specifying timelines for documentation related to the complaints process and grant expanded power to the executive director of the commission, including the authority to dismiss complaints that are frivolous or do not fall within the jurisdiction of the act.