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UPDATE ON ONTARIO'S NEW HUMAN RIGHTS SYSTEM

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It was just over one year ago (June 30, 2008) that the human rights system in Ontario changed from a complaints driven process operating through the Human Rights Commission, to a process based on direct application to the Human Rights Tribunal of Ontario. This past year has been a period of learning and adjustment for all parties involved in the new process.

Based on comments made in a speech by the Chair of the Tribunal and our experiences dealing with the Tribunal under the new process, the most significant change to date has been the speed in which matters are being addressed. Under the old system, the processing and investigation of a complaint by the Commission usually happened very slowly. It was not unusual that two, three or more years would pass before a complaint would get to the point where a determination would be made on whether the matter would be referred to a hearing. The new system moves much more quickly. Applications, from start to finish, are being dealt with in less than a year - including a hearing. Not surprisingly there is a great deal more activity. For example, during the first six months of 2008 there were roughly 37 decisions issued by the Tribunal while operating under the old system. In contrast, during the first six months of this year there have been over 500 decisions issued.

What this means for employers is that if you become a respondent to a human rights matter you will need to be prepared for it to move fairly quickly. Mediation happens within a few months of the application being filed, and the hearing is scheduled four to five months after the mediation (assuming there is no settlement).

Some other general observations and notes of interest about the new system:

- The Tribunal has been pro-active in raising issues at the outset where, after having reviewed an application, it feels there may be a 'problem' with the application - such as it is untimely, it is outside the jurisdiction of the Tribunal, or it raises issues that have already been addressed through another forum (such as an arbitration). In those instances, the Tribunal has typically set out the issue of concern, invited submissions from the parties and then made a decision, often before the respondent is required to actually respond to the application;

- Mediations are now conducted by Vice-Chairs of the Tribunal (the same group of people who sit as adjudicators in hearings). This has generally been viewed as a positive development because Vice-Chairs have more credibility with the parties and are more inclined to assist the parties in assessing the strengths and weaknesses of their case and in coming up with a mutually agreeable resolution;

- One of the difficulties in the new process is that there are often people who file an application but who are unrepresented by a lawyer or paralegal. The has led to difficulties due to lack of compliance with procedural or other requirements, which in turn leads to delays and frustration. Under the old system the Commission would normally act as a representative of a complainant and as a result, these types of issues did not arise.

These are still early days for the Tribunal and one can expect its processes will continue to evolve over the next year. However, one of the major complaints about the old system (the excessive delay) has certainly been addressed.

Ontario Case Law Update - Illness Interrupting a Vacation

A recent arbitration award dealt with the issue of how to treat vacation time when an employee falls ill and at least part of that illness occurs during the time the employee was already scheduled to be on vacation.

In this case (Renfrew County and District Health Unit and OPSEU, Paula Knopf), the Grievor had pre-booked vacation for two days. Prior to the vacation she became ill and she remained off ill from the time period before her vacation until sometime after her vacation ended. The arbitration dealt with whether the Grievor was entitled to have her two day vacation (during which she was ill) considered sick time and her vacation bank credited with the two days.

The Arbitrator ruled, based on the specific language of the collective agreement, that the Grievor was not entitled to have the two days treated as sick time and upheld the Employer's decision to continue to treat the two days as used vacation time (under this collective agreement, a person had to lose at least three consecutive vacation days due to illness in order to have the vacation days changed to sick leave).

What makes this case of some interest is that in the course of her ruling, the Arbitrator reaffirmed the general principle that once an employer and employee have mutually agreed to a particular scheduled vacation, those scheduled vacation days will be treated as vacation days for pay purposes, even if there are intervening events (like an illness). It is only where the collective agreement contains language that specifically allows for vacation time to be converted to some other type of leave (like sick leave or bereavement leave) that the usage of vacation time can be avoided.

This means that in the absence of some provision in the collective agreement that allows for converting vacation time to sick time, an employee will still use up their vacation time if they happen to become ill during their vacation.

Having said that, many collective agreements do provide for some ability to restore vacation time in situations where an employee becomes ill. In those situations, the issue is whether the particular circumstances faced by the employee fall within the exceptions spelled out in the collective agreement. In this particular case, there was an exception to the general rule, but the Grievor's circumstances did not fit within the exception.

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