

XV. OTHER CLAIMS ROUTES - LABOUR ARBITRATION

Putting Human Rights Protections in Every Collective Agreement

The Task Force was asked by the Minister of Citizenship to consider the use of other dispute resolution mechanisms to enforce human rights. This included the issue of whether the protections in the *Human Rights Code* should be deemed to be a part of every collective agreement, and if so what requirements should be met.

This issue was also part of the recent *Labour Relations Act* Reform discussion paper. In light of concerns raised in that process, the Ministry of Labour asked the Task Force to consider the submissions which the Ministry received on this issue and to make recommendations to the Government for how the issue should be dealt with.

Ontario Courts have already decided that arbitrators must apply the *Code* when interpreting the collective agreement. That does not in itself guarantee the right to have every breach of the *Code* dealt with as a grievance. A person who is able to fashion a grievance to deal with a human rights issue does not need to go through the *Code* procedure, but may use the collective agreement.⁵¹ Currently, the extent of the rights that can be protected in this way depend upon the specific wording of each collective agreement. Consistent access to this enforcement mechanism requires that common language be included in every collective agreement.

The Task Force believes the protections in the *Human Rights Code* should be deemed to be part of every collective agreement. This will provide an additional, more accessible, way for many workers to get their human rights enforced. Claims would be dealt with right in the workplaces where the issues arise, using the mechanism which the workplace parties have in place already: the grievance and arbitration procedure. At the same time, neither the union nor the employee would be required to choose this route.

The Task Force agrees with the Ministry of Labour's discussion paper that putting human rights protections into every collective agreement "would benefit both employers and employees".⁵²

... benefits to employees and unions ...

Making the *Code* part of every collective agreement will clearly allow human rights claims to be pursued as employee grievances and will give employees access to the services of the union in developing their case. Such provisions are already included in many collective agreements. For example, the collective agreement between the provincial government and the Ontario Public Service Employees Union has such clause. So have many collective

agreements negotiated by the Canadian Auto Workers, the Canadian Union of Public Employees, and the United Steelworkers of America.

Including such a clause in every collective agreement will emphasize the important role unions can and do play in defending and promoting the rights of all employees, particularly employees who are vulnerable to discrimination. It will also make them accountable to their members for this role.

It should also encourage greater union involvement in human rights and increase demands for human rights training. Unions could, for example, bargain with employers to have human rights training provided to every employee and more extensive human rights training provided to employees with a particular role to play in advancing human rights in the workplace. Clauses like this have already been successfully negotiated by unions such as the Canadian Auto Workers and the Canadian Union of Public Employees.

At its public meetings, the Task Force heard from both union members and union representatives. Union representatives informed the Task Force of their support for a stronger role for unions in pursuing human rights cases in the workplace. They spoke of many major equity initiatives they have taken in their workplaces. At the same time, Union members spoke of the failure of unions to live up to their obligations under the *Code*, by as eradicating systemic barriers in employment practices that may be sanctioned in a collective agreement and supporting individual employees who experience discrimination. What both groups see as essential, however, is the provision of far more training and resources in order for them to play their role effectively.

The Task Force agrees. If the *Code* is to be deemed part of every collective agreement, and if more grievances are to go forward involving human rights, then human rights training and resources are essential to ensure the integrity of the process. For more discussion of the issue of training see Section XX of the report dealing with human rights education and training.

... benefits to employers ...

Giving the option to use the grievance and arbitration procedure for human rights claims also benefits employers. Many employers told the Task Force that they want steps taken to encourage claims to be dealt with directly in the workplace without having to bring in outside parties from an enforcement agency. They felt that solutions which are developed in the workplace by the parties who are directly affected are the best ones.

RECOMMENDATION (19):

- **The *Labour Relations Act* should be amended to provide that the protections in the *Human Rights Code*'s against discrimination in employment are deemed to**

be included in all collective agreements and enforceable through the grievance and arbitration procedure.

- **Union and management representatives involved in the grievance and arbitration procedure and union and management members of arbitration boards should receive human rights training.**

In addition to the *Labour Relations Act*, there are a number of specialized collective bargaining statutes dealing with such groups as police, teachers, public servants, and community college employees. The Task Force believes that it is important that employees covered by those statutes have the same opportunity to have human rights claims dealt with through the grievance and arbitration process.

RECOMMENDATION (20):

- **The Government should undertake an immediate review of all specialized collective bargaining statutes and ensure that amendments, similar to those proposed to the *Labour Relations Act*, which extend the right to enforce the *Human Rights Code* prohibits through the respective grievance and arbitration process are enacted.**
- **All Task Force recommendations with respect to the certification, training, powers and procedures of arbitrators under the *Labour Relations Act* should be implemented to apply equally to arbitrations under any of the province's specialized collective bargaining statutes.**

The inclusion of human rights protections in collective agreements raises some difficult issues about how it will work and what relationship such arbitration procedures will have to the new Tribunal claims system. These include:

- whether labour arbitrators possess sufficient expertise to deal with human rights issues,
- employer concerns about proceeding with the same claim in two different places and the risk of inconsistent findings, and
- whether availability of the grievance arbitration would restrict access to the investigative and adjudicative machinery under the *Human Rights Code*.

The Task Force also considered other issues arising from the differences between arbitration and human rights adjudication, many of which were raised by the Ministry of Citizenship and the Ontario Human Rights Commission in its representations to the Ministry of Labour:

- the absence of representation of the public interest before an arbitrator;
- the fact that there is no appeal from an arbitrator's decision;
- the different procedural protections under both processes;
- the difficulty arbitrators might have when faced with broad human rights policy issues, systemic discrimination cases or claims requiring comprehensive investigation;
- the absence of mandatory investigation to assist the grievor under labour arbitration; and
- the fact that unions, and not individual employees, have control over what cases go to arbitration and how they are presented and that unions have been criticized for not adequately dealing with rights claims, particularly if there is a conflict within the membership.

... ensuring expertise of arbitrators ...

The Task Force believes that only arbitrators who have human rights expertise should decide grievances involving human rights issues. The Task Force agrees with those representatives of employer, unions and equality seeking groups who indicated that human rights training of those involved in the grievance and arbitration procedures is necessary for the proper handling of human rights issues.

The Task Force believes that putting protections in place to ensure the expertise of arbitrators who are chosen or named, will help to build confidence in the ability of the arbitration process to fully and fairly deal with human rights issues. Doing so will lessen the likelihood of dissatisfaction with arbitral decisions.

While many arbitrators have not had an opportunity to get a good grounding in human rights issues, a good number of arbitrators have developed human rights expertise and have decided important human rights issues under collective agreements. For example, a landmark case dealing with the obligation of the provincial government to accommodate the religious holy days of a Jewish employee was decided by an arbitration board interpreting an Ontario Public Service Employees Union collective agreement with an anti-discrimination clause.⁵³

Ensuring arbitrator's have initial and ongoing training and expertise will also lead to better consistency of decisions. Otherwise, decisions may vary depending upon the extent of an arbitrator's expertise in human rights and familiarity with decisions from the Equality Rights Tribunal.

The Task Force believes that the Resource and Training Section of the Equality Rights Tribunal must play an important role in addressing these concerns. This Section will be responsible for initial and ongoing training and education of the Vice-Chairs and for their certification to adjudicate in the various equality areas. Accordingly, it is particularly well-placed to do the same for arbitrators. The Tribunal could share its expertise in developing new techniques and proper procedures for adjudication of human rights claims.

As arbitrators are entrepreneurs who charge a fee to the parties for their arbitration work, they should be charged a fee for the training and certification service.

RECOMMENDATION (21):

- **Only arbitrators who have been certified as having human rights expertise by the Equality Rights Tribunal through its Resource and Training Section may arbitrate a matter under a collective agreement which raises a *Code* discrimination issue. Initial and ongoing training and certification should be provided by this Section at a fee.**

... ensuring access to both the arbitration and *Code* procedures ...

The Task Force notes that grievance and arbitration procedures under collective agreements differ from the internal human rights complaint processes found in some non-unionized workplaces. They differ in one important respect; grievance and arbitration procedures, as part of collective agreements, are sanctioned by statute. The *Labour Relations Act* expresses society's confidence in arbitration by stipulating that all differences between the parties to a collective agreement are subject to final and binding settlement by arbitration. The *Act* also includes a mechanism for enforcing the results of arbitrations through the Courts.

Nonetheless, the Task Force is loathe to confine employees and unions exclusively to the grievance and arbitration procedure. They should have the choice of filing a claim of such a fundamental nature at the Equality Rights Tribunal. Effective enforcement of human rights demands no less.

To provide such a choice, it is necessary for all collective agreements to contain a provision that the deemed human rights clause in the collective agreement does not affect the right of an employee or a union to file a claim under the *Code*.

RECOMMENDATION (22):

- **The union and the employee should be able to file a claim either as a grievance or with the Tribunal.**

... avoiding unnecessary multiple proceedings ...

Some employers recommended that if an employee or union took a claim through the grievance procedure under the collective agreement, they should not be able to subsequently file a human rights claim on the same matter. They should have the right to choose, but once that choice is made, the union and the employee should be bound by it.

The Task Force shares the concern that unnecessary multiple proceedings be avoided and recommends the following solutions:

Before the Tribunal: Where an arbitrator has issued a decision on a human rights claim, the Tribunal, faced with a similar claim filed by an unsuccessful grievor or union, would determine at the initial hearing whether a hearing into the claim should take place. At the initial hearing, the employer would be required to show the following:

- the nature of the claim,
- that a "certified" arbitrator was appointed,
- that appropriate and fair procedures were followed by the "certified" arbitrator,
- that the "certified" arbitrator heard the evidence, and
- that the "certified" arbitrator issued a decision, which conformed with accepted Tribunal jurisprudence and remedial powers.

Once the employer has shown this, the rights claimant would indicate to the Tribunal why it should conduct another hearing into the claim. He or she would have to persuade the Tribunal, for example, that the decision was not based on proper human rights jurisprudence; or that it failed to consider relevant evidence; or that it failed to provide the full remedy an employee would have been entitled to under the *Code*. If the claimant succeeds, the Tribunal would hear the case.

Such an approach should allow speedy decisions when inappropriate duplication is involved, but allow cases that were not fully or properly dealt with elsewhere to go forward.

Furthermore, such an approach is an incentive to make sure that grievances involving human rights are handled only by individuals having the necessary human rights expertise so that the result is satisfactory to everyone.

Before an arbitrator: Where an arbitrator under a collective agreement is faced with a human rights grievance having the same subject matter as a claim that has been properly dealt with by the Equality Rights Tribunal, the arbitrator will have the power to dismiss the grievance.

RECOMMENDATION (23):

- **If a human rights claim under the *Code* has already been fully dealt with under the Labour Relations process by a certified arbitrator and in accordance with the equality guarantees and remedial relief provided under the *Code*, a Vice-Chair of the Equality Rights Tribunal may dismiss the claim.**
- **All collective agreements include a provision which would give an arbitrator under a collective agreement the power to dismiss a grievance which was brought by or on behalf of a person or the union when the person or the union had the same matter as raised in the grievance dealt with fully and properly by the Equality Rights Tribunal and there were no rights or remedies available under the collective agreement but unavailable under the *Code*.**

The Task Force carefully considered the potential conflict, in a given fact situation, between union carriage of a grievance in arbitration and the individual grievor's right under the *Code* to file a claim with the Equality Rights Tribunal. Although there exists the potential for the employer to have to appear before both, the Task Force believes that several factors mitigate against this likelihood:

- Unlike arbitration, individuals are responsible for finding representation before the Tribunal. If some of these individuals approached the Equality Rights Centres, the Centres, mindful of their limited resources, may refer them to their unions and encourage them to make full use of their unions' resources first.
- Unions would likely adjourn the grievance, in the name of conserving resources, when a grievor has filed a claim at the Tribunal.
- In cases where an employee files a claim with the Equality Rights Tribunal prior to the conclusion of the arbitration of the grievance, the Tribunal adjudicator might determine, at an initial hearing, whether a hearing of the claim prior to the conclusion of the arbitration was warranted.

...absence of an appeal...

Some concerns have been raised that the power of the Tribunal to dismiss a claim that has been fully heard by an arbitrator under a collective agreement, may unfairly deprive individuals of the right to appeal decisions to the Courts, a right which is contained in the current *Code*.

While arbitrators' decisions are final, so will Tribunal decisions be under the new system. There will be no right of appeal.

However, the Tribunal will have the power to reconsider any decision it has made.

The Task Force believes that the Tribunal's initial hearing procedure for claims that have been heard by a labour arbitrator, will extend a form of reconsideration for arbitration decisions.

...involvement of Human Rights Ontario representing the public interest ...

The Commission has suggested it should have the right to intervene in labour arbitrations dealing with human rights claims in order to protect the public interest.

The Human Rights Commission has suggested that it should be entitled to participate in labour arbitrations that deal with human rights claims in order to ensure that the public interest in promoting human rights is adequately protected.

The Task Force has considered this suggestion, but believes that such a right would unnecessarily encumber the private arbitration process.

Rather, it is more appropriate for the participation of Human Rights Ontario to be limited to claims heard by the Tribunal where public interest concerns are raised.

RECOMMENDATION (24):

- **Human Rights Ontario should only be entitled to seek to represent the public interest if a claim comes before the Tribunal and issues of public interest are raised by the claim.**

... remedial power of arbitrators...

In order to ensure that the grievance arbitration procedure can function as an effective parallel enforcement mechanism, the Task Force believes that remedial powers available to the Tribunal should equally be available to arbitrators.

RECOMMENDATION (25):

- **The *Labour Relations Act* should be amended to provide that arbitrators acting under the deemed *Human Rights Code* prohibitions in collective agreements will have the same remedial powers as those proposed for the Tribunal under the *Code*.**

... requirement to exhaust workplace human rights procedures ...

The Task Force believes that it is extremely important for employers to develop internal workplace human rights procedures to help deal with the problems of discrimination right in the workplace. The Task Force heard from a number of different employers' organizations about the work they had done in developing such internal procedures. As discussed earlier in this report, unionized workplaces have successfully used such procedures.

Some employers have recommended to the Task Force that a person should be required to exhaust the employer's internal human rights procedure before being allowed to file a human rights claim. The Task Force has a number of concerns with that recommendation:

- Internal procedures set up in workplaces vary greatly; there are no standards which they must meet. Some internal procedures the Task Force examined were unsatisfactory and involved little more than directly an employee to tell her supervisor she had a human rights claim and, if the supervisor was unable to resolve it, letting the top administrator decide the claim. Other internal claim procedures examined by the Task Force were substantial and better thought out.
- Without the benefit of a negotiated procedure and union representation, employer-run procedures using employer-chosen decision-makers intend to be unbalanced. None of the employer designed internal procedures provided the level of protection afforded by the best union negotiation procedures that the Task Force examined.
- Poorly developed procedures have little credibility among employees; may expose employees to retaliation; or may be long, drawn out, and cumbersome.

The Task Force does not believe it is fair to require an employee to exhaust, or even use an internal, employer controlled process, before having the right to file a human rights complaint.

It is the view of the Task Force that the appropriate way to encourage employees to use an internal procedure is for employers to ensure it works well. One way to increase that likelihood is to have strong involvement of members of those groups in setting up the process from the very beginning. The Task Force would like to encourage the development of internal procedures that are both effective and acceptable.

RECOMMENDATION (26):

- **In non-unionized workplaces, Human Rights Ontario should encourage employers to set up fair and effective internal procedures for the resolution of workplace human rights claims which are developed in partnership with their employees or negotiated with their unions; and**
- **Employees should have the option of using either internal workplace human rights procedures or filing a claim with the Tribunal.**

...collective agreements which discriminate...

Section 49(b) of the *Labour Relations Act* currently empowers the Ontario Labour Relations board to adjudicate complaints that a collective agreement discriminates against a person contrary to the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*. This power will be continued in the proposed section 49.1 of the *Labour Relations Act*.

It is appropriate that the Labour Relations Board will continue to effectively determine complaints under this section, and proposes no change to the Board's powers in this area.

The Task Force does recognize that where there is a claim that a collective agreement discriminates in an unintentional or indirect way or where it creates systemic disadvantage, that a claim may also be filed with the Tribunal in order to take advantage of its specialized expertise.

In light of the Labour Board's general expertise in experience, the Task Force is confident that it can work with the Tribunal's Resource and Training Section to ensure the ongoing expertise of its staff and adjudicators in the human rights area.