

## ***XVIII. REMEDIES AND MONITORING***

### ***A Call For Stronger Remedies***

Many submissions the Task Force received called for stronger, more effective human rights remedies. People expressed anger that many settlements in human rights cases are the payment of a token amount of money.

The Task Force was told that, when a case goes before a Board of Inquiry, the decision often does not come close to compensating the victim of discrimination for her or his true costs, losses, and suffering. For example, in cases where a person has lost his or her job because of sexual harassment or racial discrimination, the remedy is usually payment of lost wages, not also reinstating the worker in a work environment freed of sexual harassment or racial discrimination.

People recommended that greater emphasis be placed on ordering the respondent to take proactive measures to remove group disadvantages and thus deal with the underlying discrimination, rather than focusing only on individual compensation.

The Task Force was told that the *Code* should be amended to make clear and specific the remedies that can be ordered so as to prevent unnecessary cases from going forward concerning the meaning of the *Code's* general remedy powers and to make clear to respondents the extent of their obligations.

The Task Force believes the *Code* should reflect the Supreme Court of Canada's strong call for the fashioning of human rights remedies that are able to "strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment."<sup>70</sup>

### **RECOMMENDATION (54):**

- **The *Code* should be amended to clarify that a Tribunal has a broad and powerful remedial power to strike at the heart of the problem to overcome discrimination. This includes the power to fully compensate an individual claimant as well as to order specific proactive measures to overcome discrimination faced by groups.**

### ***Proper Remedies for Hurt to Self-Esteem Caused by Discrimination***

The *Code* places strict limits on when compensation for mental anguish can be awarded. The discrimination has to have been engaged in "wilfully or recklessly," and a maximum of \$10,000 is allowed for compensation.<sup>71</sup>

The members of the Task Force personally witnessed the extreme pain and anguish experienced by persons with claims of discrimination. Many stated they had suffered serious damage affecting the rest of their lives.

Remedies under the *Code* do not adequately recognize the emotional and psychological harm done by discrimination. Damage to a person's self-respect causes serious hurt and harm. The Task Force was told that a woman who is denied housing for herself and her children because she is on welfare (and therefore considered an undesirable tenant) suffers not only practical problems of finding shelter, but also mental anguish and hurt to her self-esteem. The same is true of the employee of colour who is subjected to racial harassment or the job applicant who is rejected as incompetent because she has a disability.

The Task Force believes that discrimination, in and of itself, usually causes mental anguish and harm to a person's self-esteem, and that a proper remedy should, as a standard practice, provide compensation for such damages.

The *Code's* present failure to recognize the seriousness of the personal harm caused by discrimination increases the anguish experienced by the individual. The amount of time, stress, and energy the claimant has to devote to pursuing a claim also often goes unrecognized and uncompensated.

It is ironic that people responsible for the discrimination in discrimination cases are commonly paid their regular salary for their time and presence during the investigation, settlement, and hearing process. The claimant is almost always not.

The Task Force believes that the *Code* should allow an adjudicator to order compensation for mental anguish in all cases of discrimination. Therefore, the requirement that the discrimination be "wilful" or "reckless" should be removed. Likewise, the \$10,000 limit should be removed.

The true amount of harm caused by discrimination should be recognized and compensated just as under other laws. People suffering the anguish caused by discrimination should not be treated differently than in the civil courts where there is no limit to the damages amount. The amount of the compensation for anguish should depend on the facts of the case.

If the discrimination is found to be wilful or reckless, this finding should be reflected in an increased monetary award.

#### **RECOMMENDATION (55):**

- **Compensation for mental anguish should be provided to victims of discrimination. The restriction that allows such compensation to be paid only in cases where the infringement has been engaged in wilfully or recklessly should be removed.**

- **The \$10,000 limit for an award for mental anguish should be removed, allowing the amount of the award to depend on the facts of the case.**

### *Proactive Remedies to Overcome Discrimination*

The Task Force believes that the focus of the *Code's* remedies section should be reoriented to recognize the importance of redressing group discrimination. Dealing with the situation of the individual claimant is important, but if this is all that is done, little progress will be made in overcoming discrimination.

Most human rights claims never make it to a hearing at all, and thus rarely does a settlement go beyond the individual concerned to include any significant measures to deal with the underlying problem of discrimination.

Consequently, it is only when a case is referred to a Board of Inquiry that any real opportunity exists to address discrimination in a significant, remedial manner. Under the *Code*, the focus of Board of Inquiry is, however, individualistic and adversarial. When a claim is referred to a Board of Inquiry, the Board holds a hearing "to determine whether a right of the claimant under this *Act* has been infringed" and "to determine who infringed the rights." The Task Force believes that the *Code* should be amended to reflect the positive, remedial character of human rights legislation, as set out by the Supreme Court of Canada.

The Tribunal should determine whether the respondent took positive measures to implement the right of the group in question to equal treatment and whether the particular claimant received the positive right to equal treatment.

The present powers of a Board of Inquiry as defined in the *Code* are quite broad. The *Code* says that the Board may "direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this *Act*, both in respect of the claim and in respect of future practices."<sup>72</sup> However, the power to order a change in future practices to overcome discrimination in a significant way is rarely used.

In the view of the Task Force, it is essential that remedies under the *Code* include positive measures to achieve equality rights. For example, in a case of racial harassment, the remedy should not only provide restitution to the claimant, but also require the respondent to take specific positive measures to ensure that a workplace, service, or accommodation is free of racial harassment or other discrimination.

The *Code* should specifically state that among the remedies that a Board may order are accommodation equity and service equity plans or audits, as well as employment equity plans for those groups not covered by the new *Employment Equity Act*. These plans are more fully

discussed in Section XXII, Proactive Role for Employers, Accommodation and Service Providers."

A monitoring mechanism should be built into any remedy to ensure that it is properly and effectively carried out so as to achieve its purpose. The enforcement of the remedy should not be left up in the air or it will not be taken seriously. Nor should the claimant or advocacy group have to take on the only responsibility for getting the remedy enforced. The order can stipulate that the respondent must provide periodic reports to the Tribunal Officer on carrying out any ongoing compliance issues. This requirement for a monitoring mechanism can also be incorporated into settlements that are to be enforced by the Tribunal.

If a remedy is not properly implemented, or is not successfully achieving its purpose, the case should be returned to the Board for reconsideration and a stronger, more effective order.

The cost of implementing and monitoring an equity plan or another remedy should usually be borne by the respondent. In this way, the respondent will be responsible for the costs caused by the discrimination and will also have an incentive to comply promptly and effectively with the order so that monitoring costs will be minimal.

The monitoring will usually be done by the Tribunal Officer who is assigned to and familiar with the case and the parties. The Tribunal Officer can report back to the adjudicator who ordered the remedies if there is a problem with enforcement.

Remedies should also include education and training in human rights. For example, in a racial harassment case, an employer might be required to hold anti-racism training sessions for all staff and supervisors, and to post notices informing people of the anti-racism policies, how to get more information, and how to make a claim.

#### **RECOMMENDATION (56):**

##### **The *Code* should**

- **require the Tribunal to determine whether the respondent took positive measures to implement the right to equal treatment and whether, in particular, the claimant received the positive right to equal treatment;**
- **state that remedies under the *Code*, in addition to individual redress, should include positive measures to achieve equality rights;**
- **specify that among the remedies that may be ordered are accommodation equity and service equity plans, audit plans, and employment equity plans for those groups not covered by the *Employment Equity Act*;**

- **state that an independent monitoring mechanism should be built into any remedy requiring monitoring to ensure that it is properly and effectively carried out; and**
- **allow the Tribunal to order a respondent to pay for the costs associated with carrying out the remedial order and any necessary costs of the Tribunal in monitoring the order.**

### ***Order to Cease and Desist from Discriminatory Practices***

Along with the power to order positive measures, the *Code* should explicitly allow the Tribunal to act quickly and effectively to stop discriminatory practices, such as harassing employees because of their sexual orientation.

Unlike the current *Code* provision, the *Pay Equity Act* directly allows the Tribunal to "order a party ... to refrain from an action as in the opinion of the Hearings Tribunal is required in the circumstances."<sup>73</sup>

### **RECOMMENDATION (57):**

- **The *Code* should be amended to clarify that the Tribunal has the power to act quickly and effectively to order a party to stop discriminatory practices or actions.**