Rare Costs Award At BC Human Rights Tribunal For Improper Conduct

Despite an employer's legitimate basis for terminating an employee's employment, it will often find itself a respondent to a human rights complaint following termination. The costs for employers to defend a human rights complaint can be very high and, unlike in the courts, the B.C. Human Rights Tribunal does not have jurisdiction to order unsuccessful parties to pay the successful party's legal fees. However, in exceptional circumstances, the Tribunal has a limited jurisdiction under the *Human Rights Code* to make punitive costs awards for "improper conduct" that impacts the integrity of the Tribunal's processes.

The Tribunal found such circumstances to exist in the case of Ma v. Dr. Iain G. M. Cleator and another. Kim Ma worked in the respondent doctor's clinic as an office assistant for a number of years. She eventually took an extended maternity leave and, when she returned to the workplace, found that a significant number of processes and operations had changed in her absence. Ms. Ma resisted the changes and was in immediate conflict with the new office manager. Despite efforts to make it work, Dr. Cleator found the employment relationship was unworkable and terminated Ms. Ma's employment, providing her pay in lieu of notice, approximately one month after her return.

Ms. Ma filed a complaint with the Tribunal alleging that Dr. Cleator had discriminated against her on the basis of sex (pregnancy), family status and mental disability. After ten days of hearing, the Tribunal concluded that the entirety of Ms. Ma's complaint should be dismissed, finding that Ms. Ma had purposely fabricated the basis for her complaint, lied under oath, altered or created false evidence and knowingly misled the Tribunal.

Based on its limited jurisdiction, the Tribunal took the rare step of making a punitive order for $5,000 in costs against Ms. Ma. Although the award is much less than what respondents usually expend to defend themselves against a human rights complaint, it is at the highest level in light of previous case law.

We often advise employers of the unfortunate reality that costs are not available in human rights tribunals in any jurisdiction in Canada, even when an employer is completely successful and a complaint is found to be completely without merit. Many calls have been made for reform of provincial human rights legislation – not just in British Columbia. Our colleagues in Ontario previously posted on a private member's bill in Ontario that sought to amend human rights legislation to provide the Ontario

Human Rights Tribunal with jurisdiction to order costs. Although Ontario Bill 147 passed first reading in December 2013, it has since died following the dissolution of Ontario's legislative assembly for a provincial election.

While we are not holding our breath for amendments to British Columbia's *Code* permitting the Tribunal to award costs against unsuccessful parties in the foreseeable future, the introduction of Bill 147 in Ontario provides some encouragement that legislatures are at least aware of the challenges faced by respondents to human rights complaints and that some politicians are willing to takes steps to address them.

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