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Understanding Human Rights Complaints

As a significant employer, there is no way to avoid employee turnover—especially at entry-level positions. Most businesses are pyramids, and yours is not designed to allow every service advisor the opportunity to advance to general manager. It just doesn't work that way. Some employee turnover is driven by the employee voluntarily moving on to something else, but sometimes the employer has to terminate the relationship. In many cases, employees are terminated because poor customer service cuts to the heart of your business. No-one has a monopoly on selling F-150s or Corollas and first things have to come first. If your business doesn't survive, *none* of your employees keep their jobs. In the aftermath of an employee's dismissal and as we touched upon in a previous newsletter, one potential path for a former employee to seek redress against his/her former employer is a human rights complaint.

First some background. Anglo-Canadian common law is about a millennium old. However, for most of that period the law primarily served to protect property. The concept of individual rights and protection from discrimination is

relatively new. To give some perspective, the *Magna Carta* was signed in 1215, but if you've seen *The Tudors* you know that when kings got angry, heads were put on sticks. The Canadian *Bill of Rights* was not passed until 1960 and Alberta's first human rights legislation was passed in 1968. The *Canadian Charter of Rights and Freedoms* was part of a significant constitutional amendment in 1982. As part of this legal evolution, policy decisions were made across Canada to establish administrative bodies to address human rights complaints.

That is where we are today. The Alberta Human Rights Commission has the jurisdiction to administer complaints under the *Alberta Human Rights Act* (the "Act"). The Act prevents discrimination on a list of grounds. Unlike a lawsuit—where each side has to prepare and present its own case before an impartial, otherwise uninvolved judge—the Commission is charged with investigating each complaint that is made. In other words, once a complaint is brought, the process is out of the complainant's hands and is considered and investigated by the Commission. Think of it this way: in a civil lawsuit,

each party has to do all of its own fact finding, while if a crime is reported to the police, they are the ones who then take the baton and investigate.

Human rights complaints have the following stages:

1. the Commission reviews the complaint to ensure that it falls within the Commission's jurisdiction and contains enough information to proceed. For example, a wrongful dismissal claim that has no allegation constituting a human rights violation could not proceed before the Commission;
2. the Commission then notifies the respondent (in this case, you, the employer) of the complaint and allows 30 days to respond. The respondent's written response to the complaint is then shared with the complainant. Unlike in the Court of Queen's Bench, parties do not serve each other directly, all communication flows through the Commission;
3. the Commission may request (and then share) further information from either party in an attempt to specify or narrow issues;
4. the Commission assigns a conciliator to attempt to facilitate a resolution between the parties. Any offers in this process are without prejudice and subject to settlement privilege. If it works, the complaint will be withdrawn as part of the resolution (and we also strongly recommend obtaining a release for any further attempt at recovery against you). If conciliation doesn't work, an investigator is appointed to look into the complaint further;
5. the investigator is charged with gathering information to assess whether there is a reasonable basis to proceed with the complaint. This can include reviewing documents or correspondence between the parties, as well as interviewing the parties or other witnesses. The interviews are usually conducted at your office, or at a lawyer's office. We recommend meeting with counsel prior to these meetings, and having counsel present at them;
6. a complaint can be dismissed if the information the Commission receives fails to show that there is a reasonable basis for proceeding. A complaint can also be discontinued if the Director believes that the complainant refused to accept a fair and reasonable offer; and
7. if there is a reasonable basis to proceed, the Director then refers the complaint to the Chief of the Commission and Tribunals to appoint a tribunal (which has no knowledge or involvement in any pre-hearing steps) to hear the complaint. At hearing, the complainant may be represented by counsel, but the Director is a party (represented by its own counsel) and attempts to persuade the panel that a human rights violation occurred.

Complicated enough? We strongly recommend seeking legal advice if you are served with a complaint. Some of the general points to focus on (and that differ from a lawsuit) stem from one fundamental difference: the Director (and his/her designees) have an active role the moment a complaint is made. Put practically, this means that aside from making the complaint, a complainant does not have to spend time or money on procedural steps. A complainant has no obligation to retain counsel and will usually be prepared by the Director's counsel if the matter proceeds to hearing. For an employer, this changes the economics at play and must be part of your strategy for responding to the complaint.

This Issue's Tip:

It's very important to protect yourself when you do make severance arrangements with a terminated employee. Make sure that the former employee releases you from any further redress. There are cases where employees agree they are not entitled to any further severance (or where the amount of severance paid easily meets the legislative and common law requirements) but that does not prevent a human rights complaint. It is important to have former employees sign a release that clearly includes administrative complaints.

Questions?

Send your questions or topic suggestions for upcoming newsletters to:

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About this Newsletter

The McMillan Automotive Law e-newsletter is a quarterly publication designed to keep new vehicle Owners, Presidents, Vice-Presidents, Dealer Principals, General Managers and Sales Managers in the know about legislative changes that may affect your business, as well as updates and developments relevant to your industry, and general legal tips associated with running a busy automobile dealership, such as:

- Litigation matters – what to do when legal issues arise or when faced with a lawsuit.
- Legislation or regulatory changes – to avoid legal pitfalls and minimize your risk.
- Other issues affecting your dealership.

I hope you find this e-newsletter useful. To sign up or if you have any feedback, topic suggestions or questions you'd like to submit in a future issue, please feel free to send me an email at: andrew.stead@mcmillan.ca. As well, feel free to forward this to your friends or colleagues that you think this may interest!

Thanks for reading!

Andrew Stead

About the Author



Andrew Stead is a lawyer at McMillan LLP practicing in commercial dispute resolution and regulatory law. He is a member of McMillan's automotive group and has acted for a number of car dealerships and manufacturers, including contractual disputes, product liability claims and employment matters. McMillan is a national business law firm with considerable experience providing the automotive industry with advice on topics from competition, cross-border trade to financial products, and also dispute resolution.

a cautionary note:

This newsletter provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.