Association of Ontario Midwives
Delivering what matters.

AOM advocates for improvements to HRTO

April 29, 2021

Introduction: The AOM

The AOM is pleased to be able to participate in this consultation. The AOM brings to this consultation our extensive experience of seeking compliance with the code-protected right to compensation free from gender discrimination which culminated in the Tribunal issuing two precedent-setting liability and remedial decisions in 2019 and 2020 which were upheld unanimously by the Divisional Court. However, the Government is ***still*** appealing to the Court of Appeal and are refusing to eliminate the gender discrimination in pay midwives have continued to suffer since 2014. The AOM may well have to return to the HRTO later this year. We need the HRTO to ensure systemic cases like ours can be addressed and our discrimination eliminated in a timely way. We have some suggestions for how to do that which we want to share with the HRTO.

The midwives' case at the HRTO

From 2013 to 2020 the AOM was involved in HRTO proceedings related to our claim that the Ministry of Health engaged in systemic gender discrimination in its setting of midwives' compensation as independent contractors. As the representative applicant, the AOM has experienced firsthand what it means to be an applicant in a complex, systemic discrimination claim which involved:

- Processing over 1000 Form 27 consents from midwives across the province;
- Defeating a preliminary motion to dismiss the AOM's allegations of systemic discrimination;
- A mediation process;
- 50 hearings and special examiner days during which 45 witnesses, including 10 experts, provided testimony and the evidentiary record grew to over 69,000 pages;
- A very lengthy Tribunal decision-making process taking from 2017 -2020
- A judicial review and appeal process, which is ongoing, following the Tribunal's finding of systemic discrimination and its bifurcation of the claim into liability and remedial decisions; and
- The implementation, which is also ongoing, of complex monetary and structural remedial orders involving experts, a facilitator, and a third-party administrator.

Our input to the Tribunal is informed by this lived experience.

Feedback on improving services

Our feedback is focused on how the Tribunal can better encourage and facilitate the adjudication of ***systemic*** discrimination claims which can result in advances in the law and remedies for a wide range of Ontarians.

There are two principal ways that the Tribunal can improve its approach to systemic claims:

- To develop procedures and practices which are tailored to address the unique nature and importance of systemic claims for enforcement of Ontario's Human Rights Code; and

- To advocate for and allocate sufficient resources to ensure that systemic claims proceed expeditiously, are not unduly delayed because of their complexity and resource-intensive nature and that the Tribunal remains seized to ensure compliance orders are enforced in timely way.

The Tribunal must develop procedures and practices tailored to address system discrimination claims:

a. The starting point is the Tribunal's full appreciation and recognition that systemic discrimination cases are materially different from individual discrimination cases and that the Tribunal's procedure and practice ought to reflect this and ensure that both kinds of cases can proceed efficiently and effectively.

b. As stated by Vice Chair Gotheil in his interim decision dismissing Ontario's motion to dismiss our application, "systemic claims are about the operation and impact of policies, practices and systems over time, often a long time. They will necessarily involve an examination of the interrelationships between actions (or inactions), attitudes and established organizational structures" and such examination often involves evidence over many years (2014 HRTO 1370, para 33).

c. The adjudication of systemic discrimination claims is highly specialized, requiring numerous witnesses and an extensive evidentiary record. To render a decision the adjudicator must be apprised of the history and present-day discriminatory implications of policies, practices, organizational systems and structures, interrelationships, and attitudes. Such a proceeding is a substantially different undertaking than an individual discrimination claim.

So, what must be done? How must the Tribunal change its procedure and practice to better facilitate the hearing of systemic discrimination claims? Here are some suggestions.

First, identify and track systemic discrimination claims to an administrative adjudicator who case manages these claims.

Systemic discrimination claims should be diverted to administrative adjudicator(s) who case manage the claims and assign them to vice chairs who specialize in systemic discrimination matters. Such administrative adjudicators should have a keen understanding of the necessary resourcing of systemic discrimination claims.

Second, revise the Draft Form 1 and include in a new Form 1G with information prompts on whether the claim is individual or systemic in nature.

Section 5 of Draft Form 1: Individual Application **does not include any prompts on whether the claim is individual or systemic**. An individual applicant may bring a systemic discrimination claim which is a fact that ought to be reflected in the Draft Form 1 to ensure that the Tribunal can easily identify whether the application ought to track to an administrative adjudicator who case manages systemic claims. For example, on page 14 of the draft there could be additional prompts aimed at identifying whether the claim has a systemic component. The Draft Form under the "In a few words, describe:" prompt could state, "describe whether there is a policy or practice that applies to either everyone or just a group but discriminates against you in the 'area' you selected."

We welcome consultation on this new systemic form draft, and our preliminary comments are that the Form 1G like the Form 1 must request information that would identify whether the application is an individual or systemic claim, including prompts for information on policies, practices, organizational structure and systems that would form part of the allegations of systemic discrimination set out in the application.

Further, the public Hearing Docket should include the names of parties unless the parties in the application and response forms expressly request that their names not be included in the Hearing Docket. This way the public can monitor the cases being adjudicated by the Tribunal.

Third, on the point of tailoring practice and procedure – we ask the Tribunal to revise Rules 6 to specifically allow for representative applicants in s. 35(4) Applications and to provide for a systemic discrimination class opt-out process akin to class proceeding practice and procedure.

Rule 6.8 requires that an application filed on behalf of another person under s 34(5) of the code must be filed together with the signed consent in Form 27. This rule is impractical in systemic discrimination cases such as the midwives' case, for example, where the number of people discriminated against will increase year on year as the matter proceeds through litigation and as more people join the midwifery profession. As opposed to filing a new, duplicative application with Form 27s every year the litigation proceeded, the AOM instead provided the Tribunal with batches of new Form 27s as more midwives joined the profession and/or midwives who had not previously signed a Form 27 consent decided to do so. This "opt-in" process created a substantial administrative burden and led to problems at the remedial implementation stage, culminating in the imposition of a final 'opt-in' Form 27 deadline and resulting in certain midwives filing individual applications based on the same fact pattern because they did not have a Form 27.

The AOM strongly urges the Tribunal to change its Rule 6.8 and Form 27 to reflect the 'opt-out' class proceedings procedure and practice. The AOM recommends that there be 'representative applicants' who would provide signed consents in Form 27 with the s 34(5) application to commence the proceeding and that thereafter the discriminated class would be defined such that any person who fell within the defined class would be eligible for remedy unless they opted-out.

This defined class is in effect what happened in the AOM case in that the adjudicator defined the 'eligible applicant' in her remedial decision, which created the defined class in the midwives' case. The barrier,

however, is that the defined class for the midwives included the criteria for the Form 27 – this is the barrier that we recommend the Tribunal remove. This would expand access to justice for discriminated individuals as it would ensure that everyone who falls within the class of persons subject to discrimination would be eligible for remedy without the individual having to take the positive step of opting-in by signing a Form 27 consent.

The Tribunal must advocate for and allocate sufficient resources to ensure that systemic claims proceed expeditiously, are not unduly delayed because of their complexity and resource-intensive nature and that the Tribunal remains seized to ensure compliance orders are enforced in a timely way.

The starting point here is to recognize that systemic claims should be resourced differently than individual claims as systemic claims lead to complex, lengthy legal proceedings which require more resources. This should be understood and accepted. Of course, this must be understood in the full context of systemic claims which have seriously broad, system-wide impacts and can remedy discrimination experienced by thousands of people.

When at the Tribunal, there were times when we were made to feel as if we were taking up more hearing dates than we should, or otherwise unduly draining the Tribunal's scarce resources and inappropriately so. No one should be made to feel this way when they are seeking access to justice and the elimination and remedying of systemic discrimination. When the Tribunal scarcely resources its systemic discrimination applications, there is an access to justice problem where continued delays ultimately impede resolution and the remedying of discrimination.

The Tribunal needs to make sure that it advocates for the necessary resources from the government for it to implement the Tribunal's systemic discrimination mandate embedded in the Human Rights Code. This requires persistence since the government is the most frequent respondent in systemic code applications. They cannot be allowed to defund the Tribunal which is there to hold them accountable.

Tribunal budgets must set aside sufficient funds by budgeting for these claims separately and allocating more resources to these claims than those which would be budgeted for individual claims. The Tribunal needs to be clear in its request for funding from Ontario, its funder, that it requires a certain level of funding to be able to facilitate the just and expeditious resolution of the individual and systemic claims filed with the Tribunal.

The proper resourcing of systemic discrimination claims should:

a. Minimize delays;
b. Ensure that adjudicators of systemic claims are adequately resourced; and
c. Ensure that the Tribunal has the resources to remain seized to allow for the effective implementation and enforcement of complex structural orders.

On the first point of the need to minimize delay The Tribunal issued its remedy decision in February 2020 over six years after the AOM filed its application in November 2013. While the AOM always diligently pursued its application, there were continued scheduling delays which impeded midwives' timely access to

justice as well as lengthy delays in issuing decisions after hearings were conducted. During this time midwives continued to be subject to discriminatory pay.

The Tribunal's adjudicators themselves need to have access to sufficient resources and time to hear matters and render decisions. For example, the AOM's application was originally assigned three adjudicators due to its importance which the Tribunal then changed to only one adjudicator because of resourcing constraints. Further, the hearing adjudicator was not provided with sufficient time to consider and issue her decision but was instead continually kept on the roster to adjudicate new cases. Decision time for systemic cases must be afforded to adjudicators.

Lastly, there must be sufficient resources available to allow for the Tribunal to remain seized of systemic discrimination claims that result in complex structural remedial orders. The Tribunal has the power to remain seized of a matter upon rendering its final decision. This is a powerful enforcement tool that the Tribunal ought to use.

In sum, the AOM believes that its two proposed critical pathways described in this presentation will better facilitate the access of Ontarians to a human rights process which will effectively enforce their right to be free of systemic discrimination.

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