

Civil Litigation

Mediation in human rights cases: Ounce of prevention worth pound of cure

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(September 27, 2023, 12:32 PM EDT) -- Human rights cases are on the rise. There are several contributing factors for this, including the increase in immigration and diverse hires within companies and organizations.

For many workplaces, institutions and service providers such as housing, there is a heavy focus on integration and inclusion. This is a favourable change in the market, necessitating a review of existing workplace and service policies to ensure they are in line with the protective grounds outlined in the relevant human rights legislation. If these policies do not evolve to meet current expectations, they potentially give rise to human rights complaints.

In the case of *Ceresne v Crosby*, 2023 AHRC 76, the landlord (respondent) of an apartment building discovered one of the tenants identified as homosexual. The respondent did not know this when the complainant moved in three years earlier. The “respondent treated him poorly and in a discriminatory manner,” including homophobic taunts and harassment. The treatment led to a human rights complaint that eventually ended in a settlement of \$13,000. Cases like these are becoming prevalent throughout Canada, creating a zero-tolerance culture for harm toward racialized and marginalized communities. In the *Ceresne v. Crosby* case, the complainant had a successful outcome at the tribunal. However, no other remedial dialogue had taken place, which potentially exposed current and future tenants to harm.

In the words of Benjamin Franklin, “An ounce of prevention is worth a pound of cure.” At the time, Franklin referred to the fires in Philadelphia, which required preventative measures instead of endlessly fighting them. This article explores how dialogue through mediation in human rights cases could help prevent future harm caused by discrimination.

Open dialogue through mediation

Mediation is a process of facilitating constructive communication between conflicting parties to achieve a resolution. It allows parties to explore the issues causing the conflict and build options for sustainable resolutions. Mediation processes can differ depending on the types of cases. In some instances, the mediation may involve negotiations that are transactional, whereas others may involve facilitation leading to performance-based options and resolutions.

Human rights complaints entail a host of complexities, contingent upon the ground for discrimination. Mediation offers an opportunity for an open dialogue between the parties. The mediator can provide a trauma-informed process that could potentially be transformative by exploring the reasons for the discriminatory acts and providing specific remedies such as coaching, training, and other reformatory approaches that can help repair a wider societal problem. In my experiences in addressing racism within workplaces, I have found that a significant portion of discriminatory behavior can be attributed to societal influences, a deficiency in intercultural communication and the perpetuation of stereotypes.

Racial discrimination can also emanate from the threat of competition, as many workplaces are now focusing on diverse hires who outperform homogeneous groups. Often, a resolution to many of these challenges can be achieved by providing education and guiding the parties toward embracing new practices that facilitate the dismantling of racism and foster a deeper mutual comprehension of the issues. Mediators who do this type of work will usually hold a plethora of cultural knowledge and skills and be equipped with helpful tools the parties can use. This process holds the parties accountable whilst using progressive ways to tackle discrimination.

Transformative processes in human rights cases can tackle power imbalances and empower parties to take an active role in shaping a suitable resolution, which fosters a sense of ownership over the outcome. As well as financial settlements, parties can create resolutions such as training that help to repair the harm and raise self-awareness. These types of remedies are seldom provided by a tribunal. Parties are also able to preserve confidentiality. Depending on the type of discrimination, some parties prefer to keep the discussions private and confidential rather than feel exposed as they tell their stories.

Human rights mediation process

Preparation for conducting a human rights mediation can diverge from the processes associated with mainstream litigation cases. It necessitates delving into each party's perspective through active and empathetic listening, often employing a trauma-informed approach. To gauge the extent of the harm suffered, it may entail inquiring about the individual's background, upbringing, family history and other factors that influence their perception of the conflict and how they experience the harm.

During pre-mediation meetings, it is vital for the mediator to do this work to help them narrow down the issues and design a process that will be most effective during the day of mediation. Depending on the case, additional day/s spent in mediation may be required to complete the process. If the subject of the conflict is triggering for the parties, the mediator will have to assess the best way to continue and discuss options for the parties (and their legal representatives, if any), to allow time for reflection. Mediation of this kind is an invested process where the mediator should check in with each party to ensure they are helping to reduce ongoing harm.

Human Rights Tribunal backlog

Provinces across Canada such as British Columbia and Ontario face long delays in dealing with human rights complaints. In March 2023, a CBC news article reported on the backlog at the Human Rights Tribunal of Ontario. Due to the shortage of adjudicators and the increase in cases, some lawyers describe it as a system that is not working for some human rights cases. As of December 2022, there were more than 5,000 cases in backlog, with a significant portion of them languishing in the system for over four years. There have been no further publications of the number of cases backlogged in 2023. Addressing the shortage of adjudicators causing such delays, mediation emerges as a vital tool in engaging these conflicts to relieve those still waiting for a hearing date.

Not all human rights cases are suitable for mediation, as the vulnerability of the complainant and public interest must be taken into consideration. But those that are suitable can benefit from transformative mediation processes that may impact wider social justice issues and prevent the fire before a fight.

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