

Human Rights Review

A Background Paper

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Section 27(1)(f) refers to matters which have been dealt with, not those which could be. Thus, this section can only be used when the other proceedings is finished. (The Code has provisions allowing for the deferral of complaints pending the outcome of other proceedings. In the absence of a decision to defer, the Commission will not delay dealing with a complaint pending other proceedings.)

This section applies whether the complainant was successful in the other proceeding or not. The question is not whether the complainant was successful in the other proceeding, but whether the other proceeding has appropriately dealt with the substance of the complaint.

The CIM's policies and procedures address in some detail the constituent elements of s. 27(1)(f), including the meaning of "substance of the complaint", "subject matter of the other proceeding" and "adequacy of remedies" of the other proceeding.¹²⁸ Of the CIM's ability to defer and dismiss under ss. 25 and 27(1)(f) of the Code, the point was made¹²⁹ that:

¹²⁸ The CIM's policy and procedures on s. 27 provides as follows: The substance of the complaint: The "substance" of a complaint, for the purposes of this section refers to the significant elements of the matter in dispute. The substance of a complaint refers to the harm that was done or the benefit which was denied and the ground of discrimination. This is because the purpose of the Code is to eliminate proscribed discrimination. The other proceeding must deal with the ground of discrimination in order to properly consider the substance of the complaint which could be filed under the Code. For example, when dealing with a complaint that a person was not hired because of race, the substance of the complaint is "not hired because of race." The substance will not have been dealt with if the hiring dispute is dealt with but the issue of race is not. The subject matter of the other proceeding: The substance of the human rights complaint must coincide with the subject matter of the other proceeding. Thus, if a grievance deals with dismissal as a disciplinary measure (without a mention of race discrimination) and a human rights complaint deals with an alleged discharge because of race the two issues do not coincide and the other proceeding cannot be seen as appropriate to deal with the human rights complaint. However, in such a circumstance the complainant would have to explain why the issue of race was not raised in the grievance. The failure to do so may reflect negatively on the *bona fides* of the complainant unless there is a good explanation for the failure to mention race in the grievance. The nature of the other proceeding: Another proceeding includes "a proceeding authorized by another Act and a grievance under a collective agreement". This would include redress mechanisms established by other laws, actions taken in the judicial system, and privately contracted dispute resolution systems such as grievances, commercial arbitration, or the application of formal redress mechanisms such as a respondent's harassment policy. The limitation in this section is that the other proceedings must be a formally established system of dispute resolution which is generally known by those to whom it applies. In considering the nature of the other proceeding, the following are relevant factors: (1) the administrative fairness of the other proceeding; (2) the expertise of the decision-makers and investigators; (3) whether the case involves important human rights issues which invoke the public interest enunciated by the Code; (4) which forum is more appropriate for discussion of the issues; (5) whether the other proceeding protects the complainant against the discriminatory practice; and (6) whether there is a conflict between the goals and intent of the Code and the other proceedings, and practical issues including the time which each procedure would take and the consequences in terms of emotional strain, personal relations and long term outcome of processes. The adequacy of the remedies available in the other proceeding in the circumstances: The adequacy of the remedies available in the other proceeding are to be assessed against the substance of the human rights complaint not the actual complaint filed in the other proceeding. This requires looking at the substance of the complaint and determining whether the other proceeding is capable of providing an adequate remedy for the harm which was alleged. The question is not whether the complainant was successful in the other proceeding, such whether the proceedings would have been capable of providing an adequate remedy had the complainant been successful. The test is not the duplicity of

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... On the one hand, the inclusion of these provisions in the new Code codify to some degree the concept of issue estoppel and reflect a recognition of the undesirability of multiple proceedings on the same issue, from the perspective of costs to the employer, the prevention of "double jeopardy" for the employer, the expenditure of the scarce resources of the tribunal and certainty and finality for the parties on these issues.

On the other hand, though, both [provisions] require that the commissioner of investigation and mediation consider the issue of remedies which are available in each forum in deciding whether or not to defer the complaint or dismiss it entirely. This appears to be a consideration over and above those associated with the concept of issue estoppel at common law and addressed by the Council in *Deborah Marc and Axton*. If, as the wording of the Code suggests, the availability of additional remedies is a factor that must be considered by the commissioner of investigation and mediation on every application for a deferral or dismissal of a complaint, there will be few, if any, such deferrals or dismissals where the other proceeding is a grievance arbitration since, at present, grievance arbitrators lack the authority to award damages for pain and suffering.

If the CIM determines that the other proceedings, once exhausted, did not "appropriately" deal with the complaint, the complaint is then referred to the HRT.¹³⁰

HRT Powers

The HRT does not have a statutory power or discretion to dismiss a complaint without a hearing.¹³¹ Accordingly, the HRT's ability to address duplication issues is circumscribed by

the potential remedies but their adequacy to compensate the person for the alleged harm done. All relevant factors: This catch all phrase is used to capture other relevant factors not previously considered. An example of a relevant factor might be a case whether a procedure would usually have been considered capable of appropriately dealing with the complaint, but the complainant can explain why for some reason it was not appropriate in this case.

¹²⁹ Andrea Zwack, *supra*. *Some Issues in the Interaction of Human Rights & Labour Law Processes*. (CLE, Human Rights '97).

¹³⁰ Over the past 4 1/2 years, the CIM deferred eighty-eight cases. Of these, fifty-five were dismissed, five were settled, twenty-seven remain deferred and one was referred to hearing.

¹³¹ The Black Report recommended (at pp. 149-50) that that Tribunal have statutory powers enabling it to deal with issues of actual or potential duplication of adjudication of human rights issues. The specific recommendations were: "3-C-76 It is recommended that the *Human Rights Code* require the Human Rights Tribunal to consider whether the substance of a human rights claim has been fully and adequately dealt with in another proceeding, if any party to the proceedings requests such a determination. 3-C-77 It is recommended that in making this determination, the member of the Tribunal assigned to the claim at the time of the application should take account of all relevant factors, including: the subject matter of the other proceedings, and whether those proceedings had fully and adequately considered the human rights aspects of the dispute; the expertise of the tribunal or decision-maker in human rights; the fairness and effectiveness of the other process and whether or not the parties had been adequately represented in the process; and whether the other proceeding offered a range of remedies comparable to those available under the *Human Rights Code* in the circumstances. 3-C-78 It is recommended that the statute authorize the Tribunal to dismiss a human rights claim that has been fully and adequately considered in another proceeding or to limit the claim to matters not fully and adequately dealt with. The Tribunal would not reassess the ultimate result in the other proceeding if the proceeding had met the criteria just outlined. 3-C-