The Human Rights Process and Race Discrimination Complaints

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ABSTRACT

This paper identifies some of the reasons why complaints of race discrimination have a lower success rate than complaints on other grounds. It then presents a variety of options that might be considered at different stages of the complaints process, with the goal of improving the success rate.

Studies in many jurisdictions have indicated that complaints alleging discrimination on the basis of race and related grounds have a lower success rate than cases considering other grounds.[1] The fact that similar results occur in different jurisdictions suggests that the causes go deeper than some simple error in handling such cases. The purpose of this paper is to try to identify some of those causes and to present possible strategies for increasing the success rate. My goal is to identify as many strategies as possible, rather than to try to identify some new solution that has eluded everyone else. I simply want to start the discussion.

Causes of the lower rate of success

There does not seem to be any single cause for the lower success rate of complaints of race discrimination. Ana Mohammed, who is now a member of the B.C. Human Rights Tribunal, prepared a report in 2000 comparing a selected sample of race complaints (all of which included racial harassment) with a comparable sample of sexual harassment complaints. She concluded that the lower success rate of race complaints was due to a combination of two factors. The first was that, on average, complaints of race discrimination were more difficult to substantiate. The second was that the procedures for processing complaints are not always well suited to the nature of complaints of race discrimination. Donna Young reached similar conclusions in her 1992 study for the Ontario Commission. I agree that both factors have an effect on the success rate.

Mohammed found that complaints of race discrimination are more likely to involve an ongoing course of conduct, rather than a specific incident. She also found that the discrimination often takes more subtle forms in race cases than in sexual harassment cases. In addition, a respondent is unlikely to admit that race played any part in a decision. In contrast, in cases involving other grounds such as disability, for example, a respondent will sometimes admit that the events took place but argue that a defence is available.

Ironically, the fact that race discrimination may attract a higher degree of social stigma than discrimination on some other grounds, such as age, may make it harder to prove a case in two ways. The first is that perpetrators are more careful to hide race discrimination than other forms of discrimination. The second is that there may be an unconscious tendency of decision makers (whether intake officers, investigators, Commission members or tribunals and courts) to apply a higher standard of proof to allegations of race discrimination than to other grounds.

Another factor may be that the strongest cases do not necessarily result in a complaint to the Commission. Some of those who experience the discrimination may accept the situation as a coping strategy.[2] Moreover, if racial discrimination is an ongoing feature of a workplace, it may seem futile to file a complaint about any particular incident. It seems likely that these tendencies would be more common in situations of serious ongoing discrimination than when the discrimination is less prevalent. The result would be that the complaints process may tend to exclude a disproportionately high percentage of the most serious cases.

A final factor may be that the human rights enforcement system has not yet fully applied an adverse effects analysis. The Supreme Court of Canada recognized adverse effects discrimination almost twenty years ago.[3] However, most cases classified as adverse effects cases involve facts bordering on intent, such as the maintenance of certain business hours, even after being informed that they will interfere with the religious beliefs of some employees.[4]

A broader adverse effects analysis would start from the assumption that if a group is not represented in a workplace or other establishment in the numbers one would expect on the basis of availability, that this alone is enough to create a presumption that the selection system incorporates some discriminatory barrier. Such an analysis would, of course, be relevant to any ground of discrimination. But it may be especially relevant to complaints of race discrimination, because they are often more difficult to prove by other means.

Strategies

This section lists different possible strategies for handling complaints. As mentioned in the introduction, my aim is to raise possible options for the purposes of discussion rather than to identify some optimal mix of strategies.

Attracting the strongest complaints

In a complaints-based system, the Commission has limited power to influence what complaints are filed. However, the following steps might help to bring serious instances of race discrimination to its attention:

- The educational efforts of the Commission play an important part, and it may be useful to consider ways in which these efforts could be as effective as possible in reaching racialized groups who experience discrimination.
- Liaison between the Commission and community groups and unions that have first-hand information about instances of race discrimination could be useful. Similarly, it could be useful to indicate to such groups that the Commission would welcome third-party complaints and to provide training to help such groups to assess potential complaints.[5]
- Community groups could also carry out "testing" in appropriate circumstances. If, for example, a person has been told that a job or an apartment is no longer available and suspects being excluded because of race, it may be useful to have a person from a different group make an application to see if they are given the same information. Testing has been effective in gathering information of discrimination in the past, and tribunals have upheld its use. Perhaps this strategy should be revived.
- When the complaint concerns specific conduct of a particular person it may be useful to encourage complainants to name that person as well as their employer as a respondent.[6] If the person is not named, the complainant may feel that the central issues in the complaint have not been fully canvassed, whether or not that is in fact true. Also, the corporate respondent may be more responsive to an allegation of discrimination by a particular employee than to what it perceives as a more general allegation of racism against the entire company.
- Expanding individual complaints into systemic complaints (or filing a separate systemic complaint on the basis of the investigation of an individual complaint) may be useful. Sometimes, it may be easier to demonstrate a discriminatory effect against the group than to show that a particular individual has been harmed.
- Commission instigated complaints could play a part. Commission complaints could be especially helpful in circumstances in which information is publicly available regarding discrimination (for example, news reports) but no complaint is received. Commission complaints may also be useful where, during the investigation of an individual complaint, evidence of wider systemic discrimination comes to light.[7]
- Ensuring that the complaint is well drafted can be important. The Mohammed study concluded that race complaints were inappropriately drafted more frequently than complaints on some other grounds because of factors such as limited fluency in English.[8] In this regard, it may be useful to monitor the Commission's "self-draft" policy to ensure that it maintains the quality of complaints.[9]
- Recognizing the intersectionality of race discrimination with other grounds also can be useful. The Commission's Discussion Paper, *An Intersectional Approach to Discrimination*, shows that the Commission has recognized the value of an intersectional approach.[10]

Screening of Complaints

Because complaints of race discrimination often involve subtle and hidden sources of discrimination, there is a danger that a disproportionate number will be screened out prior to a full investigation. I recognize that screening is needed, but such screening should take account of the fact that further investigation may reveal evidence that would support a complaint that on its own seems weak:

- It may be useful to adopt a presumption against screening out complaints of race discrimination prior to an investigation to take account of the fact that many complaints of race discrimination involve subtle discrimination that may not be apparent without an investigation.
- In assessing a complaint, it may be useful to consider carefully what proactive steps could be taken during a future investigation that might reveal discrimination, to avoid a focus limited to the complaint form itself (or even to the complaint and the response alone).
- Consideration of the past record of the respondent with regard to race discrimination (or discrimination in general) may also be relevant to the screening process. If the complaint, on its face, seems borderline but there have been other similar complaints in the past, further investigation may be warranted.

Mediation

I have no specific suggestions regarding the mediation process other than to try to guard against power imbalances in the process. Also, if there are indications that a respondent is willing to offer a generous settlement to a complainant with a strong case in order to avoid systemic change, the Commission might consider a separate complaint regarding the systemic aspects of the situation.

There is some controversy about mediation as part of the human rights process. Some critics question the compatibility of the process with the public interest obligations of human rights commissions.[11] On the other hand, mediation can have positive benefits to the parties and can help reduce the backlog problem. It also may sometimes serve public interest concerns in a way that would be difficult to achieve at a hearing.[12]

Investigations

One key to a fair and effective investigation is to avoid any unconscious tendency to apply a higher standard of

proof to complaints of race discrimination than to other grounds. A second goal should be to tailor investigative techniques to the particular challenges of race complaints. Some more explicit strategies are listed here. Many of these strategies also apply to other stages of assessing a complaint (for example, intake and consideration whether to refer the complaint for hearing):

- Perhaps the best strategy for avoiding the application of a higher standard of proof is to consciously take account of that risk and to ask oneself if the appropriate standard is being applied. A second strategy is to avoid the assumption that race discrimination is an aberration in our society rather than a common part, whether intended or not, of ordinary operations.[13] Widespread systemic discrimination based on race is the most convincing explanation for the patterns of inequality that exist. Unfortunately, such inequality is far from rare, and that fact should be considered.
- Because race complaints are often subtle and hidden, a more proactive investigation plan than usual may be appropriate. Though I have no direct knowledge of the investigation plans used by the OHRC, I am aware that in other jurisdictions, there is sometimes a tendency to limit the investigation to the specific allegations made in the complaint (and responses in the response), and to interview only the witnesses proposed by the parties. Such a strategy may exclude other evidence of broader systemic barriers.
- It may be useful for the investigator to collect, where possible, statistical information about the composition of the workforce within the organization and to try to identify policies of the organization that may constitute barriers to racialized groups, in addition to investigating the specific instances alleged in the complaint.
- It may also be useful to consider "similar fact" evidence. In other words, the existence of a pattern of similar discrimination against persons other than the complainant may be relevant to the investigation.
- Respondents sometimes rebut allegations of discrimination by citing the fact that they knew the race of the complainant when he or she was hired, or that the organization's workforce includes other racialized groups. In my opinion, such evidence should be treated as having little or no weight. To draw conclusions based on the presence of other racialized groups in the workforce wrongly assumes that prejudice either applies to all such groups or to none. Even the presence of members of the same group may not be of much weight if it is influenced by intersectionality of grounds or by job segregation.
- In cases alleging ongoing discrimination, there may be a tendency to focus on the most recent incidents, to the exclusion of other earlier incidents.[14] Doing so may fail to fully assess the cumulative effect of a pattern of discrimination.
- When a response is based on allegations such as the "poor attitude" or work record of the complainant, one should note the danger of relying on vague and subjective evidence. One should also consider the possibility that the behaviour of the complainant was a reasonable reaction to past discrimination.
- It is useful to keep in mind that a complaint is established if a discriminatory factor was one of several reasons for making a decision about the complainant, even if the other factors would, in the absence of the discriminatory factor, have provided justification for the decision. Human rights legislation should protect all persons, not just those with a perfect performance record.[15]

Commission Consideration of Complaints

I have no specific options to raise concerning this stage of the process. However, many of the items listed with respect to investigations (e.g. the unconscious tendency to apply a higher standard of proof to race complaints) may also be a risk at this stage.

Hearings

I cannot consider hearings in detail here. My one comment is that it would be useful to argue for a body of law that takes account of the prevalence of race discrimination and the special challenges of proving such discrimination. An appropriate standard of proof is key. Recognition of the legitimacy of statistical evidence and similar fact evidence would also be useful.

Endnotes

1 See, e.g., Ana Mohammed, *Report on the Investigation of Race Complaints at the B.C. Human Rights Commission*, (2000) unpublished report; Errol Mendes, ed. *Complaint and Redress Mechanisms Relating to Racial Discrimination in Canada and Abroad* (Ottawa: Human Rights Research and Education Centre, 1994); Donna Young, *The Handling of Race Discrimination Complaints at the Ontario Human Rights Commission* (Toronto: unpublished paper for Commission, 1992).

2 Ian Mackenzie, "Racial Harassment in the Workplace: Evolving Approaches" (1995) 3 C.L.E.L.J. 287, at 291.

3 *Ontario Human Rights Commission v. Simpsons-Sears* [1985] 2 S.C.R. 536.

4 See Mackenzie, above note 4 at 297 citing a tendency to focus on intent or malice.

5 Mohammed, above note 1 at 26.

6 Mohammed, above note 1 at 25, recommends this step.

7 It is possible that respondents would object to such a policy, but I do not think that it is unfair to use the results of one complaint as the basis for filing a broader complaint.

8 Mohammed, above note 1 at 17.

9 News Release, Commission to Implement New Self-draft Complaint Process, Sept. 29, 2004, online: http://www.ohrc.on.ca/English/news/e_pr_2004-complaint-process.shtml, accessed Nov. 1, 2004

10 Online: http://www.ohrc.on.ca/English/consultations/intersectionality-discussion-paper.shtml, accessed Nov. 1, 2004.

11 See Philip Bryden and William Black, "Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission's Early Mediation Project", (2004) 37 U.B.C. L. Rev. 73 at 86-91 discussing the different views about this issue.

12 Interview with members of the B.C. Human Rights Tribunal, Aug. 31, 2004, in which it was said that mediators were sometimes able to achieve agreement on systemic changes during mediation that would have been difficult to achieve as a result of a Tribunal order after a hearing.

13 See Frances Henry and Carol Tator, "Myths and Realities of Racism in Canada" in Beinvenue and R. Goldstein, *Ethnic Groups in Canada* (Toronto: Butterworths, 1985) 321, at 328; Constance Backhouse, *Colour-Coded, A Legal History of Racism in Canada 900-1950* (Toronto: Osgoode Society for Canadian Legal History, 1999) at 15; Young, above note 1 at 6-10.

14 Mohammed found such a tendency in the files she assessed; above note 1 at 18. I have no information about whether this applies to O.H.R.C. investigations.

15 Mohammed, *ibid.* refers, at 20-21, to the "Squeaky Clean Complainant Syndrome."