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Access to justice study shows increase in dismissal of race-based cases by the Human Rights Tribunal

HRTO issued 150 to 300 annual notices of intent to dismiss from 2009 to 2017 and 989 in 2021



Francis Nasca is a JD candidate at Osgoode Law School

BY [Annabel Oromoni](#) 01 Jun 2022

A jurisdiction and access to justice study has found an exponential increase in early dismissals from the Human Rights Tribunal of Ontario on race, colour, and citizenship-based cases. This study comes in the wake of another recent criticism of the HRTO by Tribunal Watch Ontario, previously [reported](#) by Law Times.

Francis Nasca, an Osgoode law placement student at the Human Rights Legal Support Centre (HRLSC) from May 2021 until mid-December, says their interest in HRTO claims peaked after working with a supervising lawyer on two applications where the applicants had experienced the same event that they alleged was discriminatory.

“They experienced the same events and filed separate, almost identical applications, and were both alleging anti-Black discrimination.”

For one applicant, Nasca says it proceeded through the tribunal process. However, the second applicant received a notice of intent to dismiss (NOID), stating that the HRTO did not have jurisdiction over the subject matter because it was a “general allegation of unfairness” and did not connect to one of the grounds set out in the Human Rights Code.

“That was concerning because this person had articulated an experience tied to discrimination based on race, and a NOID is only supposed to be issued by the tribunal if they lack jurisdiction.”

After the rejected applicant reached out to the HRLSC, who helped draft a response to the NOID, Nasca says that the application was permitted to proceed.

Simultaneously, many of the lawyers at the HRLSC observed that applicants were receiving NOID in increased numbers. Nasca says people were receiving NOID in cases where they had an issue that should be in front of the tribunal.

“It [NOID] is not an analysis of the merits of the case or whether the person would be able to produce the evidence necessary to demonstrate and balance that there is discrimination,” Nasca says, “it’s simply saying whether or not the issue falls within the tribunal’s jurisdiction and what is protected by the code.”

Nasca says the sequence of events indicated there might be an issue around the tribunal attempting to dismiss applications within its jurisdiction and that there could be an issue around access to justice with people who self-draft their pleadings.

Tribunal Watch Ontario noted that 80 percent of people who file claims with the HRTO are self-represented. Nasca says that in some instances, people might not know the exact language to capture why their issue is discriminatory under the Human Rights Code.

“It is an issue that their self- drafted pleadings are getting tossed out when their story does disclose discrimination under the code,” they say.

Nasca says they undertook a qualitative analysis to verify the numbers and trend the HRLSC was reporting, which is that the use of NOIDs increased dramatically in 2021.

“I filed a freedom of information request directly to Tribunals Ontario and asked for the total number of applications received annually from 2008 to 2021 and the total number of notices of intent to dismiss annually in the same period.”

The current framework of the Human Rights Tribunal came into place in 2008, and the human rights system operated differently before 2008, Nasca says.

Nasca says their analysis showed a significant increase in NOID, with 2018 seeing a two-fold increase over any other year prior and doubling again in 2021.

“From 2009 to 2017, the tribunal would issue 150 to 300 NOIDs annually, and we saw 989 in 2021. The 989 represents 25 percent of applications

received in that year, so the numbers say this is happening on quite a large scale.”

Nasca says they took an extra step to see how the HRTO uses NOIDs and if they were sending them to applicants whose applications should proceed.

Using a random sample of 43 cases between July and October 2021 from the HRLSC, Nasca says they read written pleadings of applicants, the notice they received from the HRTO, notes and follow up emails from the interview with legal counsel and correspondences with the HRTO to see whether those cases told a story that had an act of discrimination or a breach of the Human Rights Code.

Nasca says they found that the most cited reason for the HRTO issuing NOIDS was that it did not have jurisdiction because the complaints were a general allegation of unfairness.

“33 out of the 43 cases were dismissed or attempted to be dismissed on that basis.”

Nasca says the discrimination grounds in their sample were consistent with what was identified by Tribunal Watch Ontario. For example, around 60 percent of people claim disability. However, discrimination grounds on race, colour and citizenship were different.

“In those three grounds, more people in my sample received NOID, which indicates that at least in this sample, people pleading those grounds of race, colour, and citizenship are more likely to receive a notice of intent to dismiss.”

Nasca’s study also showed a breach of the Human Rights Code in many applications, and while sometimes that was clear, other times it was

slightly tenuous. “You had to draw some links and make some inferences, but I saw it there.”

In 11 cases where clients retained the HRLSC to draft a response to NOIDs, Nasca says all those cases then proceeded through, and the tribunal was able to see that there was, at least on the face of the case, a prima facie case of discrimination.

They say it is concerning that the HRTO is issuing NOID for incorrect applications because most people are self-represented and are drafting legal applications without expert help.

Several factors play into why self-represented people could be filing their applications incorrectly, Nasca says. For example, English might be a second language to many folks filing, and many people file on the grounds of disability, which could include limitations around writing and reading.

“I hope the study makes human rights lawyers notice that this trend is happening in this widespread way, so they have some tools to understand it and support clients coming to them.”

Nasca says there has been a loss of expertise and people that know human rights law at the tribunal and hopes the finding leads to some more accountability in how the HRTO uses notices of intent to dismiss (NOID). “I hope the study leads to more capacity being given to the tribunal appointment of more experienced adjudicators.”

Nasca has presented their study to the Ontario Bar Association and Tribunal Watch Ontario.