OBA Institute 2013, Constitutional, Civil Liberties and Human Rights Law

Back to Basics: Litigating Human Rights Applications

Is There a Case?: Interviewing the Client and Assessing the Application

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Is There a Case?: Interviewing the Client and Assessing the Application

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In meeting with a new client, one of the primary questions is whether there is a viable human rights claim: Is the matter worth pursuing or does the client have a minimal chance of success? This paper attempts to identify whether and when a client's concerns sufficiently ground a human rights claim to proceed with an application to the Tribunal. On the one hand, it is clear that the simple existence of a distinction based on a prohibited ground is not enough. However, the cases also show that discrimination may be made out where at first it seems difficult to prove. A decision or other conduct can be discriminatory where there has been only a "taint" of discrimination and often this will be proven by circumstantial evidence. As detailed below, recent cases alleging racial profiling show there is a fine line dividing allegations of discrimination which are successful and those which are not. Therefore, while it is unadvisable to proceed with a case which has minimal chance of success, it is important to examine all circumstantial evidence in detail to uncover whether a client's case exposes a taint of discrimination.

A Distinction on a Prohibited Ground is Not Enough

As a starting point, the law is very clear that not every distinction is discriminatory. The mere fact that a client has experienced a distinction and is a member of a protected group is not sufficient to establish discrimination. Rather, it is necessary to show a link between the group membership and the arbitrariness of the disadvantaging criterion or conduct. Moreover, the complainant has the burden of proving that link. As the Divisional Court has stated:

> At all times, the complainant bears the burden of proving discrimination on a balance of probabilities. While the complainant is not required to prove intent or motive, "mere speculation" as to the existence of bias is insufficient to establish a *prima facie* case of discrimination (*Khanna v. Multimatic Inc.*, 2010 HRTO 1899, at para 38). The "possibility of discrimination" is not sufficient to find a breach of the *Code* (*Filion v. Capers Restaurant*, 2010 HRTO 264, at para 25).[2]

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[2] *Peel Law Association v. Pieters*, 2012 ONSC 1048 (Div. Ct.), at para 15, quoting from *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital general de Montréal*, [2007] 1 SCR 161, per Abella, J.

In other words, a belief in discrimination, without being able to prove it, is not enough. In *Francisco v. The Carlu Corp.*,[3] for example, the applicant claimed that he was excluded from a private charity event because he was a black man and of Jewish faith. The applicant believed that he was excluded because of being black and Jewish but did not have sufficient evidence to prove it. The Tribunal found that the exclusion could not be linked to his race, colour, ancestry or creed; rather, it was explained by previous incidents at the same venue in which the applicant had acted suspiciously around alcohol and had left the premises with the police. The Tribunal was not prepared to assume that the applicant's race/colour and/or Jewish faith were the reasons for the exclusion.

Examine the Facts and Circumstances Very Carefully

Although not every allegation will ground discrimination, a "taint" of discrimination is sufficient to make out a claim. It is important, therefore, to uncover all of the relevant details and to closely examine the expected rationales for the impugned conduct.

While human rights law requires more than "mere speculation" or the "possibility of discrimination" it also recognizes the difficulty in proving human rights violations. The tribunals and courts have underscored that discrimination is "rarely openly displayed" and "in most cases, must be inferred from circumstantial evidence".[4] In addition, they are aware of the often unconscious and deeply-rooted nature of bias.[5] Partly in recognition of these difficulties, the cases do not require that the prohibited ground of discrimination be the only reason for the action taken, so long as it forms one of the reasons.[6] Put otherwise in a decision of the Ontario Labour Relations Board (OLRB), if the prohibited ground plays a role in a decision, it "taints" the entire decision.[7]

The OLRB case, *International Union of Elevator Constructors, Local 50 v. Otis Canada Inc.*, provides a useful example of the importance of uncovering every detail behind the client's circumstances and, especially, looking behind explanations provided by an employer (or other respondent). In that case, the union grieved the layoff of a worker who previously had suffered a back injury and had been assigned to restricted office duties.

Under the collective agreement, the employer was entitled to lay off any employees within the grievor's "block" of employees, which was composed of all those with six months or less of seniority. The grievor and one other employee in the block were chosen for layoff. The case is significant in that the employer had discretion to lay off

[3] 2012 HRTO 1996

[4] *Troy v. Kemmir Enterprises Inc.*, [2003] B.C.J. No. 2933 (S.C.), at para 25;

[5] *Ibid*, at para 30; *Toronto (City) Police Service v. Phipps*, 2012 ONCA 155, at para 34

[6] *Dominion Management v. Velenosi* (1997), Court file no: C13546 (C.A), at para 1; *Re Ontario (Human Rights Commission) and Gaines Pet Foods Corp.* (1993), 16 O.R. (3d) 290 (Div. Ct), at para 11.

[7] *International Union of Elevator Constructors, Local 50 v. Otis Canada Inc.*, 2004 CanLii 49773 (On LRB), at para 61.

whichever employees in the block it wished. Moreover, the employer was able to explain the grievor as one of its choices for lay off because, it claimed, his file room job was complete.

In spite of the employer's seemingly rational explanation, the OLRB took the analysis a step further and determined that the lay-off was discriminatory. It found that one of the factors the employer considered was that the grievor could not "work in the field". Therefore, at least one of the reasons the grievor was selected for lay off was because of his disability. The fact that his disability played some role in the decision-making process "tainted" the entire decision.

This case shows the importance of fully examining the reasons behind a decision which is alleged to be discriminatory. It is important not to accept a rational explanation at face value and to uncover whether or not, even if there is another rational explanation, a human rights consideration may also have played some role in, or tainted, the decision.

Cases Close to the Line

While it is important to engage in a thorough examination of the reasons behind a decision, it is not always easy to assess whether particular conduct or a particular decision will be considered discriminatory. Recent cases of alleged racial profiling or racial bias show the difficulty of assessing cases which fall close to the line.

In *Toronto (City) Police Service v. Phipps*,[8], two police constables stopped and questioned a Canada Post mail carrier, Mr. Phipps, whose skin colour was black. Mr. Phipps alleged that he was questioned for discriminatory reasons, because of his skin colour. However, there was no direct evidence of discrimination. There was no evidence that the police had discussed Mr. Phipps's skin colour or race prior to questioning him. Moreover, the police provided an explanation for why they considered his activities suspicious, including that he was not the usual letter carrier, he was crossing the street back and forth an unusual number of times, he did not stop at every house, and he knocked on a resident's door and spoke to a woman but did not deliver any mail to her.

The Tribunal examined the police's explanation carefully. The adjudicator noted that the police were in the neighbourhood following a directive to watch for white European men suspected of cutting telephone lines. They stopped and questioned Mr. Phipps even though his appearance did not match the description given in the directive. In addition, they did not approach and question other white service or construction workers present in the neighbourhood, and they subsequently approached a white letter carrier in the neighbourhood to question Mr. Phipps's *bona fides*.

Therefore, in spite of the police's explanations regarding Mr. Phipps's allegedly suspicious behaviour, the Human Rights Tribunal agreed that "the fact that the applicant was an African Canadian in an affluent neighbourhood was a factor, a significant factor,

[8] 2012 ONCA 155

and probably the predominant factor, whether consciously or unconsciously" in the police constable's actions. The Court of Appeal upheld the Tribunal's findings, rejecting the argument that the Human Rights Tribunal adjudicator had not recognized the need for a nexus between the applicant's race or colour and his adverse treatment.

While this decision provides a good example of looking behind an explanation for conduct to determine whether a decision was tainted by discrimination, it stands in stark contrast to a recent Divisional Court decision: *Peel Law Association v. Pieters*[9]. This case also involved a claim by the applicants that they were questioned because of their race. In this case, the applicants were two black lawyers using a courthouse lounge and library. They were in the courthouse acting as counsel in a proceeding. The respondent librarian approached them and asked them to confirm that they were lawyers or law students. The Human Rights Tribunal found that race was a factor in why the librarian approached the applicants. The librarian had not checked the identification of other individuals in the lounge at the time. In addition, at least one other individual in the lounge was not a lawyer and one lawyer in the lounge had never been there before.

However, on judicial review, the Divisional Court overturned this decision, finding it unreasonable. According to the Divisional Court, the Tribunal had no evidentiary basis upon which to conclude that the librarian subjected the complainants to differential treatment.

While each case turns on its own facts, these two cases have many similarities, yet with starkly different results. Both involve the questioning of individuals with black skin colour who were legitimately where they were supposed to be in the course of their work days. In both cases, the applicants were dressed appropriately (in the *Phipps* case, wearing a Canada Post uniform and in the *Pieters* case wearing suits(though not robes)). However, in the *Phipps* case, the Tribunal and Court were not prepared to accepted the rationale for approaching the applicant as having nothing to do with race. In *Pieters*, while the Tribunal did not accept the rationale, the Court overturned this decision.

One of the most significant differences between the two cases is the reliance in the *Phipps* case on the prior judicial acceptance of racial profiling by police. In *Phipps*, the Human Rights Tribunal adjudicator noted that courts in Canada have accepted that racial profiling by police occurs and that courts have been willing to scrutinize seemingly "neutral" police behaviour. She relied on a finding that the existence of racial profiling was "supported by significant social science research".[10]

In *Pieters*, by comparison, the Divisional Court found that the Human Rights Tribunal had inappropriately used police racial profiling cases to infer the nexus between the

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[9] 2012 ONSC 1048 (Div. Ct); appeal heard at the Ontario Court of Appeal December 18, 2012, court file no. C55734

[10] *Phipps v. Toronto Police Services Board*, 2009 HRTO 877, at para 19.

applicants' race/colour and their treatment. Racial profiling, in the Court's view, did not apply in this context, which was not a police interaction.

The fact that racial profiling research made a significant difference in the outcomes of these cases points to the difficulty in some cases of knowing when discrimination has occurred. That is, the research related to racial profiling exists outside the context of the particular case and is not dependent on the particular facts (except to the extent the facts may require a police context). It was necessary in those cases to look outside the case to determine whether discrimination had occurred.[11]

Conclusion

It is not always easy, then, to distinguish between situations which show discrimination and those which do not. You will want to give clients sound advice as to whether it is worthwhile proceeding, considering the cost of retaining counsel and the time and energy required to pursue an application. That said, as counsel for individuals who feel that their rights have been violated and their dignity impugned, it is important not to dismiss a client's concerns nor his or her experience of discrimination. In addition, the cases provide a good foundation for examining all circumstantial evidence and for questioning a respondent's rationales to uncover a taint of discrimination. It is important to examine each case very carefully; if the client experienced the conduct as discrimination, there may well be a case to say it was there.

[11] See also *Troy v. Kemmir Enterprises Inc., supra*, in which the British Columbia Supreme Court made an order referring a complaint from the Commission to the Tribunal on the basis that there were issues in dispute which should have been referred to the Tribunal for a full hearing. In that case, the complainant was a black male who parked and moved his van several times at a gas station, to get gas, make a phone call to a friend, and wait 25 minutes for the friend to meet him. The gas station attendant became suspicious and called 911, stating that the complainant looked like he was "casing the place" or dealing drugs. The Supreme Court was of the view that the Commission should not have dismissed the complaint outright. The evidence took the allegation beyond the realm of conjecture and there was a reasonable basis to refer the complaint to the next stage for a hearing.

<u>Practical Tips</u>

The following are practical tips for meeting with clients and evaluating the viability and strength of their human rights claim:

- Let the client tell their story – did they experience their story as a human rights violation? If they did not, this may be an indication that the human rights angle is not worth pursuing. If they did, take this experience seriously.
- Ask questions to fully explore the possibility of discrimination:
    - What is the history/practices of the Respondent? Does the conduct constitute a pattern of behaviour?
    - How did or has the Respondent treated others in/not in the protected group?
    - Has there been any research or academic treatment of the issue?
    - What are the other explanations for the conduct/decision?
    - Can you "look behind" those other explanations?
- What are the downsides to including a human rights allegation in a claim (which may otherwise have a civil or other component)? Consider:
    - The benefit of claiming general damages;
    - The disadvantage of escalation and delay.