Ontario Court of Appeal Clarifies Test for Discrimination Under *Human Rights Code*

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Introduction

In *Peel Law Association v. Pieters*,[1] the Ontario Court of Appeal (the "Court") affirmed that the test for finding *prima facie* discrimination under the Ontario *Human Rights Code* (the "*Code*") does not require that the discrimination was intentional. The Court set aside a decision of the Divisional Court and upheld a decision of the Human Rights Tribunal of Ontario (the "Tribunal"), which found that race and colour were factors in a librarian's decision to ask the applicants for identification when they were using a lawyer lounge at the Peel Law Association Library.

Background

The Peel Law Association operates a lawyer's lounge to which only lawyers and law students are permitted access. Two of the applicants were counsel in a proceeding at a Brampton courthouse, and the third applicant was an articling student. All of the applicants were in the lawyer's lounge during a break in proceedings. All of the applicants are black.

The librarian testified that she was responsible for enforcing the lounge's entrance policy and that she often asked people to produce identification. She approached the applicants and asked for their identification to show that they were lawyers or law students. The applicants, however, claimed that they were the only people in the lounge that she asked for identification, and that the librarian interacted with them in an aggressive and demanding manner.

The applicants brought a claim to the Tribunal alleging an infringement of their rights under section 1 of the *Code*, which provides for equal treatment with respect to services, goods, and facilities without discrimination because of race or colour.

The Tribunal: *Prima Facie* Discrimination Established

The Tribunal found that there were sufficient facts to support a *prima facie* case of discrimination, which included citing the allegedly aggressive and demanding tone of the librarian. The Tribunal viewed this as a departure from the librarian's general approach in carrying out her identification function.

Having found a *prima facie* case of discrimination, the Tribunal then required the respondents to provide a valid explanation which showed that the applicants' race and colour were not factors in the librarian's request for identification. While the librarian testified that she did not ask other people in the lounge to produce identification because she already knew that everyone else in the

[1] 2013 ONCA 396.

lounge was a lawyer, the Tribunal accepted evidence indicating that two other people in the lounge had never been there before and that one of them was not a lawyer.

In the absence of a valid explanation, the Tribunal inferred that the decision to question the applicants was motivated in some measure by their race and colour. As a result, each of the applicants was awarded $2,000 in *Code* damages for the injury to their dignity.

The Divisional Court: No "Causal Nexus" With Prohibited Ground

On judicial review, the Divisional Court quashed the Tribunal's decision because it concluded that the Tribunal had an insufficient evidentiary basis to find a *prima facie* case of discrimination. In doing so, the court held that a *prima facie* case of discrimination occurs when there has been:

a) a distinction or differential treatment;

b) arbitrariness based on a prohibited ground;

c) a disadvantage; and

d) *a causal nexus between the arbitrary distinction based on a prohibited ground and the disadvantage suffered*. [Emphasis added]

The court cited several findings of fact indicating that a *prima facie* case of discrimination could not be established, and in particular noted that there was conflicting evidence as to whether the librarian's demeanor was aggressive at the time. As a result, the Tribunal's decision was quashed.

Ontario Court of Appeal: Intention to Discriminate Not Necessary

On further appeal, a unanimous panel of the Ontario Court of Appeal held that the Divisional Court erred in law by stating that the test for proving a *prima facie* case of discrimination required a "causal nexus between the arbitrary distinction based on a prohibited ground and the disadvantage suffered."

Noting that the term "nexus" had not been used in prior jurisprudence, the Court held that there need only be a "connection" between the adverse treatment allegedly suffered and the ground of discrimination claimed under, in the sense that the ground of discrimination must somehow be a "factor" in the alleged adverse treatment:

> The Divisional Court's requirement of a "causal nexus" or a "causal link" between the adverse treatment and a prohibited ground seems counter to the *evolution of human rights jurisprudence, which focuses on the discriminatory effects of conduct, rather than on intention and direct cause*. [Emphasis added]

Ruling that the need for a causal nexus "elevate[s] the test [for discrimination] beyond what the law requires," the Court set aside the Divisional Court's judgment and reinstated the Tribunal's original decision.

What Does this Mean for Employers?

In *Peel Law Association*, the Court reaffirmed that intention is not a necessary element for finding discrimination under the *Code*.[2] Rather, the Court emphasized that the focus of the *prima facie* discrimination inquiry is on the effects of the discrimination suffered, without requiring proof of the perpetrator's intent.[3]

This decision is a useful reminder to employers that the governing test for finding *prima facie* discrimination presents a relatively low threshold, as the facts of the case demonstrate. Employers should be especially mindful of this in light of the recommendations made in the Pinto Report (2012), which studied the effectiveness of Ontario's human rights adjudication system. In particular, the Pinto Report recommended increasing the established range of general damages to ensure that employers were not treating them as a "license to discriminate."

Accordingly, there are certain steps employers should take to minimize their prospects of incurring liability under the *Code.*

Employers should review their non-discrimination policies to ensure that they are compliant with the *Code.* In particular, employers should make sure that "intent", "motivation", or other subjective descriptors are not necessary elements for finding misconduct under the policy. Given that intent is a relevant factor in the American discrimination analysis, some employers may have inherited this wording unknowingly.

Employers should also train all staff on discrimination policies and respect in the workplace generally, and strive to provide annual "refresher" training on same. Not only will education on potential triggers help prevent discrimination complaints in the first place, but if a case is ever brought forward, an employer will benefit from being able to show how seriously it takes its *Code* obligations.

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[2] Notwithstanding this decision, intention is still relevant for proving reprisal by an employer against an employee for exercising his or her rights under the *Code*. See *Smith v. Menzies Chrysler*, 2009 HRTO 1936.

[3] This approach is consistent with the Supreme Court of Canada's landmark decision on adverse effect discrimination in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, which stated that "[t]he proof of intent, a necessary requirement [for] criminal and punitive legislation, should not be a governing factor in construing human rights legislation."