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Employment Update

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"...Ontario's Court of Appeal released two decisions in which the issue of racial discrimination was front and centre... both confirm the applicable tests in their respective areas."

COURT OF APPEAL CONFIRMS LEGAL TESTS IN TWO RACIAL DISCRIMINATION CASES

Maria Kotsopoulos

This summer, Ontario's Court of Appeal released two decisions in which the issue of racial discrimination was front and centre. While the focus of each case was different - one being a human rights decision dealing with the provision of services, goods and facilities and the other with constructive dismissal based upon allegations of a poisoned workplace - the decisions both confirm the applicable tests in their respective areas.

Discrimination in the Provision of Services, Goods and Facilities

In *Pieters et al v Peel Law Association et al*, the Court of Appeal upheld the findings of the Human Rights Tribunal of Ontario with respect to an application brought by two black lawyers who alleged that their right to equal treatment with respect to services, goods and facilities without discrimination due to race and colour was infringed.

Mr. Pieters and Mr. Noble were counsel in a proceeding at the Brampton Court House. They went to the lawyers lounge operated by the Peel Law Association during a court break with other lawyers involved in a proceeding. The Association has a policy which permits only lawyers and law students to use the lounge. The library's administrator approached Mr. Pieters and Noble and asked them to produce identification identifying themselves as lawyers. The evidence was that she did not ask to see identification from anyone else in the lounge. Messrs. Pieters and Noble brought applications to the Human Rights Tribunal of Ontario alleging an infringement of the *Human Rights Code*.

Before the HRTO

The Tribunal determined that there was a sufficient basis to conclude that the applicants' race and colour *formed a factor* in their treatment. On this basis, the Tribunal found that a *prima facie* case of discrimination was made out, thus requiring the respondent to present evidence showing that race and colour were not factors in the incident. The Tribunal ultimately held that the respondent failed to provide any reasonable explanation as to why the applicants had been questioned and drew an inference that there was some racial basis for this measure. The Tribunal awarded each applicant $2,000 for injury to dignity.

At the Divisional Court

On judicial review, the Divisional Court held that the Tribunal erred in two ways, namely that:

1. *prima facie* discrimination was found where there was an insufficient evidentiary basis for such a finding; and

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Maria advocates on behalf of employers, not for profit organizations, trade unions, and employees, and has been involved in matters before the Superior Court ofJustice, the Federal Court, the Labour Board, the Human Rights Tribunal, the Workplace Safety and Insurance Appeals Tribunal, and other tribunals.

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2. there was an improper reversal of the burden of proof requiring the respondents to disprove discrimination.

In its decision, the Divisional Court stated that the legal test required the applicants to establish a distinction in treatment, but also a "causal link or nexus" between that distinction and a prohibited ground under the *Code* which caused disadvantage.

At the Court of Appeal

On appeal, the Court of Appeal found that the Divisional Court erred by applying a stricter than that established at law. By requiring a "causal link or nexus," the Court of Appeal found that the Divisional Court focused improperly on intention and direct cause as opposed to the discriminatory effects of the conduct.

As such, the Court of Appeal confirmed that in order to establish a *prima facie* case of discrimination an applicant need only show that an enumerated ground under the *Code*, in this case race and colour, *formed a factor or factors* in the adverse treatment.

Poisoned Work Environment Due to Racism and Constructive Dismissal

In *General Motors of Canada Limited v Johnson*, the Court of Appeal considered an appeal by GM of a trial decision in which it was found to have constructively dismissed the plaintiff based upon a poisoned workplace due to racism.

At trial, the plaintiff alleged that a fellow employee refused to take training from him due to racial animus. The plaintiff apparently believed this to be true because of information received from a third person at the workplace. In the period that followed, a number of investigations were undertaken by GM, which failed to confirm the discrimination. Flowing from the finding at trial that the incident was racially motivated, however, the trial judge determined that GM failed to provide the plaintiff with the appropriate support required to eliminate discrimination and to improve his working conditions.

Following a two year medical leave of absence, at the conclusion of which the plaintiff refused two different positions, the plaintiff was sent a letter confirming his resignation. The trial judge found that GM's offer to return the plaintiff to "virtually the same work environment in which his problems were suffered" was not reasonable and that its decision to treat his refusal to accept either position as a resignation amounted to a constructive dismissal.

Before the Court of Appeal, GM argued that the findings of a poisoned work environment due to racism were unreasonable and unsupported by the evidence at trial. GM successfully argued that there was insufficient evidence led at trial to establish that the initial incident was racially motivated. Given that all remaining findings, including those related to a workplace poisoned by racism, flowed from this central one, the Court of Appeal confirmed that GM had met the "high hurdle for appellate reversal of a trial judge's finding," and the appeal was granted.

In its discussion of the proof required to establish a "poisoned work environment" in the context of a constructive dismissal case, the Court of Appeal stated that a workplace will be found to have become poisoned for the purpose

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of constructive dismissal only where serious, wrongful behaviour is demonstrated. The Court of Appeal further confirmed the established test that in order to establish constructive dismissal an employee must prove, on the basis of objective evidence, that the employer no longer intended to be bound by the contract and/or that the work environment was intolerable such that an employee could treat his employment as having been terminated.

In the context of this case, the Court of Appeal reasoned that even if the incident had been motivated by race, this factor alone would not necessarily support a finding that the plant shop was poisoned by racism such that a finding of constructive dismissal was warranted, and noted no intention on the part of GM to treat the plaintiff's employment as having come to an end. ■

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