FTR Now

Court Clarifies Evidence Required to Establish *Prima Facie* Case of Discrimination

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For employers and service providers appearing before the Human Rights Tribunal of Ontario ("HRTO"), a recent decision of the Divisional Court involving racial profiling will be of interest.

The decision, Peel Law Association v. Pieters, provides significant clarification on the evidence required to establish a *prima facie* case of discrimination. In this *FTR Now* we discuss the decision and what it means for employers and service providers named as respondents in human rights applications.

BACKGROUND

The HRTO application arose out of an incident that occurred at the Brampton Court House. The Peel Law Association ("PLA") operates a lounge and library at the Court House that is restricted to lawyers and law students. It Is the responsibility of the librarian to ensure that only authorized individuals have access. On March 16, 2008, Ms Firth, the PLA librarian and personal respondent in the application, approached the applicants, Mr. Pieters and Mr. Noble, in the lounge and asked them to confirm they were lawyers. Both of the applicants were racialized individuals who were acting as counsel before the Brampton court that day but were not gowned. Mr. Pieters and Mr. Noble subsequently filed a human rights application alleging the PLA and Ms Firth had discriminated against them on the basis of race and colour when they were asked for identification. They further alleged that Ms Firth had not asked the other occupants of the lounge (who were White) for identification. During the hearing at the HRTO, Ms Firth testified that she routinely requested identification from individuals in the lounge, regardless of race.

Vice-Chair Eric Whist of the HRTO concluded that the applicants had established a *prima facie* case of discrimination and that the respondents had discriminated against them on the basis of race and colour. The Vice-Chair found that the evidence was sufficient to require the respondents to provide an explanation to support their position that Ms Firth's decision to question the applicants was not tainted by race or colour. Vice-Chair Whist further determined that based on the circumstances he could infer that race or colour was a factor in Ms Firth's decision to ask the applicants for identification. The HRTO ordered the respondents to pay $2,000 to each applicant. The respondents then applied for judicial review of this decision.

THE DIVISIONAL COURT DECISION

The parties agreed that the applicable standard of review was reasonableness. The Divisional Court reiterated that an applicant in a human rights application bears the burden of proving a *prima facie* case of discrimination; the *Code* does not require a respondent to disprove discrimination. Relying on the principles established in a recent decision of the Ontario Court of Appeal in *Ontario (Director, Disability Support Program) v. Tranchemontagne*, the Court clarified that to establish a *prima facie* case of discrimination an applicant must provide sufficient evidence of:

- a distinction or differential treatment;
- arbitrariness based on a prohibited ground;
- a disadvantage; and
- a causal nexus between the arbitrary distinction based on a prohibited ground and the disadvantage suffered.

On the last point, the Divisional Court confirmed a *prima facie* case is not established by an applicant simply identifying "him

or herself as possessing a characteristic that is protected under the *Code* and then [pointing] to an incident with a negative impact on him or her." The Court was clear that an applicant is required to establish a causal connection between the *Code*-protected characteristic and the negative incident; mere "speculation" of bias or the possibility of discrimination will not be sufficient to establish a *prima facie* case of discrimination.

The Divisional Court concluded that the finding of the HRTO that a *prima facie* case of discrimination had been established was unreasonable: the applicants had **not** established a causal connection or "nexus" between their race or colour and Ms Firth's request for identification. The Court essentially found that the Vice-Chair did not give effect to the respondents' evidence that there was a practice and history of requiring those in the lounge to provide identification. It determined that by requiring the respondents to provide an explanation for Ms Firth's actions (and inferring the presence of discrimination without requiring the applicants to establish a causal connection), the Vice-Chair improperly reversed the burden of proof. The respondents were then placed in the impossible position of having to disprove discrimination. The Divisional Court went on to find that the Vice-Chair had also failed to resolve key issues of credibility.

The Divisional Court concluded that the decision of the HRTO could not be rationally supported and it dismissed the human rights application.

IMPLICATIONS

The decision of the Divisional Court is very useful for those who are required to respond to human rights applications. It is now abundantly clear that an applicant must provide sufficient evidence of both a distinction based on a protected ground *and* a causal connection between the prohibited ground and the disadvantage suffered to establish a *prima facie* case of discrimination. Most importantly for respondents, the Divisional Court has made it clear that a respondent is not required to disprove discrimination and the HRTO cannot infer a causal connection absent sufficient evidence. Finally, the Court clearly stated that discrimination cannot be established by an applicant on the basis of speculation and inference.

For more information about this decision please contact or your regular Hicks Morley lawyer.

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