Case In Point

Court of Appeal for Ontario Upholds HRTO Finding of Racial Profiling, Clarifies Test Applicants Must Meet to Establish a Prima Facie Case of Discrimination

Date: June 18, 2013

The Court of Appeal for Ontario has set aside a decision of the Divisional Court and upheld a decision of the Human Rights Tribunal of Ontario ("HRTO") which found that race and colour were factors in a librarian's decision to ask the applicants for identification when they were using a lawyers' lounge operated by the Peel Law Association Library at the Brampton Courthouse.

Two of the applicants were lawyers and the third applicant was a law student. All three applicants were black. The lounge was reserved for the use of lawyers and law students. During the hearing before the HRTO, the librarian testified that, as part of her function, she was responsible for controlling access to the library and lounge and that she regularly asked persons for identification. However, after hearing the evidence, the HRTO found that race and colour were factors in the librarian's decision to question the applicants and require them to produce identification, and therefore found that the applicants had established a *prima facie* case of discrimination. After considering the evidence provided by the respondents, the HRTO found that the respondents had failed to provide a credible non-discriminatory explanation as to why the librarian had questioned the applicants as she did, and therefore concluded that the applicants' human rights had been violated. Each applicant was awarded $2000 in compensation for injury to his dignity.

The HRTO decision was quashed on judicial review. The Divisional Court found, among other things, that the HRTO had made findings of fact that were inconsistent with its conclusion that a *prima facie* case had been established, and had effectively reversed the burden of proof by requiring the respondents to prove there was no discrimination.

One of the most noteworthy features of the Divisional Court's decision was the test it established for establishing a *prima facie* case of discrimination. The Divisional Court held that, in order to establish a *prima facie* case of discrimination, an applicant must present evidence to support the following findings:

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.

In overturning the Divisional Court's decision, Justice Juriansz (writing for the Court of Appeal) found that the Divisional Court erred in applying a test to establish *prima facie* discrimination which required an applicant to prove "a causal nexus between the arbitrary distinction based on a prohibited ground and the disadvantage suffered." Justice Juriansz noted that the basis for this "causal nexus" requirement was unclear, as it was not part of the test traditionally applied by human rights tribunals, nor was it part of the test articulated by the Supreme Court of Canada in its 2012 decision in *Moore v. British Columbia (Education)*. Rather, in *Moore*, the Supreme Court had set out the following three-step test for establishing a *prima facie* case of discrimination:

[55] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, applicants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

Justice Juriansz pointed out that neither the test adopted in *Moore*, nor the test adopted in an earlier Court of Appeal for Ontario decision called *Shaw v. Phipps*, both of which articulated a three-step test to establish a *prima facie* case of discrimination, even used the word “nexus”. While Justice Juriansz found that there was nothing objectionable about the word “nexus” in and of itself, he concluded that “[a]ll that is required is that there be a ‘connection’ between the adverse treatment and the ground of discrimination. The ground of discrimination must somehow be a ‘factor’ in the adverse treatment.” Justice Juriansz also held that attaching the modifier “causal” to the word “nexus” “elevates the test beyond what the law requires…[and] seems counter to the evolution of human rights jurisprudence, which focuses on the discriminatory effects of conduct, rather than on intention and direct cause.” Accordingly, he found that the Divisional Court erred in requiring an applicant to establish a “causal nexus” between the adverse treatment and the prohibited ground(s) of discrimination relied on in order to establish a *prima facie* case of discrimination.

On the question of burden of proof, the Court of Appeal distinguished between the shifting of the burden of proof and the shifting of the evidentiary burden. Justice Juriansz stated that, in finding the HRTO reversed the burden of proof, the Divisional Court “lost sight of the distinction between the burden of proof and the evidential burden. The Vice-Chair having found a *prima facie* case existed properly looked to the respondent to provide an explanation.” In Justice Juriansz’s view, the shifting of the evidentiary burden to the respondents to provide an explanation for their conduct did not have the effect of requiring the respondent to prove a negative, it simply required the respondents to call “affirmative evidence on matters they know much better than anyone else… .”

The Court of Appeal went on to conduct a detailed review of the HRTO’s decision and the Divisional Court’s conclusion that the decision was unreasonable. In the end result, the Court of Appeal found that the Vice-Chair’s decision fell within the range of reasonable outcomes, and that the Divisional Court erred in concluding that it did not. As a result, the Court of Appeal set aside the Divisional Court’s decision and reinstated the decision reached by the HRTO.

While the Court of Appeal’s decision clarifies the burden of proof that applicants are required to meet in a hearing before the HRTO, it may also prove to have an impact on the availability of summary dismissal under Rule 19A of the HRTO’s Rules of Procedure. Under Rule 19A, the HRTO may direct, either on its own initiative or at a party’s request, that a summary hearing be held on the question of whether an application should be dismissed in whole or in part because it has no reasonable prospect of success. In many cases where summary hearings are directed, the central issue is whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him or her can show the required nexus between the adverse differential treatment alleged in the application and the prohibited grounds of discrimination relied on. While the test applied by the Tribunal under Rule 19A is more flexible than the “*prima facie* case” test, and has not traditionally required the applicant to bring forward evidence showing a causal relationship between the adverse differential treatment alleged and the prohibited grounds relied on, it remains to be seen whether the Court of Appeal’s decision will have an impact on the Tribunal’s willingness to exercise its authority to order summary dismissal of applications under Rule 19A.

Peel Law Association v. Pieters, 2013 ONCA 396 (CanLII)