

Case In Point

Are Service Providers Liable for Harassment Between Customers? The Divisional Court Weighs In

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In [*City of Toronto v. Josephs*](#), the Divisional Court reviewed a recent decision of the Human Rights Tribunal of Ontario (Tribunal) and specifically addressed the question of a service provider's liability for harassment issues arising between customers. In so doing, the Court has provided useful guidance for organizations that provide services to the public, and insight into the legal standard that applies in these situations.

On January 7, 2013, the Applicant, a paralegal trainee, attended the Toronto East Provincial Courthouse to pay a fine on behalf of a client. While being served by an intake clerk, the Applicant discovered an error and was told that he would have to speak to a supervisor to rectify the problem. The Applicant was given a number for his place in the queue.

Although his number had not been called, the Applicant approached one of the counter clerks at another window to ask that the clerk speak to a supervisor about rectifying the problem. Another customer (V.F.) who was waiting to be served began yelling at the Applicant to wait his turn. V.F. racially slurred the Applicant, who is of Afro Caribbean descent, and made an inappropriate racial gesture. He also taunted the Applicant to go outside and stated that he would be waiting for him in the parking lot.

A witness (N.P.) observed the incident and approached one of the intake clerks, a non-managerial employee. The intake clerk advised N.P. that if the altercation escalated into something physical, they would call security.

The Applicant himself approached another intake window and asked for assistance with V.F. The team lead for the counter staff (J.E.) was made aware of the altercation and left to get assistance from a court officer.

N.P. and the Applicant then approached a security guard to report the incident. The security guard confronted V.F. and told him he would not be served that day and would have to leave. Soon after, a court officer arrived and spoke to V.F. in the hallway.

Application before the Tribunal

On August 1, 2013, the Applicant filed an application with the Tribunal against the City of Toronto and alleged discrimination under the *Human Rights Code* (Code) with respect to services, goods and facilities on the basis of race and colour.

The Tribunal looked at the issue of what duty, if any, a service provider owes to a customer who has been racially harassed by another customer. The Tribunal held that the City had an obligation to take prompt, effectual and proportionate action when it became aware of the racial slur made by V.F. towards the Applicant. The Tribunal found that all but one of the City staff and security officers at the court office had acted promptly and appropriately when they learned of the racial slur. The Tribunal also found that the team lead, J.E., acted within seconds of learning about the racial slur and J.E.'s actions were reasonable and effective in the circumstances.

Despite these findings, the Tribunal held that the intake clerk's response was not appropriate and his conduct alone amounted to discrimination against the Applicant for which the City was responsible. The Tribunal ordered the City to pay \$1,500 in damages to the Applicant.

Application for Judicial Review

The City sought to overturn the Tribunal's decision and brought an application for judicial review before the Divisional Court. The key issue before the Court was whether it was reasonable for the Tribunal to find corporate responsibility for the lack of meaningful response by the intake clerk, a non-managerial employee, notwithstanding that the Tribunal found that the City's supervisor, manager and court officers all acted reasonably and responded adequately in the circumstances.

The Court noted that it was reasonable to find that the City, as a services provider, had an obligation to take prompt, effectual, and proportionate action when it became aware of the racial slur. The Court agreed with the Tribunal that the "response need not be perfect but it did need to be reasonable in the circumstances."

However, the Court held that the Tribunal applied "disproportionate weight" to the intake clerk's inaction and stated that "[i]t was unreasonable to focus on [the intake clerk's] conduct which objectively did not have any bearing on how the City actually dealt with the circumstances."

The Court quashed the Tribunal's decision and dismissed the human rights application, noting that "corporate responsibility cannot reasonably be fixed on the City in these circumstances because of the inconsequential conduct of [the intake clerk]."

Key Takeaways for Employers who Act as Service Providers

The following takeaways can be gathered from this case for employers who act as service providers:

- Service providers have an obligation to take prompt, effectual and proportionate action when they become aware of client-on-client harassment in a services environment.
- They are not required to provide a perfect response, but it does need to be "reasonable" in the circumstances and the context.
- An employer will not necessarily be found liable for the inaction of a non-managerial employee, particularly where management took appropriate, timely and reasonable action.
- Employers are not responsible for inappropriate outbursts made by clients, but they are responsible for how their employees respond to such incidents.
- Not responding appropriately when advised of harassment may amount to discrimination contrary to the Code.
- Service providers need to review their policies, provide training to their employees and ensure compliance in addressing incidents between customers.