

Discrimination Case Reversed by the Courts: Are we Entering a New Era?

Allison Taylor

Employers will be pleased with the outcome of a decision from the Divisional Court in *Audmax Inc. v. Human Rights Tribunal*. The Court took the Human Rights Tribunal to task for finding discrimination without a solid factual basis.

The Facts of the Case

Seema Saadi, a legally blind Bengali-Canadian Muslim woman employed by Audmax for some six weeks, was hired on a probationary basis as an intake worker for Audmax's settlement assistance program. This program assists female newcomers in finding work in Canada. Saadi's employment was terminated and, as a result, she filed a Human Rights complaint alleging discrimination and harassment based on race, colour, ancestry, place of origin, ethnic origin, disability, creed and sex. Audmax denied discrimination, stating that it had accommodated Saadi's religious attire requirements, and that the termination was for cause.

The employer was unrepresented at the hearing before the Human Rights Tribunal of Ontario. The Tribunal found that the employer's application of its dress code, its rules for using the office microwave and the termination were discriminatory based on ancestry, ethnic origin, creed and sex and that Audmax had failed to accommodate Saadi. Saadi was awarded general damages of \$15,000.00 and \$21,070.00 in lost wages.

Procedural Unfairness Found

Audmax sought Judicial review on the basis of procedural unfairness and the unreasonableness of the decision. The Divisional Court admitted two pieces of new evidence, a letter from an Audmax consultant related to evidence he would have given at the hearing but for his inability

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to attend due to a family emergency, which the Adjudicator did not read and handed back to the company unopened, and a photograph of a woman wearing the type of clothing Saadi had been wearing on the date in question.

With respect to the evidence of the consultant, the Court held that even though Audmax had not sought an adjournment, the fact that Audmax was unrepresented by counsel at the hearing made it incumbent on the Adjudicator to consider how the evidence could be admitted and to consider the effect that the denial might have on its rights.

The Court stated that unrepresented parties are entitled to receive assistance from the Adjudicator on issues of procedure, which might have included scheduling the testimony of the witness at a later date or obtaining the evidence through video or audio conferencing. The Adjudicator could not dismiss the request to admit the letter without considering other options. In the circumstances, this was a breach of procedural fairness.

Findings of Discrimination Unsupported by the Evidence

The Adjudicator's findings related to the microwave policy, in the Court's view, were unsupported by any rational analysis or any factual foundation. The employer had a policy restricting the use of the microwave to reheat foods with strong flavours or which could affect persons with seafood or peanut allergies. On the date in question, the Applicant was not reheating her own food but food given to her by a co-worker from Tunisia. The Court pointed out that the rights of a Bengali-Canadian Muslim could not be adversely affected by restrictions on her reheating someone else's Tunisian food.

The Adjudicator's finding that the policy was ambiguous and arbitrary were also found to contradict his finding that the Applicant was disciplined for her violations of the policy constituted discrimination based on ancestry and ethnic origin. The Court held that there was no evidence as to what the discipline or violations were or how they were connected to the Applicant's ethnic origin or ancestry.

With respect to the dress code issue, Saadi argued that she had been discriminated against based on her garb as a result of a meeting over clothing which the employer did not feel was business attire, which allegedly included a jingling ankle bracelet, open toed "slippers", a tight short skirt and leggings and a "cap". On all days, other than the one in question, Saadi had worn a hijab, without objection by Audmax.

Even though he made no finding as to what the actual clothing in question was, the Adjudicator rejected without reasons the employer's evidence in favour of Saadi's evidence that she would not wear such an outfit because she was an observant Muslim. Regarding the "cap", Saadi stated that this was a particular form of hijab which she had ordered online from Indonesia. Since Saadi did not provide either the clothing or a photograph to either the Tribunal or the Court, there was no basis for finding that the comment of the employer that her attire was

unprofessional was discriminatory, given that the hijab had been accommodated on all prior occasions.

The Court noted that there was nothing about Saadi's religion that required her to wear that particular form of hijab. The Court agreed with the employer in this case that a photograph of similar clothing would have been of assistance and ought not to have been excluded. The Court found the Adjudicator had failed to differentiate between what was religiously required and what was a matter of personal choice. The Court concluded that even if the dress code was subjective and arbitrary on Audmax's part, that did not make it discriminatory.

Finally, the Applicant had complained about the involvement of the consultant at the meeting to discuss the Applicant's attire on the basis that he was male. The consultant was regularly relied on for advice, including on personnel issues. The Court held that a discussion about proper business attire does not require excluding a person of the opposite sex and is not discriminatory, and that the Adjudicator's finding to the contrary was unreasonable.

The Adjudicator also rejected Audmax's evidence that the termination was because of suspicious behaviour on Saadi's part including missing files, secretive cell phone use and unauthorized intrusions into other people's desks. However, the Adjudicator only provided one reason for his rejection of this evidence, the failure to produce two witnesses: the consultant and another person against whom a complaint had originally been made which was dropped. Since an effort was made to introduce evidence from the former person, which was rejected by the Adjudicator, that exclusion did not support the finding. With respect to the second person, the Court felt that because the complaint was dropped and she was not called as a witness by either party, no adverse inference from that fact should be drawn.

As a result, the decision was overturned, with \$10,000.00 in legal costs inclusive of HST against Saadi.

What This Case Means for Employers

This case provides useful instruction to employers in two respects. First, it demonstrates the risks to employers of not having legal representation. Although the Adjudicator should have done more to protect its interests as an unrepresented litigant, that did not occur, resulting in a costly Divisional Court application. Employees can obtain free representation from a lawyer with the Ontario Legal Support Centre, which is funded by the Ontario government. No such service exists for employers.

Secondly, the case sends a clear signal to the Human Rights Tribunal of Ontario that it must base findings of discrimination on the facts rather than assumptions or supposition. The Tribunal has in the past set the evidentiary bar quite low in finding discrimination. The practical effect of the Tribunal's approach has been to place the onus on employers to prove that they have not discriminated. In other words, the adage of "innocent until proven guilty" has often been turned on its head at the Tribunal. This case should signal to the Tribunal that

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the Courts will require it to take a more rigorous approach to assessing allegations of discrimination before finding that discrimination has occurred. This would be a significant shift that would make it easier for employers to defend themselves when faced with allegations of discrimination.

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