CITATION: Peel Law Association v. Pieters, 2012 ONSC 1048
DIVISIONAL COURT FILE NO.: 61/11
DATE: 20120213

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CHAPNIK, HOCKIN AND HOY JJ

BETWEEN:	
PEEL LAW ASSOCIATION and MELISSA FIRTH	
Applicants	*Mark J. Freiman* and *Lucas E. Lung*, for the Applicants
– and –	
SELWYN PIETERS and BRIAN NOBLE	*Vilko Zbogar*, for the Respondent, Selwyn Pieters
Respondents	*Brian Noble*, self-represented
	Rochelle S. Fox, for the Human Rights Tribunal of Ontario
	HEARD: November 22, 2011 at Toronto

CHAPNIK J.

REASONS FOR DECISION

[1] The applicants, the Peel Law Association ("PLA") and Melissa Firth, seek judicial review of a decision of Vice-Chair Eric Whist of the Human Rights Tribunal of Ontario ("the HRTO" or "the Tribunal") dated December 3, 2010. In the decision, the HRTO found the applicants had

discriminated against the respondents, Selwyn Pieters and Brian Noble, in the provision of services, goods and facilities on the basis of race and colour, contrary to s.1 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("the *Code*").

[2] The Tribunal ordered the applicants to pay a compensatory award of $2,000 to each of the respondents for violation of their inherent right to be free from discrimination and for injury to their dignity, feelings and self-respect.

[3] The applicants request an order quashing the decision of the HRTO and an order substituting a decision dismissing the respondents' applications before the HRTO. The respondents argue that the decision of the Vice-Chair was reasonable and correct on the facts and law and that it should not be interfered with by this Court.

[4] The HRTO takes no position with respect to the application other than to ask, if it is allowed, that the application be remitted for a new hearing before a differently constituted panel of the HRTO.

BACKGROUND

[5] The background facts underlying this matter can be briefly stated:

a. The complaint arose out of an incident that occurred on May 16, 2008, at the Brampton Courthouse, where the PLA operates a lawyers' lounge and library. The policy of the lounge and library is that only lawyers and law students are permitted to use the facilities. Paralegals and the public are not. A sign posted on the premises stated "lawyers only". The librarian, Ms. Firth, has primary responsibility for ensuring compliance with the policy. Ms. Firth approached the individual respondents, Selwyn Pieters and Brian Noble, and a third person (Paul Waldon, a law student employed by Mr. Pieters), who were in the lounge at the relevant time. She asked them to confirm they were lawyers or law students (and therefore admissible to the lounge). The individual respondents and Mr. Waldron all self-identify as Black. All three were dressed in business suits, but none were gowned. It is common ground that they were in the courthouse acting as counsel in a proceeding on May 16, 2008.

b. Shortly after Ms. Firth approached the respondents and Mr. Waldron, Mr. Pieters stated explicitly to Ms. Firth, in the presence of Mr. Noble and Mr. Waldron that this was an incident of racial profiling. At the time, Mr. Pieters was on the telephone with a staff member at his law office.

c. After some discussion, Mr. Pieters and Ms. Firth agreed to exchange business cards. Ms. Firth went to her office in the library to obtain a business card to give to Mr. Pieters. Mr. Pieters followed her there. Mr. Pieters then proceeded to a courtroom to retrieve a business card for Ms. Firth. Ms. Firth followed him there. Mr. Pieters testified at the hearing that he felt Ms. Firth's decision to accompany

him while he retrieved his business card was unnecessary, treated him as suspect and subjected him to further humiliation.

d. Later that day, Ms. Firth met with three members of the PLA Board of Directors and related the details of the above incident to them. The directors approved the creation of a new sign to be posted in order to further clarify access to the lounge and library. It read, "Notice – Unless gowned, individuals must produce ID upon request. No Public Access. Peel Law Association". These signs were posted in the afternoon on the day in question, May 16, 2008. The respondents argued before the HRTO that this was a further offensive action designed to "send a message" to them while they were still in the courthouse.

e. The evidence from Ms. Firth was that she routinely, at least 8 – 12 times a week, requests identification from individuals and asks those who are not lawyers or law students to leave the lounge and library. Other staff do likewise. She has made identification requests to hundreds of people since 2004. She testified that in the days prior to the incident, she had requested identification from several persons she identified as White. Earlier that same day, she had asked for identification from a lawyer who had visited the lounge/library on numerous occasions. This lawyer became upset about her request for identification. Ms. Firth described the lawyer as being White. Other witnesses for the applicants confirmed that Ms. Firth regularly asked persons she and other staff did not recognize, for identification. The Vice-Chair accepted these facts.

f. Mr. Pieters testified that he had visited the lounge approximately ten times prior to the incident.

g. The testimony of Ms. Firth and the respondents differed as to what exactly took place during the request for identification. However, it was undisputed that at least two other lawyers in the lounge at the time (who self-identified as South Asian) volunteered their identification to Ms. Firth after the incident occurred, but she did not check their identification.

h. Although the Vice-Chair found that none of the witnesses testifying at the hearing presented a *complete* story of what had occurred when Ms. Firth encountered the respondents in the lounge, he indicated he preferred the testimony of Mr. Pieters, Mr. Noble and others over that of Ms. Firth, where their testimony conflicted.

i. The Vice-Chair found that race was a factor in why Ms. Firth approached the respondents. He noted that she did not ask other persons in the lounge for identification (some of whom were White, and some of whom were racialized persons but not Black), and that she approached the respondents in a demanding and aggressive fashion. These facts, he concluded, constituted a sufficient basis to require an explanation to support the applicants' position that the decision to

question Mr. Pieters and Mr. Noble was not "tainted by race or colour". The Vice-Chair then found that the lack of a credible and rational explanation for why Ms. Firth stopped to question the individuals as and when she did, along with "all of the surrounding circumstances", was sufficient for him to infer that the decision was "in some measure, because of their race and colour".

j. Importantly, he noted that Ms. Firth had indicated that she knew everyone else in the lounge at the relevant time was a lawyer and that is why she approached the respondents. However, this was not true, given that one individual in the lounge was not, in fact, a lawyer, and one lawyer in the lounge had never been there before. The Vice-Chair also found that Ms. Firth was "blunt and demanding" in the way she approached the complainants and Mr. Waldron, which he held to be consistent with research on patterns of racial profiling.

k. Though the Vice-Chair found discrimination in the approach made by Ms. Firth to the respondents, he rejected their allegations that following Mr. Pieters to obtain his business card and the posting of the new sign in the lounge area the same day, constituted acts of discrimination.

THE COURT'S JURISDICTION

[6] The Court's jurisdiction flows from ss. 2 and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 ("the *JRPA*"). The parties raise no issue as to the jurisdiction of the Court and there is no jurisdictional issue.

[7] The HRTO is a party to the proceeding pursuant to s. 9(2) of the *JRPA*.

THE STANDARD OF REVIEW

[8] The parties agree that the standard of review that applies to determinations of fact and the application of the *Code* is reasonableness. As the central issues in this case are issues of fact and the application of the law to the facts, reasonableness is the applicable standard. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[9] The applicants also acknowledged that within the reasonableness standard, "the highest degree of deference should be awarded to the Tribunal in respect of determinations of fact and the interpretation of human rights law". *Audmax Inc. v. Ontario Human Rights Tribunal*, 2011 ONSC 315 (Div. Ct.), at paras. 16-33; *Shaw v. Phipps*, 2010 ONSC 3884 (Div. Ct.), at paras. 27-43. The Court in *Phipps* explained at para. 42 that,

> a high degree of deference is therefore to be accorded to the Tribunal's determination whether there has been discrimination under the *Code* and what the appropriate remedy should be, given that these are questions within the specialized expertise of the Tribunal.

[10] In addition, as noted at para. 32 of *Audmax*, decisions of the Tribunal are required to be rationally supported and to fall within a range of possible, acceptable outcomes that are defensible in fact and law.

THE RELEVANT LAW

[11] Section 1 of the *Code* provides as follows:

> Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

[12] The *Code* establishes that the complainant in a human rights complaint bears the burden of proving a *prima facie* case of discrimination. A *prima facie* case of discrimination "is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent." (*O'Malley v. Simpson-Sears*, [1985] 2 S.C.R. 536, at p. 558).

[13] As recently stated in *Ontario (Director, Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, 102 O.R. (3d) 97, at para. 103, "a *prima facie* case test involves establishing substantive discrimination and…demonstrating a distinction that creates a disadvantage by perpetuating prejudice or stereotyping."

[14] If the complainant establishes a distinction, he or she must then establish that there is a causal link or nexus between the distinction that imposes a disadvantage and a prohibited ground. Thus, in order to prove a *prima facie* case of discrimination, it is not sufficient for a complainant to identify him or herself as possessing a characteristic that is protected under the *Code* and then to point to an incident with a negative impact on him or her. In order to prove a *prima facie* case of discrimination, there must be 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.

[15] As Justice Abella explained in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de L'Hôpital general de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161, at paras. 49-50,

> [w]hat flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.
>
> If such a link is made, a *prima facie* case of discrimination has been shown.

[16] At all times, the complainant bears the burden of proving discrimination on a balance of probabilities. While the complainant is not required to prove intent or motive, "mere speculation" as to the existence of bias is insufficient to establish a *prima facie* case of discrimination (*Khanna v. Multimatic Inc*., 2010 HRTO 1899, at para. 38). The "possibility of discrimination" is not a sufficient basis to find a breach of the *Code* (*Filion v. Capers Restaurant*, 2010 HRTO 264, at para. 25).

[17] It is only when a *prima facie* case of discrimination has been demonstrated that the burden shifts to the respondent to provide a non-discriminatory explanation for the conduct. As such, while the respondent bears the onus of proving any defence(s) it wishes to raise, the respondent is never required to disprove discrimination *per se*: "If a claimant proves discrimination on a balance of probabilities and the responding party fails to prove a statutory defence or exemption, then the claimant will have proved a violation of the Code." (*Tranchemontagne,* at para. 109).

THE ISSUES

[18] The applicants raise two issues for determination:

1. Did the Tribunal err by unreasonably determining that a *prima facie* case of discrimination had been established and/or by impermissibly reversing the onus?

2. Did the Tribunal unreasonably reject rational and credible explanations of non-discriminating reasons for the conduct complained of?

ANALYSIS

Issue 1:

[19] The crux of the Tribunal's conclusion that a *prima facie* case of discrimination was established is rooted in para. 84, as follows:

> There were a number of persons in the lounge on May 16 who would have been unknown to the personal respondent. The applicants and Mr. Waldron were the only Black men and the only persons the personal respondent chose to question. The personal respondent interrupted her planned trip to the robing room to stop and question the applicants and proceeded to do so in an aggressive and demanding manner. No one else in the lounge was questioned, including two White women and another racialized male who would have been unknown to the personal respondent. These facts are sufficient to require the respondents to provide an explanation for their actions to support their position that the decision to question the applicants was not tainted by race or colour.

[20] The key issues that fall under this heading are whether the complainants established a distinction or differential treatment, and if so, whether they demonstrated a causal nexus between their race and the disadvantage they claimed to have suffered, on a balance of probabilities.

[21] The basis upon which the Vice-Chair found a *prima facie* case of discrimination rests on his findings that the complainants and Mr. Waldron were the only Black men in the lounge and the only persons Ms. Firth chose to question, that no one else in the lounge was questioned, that she interrupted her planned trip to the robing room to stop and question the respondents, and that she did so in "an aggressive and demanding manner".

[22] However, it is noteworthy that the Vice-Chair made findings of fact that were inconsistent with these conclusions.

[23] Firstly, there was clear evidence, which the Vice-Chair accepted, as to why Ms. Firth approached the complainants for identification rather than anyone else. In particular, that they were situated nearest to the door from which she entered the lounge. Accordingly, they were the first persons she would have encountered when she stopped in the lounge on her way to the robing room. The Vice-Chair noted the layout of the lounge and where persons were situated when the incident occurred. At paras. 12-13, he states,

> [t]he lounge was not busy at the time of the incident with perhaps a total of twenty persons present. The applicants were seated in an area of the lounge just outside the doors to the library. Mr. Pieters was in a chair talking on the telephone to his assistant, Michael Roberts. Mr. Noble and Mr. Waldron were on a sofa perpendicular to where Mr. Pieters was sitting; Mr. Noble was closest to Mr. Pieters, Mr. Waldron closest to the library door.
>
> ...
>
> The personal respondent came through the library doors and approached the applicants and Mr. Waldron.

[24] The Vice-Chair appears to have ignored the fact of the complainants' location when holding that "the applicants and Mr. Waldron were the only Black men and the only persons the personal respondent chose to question" as a factor in establishing a *prima facie* case of discrimination by Ms. Firth.

[25] As to the fact that Ms. Firth did not confirm the others' identification, the Vice-Chair stated at para. 79, "I find the personal respondent's contention that her focus on Mr. Pieters accounts for why she did not confirm [the others'] identification to be credible."

[26] The fact that her overall credibility was "undermined" by her explanation that she knew everyone else in the room to be lawyers which was found not to be credible, does not change the finding that her focus was on Mr. Pieters at the time, and that this focus was a credible explanation for the fact that she did not check the identification of other persons in the lounge.

[27] In finding evidence of discrimination, the Vice-Chair also relied on the fact that Ms. Firth had changed her planned trip to the robing room in order to check identification in the lounge. However, the Tribunal accepted the evidence that Ms. Firth regularly checked both areas, as well as the library, and that her conduct was not irregular.

[28] After reviewing the evidence related to Ms. Firth's job responsibilities and the unrelated incident that had occurred earlier in the day, the Vice-Chair explains at paras. 30 and 31,

> I am satisfied, based on the evidence I heard, that the PLA staff, particularly Ms. Firth, regularly asked persons to confirm whether they were lawyers, articling students or students of law in order to determine whether they were admissible to the lounge and library. The evidence on this issue was consistent and full of persuasive detail. I am satisfied that the personal respondent routinely carried out this function and that this was a function clearly mandated to her as Librarian/Administrator under the PLA's Policy.
>
> I also find that controlling access to the library and lounge was an ongoing organizational concern for the PLA. I note the PLA's explicit policy on access, including its provisions for the enforcement of the Policy and the signage posted inside and outside of the lounge and library to communicate the policy and the limited access to the facilities. I note that the minutes of the PLA Board of Directors meetings make repeated reference to issues of access and security at the PLA facilities at the Brampton Courthouse, including references at the May 14, 2008 Board meeting to an intention to continue to prevent paralegals from using the library facilities.

[29] Clearly, the actions of Ms. Firth on the day in question had to be viewed in the context of the above-noted policy, her job responsibilities in regard to this, her established practice to ask for identification, the incident that had occurred earlier that day and the fact that the

complainants were the first people she encountered upon entering the library. Moreover, the Vice-Chair's findings appear, in some instances, to be contradictory

[30] In the circumstances, there was insufficient evidence for the Vice-Chair to determine that Ms. Firth stopping on the way to the robing room and questioning the respondents constituted differential treatment.

[31] In making his findings, the Vice-Chair also relied on the manner in which Ms. Firth requested identification from the complainants which he characterized as "aggressive" and "demanding". At the same time, the Tribunal found that after being accused of racial profiling, she became embarrassed, quiet, and red-faced. The Vice-Chair opines at para. 78,

> I accept the personal respondent's testimony that the allegation that she was racially profiling the applicants shook her and that it affected her subsequent actions. Her testimony about the numbing effect it had on her, that she felt overwhelmed, and that she determined that she had to focus her attention specifically on Mr. Pieters, was emotional, detailed, forthright, and persuasive on this point. I find that Ms. Reesor's testimony that she saw the personal respondent turn red and appear to be embarrassed supports this contention as well as Ms. Goswami's testimony about the personal respondent becoming quiet as the incident with the applicants unfolded.

[32] However, even if Ms. Firth was aggressive and demanding to Mr. Pieters initially, such conduct does not establish *differential* treatment since it is undisputed that her requests to others for identification have also resulted in contentious situations. As noted at para. 23 of the decision, "[t]he personal respondent provided a number of examples of when she had asked for identification, including instances in which there had been difficulties."

[33] The fact that the incident was contentious does not establish differential treatment, particularly where there were other situations when non-racialized persons had been offended when asked for identification by Ms. Firth.

[34] In the circumstances, I agree with the applicants that the Tribunal had no evidentiary basis upon which to conclude that Ms. Firth subjected the complainants to differential treatment.

[35] Moreover, the Vice-Chair's conclusion in para. 84 that "[t]hese facts are sufficient to require the respondents to provide an explanation for their actions to support their position that the decision to question the applicants was not tainted by race or colour", in effect, reverses the onus of proof.

[36] The undisputed evidence was that Ms. Firth's duties included asking for identification to confirm the admissibility of persons in the lounge and library. Her position at the hearing was that she acted on this occasion in the context of those duties.

[37] By improperly reversing the burden of proof, the Tribunal placed her in the difficult position of trying to prove a negative, namely, that her conduct in the performance of her routine duties was not motivated by race and colour.

[38] With respect, the Tribunal erred in doing so. The above matters provide sufficient basis to allow the application. For completeness, however, the other issues raised by the applicants will be briefly addressed.

[39] As noted above, there is a further element that must be established for a *prima facie* case of discrimination to be made out. Even where there is a distinction or differential treatment, the complainants must establish a causal nexus between the distinction and the disadvantage suffered.

[40] In this case, it appears that the Vice-Chair assumed the nexus from his findings of "differential treatment" and thereby reversed the onus, placing the onus on the applicant to provide an explanation for why she treated the complainants differently than others in the lounge.

[41] There was no evidence adduced that was sufficient to establish the nexus with the complainants' race or colour. In that regard, the Vice-Chair used police racial profiling cases to infer the nexus. In my view, there is a significant difference between what occurred here and a police investigation.

[42] According to the respondents, this was a perfectly proper analogy since Ms. Firth had authority and power under the *Trespass to Property Act*, R.S.O. 1990, c. T.21, to stop persons, request identification and preclude individuals from entering the lounge and library. Moreover, cases such as *Phipps* have applied racial profiling theories to human rights law. See e.g *Radek v. Henderson Development (Canada) Ltd. (No. 3)*, 2005 BCHRT 302, at para. 482.

[43] These principles may well apply in some circumstances to matters involving human rights. However, in this case, the Vice-Chair used the police cases in a context in which they do not apply. While police have authority, power and control over citizens, Ms. Firth is a librarian, employed to provide library services to lawyers, and she had no legal authority or power to detain, pursue or investigate the complainants. I agree with the applicants that the reliance by the Vice-Chair on law enforcement cases was misconceived.

[44] While racial profiling may be established by circumstantial evidence or by inference drawn from the evidence, it must still be established. A complainant cannot merely point to his or her membership in a racialized group and an unpleasant interaction to establish a *prima facie* case of discrimination.

[45] As noted, the Vice-Chair appears to have assumed the nexus with the respondents' race and colour from his finding of differential treatment. At para. 85, the Vice-Chair found that the applicants (respondents before the Tribunal) "failed to provide a credible and rational explanation for why the personal respondent stopped to question the applicants when she did.

The inference I draw from this, as well as all of the surrounding circumstances, is that this decision was, in some measure, because of their race and colour."

[46] This reversed the onus by, in effect, removing the requirement for the complainants to establish more than a mere distinction in treatment. There was no evidence to demonstrate the required nexus in this case. Speculation or inferential statements are simply not enough.

[47] In summary, the Tribunal erred in determining there was a *prima facie* case of discrimination. No evidence was adduced that was capable of supporting the finding of a distinction or differential treatment or that any such treatment was motivated by race or colour.

[48] Moreover, by failing to require the complainants to satisfy the nexus requirement, the Tribunal improperly reversed the burden of proof placing an impossible onus on the applicants to disprove discrimination.

[49] In the circumstances, it is unnecessary for me to consider the secondary argument of the applicants. However, since it was raised, I will address it briefly.

Issue 2:

[50] The applicants argue that while the Vice-Chair made credibility findings as between Ms. Firth and the complainants, he failed to resolve credibility issues between the complainants and other witnesses on two key issues: (i) Mr. Pieter's conduct during the incident, and (ii) whether the complainants were aware of the PLA's policy against non-lawyers in the lounge area.

[51] Mr. Pieters testified that he spoke in a controlled fashion and was not shouting when he spoke with Ms. Firth. However, several witnesses contradicted this assertion. Yet, the Vice-Chair made no findings on this point.

[52] Secondly, Mr. Pieters testified that he did not see the signage posted outside the lounge that said that only lawyers were admitted to the lounge, whereas one of the witnesses, Ms. McFadden, who was not a lawyer, testified she had told the group that she saw a sign posted outside that said the lounge was only for lawyers. It is undisputed that these signs were posted as indicated. Hence, either Mr. Pieters or Ms. McFadden gave inaccurate evidence to the Tribunal. This matter too was not addressed by the Vice-Chair.

[53] It is true that while the Tribunal has to make findings of fact and credibility, these cannot be reduced to an exact science. Nevertheless, given how the Vice-chair rested his conclusions regarding Ms. Firth's lack of credibility, particularly when compared with Mr. Pieters' testimony, it was necessary for him to resolve these issues.

[54] As noted previously, the Tribunal must be accorded the highest degree of deference. However, in the particular circumstances of this case, the central issues of credibility had to be examined in light of all the testimony. In our respectful view, the adjudicator erred in not doing so.

CONCLUSION

[55] The factual circumstances (including the Vice-Chair's own findings) in this case do not lead to a finding of differential treatment, nor was the required nexus or causal link established between the applicant's conduct and the prohibited ground. The decision was not rationally supported. It does not fall within the range of possible acceptable outcomes defensible in fact and law. We agree with the applicants that the Vice-Chair erred in unreasonably determining that a *prima facie* case of discrimination had been established and placing the onus on the respondent to refute this.

[56] The application is allowed.

[57] The applicants seek to quash the Tribunal's decision. The matter was heard over 3 days and involved 12 witnesses. The decision by the Tribunal was rendered December 3, 2010. The incident occurred in 2008. They contend that to send the matter back to the Tribunal would prejudice the applicants and would prove a difficulty for witnesses.

[58] In the circumstances, where we have found that the respondents' case did not even meet the threshold of differential treatment, we agree.

[59] The decision of the Vice-Chair is quashed. Order to go dismissing the respondents' applications to the Tribunal.

[60] The applicants claim a total of $20,177.59 for fees, disbursements and H.S.T. on a partial indemnity basis. Taking into account the factors set out in rule 57.01 and the reasonable expectation of the parties, a fair assessment of costs would be the all-inclusive sum of $20,000 payable by the respondents, jointly and severally, to the applicants and I so order.

CHAPNIK J.

. HOCKIN J.

HOY J.

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REASONS FOR JUDGMENT

CHAPNIK J.

Released: February 13, 2012