Surveying Racial Discrimination Cases

Amyn Hadibhai

Amyn Hadibhai was called to the bar in February 2002 after attending law school at the University of Toronto. His core practice includes representing the Ontario Human Rights Commission at hearings and mediations before the Human Rights Tribunal of Ontario and judicial reviews before the Divisional Court.

ABSTRACT

This paper surveys a number of cases where discrimination was alleged on the basis of race. While the goal of the survey is not to itemize every race related case brought before a human rights tribunal, the paper does provide a broad overview of Ontario case law over the last decade. The paper also draws upon earlier cases and significant decisions from other Canadian jurisdictions where necessary.

In *R. v. Williams*, the Supreme Court of Canada recognized that "[r]acial prejudice and its effects are as invasive and elusive as they are corrosive"[1] and warned against underestimating its "insidious nature"[2] It therefore should not be surprising that investigating and litigating race-based discrimination complaints under provincial human rights statutes is often complicated and difficult.

The first section of this paper will survey cases of overt racial harassment in order to highlight the manner in which these cases have been treated by various human rights tribunals. In the second section, the paper will review cases where the complaint is not about specific overt acts of harassment, but rather where the complainant alleges there is a pattern of differential treatment.[3]

Racial Harassment

Some of the first human rights cases to examine racial slurs intimated that such activity may not constitute unlawful conduct and at times such slurs were dismissed as merely "shop talk" or "personal interplay" between employees. However, more recent cases have declined to follow reasoning that did not fully appreciate the impact that words can have in fomenting racial discrimination.[4]

Tribunals have now recognized that racial harassment is a significant matter that can seriously injure a complainant.[5] In *Mohammed v. Mariposa Stores Ltd*.[6], the British Columbia Council of Human Rights recognized that racial harassment, like sexual harassment, is a "demeaning practice" and constitutes a "profound affront to the dignity" of the employee. More recently, in *Fuller v. Daoud*[7], the Ontario Board of Inquiry, now the Human Rights Tribunal of Ontario ("Tribunal"),[8] went further and accepted the Commission's submission that when "white people in positions of power insult black or other racialized individuals in racially abusive terms their words reflect society's judgments about the superiority of white people and inferiority of others. Racist language has this effect whether or not it is intended because these judgments are built into the meaning of the words."[9]

Human rights tribunals have also extended liability for harassment not only to those who make racial slurs, but also to employers who have not seriously considered the impact of racial harassment on their employees. In *Mohammed v. Mariposa Stores Ltd., supra*, the Council found that disciplining an employee that talked back to a customer who was hurling racial slurs was discriminatory as it condoned the discriminatory acts of the customer. The Council held that an employer has control over how it responds to discriminatory conduct in the workplace, regardless of how the conduct occurred.

Human rights tribunals have specifically recognized that employers have a duty to provide a working environment that is not poisoned by racial slurs, graffiti and other forms of harassment. In *Naraine v. Ford Motor Company*,[10] the Tribunal found that Ford Motor Company discriminated against the complainant by permitting a racially poisoned environment to develop and persist at the Ford Windsor plant. The Tribunal held that the racial slurs and graffiti at Ford were so widespread and continuous as to become a "term or condition of employment." In addition, the Tribunal also heard expert testimony that while some victims of racism "internalize the stress" through quiet acceptance and accommodation, others can be expected to respond with outbursts, becoming angry, using strong language and becoming emotional. The Tribunal used this evidence to conclude that the complainant's participation in name-calling did not serve as a bar to his claim under the *Human Rights Code*.[11]

Similarly, in *McKinnon v. Ontario (Ministry of Correctional Services) (No. 3)*[12] the complainant, an Aboriginal Canadian working as a correctional officer, successfully argued that his co-workers created a poisoned work environment in which racist slurs were the norm. A number of correctional officers, including supervisors, regularly called the complainant a series of racially charged names. The complainant was also removed from a more desirable posting to a less desirable one for making a mistake that was quite common. No one else had been reassigned after making the same type of mistake.

The Tribunal not only found that the personal respondents violated the *Code*, but also that the failure of the Ministry's managers to take appropriate measures to deal with the conduct complained of constituted an infringement by the Ministry of the complainant's right to equal treatment.[13]

Non-Overt Differential Treatment

While the impact on the complainant is anything but "subtle," non-overt forms of discrimination are often described as such because of the difficulty in proving such cases. While cases of overt racial harassment usually turn on the credibility of the parties and their witnesses, cases alleging more subtle forms of racism are, not surprisingly, contingent on inferring discrimination through circumstantial evidence.

The careful collection and analysis of disparate pieces of evidence is therefore needed to properly advance a case of non-overt discrimination. An obstacle often encountered in such cases is a general unwillingness to infer that an individual or organization has racial prejudices, even in the face of strong circumstantial evidence. For example, in *Smith v. Mardana Ltd. (No. 2)*,[14] the Tribunal found that the complainant had been subjected to several overt forms of racial harassment. However, the Tribunal was unwilling to infer that the poisoned environment created by his co-workers and supervisors was a *factor* in the complainant's subsequent dismissal. The Tribunal separated the termination of employment from the poisoned environment by stating: "Why would the very people who hired him [the complainant], who were impressed by him, who promoted him, and who accommodated his school schedule in terms of working hours, suddenly make a decision against him based on his race?" The Tribunal's presumption discounts the effects that the poisoned environment had on management's actions and ignores the fact that management's view of the complainant may have changed once he began to object to the racial name-calling. This case underscores the difficulty in recognizing non-overt forms of racism that may operate in a workplace.

Circumstantial Evidence

Recently, in *R. v. Brown*[15], the Ontario Court of Appeal dealt with the issue of using circumstantial evidence to prove cases racial discrimination, in particular racial profiling. The Court in *Brown* recognized the inherent problem with evidence needed to prove a racial profiling case. The Court held that a racial profiling claim could rarely be proven by direct evidence and therefore if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence. In particular, with respect to police officers, the Court stated that where the evidence shows that circumstances relating to a detention correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention, the record is then capable of supporting a finding that the stop was based on racial profiling.[16]

The Ontario Court of Appeal's recognition of the importance of circumstantial evidence follows a line of cases that have held that circumstantial evidence may be used to prove the existence of discrimination. In *Grover v. National Research Council of Canada*[17] the Canadian Human Rights Tribunal recognized that racial discrimination more often than not, is subtle and covert. In weighing evidence, the Court stated that one often has to assess circumstantial evidence in order to identify "the subtle scent of discrimination."[18] Similarly, in *Nelson v. Durham School Board of Education*[19] the Tribunal found that an inference of discrimination may be drawn where the evidence that is offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.[20] As the Tribunal noted, the intention to discriminate is irrelevant and the complainant does not have to provide a motive for the discrimination.

Systemic Discrimination or Differential Treatment

Some of the most complex cases of non-overt discrimination before human rights tribunals are those complaints that allege that racial discrimination is built into an organization's structures and processes. An example would be a workplace that has policies, requirements or a culture that make it more difficult for a minority person to succeed relative to his or her white colleagues. Seemingly neutral rules can often act as barriers for racial minorities. In *Wong v. Ottawa (City) Bd. of Education (No. 3)*[21] the respondents purported to make a determination of which teachers would be declared surplus based, in part, on the extra-curricular activities they were involved in at the school. The Tribunal, however, held that the narrow view of what activities qualified as "extra-curricular" operated in a discriminatory fashion. The narrow focus included activities that for cultural reasons Chinese immigrants, such as the complainant, would be unlikely to undertake and excluded legitimate activities they would be more disposed to engage in.

Differential treatment can occur when a service provider, landlord, or employer treats an individual differently because of his or her race. For example, in *Mitchell v. Nobilium Products Ltd.*[22] a comparison of how employees were treated demonstrated that Black employees of West Indian origin were dismissed for poor work performance while other poor-performing employees, with different backgrounds, continued to be employed. The comparison enabled the Tribunal to conclude that the primary reason for the complainant's dismissal was the complainant's work performance, but went on to conclude that the complainant's race, colour and ethnic origin were also factors.[23]

Another way to establish an inference that race was a factor in any particular decision is to see if the decision maker acted differently in similar past situations. In *Johnson v. Halifax (Regional Municipality) Police Service*[24] the Nova Scotia Board of Inquiry held that in deciding whether there has been a *prima facie* case of differential treatment, a board of inquiry must try to establish how events normally unfold in a given situation. Deviations from normal practice and evidence of discourtesy or intransigence are grounds for finding differential treatment. In *Johnson*, the Board of Inquiry held that the unprofessional manner in which the complainant was treated during a traffic stop was based on the complainant's race and that it would be hard to imagine similar treatment of a white driver.

Respondent's Explanation for the Impugned Conduct

Examining the respondent's explanation for the impugned conduct is often the deciding factor in complaints of non-overt racial discrimination before human rights tribunals. In *Lasani v. Ontario (Ministry of Community and*

Social Services) (No. 2)[25] the Tribunal recognized not only that the discrimination need not be intentional, but also that no one is likely to admit to not hiring minorities. Therefore, the Tribunal held that it must look closely at the proffered explanation of not promoting members of ethnic communities who are qualified.[26]

In *Quereshi v. Central High School of Commerce (No. 3)*[27], the lack of a credible explanation by the respondents figured prominently in the Tribunal's decision. The Tribunal found that the complainant was discriminated against because of his place of origin and his ethnicity when he was denied a teaching position at the respondent high school. Dr. Quereshi had four degrees, including a Bachelor of Education and a Doctor of Philosophy in Science. In 1982, he applied for a position as a teacher of mathematics and science at the Central High School of Commerce in Toronto. The position was awarded to a less qualified white woman of British ancestry. With no other available explanation from the respondents, the Tribunal, on the balance of probabilities, found for the complainant. While there was no evidence of intentional discrimination against Dr. Quereshi, the Tribunal concluded that the only available explanation for interviewers failing to give due consideration to Dr. Quereshi's qualifications was that they did not take into account cultural differences arising out of Dr. Quereshi's place of origin and ethnicity. The Tribunal noted that the hiring process was not objective and provided fertile ground for discriminatory factors to come into play.

The Commission when deciding whether to refer a case for a hearing must also be alive to the fact that there needs to be an examination of the reasons behind why a respondent acted in the manner alleged. In *Troy v. Kemnir Entrop Inc.*[28] the British Columbia Human Rights Commission's decision not to refer to a hearing a complaint against a gas station was successfully judicially reviewed. The case involved an attendant who called the police about a Black patron who was buying gas, making a call and waiting for a friend. The Court held that the Commission erred by determining the motivation for the call without resolving why the attendant stated to the police that the complainant was dealing drugs and was there for a few hours (when he was there for less than a half hour). In short, the Commission should have investigated why the attendant believed the individual in question was suspicious.

The Use of Statistics

One of the most powerful tools to establish an inference of discrimination is the use of statistical data. Statistics may be used either to show discriminatory impact or to discount a non-discriminatory reason offered to explain a situation. A *prima facie* case established through statistical evidence may be rebutted either by evidence which offers a non-discriminatory explanation of the specific situation or by challenging the statistical evidence. In sum, statistical evidence can provide another bit of circumstantial evidence, which may or may not be sufficient on its own to support an inference of discrimination.[29]

Statistics are often used to demonstrate that systemic discrimination has resulted in racial minorities being under-represented in a workplace or in certain jobs within an organization. In *Nelson v. Durham School Board*[30] the Tribunal, in finding that the complainant was discriminated against in the promotion process based on his race, noted that 15% of students were visible minorities in elementary schools and 7-10% of students were visible minorities in secondary schools, but that less than 0.6% of the Durham Board's four thousand employees (teachers and support staff) were visible minorities. This information was combined with the fact that the highest-ranking visible minority in the secondary schools was a classroom teacher and only three vice-principals in the elementary schools were visible minorities. The Tribunal also relied on the fact that so called "treatment centre schools" were the entry point for the majority of Black teachers, but that treatment school teachers were stigmatized and presumed to be less competent that their counterparts in the regular schools.

Statistical data was also used prominently in *National Capital Alliance on Race Relations (NCARR) v. Canada (Health and Welfare)*[31] where the Canadian Human Rights Tribunal accepted expert evidence that members of visible minorities were under-represented in senior management positions at Health Canada and instead were concentrated at the lower levels from which they were not promoted to management positions. The manipulability of statistical information should, however, always be remembered. In *Chopra v. Canada (Department of National Health and Welfare)*,[32] much of the statistical evidence in the *National Capital Alliance* case was not accepted as the respondents successfully demonstrated that errors in methodology systemically affected the results of the Commission's experts.

Linking Statistical Evidence to the Individual Complainant

Even where there is solid statistical evidence demonstrating systemic discrimination, this may not be enough to establish discrimination against a particular complainant. In *Abdolalipour v. Allied Chemical Canada Ltd.* the Tribunal stated that a racially homogeneous work force is an indicator that racial biases and attitudes are present in the workplace. But, the fact of a disproportion should not by itself warrant a conclusion of racial bias. The Tribunal was not willing to accept the conclusion that a racial minority person in a racially homogenous work environment inevitably faces "massive exclusion, isolation and alienation within the work place."[33]

Similarly, in *Chopra v. Canada (Department of National Health and Welfare), supra*, the Canadian Human Rights Tribunal held that even if systemic barriers to the promotion of visible minorities were found to exist, the Commission would still be required to demonstrate a link between this evidence and the evidence of individual discrimination against the complainant in order for a *prima facie* case to be established. The Canadian Human Rights Tribunal did note, however, that the greater the disparity in the data between visible minorities and non-visible minorities, the less other evidence will be required to make out a *prima facie* case.[34]

Racial Discrimination Intersecting with other Grounds

Another issue emerging in human rights litigation is the intersectionality between prohibited grounds of discrimination. For example, racial minority women may experience discrimination in a completely different way than minority men or other women. The combination of race and other prohibited grounds produces distinctive forms of stereotyping or barriers. In *Frank v. A.J.R. Enterprises Ltd.*[35] the British Columbia Council of Human Rights found that the

respondent hotel discriminated against the complainant because of her race, colour, ancestry and sex when on two occasions she was evicted from the hotel and on another occasion was denied service in the hotel lounge. The Council found that there was a distinct pattern of discriminatory conduct perpetrated by the respondent against Aboriginal women. The Council found it particularly offensive that one would assume that the complainant was a prostitute because she is a single native woman in a hotel by herself.

Recently, the Tribunal advanced the issue of intersectionality in *Baylis-Flannery v. Walter DeWilde c.o.b as Tri Community Physiotherapy (No. 2)*[36] by recognizing that the intersection of grounds can increase general damage awards. The Tribunal ruled that the respondent discriminated against the complainant because of her race and sex, sexually and racially harassed the complainant, made sexual advances, and ultimately terminated her employment because she objected to his conduct. The Tribunal held that while the findings of discrimination made in this case are of sufficient gravity that the complainant could succeed on either enumerated ground, the law must acknowledge that she is not a woman who happens to be Black, or a Black person who happens to be female, but a Black woman. The decision represents the first time the Tribunal explicitly recognized and applied the concept of intersectionality with respect to both liability and remedy and found that the intersectionality of the discrimination based on sex and race exacerbated the complainant's mental anguish.

Conclusion

While this survey could not comment on every race-based complaint in the province, it should provide an overview of the issues encountered when litigating racial discrimination cases. The survey reveals that racism in today's society is increasingly non-overt and factually complex, thus making the task of investigating, litigating and adjudicating such cases more challenging. The Commission's most recent initiative to create a new policy on racism is therefore extremely important; not only as a means to educate the public, but also as a tool to improve the Commission's ability to determine where racism is a factor in any given case.

Endnotes

1 *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 22. In *Williams*, the Supreme Court of Canada permitted challenges to potential jurors on the ground of widespread racial prejudice against Aboriginal Canadians in the community.

2 *Ibid*. at para 21.

3 In order to provide a broad overview of significant cases, especially before administrative human rights tribunals, cases in this paper were drawn from the results of numerous searches of online case law databases conducted primarily in July and August 2004. More importantly, cases included in this paper were the result of suggestions from colleagues throughout the Ontario Human Rights Commission. The author would particularly like to thank Nina Gandhi and Anita Balakrishna for their tremendous assistance and insights. Decisions as to which cases to include in this survey paper, given the limited space available, were the sole responsibility of the author and omissions and errors are his sole responsibility.

4 See the Tribunal decision in *Naraine v. Ford Motor Co. of Canada (No. 4), infra*, at paragraphs 48 through 51.

5 It should be noted that Tribunals have also ensured that the race related grounds of ethnic origin and place of origin catch harassment based on the language spoken by a complainant. See *Espinoza v. Coldmatic Refrigeration of Canada Inc.* (1995), 29 C.H.R.R. D/35 (Ont. Bd Inq.). Similarly, in *Segula v. Ferrante* (1995), 27 C.H.R.R. D/412 (Ont. Bd. Inq.) the Tribunal held that a requirement to speak English where English is not the first language may amount to discrimination if the proficiency is not truly required by the particular job.

6 (1990) 14 C.H.R.R. D/215 (B.C.C.H.R.)

7 [2001] O.H.R.B.I.D. No. 19 (Ont. Bd. Inq.)

8 For ease of reference, this paper will refer to the former Ontario Board of Inquiry or the current the Human Rights Tribunal of Ontario as the Tribunal.

9 *Fuller v.* Daoud, *supra*, at paras. 84, 85

10 (1996), 27 C.H.R.R. D/230 (No. 4) (Ont. Bd. Inq.) aff'd (1999), 34 C.H.R.R. D/405 (Ont. Ct. (Gen.Div.)) Board of Inquiry's order upheld except with respect to the issue of reinstatement (2001), 41 C.H.R.R. D/349 (Ont. C.A.)

11 See also *Gannon v. Canadian Pacific Ltd.* (1993), 22 C.H.R.R. D/97 (C.H.R.T.) where the Canadian Human Rights Tribunal held that the employer failed to exercise all due diligence to prevent racial slurs from being directed at the complainant.

12 (1998), 32 C.H.R.R. D/1 (Ont. Bd. Inq.)

13 The Tribunal has also found organizations or individuals liable when they have condoned acts of discrimination that have already occurred. In *Payne v. Otsuka Pharmaceutical Co.* [2002] O.H.R.B.I.D. No. 19 (Ont. Bd. Inq.), the Tribunal held conference organizers liable for assisting a pharmaceutical company in locating other individuals to work at the company's booth without properly investigating Ms Payne's allegations of racial discrimination.

14 (2002), 44 C.H.R.R. D/142 (Ont. Bd. Inq.)

15 (2003), 64 O.R. (3d) 161 (C.A.)

16 Relying in part on the *Brown* decision, the Ontario Superior Court of Justice in *R. v. Khan* [2004] O.J. No. 3819 (S.C.) held that an accused's *Charter* rights were violated because he was stopped in his car as a result of racial profiling. Mr. Khan was a young Black man driving an expensive car when he was pulled over. In making a finding of racial profiling the Court commented on the consistency of the accused's testimony with the documentary record and the evidence of independent witnesses. However, the version of events of the two police officers in question was both inconsistent with the documentary evidence and defied "common sense".

17 (1992), 18 C.H.R.R. D/1 (C.H.R.T.)

18 The Tribunal was citing its earlier decision in *Basi v. Canadian National Railway (No. 1)* (1988), 9 C.H.R.R. D/5029 at D/5038 (C.H.R.T.).

19 [1998] O.H.R.B.I.D. No. 14 (Ont. Bd. Inq.)

20 The Tribunal was citing B. Vizkelety's "Proving Discrimination in Canada" (Toronto: Carswell, 1987) at page 142.

21 (1994), 23 C.H.R.R. D/41 (Ont. Bd. Inq.)

22 (1981), 3 C.H.R.R. D/641 (Ont. Bd. Inq.)

23 It should be noted that for the purposes of establishing discrimination, a prohibited ground of discrimination need only be a factor in the termination as opposed to the sole factor. See *Dominion Management v. Velenosi* (1997), 148 D.L.R. (4th) 575 at 576 (Ont. C.A.).

24 [2003] N.S.H.R.B.I.D. No. 2 (N.S. Bd. Inq.)

25 (1993), 21 C.H.R.R. D/415 (Ont. Bd. Inq.)

26 In *Lasani*, the Tribunal accepted, at paragraph 54, the Commission's position that "where ethnic prejudice is a reality, but a secret, unadmitted reality, a board of inquiry should look very carefully at the proffered explanations for failure to hire or failure to promote members of ethnic communities who are otherwise qualified for a position, but are not hired or promoted." However, the Tribunal still found the Ministry's explanations sufficient based primarily on the relative qualifications of those applying for the positions Mr. Lasani was competing for.

27 (1989), 12 C.H.R.R. D/394 (Ont. Bd. Inq.)

28 [2003] B.C.J. No. 2933 (B.C.S.C.)

29 *Angeconeb v. 517152 Ontario Ltd.* (1993), 19 C.H.R.R. D/452 (Ont. Bd. Inq.)

30 [1998] O.H.R.B.I.D. No. 14 (Ont. Bd. Inq.)

31 (1997), 28 C.H.R.R. D/179 (C.H.R.T.)

32 [2001] C.H.R.D. No. 20 (C.H.R.T.)

33 (1996), C.H.R.R. Doc. 96-153 at para. 191 (Ont. Bd. Inq)

34 The need to prove a connection between institutional racism and a particular situation recently arose at the Ontario Court of Appeal in *R. v. Hamilton* [2004] O.J. No. 3252 (C.A.). The Court of Appeal, in overturning lenient sentences, pointed out that neither accused tried to forge any evidentiary connection between institutional racial and gender inequality and their particular circumstances. Absent that kind of evidence, the trial judge could not find, according to the Court, that the women's difficult economic circumstances were the direct result of systemic racial and gender bias.

35 (1993), 23 C.H.R.R. D/228 (B.C.C.H.R.)

36 (2003), C.H.R.R. Doc. 03-296 (H.R.T.O.)