April 27th, 2009

How does a complainant prove that he/she has experienced racial discrimination?

By Linda McKay-Panos

Cases Considered:

Workeneh v. 922591 Alberta Ltd., 2009 ABQB 191

The *Workeneh* case draws attention to the challenges of proving that a complainant has been discriminated against contrary to the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (”*HRCMA*“). It can be particularly difficult to prove that racial discrimination has occurred, particularly when there are other reasons given for the treatment such as poor job performance.

Meseret Workeneh (”Workeneh”) worked for 9922591 Alberta Ltd. (operating as “Community Comfort”) as a personal care aide for people with mental and psychiatric difficulties. Workeneh was African-Canadian and the only black staff member working at Community Comfort’s Tuscany House. Workeneh commenced employment on a casual basis in November 2002 and acquired full time permanent status early in 2003. Her hours were Sunday to Thursday from 5:00 p.m. to 8:00 a.m. each day, with an extra hour worked on Mondays. Her initial salary was $1,200 per month, with an increase to $1,600 per month in July 2003. She signed a contract agreeing to these terms ($1,200) in February 2003. In September 2003, Workeneh learned that other employees performing similar work were receiving $12 per hour. The other employees were instructed in writing not to speak to Workeneh about their salaries.

In addition, Workeneh presented other examples of discriminatory treatment by her employer. The employer had set up a login journal for staff at the back of a binder. She was not informed about the login journal and only found out about it three months after it was instituted. She didn’t receive health benefits as promised three months after she starting working; instead she got coverage a year and a half after starting. Finally, when the cleaning staff person resigned, these duties were added to Workeneh’s workload.

Workeneh complained in writing to her supervisor, requesting a meeting to discuss her salary, benefits and workload, but she was not provided with a meeting. In July 2004, her supervisor met with her and said he heard she was not happy. He asked her if she was going to give notice and resign, and she said yes.

For these reasons, Workeneh filed a complaint with the Alberta Human Rights and Citizenship Commission, alleging she was discriminated against in the area of employment on the grounds of race and colour under *HRCMA* s. 7.

The usual legal analysis for employment discrimination cases under the *HRCMA* was established in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd*., [1985] 2 S.C.R. 536 and is as follows:

> 1. Has the complainant made out a prima facie (sufficient to establish a case unless disproved) case of discrimination on a ground covered under the *HRCMA*?
>
> 2. If yes, can the respondent nevertheless demonstrate that the contravention of the *HRCMA* did not occur, was a bona fide occupational requirement, or was reasonable and justifiable in the circumstances?
>
> 3. If yes, there is no discrimination under the *HRCMA*. If no, what is the appropriate remedy?

The complainant has the burden of proving a prima facie case of racial discrimination. This can be challenging, as often other reasons are given for the treatment received by the complainant. In Workeneh, Panel member Diane Colley-Urquhart noted that this was a case of circumstantial evidence of racial discrimination. There could be other inferences drawn from the differential treatment - perhaps the employer was taking advantage of Workeneh. Further, Workeneh had not substantiated her claims of discrimination largely due to the considerable hearsay and circumstantial evidence of discrimination provided by her. The supervisor did not attend the hearing and did not offer any conflicting or explanatory evidence. Nevertheless, the complaint was dismissed (see *Workeneh v. 922591 Alberta Ltd.*).

Ms. Workeneh appealed the Panel decision to the Court of Queen's Bench of Alberta. Justice A.G. Park adopted the standard of review provided in *Walsh v. Mobil Oil Canada*, 2008 ABCA 268 as that of correctness, with some limited deference given to questions of fact (para. 12).

On appeal, Justice Park noted that Workeneh actually worked 285 to 330 hours per month and that she was paid significantly less than other workers, due either in whole or in part to her race and colour (para. 16). Justice Park also held that the Panel erred in fact in two instances. The Panel's conclusions regarding Workeneh's receipt of Blue Cross Benefits and her cleaning duties were not supported by the evidence. Both of the incorrect findings of fact had influenced the Panel's decision on Workeneh's credibility, which in turn affected her argument she experienced discrimination.

In addition, Justice Park concluded that the Panel erred in law in its failure to infer from the facts that Workeneh experienced racial discrimination. Justice Park relied on a quotation from B. Vizkelety in *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at 142: "an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses." In Justice Park's

opinion, the following facts constituted a prima facie case of discrimination based on circumstantial evidence:

- Workeneh was black;
- Workeneh was paid substantially less than her white co-workers;
- Her supervisor wrote a letter to the other staff to advise them not to disclose their salary details; and
- Workeneh was as well qualified, if not better qualified than many of her fellow employees for the same type and nature of employment.

Since Workeneh had established a prima facie case of discrimination, the legal onus fell on her supervisor to provide a reasonable explanation for the discriminatory behaviour. Without any conflicting evidence or explanatory testimony from the supervisor, the inference was that it was more probable than not that Workeneh was taken advantage of due to her colour and/or her race (para. 27).

Workeneh's appeal was allowed and the Panel's decision dismissing her complaint was set aside. The Panel's order was reversed and the matter was remitted back to a new human rights panel to assess damages.

On February 20, 2009, the new Human Rights Panel (per Beth Bryant) released its decision on remedy: *Workeneh v. 922591 Alberta Ltd.*

After receiving written submissions from Workeneh and the Commission, but none from the respondent, who declined to participate, the Panel ordered the following remedies for Ms. Workeneh:

- Loss of wages: $28,944.50
- Overtime pay: $5,121.95
- Holiday pay: $344.40
- Benefit loss $144.00
- Interest $10,347.24
- General damages (for injury to dignity) $8,000.00

Total: $52,902.09

This case illustrates the challenges faced by complainants in human rights cases, who must present a *prima facie* case of discrimination in order to be successful. This can be difficult in cases alleging racial discrimination, when other reasons for the differential treatment may be inferred from evidence presented by the employer. Had the supervisor appeared to provide another plausible explanation for the pay differential and the other treatment issues, the case may have had a different outcome.

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