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John v Edmonton Police Service: Guilty of Being a Black Man

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Case commented on: *John v Edmonton Police Service*, [2023 AHRC 87 \(CanLII\)](#)

This is a comment on a decision on a complaint made under s 4 of the *Alberta Human Rights Act, RSA 2000, c A-25.5*, that the Edmonton Police Service discriminated against the complainants on the basis of race, colour, ancestry, or place of origin.

The Black complainants, Yousef John and Caesar Judianga, were roommates who chased a White woman they witnessed smash a car window. Their other roommate, also a Black man, restrained the woman while one of the complainants called the police. When the police officer arrived at the chaotic scene, he believed the complainants were possibly engaged in criminal behavior and used force to gain control of the situation. The police officer directed most of the force he used against the Black complainants rather than the White woman. Tribunal Member Erika Ringseis of the Alberta Human Rights Commission (AHRC) found that the complaint was made out against the Edmonton Police Service.

Facts

The events giving rise to the complaint occurred on the early morning of May 5, 2017. Around 3:15 am, Mr. Judianga heard a disturbance outside his residence, which he shared with Mr. John and a third man who was not a complainant, Harry Lado. Mr. Judianga, Mr. John, and Mr. Lado are all Black men of South Sudanese ancestry who were born in Africa. Mr. Judianga looked outside and witnessed a White woman throw what appeared to be a rock through the window of a car parked on the street. The car belonged to Mr. Lado's wife.

Mr. Judianga alerted his roommates, and the three of them went outside. Mr. Lado had some background as a bouncer, and he restrained the White woman while Mr. John called 911. Two other witnesses were also present. As a result the scene was somewhat chaotic, and the 911 dispatcher had difficulty understanding the facts of the situation.

Constable Steele, an officer with the Edmonton Police Service (EPS), arrived on the scene first. When he arrived, the White woman was crying and others, both witnesses and complainants, were shouting. Constable Steele believed that Mr. Lado, who was restraining the White woman, might be assaulting her. He deployed pepper spray against Mr. Judianga, Mr. John, and Mr. Lado. The White woman was also affected by the pepper spray, but Constable Steele did not aim it at her. Constable Steele then arrested the three Black men.

By this time, a female officer, Constable Frattin, was on the scene. Constable Frattin escorted the White woman to a police cruiser to rinse out her eyes and take her statement. Constable Steele spoke to the three Black men and verified their ID. Once he understood their account of the events, he removed their handcuffs and gave them water to rinse their eyes.

Mr. John, Mr. Judianga, and Mr. Lado expressed frustration that the pepper spray was deployed against them, considering their property was damaged and they called 911. They accused the EPS officers of discriminatory behavior. At one point during a heated discussion between the men and the police, Constable Frattin stepped out of her car. She said the three Black men were lucky it was only pepper spray, because they “could have been shot.”

All parties departed the scene, but no one was charged.

Mr. John and Mr. Judianga later filed complaints with EPS and with the AHRC.

The Law Applied by the Tribunal

The test for *prima facie* discrimination comes from *Moore v British Columbia (Education)*, [2012 SCC 61 \(CanLII\)](#) and requires demonstration of the following three factors:

- i. The complainant has a characteristic that is protected from discrimination;
- ii. The complainant has experienced an adverse impact; and
- iii. The protected characteristic was a factor in the adverse impact.

Upon the presentation of a *prima facie* case, the burden shifts to the respondent to, on a balance of probabilities, present a statutory defence and/or provide a credible and rational explanation demonstrating that the impugned differential treatment did not involve a discriminatory consideration (*McKay v Toronto Police*, [2011 HRTO 499 \(CanLII\)](#) at para 116, cited by the Tribunal at para 43).

Differential treatment that meets the definition of discrimination does not need to be deliberate, conscious, or overt. While overtly racist acts still take place in our society, the Tribunal noted a decision of the BC Human Rights Tribunal which recognized that, in many cases, people do not express racial prejudices openly or even recognize them in themselves (at para 30, citing *Kondolay v Pyrotek Aerospace Ltd*, [2020 BCHRT 208 \(CanLII\)](#) at para 107). Instead, differential treatment is based on a deep, underlying bias known as unconscious or implicit bias.

Analysis by the Tribunal

The Tribunal found that the first two branches of the *Moore* test were easily made out (at para 28), and it focused the bulk of its analysis on the third branch: was the complainants’ race a factor in the adverse impacts they experienced during their interaction with the EPS officers? More specifically, was the officers’ choice to use the pepper spray, the timing and manner in which it was deployed, and the treatment of the complainants following the use of force affected by the complainants’ race?

To determine the answer to this question, the Tribunal heard from two experts, then considered each of the adverse impacts against the complainants.

The Experts

The expert witnesses, Dr. Owusu-Bempah and Dr. Hehman, are both academics with expertise that the Tribunal found relevant. Dr. Owusu-Bempah, a sociology professor at the University of Toronto, was qualified as a sociology expert regarding the historical context and relationship between Canadian society and racialized individuals, race and bias in the justice system, and police use of force in Canada. He noted that a large body of research demonstrates that people associate Blackness with danger and violence. With respect to research specific to policing, Dr. Owusu-Bempah noted that Black people are more likely to be viewed by police officers as dangerous, criminal, and subhuman. In general, he noted that because racial bias is commonly observed in society, and because police officers are drawn from this same society, they are likely to hold similar stereotypes and implicit racial bias (at paras 33-38).

Dr. Hehman, a psychology professor at McGill, was qualified as an expert in psychology regarding intergroup prejudice, implicit bias, police interactions with racialized members of society, and the impact of implicit bias on racialized communities. Dr. Hehman discussed “ingroup bias”, whereby people tend to make more positive associations with people in their own group than with people in other groups (at para 41). White people tend to favour White people, which means that White police officers, in a stressful or ambiguous situation, will be more likely to interpret the situation according to stereotypes, such as Black males being aggressive and “bad” (at para 41).

The Adverse Impacts

The Tribunal considered each of the following adverse impacts:

- a. the officers’ use of force against the complainants (at paras 46-59);
- b. the short passage of time between Constable Steele’s arrival and his decision to deploy pepper spray (at paras 60-66);
- c. Constable Steele’s failure to issue a verbal warning about the pepper spray (at paras 67-73);
- d. insufficient provision of medical treatment (at paras 74-81);
- e. the arrest of the complainants (at paras 82-104);
- f. the favourable treatment of the White woman whose criminal act triggered the rest of the relevant events (at paras 105-110);
- g. Constable Frattin’s comment that the complainants were lucky they had not been shot (at paras 111-116); and
- h. the officers’ failure to investigate the property damage to the car (at paras 117-125).

The Tribunal concluded that its role was not to assess whether the officers’ use of force complied with relevant policy or whether relevant policy was appropriate, but to determine whether the complainants’ race affected the officers’ application of the policy (at paras 57-59). Relevant EPS policies provided Constable Steele with a range of options for deployment of force. Rather than opting for a de-escalation approach, he decided to pepper spray the Black men without a verbal warning immediately upon arriving at the scene. The Tribunal discussed the expert opinions

available, which indicated that Constable Steele’s split-second decision was likely informed by an implicitly racist attitude toward Black men (at para 65). Specifically, the Tribunal referenced Dr. Owosu-Bempah’s expert opinion, which was that historical perceptions about White women requiring protection from “aggressive” Black men continue to inform present-day attitudes toward Black men (at para 72).

According to the Tribunal, aspects of the complainants’ arrest showed evidence of racial bias. It discussed several specific details about the officers’ behaviour at the scene that indicated a perception of heightened violence leading to a more severe police response than was normal or necessary. For example, Constable Steele reported over his radio that “men” were assaulting a woman, when the only man who ever touched the White woman was Mr. Lado (at para 82). Also, Mr. Judianga was holding part of a street sign, which he had taken from a witness to prevent it from being used as a weapon. Constable Steele assumed that Mr. Judianga intended to use the street sign as a weapon himself, even though Mr. Judianga was not holding the sign in a threatening way. Constable Steele then proceeded to pepper spray all three Black men, even though Mr. Lado was the only one touching the White woman. Mr. John and Mr. Judianga were not engaged in any unlawful behavior when they were sprayed, arrested, and handcuffed. When everyone dispersed from the scene, the officers took a statement from the White woman, but not from any of the three Black men. The Tribunal concluded that the EPS officers unnecessarily used brusque and commanding tones, failed to notice key facts, and took no steps to de-escalate or defuse the situation (at para 104). These decisions were consistent with implicit racial bias.

The Tribunal then addressed the officers’ treatment of the White woman. The treatment of the White woman was most significant due to its striking contrast to the treatment of the three Black men. The White woman immediately received compassionate assistance by Officer Frattin, was seated in the police cruiser to deal with the effects of the pepper spray, was not pepper sprayed directly, was not handcuffed, was not arrested, was assisted with putting together a statement, and was transported by police to a friend’s house (at para 108). In contrast, the three Black men were sitting on pavement, sharing minimal water. No one took their statements, no one apologized for the misunderstanding, no one appeared to be interested in helping them with the damaged property, they were told that they needed to calm down, and they were sent home on foot (at para 109).

The Tribunal further commented specifically that Constable Frattin’s comment to the Black men that they were lucky not to have been shot was “grounded in discrimination and bias” (at para 116). In addition, Constable Frattin unreasonably preferred the White woman’s narrative about the events, which led to an inadequate investigation of the property damage (at para 124).

Tribunal’s Conclusions

In the entire context of the situation, and especially given the multiple examples of differential treatment, the Tribunal concluded that Mr. John and Mr. Judianga experienced discrimination on the basis of race, colour, ancestry, and place of origin (at para 141). The Tribunal further commented that while Mr. John and Mr. Judianga had not included gender as a ground for discrimination, the fact that the complainants were Black males, and the accused was a White female, increased the likelihood of unconscious bias (at para 134). The intersectionality of race and gender increased the salience of the disparity between the complainants and the White

woman. The “petite White female” was seen as a distressed, helpless victim in need of assistance and the “large Black men” were seen as angry, aggressive perpetrators of wrongdoing (at para 136).

The complainants named Constables Steele and Frattin in the complaint individually, as well as EPS. The Tribunal concluded that discrimination was made out as against EPS, but that there was no compelling policy reason to make a finding as against individual officers (at para 140).

The Tribunal also concluded that first responders (EMS) did not discriminate by refusing to provide the complainants with transportation to the hospital, finding instead that the complainants refused transportation or the first responders had a good faith belief that transportation was refused, given the chaotic nature of the scene (at para 81).

Discussion

As the Tribunal recognized, the implicit and subconscious nature of racial bias makes context extremely important when analyzing events like those in *John v Edmonton Police Service*. One striking aspect of this case is that the context provides an unusually stark comparison between police treatment of Black men and White women. Police officers attended at a scene where a White woman and three Black men were present, and it was unclear what had transpired. Their immediate reaction was to assume guilt on the part of the Black men and treat the White woman as a potential victim. As it turned out, the White woman had likely smashed the window of Mr. Lado’s wife’s car. However, police never laid charges, even though Mr. Judianga witnessed the White woman’s alleged crime.

This case provides a unique and vivid example of unconscious bias, a type of discrimination that is rarely obvious or easily identified. When confronted with the need to make a split-second decision in a chaotic situation, the officers’ racially based assumptions determined their behaviour. They presumed that the Black men on scene were guilty, that they were the *de facto* violent aggressors, and that the White woman was more trustworthy. Further, police actors did not even immediately realize how inappropriately they had behaved, as evidenced by Constable Frattin’s comment that it was lucky the Black men hadn’t been shot.

Unfortunately, Constable Frattin was right: the men were lucky. The Ontario Human Rights Commission has found that a Black person is [more than 20 times more likely](#) to be shot and killed by the police compared to a White person. As is evident from *John v Edmonton Police Service*, police actors in Canada feel justified in deploying more serious force against Black people than against White people. This bias doesn’t have to be conscious to be real. In fact, the unconscious nature of police bias against Black people means that officers’ racially biased instincts go unexamined and unquestioned in all but the clearest situations.

This is one of those clearest situations. However, we do not yet know what the consequences will be for the Edmonton Police Service, because the Tribunal determined that it will hear submissions on remedies at a later date (at para 142). The decision does not indicate what remedy or remedies the complainants are seeking. In addition, the only party against whom remedies will be enforced is the Edmonton Police Service as an organization, not the individual officers. This means that the

practical utility of a damages award, which in a human rights context is intended to deter discriminatory behaviour (see *Walsh v Mobil Oil Canada*, [2013 ABCA 238 \(CanLII\)](#) at paras 31-32), is uncertain. The individual officers will not be ordered to pay damages. The Edmonton Police Service may be ordered to pay damages to the complainants, but a financial penalty alone is unlikely to meaningfully deter latent racism in a large and well-funded police force.

It is difficult to imagine what other non-financial remedy might meaningfully improve unconscious bias in policing, especially as regards inappropriate use of force. The Tribunal has the power to make orders regarding changes to organizational policy, but the Edmonton Police Service policy 1.1.8, [Fair and Equitable Policing](#), already requires the Chief of Police to address potentially biased practices and/or systemic racism in how EPS employees interact with the public. Given that this policy already exists and clearly is not deterring racist behaviour, it is not clear what policy order the Tribunal can make that will ensure similar discrimination does not occur in the future.

In addition, individuals in leadership positions at EPS do not have an encouraging history of taking racism in policing seriously. As Dr. Temitope Oriola, University of Alberta criminologist, [commented](#) in August 2023, Edmonton Chief of Police Dale McFee rarely releases the names of officers involved in problematic use of force cases, despite public interest and consternation of families of victims. According to Oriola, McFee “has not held his officers to rigorous disciplinary standards when it comes to problematic use of force cases.” He “rarely issues public condemnations of such conduct” and instead relies on investigations by the Alberta Serious Incident Response Team to hold officers publicly to account.

Without better accountability for racist behaviour by police actors, whether intentional or subconscious, Constable Frattin’s words will continue to echo in the ears of every Black person who interacts with a police officer in Canada: “lucky you were not shot.”

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