

Court Holds Arbitrator Misapplied The Test For Discrimination To A Workplace Investigation



In *Association of Management, Administrative and Professional Crown Employees of Ontario v. Ontario (Ministry of the Attorney General)*, the Ontario Superior Court of Justice Divisional Court (the “Court”) held that an arbitrator misapplied the test in determining whether a workplace investigation discriminated against an employee. The Court ultimately set aside the arbitrator’s decision and remitted the case back to the arbitrator to be determined by proper application of the test for discrimination. This case provides Ontario employers with important insight on how the test for discrimination will be applied to claims of discrimination in the context of workplace investigations, and the role that circumstantial evidence should play in assessing claims of discrimination.

Background Facts

On October 16, 2017, while passing each other in the hallway at work, the grievor came into physical contact with a colleague (identified in the decision as “Ms. X”). The grievor, a Black woman, believed the contact was an intentional shove, while Ms. X, a white woman, stated that it was accidental. Although no one witnessed the incident, some co-workers overheard the ensuing verbal exchange between the grievor and Ms. X.

After the grievor reported the incident, she left the workplace and was approved for WSIB benefits. The employer appointed a manager from another department to investigate the incident. This investigator, a white male lawyer, interviewed the parties and witnesses and produced an investigation report. In his report, the investigator concluded that the grievor’s allegation that Ms. X subjected her to a physical assault was unsubstantiated.

As part of the report, the investigator made a number of conclusions regarding the grievor’s credibility and her motivations in bringing the complaint. For example, the investigator found that some of the grievor’s statements made during the investigation “[seemed] contrived to support her various claims for relief”, that the grievor “[did] not admit to any wrongdoing on her part, not even raising her voice after the contact”, and that the grievor’s claim that she suffered continuing harm from the incident “[seemed] calculated to lead to the requested relief, including compensation.” The investigator also determined that the grievor had used a

"threatening" tone during the confrontation with Ms. X.

The Arbitral Decision

The grievor's union filed a grievance regarding the workplace investigation, in which it claimed that the investigation discriminated against the grievor and was tainted by anti-Black racism. In the union's view, the investigator's processes and conclusions bore the hallmarks of anti-Black stereotypes, prejudice, and implicit bias.

At the arbitration hearing, the union called an expert witness to testify about implicit/unconscious bias. The arbitrator accepted the expert's opinion that it was questionable whether the investigator would have reached the same conclusions if the grievor was white or if Ms. X was Black. However, the arbitrator also accepted the employer's argument that there was no actual evidence that demonstrated that implicit anti-Black bias had influenced the investigator.

The arbitrator concluded on a balance of probabilities that race did not play a role in the investigation and that a *prima facie* case of discrimination had accordingly not been established. He found, however, that the investigation was procedurally flawed, and ordered monetary damages be paid to the grievor.

The union applied for judicial review of the arbitrator's decision arguing that the arbitrator incorrectly and unreasonably applied the test for *prima facie* discrimination.

The Judicial Review Decision

The Court concluded that the arbitrator's decision dismissing the claim of discrimination was incorrect and had to be reconsidered by the arbitrator in accordance with the correct test for discrimination.

In reaching this conclusion, the Court held that the proper application of the test for *prima facie* discrimination is of central importance to the legal system. The Court therefore applied the correctness standard to the arbitrator's discrimination analysis. The Court reiterated the well-established test for *prima facie* discrimination, which requires a complainant to show that: (i) they have a characteristic protected from discrimination; (ii) they experienced an adverse impact on account of the protected characteristic; and (iii) the protected characteristic was a factor in the adverse impact. Once a *prima facie* case of discrimination has been established, the burden shifts to the respondent to justify the conduct or practice. If the conduct or practice cannot be justified, discrimination will be found to have occurred.

The Court held that the arbitrator misapprehended the test for *prima facie* discrimination. While the Court identified four different ways in which the arbitrator misapprehended the test, the following two points are the most instructive for Ontario employers:

- First, the arbitrator concluded that while racism was one possible explanation of the biased and unfair way in which the investigator treated the grievor during the investigation, it was not the "dominant possibility". However, the Court emphasized that all that is required under the third branch of the test is that the complainant show that race played *any* role in the decision-making process. Thus, the arbitrator had incorrectly required the union to show that racism was the "dominant possibility", which gave rise to a flaw in the arbitrator's conclusions.

- Second, the arbitrator made an error with respect to the nature and sufficiency of the evidence required before an inference of discrimination is permitted. The Court held that direct evidence of discrimination, such as the words or conduct of the investigator, was not required to establish *prima facie* discrimination. Rather, discrimination is often proven by circumstantial evidence and inference. The Court noted that the indicators of racial profiling recognized by the expert literature and case law can assist a trier of fact in determining whether an inference of racial discrimination can be drawn.

Takeaway

This case serves as an important reminder that a *prima facie* case of discrimination will be established where a prohibited ground of discrimination is a *factor* – and not just the dominant *factor* – in the adverse impact on a complainant. This case also confirms that race-based discrimination may be established by circumstantial evidence and inference. In other words, an adjudicator may rely on circumstantial evidence, including indicators of racial profiling, in determining whether an inference can be drawn that race was a factor in workplace conduct that adversely impacts a complainant. Given the high level of scrutiny that discrimination allegations attract, employers should consider retaining an external investigator to conduct workplace investigations into allegations of race-based discrimination. Further, employers should consider having in-house investigators trained on implicit/unconscious bias.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Author: [Catherine Phelps](#)

Filion Wakely Thorup Angeletti LLP