

## CASE LAW UPDATE

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### *Shaw v. Phipps*

[2010] O.J. No. 4283 (Div. Ct.), Released 6 October 2010

#### **Administrative Law – Standard of Review of Decisions of the HRTO – Human Rights – *Prima Facie* Discrimination on the Basis of Race**

The applicant at the Human Rights Tribunal, a black male, was a letter carrier with Canada Post. It was his second day delivering mail in an affluent neighbourhood in Toronto. He was wearing his Canada Post coat and was carrying a satchel used by letter carriers.

In response to a number of recent break-and-enters in the area, the respondent Officer Shaw was patrolling the area with a new constable, Officer Noto. Officer Shaw alleged that when he first observed the applicant, he saw him crossing back and forth across the street in a suspicious manner. Both officers also testified that they observed the applicant approach a house, knock on the door, and speak to a woman without delivering any mail.

Officer Shaw did not recognize the applicant as the regular mail carrier in the area. He stopped the applicant, asked for identification, and ran a check of the applicant's criminal record, which revealed nothing. The applicant was the only person who was stopped and questioned that day by the officers.

The Tribunal found that Officer Shaw had discriminated against the applicant on the basis of race, contrary to the *Ontario Human Rights Code*. The Tribunal also concluded that the Toronto Police Services Board and the Chief of Police were jointly and severally liable for \$10,000 in general damages to the applicant as compensation for injury to dignity, feelings and self-respect. The Tribunal declined to order future compliance remedies against the respondents.

On the respondents' application for judicial review, all three judges of the panel of the Divisional Court agreed that although the standard of review of the Tribunal's decisions is stated to be "patent unreasonableness" in the *Code*, the correct standard of review, in light of *Dunsmuir*, was the reasonableness standard. The majority of the Divisional Court went on to say that a high degree of deference is 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.

All judges also agreed that the Tribunal was correct to hold the Toronto Police Services Board jointly and severally liable for damages as an employer under the *Code*.

The majority agreed with the Tribunal's analysis and conclusions respecting discrimination on the part of Officer Shaw. Although the Tribunal did not specifically find that the applicant had proved a *prima facie* case on a balance of probabilities, counsel for Officer Shaw had, either implicitly or explicitly, conceded that all elements of the test were met. The majority also rejected the respondents' argument that the Tribunal essentially used the concept of "unconscious discrimination" to make a finding of discrimination in the absence of supporting evidence. The majority acknowledged that many discrimination cases do not involve direct evidence that a complainant's colour or race was a factor in the incident in question. A Tribunal must draw reasonable inferences from proven facts, which is what the Tribunal did in this case.

Writing for the minority, Justice Nordheimer disagreed with the majority and found that counsel for Officer Shaw had not conceded that a *prima facie* case of discrimination was met. He found that any such concession must be clear and explicit, and here it was not. He found that although the applicant, a black male letter carrier, was stopped and questioned by Officer Shaw, this fact, together with other facts before the Tribunal (i.e. that other non-black construction workers in the area and a non-black water carrier were not stopped and questioned), failed to establish a nexus between the first two elements and the third element of a *prima facie* case of discrimination (the latter being that one's race, colour or ancestry was a factor in the alleged adverse treatment). As the Tribunal did not undertake this analysis, Justice Nordheimer would have sent the case back to the Tribunal for a re-hearing.

Justice Nordheimer also took issue with a finding that the applicant's race was a significant factor, if not the predominant factor, in Officer Shaw's actions, whether consciously or unconsciously. He reasoned that our system of justice is predicated on the notion that only those who act voluntarily should be punished. He went on to say that "I do not know how a Tribunal, or any other decision-making body for that matter, purports to reach a conclusion that a person has acted unconsciously in his or her discrimination against another person." In making these remarks, the dissenting judge may not have taken into account well-established human rights jurisprudence confirming that intention is not relevant to a finding of a breach of the *Code*.

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