Candidate was racialized, foreign-trained

Law firm interview involved discrimination, HRTO said

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A LAW firm discriminated against a lawyer based on his age and race during the hiring process, the Human Rights Tribunal of Ontario said in a March 22 decision.

The decision, *Moore v. Ferro (Estate)*, 2019 HRTO 526 (CanLII), was written by HRTO vice chairman Mark Hart. Hart wrote that the estate of deceased lawyer Lou Ferro was vicariously liable for discrimination and reprisal against lawyer Philton Moore, and he ordered Ellen Helden, Ferro's wife, who conducted the interview, to pay $2,000. Moore self-identifies as a Black man of Afro-Caribbean descent and was 45 years old in 2011, when the interview took place, according to Hart's decision. Moore was called to the Bar of England and Wales in 1998, where he also taught law at a university, and called to the Ontario Bar in 2010, the decision said.

Still, Hart's decision said that the applicant, Moore, was not entitled to compensation for lost income because he would not have been hired to work at Ferro's firm because of reasons beyond discrimination.

Moore, who now has his own firm, declined to be interviewed as he plans to appeal the 227-paragraph decision, which he says only weakly addressed some of the core parts of his case.

He says he plans to submit evidence showing the decision is a setback for people of his background compared to the progress made over the past decade, especially in light of cases such as *Peel Law Association v. Pieters*, 2013 ONCA 396.

Ferro has since passed away and Helden, who was self-represented, could not be located for a request for comment.

Toronto lawyer Raj Anand, a partner at WeirFoulds LLP, says the decision is a cautionary tale for the legal profession. He notes that some of the behaviours described in the case, such as asking the applicant for his marks in English and screening for "fit" in the law firm, can play into unconscious bias.

"There were various allegations about improper process; some were found to have been made out and others not. My interest is not who was right and who was wrong as much as what this shows about how firms can go wrong, and what this shows about how people looking for a livelihood and to practise their profession can be disadvantaged by processes that we don't necessarily have enough awareness of," says Anand.

The dispute began with a 2011 ad for a "junior lawyer" that said that "new calls are encouraged to apply" and that "only insurance litigation experience will be considered." Although he didn't have a background in personal injury, Moore was called for a "very free-flowing" group interview alongside "a young South Asian man who was just completing his articles" and "a young Black male who was newly called to the Bar," the decision said. Moore was told that the firm provided training in personal injury, according to the decision.

"This kind of unorthodox and unstructured group interview process creates the danger and risk of the assessors' own subjective and potentially discriminatory biases coming into play," wrote Hart.

Still, the tribunal found that white candidates did not go through a different hiring process than racialized candidates, Hart's decision said.

Although Moore received the highest overall grades in the group interview, a post-interview discussion within the firm raised some concerns about hiring him, according to the decision. Among other issues, the decision said the interviewers noted that Moore was "older" with "already entrenched habits," while another candidate was "young" and had "a competitive edge." The interviewers also noted that Moore was "long winded," which might be a "possible British thing." None of the candidates from the group interview were hired, the decision said.

Raj Anand says a recent Human Rights Tribunal of Ontario decision is a cautionary tale for the legal profession.

Moore asked for feedback after the group interview, and eventually, Ferro wrote back that it was rare for the firm to hire new calls without articling experience in personal injury, the decision said. A few months later, Hart wrote, Helden wanted to re-interview Moore, and she referenced an administrative assistant who quickly learned the firm's systems and templates, while an older lawyer would go to the secretaries and ask them to do things for him because he could not work with computers.

The tribunal found that the interviewers acted contrary to the Human Rights Code in the interviews by considering Moore's age, but it did not find it was a determinative factor in the decision not to offer him a job. In particular, the tribunal highlighted an email exchange in August of that year, when the firm and Moore were unsuccessful in scheduling an interview.

Hart also wrote that Ferro engaged in reprisal with "his dismissive and contemptuous response to the applicant's allegations of discrimination, his abusive assault on the applicant's professional abilities, and his gratuitous and unwarranted attacks on the applicant's personal character."

Kim Gale, principal at Gale Law in Toronto, recently founded a group for foreign-trained lawyers as well as a website focused on law for millennials. She says the case shows how the foreign equivalents for requirements such as articling or certain law school courses are frequently misunderstood during the hiring process.

"In this circumstance, the applicant was a lawyer who was called to the Bar of England and Wales in 1998," says Gale. "There seems to have been, in the interview process, a barrier of understanding between what it means to be a lawyer in the country and what it means to be a lawyer here."

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