CITATION: Audmax Inc. v. Ontario Human Rights Tribunal, 2011 ONSC 315
DIVISIONAL COURT FILE NO.: 28/10
DATE: 20110118

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

WHALEN, MOLLOY and SWINTON JJ.

BETWEEN:	
AUDMAX INC. and MAXCINE TELFER Applicants	Ted Charney and Julian Roy, for the Applicants
– and –	
HUMAN RIGHTS TRIBUNAL OF ONTARIO and SEEMA SAADI Respondents	Prabhu Rajan, for the Respondent HumanRights Tribunal of Ontario Toby Young and Jo-Ann Seamon, for the Respondent Seema Saadi
	HEARD at Toronto: October 20, 2010

MOLLOY J.:

REASONS FOR DECISION

A. INTRODUCTION

[1] Seema Saadi was dismissed from her employment in June 2008, six weeks after she had been hired. She filed a complaint of discrimination against her employer Audmax Inc. and its

owner/chief executive officer Maxcine Telfer. Ms. Saadi identifies herself as a Bengali-Canadian Muslim woman who is legally blind.

[2] Audmax receives public funding to administer programs to assist diverse ethnic and religious populations. Ms. Saadi was hired on a probationary basis as an intake worker for Audmax's Immigration Settlement Assistance Program, a federally-funded project designed to assist newcomer women in finding work in Canada. Ms. Saadi was dismissed before her probationary period had concluded.

[3] Ms. Saadi alleged that during the course of her employment she was discriminated against and harassed because of her race, colour, ancestry, place of origin, ethnic origin, disability, creed and sex, and that this pattern of conduct culminated in her dismissal, based on those same discriminatory grounds.

[4] These allegations were denied by the employer who maintained that there had been no discrimination against Ms. Saadi, that they had accommodated her religious attire requirements throughout her employment, and that she had been dismissed for cause, unrelated to any prohibited ground of discrimination.

[5] The complaint proceeded to a hearing at the Human Rights Tribunal of Ontario ("HRTO" or "Tribunal") before Adjudicator Faisal Bhabsa for four days in July 2009. Ms. Saadi was represented at the hearing by legal counsel from the Human Rights Legal Support Centre; the employer was unrepresented. At the outset of the hearing, Ms. Saadi abandoned her allegation that there had been any discrimination based on her disability.

[6] On October 7, 2009, the adjudicator released written reasons finding against Ms. Saadi on many of her allegations.[1] However, he found that the enforcement of workplace policies on dress code and rules for using the staff microwave were discriminatory against Ms. Saadi on the basis of her ancestry, ethnic origin, creed and sex. He also found that the method of discipline taken against Ms. Saadi at a meeting dealing with the office dress code was discriminatory and that the employer failed to properly accommodate her religious attire. Finally, he determined that given this discrimination during employment, and in the face of unproved allegations supporting the employer's decision to terminate the employment, it must be concluded that some degree of discriminatory conduct contributed to the dismissal itself. He awarded Ms. Saadi general damages of $15,000 and an additional $21,070 for lost wages.

[7] Audmax and Ms. Telfer seek judicial review of the adjudicator's decision, citing issues of procedural unfairness, inadequacy of reasons, and the unreasonableness of the decision itself.

[8] There are a number of deficiencies in the reasons and in the process employed by the adjudicator. In my opinion, when these are viewed cumulatively it is not possible to say that this was a fair hearing, nor that the findings of discrimination were reasonable. The specific issues of concern include the following:

(a) the manner in which the adjudicator dealt with the inability of a key witness for the employer to attend the hearing was a denial of procedural fairness;

(b) the findings with respect to the microwave policy are flawed by legal errors and lack factual findings to support the legal conclusions reached;

(c) the reasons with respect to the dress code policy are inadequate to explain how the policy was discriminatory against Ms. Saadi, either with respect to its content or how it was applied, and fail to address applicable legal issues;

(d) the adjudicator unreasonably refused to permit Ms. Telfer to present a photographic image to explain her objection to Ms. Saadi's clothing, which interfered with the employer's ability to present its case;

(e) the findings with respect to the *hijab* are unsupportable and flawed by legal errors;

(f) the finding that it is discriminatory for a man to be present at a meeting to discuss the style of business dress required of female employees is unsupportable in fact or law;

(g) the conclusion that the termination was discriminatory was dependent upon the other findings of discrimination and is not sustainable on its own;

(h) the conclusion that the termination was discriminatory was heavily dependent upon drawing an adverse inference with respect to the failure of Mr. Barnett to testify for the employer, which was both unreasonable and legally incorrect and which compounded the procedural unfairness in proceeding with the hearing in his absence; and

(i) there is an overall failure to refer to evidence to support critical findings of fact, including findings of credibility that are either conclusory or missing altogether, and the reasons are inadequate to support the conclusions reached or to permit meaningful judicial review.

[9] I will deal first with a motion by the applicants to admit fresh evidence on this judicial review application. I will then deal with the standard of review for decisions of the HRTO. Finally, I will analyze the decision in respect of each of the areas of concern I have mentioned above and set out the basis for my conclusions.

B. MOTION TO ADMIT FRESH EVIDENCE

[10] Counsel for the applicants/employer sought leave to admit fresh evidence on this application on two issues: (1) how the adjudicator dealt with the inability of the employer's witness to attend the hearing and the employer's request to file his evidence in writing; and (2) how the adjudicator dealt with the employer's attempt to submit into evidence a photograph of clothing alleged to be similar to what the complainant had been wearing on the crucial day when she had been spoken to about the dress code. Leave to admit this evidence was granted.

[11] The employer's new evidence included two exhibits,[2] which were present before the adjudicator, but which were not filed as exhibits at the hearing. The purpose of this evidence on the judicial review application was not to expand upon the evidence heard at the hearing, nor to challenge the basis for any findings of fact made by the adjudicator. Rather, the evidence either related to issues of natural justice or served to put the decision of the Tribunal into a meaningful context. This was particularly important since there is no transcript of the proceedings and the adjudicator's reasons on the two points at issue are sparse.

[12] The first exhibit is a letter from Paul Barnett, a consultant who had worked closely with Audmax for 13 years and shared office space with it. Ms. Telfer explains in her affidavit that at the beginning of the hearing she tendered to the Tribunal a sealed envelope containing the letter from Mr. Barnett, which sets out the reason for his inability to attend and the substance of his proposed evidence. The adjudicator stated in his reasons at para. 8, "I refused to accept the previously undisclosed letter into evidence as it would have been prejudicial to the applicant, unreliable and of limited probative value." Inexplicably, the adjudicator did not open the sealed envelope, did not read the letter, and did not enter it into the record so that it could be available to a court on judicial review. Rather, he handed it back to Ms. Telfer unopened.

[13] The reasons given by Mr. Barnett for his absence are relevant to whether the adjudicator should have proceeded with the hearing without offering other options to Audmax and whether it was appropriate to draw an adverse inference against Audmax because of its failure to call Mr. Barnett as a witness. The substance of Mr. Barnett's evidence, as set out in the letter, is also relevant to those two issues, as well as to whether his testimony could have had an impact on the outcome of the hearing (the complainant having taken the position before this Court that Mr. Barnett's evidence was tangential and could not have affected the result).

[14] The second exhibit is a photograph of a woman wearing a mid-thigh length top, leggings and sandals. Ms. Telfer had attempted to introduce this photograph during her testimony as a visual aid to explain to the adjudicator the type of clothing Ms. Saadi had been wearing on May 16, 2008, which had prompted the meeting with her to discuss the office dress code. In his reasons, the adjudicator stated at para. 64 that he refused to admit the photograph because "it was raised for the first time very late in the hearing, the allegation had not been disclosed prior to the hearing and questions about this matter were not put to the applicant on cross-examination." Again, it would have been helpful if the adjudicator had included the rejected photograph in the record so that we could better understand its nature. We permitted the photograph to be filed before us solely for that purpose.

[15] The evidence sought to be admitted is very limited in nature. It addresses issues of natural justice that cannot be discerned from the record due to the complete lack of any transcript or recording of the proceedings. It is also necessary to properly understand and evaluate the adjudicator's rulings, and the impact of those rulings on the result. This Court therefore concluded that this was one of those rare and exceptional cases in which the rules for admission of such evidence, as established by the Court of Appeal in *Keeprite Workers' Independent Union v. Keeprite Products Ltd.*,[3] had been met.

C. STANDARD OF REVIEW

[16] Before determining the applicable standard for judicial review of decisions of the HRTO, it is first necessary to consider two significant and relatively recent developments in the law: one from case law and the other statutory.

[17] Prior to 2008, there were three levels of scrutiny applied in judicial review of administrative tribunals: patent unreasonableness; reasonableness *simpliciter*; and correctness. Also prior to that time, the *Ontario Human Rights Code* provided for a full right of appeal to the Divisional Court from decisions of a Board of Inquiry under the *Code* and the correctness standard was typically applied in those cases.[4]

[18] In 2009, in its landmark ruling in *Dunsmuir v. New Brunswick*,[5] the Supreme Court of Canada held that there would no longer be three standards of review; the patent unreasonableness standard was eliminated. In coming to that conclusion, the Supreme Court recognized the problems encountered by reviewing courts in grappling with the distinction between decisions that were "merely unreasonable" and those that were "patently unreasonable."

[19] Case law prior to *Dunsmuir* had interpreted the patent unreasonableness standard as meaning "clearly irrational" or "evidently not in accordance with reason." A patently unreasonable decision was described as being "so flawed that no amount of curial deference can justify letting it stand." By contrast, a decision that was merely unreasonable (but not patently unreasonable) was one in which the defect was not as immediately obvious and might only be discovered after "significant searching or testing."[6]

[20] In *Dunsmuir* the Supreme Court considered the usefulness of maintaining the two separate reasonableness standards. The Court noted at para. 41 the comments of Professor Mullan:[7]

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

[21] The Supreme Court concluded that maintaining the distinction between reasonableness *simpliciter* and patent unreasonableness could not be justified, holding (at para 42) that it is "inconsistent with the rule of law to retain an irrational decision." The Court quoted with approval, the following words of Lebel J. in his concurring reasons in *Toronto (City) v. C.U.P.E.*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness … .

[22] Essentially, *Dunsmuir* resulted in the two previous standards of reasonableness and patent unreasonableness being collapsed into a single reasonableness standard. Questions that

had previously been reviewed on a correctness standard continued post-*Dunsmuir* to be reviewed on that basis. However, decisions of tribunals that had previously been accorded the highest level of deference, the patent unreasonableness standard, are now subject to the single all-encompassing reasonableness standard. The Court in *Dunsmuir* emphasized that the move to two standards should not be interpreted as a license to reviewing courts to be less deferential in their approach to the decisions of administrative tribunals. Indeed, the Court recognized at para. 48 that the concept of deference as "central to judicial review in administrative law" and held that "[t]he move towards a single reasonableness standard does not pave the way for a more intrusive review by courts."

[23] The reasonableness standard developed in *Dunsmuir* is concerned with "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[8]

[24] All other things being equal, the application of the principles in *Dunsmuir* would likely have led to the imposition of a standard of correctness on appeals from human rights tribunals, as had been imposed in the past. However, in 2006 there was a massive change to the legislative human rightsregime in Ontario, a change which fundamentally altered the nature of the Ontario Human Rights Tribunal.[9] In addition, the legislative amendments that accomplished these changes directly addressed the judicial review issue.

[25] Under the new regime, which came into force on June 30, 2008, a decision of the Tribunal is no longer subject to a right of appeal, but rather can only be challenged by judicial review. Further, decisions of the Tribunal are protected by a privative clause and by a statutorily mandated standard of review of patent unreasonableness. Section 45.8 of the new legislation provides:

> … a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.[10]

[26] Does the statutorily imposed standard of "patently unreasonable" require a return to the previous case law distinguishing that standard from unreasonableness *simpliciter*? Based on the decision of the Supreme Court of Canada in *Khosa*[11] and the recent Divisional Court decision in *Shaw v. Phipps*,[12] the short answer to that question is "No." However, some explanation is required.

[27] First, it must be acknowledged that it is open to a legislature to specify the standard of review to be applied to decisions of a tribunal, and courts will respect such legislative choices.[13] However, the interpretation of standards imposed by statute will be determined within the context of administrative law principles. In *Khosa*, the Supreme Court of Canada considered British Columbia legislation[14] that imposed a patent unreasonableness test for "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause." Binnie J. held (at para 19):

> The expression "patently unreasonable" did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of *indicia* of patent unreasonableness are given in s. 58(3). Despite *Dunsmuir*, "patent unreasonableness" will live on in British Columbia, but the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law.

[28] In *Shaw v. Phipps*, this Court considered and applied *Khosa* to determine the content of the standard of review now to be applied to decisions of the Ontario Human Rights Tribunal in light of the statutory patent unreasonableness standard.

[29] It is important to note a key distinction between the British Columbia legislation and the Ontario human rights legislation. The British Columbia statute does not merely state the standard, but rather it stipulates various factors that would make a decision patently unreasonable. However, in the Ontario legislation there is no guidance provided as to what the term "patently unreasonable" means. I agree with the observations of the Divisional Court in *Shaw v. Phipps* at paras. 37-38 that the Ontario Legislature obviously intended that the newly created Human Rights Tribunal should be reviewed on the highest deferential standard of review and should be accorded the same high degree of deference accorded to other experienced and expert administrative tribunals such as the Ontario Labour Relations Board, labour arbitrators, and the Workplace Safety and Insurance Appeals Tribunal.

[30] However, as was noted in *Shaw v. Phipps*, the Supreme Court of Canada has signalled a clear shift away from making a distinction between decisions that are patently unreasonable and those that are merely unreasonable, having concluded that there is "no meaningful way in practice of distinguishing" the two and that it would be inconsistent with the rule of law "to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*."[15]

[31] The Ontario Court of Appeal has rejected the suggestion that there is a spectrum or continuum of deference within the reasonableness standard, with varying degrees of deference within that standard.[16] There is but one reasonableness standard. However, again as noted in *Shaw v. Phipps*, context is important. In *Khosa*, Binnie J. stated at para. 59 that reasonableness "takes its colour from the context." The Divisional Court in *Shaw v. Phipps* also referred at para. 40 to an article by Professor Gerald Heckman who suggests that the range of possible, acceptable outcomes may expand or contract depending on factors such as the nature of the question and the expertise of the decision maker.

[32] The underlying reasoning in *Dunsmuir* leads to the conclusion that labelling a standard as "reasonableness" or "patent unreasonableness" is largely a matter of semantics. The Supreme Court stipulated that the elimination of the patent unreasonableness test does not mean that tribunals previously reviewed on that standard are now to be accorded less deference. The Legislature has required that the Tribunal be reviewed on that highest deferential standard. As was found in *Shaw v. Phipps* at para. 41, "the highest degree of deference is to be accorded to decisions of the Tribunal on judicial review with respect to determinations of fact and the

interpretation of human rights law, where the Tribunal has a specialized expertise." However, decisions of the Tribunal are required to be rationally supported and to fall within a range of possible, acceptable outcomes that are defensible in fact and law. Otherwise, they will be considered to be "patently unreasonable" within the meaning of the legislation.

[33] With respect to issues of procedural fairness and natural justice, there is no need to determine a standard of review. It is clear that given the nature of this proceeding, rules of procedural fairness applied. If fundamental rules of procedural fairness are not observed, this may render the proceeding unfair, which is a sufficient ground, standing alone, to set aside the decision.[17]

D. ANALYSIS

(i) The employer's missing witness

[34] According to the letter from Mr. Barnett, he was unable to attend the hearing because he was required to travel to East Africa to deal with an emergency involving his daughter who resides there.

[35] There can be no doubt that Mr. Barnett was a key witness for Audmax. Mr. Barnett was listed by Audmax as a witness who would be called to testify at the hearing. He shared office space with and was a consultant to Audmax, including on matters involving personnel. It was Mr. Barnett who provided the microwave for the lunchroom and he was involved in both creating and implementing the office policy about its use. He was present at the May 16, 2008, meeting with Ms. Saadi about her manner of dress and at the June 3, 2008, meeting at which she was dismissed. Mr. Barnett was also to have testified as to Ms. Saadi's conduct, which the employer considered to be suspicious, including secretive cell phone use in the office, unauthorized intrusions into other people's desks, and missing files.

[36] The applicant Audmax does not challenge the adjudicator's ruling that the testimony of Mr. Barnett should not be admitted through an unsworn written synopsis. It is acknowledged that the case involved credibility issues, that Mr. Barnett's evidence was important and contentious, and that it would not be fair to the complainant to admit such evidence without giving her the opportunity to cross-examine Mr. Barnett. The applicant argues, however, that the adjudicator ought to have explored other options for obtaining Mr. Barnett's evidence.

[37] Ms. Saadi argues that since Ms. Telfer did not request an adjournment in order to obtain the evidence of Mr. Barnett, there can be no criticism of the failure of the adjudicator to consider that possibility. I do not agree. It was apparent from Ms. Telfer's witness list, and from her attempt to introduce Mr. Barnett's evidence in writing, that she was relying upon his evidence in her defence. She was unrepresented by counsel at the hearing and not fully conversant with her rights. In my view, it was incumbent on the adjudicator to consider the implications for Ms. Telfer and Audmax of his refusal to accept Mr. Barnett's evidence in written form and to provide Ms. Telfer with some information about her options.

[38] In *Toronto Dominion Bank v. Hylton*[18] the Ontario Court of Appeal ordered a new hearing based on the failure of a motion judge to properly protect the rights of an unrepresented litigant who had requested an adjournment. Epstein J.A. stated at para. 39:

> Once again, the fact that a party is self-represented is a relevant factor. That is not to say that a self-represented party is entitled to a "pass". However, as part of the court's obligation to ensure that all litigants have a fair opportunity to advance their positions, the court must assist self-represented parties so they can present their cases to the best of their abilities. [Emphasis added.]

[39] The Court of Appeal referred with approval to the following "helpful list" of ways in which a decision maker should assist unrepresented litigants, as set out by Linhares de Sousa J. on appeal from an arbitrator in a family law dispute:

> [N]umerous Court decisions have reiterated the principle again and again, that self-represented parties are entitled to receive assistance from an adjudicator to permit them to fairly present their case on the issues in question. This may include directions on procedure, the nature of the evidence that can be presented, the calling of witnesses, the form of questioning, requests for adjournments and even the raising of substantive and evidentiary issues.[19] [Emphasis added.]

[40] Ms. Telfer stated in her affidavit that if the adjudicator had advised her of the right to seek an adjournment, she would have requested a delay in the hearing until Mr. Barnett could attend. The fact that a previous adjournment of the hearing date had been obtained in this case does not mean that Ms. Telfer must be taken to have known about the right to request an adjournment. That adjournment was arranged in advance of the hearing date and at a time when Ms. Telfer and Audmax were represented by counsel. In my view, in this situation it was incumbent upon the adjudicator to at least raise the possibility of an adjournment in order to accommodate the attendance of Mr. Barnett to testify. Since no inquiries were made as to when Mr. Barnett would be available to attend, it is not clear how long an adjournment would have been required. However, there is nothing to indicate that an adjournment would have caused any prejudice to the other parties. Further, other options short of an adjournment of the hearing could have been explored. For example, it might have been possible to proceed with other witnesses, and schedule the testimony of Mr. Barnett at a later date, or it might have been possible to obtain his evidence through video or audio conferencing.

[41] If an adjournment or some other accommodation had been requested, the adjudicator would have been required to consider the "evidence and strength of the evidence of the reason for the adjournment request, the history of the matter including deliberate delay or misuse of the court process, the prejudice to the party resisting the adjournment and the consequence to the requesting party of refusing the request."[20] None of these issues were considered by the adjudicator in this case. He simply dismissed the request to admit the evidence in writing and gave no consideration to any other options that might be available to ensure the unrepresented parties had a fair opportunity to present their defence.

[42] That is not to say that an adjournment of the hearing should necessarily have been granted in this case. However, the failure to even consider the available options was unfair to the unrepresented parties and compromised the overall fairness of the hearing. This constitutes a breach of procedural fairness that could, on its own, result in the decision being quashed.[21] In this case, the adjudicator compounded the problem, and the unfairness, by drawing an adverse

inference from the failure of Mr. Barnett to testify on critical issues related to the reason for Ms. Saadi's dismissal.[22]

[43] I do not accept the respondent's argument that this issue caused no unfairness to the applicants because the evidence of Mr. Barnett could not have affected the result. He was a crucial witness for the employer. He was present with Ms. Telfer at two critical meetings: one involving the dress code and the other involving the dismissal. His very presence at the disciplinary meeting regarding the dress code was found by the adjudicator to constitute discrimination. He had direct involvement in the development and enforcement of the microwave policy. On some issues, the adjudicator did not accept the evidence of Ms. Telfer and might well have been persuaded to the contrary if there was corroborative evidence from Mr. Barnett. Finally, on the key issue of whether the employer had dismissed Ms. Saadi for discriminatory reasons, the adjudicator held that the employer had failed to prove its allegations as to the non-discriminatory reasons for firing Ms. Saadi. The adjudicator based that conclusion, in part, on an adverse inference drawn from the failure of the employer to call Mr. Barnett as a witness. Given the circumstances in which the employer was unable to call Mr. Barnett, the palpable unfairness of that ruling is obvious.

[44] Accordingly, in all of the circumstances, I find the adjudicator breached principles of procedural fairness in the manner in which he handled Mr. Barnett's inability to testify at the set hearing dates.

<u>(ii) Aspects of the complaint that were dismissed</u>

[45] A number of the allegations made by Ms. Saadi were found by the adjudicator to be unsubstantiated. For example, he found that although some questions were asked at the initial job interview about Ms. Saadi's place of origin, in the context of an organization providing services to immigrant women, such questions were not out of place and had no discriminatory impact on Ms. Saadi. Similarly, when Ms. Saadi mentioned in the workplace that her parents were from Bangladesh, Ms. Telfer had asked questions about her understanding of how Bangladeshi women were treated. The adjudicator found that these questions had relevance to the work of Audmax, whose clients included many immigrant women from Bangladesh, and were not discriminatory.

[46] Audmax had a policy that employees were required to speak English in the workplace, except when dealing with Francophone clients. Ms. Saadi alleged that this policy was discriminatory towards her. The adjudicator accepted the evidence of Ms. Telfer that she had instituted the policy prior to Ms. Saadi's hire because of a conflict that had arisen in the workplace involving two French-speaking employees. The adjudicator noted that French is not Ms. Saadi's first language and that she does not speak French regularly or at a high level of proficiency. He therefore concluded that the English-only policy was not a proxy for racial discrimination against Ms. Saadi.

[47] The adjudicator also accepted Ms. Telfer's explanation for warning her staff to be careful when using the office email system for personal emails because she believed the authorities could monitor personal emails. He found no discriminatory basis for such advice.

[48] At the time she was hired, Ms. Saadi was one of three Muslim women employed by Audmax. Not long after her hiring, the other two Muslim women resigned. Ms. Saadi believed that thereafter she was subjected to suspicion and distrust based on her Muslim identity and discriminatory stereotypes. Ms. Telfer acknowledged being suspicious and distrustful of Ms. Saadi, but alleged she had good reasons for it. The adjudicator did not accept Ms. Telfer's evidence as to the basis for her suspicions.[23] However, the adjudicator also did not find that the surveillance and distrust of Ms. Saadi were motivated, whether consciously or unconsciously, on the basis of Ms. Saadi's religion or ethnic origin. He held at para. 83 that to infer such a motivation from the circumstantial evidence available would be "too speculative."

(iii) The Microwave Policy

[49] Audmax had a workplace environmental sensitivity policy. It included a ban on the use of scented deodorants and perfume as well as restrictions on using the microwave to reheat foods that had a strong odour or that could affect persons with seafood or peanut allergies. Ms. Saadi alleged that she was singled out for discriminatory enforcement of the microwave policy based on the intersection of her race, ancestry, ethnic origin and place of origin.

[50] The adjudicator ruled at para. 46, "Nothing in the evidence suggests that the [employer] deliberately targeted [Ms. Saadi] for discriminatory enforcement of the microwave policy." His ultimate conclusion that Ms. Saadi had been discriminated against in respect of the policy must, therefore, have been based on adverse effect discrimination.

[51] Although the adjudicator referred in another portion of his reasons dealing with the dress code (at para. 60) to the Supreme Court of Canada's landmark decision in *Meiorin,*[24] in the course of his analysis on the microwave policy he made no reference to that case or to the principles it established. Indeed, he made no reference to any applicable legal principles. The only authority he mentioned is a British Columbia Human RightsTribunal decision dealing with the preparation of cooked foods in one's own home as an expression of ethnicity and ancestry.[25] The adjudicator correctly pointed out that the workplace is a different environment from one's own home, but did not deal with whether there is anything about ethnicity and ancestry generally, or in the particular case of Ms. Saadi, that requires the reheating of particular foods at lunchtime in the workplace.

[52] The adjudicator then observed at para. 47 that the microwave policy was "a moving target" that was virtually impossible to comply with because there was no list of foods that would fall within the policy. He stated that other staff members who had previously used the microwave had ceased using it completely because of Ms. Telfer's vigorous enforcement of the policy, but that Ms. Saadi continued to use it. It is difficult to understand how the policy can be said to have an adverse effect on Ms. Saadi if she continued to use the microwave whereas other employees had stopped using it altogether. It would appear from that factual conclusion that the policy had less impact on Ms. Saadi than on others.

[53] It is also difficult to discern from the reasons how Ms. Saadi's ancestry or ethnic origin relate at all to her difficulty with the microwave policy. The adjudicator makes no findings as to what foods Ms. Saadi was criticized for reheating in the microwave, and there is no transcript of the evidence. However, in Ms. Saadi's complaint she alleged that she was disciplined for

microwaving food that had been given to her by a co-worker who is originally from Tunisia. I do not see how the ethnicity and ancestral rights of a Bengali-Canadian Muslim are adversely affected by being prevented from reheating somebody else's Tunisian food.

[54] The reasons are so sparse on the factual underpinnings for this aspect of the decision that it is impossible to follow the pathway by which the adjudicator came to his conclusion of discrimination. The adjudicator stated at para. 48 that the policy was ambiguous and that such ambiguity "leads to arbitrariness and the conditions for discriminatory enforcement." He then concluded, "[t]o the extent that the applicant was disciplined for her violations of the microwave policy, and that those violations constituted a factor in her termination, I find she was discriminated against on the basis of her ancestry and ethnic origin."

[55] This is a bald conclusion that is unsupported by any factual findings. There is no reference to what the discipline was, what the violations were, or how they were connected in any way to Ms. Saadi's ethnic origin or ancestry. The fact that ambiguous standards can lead to discriminatory enforcement does not mean that this occurred here, particularly in light of the finding made by the adjudicator that Ms. Saadi was not directly targeted for enforcement.

[56] There is also no actual finding that the policy had a discriminatory impact on people of a particular ethnic origin. Further, there is no analysis whatsoever as to whether the employer had justified the policy as required under *Meiorin* by demonstrating: (1) that the standard was adopted for a purpose rationally connected to the performance of the job; (2) that the employer honestly and in good faith believed the policy was necessary to the fulfillment of that legitimate work-related purpose; and (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. Indeed, there is no reference whatsoever to any of these concepts.

[57] In short, the reasons do not disclose a rational basis for the conclusion that there was discrimination against Ms. Saadi in respect of the microwave policy. In that sense, the reasons cannot be said to be reasonable. In *Dunsmuir*, the Supreme Court held that a consideration of reasonableness includes both outcomes and the process of articulating reasons. The Court described reasonableness at para. 47 as being "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." The reasons with respect to the microwave policy are neither transparent nor intelligible. It is not possible to determine how the adjudicator reached the conclusion he did. The outcome may or may not be patently unreasonable; it is not possible to say, because the articulation of the reasons is inadequate to justify the conclusion. Accordingly, the conclusion of discrimination in respect of the microwave policy is irrational and patently unreasonable. It cannot stand.

[58] Further, the reasons are not adequate to explain the basis for the decision or to permit meaningful appellate review, and therefore also constitute a breach of principles of procedural fairness and natural justice. This is also a sufficient basis to set aside the conclusion with respect to the microwave policy.[26]

(iv) The Office Dress Code

[59] Audmax had a written dress code policy requiring its employees to wear "business attire" in the workplace. The employer argued that this policy was a *bona fide* occupational requirement as the company was in the business of advising newcomers with respect to finding employment in Canada, and it was essential that staff lead by example and dress with an appropriate degree of professionalism.

[60] As an observant Muslim woman, Ms. Saadi adhered to the principle of "modest dress and behaviour" and wore a *hijab* to cover her hair. She argued that the employer discriminatorily singled her out for corrective action regarding her mode of dress in a manner that constituted discrimination and harassment. She further alleged that the employer failed to accommodate her personal choice with respect to the style of *hijab* she wore.

[61] This aspect of the complaint is based on a meeting that took place on May 16, 2008, involving Ms. Telfer, Mr. Barnett and Ms. Saadi. At that meeting, Ms. Saadi was spoken to about various aspects of what she was wearing that day, which the employer felt did not constitute proper business attire. In particular, the employer objected to: an ankle bracelet that "jingled;" open-toed "slippers;" clothing that was described as a "tight short skirt and leggings;" and a form of head covering described as a "cap."

[62] The adjudicator made clear findings with respect to the ankle jewellery and footwear, stating that there was no link between those and any *Code* protected ground. Nobody takes issue with those findings.

[63] However, the adjudicator found that the employer breached the *Code* in relation to the clothing and the *hijab*. The process by which the adjudicator reached that conclusion on these two points is not clear, either in fact or in law.

[64] The adjudicator stated at para. 59 that employers are "entitled to maintain and enforce appropriate dress code policies." He then stated that such policies must not discriminate on their face (giving as an example a "no *hijab* allowed" rule). He further held that policies must not discriminate indirectly through the application of a neutral rule that has an adverse impact on a protected group (giving as an example a rule that no head coverings are allowed), unless the employer can show the rule is a necessary requirement of the job and that there can be no accommodation without undue hardship. The adjudicator then referred to the three stage test in *Meiorin*. There is no difficulty with the adjudicator's statement of the law in this regard. However, he failed to apply those legal principles to the case before him.

[65] In particular, although the adjudicator made a finding of discrimination, it is unclear if that finding is based on a conclusion that the employer discriminated directly by targeting Ms. Saadi and requiring her to dress in a manner contrary to her religious beliefs, or whether the finding is based on the conclusion that the dress code policy caused an adverse impact that the employer failed to properly accommodate.

[66] In respect of the clothing, this difficulty is compounded by conflicting and vague factual findings.

[67] The adjudicator made no clear finding as to what Ms. Saadi was actually wearing on May 16, 2008, the only time the employer raised the issue of her compliance with the dress

code. He stated that he rejected the employer's assertion that Ms. Saadi wore a tight short skirt and leggings. He said he preferred Ms. Saadi's evidence that she would not wear such an outfit because as an observant Muslim woman she would never wear a tight or short skirt.

[68] No reasons whatsoever are provided for rejecting the evidence of Ms. Telfer, or for accepting the evidence of Ms. Saadi. This makes appellate review of the findings illusory. The Court of Appeal held in *Law Society of Upper Canada v. Neinstein*[27] that when credibility is an important factor, bald conclusions as to the credibility of one witness as compared to another will not suffice. The Court held:

> [83] The reasons relating to C.T.'s complaints compel the conclusion that those reasons do not address the "why" component required in reasons for judgment. The Hearing Panel's reasons are a combination of generic generalities (e.g. "gave her evidence in a forthright manner"), unexplained conclusory observations (e.g. "withstood cross-examination well"), material omissions (e.g. the failure to articulate any analysis of Mr. Neinstein's evidence) and uncertainty as to the legal principles applied to the credibility analysis (e.g. the corroboration finding). Taken together, these inadequacies render the reasons in respect of C.T.'s allegations so inadequate as to prevent meaningful appellate review.
>
> [84] The Hearing Panel's reasons for accepting S.G.'s allegations offer even less insight into its decision than do its reasons concerning C.T.'s allegations. Examined from a functional perspective, the Hearing Panel's reasons relating to S.G.'s allegations come perilously close to constituting no reasons at all. After summarizing the relevant evidence, the Hearing Panel sets out its findings of fact, all in favour of S.G., in a series of conclusory statements, none of which offer any explanation for the findings or an analysis of the evidence relevant to those findings (paras. 136-148).

[69] The credibility reasons provided by the tribunal that were found to be lacking in the *Neinstein* case were far more detailed and specific than is the case here. Indeed, apart from the bald statement that he preferred the evidence of one witness over another, the adjudicator gave no actual reasons for any of his credibility findings. That is particularly problematic in this situation where resolution of the issue depended upon whose testimony was believed.

[70] Ms. Telfer attempted to place into evidence a photograph she had found on the internet to illustrate the type of outfit she said Ms. Saadi had been wearing that day. The adjudicator held that this evidence was not admissible because it was raised late in the hearing and had not been put to Ms. Saadi in cross-examination. The photograph in question is one of the exhibits we admitted as new evidence on this application. It provides a graphic illustration of the kind of apparel the employer says Ms. Saadi was wearing. I see no principled basis for excluding such evidence from the hearing. It is simply a visual aid to explain a type of clothing that is not easy to describe orally. The adjudicator appeared to be having difficulty understanding Ms. Telfer's oral testimony as to the type of clothing to which she was referring. I would have thought a photograph would have been of some assistance.

[71] Although he did not say so explicitly, the adjudicator appears to have relied on the rule in *Browne v. Dunn*[28] to exclude this evidence. In my view, that is an overly rigid approach to the evidence in a case of this nature, particularly in view of the fact that the employer was not represented by counsel and could not be expected to know about the rule. In any event, even applying the rule, exclusion of the evidence should be a last resort and only exercised where any other remedy would be unduly prejudicial to the other party. In this situation, it is difficult to see how Ms. Saadi can be said to be taken by surprise or to have been prejudiced by the introduction of the photograph. She would have the right to testify in response and to either accept or reject the accuracy of this picture as representative of the type of clothing she was wearing. Indeed, given the crucial role of the clothing Ms. Saadi wore on May 16, 2008, and the fact that Ms. Saadi herself relied on this particular meeting in support of her claim of discrimination, it is surprising that the actual clothing, or a photograph of it, was not introduced into evidence by Ms. Saadi. She was represented by counsel throughout and the importance of the clothing would have been obvious. There is no reference in the reasons to the failure of Ms. Saadi to present this evidence, which was within her sole control, nor is there any reference to any reason for not having such evidence before the Tribunal. However, quite apart from whether an adverse inference could or should have been drawn against Ms. Saadi on this issue, I consider it unfair to have prevented Ms. Telfer to use a visual aid to explain her oral testimony on this crucial point.

[72] The insufficiency of the factual findings as to what Ms. Saadi was wearing is exacerbated by conflicting findings with respect to the dress code itself.

[73] At paras. 53 and 54 in his reasons, the adjudicator refers to the dress code as being in writing, included in orientation material, “reasonably clearly drafted,” and “well known to all staff.” He further noted that the employer “went to great lengths to illustrate ways of complying with the policy.” He described the policy as requiring “business attire” and stated that the policy listed things that were appropriate, as well as things that were forbidden (such as jeans and running shoes).

[74] It is unclear how such a policy would conflict with Ms. Saadi’s religious requirements to dress in a modest fashion. There would not appear to be anything specific in the policy that would conflict with such a requirement, nor is there anything about modest clothing that would conflict with a business attire requirement.

[75] Later in his reasons, at para. 65, the adjudicator indicated that he found Ms. Telfer’s evidence as to the dress code requirements to be “confusing at best,” stating that “[s]he testified that the policy would tolerate skirts with nylons, socks or bare legs, but that leggings or tight pants would not be acceptable under skirts.” He then held that the “dress code appears to be arbitrarily applied, subject to Ms. Telfer’s opinions and preferences about how she wants her staff to look.” That conclusion would appear to be at odds with the earlier finding that the policy was clear and well known to staff. It would also seem to be pointing to a finding of direct discrimination as to the manner in which the policy was applied. However, immediately after stating that the policy was arbitrarily applied, the adjudicator made his final ruling on the point, stating:

> This constituted adverse-effects discrimination on the ground of creed against the applicant, whose religiously conforming attire at times conflicted with the

> respondents' dress code. There is no indication that the dress code comprised a *bona fide* occupational requirement within the meaning of the Code.

[76] It is difficult to rationalize this legal conclusion with the factual findings or the case law. First of all, there does not appear to have been any determination that the dress code had an adverse impact on Ms. Saadi because of the requirements of her religion. What was the neutral requirement of the policy that conflicted with the religious duty? There does not appear to have been one.

[77] Secondly, the statement that Ms. Saadi's "religiously conforming attire at times conflicted with the dress code" is not supported by any factual findings. There was only the one occasion that this came up, and the objection raised by the employer was that Ms. Saadi's clothing was inappropriate because it was too tight and too short. That is the very opposite of modest and religiously conforming attire. The employer's evidence was rejected by the adjudicator, but without any description of what Ms. Saadi was actually wearing, making it impossible to determine if there was something about that clothing that was religiously required and not in conformity with the policy.

[78] Third, the bald conclusion that there is "no indication that the dress code comprised a *bona fide* occupational requirement" is unsupported by any legal reasoning or factual findings. There is no consideration of the test established in *Meiorin*, no finding as to whether the dress code requirement in this workplace was rationally connected to the nature of the work, no determination as to whether the policy was adopted by Audmax in good faith, and no analysis of whether the imposition of the rule was reasonably necessary in the sense that accommodation short of undue hardship was not possible.

[79] Finally, if the finding was actually that there was no problem with the policy itself but that the employer used the policy as a ruse to harass Ms. Saadi because of her race or creed, that is not apparent from the reasons and is unsupported by any factual determinations made.

[80] Given the dearth of reasons on key points, the flawed legal reasoning, and the absence of important factual findings, the decision on this point cannot be said to be rational or logical. It would appear that there was something about what Ms. Saadi was wearing on that particular day that attracted the employer's attention in a negative way. It may be that the employer's dress code was to some extent subjective and a reflection of personal taste, but that does not make it discriminatory. I can see no line of reasoning that could logically lead to the conclusion that conforming to the employer's business attire dress code would conflict with Ms. Saadi's religious beliefs. The reasons disclose no contradiction between dressing modestly and dressing in a professional business manner. Nor do the reasons disclose any basis for finding that the employer's imposition of discipline with respect to the dress code on May 16, 2008, was in any way directed at, or connected to, Ms. Saadi's race or religion. Accordingly, in my view, the decision on this point is patently unreasonable.

[81] Similar problems arise in the adjudicator's analysis of the issues relating to the *hijab*. The adjudicator accepted that the employer supported the right of Muslim women to wear a *hijab* in the workplace, that Ms. Saadi (and other employees) had worn a *hijab* every day at work, and that various forms of head coverings had been accepted by the employer for other

employees, including a simple bandana. The issue with the *hijab* arose only on May 16, 2008. The employer described what Ms. Saadi was wearing as a "cap" and objected to it as not looking professional. Ms. Saadi apparently acknowledged that what she was wearing was not the traditional *hijab,* but rather what she considered to be an elegant form of the *hijab,* which she had ordered online from Indonesia, believing it would enhance her professional appearance.

[82] In my opinion, Ms. Saadi, as the owner of the head covering in question and knowledgeable as to where one might find an image of it online, could reasonably be expected to provide the Tribunal either with the item itself or an exact photograph of it. She did not do so, leaving both the Tribunal and this Court to speculate as to whether it could be considered to be appropriate office attire.

[83] I also note that there is no express finding that once Ms. Saadi provided an explanation with respect to the headdress in question she was prohibited from wearing it. Rather, it would appear that the employer merely included the "cap" as one of a number of items worn by Ms. Saadi that day that did not, in the employer's view, constitute proper business attire. There is no indication that Ms. Saadi was thereafter prevented from wearing that form of *hijab.*

[84] The adjudicator held at para. 69 that "[t]he *Code* guarantees not only a woman's right to wear a religious headdress in the workplace, but also her right to choose the <u>form</u> of religious headdress, subject only to *bona fide* occupational requirements." [Emphasis in original.] He then held that there was "no evidence beyond Ms. Telfer's description of the headdress as a 'cap' to suggest that [Ms. Saadi's] form of *hijab* was, by any fair, objective and non-discriminatory standard, unprofessional." He referred to the dress code policy as "non-neutral, vague and arbitrary" and held that the "singling out of [Ms. Saadi] for corrective action on the basis of her chosen form of *hijab*, which was clearly worn for religious reasons, amounted to discrimination."

[85] Although the adjudicator makes passing reference to the policy having an adverse effect, it would seem that his finding of discrimination is based on a conclusion that the employer directly discriminated against Ms. Saadi based on her religion. It is difficult to determine whether the headdress in question is unprofessional in appearance without seeing it. It is unreasonable to impose on the employer an obligation to prove the headdress is objectively unprofessional in appearance when the employer has no access to the headdress itself and the employee does. The fact that the employer had no problem accommodating different kinds of headdress in the past, both with respect to Ms. Saadi and others, suggests to me that what was at issue here was a question of style and taste, not religious accommodation.

[86] In my view, the adjudicator proceeded on an illogical, and legally incorrect, course of reasoning. First, he held that what Ms. Saadi was wearing on the day in question was consistent with her religious requirements. Second, he held that what Ms. Saadi was wearing was, at least according to the employer, inconsistent with the dress code. He therefore concluded that the dress code violated Ms. Saadi's religious rights. The logical step that the adjudicator missed was a consideration of whether it was possible for Ms. Saadi to comply with the dress code without compromising her religious requirements. There was nothing about Ms. Saadi's religion that required her to wear the particular form of *hijab* she was wearing on the day in question. If it was possible for her to wear a religiously acceptable form of *hijab* that was fully consistent with the dress code (as indeed she had done every day for six weeks), her religious rights were not

affected. All that was affected was her sense of style, which apparently was in conflict with that of her employer.

[87] Similarly, certain types of apparel that would not constitute a "modest" form of dress might be permitted by the dress code (such as a sleeveless blouse under a jacket). However, Ms. Saadi was not required to wear a sleeveless blouse in order to comply with the dress code. She could comply with both the dress code and her religious requirements by wearing a long-sleeved garment, provided it was suitably professional in appearance. If she chose, for example, to wear a battered old sweatshirt and baggy flannelette pants, the requirements of her religion would likely be met, but surely her employer could legitimately complain that this was not suitable attire for a professional office environment.

[88] The adjudicator in this case made an irrational decision by concluding that discrimination had been established any time an item of clothing was questioned and that clothing complied with the requirements of the complainant's religion. He ought to have considered whether the dress code, or the employer's enforcement or interpretation of it, conflicted with what the employee was <u>required</u> to wear as part of her religion. He did not consider that issue, and reached a conclusion that is not logically supportable. Therefore his decision is patently unreasonable as a question of fact and a question of law.

(v) May 16, 2008, Meeting with the Complainant—Procedural Duty to Accommodate

[89] The adjudicator held that the manner in which the employer conducted the May 16, 2008, meeting to discuss Ms. Saadi's attire was itself discriminatory. The adjudicator's finding of discrimination based on the breach of a procedural duty to accommodate rested on two found points: (1) the employer adopted a "corrective" approach, rather than a "collaborative" approach, to what were "clearly accommodation issues"; and (2) the presence of Mr. Barnett at the meeting.

[90] On the first point, the adjudicator provided no analysis as to what was corrective or disciplinary about the meeting, nor did he address whether from the employer's perspective this was "clearly" an accommodation issue. There is no indication as to what would constitute an acceptably "collaborative" approach, or how the employer departed from that standard. Indeed, there is no discussion at all as to the tone of the meeting, or what was said. There is simply a bald conclusion that the meeting was corrective and therefore discriminatory. That is a patently unreasonable conclusion, both in fact and in law, and does not comply with the Tribunal's obligation to provide adequate reasons to support its decision.

[91] The adjudicator took great exception to the presence of Mr. Barnett at the meeting, who he described as a mere office neighbour. He appears to have rejected the evidence of Ms. Telfer about Mr. Barnett's close connection to Audmax and her reliance on him for advice, including on personnel issues. No reasons are provided for rejecting her evidence. This error is compounded by the fact that the employer was unfairly deprived of Mr. Barnett's evidence on this issue.

[92] The adjudicator was particularly critical of the employer's decision to permit a man to be present at a meeting to discuss Ms. Saadi's style of dress, which he said contributed to the

discrimination by failing to consider her needs and sensitivities as an observant Muslim woman. Further, he held that while his finding of discrimination in this regard was based on the intersecting grounds of sex and creed, he would have come to the same conclusion on the ground of sex alone. He stated, "No woman in these specific circumstances, regardless of her level of religious observance or what faith, should be subjected to this form of disciplinary meeting."

[93] To the extent this represents a finding that the participation of a man in any meeting about a female employee's attire constitutes sex discrimination, I find this decision to be patently unreasonable. If there were particular sensitivities involving this employee or the issues that were discussed, they are not disclosed in the reasons. On its face, a discussion about what constitutes proper business attire is not one that would require the exclusion of the opposite sex.

(vi) Grounds for Termination of Employment

[94] On June 3, 2008, prior to the expiry of her probation period, Ms. Saadi was advised that she was being dismissed due to a lack of "organizational fit." The adjudicator found that Ms. Saadi's ethnic and/or religious background was a contributing factor in her termination. His reasoning was based on two findings: (1) that Ms. Saadi had been discriminated against during her employment with respect to the enforcement of the microwave policy, the manner of discipline and the style of *hijab*; and (2) that the employer had failed to prove its allegations supporting its decision to terminate her employment.

[95] I have already dealt with the findings of discrimination during the course of the employment. In my view, those findings are patently unreasonable and unsupported by adequate reasons, and cannot stand.

[96] Much therefore depends on whether the employer has established non-discriminatory grounds for terminating Ms. Saadi's employment. Ms. Telfer acknowledged that Ms. Saadi was being subjected to heightened supervision and scrutiny in the workplace. She testified that this was because of suspicious behaviour by Ms. Saadi, including: missing files; secretive cell phone use in the office; and unauthorized intrusions into other people's desks.

[97] The adjudicator found that the employer had failed to prove these allegations upon which the termination was based. It follows that he must not have accepted Ms. Telfer's evidence on these points, although he provides no reasons for rejecting her evidence. The adjudicator refers to a lack of particularity and supporting documentation prior to the hearing, but these concerns would form the basis for excluding evidence or ordering production, and would not provide a basis for rejecting sworn testimony. The only reason the adjudicator provides for rejecting the employer's position is found at para. 82, as follows:

> At the hearing, the [employer] failed to produce two key witnesses, Paul Barnett and Margaret Andoseh, whose evidence would have been critical to establishing that the [employer's] suspicions about [Ms. Saadi] were well founded. <u>I must draw a negative inference from the failure of these witnesses to testify and therefore conclude that the suspicions about [Ms. Saadi] are unproved</u>. [Emphasis added.]

[98] There is no indication that Ms. Telfer, as a lay person, was aware or had been advised that the adjudicator might draw an adverse inference from her unexplained failure to call Ms. Andoseh as a witness. However, it is worth noting that Ms. Andoseh had originally been named as a personal respondent to the complaint of discrimination and was on the list as an expected witness for the respondents. Shortly before the hearing, Ms. Saadi dropped the complaint against Ms. Andoseh. She was not then called as a witness by the other respondents. Caution should be exercised before placing too much weight on an adverse inference drawn in these circumstances.

[99] Drawing an adverse inference with respect to the failure of Mr. Barnett to testify is particularly problematic. Mr. Barnett was on the witness list. He was willing to testify, and there is every reason to believe he would have testified if he had not been called away unexpectedly on a family emergency. An explanation was provided for his absence. Audmax attempted to provide his evidence in writing, which was refused by the adjudicator and no other option for obtaining his evidence was raised by the adjudicator. It is incorrect in law, and patently unreasonable on the facts, to draw an adverse inference in this situation. An adverse inference is appropriately drawn when one would expect a witness to be called and where it is reasonable to infer that the failure to call him is based on the likelihood that his testimony would be unfavourable. In this case, an explanation was provided for Mr. Barnett’s absence, and there was no reason given for not accepting that. Further, given the written summary of Mr. Barnett’s proposed evidence, there was every reason to believe his evidence would be supportive of, rather than unfavourable to, the position taken by the employer.

[100] Because the adverse inference with respect to Mr. Barnett was so pivotal to the adjudicator’s conclusion that Ms. Saadi’s dismissal was discriminatory, the decision is not supportable. I find it is patently unreasonable. Further, the way in which the adjudicator treated the absence of Mr. Barnett on this key issue compounds his initial breach of natural justice in proceeding with the hearing without providing options to the employer for obtaining Mr. Barnett’s testimony.

E. CONCLUSION AND ORDER

[101] There are numerous difficulties with the adjudicator’s decision on all key points. Generally speaking, the reasons are inadequate to explain the conclusions reached as a question of fact or law. It is simply not possible to logically follow the pathway taken by the adjudicator and to determine the reasonableness of the conclusions reached. The reasons therefore cannot be said to allow for appropriate judicial review, nor are they intelligible within the meaning of *Dunsmuir.*

[102] The breach of procedural fairness with respect to Mr. Barnett’s testimony is significant. He was an important witness for the employer due to his key role in the microwave policy and his participation in the two meetings at the heart of the findings of discrimination. Drawing an adverse inference from his failure to testify compounds the unfairness to the employer in this situation.

[103] The decision is also flawed in respect of much of the reasoning that is set out. In particular, there is an overall failure to indicate whether discrimination is direct, or based on the adverse impact of a neutral policy, and the test in *Meiorin* is not properly considered and applied. There is also a common failure to tie the alleged discrimination or discriminatory impact to a prohibited ground of discrimination.

[104] It is necessary to look at these various issues cumulatively. If taken separately, some might not reach the level of patent unreasonableness required to justify setting aside the entire decision. However, considered cumulatively, I find the decision as a whole is fatally flawed and can only be described as patently unreasonable. In these circumstances, I would set the decision aside and remit the case to the Tribunal for a new hearing before a different adjudicator.

[105] In light of that determination, there is no need to deal with the issues related to remedy. Since all the findings of discrimination fall, so too does the remedy.

[106] The applicants are entitled to their costs. I would fix those costs at $10,000, inclusive of HST and disbursements, payable by Ms. Saadi.

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MOLLOY J.

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WHALEN J.

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SWINTON J.

Released: January 18, 2011

CITATION: Audmax Inc. v. Ontario Human Rights Tribunal, 2011 ONSC 315
DIVISIONAL COURT FILE NO.: 28/10
DATE: 20110118

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

WHALEN, MOLLOY and SWINTON JJ.

BETWEEN:

AUDMAX INC. and MAXCINE TELFER

Applicants

– and –

HUMAN RIGHTS TRIBUNAL OF ONTARIO and SEEMA SAADI

Respondents

REASONS FOR DECISION

WHALEN J.
MOLLOY J.
SWINTON J.

Released: January 18, 2011

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[1] *Saadi v. Audmax Inc.*, 2009 HRTO 1627 (CanLII).

[2]Although the motion material refers to a third exhibit (an application form), that aspect of the motion was abandoned.

[3] (1980), 1980 CanLII 1877 (ON CA), 29 O.R. (2d) 513 (C.A).

[4] *Entrop v. Imperial Oil Ltd*. (2000), 2000 CanLII 16800 (ON CA), 50 O.R. (3d) 18 (C.A.).

[5] [2008] 1 S.C.R. 190, 2008 SCC 9 (CanLII).

[6] *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc*., 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 57; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (CanLII), at paras. 78-82, 110; *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247, 2003 SCC 20 (CanLII), at paras. 52-53.

[7] See D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

[8] *Dunsmuir*, at para. 47.

[9] *Human Rights Code Amendment Act, 2006,* S.O. 2006, c. 30.

[10] *Human Rights Code*, R.S.O. 1990, c. H.19.

[11] *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, 2009 SCC 12 (CanLII).
[12] *Toronto (City) Police Service v. Phipps*, 2010 ONSC 3884 (CanLII), 2010 ONSC 3884 (Div. Ct.).
[13] *R. v. Owen*, 2003 SCC 33 (CanLII), [2003] 1 S.C.R. 779, at para. 32.
[14] *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 58(2)(a)
[15] *Dunsmuir* at paras. 41-42, cited in *Shaw v. Phipps* at para. 39.
[16] *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* (2008), 168 A.C.W.S. (3d) 679, 2008 ONCA 436 (CanLII).
[17] *London (City) v. Ayerswood Development Corp.* (2002), 2002 CanLII 3225 (ON CA), 167 O.A.C. 120 (C.A.), at para. 10; *Razack v. Ontario (Human Rights Commission)* (2007), 2007 CanLII 48641 (ON SCDC), 231 O.A.C. 58 (Div. Ct.), at para. 16.
[18] 2010 ONCA 752 (CanLII).

[19] *Kainz v. Potter* (2006), 2006 CanLII 20532 (ON SC), 33 R.F.L. (6th) 62 (Ont. S.C.), at para. 65; see also *Cicciarella v. Cicciarella*, 2009 CanLII 34988 (ON SCDC), [2009] O.J. No. 2906, 72 R.F.L. (6th) 319 (Div. Ct.), at paras. 35-45.
[20] *Toronto Dominion Bank v. Hylton*, *supra*, at para. 38.
[21] *Kalin v. Ontario College of Teachers* (2005), 2005 CanLII 18286 (ON SCDC), 75 O.R. (3d) 523 (Div.Ct.), at paras. 30-39; *Igbinosun v. Law Society of Upper Canada* (2009), 96 O.R (3d) 138, 2009 ONCA 484 (CanLII), at paras. 34-49.

[22] This issue is discussed below under the heading *Grounds for Termination of Employment*.

[23] See below under the title *Grounds for Termination of Employment* for further analysis of this issue.
[24] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3 ("*Meiorin*").
[25] *Chauhan v. Norkam Seniors Housing Cooperative Assn.,* 2004 BCHRT 262 (CanLII), at para. 126.
[26] *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26 (CanLII); *Gray v. Ontario (Disability Support Program, Director)* (2002), 2002 CanLII 7805 (ON CA), 59 O.R. (3d) 364 (C.A.).

[27](2010), 99 O.R. (3d) 1, 2010 ONCA 193 (CanLII), at paras. 60-92.

[28] (1893) 1893 CanLII 65 (FOREP), 6 R. 67 (H.L. (Eng.)). See also *R. v. Hall*, 2010 ONCA 421 (CanLII), at para. 18: "The rule in *Browne v. Dunn* is a rule of fairness: if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given an opportunity to address the contradictory evidence."