COURT OF APPEAL FOR ONTARIO

CITATION: Shaw v. Phipps, 2012 ONCA 155

DATE: 20120313

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Goudge, Armstrong and Lang JJ.A.

BETWEEN

Michael Shaw and Chief William Blair

Appellants

and

Ronald Phipps

Respondent

and

Toronto Police Services Board

Respondent

and

Human Rights Tribunal of Ontario

Respondent

and

Ontario Human Rights Commission

Intervenor

Kevin A. McGivney and Lisa C. Cabel, for the appellants

Jayson Thomas, for the respondent Ronald Phipps

Antonella Ceddia, for the respondent Toronto Police Services Board

Margaret Leighton and Rochelle Fox, for the respondent Human Rights Tribunal of Ontario

Cathy Pike, for the intervenor Ontario Human Rights Commission

Heard: November 4, 2011

On appeal from the order of the Divisional Court (Wilson, Swinton and Nordheimer JJ.) dated October 6, 2010, with majority reasons by Wilson and Swinton JJ., reported at 2010 ONSC 3884 (CanLII), 271 O.A.C. 305, by way of judicial review of the decision of Kaye Joachim, Alternate Chair of the Human Rights Tribunal of Ontario, dated June 18, 2009.

Lang J.A.:

A. INTRODUCTION

[1] The Alternate Chair of the Human Rights Tribunal of Ontario (the Adjudicator) concluded that a police constable, Michael Shaw, discriminated against a letter carrier, Ronald Phipps, contrary to this province's human rights legislation.

[2] The decision arose from an incident that occurred while the police constable, and an officer trainee, were on patrol in an affluent neighbourhood. The police officers had been directed by their superiors to maintain a watch for white Eastern European men with a vehicle. Men fitting that description were suspected of cutting telephone lines in the area, which was a neighbourhood that Constable Shaw regularly patrolled. While Constable Shaw did not see any men matching the description in the directive, he observed Mr. Phipps.

[3] Mr. Phipps was dressed in a Canada Post uniform with a Canada Post satchel. He was delivering mail door-to-door. Constable Shaw's suspicions were aroused because Mr. Phipps was not the regular letter carrier and because he delivered mail in an order that Constable Shaw testified was unusual. By this point, Constable Shaw recognized that Mr. Phipps's skin colour was black, although he testified that this realization did not inform his suspicions. He testified that his concerns increased when Mr. Phipps knocked at the door of one of the houses. After Mr. Phipps finished his conversation with the householder who answered the door, Constable Shaw sent the officer trainee to make inquiries about the content of the conversation. The householder explained to the trainee that Mr. Phipps had been inquiring about some mis-delivered mail. Constable Shaw's suspicions were not mollified. To the contrary, he became concerned that Mr. Phipps might be wearing the postal uniform as a ruse.

[4] Constable Shaw decided to stop Mr. Phipps. He questioned him about his postal identification and had the trainee run Mr. Phipps's name through a criminal records search. When Constable Shaw learned nothing adverse about Mr. Phipps, he allowed him to resume delivery of the mail. However, Constable

Shaw subsequently made further inquiries of a white letter carrier in the area concerning Mr. Phipps's *bona fides*.

[5] On the basis of factual findings and inferences, the Adjudicator concluded that Mr. Phipps had established discrimination, including by satisfying the court that his colour was probably "a factor, a significant factor, and probably the predominant factor" in Constable Shaw's actions towards Mr. Phipps (at para. 21).

[6] The Divisional Court dismissed applications for judicial review of the Adjudicator's decision. The majority reasons of Wilson and Swinton JJ. concluded that the Adjudicator's decision was reasonable in the sense that it was supported by the evidence and reflected a proper application of the correct law. On the issue of discrimination, Nordheimer J. dissented. In his view, the Adjudicator's decision was unreasonable because he saw it as lacking evidentiary support and a proper analysis of the issues.

[7] On this appeal, the appellants are Michael Shaw and his Chief of Police at the time, William Blair, who admitted responsibility for Constable Shaw's conduct under the *Police Services Act* R.S.O. 1990, c. P.15. The appellants argue the Divisional Court made the same reviewable errors as those made by the Adjudicator in:

> (i) identifying and applying the test for *prima facie* discrimination;
>
> (ii) effectively placing the onus on Constable Shaw to disprove discrimination; and
>
> (iii) failing to place proper weight on Constable Shaw's evidence and in particular his role as a police officer.

[8] The respondent Toronto Police Services Board also argues that the Adjudicator improperly shifted the onus to Constable Shaw or created an improper presumption of discrimination by referring to a concept of "unconscious discrimination".

[9] For the reasons that follow, I do not accept these challenges to the Divisional Court majority decision. In my view, that decision correctly concluded that the Adjudicator's decision was reasonable because, when read fairly and in the context of the arguments presented, the decision demonstrated an application of the proper test and a proper weighing of the evidence. In my view, the Divisional Court dissent erred by not giving the required degree of deference to the Adjudicator's findings and conclusions.

B. DISCUSSION

(1) Standard of Review

[10] An Adjudicator's decision is not subject to appeal, but only to judicial review: see s. 45.8 of the *Human Rights Code*, R.S.O. 1990, c. H.19 (the *Code*). All counsel agree that the Divisional Court properly identified "reasonableness" as the appropriately deferential standard of review on an application for judicial review of the Adjudicator's conclusion of discrimination: see *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190. In recognition that the Adjudicator "has a specialized expertise" in the area, the Divisional Court explained that the reasonableness standard accords "the highest degree of deference … with respect to [the Adjudicator's] determinations of fact and the interpretation and application of human rights law" (at para. 41). Deference is maintained unless the decision is not rationally supported. The ultimate question is whether the result falls within the *Dunsmuir* "range of possible, acceptable outcomes which are defensible in respect of the facts and the law", as the Divisional Court determined that it did (at para. 85).

(2) Relevant Legislation and the Applicable *Prima Facie* Test

[11] Section 1 of the *Code* provides that every person has the right to equal treatment without discrimination on the basis of his or her colour. Section 9 provides that no one shall infringe a person's right to equal treatment.

[12] The onus rests on a complainant to establish the prohibited discrimination in accordance with the "*prima facie*" test. This description of the approach to establish discrimination comes from the decision of the Supreme Court of Canada in*Ontario Human Rights Commission v. Simpson-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, which was decided in the context of employment-related discrimination. In that case, the Supreme Court of Canada explained that "[a] *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer" from the person alleged to have discriminated (at p. 558). This means that the onus lies on the complainant to establish discrimination on the balance of probabilities and that, if the complainant does so, the evidentiary burden shifts to the respondent. See also *Ontario (Director, Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII), 269 O.A.C. 137.

[13] The Adjudicator was cognizant of this aspect of the test and the proper onus. As she explained, "[o]nce a *prima facie*case of discrimination has been established, the burden shifts to the respondent to provide a rational explanation which is not discriminatory" (at para. 17). When confronted with a *prima facie* case, the respondent "must offer an explanation which is credible on all the evidence" (at para. 17). The complainant is not required to establish that the respondent's actions lead to no other conclusion but discrimination. Rather, the

"ultimate issue is whether an inference of discrimination is more probable from the evidence than the actual explanations offered by the respondent" (at para. 17).

[14] The three elements of the *prima facie* test were described by the Divisional Court majority, at para. 47, as requiring the complainant to prove the following:

> 1. That he or she is a member of a group protected by the *Code*;
>
> 2. That he or she was subjected to adverse treatment; and
>
> 3. That his or her gender, race, colour or ancestry was a factor in the alleged adverse treatment.

See *Dang v. PTPC Corrugated Co*., 2007 BCHRT 27 (CanLII), [2007] B.C.H.R.T.D. No. 27, at para. 82.

[15] No issue is taken with these elements or principles explained by the Adjudicator, but rather with their application in thiscase.

(3) The *Prima Facie* Element

[16] The appeal challenges the Adjudicator's interpretation and application of the discrimination test in three ways.

[17] First, the appellants argue that the Adjudicator "skipp[ed] over the requirement … [to] establish a connection [or nexus] between" Mr. Phipps's colour and his treatment by Constable Shaw. It is their position that no such connection is available on the record. Second, the appellants argue that the Adjudicator did not properly articulate or make the required finding that the *prima facie* test was met and that her failure to do so rendered her decision unreasonable. The third argument echoes the Divisional Court dissent position that the Adjudicator was obliged to declare whether the *prima facie* test was met at the conclusion of Mr. Phipps's case and before Constable Shaw presented his case. I will explain why I do not accept these challenges.

[18] Addressing the first argument, while the Adjudicator may not have specifically delineated and individually parsed each of the three elements of the test seriatim, that may well have been because two out of three of the elements - Mr. Phipps's colour and his adverse treatment - were conceded by Constable Shaw's counsel and, in any event, were clear on the record.

[19] In addition, the Adjudicator specifically recognized the need for a nexus or connection when she identified the core of the dispute. In her words, at para. 20,

the issue to be determined was "whether the applicant's skin colour was a factor in Constable Shaw's surveillance of, decision to stop, and subsequent inquiry about the applicant." While the appellants are correct that the Adjudicator did not use the specific word "nexus", there is no mandatory incantation of particular words, provided that the Adjudicator understood the need for the complainant to establish this element of the test. The record establishes that she did so.

[20] In her reasons, the Adjudicator gave particular attention to whether colour or race was a factor in Constable Shaw's conduct towards Mr. Phipps. The Adjudicator's repeated reference to this "factor" evidences that, indeed, she was cognizant of the need for a connection or link between the complainant's colour and the Constable's actions.

[21] The Adjudicator examined the evidence on this issue with care and linked that evidence to her conclusion that Mr.Phipps's colour "in an affluent neighbourhood was a factor, a significant factor, and probably the predominant factor, whether consciously or unconsciously, in Constable Shaw's actions" (at para. 21).

[22] The Adjudicator's clear finding that colour was a factor, when combined with the other two conceded elements of the*prima facie* test – Mr. Phipps's colour and adverse treatment – provided a reasonable basis, indeed a solid foundation, for her conclusion of discrimination.

[23] This conclusion was supported by the following findings regarding the impugned interaction between Constable Shaw and Mr. Phipps:

- Constable Shaw stopped and questioned Mr. Phipps even though his appearance did not match the description given in the directive (white, East European men driving a vehicle);

- Constable Shaw did not approach or question any white service or construction workers present in the same neighbourhood; and

- Constable Shaw subsequently approached a white letter carrier in the neighbourhood to inquire about Mr. Phipps's*bona fides*.

[24] The Adjudicator also considered Constable Shaw's denial of any racial reasoning and his evidence explaining his actions involving Mr. Phipps. However, the Adjudicator came to a reasoned decision explaining why she did not accept Constable Shaw's position as providing a credible non-discriminatory explanation for his conduct toward Mr. Phipps.

[25] In essence, the appellants' argument amounts to an attack on the Adjudicator's factual findings and the inferences she drew from those findings. As the Divisional Court observed, those findings are entitled to considerable

deference. In my view, the Divisional Court majority correctly concluded that there was no basis for this court to interfere.

[26] In their second challenge to the Adjudicator's interpretation and application of the *prima facie* test, the appellants argue that the Adjudicator erred in not stating precisely that the *prima facie* test had been satisfied. On this issue, I observe, as did the Divisional Court, that the Adjudicator expressly referred to the need to establish a "*prima facie* case of discrimination". The experienced Adjudicator would be familiar with the three elements of the test, which are well known in human rights law. In my view, a fair reading of the Adjudicator's reasons leaves no room for doubt by any reader that the Adjudicator concluded that this foundational human rights test was met based on her assessment of the evidence and her knowledge of the law. I would not give effect to this argument.

[27] Finally, both before the Divisional Court and before this court, the appellants argued that the Adjudicator was obliged to declare that the test had been met at the conclusion of the complainant's case and before she allowed Constable Shaw to give his evidence.

[28] Constable Shaw has not provided authority for this proposition. Where as here, the person alleged to have discriminated chooses to give evidence, the Adjudicator must decide the case based on all the evidence. Moreover, the argument purports to engage the same test at the end of the complainant's case as at the end of Constable Shaw's evidence: whether discrimination has been proven. Recalling the words of the Adjudicator, which were also adopted by the Divisional Court, "[t]he ultimate issue is whether an inference of discrimination is more probable from the evidence than the actual explanations offered by the respondent": see Divisional Court reasons at para. 77 and Adjudicator's reasons at para. 17. In the human rights context, there is no rational justification for requiring an adjudicator to decide the same issue on two occasions at two different points in the hearing in the absence of any challenge to the sufficiency of the evidence at the conclusion of the complainant's case. I would not give effect to this aspect of the argument.

(4) Placement of the Onus

[29] In a related argument, the appellants take the position that the effect of the Adjudicator's reasoning, including her approach to the discrimination test, improperly placed the onus on Constable Shaw to disprove discrimination. I do not agree. As in the usual civil case, the Adjudicator will decide the case on the basis of all the evidence, cognizant of the principle that the onus rests and remains on the complainant throughout the case to establish the complaint.

[30] The Adjudicator expressly recognized the basic principle that the onus is on the complainant to establish a "*prima facie*case of discrimination" after which "the

burden shifts to the respondent to provide a rational explanation which is not discriminatory" (at para. 17). She specifically addressed "whether the inference of racial discrimination is more probable than the explanations offered by the respondent" (at para. 18).

[31] The Adjudicator also recognized, to establish his case, that the complainant need not prove that the Constable's adverse actions were rationally consistent only with discrimination. Rather, the test was met if one of the factors influencing Constable Shaw's actions was Mr. Phipps's colour. The Adjudicator understood that Mr. Phipps was required to establish discrimination and only if he did so would it be necessary for Constable Shaw to provide a rational and credible explanation for his actions other than discrimination.

[32] With those principles in mind, the Adjudicator considered the whole of the evidence and rejected Constable Shaw's explanation that Mr. Phipps's conduct raised a suspicion of illegal activity. As the Divisional Court majority observed, the Adjudicator "carefully considered [Constable] Shaw's explanations for his conduct and found that he was unable to rebut the*prima facie* case of discrimination" (at para. 84). Moreover, in the majority's description, the Adjudicator reasonably concluded that "the combination of [Constable Shaw's] actions when viewed together further supports" the conclusion of discrimination (at para. 72). I agree and would not give effect to this ground of appeal.

[33] The Adjudicator's reasons are also challenged on the basis that they arrive at a conclusion of discrimination based on "unconscious discrimination". The appellants argue that this concept improperly imposes a burden of disproof on Constable Shaw. However, this was not a case where the Adjudicator concluded, without supporting evidence, that because discrimination can be unconscious, Constable Shaw unconsciously discriminated against Mr. Phipps. Indeed, the Adjudicator did not assume discrimination, but drew an inference of discrimination from a number of different pieces of evidence.

[34] As the Adjudicator observed, in any event, proof of Constable Shaw's subjective intention to discriminate is not a necessary component of the test. There is seldom direct evidence of a subjective intention to discriminate, because "[r]acial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices" and racial discrimination "often operates on an unconscious level". For this reason, discrimination is often "proven by circumstantial evidence and inference" (at paras. 16 and 18). See also *Radek v. Henderson Development (Canada) Ltd. (No. 3),* 2005 BCHRT 302 (CanLII), [2005] B.C.H.R.T.D. No. 302, at para. 482.

[35] The Divisional Court majority concluded that the Adjudicator was entitled to and, indeed, obliged to "draw reasonable inferences from proven facts" about Constable Shaw's actions and whether Mr. Phipps's colour was a factor in those

actions (at para. 75). In rejecting the argument concerning an improper use of "unconscious discrimination", the Divisional Court majority explained at para. 81 that its conclusion was not based on "Mr. Phipps' perception of racism", but on the Adjudicator's appreciation of all the evidence it accepted after rejecting "the evidence that the conduct of Mr. Phipps should have aroused the suspicion of the police of potential illegal activity." It was on this basis that the Adjudicator arrived at a finding of discrimination:

> The Tribunal found that the most rational explanation for the actions of [Constable] Shaw was that they were motivated by race - that is, Mr. Phipps was an unknown black man in an affluent neighbourhood, and, therefore, he may be disguised as a postal worker, acting for an improper or illegal purpose.

[36] I agree that the Adjudicator did not use "unconscious discrimination" to place the onus on Constable Shaw improperly. I would not give effect to this ground of appeal.

(5) Consideration of the Evidence

[37] Finally, the appellants argue that the Adjudicator failed to give sufficient weight to Constable Shaw's position as a police officer.

[38] Before the Adjudicator, the appellants argued that the discrimination test should be different when it involves allegations against police officers. Specifically, the appellants argued that the test should be the same as that applied to potential racial profiling in the criminal law context where an accused brings an application for the exclusion of evidence pursuant to the *Canadian Charter of Rights and Freedoms*. Relying on *Kampe v. Toronto Police Services Board*, 2008 HRTO 304 (CanLII), [2008] O.H.R.T.D. No. 302, at paras. 11-12, the appellants argued that the question to be asked was whether the Constable had articulable cause for the treatment of the letter carrier and whether there was an improper purpose in that treatment. The application of this criminal law test in a discrimination case was rejected by the Divisional Court and not pursued on appeal to this court.

[39] The majority of the Divisional Court also rejected the appellants' argument that the test should be whether the police constable acted reasonably in accordance with the negligence test applied in *Hill v. Hamilton-Wentworth Regional Police Services Board,* 2007 SCC 41 (CanLII), [2007] 3 S.C.R. 129. As the Divisional Court pointed out, this argument was not raised before the Adjudicator, nor was any expert evidence called to support the position that the police constable's actions were reasonable. In these circumstances the Divisional Court correctly declined to consider the argument on appeal. The

Adjudicator's role was not to determine whether Constable Shaw's actions were reasonable, but rather, whether they were discriminatory contrary to the *Code*.

[40] Again on this appeal, the appellants argue that the Adjudicator erred by failing to give adequate weight to Constable Shaw's evidence and to the "legitimate role and duty of the police to investigate circumstances of possible wrongdoing".

[41] In my view, the Adjudicator gave careful consideration to the particular position of police officers. Constable Shaw pointed to the *Police Services Act* provisions that place a duty on police officers to prevent crime, apprehend criminals, and perform the duties they are assigned. As the Divisional Court correctly concluded, the Adjudicator "did not fail to have regard to the unique duties of police officers" or Officer Shaw's obligations to investigate crime. Further, her "task was to determine whether the powers exercised by this police officer in carrying out this duty complied with the *Code*" (at paras. 91 and 95).

[42] In fulfilling that task, the Adjudicator was entitled to consider other requirements of the *Police Services Act*, including the principles articulated in s. 1 that highlight "[t]he importance of safeguarding the fundamental rights guaranteed by the...*Code"* and "[t]he need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario Society". In the words of the Divisional Court majority: "Police officers therefore have a statutory duty to uphold the *Code*, and in this the [Adjudicator] had proper regard to police officers' statutory duties" (at para. 91). There is no basis to interfere with this conclusion.

C. RESULT

[43] For these reasons, I would dismiss the appeal.

[44] In accordance with the positions advanced by counsel, I would make no order for costs.

Released: March 13, 2012 "S.E. Lang J.A."

"STG" "I agree S.T. Goudge J.A."

"I agree Robert P. Armstrong J.A."