HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Jordan Marshall

Applicant

-and-

Dufferin-Peel Catholic District School Board

Respondent

DECISION

Adjudicator:	Keith Brennenstuhl
Date:	February 12, 2013
File Number:	2011-07809-I
Citation:	2013 HRTO 256
Indexed as:	**Marshall v. Dufferin-Peel Catholic District School Board**

APPEARANCES

Jordan Marshall, Applicant	)	David O'Hare, Representative
Dufferin-Peel Catholic District School Board, Respondent	)	Eric Roher and Kate Dearden, Counsel

INTRODUCTION

[1] This is an Application filed under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination with respect to services on the basis of race and colour. The applicant self-identifies as black.

[2] The hearing into this matter was held on September 19, and 20, 2012. I heard the evidence of the applicant and the evidence of his two witnesses, his mother Wendy O'Hare and her husband David O'Hare.

[3] At the conclusion of the applicant's evidence, the respondent, citing *Pellerin v. Conseil scolaire de district catholique Centre-Sud,* 2011 HRTO 1777, asked that I dismiss the application on the basis that it had no reasonable prospect of success. *Pellerin* states at para. 30:

> For all these reasons, I have considered the parties' arguments in light of the evidence in this case in relation to the question of whether the Application has no reasonable prospect of success. In my view, this question should be considered in light of the evidence that has been heard and that is reasonably expected to be presented. This involves a consideration of whether, in light of the pleadings, witness statements, documents relied upon and evidence that has been heard, there is a reasonable prospect that an applicant can meet his or her burden of proof.

The parties provided written submissions, as well as oral submissions during a teleconference call on January 25, 2013, on whether there was a reasonable prospect of success. This decision addresses that issue.

PRELIMINARY MATTERS

[4] At the time of the filing of the Application the applicant was a minor and was identified as J.M. in the style of cause. At the time of the hearing into this matter the applicant had reached the age of majority and I ordered that the style of cause identify the applicant by his given name, Jordan Marshall.

[5] In Interim Decision *J.M. v. Dufferin Catholic District School Board,* 2012 HRTO 94, the Tribunal dismissed parts of the Application that concerned events before March 2010, on the basis that they were untimely.

[6] At the hearing the parties agreed that there were two remaining allegations of alleged racial discrimination in the Application that were timely: (1) an incident where the applicant was suspended for five days for touching his teacher Karen De Medeiros ("De Medeiros") on March 2, 2010 during a biology class (the "suspension"); and, (2) the applicant's participation in an entrepreneurship program organized by his school on Saturdays in the second semester of the 2009/2010 school year (the "Entrepreneurship Program").

[7] The parties agreed that to the extent to which the applicant called evidence outside the two remaining allegations, such evidence would be permitted for the purpose of context only and not as incidents of discrimination for which the applicant was seeking a finding of liability or remedy under the *Code.*

BACKGROUND

The Suspension

[8] The following facts relating to the suspension are not in dispute.

[9] The applicant was a student in grade 11 at St. Marguerite d'Youville Secondary School ("d'Youville") and had been a student at the school since he commenced grade 9 in September 2009.

[10] He was enrolled in De Medeiros' Grade 11 biology class in period 4 of the second semester during the 2009/2010 school year.

[11] On March 2, 2010, during biology class while walking behind De Medeiros' lab bench, the applicant touched De Medeiros' backside (the "bumping incident"). Following this incident De Medeiros went to the science office and after a brief interlude returned to the class.

[12] The respondent investigated the allegation of physical contact between the applicant and De Medeiros and concluded that the applicant walked behind De Medeiros' lab bench and brushed her with his right shoulder. On March 5, 2010, the applicant was suspended for five days in accordance with the *Education Act* for "an act considered by the principal to be injurious to the moral tone of the school". During the suspension period the respondent gave the applicant school related work.

[13] David and Wendy O'Hare appealed the suspension. At the suspension appeal meeting on April 17, 2010, the principal read a statement and David O'Hare read portions of a statement. Neither De Medeiros nor the applicant was present. A panel of three trustees voted to expunge the suspension.

[14] The applicant was transferred to a Grade 11 biology class taught by another teacher.

Entrepreneurship Program

[15] The following facts relating to the Entrepreneurship Program are not in dispute.

[16] The applicant completed a grade 11 Entrepreneurship class in the fall semester of the 2009/2010 school year. He received a mark of 94%, the highest academic standing in the class and he received the business plan award.

[17] The applicant was encouraged to participate in BizPlan. The applicant was to come in on Saturday mornings to work with his mentors to enhance his business plan. Participants in BizPlan were eligible for cash prizes.

[18] The applicant had a partner and attended the first Saturday morning meeting. He did not go to the next meeting and he was late for the following meeting. The applicant's partner dropped out and the applicant stopped going altogether following his suspension in March 2010.

SUMMARY OF EVIDENCE

Applicant's Evidence

[19] The applicant testified that from the first day of biology class he could tell that De Medeiros did not like him by the way she looked at him and that he did not feel welcome in her class.

[20] He testified that De Medeiros was unfair to him because "I was a black male". He commented that De Medeiros did not want him in her class because she did not want him to succeed even though he was one of the few students who had high marks. The applicant testified that the teachers at his school "hid their bias toward black students".

[21] The applicant testified that De Medeiros did not believe anything he had to say, thought his questions were annoying and that she turned the bumping incident into an incident of inappropriate touching so as to get him suspended. He stated "what's a better way to get me out of her class than by saying things like that".

[22] The applicant stated that he had left the classroom to get his bag from his locker. He indicated that on returning to his desk he walked past the front of the class and De Medeiros "stepped back and hit his shoulder". The applicant stated that De Medeiros "said something" and he continued to walk to his desk. When confronted with his will-say statement which said the applicant would testify that De Medeiros said "Jordan can you walk by without touching me", the applicant retorted "she said something."

[23] According to the applicant, the physical contact with De Medeiros was "not anything significant" because he and De Medeiros simply "bumped into each other".

[24] The applicant confirmed that following the physical contact De Medeiros went to the science office but he did not know why.

[25] The applicant testified that he was invited to participate in BizPlan and was provided with support. He indicated that he did not attend all of the BizPlan meetings on Saturday and that he stopped going. According to the applicant he could have won a cash prize if he had had the opportunity to finish the program.

[26] The applicant conceded that he was a challenging and temperamental student who had a record of suspensions.

Mrs. O'Hare's Evidence

[27] Mrs. O'Hare indicated that she was not a witness to the classroom events leading up to the applicant's suspension and had no direct evidence in that regard.

[28] She testified that while it would be ridiculous to say the entire school was racist she indicated that she considered the general overall attitude of teachers to be racist. She observed that except for two or three, there were no "teachers of colour" at the school. She was of the view that De Medeiros thought the applicant was a black male and therefore a black thug. She stated that she knew in her "gut" and in her "soul" that De Medeiros was racist and that she was looking for any excuse to get rid of the applicant.

[29] Mrs. O'Hare indicated that the applicant had "attitude" and had been "suspended a lot of times before this one."

[30] Mrs. O'Hare expressed her concern that her son would be ruined by a "sexual assault" allegation. She explained that she had conversations with her son and that "most black people have these conversations – be careful when in an elevator, be careful when you touch someone."

[31] Mrs. O'Hare indicated that the words "sexual assault" had come from her and not from the applicant or the respondent. She conceded that officials from the applicant's school did not see the bumping incident as a sexual incident. She testified that the

suspension was racially motivated because her son would never have "rubbed" against De Medeiros because she is a white woman with short hair, not attractive and her son did not like her.

Mr. O'Hare's Evidence

[32] Mr. O'Hare's evidence was based on what he had learned or heard from the applicant and Mrs. O'Hare. Under these circumstances I did not find his evidence to be relevant.

Analysis

[33] In *Dabic v. Windsor Police Service,* 2010 HRTO 1994, at para. 8 – 10 the Tribunal described the focus of a summary hearing:

> In some cases, the issue at the summary hearing may be whether, assuming all the allegations in the application to be true, it has a reasonable prospect of success. In these cases, the focus will generally be on the legal analysis and whether what the applicant alleges may be reasonably considered to amount to a *Code* violation.
>
> In other cases, the focus of the summary hearing may be on whether there is a reasonable prospect that the applicant can prove, on a balance of probabilities, that his or her *Code* rights were violated. Often, such cases will deal with whether the applicant can show a link between an event and the grounds upon which he or she makes the claim. The issue will be whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him or her can show a link between the event and the alleged prohibited ground.
>
> In considering what evidence is reasonably available to the applicant, the Tribunal must be attentive to the fact that in some cases of alleged discrimination, information about the reasons for the actions taken by a respondent are within the sole knowledge of the respondent. Evidence about the reasons for actions taken by a respondent may sometimes come through the disclosure process and through cross-examination of the people involved. The Tribunal must consider whether there is a reasonable prospect that such evidence may lead to a finding of discrimination. However, when there is no reasonable prospect that any such evidence could allow the applicant to prove his or her case on a

> balance of probabilities, the application must be dismissed following the summary hearing.

[34] The applicant bears the burden of proving discrimination on a balance of probabilities. Mere speculation as to the existence of discrimination is not sufficient, nor, is the possibility of discrimination: see *Peel Law Association v. Pieters*, 2012 ONSC 1048.

[35] The *Code* has not been crafted to remedy all instances of differential treatment. The Tribunal stated in *Villella v. Brampton (City),* 2011 HRTO 1085 at paragraph 10:

> The *Code* is not designed to remedy all instances of differential treatment, poor service delivery or professional misconduct. The alleged treatment must be linked in a substantive way to a *Code* ground. The applicant must show more than mere subjective suspicion to establish a link between the respondent's alleged conduct and the grounds pleaded. There must be at least some objective facts and circumstances to support the theory linking the respondents' action with the *Code*. Here, I do not see that the applicant has alleged any facts that would be capable of establishing such a link.

[36] The applicant's own feeling or suspicions are not sufficient to meet the test for establishing an application has a reasonable prospect of success. In *Wondimagnehu v. Algonquin College,* 2012 HRTO 276 the Tribunal stated at para. 10:

> I find that there is no reasonable prospect that the applicant can prove discrimination on the basis of race and sex. The applicant was unable to point to anything specific that suggests that there was discrimination on the grounds specified by the applicant. At best, the applicant has his own feeling that he was treated unfairly because of race and sex. He was unable to point to any evidence beyond his own suspicions to support his allegations of discrimination.

[37] In a similar vein, the Tribunal has indicated that the applicant's own certitude that there was no other possible explanation than discrimination does not satisfy the applicant's burden in establishing discrimination. In *Dwyer v. Intact Insurance Company,* 2011 HRTO 314 at para. 11 the Tribunal stated:

> When he was asked what evidence he had to support his allegations of discrimination, his position was that there could be no other possible explanation for the respondent's conduct. In his view, the people he interacted with were biased and he was certain that the reason behind this conduct was discrimination. The applicant provided no evidence beyond his own certitude to support his allegations.

The applicant is required to demonstrate a reasonable prospect that he can prove, on a balance of probabilities that his *Code* rights were violated. Specifically, he must show a link, connection or nexus between his race and colour and the differential treatment being claimed, that is, the suspension. In my view, the applicant has failed to show any such link. In making this finding, I am mindful that there need be no direct evidence of discrimination and that discrimination will often be proven by circumstantial evidence and inference, see *Shaw v. Phipps*, 2010 ONSC 3884 at para. 75, (aff'd *Shaw v. Phipps* 2012 OCA 155). I also find helpful the Divisional Court's comments at para. 77:

> In cases where discrimination must be proved by circumstantial evidence, there are no bright lines. The Tribunal must determine what reasonable inferences can be drawn from proven facts. These are difficult, nuanced cases that are important to both the parties, to society and the neighbourhoods in which we live.

[38] There must none-the-less be evidence from the applicant capable of giving rise to an inference.

[39] The applicant identifies with a prohibited ground under the *Code,* race and colour, and it is clear that the applicant believes he experienced mistreatment in the form of a suspension. However, the applicant has to do more than point to his membership in a racialized group and adverse treatment to establish a case of discrimination.

[40] The applicant's testimony and that of his witnesses, amounts to a bald assertion that his race must have been a factor in his suspension. This, however, is not sufficient to establish a violation of the *Code;* nor is the applicant's own certitude and that of his witnesses that the only explanation for the suspension was racism. The applicant must show a link between his race and colour and his suspension.

[41] I do not want to dwell on the applicant's credibility, although I do have some concerns in that regard, because even if the applicant's allegations were credible, I heard no evidence of any connection whatsoever between his suspension or his decision to cease participating in BizPlan and a *Code* ground. The applicant's evidence consists of suspicions, speculation, his own feelings and that of his mother. His suspicions about De Medeiros are based on sweeping and speculative allegations of racism at d'Youville.

[42] In the absence of any evidence, either direct or circumstantial, showing a connection between the applicant's suspension and the applicant's race and colour, I must conclude that the applicant has failed to make his claim that his suspension was discriminatory within the meaning of the *Code*.

[43] The applicant also failed to prove that he experienced any differential treatment by the Respondent relative to the Entrepreneurship Program. The applicant admitted through his testimony that his own actions caused the end of his participation in BizPlan and his opportunity to win a cash prize. He stopped attending the Program. The applicant provided no explanation as to why.

[44] In my view it is evident, based on the evidence presented, that the applicant cannot prove discrimination within the meaning of the *Code.* There would be little served by hearing from the respondent's witnesses.

ORDER

[45] The Application has no reasonable prospect of success and is therefore dismissed.

Dated at Toronto, this 12th day of February, 2013.
"Signed by"

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Keith Brennenstuhl
Vice-chair