

Human Rights: Investigating Discrimination

David Rogers
March 2018

Can a service provider, such as the City of Toronto, be found in breach of the Human Rights Code R.S.O. 1990, c. H.19 where one customer makes racial slurs to another customer and an employee of that service provider fails to properly address the situation? This is an important question recently considered by a three member panel of the Ontario Divisional Court in *City of Toronto v. Josephs*, 2018 ONSC 67. The answer, as is so often the case, is: *it depends*.

The Incident

Kevin Josephs was a paralegal trainee on January 7, 2013, and he attended the Court Services Office of the Toronto East Provincial Court to conduct business. Mr. Josephs identifies as a visible person of Afro Caribbean descent. After being served by an intake clerk, he discovered an error and was advised that he would have to speak to a supervisor in order to rectify the problem. He was given a number for his place in the queue and although the number had not been called, he approached one of the counter clerks asking to speak to a supervisor.

Another customer, V.F., who was waiting in the queue, told Mr. Josephs to wait his turn and then raised his tone to include racial slurs. N.P. witnessed this and approached one of the clerks to complain about V.F.'s behaviour. The clerk, Mr. Sanagustin, advised that if the altercation escalated into something physical, they would call security but most verbal disputes simply get sorted out by themselves.

Mr. Josephs complained to the team leader of the counter staff and she went to get assistance from the court officer. However, seconds later, N.P. told Mr. Josephs that the City was not going to do anything and so Mr. Josephs also reported the incident to a security guard. The security guard confronted V.F. and told him he would have to leave. Minutes later, a court officer attended and spoke to N.P. and to Mr. Josephs, and then also told V.F. to leave the courthouse, which he did.

Mr. Josephs felt that he had been discriminated against and that the City was responsible. He therefore decided to file an application against the City of Toronto (as well as the Toronto Police Services Board) with the Human Rights Tribunal of Ontario, alleging discrimination with respect to services, goods and facilities on the basis of race and colour.

The Tribunal Decision

The Tribunal framed the issue as “what duty, if any, does a service provider owe to a customer who has been racially harassed by another customer.” The Tribunal found that the City of Toronto, as a service provider, had an obligation to take prompt, effectual and proportionate action when it became aware of the harassment. The response need not be perfect, but simply reasonable in the circumstances. The Tribunal then went on to make important findings on the conduct of those involved, specifically that all but one of the City staff and security officers at the court office had acted promptly and appropriately, and met the reasonableness standard.

Despite these findings, the Tribunal found that Mr. Sanagustin had discriminated against Mr. Josephs as his response was not reasonable and was inadequate in terms of what is required under the Human Rights Code.

The Tribunal therefore ordered the City to pay \$1,500 in damages to Mr. Josephs and to provide human rights training to its court service staff. In doing so, the Tribunal gave great weight to Mr. Josephs' brief and incorrect belief that the City was not investigating the racial

slur. Because Mr. Josephs thought, for a very brief period of time, that nothing was being done, he was entitled to damages even though this was an erroneous assumption as the team leader was in fact responding promptly and reasonably.

The Divisional Court Appeal

The City of Toronto appealed to the Divisional Court and the Court overturned the Tribunal's decision and dismissed the Human Rights application against the City, with costs.

In doing so, the Court noted that N.P. made an incorrect assumption when she concluded that the City was not responding and communicated this assumption to Mr. Josephs. The Tribunal then wrongly focused on Mr. Josephs' temporary subjective belief that nothing was being done by the City. In fact, the situation was resolved within 2.5 minutes, and objectively, the City as a whole was not acting in such a way as to foster a poisoned environment.

The Court went on to conclude that the Tribunal applied disproportionate weight to Mr. Sanagustin's inaction. His comments, although inadequate, had to be viewed in the context of him being a non-supervisory employee while other responsible staff were taking appropriate and immediate action. It is the response of the corporate staff overall that should be considered as to whether the City properly addressed the situation.

Based on the Tribunal's own findings that the supervisory staff had acted promptly and reasonably in the situation, corporate responsibility could not reasonably be fixed on the City because of the inconsequential conduct of one employee.

What to take from this Decision

This decision provides important guidance for municipalities, but also to all different types of commercial service providers for best practices in dealing with human rights issues and employee oversight.

Prompt and reasonable investigation of any discrimination within a work environment must take place and the management's response as a whole must be reasonable in the circumstances.

A service provider should not be held to have breached the Human Rights Code where the actions of one employee may be considered discriminatory when the entity as a whole was reacting properly.