Ontario Court of Appeal: Employment discrimination not just about disadvantaged groups

Date : April 1, 2001

Must one must show membership in an identifiable and historically disadvantaged group in order to benefit from the protection of human rights legislation? A recent decision of the Ontario Court of Appeal suggests not. In *B. v. Ontario (Human Rights Commission)* (November 14, 2000), the Court held the key issue is not whether one belongs to a disadvantaged group, but whether one has been disadvantaged by being arbitrarily stereotyped, based on a prohibited ground of discrimination.

The case arose with the termination in 1990 of Mr. A., an employee with 26 years of service. Mr. A.'s employer was Mr. B., who was also the brother of A.'s wife, and the uncle of A.'s daughter.

A.'s daughter had been in therapy for a number of years, and eventually recollected that she had been sexually assaulted by B., her uncle. In September 1990, A.'s wife and daughter went to B.'s home and confronted him with the accusation of sexual assault. After they returned home, B. went to their house, but was refused entry. The next work day, B. shouted at A. about his daughter's accusation, and told A. he was fired.

BOARD OF INQUIRY: EMPLOYER GIVEN NO CAUSE FOR CONCERN

A. complained to the Ontario Human Rights Commission that his dismissal constituted discrimination on the grounds of marital and family status, two of the prohibited grounds listed in the *Human Rights Code*. The Board of Inquiry hearing the matter upheld A.'s complaint, finding that the sole reason for A.'s termination was the allegation of sexual assault raised by A.'s daughter against B.

The Board rejected the employer's argument that the termination had been based on a personal evaluation of A.'s ability to continue working for an employer whom A. believed had molested his daughter. In the Board's view, at the time he was terminated, A. had given his employer no cause for concern: A. had said nothing to B. about the allegations, yet B. assumed that A. had accepted his daughter's version of events and that his loyalty was fatally compromised.

DIVISIONAL COURT: TERMINATION UNFAIR, BUT NOT DISCRIMINATORY

The Board's decision was reversed on appeal to the Divisional Court, which agreed that A. had been dismissed without cause, but held that he had not suffered discrimination. The Court based its decision on its view that the purpose of including marital and family status in the Code was to promote "equality and the protection of those who have been discriminated against based on their

membership in an identifiable group in society ... not to protect against nor to prevent all acts of unfairness".

The Court observed that being denied employment because you have a child is not the same as being dismissed for being the parent of a particular child. The former is based on the stereotypical assumption that parents are less committed employees, while the latter is based on personal animosity.

COURT OF APPEAL: GROUNDS, NOT GROUPS

The Ontario Court of Appeal restored the Board's decision, holding first that the definition in the Code of marital and family status includes not only the fact of being married or having a family, but also the identity of a particular spouse or family member. For support, the Court cited a number of decisions, including *Brossard (Ville) v. Quebec*, a 1988 decision in which the Supreme Court of Canada ruled that a policy prohibiting the hiring of relatives of employees was discriminatory.

Having concluded that the identity of a particular family member was part of the definition of family and marital status, the Court went on to rule that A.'s termination was discriminatory. In deciding otherwise, the Divisional Court had erred in its preoccupation with whether A. belonged to a disadvantaged group:

> "Discrimination is not only about groups. It is also about individuals who are arbitrarily disadvantaged for reasons having largely to do with attributed stereotypes, regardless of their actual merit. While it is true that disadvantageous stereotypes usually arise when characteristics are attributed to someone based on what people in a particular group are deemed to be capable of, this does not mean that ... a complainant must be artificially slotted into a group category before a claim of discrimination can be upheld under the Code."

The question, therefore, was not whether A. fit into a disadvantaged group, but whether he had suffered discrimination based on a prohibited ground. The Court held he had:

> "The dismissal, which clearly disadvantaged him, was based on [A.'s] presumed inability, as a husband and father, to be a good employee given the accusations made by his wife and daughter, rather than on his actual merit or conduct. The dismissal therefore related to prohibited grounds under [the Code]."

Accordingly, the Court allowed the appeal.

In Our View

It should be noted that both the Board of Inquiry and the Court of Appeal observed that, had A.

demonstrated that he was incapable of performing his duties at the workplace because of his wife's and daughter's allegations, B. could well have been justified in terminating him. The problem was that the evidence had shown that A. had been terminated without his having demonstrated any sign that he even believed his family's allegations, much less that his belief affected his conduct or performance at work.

Much of the support drawn on by the Court of Appeal for its view that family and marital status under the Code encompasses distinctions based on the identity of a family member comes from cases dealing with anti-nepotism rules that were held to be discriminatory. If the decision is appealed, it will be interesting to see whether this part of the Court's reasoning comes under scrutiny by the Supreme Court of Canada, particularly since one of these nepotism cases was *Brossard*, referred to in the Court of Appeal decision. (For subsequent developments with this case, see ""An artificial exercise": Supreme Court rules that victims of discrimination need not be members of disadvantaged groups" on our What's New page).

For further information, please contact Lynn Harnden at (613) 563-7660, Extension 226.