

Divisional Court Decision "Packs a Punch"

by R. Mark Fletcher

On July 11, 2013, in *Walton Enterprises v. Lombardi*, 2013 ONSC 4218, 229 A.C.W.S. (3d) 1104 (Ont. Div. Ct.) ("*Walton*"), a judicial review application of a decision of the Human Rights Tribunal of Ontario ("the Tribunal"), Ontario's Divisional Court quashed the Tribunal's finding that the employer's decision to terminate an employee was discriminatory. The court also set aside the award made by the Tribunal for compensation for injury to dignity, feelings, and self-respect, citing the adjudicator's failure to "conduct the necessary analysis of the legal principles and the evidence". The court ordered that the matter be remitted back to the Tribunal for a new hearing on the issue of the employee's dismissal and on the issue of an appropriate remedy. The Tribunal's finding of harassment was not challenged.

This case is significant. Employment law disputes that were traditionally litigated before the Ontario Superior Court of Justice as wrongful dismissal actions are increasingly finding their way into the human rights stream and are pitched by applicants to the Tribunal as discrimination cases, often in circumstances where the merits of the wrongful dismissal aspects of the matter are dubious. *Walton* highlights the need for intellectual rigour in both fact-finding and legal analysis by the Tribunal before arriving at the conclusion that the termination of an individual's employment is discriminatory in contravention of s. 5(1) of Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19 ("the Code"). In order for the Tribunal to conclude that a dismissal was *prima facie* discriminatory, the applicant must prove three elements:

- 1) He or she is a member of a group protected by the Code;
- 2) He or she was subject to adverse treatment.
- 3) There was a connection between the adverse treatment and the ground of discrimination invoked.

(See *Peel Law Assn. v. Pieters*, 2013 ONCA 396, 228 A.C.W.S. (3d) 204 (Ont. CA.), at para 59.) Where the factual and legal nexus are insufficient to prove all three elements, it is not open to the Tribunal to determine that the termination of employment contravened the Code, or to award remedial damages available under the Code.

Walton Enterprises owns five Midas auto services franchises in Ontario. As of April 14, 2008, the company employed Paul Lombardi as a service advisor at its Oshawa Midas location. Mr. Lombardi suffers from both depression and hypothyroidism. His medical conditions were diagnosed well before he commenced employment with the company, and he took medication to treat the symptoms of both medical conditions. However, within the first three months of his employment, Mr. Lombardi started a medical leave of absence since he discontinued his thyroid medication, which resulted in his becoming "tired, irritable, and depressed". In early July 2008, after a month's medical leave, Mr. Lombardi returned to work at a different location and without any request for accommodation of his medical condition. In fact, the doctor's note provided to the employer included the assurance that Mr. Lombardi would "quickly regain his professionalism" once his medication was adjusted and had time to take effect. Out of respect for Mr. Lombardi's privacy, the company president did not inform the Newmarket staff of his medical condition.

Shortly after the transfer, Mr. Lombardi was subjected to verbal abuse from the assistant store manager. At some point during the summer of 2009, the abusive treatment included text messages with homophobic slurs. Mr. Lombardi complained to the company president and the store manager about this treatment. The assistant store manager testified that he "backed off" and stopped using the word "faggot" towards Mr. Lombardi because he observed that Mr. Lombardi had become "angry and upset". Apart from this, within the same general time-frame, Mr. Lombardi had a number of disputes with other co-workers which, in one incident, included him slamming a clipboard on a countertop. On October 29, 2009, Mr. Lombardi became embroiled in an exchange of words with another technician that escalated into a violent fist fight and caused the co-worker to have a black eye. The store manager had to break up the fight. A customer and another employee who witnessed the fight identified Mr. Lombardi as the one who threw the first

punch, On October 31, 2009, the company terminated Mr. Lombardi's employment on the basis that he had started the fight. It made the decision to terminate him for just cause after it had confirmed with the witnesses, including the customer, that he initiated the workplace violence.

Mr. Lombardi brought an application to the Tribunal alleging that he had been subjected to harassment and discrimination on the grounds of disability (depression and perceived obesity) and sex (perceived homosexuality). The Tribunal determined that the individual respondents (the store manager and the assistant store manager) engaged in harassment against Mr. Lombardi, citing the text messages and comments made by these individuals. The company was also found liable for failing to take action against the harassment. This determination was not part of the judicial review application before the court.

The Tribunal also determined that Mr. Lombardi's employment was terminated "for behaviour connected to the discrimination". In the adjudicator's reasons, she suggested that it "did not matter whether Mr. Lombardi started the fight", but she assumed he did so, and she found that the "fight was at least in part a reaction by the individual applicant to being harassed in the course of his employment". She also concluded that Mr. Lombardi's ongoing depression was part of the reason that he engaged in the fight, although there was no medical or other factual basis on which she drew this finding. The adjudicator concluded that, given that the company's president made the termination decision and that he was privy to both Mr. Lombardi's medical condition and his subjection to harassment, he was under a duty to inquire into the possibility that there was a causal link between the harassment, Mr. Lombardi's depression and the fist fight before terminating Mr. Lombardi's employment. For the Tribunal, the failure to make such inquiries amounted to a discriminatory dismissal. The Tribunal awarded \$20,000 for injury to dignity, feelings, and self-respect caused by the termination of employment and the harassment, together with compensation for lost income from October 31, 2009 to August 31, 2010.

The Divisional Court determined that there were significant gaps and errors in the Tribunal's decision. For instance, the adjudicator "failed to apply [the proper *prima facie* legal test] analysis in support of her finding that the dismissal was discriminatory". This particular error permitted Mr. Lombardi to sidestep his onus to establish a *prima facie* case of discriminatory dismissal. The court concluded that [at para. 37]:

...on reading her reasons, it is unclear whether she found a prima facie case of discrimination and did not accept the Employer's explanation for the dismissal, or whether she found a causal link between the harassment, Mr. Lombardi's mental state and the fight...

Similarly, the court noted the adjudicator's failure to identify Mr. Lombardi's health conditions as actually being linked to or factored into the termination decision. Likewise, there was no finding that the company used the violent altercation as an excuse to terminate in retaliation for the harassment complaint or because Mr. Lombardi suffered from any disability. The court concluded that the adjudicator failed to engage in a thorough factual and legal analysis before arriving at the determination that the dismissal was discriminatory. According to the court [at para. 40]:

In order to come to a reasoned decision that the dismissal was discriminatory, she had to determine what happened: who started the fight; what was Mr. Lombardi's role in it; and what impact did the harassment have on Mr. Lombardi's participation? As there was conflicting evidence on these issues, the adjudicator needed to make findings of credibility, particularly with respect to Lombardi's evidence, in order to explain and justify her decision.

There was also no evidence before the Tribunal that Mr. Lombardi's mental state caused him to resort to violence.

Ultimately, these deficiencies in the Tribunal's decision were held by the court to be "unreasonable", and the Tribunal's discriminatory dismissal finding, together with its damages award, were quashed and sent back for rehearing. It remains to be seen whether the Tribunal will come to the opposite conclusion once it revisits its initial determinations and applies the appropriate legal and factual analysis.