



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Ronald Phipps

Applicant

-and-

**Toronto Police Services Board,
Michael Shaw and William Blair**

Respondents

CASE RESOLUTION CONFERENCE DECISION

Adjudicator: Kaye Joachim

Date: June 18, 2009

File Number: T-0475-08

Citation: 2009 HRTO 877

Indexed as: **Phipps v. Toronto Police Services Board**

APPEARANCES BY

Ronald Phipps, Applicant)))	On his own behalf
Toronto Police Services Board, Respondent)))	Andrea Denovan, Counsel
Michael Shaw and William Blair, Respondents)))	Naomi E. Calla, Counsel

INTRODUCTION

[1] This is the Decision with respect to an Application filed under s. 53(3) of the *Human Rights Code*, R.S.O. 1990, c.H-19, as amended (the “Code”). The complaint which underlies the current Application was filed with the Ontario Human Rights Commission on July 11, 2005 and abandoned upon the filing of the present Application with the Tribunal on November 13, 2008.

[2] A Case Resolution Conference (“CRC”) was held on June 4, 2009 in accordance with the expectation, expressed in the *Code* and the Tribunal’s Rules, that section 53(3) applications proceed in a highly expeditious manner. I heard from the applicant, the respondent Michael Shaw, and the respondents’ witnesses Diane Noto, Bruce Finlay and Hanna Katz (by telephone).

[3] The applicant, who self-identifies as African Canadian, alleges that the respondent Michael Shaw, a police constable, discriminated against him on the basis of race and colour when he stopped and questioned the applicant on March 9, 2005. The other named respondents are the Toronto Police Services Board (“TPSB”) and William Blair, Chief of Police.

[4] I find that Michael Shaw did discriminate against the applicant on March 9, 2005 in the provision of police services on the basis of colour, contrary to section 1 and 9 of the *Code*.

[5] The parties agreed to bifurcate this proceeding. The issue of remedy and the liability of the TPSB and William Blair will be heard on the next day of hearing.

Chronology of Events

[6] The following events are not in dispute, except where I specifically note, by using words such as alleged, or asserted, or otherwise indicate a contested point.

[7] On March 9, 2005, the applicant in his capacity of a relief letter carrier employed by

Canada Post was delivering mail in the area of the Bridle Path, which is a well known affluent neighbourhood in Toronto. It was his second day delivering mail on that route. He was wearing the Canada Post coat, carrying a mail satchel, and delivering regular mail and flyers. He did not stop at every house as there was no mail for some houses and other houses had a “no flyer” notation.

[8] That day, Michael Shaw, a police constable who had served in the area for several years was training a new police constable, Diane Noto. At the start of their shift they were given a Directed Patrol Assignment, recommending that they patrol the area where the applicant was delivering mail between 12 p.m. and 4.00 p.m. The assignment details were that phone lines had been cut in the area by suspects described as Male, White and East European, who were using a vehicle.

[9] Constable Shaw decided to patrol the identified area that morning, in accordance with the Directed Patrol Assignment. As the police car turned from Farrington Drive onto Vernham Avenue, Constable Shaw allegedly immediately pointed out a figure at the other end of Vernham Avenue as engaged in potentially unusual activity, walking in the middle of the street and then crossing back and forth. It was the applicant although at that distance Constables Shaw and Noto assert that they were unable to discern the gender or the skin colour of the person. As the applicant approached, they could discern that he was an African Canadian male, wearing a Canada Post jacket and carrying material in his hand. Constable Shaw asserts that he realized that this was not the usual letter carrier and that he was not stopping to deliver mail at every house.

[10] Constable Noto drove the police car at a slow pace along Vernham Avenue, keeping the applicant in view. They followed him to the corner of Vernham Avenue and Vernham Court where the applicant went up to a house, knocked on the door, and spoke to the woman who answered. They did not see him deliver anything, which they thought unusual. Constable Shaw instructed Constable Noto to inquire of the resident why the applicant had knocked. Constable Noto spoke to the resident, Hanna Katz, who advised that the applicant had stopped to advise her that he had misdelivered something.

[11] Constable Noto advised Constable Shaw of this information. Constable Shaw found this suspicious. Accordingly, they drove up Vernham Court and stopped the applicant.

[12] They asked him for identification. The applicant willingly and politely provided his driver's licence and his Canada Post identification. Constable Noto returned to the police vehicle and performed a check which revealed nothing. Constable Noto advised of the results and after some conversation, the manner and content of which is disputed, the police entered their car and departed to continue patrolling the area.

[13] Shortly after this, they encountered another letter carrier Bruce Finlay at a relay box picking up mail and Constable Shaw recognized him as the regular carrier on a nearby route. Constable Shaw asked Mr. Finlay about the letter carrier in the Vernham Avenue area. Mr. Finlay stated that he was a male, White about 35 years of age. Constable Shaw inquired about other potential letter carriers in the area and Mr. Finlay stated that there was a temporary carrier, a "Black man", in the area. The police drove on.

[14] The applicant subsequently hailed the police officers to inquire why they had stopped him. A conversation ensued, the contents of which are disputed.

[15] The applicant believed that the police officers' decision to stop and question him was because of his skin colour and he testified that he was upset, dazed and in shock. While continuing on his route that day, he noted that a White male delivering water in the area was not questioned. He stopped at three construction sites where there were White workers and asked them if any of them had been stopped by the police. None of them had been. This is not disputed by the respondents. The applicant also met up with Mr. Finlay that morning and learned that the police had questioned him (Finlay) about the letter carriers in the area.

Analysis and Conclusions

[16] The relevant principles that apply in cases where an allegation of racial

discrimination has been raised have been usefully summarized as follows:

- (a) The prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor;
- (b) There is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant;
- (c) The prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element;
- (d) There need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and
- (e) Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.

Radek v. Henderson Development (Canada) Ltd. (No. 3) (2005), 52 C.H.R.R. D/430, 2005 BCHRT 302 at para. 482; *Pritchard v. Ziedler* (2007), CHRR Doc. 07-527 (Sask. H.R.T.).

[17] In this case, as in many cases alleging racial discrimination, there is no direct evidence that race was a factor in the officer's decision to take the actions that he did. As a result, the issue of whether the officer's actions amount to racial discrimination in violation of the *Code* falls to be determined in accordance with the following well-established principles applicable to circumstantial evidence cases.

- 1) Once a prima facie case of discrimination has been established, the burden shifts to the respondent to provide a rational explanation which is not discriminatory.
- 2) It is not sufficient to rebut an inference of discrimination that the respondent is able to suggest just any rational alternative explanation. The respondent must offer an explanation which is credible on all the evidence.
- 3) A complainant is not required to establish that the respondent's actions lead to no other conclusion but that discrimination was the basis for the decision at issue in a given case.

4) There is no requirement that the respondents' conduct, to be found discriminatory, must be consistent with the allegation of discrimination and inconsistent with any other rational explanation.

5) The ultimate issue is whether an inference of discrimination is more probable from the evidence than the actual explanations offered by the respondent.

[18] In determining whether the inference of racial discrimination is more probable than the explanations offered by the respondent officer, I also need to be mindful of the nature of racial discrimination as it is understood today and that it will often be the product of learned attitudes and biases and often operates on an unconscious level: *Nassiah v. Peel (Regional Municipality) Services Board*, 2007 HRTO 14 (CanLII).

[19] Courts in Canada have accepted that racial profiling by police occurs in Canada and have indicated their willingness to scrutinize seemingly “neutral” police behaviour to assess whether it falls within the phenomenon of racial profiling. In *R. v. Brown* (2003) 64 O.R. (3) 161 (Ont. CA) at para. 9, Morden J. A. stated that the Crown’s concession that the phenomenon of racial profiling existed was “a responsible position to take because...this conclusion is supported by significant social science research”. In *Peart v. Peel Regional Police Service Board*, [2206] O.J. NO. 4456 (Ont CA), Doherty J.A. stated the “racial profiling occurs and is a day-to-day reality in the lives of those minorities affected by it.”

[20] There is no dispute that Constable Shaw, the senior police constable, directed the day’s events. The issue for me to determine is whether the applicant’s skin colour was a factor in Constable Shaw’s surveillance of, decision to stop, and subsequent inquiry about the applicant.

[21] Constables Shaw and Noto testified that the applicant’s skin colour was not a factor in their actions and was not discussed between them. I accept their evidence that the applicant’s skin colour was not discussed between them. However, I find that on a balance of probabilities, the fact that the applicant was an African Canadian in an affluent neighbourhood was a factor, a significant factor, and probably the predominant factor, whether consciously or unconsciously, in Constable Shaw’s actions.

[22] Constable Shaw testified that a number of unusual features, including the applicant's behaviour, influenced his actions. The features he asserted were unusual are these: the applicant was not the usual letter carrier, the applicant was crossing back and forth across the street, and the applicant did not stop at every house. These three factors caused Constable Shaw to survey the applicant. His suspicion was further fostered by the applicant's knocking on the door of a house but not delivering any mail augmented by the excuse, as reported by the resident, that he had misdelivered some material. However, after conducting a police check and asking the applicant some questions, Constable Shaw testified that he was completely satisfied that the applicant was a legitimate letter carrier. Constable Shaw testified that his further inquiries of Mr. Finlay at the relay box about letter carriers in the area was in the nature of a training exercise for Constable Noto to teach her that there were various ways to obtain confirming information.

[23] In my view, the above chronology, as described by the respondent Shaw is more consistent with a finding that the applicant's skin colour played a role in his actions than the applicant's alleged unusual activity.

[24] First, the fact that the applicant was not the usual letter White male letter carrier is surely not a suspicious circumstance. Letter carriers take vacation, retire, and/or switch routes, so the fact that another letter carrier was delivering the mail on that particular day cannot explain Constable Shaw's heightened alertness. I find significant that he did not respond in a similar way to an unfamiliar White male delivering water in the area.

[25] Second, Constable Noto testified that immediately upon turning onto Vernham Avenue, Constable Shaw pointed out the applicant as a person of note. It is not likely that Constable Shaw had already noticed the applicant's alleged crossing back and forth across the street in an unusual manner as soon as they turned the corner. Whether or not Constables Shaw and Noto noticed a figure in the distance when they turned onto Vernham Avenue, I do not accept their evidence that the figure was crossing back and forth across the street in an unusual manner.

[26] Third, it is not in keeping with the preponderance of probabilities that the applicant was constantly crossing back and forth across the street. The applicant could not recall whether or how often he crossed the street that day. However, he testified and his evidence is in keeping with the preponderance of probabilities that while letter carriers usually deliver their mail on one side of the street and then the other, if they make a mistake in preparing their mail they might cross the street mid-street, occasionally. Since there is no dispute that the applicant was, in fact, a legitimate letter carrier, either he made an unusual number of mistakes and crossed the street an extraordinary number of times on that day, or in the usual manner of letter carriers, he may have crossed the street once or at most twice. I do not accept Constable Shaw's evidence as in keeping with the preponderance of probabilities that the applicant was crossing the street back and forth in an unusual fashion.

[27] Fourth, Constable Shaw in his original response to the complaint, his will say statement and his evidence at the hearing, noted the fact that the applicant did not stop at every house as an unusual circumstance. However, the evidence of the applicant and Mr. Finlay was that it is not unusual for a letter carrier to skip houses if there is no mail to be delivered and the householder has asked not to have flyers delivered. Indeed, Constable Shaw conceded in cross examination by the applicant that he had in the past seen letter carriers skip houses. In my view, it is in keeping with the preponderance of probabilities that Constable Shaw was well aware that letter carriers do not stop at every house.

[28] Accordingly, I conclude that it was not unusual behaviour on the applicant's part that caused Constable Shaw to decide to place the applicant under surveillance but rather the fact that he was an African Canadian male in an affluent neighbourhood. His suspicions were not alleviated by the Canada Post uniform, mailbag or mail delivery. It is also noteworthy that the Directed Patrol Assignment related to suspicious persons in the neighbourhood with entirely different characteristics: White, Eastern European, using a vehicle. The fact that it was an African Canadian male without a vehicle that attracted Constable Shaw's attention is what is unusual. I am further reinforced in my conclusions by Constable Shaw's continued actions, described below.

[29] Having decided to scrutinize the applicant, Constable Shaw found it suspicious that the applicant knocked on a resident's door and spoke to a woman but did not deliver any mail or flyers. Mr. Finlay testified that it was not unusual to misdeliver mail and to go back and try to retrieve it, which is what the applicant did that day. Nonetheless, Constable Shaw found this to be suspicious behaviour and asked Constable Noto to ask the resident what the applicant had been doing. Constable Noto testified Ms. Katz advised her that the applicant said he had misdelivered something.

[30] Ms. Katz testified that she could barely recall the events of that day. However, she did call Canada Post that day to report the events and she agreed that the Canada Post report was likely accurate and that she was the only source of information on the Canada Post report. Her report to Canada Post was that she told the police that the applicant had come to retrieve misdelivered mail. Had Constable Noto inquired, she would undoubtedly have learned that Ms. Katz had in fact received misdelivered mail the previous day, that she had delivered it to the correct address, and that she had told the applicant that. Constable Noto apparently did not learn this as she immediately returned to Constable Shaw with the information that the applicant had said he knocked on the door to inquire about a misdelivery. Constable Shaw concluded that this was suspicious behaviour, as it was not unknown for criminals to disguise themselves with legitimate uniforms and check out houses with false explanations. In my view, but for Constable Shaw's improperly heightened suspicion of the applicant, he would not have found the applicant's alleged misdelivery suspicious.

[31] Accordingly, I conclude that the applicant's colour was a factor in Constable Shaw's continued suspicion of the applicant and his decision to stop and question the applicant.

[32] After being provided with the applicant's driver's license and Canada Post identification and having ascertained that the applicant had no police record or other suspicious notations on his record, Constable Shaw nonetheless proceeded to question another letter carrier, Mr. Finlay, about the letter carriers in the neighbourhood. Only after Mr. Finlay identified a "Black man" who was acting as a temporary letter carrier did

Constable Shaw cease his inquiries. I reject Constable Shaw's explanation that he was trying to teach Constable Noto about alternative ways to complete an investigation and find instead that Constable Shaw's heightened scrutiny of the applicant was continuing.

[33] I emphasize that although I have rejected each of Constable Shaw's explanations as not consistent with the preponderance of probabilities, the combination of his actions when viewed together further supports my conclusions.

[34] I conclude that the applicant's colour was a factor in Constable Shaw's surveillance, decision to stop, and subsequent inquiries about the applicant on March 9, 2005 and that he breached the applicant's right to equal treatment without discrimination on the basis of colour with respect to services, contrary to sections 1 and 9 of the *Code*.

[35] I stated earlier that there were disputes between the parties with respect to the manner and content of the two conversations between the applicant and the officers. I find that it is necessary to make some findings on these matters as they may affect the remedial aspect of the case. The applicant asserted that the officers drove abruptly into a driveway that he was about to cross and approached him in an intimidating manner. The first word Constable Shaw uttered, in a disrespectful manner, was "ID." When he asked why they wanted his identification, Constable Shaw answered in an insulting manner, "I would ask even if you were the Prime Minister of Canada." The police check took a considerable period of time during which the applicant asked to continue delivering mail and the police car followed him while he was doing so.

[36] This is denied by the officers. They testified that they stopped on the curb and did not pull into the driveway because of rules against entering unnecessarily upon private property. They politely advised the applicant that they were investigating break and enters in the area and asked for identification. While Constable Noto conducted the police check, Constable Shaw inquired why the applicant had not delivered pamphlets to every home. Upon being advised by the applicant that not everyone wanted pamphlets, and upon receiving the negative results from the police check, Constable

Shaw apologized for stopping him. They deny following him in the police car while they did the check.

[37] I accept the applicant's evidence that he felt intimidated by being approached by two police officers, wearing guns, one of whom, Constable Shaw, is a very large man. I note that the applicant has a small stature. I also accept that he perceived that the officers did not treat him respectfully. However, I am not persuaded on a balance of probabilities that Constable Shaw used the police vehicle in an intimidating manner, that he approached the applicant in an intimidating manner or that he spoke rudely to the applicant.

[38] The applicant did not give any detailed testimony about the second meeting after he hailed the officers and asked why they had stopped him, and therefore it is unnecessary to make any findings of fact about the manner in which he was treated at that time.

[39] This hearing shall resume on September 14, 2009 to hear the evidence and argument with respect to remedy and liability of William Blair and the TPSB.

Dated at Toronto, this 18th day of June, 2009.

"Signed by"

Kaye Joachim
Alternate Chair