



HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Betty George

Applicant

-and-

AccertaClaim Servcorp Inc.

Respondent

DECISION

Adjudicator: Jay Sengupta

Date: January 22, 2016

File Number: 2012-13211-I

Citation: 2016 HRTO 107

Indexed as: **George v. AccertaClaim Servcorp Inc.**

APPEARANCES

Betty George, Applicant)	Beth Symes, Counsel
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AccertaClaim Servcorp Inc., Respondent)	Natalie C. MacDonald, Counsel
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INTRODUCTION

[1] This Application alleges discrimination with respect to employment because of race, colour, ancestry, place of origin, ethnic origin, family status, marital status and age contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”). Although all of the grounds enumerated above were identified in the original Application, at the hearing, the applicant, through counsel, focussed on race, colour, ethnic origin and age.

[2] Specifically, the applicant asserts that she was not offered, or given the opportunity to compete for, a position that was given to a person who was one of her direct reports, for reasons relating to the Code grounds identified. She asserts that she was, instead, left in the part of the company’s business that was being phased out.

[3] The applicant argues that this position was one that would have put her on a path to senior management within the respondent organization and she was denied that opportunity because of Code grounds. It was given, instead, to someone who was less experienced because the other candidate was younger and not a member of a racialized group. The applicant argues that this is a case of “systemic discrimination”.

[4] The respondent denies discrimination, asserts that the applicant was a valued employee who rose within the ranks of their organization rapidly and argues that placing the applicant in the job in question would have amounted to a demotion for the applicant, with a commensurate removal of management responsibilities and decreases in salary grade, amount and benefits.

[5] The respondent points out that the applicant did not approach any member of the senior management group about the job in question or indicate that she believed she had been discriminated against until her exit interview by which time she had already voluntarily resigned her employment. The respondent seeks dismissal of the Application.

[6] This Application was heard over four days in February and May, 2014. For the reasons that follow, this Application is dismissed.

THE LAW

[7] The relevant sections of the *Code* are as follows:

5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

10. In Part I and in this Part,

“age” means an age that is 18 years or more; (“âge”)

“equal” means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination; (“égal”)

“family status” means the status of being in a parent and child relationship; (“état familial”)

“marital status” means the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage; (“état matrimonial”)

THE FACTS

[8] The applicant is a woman in her early forties of South Asian descent. At the time of the hearing, she had just turned 42. She is married and the mother of a 5-year-old daughter. She was born in Kuwait and raised in the United States. She self-identifies as being Indian and describes herself as racialized.

[9] The applicant has a Bachelor's degree in Health Care Administration from Texas State University, from where she graduated in 1998. While employed by the respondent, she completed an industry-related course between August 2010 and December 2011 and received a certificate from IFEBP. She also took an Excel workshop to improve her skills. The courses completed while she was employed by the respondent were paid for by the respondent.

[10] Prior to her joining the respondent company, she worked at the Ontario Pharmacy Association ("OPA") from 2006 to December 2009, as an insurance co-ordinator, where she managed claims. Prior to her tenure at the OPA, she worked at Inhealth solutions from 2004 to September 2005 as a client services associate and managed medical portions of automobile claims.

[11] Prior to these jobs, she worked in Dallas, Texas at Travellers, a property and casualty insurance company from April 1999 through to August 2002. She initially worked as a worker's compensation claims manager and then in the company's subrogation department.

[12] The applicant describes the respondent business as one created by the Ontario Dental Association (the "ODA") to manage claims. The ODA is the only shareholder of the company. It is housed in same building and shares office space.

[13] The parties agree that the applicant was a good employee, received excellent performance reviews and rose within the ranks very quickly.

[14] The applicant began working for the respondent company on April 5, 2010. At the time she was hired, she worked in a non-management role at a salary of \$44,500.00. She was considered to be part of salary grade 7. She received a performance bonus of 3.5% that year.

[15] One year later, she was promoted to the manager level. Her salary increased by more than \$10,000.00 to \$57,500.00, and she went from salary grade 7 to 10. In January, 2012, she received another \$1,000.00 raise.

[16] As of June, 2012, she was manager of group administration and had seen a \$23,000.00 increase in her salary and had moved up 5 grids on the salary scale in a two-year period. By that time, she was at salary grade 12 and earning \$67,500.00.

[17] The parties spent some time during the hearing providing me with evidence about the racial composition of the workplace. The applicant asserts that the executive management group is made up exclusively of non-racialized persons, while the composition of the administrative and clerical staff is more diverse and includes some racialized members.

[18] The respondent indicates that the applicant was part of the management team and, as a result, there were racialized persons within the management structure of the company. It also argues that the executive management group is diverse in ways not having to do with race but in respect of gender and sexual orientation. The respondent agreed that the staff is diverse and includes racialized persons.

[19] At the time the applicant worked at the respondent company, it had two main lines of business; public and private. The public side managed dental benefits for some public organizations such as children's aid societies and social assistance recipients. To use the language of the industry, it amounted to approximately 300,000 "lives" and constituted about 80% of the company's business.

[20] The other side of the business, the private side, involved acting as a third-party administrator for employers who funded their own benefits plans health (vision, hospital, medical equipment, prescription) and dental. The company would create booklets, provide cards to employees, receive and pay claims. They would charge an administrative fee for this service and the client would be billed monthly or quarterly. The private side represented 20% of the respondent's business.

[21] The applicant worked on the private side of the business. She testified that when she came on board, the private side was in a state of disarray. There had been a number of team leads, customers had expressed dissatisfaction, and there had been instances of overpayments or claims not being paid properly.

[22] The private side of the business was not growing. Some groups were cancelling contracts and the few coming on were smaller. The applicant testified that during a meeting with staff in the summer of 2012, Doug Cooper, the respondent's CEO, had indicated that the respondent would not be investing in the private side and would, instead, be focussing on the public side of the business.

[23] The applicant testified that, as a result, she was looking for opportunities to work on the public side of the business and learn more about it. She was interested in eventually moving into the senior or executive management group and knew that in order to do so, she would need to become an integral part of the public side of the company's business. Although she had made her interest in moving to the public side of the business known, she had not been given any opportunities to do so.

[24] The applicant was caught by surprise when, on December 6, 2012, she was told by the CEO, Doug Cooper, and Sandy Fick, a member of the executive management team, that "CQ", a member of the team that reported to her, was being moved to a newly created position on the public side of the business. In her new role, CQ would be reporting directly to Sandy Fick.

[25] The job had not been posted, an open competition had not been held and, in the applicant's opinion, there were several more qualified and experienced candidates for the job that could have been selected.

[26] Although her team had been reduced by the departure of CQ, the applicant was told that the position would not be refilled and the workload would have to be redistributed between the remaining staff on the team.

[27] The applicant believed that this signalled that CQ was being groomed for a position in the senior or executive management group, something to which she aspired. She believed that she was being left in a part of the business that was dying out.

[28] She did not raise her discrimination concerns during the meeting on December 6, 2012. However, she did object to the fact that her team would now have to continue to operate with fewer resources. She later sent an email seeking additional pay for the team as a result of the higher workload; a request that was denied.

[29] I heard a great deal of evidence about the applicant's view that the process by which this job was created and filled was irregular and that while she considered CQ a good employee and had provided her with positive performance reviews, she did not find her to be an exceptional one. She also testified that CQ's qualifications and experience were not so stellar that she was an obvious fit for the job. The applicant's view was that other older and racialized employees had been overlooked by the respondent when filling the job without a competition, including the applicant.

[30] The applicant filed the instant Application to the Tribunal on December 10, 2012, and resigned her employment on December 20, 2012, as she felt she could not continue in her job with the respondent. The parties agree that during her exit interview with Doug Cooper on January 4, 2013, the applicant raised the issue of discrimination with the respondent for the first time.

[31] The applicant says that during that meeting, when she raised the issue of discrimination and the improper transfer of CQ, she was told that the position was given to CQ because she was a good fit and had skills, such as marketing, that the applicant did not.

[32] Doug Cooper's version of what took place during that meeting differs. He gave evidence that when the applicant resigned, he had assumed initially that she had found another job, perhaps with a competitor, and he was sorry to see her go. He says he knew that the applicant was upset that CQ had been transferred out of her department

because of her reaction during the meeting of December 6, 2012, but that he was surprised when the applicant raised the issue of discrimination.

[33] Doug Cooper says that the respondent valued the applicant's contribution and that she had been instrumental in sorting out issues in her department and then ensuring the continued smooth operation of the private side of the business.

[34] He indicated that although the respondent was engaged in restructuring activities, any plans to divest itself of the private side of the business did not include an intention to let the applicant go. He confirmed that the company's plans for the applicant involved having her eventually move into the role of manager of operations but acknowledged that had not yet been communicated to her.

[35] Doug Cooper says that during his meetings with the applicant he had tried to explain to her that the reason the position was created was that in November, 2012, a new software system had been purchased and Sandy Fick's responsibilities were increasing as a result of this purchase. Sandy Fick needed additional administrative assistance. The job CQ was put into, according to him, was an administrative role, with no management duties or responsibilities and compensated at a much lower level – salary grade 9. He said that the executive management team had never considered demoting the applicant to take on that role.

DECISION

[36] This Application alleges an infringement of section 5 of the *Code*, which provides that every person has the right to equal treatment with respect to employment without discrimination on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

[37] The applicant has the onus of proving on a balance of probabilities that an infringement of the *Code* has occurred. A balance of probabilities means that it is more likely than not an infringement has occurred.

[38] Discrimination is not defined in the *Code*, but has been the subject of much judicial consideration. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, in discussing the meaning of discrimination under the *Charter of Rights and Freedoms*, the Supreme Court of Canada stated:

...discrimination may be described as a distinction, whether intentional or not but based on grounds relating to the personal characteristics of the individual or group which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classified.

[39] Subsequent decisions of the Supreme Court of Canada have gone on to say that discrimination under both the *Code* and the *Charter* require the applicant to establish a distinction on a prohibited ground to a member of a protected group that creates a disadvantage by perpetuating disadvantage or prejudice, or by stereotyping. See: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, *R. v. Kapp*, 2008 SCC 41, and *Withler v. Canada (Attorney General)*, 2011 SCC 12.

[40] In order to establish that her right to equal treatment in respect of employment has been infringed by the respondent, the applicant must establish that she has been subjected to differential and disadvantageous treatment on the basis of a *Code* ground or that a neutral rule or requirement has had a differential impact on her resulting in disadvantage as a result of her membership in a group identified by a *Code* ground.

[41] The applicant argues that this is not a case of direct discrimination. Instead, she argues that this is a case of “systemic discrimination” and has argued that the principles in the Supreme Court of Canada’s decision in *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536, apply.

[42] She says that the respondent company’s senior or executive management group is exclusively Caucasian and there are no racialized persons within that group. She also

asserts that jobs involving administrative and support functions in the company were filled by racialized persons, such as the applicant.

[43] She argues that the decision to create a position and fill it without competition with a younger white woman is evidence that the respondent seeks to perpetuate that state of inequality and that decision resulted in a disadvantage to her on the basis of *Code* grounds.

[44] The respondent disagrees and argues that the applicant was, herself, a member of the management team of the respondent business before she resigned and it is inaccurate, therefore, to suggest that the management team is exclusively Caucasian and non-racialized. It says that there is diversity both within the broader company as well the executive management team.

[45] The respondent also argues that its decision to create and fill a new position without an open competition within the workplace was not in contravention of its own policies as it is open to the company to promote staff without a competition and points out that one of the applicant's own promotions did not involve a competition.

[46] In any event, the respondent argues that the position in question was an administrative one and not a stepping stone to a seat at the executive management table, as the applicant has assumed. It argues that the position created was not a management position and placing the applicant in that position would have amounted to demoting her because of the lower salary grade, lower compensation level, lesser vacation entitlement and removal of management tasks and responsibilities.

[47] I am not persuaded of the relevance of the current racial composition of the executive management group within the respondent company to the issues at hand. Assuming, without finding, that the executive management team was made up of exclusively non-racialized persons, that finding would not, in and of itself, lead me to conclude that the rights of the individual applicant in this Application were infringed as a result of the racial composition of the various job categories within the company.

[48] The event that brought matters to a head for the applicant was the creation of a job and the appointment of CQ to that job by the executive management group.

[49] Indeed, before that event, it is undisputed that the applicant, a racialized person, had experienced a steady and rapid progression through the ranks of the respondent company, had not raised any issues regarding being overlooked for promotion and advancement, and had not identified any barriers being placed in her path or opportunities to which she or other racialized employees had been denied access.

[50] Again, assuming, without finding, that the new position was improperly filled, without posting it and holding an open competition, it is not disputed that the position was one that was at salary grade 9 and compensated at a level lower than the applicant's salary in December, 2012.

[51] If the job was improperly filled and I was to accept that there was, as the applicant argues, a "preferential hiring" or promotion of CQ, it resulted in CQ filling a position that would have amounted to a demotion for the applicant.

[52] In other words, if there was a preferential hiring or promotion of CQ, and differential treatment or a differential impact based in part on *Code* grounds occurred, those disadvantaged by these events would have been co-workers working in positions alongside CQ, not the applicant, who was her manager. It would be those individuals who could suggest that they had a legitimate grievance about the events in question.

[53] I am not persuaded by the applicant's evidence or argument that there was any discernable disadvantage arising out of the hiring or promotion of CQ to the applicant. Any future possible disadvantage to the applicant or advantage to CQ from the latter being placed in this job, envisioned by the applicant, is speculative and remote.

[54] The mere fact that another person in the respondent company is promoted into another position does not lead inevitably to the conclusion that the applicant is being

disadvantaged or harmed as a result, particularly if, as is the case here, the transfer would amount to a demotion.

[55] Even if the applicant is correct in assuming that CQ was being groomed to move up in the company, it does not follow that the applicant was disadvantaged or that her history of advancement and promotion was going to be negatively impacted going forward, i.e. that she would no longer being considered or “groomed” for advancement in the respondent company. That is a conclusion, based on an assumption made by the applicant, that I do not find supported by the evidence that I have heard.

[56] Finally, even if I were to accept that the applicant was disadvantaged by not being given an opportunity to compete for the position CQ was placed into, I find that the respondent has provided me with a non-discriminatory explanation, unconnected to any *Code* grounds, for its failure to consider the applicant for that job, specifically that it would have amounted to a demotion to consider or place her in the job and the respondent did not wish to demote the applicant.

[57] As a result, I find that the applicant has not established on a balance of probabilities that her right to equal treatment in respect of employment under the *Code* has been infringed.

[58] Accordingly, the Application is dismissed.

Dated at Toronto, this 22nd day of January, 2016.

“Signed by”

Jay Sengupta
Vice-chair