

Members Quarterly

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Feature

The Rising Tide of Remedial Awards: Human Rights in Nova Scotia

Don't stay silent when you discover discriminatory behaviour

Awards for lost income may be on the rise in Nova Scotia Human Rights cases. There is a recent case that deserves attention where an employee with 3 years and 7 months service received 18 months lost earnings, less income earned during that period.

On April 8, 2014, a Nova Scotia Human Rights Board of Inquiry released its decision on the *Garnetta Cromwell v. Leon's Furniture Limited* (2014 CanLII 16399 (NS HRC)) case. Ms. Cromwell had been a sales associate at Leon's Furniture store in Dartmouth for less than four years. During this time she was subjected to discrimination based on race; Ms. Cromwell is African Nova Scotian. The Board found ten incidents of racial harassment which included excessive discipline, limiting her ability for advancement as well as inappropriate racial comments. The workplace culture appeared to allow this racism, especially in one instance where a particularly offensive comment was made in front of other managers who remained silent.

Here are some examples of comments and actions Ms. Cromwell experienced in her workplace. Ms. Cromwell's manager would touch her hair saying "Somewhere a sheep is missing its wool." He did this in the office as well as on the sales floor. This same manager would refer to her as "Condoleezza Rice" when she was waiting on customers. When she arrived for her performance review, that same manager stated in front of three other managers, "Everybody out. It's time for a lynching." Two of the managers left and the third stayed as part of the performance review. None of them said a word and Ms. Cromwell proceeded to her performance review.

The managers at Leon's may have stayed silent, but the Human Rights Board of Inquiry raised its voice. It validated Ms. Cromwell's claims and ordered Leon's Furniture to pay Ms. Cromwell \$8,000 in general damages and eighteen (18) months of lost income, less any income earned in the 18 months after she left Leon's. The Board of Inquiry did not find that Ms. Cromwell quitting constituted constructive dismissal, rather the Board was assessing damages for the breach of Ms. Cromwell's statutory right to be free from discrimination. The Board of Inquiry found at paragraph 292 of the decision that "There was a moment when the lack of reaction of members of management broke the employment relationship."

In the award, the Board did not award loss of income based on reasonable notice. The oft-quoted measure of one month per year of service could have resulted in an award of 3 to 4 months lost income. Instead, the Board applied the restitution model, looking to rectify the actual injury caused to Ms. Cromwell through an award of compensation.

In following this remedial approach, the Board used the following measure at paragraph 409 "In my assessment had these events not occurred, the Complainant would have continued working for the Respondent for a further 18 months." In coming to that decision, the Board considered "various contingencies including the likelihood that the Complainant would have eventually



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sought positions elsewhere based on her overall employment history.”

What does this mean to you?

Do not stay silent when you witness or are informed of discriminatory behaviour at your workplace. Lack of reaction is an action. It is to allow the status quo to continue.

When it comes to the restitution model, be very cautious when ending employment where a human right may be involved, believing the extent of your liability could rest in a reasonable notice period. Ensure that you are able to substantiate fully that the action taken is not related in any way to a potential human right. Consider the impact if an employee was four (4) years away from retirement, and but for the discriminatory action would have remained an employee until retirement. Applying the measure used in this case could result in a very high award for lost income.

Note there are also great lessons in this case regarding policies and procedures and what falls short of a reasonable investigation.

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