

Evidence in Cases of Systemic Discrimination

Sometimes individual grievances / complaints do not have the necessary scope to prove that an employer is discriminating against a member or group of members. An employer's actions might look reasonable or innocent on an individual basis, but not when evaluated at a broader level. Sometimes you cannot see the forest through the trees; a bird's eye view becomes necessary.

Filing a systemic discrimination grievance or complaint, either as a group or policy grievance or systemic complaint, is one way to bring a bird's eye view to an arbitrator, labour board, or human rights tribunal. The Supreme Court of Canada described systemic discrimination in a case called *Action Travail des Femmes* in 1987:

[S]ystemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (see the Abella Report, pp. 9-10).

The Ontario Human Rights Commission has adopted a similar definition: *Racial discrimination can result from individual behaviour as well as because of the unintended and often unconscious consequences of a discriminatory system. This is known as systemic discrimination. Systemic discrimination can be described as patterns of behaviour, policies or practices that are part of the structures of an organization, and which create or perpetuate disadvantage for racialized persons.*

Case examples

Action Travail des Femmes v. Canadian National Railway Company: The Canadian Human Rights Tribunal determined that the recruitment, hiring, and promotion policies at CN prevented and discouraged women from working on blue-collar jobs. Reports showed that women made up a smaller portion of CN



employees than of the total Canadian labour force. The Tribunal also heard evidence about sexist attitudes towards women in the workplace. The Tribunal made a finding of systemic discrimination and concluded that it was essential to impose upon CN a special employment program.

National Capital Alliance on Race Relations (NCARR) v. Canada (Health and Welfare): The Tribunal determined that Health Canada systemically discriminated against racialized persons by depriving them of employment opportunities in management and senior professional jobs. It reached this conclusion after analyzing statistical evidence (racialized persons represented 0.8 percent of senior management), the structure on the “feeder groups” to management, how experience is gained by informal acting assignments and who gets those assignments, and hearing testimony from witnesses who experienced discrimination first-hand.

What goes into a systemic discrimination grievance?

A systemic discrimination grievance is almost always a complex undertaking. It can involve testimony from individual members and expert witnesses, as well as a review of statistical data. There is no magic formula, but the following types of evidence will likely strengthen a claim of systemic discrimination:

- **Workplace culture.** What types of attitudes and assumptions to members encounter?
- **Hiring practices.** How are acting opportunities assigned? Who is encouraged to apply for new opportunities? Are certain backgrounds favoured over others? What kinds of groups tend to have these backgrounds?
- **Impacts of employer policies and practices.** Are some groups more disadvantaged than the others? If so, which ones? Why?

Our stewards and other frontline union officials have an important role to play in this undertaking: actively listening to our members when they want to talk about experiences of discrimination. This gives the PSAC a more accurate understanding



of workplace issues and helps us decide where and how to direct our efforts. It also builds trust with our membership, which encourages our members to come forward and even get involved in the union movement.

If you believe that a systemic discrimination grievance might be an appropriate way to challenge an employer, please contact PSAC Representation (arb-representation@psac-afpc.com) to seek their assistance.

This document is for informational purposes only and does not constitute legal advice.

