Evidence in Workplace Racism Files

In order to combat racism, we need to be able to identify the different levels at which it operates in our workplaces.

Begin with the discrimination:

We know that racism and discrimination can take many forms:

1. People can be discriminated against or harassed on the basis of a prohibited ground of discrimination (e.g. race, ethnicity, national origin, colour, religion, gender, sexual orientation, disability, age, etc.). This can be specific to the individual or it can be against groups of people with these characteristics.

2. People can be adversely impacted by a policy or a practice (for example, the design of a policy which appears neutral and is applied the same way to everyone but which has an adverse impact on people on the basis of one of the prohibited grounds of discrimination; like staffing procedures that are culturally biased).

3. People may be denied an accommodation (as in the case of people with disabilities whose limitations are not being accommodated by the employer or the family who needs to adjust their hours to provide elder care, or the person who wants to amend their hours of work to allow for religious observance).

4. People can be harassed (also a form of discrimination if linked to a prohibited ground of discrimination).
Overall, a discriminatory action is a practice, decision, an action that was harmful, that treated people differentially, or that denied an entitlement based on a prohibited ground.

Evidence Needed

A *prima facie* case of discrimination “is one which covers the allegations made and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer”.
See *Ontario (Human Rights Commission)* v. *Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536.

What does this mean? The evidence must satisfy the following test:

1. The person(s) who is experiencing the discrimination (racism) falls within the prohibited grounds.

2. The adverse impact of the discriminatory practice (e.g. person had to take leave of absence due to the discriminatory practice; demoted; terminated; disciplined).

3. The discriminatory practice is linked to the prohibited ground. Or in other words, there is a nexus between the discriminatory practice and prohibited ground (i.e. a racialized person is denied an employment opportunity, on part, due to her or his race).

Below are some key principles to remember when gathering evidence in cases where there is an allegation of racial discrimination:

1. 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.

   What this means is that if race even factored into a decision or an action it will be seen as discriminatory. **Race doesn't have to be the only reason a decision or action was taken, it just has to be one of the reasons.**

2. Consider all alleged incidents and all the circumstances **as a whole rather than only individually**. Is there an overall pattern that suggests race could have been a factor in the treatment?

3. There's **no need for direct evidence of discrimination**; discrimination will more often be proven by circumstantial evidence. This includes any details about circumstances that make it possible to make an inference that it is more likely than not that race was a factor in the alleged treatment.
4. 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 person experiencing racism. We often

hear, “Well it was not my intention to cause harm” – or “I didn’t mean it like that.” What the law tells us is that it is the “impact” and not the intention that matters.

5. Racial discrimination is often **subtle or cloaked.**

6. Racial discrimination is usually the result of **subtle unconscious beliefs, biases and prejudices**. (See *Shaw v. Phipps*, 2010 ONSC 2884, affirmed 2012 ONCA 155 at paras. 75 to 79).

The initial evidentiary burden rests with the person experiencing racism to establish, on a balance of probabilities, a *prima facie* case that they were discriminated against because of their race and colour.

Once a *prima facie* case of discrimination has been established, the burden or onus shifts to the respondent to provide a rational or reasonable explanation for its actions/inactions or as to how discrimination has NOT occurred.

Other points to remember:

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 respondent’s 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.

Radek v. Henderson Development (Canada) Ltd. (No.3) (2005), 52 C.H.R.R. D/430, 2005 BCHRT 302 at para 482. and quoted in *Oscar Correia and York Catholic District School Board* 2011 HRTO 1733 (CanLii)

Examples of Evidence

Evidence is required to support the allegation(s). Typical sources to gather evidence:

- copies of employer policies or decisions;
- minutes of meetings (UMCCs or other);
- e-mails; personal appraisals;
- works schedules;
- job descriptions;
- personnel files (and shadow files);
- disciplinary history;
- annual reports (such as Employment Equity Reports or Reports on Staffing);
- interviews with the member and with witnesses;
- ATIP documents (Access to Information and Privacy) but the process can take 30 days to six months; and
- treatment of other non-racialized or Indigenous workers.

You may need to conduct a union survey of your members (or former members) as a way of gathering evidence about racism and the workplace culture or perceptions about management decisions or behaviors.

As well, when a case goes before an arbitrator or adjudicator, the employer will be required to provide their evidence. Don't hesitate to request the evidence you need.

Sometimes you might not be sure if you have enough evidence to proceed. Not having enough evidence does not mean that you can rule out that racism has occurred.

How do I establish that adverse treatment was based on a prohibited ground of discrimination?

Direct evidence of discrimination is rare and not required; evidence of discrimination can be inferred from the surrounding circumstances (*Reeves v. Deputy Head (Department of National Defence)*, 2019 FPSLREB 61 at paragraph 181). Courts have recognized that discrimination can take new and more subtle forms. Consider the following litmus tests:

- **Is the "subtle scent" of discrimination present**? (*Basi v. Canadian National Railway*, 1988 CanLii 108 CHRT, *Neilson v. Canada (Deputy Minister of Fisheries & Oceans)*, 2012 PSST 10 at paragraph 92; *Turner v Canada (Border Services Agency)*, 2020 CHRT 1 at paragraph 107).
- **Has there been a deviation from normal practices? How do events normally unfold in a given situation?** (*Davis v. Canada (Border Services Agency)*, 2014 CHRT 34 at paragraph 258; *Johnson v. Halifax (Regional Municipality) Police Service*, [2003] N.S.H.R.B.I.D. No. 2, 48 C.H.R.R. D/307 (N.S. Bd Inq.) at paragraph 62).

This is one of those principles that people often don't know. We know that racism can have subtle forms and this means that evidence of direct evidence might not exist. However, when we take a look at the bigger picture, there may be no other explanation as to why the situation has occurred. The burden of proof in grievances is on a balance of probabilities (50% plus 1). The question becomes "what is likely the reason or what likely happened." It is not criminal law where the test is "beyond a reasonable doubt." Naming the right issue in your case is important since this will determine the evidence you require. The evidence submitted must be credible.

The ultimate issue is whether an inference of discrimination is more probable from the evidence than the actual explanations submitted by

the respondent regarding the incident(s). This goes to the balance of probabilities. If there is an allegation of racism, and the employer attempts to justify their action(s) with a rationale that does not appear to be probable or defensible, then it can be inferred that there is no non-racist reason for the action.

Comparator evidence (evidence that shows how other people are treated in the same or similar situation) is not **legally required** but becomes a **practical necessity** if the employer's actions appear reasonable on their face.
Example: An employer rejects a vacation request based on operational requirements. Comparator evidence might show the employer allowed vacation requests from other employees under similar circumstances.

What are privacy and confidentiality considerations?

There is never an absolute guarantee that evidence will be kept confidential. If a case is referred to arbitration, adjudication or tribunal, the case summary and details become public record.

Due process in an investigation requires that information be shared to the complainant and the respondent. However, only people who need to know (involved in the process, hearing the case, offering representation) should have access to the details of the case.

What is the relevance of racial biases and stereotypes?

Consider whether the respondent's vision was distorted or influenced by racial biases or stereotyping, either consciously or subconsciously. Sometimes racial biases or stereotypes are the most plausible explanation for the employer's actions.

This argument becomes more persuasive as the disconnect between perception and reality grows. Consider the following examples:

- The "**violent and prone petty crime" Indigenous woman**: In *Radek v. Henderson Development Canada and Securiguard Service*s 2005 BCHRT 302, the B.C. Human Rights Tribunal concluded that Radek was

discriminated against based on stereotypes of Indigenous woman with a disability when security guards refused to let Radek into a mall. The tribunal also held there was systemic discrimination against Indigenous people because there was a pattern on how Indigenous people were treated. At paragraph 135 is a list of stereotypes of Indigenous people and discusses intersectionality.

- "**South Asian men's leadership style as being "top down" or authoritarian**": In *Oscar Correia and York Catholic District School Board* 2011 HRTO 1733 (CanLii), the Tribunal found that Correia had been discriminated against when he was not selected for a position based on stereotypes of South Asian men having an authoritarian management style, even though it have been unconscious. Also see *Chopra v. Department of National Health and Welfare* 2001 CHRT 8492 (CanLii) where the Tribunal found that the stereotype of South Asian men as "authoritarian" and "confrontational" was based on stereotype that certain "cultural" minorities may not be well-suited for senior management positions because they lack "soft skills'.

- **The "lazy Black man"**: In *Turner*, the Tribunal concluded that the employer's reasons for screening an employee out of a job competition were based on the stereotype of the "lazy Black man" because the reasons did not align with the employee's performance appraisals.

- **The "violent Black man":** In *Grant v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 59, the employer placed an employee on administrative leave before terminating his employment for performance issues. Shortly after placing the employee on leave, the employer escorted him out of the building, locked the door behind him, and placed a photo of him at the commissionaire's guard desk beside the door. The Board determined that this treatment was the result of the stereotype of the "violent Black man" because the employee had never exhibited violent or threatening behaviour and because a colleague did not receive the same treatment when placed on administrative leave.

What difference does it make if the adverse treatment comes from the member's coworkers?

The employer has an obligation to provide a workplace free of discrimination. A failure to investigate an allegation of racism can itself constitute racial discrimination (*Reeves* at paragraph 93). Similarly, a failure to respond to an allegation can be a factor in determining the appropriate remedy (*Graham* at paragraph 62).

What should I do if the member has valid performance issues?

You can still satisfy a claim of discrimination despite a valid termination of employment (*Grant)*. Unfortunately, it also follows that the union must establish a connection between adverse treatment and termination of employment in order to win reinstatement (*Kirlew v. Deputy Head (Correctional Service of Canada)*, 2017 FPSLREB 28 at paragraph 141). To avoid a "damages only" outcome, remember the **purpose** of the *Canadian Human Rights Act* and ask the member (and yourself): how did the adverse treatment **hinder** or **prevent** the member from performing to the best of his or her abilities?

Similarly, an overreaction to an objectively difficult situation can give rise to a *prima facie* case of discrimination (*Graham* at paragraph 59).

Research on case law

It can be helpful to look at other similar race cases to see what evidence was used. This website is helpful: www.canlii.org.