NO.22-HWC 46

WINDSOR COURT OF APPEAL

JAYANA HOLIDAY

Appellant

-and-

COFFIN INDUSTRIES

Respondent

OFFICIAL MOOT PROBLEM

THIRD ANNUAL LLOYD DEAN MOOT COURT COMPETITION

PRESENTED BY:

BLACK LAW STUDENTS' ASSOCIATION OF CANADA – WINDSOR CHAPTER

PROBLEM AUTHORED BY:

OSARO OBASEKI, ASSOCIATE, SAMFIRU TUMARKIN LLP

2021- 2022 MOOT COMMITTEE:

NATASHA DALEY (CO-CHAIR), BRAIN PROVO (CO-CHAIR), TISH LEWIS, TIMI ROBERT, NICOLE BALTHAZAR

Overview of the Moot Problem

This Moot Problem is an appeal of an arbitration decision that will be heard by the Windsor Court of Appeal. The Appellant (Jayana) used to work for the Respondent (Coffin Industries) and claims that she was discriminated against when she was terminated. The primary issue is whether or not the Respondent met its obligations under the *Ontario Human Rights Code*. The parties are also in disagreement as to how much notice the Respondent is entitled to in light of her without cause termination. The Appellant believes that there is a pervasive racial bias in the industry and that this should have influenced her former employer's actions and entitles her to a longer notice period.

Instructions

Moot participants will be divided into two teams. One team will represent the Appellant and the other team will represent the Respondent. In this complete Moot Problem package, we have provided all of the relevant principles, legislative, and case law research for the participants. No outside research is required or permitted. Moot coaches are also available for ongoing support throughout the competition.

Moot Questions

The following issues are before the Windsor Court of Appeal:

1. Did Coffin Industries violate section 5 of the *Ontario Human Rights Code*?
2. Was the Arbitrator correct in deciding that Jayana was entitled to 4 months' notice upon applying the Bardal factors?

Facts

1. Jayana Holiday is a 28-year-old Black Afro-Caribbean woman (originally from Antigua) who lives in Toronto, Ontario. Her family immigrated to Windsor, Ontario when she was 16. After graduating high school, she earned a bachelor's degree in Computer Science from the University of Windsor, and then completed a graduate degree in Artificial Intelligence at the University of British Columbia in 2017.
2. Coffin Industries (the "Company") is a multinational corporation that provides IT services. The Company is well-known for cultivating long-standing relationships with industry leaders and prides itself on its reputation for providing stellar client service.
3. The Company has a strict Customer Relations Policy, which states: "*Here at Coffin Industries, client service, and reputation are critical to our success and are of the utmost importance to us. Accordingly, any employee who receives three distinct formal complaints from any of our clients or business partners, is subject to disciplinary action, up to and including termination. In particular, employees who are in client-facing roles are held to the highest standard and are therefore subject to harsher disciplinary measures.*
4. Jayana has worked at the Company's Toronto office since October 12, 2013, during her second year of undergrad. She started off in an administrative role and made her way up to a Senior Software Developer. Jayana has been a Senior Software Developer for 3 years, and a Team Lead for 2 years. She is the youngest Team Lead at the Company.
5. On December 1, 2020, Jayana was offered a position as an Account Manager with the Company. This role involves less technical work as her primary duties include working with clients to assess the market and business needs, liaising between clients and internal team leads, and assisting clients with long-term strategic planning. The role was offered to Jayana by the Chief Operating Officer of the Company, Leena Morris. In her new role as

an Account Manager, Jayana would receive a 30% pay increase, increased responsibility, exercise more control over her hours, and directly report to Leena. Leena also explained that the Account Manager role meant that she would work independently, and would no longer have anyone reporting to her. Jayana happily accepted the position as she was excited at the prospect of developing her client-management skills and business acumen. She also saw the new position as a promotion.

6. During their initial meeting, Leena explained that Jayana was to work with the Company's social media portfolio, working with some of their biggest clients—Facebook, Instagram, Tik Tok, and Twitter. Jayana told Leena that she was aware that this particular portfolio of clients had a reputation for being hard to work with.
7. Jayana started her new role on January 5, 2021. She organized a Welcome Lunch with all of her primary contacts from each of the organizations in her portfolio. The lunch, which occurred in late January, was attended by Michael Scott and Dwight Shrute — who worked at Facebook and Instagram respectively — as well as representatives from the other companies.
8. During the Lunch, Jayana felt that she and Dwight would not get along. She found him to be impolite, vulgar, and abrasive. At one point during the Lunch, the attendees started discussing sailing and yacht trips. Dwight then turned to Jayana and asked her why she seemed to go quiet and was disengaged in the conversation. She explained that she did not have much to say as she did not know much about sailing, nor did she own a yacht, and she thought it was a very "privileged" topic. She could tell that Dwight did not like this comment, but the conversation carried on as normal.
9. On February 12, 2021, approximately two weeks after the Welcome Lunch, Jayana had received an email from Leena notifying her that a formal complaint had been written about

her. When they met later that afternoon to discuss it, Lenna told Jayana that it was made by Dwight. The complaint indicated that Leena was cold, not personable, and "seemed disinterested in developing a healthy business relationship". He also mentioned that her "accent was difficult to understand".

10. Jayana thought these characterizations were inaccurate and unfair. She felt that her dealings with all of her clients were warm, personable, and engaged. Leena was supportive of Jayana and expressed that she knew that Dwight was "difficult to please". Leena also mentioned that Jayana had a great reputation at the Company, which gave her confidence that Jayana was not the problem. Leena reassured Jayana that she had nothing to worry about as he usually makes a complaint with new Account Managers. Leena brought the "three-strike" Customer Relations Policy to Jayana's attention, and Jayana confirmed that she was aware of it. Neither of them specifically brought up Dwight's comment about Jayana's accent.
11. After her first complaint, Jayana made notable efforts to improve her relationship with Dwight over the next several months, which is reflected by positive reviews and informal comments that he and others made to Leena about her work.
12. On July 12, 2021, Jayana had a meeting scheduled with all of her clients to discuss the Company's latest artificial intelligence program. The meeting was to take place at Tik Tok's Toronto office at 11:30 am. Jayana arrived approximately an hour early to ensure she was prepared. As she made her way from the reception area to the boardroom, Jayana overheard Dwight and Michael laughing hysterically, and then heard Dwight use a racial slur as part of a joke immediately before she entered the room. Dwight and Michael looked surprised by Jayana's presence and seemed embarrassed. However, neither Jayana, Dwight, nor Michael directly addressed the comment.

13. On September 25, 2021, Leena called Jayana into her office for an emergency meeting. Leena told Jayana that Dwight had made another formal complaint about her and that she was worried that her job was at risk. The complaint stated that despite making progress in the last few months, Jayana had become cold toward Dwight, particularly in the last few weeks. The Complaint also stated that Jayana was "not a good fit", especially in comparison to the person who previously held her position, Kevin Malone. Kevin was a Caucasian, middle-aged man.
14. Jayana expressed frustration about the second complaint but said that she wasn't surprised. She said that she was being targeted, treated unfairly, and could explain, but that she didn't have the time or energy to discuss it at the moment as she had a very busy and long day ahead of her. Jayana left the meeting and told Leena that she would get back to her as to "what was really going on".
15. On November 15, 2021, Leena had another meeting with Jayana. When Jayana arrived at Leena's office, she noticed Pam Beesley, the head of Human Resources, was in attendance. Leena told Jayana that a third complaint was made about her on November 13, 2021. This Complaint was made by Michael, and as a result, the Company decided to terminate Jayana's employment in accordance with the Customer Relations Policy.
16. Upon looking at Michael's complaint, Jayana noticed and pointed out that the wording in the report was the exact same as Dwight's second complaint. Jayana also mentioned that she knew Michael and Dwight had a very close relationship and that she felt like she was being targeted. Jayana raised all of the incidents that occurred with Dwight to Leena's attention, including the accent comment, and the racial slur and jokes she overheard them saying. Leena stated that it did seem "on-brand" with Dwight's reputation, but that her

decision was made. Leena also pointed out that Jayana had never "formally raised" these issues with her before, including six weeks since the last complaint.

17. Pam agreed with Leena, adding that the Company has a *Diversity and Inclusion Policy* that clearly lays out how to make a discrimination complaint, and that the Company had a reputation for taking these complaints very seriously. Leena pointed out that the Policy only refers to internal complaints, and that she was not exactly sure how to handle Dwight and Michael as they were very important clients of the Company. Pam agreed with Leena and said that Jayana should have come to her earlier if she was having issues.
18. The Company terminated Jayana without cause and provided her with severance in accordance with the *Employment Standards Act.* They told her that they were not willing to give her anything more than the statutory minimum because her dismissal was a result of the Customer Relations Policy.

Post Termination and Procedural History

After Jayana's termination, a lawyer told her that she had a strong wrongful dismissal claim and potential human rights claim. The lawyer told Jayana that she was entitled to 8-10 months of pay in lieu of notice. Jayana and Coffin Industries entered into a two-stage arbitration agreement. In the first phase, the parties participated in mediation-arbitration whereby they would attempt to reach a settlement before a mediator. If no resolution was reached, an arbitration would take place. In the second phase, the losing party had a right to appeal to the Windsor Court of Appeal (WCA). Only the conclusions from the first mediation-arbitration decision, and not the reasons, were given to the WCA.

In the first phase, the mediator concluded that Jayana was not discriminated against. They also accepted the Company's argument that Jayana was only entitled to 4 months of notice in light of her without cause termination.

Relevant Law

Statutes

1. *Human Rights Code,* R.S.O. 1990, CHAPTER H.19

> **Employment**
>
> **5** (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, color, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (1); 1999, c. 6, s. 28 (5); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (5); 2012, c. 7, s. 4 (1).
>
> **Constructive discrimination**
>
> **11** (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. R.S.O. 1990, c. H.19, s. 11 (1).

Key Case Law Decisions- See ***Appendix A*** on page 13 of this Moot Problem for the specific excerpts:

1. *Nelson v. Lakehead University* 2002 HRTO 41- (paras 30-37; 90-106)
    a. Test for establishing discrimination; responding to allegations of discrimination
2. *Payne v. Otsuka Pharmaceutical Co.,* 2002 CarswellOnt 5502 (paras 59-64; 76-80)
    a. Third-party discrimination and duty to inquire and investigate
3. *Bageya v. Daydem International Ltd.,* 2010 HRTO 1589 (paras 151-157)
    a. An employer cannot be said to have failed to investigate/respond to an allegation of discrimination where an employee fails to properly, and specifically, make a complaint.

Notice Period References

Background: An employee who is terminated without cause is entitled to reasonable notice or pay in lieu of notice. Reasonable notice is meant to give the employee adequate time to search and obtain a similar position with another employer. The amount of notice or pay an employee is entitled to can be set out in the employment contract. Employees who do not sign employment contracts (or whose contracts do not have a termination clause), are entitled to "common law notice" or "reasonable notice". Though this is meant to be a highly individualized exercise as it is up to each Court to weigh the factors and determine what is the applicable notice period in any given case, adjudicators often look to other decisions for guidance. In other words, employees in similar positions should receive similar notice periods.

Bardal Factors (the *Bardal* factors): The leading case with respect to reasonable notice *is Bardal v. Globe & Mail Ltd.* (1960), 1960 CarswellOnt 144 (Ont. H.C.). The relevant legal principles can be summarized as follows:

> *"There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The amount of reasonable notice is a question of fact, to be decided in each case having regard to the character of employment, the length of service, the age of the employee, and the availability of similar employment (in the determination of which the experience, training, and qualifications of the employee are taken into account), as well as any other factors peculiar to that case. Depending upon the facts of the case, other factors which may apply in determining the length of reasonable notice include whether the dismissed employee was induced to leave previous secure employment. Arriving at a reasonable notice period is thus not as formulaic as it is sometimes made out to be."*

Summary of Bardal Factors:

- **Years of Service-** This factor is often seen as the cornerstone for determining the notice period and perhaps is the most influential. Long-term employees are entitled to more notice than their shorter service counterparts.
- **Age-** This factor typically weighs in favor of older employees. The law recognizes that older employees generally have a harder time finding new employment than younger ones. One exception to this general rule is younger employees in positions typically held by older employees; a 30-year-old CEO of a large company, for example, is entitled to a longer notice period. The rationale for this is that these positions are rarely held by younger persons, making someone in this position less competitive in the job market.

- **Character of Employment**- The purpose of this factor is to distinguish between entry-level roles from positions that are more supervisory, managerial, or executive in nature. The latter are not as readily available, are more competitive, and therefore harder to obtain. The higher up you are in a Company, the more notice you will receive.
- **Availability of Similar Employment**- Here, the Court will consider market factors such as how many jobs there are, how unique a job is, the person's background, education, and qualifications in light of the position they previously held.

For the **purposes of determining the notice period**, the parties have jointly submitted the following to the WCA:

- The COVID-19 Pandemic has had an adverse impact on the job market generally, but the tech industry remains relatively stable.
- Jayana is highly skilled and qualified for many positions in the tech industry generally, but most applicants of the type of job she is seeking have business backgrounds.
- There has been an uptick in persons of color entering the tech industry in recent years, however, the overwhelming majority of the Account Manager's in the tech industry are middle-aged, white men.
- There are lots of similar jobs in Toronto, but Jayana plans on moving back to Windsor to be closer to her family.

Precedents: Precedents can help you see the notice periods other people received, compared to Jayana. For the purposes of determining the appropriate notice period, the parties have submitted the following precedents to the Court:

Name:	Kendra v. Tesla
Age:	27
Position:	Senior Software Developer and Team Lead
Length of Service:	7 years
Year & Jurisdiction:	2018-ONCJ
Award:	4 months
Rationale:	The Court noted that the tech industry was booming, and that there was an unusually high need for Software Developers at the time of Ms. Kenda's termination.

Name:	Angela v. Google
Age:	62
Position:	Account Manager
Length of Service:	14
Year & Jurisdiction:	2016-ONSC
Award:	14 months
Rationale:	The Court emphasized that Ms. Angela was unlikely to find similar employment given her age and gender.

Name:	Charles v. Amazon
Age:	32
Position:	Software Engineer
Length of Service:	5 years
Year & Jurisdiction:	2021-MBQB
Award:	11 months
Rationale:	Despite Mr. Charles' short service, he was awarded 5 months on the basis that there were very few tech-based jobs in the area. There was an abundance of jobs he was seeking in Ontario, BC, and Alberta, but Mr. Charles was unwilling to leave his home province to find comparable work. There Court agreed that he should not have to do this.

Name:	Chris v. Apple
Age:	21
Position:	Chief Technology Officer
Length of Service:	1 year
Year & Jurisdiction:	2019-BCCA
Award:	9 months
Rationale:	Mr. Chris was considered a “child prodigy” by the Company, and held an executive position at a tech giant.

Name:	AJ v. Microsoft
Age:	28
Position:	Software Engineer Team Lead
Length of Service:	5 years
Year & Jurisdiction:	1990-ONSC
Award:	10 Months
Rationale:	The Court noted that Mr. AJ was deserving of a longer notice period as there were few comparable positions in light of the industry being relatively novel at the time.

Appendix A

***Nelson v. Lakehead University,* 2008 HRTO 41** (paras 31-33; 90-106)

31 I heard extensive submissions on the burden of proof. All parties agreed that the burden of proof is on a complainant to establish a prima facie case of discrimination, although there was some difference of opinion on the test to be employed.

32 I accept that the legal test for establishing a prima facie case of discrimination is set out by the Supreme Court of Canada in O'Malley v. Simpsons-Sears Ltd. (1985) 7 C.H.R.R.D/3102 (S.C.C.). In O'Malley, at paragraph 24782, the Supreme Court of Canada held that a prima facie case is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favor in the absence of an answer from the respondent-employer".

33 Once the prima facie case is established, the burden shifts to the respondent to provide a reasonable explanation for the otherwise discriminatory behavior. If the respondent provides such an explanation, the complainant has the ultimate burden of demonstrating that the alleged discrimination is more probable from the evidence than the actual explanation offered by the respondent.

. . . 2. Did the Dean's response to the allegations violate the Code?

90 It is well established in the Tribunal's jurisprudence that included in the right to employment without discrimination in section 5 (1) is a duty not to condone or further a discriminatory act that has already occurred and a duty on an employer to investigate a complaint of discrimination. The Commission argued that both of these duties had been violated in this case.

91 Given my conclusions above, I do not find that the Dean furthered or condoned a discriminatory act, since I have concluded that the decision not to hire Dr. Nelson was untainted by considerations of age. However, I conclude otherwise in respect of the Dean's response to the complaint of discrimination made by Professor Cole.

92 The rationale underlying the duty to investigate a complaint of discrimination is to ensure that the rights under the Code are meaningful. As stated in Laskowska v. Marineland of Canada Ltd. (2005), 53 C.H.R.R. D/262 at para. 53:

> It would make the protection under s. 5(1) to a discrimination-free work environment a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it. If that were so, how could it determine if a discriminatory act occurred or a poisoned work environment existed? The duty to investigate is a "means" by which the employer ensures that it is achieving the Code-mandated "ends" of operating in a discrimination-free environment and providing its employees with a safe work environment.

93 The jurisprudence has established that the content of the duty is to take reasonable steps to address allegations of discrimination. (See, for example, Marineland, supra, at paragraph 59).

94 Counsel for the University and the Dean did not dispute that there was a duty to investigate but argued that in the circumstances of this complaint, the response of the Dean was measured and appropriate considering all of the circumstances.

95 There was no dispute about what the Dean did, and I accept his testimony about how he responded in its entirety.

96 According to the Dean, he responded directly to Professor Cole by his letter dated March 22, 2002, set out in paragraph 53 above. He indicated that he did not alert the other members of the Committee to Professor Cole's resignation until the Tuesday or Thursday of the following week. At that time, he reported that she had resigned and had raised concerns about the professionalism of the Committee, but elected not to advise them of her specific allegations with respect to age bias. He stated that he kept it "confidential" because he thought Professor Cole wanted it kept confidential since she had not copied her letter to the members of the Committee.

97 The Dean testified that at some point during the following week, he asked Professor Phillips, who was then involved in three other competition processes if the age of any candidates had been raised in any of the selection processes that were then occurring. Further, he stated that he informally mentioned during lunch with faculty that they should not bring certain things up like the prohibited grounds in the Code.

98 The Dean also testified that he held on to the vote results for ten days in the event that Professor Cole sought a meeting to review her concerns. After the ten days, he forwarded the recommendation to the Vice President (Academic), along with some of the documentation from the process. The recommendation was ultimately approved by the President of the University and Dr. Mihai was offered the position.

99 The Dean stated that he had no recollection of any further contact with Professor Cole about this incident. He stated that he may have only seen her once after the March 19, 2002 meeting and the day that she subsequently went off on sick leave in early May. Professor Cole resigned effective August 31, 2002.

100 Counsel for the University and Dean provided a number of reasons why the response summarized in paragraphs 96 to 99 above was appropriate including that Professor Cole had ill will and animosity toward the Dean; that she had originally supported the hiring decision and was now resiling from it; that Professor Cole was raising concerns of "tenurability" and controllability that had not been raised in the meeting; that the reference to "inquiries as far back as January" was vague and obviously not to be taken seriously since Professor Cole had not raised them sooner;

and that there were administrative reasons supporting the request to meet as opposed to another response since a meeting would be more conducive to considerations of the morale, collegiality and functioning of the faculty. In respect of the latter, Counsel argued that to handle it as suggested by the Commission was not suited to the circumstances of the university setting, the faculty and what was then occurring in the university: namely, moving forward as an accredited graduate school.

101 I have carefully considered the Dean's conduct in this case and the argument of counsel, but I am not satisfied that the Dean's response was reasonable in the circumstances. Informing counsel's argument appears to be a conclusion that there was no credibility to the allegations raised by Professor Cole. While I have reached that conclusion in this proceeding, that conclusion has come after a very lengthy hearing into the allegations. In any event, I have difficulty in accepting that this is a legitimate explanation for the Dean's response in this case because as the Dean acknowledged, he had "no clue" about some of the allegations made by Professor Cole in her letter of resignation, namely that there had been inquiries made about this candidate's age as far back as January. While I agree with counsel for the University and the Dean that this allegation was vague, I find its vagueness should have resulted in a different response because the result of ignoring the allegation could have been a hiring tainted by discrimination.

102 While I appreciate that the Dean sent a response to Professor Cole, the tone of the letter was dismissive of the allegations. Moreover, the Dean's informal inquiry and comments to staff about the Code did not constitute a reasonable investigation into the allegations. In my view, the Dean should have responded in a neutral fashion to Professor Cole and should have attempted to meet with or otherwise communicate to Professor Cole for the purpose of outlining what options were available to her.

103 In considering the Dean's response, I note that he did not follow the University's own human rights policy and accordingly, I do not accept the argument that the Dean responded in the way he did because of the unique attributes of a university environment. In this respect, in response to a complaint of discrimination raised informally, the University's policy provides in paragraph 3.3 that a supervisor, staff or faculty member shall maintain confidentiality, "encourage the complainant to talk with the Harassment and Discrimination Officer" and "notify the Officer immediately of the nature of the complaint without naming the complainant and alleged respondent and to consult with the Officer about any necessary action". The Dean did not comply with any of these steps or take other analogous steps that were responsive to the University's obligations under the Code.

104 While the Dean was aware of the University's human rights policy, his evidence was confusing as to whether or not he believed it applied in the situation. His confusion regarding the application of the policy is perhaps not surprising, given that the Dean stated that he had not received any human rights training at the time or even subsequently up to the date he testified.

105 In reaching these conclusions about the adequacy of the Dean's response, I am not suggesting that the Dean intended to violate the Code. However, the intention is not relevant to a finding of a breach of the Code, and the Dean's response, while perhaps well-intentioned, fell short of being a reasonable response to the allegations of discrimination raised by Professor Cole. As such his actions constitute a violation of the Code.

106 Further, I find that the University has failed to meet its corporate responsibility under the Code. While the University has a policy, it is clear that the University has not ensured that the Dean was trained in the policy or otherwise trained on how to respond to allegations of discrimination in a hiring situation. The University's failure to do so contributed to the failure to take reasonable steps to address the allegations of discrimination.

Payne v. Otsuka Pharmaceutical Co., 2002 CarswellOnt 5502 (paras 59-64; 76-80)

59 Based on the findings of fact made earlier, the Board is satisfied that Mr. Okada denied Ms Payne the job of booth receptionist for Otsuka because she is Black, thus violating subsection 5(1) of the Code. A clear prima facie case has been made out. And no justification or defence has been provided by Otsuka or Okada. As noted earlier, they chose not to give or lead evidence or even to file pleadings.

60 The Board makes its determination, looking at the particular statements individually, and then as an aggregate. The Board finds Mr. Okada was sufficiently proficient in the English language to make his communications (verbal or written) understood and to have understood other people's communications to him. The Board accepts the evidence that Mr. Okada was surprised, at learning for the first time, that Michelle Gay would not be Otsuka's booth receptionist, on the morning of June 25, 1994 when he was introduced to Ms Payne. The Board also finds that Ms Akehurst was not aware prior to the day of the incident of Ms Gay not being available. "No, not right girl" underscores Mr. Okada's surprise and disappointment. The Board also accepts that, like Ms Gay, he wanted to select the candidate, not have one presented to him as a fait accompli. However, he could have gotten over his initial disappointment and considered Ms Payne for the job. The woman Mr. Okada ultimately selected from the Manpower list to work at the booth was also "not right girl" (since it was not Ms Gay) but he chose the person nevertheless. Regarding Ms Payne, he may not have decided to hire her on the spot. He may have asked for "other girls please". He may or may not have hired her after interviewing other applicants. But he did none of these things. He dismissed Ms Payne outright. He didn't speak to her or acknowledge her, other than accepting Ms. Payne's handshake. He never asked about her credentials. Had he done so, he would have seen that she was well qualified for the position. The Board also accepts the evidence that he said to Ms Sears something to the effect of "what would Japanese doctors think" and the "company's image" - implying it would be bad for the company's image to hire Ms Payne. Why? The Board believes it was because she is Black. She was qualified for the job, presented to Mr.

Okada by the same employment agency that presented Ms Gay, whom he hired. Ms Sears told Mr. Okada that Ms Payne had a very good track record with People Bank.

Is There a Human Rights Duty Not to Condone or Further Discrimination?

61 Ms Payne and counsel for the other parties were unable to produce a precedent directly on point, for a very good reason: there is none. The issue of liability against the Ontario Respondents involves many novel and far-reaching issues. Essentially, how far down the chain of discrimination does liability attach? Is there a human rights duty not to condone or further discrimination owed to Ms Payne by the Ontario Respondents? If so, what is the composition of that duty and did they meet it?

62 The Board finds there is a human rights duty not to condone or further a discriminatory act that has already occurred. To condone or further a discriminatory act would extend or continue the life of the initial discriminatory act. Indeed, it is conceivable that the subsequent discriminatory act or tail-end could be worse in impact than the beginning of the chain of discrimination. The legal duty owed is not just as between employer-employee, service provider-client, landlord-tenant, etc. The obligation extends to those who become involved in a situation that involves a discriminatory act, who, while not the main actors, are drawn into the matter nevertheless, through contractual relations (i.e., the Ontario Respondents) or otherwise.

63 The nature of when a third party or collateral person would be drawn into the chain of discrimination is fact specific. However, general principles can be determined. The key is the control or power that the collateral or indirect respondent had over the complainant and the principal respondent. The greater the control or power over the situation and the parties, the greater the legal obligation not to condone or further the discriminatory action. The power or control is important because it implies an ability to correct the situation or do something to ameliorate the conditions. Accordingly, on one end of the spectrum of responsibility, an employer has a legal duty to its employees, agents and even to its customers and clients. On the other end of the spectrum, a mere bystander would have no duty to another stranger. A customer generally would have no duty to another customer of its supplier.

64 The foregoing discussion about a duty is reinforced by four points. First, section 9 of the Code provides, "No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part." [Emphasis added.] Secondly, the Supreme Court of Canada repeatedly has stated the Code should receive a large and liberal interpretation and one which advances the broad purposes set out in its preamble: see Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Ville), [2000] 1 S.C.R. 665 (S.C.C.). Thirdly, and consistent with the above, one must remember that the Code is limited in its scope and application: i.e., it applies only to specific social areas, relations and prohibited grounds. As will be seen later in these Reasons, the Board finds that the duty not to have condoned or furthered Mr. Okada's discriminatory act owed to Ms Payne is grounded in subsection 5(1). Finally, the concept of condonation can be found

elsewhere in the Code. The anti-employment discrimination deeming provision in contracts, loans and grants from the Government - a contract compliance mechanism - found in section 26 of the Code speaks to this issue. The Government did not want to be seen as condoning or furthering discrimination with respect to employment by those companies or individuals who received Government grants, loans or contracts. Section 26 will be discussed further in these Reasons. For a useful description of section 26 and contract compliance, including that in the United States, see Keene, Judith, Human Rights in Ontario, 2nd ed. Toronto: Carswell, 1992, at pp. 41-45 . . .

. . .Did They Meet the Duty?

76 As indicated above, at a minimum, there was a duty to investigate promptly and properly and arrive at a reasonable conclusion and to take appropriate, reasonable action if they determined discrimination had occurred, commensurate with their control or power over Otsuka and Mr. Okada. The Board finds the Ontario Respondents did not meet their duty owed Ms Payne. Based on what was told to Ms Akehurst by Mr. Okada, Ms Payne and Ms Sears, Ms Akehurst's conclusion that it had been a "big misunderstanding" and that Mr. Okada did not deny Ms Payne the job because she is Black was unreasonable. Her "investigation" (the Board puts this in quotes to emphasize the tenuousness of using this word here) should have been more extensive and thorough (e.g., she could have asked Mr. Okada why he wouldn't take Ms Payne instead of providing "other girls" and she could have gotten back to Ms Payne directly). It was a barebones "investigation".

77 Both Mr. and Ms. Akehurst averred about the "horrible misunderstanding" and "big misunderstanding" respectively. In the Board's mind, the Ontario Respondents never, during the hearing, explained satisfactorily what was the "horrible misunderstanding". They suggest that it was Mr. Okada's shock at hearing that Ms. Gay was no longer available. While the Board accepts that the Ontario Respondents honestly believe that it is not a conclusion that a reasonable person would draw. Assuming Mr. Okada was shocked at seeing Ms. Payne because he was told Ms. Gay, whom he expected to see, would not be there, his actions and words thereafter were inconsistent with that conclusion. He dismissed Ms. Payne outright. Notwithstanding that he was told she was qualified, he did not ask to see her curriculum vitae. He did not ask her a single question or even acknowledge her. He did not ask Ms. Sears about her qualifications in their private exchange. When Ms. Akehurst spoke to him when she asked him if there was a problem, he replied, "no not right girl, not Michelle Gay." But he clearly was told, more than once, that Ms. Gay was no longer available. But instead of considering the replacement (Ms. Payne) recommended by the same agency that brought him, Ms. Gay, he wanted "other girls please". The Ontario Respondents say that the Board should not conclude from that statement that he was refusing to consider Ms Payne for the job at that point. The Board would have to suspend its disbelief to accept that proposition. Mr. Okada ruled out Ms Payne the minute she was presented to him, and for one reason alone - she is Black, and therefore didn't fit the "company's image".

78 The Board acknowledges that Ms Akehurst was not present during the initial introduction of Ms Payne to Mr. Okada, the subsequent short conversation between Ms Sears and Mr. Okada, the conversation between Mr. Jones and Ms Sears, and the conversation among Mr. Jones, Ms Sears and Mr. Okada. Nor was Ms Akehurst told of the contents of the conversation among Messrs. Jones and Okada and Ms Sears. Ms Akehurst looked into the matter and executed what she thought was a satisfactory response in the context of a 3,000-plus delegate international convention with over 2,200 exhibitors starting the following day with a myriad of responsibilities for Ms Akehurst as the ICO Human Resources Coordinator. However, she fell below the standard required here and came up with an unreasonable conclusion about what had occurred. Ms Akehurst was involved right from the moment she entered into an executory contract with Mr. Okada. Indeed, had she wrongfully terminated the contract, Otsuka might have sued Conference Aide/Intertask for breach of contract. She cannot "pass the buck" to People Bank. She chose to subcontract the task to People Bank. People Bank was her/Intertask's agent.

79 The Board also wishes to make another comment on the foregoing. Ms Akehurst was the ICO Human Resources Coordinator. Paul Akehurst was the ICO Director of Operations. Indeed Intertask and any related companies like Conference Aide were selected by COS, inter alia, because of their expertise in organizing large, international conferences. Mr. Akehurst testified that they had dealt with such "cultural misunderstandings" many times at previous international conferences they organized. Based on this, Intertask and Ms Akehurst should have treated the matter more seriously and investigated it more thoroughly. If this had occurred, the Board is confident that Ms Akehurst would have come to the conclusion that Mr. Okada refused to hire Ms Payne because she is Black. Undoubtedly, she would then have refused to provide further names to Mr. Okada. On one point alone, if Ms Akehurst had asked Mr. Okada, "Why don't you want to hire Ms Payne?" after dealing with the fact that Ms Gay would not be available, Mr. Okada's answer ("no, not right girl...") would not have stood up to scrutiny. Upon hearing his subsequent request - "other girls please" - the reasonable course would have been for Ms Akehurst to have said, "Okay, why not hire Alicia Payne? She's qualified."

80 The Board further finds that Ms. Akehurst's assistance to Mr. Okada in finding other candidates for the Otsuka booth receptionist position condoned or furthered Mr. Okada's discriminatory act, thus violating Ms. Payne's rights under the Code. Saying that Ms. Thorpe of Manpower thought it could have been a "misunderstanding" does not diminish Ms. Akehurst's responsibility. The Board places little weight on the hearsay statement. Ms. Thorpe was never called as a witness. At times, Ms. Akehurst's conduct bordered on willful blindness: i.e., wanting to believe it was a "big misunderstanding"; under-investigating the allegations; and drawing unreasonable conclusions from what was actually presented. It is true that Ms. Payne was not "the judge, jury, and executioner", as Manpower's counsel put it at the motion to add parties. The Board agrees with Mr. Akehurst that they had an obligation to treat both Ms. Payne and Mr. Okada fairly. However, the Board finds that the Ontario Respondents failed to treat Ms. Payne fairly by not doing a proper investigation, and because of that, drawing the unreasonable conclusion that

discrimination had not occurred. Because of this conclusion, they then condoned and furthered the discrimination by not addressing Mr. Okada's actions and by helping him find another "young and attractive person" to fill the job.

***Bageya v. Daydem International Ltd.*, 2010 HRTO 1589** (paras 1-4; 151-157)

1 The applicant identifies as a Black man, who is originally from Uganda and in his mid-fifties. He filed an Application under s. 34 of the Human Rights Code, R.S.O. 1990, c. H.19, as amended (the "Code"), in October 2008, which alleged that the respondent harassed and discriminated against him with respect to employment because of his race, color, ancestry, place of origin, ethnic origin, and age.

2 Specifically, the applicant alleged that the respondent passed him over for promotion to management positions. He also alleged that the respondent hired a new manager (who identifies as an Indian woman who is originally from Tanzania), who harassed him and issued him an unwarranted warning letter for insubordination and poor work performance. He further alleged that the respondent's management refused to investigate his complaints of harassment and discrimination, and ultimately terminated his employment, even though he had not done anything to warrant dismissal.

3 The respondent filed a Response on December 3, 2008, which denied the allegations of harassment and discrimination.

4 Specifically, the respondent denied that the applicant's new manager harassed him, or that the applicant complained to its management about harassment and discrimination. The respondent stated that its workforce is multicultural and that the new manager, like the applicant, was originally from East Africa. The respondent stated that the new manager instructed the applicant on how to improve his work performance, including giving him a written warning, and when his performance did not improve, the respondent decided to terminate his employment. The respondent stated that it terminated the applicant's employment solely because of his poor work performance…

<u>. . . Did the respondent fail to investigate complaints of harassment and discrimination by the applicant?</u>

151 It is well established in the Tribunal's jurisprudence that section 5 of the Code imposes a duty on employers not to condone or further a discriminatory act that has already occurred, and to investigate a complaint of discrimination. See Nelson v. Lakehead University, 2008 HRTO 41 (Ont. Human Rights Trib.) (CanLII) at paras. 90 and 92-93 and Laskowska v. Marineland of Canada Inc., 2005 HRTO 30 (Ont. Human Rights Trib.) (CanLII) at paras. 51-53.

152 The rationale underlying the duty to investigate a complaint of discrimination is to ensure that the rights under the Code are meaningful. The Tribunal explained this rationale in *Laskowska*, supra, at para. 53:

> It would make the protection under subsection 5(1) to a discrimination-free work environment a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it. If that were so, how could it determine if a discriminatory act occurred or a poisoned work environment existed? The duty to investigate is a "means" by which the employer ensures that it is achieving the Code-mandated "ends" of operating in a discrimination-free environment and providing its employees with a safe work environment.

153 In his closing submissions, the applicant's representative stated that the respondent's senior management knew directly or indirectly of the applicant's complaint of harassment and discrimination, and failed to act. He submitted that Mr. Osipov, in particular, knew what was happening. He acknowledged that the applicant did not call Mr. Osipov as a witness, but explained that he did not do so because the respondent would have reprised against him.

154 In her submissions, the respondent's counsel stated that there was no evidence that the applicant complained to anyone about harassment and discrimination, and that the Tribunal should draw an adverse inference from the applicant's failure to call Mr. Osipov as a witness.

155 I accept the applicant's testimony that he approached Mr. Guillard, Ms. Patterson, and Mr. Osipov to discuss the way Ms. Meghji was treating him, but do not find that he specifically made a complaint about harassment or discrimination. Even in his own testimony, the applicant merely stated that he told Mr. Guillard and Ms. Patterson that he wanted to speak with them about "issues" and that he told Mr. Osipov that Ms. Meghji was generally mistreating him. Furthermore, I accept Mr. Guillard's evidence that the applicant never raised harassment or discrimination issues with him.

156 I also draw an adverse inference from the applicant's failure to call Mr. Osipov as a witness. This Tribunal has recognized that the failure to call a witness who has material and direct knowledge of the disputed facts may allow the Tribunal to draw an adverse inference that the party did not call a particular witness because the witness would not have been supportive to that party's case: Shah, supra, at para. 14.

157 Accordingly, I have decided that the applicant has not proven on a balance of probabilities that the respondent failed to investigate complaints of harassment and discrimination by him, and this part of the Application is dismissed.