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EMPLOYER LIABILITY FOR RACIAL PROFILING: IMPORTANT REMINDERS FROM THE HUMAN RIGHTS TRIBUNAL OF ONTARIO

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In the recent decision of *Graham v. Enterprise Rent A Car Canada Company representing Enterprise, Alamo, and National Car Rental*, 2020 HRTO 424, the applicant alleged that the respondents discriminated against her on the basis of her race, colour, place of origin, and disability in the area of goods, services and facilities contrary to the Ontario *Human Rights Code*.

The applicant pre-booked online a car rental with the respondents. The respondents' policy, as posted online and in its rental agreement, was that renters were required at pickup to produce a credit card and a driver's license. When the applicant attended at the rental counter she was asked for and produced her credit card and driver's license to the agent. As requested she also provided her telephone number but declined to provide an email address and explained that she did not wish to receive promotional emails.

The agent also asked for a second piece of photo identification and the applicant advised that she only had a health card and handed it to him. The agent glanced at the health card and handed it back saying it was not a valid form of photo identification. Another agent then chimed in and said that they have had a lot of car thefts recently which was why they needed the additional photo identification. However, the agent attending to the applicant threw his hands in the air and said there was no need to explain anything to her and then walked away to speak with the manager, whom he had called. The applicant overheard the agent tell the manager not to rent the vehicle to her.

The applicant began to feel that she was being racially profiled, especially because there were two Caucasian gentlemen with suitcases that were not asked for additional photo identification and were able to rent a car. While the agent was speaking with the manager, the applicant called customer service to make a complaint. Following her call, the manager approached the applicant. The applicant asked the manager if he would be renting her the car and he said "no". The Human Rights Tribunal of Ontario (the "Tribunal") found that the manager made his decision based on the agent's recommendation and without speaking to the applicant first.

The applicant grew frustrated due to the employees' treatment of her and the fact that she was now running late, and so she began raising her voice—the manager testified that he did not feel threatened by her conduct. The respondents claimed that the manager did not rent the vehicle to applicant because of her behaviour and her inability to provide a second piece of photo identification. The Tribunal did not accept this given all of the evidence.

Still needing a car, the applicant left and went to another location (same company) and walked in without a reservation, presented the same driver's license and credit card she had used earlier and was rented a more expensive vehicle without the need for additional photo identification.

The Tribunal found that the applicant's race and colour were factors in the employees' requirement that she provide additional photo identification, as there was no blanket requirement for additional photo identification at that location. The respondents' rental agreement indicated the policy requirements for all renters include a driver's license and credit card. While provisions were provided for foreign nationals to provide a passport or international driver's license, that was not applicable to the applicant because she had provided an Ontario driver's license and a MasterCard.

The Tribunal also found that if in fact a second piece of photo identification was required, "the manager had the discretion to accept the health card but failed to do so, focusing on the applicant's anger at the time which was likely based on racial stereotypes of the "angry Black person." The Tribunal went on to express concern "whether if this had been a White person who was upset by the additional requirement, it would have resulted in the same decision by the manager, who was called over to diffuse the situation." The Tribunal found that in the circumstances, it was reasonable for a customer in a busy airport setting to become angry, but the manager could have accepted the health card identification or directed the applicant to another location that required single photo identification.

In carrying out its analysis, the Tribunal gave due consideration to the "well recognized principles regarding subtle forms of anti-Black racism and its manifestations articulated in *Sinclair v. London (City)* [...] that a Black person can be treated adversely by a service-provider because of a conscious or an unconscious stereotype of Black people being criminals." The Tribunal has also recognized, as set out in *Sinclair*, 2008 HRTO 48, that discrimination is often subtle and may be difficult to prove.

In conclusion the Tribunal noted that it understood:

[...] that the application of racial stereotypes includes the heightened scrutiny of Black people as being prone to violence and criminal behaviour [...] In *Sinclair*, it was noted that such heightened scrutiny may involve an over-reaction to the behaviour of Black people when they are involved in situations that pose challenges to those in authority and this too, can form part of the differential treatment they experience. While the scrutiny itself may be unintentional, the impact of being more highly scrutinized must be examined from the perspective of the racialized person and not from the perspective of those who do not experience it. In this case, the applicant was subject to heightened scrutiny by the [employees] as a Black woman, and even though she had presented the additional photo ID as requested, she was still refused the rental because she was presenting as an angry Black person who was challenging the authority of the manager.

The respondents were ordered, among other things, to pay the applicant monetary compensation for injury to dignity feelings and self-worth; and to provide its managers and agents at the airport location with *Human Rights Code* related training.

This case is a reminder of the role conscious and unconscious bias can and does play in Canadian society and within our workplaces. It is also a reminder that employers are liable for the actions taken by their employees in the course of performing their duties. Accordingly, employers should give heed to the importance of establishing and implementing robust workplace discrimination policies and, at least, annual trainings with respect to the role of conscious and unconscious bias in all its forms, and issues of systemic discrimination in the workplace and in the performance of work duties. Lastly, it is advisable to have a comprehensive annual review of your workplace policies and training materials to ensure legal compliance and best practices are in place.

Philip Graham practices *Privacy and Compliance and Employment Law*. He has broad experience advising employers and employees on all aspects of the employment relationship. He is an experienced workplace investigator. He also assists organizations and individuals on issues regarding the collection, use and protection of personal information.