

Case Name:
Gnanasegaram v. Allianz Insurance Co. of Canada

Between
Karla Gnanasegaram, plaintiff/appellant, and
Allianz Insurance Company of Canada,
defendant/respondent

[2005] O.J. No. 1076

251 D.L.R. (4th) 340

195 O.A.C. 319

39 C.C.E.L. (3d) 196

[2005] CLLC para. 230-012

138 A.C.W.S. (3d) 44

Docket: C41813

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, J.I. Laskin and J.L. MacFarland JJ.A.

Heard: March 8, 2005.
Judgment: March 24, 2005.

(16 paras.)

Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Appeal from lower court decision allowed.

Civil procedure -- Appeals -- Appeal from lower court decision allowed.

Employment law -- Termination of employment -- Constructive dismissal -- Appeal from lower court decision allowed.

Human rights law -- Discrimination -- Employment -- Dismissal -- Appeal from lower court decision allowed.

Appeal by Garam from an order of a motions court judge striking out portions of her statement of claim. Garam brought an action against Allianz Insurance for constructive dismissal on the basis of her race and ethnic origin. In her statement of claim, Garam alleged that Allianz had systemically discriminated against employees of colour by invoking a slow track for promotion that was not invoked for Caucasian employees; that Allianz promoted Caucasian employees notwithstanding the existence of applicants of colour with superior qualifications; and that Allianz denied access to company seminars and leadership conferences to employees of colour on a disproportionate basis relative to Caucasian employees. The motions judge struck these portions of Garam's pleading, allowing only the claims based on discriminatory conduct specifically directed at Garam to stand. He did not let stand the pleas of systemic discrimination, which he considered to be actions committed against nonparties to the action.

HELD: Appeal allowed in part. The motions judge erred in striking out the impugned paragraphs. For the purposes of pleading discriminatory conduct as a basis for a wrongful dismissal claim, there was no principled basis for distinguishing between allegations of direct discrimination aimed at Garam and allegations of systemic racism, which targeted a class or group of which Garam was a member. In either case, the allegation was one of discrimination against Garam offered to support the wrongful dismissal claim.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 21, 25

Appeal From:

On appeal from the order of Justice William Somers of the Superior Court of Justice dated October 3, 2003.

Counsel:

Elisabeth Widner and Karen R. Spector, for the appellant Gnanasegaram

Lindsay P. Hill and Patricia I. McMahon for the respondent Allianz Insurance

The judgment of the Court was delivered by

- 1 J.L. MacFARLAND J.A.:**-- The plaintiff appeals from an order of Somers J. striking out paragraphs 17(i), (ii) and the second sentence of paragraph 17(iv) of the statement of claim without leave to amend pursuant to Rules 21 and 25 of the Rules of Civil Procedure.
- 2** The plaintiff is a woman of colour of Sri Lankan origin who claims she was constructively dismissed by the defendant on the basis of race and ethnic origin.

3 In her statement of claim the plaintiff states that she was recruited by the defendant and offered a position as an Accident Benefits Claims Specialist. She was told that because of her specialized training as a solicitor, her role would focus on alternative dispute resolution files and management of the litigation aspect of accident benefit claims proceedings before the Financial Services Commission of Ontario. She pleads that on the basis of these assurances and the express assurance that she would not be employed as a claims adjuster she accepted the offer and began employment with the defendant on June 1, 1999.

4 Around August 31, 2002 the plaintiff pleads that she was demoted, her work assignment was changed and her position became one of adjusting insurance claims. She concluded that she had been constructively dismissed and left her employment with the defendant on October 18, 2002.

5 She brings this action against the defendant seeking damages for breach of her contract of employment and for punitive damages. Paragraph 17 of her statement of claim provides:

17. The plaintiff further states that Allianz breached an implied term of the employment contract that the plaintiff would be employed without discrimination on the basis of race. The plaintiff, a woman of colour, applied for three internal promotion positions while she was employed at Allianz and, although in each case she was the most qualified candidate, the position was granted to a Caucasian woman (see paras. 7, 9 and 12 above). Without restricting the generality of the foregoing, the plaintiff states that the discriminatory conduct of Allianz is evidenced by the following:

- (i) *Historically the Company has systemically discriminated against employees of colour by invoking a "slow track" for promotion that is not invoked for Caucasian employees;*
- (ii) *The Company promotes Caucasian employees notwithstanding the existence of applicants of colour with superior qualifications;*
- (iii) The Company discriminated against the plaintiff on grounds of race in her applications for internal promotion on three occasions, where the position applied for was granted to a Caucasian employee of lesser qualifications;
- (iv) The plaintiff was denied equal access to company seminars and leadership conferences, including being dis-invited from the April 2002 Leadership Fundamentals Workshop. *The Company has historically denied access to Company seminars and leadership conferences to employees of colour on a disproportionate basis relative to Caucasian employees; and*
- (v) The plaintiff was paid less in salary and bonuses than Caucasian employees of similar or lesser seniority and job performance were. [Emphasis added.]

6 The motions judge struck the italicized portions of the pleading. In his reasons the motions judge referred to this court's decision in *L'Attiboudeaire v. Royal Bank* (1996), 17 C.C.E.L. (2d) 86 and stated in part:

In *L'Attiboudeaire* [supra], the Ontario Court of Appeal distinguished the *L'Attiboudeaire* case on the grounds that the racist actions were directed specifically at the plaintiff and formed the atmosphere, which he felt was sufficiently poisoned that he could not continue to work at that place and continue to experience the conduct, which he specifically complained of.

In my opinion, the cases to which the court was referred, such as *L'Attiboudeaire v. Royal Bank* [supra] and *Shah v. Xerox Canada Ltd.* [2000] O.J. No. 849 are ones in which the acts complained of were directed specifically against the plaintiff. I am of the opinion that allegations alleging racist actions, or failure to take action, or activities of any sort committed against nonparties to this action are not relevant and ought not to be subject matter of the litigation.

7 On the basis of *L'Attiboudeaire* he was prepared to let stand only the claims based on discriminatory conduct specifically directed to the plaintiff. He was not prepared to let stand the pleas of systemic discrimination which he considered to be actions "... committed against nonparties to this action ...".

8 The law is clear since the Supreme Court of Canada's decision in *Board of Governors of Seneca College of Applied Arts & Technology v. Bhaduria* (1981), 124 D.L.R. (3d) 193 that no cause of action lies for breach of the Ontario Human Rights Code or at common law based on an invocation of the public policy expressed in the Code.

9 In this case as in *L'Attiboudeaire* the plaintiff had been in an employment relationship with the defendant. To prove conduct on the part of the defendant which amounted to constructive dismissal she does not need to invoke the policy of the Ontario Human Rights Code or the Canadian Human Rights Act. However, to quote from *L'Attiboudeaire*:

This does not mean that its terms could not be relevant factors to take into account in assessing the defendant's conduct.

10 For the purposes of pleading discriminatory conduct as a basis for a wrongful dismissal claim I see no principled basis for distinguishing between allegations of direct discrimination aimed at the plaintiff and allegations of systemic racism which target a class or group of which the plaintiff is a member. In either case the allegation is one of discrimination against the plaintiff offered to support the wrongful dismissal claim.

11 It is important I think to recognize the difficulty in proving allegations of race discrimination by way of direct evidence. As others have noted, rarely are there cases where one can show by direct evidence that discrimination is purposely practised.

12 The motions judge expressed concern that:

... the plea as it stands would be a wholesale investigation of all of the personnel files of the defendant ...

13 I am satisfied that the Rules of Civil Procedure and specifically those which relate to the ability of the Defendant to require particulars, and which govern the scope of both documentary and oral discovery are adequate to meet any concerns about the breadth of these pleadings. Further, the

defendant always has the option to move for a stay of the action on the basis that the Human Rights Commission is the more appropriate forum in the particular circumstances.

14 In my view the motions judge erred in striking out paragraphs 17(i), (ii) and the second sentence of paragraph 17(iv). I would therefore allow the appeal and set aside paragraph 1 of the motions judge's order made October 3, 2003.

15 The appellant's Bill of Costs on a partial indemnity basis totalled \$21,828.00 and the respondents \$21,345.07. In my view these amounts are much too high in an appeal of this nature. The time spent in relation to the appeal was inordinate when one considers these same issues had already been addressed before the motions judge.

16 I would fix costs to the appellant in the sum of \$11,000.00 inclusive of disbursements and G.S.T.

J.L. MacFARLAND J.A.

D.H. DOHERTY J.A. -- I agree.

J.I. LASKIN J.A. -- I agree.

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