



# HUMAN RIGHTS TRIBUNAL OF ONTARIO

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**BETWEEN:**

**Ontario Human Rights Commission**

**Commission**

**-and-**

**Clive R. Stephens and Joseph O. Symister**

**Complainants**

**-and-**

**Lynx Industries Inc., Mark Schram and  
Marjorie Morris**

**Respondents**

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## DECISION AND REASONS RE COSTS

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**Adjudicator:** The Honourable Alvin B. Rosenberg, Q.C.

**Date:** November 7, 2005

**File Number:** HR-0589-04 and HR-0590-04

**Citation:** 2005 HRTO 47

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## **INTRODUCTION**

[1] The Motion in regard to costs in the above matter was heard the 15<sup>th</sup> day of September, 2005.

[2] The complaints in this case were basically that the two Complainants were fired, at least in part, due to their colour or race. At the end of a lengthy hearing I found that colour or race played no part in the firing of the two Complainants.

[3] Even when the Complainants do not succeed, it is unusual to order costs against the Commission. I have however determined that this is one of those unusual cases where there should be an order of costs against the Commission.

[4] Ms. Ffolkes-Abrahams defended the Commissions decision to refer the matter for a hearing and argued that the Commission, with the report and material before them, were correct in making a decision to refer. However, I find that the fault lies not with the Commissioners themselves but with the staff of the Commission. The Commission is responsible for the acts of the staff.

## **PROCESS**

[5] These complaints were originally referred to an investigator for the Commission (the 'First Investigator') for the Commission to determine her recommendation with regard to whether or not there should be a referral for a hearing. After a very thorough investigation, and interviews of a large number of witnesses, the First Investigator came to the conclusion that there was not enough evidence to support a board recommendation; however, on the 4<sup>th</sup> day of February, 2002, a Commission policy analyst (the 'Policy Analyst') became involved.

[6] The involvement of the Policy Analyst started approximately a year and a half after the investigation was started and completed by the First Investigator. As a result of the Policy Analyst's position, the First Investigator went back to Lynx Industries Inc. and interviewed a number of additional witnesses, including re-interviews of the black

employees and other visible minority employees. The First Investigator added the additional information to the case analysis but still stated, "There is no support for the Complainants [sic] position that they were discriminated against".

[7] On April 4, 2002, the Policy Analyst did a thorough analysis of these two files. On April 8, 2002, the Policy Analyst sent a memo that shows her reasons. She stated in part, "It is not clear that the Respondents had policies dealing with inappropriate behaviour or policies prohibiting racial or sexual harassment in the workplace". That may be so, but that has nothing to do with the complaints. It may be worthwhile to try to have employers with appropriate policies but failure to have appropriate policies is not contrary to the *Code* and has nothing to do with the complaints.

[8] Further, the Policy Analyst states in part, "Also black employees in the shipping area were subject to name calling by customers". There was no such evidence. She then states with respect to representation of black employees in the workplace, "only two black employees remained". There is no indication that this is out of proportion to blacks in the area, and in any event, is not in breach of the *Code* or relevant to the complaints.

[9] She then went on to state, "Also the Respondents practice of hiring by word of mouth rather than through the objective hiring policy is likely to have an adverse impact or exclude other black applicants". This is not a breach of the *Code* nor is it relevant to the complaints. She then refers to the termination of both employees at the same time, "without progressive discipline and in the absence of any objective policies". She ended with, "I see these as board recommendations I'm still available to discuss".

[10] On April 9th, the First Investigator reviewed all of the comments of the Policy Analyst. It should be born in mind that the First Investigator was the only one who interviewed all of the witnesses and her opinion should be respected. She ends her memorandum to the Policy Analyst as follows:

I strongly feel that a recommendation for a Board of Inquiry is not warranted based on the evidence in this case.

[11] On April 11, 2002 the Policy Analyst replied in some detail as follows:

The R[espondent]'s workplace seemed to be characterized by mismanagement, lack of personnel policies and procedures to address such issues as company rules that would explain workplace behaviours and what misconduct warrants discipline and what types of penalties would be handed out; office procedures, or how the company wants to run its business; discipline performance expectations and evaluations or how it makes its decisions to terminate an employee.

Other issues included practice of hiring by word of mouth and issues of representation of black employees in the company. The lack of a hiring policy has the potential to lead to adverse impact e.g. preference of one group or exclusion of another group.

The absence of harassment and human rights policies suggests that the Respondent does not have a documented objective approach to address incidents of racial and / or sexual harassment, or any other type of inappropriate behaviour.

The Commission's *Developing Procedures to Resolve Human Rights Within Your Organization* provides comprehensive information that would assist companies that do not have the proper procedures in place. It emphasizes a process of developing the policy and training staff on how to comply. Other Commission policies provide helpful information on the types of workplace behaviours that violate the Code and corrective actions to take.

[12] On April 12<sup>th</sup> a Manager in the Mediation and Investigation Branch of the Commission (the 'First MIB Manager') sent a memo with regard to these two files, and he states in part, "We met with the Policy Analyst on this case. Policy does not decide the recommendation. However, I think she is correct in that we must put more of a Policy perspective in the analysis/investigation". He then recommends what should be done, "Tell the company that they have to come in to the 21<sup>st</sup> century in this regard", but he ends with, "if they don't, it is still a No Board but with a new analysis".

[13] On May 10<sup>th</sup>, the First MIB Manager wrote a memo to the Policy Analyst, which states in part, "However, the evidence is not sufficient in the face of the complainant's poor performance to send this case to a Board".

[14] On November 12, 2002, a second Manager in the Mediation and Investigation Branch of the Commission (the 'Second MIB Manager') writes to the First Investigator and finishes off with, "[...] I suggest you discuss these cases with policy also and obtain their perspective".

[15] On November 13, 2002, over two years after the investigation started the First Investigator writes in part, "The current document has been revised so many times to address these same issues that I am quite frustrated with the process but will try to plug on".

[16] On the 24<sup>th</sup> of March, 2003 the Second MIB Manager sends the two cases to a new investigator (the 'Second Investigator') with instructions to her in part, "Do not depend on the previous case analysis, complete new ones from the beginning". He attaches a series of reasons why he feels that the investigation should be redone. His comments are not justified: for example, he states, "A witness, "Jimmy" who previously ran the company has not been interviewed". It was the testimony of everyone involved that Jimmy was rarely on the premises while he was managing and that he attended mainly to pick up his paycheque. It is hard to see how he could have evidence relevant to the present complaints or breaches of the *Code*.

[17] As could well be anticipated from the correspondence referred to and other indications of an inappropriate approach to the complaints, the recommendation by the Second Investigator was that there be a referral for hearings.

[18] On July 18, 2003, the Second Investigator writes with regard to re-interviewing the witnesses which she had been instructed to do, in part as follows:

"I can now advise you that it will not be necessary to re-interview your clients. Rather, the interviews which were previously conducted, as well as documents already submitted by both parties will be sufficient [sic] for my purposes."

[19] It is hard to understand how reading the same material she can come to a different conclusion than the person who did the interviews. However, that is not the worst of it. She reached her conclusions after conducting Complainant interviews but not conducting interviews of the Respondents or their witnesses.

[20] While it may be appropriate for a policy analyst to want to see procedures implemented of the kind that the Policy Analyst in this matter refers to, it is not reasonable to have hearings on these two complaints in order to try to have the Respondents found guilty of breaches of the *Code* for matters that are not required by the *Code* and for matters that are not relevant to the complaints. Because of the inappropriate way in which the investigations were handled, and because of the biased investigation by the Second Investigator, demonstrated by her interviewing one side and not the other, the Respondents are entitled to costs against the Commission.

## **COSTS**

[21] The *Human Rights Code* provides the following with regard to costs:

- (4) Where, upon dismissing a complaint, the Tribunal finds that,
  - (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
  - (b) in the particular circumstances undue hardship was caused to the person complained against,

the Tribunal may order the Commission to pay to the person complained against such costs as are fixed by the Tribunal.

[22] I find that the complaint was in fact trivial, frivolous, vexatious and made in bad faith. The Commission knew from its own researchers, that there was no grounds for finding the Respondents guilty of either breach of the *Human Rights Code* or guilty of the complaint. Notwithstanding this, they for inappropriate reasons and in breach of the requirement of fairness, recommended that the matter be referred to the Tribunal.

[23] I am also of the view that in the particular circumstances of this case undue hardship was caused to the Respondents. Not only were they put to the expense that I have referred to, but they had the demands of their time for a lengthy hearing and the unfair accusations that remained outstanding against them which caused them much anxiety. Accordingly the Respondents are entitled to costs pursuant to both (a) and (b) of the Code.

[24] The Respondents show that they incurred costs of \$147,290.73 in connection with this matter and they claim against the Commission the sum of \$131,460.79. Their account includes the motion to have the complaints dismissed because of an, "abuse of process" and also includes costs that were incurred before I was appointed as adjudicator. Accordingly I award them costs in the amount of \$100,000.00 in full of, costs, G.S.T. and interest.

[25] Having seen the amount of expense incurred to defend the Respondents in this matter, and the time wasted, the Commission should realize how significant their recommendation is to the Respondents in each case and make certain that the investigation to determine whether or not there should be a referral is even handed and fair, and addresses the subject matter of the complaints and breaches of the *Code* and not policy matters.

Dated at Toronto, this 7th day of November, 2005.

"Signed By"

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The Honourable Alvin B. Rosenberg, Q.C.  
Member