HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Rupert Bartley

Applicant

-and-

Cott Corporation

Respondent

DECISION

Adjudicator:	Douglas Sanderson
Date:	March 27, 2012
File Number:	2011-08400-I
Citation:	2012 HRTO 630
Indexed as:	**Bartley v. Cott Corporation**

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APPEARANCES:

Rupert Bartley, Applicant	)	Self Represented
Cott Corporation Respondent	)	Ryan Wozniak, Counsel

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[1] This is an Application filed on March 22, 2011 under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19 as amended (the "*Code*"), alleging discrimination in employment because of race, colour and age. The applicant identifies himself as black and was born on March 24, 1952.

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The Application

[2] In August 2007, the applicant was employed by an employment agency and was placed with the respondent ("Cott"). In March 2008, the respondent contacted the agency to determine if the applicant was interested in returning to work with the respondent. The applicant states that his work was well received by the respondent's personnel. In October 2008, the applicant was placed at a different company, but left that assignment for work with the respondent because of assurances that he would be "accommodated" as long as the respondent had work. The applicant resumed working at Cott (through the agency) in November 2008 and submitted a resume to the respondent. He did not receive a response, but his managers and supervisor were encouraging and indicated "he would be on the list" if the respondent were to hire in the future. In March 2009, he applied for a vacancy for a machine operator position, having been encouraged to do so because of the quality of his work. The applicant's work through the agency, however, ended on or about March 27, 2009. On April 13, 2009, the agency called the applicant because the respondent wanted him to return on a casual contract. The applicant worked until September 25, 2009, when the contract ended, allegedly seven hours short of the threshold to "automatically become Cott's employee".

[3] In March 2010, the respondent contacted the applicant and stated they wanted him to return on either a permanent or seasonal basis. To qualify for permanent employment he had to pass a test, but he made a serious error on the test and was unsuccessful. He immediately advised Human Resources of his error, but was advised that nothing could be done. He worked on a casual basis until September 2010. In March 2011, the respondent again offered the applicant casual employment. He inquired about permanent employment, but Portia Palmer, a supervisor, informed him

that Sara Boscianowki advised her that Cott did not plan to hire anyone who had written the test previously. He then spoke directly with Ms. Boscianowski who informed him that the respondent would not know about permanent employment until September of 2011. The applicant was aware that Cott had in fact hired full time employees in the two weeks before the conversation. The applicant declined casual employment and filed an Application with the Tribunal.

[4] By Case Assessment Direction ("CAD") dated July 14, 2011, the Tribunal ordered a summary hearing to determine whether the Application should be dismissed as having no reasonable prospect of success. The Tribunal noted that some of the allegations may be untimely pursuant to sections 34(1) and (2) of the *Code* and that, on a review of the Application, it appears that the applicant may not be able to establish a link between the respondent's actions and a prohibited ground of discrimination. The hearing took place on December 21, 2011 by teleconference.

Delay

[5] Section 34 of the Code establishes a statutory time limit for filing applications, subject to certain exceptions. The relevant portions of section 34 are as follows:

> 34. (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,
>
> (a) within one year after the incident to which the application relates; or
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> (b) if there was a series of incidents, within one year after the last incident in the series
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> (2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

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[6] The Tribunal's approach to delay is set out in *Miller v. Prudential Lifestyles Real Estate* 2009 HRTO 1241 at paragraphs 24 and 25:

> In my view, where an applicant seeks to establish that a delay in filing an application was "incurred" in good faith, the applicant must show something more than simply an absence of bad faith. Otherwise, there would be little meaning to the statutory limitation period. The Code requires a person who wishes to pursue a claim of discrimination to bring the claim forward by filing an Application within one year of the alleged incident, or where there is a series of incidents, within one year of the date of the last incident. This is a mandatory provision, subject only to section 34(2). The mandatory one-year limitation period is consistent with the policy objective, expressed elsewhere in the Code, that human rights claims should be dealt with expeditiously. Thus, the Code requires an individual to act with all due diligence, and file their application within one year, when they may seek to pursue a human rights claim.
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> [25] In dealing with requests that applications be considered outside the one-year limitation period, the Tribunal has set a fairly high onus on applicants to provide a reasonable explanation for the delay, while recognizing that there will be legitimate circumstances, often related to the human rights claim itself, that justifies exercising the discretion under section 34(2). For example, in *Klein v. Toronto Zionist Council*, 2009 HRTO 241 (CanLII), 2009 HRTO 241 (CanLII), the Tribunal held that an applicant cannot justify a delay on the basis that they only later discovered evidence which would assist in proving their claim. In *Lutz v. Toronto (City)*, 2009 HRTO 1137 (CanLII), 2009 HRTO 1137 (CanLII), the Tribunal held, referring to a number of Court decisions, that a delay may be found not to have been incurred in good faith where a party says simply that they were not aware of their rights, and made no inquires about options for pursuing the alleged wrong.

Submissions

[7] The applicant explained that he believed the respondent's decisions not to hire him violated the *Code*, but he chose not to file an application until March 22, 2010 because he believed that the respondent would eventually "come through" and hire him. Throughout his affiliation with the respondent he received assurances about his employability and did not want to harm his relationship with the respondent. Only in March 2011 did the respondent finally confirm that it did not intend to hire him as a

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permanent employee. At that point, the applicant considered the respondent to have broken its promise to him and he pursued an Application to the Tribunal.

[8] The respondent submitted that the Tribunal's jurisprudence requires the applicant to provide a good faith explanation for the delay in filing the Application and that the Tribunal has required applicants to meet a fairly high onus to avoid dismissal for delay. The respondent noted that the applicant's delay seems to because the applicant wanted to "wait it out" in the expectation that the respondent would hire him permanently. The respondent submitted that this does not amount to a good faith explanation for this delay and the applicant did not assert that the alleged incidents set out in the Application are a pattern or series within the meaning of section 34(1)(b). In written submissions filed prior to the hearing, the respondent noted that, the applicant applied for a permanent position on March 2, 2010, but was unsuccessful because he did poorly on a written exam. The respondent stated that the respondent informed the applicant of the decision not to hire him before March 21, 2010.

Analysis

[9] The applicant filed the Application on March 22, 2011; therefore, only alleged incidents that occurred on or after March 21, 2010 come within the statutory time limit. There is no dispute that the respondent declined to hire the applicant for a permanent position in March 2010 after he failed a written exam. The applicant did not specify whether the alleged incident occurred before or after March 21, 2010 and did not contradict the respondent's assertion that it came before that date. The applicant bears the onus of establishing that the Application is timely; therefore, I find this incident occurred before March 21, 2010 and is untimely. In the alternative, I find there is no reasonable prospect of that this allegation would succeed should the matter proceed to a hearing (see below).

[10] The applicant believed the decisions not to hire him in March 2009 and March 2010 were in violation of the *Code*, but he did not file an Application because he continued to believe the respondent would hire him and did not want to harm his

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prospects. I can appreciate that the applicant faced a difficult choice, but the Tribunal has stated on a number of occasions that waiting for the outcome of other processes does not amount to a good faith explanation for delay. See for example: *Winston v. University Health Network* 2011, HRTO 1648, *Low v. Hanley Corporation (Tim Hortons),* 2011 HRTO 1012 and *Deloras-Billot v. Ontario (Health and Long-Term Care)*, 2011 HRTO 1172. The applicant waited to see if the respondent would hire him and only filed an Application in March 2011 when he concluded he would not be hired. In my view, the applicant has not established a good faith explanation for his delay. Accordingly, the applicant may only rely on those incidents alleged to have occurred on or after March 21, 2010. Consequently, the only alleged incident occurring in this time was the respondent's decision not to consider him for permanent employment in March 2011.

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No Reasonable Prospect of Success

[11] The summary hearing process is described in Rule 19A of the Tribunal's Rules of Procedure. In *Dabic v. Windsor Police Service*, 2010 HRTO 1994 at paragraphs. 8-10, the Tribunal made the following observations on the type of inquiry that may be involved in a summary hearing:

> In some cases, the issue at the summary hearing may be whether, assuming all the allegations in the application to be true, it has a reasonable prospect of success. In these cases, the focus will generally be on the legal analysis and whether what the applicant alleges may be reasonably considered to amount to a *Code* violation.
>
> In other cases, the focus of the summary hearing may be on whether there is a reasonable prospect that the applicant can prove, on a balance of probabilities, that his or her *Code* rights were violated. Often, such cases will deal with whether the applicant can show a link between an event and the grounds upon which he or she makes the claim. The issue will be whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him or her can show a link between the event and the alleged prohibited ground.
>
> In considering what evidence is reasonably available to the applicant, the Tribunal must be attentive to the fact that in some cases of alleged discrimination, information about the reasons for the actions taken by a

> respondent are within the sole knowledge of the respondent. Evidence about the reasons for actions taken by a respondent may sometimes come through the disclosure process and through cross-examination of the people involved. The Tribunal must consider whether there is a reasonable prospect that such evidence may lead to a finding of discrimination. However, when there is no reasonable prospect that any such evidence could allow the applicant to prove his or her case on a balance of probabilities, the application must be dismissed following the summary hearing.

Submissions

[12] The applicant submitted that his performance while working with Cott was always considered good and he received recognition for exceeding performance expectations and helping to meet production targets. Nonetheless, the respondent preferred candidates "off the street" over him, despite his work history and familiarity with the respondent. The applicant stated that the respondent employs no one in his age range. He stated that "over the years" co-workers informed him that the respondent would not hire him because of his age and colour. A union representative "Sheffy" stated that the respondent was trying to get rid of employees in the applicant's age bracket and another union representative, "Rudy", who is also racialized and has the same complexion and skin colour of the applicant, told the applicant that the "new people" managing the company do not want people like "he and I". The applicant stated that the one of the people selected over him was a white person in his 30's and another a Filipino person in his 20's or 30's. The applicant acknowledged that he failed the written exam in March 2010, but asserted that passing the test was irrelevant because he passed a similar test in 2009 and had shown he was capable of performing the work in his work assignments with the respondent. He noted the respondent continued to employ him on a casual basis after he failed the examination. The applicant submitted that the respondent thought he was good enough to fill in, but not young enough for the respondent to take responsibility for him, e.g., with respect to employee benefits. In the circumstances, the only explanation for the respondent's actions towards him was discrimination.

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[13] The respondent submitted that the applicant had to establish that the allegations contained in his Application could amount to a violation of the *Code*. The respondent noted that the Tribunal's jurisprudence in hiring or promotion cases requires proof of the following to establish a *prima facie* case of discrimination:

- The complainant was qualified for the particular employment;
- The complainant was not hired; and
- Someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

The respondent noted that the Applicant contained no allegation that he was ever refused permanent employment because of his age, race or colour, provided no names of the successful candidates or any description of their ages, races or qualifications and did not assert discrimination because of a prohibited ground of discrimination. The applicant described no evidence of how race, colour or age affected hiring decisions and provided mere speculation regarding the reasons he was not a successful candidate. The applicant was clearly unhappy about being passed over and feels the respondent was unfair and may sincerely believe the decision not to hire him was discriminatory. The respondent submitted, however, that the applicant's subjective belief was not sufficient and the applicant has not described the evidence required.

Analysis

[14] As the respondent noted, the applicant must provide evidence of the following to succeed in a hiring or promotion case:

- The complainant was qualified for the particular employment;
- The complainant was not hired; and
- Someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently

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obtained the position. (See *Tahna v. Bombardier Aerospace Regional Aircraft, 2010 HRTO 1425*)

[15] The only timely allegation was that the respondent informed him that it would not consider him for permanent employment in March 2011. He stated that the respondent's personnel told him two different things. Ms. Palmer told him that Ms. Boscianowski advised her that Cott would not be hiring anyone who had written the test before. He spoke directly to Ms. Boscianowski who informed him that she would not know about permanent employment until September 2011. The applicant did not suggest that he applied for a permanent position in March 2011 and the respondent chose other candidates not sharing his race, colour or age. Declining to consider candidates who had previously taken the written exam, as Ms. Palmer allegedly stated, would eliminate the applicant, but the applicant described no evidence that this criterion was connected to a prohibited ground of discrimination. The statement attributed to Ms. Boscianowski suggested that the possibility of permanent employment for the applicant was not foreclosed, which in my view cannot be taken to be evidence of discrimination. Accordingly, the applicant described no evidence that he has or is reasonably available to him that links the respondent's actions towards him in March 2011 to a prohibited ground of discrimination under the *Code*.

[16] Assuming the decision not to hire the applicant in March 2010 was timely, the applicant has not pointed to evidence that he has or is reasonably available to him that would support a finding that the decision was discriminatory. The Application stated that the respondent invited him to pursue either permanent or seasonal employment, which does not suggest the respondent did not want to hire him. The respondent required him to write a test, as it did other candidates. The applicant wrote and passed a similar test in 2009 and the applicant pointed to no evidence that would suggest that the test was intended to disqualify him. Rather, the applicant acknowledged that he made a serious mistake on the test and he scored poorly. He advised Human Resources of the situation, but they offered him no assistance. There is nothing *per se* discriminatory about using a test to screen candidates and the applicant did not describe any evidence that would suggest the test was discriminatory in it is design or the circumstances under

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which the candidates wrote it. The applicant did not state that other candidates were allowed to correct errors after the fact or that the respondent selected candidates whose test results were worse than his. The applicant did state that the candidates selected were white or Filipino and younger than him and had no previous experience working with the respondent. The applicant described no evidence regarding the successful candidates' qualifications and it would seem that the only evidence available on this point is that the successful candidates passed the screening test and he did not. The applicant undoubtedly felt the result was unfair given his experience with the respondent and that he had passed a previous test. The Tribunal, however, does not have the general power to deal with allegations of unfairness, as noted in the CAD.

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Summary

[17] The allegations predating March 21, 2010 are untimely and the applicant has not provided a good faith explanation for the delay. Regarding the timely allegations, the applicant did not point to any evidence that he has or may be reasonably available to him linking the respondents' alleged behaviour to any prohibited ground of discrimination under the *Code.* Consequently, I find the Application has no reasonable prospect of success.

Order

[18] The Application is dismissed.

Dated at Toronto this 27th day of March, 2012.

"Signed by"

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Douglas Sanderson
Vice-chair