

Case Law - Sexual Orientation

Leshner v. Ontario (1992) Ontario Board of Inquiry

Michael Leshner, a crown attorney for the province of Ontario, alleged that his employment benefits were limited in a discriminatory fashion, based on his being in a same-sex rather than opposite-sex conjugal relationship. The benefits included a supplementary health and hospital plan; a dental care plan; and a pension plan. All of these offered "family coverage", "family" being defined as opposite-sex spouses and children.

Sometime after filing his complaint, the Government of Ontario changed its policy with respect to all insured and non-insured benefits for public servants. Under the new policy, family coverage was extended to same-sex couples. Mr. Leshner applied for and obtained benefits for his partner.

In making its judgment, the Ontario Board of Inquiry noted a few points of interest to all similar cases. First, it acknowledged that benefit plans are part of the terms and conditions of employment. Second, it noted that "while an employer may have no obligation to provide employment benefits, it is clear that once it has undertaken to provide benefits, those benefits must be provided in a non-discriminatory manner". Finally, having described in some detail the nature of Mr. Leshner's marriage-like relationship with his partner, the Board took time to clarify that such relationships do not have to mirror traditional heterosexual marriages in order to warrant protection from discrimination.

Moffatt v. Kinark Child and Family Services et al.

Board of Inquiry Decision, November 2, 1999

Key Words: Remedies, General Damages, Reinstatement

Decision on the Merits:

The Complainant, Larry Moffatt, was a senior manager at the Respondent children's services agency. Mr. Moffatt alleged that his workplace became rife with offensive rumours immediately after he disclosed that he was a gay man and entered into a fostering relationship with a youth. Mr. Moffatt alleged that his employment was terminated in 1991 because of his sexual orientation and because his employer believed he had AIDS.

In December 1998, the Board found that Mr. Moffatt was subjected to a poisoned work environment because of rumours and gossip regarding his sexual orientation, speculation of a sexually exploitative relationship with his foster son and perceived handicap, AIDS. The pejorative associations drawn between homosexuality and pedophilia, and homosexuality and AIDS were indicative of the fact that the trigger for the gossip in the workplace was the Complainant's sexual orientation.

The Board held that while the Respondents failed to take adequate steps to investigate and address the Complainant's concerns of harassing rumours, the ultimate decision to terminate Mr. Moffatt's employment was based on non-discriminatory reasons.

The Board did, however, find that reprisal was a factor in the 1991 sexual abuse report made by the Respondents to children's aid alleging sexual impropriety on the part of the Complainant. The Board held that in making the sexual abuse report, the Respondents provided misleading information to the Children's Aid Society as a form of retaliation.

Decision on Remedy:

The Board held that while the Complainant's employment was not lost because of discrimination, the Complainant's ability to regain employment was seriously affected by the Respondent's failure to curb the poisoned work environment before his dismissal and the on-going rumours after his dismissal. The Board ordered the following:

General damages totaling \$36,000, divided as follows:

\$10,000 for the intrinsic right to be free of discrimination under section 5(1) of the Code,

\$6,000 for the right to be free of reprisal under section 8 of the Code and

\$10,000 for mental anguish flowing from the discrimination, and

\$10,000 for mental anguish flowing from the reprisal.

Special damages representing lost of employment income for approximately ten months, that being the period of unemployment after dismissal.

Pre and Post judgement interest on these amounts.

An order requiring the Respondents to pay \$5000 towards career counseling for the Complainant.

Partial Re-employment:

An order requiring the Respondent to offer the Complainant a limited term contract of employment.

Details to be negotiated by the parties or to return to the Board for an order. Further, an order requiring the Respondents to interview the Complainant for job vacancies in its organization for two years from the date of this decision.

Distribution of the Board's decision to all Respondent agencies, employees and members of the Board of Directors throughout the province. Provide a copy of the Board's decision to the Children's Aid Society for their records.

Provide the Complainant with a written letter of reference and verbal references based on terms dictated by the Board, notwithstanding the Respondent's corporate-wide no references policy.

Develop and implement an internal human rights complaint procedure to be filed for review by the Human Rights Commission.

There is an interesting element to the Board's reasons on remedy:

Firstly, even though the Board found the dismissal was non-discriminatory, the Board ruled that employers are responsible for their conduct after a dismissal to ensure the past poisoned work environment does not further prejudice the Complainant. In this case, the Board awarded special damages and a form of reinstatement, despite the fact that the Board's decision on the merits concluded that the dismissal was not in violation of the Code.