

# Thoughts from a Management Lawyer

## Commentary on Canadian Labour and Employment Law Issues

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### → Divisional Court Overturns Human Rights Tribunal Decision

While it's a generalization, it's tough to overturn on judicial review a decision of an administrative tribunal. That said, it's not impossible to do so as demonstrated by the case of [Audmax Inc. v. Ontario Human Rights Tribunal](#) (January 18, 2011, Ont. Div. Ct.) which overturned [this](#) decision from the Ontario Human Rights Tribunal.

The adjudicator found that the respondents had discriminated against the applicant in her employment on the basis of her "ethnic origin, creed and sex. This discrimination occurred indirectly through the enforcement of office dress code and food policies, in the respondents' disciplinary action and failure to accommodate the applicant's religious attire, and in the termination of her employment."

The respondents sought judicial review of this decision on a number of grounds including "procedural unfairness, inadequacy of reasons, and the unreasonableness of the decision itself". The unanimous Divisional Court overturned the decision and held that:

There are a number of deficiencies in the reasons and in the process employed by the adjudicator. In my opinion, when these are viewed cumulatively it is not possible to say that this was a fair hearing, nor that the findings of discrimination were reasonable. The specific issues of concern include the following:

1. the manner in which the adjudicator dealt with the inability of a key witness for the employer to attend the hearing was a denial of procedural fairness;
2. the findings with respect to the microwave policy are flawed by legal errors and lack factual findings to support the legal conclusions reached;
3. the reasons with respect to the dress code policy are inadequate to explain how the policy was discriminatory against Ms. Saadi, either with respect to its content or how it was applied, and fail to address applicable legal issues;
4. the adjudicator unreasonably refused to permit Ms. Telfer to present a photographic image to explain her objection to Ms. Saadi's clothing, which interfered with the employer's ability to present its case;
5. the findings with respect to the hijab are unsupportable and flawed by legal errors;
6. the finding that it is discriminatory for a man to be present at a meeting to discuss the style of business dress required of female employees is unsupportable in fact or law;
7. the conclusion that the termination was discriminatory was dependent upon the other findings of discrimination and is not sustainable on its own;
8. the conclusion that the termination was discriminatory was heavily dependent upon drawing an adverse inference with respect to the failure of Mr. Barnett to testify for the employer, which was both unreasonable and legally incorrect and which compounded the procedural unfairness in proceeding with the hearing in his absence; and
9. there is an overall failure to refer to evidence to support critical findings of fact, including findings of credibility that are either conclusory or missing altogether, and the reasons are inadequate to support the conclusions reached or to permit meaningful judicial review.

This decision is worth a close read. Not only will the conclusions and result be considered on an application for judicial review, but so too will the manner in which the adjudicator reached the conclusions. It takes a lot for the Divisional Court to intervene and they will generally default to deference to the administrative body with the expertise and experience for adjudicating specific complaints under a particular statute. But as this case demonstrates, they will not defer in every case and will step in in the appropriate case..

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