

**IN THE MATTER OF a Complaint
pursuant to section 11 of the
Human Rights Act, 2010, SNL 2010,
c. H-13.1**

BETWEEN:	ZAID SAAD	COMPLAINANT
AND:	AUBREY LYNCH	RESPONDENT
AND:	NEWFOUNDLAND AND LABRADOR HUMAN RIGHTS COMMISSION	COMMISSION

Adjudicator: Kimberley Horwood

Hearing Date: 27th November 2018

Decision: 8th July 2019

Appearances:

On Behalf of the Complainant:	Zaid Saad
On Behalf of the Respondent:	(no appearance)
On Behalf of the Commission:	Donna Strong

DECISION OF THE ADJUDICATOR

INTRODUCTION & PROCEDURAL HISTORY OF THE COMPLAINT

1. A complaint was filed by Zaid Saad on the 17th day of November, 2011, pursuant to section 11 of the *Human Rights Act, 2010*, against Aubrey Lynch alleging that he was subjected to discrimination against a person or class of persons with respect to goods, services, accommodation, or facilities that are customarily offered to the public.
2. The Respondent was not present for the hearing. The Human Rights Commission advised that he did participate early on and was aware of the complaint. He did file a Reply dated 28th November 2011, and later filed correspondence dated 7th July 2014 outlining his position in respect of the complaint. However, after that time, it appeared that he was unwilling to continue to participate in the process.

3. Despite several attempts by representatives of the Human Rights Commission, they were unsuccessful in contacting Mr. Lynch. Thereafter, the Human Rights Commission engaged the Sheriff's Office to serve notice of the hearing upon Mr. Lynch, however their efforts were also unsuccessful. Two affidavits from representatives of the Human Rights Commission outlined the measures undertaken to contact Mr. Lynch, and I am satisfied that all reasonable efforts were made to notify the Respondent of the hearing. It was decided that the hearing would proceed in his absence.
4. Given that Mr. Lynch did not participate in the hearing, his Reply and his correspondence from July 2014 were provided to the Adjudicator, in order that his position would be advanced and considered.

NATURE OF THE COMPLAINT

5. The Complainant alleges that he responded to the Respondent's offer to sell an automobile on the used-goods online service "Kijiji". He claims that the Respondent had offered for sale a 2006 Toyota Corolla motor vehicle which the Complainant offered to purchase. It is alleged that in the course of the email correspondence that followed, the Respondent discriminated against Mr. Saad in respect of a good that was offered to the general public for sale. He alleges that Mr. Lynch refused to bargain or enter into negotiations because of Mr. Saad's nationality and ethnic origin.
6. The Respondent, in his Reply, denies ever receiving any email from the Complainant, and further denies writing or sending the 14th September 2011 email response. The Respondent asserted in the alternative that either the Complainant was disgruntled at not being able to acquire a vehicle and created these emails himself, or that it was more likely that his email account was hacked and that some other third party received and sent these emails from the Respondent's account.

ISSUES

7. Does advertising a used car for sale on a classifieds website, such as Kijiji, constitute a good or service that is being customarily offered to the public?
8. If yes, did the Respondent discriminate against the Complainant on the basis of his nationality and ethnic origin contrary to section 11 of the *Human Rights Act, 2010*?
9. If discrimination is proven, what is the appropriate remedy?

EVIDENCE AT THE HEARING

Testimony of Zaid Saad

10. Mr. Saad began his evidence by stating that he came to Canada about two years before the incident in September 2011. At that time, Fall 2011, he was desirous of purchasing a motor vehicle and had a budget of \$5,000.00 - \$6,000.00 for that purpose.
11. He advised that he began perusing the online classified website, Kijiji, every day, looking for a vehicle that would suit his purpose. On 10th September 2011, he noted an advertisement for a 2006 Toyota Corolla with 135,000kms and for a sale price of \$6,950.00. The advertisement did state that interested buyers should call, and listed a phone number to reply, and continued to state "I WILL NOT REPLY TO ANY EMAILS WHATSOEVER." Mr. Saad said that he noted the vehicle had high mileage, but thought he could make it work, so he decided to make an offer.
12. On 13th September 2011, Mr. Saad replied to the advertisement using the Kijiji messaging link, using his Memorial University email address. He stated, despite that Mr. Lynch had written that he did not want to receive email offers, that he figured if Mr. Lynch was serious about selling his car, he expected he would entertain an email offer. His offer stated:

hi
if you still have the car,
i will offer you 5000 tax and all,
the car has high milage [sic],
im [sic] serious about it
thnks [sic]
13. Mr. Saad confirmed that the reply that he received from "aubrey.lynch@gmail.com" stated:

Your first step when you move here from another country is learn how to read english. Your next step is learn this is not a country of donations.

Now DO NOT email me again.

Sent on the TELUS Mobility network with Blackberry
14. Mr. Saad explained that upon receiving this response, he was insulted; he said the ad was in English, he answered in English, and that he hadn't written anything out of line. As he thought more about it, he recalled that he had actually been very pissed off but didn't want to write anything inappropriate. He did answer, however, at 9:34am on 14th September 2011, stating:

Its [sic] sad that ignorant pigs like you have the opportunity to damage the reputation of such a wonderful place like Newfoundland. Good thing there are very few people I have met who show such racism and disrespect to others.

15. A few hours later, on 14th September 2011, a reply was received from aubrey.lynch@gmail.com, which stated:

you obviously can't read english dude because read the friggin ad, do not email me. Now fuck off and beg someone else for a donation.

I will be forwarding your email off to MUN admistration [sic]. Nows [sic] how's that's [sic] my son.

Now read and follow the rules.

Sent on the TELUS Mobility network with Blackberry

16. Ms. Saad testified that he felt that all Mr. Lynch's communications were based on his last name. He said the he felt Mr. Lynch assumed he was an international student because of his MUN email address. He went on to say that he felt nobody should be treated that way, even if the offer was low.
17. It was then put to Mr. Saad, that Mr. Lynch had asserted that his emails might have been hacked, and that he claimed no knowledge of the email exchange. There was a further suggestion by Mr. Lynch that he had issues with Kijiji and that he complained about it. He was relying on this to assert that perhaps even his Kijiji account was hacked. Mr. Saad commented that Mr. Lynch's complaints to Kijiji were in November 2011, which was two months after the incident and right around when this complaint was initiated. He also stated that he did not believe that Mr. Lynch's emails were hacked, suggesting that because the email responses came from Mr. Lynch's smartphone, it made it more unlikely that his emails would have been hacked. I do not have any evidence before me whether this is true or not that it would be harder to hack emails from a smartphone, only Mr. Saad's conjecture, so I do not consider Mr. Saad's evidence in that regard. Either way, Mr. Saad stated that he found this to be a convenient explanation for Mr. Lynch's misdeeds.
18. It was also put to Mr. Saad that Mr. Lynch relied on email testimonials offered by individuals who are immigrants, according to their respective emails. They assert that they have had dealings with Mr. Lynch and that they have had no issue with how he treated them. Unfortunately, these individuals were not named in the information presented to the Adjudicator, nor were they presented for cross-examination, or so the Adjudicator could make a determination as to their credibility. There was nothing to confirm, therefore, who actually wrote these emails, nor was there any meaningful way to assess the reliability of the contents. These emails were therefore not considered for the purposes of this hearing.

19. Mr. Saad did make a comment regarding the testimonials, saying that regardless of whether these emails were true and Mr. Lynch was kind to others, that this did not change the fact that he discriminated against him.
20. It was his intention, by filing the Human Rights Complaint, to ensure that this didn't happen again. He regrets that Mr. Lynch was disinterested in doing anything to resolve this matter, and that he would have preferred Mr. Lynch to have respected the fact that his actions had a dramatic consequence for Mr. Saad. In that circumstance, Mr. Saad states that he would have worked with him to resolve this matter in a mutually agreeable manner. Unfortunately, however, Mr. Lynch simply declined to continue his participation.
21. Mr. Saad was asked why he chose to email Mr. Lynch when the advertisement specifically stated the reply by phone and that emails would not be considered. Mr. Saad responded that he was going to get his friend to call, stating that he had only been in Canada at that point for two years and while his English was good, he was not confident enough to negotiate a business transaction. He reflected upon his experience that he found Newfoundlanders would speak very fast, and he was afraid that he would be embarrassed if he couldn't negotiate. He did not want that to happen.
22. In respect of what happened next, Mr. Saad reported that he did go on to purchase a vehicle from Toyota Plaza a couple of months later. He purchased a Toyota Matrix for \$3,400.00 + tax. He recalled the list price to be \$3,495.00.
23. Mr. Saad was interested in securing a vehicle before winter. In the interim, he advised that he took the bus, rented vehicles during the summer, and that he also relied on friends with vehicles for transportation.
24. On the topic of the impact that Mr. Lynch's email had on him, Mr. Saad stated that he felt insulted. He stated that he was not looking for donations, and was offended by the implication of that message. He said Mr. Lynch could have called it what he wanted in terms of a "stupid offer" or a "low-ball offer" or he could have chosen, as it stated he would in his ad, to not reply to Mr. Saad's email. Instead, Mr. Lynch chose to degrade and humiliate Mr. Saad.
25. It didn't bother him so much that there was a comment about his English, so much as the suggestion that anyone coming from another country would be looking for hand-outs. Mr. Saad testified that he felt compelled to respond, and was shocked when Mr. Lynch said it all again in his second reply.
26. He then became increasingly frustrated that not only was he being demeaning, but that he then tried to threaten Mr. Saad by stating he would report him to MUN administration. Mr. Saad was not overly concerned about any such action, only that it would continue to cause him continued embarrassment and grief.

27. When asked about what remedy he was seeking, Mr. Saad responded that he would like an official letter of apology and financial compensation, on the basis that the entire ordeal was an insult to his dignity and self respect.

THE LAW

Sections of the Human Rights Act, 2010

28. The relevant portions of section 11 of the *Human Rights Act, 2010* state:

9. (1) For the purpose of this Act, the prohibited grounds of discrimination are race, colour, nationality, ethnic origin, social origin, religious creed, religion, age, disability, disfigurement, sex, sexual orientation, gender identity, gender expression, marital status, family status, source of income, and political opinion.

...

(4) Where this Act protects an individual from discrimination on the basis of a prohibited ground of discrimination, it also protect the individual from discrimination on the basis of

(a) 2 or more prohibited grounds of discrimination or the effect of a combination of prohibited grounds; and

(b) the individuals association or relationship, whether actual or presumed, with an individual or class of individuals identified by a prohibited ground of discrimination.

...

11. (1) A person shall not, on the basis of a prohibited ground of discrimination,

(a) deny to a person or class of persons goods, services, accommodation or facilities that are customarily offered to the public; or

(b) discriminate against a person or class of persons with respect to goods, services, accommodation or facilities that are customarily offered to the public.

(2) Notwithstanding subsection (1), a limitation, specification, exclusion, denial or preference because of a disability shall be permitted where that limitation, specification, exclusion, denial or preference is based upon a good faith qualification.

...

(5) For the purpose of this section, “accommodation, services, facilities or goods to which members of the public customarily have access or which are customarily offered to the public” include accommodations, services, facilities or goods that are restricted to a certain segment of the public.

29. The burden of establishing a *prima facie* case of discrimination is on the Complainant. If met, the onus then shifts to the Respondent to prove otherwise, as stated by the Supreme Court of Canada.
30. A *prima facie* case of discrimination has been described by the Supreme Court of Canada in *Human Rights Commission of Ontario and O'Malley v. Simpsons – Sears* [1985] 2 SCR 536 at page 558, where it was held that:

A *prima facie* case in this context is one which covers the allegations and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent employer.

31. The standard of proof in a Human Rights complaint is on the balance of probabilities.
32. As set out in *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143, the meaning of discrimination has been widely recognized to mean the following:

Discrimination is a distinction which, whether intentional or not, based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

ANALYSIS

33. Mr. Saad brought his complaint under sections 9 and 11 of the *Human Rights Act, 2010*, on the basis of discrimination relating to nationality or ethnic origin.
34. In respect of the first issue, as to whether this activity of online sale of goods falls within the meaning of “goods and services” as contemplated under the *Act*, the Commission stated that there had been scant interpretation of “goods”, such that one ought to look to the general meaning of “goods” in the Human Rights context. Commission counsel referred to secondary material on the subject, “The Law of Human Rights in Canada”, wherein it was noted by the Honourable Justice Russel W. Zinn at page 2-18 of the 2017 update, that “Although no cases have considered or defined the term “goods”, the terms “service”, “facility” and “accommodation” have generally been used interchangeably by the Canadian courts and have been interpreted broadly.
35. In *British Columbia (Ministry of Education) v. Moore* 2008 BCSC 264, at paragraph 84, the court considered that determining whether a service is customarily available to the public is a question of law as to its meaning and scope, although whether it is customarily available is a matter of fact. The Court went on to clarify, at paragraph 88, that there are really three questions within this consideration: 1) what is the “service” (or in the within case, the “good”) that is the subject matter of the complaint, 2) what is the “public” that is being served, and 3) was that service customarily available to that public?
36. At paragraph 95 of *Moore* the Court held that the concept is that “...the public must have access to the service or a member of the public must be denied access to a service available to others in the public to found a discrimination claim”. This concept is equally analogous to provision of a “good”.
37. In determining the element of “customarily available to the public”, we must consider, on the facts of the case, whether a good for sale can be said to be “customarily available” or whether the offer for sale of a good can be said to be “discretionary”. It is not the particular offer or the particular transaction that dictates this finding, as in, it is neither here nor there whether Mr. Lynch had any intention of using his own discretion in accepting Mr. Saad’s offer or not, but rather that the simple act of placing the advertisement on a public online forum, such as Kijiji, makes it customarily available to the public”.
38. I find that the facts in the within matter do satisfy that Mr. Lynch’s online advertisement of his vehicle for sale, on Kijiji, amounts to a good or service that would customarily be available to the public.
39. Has the Complainant established, on a balance of probabilities, that the Respondent discriminated against him on the basis of nationality and ethnic origin, contrary to section 11 of the *Human Rights Act, 2010*?

40. The burden of establishing a *prima facie* case of discrimination is on the Complainant. If met, the onus then shifts to the Respondent to prove otherwise, as stated by the Supreme Court of Canada.
41. In *Duong v. Les Garai carrying on business as Langstaff Auto Repairs*, 2000 CanLII 20869 (ON HRT), a 2000 decision of the Human Rights Tribunal of Ontario wherein it was alleged that there was discrimination with respect to services because of place of origin, ethnic origin and race. It is somewhat analogous to the within subject matter, in that *Duong* dealt with the purchase, and subsequent dispute over repairs to, a motor vehicle. It also was similar in that the Respondent did not participate in the Ontario Human Rights Commission hearing. The Adjudicator in that case found that:

Based on the evidence before me, I find the following: Mr. Garai did make slurs involving Mr. Duong's ancestry, race and place of origin. Specifically, I find that Mr. Garai did say the following:

"You fuckin Chinese people, in your country, you drive a bicycle. Here you drive a car like this and you want me to fix this, fix that.

Fucking you people, I don't like you. I don't like your people. I don't like your country.

Look, look, the government gives the monkey a licence to teach other monkeys to drive. Get the fuck out of here."

The above comments, without a doubt, violated Mr. Duong's right to be free from discrimination in the provision of services and goods. Those comments are disparaging and derogatory in nature, heaping derision on a group of people, of whom Mr. Duong is a member. I am satisfied on a balance of probabilities that the Respondent violated the section 1 rights of the Complainant to receive equal treatment in the provision of services, goods and facilities.

42. I find that the comments made by Mr. Lynch to Mr. Saad to be similarly disparaging and constitute a *prima facie* case of discrimination.
43. The burden then shifts to the Respondent. While he did not participate in the hearing, Mr. Lynch previously asserted, in his Reply, that he did not send those emails, but rather that someone else must have used his email address, and he therefore is not liable. I do not accept this.
44. With his Reply, Mr. Lynch offered emails from four international students who claim to have had dealings with him regarding the purchase of motor vehicles and that he dealt with them fairly and showed them respect. The identifying information for these individuals was redacted. The original emails were not tendered as evidence, nor were the individuals

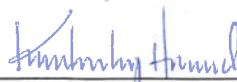
called to give evidence in this matter. In that circumstance, the emails cannot be considered, nor would they have been enough to disprove Mr. Saad's allegations in any event.

45. Based on the evidence before me, I find that Mr. Lynch was annoyed by Mr. Saad's email response, rather than phone as was requested, and/or by his low offer. Rather than simply ignoring his email correspondence, Mr. Lynch went a step further and responded in a disparaging manner, made comments about Mr. Saad's ability to comprehend English, allegations about him being from another country and looking for donations, together with veiled threats meant to intimidate him regarding his international student status at Memorial University.
46. I am uncertain whether Mr. Saad's ethnicity or nationality was the basis for declining Mr. Saad's offer or whether it was strictly based on the offer itself. So as to section 11(1)(a) of the *Act*, I cannot determine on what basis Mr. Saad's offer was denied. Notwithstanding the reason for denial of the offer, I do find that Mr. Lynch discriminated against Mr. Saad by subjecting him to disparaging remarks regarding him being an immigrant, which infringes section 11(1)(b) in that he discriminated against a person or class of persons by characterizing Mr. Saad in the way he did in his emails.

CONCLUSION

47. I am satisfied that the evidence supports a finding of discrimination on the basis of nationality and ethnic origin in the provision of goods, services, accommodations, or facilities that are customarily offered to the public.
48. I order that, pursuant to section 39(1)(b)(iv) of the *Human Rights Act, 2010*, the Respondent will pay to the Complainant, damages in the amount of \$1,500.00.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 8th day of July, 2019.



Kimberley Horwood
Chief Adjudicator