

The Ontario Division Court Weighs In: He Said/She Said, Credibility and Trauma

The Ontario Human Rights Tribunal (“Tribunal”) has made the highest monetary award to date in the monumental 2018 decision of *A.B. v. Joe Singer Shoes Limited*. The Tribunal awarded the employee (the store owner) \$200,000.00 for the twenty (20) years of pain and suffering she experienced by her employer (and landlord), Mr. Singer.

Mr. Singer sought judicial review of the decision, not with respect to the quantum of damages, but rather based upon the Tribunal’s assessment of the parties’ credibility. In the absence of direct witnesses, the Tribunal had the difficult task of assessing the credibility of both parties – given the “he said/she said” nature of the matter.

It is noteworthy that at the initial hearing, the Tribunal preferred the employee’s evidence despite gaps in her memory. The Tribunal found that the employee was persuasive in describing incidents in a straightforward manner. The Tribunal’s conclusion, in determining the employee’s evidence to be credible, was also informed by medical evidence indicating that the employee had suffered from depression and post-traumatic stress disorder (“PTSD”), which had significantly impacted her memory.

On appeal, the Ontario Divisional Court (the “Court”) heard arguments from Mr. Singer’s counsel that the Tribunal failed to consider several inconsistencies in the employee’s evidence when assessing her credibility. The Court also considered arguments by Mr. Singer’s counsel that the Tribunal had unfairly scrutinized the inconsistencies in Mr. Singer’s statements.

The Court upheld the Tribunal’s decision. The Court found that given the employee’s diagnosis of depression and PTSD, the gaps in her memory and inconsistencies in her evidence were not signs for falsification. The Court denied that the inconsistencies in Mr. Singer’s evidence had been unfairly scrutinized compared to the employee. The Court noted that the Tribunal had simply placed less weight on the inconsistencies in the employee’s evidence, by virtue of her medical condition.

“He said/she said” matters involving harassment present unique challenges – especially with respect to the determination of credibility. This decision provides valuable insights for employers who are investigating allegations of harassment or violence in the workplace. First and foremost, investigators



should make a concerted effort to scrutinize the evidence of each party equally and consider inconsistencies in testimony appropriately. With that being said, if one of the parties suffers from a medical condition (and has provided medical evidence) due to a trauma-related mental illness, gaps in memory or inconsistencies in the evidence may not necessarily undermine the individual's credibility.

We strongly encourage any employer required to undertake a workplace investigation to reach out and speak to an e2r® advisor regarding investigation best practices.

