Game, Set, Equality! The Human Rights Tribunal's Decision On Gender Equality In Recreational Tennis

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Miller v. InterCounty Tennis Association is a recent decision of the Ontario Human Rights Tribunal (the "Tribunal"), which highlights the broad remedies at the Tribunal's disposal and reiterates the legal tests for complaints related to discrimination.

Background

The InterCounty Tennis Association ("ICTA") "encourages and promotes tennis activities, through the organization of intercounty regional Team play." The association facilitates interclub tennis by offering four leagues: Ladies, Mixed Doubles, Junior, and Plus 55. In doing so, the organization allows tennis players to compete with individuals beyond their respective clubs. The main issue before the Tribunal deals with the ICTA's Mixed League, which is one of the largest in Ontario. Since 1962, an unbalanced requirement for the Mixed League has been in force. Under the ICTA rules, clubs are to put forward teams comprised of eight men and four women. The applicants' evidence was that the 8:4 format led to women having fewer opportunities to participate in the league as they are vying for fewer allocated spots.

The Decision

The Tribunal agreed with the applicants that the ICTA discriminates against women players by offering them half as many opportunities to play as it does men in its Mixed League. In reaching this decision, the Tribunal relied upon the following test to establish *prima facie* discrimination under the Ontario *Human Rights Code* ("the Code"):

1. They are members of a group protected by the Code;
2. They were subject to adverse treatment; and
3. A ground protected under the Code was a factor in the alleged adverse treatment.

It was not disputed that the applicants, as women, are members of a group protected by the ground of sex in the Code. In regards to the third point, the respondent did not strongly dispute that if there was adverse treatment, the applicants' sex was a factor.

The ICTA submitted that none of the three applicants, nor women players, generally experienced adverse treatment as a result of the provision of having half as many playing opportunities for women as for men. In particular, the ICTA pointed to the existence of a greater number of playing opportunities through the daytime Ladies League and generally within the geographic region served by the ICTA. However, the vice-chair clarified that the appropriate frame of reference in this case is the ICTA Mixed League, and therefore found that the applicants and women players in general are adversely affected.

The vice-chair was not convinced, on a balance of probabilities, that the ICTA would incur undue hardship if it was required to offer the same number of Mixed League playing opportunities to women as it does to men. The vice-chair was not persuaded with the evidence submitted relating to the negative financial consequences of equalizing the Mixed Doubles program given the demand impacts of doing so. Much of the respondent's witness testimony related to the difficulty in securing "competitive" women to play in the Mixed Doubles League. One witness emphasized the physicality of men being superior to that of women. The vice-chair stressed that finding women who are perceived to be "good enough" is not the same as finding women interested in playing. Moreover, it was noted how increasingly more women are participating in sport and working full-time outside the home. Therefore, it is not reasonable to justify inequalities in evening tennis by pointing to the existence of daytime playing opportunities for women.

The applicants sought an order that the ICTA institute an equal gender format in its Mixed League and did not seek monetary compensation. Under section 45.2 of the Code, the Tribunal is given discretion in determining appropriate orders. The vice-chair used this discretion to craft a creative "staged remedy" as follows:

1. From the 2019 season onwards, the ICTA must provide the same number of playing opportunities to women and men playing at the C level of its Mixed League;
2. From the 2020 season onwards the ICTA must provide the same number of playing opportunities to women and men playing at the B level of its Mixed League;
3. From the 2021 season onwards the ICTA must provide the same number of playing opportunities to women and men playing at the A level of its Mixed League; and
4. From the 2022 season onwards the ICTA must provide the same number of playing opportunities to women and men playing at the Majors level of its Mixed League.

Takeaways

The ICTA sought to be exempt from the applicants' allegations of discrimination by virtue of the "recreational clubs" exception contained in s. 20(3) of the Code. The vice-chair clarified that the ICTA does not fall within the meaning of a "recreational club" as it does not have members with human characteristics. The ICTA is a collection of tennis

clubs that individually have human members. Specifically, the vice-chair elaborated that even if the ICTA had been deemed a “recreational club” the exception would not prevail on the facts. The s. 20(3) provision is to be “interpreted in light of the Code’s purposes of promoting equality and the dignity and worth of every person.” By restricting playing opportunities for women, the ICTA is perpetuating systemic inequalities in sport rather than addressing them, and therefore the “recreational club” exception would not apply.

Another interesting aspect of this decision is how the demand on the part of women to play in the Mixed League was incorporated into the analysis. The applicants submitted it should only be considered in the analysis of undue hardship whereas the respondents felt it should be considered at the outset of the discrimination analysis. Beyond demand being difficult to decipher, the vice-chair explained how unequal conditions may persist due to demand being inaccurately measured or a failure to put in place conditions that would permit demand to emerge. As such, demand was considered in the undue hardship analysis. Overall, the vice-chair was not convinced by the evidence presented that the ICTA would incur undue hardship as a result of purported insufficient demand.

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