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Gender bias ruling against Hamilton Health Sciences 'an instigator of change'

Joanna Frketich

A finding of gender discrimination against Hamilton Health Sciences (HHS) could result in meaningful change for women leaders across workplaces in Ontario.

“This finding is really quite significant,” said Ivy Bourgeault, research chair in gender, diversity and the professions at the University of Ottawa. “I think what it does, is it causes people to reflect. My hope is that those reflections will cause systemic changes.”

Dr. Irene Cybulsky successfully complained to the Human Rights Tribunal of Ontario (HRTO) that gender discrimination was behind her removal in 2016 as the first woman head of cardiac surgery in Canada. While the March decision by the tribunal doesn’t break new legal ground, it’s an important reminder about gender bias.

“There’s always been in the human rights law the concept of indirect discrimination which means you don’t have to prove somebody said, ‘Well don’t give her the job because she’s a woman,’ ” said Ed Canning, employment and human rights lawyer and partner at Ross and McBride. “There’s always been an obligation to consider the entire context of the situation ... and the possibility of gender bias.”

Dr. Irene Cybulsky successfully complained to the Human Rights Tribunal of Ontario that gender discrimination was behind her removal in 2016 as the first woman head of cardiac surgery in Canada. Dr. Irene Cybulsky launched a successful human rights complaint claiming gender discrimination led to her dismissal. The Spectator’s Joanna Frketich looks at what happened during her tenure and what HHS plans to do about it.

Cybulsky was in charge of a department with seven male surgeons, and hoped to be a role model for women when she took the leadership position in 2009. Instead, she was ousted as head of service in 2016 and took her case to the HRTO.

“I explicitly raised the challenges that a woman leader faces,” Cybulsky stated in her closing arguments submission in October 2019. “I believe the bias against female leaders played a role in what was happening in my case. HHS has not been proactive; the respondents have been the opposite — refusing to consider gender bias, denying that any gender discrimination could exist at HHS and failing to ensure policies that would minimize bias ... be implemented.”

The case ultimately came down to HHS and three of its leaders being found by the tribunal to have ignored the role gender played in the issues Cybulsky had leading the all-male department.

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“The applicant raised the challenges of female leaders, and the expectations around female versus male traits and behaviours,” Laurie Letheren, vice chair of the tribunal, stated in her decision on March 18.

“She raised with them how her being a direct and assertive female ... could work against her. Despite the applicant having raised the stereotypes and biases faced by women in leadership ... these factors are never addressed.”

Letheren specifically pointed to a 2014 review of the cardiac surgery department that was so highly critical of Cybulsky that parts of it were made confidential. It was so potentially devastating that even Cybulsky wasn’t shown the private section at first, testified hospital leaders.

That review — initiated and based heavily on criticisms by the male surgeons — didn’t consider gender and failed to respond appropriately to Cybulsky’s concerns that it could be a factor in the assessment of her as leader, found Letheren.

“There’s always been an obligation for the employer to investigate human rights issues that are raised, which HHS did not,” said Canning, who is also a columnist at *The Spectator*. “You can be female and be a bad leader just like men can be bad leaders. But to not even take it into consideration — especially where it’s been specifically raised by the complainant — and to leave it out of the report is a bit of a glaring omission.”

A separate process has yet to be scheduled to determine remedies. It could result in a payout as compensation to Cybulsky. It could also include orders for HHS such as developing human rights

policies or additional training for staff.

“We are pursuing the highest standards on gender equity, and expect that many of the remedies that could be assigned by HRTO in response to its decision are now in place,” said a statement on Sept. 22 from the hospital network and the three leaders — Dr. Michael Stacey, Dr. Helene Flageole and now retired Dr. Richard McLean.

Both HHS leadership and Cybulsky declined to be interviewed.

“Hamilton Health Sciences believes that everyone should feel welcome and supported in our workplace,” said the statement.

“Administrative and medical leaders working together have implemented important policies and processes that did not exist six years ago.”

Cybulsky’s case was hailed as “an important human rights decision” by the Human Rights Legal Support Centre that is based out of Toronto and serves Hamilton.

It’s hard to say how often the HRTO makes findings of discrimination because it changes significantly year over year. The most recent *Tribunals Ontario* annual report — which includes Cybulsky’s decision — shows discrimination was found 60 per cent of the time, or 33 out of 55 cases from April 1, 2020 to March 31, 2021.

The year before, it was about 50 per cent of decisions, or 26 out of 50 cases. The year before that it was substantially lower at just under 30 per cent — 19 out of 65. It was around 40 per cent — 40 out of 97 decisions — in the year ending March 31, 2018.

Applications involving employment have been steadily dropping to 55 per cent by March 31, 2021 compared to 70 per cent in the year ending March 31, 2018.

The decision is part of an increasing recognition among organizations of long-standing gender bias in society and against women in leadership roles, said Bourgeault.

“It’s reflecting that all of us are socialized into seeing certain things so we are all biased toward thinking that leadership positions should be held by people who look a certain way, who are a particular gender, who are a particular colour because those have been the people who have occupied those positions almost forever,” she said.

Only eight of the 152 past presidents of the Canadian Medical Association have been women, shows an analysis published Feb. 16 in the *Canadian Medical Association Journal (CMAJ)*. The first woman dean of a Canadian medical school wasn’t until 1990 — 170 years after the first medical school was established — and there have only been eight women deans since then.

“The medical profession has an equity problem, particularly in leadership,” said the study, which included Bourgeault as an author. “Although women have outnumbered men in Canadian medical schools for a quarter of a century, women are not equally represented in leadership positions and are less likely to reach higher ranks than men, even after controlling for age, experience, productivity and specialty.”

Another study published Nov. 10 found female surgeons are disadvantaged because male doctors have a “strong pref-

erence” for referring patients to male surgeons.

The study of nearly 40 million referrals concluded the disparity is not narrowing over time and that it was “associated with sex-based inequities in medicine.”

“Female surgeons have fewer opportunities to perform highly remunerated operations, a circumstance that contributes to the sex-based pay gap in surgery,” stated the study published in the medical journal JAMA Surgery and led by Toronto researchers. “In the U.S. and Canada, most practicing physicians who provide referrals are men.”

It’s significant because one of the key points of the CMAJ study is that “greater gender equity has been shown to be better for health policy-making and patient care.”

“The more diversity that we have, the better decisions,” says Bourgeault. “People bring their unique lived experiences to the different complex problems that people face in health care.”

The CMAJ study says the problem of “gender inequity in medical leadership is not the result of too few candidates who are not men with the appropriate experience and training to fulfil leadership roles, nor can it be explained by merely suggesting that different genders do not have the same aspirations as men.”

Instead, it is “largely underpinned by socially constructed gender norms, roles and relations.”

“Implicit gender bias is pervasive across the continuum of medical training and practice,” states the study. “Therefore, solutions must begin with recognition of

the systemic nature of the problem.”

Cybulsky said she had aspirations of using the head of service role as a launching pad to continue breaking the glass ceiling.

“The majority of medical leadership roles are voluntary, with minimal compensation, but with prestige and additional policy or program influence,” she stated in her closing submissions to the tribunal. “However, they are a stepping-stone to more senior administrative roles.”

Instead, the case effectively ended the career of the only woman cardiac surgeon in Hamilton. Cybulsky left medicine altogether in 2017 for law school at Queen’s University in Kingston, graduating in 2020. She represented herself at the hearings.

Freedom of information documents obtained by The Spectator show HHS spent nearly \$850,000 in legal fees as of April 7, 2020 defending itself and its leaders against the gender discrimination claim.

“These are public funds,” said Bourgeault. “Imagine if that \$850,000 was spent on bringing in equity, diversity and inclusion consultants to improve their processes.”

While there is no quick fix for gender bias, Bourgeault says the decision regarding HHS will spur organizations on to make reforms more rapidly.

“It is an instigator of change,” she said.

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