Federal Court  Cour fédérale

Date: 20151026

Docket: T-865-14

Citation: 2015 FC 1209

Ottawa, Ontario, October 26, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

LEVAN TURNER AND
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

JUDGMENT AND REASONS

I. Overview

[1] From 1998 to 2003, Mr Levan Turner worked on term contracts as a Customs Inspector for the Canada Border Services Agency (CBSA). He tried twice to secure a permanent position, first in Vancouver and then in Victoria. He was turned down both times.

[2] While Mr Turner's performance evaluations had always been positive, internal emails at CBSA revealed some concerns about his work habits. The Victoria selection board that reviewed his application also noted some shortcomings. After interviewing him, the Vancouver selection board found that Mr Turner was actually ineligible for the position because he had already been interviewed for a similar job in Victoria.

[3] An investigation by the Public Service Commission (PSC) concluded that the selection boards for both competitions had acted unfairly.

[4] Mr Turner then filed a complaint with the Canadian Human Rights Commission alleging discrimination on the basis of race, national or ethnic origin, age, and perceived disability (obesity). A tribunal dismissed his complaint, and I later denied his application for judicial review. The Federal Court of Appeal then set aside the tribunal's decision and referred the matter back for redetermination out of concern that the tribunal had not explicitly considered the perceived disability aspect of Mr Turner's complaint.

[5] On reconsideration, a second tribunal found in Mr Turner's favour. It concluded that Mr Turner had been the object of stereotypical assumptions about older, obese, black males. With respect to the Vancouver competition, the tribunal found that Mr Turner had been wrongly disqualified.

[6] The Attorney General of Canada (AGC) seeks judicial review of the second tribunal's decision. The AGC argues that the tribunal should not have reviewed the selection processes for

the two job competitions because those had already been investigated by the Public Service Commission. Further, the AGC maintains that the tribunal erred by basing its redetermination on the previous record. Finally, the AGC contends that the tribunal's decision was unreasonable on the evidence. The AGC seeks to quash the tribunal's decision and requests me to order another tribunal to reconsider Mr Turner's complaint.

[7] I agree with the AGC that the second tribunal's decision was unreasonable because its adverse credibility findings and ultimate conclusion were unsupported by the evidence before it. I will therefore allow this application for judicial review.

[8] There are three issues:

1. Did the tribunal err by reviewing the selection processes?
2. Did the tribunal err by basing its decision on the previous record?
3. Was the tribunal's decision unreasonable?

[9] The first issue involves a jurisdictional question and is reviewable on the standard of correctness. The other issues involve mixed questions of fact and law reviewable on a standard of unreasonableness.

[10] Because the findings of the second tribunal are so starkly different from those of the second tribunal, I will briefly review both tribunals' decisions.

II. The First Tribunal's Decision

[11] The tribunal reviewed the evidence to determine if Mr Turner had made out a *prima facie* case of discrimination. It found that there was no direct evidence to support Mr Turner's complaints of discrimination based on age, race, and national and ethnic origin. The tribunal went on to consider whether an inference could be drawn from circumstantial evidence. The tribunal considered Mr Turner's positive job assessments, internal emails, and the circumstances surrounding the Victoria and Vancouver competitions.

[12] The tribunal assumed that the evidence satisfied a *prima facie* case of discrimination. It went on to consider whether CBSA had provided a reasonable explanation for not offering Mr Turner an indeterminate position as a customs inspector.

[13] With respect to the Victoria competition, the tribunal found that, while Mr Turner had received positive assessments of his performance as a seasonal employee, this was not enough to qualify him for a permanent position. His application and interview revealed certain shortcomings in communication skills and teamwork. The tribunal found that the selection board`s assessment was supported by the facts. The tribunal noted that the members of the selection board followed up with Mr Turner encouraging him to gain more enforcement experience in order to advance his career with CBSA. The tribunal found that this conduct was inconsistent with a discriminatory attitude toward Mr Turner.

[14] With respect to the Vancouver competition, the tribunal concluded that it contained a poorly drafted eligibility restriction. The restriction stated that applicants who had interviewed for the position after January 1, 2002 were ineligible to apply. It did not clarify that only *unsuccessful* interviewees would be found ineligible.

[15] After reviewing the screening process, the tribunal found that Mr Turner may have been the only person the selection board followed up with and the only person screened out. Nonetheless, the tribunal concluded that, in fact, he was the only candidate who was actually ineligible.

[16] The tribunal accepted the testimony of Mr Ron Tarnawski, who was one of the members of the selection board. Mr Tarnawski stated that he recognized Mr Turner from a previous competition due to his upbeat personality, and this caused him to follow up on the question of his eligibility.

[17] The tribunal concluded that CBSA had provided a reasonable explanation for the fact that Mr Turner had been found not to be qualified in the Vancouver and Victoria competitions. It dismissed Mr Turner's complaint.

III. The Second Tribunal's Decision

[18] The procedure the tribunal followed was agreed on by the parties. The tribunal would review the record created before the first tribunal; the parties would then have an opportunity to make further oral submissions at a hearing.

[19] In its lengthy reasons, the tribunal set out the parts of the transcript and the other evidence on which it relied, and its credibility findings. It also laid out the legal framework that should apply to claims of discrimination, citing the leading cases of *Shakes v Rex Pak Limited* (1982), 3 CHRR D/1001; *Basi v Canadian National Railway Company*, [1988] CHRD No 2; *Radek v Henderson Development (Canada) Ltd., et al*, 2005 BCHRT 302. This jurisprudence makes clear that the tribunal had to determine whether the complainant had shown that he or she was qualified for the position in question; that he or she was not hired; and that another person, who was no better qualified but lacked the attributes underlying the complaint, was hired instead.

[20] The tribunal concluded that this test was met, meaning that Mr Turner had made out a *prima facie* case of discrimination. The staffing process for the two competitions, in the tribunal's view, was permeated with the "subtleness of discrimination" based on the intersecting grounds (age, race and perceived disability) identified in the complaint.

[21] The tribunal then evaluated the employer's response to the *prima facie* case. It found that no explanation had been given for singling out Mr Turner for the application of the eligibility restriction that applied to the Vancouver competition. As a result, the tribunal found that it was "inexorably drawn by the probabilities surrounding this case to conclude that [the employer] negatively stereotyped Mr Turner as an obese, older black man, likely to be lazy and untruthful, and therefore unacceptable as a potential employee of the newly established law-enforcement-oriented CBSA". In fact, according to the tribunal, the eligibility restriction amounted to an arbitrary and expedient pretext to terminate Mr Turner's candidacy.

[22] In respect of the Victoria competition, the tribunal found that the employer had not provided a valid explanation for the selection board's decision not to hire Mr Turner. In particular, the tribunal found that it was "beyond comprehension", "injudicious", and "egregious" for the selection board not to have weighed in Mr Turner's favour his prior positive performance evaluations. The tribunal concluded that it could reasonably infer that the board had "negatively stereotyped Mr Turner as a lazy, older, obese, black man, and decided to deny him the opportunity to continue working for the CBSA as a uniformed Border Services Officer".

[23] The tribunal concluded that the CBSA had discriminated against Mr Turner contrary to ss 7 and 10 of the *Canadian Human Rights Act*, RSC 1985 c H-6 (see Annex).

IV. Issue One – Did the tribunal err by reviewing the selection processes?

[24] The AGC argues that the tribunal overstepped its mandate when it reviewed the processes relating to the two competitions. According to the AGC, only the PSC can perform that role. The AGC also maintains that the tribunal should have been estopped from embarking on that review given that the PSC had already conducted an investigation.

[25] In my view, the tribunal did not overstep its jurisdiction. It considered whether the selection boards engaged in a discriminatory assessment of Mr Turner's candidacy by exhibiting attitudes based on stereotypes. This can be distinguished from the function of the PSC whose role is to ensure that appointments to the public service are based on merit. The PSC investigated the selection process through that particular lens (*Hughes v Canada (Human Resources and Skill*

Development), 2014 FC 278 at para 49). I see nothing improper about the tribunal's inquiry into the possibility of discrimination in the selection process. That was well within its mandate.

V. Issue Two – Did the tribunal err by basing its decision on the previous record?

[26] Prior to the hearing, the parties had reached an agreement on the process the tribunal would follow. The tribunal would review the previous record and then receive submissions from the parties at an oral hearing.

[27] I see nothing wrong with the procedure adopted by the tribunal, especially as it was agreed upon by the parties. The tribunal had a discretion to proceed as it saw fit (*Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 37). Further, reliance on transcripts is not unfair if the parties are given an opportunity to make further submissions to the decision-maker (*Badal v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ 440 at paras 16-17).

[28] Accordingly, the tribunal adopted an appropriate methodology in the circumstances.

VI. Issue Three – Was the tribunal's decision unreasonable?

[29] The issue before the second tribunal was a relatively narrow one – whether the evidence compiled by the first tribunal showed that Mr Turner had been discriminated against as a result of perceived disability, or as a result of that ground in combination with other grounds, such as race and age. The second tribunal reviewed all possible grounds underlying Mr Turner's

complaint and found that, indeed, he had been treated adversely as a result of stereotypes about older, black, obese men.

[30] Mr Turner argues that the tribunal made reasonable findings of fact and arrived at a reasonable conclusion in his favour. With regret, I disagree. The tribunal made numerous adverse credibility findings for which I cannot find support in the evidence. Indeed, the tribunal went beyond findings of credibility – it seriously impugned the character of witnesses and ascribed to them blatantly prejudicial attitudes. I see no basis for those accusations in the record.

[31] The first tribunal made no adverse credibility findings after hearing all of the witnesses in person having the benefit of observing the witnesses` demeanor. By contrast, the second tribunal made a number of seriously adverse credibility findings, based solely on a review of the written record before the first tribunal. Four witnesses of the CBSA were negatively assessed in the second decision.

A. *The Witnesses*

(1) Terry Klassen

[32] Mr Terry Klassen was Mr Turner`s supervisor in 2003. He had authored an email in which he summarized a discussion with Mr Turner about his job performance. In his discussion, he identified a couple of areas for future improvement – for example, not shying away from difficult tasks, and not leaving responsibility for cash reconciliations to others. During his testimony, Mr Klassen provided an example of Mr Turner taking the easy way out when faced

with difficult tasks. He described an instance where Mr Turner approached Mr Klassen to ask him if he could just let a traveller go without completing some paperwork. Mr Klassen provided another example from first-hand observation of Mr Turner. The tribunal found that his testimony was "hesitant and vague" and that he "stubbornly maintained" that this example showed that Mr Turner had taken a shortcut even though it was contrary to what was described in Mr Turner's positive performance assessments. The tribunal found that the emails disclosed a racist attitude on the part of the Victoria superintendents.

[33] The email was sent to all the superintendents to ensure that whoever would be supervising Mr Turner the next year would follow up on the feedback. However, since some of them were on the selection board, the tribunal found that sending this email a week before the announcement of the Victoria competition brought into question the board's impartiality.

(2) Trevor Baird

[34] Mr Trevor Baird was Mr Turner`s supervisor in 2002. He testified that Mr Turner was good at client relations but that enforcement was "not a strong suit". The tribunal described his testimony as a "backhanded characterization".

[35] Mr Baird was asked to explain why the Victoria selection board had noted that Mr Turner sometimes painted other workers in a negative light. He gave an example from Mr Turner's written submissions in which he had described how he dealt with a difficult traveller while another officer, Ms Nina Patel, stood back. The tribunal described his answer as amounting to "unbridled and inarticulate prolixity" and showing "subjective partiality". Mr Baird stated that he

followed up with Ms Patel to hear her version of that incident because Mr Turner's account did not accord with his own knowledge of her work habits.

[36] While Ms Patel's description did not correspond with Mr Turner's submission, her version did not affect Mr Turner's evaluation in the job competition because that had already been completed. Mr Baird was asked if he would have scored Mr Turner's submission differently if Ms Patel had corroborated his description. He said no. The tribunal characterized his answer as "implausible" and his reliance during the competition on personal knowledge of Ms Patel as "discreditable". The tribunal inferred from this evidence that Mr Baird had "prejudicially determined that Mr Turner would not be deemed to have the competence to be a border service officer". In addition, it amounted to an "aggravating circumstance" supporting the tribunal's conclusion that the selection process was "a pretext to ensure that an older, obese, lazy black man, as Mr Turner had been stereotyped, would not be employed" by CBSA.

[37] Mr Baird testified that the selection board decided not to rely on candidates' past performance assessments to level the playing field for internal and external candidates. He was asked if he was concerned by the fact that the process screened out an applicant with positive performance evaluations as a customs officer. He said no. The tribunal said his answer was "not worthy of belief" and Mr Baird's decision not to consider past performance showed that he was "unscrupulous", and that the process was an "absurdity". The tribunal found that Mr Baird had a preconceived idea that Mr Turner was not a suitable candidate because he was an older, obese, black male.

[38] Mr Baird testified that the contents of the Klassen email were consistent with his own observations about Mr Turner. However, he was not sure that he had actually read the email before. The Board found that Mr Baird had "responded irrationally" to questions on this point, and "deepened his discredit" by stating that he was not sure whether he had read the email before the Victoria competition. The tribunal described Mr Baird's testimony as "evasive and not worthy of belief", and concluded that "the improbability of Mr Baird's explanation swept aside the last vestiges of his credibility". In the tribunal's view, Mr Baird was either negligent or had decided to resort to evasion. Either way, according to the tribunal, Mr Baird's conduct raised "a significant question as to the propriety of the Selection Board process concerning Mr Turner's application".

(3) Shalina Sharma

[39] Ms Shalina Sharma was responsible for the drafting and implementation of the eligibility restriction in the Vancouver competition. She admitted that the eligibility restriction was drafted poorly. She also explained that past performance assessments were not used in the Vancouver competition because this was an external competition. The tribunal concluded from her evidence that the staffing process was "the opposite of rigorous". It was "based on a grandiose Portfolio of Competencies (a misnomer)", "haphazard and subjective", and "pretentiously determined whether a candidate was competent". In reality, according to the tribunal, becoming qualified or capable for a particular position "requires learning on the job and establishing a state of competence", not proof of competence ahead of time. Ms Sharma, according to the tribunal, was "openly partial".

(4) Ronald Tarnawski

[40] Mr Tarnawski described the staffing process that he helped develop at CBSA. He interviewed Mr Turner both for the Vancouver and the Victoria competitions. His notes on the Victoria competition suggest that Mr Turner, in describing his decision-making process, was prone to making decisions based on assumptions. In his testimony before the tribunal, Mr Turner was given a chance to elaborate on the decision-making process he had earlier described during the competition. The tribunal found that Mr Tarnawski had erred in finding that Mr Turner was relying on assumptions because Mr Turner adequately explained in that testimony that the assumptions were preliminary and would be followed by measured consideration of other factors.

[41] Mr Tarnawski also explained the intent of the eligibility restriction for Vancouver. The employer wanted to avoid interviewing the same unsuccessful candidates over and over again. He conceded that its wording caused "nightmares". He also admitted that Mr Turner might have been the only candidate screened out based on the restriction. At the same time, many candidates with no customs experience were found to be eligible. The tribunal described the restriction as "an irrational disqualification" which Mr Tarnawski had "rashly applied". It described Mr Tarnawski's evidence as "inconsistent and argumentative" amounting to an "intractable and incomprehensible application of the eligibility restriction". It also displayed his "intransigence" and his "vexatious" decision to disqualify Mr Turner.

[42] Mr Tarnawski testified that he recognized Mr Turner from the Victoria competition based on his voice, presence, and positive attitude, not because he was a large black man. The tribunal questioned whether Mr Tarnawski was "phobic" and had an "aversion" to saying that he remembered Mr Turner because of his physical characteristics.

B. *The Tribunal's Conclusions*

[43] The second tribunal found that Mr Turner's testimony established a *prima facie* case of discrimination. It also found that the employer had not provided an adequate explanation for the differential treatment that Mr Turner received.

[44] In respect of the Vancouver competition, the tribunal found that the evidence clearly established that there were other candidates who should have been found ineligible but were not, and that those candidates lacked the characteristics (age, race, and perceived disability) underlying Mr Turner's complaint. Further, the tribunal found that its conclusion was reinforced by the fact that applicants with no previous experience were found to be qualified, while Mr Turner was not.

[45] Therefore, the tribunal was "inexorably drawn by the probabilities surrounding this case to conclude that Mr Tarnawski negatively stereotyped Mr Turner as an obese, older black man, likely to be lazy and untruthful, and therefore unacceptable as a potential employee of the newly established law-enforcement-oriented CBSA".

[46] With respect to the Victoria competition, the tribunal found that it was "beyond comprehension" that the selection board would "dogmatically exclude" from consideration Mr Turner's past performance assessments. The board followed a "totally injudicious" process. Mr Baird's contact with Ms Patel amounted to an "amoral attempt" to verify Mr Turner's written submissions. Overall, Mr Baird displayed "egregious and injudicious behaviour" supporting an inference that he had "negatively stereotyped Mr Turner as a lazy, older, obese, black man, and decided to deny him the opportunity to continue working for the CBSA".

C. *The Tribunal's Conclusions Were Unreasonable*

[47] A number of concerns lead me to the conclusion that the second tribunal's decision was unreasonable. First, the tribunal obviously felt that the selection boards should have credited Mr Turner with his positive performance assessments and, on that basis, place his candidacy ahead of others who had little or no previous experience. As mentioned, the tribunal was entitled to review the staffing process to determine whether it was discriminatory. However, it should not have presumed that the process was discriminatory simply because it disagreed with the criteria that were employed. For both Vancouver and Victoria, the selection boards decided not to consider past performance evaluations. The tribunal felt that this approach was irrational and, therefore, that the selection boards' reliance on it supported Mr Turner's claim of discrimination. In my view, the witnesses explained why that approach was taken. The tribunal plainly disagreed with their point of view, but that did not necessarily mean that the process was devised to screen out persons with Mr Turner's personal characteristics. Nor is there any evidence that the board applied the process in a discriminatory manner.

[48] Second, the tribunal wrongly found that there were other candidates who should have been found ineligible for the Vancouver competition. There was no evidence to support that conclusion. Again, the tribunal drew an adverse inference from the fact that candidates who had less experience that Mr Turner were found to be qualified in that competition. The tribunal refused to accept the proposition that past experience and performance appraisals should not form part of the selection board's consideration. While it was entitled to its opinion, that was not a sufficient basis on which to conclude that the process was aimed at excluding Mr Turner.

[49] Third, the tribunal second-guessed the conclusions drawn by the Victoria selection board about Mr Turner's qualifications based on evidence before the tribunal that was not before the board. In particular, the tribunal found that the board had wrongly concluded that Mr Turner was inclined to make decisions on assumptions rather than evidence. However, the tribunal was relying on Mr Turner's testimony in the hearing, not on what he said during the interview. This was not a proper basis for impugning the selection board's assessment.

[50] Fourth, as described above, the tribunal applied a plethora of pejorative adjectives to the testimony of the main witnesses for the respondent. Of course, the tribunal was entitled to make credibility findings. However, it had an obligation to explain them, which it did not. Reviewing the tribunal's decision and the record that was before it, I simply cannot find any basis for the tribunal's severely adverse findings. In the tribunal's decision, I see many references to the testimony recorded in the transcript and the tribunal's characterization of that evidence. But I do not see an explanation for the tribunal's consistently harsh assessment of it. Nor do I see any

basis for impugning the witnesses' personal character or attributing to them overtly racist tendencies.

[51] Fifth, the tribunal erred by wrongly characterizing the position of the employer as a concession that Mr Turner would have been placed on a list of qualified employees if not for the eligibility criterion that applied to the Vancouver competition. The record shows no such concession. Counsel for the employer merely stated that Mr Turner was found to be disqualified solely because of the applicable eligibility criterion. He did not concede that Mr Turner was otherwise qualified for the position. At the hearing, counsel for Mr Turner clearly understood the government's position stating "so he was disqualified because of eligibility restriction only, but you're saying there were other facts that the Board was aware of that might have affected how they dealt with him". The answer from counsel for CBSA was "Correct". Therefore, contrary to the tribunal's finding, it was not clear that Mr Turner would have been found to be qualified for the Vancouver competition even if the ineligibility restriction had not been applied to him. This led the tribunal to an unreasonable application of the *Shakes* test.

[52] Based on these issues, I find that the second tribunal's assessment of the evidence and its conclusion that Mr Turner had made out a case of discrimination – by having been denied employment opportunities because of his age, race, and a perceived disability of obesity – was unreasonable.

VII. Conclusion and Disposition

[53] The tribunal's findings are not supported by the evidence that was before it. Therefore, its conclusion that Mr Turner had established a case of discrimination did not fall within the range of defensible outcomes based on the facts and the law. Accordingly, I must allow this application for judicial review and order another tribunal to reconsider the matter.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, with costs.

2. The matter is returned to another tribunal for reconsideration.

"James W. O'Reilly"
Judge

Annex

Canadian Human Rights Act, RSC 1985 c H-6	*Loi canadienne sur les droits de la personne*, LRC (1985), ch H-6
Employment	Emploi
7. It is a discriminatory practice, directly or indirectly,	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(*a*) to refuse to employ or continue to employ any individual, or	*a*) de refuser d'employer ou de continuer d'employer un individu;
(*b*) in the course of employment, to differentiate adversely in relation to an employee,	*b*) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	
Discriminatory policy or practice	Lignes de conduite discriminatoires
10. It is a discriminatory practice for an employer, employee organization or employer organization	**10.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :
(*a*) to establish or pursue a policy or practice, or	*a*) de fixer ou d'appliquer des lignes de conduite;
(*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,	*b*) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.
that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.	

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-865-14
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v LEVAN TURNER AND CANADIANHUAN RIGHTS COMMISSION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 14, 2015
JUDGMENT AND REASONS:	O'REILLY J.
DATED:	OCTOBER 26,2015

APPEARANCES:

Graham Stark	FOR THE APPLICANT
David Yazbeck	FOR THE RESPONDENT– LEVAN TURNER
Unrepresented	FOR THE RESPONDENT – CANADIAN HUMAN RIGHTS COMMISSION

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
Raven, Cameronn, Ballantyne & Yazbeck Barristers and Solicitors Ottawa, Ontario	FOR THE RESPONDENT – LEVAN TURNER
Canadian Human Rights Commission Litigation Services Ottawa, Ontario	FOR THE RESPONDENT – CANADIAN HUMAN RIGHTS COMMISSION