

Federal Court



Cour fédérale

Date: 20160125

Docket: T-71-15

Citation: 2016 FC 89

Ottawa, Ontario, January 25, 2016

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JOSEPH BATE

Applicant

and

**CANADA REVENUE AGENCY
(ATTORNEY GENERAL OF CANADA)**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act or CHRA], the Canadian Human Rights Commission [the CHRC or the Commission] decided on December 18, 2014 that the allegations of discrimination against Mr. Joseph Bate [the applicant] by his former employer, the Canada Revenue Agency [CRA] were not supported. The applicant filed for judicial review of this decision, which decision was communicated to him on January 5, 2015. The applicant asks the Court for relief in the form of: 1) full transparency

and access to the Act audit done on CRA in 2003; 2) grant of the judicial review of the CHRC decision; 3) case law for the claim; and 4) an explanation for the decision by CHRC.

I. Background

[2] The applicant is an able-bodied white man, who worked at the CRA until he was deemed unfit to work on April 29, 2014. CRA asked the applicant not to work following the applicant filing a medical note supporting that the applicant was unfit for work. On April 10, 2014, the applicant filed a complaint with the CHRC, alleging that the CRA was discriminating against him on the basis of his gender, ethnicity and skin colour.

[3] The CHRC rejected his claim on December 18, 2014. The applicant now appeals to this Court for judicial review of the decision.

II. Decision under Review

[4] The CHRC rejected the applicant's claim on December 18, 2014, stating that the allegations of discrimination on the basis of race, colour and sex are not supported. The Commission recommended in its assessment report that the Commission should dismiss the complaint pursuant to subparagraph 44(3)(b)(i) of the CHRA.

[5] The preliminary assessment was completed on August 25, 2014.

III. Assessment Report Summary

[6] The assessment report is part of the record for the CHRC decision. The assessment report summarizes the hiring process at the CRA, including the selection, assessment and placement stages. The decision also acknowledges that the applicant did not apply for a position posted in September 2013, because it had “Employment Equity” as one of the criteria on the job posting. The position was later filled by a non-minority hire states the respondent.

[7] The CHRC also notes the applicant’s argument that the CRA has an over-representation of employees in the designated groups and that the groups are merely self-identified, which undermines the legitimacy of the composition of the groups. The applicant also argued that the employment equity policy had an impact on him, as he was perhaps deprived of revenue “in the millions” as a consequence of employment equity. The applicant also presented evidence of the 107 employees in his Toronto office as evidence that the CRA had met its target for employment equity and that this criteria should no longer be used where it has a negative impact on non-minority group members.

[8] The CHRC rejected this argument, stating that the respondent had provided evidence of the statistics at regional and national levels which indicated that some groups were still underrepresented. The CRA also stated that the CHRC had concluded that the CRA met the requirements related to its workforce analysis in its employment equity audit. Finally, the CRA is an employer to which the *Employment Equity Act*, SC 1995, c 44 applies; it must therefore apply employment equity, which is not illegal discrimination as alleged by the applicant.

[9] For all these reasons, the CHRC reported that the allegations of discrimination are not supported.

IV. Issues

[10] The applicant raises issues with the CRA's "reverse discrimination" policy and discusses it and in hypotheticals, the ways in which CRA's figures for minorities in its employ are not representative of the overly-represented minority groups. The applicant appeals to the Court for it to find that discrimination exists at the CRA.

[11] The respondent presents the following issues:

- A. Should the applicant's affidavit be struck?
- B. Is the material that was not before the Commission when it made its decision properly before the Court?
- C. What is the standard of review for the decision by the CHRC?
- D. Was the CHRC's decision reasonable?

[12] The respondent further submits that the applicant's position that the CHRA and the *Employment Equity Act* are discriminatory against him is not properly the subject matter of a complaint made under the CHRA.

[13] In my view, the issues raised by the respondent are the issues to be examined on judicial review.

V. Applicant's Written Submissions

[14] The applicant submits that he was discriminated against by his employer, the CRA and that the CHRC erred in finding that there had not been any discrimination.

[15] To support his claim, the applicant refers to statistics he compiled for his office, which has 107 employees, located in the Greater Toronto Area. Out of these, 102 fall into one of the four employment equity designated groups. According to the applicant, the employment equity criteria in job postings and used in all decisions related to hiring and firing, is discriminatory as to white men. Moreover, special programs to promote hiring and promotion of designated groups merely discriminates against those not belonging to a designated group. Because the targets of special programs have been reached, the programs are now discriminatory towards non-designated group members.

[16] The applicant in his submissions to the CHRC, contends that the discrimination is based on his gender and ethnicity. In his pleadings to this Court, he also contends that the discrimination is based on his being able-bodied. Essentially, the applicant alleges discrimination on the basis of not falling within one of the four designated groups for employment equity.

[17] The applicant submits in additional evidence to this Court many emails and correspondence with politicians and CRA officers who, according to the applicant, admit to discrimination.

[18] The applicant submits that the CHRC would not accept all the evidence he attempted to provide, as his submissions to the Commission were limited to ten pages.

[19] The applicant argues that the CRA has refused to allow him access to documents which would prove his discrimination allegations.

[20] The applicant claims that the CRA has achieved targets according to labour-market availability for over a decade, but continues to use employment equity in its hiring decisions. The applicant argues that this practice is discriminatory as it has a negative impact on white able-bodied men, who are the only people who do not fall within any of the four minority groups identified in the *Employment Equity Act*. The applicant alleges he suffered from this discrimination, possibly by losing revenue in the millions.

VI. Respondent's Written Submissions

[21] In its memorandum, the respondent submits that the applicant's affidavit should be stricken in whole or in part for being argumentative. Moreover, the respondent submits that the applicant's evidence submitted on judicial review was not before the decision maker and therefore should not be considered by this Court.

[22] The respondent submits that the standard of review to be applied to the CHRC decision is reasonableness.

[23] The respondent states that the CHRC's decision was reasonable, without delving into the particular facts of the case. The respondent provides some legislation which explains the legal responsibilities of the CRA when developing a framework for employment equity in its workplace. This responsibility includes periodic surveys of its workforce. The respondent also claims that the employment equity policy operates at the agency-wide level and that the applicant's microscopic view is not representative of the agency as a whole.

[24] The respondent further states that the applicant did not demonstrate any personal harm suffered by him from this alleged discrimination.

[25] Finally, the respondent asks that judicial review be denied.

VII. Analysis and Decision

A. *Should the applicant's affidavit be struck?*

[26] The applicant's affidavit was properly placed before the Court, but the CRA argues that its content is not free of argument. The CRA submits that the entire affidavit or in the alternative, paragraphs outlined in the respondent's memorandum should be struck.

[27] In my view, the affidavit is not free of argument as required by subsection 81(1) of the *Federal Courts Rules*, SOR/98-106. I find paragraphs 2 and 7 are argumentative and as such, I would strike those portions of the affidavit.

B. *Is the material that was not before the Commission when it made its decision properly before the Court?*

[28] In this case, the Court has looked at the test for new evidence, which it finds the affidavit and additional documentary evidence to be. In *Delios v Canada (Attorney General)*, 2015 FCA 117, citing to *Assn. of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 [*Canadian Copyright*]. In *Canadian Copyright*, Mr. Justice Stratas writes for the Court that new evidence will be admitted on judicial review if: 1) general background might be helpful to the Court in its review; 2) an affidavit could bring forward a procedural defect when it is not otherwise apparent; or 3) evidence could show the absence of evidence on which the decision-maker made its finding.

[29] The new evidence now placed before this Court does not show that the CHRC did not have evidence before it; the applicant's record now only goes to building on arguments that were already before the CHRC. Therefore, the applicant's affidavit and material not before the CHRC when it made its decision should not be considered by this Court on judicial review.

[30] The applicant states that the CHRC would not consider submissions beyond ten pages and this is why so much evidence would be new if allowed before this Court. Arguably, the applicant could introduce the evidence as context for procedural unfairness before the CHRC. However, the applicant does not argue this point.

[31] In this case, I find the new evidence presented by the applicant does not meet one of the listed exceptions.

C. *What is the standard of review for the decision by the CHRC?*

[32] With respect to the standard of review to be applied to the CHRC decision, the respondent submits, and I agree, that the standard of review is reasonableness per *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 54, [2008] 1 SCR 190. Per *Dunsmuir*, where the jurisprudence has already determined the applicable standard of review to apply, the Court does need to proceed with its own analysis. In this case, CHRC decisions have been reviewed under a reasonableness standard: *Alkoka v Canada (Attorney General)*, 2013 FC 1102 at paragraph 39, *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraphs 53 to 55.

[33] The test to determine whether a decision was reasonable was set out in *Dunsmuir*. The test is whether the CHRC's decision, when taken as a whole, was reasonable. This means that I should not intervene if the decision is transparent, justifiable, intelligible and within the range of possible, acceptable outcomes in light of the facts and the law (*Dunsmuir* at paragraph 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339 [*Khosa*]).

D. *Was the CHRC's decision reasonable?*

[34] I believe that it would be useful to state some of the legislative provisions that have application to this matter. Section 10 of the Act states:

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.

[35] Subsection 16(1) of the Act reads:

16. (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or

16. (1) Ne constitue pas un acte discriminatoire le fait d'adopter ou de mettre en oeuvre des programmes, des plans ou des arrangements spéciaux destinés à supprimer, diminuer ou prévenir les désavantages que subit ou peut vraisemblablement subir un groupe d'individus pour des motifs fondés, directement ou indirectement, sur un motif de distinction illicite en améliorant leurs chances d'emploi ou d'avancement ou en leur facilitant l'accès à des biens, à des services, à des

employment in relation to that group.	installations ou à des moyens d'hébergement.
---------------------------------------	--

[36] Sections 2 and 9 of the *Employment Equity Act* states:

2 The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.	2 La présente loi a pour objet de réaliser l'égalité en milieu de travail de façon que nul ne se voie refuser d'avantages ou de chances en matière d'emploi pour des motifs étrangers à sa compétence et, à cette fin, de corriger les désavantages subis, dans le domaine de l'emploi, par les femmes, les autochtones, les personnes handicapées et les personnes qui font partie des minorités visibles, conformément au principe selon lequel l'équité en matière d'emploi requiert, outre un traitement identique des personnes, des mesures spéciales et des aménagements adaptés aux différences.
---	--

...

...

9 (1) For the purpose of implementing employment equity, every employer shall	9 (1) En vue de réaliser l'équité en matière d'emploi, il incombe à l'employeur :
(a) collect information and conduct an analysis of the employer's workforce, in accordance with the regulations, in order to determine the degree of the underrepresentation of persons in designated groups in each occupational group in that workforce; and	a) conformément aux règlements, de recueillir des renseignements sur son effectif et d'effectuer des analyses sur celui-ci afin de mesurer la sous-représentation des membres des groupes désignés dans chaque catégorie professionnelle;
(b) conduct a review of the	b) d'étudier ses systèmes,

employer's employment systems, policies and practices, in accordance with the regulations, in order to identify employment barriers against persons in designated groups that result from those systems, policies and practices.

règles et usages d'emploi, conformément aux règlements, afin de déterminer les obstacles en résultant pour les membres des groupes désignés.

(2) Only those employees who identify themselves to an employer, or agree to be identified by an employer, as aboriginal peoples, members of visible minorities or persons with disabilities are to be counted as members of those designated groups for the purposes of implementing employment equity.

(2) En vue de réaliser l'équité en matière d'emploi, seuls sont pris en compte dans les groupes correspondants les salariés qui s'identifient auprès de l'employeur, ou acceptent de l'être par lui, comme autochtones, personnes handicapées ou faisant partie des minorités visibles.

[37] It is also important to note that on judicial review, the role of the Court is to review the record that was before the Canadian Human Rights Commission and determine whether the Commission's decision was reasonable. There are certain limited exceptions where evidence not before the Commission may be considered but none apply in the present case. As stated by Madam Justice Heneghan in *Shaw v Royal Canadian Mounted Police*, 2013 FC 711 at paragraph 42, the decision is reasonable if:

The decision of the Commission meets the standard of reasonableness, that is one that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"; see *Dunsmuir, supra*, at para. 47.

[38] It is against this background that I will assess whether the Commission's decision is reasonable.

[39] At the hearing, the applicant re-stated the arguments and evidence of discriminatory acts presented to the CHRC in greater detail. In his affidavit, the applicant submits the CHRC made an incorrect decision because the evidence supports that CRA does not need employment equity, that disadvantaged groups have been overrepresented for over a decade, that CRA is not taking into account the impact on non-disadvantaged group members and that employees could be hired even though they are not qualified for a position, as long as one was part of a designated group.

[40] The respondent submits that the CHRC's decision was reasonable in light of the facts and the law. The respondent submits that when the CHRC decision endorses the results of an assessment report, the reasons therein are the reasons to be assessed for reasonableness. Where those reasons are deficient, so will the decision by the CHRC.

[41] I agree with these statements respecting the assessment report. The respondent then outlined the *Employment Equity Act* requirements and the legislation to which the CRA is subject.

[42] Turning to the record, I am satisfied that the CHRC considered the arguments presented by the applicant and by the respondent and properly weighed the evidence before it in its screening role. Looking to the applicant's documented evidence for the alleged discrimination, I find that the applicant selectively read the explanations that were provided to him to answer his employment equity queries. For example, the applicant claims various CRA or political officers admitted to the alleged discrimination, when the full picture indicates otherwise. The CHRC takes this full picture into consideration. For example, CHRC looks to the statistics provided by

the CRA and does not limit itself to the applicant's survey of 107 employees in one Toronto office for an agency with thousands of employees across the country.

[43] There is no dispute that employment equity criteria can be used in proper cases by the respondent in work force adjustment situations.

[44] For the purposes of this matter, it is not in dispute that the respondent is using the *Employment Equity Act* to govern its employment equity policies.

[45] The CHRC's assessment report noted at paragraphs 36 and 37:

36. The respondent agrees that for the past ten years, representation for all four employment equity designated groups at the "agency-wide level" remains above the respective labour market availability rates. The word "agency wide" refers to a national level but, says the respondent, under-representation still exists in some occupational groups in specific regions.

37. Per its obligations under the *Employment Equity Act*, the respondent develops and implements employment equity through workforce plans and through integrated workforce planning. The respondent's employment equity plan and report identified regional gaps based on regional workforce analysis and included an employment equity representation analysis with strategies to reduce gaps where they exist. While the respondent does not have statistics for every position, office or group, its public report did identify gaps in the Ontario region's supervisory/management group. The Ontario region employment equity plan includes the mandatory use of employment equity for all EE OG-05 – supervisor groups and for all MG managers group, levels 1, 2 and 3. This objective remains in place to address under-representation of the visible minority group in those categories.

[emphasis added]

[46] In my view, this answers the applicant's assertion that his own office was over-represented and thus results in discrimination for him.

[47] On the issue of self-identification, only employees who self-identify can be considered to be a member of a designated group. Also, self-identification is voluntary (see section 9 of the *Employment Equity Act*).

[48] Moreover, the CHRC reasonably concludes that the applicant does not set out a discrimination claim under the CHRA where all that is alleged is that CRA is meeting its legal obligations under the *Employment Equity Act* and the CHRA.

[49] Although the applicant presents extensive email correspondence with various CRA representatives and politicians, the evidence as a whole reasonably supports the CHRC's finding that a claim of discrimination has not been set out by the applicant, where the CRA follows the law on employment equity. This is not to say that the applicant does not raise a policy issue for the legislator. However, this policy decision is not for this Court to make on judicial review, especially in light of the applicant's failure to demonstrate that the policy is no longer needed for the entirety of his employer, the CRA.

[50] Finally and importantly, the employment equity criteria which the applicant alleges constitutes discrimination may not determine the outcome of a job posting. As explained by the respondent in its submissions to the CHRC, CRA might be required to list employment equity as a criterion, but CRA could nonetheless hire a non-designated individual, or seek an exception to

employment equity. This policy operates agency-wide with some degree of discretion. The applicant's case was very difficult to make where the policy on its face and in fact does not readily support that discrimination for his particular ethnicity and sex exists at the CRA.

[51] In my opinion, the decision of the CHRC was reasonable. The decision "falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47). The CHRC addressed the issues of over-representation and failing to verify self-identification and came to reasonable conclusions with respect to these issues.

[52] In coming to my conclusion, I also considered the oral arguments made by the parties at the hearing.

[53] The respondent objected to the admissibility of charts presented at the hearing by the applicant. Any material in the charts that was not before the CHRC is not admissible.

[54] As a result of my finding that the CHRC's decision was reasonable, the application for judicial review is dismissed. There shall be no award of costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There shall be no order as to costs.

“John A. O’Keefe”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-71-15

STYLE OF CAUSE: JOSEPH BATE v
CANADA REVENUE AGENCY,
(ATTORNEY GENERAL OF CANADA)

PLACE OF HEARING: OSHAWA, ONTARIO

DATE OF HEARING: OCTOBER 27, 2015

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'KEEFE J.

DATED: JANUARY 25, 2016

APPEARANCES:

Joseph Bate

SELF-REPRESENTED
FOR THE APPLICANT

Debra Prupas

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of
Canada
Toronto, Ontario

FOR THE RESPONDENTS