Federal Court Cour fédérale

Date: 20240909

Docket: T-1930-23

Citation: 2024 FC 1404

Toronto, Ontario, September 9, 2024

PRESENT: Mr. Justice Diner

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

and

THE ATTORNEY GENERAL OF CANADA AND ISHRAT NIPA

Respondents

Docket: T-1934-23

BETWEEN:

ISHRAT NIPA

Applicant

and

THE ATTORNEY GENERAL OF CANADA, CANADIAN HUMAN RIGHTS COMMISSION

Respondents

JUDGEMENT AND REASONS

[1] This is an application for judicial review of a Canadian Human Rights Tribunal [Tribunal] decision, which dismissed the Applicant, Ms. Nipa's, discrimination claim because it was unsubstantiated. Both Applicants, in their own right, claim that the underlying decision was unreasonable. For the following reasons, I cannot agree, and find that the decision satisfied the required elements of reasonability given the factual and legal constraints presented to the Tribunal. This application for judicial review will, as a result, be dismissed.

I. Background

[2] Ms. Nipa is a Canadian woman of Bangladeshi origin. She applied for a position with Transport Canada [the Department] as a Junior Access to Information and Privacy Officer, and attended a formal oral interview for this position on January 20, 2020. She was assessed on six merit criteria, one of which was her "ability to communicate effectively orally." At the "merit-based" (formal) interview, she satisfied this criterion by scoring 3 out of 5 points, and passed the other five criteria as well. Two managers, Ms. Angie Belsher and Ms. Betricia Abou-Hamad, conducted the merit-based interview, the purpose of which was to create a pool of qualified candidates.

[3] When it became apparent that the first round of interviews produced too large a pool of candidates for the number of positions being offered, the Department decided to reconsider the initially-qualifying pool by holding a second interview for which certain applicants were selected. Those selected for a second interview included Ms. Nipa. The Department aimed to

identify “best fit” for the position through this second interview, also described during the present proceedings alternatively as an “informal” or “non merit-based” interview. A set of two different managers, Ms. Marie-Josée Ouellette and Ms. Josée Laurin, conducted this second interview with Ms. Nipa.

[4] After the second interview, the hiring manager, Ms. Brigitte Parent, convoked an impromptu meeting with the four managers who had conducted the two rounds of interviews in her office. She decided to call the meeting after Ms. Ouellette and Ms. Laurin raised concerns about Ms. Nipa’s ability to communicate effectively orally. At that impromptu internal meeting, the merit-based interviewers (Ms. Belsher and Ms. Abou-Hamad), when asked by Ms. Parent, acknowledged that they also had concerns with Ms. Nipa’s communication skills.

[5] After the internal meeting, the first two interviewers (who had conducted the merit-based process) both reduced their marks for the sixth criterion – the overall oral communication assessment criterion – from their original passing scores that both had given Ms. Nipa, of a 3, to a 2, which constituted a failing mark in that category. Failing to achieve passing marks in each of the six criteria eliminated the candidate from the hiring pool. Since Ms. Nipa no longer met one of the six merit criteria (namely criterion #6 relating to overall oral skills), she was at that point eliminated from the pool of qualified candidates.

[6] Ms. Nipa filed a complaint before the Canadian Human Rights Commission [Commission], alleging that her elimination from this competition was due to discrimination on

basis of her race, and/or national or ethnic origin, contrary to section 7 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

[7] The Commission accepted the claim and referred it to the Canadian Human Rights Tribunal [CHRT or Tribunal]. Ms. Nipa represented herself before the Tribunal.

II. Decision under review

[8] In a 20-page decision dated August 16, 2023, a CHRT Member [Edward Lustig, hereafter Member] assessed and dismissed Ms. Nipa's discrimination allegation and ultimately found that her claim was not substantiated [Decision].

[9] In this Decision, the Member first thoroughly reviewed the facts of the matter, the evidence that was raised before him at the hearing, and the applicable legal framework. The Applicants do not contest these aspects of the Decision.

[10] In the latter part of the Decision, which contains the analysis, the Member acknowledged that the hiring process was flawed, pointing to certain elements of the testimony provided by the witnesses during the Tribunal hearing.

[11] Taking those flaws into consideration, as well as the entirety of the evidence, the Member nonetheless found that there was no direct or indirect evidence that would allow him to infer, on a balance of probabilities, that there was conscious or unconscious bias, or discrimination against Ms. Nipa. In the Member's view, the decision to change Ms. Nipa's mark was more so a

spontaneous reaction to her perceived poor oral communication skills, which the responsible CRA Human Resource [HR] advisor, Mr. Patrick Toupin, had told Ms. Parent to consider in the hiring process pursuant to section 30 of the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 [*PSEA*].

III. Analysis

[12] The sole issue before this Court is whether the CHRT's Decision is reasonable (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 59–63; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]). I note that two applications were filed – by the Commission as well as Ms. Nipa – both challenging the reasonableness of the Decision. These two applications were consolidated in advance of the hearing of this judicial review. The Applicants, also prior to the hearing, agreed that the Commission would proceed with their arguments first, and I will address the arguments in the order raised at the hearing.

[13] The Commission asserted three issues: first, the Member erred in his application of the legal principles on the subtle scent of discrimination; second, the use of statistics to negate the presence of discrimination in Ms. Nipa's case constituted a reviewable error; and third, the second informal interview to assess whether the candidate is the "best fit" was also discriminatory.

[14] Ms. Nipa, who made arguments on her own behalf after the Commission presented their arguments, agrees with the positions asserted by the Commission, to support her contention that

the Department discriminated against her by singling her out after having qualified for the job pool and subsequently removing her due to nationality, colour and ethnicity, and on account of her accent. In particular, she alleges being singled out due to her profile, and being required to attend a second interview, which the majority of candidates were not required to undergo. Thereafter, the staff amended her score from a passing mark of 3 for her "ability to communicate effectively orally" to a failing mark of 2.

[15] In short, Ms. Nipa claims that this negative action, which occurred to no one else, transpired on prohibited grounds of ethnicity, colour and nationality under section 7 of the *CHRA*, and despite her having merited the position in the first place, given her initial oral communications score of 3.

[16] As further evidence of her position, Ms. Nipa pointed to another candidate who she claimed benefited from the unconscious bias exercised against her. In brief, she alleged that the candidate, listed as #227 on the Excel spreadsheet disclosed in the litigation process, received the same scores as her, but was not negatively impacted by the informal interview. This is because Candidate #227 maintained her passing mark in oral communication. Ms. Nipa contends that this was due to the fact that Candidate #227 is Canadian, does not have an accent, and is not a visible minority.

[17] The Respondent Attorney General of Canada [AGC], representing the CHRT, denies all allegations of discrimination, and maintains that Ms. Nipa was denied entry into the pool of qualified candidates because the hiring staff – including all four managers who interviewed her –

had concerns about her oral communication abilities, which were a core requirement to the posted position, and the hiring manager, Ms. Parent, had a statutory duty under section 30 of the *PSEA* to ensure that the person(s) selected for the position in question was chosen on the basis of merit, which meant "meeting the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency" (paragraph 30(2)(a), *PSEA*).

[18] In my view, after considering the record before the Court, including having listened carefully to all of the hearing that took place before the CHRT, the Decision is reasonable. With respect to the Commission's first argument, I cannot agree that the Member applied the wrong legal test to assess whether the hiring process had a subtle scent of discrimination.

[19] The leading case regarding the test for "subtle scent" is *Basi v Canadian National Railway*, 1988 CanLII 108 (CHRT) [*Basi*], which instructs that where a finding of discrimination is not obvious or clear through direct evidence, a decision maker should assess the entire circumstances and facts of the case to evaluate whether, on a balance of probabilities, an inference of discrimination is more probable than the other possible inferences (*Basi* at p. 10; see also *Khiamal v Canada (Human Rights Commission)*, 2009 FC 495 at paras 80–84; *Shaw v Phipps*, 2012 ONCA 155 at para 13; *Turner v Canada (Attorney General)*, 2011 FC 767 at para 17; *Agnaou v Canada (Attorney General)*, 2014 FC 850 at para 122; *Canada (Attorney General) v Hughes*, 2015 FC 1302 at para 21).

[20] Here, in looking at the entirety of the Decision, I am satisfied that the Member followed the dictates of the "subtle scent" test as articulated by *Basi* and followed in the relevant cases since. While the Member may not have said so explicitly, it is clear through the comprehensive reasons that he assessed the factors relevant in this case and reached one of many reasonable outcomes: that the hiring manager acted spontaneously in response to Ms. Nipa failing to meet one of the essential criterion.

[21] As underlined by the Member himself, there were weaknesses surrounding the unusual process in convoking a second interview, but that distinction from an ordinary competition alone did not meet the threshold to infer that there was a subtle scent of discrimination.

[22] The Commission argues that the mere recognition of an unusual process is sufficient to demonstrate the presence of a subtle scent of discrimination given all the circumstances, including the fact that the Supreme Court of Canada has recognized systemic discrimination, through cases such as *R v Parks*, 1993 CanLII 3383 (ONCA). Indeed, this very Member acknowledged such discrimination in his recent decision in *Turner v Canada (Border Services Agency)*, 2020 CHRT 1 (CanLII) [*Turner*]. However, I disagree.

[23] Rather, I agree with the AGC that the mere fact that there was an unusual process does not, in and of itself, necessarily lead to a finding of discrimination – there must be sufficient circumstances beyond the unusual process in this case, which, when assessed as a whole, could lead to a finding of subtle scent of discrimination.

[24] While there are certainly circumstances that could – combined with the evidence of an unusual process – lead to the subtle scent of discrimination, I find neither the presence of any concrete evidence pointing to discrimination here, nor any circumstantial evidence which would suggest that the finding of no discrimination was unreasonable in these particular circumstances. Otherwise put, I find there was sufficient evidence for the Member to conclude, on a balance of probabilities, that an inference of discrimination was not more probable than the other possible inferences.

[25] Such circumstances have been present in other cases which did indeed lead to inferences of a subtle scent of discrimination. For example, in *Premakumar v Air Canada*, 2002 CanLII 23561, the CHRT found the interviewer made baseless derogatory notes of the complainant's interview, which, assessed alongside the disproportionately low hire rate of visible minorities, satisfied the CHRT that discrimination was a factor in the employer's decision not to hire the complainant (see paras 87–91).

[26] In *Brooks v Department of Fisheries and Oceans*, 2004 CHRT 36 (CanLII), there was credible testimonial evidence to the effect that race was a factor in the employment decisions made throughout the job competition (see paras 111–115).

[27] In *Turner*, the same Member (Lusting) assessed the accumulation of factors which satisfied him that the employer's decision to disqualify the complainant was influenced by unconscious biases (see paras 125–127). This conclusion was informed by a considerably longer history of circumstantial evidence that was a natural result of a long employment relationship

(six successive contracts), and a long history with the government entities in question (CCRA and then CBSA). This is unlike the circumstances of this case, where there was no history of employment, and indeed, the process was to qualify for a pool without any guarantee of hire.

[28] Finally, in *Basi* itself, the interviewer was dismissive while interviewing the complainant, and did not verify the complainant's references and qualifications before eliminating him. The interviewer then gave inadequate reasons as to why the complainant was eliminated. In each of these cases, the subtle scent was present due to extenuating or aggravating factors beyond any oddities in the process. Here, on the other hand, no analogous, aggravating or extenuating factors were present in Ms. Nipa's case, beyond what the Member transparently acknowledged was both an unusual process, in terms of a second interview, and result, in terms of a changed score.

[29] Here, none of the four managers displayed any indicia of prejudice based on any prohibited or other ground, or provided any hint of discrimination through their comments or interactions with Ms. Nipa. In this case, unlike in the jurisprudential examples referenced above, there was no circumstantial evidence that may have led to a finding of discrimination, such as baseless or derogatory comments, a hostile environment, or statistics that paint a portrait of a non-diverse workplace. Indeed, Ms. Nipa did not complain of a negative interview experience when, or after, she attended the Tribunal hearing.

[30] By the same token, I do not agree with the Applicants' argument that the Tribunal erred by not taking judicial notice of certain jurisprudence on racial and unconscious bias, such as *R v Find*, 2001 SCC 32, *R v Morris*, 2021 ONCA 680, *R v Parks*, 1993 CanLII 3383 and *R v Spence*,

2005 SCC 71, that recognizes that racial bias is a social fact, therefore an applicant need not provide proof to establish such bias.

[31] I note that the circumstances in each of those cases that led to a finding of discrimination and bias were entirely different, and every case will turn on its own facts, evidence and circumstances. In other words, I do not read the findings in the cases raised by the Applicants to automatically import a finding of racial/unconscious bias in every racial discrimination complaint. As such, the Member did not err by basing his analysis on the evidence specific to this case rather than taking judicial notice of the findings in the aforementioned cases.

[32] Given the foregoing, I find it was open to the Member to conclude that this type of clear, and/or circumstantial evidence, was simply absent from the set of events that led to Ms. Nipa being screened out of the pool.

[33] In fact, the evidence demonstrates that Ms. Nipa's interviewers at the formal interview had noted concerns with her oral communications skills in their contemporaneous notes and scores from the very outset. The two managers who interviewed Ms. Nipa in her first interview both gave her the lowest score – both cumulative and in oral communication – of all of the other candidates. The second interviewers expressed their concerns to the decision-maker immediately after the interviews, which triggered the impromptu meeting in which Ms. Parent convoked all four interviewers in her office. The unanimous concerns expressed by the interviewers, as noted during the CHRT hearing (at least the two of them who testified, along with the other evidence tendered including scoring sheets of the other two interviewers), further shows that the decision

to remove Ms. Nipa from the pool of qualified candidates was more likely based on the merits of her application, than discrimination.

[34] I also do not share the Applicants' view that the Member committed a reviewable error by assessing the departmental statistics on the hiring data of visible minority candidates. Ultimately, the Member looked at the panoply of evidence before him, candidly addressed the weaknesses of the process, and explained that despite these circumstances, he was of the view that the outcome was not motivated by discrimination but rather by a spontaneous decision which took place after the impromptu meeting that Ms. Parent convened. The Member's analysis included consideration of the discussion Ms. Parent had with the HR advisor who she consulted (Mr. Toupin) in advance of the Department's decision. The acknowledgement and assessment of the positive data of diversity in hiring by the Department did not, in my view, detract from the reasonableness of the Member's analysis. The Member simply noted it as it was presented to him at the hearing. There is no reviewable error in that regard. Furthermore, the Applicants take particular issue with what they perceive to be an inappropriate reversal of onus on Ms. Nipa, by asking her to provide evidence of stereotypes that are generally perceived in society against people of her ethnic origin. The Commission criticizes the following passage of the Decision:

> I am not able to draw such an inference in this case based upon my review of the evidence. There was no evidence presented about any negative stereotypical biases generally prevalent in society against persons of Ms. Nipa's race and or ethnicity or national origin.

[35] I agree with the Commission that the law does not and should not impose an obligation on the complainant to bring evidence of negative stereotypical biases prevalent in society against their race in order to make a successful discrimination claim. Such requirement would be

inconsistent with the teachings in *Basi*, which were correctly identified and otherwise applied by the Member.

[36] Even so, I note that reasons do not need to be perfect (*Vavilov* at paras 91–92). This is particularly apt when the decision ensues after multi-day proceedings before a tribunal with the complexities and nuances of hiring decisions. The potential error here – namely that one could interpret the CHRT as reversing an onus (but could also simply read in that Ms. Nipa had not produced sufficient evidence to substantiate her claim) – was ultimately not of a central nature such that it could be said to be fatal to the overarching decision and conclusion.

[37] The Member, as instructed by the case law on the subtle scent of discrimination, looked to the entirety of the evidence raised before him, including the <u>lack</u> of evidence of an “untrue negative stereotype”, and reached the reasonable decision that while the process was highly unusual, it was the product of a spontaneous decision in light of all the circumstances.

[38] Finally, Ms. Nipa submits that the hiring staff discriminated against her in favour of a particular candidate (Candidate #227). Ms. Nipa takes the position that this other candidate had the same exact score as her on the six essential merit criteria, but was entered into the pool of qualified candidates because she is Canadian. I disagree with Ms. Nipa’s propositions. The evidence demonstrates that, while Ms. Nipa and the said candidate scored similarly on certain merit criterion, their cumulative scores were not the same (as Ms. Nipa scored lower on her oral communication skills). Moreover, there is no evidence on the said candidate’s nationality, race or

ethnic origin which would support Ms. Nipa’s allegation. Therefore, I find this proposition to be baseless in light of the evidentiary record.

IV. Conclusion

[39] Overall, while the Decision suffered from the shortcoming in reasoning discussed above, that imperfection did not render it unreasonable when viewed as a whole. In this case, I find that there is a reasonable basis behind the Member’s conclusion, and that the Decision falls within a range of possible and acceptable outcomes (*Vavilov* at para 86). As such, I do not see a basis for this Court to intervene. The CHRT’s Decision withstands judicial review.

V. Costs

[40] I agree with the Commission that costs should not issue in this case, both due to the public interest vis-à-vis their role, and the fact that the Applicants raised legitimate concerns both regarding the unusual process, and the Member’s discussion of the onus. There is also an important public interest in raising concerns regarding discrimination with the Court. Hence, I will exercise my discretions not to order any costs pursuant to Rules 400(1), and factors 400(3)(c)/(h) (importance and complexity of the issues, and public interest in having the proceeding litigated).

JUDGMENT in T-1930-23, T-1934-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No costs will issue.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1930-23 AND T-1934-23
DOCKET:	T-1930-23
STYLE OF CAUSE:	CANADIAN HUMAN RIGHTS COMMISSION v THE ATTORNEY GENERAL OF CANADA AND ISHRAT NIPA
AND DOCKET:	T-1934-23
STYLE OF CAUSE:	ISHRAT NIPA v THE ATTORNEY GENERAL OF CANADA, CANADIAN HUMAN RIGHTS COMMISSION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JULY 24, 2024
JUDGMENT AND REASONS:	DINER J.
DATED:	SEPTEMBER 9, 2024

APPEARANCES:

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