Date: 20070831

Docket: T-536-06

Citation: 2007 FC 856

Ottawa, Ontario, August 31, 2007

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

GIAN SINGH SANGHA

Applicant

and

THE MACKENZIE VALLEY LAND AND WATER BOARD

Respondent

AMENDED REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 in respect of discriminatory practices in employment on the prohibited ground of national or ethnic origin contrary to section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the *Act*). The narrow issue on this judicial review is whether the correct remedy was imposed by the Canadian Human Rights Tribunal (the Tribunal), and more particularly, whether the remedy should include compensation for loss of an opportunity for employment and, if so, how it should be calculated.

FACTS

[2] The Applicant, Dr. Gian Singh Sangha, is a 57 year old Sikh of East Indian origin. He was educated in the area of agriculture, environmental science and land planning. He holds a Bachelor of Science in Agriculture from the Punjab University (1972), a Masters of Science in Landscape Planning (1983), a Ph.D. in Environmental Science (1983) and a Certificate in Project Planning & Management (1989) from the Technical University of Berlin. He is also fluent in German, Punjabi, Hindi and English. Dr. Sangha has a varied work experience. He worked for the German Federal Government as an environmental scientist, and was an Associate Professor at Punjab Agricultural University when he decided to come to Canada with his family in 1996. Unfortunately, he has been unable to secure a position commensurate with his qualifications and experience ever since.

[3] The Respondent, the Mackenzie Valley Land and Water Board (the Board), is a regulatory authority established pursuant to the *Mackenzie Valley Resource Management Act*, 1998, c. 25. The Board came into being to fulfill obligations which arose from the Gwich'in and Sahtu Comprehensive Land Claims Agreements, to create an integrated co-management regime for lands and waters in the Mackenzie Valley in the Northwest Territories. The functions of the Board are primarily to issue land use permits and water licenses in the unsettled claims area until the balance of the land claims are settled and to process transboundary land and water use applications in the Mackenzie Valley.

[4] The facts are not contested and were indeed the subject of an agreement before the Tribunal. They can be briefly summarized as follows.

[5] On August 11, 2001, the Board placed an advertisement in the Vancouver Sun for Regulatory Officer (RO) positions at a salary of $48,410.00 to $60,770.00 each. The positions were for a term of three years, subject to a six month probationary period, and with the possibility of an extension. The primary responsibility of an RO is to process land use permit and water license applications. The RO is responsible for ensuring that the application is complete. If it is not complete, then the RO will contact the applicant and request further information. Once the application is complete, the RO sends it out to a list of reviewers which includes First Nation communities, the relevant Federal government departments and departments of the Northwest Territories. After receiving comments, the RO synthesizes them into a staff report which includes the application details, comments of the reviewers and whether there is public concern or a potential harm for the environment. If no concerns have been identified, the RO will indicate this in the staff report and draft the licence or permit for the Board's approval. If there are concerns identified in the staff report, it is left to the Board to address them and take a decision.

[6] The advertisement provided that the education, experience and skills required was an undergraduate degree in science, environmental studies, ecology, resource management or a related field with two years work experience; or a post secondary diploma in environmental management or a related field and three years experience; knowledge of environmental issues in Canada's North, especially relating to mining, and oil and gas developments; knowledge of the technology

associated with the reduction of impacts caused by developments in a northern environment; operating knowledge of Microsoft Office software; experience working in remote locations; ability to write technical reports; and a Class 5 driver's licence.

[7] An interview committee of three persons (the Committee) was set up to review the potential candidates for the RO positions. The Board received 38 applications for four available positions. The applicants presented a broad range of educational backgrounds. Of the applicants, 2 had a Grade 12 level of education, 6 held Diplomas, 22 held Bachelor degrees, 6 held Master degrees and 2 were Ph.D graduates. The Board screened out all applicants with only a Grade 12 education and those holding post-graduate degrees, with the exception of Dr. Sangha.

[8] The Board arranged for Dr. Sangha to be interviewed and paid for his flight from Vancouver to Yellowknife for this purpose, together with his accommodation for two nights. The Committee conducted a structured interview in which each candidate was asked a set of standard questions regarding their skills, experience and salary expectations. The Committee also asked questions to test the candidate's knowledge of the Board's processes. There were no questions posed by the interviewers relating to personal characteristics, such as race, colour, national or ethnic origin, religion or age.

[9] The interviewers took notes and scored each candidate out of 60. These interview notes were maintained by all but one of the interviewers who later threw out the notes he took for all 12 candidates. He nevertheless testified that Dr. Sangha was granted an interview because of his

impressive educational qualifications and good work experience, but that he was eventually not offered an RO position because it was an entry level position that would not sufficiently challenge him (Dr. Sangha Affidavit, para. 3, Ex. "B"; A.R., pp. 929, 938-939, 943-944).

[10] The notes of the other two interviewers confirm that there were no issues raised relating to personal characteristics such as race, colour, national or ethnic origin, religion or age. One of the other two interviewers, Ms. Anderson, gave Dr. Sangha a score of 41/60, and did not recommend offering him a position as he could be overqualified, would be easily bored and would look for another job quickly. She also noted that Dr. Sangha was very smart, able to answer the questions well and more of a policy person. As for the last interviewer, Mr. Lauten, he gave him his highest rating (52/60), and noted that he had lots of academic and work experience and made much effort to review the Board's website, the Act and the Regulations; he added, however, that he had no northern experience.

[11] Of the twelve interviewees, six people were offered a position (two having refused their offer). Dr. Sangha was not one of them, and he was advised of that by way of email communication dated September 17, 2001.

[12] On January 28, 2002, Dr. Sangha contacted the North West Territory Fair Practices Office to make a complaint that he had been discriminated against in having not being hired by the Board. Because it lacked jurisdiction to deal with the complaint, the North West Territory Fair Practices Office forwarded the complaint to the Canadian Human Rights Commission (the Commission).

[13] On May 6, 2002, Dr. Sangha filed a complaint with the Commission alleging that he was discriminated against pursuant to section 7 of the *Act* on the grounds of race, national or ethnic origin, colour, religion and age when the Board did not offer him the position of RO.

THE IMPUGNED DECISION

[14] Following a five day hearing of the evidence, including expert evidence on behalf of both the Commission and the Board, the Tribunal concluded the Applicant had established a *prima facie* case of discrimination. The Tribunal easily found that the complainant possessed the basic qualifications for the job, that he is a visible minority immigrant, and that he is overqualified vis-à-vis the job in question. The Board also conceded that one of the reasons why Dr. Sangha was not hired for the RO position was because he was deemed to be overqualified.

[15] More contentious was the correlation between visible minority immigrant status and the overqualified professional status. Relying on the evidence provided by the expert who testified on behalf of the Applicant, the Tribunal held that because visible minority immigrants are disproportionately excluded from the higher rings of the job market due to barriers to employment at this level, they seek employment at lower echelons where their qualifications exceed the job requirements. As a result, the experience of applying for a job for which one is overqualified is disproportionately an immigrant experience. It follows that when an employer establishes a rule against the hiring of overqualified candidates, it has a greater impact on the visible minority immigrant candidates.

[16] Having found that the Applicant had established a *prima facie* case that he had been discriminated against on a prohibited ground, that of national or ethnic origin, it then considered whether the Board had answered that case with a reasonable explanation. Relying on the decision of the Federal Court of Appeal in *Holden v. Canadian National Railway* (1990), 112 N.R. 395; (1990), 14 C.H.R.R. D/12, the Tribunal held that discrimination did not have to be the basis for the impugned decision, but needed only be one factor among others, to find a contravention of the *Act*. The Board having conceded that the complainant's overqualified status played a significant role in its decision not to hire Dr. Sangha, it was required to refute the correlation between overqualified status and visible minority immigrant status to rebut the *prima facie* case. Having carefully assessed the evidence provided by the two expert witnesses, the Tribunal found that the correlation was unassailable and was not convincingly disproved by the expert appearing on behalf of the Board.

[17] Dr. Sangha, together with the Commission, requested that he be hired for the next available RO job, that he be compensated for 3 years of lost wages, and that he receive an award of $10,000 for pain and suffering. The Tribunal accepted to award Dr. Sangha the sum of $9,500 plus interest, in respect of his claim for pain and suffering, but denied his requests for instatement and compensation for loss of wages. The Tribunal rejected the claim for lost wages on the basis that Dr. Sangha did not meet the threshold of showing that there was not just a mere possibility of acquiring the job, but a serious one. Further, the qualifications of the other candidates chosen for the RO position were more congruent for the RO position than those of Dr. Sangha. Here is the relevant portion of the Tribunal's reasons on this critical issue:

> 215. Turning now to the question of instatement and compensation for lost wages, in deciding this claim, I am guided by the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401.
>
> 216. *Morgan* dealt with the issue of how to evaluate the compensation for loss of a job opportunity where there is a finding of discrimination by the Tribunal. The relevant part of the discussion is found in the reasons of Marceau J.A. In his reasons, Marceau J.A. says that the complainant is not required to prove that, but for the discrimination they would have certainly obtained the position. To establish damage does not require a probability. Rather, the test for loss of job is a "mere possibility" so long as it is a "serious one". Of course, the uncertainty about whether a job could be denied is relevant to an assessment of the compensation. (p. 412)
>
> 217. For Dr. Sangha to succeed in his claim to instatement and for lost wages, he must cross the threshold of showing that there was not just a mere possibility of acquiring the job but a serious one. In my opinion, Dr. Sangha does not meet this threshold.
>
> 218. This is where the reasons put forward by the Board other than over-qualification became relevant. The Board's position is that the other candidates chosen for the RO position were more qualified, their qualifications were more congruent for the RO position, than those of Dr. Sangha. I agree. The evidence of the qualifications of the other candidates, as shown on their resumes, and the evidence of Ms. Anderson and Mr. Lennie-Misgeld clearly demonstrate this. I need not repeat this evidence. It is set out in great detail earlier in this decision.
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> 219. For these reasons, I cannot endorse Dr. Sangha's request for instatement and compensation for lost wages.

[18] In addition, the Commission had requested that the Board take measures in consultation with it to redress the discriminatory practice. The Tribunal did not order such measures based on its assessment of the facts and the evidence of the witnesses. The Tribunal found that the witnesses were open and forthcoming about how they were affected by the allegations of discrimination and

in the view of the Tribunal were sensitized to issues facing visible minority immigrant job applicants. The Tribunal did order, however, that where a visible minority immigrant has been chosen for an interview for a position with the Board, that the Board cease using any policy or practice that would automatically disqualify such candidate for the reason that they are overqualified for the job.

THE ISSUES

[19] The narrow issue in this judicial review is whether the appropriate remedy was granted by the Tribunal to Dr. Sangha and whether it should have included compensation for loss of an opportunity for employment. It is worth noting that he is no longer asking to be hired for the next available RO job. Accordingly, the points to be decided are as follows:

- What is the standard of review to be applied in reviewing the Tribunal's decision?
- Did the Tribunal err in law by incorrectly applying the principles that relate to awarding damages to Dr. Sangha for loss of opportunity of employment?
- Alternatively, did the Tribunal, in finding that Dr. Sangha did not have a serious possibility of obtaining the position, make an erroneous finding of fact without regard to the evidence before it?

RELEVANT LEGISLATIVE PROVISION

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. (2) Where the ground of	3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.

(2) Une distinction fondée sur la grossesse ou l'accouchement est réputée être fondée sur le sexe.

7. It is a discriminatory practice, directly or indirectly,

(*a*) to refuse to employ or continue to employ any individual, or

(*b*) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

a) de refuser d'employer ou de continuer d'employer un individu;

b) de le défavoriser en cours d'emploi.

53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(*a*) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or

53. (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.

(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;

b) d'accorder à la victime, dès

arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(*b*) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(*c*) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(*d*) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

(4) Subject to the rules made under

que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

(4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.	

Canadian Human Rights Act, R.S.C. 1985, c. H-6	*Loi canadienne sur les droits de la personne*, L.R.C. 1985, c. H-6

ANALYSIS

[20] This application for judicial review raises both questions of law and questions of fact. The Respondent conceded, rightly so in my view, that the Tribunal's determination of the legal principles relating to the award of damages to Dr. Sangha for loss of opportunity of employment is a pure question of law, and therefore calls for the standard of correctness. The Supreme Court of Canada has stated on numerous occasions that the standard of review on questions of law should be one of correctness, especially in the context of human rights legislation: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at para. 25, 45. See also *Chopra v. Canada (Attorney General)*, 2006 FC 9 [*Chopra*], at para. 38.

[21] The second question raised by this application for judicial review raises, in my view, both a pure question of fact and a question of mixed law and fact. The Tribunal's finding that the other candidates chosen for the RO position were more qualified, and that their qualifications were more congruent for that position than those of Dr. Sangha, is clearly a question of fact. Such a determination lies at the heart of the Tribunal's jurisdiction and expertise, and the Tribunal has the advantage of hearing witnesses and can therefore assess their credibility. This is why on such issues, this Court should accord considerable deference to the Tribunal member. In the specific context of

the judicial review of a decision made by a human rights tribunal, the Federal Court of Appeal explained the following:

> With respect to review of findings of fact, in my view it is s. 18.1 of the **Federal Court Act** which defines the standard of review exercisable by the Federal Court. It is a relatively narrow basis of review which only permits judicial intervention where this court concludes that the findings of fact are wrong and that they were made in a perverse or capricious manner or without regard to the material before the Tribunal. As has been pointed out by Hugessen J., in **Canadian Pasta Manufacturers' Association** […], this is tantamount to a "patently unreasonable" test espoused elsewhere as a standard of review in matters of fact.
>
> *Stadnyk v. Canada (Employment and Immigration Commission)* (2000), 257 N.R. 385, at para. 22.

[22] Once the facts have been properly assessed, the Tribunal must apply the correct legal principles with a view to determine whether Dr. Sangha should be awarded damages as a result of having lost an opportunity of employment. This is, in effect, the conclusion that the tribunal must draw from an examination of the law and of the facts. As such, it is a question of mixed law and fact which must be reviewed against a standard of reasonableness.

[23] These standards of review have been applied consistently by this Court in reviewing decisions of the Tribunal. My colleague Justice Gibson came to that same conclusion in *International Longshore & Warehouse Union (Marine Section), Local 400* v. *Oster*, 2001 FCT 1115, at para. 22, and reiterated it in *Quigley* v. *Ocean Construction Supplies Ltd., Marine Division*, 2004 FC 631, after conducting a pragmatic and functional analysis along the lines suggested by the Supreme Court of Canada in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1

S.C.R. 982. There is no reason to depart from this line of reasoning, and the parties did not suggest otherwise.

[24] Turning now to the legal issue put forward by the Applicant, it was submitted that the Tribunal purported to apply Justice Marceau's judgment and the "serious possibility" principle in *Canada v. Morgan*, [1992] 2 F.C. 401 [*Morgan*] regarding the question of instatement and compensation of lost wages, but nevertheless failed to do so in applying a balance of probabilities test and finding that Dr. Sangha would not have been offered the position in any event. According to the Applicant, the Tribunal required in effect Dr. Sangha to prove that he was more qualified and more congruent for the RO position than other applicants in order to be compensated. The Applicant also contended that there is a presumption in favour of awarding damages to complainants of discriminatory practices.

[25] After reading carefully the decision of the Board member, I am unable to subscribe to that interpretation of his reasons. Not only did he refer explicitly to the *Morgan* decision, as can be seen from the extract quoted in these reasons at paragraph 17, but he also borrowed Justice Marceau's exact language when stating the test to be met by Dr. Sangha ("For Dr. Sangha to succeed in his claim to instatement and for lost wages, he must cross the threshold of showing that there was not just a mere possibility of acquiring the job but a serious one") (my underlining). There is simply no basis to argue that the Tribunal applied a balance of probabilities standard. Indeed, counsel for the Applicant submitted at the hearing that the Tribunal had in effect found that it was *impossible* for the Applicant to have been hired. If that is the case, the Tribunal did apply a very low threshold and

must be taken to have concluded that the Applicant did not even have a mere possibility, let alone a serious one, to be hired. That would be an even lower threshold than that set out by Justice Marceau in *Morgan*, not a higher one as submitted by the Applicant.

[26] In *Morgan* (at para.15), Marceau J.A. made a distinction between the right to compensation (i.e. the existence of "real" or "actual damage") on the one hand and the extent of compensation on the other:

> It seems to me that the proof of the existence of a real loss and its connection with the discriminatory act should not be confused with that of its extent. To establish that real damage was actually suffered creating a right to compensation, it was not required to prove that, without the discriminatory practice, the position would certainly have been obtained. Indeed, to establish actual damage, one does not require a probability. In my view, a mere possibility, provided it was a serious one, is sufficient to prove its reality. But, to establish the extent of that damage and evaluate the monetary compensation to which it could give rise, I do not see how it would be possible to simply disregard evidence that the job could have been denied in any event. The presence of such uncertainty would prevent an assessment of the damages to the same amount as if no such uncertainty existed. The amount would have had to be reduced to the extent of such uncertainty.

[27] There may be a presumption in favour of awarding damages to complainants of discriminatory practice, in the sense that such an award is not purely discretionary. This is how I interpret the decisions of the Tribunal referred to by the Applicant in support of his proposition: see *Foreman v. Via Rail Canada Inc.* (1980), 1 C.H.R.R. D/233 and *Torres v. Royalty Kitchenware Limited* (1982), 3 C.H.R.R. D/858. But this is a far cry from saying that for every complainant who has succeeded in showing a prima facie case of discrimination, real or actual loss is to be presumed.

[28] Section 53 of the *Act* must be interpreted to be consistent with the basic principle underlying tort law, that of making the victim whole for the damage caused. A corollary of this principle, of course, is that the victim should not end up in a better position than he/she would have been otherwise. As my colleague Justice Phelan aptly stated in *Chopra* (at para. 42):

> A corollary of this principle of restoring the victim to his/her rightful place is that the victim is not overcompensated – that human rights awards do not result in unrealistic or windfall compensation. Such a result would otherwise undermine the integrity of the strong social justice purpose of the legislation.

[29] On the basis of the foregoing, I can find no error in the legal analysis of the Tribunal. Having found that Dr. Sangha's complaint of discrimination was substantiated, the Tribunal looked for evidence that there was not just a mere possibility of acquiring the job but a serious one, had he not been discriminated against. This line of reasoning was entirely consistent with the established principles recognized by the various courts of this country. It remains to be seen, however, whether its assessment of the facts can withstand judicial review.

[30] In his written submissions, the Applicant argued that he had a serious possibility of obtaining the position on the basis of a purely statistical analysis. According to such an analysis, he had a 4/38 chance of obtaining a RO position at the time of applying (four positions and 38 applicants), a 1/3 chance of obtaining a RO position at the time of the interview (four positions and 12 interviewed candidates), and a 4/10 chance of obtaining a RO position when two applicants did not accept the offer.

[31] This argument cannot hold sway, essentially for two reasons. First of all, this method presumes that all applicants are identically qualified and suitable for the position and, further, that each applicant's likelihood of obtaining the position is based on random selection. This was precisely the situation at play in *Chaplin v. Hicks*, [1911] 2 K.B. 786, a decision relied on by the Applicant, where the defendant had breached a contract resulting in the Plaintiff losing the opportunity to compete as one of fifty beauty contestants for twelve contracts. But competing for a position cannot be equated with a lottery. Each candidate has a different skill set, education and experience that will have an impact on his or her likelihood of being hired. This is why a pure statistical analysis will not suffice in determining whether a candidate did have a serious possibility to be offered a position.

[32] Perhaps more importantly, this analysis once again ignores the two-step process set out in *Morgan* and confuses the threshold of establishing that real damage was suffered with the assessment of the extent of that loss. While the number of candidates should not be factored in when evaluating whether a candidate has demonstrated he had a serious possibility to be offered a position, it must be taken into account, along with other factors, to determine the extent of the damages. As Justice Marceau wrote in *Morgan*, evidence that the job could have been denied in any event must be considered in evaluating the monetary compensation. At that second stage of the analysis, the pool of applicants and their respective qualifications cannot be disregarded. But this is not the case at the first stage.

[33] Having said that, I believe the Tribunal erred in concluding that Dr. Sangha had not met the threshold of showing that there was not just a mere possibility of acquiring the job but a serious one. To come to that conclusion, the Tribunal agreed with the Board's submissions that there were reasons other than over-qualification why Dr. Sangha was not offered the position. Relying on the evidence of the qualifications of the other candidates, as well as on the evidence of two interviewers, the Tribunal endorsed the Board's position that the other candidates chosen for the RO position were more qualified, and their qualifications were more congruent for the RO position than those of Dr. Sangha. There are several problems with this finding.

[34] First of all, there was ample evidence before the Board that Dr. Sangha was denied a position largely due to being overqualified. In the Tribunal's own words (at paragraph 205 of its decision), "[t]he Board conceded that the complainant's overqualified status played a significant role in its decision not to hire him". This finding is borne out by the testimonies of the two interviewers, as summarized by the Tribunal at paragraphs 51 and 70 of its decision. In his response to the complaint made by Dr. Sangha, the Executive Director of the Board went as far as saying:

> The issue that led the Committee to its eventual decision is, however, one that Dr. Sangha also recognized in his complaint to the Commission; the fact that his experience and education were far beyond that which are required for the Regulatory Officer position.
>
> (…)
>
> In short, the committee felt that Dr. Sangha's credentials were so far beyond those which are required for the position that he would inevitably become bored and frustrated; a situation that would not be in the best interests of our organization or Dr. Sangha.
>
> (Applicant Record, pp. 976-978)

[35] The Respondent counters (and the Tribunal agreed) that there were reasons other than over-qualification to turn down Dr. Sangha's application. Unfortunately, the Tribunal was rather vague on that issue. According to the Respondent, the interviews were only one of the criteria for ranking the candidates and other factors were also considered, like the northern experience and the "congruency" of the candidates with the position.

[36] There may well have been other factors beyond qualification that were taken into account in deciding who of the candidates would be offered a position. But one should not lose sight of the fact that the interview questions themselves incorporated congruency issues such as suitability, educational and professional experience as well as northern experience. In other words, the interview scores already incorporate the criteria that the Respondent wishes to emphasize. After all, the entire purpose of an interview is to evaluate the candidate's ability and suitability for the position. The interview scores are meant to provide an objective ranking of candidates in order to overcome personal reactions and ensure that a fair and objective ranking is obtained.

[37] There was very little discussion, both in the Tribunal's reasons and in the Respondent's submissions, of what precisely is meant by "congruency". There is room to suspect that this highly subjective criterion is nothing more than a back-door reintegration of the over-qualification factor that was required to be disregarded as being discriminatory. The Applicant invited me to compare Dr. Sangha with the other six candidates who were offered a position, with a view to assess their strengths and weaknesses in relation to the three main criteria against which they were to be evaluated. This is an exercise that is better left to the Tribunal, which has far more experience than

this Court in performing such a task and which had the benefit of hearing the witnesses and canvassing all the evidence. I need only add that, on the face of it, it is far from obvious that the other candidates were more qualified than Dr. Sangha once the over-qualification factor is completely disregarded, both explicitly and implicitly.

[38] For all of the above reasons, I am of the view the Tribunal erred in its assessment of the evidence and came to its conclusion that Dr. Sangha did not have a serious possibility of acquiring an RO position without discarding completely the over-qualification factor. I would therefore allow the application for judicial review, set aside the decision of the Tribunal and remit the matter to the same Tribunal member for reconsideration in accordance with these reasons.

ORDER

THIS COURT ORDERS that this application for judicial review is granted, with costs payable by the Respondent to the Applicant.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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