Federal Court  Cour fédérale

Date: 20100927

Docket: T-771-09

Citation: 2010 FC 963

BETWEEN:

CHRIS HUGHES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

HENEGHAN J.

[1] By Order issued on June 10, 2010, the within application for judicial review was allowed, with reasons to follow. These are the reasons.

[2] Mr. Chris Hughes (the "Applicant") seeks judicial review of the decision made by the Canadian Human Rights Commission (the "CHRC" or "the Commission") dated May 1, 2009. In that decision, the Commission dismissed his complaint filed pursuant to sections 7 and 10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, alleging discrimination by the Canada Border Services Agency (the "CBSA") in not employing the Applicant.

[3] The CBSA is represented in this proceeding by the Attorney General of Canada as the Respondent (the "Respondent"), pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules").

[4] The Applicant filed this complaint on January 19, 2005. The complaint was assigned file number 20050026 by the Commission. In his complaint form, the Applicant alleged that he was not hired by the CBSA on the basis of discriminatory hiring practises dating back to 2001 with the Canada Customs and Revenue Agency (the "CCRA"), the predecessor to the CBSA and the Canada Revenue Agency (the "CRA").

[5] The Applicant had filed other complaints with the Commission relating to the CBSA and the CRA which are the subject of applications for judicial review in this Court. Cause T-19-09 seeks review of the refusal of the Commission, in December 2008, to reopen or to reinstate the Applicant's complaint number 20061563 relating to retaliation by the CBSA. Cause T-702-09 relates to the Commission's refusal, in March 2009, to amend the complaint to allow the incorporation of complaint 20080634, to reopen complaint 20061563 and join it to complaint 20050026, and, or alternatively to re-submit the retaliation allegation that was part of complaint 20061563 and join it with complaint 20050026.

[6] The Applicant brought a motion in the present proceeding to consolidate all three applications for judicial review. The motion was dismissed by Prothonotary Lafrenière on July 31, 2009.

[7] In its decision of May 1, 2009, the Commission dismissed the Applicant's complaint on the basis of paragraph 44(3)(b), as follows:

(3) On receipt of a report referred to in subsection (1), the Commission	(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
…	…
(b) shall dismiss the complaint to which the report relates if it is satisfied	b) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).	(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

Background

[8] In support of this application, dealing only with complaint 20050026, the Applicant filed two affidavits. The first affidavit, affirmed on June 5, 2009, sets out the history of the Applicant's complaint. Fifty-four documentary exhibits are attached to the affidavit. Some of these exhibits relate to complaint 20050026, while other exhibits refer to complaint 20061563 and complaint 20080634.

[9] The Applicant obtained leave to file a Supplementary Application Record by Order dated September 14, 2009. He filed the Supplementary Record on November 5, 2009. That Record

included a second affidavit of the Applicant affirmed on September 4, 2009. Twenty-three documentary exhibits are attached to this affidavit. The exhibits include copies of emails sent by the Applicant to the Commission, email correspondence from the Commission and internal file memos maintained by the Commission.

[10] The Respondent also filed an affidavit as part of his Application Record, that is the affidavit of Wendy Andrews, a legal assistant employed with the Department of Justice, Canada. A copy of the Certified Tribunal Record was attached as the sole exhibit to her affidavit. According to the certificate signed by Lucie Veillette, secretary to the CHRC, the documents listed in the certificate "constitute all the material that was before the CHRC when it made its decision on April 22, 2009" concerning complaint 2005-0026. The following materials were identified in the certificate:

1. Investigation Report, dated January 22, 2009 (pages 1-11);
2. Complaint Summary (page 12);
3. Complaint Form, dated January 19, 2005 (pages 13-16);
4. Complainant's response to the Investigation Report, dated February 24, 2009 (pages 17-26);
5. Respondent's response to the Investigation Report, dated February 5, 2009 (page 27);
6. Amended Complaint Form, dated March 11, 2009 (pages 28-32);
7. Letter from Suzanne Best to Chris Hughes, dated March 25, 2009 (page 33);
8. Respondent's submissions in reply to the Complainant's response to the Investigation Report, dated April 8, 2009.

[11] The Applicant, in this application for judicial review, argues that the Commission breached the duty of procedural fairness by erroneously opening a second complaint that is complaint

20051563 and a third complaint, that is complaint 20080634, rather than permitting him to amend the first complaint, complaint 20050026.

[12] He argues that the Commission also breached the requirements of procedural fairness by not allowing the Investigator to investigate the mental illness disability ground since this complaint was known to the Commission in February 2005 and when he asked for the complaint files to be joined.

[13] The Applicant also alleges that the Investigator breached the requests of procedural fairness by failing to investigate the complaint based on his disability of mental illness, even though the complaint had not been formally amended.

[14] The Applicant argues that the failure of the Investigator ignored crucial evidence, including the ages of the candidates who had been hired by the CBSA. This information was readily accessible and available.

[15] Finally, the Applicant submits that the Commission breached the requirements of procedural fairness by failing to join the complaint with that of a similarly situated complainant whose complaint, on similar grounds was referred to a hearing before a tribunal.

[16] The Respondent argues that the content of procedural fairness is variable, in relation to the context of each case. The subject of this application for judicial review is not the result of an adjudication process but the result of an investigation. The duty of fairness in this case required a

fair investigation, together with the opportunity for the complainant and the employer to present their cases.

[17] The Respondent submits that the record shows that the Applicant had the opportunity to adequately present his case and that he carried the onus of showing a *prima facie* case of discrimination. He failed to do so.

[18] As for the Applicant's arguments that the failure to join his complaints with that of a similarly situated person, the Respondent argues that the other complaint did not include an alleged breach of section 10 and did include an allegation of race-based discrimination. Refusal of one complaint does not mean that the Applicant's complaint should be referred to a hearing nor that the two complaints should be joined.

Facts

[19] In accordance with the discussion above, I have limited my summary of the facts to those contained within complaint 20050026, and the events immediately surrounding the making of the decision that is the subject of this application for judicial review.

[20] The Applicant became an employee of the CCRA in 1995. In December 2003, the CCRA was split into the CRA and the CBSA.

[21] The Applicant applied, performed the necessary testing, and was qualified into pre-qualified pools (PQP) as a Customs Inspector in Victoria, British Columbia in March 2001, March 2003 and March 2004. A PQP is a pool of persons who have been found to be qualified for a specific type of employment. The principle is that once a PQP is established, the hiring of persons into that type of employment should be made from the existing PQP. These PQPs were used to staff Border Services Officers after the separation of the CBSA from the CCRA.

[22] In spite of being in a valid PQP from 2001-2005, the Applicant was never hired permanently by the CBSA. The Applicant alleges that this occurred because of his age. He maintains that younger applicants, many who were not qualified, were improperly hired before him. Further, he applied for the Vancouver PQP in 2003. Notwithstanding that he submitted his application for the same position for which he had been pre-qualified in Victoria, he was found to be unqualified for entry into the Vancouver PQP.

[23] The Applicant states that of 2000 candidates, only 23 were selected as qualified. All of the selected candidates were under 31 years of age. The age of candidates can be determined because they are required to declare the year that they finished high school, and they must provide identity documents that clearly state age.

[24] In August 2004, Mr. Ross Fairweather, a CBSA official reportedly responsible for Vancouver Airport hiring, is alleged to have said “If you are under 35 and want a career in Customs,

come to Vancouver." This statement was reportedly made at a career discussion with the Victoria Customs team that the Applicant attended.

[25] In 2004, the CBSA offered the Applicant a term position in Stewart, British Columbia. As a term position, it did not include moving expenses or have employment security. The Applicant declined the term position for that reason. Subsequently, the CBSA hired a younger and unqualified person out of the Vancouver PQP into a permanent position in Stewart.

[26] Between September 2005 and March 2006, as a result of a "significant staffing shortage" in Whitehorse, the CBSA "bridged" student employees to permanent positions without a competition. The CBSA stated that it had exhausted all other possible staffing strategies, including "importing staff from other Districts."

[27] The Applicant informed the CBSA that he would work in the Yukon. He was not offered any of the many permanent positions that were created. Instead student employees were "bridged" into permanent positions; see p. 63 of the Applicant's Supplementary Record.

[28] The CBSA also hired five permanent employees from the Victoria PQP in December 2004-January 2005. All individuals were younger and are alleged to have had less experience than the Applicant.

[29] As a result, the Applicant filed complaint 20050026, with the CHRC, on January 19, 2005, alleging discrimination under the Act on the basis of age, a prohibited ground of discrimination pursuant to subsection 3(1) which provides as follows:

> 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.

[30] In complaint 20050026 the Applicant alleged that the refusal to hire him was on the basis of his age and was a violation of s. 7 of the Act:

> 7. It is a discriminatory practice, directly or indirectly,
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> (*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.

[31] The Applicant further alleged that the CBSA was engaged in a discriminatory practice or policy contrary to s. 10 of the Act:

> 10. It is a discriminatory practice for an employer, employee organization or employer organization
>
> (*a*) to establish or pursue a policy or practice, or
>
> (*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[32] In addition to the human rights complaint, the Applicant had also brought an application for judicial review of the hiring process in Vancouver in 2003. He also brought a complaint before the Public Service Commission (the "PSC"). The PSC commenced an investigation of the Applicant's complaints. Because the Applicant had initiated these alternative remedies, the Commission declined to conduct an investigation until those remedial processes were completed.

[33] As well, the Applicant filed a complaint alleging discrimination on the grounds of disability, due to his mental illness. Complaint 20050135 was submitted against the CRA on February 7, 2005. The history of this complaint, and the CHRC's refusal to join it with 20050026, is the subject of the application for judicial review in file T-702-09.

[34] The PSC investigation found that the CBSA had in fact engaged in a course of improper hiring that was contrary to the applicable legislation, regulations and policy. A number of the younger newly hired Border Services Officers were found to have been unqualified and, or improperly hired. However, it was another year until the corrective measures that would be required by the PSC were determined. In December 2007 the CHRC investigation of complaint 20050026 was resumed.

[35] The complaint was investigated by Mr. Robert Cantin (the "Investigator"). The investigation consisted of interviewing the Applicant, as complainant, and four employees, or former employees, of the CBSA, the respondent to the complaint. Both parties made written submissions and answered subsequent questions, either by telephone or in writing. The Investigator also reviewed the notes

disclosed to the Applicant through a request under the *Privacy Act*, R.S.C. 1985, c. P-21, details on the qualifications and experience of the newly hired Border Services Officers cited by the Applicant, and the PSC Investigation Case Reports.

[36] The Investigator concluded that the Applicant was not offered employment for reasons that were not related to age. He further concluded that the evidence tended to indicate that persons were selected because they were better qualified, or hired from a different pool, than the Applicant. He also noted that the Applicant did not accept a term position in Stewart, British Columbia and that the permanent position was later filled from a different pool.

[37] Concerning the allegation that the CBSA was pursuing a discriminatory policy, the Investigator concluded that the evidence indicates that the CBSA's hiring policy does not appear to discriminate based on age. There is information requested during the hiring process that would make it possible for the CBSA to determine the age of candidates. However, there was no evidence to indicate that the CBSA relied upon the information; rather there is contrary information that the average age of all similar employees is older than 35.

[38] Both parties were given an opportunity to respond to the investigation report, before the Commission rendered its decision. The Applicant provided a substantial written rebuttal to the report.

[39] Throughout the process the Applicant drew the Commission's, and the Investigator's, attention to the related complaint filed by Mr. Levan Turner (the "Turner complaint"). Mr. Turner was a co-worker of the Applicant and filed a complaint on the basis of age and race discrimination. The Turner complaint included evidence as to the exact age of all persons hired in the geographical region, into permanent Border Services Officer positions. The Applicant was a witness who was interviewed, by the CHRC Investigator, in the Turner complaint as to the age discrimination suffered. Mr. Turner's complaint was referred to the Tribunal.

[40] On May 1, 2009, the Commission wrote to the Applicant and informed him of its decision relative to complaint 20050026. The Commission noted that it had reviewed the report and the submissions of both parties. However, it had decided to dismiss the complaint pursuant to para. 44(3)(b) of the Act.

[41] Paragraph 44(3)(b) of the Act provides:

> 44. (3) On receipt of a report referred to in subsection (1), the Commission
>
> …
>
> (*b*) shall dismiss the complaint to which the report relates if it is satisfied
>
> > (i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or
> >
> > (ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*).

[42] As a result of the dismissal of complaint 20050026, the Applicant filed this application for judicial review.

Discussion and Disposition

[43] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Supreme Court of Canada said that decisions made by statutory decision-makers are reviewable on either reasonableness or correctness. Issues of procedural fairness are to be reviewed on the standard of correctness. Where prior jurisprudence has established the applicable standard of review, that standard shall be adopted.

[44] According to the decision in *Balogun v. Her Majesty the Queen (Minister of National Defence)*, 2009 FC 407, 345 F.T.R. 67, a decision of the Commission not to refer a matter to a hearing before a tribunal is reviewable on the standard of reasonableness.

[45] In respect of a decision of the Commission not to refer a matter to a full hearing, the standard of reasonableness is to be applied more critically, following the direction of the Federal Court of Appeal in *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 (F.C.A.) in para. 80 as follows:

> when the Commission decides to dismiss a complaint, its conclusion is "in a real sense determinative of rights" (*Latif v. Canadian Human Rights Commission*, [1980] 1 F.C. 687 at para. 24 (F.C.A.) (*Latif*)). Any legal assumptions made by the Commission in the course of a dismissal decision will be final with respect to its impact on the parties. Therefore, to the extent that the Commission decides to dismiss a complaint on the basis of its conclusion concerning a fundamental question of law, its decision should be subject to a less deferential standard of review.

[46] I will first address the submissions respecting breach of procedural fairness.

[47] In my opinion, these allegations are not substantiated, insofar as they relate to the Commission's decision not to consolidate the Applicant's complaint relative to alleged discrimination on the basis of a disability, that is a mental illness, with complaint 2005-0026, nor with respect to the Commission's administrative step in opening a new complaint.

[48] The Commission is authorized to adopt appropriate administrative steps with respect to its processes. In any event, the Applicant began judicial review proceedings in connection with the alleged missteps by the Commission. He later sought leave to proceed with the three applications for judicial review at the same time. That motion was refused.

[49] In the result, the Applicant has suffered no prejudice nor breach of procedural fairness since he still has the opportunity to challenge these aspects of the Commission's actions. He has the right to challenge any breaches of procedural fairness resulting from the actions of the Commission or the Investigator.

[50] I will address the allegation that the investigation was insufficient and that the Applicant's claim should have been joined with the Turner complaint.

[51] An investigation under the Act is an initial screening to determine if there is sufficient evidence to warrant convening a tribunal. It is not a final determination on the merits of the claim. The Commission should dismiss a complaint where there is insufficient evidence; see *Canadian Broadcasting Corp. v. Paul*, [1999] 2 F.C. 3 at para. 62, overturned in part on other grounds ((2001), 198 D.L.R. (4th) 633 (F.C.A.)). However, contrary to the submissions of the Respondent, procedural fairness requires more than the simple provision to the Applicant of a copy of the report and allowing him an opportunity to respond. The CHRC must have an adequate and fair basis upon which to evaluate the sufficiency of evidence; see *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] 2 F.C. 574 at para. 48.

[52] As the Respondent argued, an investigation under the Act will be recognized as fair and adequate when it meets two conditions: neutrality and thoroughness. The test for the legally required degree of thoroughness was established by Justice Nadon, in *Slattery*, at paras. 55-57:

> 55 In determining the degree of thoroughness of investigation required to be in accordance with the rules of procedural fairness, one must be mindful of the interests that are being balanced: the complainant's and respondent's interests in procedural fairness and the CHRC's interests in maintaining a workable and administratively effective system. Indeed, the following words from Mr. Justice Tarnopolsky's treatise Discrimination and the Law (Don Mills: De Boo, 1985), at page 131 seem to be equally applicable with regard to the determination of the requisite thoroughness of investigation:
>
> > With the crushing case loads facing Commissions, and with the increasing complexity of the legal and factual issues involved in many of the complaints, it would be an administrative nightmare to hold a full oral hearing before dismissing any complaint which the investigation has indicated is unfounded. On the other hand, Commission should not be assessing credibility in making these decisions, and they must

> be conscious of the simple fact that the dismissal of most complaints cuts off all avenues of legal redress for the harm which the person alleges.
>
> 56 Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted. Such an approach is consistent with the deference allotted to fact-finding activities of the Canadian Human Rights Tribunal by the Supreme Court in the case of Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554.
>
> 57 In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker. Therefore, it should be only where complainants are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it; or (2) where fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it.
>
> (underlining added)

[53] It is accepted that the onus lies on a claimant to demonstrate a *prima facie* case of discrimination; see *Sketchley* at para. 86. The Supreme Court of Canada in *Ontario (Human Rights Commission) v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536, at para. 28, said that this means that the claimant must present a case which,

> covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in complainant's favour in the absence of an answer from the respondent-employer.

[54] However, in my opinion, this onus does not reduce the obligation on the Investigator, in accordance with procedural fairness, to conduct a neutral and thorough investigation. The role of the investigator was described by Madam Justice Tremblay-Lamer, of the Federal Court, in *Paul* at para. 63:

> In essence, the investigator must collect the information which will provide an adequate and fair basis for a particular case, and which will in turn allow the Commission to balance all the interests at stake and decide on the next step. No relevant fact should be left out. Omissions, particularly when the information is damaging to the complainant's position, only result in casting serious doubts on the neutrality of the investigator. I realize that this is a difficult task, but it is only in achieving this high standard of fairness that the investigator will help the Commission retain its credibility.

This holding was not disturbed by the Federal Court of Appeal.

[55] As noted by the Federal Court of Appeal in *Sketchley*, at para. 77, an investigator is essentially conducting a fact-finding mission. There is “no obligation placed upon the investigator to interview each and every person suggested by the parties"; see *Miller v. Canada (Canadian Human Rights Commission)* (1996), 112 F.T.R. 195, at para 10. Likewise, no reviewable error arises where an “investigation report dealt with all of the fundamental issues raised in the applicant's complaint and therefore sufficient thoroughness exists”; see *Bateman v. Canada (Attorney General)*, 2008 FC 393, at para. 29.

[56] If the Investigator's report is adopted by the Commission, it is considered the reasons for that decision. This was discussed by Justice Russell in *Balogun* at para. 50:

> 50 The Investigator's report constitutes the Commission's reasons. Therefore, if the report is flawed, the Commission's decision is equally flawed because the Commission was not in possession of other relevant information upon which it could properly exercise its discretion: *Forster v. Canada (Attorney General)*, 2006 FC 787 at paragraph 37 and *Canada (Attorney General) v. Grover*, [2004] F.C.J. No. 865 (F.C.) at paragraph 25 (*Grover*).

[57] In my opinion, a review of the Investigator's report raises concerns that it was neither neutral nor thorough. I will first address neutrality.

[58] First, I perceive a problem in the way that the Investigator conducted his investigation. The Applicant alleged both specific discrimination against him, under s. 7 of the Act, and a general policy of discrimination, under s. 10 of the Act. In conducting the investigation, the Investigator interviewed the complainant and four employees, or former employees, of the CBSA. This suggests to me an imbalanced investigation that favours the CBSA.

[59] In my view, this process was flawed as it did not adequately seek the perspective of other similarly situated persons, for example, Mr. Turner, whose complaint the Investigator knew was related and was also before the Commission. I question whether a neutral investigation of alleged systemic discrimination can be conducted by primarily interviewing the alleged discriminator, that is the employer.

[60] Further, I note that the investigation report also appears to be less than neutral as it fails to reference highly relevant issues that are harmful to the CBSA's response. I refer to the findings of the PSC that determined that the CBSA had been hiring unqualified students through an improper process. When considered with the Investigator's conclusion that persons were selected over the Applicant because they were better qualified, this omission is highly prejudicial and indicates a lack of neutrality.

[61] The Investigator also accepted, at face value, the irrelevant statistics provided to him by the CBSA with respect to the average age of PM-03 personnel, rather then reviewing the data as to the age of newly hired Border Service Officers. The average age of the group of existing employees does not address alleged discrimination in hiring. This suggests to me that the Investigator was willing to rely on the CBSA's position to justify a recommendation to dismiss the complaint.

[62] Likewise the Investigator's acceptance of the CBSA explanation of the hiring process for the Stewart position, raises questions about the neutrality of the investigation. The Applicant was offered a term position from the Victoria PQP to fill the Stewart position. However, the position was then offered as a permanent position to a candidate in the Vancouver PQP. This result is inconsistent with the inability to hire from different geographic pools, a justification which was simply repeated by the Investigator without further investigation or analysis.

[63] Similarly, the reliance on the CBSA position that it was hiring better “qualified” individuals over the Applicant is not supported by the evidence and further indicates that the report was not neutral.

[64] In my opinion, the investigation does not meet the standard of thoroughness because it did not address several critical aspects of the complaint.

[65] First, the Investigator did not adequately address the findings of the PSC investigation. That investigation concluded that the hiring practices were improper and unqualified personnel had been hired. Further, the Investigator did not consider the Applicant’s status as a member of a PQP in the context of the CBSA hiring practices and the PSC findings.

[66] Second, I accept the Applicant’s submissions that the report is flawed because it does not reveal any investigation of student hiring practices or student bridging programs. The Applicant raised these two issues with the Investigator.

[67] I agree with the Respondent that the Investigator does not “prosecute” the complaint, after the Applicant had made a bald allegation. However, there was documentary evidence, provided by the Applicant, which explained the justification for using student bridging. That evidence was inconsistent with the CBSA’s failure to hire the Applicant. The Investigator should have inquired into the hiring of students into permanent positions. This was a critical issue within the Applicant’s

allegation of systematic discrimination in favour of younger applicants. The report failed to deal with all fundamental issues in the matter and was not sufficiently thorough.

[68] The Applicant has also submitted that the Investigator should have considered the evidence in the related Turner case. I accept the Applicant's position for the following reasons.

[69] This evidence was in the possession of CHRC and the Investigator was aware of its existence. It included a breakdown by age of all newly hired Border Services Officers. It revealed a disproportionate number of newly hired under 35 year old personnel. It rebuts the CBSA position, as accepted by the Investigator, as to average ages and availability of such statistics. This evidence was particularly relevant to the Applicant's claim regarding age discrimination in hiring. The failure by the Investigator to consider this evidence amounts to a failure "to investigate obviously critical evidence."

[70] In my opinion, this report is not neutral and thorough, as required by the duty of fairness. As it constitutes the reasons for the Commission's decision to dismiss the Applicant's complaint, I conclude that the decision should be quashed as it did not have a "fair and adequate" basis.

[71] With respect to the Respondent's argument that the Applicant has failed to make a *prima facie* case, I note that the Investigator reported that the CBSA had access to information through which age could be obtained. There were statements reportedly made by senior CBSA personnel that they indicated that preferential hiring was given to persons under 35 years of age. There was

evidence that a disproportionate number of persons under 35 years of age were hired in British Columbia, actually 100% for the position, time and geographic area in question.

[72] Finally, these younger persons were hired without regard for legislation, regulations and policies. In my opinion that is a *prima facie* case and the consideration of the Applicant's burden of proof should not be determinative in this matter.

[73] Notwithstanding my comments above regarding the failure to acknowledge the age evidence from the related Turner proceeding, I am satisfied that no reviewable error arose because the two matters were not joined. The Commission is the master of its own process.

[74] For these reasons, an Order issued allowing the Applicant's application for judicial review.

Costs

[75] The Applicant seeks recovery of costs. He has succeeded in this application and an award of costs is appropriate, in respect of reasonable disbursements and costs, pursuant to the discretion set out in Rule 400(1). If the parties are unable to agree on costs, including costs pursuant to the Order of Prothonotary Lafrenière made on September 14, 2009, brief submissions not exceeding three pages, can be made in accordance with the following schedule:

i. the Applicant's submissions to be served and filed by October 7, 2010;

ii. the Respondent's submissions to be served and filed by October 14, 2010;

iii. any reply submissions from the Applicant to be served and filed by October 20, 2010.

[76] A final order will then issue disposing of all matters in this application.

"E. Heneghan"
Judge

St. John's, Newfoundland and Labrador
September 27, 2010

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-771-09
STYLE OF CAUSE:	CHRIS HUGHES v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	December 16, 2009
REASONS FOR ORDER:	HENEGHAN J.
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APPEARANCES:

Chris Hughes	FOR THE APPLICANT (Self-Represented)
Graham Stark	FOR THE RESPONDENT

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