Federal Court		Cour fédérale

Date: 20101223

Docket: T-172-10

[UNREVISED ENGLISH CERTIFIED TRANSLATION] **Citation: 2010 FC 1325**

Ottawa, Ontario, December 23, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

CONSEIL DES MONTAGNAIS DE NATASHQUAN

Applicant

AND

ÉVELYNE MALEC, SYLVIE MALEC, MARCELLINE KALTUSH, MONIQUE ISHPATAO, ANNE B. TETTAUT, ANNA MALEC, ESTELLE KALTUSH

AND

CANADIAN HUMAN RIGHTS COMMISSION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

FACTS

[1] This is an application for judicial review of a decision of the Canadian Human Rights Tribunal (the Tribunal), dated January 27, 2010, which allowed in part the respondents' complaint of discrimination in the course of employment on the basis of their race, contrary to section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act).

[2] The respondents, Évelyne Malec, Sylvie Malec, Marcelline Kaltush, Monique Ishpatao, Anne Bellefleur-Tettaut, Anna Malec and Estelle Kaltush, are Innu from the Montagnais community of Natashquan. All of them work at Uautshitun School, administered by the Conseil des Montagnais de Natashquan (the applicant). All of them hold bachelor's degrees, with the exception of Anne Bellefleur-Tettaut and Sylvie Malec.

[3] Évelyne Malec has been a special education teacher since 2001, with the exception of the 2003-2004 school year, during which she did not work at the school. Anne Bellefleur-Tettaut has taught Innu at the elementary level since 1983, with the exception of the 2003-2004 school year. Sylvie Malec has also taught Innu since January 2003, with the exception of the 2003-2004 school year. Anna Malec has taught at the preschool level since 1985, with the exception of the 2003-2004 school year. Monique Ishpatao has taught at the preschool and elementary level since 1990, with the exception of the 2003-2004 school year. Marcelline Kaltush has been teaching from 1994 to 2007, with the exception of the 2003-2004 school year. Estelle Kaltush was vice-principal from 2003 to 2009. From January to June 2007, she was acting principal.

[4] Uautshitun School is located in the Innu community of Natashquan, on the north shore of the Gulf of St. Lawrence, 376 km east of Sept-Iles, in the province of Quebec. The community is home to about 1,000 people. It is not disputed that all of the respondents lived within a 50-kilometre radius of Uautshitun School, in the Innu community of Natashquan.

[5] In June 2005, the working conditions for employees at Uauitshitun School were set out in a document entitled *Entente intervenue entre le Conseil des Montagnais de Nutashkuan et le personnel de l'École Uauitshitun de Nutashkuan — Convention réciproque de traitement du*

personnel de l'École Uauitshitun de Nutashkuan [Agreement between the Montagnais de Nutashkuan Band Council and Employees at the Uauitshitun School in Nutashkuan – Mutual Agreement on the Treatment of Employees at the Uauitshitun School in Nutashkuan] (the 2005 agreement). This agreement provided for an isolated post allowance to be paid to teaching staff and professional employees who had at least a bachelor's degree (article 6.5), three allowances for "annual outings for employees hired outside a 50 km radius" (article 6.4) as well as a monthly housing allowance (article 8.6).

[6] In 2007, the applicant adopted its *Politique des ressources humaines ─ Personnel de l'école Uauitshitun* [Human Resources Policy—Employees at Uauitshitun School], which replaced the 2005 agreement. This policy also provided for an isolated post allowance for teaching staff and professional employees at the school, but specified that it was for non-resident staff, i.e. whose ordinary and main place of residence is located more than 50 kilometres from Natashquan. This policy also provided for three allowances for annual outings and a monthly housing allowance for non-resident employees.

[7] On April 21, 2007, the respondents filed a complaint with the Canadian Human Rights Commission (the Commission) against their employer, the Conseil des Montagnais de Natashquan, alleging employment discrimination on the basis of their Aboriginal status, contrary to the Act. They claim the applicant's policy on isolated post allowances discriminates against Aboriginal teachers and professional employees because they are not entitled to the same benefits as non-Aboriginal teachers. This complaint was heard before the Tribunal and a decision was rendered on January 27, 2010, allowing the application in part.

[8] The Tribunal determined that the respondents had established a *prima facie* case that, until 2007, they were adversely differentiated against in the course of employment based on their race because the applicant refused to pay them an isolated post allowance when such an allowance was paid to all non-Aboriginal teachers, whether they resided in the community or not. However, this *prima facie* evidence was not established with regard to the allowances for annual outings or the housing allowance.

[9] As for the isolated post allowance, the Tribunal noted that until February 2007, the policy made no distinction between teachers who lived in the Innu community and those who lived outside but that the allowance was nonetheless paid only to non-Aboriginal teachers, although it had once been paid to a teacher who had acquired Aboriginal status under the *Indian Act*, R.S.C. 1985, c. I-5. After 2007, the policy clearly distinguished between those employees living outside of the community and those living within the community. The Tribunal then determined that the applicant could not justify the existence of this unfair treatment and therefore could not rebut the presumption that the respondents had been discriminated against on this ground.

[10] However, the evidence did not support the respondents' allegations that the applicant had retaliated against them following the filing of the complaint, contrary to section 14.1 of the Act.

[11] The Tribunal determined that, for the years leading up to 2007, the respondents were entitled to the isolated post allowance, which the discriminatory practice had deprived them of. The amount of compensation was determined according to each respondent's particular situation. The Tribunal also ordered that each respondent be paid $500 in compensation for pain and suffering.

PARTIES' POSITION

[12] The applicant submits that the Tribunal erred in determining that the applicant was not able to justify the purpose of the isolated post allowance and rebut the *prima facie* evidence of discrimination when it is clear from the testimony that the purpose of this policy was the need to recruit teaching staff from outside the Natashquan region. The respondents had not been discriminated against based on their race because evidence had been adduced showing that Geneviève T. Néashit also received an isolated post allowance even though she had Aboriginal status.

[13] In addition, it was unreasonable for the Tribunal to have awarded isolated post allowances to Sylvie Malec and Anne B. Tettaut, who did not have bachelor's degrees when, under article 6.5 of the 2005 agreement, a bachelor's degree was required in order to receive this allowance. In a similar vein, Marcelline Kaltush was not entitled to the isolated post allowance for employees with dependent children because the children she was caring for were her niece and nephew, not her biological children. Article 3.15 of the 2005 agreement states that the dependent child must be the employee's child.

[14] The Tribunal also erred when it awarded the respondents over three years of retroactive isolated post allowances. Article 2925 of the *Civil Code of Québec* sets a three-year limitation period for any action to enforce a personal right or movable real right. Under section 8.2 of the *Interpretation Act,* R.S. (1985) c. I-21, this limitation period in the *Civil Code* applies to the case at bar. It should have also considered the fact that all of the respondents, except for Évelyne Malec and Marcelline Kaltush, were not working at the school in 2003-2004.

[15] The respondents submit that the Tribunal did not err in finding that there was discrimination on the basis of race. Geneviève T. Néashit was a non-Aboriginal and had acquired her status through marriage. Furthermore, the evidence showed that the entire group of Aboriginal residents was not receiving this isolated post allowance while non-Aboriginal residents were receiving it. The Tribunal reasonably found that by refusing to pay the isolated post allowance to a clearly identified group, the applicant was discriminating against that group.

[16] Nor did the Tribunal err when it found that the applicant had not provided a bona fide justification for its refusal to pay the respondents the isolated post allowance. The isolated post allowance could not have been based on the need to recruit teaching staff from outside the Natashquan region since there is no mention of this in article 6.5 of the 2005 agreement. Moreover, as the Tribunal noted in its decision, a new policy was adopted in 2007 in order to add the ordinary and main residence criterion as a requirement for the allowance, which confirms the fact that this criterion did not exist before that date.

[17] The Tribunal was also justified in awarding an isolated post allowance to Sylvie Malec and Anne B. Tettaut, even though they did not have bachelor's degrees. It considered the fact that it is impossible to obtain a bachelor's degree in Innu because no universities offer this kind of degree program. It was therefore reasonable for it to recognize the experience and equivalent qualifications of these two teachers. In addition, there was no termination of the employment relationship between the respondents and the applicant. The respondents had signed releases indicating that they would all be reinstated in their teaching positions at the start of the 2004 school year. Reinstatement presupposes regaining all of their rights as teachers.

[18] For its part, the Commission argues that the Tribunal did not err when it awarded the respondents a 17-year retroactive isolated post allowance, pursuant to paragraph 53(2)(*b*) of the Act. According to *Robichaud v. Canada (Treasury Board),* [1987] 2 SCR 84, at para 13, remedies must be effective and consistent with the "almost constitutional" nature of the rights protected.

[19] The three-year limitation period set out in the *Civil Code* does not apply here: human rights legislation does not create a common-law cause of action (*Chopra v Canada (Attorney General*), 2007 FCA 268, [2007] FCJ No 1134). It can also be inferred that this legislation does not create a right to seek redress under civil law. Furthermore, it is for the Tribunal to determine when the discriminatory practice began and ended. Therefore, there is causal link between the discriminatory policy and the losses incurred by the respondents that justifies the payment of compensation for the entire employment period.

ISSUES

[20] The following issues arise from this matter:

(1) Did the Tribunal err by finding that the respondents had been discriminated against based on their race?

   (a) Did the Tribunal err by determining that the respondents had established a *prima facie* case that they had been discriminated against in the course of employment?

   (b) Did the Tribunal err by finding that the applicant had not provided a bona fide justification for refusing to pay the respondents the isolated post allowance?

(2) Did the Tribunal err by awarding the isolated post allowance to the respondents?

(a) Did the Tribunal err by awarding isolated post allowances to the two respondents who did not have bachelor's degrees and awarding another respondent the isolated post allowance for employees with dependent children?

(b) Did the Tribunal err by awarding retroactive isolated post allowances to the respondents?

STANDARD OF REVIEW

[21] As this Court noted in *Sadi v Canada (Canadian Human Rights Commission)*, 2006 FC 1067, [2006] FCJ No 1352 at para 14, the Tribunal has experience and expertise in human rights. In this regard, considerable deference is owed.

[22] The Court must also show deference to an administrative tribunal when it makes a decision on matters within its enabling statute, as is the case here (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 147; *Public Service Alliance of Canada v Canadian Federal Pilots Association and Attorney General of Canada*, 2009 FCA 223, [2009] FCJ No 822 at para 36). Therefore, all of the issues are reviewable on a standard of reasonableness.

ANALYSIS

(1) Did the Tribunal err by finding that the respondents had been discriminated against based on their race?

[23] Under paragraph 7(*b*) of the Act:

Employment	**Emploi**
7. It is a discriminatory practice, directly or indirectly: … (*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 : … *b*) de le défavoriser en cours d'emploi.

[24] The Supreme Court of Canada established that it was necessary to adopt a unified approach to adjudicating human rights complaints. When there is a complaint of discrimination, the plaintiff must establish *prima facie* evidence of discrimination. Once this evidence is established, the onus shifts to the defendant to prove, on a balance of probabilities, that the discriminatory practice has a bona fide and reasonable justification *(British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*]; *British Columbia* (*Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*].

(a) Did the Tribunal err by determining that the respondents had established a *prima facie* case that they had been discriminated against in the course of employment?

[25] In *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536, the Supreme Court of Canada defined what constitutes *prima facie* evidence in employment discrimination:

> The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

[26] In the case at bar, the Tribunal found that the respondents had established a *prima facie* case that they had been discriminated against in the course of employment on the basis that the applicant refused to pay them an isolated post allowance. In coming to this conclusion, the Tribunal took into consideration the fact that the 2005 agreement made no distinction between teachers living in the community and those living outside the community and made no mention of the allowance being used to recruit or facilitate the recruitment of teachers from outside the community.

[27] Only the testimony of Geneviève Taschereau Neashit, whose Aboriginal status had been acquired through marriage while the respondents are all Aboriginal by birth, was not accepted by the Tribunal, which determined that the respondents were a distinct group at risk of discrimination based on their race.

[28] The finding that the respondents had established a *prima facie* case that they had been victims of discrimination was based both on their testimony and on the documentary evidence which showed that this isolated post allowance had not been paid to them when it was being paid to non-Aboriginal teachers living in the community.

[29] Thus, in the absence of proof to the contrary and to the extent that the evidence is credible, this evidence is complete and sufficient to justify a verdict in the complainants' favour in the absence of an answer from the employer. The Tribunal's finding was therefore reasonable and fell within a range of possible acceptable outcomes, having regard to the facts and law.

(b) Did the Tribunal err by finding that the applicant had not provided a bona fide justification for refusing to pay the respondents the isolated post allowance?

[30] Once this *prima facie* evidence is established, the onus shifts to the applicant to prove that there was no discrimination against the respondents or that the discriminatory practice or policy was justified. The test established by the Supreme Court in *Meiorin*, above, at para. 54, applies to the case at bar:

> Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> 1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> 2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
> 3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. …

[31] In this regard, the Tribunal determined that no evidence had been adduced by the applicant to justify why this allowance had not been paid to the respondents:

> The burden is now on the respondent to show, on a balance of probabilities, that there was a *bona fide* justification to deny the complainants the isolated post allowance. The respondent did not submit any evidence to justify this unfair treatment. Moreover, the respondent did not submit any evidence to show that the treatment was due to the permanent residence of the recipients rather than their race/ethnic origin or national origin. The so-called "admissions" by the complainants have no probative value that would allow such a conclusion or practice. (Tribunal's decision, at para 45). [Emphasis added.]

[32] However, it is not true that the employer failed to submit any evidence to justify the isolated post allowance policy**.** The Tribunal failed to take into account the testimony of André Leclerc, the former principal of Uauitshitun School. Mr. Leclerc had also contributed to the writing of a report on that school entitled *Rapport d'évaluation des services éducatifs de l'école Uauitshitun de Nutashkuan* [Report on the Assessment of Educational Services at Uauitshitun School in Nutashkuan]. He therefore has undeniable expertise in matters relating to the school. During his testimony, when explaining the purpose of the isolated post allowance, Mr. Leclerc stated:

> [TRANSLATION]
>
> I … it is to bring in…it is to bring in staff in the hope that they would stay, to avoid…To try and find competent staff first, on the one hand, and to try and ensure some kind of continuity, then to try and get them to stay with us.

[33] The Tribunal, without a valid reason, also failed to assign any probative value to Ms. Malec's admission, during cross-examination, that her spouse, who was non-Aboriginal but living in the community, had received an isolated post allowance because he had been living outside the community at the time he was hired:

> [TRANSLATION]
>
> Well, I'll tell you why, because it's non-Aboriginal teaching. They hired him on (inaudible) it was in Quebec City, that's why he got the allowance.

[34] Nor did the Tribunal examine the statement by Geneviève T. Néashit, an Aboriginal who acquired her status through marriage, who explained that she received the allowance because she lived outside the community:

> [TRANSLATION]
>
> Q: Are you entitled to an allowance?
>
> A: Yes.
>
> Q: And what kind of allowance are you entitled to?
>
> A: To that isolated post allowance, because I was not living at home… .

[35] The Tribunal should have considered all of the testimony that explained that the purpose of the isolated post allowance was to attract professional and teaching staff who were from outside the community of Natashquan at the time of hiring, and then to retain that staff.

[36] It is one thing to say that a piece of evidence is insufficient to overturn a *prima facie* case of discrimination, but it is quite another to completely ignore, as is the case here, the evidence of bona fide justification that had been submitted. The Tribunal should have taken the applicant's explanations into account and then decided whether, under the applicable case law and having considered the totality of the evidence, these explanations were sufficient to overturn the *prima facie* case of discrimination.

[37] The Tribunal's finding regarding the lack of bona fide justification is therefore unreasonable and does not fall within the range of possible acceptable outcomes which are defensible in respect of the facts and law. Therefore, there is no need to assess the reasonableness of the compensation awarded by the Tribunal to the respondents.

CONCLUSION

[38] For all these reasons, the application for judicial review is allowed. The decision is set aside and the matter referred back to a member or panel of the Canadian Human Rights Tribunal for redetermination in accordance with these reasons.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed, that the decision be set aside and the matter be referred back to a member or panel of the Canadian Human Rights Tribunal for redetermination in accordance with these reasons**.** With costs.

"Danièle Tremblay-Lamer"

Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-172-10
STYLE OF CAUSE:	CONSEIL DES MONTAGNIAS DE NATASHQUAN Applicant **ÉVELYNE MALEC, SYLVIE MALEC, MARCELLINE KALTUSH, MONIQUE ISHPATAO, ANNE B. TETTAUT, ANNA MALEC, ESTELLE KALTUSH** **AND** **CANADIAN HUMAN RIGHTS COMMISSION** Respondents
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