

Federal Court



Cour fédérale

**Date: 20110708**

**Docket: T-1190-10**

**Citation: 2011 FC 839**

**Ottawa, Ontario, July 8, 2011**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Applicant**

**and**

**WILLIAM G.M. SHMUIR and  
CARNIVAL CRUISE LINES**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Applicant, the Canadian Human Rights Commission [the Commission], applies judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. This application relates to a decision of the Canadian Human Rights Tribunal [the Tribunal] dated June 24, 2010 in which it dismissed the complaint filed by William G.M. Shmuir [the Complainant]. The Tribunal determined that the Respondent, Carnival Cruise Lines [Carnival], had not contravened section 7(a) of the

*Canadian Human Rights Act*, RSC 1985, c H-6 [the Act]. The Complainant did not participate in this application.

[2] For the following reasons, the application will be dismissed.

### **The Facts**

[3] The Complainant is visually-impaired. On October 11, 2006, he attended a job fair hosted by Carnival. Its aim was to recruit employees for the shipboard position of Corporate Trainer [the Position]. The Complainant was accompanied to the fair by his friend Mr. Bishop.

[4] The job fair began with presentations about Carnival and about the Position. Thereafter, a basic skills test was administered [the Test]. The Test was composed of multiple-choice questions which applicants answered by darkening small circles on an answer sheet. After the Test, participants were to be interviewed individually.

[5] As the Test was being distributed, the Complainant raised his hand and informed one of Carnival's representatives, Mr. Nelson, that he was unable to take the Test as a result of his disability. As the other applicants were beginning the Test, Mr. Nelson asked the Complainant to step out into the hallway. They then had a discussion [the Hallway Discussion], following which the Complainant left the job fair rather than take the Test and attend an interview. The parties agree that the Hallway Discussion dealt with the Coast Guard's requirements for cruise line employees and shipboard safety. As well, according to Mr. Nelson, the Hallway Discussion also involved

Carnival's refusal to allow the Complainant to bring Mr. Bishop on board the ship to assist him if he secured the Position. However, the Complainant denies making such a request.

[6] Five months later, on March 21, 2007, the Complainant filed his complaint, alleging that Carnival had discriminated against him on the basis of his visual impairment. Following an investigation by the Commission, the Tribunal heard the complaint from January 18 to 21, 2010. There is no transcript of the hearing, but it is agreed that it included three days of evidence and a fourth day of argument.

[7] The Tribunal summarized the Complainant's evidence about the Hallway Discussion as follows:

Mr. Nelson told Mr. Shmuir that as a consequence of regulations related to cruise ships at sea, Coast Guard inspections and various problems that he would encounter on board including seeing the various signs, he would not be able to qualify for the job as a Corporate Trainer because of his visual impairment. Mr. Nelson asked Mr. Shmuir to leave. Mr. Shmuir told Mr. Nelson that in 90% of his job applications he was denied opportunities because of his sight impairment. After he was told to leave by Mr. Nelson, Mr. Shmuir and Mr. Bishop went into the room and got their coats and then left. They were followed by two men in dark suits who appeared to be escorting them out of the hotel to the street at very close quarters. He felt that the experience of being asked to leave and being followed out of the building was demeaning and made him feel like a second class citizen. He did not ask Mr. Nelson whether Mr. Bishop could join him on the cruise ship to attend and assist him with his job.

[8] The Tribunal then summarized Mr. Nelson's evidence about the Hallway Discussion:

Mr. Nelson spoke with Mr. Shmuir in the hallway and tried to explain to him some of the challenges he might face with his visual impairment in doing the job as a Corporate Trainer on board a cruise ship at sea. He mentioned the Coast Guard inspections, regulations

and requirements and signage. He told Mr. Shmuir that it was his choice as to whether or not he wanted to pursue this job opportunity. He did not ask him to leave or discourage him from continuing to participate in the process in any way and, in fact, specifically asked him if he wanted to continue. Mr. Shmuir did not ask Mr. Nelson to accommodate him in the writing of the test. Mr. Shmuir asked Mr. Nelson whether Mr. Bishop would be allowed to join him on board the ship in order to assist him and Mr. Nelson told him that would not be possible. Mr. Shmuir indicated to Mr. Nelson that he did not want to continue with the application process and that he wanted to leave. He thanked Mr. Nelson for the information. Mr. Shmuir and Mr. Bishop went into the room and got their coats and left without anyone following them.

[9] These summaries show that the evidence of the Complainant and of Carnival diverged on the following significant issues:

- Whether the Complainant was told that he would not be suitable for the Corporate Trainer position because of his disability;
- Whether the Complainant was allowed to choose whether to continue with his job application; and
- Whether the Complainant was asked to leave the job fair.

### **The Decision**

[10] The Commission made it clear in its oral submissions on this application that it does not dispute the Tribunal's findings of fact. These include:

- A finding that Mr. Nelson did not discourage the Complainant from continuing his attendance at the job fair but instead indicated that he could continue with the hiring process;

- A finding that Mr. Nelson did not ask the Complainant to leave the job fair but rather asked him if he chose to continue the hiring process;
- A finding that no men in dark suits were present so, by necessary implication, the Complainant was not followed by men of that description as he left the job fair;
- A finding that the Complainant left the job fair voluntarily and that he terminated his employment application;
- A finding that, had the Complainant asked to take the Test, he would have been accommodated.

[11] These findings make it clear that the Tribunal did not find the Complainant to be a credible witness.

### **The Issues**

[12] Although the Commission's written submissions identify two issues, it seems, following oral argument, that the following five questions require resolution:

- 1) Is there an inconsistency between the Tribunal's finding of *prima facie* discrimination and its finding that section 7(a) of the Act had not been breached?
- 2) Did the Tribunal err in considering Carnival's intention?
- 3) Did the Tribunal fail to consider indirect discrimination?

- 4) Was it unreasonable for the Tribunal to conclude that the Act had not been breached given Carnival's failure to accommodate as soon as the disability was disclosed?
- 5) Was Carnival required to inform the Complainant during the Hallway Discussion that accommodation, perhaps by individual assessment, might be available if required later in the hiring process?

### **The Standard of Review**

[13] The parties agree, as do I, that the standard of review is reasonableness (see *Brown v Canada (National Capital Commission)*, 2009 FCA 273, 394 NR 348 at para 5 and *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 54).

### **Discussion**

- 1) **Is there an inconsistency between the Tribunal's finding of *prima facie* discrimination and its finding that section 7[a] of the Act had not been breached?**

[14] The Commission submits that, because the Tribunal found that the Complainant had shown a *prima facie* case, this finding meant that it accepted his evidence that he was asked to leave and could not continue with his job application because of his disability. The Commission then submits that the Tribunal's finding that section 7[a] of the Act had not been breached because he left voluntarily was inconsistent with the initial determination and is therefore unreasonable.

[15] However, it is important to recall that there are two stages in a discrimination analysis. The first is to determine whether a complainant has established a *prima facie* case. This stage was explained by the Supreme Court of Canada in *Ont Human Rights Comm v Simpson-Sears*, [1985] 2 SCR 536, 23 DLR (4<sup>th</sup>)321 at paragraph 28:

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.

[My emphasis]

[16] Once the Complainant shows a *prima facie* case, the respondent's evidence is then considered before a final determination is made. At this second stage, the burden of proof shifts to the respondent, who must either disprove or explain the impugned behaviour.

[17] In my view, it was open to the Tribunal to accept the Complainant's unchallenged evidence for the purpose of establishing a *prima facie* case. However, once the Complainant's evidence was challenged and found to lack credibility, the Tribunal was entitled to reject the facts which had initially supported the *prima facie* case.

[18] Accordingly, in my view, the inconsistency identified by the Commission is not unreasonable.

## 2) Did the Tribunal err in considering Carnival's intention?

[19] The relevant portion of the Decision is paragraph 26. It is the last paragraph in the section of the Decision entitled “Findings of Fact” and it reads as follows:

I accept the evidence of Mr. Nelson that it did not discourage Mr. Shmuir from continuing his attendance at the job fair and that he did not ask him to leave. Mr. Nelson was an excellent witness who was very clear in his evidence. He is very experienced in his job. Mr. Shmuir seemed to have some difficulty in remembering events. For example, after mentioning that he had applied for a number of positions he could not actually specify any positions that he had applied for in particular other than one. His story about the two men in dark suits and the unidentified “Afro-American” man seemed improbable to me. None of these individuals were identified by Mr. Nelson or Ms. Barton as being present and one would hardly expect such people to be hired for security or similar purposes for a job fair for a corporate trainer position. In my view, Mr. Nelson tried to properly advise Mr. Shmuir about what he might face on board a cruise ship at sea as a Corporate Trainer who was visually impaired. I believe that had he been asked to accommodate Mr. Shmuir in the writing of the test he would have done so. If Mr. Nelson had truly been inclined to discriminate against Mr. Shmuir on the basis of his disability he could easily have had Mr. Shmuir continue to participate at the job fair and then allow the medical testing or the assessment of his qualifications and experience for the job to end his application. I believe that Mr. Shmuir’s decision to leave the job fair was completely voluntary and at that point he himself ended his application for employment. Ms. Marton, who was also a credible witness, corroborated Mr. Nelson’s account of the events at the job fair.

[My emphasis]

[20] The underlined passage is the one the Commission says shows that the Tribunal erred in treating Carnival’s intention as a necessary element of a finding of discrimination.

[21] However, this submission is not borne out by the Tribunal’s ultimate conclusion. In paragraph 31 of the Decision, the Tribunal found that the Complainant terminated his employment application voluntarily before Carnival could decide whether or not to offer him employment.



[22] Given this conclusion, the Tribunal's speculation about how Carnival could have discriminated against the Complainant had it wished to do so, is of no import.

**3) Did the Tribunal fail to consider indirect discrimination?**

[23] The Complainant framed his case as one of direct discrimination. The Decision shows that he testified that he was told that "he would not be able to qualify for the job as a Corporate Trainer because of his visual impairment." He also said that he was then asked to leave. Notably, he did not allege that he was discouraged and chose to leave because of the Hallway Discussion.

[24] Nevertheless, the Tribunal did consider whether the Hallway Discussion amounted to indirect discrimination and held that Carnival did not discourage the Complainant. Given this finding, which is not in dispute, the Commission cannot succeed on this issue.

**4) Was it unreasonable for the Tribunal to conclude that the Act had not been breached given Carnival's failure to accommodate as soon as the disability was disclosed?**

[25] This issue is framed in a way that suggests that Carnival failed to accommodate as soon as the Complainant made his disability known. However, the facts found by the Tribunal do not support this suggestion. As soon as the Complainant raised his disability, he was asked to step into the hallway. This was a reasonable course of action because it meant that other candidates who had started the test would not be disturbed.

[26] Since the Tribunal accepted Carnival's evidence about the Hallway Discussion which followed and concluded that the Complainant was not discouraged and voluntarily terminated his employment application, I can discern no failure to accommodate. Accordingly, the Commission cannot succeed on this issue.

**5) Was Carnival required to inform the Complainant during the Hallway Discussion that accommodation, perhaps by individual assessment, might be available if required later in the hiring process?**

[27] Both the Complainant and Mr. Nelson agree that the Hallway Discussion began with a conversation about the Coast Guard, signage regulations and the problems or challenges the Complainant might face due to his inability to read signs aboard ship.

[28] However, their evidence then diverged. The Complainant was not believed when he said he was told he could not qualify for the job due to his visual impairment and was asked to leave. Mr. Nelson was believed when he said that he told the Complainant he could continue with his job application and asked him if he wished to do so. The Tribunal concluded that this evidence showed that, had the Complainant expressed a desire to continue he would have been accommodated in writing the Test.

[29] In the circumstances, there was no need to forecast the kinds of accommodation that might be made available in the future. The Complainant was not yet eligible to be offered a position. He had not passed the Test and had not been interviewed.

[30] Accordingly, on the facts of this case, it would have been premature to mention the possibility of individual assessment during the Hallway Discussion and there was no onus on Carnival to do so.

## **CONCLUSION**

[31] Given the findings of fact which are not impugned and for the above reasons, the Decision is reasonable.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that** this application for judicial review is dismissed with costs to the Respondent Carnival. It is to submit a bill of costs to the Commission, under column III in the tariff. If an agreement cannot be reached about a lump sum payment by the Commission to Carnival, it may contact the Registry about a date on which I will hear submission about costs via teleconference.

“Sandra J. Simpson”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1190-10

**STYLE OF CAUSE:** Canadian Human Rights Commission v Shmuir et al

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** March 17, 2011

**REASONS FOR JUDGMENT:** SIMPSON J.

**DATED:** July 8, 2011

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