

Federal Court



Cour fédérale

Date: 20111017

Docket: T-100-11

Citation: 2011 FC 1171

Ottawa, Ontario, October 17, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

CAM LINH TRAN

Applicant

and

**ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR ORDER AND ORDER

[1] In December 2003, Ms. Tran complained to the Canadian Human Rights Commission that the Canadian Customs and Revenue Agency (CCRA) (later divided into the Canada Revenue Agency and the Canada Border Services Agency) did not hire her despite her superior qualifications. Her complaint was that she was not hired because of her race, colour, national or ethnic origin (Chinese Canadian born in Vietnam) and/or her family status as her brother-in-law, Chris Hughes, was a CCRA employee who was allegedly a thorn in its side. If so, she was adversely discriminated against within the meaning of the *Canadian Human Rights Act*.

[2] Her complaint related to three competitions; two for positions at the Vancouver Island Tax Services Office and the other with Customs. The complaint was broken down into six specific allegations. The investigator who was appointed issued a report in 2005. He recommended that the Commission dismiss the complaint. It did so. Ms. Tran did not apply to this Court for a judicial review of that decision.

[3] In January 2010, she wrote to the Commission with the request that her complaint be reopened. In her letter she said there had been no reason to seek a judicial review as the report indicated that her marks were not high enough compared to other candidates and it had been found that there had been no under representation of visible minorities in Victoria which might have brought “employment equity” into issue as a placement criteria.

[4] However, Ms. Tran also indicated that in her research into another complaint against Canada Revenue Agency, she obtained information via the *Privacy Act* and concluded that the Commission’s investigation report was incorrect based on evidence provided by the CCRA. She said that some of the information had been “fabricated/falsified”.

[5] In December 2010, the Commission refused to reopen the matter. It acknowledged it had the power to reconsider its decisions, a power that is to be used sparingly in exceptional and rare circumstances (*Merham v Royal Bank of Canada*, 2009 FC 1127, 358 FTR 101, [2009] FCJ No 1410 (QL)). It was of the view that the circumstances did not justify a reopening.

[6] The Commission noted that while there is no time limit on an application to reopen, nevertheless that is a factor to take into account. The initial allegations went back approximately ten years, and the Commission's decision to dismiss the complaint had been in place for some four years.

[7] As to "fabricated/falsified" evidence, Mr. Hughes, who later submitted material on Ms. Tran's behalf, alleged that a document was "accidentally or deliberately switched". This suggested to the Commission that even he had some doubt as to whether there had been a deliberate attempt to falsify documents.

[8] In any event, the Commission was not persuaded that the outcome would have been different in that she had qualified and had ultimately been offered employment.

[9] It is this refusal of the Commission to reconsider its earlier decision which is the subject of this judicial review.

THE FEDERAL COURT HEARING

[10] On 30 August, the hearing was set down to take place in Victoria on 6 October. A few days prior thereto, Ms. Tran wrote to the Court to say, among other things, she had a newborn baby and would not be able to attend the hearing, which she nevertheless asked to proceed. She would rely on her written submissions.

[11] Not wishing to deprive Ms. Tran of the opportunity to make oral representations, if she wanted, I invoked rule 32 of the *Federal Courts Rules*, which allows for remote conferencing and directed that the hearing take place by teleconference, with counsel for the respondent remaining in her office. The direction specifically stated “Ms. Tran may, if she wishes, participate by telephone.”

[12] On 5 October, she again wrote to the Court to say that she would not attend the teleconference. The parties also exchanged written representations with respect to costs.

[13] The hearing proceeded by teleconference as directed. Ms. Tran’s brother-in-law, Mr. Hughes, was present, but simply as a member of the public.

THE DECISION

[14] I have decided to dismiss this application for judicial review.

[15] The circumstances are far from compelling. If an error had been made in switching criteria, there is no evidence whatsoever to support Ms. Tran’s suspicions that this switch was based on a prohibited ground of discrimination.

[16] Although there were a number of criteria which had to be satisfied to get into the pool in the first place, actual job offers were based on two criteria: “ability to research and apply information” and “effective interpersonal skills”. The most qualified candidates were identified in order of their total scores. Some who were offered jobs, declined.

[17] According to the investigator's report, the first criteria, "ability to research, interpret and apply information", was based on 10. Sixteen candidates scored 10 out of 10. Ms. Tran scored 8. On the second criteria, "effective interpersonal skills", the marks were based on 30. The scores ranged from 20 to 29. Ms. Tran had 23.

[18] As reported by the investigator, Ms. Tran provided a rating document she obtained by an Access to Information Request. This showed she had 86 out of 100 for "effective interpersonal skills".

[19] Right there, she should have spotted a problem and taken it up when the investigator's report was circulated, and before the Commission made its decision. Not only is 86 out of 100 better than 23 out of 30, but if the total score was to be based on 110 (10 plus 100), rather than 40 (10 plus 30), her overall mark would obviously have been better.

[20] The document she obtained via Access to Information in January 2010 is a spreadsheet entitled "Report on Selection Board Findings". There are ten columns of access criteria. Handwritten abbreviations were added to all ten. What appear to be at issue are columns 2, 6 and 8. It is common ground that column 2 was "ability to research, interpret and apply information", and was based on 10. Column 8 bears the notation "EIS", *i.e.* "effective interpersonal skills". It shows a range of scores from 20 to 29. Ms. Tran's was 23.

[21] However, column 6, bearing the handwritten notation “initiative” shows scores running from 42 to 99. Ms. Tran had 86. This report is dated 25 January 2001, while the rating document which showed Ms. Tran to have 86 out of a 100 for “effective interpersonal skills” is dated 11 December 2000. Ten years later, who is to say which document is correct, Ms. Tran works the numbers, somewhat speculatively, to show that her ranking would have improved. Even if that is so, it cannot be said that she was discriminated against on a prohibited ground, as the other candidates would also have been affected, some adversely and others perhaps to their benefit.

[22] Ms. Tran was also unable to accept some job offers from the CCRA because she was then attending school full-time in Vancouver.

[23] Originally Ms. Tran sought to have all her allegations reopened. However, in her letter of 1 October she withdrew her arguments of lack of fair treatment due to being related to Mr. Hughes and the employment equity issue.

[24] In my opinion, it would be highly prejudicial to the CCRA, which no longer exists as such, to revisit events which occurred ten years ago. The corporate memory may well have been lost and witnesses may have retired or died. It would be a hopeless task to establish that an error was made in titling the columns, and that the error prejudiced Ms. Tran, much less prejudiced her on a prohibited ground of discrimination.

COSTS

[25] The Court has considerable discretion when it comes to the award of costs. Ms. Tran submitted that if her application were to be dismissed, no costs should be awarded, or failing that, \$250 lump sum as, to use her words, “the application was very simple and not time consuming”. In my view the case was certainly time consuming. The Attorney General submitted a draft bill of costs for fees \$1,950 plus GST and disbursements of \$632.28. Of the fees, \$390 relate to a contested motion, but one in which the Commission Counsel himself took the lead. Disbursements include copying fees of \$371.26, but no information was given as to how that figure was calculated.

[26] All and all, I consider lump sum costs of \$1,500, including GST, to be appropriate.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that

1. This application for judicial review is dismissed with lump sum costs in favour of the respondent fixed at \$1,500, all inclusive.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-100-11

STYLE OF CAUSE: CAM LINH TRAN v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: OCTOBER 6, 2011

REASONS FOR ORDER AND ORDER: HARRINGTON J.

DATED: OCTOBER 17, 2011

APPEARANCES:

NO ONE APPEARING

FOR THE APPLICANT
(ON HER OWN BEHALF)

Sally Rudolph

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cam Linh Tran

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