

CANADA / JUDGMENT

Canada (Attorney General) v. Brooks

2006 FC 1244

COURT

Federal Court

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Canada (Attorney General) v. Brooks**Court (s) Database****Federal Court Decisions****Date****2006-10-18****Neutral citation****2006 FC 1244****File numbers****T-4-05****Decision Content****Date: 20061018****Docket: T-4-05****Citation: 2006 FC 1244****Ottawa, Ontario, October 18th, 2006****PRESENT: The Honourable Mr. Justice Kelen****BETWEEN:**

Attorney General of Canada

Applicant

and

Cecil Brooks and

Canadian Human Rights Commission

Respondents

Docket: T-534-05

BETWEEN:

Cecil Brooks
Applicant
and
Attorney General of Canada
Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This case involves two related applications for judicial review of decisions of the Canadian Human Rights Tribunal (the Tribunal). The decisions relate to a complaint of racial discrimination brought under the Canadian Human Rights Act, R.S.C. 1985, c. H-6 (the Act) against the Department of Fisheries and Oceans (the DFO) by Mr. Cecil Brooks. The Tribunal first decided that DFO discriminated against its employee Mr. Brooks on account of race. The second decision was to decline to consider the remedies sought by Mr. Brooks, namely reinstatement and back pay. The Attorney General of Canada (the AGC) seeks to set aside the first decision, and Mr. Brooks applies for a review of the second decision. These reasons apply to both applications.

Background

[2] Cecil Brooks is a black man who was first employed by the Coast Guard through the DFO on a temporary basis in 1988. He continued to work at various times for the Coast Guard until 1997. In 1997, Mr. Brooks filed with the Canadian Human Rights Commission (the Commission) a complaint under s. 7 of the Act, which provides:

PART I

PROSCRIBED DISCRIMINATION

[...]

Discriminatory Practices

[...]

Employment

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.

PARTIE I

MOTIFS DE DISTINCTION ILLICITE

[...]

Actes discriminatoires

[...]

Emploi

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.

[3] Mr. Brooks' complaint before the Tribunal raised three allegations. He first alleged that he was treated unfairly since 1988 in the course of his employment with the Coast Guard. The second allegation related to an eligibility list drawn up in 1989. Mr. Brooks alleged that the DFO appointed two stewards from the eligibility list after it expired. Both stewards were white. The third related to a job competition in 1992 in which Mr. Brooks ranked thirteenth. Only the top three candidates in the 1992 competition obtained permanent positions. The top three candidates were white.
The Decision Under Review

[4] The Tribunal conducted a hearing of Mr. Brooks' complaint over 20 days between March 22, 2004 and July 8, 2004. At the request of Mr. Brooks, the hearing was bifurcated between liability and remedy. The Tribunal issued its decision on December 3, 2004 with respect to liability. The Tribunal dismissed the first and second allegations but found that Mr. Brooks raised a prima facie case of discrimination in respect of his third allegation. The Tribunal then concluded, based on its assessment of the DFO's rebuttal, that Mr. Brooks' complaint of discrimination had not been rebutted. The Tribunal held at paragraphs 119 and 122:

¶ 119 The evidence supports the Complainant's submission that race had entered the employment process. It may not have been the primary factor, but it was there, in the background. The caselaw has held, since *Holden v. Canadian National Railway Co.* (1990), 14 C.H.R.R. D/12 (F.C.A.), at p. 397, that this is sufficient to establish discrimination.

[...]

¶ 122 Mr. Brooks has waited a long time for some recognition of the problems that existed in the 1992 period. There may still be differences regarding his account of what occurred. The fundamental point is nevertheless clear. The Complainant has established that he was a victim of discrimination.

[Emphasis added]

Before proceeding to the remedy stage of the bifurcated proceeding, the Tribunal advised the parties that the evidence did not establish that Mr. Brooks would have received a permanent position even if the 1992 job competition was conducted in a non-discriminatory manner. Accordingly, the Tribunal held that the remedies of reinstatement and back-pay were precluded by its decision concerning liability.

[5] Following the decision, the Tribunal conducted a teleconference on December 15, 2004 to set the dates for the second part of the hearing with respect to remedies. On February 3, 2005 the Tribunal made a ruling with regard to the issues that should be considered in dealing with remedy. In both the teleconference and the ruling the Tribunal commented on the evidence. Accordingly, the Court is reviewing the main decision dated December 3, 2004, comments made by the Tribunal at the teleconference and the decision of the Tribunal in its ruling dated February 3, 2005.

Issues

[6] This case raises the following issues:

1. Did the Tribunal err in holding that Mr. Brooks established a prima facie case of discrimination?
2. Did the Tribunal err in holding that the DFO failed to rebut the prima facie case of discrimination?
3. Did the Tribunal err in concluding that Mr. Brooks would not have obtained an indeterminate position in the absence of discrimination?
4. Did the Tribunal violate the rules of procedural fairness; i.e., breach its duty to provide Mr. Brooks with a fair hearing regarding the issue of remedy?

Relevant Legislation

[7] The legislation relevant to these applications is the Canadian Human Rights Act, R.S.C. 1985, c. H-6. The relevant excerpts of this Act are set out in Appendix "A" to these Reasons.

Standard of Review

[8] These applications require the Court to review the procedural fairness provided to the parties by the Tribunal at its hearing. Additionally, these applications invite the Court to conduct a substantive review of the Tribunal's final decision. The standard of review applicable to the Court's substantive review will vary depending on the nature of the particular question before the Tribunal.

1. Procedural fairness

[9] The pragmatic and functional analysis is not applied in respect of procedural fairness issues: *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraphs 100-103; *Sketchley*, above, at paragraphs 52-55. The Court, when reviewing a decision challenged on the grounds of procedural fairness, must isolate any act or omission relevant to procedural fairness. This element is reviewed as a question of law. No deference is due. Accordingly, the Tribunal's compliance with the duty of fairness will be reviewed on a standard of correctness.

2. Substantive review

(a) Presence or absence of a privative clause or statutory right of appeal

[10] The first factor in the pragmatic and functional analysis concerns the presence or absence of a privative clause or statutory right of appeal. The Act provides no guidance as to reviews or appeals of the Tribunal's decisions. Accordingly, the first factor of the pragmatic and functional analysis warrants a low level of deference.

(b) Relative expertise

[11] The second factor concerns relative expertise of the decision-maker. As La Forest J. explained in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at paragraph 45:

The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law. [...] These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal.

The second factor therefore favours significant deference on findings of discrimination, and no deference on questions of law.

(c) Purpose of the statute as a whole and the provision in particular

[12] The third factor considers the purpose of the Act as a whole and the particular provision engaged within it. With regard to the purpose of the Act, I adopt the reasons of Linden J.A. in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at paragraph 74:

The purpose of the Act, as set out in section 2, is essentially to prevent discriminatory practices based on a series of enumerated grounds. The protection of human and individual rights is a fundamental value in Canada and any institution, organization or person given the mandate by law to delve into human rights issues should be subjected to some control by judicial authorities.

The particular provisions at issue are section 7 of the Act, which prohibits discrimination on grounds identified in section 3, and section 53, which sets out the scope of remedies open to the Tribunal in respect of a substantiated complaint of discrimination. In my view, the purpose of the Act as a whole and the particular provisions at issue suggest a less deferential standard of review in respect of findings of discrimination, while greater deference is owed in respect of the Tribunal's ultimate choice of remedies.

(d) Nature of the question

[13] The fourth factor addresses the nature of the particular question at issue before the Tribunal. The applications raise three distinct issues for substantive review, and I will address each separately.

(i) Prima facie case of discrimination

[14] The AGC argues that the Tribunal erred in finding that Mr. Brooks established a prima facie case of discrimination. The determination as to whether prima facie discrimination has been established in a particular complaint will in some cases be a

question of mixed fact and law, and in others a question of law: *Sketchley*, above, at paragraph 59. In this case, the question of what constitutes *prima facie* discrimination is not considered in the abstract; it requires an application of legal principles to a unique set of facts as found by the Tribunal. The question is therefore one of mixed law and fact. Having regard to all four factors, the Tribunal's determination of whether *prima facie* discrimination has been established should be reviewed on a standard of reasonableness.

(ii) Failure to rebut the *prima facie* case

[15] The AGC alternatively argues that the Tribunal erred in finding that the DFO did not rebut the *prima facie* case of discrimination. This issue concerns a question of mixed fact and law, albeit a factually intensive one. Having regard to all four factors, I conclude that the standard of reasonableness applies to the Tribunal's finding that the DFO did not rebut the *prima facie* case of discrimination.

(iii) Availability of remedies

[16] Mr. Brooks argues that the Tribunal erred in holding that its ruling concerning liability precluded the availability of reinstatement and back pay remedies. In particular, Mr. Brooks argues that the Tribunal erred in applying the doctrine of *functus officio*. As noted above, the ultimate choice of remedy granted by the Tribunal in the case of a substantiated complaint ought to be granted some deference by a reviewing court. However, it is a legally intensive mixed question of fact and law as to whether the Tribunal had the authority to award a particular remedy given the specific set of facts found by the Tribunal. Therefore, the Tribunal's decision concerning the available scope of remedies will be reviewed on a reasonableness standard.

Analysis

Issue No. 1: Did the Tribunal err in holding that Mr. Brooks established a *prima facie* case of discrimination?

[17] The AGC argues that the Tribunal erred in finding that Mr. Brooks established a *prima facie* case of discrimination.

[18] The AGC argues that the Tribunal erred by importing general findings of workplace discrimination to presume consequences in the 1992 competition despite a lack of evidence of discriminatory conduct in the 1992 competition itself. The AGC further argues that the Tribunal erred by basing its general findings on inadmissible opinion and hearsay evidence and by making patently unreasonable inferences of fact. But for these errors, the AGC argues, Mr. Brooks' complaint would have been dismissed.

[19] The Tribunal found that there were irregularities in the 1992 competition process. The Tribunal also found that there was some discrimination in the Coast Guard's workplace at the time of the competition. The conclusion drawn by the Tribunal—and under challenge by the AGC—is that there was a discriminatory component to the irregularities in the 1992 competition. At paragraph 112 of its decision, the Tribunal states:

There is a context in which the competition occurred, and that context is full of an apprehension that race was a factor in the employment decisions of the [DFO]. No one suggested that this was particularly explicit. It was nevertheless an integral part of the sociology of the situation.

The sociology of the situation notwithstanding, the Tribunal rejected Mr. Brooks' assertion that the competition itself was discriminatory. On December 15, 2004, the Tribunal stated the following during a hearing held by teleconference:

It seems to me – and I am speaking perhaps informally here – but it seems to me that you had a theory of the case, and your theory of the case was that Mr. Brooks should

have essentially won competition, or at least finished high enough in the competition to have been granted an indeterminate or position.

And there were problems with the competition, and since he should have received a position, you essentially wanted to argue that the competition was discriminatory. I rejected that. I didn't accept that view of the facts. I don't think you established that.

My decision was based on the finding that there was favouritism in the competition and that there was a residual element of racism in that favouritism, and I based that on a lot of circumstantial evidence which, in my view, pointed to one thing and that was that there was a very serious problem with racism – that might be saying it too strongly – but that there was a racial element in whatever was taking place in the workplace at the time.

[20] Mr. Brooks argues that the Tribunal's finding of discrimination is consistent with the evidence and relevant jurisprudence. In particular, Mr. Brooks argues that the Tribunal is entitled to draw an inference of discrimination where the evidence offered in support of it makes such an inference more probable than its alternates: *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029, 88 C.L.L.C. 17,006 at paragraph 38491 (Cdn. Human Rights Trib.). Mr. Brooks further argues that it is sufficient to establish that the prohibited ground of discrimination constituted only one among a number of factors leading to the decision subject to complaint: *Almeida v. Chubb Fire Security Division of Chubb Industries Ltd.* (1984), 5 C.H.R.R. D/ 2104 at 2105.

[21] Mr. Brooks identifies two facts found by the Tribunal that suggest subjective criteria were used in the selection process. First, the competition closed on June 15, 1992. Despite this, the first and second ranked candidates submitted their applications on December 8, 1992 and June 23, 1992 respectively. Second, the Tribunal found that the first and second ranked candidates did not meet the advertised prerequisites for the position. These facts, Mr. Brooks argues, trigger a *prima facie* case of discrimination because the fifth and thirteenth ranked candidates were members of a visible minority who applied on time and satisfied the prerequisites.

[22] The legal test for establishing a *prima facie* case of discrimination is set out in the Supreme Court of Canada's judgment in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at paragraph 28 [O'Malley]:

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.

[23] The Ontario Board of Inquiry applied the *prima facie* test in the employment context in *Florence Shakes v. Rex Pak Limited*, [1982] C.H.R.R. D/1001. The test in *Shakes* has been cited with approval by the Federal Court of Appeal in *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para. 18. At para. 8918 of *Shakes*, the Board held: Proof of discrimination is almost invariably by circumstantial evidence. Only rarely at a Board of Inquiry will there be an admission by the respondent or other direct evidence. In an employment complaint, the Commission usually establishes a *prima facie* case by proving (a) that the complainant was qualified for the particular employment; (b) that the complainant was not hired; and (c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (i.e., race, colour, etc.) subsequently obtained the position. If these elements are proved, there is an evidentiary onus on the respondent to provide an

explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred.

[...]

[Emphasis added]

[24] In this case, Mr. Brooks alleged that he was the victim of racial discrimination during the 1992 job competition process. The result of the discrimination, Mr. Brooks alleged, was that he was denied a permanent position with the Coast Guard.

[25] The Tribunal considered the O'Malley test and noted at paragraph 99 of its decision that "this description seems to have been taken from the test for a non-suit, since it suggests that evidence should not be weighed." The DFO argued before the Tribunal that there was no positive evidence of discrimination and, accordingly, no case to meet. In support of this argument, the DFO relied on the Tribunal's earlier decision in *Kibale v. Transport Canada* (1985), 6 C.H.R.R. D/3033, for the proposition that it is not possible to infer discrimination from "an irregularity of outright illegality in the administration of the staffing process of the Public Service of Canada" without some evidence linking the irregularity to a ground of discrimination. The DFO also referred the Tribunal to *Chopra v. Canada* (Dept. of National Health and Welfare) (No. 5) (2001), 40 C.H.R.R. D/396 (C.H.R.T.) and *Singh v. Statistics Canada* (1998) 34 C.H.R.R. D/203 (C.H.R.T.) in support of this principle.

[26] It is clear from the Tribunal record that Mr. Brooks established a prima case for discrimination based on the requirements set out in *Shakes*, above. It was open to the Tribunal to look for additional evidence of discrimination in the operating environment or, as counsel for Mr. Brooks put it in his oral submissions, "the water in which the fish swim".

[27] As noted above, it is well established that circumstantial evidence may be considered in the adjudication of discrimination complaints. Having found that the competition was "manifestly unfair", the Tribunal focussed on determining whether there was "a discriminatory component in the wrongdoing". The Tribunal considered as evidence the perceptions of Mr. Brooks, Ms. Howe—a black woman who ranked fifth in the competition, and numerous minority employees. All shared the belief that racism had permeated the workplace.

[28] At paragraph 110 of its decision, the Tribunal concludes that "impressions, even mere impressions, may have some probative value." In particular, the Tribunal attached weight to Ms. Howe's evidence because she was not a party to Mr. Brooks' complaint and continued to work at the Coast Guard. The Tribunal stated: "She has not let her feelings interfere with her relations with her employer. I found her evidence credible and convincing." On this basis, the Tribunal found at paragraph 112 of its decision that Ms. Howe's testimony, supported by Mr. Brooks' and other minority employees' testimonies, provided some evidence of discrimination.

[29] At paragraph 113, the Tribunal found that the Coast Guard shared the minority employees' concerns about racism. This finding was based on various steps taken by the Coast Guard to ameliorate conditions for minority employees including the implementation of an equity hiring list, the appointment of an equity officer on staffing boards, and the commissioning of a report concerning workplace discrimination. The AGC's argument that this evidence should not be taken as an admission of discrimination is a strong one; however, it was open to the Tribunal to find that these measures represented a recognition by the Coast Guard that there was a problem within the work environment.

[30] The Tribunal identified the evidence supporting Mr. Brooks' discrimination complaint as circumstantial. At paragraph 114, the Tribunal discussed its treatment of circumstantial evidence:

There is a rule regarding circumstantial evidence. As I understand it, it is not enough if circumstantial evidence is consistent with an inference of discrimination. This merely establishes the possibility of discrimination, which is not enough to prove the case. The evidence must be inconsistent with other possibilities.

The DFO argued that the “other possibility” was that the process was corrupted by favouritism rather than by racial discrimination. The Tribunal, however, stated at para. 115: “There is nothing in the fact of favouritism that negates the possibility of discrimination. Indeed, it is in the nature of favouritism to favour some and disadvantage others.” The Tribunal then concluded at paragraph 116 that the evidence was “more than sufficient” to meet the *prima facie* test.

[31] There is no question that the job competition process was flawed. Candidates were “screened in” despite submitting their applications after the deadline and despite not satisfying advertised prerequisites for the steward position. To establish a *prima facie* case, Mr. Brooks must provide some evidence that the DFO racially discriminated against him in the competition process.

[32] It is clear from the Tribunal record that there was circumstantial evidence which, if believed, proved Mr. Brooks’ allegation of racial discrimination in the competition process. I am accordingly satisfied that it was reasonably open to the Tribunal to conclude that Mr. Brooks established a *prima facie* case of discrimination.

Issue No. 2: Did the Tribunal err in holding that the DFO failed to rebut the *prima facie* case of discrimination?

[33] The AGC argues in the alternative that the Tribunal erred in finding that the DFO did not rebut the *prima facie* case of discrimination. The Tribunal stated its findings of discrimination at paragraphs 118 to 122 of its decision:

¶ 118 The Respondent is in the best position to provide an explanation for what occurred. It has simply failed to do so. The only explanation I have really heard is that there was favouritism in the department. This simply shifts the focus of the inquiry. If there was favouritism, as there clearly was, the question is whether there was a racial element in that favouritism. I think this is where the burden falls on the Respondent.

¶ 119 The evidence supports the Complainant’s submission that race had entered the employment process. It may not have been the primary factor, but it was there, in the background. The caselaw has held, since *Holden v. Canadian National Railway Co.* (1990), 14 C.H.R.R. D/12 (F.C.A.), at p. 397, that this is sufficient to establish discrimination.

¶ 120 The respondent did not provide any real explanation of the circumstances before me. The case on the Respondent’s side consisted essentially of denials. The witnesses for the Respondent rejected the allegations of racism. But of course they also rejected the idea that the 1992 competition was corrupted by the politics within the department. Mr. Savoury kept his motivations to himself.

¶ 121 The Respondent has failed to meet its burden in this case. The complaint has accordingly been substantiated.

¶ 122 Mr. Brooks has waited a long time for some recognition of the problems that existed in the 1992 period. There may still be differences regarding his account of what occurred. The fundamental point is nevertheless clear. The Complainant has established that he was a victim of discrimination.

[Emphasis added]

[34] The AGC argues that the Tribunal erred in two respects. First, the Tribunal made an unreasonable finding that the evidence did not constitute a rebuttal of the *prima facie* case and imposed too high a burden on the DFO in that respect. Second, the

Tribunal erred in law by ignoring material evidence and failing to consider the explanations provided by the DFO.

[35] The AGC referred this Court to numerous facts and arguments which, it is argued, the Tribunal failed to consider in reaching its conclusion:

1. Mr. Brooks was contacted and specifically requested to apply for the competition;
2. Mr. Brooks was “screened into” the competition, at which point he was on equal footing with all other candidates since there was no finding of impropriety at the interview and scoring stages of the competition;
3. Any errors committed in the screening of the two top-place candidates affected all remaining candidates, including the ten candidates who placed ahead of Mr. Brooks—all but one of whom were white;
4. The fourth place candidate, a white male, was more adversely affected by the errors than Mr. Brooks;
5. Evidence that persons who were not members of a minority group were similarly affected by alleged wrongdoing is an indication that the matter did not have a discriminatory component;
6. The Coast Guard appointed Rose Lucas, black woman, to the competition board to ensure equal treatment of candidates;
7. Rose Lucas personally knew Ms. Howe, the fifth-place black candidate, whom she “actually grew up with”, and knew Mr. Brooks as an acquaintance with whom she had shared lunch aboard the ship;
8. The competition was a formal scored process based on pre-set questions and answers;
9. Mr. Brooks’ rank in the competition process was the result of his performance in his interview and reference check; and
10. In its closing arguments, the DFO expressly rejected the Tribunal’s suggestion that favouritism affected the job competition process.

[36] The AGC’s arguments that the Tribunal improperly admitted unreliable evidence and failed to consider relevant evidence must fail. The Tribunal’s decision addresses each of the facts and arguments identified by the AGC as having been ignored. The Tribunal is entitled to weigh the evidence before it and draw reasonable conclusions from such evidence.

[37] The AGC also challenges the Tribunal’s admission into evidence of “mere impressions” of some Coast Guard employees. In particular, the AGC objects to the Tribunal’s consideration of a 1991 report prepared by Joan Jones, and the “impressions” of Lisa Howe and Mr. Brooks provided through their testimony.

[38] The AGC’s objection to the Tribunal’s admission of evidence cannot be sustained in light of the discretion granted to the Tribunal under paragraph 50(3)(c) of the Act to:

(c) subject to subsections (4) and (5) [the law of privilege and testimony from conciliators], receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;

c) de recevoir, sous réserve des paragraphes (4) et (5) [les éléments qui, dans le droit de la prevue, sont confidentiels devant les tribunaux judiciaires, et le témoignage d’un conciliateur], des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu’il estime indiqué, indépendamment de leur admissibilité devant un tribunal judiciaire;

After twenty days of hearing evidence and submissions, the Tribunal was not satisfied that the DFO had rebutted Mr. Brooks’ complaint of discrimination. The evidence was open to the Tribunal to weigh. The Tribunal concluded, based on the

evidence before the Tribunal concerning the issues of racism affecting Mr. Brooks' workplace, that race had entered the employment process.

[39] The Tribunal's decision that the DFO discriminated against Mr. Brooks contrary to section 7 of the Act is therefore reasonable.

Issue No. 3: Did the Tribunal err in concluding that Mr. Brooks would not have obtained an indeterminate position in the absence of discrimination?

[40] Mr. Brooks argues that the Tribunal erred in concluding that he would not have obtained an indeterminate position in the absence of discrimination, and thus preventing him from arguing for the remedies of reinstatement or back pay. At paragraph 81 of its decision, the Tribunal stated:

I am not in a position to determine the exact ranking of the candidates. The evidence does not however support Mr. Brooks' contention that he would have finished high enough on the eligibility list to receive an indeterminate appointment.

The Tribunal further stated at paragraph 124 of its decision:

The parties are invited to make submissions on remedy. It may be of assistance to say that I am satisfied, on the evidence before me, that Mr. Brooks would not have obtained an indeterminate position, even if the competition was properly conducted. It is also clear that he refused to sign the proposed conciliation agreement. I would accordingly think that the major issue relates to pain and suffering. There is also the question of costs.

[41] Mr. Brooks argues that the Tribunal erred in applying the wrong legal test in determining whether he could have obtained an indeterminate position in the absence of discrimination. Counsel referred to the Federal Court of Appeal's judgment in *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 and *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569 (F.C.T.D.), per Rothstein J., as he then was. At paragraph 36 of *Morgan*, above, Mr. Justice Marceau stated:

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.

[Emphasis added]

[42] *Morgan*, above, provides that, in proving that a complainant suffered a real loss because of discrimination, the complainant is only required to prove that there was a serious possibility that, but for the discrimination, he would have obtained the position sought. The portions of the Tribunal's decision at paragraphs 81 and 124 excerpted above reveal that the Tribunal required probable evidence that Mr. Brooks "would" have obtained an indeterminate position in the absence of discrimination. Degrees of probability are only relevant in assessing the extent of the damage suffered, which is an issue of remedy.

[43] At the teleconference dated December 15, 2004, counsel for Mr. Brooks advised the Tribunal that it had applied the wrong test in determining whether Mr. Brooks should be reinstated. The Tribunal Member responded that he was fully aware of the correct test when he wrote the decision. Even if the Court could review the transcript

of the teleconference to qualify the decision, it is not clear that the Tribunal Member understood or applied the correct test.

[44] In the ruling with regard to the issues that should be considered in dealing with remedy, dated February 3, 2005, the Tribunal Member once again did not use clear language in considering this issue. At paragraphs 5 and 9 of the ruling the Tribunal Member stated:

¶5. Mr. Brooks should appreciate that I am restricted to the evidence that was put before me. When I confine myself to this evidence, and avoid speculation, I am satisfied that he finished too far down the list for me to realistically find that he would have received a permanent position. The jurisprudence from the Tribunal and the Federal Court on the question of lost wages are of no assistance here. The evidence does not suggest, seriously or otherwise, that Mr. Brooks would have received a permanent position. It suggests that he would not have received such a position.

[...]

¶9. On the request for direction, I think the Tribunal has to send a clear message that it will not be swayed by the Complainant's rather stubborn refusal to accept its decision on liability. My position remains firmly as it was, and I am satisfied, on the evidence before me, that Mr. Brooks would not have received a permanent position. The facts have been decided; the finding has been made; and the doctrine of *functus ex officio* applies. There is nothing more for me to say on the matter.

[45] The Court must conclude that the Tribunal applied the wrong legal test in finding that Mr. Brooks would not have obtained an indeterminate position in the absence of discrimination. The resultant factual finding is therefore unreasonable and must be set aside.

Issue No. 4: Did the Tribunal violate the rules of procedural fairness; i.e., breach its duty to provide Mr. Brooks with a fair hearing regarding the issue of remedy?

[46] Mr. Brooks' submitted that the Tribunal denied him an opportunity to present evidence and speak to the issue of remedy with respect to reinstatement or back pay. Given the Court's conclusion that the Tribunal erred in determining that its ruling concerning liability precluded the availability of reinstatement and back pay remedies, it is unnecessary to consider this issue.

[47] Mr. Brooks did not have the opportunity to argue that the whole competition should be set aside because it was tainted and thus impossible to determine whether there was a "serious possibility" that Mr. Brooks could have obtained an indeterminate position. I am satisfied that Mr. Brooks did not have a fair hearing with respect to this remedy issue.

Conclusion

[48] For the reasons above, I must dismiss the AGC's application under docket T-4-05, allow Mr. Brooks' application under docket T-534-05, set aside the Tribunal's decision that Mr. Brooks would not have obtained an indeterminate position in the absence of discrimination, and refer back this latter decision to a differently constituted Tribunal with instructions to apply the "serious possibility" test described in *Morgan*, above, based on the record before the Tribunal. The Tribunal's decision not to entertain the remedies of reinstatement or back pay is also set aside for re-determination following an assessment of whether there was a serious possibility that Mr. Brooks would have obtained an indeterminate position in the absence of discrimination.

[49] The Court's conclusions are as follows:

1. The Tribunal did not err in holding that Mr. Brooks established a *prima facie* case of discrimination;

2. The Tribunal did not err in holding that the Coast Guard failed to rebut this prima facie case of discrimination. Accordingly, the finding of the Tribunal at paragraph 122 "... the Complainant has established that he was a victim of discrimination." withstands judicial review so that the application by the Attorney General of Canada in Docket T-4-05 must be dismissed with costs to Mr. Brooks;
3. The Tribunal applied the wrong legal test in finding that Mr. Brooks would not have obtained a permanent position in the absence of discrimination. Accordingly, this finding must be set aside and the Tribunal Record referred to a different member of the Tribunal for re-determination; and
4. Before re-determining the issue, the parties should have the opportunity to make representations with respect to the remedy related to this issue. Mr. Brooks never had the opportunity to argue that the whole competition should be set aside because it was tainted by discrimination and thus impossible to determine whether there was a "serious possibility" that Mr. Brooks would have obtained an indeterminate position. Accordingly, the application by Mr. Brooks in Docket T-534-05 is allowed with costs to Mr. Brooks.

JUDGMENT

THIS COURT ADJUDGES AND DECLARES that: The application for judicial review under docket T-4-05 is dismissed; The application for judicial review under docket T-534-05 is allowed, the Tribunal's decision concluding that Mr. Brooks would not have had an obtained an indeterminate position is set aside and remitted for re-determination on the Record by a different Tribunal member with instructions to apply the "serious possibility" test described in the Reasons for Judgment after providing the parties with an opportunity to make submissions; The Tribunal's decision not to entertain the remedies of reinstatement or back pay is also set aside and remitted for re-determination by the new Tribunal member following an assessment of whether there was a serious possibility that Mr. Brooks would have obtained an indeterminate position in the absence of discrimination; and Costs of both applications to Mr. Brooks. "Michael A. Kelen" Judge

Appendix "A" The Canadian Human Rights Act, R.S.C. 1985, c. H-6 PART I PROSCRIBED DISCRIMINATION General Prohibited grounds of discrimination

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. [...] Discriminatory Practices [...] Employment
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. [...] PART III DISCRIMINATORY PRACTICES AND GENERAL PROVISIONS [...] Inquiries into Complaints [...] Conduct of inquiry
50. [...] Additional powers

- (3) In relation to a hearing of the inquiry, the member or panel may [...]
- (c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law; [...] Limitation in relation to evidence
- (4) The member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence. Conciliators as witnesses
- (5) A conciliator appointed to settle the complaint is not a competent or compellable witness at the hearing. PARTIE I MOTIFS DE DISTINCTION ILLICITE Dispositions générales Motifs de distinction illicite
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. [...] Actes discriminatoires [...] Emploi
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. [...] PARTIE III ACTES DISCRIMINATOIRES ET DISPOSITIONS GÉNÉRALES [...] Instruction des plaints [...] Fonctions
50. [...] Pouvoirs
- (3) Pour la tenue de ses audiences, le membre instructeur a le pouvoir : [...]
- c) de recevoir, sous réserve des paragraphes (4) et (5), des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il estime indiqué, indépendamment de leur admissibilité devant un tribunal judiciaire; [...] Restriction
- (4) Il ne peut admettre en preuve les éléments qui, dans le droit de la preuve, sont confidentiels devant les tribunaux judiciaires. Le conciliateur n'est ni compétent ni contraignable
- (5) Le conciliateur n'est un témoin ni compétent ni contraignable à l'instruction. FEDERAL COURT SOLICITORS OF RECORD DOCKET: T-4-05 STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v. CECIL BROOKS AND CANADIAN HUMAN RIGHTS COMMISSION PLACE OF HEARING: Toronto, Ontario DATE OF HEARING: October 10, 2006 REASONS FOR JUDGMENT AND JUDGMENT: KELEN J. DATED: October 18, 2006 APPEARANCES: Mr. Scott E. McCrossin Ms. Melissa R. Cameron FOR THE APPLICANT Mr. Davies Bagambiire FOR THE RESPONDENT CECIL BROOKS SOLICITORS OF RECORD: John H. Sims, Q.C. Deputy Attorney General of Canada FOR THE APPLICANT Davies Bagambiire and Associates

Toronto, ON Dan Pagowski Canadian Human Rights Commission FOR THE RESPONDENT
CECIL BROOKS FOR THE RESPONDENT CANADIAN HUMAN RIGHTS COMMISSION
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