

CANADA / JUDGMENT

Rabah v. Canada (Attorney General)

2001 FCT 1234

COURT

Federal Court

DECIDED

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20011109 Docket: T-1228-99 Neutral citation: 2001 FCT 1234 BETWEEN: AHMED RABAH Applicant

- and - THE ATTORNEY GENERAL OF CANADA Respondent REASONS FOR ORDER
McKEOWN J.

- [1] The applicant seeks judicial review of a decision of the Canadian Human Rights Commission ("the Commission") dated May 10, 1999, dismissing the applicant's complaint of discrimination on the basis of nationality or ethnic origin.
- [2] The issue is whether the Commission erred in dismissing the applicant's complaint pursuant to subparagraph 44(3)(b)(i) of the Canadian Human Rights Act ("CHRA") by failing to adequately investigate the applicant's complaint.

FACTS

- [3] In September 1997, the applicant applied for a position as a Bilingual Program Assistant with Citizenship and Immigration Canada. The applicant was required to participate in a competition with other applicants. He performed sufficiently well in the written aspect of the competition to be invited to an interview intended to assess his ability to communicate orally. A portion of the interview consisted of a role-play to determine the applicant's ability to deal with persons calling for information. The three person panel interviewing him assigned him a failing mark (14/35) in oral communication, thus eliminating him as a possible candidate.
- [4] On November 7, 1997, the applicant filed a complaint with the Commission against the Department of Citizenship and Immigration for refusing to employ him on the basis of national or ethnic origin, in contravention of section 7 of the CHRA. He alleged that the failing mark in oral communication was based on his accent.

- [5] The Investigator's Report, prepared on February 24, 1999, recommended that "the complaint be dismissed because on the evidence the allegation of discrimination is unfounded." In particular, the report stated: The evidence does not support the complainant's allegation that the respondent screened him out of the competition for a CR-05 Bilingual Program Assistant position because of his accent. The evidence shows that sixty-nine (69) candidates were referred by the Public Service Commission for the CR-05 Bilingual Program Assistant position. The complainant was one of thirty-nine (39) candidates who passed the knowledge portion of the competition. They were then invited to an oral interview which was designed to assess a candidate's communication skills. The evidence shows that the 12 candidates who were offered employment received higher scores at the oral stage than the complainant and 26 other candidates were unsuccessful. The report further stated: The respondent's representative denies the allegation of discrimination. She submits that the complainant's accent was not a factor in his being found not qualified for a CR-05 Bilingual Program Assistant term position. She states that it was the complainant's oral communication in its entire context where he was found not qualified. She submits that other candidates interviewed had accents and of the twelve successful candidates, six have accents.
- [6] At paragraphs 14 through 18 of the Investigator's Report, the Investigator specifically considers the "role play" exercise and the Applicant's allegations that one of the three interviewers who played the role of "a client with psychological problems" did not understand the applicant's accent, made fun of him, used profane language and was intimidating.
- [7] In its letter to the applicant May 21, 1999, notifying the applicant of the decision, the Commission stated: Pursuant to subparagraph 44(3)(b)(i) of the Canadian Human Rights Act, the Commission has decided to dismiss the complaint because: the evidence does not support the complainant's allegation that the respondent screened him out of a competition because of his accent; the evidence shows that the successful candidates received higher scores than the complainant in the competition; the evidence does not support the allegation that the respondent failed to qualify the complainant in the CR-05 competition because of his national or ethnic origin.
- [8] At the beginning of the hearing the applicant sought to submit further material which was not before the CHRC. This was dismissed. He also had subsequently obtained information pursuant to the Freedom of Information Act and sought to introduce that as well. This latter information had been provided to him in May 2000 but it was never provided to the respondent. I refused his motion to admit this evidence.

ANALYSIS

- [9] The standard of review of a decision of the Commission on receipt of an investigation report is a highly deferential one. The Commission does not have an adjudicative function, but is an administrative and screening body, whose role it is to decide if an inquiry is warranted through assessing the sufficiency of the evidence before it. See: *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at 891 and *Holmes v. Canada (Attorney General)* (1999), 242 N.R. 148 (F.C.A.).
- [10] In my view there was no reviewable error committed by the Commission in this case. Procedural fairness requires only that the investigator's report address the fundamental or essential aspects of the applicant's alleged incidents of discrimination. Joyal J. in *Robinson v. Canada (Canadian Human Rights Commission) (re Royal Canadian Mint)* (1995), 90 F.T.R. 43 (F.C.T.D.) stated at page 49: In determining the degree of thoroughness of investigation required to be in accordance with the rules of procedural fairness, the interests of the complainant and the respondent must be balanced with the Commission's interest in maintaining an administratively workable system. Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide whether to further investigate accordingly. Only where unreasonable omissions have been made, such as the failure to investigate crucial evidence, is judicial review warranted. ... In this case there are no unreasonable omissions. I also note that *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (T.D.) at 609, aff'd. (1997), 205 N.R. 383 (F.C.A.) establishes that an investigator is not required to address each and every alleged incident of discrimination. In this case the report addressed the essential aspects of the applicant's complaint, and did consider the "role play" exercise.
- [11] This issue was also recently addressed by this Court in *Hedges-McKinnon v. Canada* [2001] F.C.J. No. 1353 (T.D.). Muldoon J. stated at page 7: On judicial review, this Court should intervene only where the decision was based on irrelevant or extraneous factors, or where the discretion was exercised in a discriminatory, unfair, capricious or unreasonable manner.
- [12] In the case before me, the decision was not based on irrelevant or extraneous factors, and the discretion was not exercised in a discriminatory, unfair, capricious or unreasonable manner. The evidence indicated the applicant received a failing mark in his oral interview, that only 12 of the 39 candidates who had an oral interview were offered employment, and that six of the successful candidates had accents. The role playing exercise is addressed in the investigator's report as stated earlier.
- [13] Finally, I note that in another case involving the Canadian Human Rights Tribunal, fresh evidence was not allowed at the judicial review application. Teitelbaum J. stated in *Via Rail Canada Inc. v. Canadian Human Rights Commission and John Mills*, [1998] 1 F.C. 376 at 389: Finally, as a point of law, I should state that the Federal Court Rules [C.R.C., c. 663] do not provide for the introduction of fresh evidence on a judicial review application: *Franz v. Minister of Employment and Immigration* (1994), 80 F.T.R. 79 (F.C.T.D.). There is good reason

for this restraint because as Justice Simpson noted at page 80 in Franz, "judicial review is intended to address errors made during the Board's proceedings". In a similar vein, Justice Muldoon remarked in West Region Tribal Council v. Booth et al. (1992), 55 F.T.R. 28 (F.C.T.D.), at page 35: "This is not an appeal on the record ... but rather a discretionary judicial review upon application to be supported by affidavits".

- [14] Furthermore, as stated by Aronovitch, Prothonotary in Copello v. Canada (Minister of Foreign Affairs), [1999] F.C.J. No. 1664 at paragraph 6: ... It is also important that any supplementary affidavit neither deal with material which could have been made available at an earlier date nor unduly delay the proceedings. The applicant has not satisfied the test in Copello, supra.
- [15] The application for judicial review is dismissed with costs to the respondent. "W. P. McKeown" JUDGE TORONTO, ONTARIO November 9, 2001 FEDERAL COURT OF CANADA Names of Counsel and Solicitors of Record COURT NO: T-1228-99 STYLE OF CAUSE: AHMED RABAH Applicant -and- THE ATTORNEY GENERAL OF CANADA Respondent DATE OF HEARING: THURSDAY, OCTOBER 25, 2001 PLACE OF HEARING: TORONTO, ONTARIO REASONS FOR ORDER BY: MCKEOWN J. DATED: FRIDAY, NOVEMBER 9, 2001 APPEARANCES: Mr. Ahmed Rabah For the Applicant, on his own behalf Ms. Lara Speirs For the Respondent SOLICITORS OF RECORD: Ahmed Rabah 310-291 George Street Toronto, Ontario M5A 2N2 For the Applicant, on his own behalf Morris Rosenberg Deputy Attorney General of Canada For the Respondent FEDERAL COURT OF CANADA Date: 20011109 Docket: T-1228-99 Between: AHMED RABAH Applicant -and- THE ATTORNEY GENERAL OF CANADA Respondent REASONS FOR ORDER

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