Federal Court  Cour fédérale

Date: 20180201

Docket: T-381-17

Citation: 2018 FC 112

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 1, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ABENAKIS OF ODANAK COUNCIL

Applicant

and

NAHAME O'BOMSAWIN

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] The Abenakis of Odanak Council [the Council or the applicant] is seeking judicial review of a decision by the Canadian Human Rights Tribunal [Tribunal] rendered on February 17, 2017 (*O'Bomsawin v Abenakis of Odanak Council*, 2017 CHRT 4) [decision]. Pursuant to section 7 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [CHRA], the Tribunal allowed the complaint

filed by Nahame O'Bomsawin [respondent] for employment-related discrimination based on the prohibited ground of family status.

II. Facts

[2] The applicant is a band council within the meaning of the *Indian Act*, RSC, 1985, c I-5.

[3] The respondent is a member of the Abenaki First Nation in the Odanak reserve. She is the daughter of Deny O'Bomsawin, Director of the Odanak Health Centre.

[4] On July 9, 2012, the Council passed a resolution mandating the Odanak Health Centre to initiate an accreditation process with Health Canada, which had no particular requirements for the project. Subsequently, Mr. O'Bomsawin drafted a competition notice for the contractual position of "Project Manager (Accreditation Coordinator)." The competition was posted twice, with a closing date of July 26, 2012. The position's job description and requirements were the same in the two notices and read as follows:

> University education completed in project management or management;
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> Experience as a project manager;
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> Interpersonal communication skills;
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> Ability to work well under pressure;
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> Excellent oral and written communication skills;
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> Experience with government organizations;
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> Local knowledge;
>
> Bilingual (English – French).

[5] At the end of the application period, the Council Chief designated Robert Saint-Ours and Daniel G. Nolett as members of the selection committee. This selection committee developed an interview process, and two candidates were interviewed: the respondent and candidate M. P., who ultimately received the position. A third candidate had applied for the position but did not complete the process and withdrew from the competition.

[6] It appears from the record that at the time of the hiring process, the respondent had a bachelor's degree in communication and a diploma with a specialization in management, and candidate M. P. had a college diploma in office automation and accounting and a university certificate in administration and was in the process of earning a second university certificate in human resources.

[7] The selection committee evaluated the two candidates based on the following grid:

a) Training – 25 points
b) Project management experience – 20 points
c) Quality of answers – 15 points
d) Knowledge of programs – 10 points
e) English – 10 points
f) Overall evaluation – 10 points
g) Maturity (enthusiasm, motivation and life experience) – 10 points

[8] Following the interviews, the respondent received a score of 78/100 from the first committee member and 83/100 from the second. Candidate M. P. received scores of 74/100 and 77/100 from the committee members.

[9] For the “Training” criterion, both candidates received scores of 25/25 and 23/25 from the two committee members. For the “Project management experience” criterion, the respondent received 12/20 and 15/20, while candidate M. P. received 5/20 and 5/20. For the “Quality of answers” criterion, the respondent received 12/15 and 13/15, while candidate M. P. received 15/15 and 15/15. For the “Knowledge of programs” criterion, the respondent received 9/10 and 5/10, while candidate M. P. received 3/10 and 2/10. For the “English” criterion, both candidates received 10/10 from both committee members. For the “Overall evaluation” component, both candidates finished on equal footing, with 8/10 and 10/10 from both committee members. For the “Maturity (enthusiasm, motivation and life experience)” criterion, the respondent received 4/10 and 5/10, while candidate M. P. received 10/10 from both committee members.

[10] On October 29, 2012, the selection committee recommended that the Council hire candidate M. P. The respondent was informed of the Council’s decision to approve that recommendation on October 31, 2012, and she met with the selection committee on November 2, 2012, for a “post-mortem” in order to understand the process and the reason why her application had not been chosen.

[11] On April 15, 2013, the respondent filed a complaint against the Council with the Canadian Human Rights Commission, alleging that she had been discriminated against on the prohibited ground of family status. She alleges that the reason she was not given the position is the family relationship between her and the director of the Health Centre.

III. Decision

[12] On February 17, 2017, following the hearing on December 20 and 21, 2016, the Tribunal found that the respondent's complaint was substantiated.

[13] The Tribunal first addressed the facts surrounding the respondent's complaint: the respondent's qualifications, the advertised position, the selection committee, the candidate evaluation process and the Council's decision.

[14] The Tribunal listed the scores obtained by both candidates during the interviews conducted by the selection committee. It noted that the candidates received the same score for their training, even though only the respondent met the university education requirements of the advertised position, and that the respondent received a higher score for her project management experience and knowledge of programs, but candidate M. P. scored higher in the quality of her answers and her motivation.

[15] The Tribunal noted that the evaluation grids had not been submitted to the Council when the selection committee made its hiring recommendation and that the respondent had not been chosen, despite having a higher overall score than candidate M. P.

[16] The Tribunal observed that:

> [43] In the context of the present complaint, Ms. O'Bomsawin must show, according to section 7 of the *CHRA*, on a balance of probabilities, that: (1) she has a personal characteristic protected from discrimination; (2) that the Council refused to employ her; (3)

> that the protected characteristic was a factor in refusing to employ her (*Moore v. British Columbia (Education)*, 2012 SCC 61, at para. 33 ("*Moore*"); *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39, at paras. 56 and 64 ("*Bombardier*")).

[17] The Tribunal subsequently applied the law to the facts. It found that the respondent had established a *prima facie* case of discrimination as required in the case law (*Shakes v Rex Pak Ltd.*, (1981), 3 CHRR D/1001, 1981 CarswellOnt 3407 (Ont. Bd. of Inquiry) [*Shakes*; *Moore*]. The respondent established that she was qualified for the position and yet was not hired, while candidate M. P. was chosen, even though she was not more qualified, and because there was no alleged prohibited ground of discrimination (family status).

[18] However, the Tribunal was careful to note that the test in *Shakes* serves only as a guide and should not be applied in a rigid or arbitrary manner. The circumstances must be examined in order to determine whether the application of any of these criteria is appropriate (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2005 FCA 154 at paragraph 25).

[19] According to the Tribunal, it was demonstrated by a preponderance of evidence that the family status factor had influenced the Council's decision. The respondent had the university education required for the position as advertised, unlike the other candidate. She also had more experience and had knowledge of the programs as a result of her past work experience at the Health Centre.

[20] The Tribunal considered the Council's explanation to show that its actions were not discriminatory and that the hiring of the other candidate was instead based on her skills, but it did not accept the Council's arguments. Firstly, the Tribunal noted an inconsistency between the scores recorded on the candidates' evaluation grids and the outcome of the interview process, since the committee subjectively gave different weight to the criteria in its own grid, without having changed the requirements of the advertised position.

[21] Moreover, the Tribunal did not accept the Council's argument that candidate M. P. had been chosen over the respondent based on the *bona fide* occupational requirement of the ability to maintain and develop interpersonal relationships and the fact that she was more "motivated." In reality, that candidate had neither the university education nor the project management experience that the respondent has. One of the members of the selection committee, Mr. St-Ours, even testified that she was [TRANSLATION] "overqualified" for the position. In addition, in her previous jobs, the respondent had never received any complaints about her work, and the witnesses called before the Tribunal had no negative remarks about the quality of her past work.

[22] The Tribunal found that candidate M. P. had been chosen "solely on the basis of the motivation criterion and not on all of the criteria, as is apparent from the score grids and the results of the two candidates, which shows a higher overall score for Ms. O'Bomsawin than that of the candidate chosen, and this by the admission of the witnesses before the Tribunal."

[23] The Tribunal also noted that it is not necessary that family status have been the sole and unique factor in selecting a candidate for discrimination to have occurred; it is sufficient for it to

have been one of the factors (*Holden v Canadian National Railway Company*, [1990] FCJ No. 419, 14 CHRR D/12 (FCA) [*Holden*]).

[24] The Tribunal noted that a "subtle scent of discrimination" was present in the testimonies at the hearing (*Basi v Canadian National Railway*, [1988] CHRD No. 2, 1988 CanLII 108 [*Basi*]). Furthermore, the witnesses noted that the fact that the respondent had already been given contracts at the Health Centre without an interview "caused a lot of talking in the community" and that those comments were not related to the respondent's skills.

[25] The Tribunal also noted that the hiring process for the position was unique because the respondent is the daughter of Mr. O'Bomsawin.

[26] During the "post-mortem" meeting on November 2, 2012, the selection committee—meaning Mr. St-Ours and Mr. Nolett—did not tell the respondent that motivation had been a decisive factor in their recommendation to the Council and in its decision. On the contrary, the respondent wrote that "in that meeting, reference was made, in veiled terms, to the fact that Ms. O'Bomsawin's being the daughter of the director of the Centre could have had an impact." Ms. O'Bomsawin was told by Mr. St-Ours that [TRANSLATION] "sometimes the Council's decisions can produce victims," but they did not explain that the motivation criterion had been decisive.

[27] The Tribunal also did not accept the Council's explanation that candidate M. P. had better skills and was more motivated. No change had been made to the grid in order to reflect the

higher importance of the motivation criterion. And if, as the Council explained, the grid was no longer important, then it had the time and opportunity to change the job posting in order to reflect the actual requirements.

[28] Lastly, the Tribunal examined the Council's argument that the refusal to hire the respondent was based on a *bona fide* occupational requirement that she did not meet, namely, the ability to maintain and develop interpersonal relationships. The Tribunal determined that the Council had demonstrated no evidence to establish a *bona fide* occupational requirement and that the supposed requirement was only a "pretext".

[29] As a result, the Tribunal found that the respondent's complaint was substantiated and that there had been discrimination under paragraph 7(a) of the CHRA. It awarded the respondent relief for loss of wages ($20,654.43) and pain and suffering ($10,000), as well as special compensation for willfully engaging in a discriminatory practice ($7,500) and interest (which was not calculated in the decision).

IV. Positions of the parties

[30] The Council disagrees with the following paragraphs of the decision:

> [68] For these reasons, I find that the Complainant has established a *prima facie* case of discrimination under section 7 of the CHRA on the basis of family status.
>
> ...
>
> [76] For all of these reasons, I find that the Council's evidence is not convincing and is simply a pretext.

> [77] On the balance of probabilities, I therefore find that the Council engaged in a discriminatory practice under section 7(a) of the CHRA, based on family status, by refusing the [*sic*] hire the Complainant, Nahame O'Bomsawin.
>
> ...
>
> [108] Nahame O'Bomsawin's complaint is found substantiated and it is ordered that the Abenakis of Odanak Council:
>
> > 1. Compensate the victim in the amount of $20,654.43 for the wages the victim was deprived of.
> >
> > 2. Compensate the victim in the amount of $10,000 for the pain and suffering she experienced.
> >
> > 3. Compensate the victim in the amount of $7,500 for having engaged in the discriminatory practice willfully.
> >
> > 4. Pay interest on the foregoing compensation amounts in accordance with the terms outlined in paragraph 107 of this decision.

[31] The applicant argues that the Tribunal ignored determinative evidence. First, it criticizes the Tribunal for not considering the testimonies from Mr. Saint-Ours and Mr. Nolett, which highlighted that the respondent's father had tried to favour his daughter by awarding her the contract without an interview and that the Council had therefore decided to create a transparent hiring process with interviews. Rather than finding that the Council had been required to oversee a hiring process as a result of the interference of the Health Centre's director, the Tribunal should have found that it was unusual and unique that the Council had to choose the candidate for that type of job. In addition, the "uniqueness" of that situation resulted from the fact that one of the candidates was the daughter of the Health Centre's director. Thus, the Tribunal allegedly erred in finding that there had been a wilful discriminatory practice.

[32] Second, on the basis of the transcripts, the applicant is criticizing the Tribunal for having made [TRANSLATION] “an erroneous connection in the evidence between the remarks that spread around the Odanak Indigenous community and the decision made by the band council.”

[33] Third, the applicant alleges that the Tribunal placed no importance on the testimony of Deny O’Bomsawin, who revealed that Health Canada had required only a minimum of college-level training for the position.

[34] Fourth, with respect to the evaluation of the Council’s explanation regarding the *bona fide* occupational requirement, the applicant submits that the Tribunal did not consider the arguments that it made, though it did not specify the nature of those arguments that had allegedly been ignored.

[35] As for the respondent, she indicates that the Council did not identify any palpable errors in fact or in law that would have made the Tribunal’s decision unreasonable and that it is merely presenting a more forceful version of its arguments to the Court on judicial review. She argues that the Tribunal was correct in identifying contradictions between the selection committee’s evaluation grid and the outcome of the hiring process, among other valid reasons for finding that the decision not to hire the respondent was discriminatory. In summary, according to the respondent, the applicant identified no errors that flawed the Tribunal’s decision.

V. Standard of review

[36] The parties agree, as do I, that the standard of review is that of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]). The crux of the dispute is, in reality, the Tribunal's assessment of the evidence and the testimonies presented to it. It is trite law that the Tribunal's decisions with regard to the assessment of the evidence are reviewable on the reasonableness standard (*Canadian National Railway Company v Seeley*, 2014 FCA 111 at paragraph 35; *Canada (Attorney General) v Hughes*, 2015 FC 1302 at paragraph 33).

[37] The reasonableness standard requires the Court to show deference to the Tribunal's decision. The Court must intervene only if the Tribunal's decision does not meet the requirements of transparency, justification and intelligibility and if it does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at paragraph 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16). Similarly, it is not for this reviewing Court to substitute its own appreciation of the appropriate solution for that of the Tribunal or to reweigh the evidence (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59, 61 [*Khosa*]).

VI. Analysis

[38] Before weighing the arguments raised, the following are the three key provisions in this matter.

[39] First, section 7 of the CHRA prohibits discriminatory practices related to 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.	**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.

[40] Next, subsection 3(1) of the CHRA sets out the 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, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	**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'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.

[41] Lastly, paragraph 15(1)(a) and subsection 15(2) of the CHRA exclude refusal to hire from the discriminatory practices if it is based on a *bona fide* occupational requirement:

15 (1) It is not a discriminatory practice if **(a)** any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a	**15 (1)** Ne constituent pas des actes discriminatoires : **a)** les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

bona fide occupational requirement;	
[…]	[…]
(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.	**(2)** Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

[42] After reviewing the transcript and the evidence presented, I see no reason to set aside the decision, which I consider to be well founded in fact and in law. It appears from the applicant's arguments that it disagrees with the Tribunal's conclusions. Essentially, it is reiterating its arguments and asking the Court to reweigh the evidence that was submitted to the Tribunal.

[43] The test for establishing discrimination set out in *Moore* could also apply to the present case:

> [33] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights

> statutes. If it cannot be justified, discrimination will be found to occur.

[44] Firstly, it has not been demonstrated that the Tribunal erred in finding that a *prima facie* case of discrimination had been established. It is not for the Court to give more or less weight to the testimonies heard by the Tribunal.

[45] The applicant criticizes the Tribunal for having not sufficiently considered three assertions: first, that the hiring process was made necessary by the interference of the Health Centre's director, Mr. O'Bomsawin, to favour the respondent (his daughter); second, that the position did not require university training; and third, that the Tribunal erred by giving weight to the remarks of third parties.

[46] I cannot agree with the applicant's arguments. In my view, if the Health Centre's director allegedly interfered to the extent that the Council felt it necessary to appoint a hiring committee, that committee could have reposted the position with an amended list of requirements, including that related to the required university training. Instead, the selection committee eliminated the respondent's application, even though she received a higher score than candidate M. P.

[47] It is incorrect to submit that the Tribunal erred by considering remarks that were spread by third parties. Specifically, I do not share the applicant's opinion that the Tribunal made an erroneous connection between the "remarks that spread around the community" and the selection process. In fact, several witnesses reported that the Council's decision to task a selection committee with filling the position was motivated by the fact that previous contracts had been

awarded by the director of the Health Centre to his daughter, the respondent, without any particular hiring process. Thus, in my view, it was open to the Tribunal to draw inferences from the evidence as it did. No error was demonstrated in the Tribunal's findings on the discriminatory practices. Consequently, there are no grounds to intervene on the Tribunal's determination of a *prima facie* case of discrimination.

[48] Secondly, it has not been demonstrated that the Tribunal erred in finding that the Council had not discharged its burden of proving that the discrimination was justified. At most, the applicant disagrees with how the Tribunal handled its arguments. Nevertheless, the applicant has failed to indicate to the Court what those arguments are and how the Tribunal might have erred by rejecting them.

[49] A reading of the entire transcript of the hearing confirms that the Tribunal was indeed justified in its findings as to the absence of a satisfactory explanation from the Council in which it would have reversed the burden by justifying the discriminatory conduct. The reasoning that the conduct could not be justified and the finding of a discriminatory practice were both reasonable.

[50] The Tribunal's reasons demonstrate the transparency and intelligibility of the decision-making process and, consequently, the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. Once again, there are no grounds here for the Court to intervene in the Tribunal's decision.

[51] Thirdly, the applicant is challenging the compensation that the Tribunal awarded to the respondent under section 53 of the CHRA, particularly regarding the punitive compensation under subsection 53(3) and the pain and suffering under paragraph 53(2)(e).

[52] Once again, I consider the conclusions and the underlying findings of fact to be completely reasonable, given the information provided in the testimonies during the Tribunal hearing and what was thoroughly summarized in the final arguments from counsel for the respondent. This discriminatory conduct includes: the unflattering remarks about the respondent by a member of the Council; the previous contracts that "caused a lot of talking in the community"; the fact that both members of the selection committee disregarded the evaluation grids; the respondent's profile and skills, including her education, professional training and relevant experience; the absence of complaints about the respondent's work in her past positions; her knowledge of the work environment and her interest in the position; the failure to notify the respondent of the alleged reason of her lack of motivation during the "post-mortem" meeting; the letter of recommendation from Mr. Saint-Ours and his comments about her previous job.

[53] The decisions cited by the applicant are distinct, and none of them deal with a comparable situation. For example, in *Bressette v Kettle and Stony Point First Nation Band Council*, 2004 CHRT 40, the complainant did not have the required qualifications for the position. Moreover, it was not a question of another candidate having been chosen despite having a lower score, since none of the five candidates were ultimately selected. The Tribunal had found no indications of *prima facie* discrimination, as there are in this case. The other cases the applicant cites do not help its cause, either.

[54] At the hearing before this Court, the parties were unable to submit precedents with analogous facts, in which an evaluation grid had been used during a selection process that did not reflect the requirement of a decisive criterion (in this case, motivation). Consequently, I must rely on the statutory provisions of the CHRA reproduced above (sections 7, 15, and 53) and on the decisions that interpret the Act, particularly *Moore*, *Shakes*, *Holden* and *Basi*.

[55] Lastly, I reviewed the evidence submitted to the Tribunal regarding the after-effects of the decision not to hire the respondent and the impact that decision had on her, including her psychological condition, her decision to leave the community and the need to find another job, which did not pay as well. In short, I am of the view that the compensation set by the Tribunal, which was lower than the amounts sought by the respondent, represented a fair, equitable and, above all, reasonable compromise in light of all the facts and law. Since the applicant did not identify a reviewable error, the Court's intervention is not justified (*Dunsmuir*; *Khosa*).

VII. Conclusion

[56] There is no basis in law that warrants the Court setting aside the Tribunal's decision. Consequently, I am dismissing the application for judicial review, with costs.

JUDGMENT in T-381-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. With costs payable by the applicant to the respondent.

"Alan S. Diner"
Judge

Certified true translation
This 20th day of January 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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