

Federal Court



Cour fédérale

Date: 20200331

Docket: T-1538-18

Citation: 2020 FC 464

Ottawa, March 31, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

PEDRO PEDROSO

Applicant

and

AIR CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Pedro Pedroso, is seeking judicial review of the August 9, 2018 decision of the Canadian Human Rights Commission (the Commission) in which it dismissed his complaint against the Respondent, Air Canada.

[2] The Applicant, who is self represented, alleges that the Respondent discriminated against him based on his age, contrary to sections 7 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the *CHRA*].

[3] The Commission dismissed the complaint under subparagraph 44(3)(b)(i) of the *CHRA* stating that it did not appear, based on the evidence collected during the investigation, that the Respondent failed to hire him based on his age.

[4] The Applicant has not set out a discrete or known ground of relief in his application. In the Notice of Application, where he was to state the precise relief sought, the Applicant set out “Age discrimination Age (60)”, “The Canadian Human Rights Commission did not provide to the investigator all my documents of evidence I submitted to the Commission” and “My documents are missing. The investigator did not have any evidence other than my emails from the respondent. I have and presented all my evidence to the CHRC”.

[5] The Respondent believes that the Applicant seeks a ruling that he was discriminated against by Air Canada based on his age. That is consistent with his complaint form and his arguments. The Respondent also seeks dismissal of the application, with costs.

[6] On considering that he is self-represented, I am prepared to find that the Applicant is seeking the usual relief of having the Decision set aside and the matter returned either for a fresh or further investigation.

II. Preliminary Issue

[7] The Respondent raises a preliminary issue: it objects to the admissibility of five documents attached as exhibits to the Applicant's affidavit because they were not before the Commission.

[8] There are limited exceptions to the rule that judicial review should only consider the materials that were before the original decision-maker. Exceptions are made if the proposed evidence: (1) contains general information to help the Court understand the issues; (2) may demonstrate a procedural defect that cannot be found in the evidentiary record; (3) is presented to highlight the complete absence of evidence before the decision-maker when it made the particular finding: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20.

[9] I have reviewed the five exhibits in question and find that none of them fall into any of the exceptions. Even considering that the list of exceptions is not closed, the proffered exhibits are not material to the consideration on the merits. They either restate or substantiate existing facts in the record, such as the contents of the original complaint, or they contain submissions and arguments that were already made to the Commission.

[10] For the foregoing reasons, I find the five exhibits are not admissible in this judicial review.

III. **Background Facts**

[11] On July 11, 2016, the Applicant applied to be a bilingual flight attendant for the Respondent. He was 60 years old at that time and worked as an airplane groomer at the Ottawa International Airport.

[12] On August 22, 2016, the Applicant completed a 20 minute telephone interview with the Respondent. The following day he completed a Spanish language assessment by telephone. The following week, language assessments were conducted in German and English by telephone.

[13] The Applicant indicated in his complaint to the Commission that he passed all of the language assessments, doing very well. He subsequently completed a 55 minute online assessment referred to as the Thomas International Intelligence Assessment (GIA).

[14] The Applicant states that the purpose of the GIA test is to predict the time it will take someone to come to grips with the new role. It is designed to measure the mental capacity, problem-solving and adaptability of the person taking the assessment in order to identify potential leaders.

[15] The Applicant believes that he must have passed the intelligence assessment test because he was subsequently invited to an in-person interview at Air Canada headquarters in Montréal on October 1, 2016.

[16] The outcome of the in-person interview is the event that resulted in this application for review. It was conducted by three employees of the Respondent each of whom is titled a Talent Acquisition Partner. The Applicant believed that he did very well in the interview but, on November 8, 2016, he was sent a letter stating that his application for the position was unsuccessful.

[17] On May 30, 2017 the Commission received the Applicant's complaint. It was referred to investigation on September 14, 2017 and an investigator was appointed on February 14, 2018.

IV. **The Investigation Report**

[18] The Investigation Report [Report] was completed on May 14, 2018. It recommended that the Commission dismiss the Applicant's complaint pursuant to subparagraph 44(3)(b)(i). As already noted, the Commission accepted the recommendation and dismissed the complaint.

[19] In arriving at the recommendation, the investigator interviewed each of the three Talent Acquisition Partners who were present at the in-person interview in Montréal. In addition, she questioned the Respondent to obtain additional information and obtained statistics related to the ages of the people interviewed in-person for the same position as the Applicant.

[20] The investigator spoke with and questioned each of the parties during the investigation. When the Report was completed she sought, received and reviewed submissions from each party in response to the Report. She also received and reviewed follow-up submissions from each party responding to the submissions of the other party.

[21] More will be said about the submissions in the Analysis section.

A. *No evidence of age discrimination arising from the in-person interview*

[22] An email inviting the Applicant to the in-person interview in Montréal required that he bring certain identification and security documents to the interview. The email advised that if he did not bring all the requested documents, the interview would not proceed.

[23] The Applicant took the required documents to the interview but now objects that some of the documents - such as his passport and driver's licence - contained his age which was therefore known to the Respondent. That is one of the bases upon which he alleges that he experienced age discrimination when his candidacy was unsuccessful.

[24] The investigator asked the Respondent why the identity documents were required. She was advised that it was to ensure the identity of the candidate, confirm the information in their application was correct and that they had the relevant qualifications such as either citizenship or permanent residency. The investigator accepted the Respondent's information that the identity documents were validated by employees known as Talent Acquisition Coordinators, who were the only people to view them. The documents do not form part of the interview package.

[25] The investigator was satisfied that, with respect to the age of the Applicant, none of the Talent Acquisition Partners who interviewed him were in possession of the identity documents stating his age nor did they have access to them. When interviewed, each of them denied being aware of his age or even considering it.

B. *The assessment by the interviewers of the Applicant's answers*

[26] The Report indicates that contrary to the Applicant's view that he "aced" the in-person interview, the three Talent Acquisition Partners who were present did not share his opinion.

[27] The Applicant told the investigator that the questions he was asked were very simple and pertained to customer service. For example, what would he do if a customer had ordered beef and received fish instead.

[28] The primary interviewer, Bik, told the investigator that the interviewers have a questionnaire template they follow. Candidates are asked behavioural-type questions in various categories. While the telephone interview asks scenario-related questions, the in-person one asks about their own experience from prior jobs or education.

[29] On being asked to explain why she considered the Applicant to be non-competitive, Bik said that she thought that his examples were vague and they did not show the competencies they were looking for. For example, he could not demonstrate the kind of empathy in relation to customer service that they required.

[30] The other two people present at the interviews were trainees who took notes. Both of them remembered the Applicant. One recalled that he mumbled and did not engage in great eye contact. The other said that the Applicant gave very vague answers and did not provide specific examples to show he had the required competencies.

C. *The Respondent's criteria and hiring statistics for the position sought by the Applicant*

[31] The Respondent told the investigator that it does not ask applicants their age nor does it ask questions related to age during the application or interview process. A decision to reject a candidate is based purely on the operational requirements.

[32] The investigator queried what was meant by "operational requirements" in this case. The answer was that the Respondent "seeks to hire enthusiastic individuals to join its onboard team dedicated to creating a safe and highly enjoyable travel experience for our customers."

[33] The investigator also asked for statistics regarding the hiring process during the relevant time period. The Respondent said it had interviewed 3,403 candidates for the Bilingual Flight Attendant position of which 742 were successful in obtaining a position. Of those, 650 were between the ages of 20 to 39.

[34] The breakdown by age of successful candidates showed that 7 were between the age of 50 to 59 and none were over the age of 60. When the investigator asked for a record of the ages of the 3,403 applicants, in order to ascertain how many over the age of 50 were interviewed, she was told no personal documents were kept for those who were interviewed but not retained.

[35] The investigator observed that it was unknown how many of the initial applicants were over 50 years old. Noting the bulk of applicants (461) were between the ages of 20 and 29, she observed that the job in question may not have wide appeal to people who are older.

[36] The investigator's summary at paragraphs 39 and 40 of the Report provides a good synopsis of the evidence and the reasons for the conclusions she drew:

39. The complainant alleges that the respondent failed to hire him based on age (60). The evidence gathered at investigation shows that the complainant was successful in his telephone interview, wherein he was asked scenario-based questions. The complainant was not successful in his subsequent in-person interview. The latter interview required the complainant to answer questions based on his own past experiences, and to 'present' himself in relation to the needs of a customer service position. All interviewers stated that the complainant's answers were too vague, and one interviewer noted that the complainant mumbled and failed to make adequate eye contact.

40. Given the above information, and the fact that the complainant did not provide evidence to support his claim that he was unsuccessful due to age, the evidence does not appear to support an allegation of failure to hire based on age.

V. **Issues and Standard of Review**

[37] The Applicant raised four issues in his written materials. At the hearing of this application his sole issue was that the investigation of his complaint was not sufficiently thorough and neutral, rendering it procedurally unfair.

[38] Whether the investigation was sufficiently thorough is a matter of procedural fairness. It is not subject to a particular standard of review, although reviewing it most closely resembles a correctness review. The question rather is whether a fair and just process was followed having regard to all the circumstances, including the nature of the substantive rights involved and the consequences for the individual: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

[39] If the investigation was not sufficiently thorough then the decision cannot stand because it would have been arrived at in a manner that was procedurally unfair: *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 18.

[40] If the investigation was sufficiently thorough then the only issue is whether the decision was reasonable.

[41] Recently, the Supreme Court has reaffirmed that reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so to safeguard the legality, rationality and fairness of the administrative process. Although it is not a “rubber-stamp”, reasonableness review starts with judicial restraint and a respect for the distinct role of administrative decision-makers: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 13.

VI. **The hallmarks of a sufficiently thorough and neutral investigation**

[42] Turning specifically to the duty of procedural fairness owed by the Commission to the complainant, it has been established that the investigation upon which the Commission relies must be both neutral and thorough. Where obviously crucial evidence is not investigated, judicial review is warranted: *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 at paras 49 and 56.

[43] The phrase “obviously crucial evidence” has been interpreted to mean that “it should have been obvious to a reasonable person that the evidence an applicant argues should have been

investigated was crucial given the allegations in the complaint”: *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at para 66.

[44] The Applicant says the interview notes are the obviously crucial evidence that ought to have been investigated.

VII. Analysis

[45] As the Commission adopted the Report, it contains the reasons and grounds upon which the decision of the Commission is based: *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37 [*Sketchley*].

A. *The interview notes*

[46] The Applicant has been seeking, without success, a copy of the interview notes prepared at the time of his in-person interview in Montréal. He believes the notes will verify that his responses were not vague. He reasons that, if that is the case, age discrimination must have been the reason he did not succeed in his job application.

[47] However, as previously stated, the Applicant’s version of his answers at the in-person interview stands in stark contrast to the evidence of the three Talent Acquisition Partners who were present to ask the Applicant questions and consider the answers he provided. The Applicant insists that in order to substantiate the evidence given by the three people present at his interview in Montréal to the investigator, the interview notes created at that time should have been reviewed by the investigator.

B. *Submissions of the parties to the investigator about the Report'*

[48] In his written submissions responding to the Report, the Applicant made several unsupported, bald assertions in an attempt to persuade the investigator to review the notes.

[49] With respect to the views of the three Talent Acquisition Partners about his answers his written submissions stated, in all uppercase letters, that "THEY DOESEN'T (*sic*) SPEAK THE TRUTH ABOUT MY ACED INTERVIEW IN MY OPINION I GIVED (*sic*) A PERFECT ANSWERS (*sic*) TO THEIRS (*sic*) QUESTIONS WHAT THEY WERE LOOKING FOR TO GIVE ME AN "A" NONE OF MY ANSWERS WERE VAGUE I SHOWED MY COMPETENCES (*sic*) TO THE RESPONDENT FROM MY PAST EXPERIENCE AND PRESENT AND PRESENT IN RELATION TO CUSTOMER SERVICE EXPERIENCES."

[50] The Applicant also submitted that the three interviewers never introduced themselves to him and he never mumbled in the interview. He said that he made eye contact every time he was asked a question.

[51] Unfortunately, the Applicant did not provide any specific example of his "perfect answers" to questions nor did he say how he showed his competencies or identify which of his past experience or present customer service experiences had demonstrated those capabilities.

[52] The investigator did ask the Respondent for a copy of the interview notes. At paragraph 15 of the Report she set out the answer received from the Respondent:

The investigator asked the respondent for a copy of its interview notes in relation to the complainant's interview. The respondent

replied that the questions asked during interviews are behavioural-based on the following competencies: teamwork, decision making, resilience & flexibility, quality driven, influence & persuasion and motivation. It stated that its questions and interview notes are commercially sensitive, and while it would show the documents to the investigator, it is concerned that the information could be publicly disclosed by the Commission at a later stage.

[53] The investigator was satisfied not to pursue this further. That is consistent with the role of the investigator which includes exercising her discretion by applying her expertise. It is also consistent with the lack of evidence provided by the Applicant to support his allegations that the three Talent Acquisition Partners had lied to the investigator.

[54] The Applicant has not persuaded me that the contents of the interview notes are “obviously crucial evidence”. It is unlikely that the contents of the interview notes would differ in any significant or meaningful way from the evidence already provided to the investigator by the three people who wrote the notes.

[55] I also note that the Commission reviewed the Report and did not require any further investigation.

VIII. **Summary and Conclusion**

[56] It is not the Commission’s job to determine if the complaint is made out. The central component of the Commission’s role is to assess the sufficiency of the evidence before it:

Cooper v Canada (Canadian Human Rights Commission), [1996] 3 SCR 854 at para 53.

[57] In deciding whether a complaint should be dismissed or referred to the Tribunal for an inquiry, the Commission is entitled to deference in relation to the scope and depth of the investigation it relies upon: *Richards v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 341 at para 9.

[58] The investigator looked into the interview process, including the Applicant's concern that the identification documents were not properly requested and resulted in the interviewers knowing his age. She acquired and examined the Respondent's statistics with respect to interviews conducted and people hired for the position. Given the evidence from the interviewers and the lack of specificity provided by the Applicant regarding his answers, the conclusion drawn by the investigator that the complaint was not made out is reasonable and is justified on the underlying record.

[59] The investigator's reasoning process is clearly set out. It enables the Applicant, as well as this Court, to understand how and why she made the recommendation to dismiss the complaint. The Report, being the reasons of the Commission, meets the requirements of having a reasoning process that is transparent, intelligible and justified and an outcome that falls within the range of possible, acceptable outcomes defensible in respect of the facts and law. The decision to dismiss the complaint is thereby reasonable: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Vavilov* at para 99.

[60] The Applicant provided no tangible evidence to the investigator to substantiate his complaint. He offered his views and opinions. There is no evidence to support those views and opinions.

[61] For all the foregoing reasons, this application is dismissed.

[62] There is no serious question of general importance to be certified on these facts.

[63] The Respondent was seeking costs but, during the hearing, acknowledged that the Applicant is probably in a precarious financial position. Therefore, I make no costs award.

JUDGMENT IN T-1538-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed, without costs.
2. No question of general importance is certified.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Pedro Pedroso

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Samuel Eichenwald

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Samuel Eichenwald
Counsel, Labour & Human Rights
Air Canada Law Branch
Dorval, Quebec

FOR THE RESPONDENT