

Federal Court



Cour fédérale

Date: 20220401

Docket: T-1266-21

Citation: 2022 FC 461

Ottawa, Ontario, April 1, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

RAY DAVIDSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of the July 14, 2021 decision of the Canadian Human Rights Commission (the “Commission”) to dismiss the Applicant’s human rights complaint, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act* (the “CHRA”).

[2] The Applicant's complaint to the Commission claimed that the Canada Border Service Agency ("CBSA")'s discriminatory application of a language requirement policy violated his rights under sections 7 and 10 of the *CHRA* and that his identity as a black man played a role in the CBSA's decision not to offer him an employment opportunity for which he was qualified. The Commission found that the Applicant did not provide sufficient basis to show that his race and colour played a role in the CBSA's application of the language requirement policy.

[3] The Applicant is self-represented in these proceedings. He submits that the Commission erred in dismissing his complaint and failed to adequately consider the evidence of how he faced discrimination as a result of the CBSA's rigid application of language requirement policy.

[4] For the reasons that follow, I find that the Commission's decision to dismiss the Applicant's complaint is reasonable. This application for judicial review is dismissed.

II. **Facts**

A. *The Applicant's Complaint*

[5] At the time of his complaint, the Applicant worked as a Senior Access to Information and Privacy ("ATIP") Analyst with Immigration, Refugees and Citizenship Canada ("IRCC") and his French-language proficiency was evaluated by the Public Service Commission of Canada (the "PSC") as being at a "BBB" level.

[6] The PSC is responsible for Second-Language Evaluation (“SLE”) in a test comprised of three components: reading, writing and oral proficiency. Each component is represented by a letter in a three-letter acronym: “C” is the highest score, followed by “B” and then “A”. In some cases, the letter "E" (for “Exempt”) is used: “E” is a higher rating than “C” and means that a person’s results are high enough that they do not require further testing in their career.

[7] The Applicant’s position at IRCC was classified at a PM-05 level, but he was identified by the Officer of the Information Commissioner of Canada as being qualified for positions at the PM-06 level, which allowed him to be placed in a pool of candidates for potential ATIP positions within various government departments, including the CBSA.

[8] On June 7, 2017, the CBSA’s Executive Director of ATIP, Mr. Dan Proulx, sent an email to four directors within the federal public service advising that he was looking to hire for ATIP positions from levels PM-02 to PM-06 and asked potential candidates to contact him directly. On June 10, 2017, the Applicant sent Mr. Proulx an expression of interest in a CBSA Assistant Director position at the PM-06 level.

[9] On June 12, 2017, Mr. Proulx emailed the Applicant to inform him that based on the information provided he did not meet the SLE requirement of at least “CBC” for the PM-06 position at the CBSA, as mandated by the CBSA’s “Directive on Linguistic Identification of Positions” (the “CBSA Language Policy”).

[10] On January 31, 2018, the Applicant filed a complaint with the Commission against the CBSA, claiming a violation of sections 7 and 10 of the *CHRA*. The Applicant's complaint stated that the CBSA had discriminated against him in employment on the grounds of race and colour by denying him a position for which he was qualified. The Applicant believed that his identity as a black male played a role in the CBSA's choice to strictly adhere to the language requirement policy and not appoint him to the PM-06 position. The Applicant also argued that the language requirement policy is arbitrarily administered throughout the federal public service, resulting in discrimination under section 10 of the *CHRA*.

[11] Upon receipt of the Applicant's complaint, the Commission appointed an investigator (the "Investigator") pursuant to subsection 43(1) of the *CHRA* to review the complaint and complete a report (the "Investigation Report").

B. *The Investigation Report*

[12] The Investigation Report, dated April 12, 2021, recommends that the Commission dismiss the Applicant's complaint pursuant to subparagraph 44(3)(b)(i) of the *CHRA* because an inquiry into the complaint was not warranted.

[13] The Investigation Report concludes that the evidence does not support the Applicant's claim that the CBSA discriminated against him in employment under section 7 of the *CHRA* on the grounds of race and colour by failing to offer him a PM-06 position. The Investigator found that it was reasonable of the CBSA not to have considered the Applicant for the PM-06 Assistant Director position because he did not have the required language proficiency for the position.

[14] The Investigation Report notes that the Treasury Board of Canada Secretariat's "Policy on Official Languages" (the "TBS Policy") applies to the CBSA and, like the CBSA Language Policy, is designed to ensure compliance with the *Official Languages Act* ("OLA"). The Investigation Report states that the PM-06 Assistant Director position had supervisory functions and was located in the National Capital Region – a bilingual region. In keeping with the OLA, the TBS Policy and the CBSA Language Policy, the CBSA was required to adhere to a specific linguistic profile in staffing the position. It was thus required that the position be bilingual and filled by someone who met the language proficiency level of at least "CBC".

[15] At the time the Applicant submitted an expression of interest for the position, his level of proficiency was only "BBB". The Investigator noted that the applicable laws do not support the Applicant's position that the CBSA had the discretion to hire the Applicant, given his language qualifications. Further, the evidence indicated that both individuals who filled the Assistant Director PM-06 position in question exceeded the required "CBC" language level, as both held "E" qualifications. As such, the Investigator found no reasonable basis to support the position that someone no better qualified but lacking the Applicant's characteristics based on race and/or colour obtained the employment opportunity.

C. *Decision Under Review: The Commission's Decision*

[16] In a decision dated July 14, 2021, the Commission agreed with the recommendation in the Investigation Report and dismissed the Applicant's complaint pursuant to subparagraph 44(3)(b)(i) of the CHRA. The Commission found that, having regard to all the circumstances, further inquiry into the complaint was not warranted.

[17] The Commission acknowledged the Applicant's efforts to draw attention to the impacts of language requirement policy across the federal service, yet found that the specifics of the Applicant's complaint were not grounds to proceed with this broad claim. The Applicant's complaint concerned the CBSA's application of language requirement policy to a specific employment opportunity, which was in a bilingual region and involved the supervision of employees working in both official languages. The Commission concluded that the Applicant had not provided a sufficient basis to show that his race and colour played a role in the application of the language requirement policy by the CBSA.

III. Preliminary Issues

A. *Style of Cause*

[18] At the request of the Respondent, and without objections from the Applicant, the style of cause in this proceeding will be amended to name the Attorney General of Canada as the proper Respondent, pursuant to Rules 303(1)(a) and 303(2) of the *Federal Court Rules*, SOR/98-106.

B. *New Evidence*

[19] The Respondent submits that the Applicant's Record contains additional documents that were not before the Commission when it made its decision and are thus inadmissible. I agree. The additional documents in the Applicant's Record also do not meet any of the exceptions to the admissibility of evidence on judicial review (*Tsleil-Waututh Nation v Canada (Attorney*

General), 2017 FCA 128 at paras 85-87). I therefore find the additional documents submitted by the Applicant to be inadmissible.

IV. **Issue and Standard of Review**

[20] The sole issue in this judicial review is whether the Commission's decision is reasonable.

[21] The appropriate standard of review is reasonableness, in accordance with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*").

[22] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[23] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings

must be more than peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

V. **Analysis**

A. *The Applicant’s position*

[24] The Applicant submits that the Commission failed to address how he was adversely impacted by the CBSA’s choice to adopt a discriminatory language requirement policy in hiring for the PM-06 position. The Applicant argues that the Commission failed to apply the Canadian Human Rights Tribunal’s decision in *National Capital Alliance on Race Relations v Canada (Department of Health & Welfare)*, (“*Race Relations*”) 1997 CanLII 1433 (CHRT). In *Race Relations*, the CHRT noted that there was a significant under-representation of racialized people in Health Canada’s senior management and found Health Canada’s staffing practices to be discriminatory because of how they disproportionately affected racialized people (at p. 29).

[25] The Applicant further submits that the Commission did not address how the CBSA abused its authority by refusing to exercise its discretion with respect to the CBSA Language Policy, and by adopting a policy that inhibits the ability to consider individual cases with an open mind. The Applicant argues that there was no law preventing the CBSA from giving him a trial period in the position and the time to obtain the required “CBC” level. The Applicant points to examples where ATIP Directors from other federal departments have allegedly appointed individuals to PM-06 positions who did not have “CBC” SLE level.

[26] The Applicant submits that the *OLA* does not prescribe a SLE level for specific positions, and that no portion of the *OLA* would have been contravened if the CBSA had hired him, since he would have been able to communicate with staff in both languages with his “BBB” SLE proficiency. The Applicant argues that the CBSA failed to present any evidence of the undue hardship it would have suffered if the Applicant had been hired on an acting basis with his “BBB” SLE proficiency. As such, the Applicant maintains that the CBSA language policy was applied discriminatorily to screen him out as a candidate for the PM-06 position.

B. *The Respondent’s position*

[27] The Respondent submits that based on the information provided, the Commission reasonably concluded that further inquiry into the complaint was not warranted. As noted in the Investigation Report, the Applicant did not meet an essential qualification for the employment opportunity – a “CBC” SLE proficiency – nor did the Applicant dispute that the CBSA was able to staff the position with a candidate who exceeded the “CBC” SLE proficiency requirement.

[28] The Respondent notes that decisions to dismiss complaints under subparagraph 44(3)(b)(i) of the *CHRA* are fact-based and discretionary (*Keith v Canada (Correctional Service)*, 2012 FCA 117 at paras 47-49). As such, the Commission is owed significant deference in performing its screening function (*Harvey v Via Rail Canada Inc.*, 2020 FCA 95 at para 11), and it must dismiss a complaint if satisfied that an inquiry into a complaint is not warranted.

[29] The Respondent maintains that while the Applicant is correct to state that the *OLA* does not mandate a specific SLE proficiency for the PM-06 position, the position’s language

requirement was set in accordance with the CBSA Language Policy, which was implemented to uphold the requirements of the TBS Language Policy and the *OLA*. It was not discriminatory of the CBSA to follow its own policy in this respect. The Respondent further submits that the CBSA was not required to provide the Applicant with a trial period to see if he could obtain the required “CBC” proficiency while in the PM-06 position.

[30] Finally, the Respondent submits that it was reasonable for the Commission to focus on the complaint before it, which concerned allegations against the CBSA vis-à-vis a specific employment opportunity, rather than the conflicting styles of administering second-language proficiency policy across the federal public service (*Desgranges v Canada (Administrative Tribunals Support Services)*, 2020 FC 315 (“*Desgranges*”) at paras 61, 68-71). The Respondent argues that selected examples of situations where federal entities other than the CBSA have staffed PM-06 positions with employees holding different SLE proficiencies than those required of the CBSA position in question are not sufficient to ground the Applicant’s complaint of systemic discrimination across the public service.

C. *Analysis*

[31] The purpose of this judicial review is to determine whether the Commission reached a reasonable decision, not to re-weigh the evidence that was before the decision-maker (*Vavilov* at para 125). In my view, the Applicant has not demonstrated that there are sufficient shortcomings in the Commission’s decision to render it unreasonable (*Vavilov* at para 100).

[32] When the Commission adopts an investigator's recommendations and provides only brief reasons, the Investigation Report is to be considered by the Court as the Commission's reasons (*Phipps v Canada Post Corporation*, 2016 FCA 117 at para 6). I find that the Investigation Report provides reasons for the decision that are transparent, intelligible and justified in relation to the factual and legal constraints of this case (*Vavilov* at paras 85, 99).

[33] While the Investigation Report only focuses on whether the Applicant's rights under section 7 of the *CHRA* were violated, I find that the Commission based its decision on a fair and thorough investigation of the Applicant's complaint and did not fail to consider any crucial evidence or fundamental issues in this case (*Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 74). As in this Court's decision in *Desgranges*, I do not find that the Commission erred in considering the Applicant's complaint in the context of section 7 of the *CHRA*, which is a broad provision that corresponds to the circumstances of the Applicant's complaint (*Desgranges* at para 61). It was reasonable of the Commission to find that the Applicant's complaint concerned the CBSA's application of language requirement policy to a specific employment opportunity, which involved the supervision of employees working in both official languages in a bilingual region, and that the Applicant failed to show that his race and colour played a role in him not being hired for the PM-06 position.

[34] Furthermore, I agree with the Respondent that examples of situations where federal departments other than the CBSA have staffed similar PM-06 positions with employees holding different SLE language proficiencies are not sufficient to ground the Applicant's complaint of systemic discrimination across the public service.

[35] Unlike in *Race Relations*, I do not find that this is a case of systemic discrimination whereby people with the Applicant's profile – black people working in the public service – are being affected in a disproportionately negative way by federal language requirement policy. The Investigation Report reasonably outlines how the evidence shows that the Applicant was found ineligible for the PM-06 position because he did not meet the SLE proficiency requirements, not because of his colour or race.

[36] Finally, I do not find that the CBSA erred by not exercising its discretion to hire the Applicant, nor was the CBSA required to provide him with a trial period in the PM-06 position, or show how it would suffer 'undue hardship' if the Applicant was hired on an acting basis. The CBSA's Executive Director of ATIP was clear in his response to the Applicant's expression of interest that the PM-06 position at the CBSA required a level of SLE competency, which the Applicant did not possess. As outlined in the Investigation Report, the evidence also indicates that both individuals who filled the CBSA's Assistant Director PM-06 positions held "E" SLE qualifications, thus exceeding the "CBC" requirement for the position.

VI. **Conclusion**

[37] While I sympathize with the Applicant, I find that the Commission's decision is reasonable. The application for judicial review is dismissed. There shall be no costs.

JUDGMENT in T-1266-21

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to reflect the Attorney General of Canada as the proper Respondent.
2. This application for judicial review is dismissed.
3. No costs are awarded.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1266-21

STYLE OF CAUSE: RAY DAVIDSON v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 22, 2022

JUDGMENT AND REASONS: AHMED J.

DATED: APRIL 1, 2022

APPEARANCES:

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(On his own behalf)

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