

Date : 20071101

Docket: T-959-06

Citation: 2007 CF 1132

[ENGLISH TRANSLATION]

Ottawa (Ontario), November 1, 2007

Present: Tremblay-Lamer J.

BETWEEN:

IBRAHIM NJONKOU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission (the Commission) dated May 16, 2006, which rejected the applicant's complaints pursuant to paragraph 44(3)b) of the *Canadian Human Rights Act* (the "Act").

The facts

[2] The applicant, who is 56 years old, applied for two positions at the Parks Canada Agency (the “Agency”) on November 8, 2004, and on January 19, 2005, namely environmental assessment specialist and ecosystems management specialist, respectively. The two positions in question have the same classification within the public service, namely PC-02.

[3] With regard to the first position, the applicant was informed on March 16, 2005, that he had been eliminated from consideration for appointment. The applicant did not demonstrate that he possessed the experience required to prepare and carry out environmental assessments for projects subject to the *Canadian Environmental Assessment Act* or under an equivalent system, nor did he demonstrate that he possessed the experience required to actually assess contaminated sites.

[4] As for the second position, on February 3, 2005, another employee of the Agency informed him by email that he had been eliminated from consideration for appointment. The applicant did not meet the preselection criteria related to the educational requirement, namely a bachelor's degree or a master's degree in natural sciences or applied sciences with a major in a field that is relevant to the position.

[5] On February 10, 2005, the applicant received a second email from the Agency, which indicated that the first message had been sent by mistake, that the staffing committee had reached the last step of the preselection process, and that the applicant would receive an additional message when this step was completed. The applicant did not receive a subsequent written message intended

to clarify the fact that the applicant had not been screened into the selection process, which is why the Agency presented its apologies.

[6] On August 11, 2005, the applicant filed two complaints with the Commission related to the two aforementioned selection processes, claiming that he had been the victim of discrimination due to his age.

[7] An investigator was charged, under section 43(1) of the Act, with investigating the two complaints. On January 30, 2006, she recommended that the Commission reject both complaints because the body of evidence did not support the applicant's allegation to the effect that he was the victim of discrimination due to his age.

[8] As for the first position, environmental assessment specialist, the investigator remarked that the body of evidence demonstrated that the applicant did not have any experience in relevant fields, nor did it support the allegation of discrimination based on age.

[9] As for the second position, ecosystems management specialist, she remarked that the body of evidence indicated that preference may be given to individuals who possessed a master's degree; the Agency decided to use this criterion due to the number of candidates who had a master's degree. Furthermore, the applicant had not acquired a specialization in a field relevant to the duties of the position. In addition, though some documents submitted by the complainant indicated his age, the assessment carried out by the Agency does not seem to have taken this factor into consideration

during the selection process. In fact, the individual who was eventually hired by the Agency was over 50 years old.

[10] Following these two reports by the investigator, the Commission gave the applicant the opportunity to make representations.

[11] Following the applicant's submission of comments, the Agency argued that most of the points raised by him concerned his skills and his education, and they had nothing to do with his age.

[12] On May 16, 2006, the Commission rejected the applicant's complaints pursuant to paragraph 44(3)b of the Act, which is the reason for this application for judicial review.

Analysis

Standard of review

[13] Case law has determined on many occasions that allegations concerning violating the rules of natural justice do not require that a pragmatic and functional analysis be carried out (please consult *Sketchley v. the Attorney General of Canada*, [2006] 3 F.C.R. 392, [2005] F.C.J. no 2056 (F.C.A.)). (QL), at para 46; *Moreau-Bérubé v. Nouveau-Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249). To check whether an administrative tribunal has complied with procedural fairness in a given circumstance, it is necessary to determine the procedures and guarantees that are required in a particular case (*Baker v. Canada (Minister of Immigration, Refugees and Citizenship)*, [1999] 2

S.C.R. 817, [1999] A.C.S. no 39 (QL)). It falls within the jurisdiction of courts of law to determine whether the decision maker complied with the duty of fairness in the circumstances of the case.

[14] With regard to the standard of review that applies to decisions made under section 44(3) of the Act, though case law from the Federal Court of Appeal adopted two different standards of review, namely reasonableness as the standard of review in *Singh v. Canada (Attorney General)*, [2002] FCA 247, [2002] F.C.J. no 885 (QL); *Tahmourpour v. Canada (Attorney General)*, [2005] FCA 113, [2005] F.C.J. no 543 (QL), *Gardner v. Canada (Attorney General)*, [2005] FCA 284, [2005] F.C.J. no 1442 (QL)), and the patently unreasonable standard in (*St-Onge v. Canada*, [2000] F.C.J. no 1523 (C.A.) (QL)), it is my opinion that in this case, regardless of the standard of review adopted, the Commission's decision must be upheld because it reflects a rational interpretation of the facts or the law.

[15] As noted by Abella J. in *The Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] A.C.S. no 15, at para 103, regardless of the qualifier used to describe the reasonableness standard, the process that must be undertaken by the reviewing Court remains the same in both cases:

103 " But whatever label is used to describe the requisite standard of reasonableness, a reviewing court should defer where "the reasons, taken as a whole, are tenable as support for the decision" (Ryan, at para. 56) or "where . . . the decision of that tribunal [could] be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at pp. 1369-70, per Gonthier J.). The "immediacy or obviousness" to a reviewing court of a defective strand in the analysis is not, in the face of the inevitable subjectivity involved, a reliable guide to whether a given decision is untenable or evidences an unreasonable interpretation of the facts or law.."

[16] It is firmly established that in assessing an investigation report "the Commission is performing an administrative screening function that does not attract the scrutiny given to a judicial or quasi-judicial body." (*Banks v. Canada Post Corporation*, [2004] FC 713, [2004] F.C.J. no 923 (QL), at para 29).

[17] However, the Commission is bound to comply with the rule of procedural fairness. To this end, it must disclose the substance of the evidence on which it intends to base itself to make its decision, provide an opportunity to the parties to reply to this evidence, and take these observations into consideration when it delivers its final decision. (*The Canadian Broadcasting Corporation*, above, at para 43; *Syndicats des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, on p. 902).

[18] The investigation that serves as a basis for a decision must meet two conditions. It must be conducted in a fair and impartial fashion (*Slattery v. Canada (Human Rights Commission) (TD)*, [1994] 2 F.C. 574 (QL), at para 49).

[TRANSLATION]

To determine the level of stringency of the investigation that must correspond to the rules of procedural fairness, it is necessary to take into consideration the interests at stake: the specific interests of the complainant and the respondent with respect to procedural fairness and the interest of the CHRC to preserve a system that works and that is efficient administratively.

[19] In this case, I am satisfied that the investigation was sufficiently exhaustive and stringent given the circumstances.

[20] The applicant's procedure suggests that many other questions could have been asked by the investigator to meet the required level of stringency. I do not share this opinion. In hindsight, it is easy to suggest that the investigation was flawed. However, I did not find any items that could have alerted her to the fact that the applicant had been discriminated against due to his age. The investigator obtained information on the candidates who applied, their ages and skills, and the circumstances surrounding the procedural irregularities identified by the applicant. The procedural errors committed by the Agency's employees do not in any way evince age-related discrimination. The evidence demonstrated unequivocally that, in both cases, the applicant's candidacy was rejected because he did not meet the criteria for qualification that were indicated in the job postings.

[21] The Commission's decision was reasonable with respect to the evidence on file.

[22] For these reasons, this application for judicial review is dismissed with costs in the cause.

JUDGMENT

THE COURT ORDERS that this application for judicial review be dismissed with costs in the cause.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-959-06

STYLE OF CAUSE:
IBRAHIM NJONKOU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

PLACE OF HEARING: Montréal (Quebec)

DATE OF HEARING: October 23, 2007

REASONS FOR JUDGMENT: TREMBLAY-LAMER J.

DATED: November 1, 2007

APPEARANCES:

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ANNEX

<p>Canadian Human Rights Act, 1976-77, c. 33, s. 1.</p> <p>[...]</p> <p>Purpose</p> <p>2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted. R.S., 1985, c. H-6, s. 2; 1996, c. 14, s. 1; 1998, c. 9, s. 9.</p> <p>[...]</p> <p>PART I PROSCRIBED DISCRIMINATION General Prohibited grounds of discrimination</p> <p>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.</p> <p>[...]</p>	<p>Loi canadienne sur les droits de la personne, 1976-77, ch. 33, art. 1.</p> <p>[...]</p> <p>Objet</p> <p>2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées 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, la déficience ou l'état de personne graciée. L.R. (1985), ch. H-6, art. 2; 1996, ch. 14, art. 1; 1998, ch. 9, art. 9.</p> <p>[...]</p> <p>PARTIE I MOTIFS DE DISTINCTION ILLICITE Dispositions générales Motifs de distinction illicite</p> <p>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.</p> <p>[...]</p> <p>Emploi</p> <p>7. Constitue un acte discriminatoire, s'il est</p>
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<p>Employment</p> <p>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. 1976-77, c. 33, s. 7.</p> <p>[...]</p>	<p>fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :</p> <p>a) de refuser d'employer ou de continuer d'employer un individu; b) de le défavoriser en cours d'emploi. 1976-77, ch. 33, art. 7; 1980-81-82-83, ch. 143, art. 3. [...]</p>
<p>Consent of victim</p> <p>40. (2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto. [...]</p>	<p>Consentement de la victime</p> <p>40. (2) La Commission peut assujettir la recevabilité d'une plainte au consentement préalable de l'individu présenté comme la victime de l'acte discriminatoire.</p> <p>Irrecevabilité [...]</p>
<p>Complaints may be dealt with together</p> <p>(4) If complaints are filed jointly or separately by more than one individual or group alleging that a particular person is engaging or has engaged in a discriminatory practice or a series of similar discriminatory practices and the Commission is satisfied that the complaints involve substantially the same issues of fact and law, it may deal with the complaints together under this Part and may request the Chairperson of the Tribunal to institute a single inquiry into the complaints under section 49. [...]</p>	<p>Jonctions de plaintes</p> <p>(4) En cas de dépôt, conjoint ou distinct, par plusieurs individus ou groupes de plaintes dénonçant la perpétration par une personne donnée d'actes discriminatoires ou d'une série d'actes discriminatoires de même nature, la Commission peut, pour l'application de la présente partie, joindre celles qui, à son avis, soulèvent pour l'essentiel les mêmes questions de fait et de droit et demander au président du Tribunal d'ordonner, conformément à l'article 49, une instruction commune. [...]</p>
<p>Commission to deal with complaint</p> <p>41. (1) Subject to section 40, the</p>	<p>Irrecevabilité</p> <p>41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :</p> <p>a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;</p>

<p>Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that</p> <p>(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;</p> <p>(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;</p> <p>(c) the complaint is beyond the jurisdiction of the Commission;</p> <p>(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or</p> <p>(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.</p>	<p>b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;</p> <p>c) la plainte n'est pas de sa compétence;</p> <p>d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;</p> <p>e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.</p>
<p>Commission may decline to deal with complaint</p>	<p>Refus d'examen</p> <p>(2) La Commission peut refuser d'examiner une plainte de discrimination fondée sur l'alinéa 10a) et dirigée contre un employeur si elle estime que l'objet de la plainte est traité de façon adéquate dans le plan d'équité en matière d'emploi que l'employeur prépare en conformité avec l'article 10 de la Loi sur l'équité en matière d'emploi.</p> <p>[...]</p>
<p>(2) The Commission may decline to deal with a complaint referred to in paragraph 10(a) in respect of an employer where it is of the opinion that the matter has been adequately dealt with in the employer's employment equity plan prepared pursuant to section 10 of the Employment Equity Act.</p> <p>[...]</p>	<p>Enquête</p> <p>Nomination de l'enquêteur</p> <p>43. (1) La Commission peut charger une personne, appelée, dans la présente loi, « l'enquêteur », d'enquêter sur une plainte.</p>
<p>Investigation</p> <p>Designation of investigator</p>	<p>Procédure d'enquête</p> <p>(2) L'enquêteur doit respecter la procédure d'enquête prévue aux règlements pris en vertu du paragraphe (4).</p>
<p>43. (1) The Commission may designate a person, in this Part referred to as an "investigator", to investigate a complaint.</p>	<p>Pouvoir de visite</p> <p>(2.1) Sous réserve des restrictions que le gouverneur en conseil peut imposer dans l'intérêt de la défense nationale ou de la sécurité, l'enquêteur muni du mandat visé au</p>
<p>Manner of investigation</p>	

<p>(2) An investigator shall investigate a complaint in a manner authorized by regulations made pursuant to subsection (4).</p> <p>Power to enter</p> <p>(2.1) Subject to such limitations as the Governor in Council may prescribe in the interests of national defence or security, an investigator with a warrant issued under subsection (2.2) may, at any reasonable time, enter and search any premises in order to carry out such inquiries as are reasonably necessary for the investigation of a complaint.</p> <p>Authority to issue warrant</p> <p>(2.2) Where on ex parte application a judge of the Federal Court is satisfied by information on oath that there are reasonable grounds to believe that there is in any premises any evidence relevant to the investigation of a complaint, the judge may issue a warrant under the judge's hand authorizing the investigator named therein to enter and search those premises for any such evidence subject to such conditions as may be specified in the warrant.</p> <p>Use of force</p> <p>(2.3) In executing a warrant issued under subsection (2.2), the investigator named therein shall not use force unless the investigator is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.</p> <p>Production of books</p> <p>(2.4) An investigator may require any individual found in any premises entered pursuant to this section to produce for inspection or for the purpose of obtaining copies thereof or extracts therefrom any</p>	<p>paragraphe (2.2) peut, à toute heure convenable, pénétrer dans tous locaux et y perquisitionner, pour y procéder aux investigations justifiées par l'enquête.</p> <p>Délivrance du mandat</p> <p>(2.2) Sur demande ex parte, un juge de la Cour fédérale peut, s'il est convaincu, sur la foi d'une dénonciation sous serment, qu'il y a des motifs raisonnables de croire à la présence dans des locaux d'éléments de preuve utiles à l'enquête, signer un mandat autorisant, sous réserve des conditions éventuellement fixées, l'enquêteur qui y est nommé à perquisitionner dans ces locaux.</p> <p>Usage de la force</p> <p>(2.3) L'enquêteur ne peut recourir à la force dans l'exécution du mandat que si celui-ci en autorise expressément l'usage et que si lui-même est accompagné d'un agent de la paix.</p> <p>Examen des livres</p> <p>(2.4) L'enquêteur peut obliger toute personne se trouvant sur les lieux visés au présent article à communiquer, pour examen, ou reproduction totale ou partielle, les livres et documents qui contiennent des renseignements utiles à l'enquête.</p> <p>Entraves</p> <p>(3) Il est interdit d'entraver l'action de l'enquêteur.</p> <p>Règlements</p> <p>(4) Le gouverneur en conseil peut fixer, par règlement :</p> <p>a) la procédure à suivre par les enquêteurs;</p> <p>b) les modalités d'enquête sur les plaintes dont ils sont saisis au titre de la présente partie;</p>
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<p>books or other documents containing any matter relevant to the investigation being conducted by the investigator.</p>	<p>c) les restrictions nécessaires à l'application du paragraphe (2.1). L.R. (1985), ch. H-6, art. 43; L.R. (1985), ch. 31 (1er suppl.), art. 63.</p>
<p>Obstruction</p>	<p>Rapport</p>
<p>(3) No person shall obstruct an investigator in the investigation of a complaint.</p>	<p>44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.</p>
<p>Regulations</p>	<p>Suite à donner au rapport</p>
<p>(4) The Governor in Council may make regulations</p>	<p>(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :</p>
<p>(a) prescribing procedures to be followed by investigators;</p>	<p>a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;</p>
<p>(b) authorizing the manner in which complaints are to be investigated pursuant to this Part; and</p>	<p>b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.</p>
<p>(c) prescribing limitations for the purpose of subsection (2.1).</p>	<p>Idem</p>
<p>R.S., 1985, c. H-6, s. 43; R.S., 1985, c. 31 (1st Suppl.), s. 63.</p>	<p>(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :</p>
<p>Report</p>	<p>a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :</p>
<p>44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.</p>	<p>(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,</p>
<p>Action on receipt of report</p>	<p>(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);</p>
<p>(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied</p>	<p>b) rejette la plainte, si elle est convaincue :</p>
<p>(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or</p>	<p>(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci</p>
<p>(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,</p>	<p></p>
<p>it shall refer the complainant to the appropriate authority.</p>	<p></p>

<p>Idem</p> <p>(3) On receipt of a report referred to in subsection (1), the Commission</p> <p>(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied</p> <p>(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and</p> <p>(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or</p> <p>(b) shall dismiss the complaint to which the report relates if it is satisfied</p> <p>(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or</p> <p>(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).</p> <p>Notice</p> <p>(4) After receipt of a report referred to in subsection (1), the Commission</p> <p>(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and</p> <p>(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).</p> <p>R.S., 1985, c. H-6, s. 44; R.S., 1985, c. 31 (1st Suppl.), s. 64; 1998, c. 9, s. 24.</p> <p>[...]</p>	<p>n'est pas justifié,</p> <p>(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).</p> <p>Avis</p> <p>(4) Après réception du rapport, la Commission :</p> <p>a) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des paragraphes (2) ou (3);</p> <p>b) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3).</p> <p>L.R. (1985), ch. H-6, art. 44; L.R. (1985), ch. 31 (1er suppl.), art. 64; 1998, ch. 9, art. 24.</p> <p>[...]</p>
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