

Date: 20090423

Docket: T-152-08

Citation: 2009 FC 407

Ottawa, Ontario, April 23, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DR. ABDUR-RASHID BALOGUN

Applicant

and

**HER MAJESTY THE QUEEN
MINISTER OF NATIONAL DEFENCE**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Dr. Abdur-Rashid Balogun, for judicial review of a decision of the Canadian Human Rights Commission (CHRC) dated January 10, 2008, which dismissed Dr. Balogun's human rights complaint against the Canadian Forces (CF) under section 44(3)(b)(i) of the *Canadian Human Rights Act*, R.S., 1985, c. H-6 (Act). Dr. Balogun is self-represented.

BACKGROUND

[2] Dr. Balogun is a black, Muslim male of African origin. He is a university graduate and holds a Bachelor of Science majoring in accounting from Minnesota State University Moorhead in

Moorhead, Minnesota and a Masters of Business Administration degree from California State University and Doctor of Philosophy in Business Administration with a designation in Accounting from California State University. Dr. Balogun also has a law degree.

[3] Dr. Balogun visited the Toronto 25 Service Battalion in February 2001 to apply as a Canadian Forces Reserve Officer. He was referred to the Captain of the Battalion who attempted to convince him to apply as a Non-Commissioned Member (NCM) rather than as an Officer, citing the onerous conditions that had to be met and the length of time it could take.

[4] In April 2001, at a reception at the Canadian Forces Recruiting Center in Toronto (CFRC Toronto), while Dr. Balogun was waiting to be documented by Master Corporal Cook, an intake attendant advised him to abandon his application as an Officer and apply as an NCM. The attendant allegedly told Dr. Balogun that his file would not be approved because of “a thing for visible minorities applying as an officer.”

[5] In May 2001, following an aptitude test, Master Corporal Cook told Dr. Balogun that the process for an Officer application was slow and lengthy and that, although Dr. Balogun was conditionally offered an Officer position, his file would remain pending until he returned with an evaluation of his USA degrees from the University of Toronto.

[6] In June 2001, Dr. Balogun called CFRC Toronto to inform them about the requirements for obtaining his official academic transcripts. The transcripts would take a minimum of 90 days and the cost would exceed \$150 (lawyer and university fees).

[7] In July 2001, Dr. Balogun called CFRC Toronto to notify them that he had received his official transcripts from the USA universities he had attended and had begun the process for other requirements. He was told that, because of a new policy, he should call in and pick up a personal reference form. Dr. Balogun did this.

[8] In August 2001, Dr. Balogun received a call asking him to bring his Citizenship Card to CFRC Toronto. He informed CFRC that he did not have the card at that time because he had sent it to Citizenship and Immigration Canada as part of an application for his son's Citizenship Card. Dr. Balogun questioned this requirement because his Canadian passport and other identification had been copied and verified. The CFRC informed him that this was standard policy.

[9] In September 2001, Dr. Balogun submitted his Citizenship Card to CFRC Toronto and was informed that his file was missing but that his information was in the computer. He was then told that CFRC would require his high school transcripts. The officer who requested the high school transcripts was corrected and told that the transcripts were not required. The mistaken officer allegedly said that Dr. Balogun would be better off applying as a NCM, or else he would have to continue to meet the requirements.

[10] In November 2001, Dr. Balogun received a telephone call from Captain Wade Sett of the 25 Service Battalion in Toronto advising him that he was now in charge of recruiting and wanted to know how far Dr. Balogun had come in the application process. Later, Captain Sett called to inform Dr. Balogun that his file had been closed and he would try to have it reopened. Dr. Balogun received the University of Toronto's academic evaluation report and submitted it to CFRC Toronto. An unidentified Corporal confirmed the closure of Dr. Balogun's file and, after a 45 minute wait, the unidentified Corporal returned to say that Dr. Balogun's file was missing again. However, the Corporal accepted the evaluation report.

[11] In December 2001, Captain Sett informed Dr. Balogun that he could not re-open his file. Dr. Balogun complained to the DND through D-Net.

[12] In February 2002, Captain Howard of CFRC Toronto re-opened Dr. Balogun's file indicating that none of his visits had been documented and that the unit had been going through some changes lately. Captain Howard advised Dr. Balogun that a pre-security clearance would take no less than six months and that, until then, no interview could be scheduled. Dr. Balogun responded that he was not surprised that "no further contact" had been written on his file as the file had gone missing twice.

[13] On July 17, 2002, Dr. Balogun was interviewed by Captain Thompson (Air Force) of CFRC Toronto after his security clearance and reliability checks were received. Captain Thompson said that Dr. Balogun had a terrible credit rating and several debts. Dr. Balogun responded that he had no

knowledge of these and could only speculate that the search results could relate to loans he had co-signed for relatives in distress. Captain Thompson stated that the debts were Dr. Balogun's. Dr. Balogun requested documentation about these debts, but Captain Thompson declined to oblige. The alleged creditors were Eatons and Zellers. Dr. Balogun was asked to submit a letter on how he intended to resolve this matter so that his file could be approved.

[14] A week later, Dr. Balogun made inquiries about the debts and wrote a letter to Captain Thompson. Captain Thompson stated verbally that the letter was not enough and that payment arrangements had to be made with the companies, despite Dr. Balogun's belief that he did not owe anything. Captain Thompson warned Dr. Balogun that his file could be closed again, but admitted that he was qualified for a position with CF.

[15] The Respondents allege that Dr. Balogun provided the following responses to the debt issue:

- 1) He told the CF orally that the debts were not his and that Eatons and Zellers must have falsified his credit records;
- 2) In September 2002, he again wrote to the CF to deny the debts and claimed they were the result of identity theft;
- 3) In July 2003, after receiving a credit report from Equifax Canada confirming the debt to Zellers of \$1,794.00 and a debt to Eatons of \$1,183.00, Dr. Balogun threatened to sue Equifax and bring lawsuits against Eatons and Zellers;

- 4) Dr. Balogun decided it would be too expensive to hire a lawyer to pursue the lawsuits and he had decided to go to law school in England so that he could represent himself.

[16] In August 2002, Dr. Balogun complained to the DND. A response was given by Major Orfankos who reiterated and supported Captain Thompson's requirements regarding the debts.

[17] In September 2002, Dr. Balogun filed another complaint with Assistant Deputy Minister-Human Resources (Military) whose mandate includes Recruiting and Employment Equity. He received no immediate response. Colonel Alain Tremblay responded in March 2003. He informed Dr. Balogun that he was now in charge of the file, and stated in writing that more documentation was required to prove Dr. Balogun's position regarding the debts.

[18] In June 2003, Dr. Balogun complained to the Chief of Land Staff, Lt. General Hillier. He received no response.

[19] In October 2003, Dr. Balogun received a federal loan of approximately \$8000, was granted a Bank overdraft and enrolled in law school through the University of London Extension Programme. He provided Colonel Tremblay with over 20 pages of documentation about the steps he had taken to resolve his debts. Dr. Balogun further informed Colonel Tremblay that the debt situation was not his and that his credit rating was satisfactory. Colonel Tremblay allegedly refused to respond.

[20] In November 2003, Dr. Balogun telephoned Lt. General Hillier's office and was told that Colonel Tremblay was handling the matter.

[21] In December 2003, Dr. Balogun wrote to Major-General Arp and provided over 25 pages of documented proof that the credit report was false. The Major-General responded by letter dated December 19, 2003 and received on February 2004. Dr. Balogun was told that "you will have to either prove beyond reasonable doubt that you are not responsible for the debts recorded in your credit history or provide verifiable evidence that you have paid off the debts."

[22] On February 26, 2004, Dr. Balogun brought a discrimination complaint before the CHRC against DND. The complaint was that he was being subjected to discrimination by the CF. The complaint was dismissed without any investigation.

[23] On January 26, 2005, Dr. Balogun sent a letter to the Minister of National Defence in response to a letter the Minister sent on August 27, 2004 discussing racial differential treatment at DND and that the DND was wrong about their "defunctory assertions" and he would further his legal action if the DND did not "do the right" within 10 days.. The documents attached to Dr. Balogun's letter included another Equifax report that did not show any outstanding debts for him.

[24] On April 5, 2006, the Federal Court allowed Dr. Balogun's judicial review application and set aside the CHRC decision. The file was referred back with the stipulation that the CHRC conduct an investigation in accordance with sections 43 and 44 of the Act.

[25] On July 13, 2006, Dr. Balogun received a letter from Mr. Dean Steacy, an Investigator with the CHRC, that he had been assigned as the Investigator and required certain documents. Dr. Balogun replied to Mr. Steacy on July 14, 2006. Dr. Balogun was contacted by Mr. Steacy several times between July 14, 2006 and March 8, 2007. It is alleged by Dr. Balogun that Mr. Steacy told him that an investigation was unnecessary. Mr. Steacy suggested mediation because the DND was ready to employ Dr. Balogun and just needed time to find a suitable location for him.

[26] Dr. Balogun alleges that he asked Mr. Steacy to correspond with the individuals he had identified. Mr. Steacy allegedly said it was unnecessary since the DND would employ him but needed more time. On November 5, 2006, Dr. Balogun received another letter from Mr. Steacy dated November 2, 2006, including DND responses and refusals to answer questions. After receipt of the letter, Mr. Steacy called Dr. Balogun and told him that he should accept the position of Infantry officer.

[27] On November 10, 2006, Dr. Balogun responded to Mr. Steacy's November 2, 2006 letter. Dr. Balogun alleges that he received a series of telephone calls from Mr. Steacy suggesting that he accept the DND offer because he did not think an investigation was necessary. Mr. Steacy requested documents and written demands from Dr. Balogun to facilitate mediation.

[28] On March 8, 2007, Dr. Balogun refused to agree to Mr. Steacy's suggestions of accepting the DND offer and Mr. Steacy wrote his report. Dr. Balogun alleges that Mr. Steacy coerced him to

keep his responses to Mr. Steacy's report as brief as possible. Dr. Balogun filed his submissions with the CHRC in March 2007.

[29] On March 30, 2007, Mr. John Chamberlin, an employee at the CHRC, wrote a letter to Dr. Balogun attaching the DND's two-page letter of submissions. Dr. Balogun replied on April 4, 2007 to Mr. Chamberlin.

[30] On April 10, 2007, Mr. Sean Davy, an employee at CHRC, was appointed by the CHRC to conciliate the dispute. Dr. Balogun alleges that the conciliation was unusual because the parties never met or had any direct discussions. Also, the matter was discussed about three times in 5 months. The conciliator's report was supplied to Dr. Balogun with a letter dated October 23, 2007. Dr. Balogun responded with a submission on October 24, 2007. On November 9, 2007, the CHRC wrote Dr. Balogun a letter with an attached copy of the DND submission. Dr. Balogun replied on November 9, 2007 with a submission dated November 13, 2007. The CHRC wrote a letter dated December 18, 2007 to Dr. Balogun enclosing additional information from the Respondent regarding the conciliation report in the Applicant's complaint.

[31] On March 28, 2007, Mr. Steacy wrote a report in relation to the complaint. After the report, the CHRC appointed a conciliator for settlement discussions. The parties could not agree. The matter was then referred to the Canadian Human Rights Tribunal (CHRT).

Government Security Policy

[32] The Government of Canada's Security Policy (GSP) is administered by the Treasury Board of Canada and applied to all government departments, certain commissions and the CF. The GSP states that entities covered by the policy are required to conduct their own threat assessments to determine if safeguards above baseline levels are necessary. The DND conducted a threat assessment and determined that it should have safeguards above baseline levels, so the DND issued a National Defence Security Policy and Recruiting Directive to deal with reliability checks for CF enrolment. The Recruiting Directive states that it is a mandatory condition of eligibility for enrolment in the CF that a recruit successfully obtain enhanced reliability status which can include criminal records, name checks and credit checks.

[33] When assessing a credit check for a recruit, the Recruiting Directive directs that the following factors shall be considered: (a) the degree of indebtedness; (b) the reason for indebtedness; (c) whether the situation is stable or changing; (d) the individual's reaction to the problem; and (e) the nature of the duties and access to designated information and assets.

DECISION UNDER REVIEW

[34] CHRC found that an inquiry by a Tribunal was not warranted. Dr. Balogun's file was closed and the complaint dismissed.

[35] The Investigator dealt with only one issue in his report: whether Dr. Balogun had been denied employment opportunities because of his race (African), religion (Muslim), and national/ethnic origin (Nigerian).

[36] The Investigator found that Dr. Balogun had only provided the transcripts for his Bachelor of Science degree and that it was equivalent to a four-year bachelor's degree at an accredited Canadian university. Dr. Balogun had also provided both his passport and his Citizenship Card and both were on his recruiting file.

[37] It is customary to explore different career paths with applicants, including Officer and NCM. Dr. Balogun's application had been processed for recruitment as an Officer. There had been significant delays in processing the application; however, not all of these delays were attributable to the CF. For example, there was a delay caused by the time it took to evaluate Dr. Balogun's transcripts. Evidence in the CF Ombudsman's report revealed that the processing of recruit applications was not being dealt with as expeditiously as possible; this had caused lengthy delays in the actual processing of the applications. While there were delays in processing Dr. Balogun's enrolment application, the delays were not related to a proscribed ground.

[38] The Investigator relied upon the Treasury Board policy which states that the "existence of negative information in a credit report can be, but need not be, sufficient grounds to deny enhanced reliability status. Where adverse credit information exists, the authorizing manager must evaluate: To what extent the individual has changed habits with respect to financial reliability. The likely

recurrence of financial difficulties and their potential effect on job reliability.” The Investigator noted that Dr. Balogun’s enrolment process was put on hold because of debt concerns. However, his enrolment was not rejected because of the debt situation. Before the CF could continue with his enrolment, Dr. Balogun had to provide documentation to show he had rectified the debt situation. Dr. Balogun did not provide the required documentation until January 26, 2005.

[39] The CF requires all candidates to complete an enhanced reliability security check. Part of that check is a credit check. The CF used the Treasury Board Secretariat’s policy to administer this requirement which is part of the evaluation process to determine a candidate’s suitability. It is not the fact of credit issues that precludes a candidate from enrolment in the CF; the issue is how candidates handle their debts.

[40] The Investigator held that the evidence did not support Dr. Balogun’s allegation that the security policy and credit check were used to temporarily place his candidacy on hold. Based on the documentation provided by Dr. Balogun and the Respondents, Dr. Balogun’s recruitment was placed on hold because he did not provide documentation which showed the debt issue had been dealt with. Dr. Balogun signed his complaint form against the CF on February 26, 2004 and the debt issue was dealt with on January 26, 2005.

[41] In the Investigator’s view, there was no evidence to support a link between the CF’s administration of the security policy and the prohibited grounds of discrimination.

[42] The Investigator recommended that a conciliator be appointed to attempt to settle the complaint because the evidence did not support the allegations of discrimination based on race, national/ethnic origin, and religion; the evidence revealed that the complainant had been a victim of poor administration and the parties were amenable to settling.

ISSUES

[43] Dr. Balogun submits the following issues on this application:

- 1) Was an independent investigation under section 43 of the Act conducted and, if so, was it neutral and thorough?
- 2) Was the independent investigation compatible with mediation under subsection 43 of the Act and can an Investigator simultaneously mediate between parties while conducting an investigation?
- 3) Did the CHRC and the DND breach fundamental principles of natural justice and procedural fairness?
- 4) Do credit checks constitute a *bona fide* occupational requirement for a military occupation?
- 5) Did the CHRC err at law?
- 6) Is the GSP subject to the Act? If so, was there sufficient evidence to warrant referral to the CHRT based on section 7 and 10 of the Act?

STATUTORY PROVISIONS

[44] The following provisions of the Act are applicable to these proceedings:

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.

10. It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective

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.

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :

a) de fixer ou d'appliquer des lignes de conduite;

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre

<p>employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.</p>	<p>aspect d'un emploi présent ou éventuel.</p>
<p>Designation of Investigator</p>	<p>Nomination de l'enquêteur</p>
<p>43. (1) The Commission may designate a person, in this Part referred to as an "Investigator", to investigate a complaint.</p>	<p>43. (1) La Commission peut charger une personne, appelée, dans la présente loi, « l'enquêteur », d'enquêter sur une plainte.</p>
<p>Manner of investigation</p>	<p>Procédure d'enquête</p>
<p>(2) An Investigator shall investigate a complaint in a manner authorized by regulations made pursuant to subsection (4).</p>	<p>(2) L'enquêteur doit respecter la procédure d'enquête prévue aux règlements pris en vertu du paragraphe (4).</p>
<p>Power to enter</p>	<p>Pouvoir de visite</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>(2.1) 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 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) Where on <i>ex parte</i> application a judge of the Federal Court is satisfied by information on oath that there</p>	<p>(2.2) Sur demande <i>ex parte</i>, un juge de la Cour fédérale peut, s'il est convaincu, sur la foi d'une dénonciation sous</p>

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.

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.

Use of force

Usage de la force

(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.

(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.

Production of books

Examen des livres

(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 books or other documents containing any matter relevant to the investigation being conducted by the Investigator.

(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.

Obstruction

Entraves

(3) No person shall obstruct an Investigator in the investigation of a complaint.

(3) Il est interdit d'entraver l'action de l'enquêteur.

Regulations	Règlements
(4) The Governor in Council may make regulations	(4) Le gouverneur en conseil peut fixer, par règlement :
(a) prescribing procedures to be followed by Investigators;	a) la procédure à suivre par les enquêteurs;
(b) authorizing the manner in which complaints are to be investigated pursuant to this Part; and	b) les modalités d'enquête sur les plaintes dont ils sont saisis au titre de la présente partie;
(c) prescribing limitations for the purpose of subsection (2.1).	c) les restrictions nécessaires à l'application du paragraphe (2.1).

STANDARD OF REVIEW

[45] Dr. Balogun has not dealt with the standard of review.

[46] The Respondents submit that the CHRC is required to dismiss a human rights complaint pursuant to section 44(3)(b)(i) of the Act if the CHRC is satisfied, having regard to all the circumstances of the complaint, that an inquiry into the complaint by the Tribunal is not warranted. This allows the CHRC to screen-out complaints that, in the opinion of the CHRC, do not have merit.

[47] The Respondents state that the Court has afforded the CHRC a great deal of deference when reviewing decisions made under section 44(3)(b)(i) of the Act. The Respondents cite *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056 (F.C.A.) at paragraph 38 (*Sketchley*):

...A reviewing Court's focus under this approach ultimately remains upon the Commission's screening decision, which is reviewed with a high degree of deference with respect to fact-finding activities: only errors evincing an error of law, patent unreasonableness in fact-finding, or a breach of procedural fairness will justify the intervention of a Court on review (*Bell Canada, supra* at para. 38; *Connolly v. Canada Post Corp.*, [2002] F.C.J. No. 242, 2002 FCT 185 (T.D.) at para. 28, affirmed (2003), 238 F.T.R. 208, 2003 FCA 47 (C.A.) [*Connolly*]). Such errors belong, virtually by definition, to the category of investigative flaws that are so fundamental that they cannot be remedied by the parties' further responding submissions...

[48] The Respondents submit that the findings of fact and findings within the Investigator's jurisdiction and expertise should be reviewed on the reasonableness standard, and questions of law and procedural fairness should be reviewed using a correctness standard.

[49] The appropriate standard of review with respect to a Commission's general decision is reasonableness *simpliciter*: *Corbiere v. Wikwemikong Tribal Police Services Board*, [2007] F.C.A. 97; *Garvey v. Meyers Transport Ltd.*, [2005] F.C.J. No. 1684 (F.C.A.) and *Lindo v. Royal Bank of Canada*, [2000] F.C.J. No. 1101 (F.C.T.D.) (*Lindo*).

[50] The Investigator's report constitutes the Commission's reasons. Therefore, if the report is flawed, the Commission's decision is equally flawed because the Commission was not in possession of other relevant information upon which it could properly exercise its discretion: *Forster v. Canada (Attorney General)*, 2006 FC 787 at paragraph 37 and *Canada (Attorney General) v. Grover*, [2004] F.C.J. No. 865 (F.C.) at paragraph 25 (*Grover*).

[51] The discretion vested in the Commission in deciding whether to dismiss a complaint or refer it to adjudication before a Tribunal does not allow it to “short-circuit” the investigation process or ignore a necessary witness. No relevant fact should be left out and omitted, particularly when the information is damaging to the complainant’s position, as this casts serious doubts on the neutrality of the Investigator: *Grover* and *Canadian Broadcasting Corp. v. Paul*, [1988] F.C.J. No. 1823 (F.C.T.D.) at paragraph 63 (*Paul*).

[52] The Commission should dismiss a complaint “where there is insufficient evidence to warrant appointment of a tribunal” and determine if there is a “reasonable basis in the evidence for proceeding to the next stage”: *Paul* at paragraph 62.

[53] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review”: *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[54] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may

adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[55] Thus, in light of the Supreme Court of Canada’s decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the non-procedural and non-error of law issues to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”:
Dunsmuir at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[56] Procedural fairness issues are reviewed on a standard of correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

ARGUMENTS

Dr. Balogun

CHRC Failed to Investigate

[57] Dr. Balogun submits that:

- 1) The CHRC failed to investigate his complaint because it did not contact the individuals he identified;
- 2) The CHRC failed to review statistics which have been accepted by the Supreme Court of Canada as proof that people exhibiting Dr. Balogun's characteristics are mostly living below the poverty level;
- 3) The CHRC failed to disclose that the DND did receive over 25 pages of "documented proof" that the credit report was false;
- 4) The CHRC did not contact the Auditor General of Canada in respect to his report disclosing that 26, 000 employees of the CF lacked security clearances or enhanced reliability status;
- 5) The CHRC refused to disclose significant issues raised in Dr. Balogun's submissions;
- 6) The CHRC did not investigate any issues relating to the *bona fide* occupational requirement tests and their effect on job performance criteria;
- 7) The CHRC did not investigate any issues relating to undue hardship that may be caused by accommodating Dr. Balogun under subsection 15(2) of the Act;
- 8) The CHRC did not investigate whether the person hired had characteristics similar to Dr. Balogun with better qualifications;
- 9) The CHRC did not investigate the level of visible minorities within DND who are Officers;
- 10) The CHRC failed to follow up on significant inaccuracies by DND either orally or in writing.

[58] Dr. Balogun further submits that the CHRC did not investigate DND's inaccurate statements or highlight them in the report. As well, Dr. Balogun alleges that the CHRC ignored several "admitted facts" by the DND, and goes on to list those "admitted facts" along with the evidence of the DND and the CHRC.

Investigation

[59] Dr. Balogun submits that Webster's dictionary defines "investigate" as meaning "to search or to inquire into; to examine carefully." Dr. Balogun states that all acts of the CHRC must be independent, including the conduct of its Investigators. An Investigator has a duty to investigate in a neutral and thorough manner: *Watt v. Canada (Attorney General)* 2006 FC 619 (*Watt*) and section 43 of the Act. Dr. Balogun also states that an investigation under the Act must be conducted in a neutral and thorough manner so that the Commission has before it sufficient information to determine the proper tests in the context of the circumstances of the case.

[60] Dr. Balogun notes that the required test for discrimination is:

- 1) That the complainant was qualified for the particular employment;
- 2) That the complainant was not hired; and
- 3) That someone no better qualified but lacking the distinguishing feature of the complainant was hired.

[61] Dr. Balogun also notes that the required test for justification are:

- 1) That the employer adopted the standard for a purpose rationally connected to the performance of the job;
- 2) That the employer adopted the particular standard in an honest and good faith belief that it was necessary for the fulfillment of that legitimate work-related purpose; and
- 3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

See: *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] S.C.J. No. 74; *Basi v. Canadian National Railway*, [1988] C.H.R.D. No. 2 (C.H.R.T.) and *Watt*.

Evidence

[62] Dr. Balogun submits that the “Applicant Assessment” dated May 16, 2001 was not presented to Dr. Balogun until March 17, 2008. Dr. Balogun claims that the CHRC knew about this document but failed to disclose its contents to Dr. Balogun or mention it in the Investigator’s report. Dr. Balogun alleges that, since Captain Thompson was the only one present during Dr. Balogun’s interview, senior officers including Minister David Pratt, Major Orfankos, Colonel Tremblay and Major-General Arp relied on this document without disclosure to Dr. Balogun.

[63] Dr. Balogun alleges that Captain Thompson's comment that Dr. Balogun "could not comment on either debt" was a lie because Captain Thompson admitted to the other superior officers and the CHRC that Dr. Balogun had commented. The Investigator did not inquire further about this document, even though the document lacked justification in Dr. Balogun's view.

[64] Dr. Balogun concludes that the CHRC failed to perform any investigation of Dr. Balogun's complaint under subsection 10(a) of the Act because Captain Wade Sett, Master Corporal Cook, the previous recruiting Captain at the 25 Service Battalion, Major Orfankos, Colonel Tremblay and Major-General Arp were never interviewed or contacted by CHRC.

Investigation of Government Security Policy

[65] Dr. Balogun also submits that the CHRC did not inquire into why the DND did not perform an evaluation in accordance with the requirements mandated by the Act or supply any evidence that the DND performed an evaluation under the credit assessment factors outlined in the National Defence policy. The CHRC failed to inquire about this evaluation.

Investigation as Mediation

[66] Dr. Balogun also submits that Mr. Steacy of the CHRC told him on more than three occasions that his intention was to mediate between the parties because the CF was ready to hire Dr. Balogun but had no current position in Dr. Balogun's occupational category until around January

2007, unless he was willing to take a position as an Infantry Officer in or around Toronto. Dr. Balogun alleges that the primary role of Mr. Steacy was to conduct an investigation, not to mediate, as the CHRC had other staff employed to perform mediations.

[67] Dr. Balogun says that Mr. Steacy ignored the delays that would support Dr. Balogun's complaint, and he also ignored the fact that there were differences in processing recruit applications and officer applications. Mr. Steacy also did not investigate why, if the reliability clearance rules were applied so stringently, the report of the Auditor General of Canada indicated that 26,000 Canadian Forces personnel lacked reliability clearance. Dr. Balogun submits that Mr. Steacy's report should be thrown out because he did not talk to everyone involved and his conduct was highly tainted and of no force and effect.

Breach of Principles of Natural Justice and Procedural Fairness

[68] Dr. Balogun submits that the Supreme Court of Canada in *Therrien (Re)*, [2001] 2 S.C.R. 3 held that the duty to act fairly has two components: the right to be heard and the right to an impartial hearing. Dr. Balogun also cites *Timpauer v. Air Canada* (1986), 11 C.C.E.L. 81 at 97 which held that the refusal to hear an applicant's evidence denied the applicant in that case natural justice and "the fact that such evidence might not assist the applicant was not a valid reason for refusing to hear it."

Failure to Disclose Key Materials to Applicant

[69] Dr. Balogun submits that the CHRC conducted an investigation under section 43 of the Act and, during that process, claimed to obtain documents and statements from the DND. The only document supplied to Dr. Balogun was the DND's refusal to answer questions or to supply any documents. Dr. Balogun was never given the opportunity to be heard on verbal points or on any documents not supplied to him.

[70] Dr. Balogun submits that he did not receive the Applicant Assessment document until March 17, 2008. He was not allowed an opportunity to comment on this document before a decision was made by the DND and the CHRC.

Fairness

[71] Dr. Balogun submits that the CHRC failed to investigate his complaint fairly. He alleges that the DND hatched a "secret plan" to avoid its obligation to evaluate him by deliberating stating that he did not comment on his debt and that he had to prove beyond a reasonable doubt that the false debts were not his. Dr. Balogun states that he did comment on the debts and alleged that there was a possibility of identity theft, errors or other reasons for the debts.

[72] Dr. Balogun notes that Mr. Steacy claimed that the DND stated that his enrolment process was fraught with many administrative delays but that these did not result in an admission by the

DND of adverse treatment of Dr. Balogun. Dr. Balogun argues that Mr. Steacy ignored the fact that the DND did not have any records of visible minorities in relation to some of the questions Mr. Steacy posed to the DND, and that Mr. Steacy failed to inquire further in relation to the other intake attendants at that time Dr. Balogun made his application.

Credit Check

[73] Dr. Balogun submits that in *DeJager v. Canada (Department of National Defence)*, [1986] C.H.R.D. No. 3 (C.H.R.T.), the court ruled that, for something to be an occupational requirement and a qualification, the limitation must be imposed honestly, in good faith, and in the sincere belief that such a limitation is in the interests of the adequate performance of the work involved. It must also be related, in an objective sense, to the performance of the employment concerned.

[74] Dr. Balogun rejects the notion that a good credit evaluation is a requirement under the GSP. As well, he says a credit check is not a *bona fide* occupational requirement or qualification. He submits that the DND did not supply any evidence that good credit is rationally connected to the performance of the job, or that it was related to honest and good faith criteria. This is unreasonable in Dr. Balogun's view, as 26,000 of those currently serving in the CF, lack such a credit evaluation.

[75] Dr. Balogun submits that CHRC and DND erred by interpreting the provision on credit to mean that he must prove beyond a reasonable doubt that he did not owe any debts, rather than whether there was a likelihood of recurring financial difficulties that could affect him on the job.

The Respondents

Investigator's Report

[76] The Respondents submit that the Investigator, after interviewing a number of witnesses (including Dr. Balogun and Captain Thompson), and reviewing a wide range of documents (including Dr. Balogun's recruitment file) came to the following conclusions:

- 1) Dr. Balogun had not been refused an employment opportunity with CF; rather, his application had been temporarily put on hold to provide him with an opportunity to provide documentation showing he had addressed the debt situation;
- 2) While there had been significant delays in processing Dr. Balogun's application, the delays were not linked to Dr. Balogun's race, national/ethnic origin or religion. Rather, some of the delays were caused by recruitment requirements (such as the time it took Dr. Balogun to have his out-of-country school transcripts evaluated at the University of Toronto), and some of the delays were caused by administrative inefficiencies in the system (such as those identified in the CF Ombudsman's Report regarding problems with recruitment);
- 3) It was common for different career paths to be discussed with recruits (such as the pros and cons of applying to be an officer or non-commissioned officer) and Dr. Balogun was processed for recruitment as an officer;
- 4) Since passing a credit check was a requirement for employment with the CF, and Dr. Balogun did not provide evidence that his credit problem had been addressed until

January 26, 2005, Dr. Balogun had not been qualified for the employment opportunity he was seeking at the material time.

Section 10 Complaint

[77] The Respondents submit that the CF requires all candidates to complete an enhanced reliability security check and that a credit-check is part of that process. Also, a credit check is used by the CF (in conjunction with other checks) to evaluate a candidate's suitability for the CF and to determine how a candidate handles debt issues. Dr. Balogun's application was put on hold, not because of his race, national/ethnic origin or religion, but to provide him with an opportunity to provide documentation showing the debt issue had been addressed, which was not done until January 26, 2005.

Reasonableness of CHRC Decision

[78] When a decision is reviewed by the CHRC under section 44(3)(b)(i) of the Act, the CHRC typically adopts the investigator's reasoning and/or provides no reasons of its own. The reasons given by an investigator in his report are considered the reasons of the CHRC: *Sketchley*.

[79] The Respondents submit that the reasons given by the Investigator in the present case are based on the evidence before him and support the conclusion that there was no discrimination based on race, national/ethnic origin or religion for the following reasons:

- 1) The Government and the DND have security requirements for recruits and a credit check is part of those requirements;
- 2) The searches indicated that Dr. Balogun had debt issues at the relevant time;
- 3) Dr. Balogun's application was put on hold to allow him to provide documentation to show the debt issues had been rectified, and;
- 4) Dr. Balogun did not provide documentation to address the debt issues until well after his recruitment file had been closed and he had commenced his human rights complaint.

[80] The Respondents also submit that the limited evidence provided by Dr. Balogun regarding the incidence of low incomes among visible minority groups in Canada between 1995 and 1999 and the labour force activity of black people in Canada in 2001, comes nowhere near demonstrating that black people have more debts than other groups or that credit checks constitute adverse effect discrimination. The Respondents state that a person is not denied employment with the CF simply because they have debts; rather, if a recruit is found to have debts, a number of factors are considered in deciding whether the recruit is suitable for the CF.

[81] The Respondents conclude that they are only required to demonstrate an employment requirement is a *bona fide* occupational requirement after a *prima facie* case of discrimination has been found: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] S.C.J. No. 46 at paragraphs 19, 20, 22 and 54. The Respondents suggest that the Investigator did not find a

prima facie case of discrimination in this case; hence there was no need for the Investigator to consider whether a credit check was a *bona fide* occupational requirement.

Procedural Fairness

[82] The Respondents rely upon *Slattery v. Canada (Human Rights Commission)*, [1994] F.C.J. No. 181 (F.C.T.D.) (*Slattery*) at paragraphs 47-49 for what must occur for a decision under section 44(3)(b)(i) to be considered procedurally fair:

- 1) The investigation conducted prior to the CHRC decision must be thorough and neutral; and
- 2) The CHRC must inform the parties of the substance of the evidence obtained by the Investigator, provide the parties with an opportunity to respond to this evidence and make its own decision in light of the evidence and submissions provided.

[83] The Respondents goes on to state that, in considering whether an investigation is “thorough,” a court must balance procedural fairness with the need to maintain a workable and administratively effective system. Hence, deference must be given to the Investigator to assess the probative value of evidence and decide whether further investigation is warranted: *Slattery* at paragraphs 55-56.

[84] The Respondents cite paragraph 69 of *Slattery* for the following:

The fact that the Investigator did not interview each and every witness that Dr. Balogun would have liked her to and the fact that the

conclusion reached by the Investigator did not address each and every alleged incident of discrimination are not in and of themselves fatal as well. This is particularly the case where Dr. Balogun has the opportunity to fill in gaps left by the Investigator in subsequent submissions of her own. In the absence of guiding regulations, the Investigator, much like the CHRC, must be master of his own procedure, and judicial review of an allegedly deficient investigation should only be warranted where the investigation is clearly deficient.

[85] The Respondents note that, in order to determine whether an investigation is “neutral”, the focus will be on whether the Investigator was biased. In judging an investigator, the court does not determine whether bias can be reasonably apprehended but, whether the standard of open-mindedness has been lost to the point where it can be reasonably said the issue before the Investigator was predetermined: *Canadian Broadcasting Corp. (CBC) v. Canada (Canadian Human Rights Commission)*, [1993] F.C.J. No. 1334 (F.C.T.D.) at paragraph 47.

[86] The Respondents submit that the witnesses interviewed by the Investigator in this case, who included Dr. Balogun, Captain Thompson, Lieutenant Commander Scott and Lieutenant Commander MacGregor, provided the Investigator with sufficient information to conduct a thorough investigation.

Evidence

[87] The Respondents note that Dr. Balogun claims that CHRC failed to take into account a *Globe and Mail* article dated April 11, 2007, which reported that there was a backlog of 26,000 employees of DND for whom security screening had not been completed. The Respondents submit

that an article about security screening (which is different from a reliability check) for current employees is not relevant to a judgment about a reliability check for a person trying to enrol in the CF in 2002. As well, the article is not evidence that security requirements have been waived; only that there was a backlog in completing those requirements. Thirdly, the article was provided to the CHRC after the Investigator had finished his report. The Investigator was not required to conduct a supplemental investigation based on new information. His job was to provide the responses submitted by the parties to the CHRC for consideration prior to a decision being made under section 44(3)(b)(i) of the Act. The Respondents submit that the articles, as well as Dr. Balogun's submissions, were considered by the CHRC when making its Decision.

Disclosure

[88] The Respondents note that Dr. Balogun has argued that the Investigator wrongly withheld documents from him. The Respondents submit that an investigator is not required to disclose all documents to a complainant, but only the "substance of [that] evidence obtained," so that the parties have an "opportunity to respond to this evidence": *Slattery* at paragraphs 47-49. The Respondents contend that the substance of the evidence obtained in this case, including the substance of Captain Thompson's report, was included in the Investigator's report, which was then circulated to the parties for comment.

Bias

[89] The Respondents note that Dr. Balogun has also argued that the Investigator was biased because he told Dr. Balogun he hoped to be able to mediate a settlement. The Respondents submit that the CHRC tries, through formal and informal mechanisms, to resolve disputes between parties under the Act. An investigator is entitled to discuss settlement options with the parties if they are interested. There is no evidence that the Investigator did not keep an open mind when drafting his report.

ANALYSIS

[90] Dr. Balogun has been unsuccessful in his attempts to secure employment with the CF. His feelings of annoyance and frustration are entirely understandable. Even the CF has acknowledged delays during the recruitment process that have left some applicants “very frustrated” by the way their applications have been mishandled. The Investigator also found that significant delays had occurred in the processing of Dr. Balogun’s application.

[91] The question is, though, whether Dr. Balogun’s difficulties and frustrations, not to mention the time and resources he has fruitlessly expended, can be attributed to a proscribed ground. The Investigator and the Commission thought not and decided that no Tribunal was required. Dr. Balogun disagrees and thinks that reviewable errors were made by the Commission in its investigation of his complaint and the resulting report and Decision.

[92] Dr. Balogun raises what he sees as a significant number of errors, but they appear to coalesce around mistakes and omissions in the report and procedural unfairness.

The Complaint

[93] Dr. Balogun asserts that he was refused an employment opportunity with the CF because of his race, national/ethnic origin or religion, in breach of section 7 of the Act. He further claims that the CF has pursued a policy or practice that deprives people of his race, national/ethnic origin or religion of employment opportunities in breach of section 10 of the Act.

Section 7 Complaint

[94] Dr. Balogun points to a number of facts which he says establish a breach of section 7. For example, his recruitment file was repeatedly closed and he experienced difficulties in having it reopened. He also says he was discouraged by CF personnel from enrolling as an officer and was even told by someone that CF discourages visible minorities from applying as officers, so that he should expect resistance to his aspirations. He points to mistakes made in the recruitment process that he believes reveal a systemic effort to thwart his attempts to enlist as an officer, and takes particular objection to the way the CF used bad debts as an excuse to keep him out of the CF.

[95] With regards to this aspect of the recruitment process, the Investigator made the following findings:

39. A review of the University of Toronto equivalency report indicates that the complainant provided the transcripts for his Bachelor of Science only and that the report states that his B.Sc. is the equivalent to a four-year Bachelor's degree at an accredited Canadian university. It does not appear from the report that the complainant submitted transcripts for his M.B.A or Ph.D. for evaluation.

40. The evidence shows that it is an absolute requirement that post-secondary school transcripts must be submitted as part of the application process for an Officer. It is also a requirement that if these transcripts are from an educational institution outside of Canada, the transcripts must be evaluated by a Canadian university. In this case, the complainant was required to have his transcripts evaluated by the University of Toronto.

41. A review of the recruiting process of the CF's website indicates that proof of Canadian citizenship is required and that a Canadian birth certificate and/or a Canadian citizenship card are acceptable documents. However, neither the website nor the CF have indicated why a Canadian passport would not be considered an acceptable document. In this regard, the evidence shows that the complainant provided both his passport and his Canadian citizenship card and both documents are on his recruiting file.

42. The evidence indicates that during the recruiting process, different career paths are explored with each applicant. This would include both Officer and NCM. In the case of Dr. Balogun, the evidence shows that his application was processed for recruitment as an Officer.

43. The evidence shows that there were significant delays in processing the complainant's application; however, not all the delays were attributable to the CF. For example, one of the delays was caused when the complainant had to have his transcripts evaluated. The evidence shows that as described in the CF Ombudsman report, that processing of recruit applications was not being dealt with as expeditiously as possible and that this caused lengthy delays in the actual processing of applications. The evidence shows that while there were delays in processing the complainant's enrolment applications, the delays were not as a result of a proscribed ground.

44. As the evidence does not appear to support the complainant's allegation of adverse differential treatment, there is no need to proceed with the criteria.

[96] I have gone over all of the factors raised by Dr. Balogun with regard to this aspect of the Decision. While I can see that the cumulative impact was extremely discouraging and that Dr. Balogun might well have come to feel that his aspirations to enlist as an officer were thwarted because of section 7 grounds, I cannot say that the Investigator's findings and conclusions were unreasonable.

[97] As Captain Thompson's report of July 18, 2002 makes clear, notwithstanding the delays and difficulties experienced by Dr. Balogun, he was eventually assessed as eminently qualified for officer status, and all that remained was the resolution of the debt issues that had been identified as part of the recruiting process:

Mr. Balogun displayed a sound understanding of what is required of a leader, and his devotion to his academic and athletic pursuits and his ability to maintain employment as a consultant indicate a high level of discipline and commitment. He was counselled on the requirement to resolve his debt issues prior to enrolment. Mr. Balogun is temporarily unsuitable until providing proof of debt resolution, otherwise would be assessed as above average (MP7) applicant for Pres DEO as a R69 LOG officer with 25 Svc Bn.

[98] So whatever may have been said or written to Dr. Balogun prior to this report, did not prevent a highly complimentary assessment from Captain Thompson. The one factor that rendered him "temporarily unsuitable" was the debt issue, and I think that requires separate comment.

The Debt Issue

[99] Dr. Balogun points out that CF's handling of the debt factor does not make much sense; that may be so, but the issue is whether the CF used apparent debts as an excuse to keep him out of CF because he is black, a Muslim, and of African origin.

[100] The debt factor comes into play because of a DND National Defence Security Policy and a Recruiting Directive that deals with reliability checks for CF enrolments. The Recruiting Directive provides that it is a mandatory condition of eligibility for enrolment that a recruit successfully obtain enhanced reliability status. The Enhanced Reliability check used by the CF includes the following:

... an assessment of reliability, where possible, by references and previous employers, as well as a Criminal Records Name Check and Credit Check.

[101] When assessing the credit check of a recruit, the Recruiting Directive states that the following factors shall be considered:

- a. The degree of indebtedness;
- b. The reason for indebtedness;
- c. Whether the situation is stable or changing;
- d. The individual's reaction to the problem; and
- e. The nature of the duties and access to designated information or assets.

[102] Dr. Balogun was told at his interview with Captain Thompson on July 17, 2002, that a credit check had revealed that he had debts outstanding to Zellers and Eatons.

[103] In his report, Captain Thompson makes mention of the debt issue in two ways:

- a. “Mr. Balogun had an account written off to bad debt and another account sent to collect. He could not comment on either debt and reported the ability to meet his financial obligations based on the current CF pay scale”;
- b. “He was counselled on the requirement to resolve his debt issues prior to enrolment. Mr. Balogun is temporarily unsuitable until providing proof of debt resolution, otherwise would be assessed as an above average (MP7) applicant for Pres DEO as a R69 Log officer with 25 Svc. Bn.”

[104] Dr. Balogun has made much of Captain Thompson’s comment that “He could not comment on either debt” He says that he did comment and made it clear that the debts were not his and that there was some mistake. He thinks that Captain Thompson’s inaccuracies in reporting his position on the debts is part of the systemic effort, on proscribed section 7 grounds, to keep him out of the CF.

[105] There seems little doubt, however, that the CF check had turned up a record of debts against Dr. Balogun in relation to Zellers and Eatons. The evidence also shows that Dr. Balogun could not account for these debts and that, in his interview with Captain Thompson and following, he speculated as to why the debts had been registered against him. He made suggestions that Zellers and Eatons had falsified their accounts or that there must have been some kind of identity theft. He did his own search and received confirmation from Equifax Canada of a debt to Zellers in the

amount of \$1,794 and to Eatons in the amount of \$1,183. He then threatened Equifax, Eatons and Zellers with lawsuits.

[106] We still do not know how those debts came to be registered against Dr. Balogun. A subsequent search dated January 26, 2005 revealed that they had been removed. But we do not know how or why the record changed.

[107] I do not think that Captain Thompson and CF can be faulted for bringing these debts to Dr. Balogun's attention. All that CF knew was that the debts had been recorded in a registry system and that Dr. Balogun denied the indebtedness but could only speculate as to why the debts had been recorded against him.

[108] In the context of Captain Thompson's report as a whole, I believe that Dr. Balogun is placing too much emphasis on the words "He could not comment on either debt" This looks to me like a clumsy attempt by Captain Thompson to say that Dr. Balogun could not explain how the Zellers and Eatons debts had come to be registered against him. This is still the case. On one side, there was the fact of the registrations and the Equifax report; on the other side was Dr. Balogun's denial of indebtedness and his speculations as to how the registrations might have occurred. Captain Thompson counselled him that the debt issue had to be resolved prior to enrolment.

[109] What is less satisfactory, in my view, is why these debts should have suspended Dr. Balogun's enrolment given his general financial picture and his position, as acknowledged by

Captain Thompson, that Dr. Balogun “reported the ability to meet his financial obligations based on the current CF pay scales.”

[110] The debts could hardly be classified as significant and yet they were the factor that rendered Dr. Balogun “temporarily unsuitable” for enrolment.

[111] As the evidence also shows, CF later went on to take a position that the enrolment process would continue to be suspended until Dr. Balogun disproved the indebtedness beyond a reasonable doubt. In other words, the resolution of the debt issues was left to Dr. Balogun, who eventually resorted to lawsuit threats against Equifax, Zellers and Eatons. CF appears to have been satisfied with nothing less than a removal of the debts from the registry system.

[112] CF’s explanation is that an applicant is not denied employment with the CF simply because he or she has debts. If debts exist, a number of factors are considered in deciding whether the recruit is suitable for the CF, including the way that the recruit deals with those debts.

[113] Dr. Balogun dealt with the registered debts in this case by denying that they were his, by speculation about false registrations and identity theft, and by threatening legal action.

[114] Once again, I can entirely understand why Dr. Balogun should feel that the debt issue was used as an excuse to thwart his enrolment in CF, given the size of the debts, his general financial solvency, and his denial that the debts were even his. On the other hand, a routine search and report

by CF's Deputy Provost Marshal Secur 2 for credit history analysis had identified the registrations and there was no way for CF to know how they had come about, or whether Dr. Balogun's speculations had any basis in reality, or whether he was just someone in denial.

[115] It is easy to see in the circumstances of this case why the debt issue took on a greater significance than it would otherwise have deserved. The mystery remains to this day, even though it is now clear that the Zellers and Eatons registrations had been removed by January 26, 2005.

[116] It is against this background of confusion and speculation that the Investigator had to conduct his assessment of the situation in his report. The Investigator went very carefully through the evidence and the arguments advanced by both sides and concluded as follows:

67. A review of the Treasury Board policy states that "The existence of negative information in a credit report can be but need not be sufficient grounds to deny enhanced reliability status. Where adverse credit information exists, the authorizing manager must evaluate: To what extent the individual has changed habits with respect to financial reliability. The likely recurrence of financial difficulties and their potential effect on job reliability."

68. The evidence shows that the complainant's enrolment process was temporarily put on hold because of a debt situation with the complainant. The evidence indicates that the complainant's enrolment was not rejected because of the debt situation; rather, that before the CF could continue with his enrolment, the complainant had to provide documentation showing that he had rectified the situation.

69. The evidence shows that the complainant did not provide the required documentation until January 26, 2005.

...

76. The evidence shows that the CF requires that all candidates must complete an enhanced reliability security check and that part of the security check is a credit check. The CF uses Treasury Board Secretariat's policy in administering this requirement.

77. The evidence shows that in the administration of this policy, the credit check is used as part of the evaluation process to determine a candidate's suitability. However, when a candidate has credit issues, it is not the fact that they have credit issues which may preclude them from enrolment in the CF but rather how he or she will handle their debt issues.

78. The evidence does not support the complainant's allegation that the security policy and credit check were used to temporarily place the complainant's candidacy on hold. It appears from the documentation provided by both the complainant and the respondent that the reason that the complainant's recruitment was placed on hold was because he did not provide documentation which showed that the debt issue had been dealt with. The complainant signed his complaint form against the CF on February 26, 2004 and the documentation showing that the debt issue had been dealt with was finally provided by the complainant to the CF on January 26, 2005.

[117] The report reveals a thorough examination of the evidence and the arguments on both sides of this issue. It is always possible to disagree, but I cannot say that the Investigator's investigation or findings on this issue were unreasonable.

Section 10 Complaint

[118] The Investigator came to the conclusion that there was no need to investigate the section 10 component of Dr. Balogun's complaint:

70. As the evidence appears to indicate that the complainant was not qualified for the employment opportunity because he did not pass the credit check, there is no need to proceed with the criteria. i. does the

Respondent rely on a policy, rule, practice, or standard as the basis for the alleged discriminatory action.

[119] Dr. Balogun says that, in coming to this conclusion, the Investigator and the Commission committed an error in law. He says that a credit check is not a functional requirement for any position in the military and that the onus was upon CF to provide justification for this requirement. He says the Investigator erred in law because he did not investigate this matter and seek justification for the requirement from CF.

[120] The Respondents say that, based upon Dr. Balogun's complaint form and correspondence, the initial focus of his section 10 complaint was an allegation that the CF had used its enhanced reliability screening policy to unfairly keep him out of the CF. The Respondents also say that an employer is only required to demonstrate that an employment requirement is a *bona fide* occupational requirement after a *prima facie* case of discrimination has been found. Since the Investigator did not find a *prima facie* case of discrimination in this case, there was no need for the Investigator to consider whether a credit check was a *bona fide* occupational requirement.

[121] The Investigator's statement at paragraph 70 of the report was that "the complainant was not qualified for the employment opportunity because he did not pass the credit check"

[122] Captain Thompson's report reveals that Dr. Balogun was assessed as "above average" but was designated "temporarily unsuitable until providing proof of debt resolution"

[123] Dr. Balogun did not provide evidence that his credit problem had been addressed until January 26, 2005. Hence, the Investigator concluded that Dr. Balogun had not been qualified for the employment opportunity he was seeking at the material time.

[124] It is important to bear in mind, however, that it was not simply the outstanding debts that rendered him unqualified. Rather, it was because he had failed to resolve the issue of the debts as part of an assessment of reliability. He simply denied that the debts were his and expected that such a denial should be enough. He then resorted to speculation and extreme legal measures. This simply made the situation worse because it did not assist with the assessment of his reliability for which the debt issue was but one factor. As Captain Thompson pointed out to the Investigator, the fact that Dr. Balogun had some debt was not the issue. The reliability issue was how he was going to rectify the situation. Dr. Balogun's only answer to this was to deny that the debt was his. But this was not a suggestion for rectification of the problem. A simple denial does not assist with the issue of reliability unless, of course, Dr. Balogun can provide some objective proof or confirmation that a mistake has been made. Objective proof that the debts were not Dr. Balogun's at the time of his interview with Captain Thompson has never been provided. Dr. Balogun merely produced an Equifax search in 2005 which showed that the registrations had been removed.

[125] Dr. Balogun says that a credit check is not a functional requirement for any position in the military. This, however, misses the point. Reliability is the issue and there is no argument before me that reliability is not a functional requirement for an officer. Criminal searches and credit searches,

as well as an applicant's response to what is revealed by those searches, are simply one aspect in the determination of reliability.

[126] In my view, Dr. Balogun is not accurate in his assertion that "DND claimed good credit is part of the qualification for employment as a Military Officer" Reliability is part of the qualification and CF simply uses various means to determine reliability. One of them is to do a credit check and then discuss with applicants how they plan to handle their credit situations. In Dr. Balogun's case, he simply denied that the two specific debts were his. Obviously, something more was required than a denial to allow CF to gauge Dr. Balogun's reliability over his credit situation. Denial, speculation and legal threats are not indicia of reliability. Yet Dr. Balogun provided little more until he produced the Equifax search in 2005.

[127] Dr. Balogun says that he "established a *prima facie* case of discrimination and DND failed to supply any shred of evidence to support its justification, if any."

[128] However, CF produced evidence and an explanation concerning reliability testing and the way that credit searches are used to gauge reliability in aspiring officers.

[129] The Investigator did not proceed to look at justification issues because, in fact, there was no *prima facie* case of discrimination on the facts. Dr. Balogun's application was simply placed on hold while the credit issue was resolved. Behind the credit issue lay reliability concerns. Dr. Balogun did not resolve the outstanding credit issue so that his reliability could be fully gauged.

[130] There was no *prima facie* case of discrimination and, hence, no reason for the Investigator to examine justification issues. In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] S.C.J. No. 46 at paragraphs 69-70, Ms. Meiorin “discharged the burden of establishing that, *prima facie*, the aerobic standard discriminates against her as a woman” and, for this reason “the burden shifts to the Government to demonstrate that the aerobic standard is a BFOR.”

[131] In the present case, there was no *prima facie* case that Dr. Balogun has suffered discrimination and that, in particular, a reliability test that used, *inter alia*, a credit check and his way of dealing with ostensible outstanding debts as one means of gauging reliability discriminated against him as a black, Muslim and African origin applicant to CF.

[132] On the present facts, there was no refusal to employ Dr. Balogun on a prohibited ground of discrimination. Dr. Balogun was assessed as being “temporarily unsuitable until providing proof of debt resolution,” and he knew that his file would eventually be closed if he did not deal with this issue. I can see no error of law on the part of the Investigator and the Commission on this point.

Procedural Fairness Issues

[133] I have reviewed each of the procedural fairness issues raised by Dr. Balogun against a standard of correctness. For a decision under 44(3)(b)(i) to be procedurally fair the following general conditions must be satisfied:

- a. The investigation must be thorough and neutral;
- b. The Commission must inform the parties of the substance of the evidence obtained by the Investigation, provide the parties with an opportunity to respond to that evidence and then makes its own decision in light of the evidence and submissions provided.

[134] These general rules are laid out in *Slattery v. Canada (HRC)*, [1994] F.C.J. No. 181 (F.C.T.D.) at paragraphs 47-49. *Slattery* also makes it clear that, in determining whether an investigation is fair the Court must take into account the need to maintain a workable and administratively effective system. See *Slattery* at paragraphs 55-56.

Witnesses

[135] Dr. Balogun argues that all of the potential witnesses he suggested should have been interviewed. It is not clear from the names listed how those witnesses would have changed the Investigator's conclusions, or how his decision not to interview them prevented him from thoroughly assessing what had happened to Dr. Balogun in his attempts to enlist in the CF.

[136] The witnesses that the Investigator did interview provided him with sufficient information, in addition to the documentary evidence, to allow a clear and objective picture of what had occurred. There is nothing to suggest that interviewing all of the witnesses named by Dr. Balogun would have materially changed that picture. *Slattery* makes it clear that it is not necessary to interview all witnesses put forward by either side:

69. The fact that the Investigator did not interview each and every witness that Dr. Balogun would have liked her to and the fact that the conclusion reached by the Investigator did not address each and every alleged incident of discrimination are not in and of themselves fatal as well. This is particularly the case where Dr. Balogun has the opportunity to file in gaps left by the Investigator in subsequent submissions of her own. In the absence of guiding regulations, the Investigator, much like the CHRC, must be master of his own procedure, and judicial review of an allegedly deficient investigation should only be warranted where the investigation is clearly deficient.

[137] I cannot say on the evidence before me that the investigation was clearly deficient. In fact, it appears to me that the Investigator did what was needed to ascertain what had happened to Dr. Balogun, why it had happened, and whether this amounted to some form of discrimination.

Overlooking Evidence

[138] Besides alleging a general failure by the Investigator to interview all the witnesses he identified and to gather additional information, Dr. Balogun complains that the Commission failed to take into account a *Globe and Mail* article dated April 11, 2007 which reported that a DND audit had revealed a backlog of 26,000 employees who had not completed security screenings. Dr.

Balogun's point is that he was denied employment because of an unresolved debt problem, while a lack of security screenings has not prevented 26,000 people from becoming employees of DND.

[139] This article was provided to the Commission after the Investigator had finished his report. There is nothing to suggest that this *Globe and Mail* article was not considered by the Commission alongside all of the other comments that Dr. Balogun submitted prior to the Decision. I cannot say that this evidence was overlooked by the Commission.

[140] It is also difficult to see how such evidence can be related to a reliability check on Dr. Balogun that took place in 2002. There is not enough before the Court to establish a connection between the DND audit or security screening and the "temporarily unsuitable" designation that Captain Thompson gave Dr. Balogun "until providing proof of debt resolution." The real problem for me is that Dr. Balogun's debts were not something he acknowledged and dealt with, as would be the normal situation. He vehemently denied the debts, speculated about what had happened, and then finally resorted to legal action. In other words, this was a very singular situation and neither side appears to have had any knowledge of the real significance of those debts for Dr. Balogun's reliability as an officer. He would not acknowledge responsibility for them and CF had no way of knowing if his assertions were true. Hence, Captain Thompson counselled Dr. Balogun to resolve the debt situation. Dr. Balogun did not do this until 2005 when he finally presented an Equifax search showing that the Zellers and Eatons debts had been removed. We still do not know how that occurred.

[141] It is difficult to equate this somewhat extraordinary debt issue, connected to reliability in 2002, with a DND audit related to security screening. In many ways, Dr. Balogun's debts took on a life of their own and he was left to provide a resolution.

[142] Hence, I do not think it can be said that the Commission overlooked the 2007 audit or that it had such a material significance for the Commission's conclusion that it needed to be specifically addressed as a piece of evidence.

Disclosure

[143] Dr. Balogun argues that the Investigator wrongly withheld documents from him. In particular, he says that he should have been provided with Captain Thompson's report of July 18, 2002.

[144] Dr. Balogun has provided the Court with no authority that says he is entitled to see particular documents or to question the general words in *Slattery* at paragraph 47 that "in order to satisfy the duty of fairness, the CHRC had to inform the parties of the substance of the evidence obtained by the Investigator, and which was put before the CHRC." The purpose of this requirement is to give the parties an opportunity to respond to the evidence and "make all relevant representations in relation thereto."

[145] In the present case, Dr. Balogun has not convinced me that he was not provided with the substance of the evidence following a neutral and thorough investigation and report by the Investigator. He sees Captain Thompson's report as crucial because it contained an inaccuracy that he could not comment upon because he had not seen the report itself. He says that inaccuracy was that "he could not comment on either debt" He says he did comment and he made it clear, in no uncertain terms, that these debts were not his. However, in the context of the report as a whole, I do not regard this issue as material. It is just a clumsy way of saying that Dr. Balogun could not explain why he had debts registered against him; hence, it obviously remained an issue to be resolved in the context of a reliability check: "He was counselled on the requirement to resolve his debt issues prior to enrolment."

[146] When I turn to the Investigator's report, it is clear that Dr. Balogun was provided with the substance of the evidence from a neutral and thorough investigation and that, in particular, the full scope and import of his discussions with Captain Thompson were provided to him.

53. During the credit check, the CF used national credit reporting agencies which indicated that Dr. Balogun had bad debt. Dr. Balogun was asked to provide documentation showing that the bad debt issue had been dealt with; however, Dr. Balogun did not provide this documentation. Therefore, his application for enrolment in the CF was put temporarily on hold.

54. The complainant was asked to advise the respondent in writing how he would deal with his debt issue. He was also advised that once the debt issue was resolved, his application process would be reactivated. He was also advised of this in a letter from Col. Tremblay.

55. Consequently, the respondent states that until the debt issue was rectified, the complainant was not qualified to enrol in the CF as an Army Officer in the Reserves.

56. The respondent states that the complainant meets the academic requirements and is physically qualified for enrolment as an Officer in the Army Reserve. It states that during the enrolment process, a pre-security clearance is required by the Government of Canada. It states that before an enrolment interview is scheduled, the pre-security clearance must be completed. As part of the security clearance process, a credit check is required.

57. On July 18, 2002, the complainant's assessment report made the following statements: that the complainant was highly motivated, intelligent, and had good leadership skills. The final statement of the complainant's assessment report states "...otherwise would be assessed as a above average (MP7) applicant for Pres DEO as a R69 LOG officer with 25 Svc. Bn." However, during the credit check, it was determined that the complainant had several debts that were referred to collection. He was advised of this fact and that he would be considered "temporarily unsuitable for enrolment" until the debt situation was rectified. The CF states that this is standard operating procedure.

58. The CF stated that while the complainant denied that the debt was his, the CF advised him that this was not sufficient to be considered as having dealt with the debt issue. In August 2002, after further consultation concerning the debt issue, the CF determined that the complainant was not rectifying the debt situation to its satisfaction and therefore closed the complainant's file. In September, the complainant's file was reviewed again and the CF determined that it had handled the complainant's file in accordance to proper policy and procedure and that his file would remain closed until his debt situation was rectified.

59. In December 2003, the CF confirms receipt of a letter sent to Maj-Gen Arp wherein the complainant maintained that the debt was not his; however, the credit report that the complainant provided indicated that the debt from one of the creditors had increased and the debt from the other creditor had decreased. Therefore, the CF maintains that the debt belonged to the complainant even though he has denied owing the debt. Maj-Gen Arp stated in his letter that this was not sufficient rectification of the debt issue.

60. The CF indicated that the complainant's "solution to this issue – becoming a lawyer and represent yourself in civil suits against Sears

and Zellers – cannot be taken as evidence that you are attempting to clear your debts. As such, your applicant file will remain closed.”

61. In conclusion, the CF denies that the enrolment process was based on racist policies; rather, the complainant’s temporary denial for enrolment in the CF was based on his credit history. The CF states that once the complainant has rectified his credit issue, the CF will reopen his application for an Army Reserve Officer.

62. On February 20, 2007, the Investigator interviewed Maj. Thompson who was the military career counsellor for Dr. Balogun. Maj. Thompson stated that during his interview with Dr. Balogun, they discussed his security check results; specifically, the fact that there was an issue with Dr. Balogun’s credit. Maj. Thompson said the fact that Dr. Balogun had some outstanding debt was not the reason that his file was placed on temporary hold.

63. Maj. Thompson stated that often, applicants have a debt situation and as part of the reliability check, the debt situation is discussed with the individual to determine how the debt situation will be dealt with. Maj. Thompson stated that for example, if an individual has a large debt and monthly payments of \$3,000 or \$4,000 and is making only \$1,200 with the CF, the question arises for the CF: how will the individual responsibly handle the debt? Often, applicants are advised that until they get their debt situation under control, their application will be temporarily placed on hold.

64. Maj. Thompson stated that in regard to Dr. Balogun, the fact that he had some debt in collection was not the issue, but was rather how he was going to rectify the situation. Maj. Thompson went on to state that Dr. Balogun insisted that the debt was not his as he had been the subject of identity theft. Maj. Thompson indicated that if this was the case, that the CF would need some form of documentation such as a statement from the bank or the police or the creditor showing that this was the case.

65. Maj. Thompson said that Dr. Balogun insisted that it was the CF’s responsibility to prove that the debt was not Dr. Balogun’s. Maj. Thompson said he tried to explain to Dr. Balogun that it was his responsibility and that the CF did not have the ability to initiate such a process and that until he provided documentation showing how the debt would be handled, they could not proceed with his application for enrolment any further.

[147] I cannot say that Dr. Balogun was prejudiced in any way in his response to the report because he did not receive a copy of Captain Thompson's letter or any other particular document.

Bias

[148] Dr. Balogun says that the Investigator was biased because he informed Dr. Balogun that he hoped to mediate a settlement between the parties.

[149] There is no evidence before me that the Investigator's efforts to mediate prevented him from producing a neutral and thorough report. An Investigator is entitled to discuss possible settlement options with the parties (and both parties in this case indicated they were interested in settlement). There is no evidence that settlement discussions affected the final report in any way.

Conclusions

[150] My conclusions are that Dr. Balogun has had a very frustrating experience in his dealings with CF. There have been delays and annoying breaks in the recruitment process. From time to time, Dr. Balogun has been told inconsistent things by different CF personnel and the debt issue was so strange that it took on a life of its own, which makes it hard to assess against standard procedures. However, the Investigator looked into these matters and provided a neutral and thorough report. I cannot conclude that any of his findings were unreasonable or that his methods were procedurally unfair. The Commission simply could not, on the evidence and after a thorough investigation,

connect Dr. Balogun's experiences to a proscribed ground. It is, as always, possible to disagree with those conclusions, but it is not my job to decide this matter anew and I can find no reviewable error in the Decision.

[151] Dr. Balogun is a highly intelligent, highly educated and articulate person. He has a great many other qualities too that caused Captain Thompson to rate him highly. He was obviously eminently suitable for an Officer's position. Stepping back, it seems bizarre that such a candidate should have been held back in his aspirations because of two fairly modest debts.

[152] The evidence suggests to me that the debt issue could have been handled better on both sides. CF could have looked at outstanding debt in the context of Dr. Balogun's general financial situation. At the same time, however, Dr. Balogun's reaction to the debt registrations and his taking their existence as a personal affront caused a polarization to occur. CF had no way of knowing why the debts were registered or whether Dr. Balogun's protestations and speculations had any substance to them. It was his responsibility to resolve the reliability concerns that arose as a result of the debts registered against him. He did not do this and we still do not know how those debts came to be registered against him, even though the registrations were eventually discharged.

[153] These are indeed unfortunate and somewhat bizarre circumstances. But the issue for the Commission was whether they could be connected to a proscribed ground. It concluded that they could not. On review, I do not think they can be faulted for that conclusion even though I can fully appreciate Dr. Balogun's frustrations and suspicions.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application for judicial review is dismissed.
2. Both sides are free to address the Court on the issues of costs. This can be done, initially, in writing and the Court will decide whether a further hearing on costs is required. The parties must, of course, serve each other with any cost submissions made to the Court.

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-152-08

STYLE OF CAUSE: DR. ABDUR-RASHID BALOGUN

APPLICANT

- and -

HER MAJESTY THE QUEEN
MINISTER OF NATIONAL DEFENCE

RESPONDENT

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: MARCH 17, 2009

REASONS FOR : HON. MR. JUSTICE RUSSELL

DATED: April 23, 2009

APPEARANCES:

Dr. Abdur-Rashid Balogun

Self-Represented APPLICANT

Liz Tinker

RESPONDENT

SOLICITORS OF RECORD:

Dr. Abdur-Rashid Balogun

Self-Represented APPLICANT

John H. Sims, Q.C.
Deputy Attorney General of Canada

RESPONDENT