Federal Court  Cour fédérale

Date: 20110624

Docket: T-1094-10

Citation: 2011 FC 767

Ottawa, Ontario, June 24, 2011

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

LEVAN TURNER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Levan Turner claims that his employer, the Canadian Border Services Agency [CBSA], discriminated against him when it screened him out of two job competitions for an indeterminate position as a Customs Inspector [CI]. He alleges discrimination primarily on grounds of race, and national or ethnic origin.

[2] A panel of the Canadian Human Rights Tribunal dismissed Mr. Turner's complaint after a 10-day hearing. Since there was no evidence of direct discrimination, Mr. Turner argued before the Tribunal that his employer's seemingly neutral conduct was actually a pretext for discrimination. In the first competition, even though he had received positive reviews when hired for seasonal work, Mr. Turner failed to achieve a high enough score in his interview for a permanent position in Victoria. In the second, he was found not to be eligible for a job opening in Vancouver.

[3] The Tribunal assumed, without deciding, that Mr. Turner had made out a prima facie case of discrimination. It then went on to consider whether the CBSA had provided a reasonable explanation for screening out Mr. Turner that did not amount to a pretext for discrimination. In respect of the position in Victoria, the Tribunal accepted the CBSA's explanation that Mr. Turner's positive reviews as a seasonal employee did not necessarily mean that he possessed the qualities sought in a permanent employee. In respect of the Vancouver position, the Tribunal found that the CBSA had valid reasons for its eligibility criteria and that it had not screened out Mr. Turner for a discriminatory reason.

[4] Mr. Turner argues that the Tribunal applied the wrong legal principles, erred in its treatment of the evidence, and failed to provide adequate reasons. He asks me to overturn the Tribunal's decision and refer the matter back to a different panel. However, I can find no grounds for overturning the Tribunal's decision and must, therefore, dismiss this application for judicial review.

[5] The issues are:

1. Did the Tribunal apply the correct legal principles?
2. Did the Tribunal err in its treatment of the evidence?
3. Did the Tribunal provide adequate reasons?

II. The Tribunal's Decision

[6] The Tribunal thoroughly reviewed Mr. Turner's qualifications and experience for the CI position, and the circumstances surrounding the competitions. Mr. Turner had been a member of the Metropolitan Toronto Police Auxiliary between 1991 and 1995, a voluntary role involving community policing, traffic control and public relations. His CI experience began in Victoria in May 1998 with a position as a seasonal worker on the Marine Team. His duties included processing ships, ferries and other water craft for entry into Canada. After that term ended in October 1998, Mr. Turner took another seasonal position from December 1998 to October 1999 in the Telephone Reporting Centre. This role involved receiving telephone calls from vessels seeking clearance into Canadian waters.

[7] Mr. Turner returned to work as a CI on a seasonal basis in 2000 and 2001. His term was extended until October 2002, as additional CIs were required after the events of September 11, 2001. Mr. Turner again worked as a seasonal CI in 2003.

[8] Mr. Turner's first performance review related to his 1998-1999 term. The review was mostly favourable. His supervisor recommended re-employment for the next season. His assessments for 2000 and 2001 were also positive, and he was again recommended for further employment as a seasonal worker. He received two further favourable reviews in 2002. In testimony before the Tribunal, Mr. Turner's supervisor in 2002 explained that Mr. Turner had conducted himself in a professional and courteous manner, and showed potential to be an effective CI.

[9] Mr. Turner's supervisor in 2003, a Supt. Klassen, also praised Mr. Turner. However, he noted that Mr. Turner's experience was rather limited; he had only been involved in six enforcement actions that year, all relating to narcotics. Still, Supt. Klassen recommended Mr. Turner for re-employment. During a conversation about the review, Supt. Klassen informed Mr. Turner that other supervisors had perceived Mr. Turner to have avoided some of the more difficult tasks of a CI. He also told Mr. Turner that other CIs had complained that Mr. Turner had not always cashed-out the monies collected from duties during his shift, as he was expected to do. After this conversation, Supt. Klassen sent an email to other supervisors summarizing the discussion, which concluded as follows: "I asked him to take a close look at himself next year to ensure he is not dodging harder tasks or seeking the easy path. In turn he asked that we give him ongoing feedback on how he is doing in our eyes. The conversation went very well and without conflict".

[10] Supt. Klassen subsequently sent another email adding that the question of Mr. Turner's attendance record had also been discussed. Supt. Klassen testified before the Tribunal that he had not included these supplementary observations in Mr. Turner's performance review because Mr.

Turner had not been given a chance during their conversation to respond to them. His intent was to create a record that would be useful to Mr. Turner's future supervisors.

[11] The Tribunal described CI competitions in which Mr. Turner had participated. The first took place in 2002. Mr. Turner did not pass the interview, in part because of his limited enforcement experience. One of the interviewers encouraged Mr. Turner to try to gain broader experience in subsequent seasons, and to apply again. Mr. Turner applied again later in 2002, but again failed to pass the interview.

[12] Coming then to the competitions that resulted in Mr. Turner's complaints, the Tribunal set out in considerable detail the circumstances surrounding those events. The first competition on which Mr. Turner's complaint was based is referred to as "Victoria 7003". Mr. Turner attended an interview in December 2003 before a Board of two members. In two areas of inquiry - Effective Interactive Communication, and Teamwork and Cooperation - Mr. Turner scored 60 and 40 points respectively. A passing mark was 70 points in each category. Before the Tribunal, a Board member explained that Mr. Turner had been found not to be clear in his communication given that he had first stated that he had been a member of the Metropolitan Toronto Police but later clarified that he was a member of the police auxiliary. In respect of teamwork and cooperation, Mr. Turner had given examples of his own behaviour in circumstances where he felt his co-workers had not responded appropriately. Mr. Turner provided the names of persons [validators] who could substantiate his account of those events. A Board member contacted one of those validators in January 2004, well after Mr. Turner had been found not to be qualified. The member explained that he did so because Mr. Turner's description of events did not accord with the member's knowledge

of the persons involved. Indeed, the person did not corroborate Mr. Turner's description of the relevant events.

[13] The second competition is referred to as "Vancouver 1002". The position related to a CI position in Vancouver. According to the criteria established for that competition, persons who had been interviewed for the position after January 1, 2002 were not eligible. Even though he had been interviewed for other CI positions after that date, Mr. Turner considered himself to be eligible because those other interviews were for positions in locations other than Vancouver. So, he applied.

[14] The first interview for Vancouver 1002 took place before a Board of three members on April 26, 2004. Mr. Turner recognized one of the members, a Mr. Tarnawski, as a person who had previously interviewed him. Mr. Tarnawski also remembered Mr. Turner, based on his "voice and presence". After the interview, the Board checked its records and discovered that Mr. Turner had, in fact, been interviewed for other CI positions after January 1, 2002 and, therefore, was not eligible for the Vancouver position.

[15] Mr. Turner disputed the Board's conclusion, pointing out that other candidates who had been interviewed for CI positions after January 1, 2002 had been found to be eligible for Vancouver 1002. The Board noted, however, that those other persons had been successful in the earlier competitions while Mr. Turner was not. The intent of the eligibility restriction, according to the Board, was to screen out persons who had been unsuccessful in previous competitions. The Board sent Mr. Turner a written notice of its decision, which invited Mr. Turner to make any request for

further information before June 9, 2004. Mr. Turner replied, again disputing the Board's conclusion, but the Board did not receive it until June 11, 2004. So, it did not respond.

[16] Based on the evidence before it, the Tribunal concluded that no candidate who had been unsuccessful in other competitions had succeeded in the Vancouver 1002 competition, although it appeared there might have been one ineligible candidate who had made it to the second round of interviews.

[17] After considering the evidence, the Tribunal found there to be no direct proof of discrimination. It went on to consider whether the evidence supported an inference of discrimination that was more probable than other possible inferences or hypotheses (according to *Basi v Canadian National Railway Company* (1988), 9 CHRR D/5029, [1988] CHRD No 2 (QL) (CHRT)). The Tribunal assumed that Mr. Turner had presented a prima facie case of discrimination and focussed on the question whether the CBSA had given a reasonable explanation for not hiring Mr. Turner in an indeterminate position.

[18] Regarding Victoria 7003, the Tribunal found the Board's conclusions about Mr. Turner's poor interview performance to be reasonable. There was no evidence that would support an inference of discrimination.

[19] The Tribunal was also satisfied that, while the wording of the restriction on eligibility for Vancouver 1002 was poorly drafted, the purpose of the exclusion was to avoid having to interview candidates who had already been found not to qualify for the CI position. Further, the evidence

showed that Mr. Turner was, in fact, the only candidate for Vancouver 1002 who was ineligible according to that interpretation of the rule. The Tribunal noted that, had it wished to discriminate against Mr. Turner, the Board would likely have found that he had failed the interview, instead of finding him not to be eligible. The fact that one of the Board members had remembered Mr. Turner from a previous interview did not suggest discrimination on the basis of Mr. Turner being a large, black male – the member simply remembered Mr. Turner's voice and personality.

[20] Accordingly, the Tribunal found that the evidence did not support Mr. Turner's complaint of discrimination.

III. Issue One – Did the Tribunal apply the correct legal principles?

[21] Mr. Turner maintains that the Tribunal failed to explore the question whether his race had subtly influenced the CBSA's treatment of him. He suggests that he may have been stereotyped as a lazy, black person, a possibility that the Tribunal failed adequately to address.

[22] Mr. Turner points to the following factors to support his submission that the CBSA's conduct was really a pretext for discrimination:

- In one of his emails, Mr. Klassen had questioned his work ethic by mentioning a concern about his attendance record;

- Mr. Klassen's email reference to Mr. Turner not "cashing-out" was contradicted by evidence before the Tribunal, but the Tribunal did not refer to that evidence;

- Mr. Klassen never raised concerns in these areas with Mr. Turner directly;

- The emails were sent the day before the Victoria 7003 competition commenced, yet a Board member who testified before the Tribunal stated he "did not read every" email, raising a question about the member's credibility;

- The Tribunal found nothing ominous about the Board contacting one of Mr. Turner's validators even after he had been found not to be qualified, but did not refer to the contradictory evidence the validator provided at the hearing;

- Mr. Turner's prior performance reviews found him to be competent in the areas where he was found later not to be qualified;

- Mr. Turner passed the initial interview for Vancouver 1002 and was then found not to be qualified, which seemed to cast doubt on the finding that he was not qualified for Victoria 7003, and appeared to single out Mr. Turner;

- Mr. Tarnawski testified that he remembered Mr. Turner because he had not interviewed "a whole pile of people that would meet the same physical

characteristics as Mr. Levan Turner", which suggested that Mr. Turner stood out as a large, black male and that his characteristics affected the Board's treatment of him;

- Mr. Tarnawski failed to respond to Mr. Turner's request for more information.

[23] The accepted legal principles applicable to claims of discrimination recognize that, once a complainant has made out a prima facie case, the burden shifts to the respondent to provide a reasonable explanation. If it does so, the complainant must then show that the explanation amounts to a pretext for discrimination (*Maillet v Canada (Attorney General)*, 2005 CHRT 48, [2005] CHRD No 38 (QL)).

[24] Here, once the Tribunal made an assumption that Mr. Turner had presented a prima facie case of discrimination, it had to consider CBSA's explanation for its treatment of Mr. Turner in the two job competitions in issue. The Tribunal reviewed the evidence in considerable detail and, ultimately, found CBSA's explanation to be reasonable. In turn, it found that Mr. Turner had not presented persuasive evidence that the explanation was a mere pretext for discrimination. As I review the Tribunal's decision, it appears to me that it stated the correct legal test (*Basi*, above) and applied the relevant legal principles correctly, even though it did not agree with Mr. Turner's characterization of the evidence.

IV. Issue Two – Did the Tribunal err in its treatment of the evidence?

[25] Mr. Turner submits that the Tribunal failed to consider whether the evidence, in its entire context, supported an inference of discrimination. Further, he contends that the Tribunal left out some areas of evidence that would have supported that inference. These errors, he says, caused the Tribunal to arrive at an unreasonable conclusion.

[26] Mr. Turner contends that the evidence as a whole supports an inference that his superiors at CBSA perceived him to be large, black man who is lazy and dishonest. He points particularly to the content of, and the circumstances surrounding, the emails sent by Mr. Klassen as being a manifestation of how he was perceived in the workplace. In turn, that perception influenced those persons who reviewed his candidacy for the two job competitions.

[27] Mr. Turner also points to evidence overlooked by the Tribunal – testimony from a black customs officer who stated that prejudice was prevalent in the CBSA workplace, and evidence that less qualified candidates had been hired while Mr. Turner was not. Mr. Turner argues that the Tribunal had a duty to consider that evidence (citing *Canada (Attorney General) v Bates*, [1997] 3 FC 132, 147 DLR (4^{th}) 358 (TD)).

[28] Finally, Mr. Turner maintains that the Tribunal failed to consider part of his complaint. He submits that the basis for the discrimination he endured was in part because he was overweight. Courts have recognized this ground as “perceived disability”. The Tribunal did not address that ground specifically.

[29] In my view, however, the Tribunal's treatment of the evidence was not unreasonable. In effect, Mr. Turner is asking me to reweigh the evidence before the Tribunal and to arrive at a conclusion more favourable to him.

[30] The Tribunal considered the evidence relating to the emails and accepted Mr. Klassen's testimony regarding his perception of Mr. Turner and his reasons for sending those messages. The Tribunal also found there was no causal connection between the emails and Mr. Turner's lack of success in the Victoria competition. Further, it considered the Board's reasons for contacting Mr. Turner's validator after the Victoria competition and found the Board's explanation to be reasonable.

[31] In respect of evidence the Tribunal allegedly overlooked, Mr. Turner is correct that the Tribunal did not refer expressly to the evidence it heard about racism in the CBSA workplace. However, that evidence related to one person's description of a remark made by a CBSA trainer. Its connection to Mr. Turner's case was remote and of little probative value.

[32] In circumstances where a Board has knowledge that a candidate's skills and experience do not accord with his or her performance in a competition, it has a duty to try to reconcile the conflicting evidence before it (*Bates*, above). However, that was not the case before the Board here. The Board did not have personal knowledge of Mr. Turner's past performance. Further, it had convened an open competition, in which all candidates had to be given an equal opportunity to present their qualifications for the position. The Board did not have to treat Mr. Turner's application

any differently from the others. The Tribunal did not err in failing to conclude that the Board's conduct supported Mr. Turner's complaint.

[33] As for the Tribunal's failure to consider perceived disability as a ground of discrimination, I note that Mr. Turner's original complaint did not put forward that allegation. It seems to have been the subject of oral argument before the Tribunal, but little, if any, evidence was presented to the Tribunal on the subject. I cannot conclude that the Tribunal erred by failing to address it specifically in its reasons.

[34] Therefore, I cannot find that the Tribunal erred in its treatment of the evidence before it. Its conclusion was not unreasonable based on the evidence.

V. Issue Three – Did the Tribunal provide adequate reasons?

[35] Mr. Turner's final argument is that the Tribunal failed in its duty to provide adequate reasons. He submits that, even if the Tribunal did not err in respect of the issues discussed above, it erred by failing to explain why it applied the legal principles and dealt with the evidence in the way that it did. This amounts to a breach of the rules of fairness.

[36] As I see it, this line of argument amounts in essence to a repackaging of the first two issues. In effect, Mr. Turner is suggesting that, even if the Tribunal did not make an error of law, it erred by not explaining why it did not accept Mr. Turner's articulation of the applicable legal principles. And

even if the Tribunal did not arrive at an unreasonable conclusion on the evidence before it, it erred by providing a poor written analysis of that evidence.

[37] To my mind, it would be the rare case where a decision-maker can be found to have made no error of law and to have arrived at a conclusion that is not unreasonable on the evidence, yet to have failed to articulate adequate reasons. The purposes of reasons include informing the parties why the decision-maker arrived at its conclusion, permitting them to decide whether to seek judicial review, allowing the reviewing court to determine whether the decision was reasonable, and ensuring that the decision is justified, transparent and intelligible (*Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 at para 16).

[38] Here, Mr. Turner had no apparent difficulty understanding the Tribunal's decision, deciding to seek judicial review, and presenting grounds on which this Court might have intervened. In particular, given my finding that the Tribunal's conclusion was not unreasonable, it follows that it was justified, transparent and intelligible (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[39] While I would not go so far as to say that the duty to provide adequate reasons adds nothing to the tribunal's obligations to adhere to the law and to render a reasonable decision, I would say that, in some circumstances, these obligations may overlap considerably. In addition, where, as here, an applicant has presented extensive submissions regarding the substance of a tribunal's decision which closely parse its written reasons, a supplementary and distinct challenge based on an alleged failure to provide an adequate explanation for the decision may be met with some scepticism by a reviewing court.

[40] In my view, the Tribunal's reasons were adequate. They served the well-established purposes for which written reasons are required.

VI. Conclusion and Disposition

[41] The Tribunal applied the proper legal principles, arrived at a reasonable conclusion based on the evidence before it, and provided adequate reasons for its conclusion. Therefore, I must dismiss this application for judicial review, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, with costs.

"James W. O'Reilly"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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