

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Ottawa, Canada K1A 1J4

Citation: 2015 CHRT 10

Date: May 7, 2015

File No.: T1248/6007

Between:

Levan Turner

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Decision

Member: Wallace G. Craig

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I. Introduction

[1] On March 7, 2014 I rendered a decision (2014 CHRT 10) that, in 2003, Canada Border Services Agency (CBSA) engaged in discriminatory practices against the Complainant contrary to sections 7 and 10 of the *Canadian Human Rights Act (CHRA)*; that by reason of his age, race, colour and a perceived disability of obesity, CBSA wilfully deprived the Complainant of employment opportunities in Vancouver Competition 1002 and Victoria Competition 7003.

[2] In section VI of my March 7, 2014 decision I made a series of determinations including:

[257] Based on reasons stated throughout this decision, and in all the surrounding circumstances of this case, I made findings of fact that Mr. Tarnawski and Mr. Baird were not credible witnesses; they revealed similar characteristics, often reticent, often resorting to prolixity in order to avoid making direct dispassionate answers. Both floundered under cross-examination. Wherever their evidence differs with that of Mr. Turner, I have accepted Mr. Turner's evidence.

[258] Neither Mr. Tarnawski or Mr. Baird provided a reasonable explanation demonstrating that the alleged discrimination did not occur as alleged or that the conduct was somehow non-discriminatory.

[259] I find that the interviews of Mr. Turner by Mr. Tarnawski (Vancouver Competition 1002) and Mr. Baird (Victoria Competition 7003) were flawed and injudicious, that they were conducted in a manner which denied Mr. Turner an opportunity to compete for indeterminate employment with CBSA; and that in each case the decision was arbitrary and pretextual, based on prejudice, and constituted discriminatory practices under sections 7 and 10 of the *CHRA*.

[3] In section VII of my March 7, 2014 decision I cited s. 53 of the *CHRA*:

[263] Section 53(2)(e) of the *CHRA* provides that a complainant may be compensated up to \$20,000 for pain and suffering experienced as a victim of a discriminatory practice. After a subsequent hearing on remedy, I will order the Respondent to pay such amount as may be appropriate to the

Complainant compensating him for pain and suffering experienced after he was denied employment opportunities.

[264] Section 53(3) of the *CHRA* provides that the Tribunal may order a respondent to pay up to \$20,000 in compensation to the victim if the Respondent is found to have engaged in the discriminatory practice wilfully or recklessly. I find that Respondent managers Ron Tarnawski and Trevor Baird acted wilfully in denying the Complainant an opportunity for employment. I will, in due course, after the remedy hearing, make an order in compensation for their wilfulness.

[265] Section 53(2)(c) of the *CHRA* provides that a victim may be compensated for any and all wages of which he was deprived as a result of the discriminatory practice. I find that the Complainant did suffer lost wages that he would have earned as a Border Services Officer. The wage loss shall be determined by calculating the total earnings the Complainant would have earned as a Border Services Officer and deducting from that sum the amount of salary the Complainant has been able to earn from other mitigating employment. Income earned by the Complainant in his effort to mitigate his loss of earnings as a Border Services Officer must be supported by particulars and personal income tax returns.

[266] Interest is payable in respect of all awards made in this decision under s. 53(4) of the *CHRA*. The interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank Rate (monthly series) set by the Bank of Canada. Interest is to be calculated from the date of the complaint with respect to the compensation for lost wages, pain and suffering, and special damages.

[267] During the hearing on remedy I will consider whether the Tribunal has jurisdiction to order the Respondent to offer employment to the Complainant.

II. Wilfulness

[4] In my March 7, 2014 decision I summarized the testimony of Respondent superintendents Ron Tarnawski and Trevor Baird. I found neither of them to be credible witnesses. I now determine that in each of the Competitions the respective conduct of Ron Tarnawski and Trevor Baird was wilful. It was deliberate, driven by prejudice and

permeated with an ulterior motive to deny the Complainant an opportunity to continue in being employed with CBSA.

III. Denial of Employment Opportunity – How It Affected the Complainant

[5] The following is an extract from extensive testimony of the Complainant in the hearing of his complaint conducted by Chairperson Sinclair:

Q. (Mr. Yazbeck) Mr. Turner, generally with respect to the denial of promotional opportunities in Victoria and Vancouver competitions, how did that affect you?

A. It affected me quite a bit. I mean, when I was first told that I wasn't going to be coming back, because I had been trying --- hard to get on full-time with them, I was stressed out. I began to wonder, like what's wrong with me. Have I been doing something wrong all this time.

I was trying to think about, well, how can I make myself better. Like I said, I went to the EI courses to, you know, first of all, to extend my EI, but, you know, maybe think maybe they would help me with skills or anything like that.

So, I was just trying my best to do it, but it extremely hurt me. I mean, I thought I was good. I was training staff as my performance reviews were saying. I was helping out as much as I could. And it affected me that I can't sleep at night sometimes and this whole process has been drawn out for three years.

It's totally affected, taken over most of my life. I can't go anywhere. I can't travel anywhere because I have lawyer's fees, everything else. It's completely affected me.

And it's – they're a government organization and I'm shocked that even that they didn't want to – when I put in my complaint, they didn't want to investigate it. They just sloughed it off as being just not important.

And for a government organization, I'm shocked and I'm pissed. Service Canada, when I got to them, they welcomed me. They treated me equally. As you can see, I've moved up from my original CR3 rankage (sic), I'm not PMO2. So obviously, it wasn't something I was doing wrong.

Q. Mr. Turner, your complaint is dated February 2005 and, as you know, the agency would have been made aware of it sometime after that. You just mentioned a moment ago that they did not want to investigate it. So did anybody from the agency contact you to discuss your allegations and try to determine directly what your concerns were?

A. No. The first time I got any sort of contact with the agency was when we had our first mediation session through the Human Rights Commission. ...

IV. Respondent Counsel in a Discussion with Member Sinclair on Remedy

[6] The following is an extract from the transcript of the proceedings in the hearing conducted by Chairperson Sinclair. It is a portion of interlocutory conversation between Chairperson Sinclair and Respondent counsel:

Mr. Stark: I don't think a retroactive appointment is actually appropriate in the circumstances of this case and this is why. Mr. Turner is now appointed at the position of PM02 with Service Canada, he has an existing position at (inaudible). I think he had been appointed as Customs Inspector in Victoria, in the Victoria prequalified pool.

So he is at the same level now that he was back then and so there is no benefit to him of being reappointed to this position.

Now this issue I, my learned friend made this, there is no position such as Customs Inspector anymore, it's Border Services Officer which has been reclassified to a PM03 position, so it's a different position/. It doesn't (inaudible) so there is a whole bunch of other attributes to it as well. After this competition the port of entry functions were transferred from CIC to the Canada Border Services Agency and all employees are challenged, and demonstrate their competency to fill a position as a Border Services Officer, not all of them have.

So you are quite correct in your initial statement Mr. Sinclair, that if there is – it is impossible to put the Complainant back in the position he would have been in. The landscape has changed, he would have to demonstrate competency and that he is qualified to be a Border Services Officer as opposed to a Customs Inspector. He just can't be put back in the position he was in.

The only way to do that is to do it is through compensation if the Tribunal is of a mind to do that. But as I said that's relatively limited (inaudible), he is at the stage – and he has reached the position PM02 at the same classification level. So I don't think it should be done for that reason.

Now another issue that we talked, and I'm really trying to abbreviate this, Mr. Sinclair, we talked about (inaudible) was mentioned about (inaudible) possibility, that being the test for reappointment. Now Mr. Turner, it should be noted that most candidates appointed from the Vancouver, the Victoria prequalified pool, I can't stop mixing them up, they were qualified, all of those were – the only appointments from that pool was term positions.

So the (inaudible) that Mr. Turner could have expected from being (inaudible) out of the Vancouver, out of the Victoria prequalified pool was to be a term position. It wouldn't have given him indeterminate employment. That's a very important point to note, so out of the Victoria pool he wouldn't have got indeterminate employment. That's another reason why Mr. Turner should not be retroactively appointed to a position.

The Chairperson: So you are saying the 7003 if successful in that pool he could only go into a term position.

Mr. Stark: Yes ... (referring to Exhibit R-2, Tab 52) ... this is a report on the competition and you'll note that every single candidate who was appointed from this pool was appointed for a term position.

The Chairperson: And is that what the poster said?

Mr. Stark: Well the poster I think was a bit (inaudible) than that, actually the poster was, the poster included permanent, term and (inaudible) but the fact this would appear that there wasn't any permanent positions granted from there, so there were only term positions. ...

The Chairperson: You say he can be adequately compensated ... through damages, what does that mean? ...

Mr. Stark: Meaning that he can be topped up from the time that he was, from the time of the Victoria prequalified pool up to the time he got his position with Service Canada, he can be compensated for the difference in the two salaries (inaudible) until he reached the difference in the two salaries (inaudible) until he reached the equivalency of PM02. So he would be compensated in that way. But he can't be compensated for a

position that he wasn't qualified for which is a border Services Officer position. It's a different position, it's been reclassified and he would have to challenge a competition in that, just like everyone else did.

The Chairperson: So you are saying the time frame for damages would be from the time he was not qualified for Victoria or Vancouver to the time he obtained the PM02 Service Canada position. ...

Mr. Stark: Correct.

[7] In my opinion two matters are misstated in the foregoing discussion, matters which are relevant to the Complainant's entitlement to be compensated for lost wages.

[8] First, the assertion that reclassification of Customs Inspector to Border Services Officer reflected a substantial change in the duties performed at Canada's ports of entry. In my review of the evidence presented to Member Sinclair I was unable to find specific evidence which established that, at the time of the competitions in question, the renaming of Customs Inspectors as Border Services Officers involved any significant change in the duties being carried out at Canada's ports of entry, other than additional duties related to immigration.

[9] Second, there was substantial evidence in annual appraisals which established Mr. Turner's competency as a Customs Inspector. Therefore it is reasonable to draw the inference that, if Border Services Officers were in fact burdened with additional duties, Mr. Turner's five years of experience as a Customs Inspector would have enabled him to master and carry out any extra duties entrusted to him as a Border Services Officer.

[10] In the Remedy hearing on April 21 and 22, 2015 Counsel for the Respondent maintained that the circumstances of this case do not warrant compensation for the Complainant's wage loss for the entire period 2004 to 2014: that compensation should be capped at four years. Capping the Complainant's wage loss at four years would constitute an arbitrary decision, quite lacking in the exercise of judicial discretion. Moreover, limiting wage-loss-compensation to four years would require me to disregard the emotional trauma of victimization.

[11] I conclude that the facts and circumstances of this case rule out capping the Complainant's wage-loss at four years.

V. Exhibit C-4: Calculation of Complainant's Wage Loss

[12] Exhibit C-4 is a four-page factual record, a cooperative endeavour of counsel for the Complainant and counsel for the Respondent. It reveals income Mr. Turner earned in the period 2004 to 2014. It demonstrates that Mr. Turner was able to secure employment with Service Canada, where, in due course, he became an indeterminate federal civil servant.

[13] Under the caption "Difference", Exhibit C-4 contains a calculation of the shortfall between Mr. Turner's actual wages at Service Canada and higher wages paid by CBSA to Border Services Officers. Exhibit C-4 also provides an estimate of additional salary earned from overtime work.

| | |
|------|-------------|
| 2004 | \$40,711.19 |
| 2005 | \$17,031.25 |
| 2006 | \$22,293.89 |
| 2007 | \$22,646.93 |
| 2008 | \$25,089.37 |
| 2009 | \$16,665.96 |
| 2010 | \$16,169.74 |
| 2011 | \$11,019.97 |
| 2012 | \$15,238.05 |
| 2013 | \$10,452.58 |
| 2014 | \$13,059.57 |

Total: \$210,378.50 +*\$5,191.53 interest = \$215,570.03

*Exhibit C-4 includes an interest calculation for each year from 2004 to 2014, totalling \$5,191.53.2014, totalling \$5,191.53.

[14] Exhibit C-4 included the following notations:

Salary: 2004 to 2014 (CBSA's Rated); CBSAShift/OT Premiums Average for Victoria; Service Canada – Actual T4 Slip Amounts.

Highlighted Notes: 2004 includes Salary of \$12,635.00 and NOT EI of \$10,325.00; 2009 Signing Bonus of approx. \$5,000.00 Not included (Income Tax show \$59,534.00); 2011 does not include Severance Payout from Service Canada. CBSA document shows \$17,134.85 severance; 2015-2019 is 2014 difference in pay (\$13,059.57) x 5 years in lieu of reinstatement.

All CBSA amounts taken from Treasury Board Salary Information provided by Mr. Stark

CBSA amounts: 2003 PM02 step 1; 2004-2006 PM03 step 2-3; 2007-2014 FB03 step 2-4

Service Canada amounts: 2004 CR3 step1; 2005-2008 CR04 Step 1-4 *2008 is 6 months at CR04; 2008-2014 PM02 step 1-4 *2008 is 6 months at PM02

Levan amounts are taken from 2004 – 2014 income tax returns/tax slips

Interest Rates from Bank of Canada Average Annual Interest Rate

VI. Compensation In Lieu Of Reinstatement

[15] In paragraph 267 of my March 7, 2014 decision I stated: “During the hearing on remedy I will consider whether the Tribunal has jurisdiction to order the Respondent to offer employment to the Complainant.”

[16] At the remedy hearing on April 21 & 22, 2015 the Complainant withdrew his claim for reinstatement as a Border Services Officer. Instead the Complainant seeks an award of compensation of \$65,297.85 with respect to anticipated loss of income in the five-year period 2015-2019. This lump sum payment was calculated using the “difference” in wages for 2014, \$13,059.57, and projecting it as a best-guess wage-loss – (5x \$13,059.57 = \$65,297.85) – through each of the ensuing five years.

VII. Complainant Argument on Compensation for Loss of Income

[17] Counsel for Mr. Turner argued that the Tribunal should award full compensation for loss of income in the eleven year period 2004 to 2014 as recorded and calculated in Exhibit C-4 in the section captioned "Difference", together with the lump sum payment in lieu of reinstatement.

[18] I conclude that Exhibit C-4 provides an accurate calculation that the Complainant's wage-loss amounts to \$210,378.50 which, with interest of \$5,191.53 added, amounts to \$215,570.03. Additional to that sum is compensation in lieu of reinstatement - \$65,297.85 making the total amount of compensation sought by the Complainant to be \$280,867.88.

VIII. Mitigation

[19] Within a year after he was rejected by CBSA, the Complainant gained employment at Service Canada; doing so while in emotional turmoil over the fact that he likely had been the victim of racial discrimination. It was an exceptional achievement. By getting on with his life and making ends meet the Complainant fulfilled the duty to mitigate his loss of income resulting from CBSA's discriminatory practices.

IX. Damages

[20] It is highly relevant that the two acts of discrimination shattered the Complainant's dream of a career with CBSA. That discriminatory behaviour was engrained in Vancouver Competition 1002 and Victoria Competition 7003 was detestable; and it was disdainful of the spirit and purpose of the *CHRA*. It is a matter to be factored into the assessment of damages.

X. Remedy: Orders for Compensation and Damages

[21] After consideration of all the findings and conclusions I reached in my March 7, 2014 decision that the Complainant had been subjected to discriminatory practices in two employment competitions; and after consideration of submissions by the parties in the

April 21 and 22, 2015 hearing on Remedy, I make the following orders: compensation for lost wages; compensation for pain and suffering; compensation related to the fact that the discriminatory practices were engaged in wilfully.

1. Pursuant to Section 53(2)(c): I order that the Respondent shall compensate the Complainant in the amount of \$280,867.88 for wages that he was deprived of as a result of the Respondent's discriminatory practice. Gross-up for Income Tax Liability: I direct the Respondent to pay the Complainant an additional amount sufficient to cover any additional tax liability resulting from this Order for compensation.
2. Pursuant to Section 53(2)(e): I order that the Respondent shall compensate the Complainant in the amount of \$15,000.00 for pain and suffering that the Complainant experienced as a result of the Respondent's discriminatory practice.
3. Pursuant to Section 53(3): By reason of my finding that the Respondent engaged in the discriminatory practice wilfully, the Respondent shall compensate the Complainant in the amount of \$15,000.00.
4. Each amount of compensation shall bear simple interest calculated as directed in my March 7, 2014 decision.

XI. Tribunal Jurisdiction to Continue

[22] The Tribunal shall retain jurisdiction to deal with all matters arising out of this decision on remedy for a period of one year after its release.

Signed by

Wallace G. Craig
Tribunal Member

Ottawa, Ontario
May 7, 2015

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1248/6007

Style of Cause: Levan Turner v. Canada Border Services Agency

Decision of the Tribunal Dated: May 7, 2015

Date and Place of Hearing: April 21 and 22, 2015

Victoria, British Columbia

Appearances:

David Yazbeck, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Graham Stark, for the Respondent