Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Todd Chaudhary

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Smoother Movers

Respondent

Decision

Member: Susheel Gupta
Date: June 6, 2013
Citation: 2013 CHRT 15

Table of Contents

I. Complaint 1

II. Background 1

III. Motions to Dismiss 2

A. Motion dated March 22, 2012 2

B. Motion dated April 24, 2013 4

IV. Merits of the Complaint 5

A. Complainant’s evidence 5

B. Has the Complainant established a *prima facie* case? 7

(i) Complainant’s allegations under subsection 7(a) of the *Act* 8

(ii) Complainant’s allegations under subsection 7(b) of the Act 9

(iii) Complainant’s allegations under paragraph 14(1)(c) of the Act 11

C. Respondent’s evidence 12

D. Has the Respondent established that the *prima facie* discrimination did not occur as alleged? 13

V. Conclusion 15

I. Complaint

[1] On October 7, 2010, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*], the Canadian Human Rights Commission (the Commission) requested the Chairperson of the Canadian Human Rights Tribunal (the Tribunal) institute an inquiry into the complaint of Todd Chaudhary (the Complainant) against Smoother Movers (the Respondent).

[2] Under sections 7 and 14 of the *Act*, the Complainant alleges he was discriminated against and harassed, during the course of his employment with the Respondent, on the basis of his race, national or ethnic origin, colour and sex.

[3] The Tribunal held a hearing in this matter from July 10 to 12, 2012, in Vancouver, British Columbia.

II. Background

[4] The Complainant had originally filed his complaint with the British Columbia Human Rights Tribunal (the BC Tribunal) on February 6, 2008.

[5] At the beginning of the BC Tribunal hearing, held on March 10, 2009, the Respondent argued the BC Tribunal was without jurisdiction to deal with the complaint. In an affidavit, Doug Bensley, doing business as Smoother Movers, swore: "...that his business...on a regular and continuous basis, historically and currently, does about 30% of its business – pick-ups and deliveries – in other provinces of Canada and in the United States" (*Chaudhary v. Smoother Movers*, 2009 BCHRT 111, at para. 2 [*Chaudhary*]).

[6] The BC Tribunal accepted that Smoother Movers is regularly and continuously engaged in extra-provincial shipping, which falls within Federal jurisdiction, and found that the complaint was not within its jurisdiction (see *Chaudhary* at paras. 8-9).

[7] Subsequently, the Complainant filed the current complaint with the Canadian Human Rights Commission on June 23, 2009.

III. Motions to Dismiss

[8] The Respondent has filed two motions to dismiss the complaint. The first Notice of Motion, dated March 22, 2012, is to dismiss the complaint because of delay in getting to a hearing. The second Notice of Motion, dated April 24, 2013, is to dismiss the complaint because of delay in rendering a decision.

[9] The Tribunal must ensure that parties appearing before it have a full and ample opportunity to appear at the inquiry, present evidence and make representations (see subsection 50(1) of the *Act*). In this regard, delay may impair a party's opportunity to present its case:

> Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy [...] It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied...
>
> (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, at para. 102 [*Blencoe*])

[10] However, "delay, without more, will not warrant a stay of proceedings as an abuse of process at common law" (*Blencoe* at para. 101). According to a majority of the Supreme Court, "there must be proof of significant prejudice which results from an unacceptable delay" (*Blencoe* at para. 101; see also *Grover v. National Research Council of Canada*, 2009 CHRT 1, at paras. 40-43; and, *Grover v. Canada (Attorney General)*, 2010 FC 320, at paras. 29-30).

A. Motion dated March 22, 2012

[11] The first motion to dismiss was heard as part of the hearing from July 10-12, 2012.

[12] The Respondent's motion is based upon the time that has elapsed between the dates of the alleged incidents giving rise to the complaint and the date of the hearing before the Tribunal, which is over four years. According to the Respondent, this delay is unreasonable and has caused it prejudice in providing a full answer and defence to the complaint. Specifically, the Respondent claims witnesses are no longer available or no longer have a clear recollection of the events and evidentiary issues in this case.

[13] The Respondent identified two witnesses who were unable to attend the hearing. The Respondent submits that the evidence of these two witnesses would have been important to its case. The first potential witness, Jason Pilay, whom the Respondent described as a transient, who worked for the Respondent during the three day period giving rise to this complaint, and who was named by the Complainant in the complaint, could not be located. According to the Respondent, it is not reasonable to expect that somebody who's living in a homeless shelter can be located four and a half years later. The second potential witness, Jim Postlethwaite, who was also mentioned by the Complainant in the particulars of the complaint, was subpoenaed but could not attend the hearing due to the fact that he was incarcerated outside of the country at that time. According to the Respondent, Mr. Postlethwaite was available for the last four years, and had the case proceeded in a timely manner it would have had the benefit of his testimony.

[14] Despite knowing of the Complainant's allegations since 2008 and the fact that Mr. Pilay is a transient, the Respondent indicated that it did not make attempts to locate Mr. Pilay until the Commission began investigating the complaint which at its earliest would have been some time after June 23, 2009 when Mr. Chaudhary filed his complaint with the Commission, after the BC Tribunal hearing. The Respondent testified that the last time it tried to locate Mr. Pilay was at least two years prior to the Hearing. No steps were taken to locate Mr. Pilay once a hearing date had been scheduled. Similarly, the Respondent indicated that it was anticipating Mr. Postlethwaite being released prior to the hearing and had hoped he would therefore be able to attend the hearing. However, once the Respondent was made aware of Mr. Postlethwaite's situation and, subsequently, his unavailability to attend the hearing, it did not make a request to the Tribunal to adjourn these proceedings or explore other avenues of obtaining his evidence. As

a result, I find that while the Respondent may have been prejudiced by the unavailability of these two witnesses, the unavailability is due to the Respondent's own inaction, and not due to delay *per se*.

[15] The Respondent did have three witnesses appear at the hearing: Doug Bensley, Brad Burke and Kevin Carson. However, the Respondent claims that, due to delay, these witnesses no longer have a clear recollection of the events and evidentiary issues in this case. In hearing from these witnesses, they appeared to have good knowledge and recollection of the events giving rise to this complaint. They were able to give evidence independently, without notes or other aids, and remembered much of the detail surrounding the events in question. As a result, I also do not accept that any delay in these proceedings has caused witnesses' memories to fade on any of the key issues raised in the complaint, or, consequently, resulted in any significant prejudice to the Respondent.

[16] Therefore, the Respondent's motion, dated March 22, 2012, is dismissed.

B. Motion dated April 24, 2013

[17] The basis for the second motion to dismiss is the Tribunal's Practice Note No. 1, Re: Timeliness of Hearings and Decisions, dated October 22, 2007 (available online: http://chrt-tcdp.gc.ca/NS/about-apropos/download/pn-np-eng.asp), which provides:

> Moreover, the Tribunal intends to adhere firmly to the Parliament's directive in subsection 48.9(1), and to release decisions as often as possible within a four month time frame, in keeping with its stated commitment to Parliamentarians and Canadians as a whole.

[18] According to the Respondent, over nine months have passed since the hearing and there has been no explanation or excuse for the delay in rendering a decision. In the Respondent's view, the delay is unacceptable as Smoother Movers has been in the public eye, accused of human rights violations, for over five years. Therefore, the Respondent requests the complaint be dismissed.

[19] In this case, while the Tribunal was unable to adhere to its four month time frame for releasing decisions, aside from the actual delay, there is no proof that this has prejudiced the Respondent by causing injury to the Respondent's reputation. As mentioned above, "delay, without more, will not warrant a stay of proceedings as an abuse of process at common law" (*Blencoe* at para. 115-121 and 133).

[20] As a result, the Respondent's motion, dated April 24, 2013, is also dismissed

IV. Merits of the Complaint

A. Complainant's evidence

[21] At the hearing of this matter, the Complainant testified as to his version of the events giving rise to this complaint. He describes himself as a brown skinned man of Middle Eastern descent.

[22] In December 2007, the Complainant applied for a position with the Respondent. According to the Complainant, the job was posted on the Employment Canada job website and was for a permanent, full-time, moving van driver position. On these terms, the Complainant claims he was hired by Doug Bensley, doing business as Smoother Movers.

[23] The Complainant worked for the Respondent for a three day period from December 17-19, 2007, moving an office. Among other things, the Complainant was asked to pack and move items from the office into an elevator to bring them down to the moving truck; to unload the items at the new office location; and, also, to assemble shelves and cubicles at the new location

[24] From his first day of work, the Complainant claims employees of the Respondent made discriminatory comments relating to his race, national or ethnic origin, and colour. According to the Complainant, on December 17, 2007, he was in the elevator taking down a load with another employee, Jim Postlethwaite. The Complainant recounted the incident wherein he claims to have said to Mr. Postlethwaite: "so they eliminated the Hate Crimes Act in USA". In response, the

Complainant alleges that Mr. Postlethwaite made a comment regarding the fact that he wanted to move to the United States to start a KKK clan.

[25] Also on December 17, 2007, the Complainant claims that another employee, Jason Pilay, kept calling him an Indian in the loading dock area at the old office location. The Complainant claims he told Mr. Pilay, “hey, man, that’s not cool, bro...”, but unfortunately, the comments continued.

[26] On December 18, 2007, the Complainant claims a third employee, Brad Burke, started calling him a “nigger”. According to the Complainant, he asked Mr. Burke to define the term and explained to him that he did not fall within its definition. The Complainant claims that, thereafter, the term was used frequently throughout the day by the other employees and, specifically, that Mr. Pilay started making jokes using that term.

[27] Also on December 18, 2007, the Complainant alleges a fourth employee, Kevin Carson, began asking him, in an east Indian accent: “do you eat curry?”. The Complainant claims Mr. Carson kept asking him the question repeatedly while taking up a load in the elevator.

[28] Again on December 18, 2007, while in a tightly packed elevator taking down a load of cargo, the Complainant alleges Mr. Burke began rubbing his buttock on him. According to the Complainant, this made him very upset and he told Mr. Burke as much when he exited the elevator.

[29] On December 19, 2007, the Complainant was asked to assemble a shelf. According to the Complainant, the project was a two person job; however, all the other employees were reluctant to help him and left him to complete the project on his own. While completing the task of putting the shelf together, the Complainant claims Doug Bensley came in and stated: “You’re incompetent. Are you retiring in here?”. The Complainant viewed this comment as implying he could not do the job right and that it was taking him too long to complete.

[30] As he was nearing completion of the shelf project, the Complainant contends Mr. Carson came in, asking him what was taking so long and bent over as if to assist the Complainant. However, the Complainant claims Mr. Carson's pants were so low that he exposed his buttock to the Complainant. and that he left without assisting the Complainant. In another incident on that same day, while working on a cabinet unit, the Complainant alleges Mr. Burke's pants were so low that he also exposed his buttocks to the Complainant.

[31] Also on December 19, 2007, the Complainant and some of the other employees were setting up office cubicles. According to the Complainant, he advised the other employees that the cubicles were not spaced properly. In response, the Complainant claims Mr. Burke, Mr. Carson and Mr. Pilay told him to "shut-up, just stand there and hold the cubicle wall". When Mr. Postlethwaite, the team leader, arrived, the Complainant claims he attempted to explain to him that the cubicles were not properly spaced and Mr. Postlethwaite started yelling at him and told him to "Go home". In response, the Complainant stated: "No, let's keep moving forward and get the job done". The Complainant added that Mr. Postlethwaite later came to him stating he had been flustered from having got the moving van into an accident and, subsequently, getting into a conflict with a tow-truck driver.

[32] After his December 19, 2007 shift, the Complainant alleges he received no more hours from the Respondent. He claims to have phoned Mr. Bensley shortly after December the 19th asking for more hours and inquiring as to when he would be paid. According to the Complainant, Mr. Bensley spoke to him abruptly and hung up on him. The Complainant was eventually paid for his three shifts, but did not return to work for the Respondent. The Complainant adds, despite being hired as a moving van driver, he was never given the opportunity to drive the moving van.

B. Has the Complainant established a *prima facie* case?

[33] The complainant in proceedings before the Tribunal must establish a *prima facie* case of discrimination. A *prima facie* case is "…one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the

absence of an answer from the respondent…" (*Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 at para. 28).

[34] Based on the employees making racial comments towards him; Doug Bensley calling him incompetent; and, the employees showing their buttocks to him, the Complainant feels he was intentionally tormented and segregated in his work environment. In this regard, he alleges discrimination and harassment pursuant to section 7 and paragraph 14(1)(c) of the *Act*.

(i) Complainant's allegations under subsection 7(a) of the *Act*

[35] Paragraph 7(a) of the *Act* provides that it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual on a prohibited ground of discrimination. In complaints under subsection 7(a), the complainant must establish a link between a prohibited ground of discrimination and the employer's decision to refuse to employ or continue to employ him or her (see *Roopnarine v. Bank of Montreal*, 2010 CHRT 5 at para. 49). That said, discrimination does not need to be the only reason for the decision. It is sufficient that discrimination be one factor in the decision (see *Holden v. Canadian National Railway Co.*, [1990] F.C.J. No. 419 (F.C.A.) (Q.L.); and, *Khiamal v. Canada (Canadian Human Rights Commission)*, 2009 FC 495 at para. 61).

[36] Based on the evidence provided by the Complainant, it is not clear why the Respondent did not offer the Complainant more hours following his December 19, 2007 shift; neither party subsequently contacted the other with regards to further work or lack of work. Arguably, the Complainant's evidence suggests that the Respondent may have had concerns with his competence. Ultimately the Complainant was not able to show a link between a refusal to continue to employ, if there was one, and a prohibited ground of discrimination.

[37] The Complainant testified that he was not able to bring to Mr. Bensley's attention the alleged discriminatory conduct that occurred between December 17-19, 2007. According to the Complainant, Mr. Bensley was intimidating and not approachable, and the Complainant was hesitant to raise the issue in fear that it might affect his employment. In any event, Mr. Bensley,

the owner and operator of Smoother Movers, was not present during any of the events alleged to be discriminatory and no evidence was presented which would indicate that Mr. Bensley was aware of the alleged discrimination by his other employees until the BC Tribunal complaint. Nor did the Complainant allege any discriminatory conduct by Mr. Bensley. The fact that Mr. Bensley may have called him incompetent is not related to a prohibited ground of discrimination.

[38] Therefore, I find the Complainant has not established a *prima facie* case pursuant to subsection 7(a) of the *Act*.

(ii) Complainant's allegations under subsection 7(b) of the Act

[39] Paragraph 7(b) of the *Act* provides that it is a discriminatory practice, directly or indirectly, to differentiate adversely in relation to an employee in the course of employment on a prohibited ground of discrimination. To "differentiate" is to create a distinction or to treat someone differently (see *Tahmourpour v. Canada (Royal Canadian Mounted Police)*, 2009 FC 1009 at para. 44 [*Tahmourpour*]; varied on other grounds in *Tahmourpour v. Canada (Royal Canadian Mounted Police)*, 2010 FCA 192 [*Tahmourpour (FCA)*]; and, *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at para. 254 aff'd 2013 FCA 75 [*FNCFCS*]). However, not every distinction is discriminatory, as the *Act* qualifies the differential treatment with the term "adversely". According to the Federal Court, "adverse" is an adjective that in its ordinary meaning means harmful, hurtful or hostile (see *Tahmourpour* at para. 44; see also *Tahmourpour (FCA)* at para. 12). Finally, the adverse differential treatment must be based on a prohibited ground of discrimination and does not require the Complainant to present evidence of how a comparator group is treated (*FNCFCS*, FCA at paras. 16-18).

[40] There was insufficient evidence to suggest that the alleged comment from Mr. Postlethwaite regarding starting a KKK clan was directed towards the Complainant because of his being a person of colour or that it affected him adversely. However, the Complainant testified that the other alleged racial comments and jokes directed towards him from the other employees were offensive to him. After his shift on December 18th, 2007, the Complainant

claims he suffered mental anguish, making it difficult for him to sleep that night and causing him to be late for work the next day.

[41] With regard to the alleged buttock incident in the elevator with Mr. Burke, the Complainant indicated that he told Mr. Burke to “go fuck himself”. Following the other two alleged buttock incidents, where Mr. Carson and Mr. Burke’s pants were hanging too low exposing their buttocks to the Complainant, the Complainant testified that he did not know what their intentions were, but he says he did not like it.

[42] Overall, the Complainant felt traumatized by his three day employment with the Respondent. He feels as though the other employees at Smoother Movers were tormenting him because he was the new guy. According to the Complainant, the alleged discriminatory conduct he suffered while working for the Respondent has always been baffling to him and he says it has consumed his life for the last few years.

[43] While the buttock incidents may have been unpleasant for the Complainant, I fail to see a link between the alleged conduct and the Complainant’s sex. As the Complainant stated, “he did not know what their intentions were”, aside from perhaps tormenting him because he was the new guy. Although the alleged conduct may have been improper, it does not result in *prima facie* adverse differentiation, on the basis of sex, pursuant to subsection 7(b) of the *Act*.

[44] However, aside from Mr. Postlethwaite’s comment, I accept that the other alleged racial comments and jokes distinguished the Complainant from the rest of his colleagues on the basis of his race, national or ethnic origin, and colour. As outlined above, those alleged comments and jokes were also hurtful to the Complainant.

[45] Therefore, the Complainant has established a *prima facie* case pursuant to subsection 7(b) of the *Act*, on the basis of race, national or ethnic origin, and colour.

(iii) Complainant's allegations under paragraph 14(1)(c) of the Act

[46] Within the meaning of section 14 of the *Act*, harassment has been defined as unwelcomed conduct, directed at another person on the basis of a prohibited ground of discrimination and harassment generally requires an element of persistence or repetition; however, the more serious the conduct and its consequences, the less repetition may be necessary. The severity of the impugned conduct is assessed from the perspective of the reasonable person in the circumstances (see *Janzen v. Platy enterprises ltd.*, [1989] 1 SCR 1252; and, *Canada (Human Rights Commission) v. Canada (Armed Forces)*, [1999] 3 FC 653 [*Franke*]). Finally, where the complaint against an employer involves the conduct of its' employees, fairness requires that the victim of the harassment, wherever possible, notify the employer of the alleged offensive conduct (see *Morin v. Canada (Attorney General),* 2005 CHRT 41, at para. 246).

[47] In his first two days of work for the Respondent, on December 17-18, 2007, the Complainant testified that he had to persistently endure alleged comments and jokes from Mr. Pilay, Mr. Burke and Mr. Carson regarding the Complainant's race, national or ethnic origin, and colour. These comments were unwelcomed, as demonstrated by the Complainant's challenging Mr. Burke on his definition of the term "nigger" and by his testimony that he told Mr. Pilay that his comments were not appreciated. Therefore, I am of the view that the Complainant has established a *prima facie* case of harassment, under section 14 of the *Act*, on the basis of race, national or ethnic origin, and colour.

[48] Based on the buttock incidents, the Complainant also claims to have been sexually harassed. Pursuant to subsection 14(2) of the *Act*, sexual harassment is deemed to be harassment on a prohibited ground of discrimination. Sexual harassment requires that the conduct be sexual in nature, which includes a broad range of conduct, and is determined on a case-by-case basis based on the test of the reasonable person in the circumstances (see *Franke*).

[49] I do not accept that the Complainant was sexually harassed. The buttock rubbing did not persist beyond the one incident in the elevator, after the Complainant got upset with Mr. Burke. From the perspective of the reasonable person, Based on the evidence I do not believe the

conduct was sexual in nature. I also do not believe that the severity of this one incident would amount to harassment.

[50] The other two incidents, where Mr. Carson and Mr. Burke allegedly exposed their buttock to the Complainant, also do not meet the standard for sexual harassment under the *Act*. Neither through words nor actions did the Complainant express to Mr. Carson and Mr. Burke that the conduct was unwanted; and, aside from these two incidents, the conduct did not persist. It is also questionable whether the conduct was sexual in nature. Certainly, the Complainant presented no evidence that the alleged acts were sexual in nature. Therefore, in my view, the Complainant has not established a *prima face* case of sexual harassment under the *Act*.

[51] For all the above reasons, I am of the view that the Complainant has established a *prima face* case pursuant to subsection 7(b) and section 14 of the *Act* on the prohibited grounds of race, national or ethnic origin, and colour. I will now consider the Respondent's response to the *prima facie* discrimination

C. Respondent's evidence

[52] Once a complainant has established a *prima facie* case of discrimination, the respondent must demonstrate that the *prima facie* discrimination did not occur as alleged or that the practice is justifiable under the *Act* (see sections 15-24 of the *Act*).

[53] At the hearing of this matter, Doug Bensley, Brad Burke and Kevin Carson testified on behalf of the Respondent. They claim the *prima facie* discrimination did not occur as alleged.

[54] Mr. Bensley did not witness any of the *prima facie* discrimination and testified that the Complainant never reported any such incidents to him, whether during his three day employment with the Respondent or subsequently.

[55] Mr. Burke testified that he has never witnessed or participated in racial harassment while working for Smoother Movers. He denies calling the Complainant a "nigger" or having a

conversation with him regarding its definition. He also denies hearing any of the other staff using that sort of language or making any other comments or jokes with regard to the Complainant's race, national or ethnic origin, or colour.

[56] Mr. Carson testified that he has never witnessed or participated in racial harassment while working for Smoother Movers. He denies calling the Complainant a "nigger" or mocking him in an East Indian accent. He also denies hearing any of the other staff using that sort of language or making any other comments or jokes with regard to the Complainant's race, national or ethnic origin, or colour.

D. Has the Respondent established that the *prima facie* discrimination did not occur as alleged?

[57] The Complainant argues that Mr. Burke and Mr. Carson's testimony was not credible. He claims their testimony was rehearsed before hand with Mr. Bensley. The Complainant also pointed out that Mr. Burke is still working for the Respondent and, therefore, has a vested interest in protecting his employer and his own employment. In the same vein, the Complainant claims that Mr. Burke and Mr. Carson maintain a personal friendship with Mr. Bensley that extends beyond their professional relationship.

[58] In hearing from all of the Respondent's witnesses, I had no reason to question their credibility and was unable to identify any inconsistencies in their testimony. While they all categorically denied the Complainant's allegations, that does not necessarily mean that their testimony was coached. Mr. Bensley, Mr. Burke and Mr. Carson also denied having any sort of relationship beyond their professional relationship. Overall, I have no reason to believe that the Respondent's witnesses have misled the Tribunal.

[59] On the other hand, I find it difficult to reconcile the Complainant's allegations with the fact that he never raised any of those allegations with his employer. He claims Mr. Bensley is intimidating and not approachable, and he was hesitant to raise the issues in fear that it might affect his employment. Despite this assertion, the Complainant was able to confront his alleged

harassers about their conduct, challenging Mr. Burke on his use of the term “nigger” and asking Mr. Carson to stop calling him an Indian.

[60] The Complainant was also able to speak up in the workplace regarding the problems he perceived with the December 18, 2007 job of assembling the cubicles. Despite claiming to be told to “shut-up” by Brad, Kevin and Jason, the Complainant also raised the issue subsequently with Jim as well.

[61] The Complainant also testified to be a shrewd negotiator and, in this regard, was able to negotiate his rate of pay with Mr. Bensley. Following his three shifts with the Respondent, Mr. Bensley claims the Complainant was difficult when it came to his rate of pay and, the Complainant specifically asked him how much he was going to get paid. There was a dispute as to whether the Complainant was to be paid as a labourer or a driver, the latter being at a higher rate of pay. Mr. Bensley wanted to pay him as a labourer. The Complainant argued that the job posting was for a moving van driver and, therefore, he should be paid based on the posting he responded to. Instead of arguing with the Complainant, Mr. Bensley claims to have acceded to the Complainant’s request and paid him more than he would typically pay a labourer.

[62] Finally, in his closing statements, the Complainant stated that he did approach Mr. Bensley in early 2008 about Mr. Burke’s behaviour and received no response from him (*Transcript of hearing*, at p. 489). This statement is inconsistent with the Complainant’s testimony. In fact, later in his closing statement the Complainant went on to state:

> Had I had the opportunity to work for Mr. Bensley longer, I would have brought this information to his attention; however, Mr. Bensley did not give me an opportunity to meet with him again or work with him again. I had every intention to bring this to him; however, again, I was never given an opportunity to work with him or speak to him after and, as such, we are here today.
>
> (*Transcript of hearing*, at pp. 490-491)

[63] Despite claiming to be intimidated to approach Mr. Bensley about the issues he was having in the workplace, in other similar situations, the Complainant had no problem speaking up. The inconsistency of his statements in paragraph 62 above, also casts doubt on the credibility of the Complainant's testimony.

[64] I also find it difficult to reconcile the fact that, despite being offended and hurt by the other employees' alleged racial comments and jokes, and the alleged torment they were putting him through, the Complainant continued to interact with them in the workplace. The Complainant testified to taking smoke breaks with Mr. Postlethwaite and Mr. Carson and even stated that on December 19, 2007, he went to a cafeteria with Mr. Carson and Mr. Burke (*Transcript of hearing*, at p. 181). In my view, these facts also cast doubt on the credibility of the Complainant's testimony. I do not find it reasonable that the Complainant would attempt to ingratiate himself with his co-workers by socializing with them if he were so hurt, offended and feeling discriminated against by them.

[65] In weighing the totality of the evidence presented by both parties, I find that the Respondent has established that the *prima facie* discrimination did not occur as alleged.

V. Conclusion

[66] Weighing the Complainant's credibility against the credibility of the Respondent's witnesses, on a balance of probabilities, I find that the *prima facie* discriminatory conduct did not occur as alleged by the Complainant.

[67] Therefore, the complaint is dismissed.

Signed by

Susheel Gupta
Acting Tribunal Chairperson

Ottawa, Ontario
June 6, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1610/15610

Style of Cause: Todd Chaudhary v. Smoother Movers

Decision of the Tribunal Dated: June 6, 2013

Date and Place of Hearing: July 10 to 12, 2012

Vancouver, British Columbia

Appearances:

Todd Chaudhary, for himself

No one appearing, for the Canadian Human Rights Commission

Doug Bensley, for the Respondent