Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Citation:** 2017 CHRT 15
**Date:** May 26, 2017
**File No.:** T1248/6007

**Between:**

**Levan Turner**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canada Border Services Agency**

**Respondent**

**Ruling**

**Member:** Edward P. Lustig

## Outline

## I. Procedure to be followed on reconsideration

[1] This case has now returned to the Canadian Human Rights Tribunal (the "Tribunal") for a third hearing. This ruling is to determine the procedure to be followed in reconsidering this matter.

## II. Background

[2] Mr. Turner originally filed his Complaint with the Canadian Human Rights Commission (the "Commission") on February 8, 2005. He alleges the Canadian Border Services Agency (the "CBSA") discriminated against him contrary to section 7 of the *Canadian Human Rights Act* (the "Act") on the basis of race, national or ethnic origin, age and the perceived disability of obesity. The allegations stem from two CBSA job competitions in 2003 and 2004.

[3] On August 24, 2007, the Commission requested the Tribunal to institute an inquiry into the Complaint, pursuant to section 44(3)(a) of the Act.

[4] A hearing was held by the former Chair of the Tribunal, J. Grant Sinclair, for 10 days in Victoria starting on November 17, 2008. At the hearing, the Tribunal heard oral evidence from a number of witnesses, and received documentary evidence and closing oral submissions. A decision in the case was rendered by Member Sinclair on June 10, 2010 wherein he held that the Complaint was not substantiated (see *Turner v. Canada Border Services Agency*, 2010 CHRT 15) ["*Decision 1*"]).

[5] *Decision 1* was judicially reviewed by the Federal Court (the "FC"). In its decision on June 24, 2011, the FC dismissed the application for judicial review (see *Turner v. Canada (Attorney General)*, 2011 FC 767).

[6] The FC's decision was appealed to the Federal Court of Appeal (the "FCA"). In its decision on May 30, 2012, the FCA allowed the appeal and set aside the FC's decision. In its decision, the FCA concluded that the Tribunal had failed in *Decision 1* to consider one of Mr. Turner's alleged grounds of discrimination–perceived disability due to weight. The FCA referred the Complaint back to the Tribunal for a new determination by a different

member so that it could take into account Mr. Turner's submissions on perceived disability and the way in which that ground may have intersected with the other grounds alleged (see *Turner v. Canada (Attorney General)*, 2012 FCA 159).

[7] Following the FCA's decision respecting *Decision 1*, at a Case Management Conference call with former Member Wallace Craig, who was then assigned to the case, the parties agreed that the new determination would not be by way of a hearing *de novo* but instead would involve Member Craig reviewing the record in *Decision 1*, including the submissions and exhibits filed by the parties and the transcripts of the hearing. In addition, Member Craig decided to allow supplemental closing arguments to be made by the parties at a hearing, which occurred in Victoria over two days in November of 2013.

[8] A decision was rendered by Member Craig on March 7, 2014 based on the record in *Decision 1*. Member Craig's decision was that the Complaint was substantiated (see *Turner v. Canada Border Services Agency*, 2014 CHRT 10) ["*Decision 2*"]).

[9] A separate decision on remedies was rendered by Member Craig on May 7, 2015 (see *Turner v. Canada Border Services Agency*, 2015 CHRT 10).

[10] *Decision 2* was judicially reviewed by the FC. In its decision on October 26, 2015, the FC allowed the application for judicial review and directed that the matter be returned to another tribunal to reconsider the matter (see *Canada (Attorney General) v. Turner*, 2015 FC 1209). At paragraphs 52 and 53 of its decision, the FC stated as follows:

> [52] Based on these issues, I find that the second tribunal's assessment of the evidence and its conclusion that Mr. Turner had made out a case of discrimination – by having been denied employment opportunities because of his age, race, and a perceived disability of obesity – was unreasonable.
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> VII. Conclusion and Disposition
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> [53] The tribunal's findings are not supported by the evidence that was before it. Therefore, its conclusion that Mr. Turner had established a case of discrimination did not fall within the range of defensible outcomes based on the facts and the law. Accordingly, I must allow this application for judicial review and order another tribunal to reconsider the matter.

[11] The FC's decision was appealed to the FCA. In its decision on January 6, 2017, the FCA dismissed the appeal (see *Turner v. Canada (Attorney General)*, 2017 FCA 2). At paragraphs 56 and 70-72, the FCA stated as follows:

> [56] I accept the view of the respondent that the Tribunal's findings as to the credibility of witnesses are due less deference than credibility findings are usually given because the Tribunal based its decision on the transcript alone without the advantage of hearing the witnesses directly and was therefore not in a position to assess their demeanour. There is no disagreement that, in an ideal world, the Tribunal should have been able to hear the witnesses afresh. The respondent, at the hearing, suggested that the Tribunal could have called witnesses if it had any doubts. I must reject that argument since the parties agreed that the extensive record would be adequate for the purposes of reconsideration. Indeed, the transcript of the parties' Case Management Conference demonstrates that both parties and the Tribunal were aware of the difficulties raised by reconsideration on the record alone. That being said, the Tribunal was required to base its credibility findings on the evidence.
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> [70] Those errors convince me that the Tribunal's decision is not supported by the record. I conclude that the Tribunal substituted its assessment of the appellant's qualifications for that of the selection board's when it held that the appellant had been discriminated against. It is apparent when reading the Tribunal's decision that it disagreed with the criteria used by the selection boards and made a fundamental error in concluding that the first part of the Shakes test had been met based, in part, on a concession that was never made by the respondent (Tribunal's decision at paragraphs 168, 189, 195, 212, and 220).
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> [71] I must also point out that, in my view, there is no basis for the adverse credibility findings made by the Tribunal in regards to the respondent's witnesses, particularly Mr. Tarnawski (Tribunal's decision at paragraphs 181, 189, 228 and 233) and Mr. Baird (idem at paragraphs 135, 141, 149, 152, 252, and 253) and certainly no justification for the pejorative adjectives employed. Having reviewed the transcript, it is clear that the Tribunal's credibility findings are not supported by the record.
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> V. Conclusion
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> [72] For all these reasons, I conclude that the Tribunal's decision does not fall within a range of defensible outcomes based on the facts and the law. Accordingly, I would dismiss the appeal with costs.

[12] At a Case Management Conference Call with me on March 20, 2017, the parties could not agree on a procedure to be followed for the reconsideration of the matter as ordered by the Federal Courts in their decisions respecting *Decision 2*. I allowed the parties to make written submissions setting out their positions regarding the procedure to be followed on the reconsideration. The parties provided written submissions setting out their positions.

## III. Positions of the parties

### A. Mr. Turner's position

[13] Mr. Turner's position is that there is no basis to justify proceeding with a *de novo* hearing of the Complaint. Instead, the Tribunal ought to reconsider the matter by reviewing the record from *Decision 1* as Member Craig did in *Decision 2*. In addition, however, Mr. Turner also wants the Tribunal in its reconsideration to hold a "partial *de novo* hearing" to receive new evidence that has come to light. As well, the parties should be entitled to make oral submissions before the Tribunal.

[14] The Complainant makes the following arguments in support of his position:

- The FCA has now directed the Tribunal to reconsider the matter and to determine the procedure to be followed. The Tribunal is "master of its own procedure". By not issuing an order for a hearing *de novo* as requested by the CBSA, it can be implied that the FCA did not expect the Tribunal to hold an entire hearing *de novo* and that to do so would be inconsistent with the FCA's decision.

- It is not open to the Tribunal to proceed by way of an entire hearing *de novo* since Member Craig previously decided that a *de novo* hearing was unnecessary, with the concurrence of the CBSA, and nothing has occurred since *Decision 2* to change that approach. The concurrence by the CBSA to this approach is specifically noted in the FCA's decision as supporting the adequacy of the existing record for the purpose of reconsideration.

Moreover, such an exercise would unnecessarily delay matters and add various costs as it is estimated to take about 3 weeks for a hearing *de novo,* whereas oral submissions would only take 2 days (the Complainant has not specifically provided an estimated time period for the "partial *de novo* hearing" he is seeking).

- It makes no sense to ignore the transcripts of the hearing in *Decision 1* that was held in 2008 and 2009 and now hear oral evidence that would be less reliable and, therefore, potentially prejudicial given the lengthy passage of time.

- Difficulties would arise if oral evidence given by witnesses at a hearing *de novo* was inconsistent with their evidence from the original hearing. Further difficulties would arise as a result of the absence of a key CBSA witness who gave evidence at the original hearing, but now is not expected to be able to testify at a new hearing for personal reasons.

- There is no legal requirement for a *de novo* hearing. None of the "traditional reasons" that might require a hearing *de novo* are present here (i.e. bias or violation of procedural fairness or unresolved issues of fact).

- There are arguably relevant documents pertaining to the selection processes in this case which were not produced prior to the original hearing that Mr. Turner intends to request production of. It is a requirement of natural justice to allow either party to rely upon such evidence given that the matter has been sent back for reconsideration and the Tribunal is bound to consider it. Further, there may be other gaps in the evidence known to the parties which Mr. Turner maintains would be appropriate for further testimony, subject to the parties' right to object and the Tribunal's ruling.

## B. CBSA's position

[15] The position of the CBSA is that the principles of natural justice and procedural fairness require that this case, in its entirety, be reheard *de novo*.

[16] The CBSA makes the following arguments in support of its position:

- The reasons for the decision of the FCA with respect to *Decision 1* and the reasons for the decision of the FCA with respect to *Decision 2* are profoundly different and the CBSA's position regarding the procedure to now be followed by the Tribunal for reconsideration is related to this difference.

- With respect to *Decision 1*, the FCA returned the matter to the Tribunal for a new determination on the basis that Member Sinclair's reasons were silent as to one of the prescribed grounds (perceived disability, obesity) and its intersection with other grounds, but Member Sinclair had presided over a 10 day oral hearing and had the opportunity to fully assess the demeanor of the witnesses. For this reason, the CBSA agreed with the determination of *Decision 2* to be carried out on the basis of a review of the record alone.

- With respect to *Decision 2*, the FCA upheld the FC's decision to return the matter to the Tribunal to reconsider the matter on the basis that Member Craig's reasons were unreasonable in that he made fundamental errors in his findings of fact and made adverse credibility findings that had no support on the record. The FCA noted that Member Craig based his decision on the evidence in the transcripts without hearing the witnesses testimony directly and was therefore not in a position to assess their demeanor. The FCA opined that "There is no disagreement that, in an ideal world, the Tribunal should have been able to hear the witnesses afresh" (2017 FCA 2 at para. 56).

- Unlike the situation before Member Craig in *Decision 2*, in the case at hand, the parties have not agreed on a procedure for reconsideration by the Tribunal going forward. The lack of consent by the CBSA to

the Tribunal basing its current reconsideration on a review of the record, rather than a hearing *de novo,* is based on the differences between *Decision 1* and *Decision 2*. In the Federal Court's decision regarding *Decision 2*, Member Craig's decision was held to be unreasonable based on errors of fact and credibility, grounded in evidence in the transcripts, without hearing witnesses testify directly.

- Absent unanimous consent of the parties to a hearing on the basis of all or part of the existing record, the *audi alteram partem* rule -- "he or she who hears must decide" -- requires that a *de novo* hearing be held in the matter. The CBSA has not waived this right. Its right to procedural fairness and natural justice would be prejudiced without a full *de novo* hearing where the Tribunal is able to directly hear the witnesses testify and has the opportunity to assess their demeanor and credibility.

- The CBSA strongly disagrees with the assertions made by Mr. Turner in his submissions that "for whatever reason" the CBSA did not meet its disclosure obligations "before the prior hearing" and that there is new evidence to be disclosed by the CBSA in a "partial *de novo* hearing".

- The CBSA recognizes the need to reduce costs and delays by agreeing with Mr. Turner in good faith on facts not in dispute and testimony and documentary evidence that is not contentious and does not need to be introduced in the same manner as it was before Member Sinclair. The CBSA confirms that one of its witnesses will not be able to testify at the new hearing because of personal reasons and that a determination will need to be made as to how to receive his evidence, if at all.

## IV. Analysis

[17] I do not consider CBSA's consent to using the previous record for the purposes of determining *Decision 2* now binds it in some way to again use the previous record as the present means of reconsideration. Nor do I consider that the FCA has inferred that the record before Member Craig is adequate for a reconsideration in this case based on its comment about the CBSA's previous concurrence. In my opinion, the FCA at paragraph 56 of 2017 FCA 2 quoted above was simply rejecting an argument made before it by the CBSA that Member Craig could have heard oral evidence if he had wanted. It simply pointed out that the parties had agreed that, for the purpose of the hearing by Member Craig, the record was adequate. Nothing in the decision suggests to me that the FCA also reached the conclusion that the procedure followed by Member Craig was the best way for him to proceed. If anything, this paragraph can also be read to mean the opposite.

[18] Further, I do not agree with Mr. Turner's suggestion that, by not specifying that a hearing *de novo* now be held by the Tribunal as the means for reconsidering the matter, the FCA impliedly concluded that a hearing *de novo* is not now the appropriate means to proceed with the reconsideration or that Mr. Turner's proposed procedure is more appropriate. It can equally be argued that, by not specifying that a review of the record be the means by which the Tribunal now conduct the reconsideration, the FCA impliedly did not agree with such a procedure being followed, especially given its comments in paragraph 56 of 2017 FCA 2 about known "difficulties" in proceeding that way and the advantages of being able to "hear witnesses afresh."

[19] What we know, without the need to imply anything, is that the FCA did not specify a means of procedure for the current reconsideration and consequently has left it to the Tribunal to decide. In deciding on a means of procedure, the Tribunal, first and foremost, has a duty to act fairly.

[20] The duty of fairness provides that parties affected by a decision should have "...the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the

statutory, institutional, and social context of the decision" (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 28 [“*Baker*”]).

[21] Indeed, section 50(1) of the Act provides:

> After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

Further, section 48.9(1) of the Act provides that "[p]roceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow."

[22] An aspect of the duty of procedural fairness is the principle that she or he who decides the case must actually hear the case. That is, as a general rule, procedural fairness requires decision-makers to hear all the evidence as well as all the arguments presented by the parties (see *Iwa v. Consolidated-Bathurst Packaging Ltd.,* [1990] 1 SCR 282 at p. 329 [“*Consolidated-Bathurst*]”). As the majority of the Supreme Court of Canada put it in *Consolidated-Bathurst* at page 335:

> In every decision, panel members must determine what the facts are, what legal standards apply to those facts and, finally, they must assess the evidence in accordance with these legal standards […] The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result.

[23] While a decision-maker must hear all the evidence and arguments of the parties, the manner in which that hearing takes place is another question. That is, the existence of a duty of fairness does not determine what procedural requirements will be applicable in a given set of circumstances. The context of each case must be considered in order to determine the content of the duty of procedural fairness (see *Baker* at para. 21).

[24] In this regard, the Tribunal does not have to hold a full oral evidentiary hearing in order to decide substantive issues coming before it (see *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at paras. 115-158 ["*First Nations Child and Family Caring Society*"]; and, *Canada (Human Rights Commission) v. Canada Post Corp.*, 2004 FC 81 at paras. 5-20). As the FC put it in *First Nations Child and Family Caring Society* at paragraphs 128 and 148-149:

> [128] It is, therefore, properly part of the Tribunal's adjudicative role to identify an appropriate procedure to secure the just, fair and expeditious determination of each complaint coming before it. The nature of that procedure may vary from case to case, depending on the type of issues involved.
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> [148] In every case, the Tribunal will have to consider the facts and issues raised by the complaint before it, and will have to identify the appropriate procedure to be followed so as to secure as informal and expeditious a hearing process as the requirements of natural justice and the rules of procedure allow.
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> [149] However, the process adopted by the Tribunal will have to be fair, and will always have to afford each of the parties "a full and ample opportunity to appear[,] … present evidence and make representations" in relation to the matter in dispute.

[25] This reasoning is in line with the characterization of the duty of procedural fairness in *Baker* and also with the reasoning of a majority of the Supreme Court of Canada in *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560, wherein at pages 568-569 it stated that:

> As a general rule, these tribunals are considered to be masters of their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial function, the rules of natural justice.

[26] That said, the issue of credibility and conflicting evidence supports the need to hear witnesses in person. On this issue, the Supreme Court of Canada stated in *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177, at paragraph 59:

> I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see *Stein v. The Ship "Kathy K"*, 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802, at pp. 806-08 (*per* Ritchie J.) I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

[27] In the context of human rights proceedings, the FC also espoused a similar view, stating in *First Nations Child and Family Caring Society* at paragraph 141:

> [141] Most human rights cases are highly dependent on their individual facts and those facts are often hotly contested. As a result, many cases involve serious issues of credibility. While it is open to the Tribunal to receive evidence by way of affidavit, the more contested the facts and the greater the issues of credibility, the less appropriate this will be. Such cases may well require a full hearing on their merits, including *viva voce* evidence in chief and cross-examinations held in the presence of a Tribunal member.

[28] In this case, I must weigh both fairness and expediency in ruling upon this motion. There are valid arguments for both procedures proposed by the parties. On balance, however, I believe it is more fair and expeditious to proceed by way of a complete hearing *de novo*, because:

1. Both parties do not consent to using the record from the previous oral hearing before Member Sinclair, as they did before Member Craig. I know of no case where the Tribunal has refused to hold a hearing *de novo* on reconsideration when a party has asked for one.

2. There are issues of credibility and conflicting evidence in this matter. There is a greater chance for me to avoid the difficulties that Member Craig had by actually seeing and hearing witnesses in person and being able to ask them questions myself. Any issues with the reliability or inconsistency of evidence given by witnesses at the *de novo* hearing with the evidence from the original hearing are best addressed if and when those issues arise. At that point, the Tribunal and the parties will be in a better position to assess the actual situation.

3. The time it would take me to properly read the transcripts and thoroughly review the record from the previous hearing must be considered. It is unlikely that there would be a meaningful time savings in reviewing the previous record given Mr. Turner's request for a "partial *de novo* hearing" that might itself add time and confusion to the proceedings.

4. Moreover, I expect the parties to act in good faith to reduce the time and expense of the hearing by agreeing on facts and documents that are not contentious and taking such other steps as are necessary and available to streamline matters.

## V. Ruling

[29] For these reasons, the procedure for the reconsideration of this matter will be by way of a hearing *de novo.*

[30] Issues with respect to new evidence, disclosure and the use of the transcript from the previous hearing in the upcoming hearing *de novo*, shall be discussed at a future Case Management Conference Call.

*Signed by*

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
May 26, 2017

**Canadian Human Rights Tribunal**

**Parties of Record**

**Tribunal File: T1248/6007**

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

**Ruling of the Tribunal Dated:** May 26, 2017

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

David Yazbeck, counsel for the Complainant

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