

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2017 CHRT 32

Date: October 19, 2017

File No.: T1981/6113

Between:

Arthur Lee Keith

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Armed Forces

Respondent

Decision

Member: Ronald Sydney Williams

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I. The Complaint

[1] The Complaint is brought against the Canadian Armed Forces (“CAF” or “Respondent”) for reason of its policy that psychiatrists employed by the CAF, be certified as specialists with the Royal College of Physicians and Surgeons of Canada (“RCPSC”), alleging it is a discriminatory practice on the part of the CAF. The Complainant, Dr. Arthur Keith relies on section 7 of the *Canadian Human Rights Act*, RSC 1985 c H-6. (the “Act” or “CHRA”) and alleges that he was discriminated against, on the grounds of national origin.

[2] The Complainant is an American-born physician receiving all of his medical training and specialty training in psychiatry in the United States of America (“U.S.”).

[3] The Complainant alleges that this hiring policy of the CAF precludes members of fully qualified specialists of non-Canadian origin from being considered for employment, and subjects the Complainant to discriminatory exclusion from employment opportunities, and therefore, discrimination having an adverse effect.

[4] The Respondent’s position is that by adopting the RCPSC standard, the CAF ensures that its psychiatrists meet a nationwide recognized standard for proficiency in psychiatry, and is therefore a *bona fide* occupational requirement (“BFOR”) and denies that this requirement is discriminatory.

[5] The Complainant argued that the CAF adopted a hiring standard (fellowship in RCPSC) that leads to discrimination under the *CHRA*.

[6] If there is no *prima facie* evidence of direct or adverse effect discrimination by the federally regulated employer, the matter need not be investigated further.¹

¹ Par 57 Complainant BOA Vol1 Tab 1

II. The Facts

[7] The Complainant, Dr. Arthur Keith a U.S. citizen received his medical training in the U.S., firstly as a general practitioner and subsequently as a qualified psychiatrist in the U.S. on the completion of his Residency program in 1983.²

[8] Dr. Keith, born in 1950, had an impressive U.S. military career serving as a member of the U.S. Army Special Forces. Later he attended medical school receiving a medical school scholarship from the U.S. Air Force (“USAF”).

[9] He was a physician with the USAF in various capacities from 1979 to 1986, having completed his residency in psychiatry in 1983. He was voluntary certified as a specialist in psychiatry in 1987, with the American Board of Psychiatry and Neurology (“ABPN”).³

[10] While residing in the U.S., in 1989, Dr. Keith sought Canadian recognition as a specialist in psychiatry from the RCPSC.

[11] At the time of seeking this RCPSC recognition, he had not moved to Canada, nor had he sought employment with the CAF.

[12] After reviewing the Complainant’s credentials and recognizing most of his American training, the RCPSC determined to meet its recognition, Dr. Keith needed only to take and pass a written examination, complete a six month residency in child psychiatry and pass an oral examination in psychiatry.

[13] The Complainant’s evidence was that the certification process by the ABPN and the RCPSC was similar, consisting of a written and oral examination both of which were “virtually identical, with not substantial differences”.

[14] In 1990, Dr. Keith undertook the written examination administered by the RCPSC, but he was unsuccessful. He subsequently passed the written examination in 1992. However he was unsuccessful with the oral examinations, on three separate occasions,

² Complainants Documentary Evidence Vol 3, Tabs 66 & 67

³ Ibid Tab 67

the last being in 1993. After the third failed attempt, his eligibility for the examination had expired.

[15] To complete the oral exams a further time, would require an application to the Credentials Committee of the RCPSC for a renewal of eligibility. Dr. Keith declined to make that application.

[16] At the time of Dr. Keith's complaint, all physicians, regardless of their national origin or training, to obtain specialist accreditation, were required to take standard examinations set by the RCPSC.

[17] Dr. Keith having moved to Ontario in 2004, sought certification by the College of Physicians and Surgeons of Ontario ("CPSO"), which was then providing certificate designation for specialists for those qualified by the CPSO, but not RCPSC so designated. While CPSO designation was recognized in many Provinces, it was not uniformly recognized across Canada, unlike certification by RCPSC. In 2007, CPSO granted Dr. Keith recognition as a specialist in psychiatry.

[18] The CPSO specialist status is not equivalent to a fellowship with the RCPSC. The CPSO register provides doctor-specific information about physicians in Ontario, including whether the physician is a specialist and the body that accredited the physician's specialty.

[19] At all material times, the health services for the CAF (DND) was provided by Calian Ltd., which as an independent third party, advertises and recruits physicians for various locations and positions as required by the CAF.

[20] The standards for candidates hired by Calian Ltd. were set by the CAF.

[21] As requested by the CAF, Calian Ltd. advertised for psychiatrists for the CAF bases in Cold Lake, Alberta and in Petawawa, Ontario. It indicated that a mandatory requirement for either position was RCPSC certification.

[22] In 2008, notwithstanding knowing of the RCPSC certification requirement, the Complainant applied to Calian Ltd., for psychiatry positions at either location and submitted his formal application for the Petawawa position.

[23] Calian Ltd. was subsequently advised by CAF that RCPSC certification was a requirement for the psychiatric positions on CAF bases and as a result the Complainant's application did not proceed.

[24] In 2005, CPSO commenced a process to recognize specialists on a "practice based assessment", (the "eligibility route") for those foreign trained specialists who had practiced their specialty for a number of years. This method of qualifying specialists in Ontario is not standard in all ten Provinces of Canada.

[25] While the RCPSC adopted the practice eligibility route in 2011, as an alternative to the examination route, it was not available to RCPSC certification when Dr. Keith applied, then only using the examination route.

III. The Argument

[26] The complaint is brought under section 7(b) of the *CHRA* which states:

7. It is a discriminatory practice directly or indirectly

(a) to refuse to employ or continue to employ an individual, or

(b) in the course of employment, to differentiate adversely in relation to any employee,

on a prohibited ground of discrimination.

[27] Section 3(1) of the *CHRA* states that national or ethnic origin is a proscribed ground of discrimination. Having been born and educated in the U.S., equating place of education with national origin.

[28] Dr. Keith alleges discrimination contrary to the protection of the *CHRA* on the basis of the CAF's refusal to assess his application for two psychiatric positions in Petawawa and or Cold Lake Alberta, for reasons that CAF require certification by the RCPSC as a fundamental requirement. This requirement disadvantages foreign trained doctors where by foreign education is often an accepted extension of national origin. *Bitonti v. College of Physicians & Surgeons of British Columbia* [1999] B.C.H.R.T.D. No. 60 ("*Bitonti*").

[29] Relying on the jurisprudence which has held that place of education is equivalent to or an extension of place of origin, Dr. Keith claims that a *prima facie* case of discrimination has been established.

[30] The Respondent relies upon section 15(1)(a) of the *CHRA* on the basis that the certification by the RCPSC is a BFOR of the CAF; and pursuant to section 15(2), to accommodate the requirement of Dr. Keith would impose an undue hardship on the CAF as it is not qualified to determine the equivalency of the certification by the CPSO with that of the RCPSC.

[31] Both the Complainant and Respondent refer to the leading case of *Moore v. British Columbia (Education)*, 2012 SCC 61 (“*Moore*”) as the test for *prima facie* discrimination.

[32] *Moore* provided, at paragraph 33, that to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *CHRA*, in that:

[33]... they have experienced an adverse impact with respect to the service; and the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden of proof shifts to the Respondent to justify the conduct or practice within the framework of the exemptions available under the human rights statutes. If it cannot be justified, discrimination will be found to occur.

[33] The Complainant states that being born in the U.S. and having obtained his medical degree and psychiatric speciality in the U.S., meet the first test for *prima facie* discrimination relying on the case of *Bitonti, supra*.

[34] The Respondent’s position that the place of training may be a proxy for “place of origin”, can be relied upon only when the circumstances where more onerous certification or licensing requirements are imposed based on a negative assumptions about an individual’s place or origin, citing *Fazil v. National Dental Examining Board of Canada*, 2014 HRTO 1326 (“*Fazil*”) at paragraphs 39 – 40.

[35] The Respondent’s position is that *Bitonti* must be read with the decision in *Gould v. Yukon Order of Pioneers* [1996] 1 SCR 571 (“*Gould*”). Place of origin to include place of

education is too liberal an interpretation. The Court stated that such a broad interpretation would amount to rewriting the *Act*.

[36] Dr. Keith argued that American trained doctors are at a disadvantage in writing the RCPSC and American trained doctors are overwhelmingly American by birth, discrimination is effected by national origin.

[37] The Respondent argued that “common sense also dictates that place of training cannot be automatically equivalent to “national origin”.” The Respondent stated that had the Complainant chosen to complete his medical education in Canada, would his “national origin” then become “Canadian”? Place of education and national origin cannot automatically be a proxy for the other.

[38] The Complainant argued that his American credentials placed him at a disadvantage and therefore discriminatory. The Executive Director of the RCPSC on cross – examination by the Complainant’s able Counsel, stated that attending a Canadian Medical School was “one of the best mechanisms” to prepare for the RCPSC examinations. But that does not by implication devalue the Complainant’s American education.

[39] The Respondent argued that Dr. Keith’s American education did not put him in a disadvantage to Canadian trained doctors, referred to decision in *Keith v. College of Physicians and Surgeons of Ontario* [2013], OHRTD No. 1646 (“*Keith-CPSO*”), wherein the Complainant unsuccessfully challenged the CPSO’s distinction on its website between CPSO and RCPSC specialist as discriminatory based on place of origin because most CPSO specialist are foreign born. The Ontario Human Rights Tribunal (“OHRT”) found that American credentials are on occasion valued higher if not on par with Canadian credentials.

[40] The Respondent led evidence that over 90 per cent of specialists in Ontario are RCPSC certified even if they are foreign born or foreign trained.

IV. The Decision

[41] As required under the *CHRA*, the Complainant must first make a *prima facie* case of discrimination under the grounds enumerated under the *Act*, that the CAF requirement of RCPSC certification is a *prima facie* case of adverse effect discrimination.

[42] The recent decision of *Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2016 ABQB 61 (“*Mihaly*”) stated at paragraph 73:

Under the Moore test, establishing a *prima facie* case of adverse effect discrimination requires complainants to show that they have a characteristic that is protected from discrimination; that they experienced an adverse impact, and that the protected characteristic was a factor in the adverse impact.

[43] Dr. Keith’s American birth, born outside of Canada, could therefore argue that being foreign born and therefore his place of origin is a prohibited ground of discrimination. Discrimination on the grounds of place of origin is prohibited under the *CHRA*. Dr. Keith argued that his U.S. medical education is an accepted extension of “place of origin”.

[44] I do agree that one’s place of origin, may well serve as an appropriate ground for finding discrimination in the work force and in society as a whole, and therefore an appropriate prohibition under the *CHRA*. However, I do not subscribe to the theory that merely born and educated outside of Canada leads to discrimination having an adverse impact and therefore automatically protected under the *CHRA*.

[45] While the extension of “place of origin” to include place of foreign education may be appropriate in some circumstances, such as educational degrees from some third world universities. I agree that automatic extension of the definition of “place of origin” was not the intention of *Bitonti*, and the finding expressed in *Fazil* is the proper interpretation. There was no evidence before the Canadian Human Rights Tribunal (“Tribunal”) that RCPSC certification process was more onerous due to Dr. Keith’s American birth and education.

[46] I subscribe to the opinion expressed in *Grover v. Alberta (Human Rights Commission)*, [1996] AJ No. 667 (Alta QB) and affirmed [1968] AJ No 924 (Alta CA) in discussing origin of education as an extension of “place of origin”, the Court stated at paragraphs 47- 48 that “it must give a fair, liberal but faithful interpretation to the phrase “place of origin”. That phrase - place of origin of a person – cannot be stretched to include the place where a person received their PhD degree”.

[47] I do not accept that the policy of the CAF requiring RCPSC certification was based on discriminatory assumptions and no evidence was provided to the Tribunal that Dr. Keith’s ABPN certification was inferior to RCPSC certification and therefore creating the extension of “place of origin” with “place of education”. Dr. Keith argued that they were substantially similar.

[48] Further if place of training is to serve as a proxy for place of origin, then the emphasis, must be on the place of training to extend the place of origin to include place of training. No evidence was advanced by the Complainant that American trained physicians are substantially of American origin, therefore equating American trained as therefore American origin or therefore foreign trained.

[49] I find the *Mihaly* case most helpful, in the case before me. Mr. Mihaly was born and educated in the former Czechoslovakia. He obtained a M.Sc. Diploma with a specialization in Technology of Fuels and Thermal Energy from the Slovak Technical University, in Bratislava; and a further Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague in 1981 (*Mihaly* at paragraph 40).

[50] After immigrating to Canada, Mr. Mihaly applied to the Association of Professional Engineers, Geologists and Geophysicists of Alberta (“APEGA”), and notwithstanding his high level of education, he was required to write the National Professional Practice Exam (“NPPE”). Similar to Dr. Keith, he failed the exams on three occasions, filing a complaint with the Alberta Human Rights Commission pursuant to the *Alberta Human Rights Act*, RSA 299, c A-35.5 alleging that the APEGA discriminated against him based on his place of origin when it denied him registration as a professional engineer.

[51] The CAF required all medical applicants to pass and acquire the RCPSC credentials. Similar to *Mihaly*, the Complainant did not provide any compelling evidence that his national origin was a factor in any disadvantage that he may have had obtaining RCPSC certification.

[52] The Court in *Mihaly* stated at paragraph 106:

There was no finding and no basis for a finding that the requirement to pass the NPPE constituted adverse discrimination. The NPPE is required of all applicants wherever they were educated. While there was evidence that Mr. Mihaly failed this examination three times, there was no evidence that this was in any way related to his place of origin. There was, for example, no evidence that the requirement to take the NPPE disproportionately excludes foreign engineering graduates from registration with the APEGA.

[53] Whether Canadian born or foreign born, the CAF required all doctors to be certified by the RCPSC. The Respondent Counsel correctly, in my view, stated that there was no evidence that the requirement to take the RCPSC certification was in any way related to place of origin. Whether he was Canadian, American or other, CAF required the same qualification.

[54] I found no compelling evidence that Dr. Keith was treated differentially as a result of his educational qualifications from any other party as a result of being American. I do not find that his place of origin resulted in an adverse effect on his ability to pass the requirements of the RCPSC.

[55] I do not find any compelling reasons for a basis for a finding that the requirements to pass the RCPSC, constituted adverse discrimination on the part of the CAF. As in *Mihaly* at paragraph 106, “while there was evidence that Mr. Mihaly failed the [the NPPE] examination three times, there was no evidence that this was related to his place of origin”.

[56] The evidence of Dr. Jeffrey Reitz, accepted as an expert witness on behalf of the Complainant provided evidence as to the differential treatment of immigrants and ethnic minorities. However his research was based on visible minorities and did not provide any substantial evidence as to education and place of origin for white American born and American trained physicians. His evidence was accepted that immigrants with foreign credentials are often discriminated against in favour of Canadian trained applicants.

[57] Dr. Keith by his own accepted evidence was highly trained in his medical education and will accomplish in his other endeavours. By his own admission, he believed his American accreditation was equal to if not superior to Canadian medical education.

[58] I find that Dr. Reitz's evidence was not persuasive to advance the Complainant's allegation of discrimination based on his foreign birth and by extension, his education. One cannot automatically apply the principal that foreign education is an extension of foreign birth. It is not absolute; otherwise it would also be a separate heading for discrimination under the *CHRA*. While the Tribunal has wide discretion in interpretation, it is entitled to limit what otherwise might apply in a case of dissimilar facts.

[59] The Complainant is unsuccessful in establishing that the CAF's requirement of RCPSC certification is discriminatory against foreign born and trained. I accept the Respondent's evidence produced by the National Physicians' Survey administered by the Canadian Medical Association, which found that most specialists in Ontario are RCPSC certified to the extent that 99.2% of Ontario specialists who are born outside Canada are RCPSC certified.

[60] Similarly I do not accept that the CAF's insistence on RCPSC certification is discriminatory, as it is equivalent to CPSO credentials. I accept the evidence of Mr. Dan Faulkner and Dr. Harris, as both the RCPSC and CPSO view the credentials differently. The RCPSC is recognized as a national standard, recognized across Canada.

[61] The CAF's reliance on RCPSC credentials results in a standard to which it can rely across Canada. The Complainant argued that CPSO was equivalent. There was no credible evidence to this effect. While CPSO specialty accreditation is accepted in some of the Canadian Provinces but not all, no evidence was provided that it was accepted by the Province of Alberta. Dr. Ken Harris, Executive Director of the RCPSC testified that specialty certification is a national standard applicable in all provinces and is also accepted by all Provincial Colleges as having met the standard for specialty designation.

[62] The OHRT found that the CPSO and RCPSC are not equivalent while the RCPSC develops national standards and the CPSO deals with licensing to practice medicine in Ontario. *Keith-CPSO, supra*, at paragraphs 46, 49 & 50.

[63] I also accept that RCPSC is a BFOR. The Respondent referred to the three step test by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3 (“*Meiorin*”) at paragraph 54 to establish that an occupational requirement is *bona fide*:

[...]

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job.

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work related purpose, and;

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[64] I accept that it would be an undue hardship on the CAF to be required to determine the qualifications of all of its medical practitioners. I accept the plain explanation of Colonel MacKay when he stated:

Before 2009, not all the provinces in this country would recognize the licence and certification from one province to another. If all of the provinces can't come to an agreement with respect to the certification process within each of those provinces what level of confidence can I have in the process that was undertaken to certify them within that province? The Royal College of Canada's certification was recognized by every province at that time as it is today as an acceptable standard to assure high quality of care to be provided by health care providers.

[65] As I find that the CAF did not discriminate against Dr. Keith within the requirements of the *CHRA*, having met the test set out by the Supreme Court of Canada in *Meiorin*, and to suggest otherwise would place an undue hardship on the CAF and the health and standards of its employees.

[66] As I find further that the Complainant has failed to establish that he has been the subject of discrimination under the *CHRA*, I need not address his claim for compensation.

[67] For these reasons, I find that the complaint is not substantiated.

Signed by

Ronald Sydney Williams
Tribunal Member

Ottawa, Ontario
October 19, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1981/6113

Style of Cause: Arthur Lee Keith v. Canadian Armed Forces

Decision of the Tribunal Dated: October 19, 2017

Date and Place of Hearing: April 13 to 17, 2015

August 24 to 26, 2015

Toronto, Ontario

Final written submissions were received on December 29, 2015

Appearances:

David Baker, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Victoria Yankou & Jacqueline Wilson, for the Respondent