

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Joselito Silva

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Post Corporation

Respondent

Decision

Member: Edward P. Lustig

Date: April 8, 2011

Citation: 2011 CHRT 8

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I. The Complaint

[1] This is a decision regarding a complaint made by Mr. Joselito Silva, the Complainant, against Canada Post Corporation (“Canada Post”), the Respondent. In his Complaint, filed with the Canadian Human Rights Commission (the “Commission”) on January 6, 2008, the Complainant alleged that in June of 2007 the Respondent, as his employer, discriminated against him in the course of his employment, by differentiating adversely on the basis of family status, contrary to s. 7 (b) of the *Canadian Human Rights Act* (the “Act”). In particular, the Complainant alleged that he was refused a promotion by the Respondent to a supervisory position that he was qualified for, on account of two previous grievances that were successfully taken against the Respondent by two of his sisters who are also employees of the Respondent.

[2] The inquiry by this Tribunal into the Complaint was requested by the Commission as being warranted pursuant to s. 44 (3) (a) of the *Act* by a letter dated December 23, 2009.

[3] The Commission did not appear at the Hearing of this Complaint by the Tribunal.

II. Findings of Fact

[4] The Complainant began his employment with the Respondent at its Calgary mail processing plant in 1998 as a Christmas casual employee. He subsequently became a temporary employee and ultimately, in 2002, became a permanent employee with the Respondent, where he currently works as a unionized full-time Postal Clerk at the plant. Mr. Greg Beauchamp of the Respondent’s Human Resources Department hired the Complainant.

[5] The Complainant came to Canada in 1987 from the Philippines where he was educated and obtained a degree in Civil Engineering from the Technological Institute of the Philippines in 1986. Prior to working for the Respondent, he had several jobs including jobs with Nortel Networks and Stanley Associates Engineering. He has taken various self-improvement courses since coming to Canada. He has been involved, as well, in various volunteer efforts in his

community. Over the years, he has provided support to various family members in addition to his immediate family.

[6] In 2004, the Complainant attended the Canada Post Career Leadership Development Program (“CLDP”). The CLDP is a leadership program for internal Canada Post employees. It is a three day program that is offered from time to time. Applicants apply for participation in the program with the support of their supervisor. The program is run by a facilitator and a number (usually 5) of the Respondent’s managers from various departments who act as assessors, observing the participants during the program and assessing their performance in the tasks completed. The program requires the participants to perform tasks in groups, to make presentations and to engage in problem solving.

[7] After his participation in the 2004 CLDP, the assessors concluded, through their observations of him at the CLDP, that the Complainant would not be put forward for a supervisory position. The Complainant was provided with feedback on his performance at the CLDP by three of the assessors who were in attendance at the program, including Mr. Greg Beauchamp of the Employee Relations Department. During the feedback session with the assessors, the Complainant advised them that he had interests in being involved in engineering technology. It was suggested to him that he should contact the Manager of Operations Improvement to further his interests in the area of engineering technology if that was his real preference rather than becoming a supervisor in his area. The Complainant was also provided with feedback on his communication skills and his proficiency in English. He was advised that in both of these areas he would need improvement in order to be a supervisor of other employees, with tasks including holding meetings to direct them.

[8] Ms. Magdalena Silva is the Complainant’s sister. She was provided with an offer of employment letter from the Respondent in November of 2005 despite the fact that she had failed the GAT (General Abilities Test) and, as a result of her score, would not have met the criteria for an offer of employment with the Respondent. When this error was discovered by the Respondent the offer was withdrawn. Mr. Beauchamp wrote a letter dated November 18, 2005

to Ms. Silva terminating her employment. Ms. Silva grieved the withdrawal of the offer and the matter was settled prior to arbitration with Ms. Silva being hired as a permanent employee in June, 2006 with a continuous service date of November, 2005.

[9] Ms. Rosalyn Trudel is also the Complainant's sister. Ms. Trudel was hired in November, 2005 for Christmas coverage and was provided with a work schedule. When her personal information was entered into the Respondent's personnel computer system, a number of discrepancies were discovered related to her married name (Trudel) and her maiden name (Silva). When this information was discovered, the Respondent terminated Ms. Trudel's employment. This occurred a few days prior to the date that she was scheduled to report for her first shift. Mr. Beauchamp wrote a letter dated November 10, 2005 to Ms. Trudel confirming her temporary employment with the Respondent then wrote a letter dated November 24, 2005 to Ms. Trudel terminating her employment. She grieved the withdrawal of the offer of employment and the termination. An arbitration decision was rendered in her favour. Ms. Trudel was reinstated with a continuous service date of employment with the Respondent of November, 2005.

[10] After hearing from his sister, Rosalyn Trudel, on November 24, 2005, after she received her termination letter, the Complainant phoned Mr. Beauchamp on November 25, 2005 to enquire about his sister's termination. Mr. Beauchamp refused to provide the Complainant with the information on the basis that it was privileged and private personal information that he was not permitted to disclose to the Complainant under privacy policies and legislation. The Complainant was agitated and upset during this call.

[11] From 2006 and during the time frame of the Complainant's Complaint of June 2007, the Respondent undertook a program to significantly increase the number of supervisors at its facilities across Canada. In order to be able to handle the increased work load for this procurement undertaking, the Respondent engaged a third party service provider Spherion Corporation ("Spherion") to assist with its national recruitment program of supervisors. Both

internal and external candidates could apply directly to Spherion for consideration for placement in supervisor training.

[12] In January of 2006, the Complainant again applied for a supervisory position in his area of work with the Respondent. His application was not put forward for further consideration as there had been no changes in his resume since his last application in 2004.

[13] Later in 2006, the Complainant applied for another supervisory position through Spherion. Through the application process involving both on-line testing and a personal interview, the Complainant did not meet the minimum benchmark score of 70 percent required to move forward in that process.

[14] Again in June of 2007, the Complainant applied for a supervisory position with the Respondent through Spherion. He dealt with Ms. Leanne Nichol of Spherion during this process.

[15] The Spherion recruitment process includes a pre-screen telephone questionnaire, online testing (typing, computer literacy, personality and language proficiency), in person behavioural interview and written assessment, reference verification followed by a second interview by the Respondent, if warranted by a successful minimum benchmark score of 70 percent through the Spherion process.

[16] Prospective candidates were brought to Ms. Nichol's attention through a few different avenues. Either they would apply directly to Spherion through a public job board where an advertisement was posted, or their name might be brought forward through Spherion's temporary division, or they may have been referred directly to Spherion from the Respondent. From time to time, the Respondent's contact, Diana Cheys, of the Human Resources Department or another of the Respondent's supervisors would refer an internal candidate of the Respondent to Ms. Nichol and provide her with the candidate's resume directly. Regardless of how the candidate's

application came to her, the candidate would complete the same process and testing with Spherion.

[17] In 2007, the Complainant applied to Spherion directly in response to a posting on the public job board. Unless they were advised by the Complainant himself, neither Ms. Cheys nor anyone else affiliated with the Respondent would have been aware of the Complainant's application through the public job board because Spherion did not report the names of the applicants to the Respondent at the application stage.

[18] The Spherion online testing is conducted through secured programs known as Proveit and Prevue Systems, which are designed to be unbiased to any candidate conducting the tests. They are assigned through the staffing agency and are inaccessible to the Respondent or any other organization. The organizations Spherion recruits for (in this case the Respondent) identifies the types of tests and assessments to be completed by the applicants for the position being recruited. Once a candidate has completed a test, Ms. Nichol would receive notification from Spherion's corporate office in order to access the results. These programs are utilized throughout various staffing agencies and recruits outside of the front line supervisor recruit with the Respondent. For the Respondent's recruitment program, it was Ms. Nichol's role to administer the tests, assessments and an interview and endorse any candidates who scored benchmarks of 70 percent and higher for further consideration through a subsequent interview with the Respondent.

[19] Ms. Nichol first came into contact with the Complainant as part of his application to Spherion in June, 2007, when the Complainant applied for a front line supervisor role with the Respondent. Ms. Nichol had no knowledge of any of the Complainant's previous applications or results from any prior applications and candidacy assessments. On June 6, 2007, the Complainant completed the online behavioural assessment, which rated the Complainant at 66 percent. The Complainant scored average percentiles on his software testing which was also conducted on June 6. The Complainant's online assessments were only a portion of the process and not enough to excuse the Complainant from the entire recruit; therefore Ms. Nichol could not determine if the Complainant would be successful or not just based on the Complainant's online

assessments. Ms. Nichol required an in person interview to determine the Complainant's overall potential for the position and left voicemails to the Complainant requesting an in person interview immediately following the online test. Her voicemails were very upbeat. The Complainant took from those voicemails the view that he would be successful though there was nothing said to that effect on the voicemails.

[20] The Complainant had an in person interview with Ms. Nichol on June 7, 2007 and completed a written assessment at Spherion's office prior to the interview. It was Ms. Nichol's professional practice not to advise any candidate in an interview that they would be put forward to the Respondent for an interview, as this could not be determined until their entire assessment was scored. Subsequent to the Complainant's interview and written assessment, Ms. Nichol calculated the onsite assessments with the Complainant's online assessments.

[21] The Complainant's score was below the required benchmark. Ms. Nichol's did her very best to find a valid scenario whereby she would be able to score the Complainant at the 70 percent benchmark level that was required by the Respondent before an applicant in the Spherion process could be recommended for the next step in the process, which was an interview with the Respondent, however, Ms. Nichol could not score the Complainant at this level, and thus he did not attain the minimum benchmark score of 70 percent. Ms. Nichol recalled the score being in the mid-60's. Ms. Cheys recalled being told a score of 66 percent by Ms. Nichol. The Respondent set a benchmark score in the Spherion process of 70 percent for all applicants. Ms. Nichol gave evidence that while she had, from time to time, attempted to encourage the Respondent to put forward applicants, including the Complainant, who scored close to the 70 percent benchmark, she was never successful in those attempts. She admitted that her firm got paid for recruiting successful applicants, however, the only candidates that moved forward were those with a 70 percent score.

[22] The Respondent was advised by Ms. Nichol of the Complainant's application and unsuccessful assessment. Ms. Nichol expressed concern to Ms. Cheys regarding a language and communication barrier she felt the Complainant had. Ms. Cheys asked that Ms. Nichol provide

recommendations to the Complainant for ESL (English as a Second Language) training to improve the Complainant's communications skills so that the Complainant may be successful with his applications for a supervisory position in the future. Ms. Nichol gave the Complainant recommendations for a number of ESL programs in Calgary that the Complainant might wish to investigate.

[23] Although the Complainant received some positive feedback from the interview, the Complainant did not achieve the benchmark result of 70 percent in the overall assessment and was therefore not eligible to move forward in the process. The Complainant had the impression from his interview with Ms. Nichol that he would be moved forward to an interview with the Respondent. While the evidence was that Ms. Nichol spoke with Ms. Cheys and was hoping that, since the Complainant was close to the minimum benchmark, he might be "put through", there was nothing ever done by Ms. Nichol to recommend that the minimum benchmark requirement be waived and nothing was ever said or written to the Complainant by Ms. Nichol or anyone else that he would receive an interview with the Respondent.

[24] Other than the behavioural interview, a few brief telephone calls with the Complainant, and emails to the Complainant advising him that he was not moving forward in the process, Ms. Nichol did not have any other involvement with the Complainant regarding his application to the Respondent for a supervisory position.

[25] At no time during the assessment process that Ms. Nichol conducted with the Complainant did she have any information on any concerns or issues regarding the Complainant's family members. As well, Ms. Nichol's uncontradicted evidence was that Mr. Daryl Pinto and Mr. Prakash John, who were candidates for supervisor at the same time as the Complainant, both scored above the minimum benchmark requirement contrary to the Complainant's belief in this regard.

[26] Ms. Cheys gave evidence that she did not know any of the past history of the Complainant's sisters with the Respondent until after the evaluation was complete and a decision

had been made on the Complainant's application. Ms. Cheys evidence was that the Complainant's Spherion application was not put forward because he did not attain the 70 percent benchmark, and this was a firm rule that she did not have any discretion to overrule. Ms. Cheys evidence was that she never at any time prevented the Complainant's application from moving forward based on any issues with his sisters. Ms. Cheys also confirmed the evidence given by Ms. Nichol that the Respondent had not moved forward any applicant who scored less than 70 percent as she had no discretion to do so.

[27] After the Complainant was declined in June of 2007 through Spherion, he enlisted the support of his supervisor, Rick Watson, who had worked with him previously at Nortel. Mr. Watson sent a request to the Director, Tom Dixon, inquiring about the supervisor process. The inquiry was brought to the attention of Ms. Cheys, and she related this to Mr. Beauchamp. They decided to meet with the Complainant to explain to him why he had been unsuccessful in the competitive process for supervisor training.

[28] This meeting was held on June 20, 2007. During the meeting Ms. Cheys and Mr. Beauchamp reviewed with the Complainant that one of the reasons why he was unsuccessful in the process was that his skills communicating in English needed to improve as this was very important to a supervisor's interactions with employees on the work floor.

[29] During the meeting on June 20, 2007, Mr. Beauchamp reviewed with the Complainant concerns he had previously had with him in 2005 regarding his involvement in hiring decisions concerning the Complainant's sisters, Rosalyn Trudel and Magdalena Silva. The incident Mr. Beauchamp was referring the Complainant to, happened in November, 2005, when the Complainant telephoned Mr. Beauchamp demanding information about why his sisters had not been hired by the Respondent. Mr. Beauchamp advised the Complainant at that time that this was the personal information of his sisters and due to privacy laws, the Complainant was not entitled to the information, regardless of his relationship to them. During this November, 2005 conversation, the Complainant became quite agitated and repeatedly insisted on being provided with personal information about his family members.

[30] During the June 20, 2007 meeting with the Complainant and Ms. Cheys, Mr. Beauchamp was using the reference to the Complainant's past behaviour in 2005 as an example of one of his skills gaps to illustrate that if this was how the Complainant behaved when it came to the Complainant's family members, how would the Complainant behave on the work floor if a similar situation came up. Would the Complainant inappropriately disclose personal information, or get agitated and insist on being provided with information that the Complainant was not entitled to? Supervisors are provided with access to confidential and personal information about the employees they are supervising and it was a concern to Mr. Beauchamp that the Complainant appreciate the demands placed on a supervisor when dealing with employees in difficult circumstances and that supervisors must be discrete and know how to use and protect confidential information and personal information. The Complainant took this reference by Mr. Beauchamp instead, as a clear sign that he was reminding the Complainant of the fact that his sisters had grieved their terminations in the past and that this was why he was not being promoted. It is my finding that the Complainant misunderstood this reference and that Mr. Beauchamp's intention was to use the reference as an example of one of the Complainant's skill deficiencies and not for any vindictive or discriminatory purpose.

[31] With respect to the Complainant's applications through the Spherion process, Mr. Beauchamp had no involvement in Spherion's application or screening process. Mr. Beauchamp's only involvement with the Complainant's application in June, 2007 was by way of the meeting with Ms. Cheys and the Complainant on November 20, 2007. After 2005, Mr. Beauchamp had no dealings with Magdalena Silva or Rosalyn Trudel.

[32] At the time of the Hearing, Ms. Nichol was no longer working for Spherion, Ms. Cheys was no longer working for the Respondent and Mr. Beauchamp had retired and was no longer working for the Respondent.

III. Law

A. Establishing a *Prima Facie* case of discrimination

[33] Section 7 of the *Act* states:

It is a discriminatory practice, directly or indirectly,

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

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

on a prohibited ground of discrimination.

Family status is a prohibited ground of discrimination under s. 3 of the *Act*.

[34] The initial onus is upon the Complainant to 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 decision in favour of the Complainant, in the absence of an answer from the Respondent. The Respondent's answer should not be considered in the determination of whether the Complainant has made out a *prima facie* case of discrimination. (See *Ontario (Human Rights Commission) and O'Malley v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536; and *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204.)

B. Reversal of burden of proof and justification

[35] Once a *prima facie* case of discrimination is established, the burden of proof shifts to the Respondent to demonstrate by providing a reasonable (non-pretextual) explanation that the alleged discrimination either did not occur as alleged, or that the conduct was somehow non-discriminatory or justified. It is not necessary that the discriminatory considerations be the sole reason for the actions in issue for a Complainant to succeed. It is sufficient that the discrimination be but one basis for the employer's actions or decisions. (*Maillet v. Canada (Attorney General)*, 2005 CHRT 48, paras. 4-5; *CHRA*, s. 15). See also *Canada v. Lambie* 1996 CanLII 3940 (F.C.).

IV. Issues

[36] There are two issues that need to be determined in this case:

- (1) Has the Complainant demonstrated a *prima facie* case of discrimination on the basis of family status?
- (2) Has the Respondent provided a reasonable explanation that is not a pretext for discrimination?

V. Analysis/Conclusions

[37] The Complainant's case at the hearing consisted of the testimony of his two sisters Magdalena Silva and Rosalyn Trudel as well as his own testimony. In addition, he produced various documents as exhibits.

[38] While Ms. Silva's and Ms. Trudel's evidence confirmed their terminations, grievances and reinstatements as referred to above, neither of them provided any evidence supporting the Complainant's allegation that his failure to obtain a promotion to supervisor through the Spherion process in June of 2007 was in any way related to them or their earlier grievances.

[39] The Complainant's evidence did not establish that he had been successful in the Spherion process warranting an interview by the Respondent. In fact, he produced documentation, in the form of copies of the summaries of the testing phase of the process that indicated that his score was 66 percent which was below the benchmark threshold of 70 percent required to succeed. He did not produce any evidence that indicated that other candidates had been hired as a supervisor with an overall score below 70 percent.

[40] The Complainant had the impression from his conversation and e-mails with Ms. Nicol on June 6, 2007 that he had done well enough on the interview with her to bring his overall assessment above the 70 percent mark, however, he admitted in cross-examination that neither Ms. Nicol nor anyone else actually told him or wrote to him that he had passed and would be

interviewed by the Respondent. He acknowledged that he had been advised by Ms. Nichol that he lacked certain skills necessary to advance and required further training in these areas.

[41] The Complainant's evidence did not vary from Mr. Beauchamp's evidence in any material way respecting their conversation of November 25, 2005 regarding his sisters' terminations. The Complainant was upset about the terminations and called Mr. Beauchamp who refused to discuss the matter on the basis of the need for the protection of his sisters' privacy.

[42] The Complainant had the impression that Ms. Cheys and Mr. Beauchamp had negatively influenced the outcome of his application through Spherion in June of 2007 because of the earlier grievances by his sisters. He did not, however, produce any evidence to confirm the validity of his impression in this regard. He admitted, in cross-examination, that neither Ms. Cheys nor Mr. Beauchamp had been involved in the Spherion process except to the extent of the discussion that took place between Ms. Nicol and Ms. Cheys after the testing and behavioural assessment by Ms. Nicol had been concluded. He did not produce any evidence that Ms. Nicol had recommended him for an interview with Ms. Cheys on the basis that he had achieved the minimum benchmark of 70 percent.

[43] Ms. Cheys knew nothing of the past grievances by his sisters until she met with the Complainant and Mr. Beauchamp after the Complainant had been made aware that his application was unsuccessful. Her evidence was very clear that she never waived the 70 percent benchmark requirement for any candidate to succeed

[44] Neither Ms. Cheys nor Mr. Beauchamp were involved in the June, 2007 supervisor application process of the Complainant until after the Complainant had failed to achieve the required benchmark through the Spherion testing and interview process when they met with him on June 20, 2007. During this meeting they tried to help explain to the Complainant why he had not succeeded in the process and to encourage him to address his deficiencies.

[45] On the basis of the foregoing facts, I find that the Complainant has failed to make out a *prima facie* case and that the Respondent has provided a full and reasonable (non-pre-textual) explanation for the alleged discrimination.

[46] As such, the Complaint is dismissed.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
April 8, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1456/0210

Style of Cause: Joselito Silva v. Canada Post Corporation

Decision of the Tribunal Dated: April 8, 2011

Date and Place of Hearing: December 13-15, 2010

Calgary, Alberta

Appearances:

Joselito Silva, for himself

No one appearing, for the Canadian Human Rights Commission

Laurie M. Robson and Debra Carrothers, for the Respondent