CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

CECIL BROOKS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF FISHERIES AND OCEANS

Respondent

RULING ON THE EXPERT'S REPORT TENDERED BY THE COMPLAINANT

MEMBER: Dr. Paul Groarke

2004 CHRT 20
2004/06/08

I. INTRODUCTION

[1] The following ruling deals with an objection to an expert's report tendered by the complainant. The report was prepared by Dr. Frances Henry, who appears to be eminently qualified as an expert on racism. Dr. Henry has a PhD in social anthropology, has many publications, and has testified as an expert before many courts and tribunals. At this point in the proceedings, at least, her qualifications are not in issue.

[2] In the introduction to the report, Dr. Henry poses two questions. Those questions are as follows:

1. Whether or not it is possible that race played a role in having the Complainant placed in the 13th position on the competition eligibility list, or whether it was simply favoritism and incompetence on the part of the competition panel?
2. Whether or not it is possible that the refusal to appoint the Complainant to a six plus term even though he met the legal requirements for doing so on a number of occasions, was an act of racism?

I would have thought that each of these possibilities is properly before the Tribunal.

[3] Dr. Henry then sets out a substantive framework for the evaluation of these questions. She asserts that there is a "new racism", which has replaced older and more deliberate forms of racism. This kind of racism includes "more covert, subtle and sometimes even unconscious forms of behavior and attitude that nevertheless serve to discriminate"

against minority groups. The new racism manifests itself in a "discourse of denial", which obscures the racial motivations behind many discriminatory acts in the workplace. As Dr. Henry puts it, on page 3 of her report, there "is a refusal to accept reality of racism despite the evidence of racial prejudice and discrimination in the lives and in the life chances of people of color."

[4] Dr. Henry then applies these general observations to the facts of the case. The report provides little however in the way of statistical or scholarly information that would shed light on the precise circumstances before me. The real thrust of her argument is simply that this failure of perception is the principal contributing factor in the case before me. The difficulty with such an approach is that it blankets anyone who rejects the complainant's assertions with accusations of racism. These accusations naturally come with the *imprimatur* of an expert. This merely puts the Respondent on the defensive and upsets the equilibrium that provides the basis of any fair hearing. As a practical matter, it is impossible to assert such propositions without offering an opinion on the credibility of the witnesses to be called by the other side. This is not the proper subject of opinion evidence.

[5] The Complainant has argued that the report is necessary to rebut the findings in the report of the Public Service Commission. This report has been filed as an exhibit in the hearing and deals with the same fundamental allegations that are before the Tribunal. The point is that the Commission's investigator, Ella Coffil, rejected the Complainant's allegations. Mr. Bagambiire and Mr. Flaherty have accordingly argued that Dr. Henry's report provides a necessary corrective to the views expressed in her report. This line of argument cannot succeed. Although the contents of the report may have some value, in establishing the chronology and indeed some of the facts in the case, it has nothing to say on the fundamental issue before the Tribunal. The question whether Mr. Brooks was discriminated against under the *Canadian Human Rights Act* lies exclusively within the keeping of the Tribunal.

[6] All of this comes with a qualification. I share many of the general concerns in the Henry report and do not want to prevent the Complainant from arguing his case. Mr. Brooks is free to argue that those who made the decisions regarding his employment were unable to see the racial elements in their decisions. Those kinds of submissions are well within the ordinary range of argument in a case of this nature. I also agree that a Tribunal should be careful to distance itself from whatever perspective was adopted by the investigator from the Commission. There is no arguing with the proposition that the decision of the Tribunal must be based on the facts and evidence before the Tribunal rather than the preconceptions of the parties.

II. LAW

[7] The test for determining the admissibility of an expert's report was set out by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9. There, Justice Sopinka held that the admission of expert evidence depends on the application of four criteria:

i) relevance,

ii) whether the evidence is necessary,

iii) the absence of an exclusionary rule, and

iv) the qualifications of the expert.

The Court went on to say that a costs-benefits analysis should be conducted to determine whether the probative value of an expert's report outweighs its prejudicial effect.

[8] The first criteria is accordingly relevance. Counsel for the Complainant appeared to raise two arguments. The first is simply that Dr. Henry's report is relevant because it tends to establish that race was a factor in the decisions that were made regarding Mr. Brooks. The problem with this argument is that the report provides no evidentiary basis for such a conclusion. There is none of the statistical or expert analysis that one would normally find in the report provided by an expert. The second argument goes to credibility. On this account, the report allegedly establishes that the investigator from the Public Service Commission was blind to the possibility of racism in the facts before her. This implies that she harboured racial views. This kind of issue is completely collateral to the matter before me however. There is no reason to investigate it.

[9] On the broader issue, it seems to me that Dr. Henry has merely reviewed the facts of the case and advised the Tribunal that they support a finding of racism. This kind of coaching goes beyond the legitimate role of an expert. I agree with the decision of the Nova Scotia Supreme Court in *Campbell v. Jones*, [2001] N.S.J. No. 598 (QL), at para. 26, where that Court, in dealing with another report from Dr. Henry, held that: "nothing in the report justifies reasoning from generalization of Social Science to the specifics of Constable Campbell in a court of law." Although the court in *Campbell* was concerned with the effect of such evidence on a jury, the more fundamental concern lies in the role of facts and opinion in the legal process. Mere statements of opinion are of little assistance in deciding whether a complainant was discriminated against.

[10] The second question is necessity. The Supreme Court in *Mohan*, *supra*, held that the purpose of an expert's report is to provide an inference that would not be available without the evidence of the expert. At paragraph 21, the Court approved of the statement by Dickson J. in *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 42, where he held:

An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate, `An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary'.

This is the context in which the question of necessity must be considered.

[11] A Tribunal should not be too scrupulous in applying a standard like necessity. The question is whether the evidence is logically rather than probatively necessary. There must be a reason to call an expert and the mere fact that the evidence seems to advance the case for one of the parties is not sufficient. A party is not entitled to buttress its evidence by providing the Tribunal with the opinions of experts who happen to share its view of the matter. The case cannot be decided by polling the experts.

[12] There are additional concerns that arise in the context of necessity. One is that the Human Rights Tribunal is an expert Tribunal, with its own expertise in the area of discrimination. It is accordingly in a position to reach an informed opinion as to the weight and value of any evidence of discrimination, without the assistance of an expert. Another concern relates to the nature of the report, which argues for a specific interpretation of the evidence before the Tribunal. In *Brough v. Richmond*, 2003 BCSC 512, at para. 14, the British Columbia Supreme Court stated:

An expert cannot lapse into advocacy, "[E]very expert should avoid arguing the case, a matter which is more properly left in the hands of counsel." *Surrey Credit Union v.*

Willson, [1990] B.C.J. No. 766 (S.C.) at p. 5. Expert opinions are inadmissible where they reflect or are a reworking of the argument of counsel. If an argument is dressed up as the report of an expert it will be rejected for what it is.

I think that these comments apply to the report tendered by the Complainant.

[13] The third concern is more substantive. Although the rule against providing an opinion on the ultimate issue before a Tribunal has been relaxed in recent years, it must still be respected. The responsibilities of the Tribunal cannot be delegated to experts, who have none of the legal training, evidentiary sensibilities or adjudicative experience of the members of the Tribunal. Every adjudicative body has an obligation to reach its own conclusions on the fundamental issues in a case, without direction from the parties.

[14] The report of Dr. Henry is prejudicial in the true sense of the word. It comments on the evidence that the Respondent apparently intends to call and suggests that only one conclusion is available to the Tribunal at the end of the hearing. In my view, this undermines the independence of the process and implicitly impinges on the right of the Respondent to present its case. There is a danger that this might fetter the ability of the Tribunal to choose freely between the alternatives put before it by the different parties. This is exactly what the evidence of an expert must not do.

III. CONCLUSION

[15] When I apply the kind of cost-benefits analysis contemplated by the Supreme Court in *Mohan,* I find that the report of Dr. Henry does not meet the standard set out in case law. It should therefore be excluded from the evidence. This is in keeping with the ruling in *Singh v. Statistics Canada* (January 5, 1998; trans. attached) in reaching this conclusion, where a panel of this Tribunal made a similar ruling with respect to a previous report from Dr. Henry.

Paul Groarke

HALIFAX, Nova Scotia

June 8, 2004

PARTIES OF RECORD

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APPEARANCES:	

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