

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Daniel Kasongo

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Farm Credit Canada

Respondent

Decision

Member: Michel Doucet

Date: June 21, 2005

Citation: 2005 CHRT 24

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I. Introduction

[1] In the fall of 2000, the Complainant filed a complaint with the Canadian Human Rights Commission alleging employment discrimination on the basis of his race, national or ethnic origin, and family status, in contravention of section 7 of the *Canadian Human Rights Act*, R.S. 1985, c. H-6.

II. Facts

[2] The Complainant, Daniel Kasongo Sadi, was born in the Democratic Republic of Congo. After completing his secondary studies, he won a competition that enabled him to leave his country of birth and study at the Antwerp Maritime Academy in Belgium, where he spent three years studying marine navigation. Following these studies, he left Belgium and went to Algeria, where he obtained a Foreign Going Mate Certificate. He then worked in marine navigation for two years, but since he was unable to obtain his marine officer's service book, he had to reorient his career.

[3] The Complainant worked as a musician for some time. Eventually, the Office of the High Commissioner for Refugees lent him assistance, which enabled him to leave the African continent. He was offered the opportunity to go to Australia, the United States or Canada. Since he had known a Canadian instructor in Algeria, he chose Canada. He arrived in Montreal on October 14, 1984, and became a Canadian citizen in 1988.

[4] Once in Canada, the Complainant decided to return to school and choose a new career. He enrolled at Concordia University in Montreal, where he obtained a Bachelor of French Studies with a specialization in French Language Instruction. He had obtained a certificate in adult French Second Language Instruction ("adult FSL instruction") from the same university in 1990.

[5] After obtaining his Bachelor's degree, the Complainant worked as an orientation officer on a volunteer basis for *Services Catholiques pour Immigrants* teaching French to new

immigrants. The organization worked with Immigration-Québec at the time. The Complainant testified that this work inspired him to specialize in adult FSL instruction.

[6] The Complainant's next job, which he held from 1991 to 1998, was with the Commission des Écoles Catholiques de Montréal. He was an adult FSL instructor with that school board. In 1990-91, the Complainant began a Master's in Linguistics at the Université du Québec à Montréal with a special option in French Instruction. He took three courses but then abandoned the program. On his complaint form, the Complainant stated that he had a [Translation] "Master's degree in Linguistics with a specialization in French Instruction." Based on his curriculum vitae and his testimony, this is inaccurate. When cross-examined regarding the inconsistency, the Complainant embroiled himself in rather unconvincing explanations. He admits that this is a mistake and that there are other mistakes in his complaint form, a fact that obviously casts doubt on the document's reliability.

[7] During the same period, the Complainant worked as a journalist for Radio Centre-Ville in Montreal and as an editor and journalist for a newspaper called *Alternatives*, for which he filed reports from the Great Lakes region of Africa, and for a magazine called *Afrique*. He also produced 24 programs for "Échos d'Afrique".

[8] Other positions held by the Complainant during his stay in Montreal were that of director of public relations and project manager of Safari Maison Interculturelle (an intercultural centre established to welcome immigrants) and that of executive director of the Centre Culturel Africain.

[9] In 1997, the Complainant returned to the Congo (Zaire) where for roughly six months he was the national director of the Radio-télévision Nationale du Congo. He then returned to Canada to be with his wife, who was pregnant with their second child. In May 1998, he decided to leave for Western Canada to find work. His intention was to go to British Columbia, but his car broke down in Regina, Saskatchewan, where he decided to settle and look for employment.

[10] The Complainant's first job in Saskatchewan was with the Conseil Culturel Fransaskois.¹ Shortly thereafter, he obtained a position with the Language Institute of the University of Regina as an adult FSL instructor. He began this job on a part-time basis during the summer, teaching FSL to CBC technicians.

[11] In September 1998, the Complainant taught three French courses at the Language Institute. The Institute also hired him to give French courses to public servants, a judge, and a senior University official.

[12] In May 1999, he began a new part-time job at the CBC on the weekends. In the summer of that year, he left the Institute and began working for the CBC full-time. During the same period, he taught FSL to adults at the RCMP Training Academy.

[13] Since November 2002, the Complainant has been working for the Canada School of Public Service in Ottawa, where he teaches FSL to federal public servants.

[14] In his complaint form, the Complainant alleges that he was discriminated against based on his race, his national or ethnic origin and his family status, in contravention of section 7 of the *Canadian Human Rights Act*.

[15] Specifically, he claims that in late July 1999, he responded to a job posting for an FSL instructor with the Farm Credit Corporation, which is now called Farm Credit Canada ("the Respondent"). The position was advertised in the Regina newspapers. The Complainant allegedly sent a resume and covering letter to Marie-France Kenny, the Respondent's Director of Official Languages and Translation. In his complaint form, he also claims he submitted his

¹ Saskatchewan Francophones refer to themselves as Fransaskois.

resume during the year 2000 for a position of employment equity officer and for a translator position. His applications for all three positions were unsuccessful.

[16] The complaint form also alludes to “nepotism” in the Respondent’s recruitment process. The Complainant alleges that unless one is a member of [Translation] “one of the important Fransaskois families”, it is difficult to obtain a position with the Respondent. At the hearing, the Complainant adduced no conclusive evidence, only impressions, in support of this allegation. No witness was called to corroborate the Complainant’s perceptions in this regard. I wish to emphasize that neither impressions nor impressionistic evidence are sufficient to establish discrimination. Actual evidence is required. In view of the evidence before me, I have no reason to believe that the Respondent practiced the “nepotism” to which the Complainant refers, nor do I have evidence that members of “important Fransaskois families” are the only ones to be favoured in hiring. In light of this absence of evidence, I will not take those allegations into account in this decision.

[17] Before addressing in greater detail the complaints regarding the different positions applied for, we should ascertain which legal principles apply to the case.

III. Legal Analysis

[18] Section 7 of the *Canadian Human Rights Act* states that it is a discriminatory practice to refuse to employ a person on the basis of a prohibited ground of discrimination. Race, colour, and national or ethnic origin are all prohibited grounds.

[19] The initial burden of proof in cases such as this lies with the Complainant, who must establish a *prima facie* case of discrimination. (See *Israeli v. Canadian Human Rights Commission and Public Service Commission* (1983), 4 C.H.R.R. D/1616 at 1618; *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029; and *Premakumar v. Air Canada*, T.D. 03/02, 2002/02/04).

[20] 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. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at 208; *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28.) Thus, the question is whether there is evidence which would, in and of itself, establish on a balance of probabilities that the Complainant was discriminated against.

[21] In *Lincoln v. Bay Ferries Ltd*, 2004 FCA 204, the Federal Court of Appeal specified, at para. 22, that the Tribunal must not take account of the respondent's answer before concluding that a *prima facie* case has been established. The Court added that this element has no role in determining whether the complainant has met his or her burden of proof.

[22] In the employment context, a *prima facie* case has been held to require evidence of the following elements:

- a) the complainant was qualified for the particular employment;
- b) the complainant was not hired;
- c) someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (i.e. race, colour, etc.) subsequently obtained the position (*Shakes v. Rex Pak Ltd.* (1982), 3 C.H.R.R. D/1001 at para. 8918.)

[23] This criterion has been adapted to situations in which the complainant was not hired and in which the respondent continued to search for an appropriate candidate. In such cases, the following elements must be established in order to make out a *prima facie* case:

- a) the complainant belongs to one of the groups which are subject to discrimination under the Act, e.g. religious, disabled or visible minority groups;

- b) the complainant applied and was qualified for the job the employer wished to fill;
- c) although qualified, the complainant was rejected; and
- d) thereafter the employer continued to seek applicants with the complainant's qualifications (*Israeli v. Canadian Human Rights Commission and Public Service Commission* (1983), 4 C.H.R.R. D/1616 at 1618).

[24] In *Premakumar v. Air Canada*, T.D. 03/02, 2002/02/04, Chairperson Anne Mactavish, as she then was, noted:

While both the *Shakes* and the *Israeli* tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every hiring case: rather the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether [the complainant] has satisfied the *O'Malley* test, that is: if believed, is the evidence before [the Tribunal] complete and sufficient to justify a verdict in [the complainant's] favour, in the absence of an answer from the respondent?

[25] Once a *prima facie* case has been made out, the burden of proof shifts to the respondent, who must provide a reasonable explanation for the conduct complained of. If he provides a reasonable explanation of what would otherwise be discriminatory conduct, the burden will shift back to the complainant, who will have to show that the explanation was a pretext and that the true motivation behind the respondent's acts was discriminatory.

[26] The jurisprudence recognizes that it is difficult to prove allegations of discrimination by means of direct evidence. As mentioned in *Basi*: "Discrimination on the grounds of race or color are frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every discriminatory situation or occurrence." (*Basi, supra*, at para. D/5038.) It is therefore the Tribunal's task to take account of all the circumstances and ascertain whether what has been described as "the subtle scent of discrimination" is present. (*Premakumar*, at para. 79.)

[27] The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities: “An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.” (*Premakumar*, at para. 81.) It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient if race, colour or national or ethnic origin were factors in the decision not to hire. (*Premakumar*, at para. 82; *Holden v. Canadian National Railway Company* (1990), 14 C.H.R.R. D/12, at para. D/15.) However, it should be specified that the circumstantial evidence cannot merely be consistent with an inference of discrimination; it must also be inconsistent with other possibilities.

[28] Indeed, discrimination has its own set of difficulties. Foremost among these, without question, is that the same set of circumstances may be open to a variety of interpretations. In *Brooks v. Canada (Department of Fisheries and Oceans)*, 2004 CHRT 36, my colleague Paul Groarke noted as follows at para. 107:

It could be said that the act of discrimination lies in differentiation. The problem is that this differentiation does not exist independently of the actions of the parties. It must be inferred. It follows that here is an element of judgement in any assessment of the circumstances that give rise to a complaint of discrimination.

[29] The Tribunal must be careful in assessing evidence, which is often impressionistic. In *Shakes, supra*, the Board of Inquiry recognized the limits of this kind of evidence when it cited Professor Borins in *Kennedy v. Mohawk College* (1973):

It should also be added that the Board must view the conduct complained of in an objective manner and not from the subjective viewpoint of the person alleging discrimination whose interpretation of the impugned conduct may well be distorted because of innate personality characteristics, such as a high degree of sensitivity or defensiveness.

[30] As the Tribunal stated in *Brooks, supra*, the use of the word “innate” in this excerpt is unfortunate. However, the point that Professor Borins was trying to make is important: a Tribunal should be cautious in relying on the perceptions of the parties.

[31] Those are the principles that I must apply in the instant case. The complaint form, signed by the Complainant on September 24, 2000, alleges discrimination with regard to three positions:

- adult FSL instructor

- diversity advisor

- translator

[32] The position of bilingual communications officer is not mentioned on the complaint form, but was raised by the Complainant in his disclosure and at the hearing. Since the Respondent was notified of the Complainant's intent to raise the question when he filed his disclosure on September 8, 2004, and since there is no resulting prejudice to the Respondent, the Tribunal intends to consider the facts surrounding this question in its decision.

A. The Position of FSL Instructor

[33] On July 31, 1999, the Respondent advertised an employment offer in *The Leader Post*, an English-language Regina newspaper, and in the French-language weekly *L'Eau Vive*, for a position of FSL instructor. According to the advertisement, the incumbent would provide group and private instruction to students of different levels. The position required the experience needed to customize training programs for students. The advertisement also required a good knowledge of the *Programme de Base de Français au Travail* (PBFT). The candidate was required to have a "B.Ed. degree as well as excellent command of written and oral French, and have broad experience in teaching adults." The position was offered on a contractual basis and the incumbent was to be considered self-employed. Interested persons were invited to "send [their] resume by August 6, 1999, to Marie-France Kenny" who was then "Director, Official Languages and Translation". At the hearing, Ms. Kenny was the [Translation] "Director, Official Languages / Cultural Practices Business Partner, Human Resources."

[34] Ms. Kenny is the Respondent's Manager of Language Training. In this capacity, she prepared the material used to select the candidates, except the written French test, which is the Respondent's standard test. She is responsible for preparing the interview guide and the questions that are asked.

[35] Louise Beaudoin, Ms. Kenny's Administrative Assistant, testified that a dozen people applied for the position. Ms. Kenny said that once she had the candidates' resumes, she proceeded to select the candidates who would be invited to take the written test. Ms. Beaudoin was the person who contacted them to invite them to the test. Ms. Kenny corrected the test papers.

[36] Since the Complainant felt he was qualified for the position, he decided to apply. The evidence does show that the Complainant has solid FSL instruction experience.

[37] The Complainant claims to have gone to the Respondent's offices in person to submit an envelope that was addressed to Ms. Kenny and contained his resume and a cover letter. The cover letter was never tendered in evidence. In fact, no cover letter, for any of the Respondent's positions for which the Complainant claims to have applied, was ever produced in evidence. I am not satisfied with the Complainant's explanations regarding the absence of these letters, and I have come to doubt whether they existed.

[38] The Complainant states that he handed over the envelope at the reception desk. François Magnin, the receptionist that day, said that only a resume — no cover letter or envelope — was submitted. He added that if he had been handed an envelope, he would have stamped it "Reception/Réception Received/Reçu" without opening it. In this case, the stamp is on the copy of the Complainant's resume, which means, according to Mr. Magnin, that the document was handed to him without an envelope. He also said that if the Complainant had told him that the document should be given to a specific person, he would have given it to that person. I have no reason to doubt Mr. Magnin's testimony on this subject. He appeared to be a credible, reliable

and impartial witness since his conduct is not directly in issue in this case. Given these circumstances, I accept his testimony when it contradicts the Complainant's.

[39] The Complainant claims he told Mr. Magnin he was there about the position advertised in *L'Eau Vive* and that Mr. Magnin replied [Translation] "Yes, the position advertised by Marie-France Kenny." However, under cross-examination, he admitted that this was the first time he made reference to this alleged conversation with Mr. Magnin. I prefer Mr. Magnin's testimony to the Complainant's.

[40] On August 4, 1999, a few days after he submitted his application, the Complainant received a letter from the Respondent. The letter is signed by intern Tenille Nashiem on behalf of Misha Fafard, who was a staffing and employment relations assistant with the Human Resources Division. It states that there are no positions with the Respondent which match the Complainant's profile, and informs the Complainant that his resume will be kept on file for six months. This, says Ms. Fafard, is the Respondent's practice when a resume is received without any indication of the position for which the person has applied.

[41] On or about August 9, after receiving the letter, the Complainant allegedly phoned the Respondent and asked to speak with Ms. Kenny to find out what was wrong. He spoke first with Ms. Fafard, who explained that she had received his resume, which had been placed in the file containing resumes sent without a cover letter as there had been no indication of the position for which the author of the letter was applying. When the Complainant said he was applying for the position of French instructor, Ms. Fafard told him she was unaware of the posting because the Human Resources Division was not involved in the staffing, which falls under Ms. Kenny's responsibility. Thus, Ms. Fafard transferred the call to Ms. Kenny. Ms. Fafard adds that she went to look for the Complainant's resume and sent it to Ms. Kenny.

[42] Ms. Kenny says that she realized, while speaking with the Complainant, that he had the basic qualifications required to apply for the position. She told him that she would get his

resume from the Human Resources Division even though the deadline for the conditions had expired.

[43] The Complainant was invited to the written test and was then invited in for an interview.

[44] The Complainant claims that he got the top score on the written test. This is confirmed by Nicole Bussières, a member of the interview committee. However, Ms. Bussières adds that all the candidates performed quite well on the written test and that the ranking was ultimately of little importance because the four best performers were selected for an interview. At the hearing, Ms. Kenny specified that the results on the written test and the interview were not cumulative.

[45] The Complainant was asked to attend an interview for the position of instructor on August 19, 1999 at 9:00 a.m. The three other candidates invited to an interview were Lorraine Laliberté, Céline Merriman and Nicole Lemelin-Sarny.

[46] Ms. Kenny attended the interview along with Nicole Bussières, one of the Respondent's FSL instructors. Ms. Bussières is self-employed; she is not a Respondent's employee. The interview was the first time the Complainant met with the two people in question, though he did speak with Ms. Kenny on the telephone once earlier. The interview process was the same with all the candidates.

[47] Ms. Kenny testified that her impression of the Complainant's interview was very "good". She adds that she found the interview [Translation] "engrossing." She says that she found the Complainant [Translation] "dynamic and creative." She had told Ms. Bussières that it would not matter if the three other candidates were not suitable because the Complainant was an excellent candidate. Nicole Bussières says she found the Complainant a [Translation] "very interesting candidate."

[48] Ms. Kenny and Ms. Bussières claim to have discussed the candidates between interviews. Before Ms. Lemelin-Sarny was interviewed, the choice was still Mr. Kasongo. After she was

interviewed, the choice was between her and the Complainant. Ms. Kenny testified that she was leaning toward the Complainant, but that they finally opted for Ms. Lemelin-Sarny.

[49] Ms. Bussières states that both candidates ranked equally on the interview. The factor that tipped the balance in favour of Ms. Lemelin-Sarny is that she taught two of Ms. Bussières' students during a one-week immersion course and the students strongly recommended her. The Complainant had also participated in the course, but he did so as part of a cultural activity, not as an instructor. Ms. Bussières added that if Ms. Lemelin-Sarny had turned down the position, Ms. Kenny and she were in agreement that it would be offered to the Complainant.

[50] According to Ms. Kenny, the Complainant could most certainly have adapted to the Respondent's environment. However, her perception during the interview was that Ms. Lemelin-Sarny already had the "whole package." In Ms. Kenny's words, she would [Translation] "need less guidance." She added that Ms. Lemelin-Sarny had placed a particular emphasis on her teaching experience in the interview, while the Complainant showed that he was very creative but spoke about different experiences. She concluded that she could have worked with either candidate, but that she went along with Ms. Bussières' choice because Ms. Bussières was the one who would be working with the successful applicant.

[51] A few days after the interview, Ms. Kenny phoned the Complainant to inform him that the FSL instructor position had been given to someone else.

[52] Let us now apply the legal principles described above to these facts. The Complainant has established that he belongs to a group that can be subject to racial discrimination. He has also shown that he had the academic qualifications and the experience necessary to meet the requirements of the FSL instructor position. The facts have shown that another person with similar qualifications was awarded the position and that this person is not black. Thus, the Complainant has made out a *prima facie* case of discrimination. Indeed, the Respondent has admitted to this finding and no additional time need be spent on it.

[53] Since the Complainant has discharged the burden of establishing a *prima facie* case, the burden now shifts to the Respondent, who must provide a reasonable explanation for the conduct complained of.

[54] Under the Respondent's selection process, the candidates were to submit their resumes to Marie-France Kenny no later than August 6, 1999. François Magnin testified that he received the resume from the Complainant without an envelope, and, more importantly, without a cover letter. The Complainant says it is his practice to include a cover letter with his resume, and, in support of this contention, he tendered copies of cover letters prepared under other circumstances. However, the Complainant was never able to present a cover letter for the position of FSL instructor, and this inability leads me to believe the letter never existed.

[55] Mr. Magnin, the receptionist, testified that the Complainant did not tell him he was applying for a specific position. Consequently, in keeping with the Respondent's practice, the Complainant's resume was remitted to Human Resources, where it was placed in the general file so that it could be retained for six months. Once again, in accordance with the Respondent's practice, a form letter was sent to the Complainant on August 4, 1999, informing him that there was no position matching his skills. The Complainant interpreted the letter as an attempt to exclude him from the process, but the evidence showed that when the Respondent receives a resume and the writer of the letter does not indicate which position he is applying for, the practice is to send him a standard letter of the kind sent to the Complainant on August 4, 1999.

[56] After receiving the letter, the Complainant phoned the Respondent and spoke with Ms. Fafard, who explained that his resume had been placed in the file containing applications sent without a cover letter. After learning that the Complainant was applying for the position of FSL instructor, the call was transferred to Ms. Kenny.

[57] Since Ms. Kenny was satisfied that the Complainant had the basic qualifications for the position, she invited him to the written test, followed by the interview, and she did so even though the deadline for submitting applications had passed.

[58] In light of these facts, I cannot conclude that the Respondent intended to exclude the Complainant from the selection process at this stage. The Respondent provided a reasonable explanation of the conduct complained of. In fact, I find that the Complainant is largely, if not totally, responsible for the imbroglio that followed the submission of his resume for this position. If he had followed the instructions that were clearly set out in the vacancy announcement, and had filed his resume with Ms. Kenny as requested, he would have avoided a lot of frustration.

[59] Twelve candidates, including the Complainant, were invited to take the French test. Four candidates, including the Complainant, were selected for an interview on August 19, 1999. Once again, since the Complainant got through these phases without difficulty, there is no evidence that the Respondent tried to exclude him from the position, by reason of his race or his ethnic origin, at this stage.

[60] Marie-France Kenny and Nicole Bussières were responsible for interviewing the candidates who made it to the interview phase. Nothing worthy of being called notes was produced at the hearing, so we must rely on the participants' memory to understand what happened during the interviews.

[61] Two candidates were quickly ruled out at the interview stage. Both Ms. Kenny and Ms. Bussières testified that they were very impressed with the Complainant's interview. Ms. Kenny added that she knew, from the moment he was being interviewed, that they had found an acceptable candidate no matter what else might happen. However, Nicole Lemelin-Sarny, the last candidate, impressed them just as much. Ms. Bussières says both candidates were equal in standing but that, in her mind, the balance tipped in Ms. Lemelin-Sarny's favour because of the positive comments made by two students who had taken an immersion course at the University of Regina with the candidate.

[62] As for Ms. Kenny, she adds that she "clicked" better with the Complainant, but felt that Ms. Lemelin-Sarny had more experience teaching Anglophones, while the Complainant's experience was primarily with "allophones" (speakers of foreign languages). I must admit that

I find Ms. Kenny's conclusion on this matter puzzling to say the least. She never explained how this experience with "allophones" was so different from experience with Anglophones.

[63] Ms. Kenny specifies that Ms. Lemelin-Sarny seemed more mature, poised and structured in her interview and gave the impression she would need less guidance than the Complainant. Lastly, she says that Ms. Lemelin-Sarny spoke only about her teaching experience in the interview, while the Complainant spoke about a number of subjects.

[64] Ms. Kenny adds that she deferred to Ms. Bussières in the final analysis because she was the one who would have to work with the successful candidate. They decided to offer the position to Ms. Lemelin-Sarny.

[65] An analysis of both candidates' resumes shows that the Complainant had greater experience than Ms. Lemelin-Sarny teaching English as a second language to adults. Her experience consisted mainly of teaching in the public school sector.

[66] However, I must point out that it is not the Tribunal's role to review the merits of the Respondent's choice and determine whether it was correct. There is a subjective element in every hiring process. The fact that the Respondent used subjective criteria in assessing the candidates, and that it may have erred in applying those criteria, does not in itself render its decision subject to attack on the basis that it is discriminatory. (See *Folch v. Canadian Airlines International* (1992), 17 C.H.R.R. D/261 at D/303).

[67] The evidence showed which criteria were used to evaluate the candidates as well as the specific reasons it was felt the Complainant should not be the successful candidate. It is not my function to agree or disagree with the final choice, provided the choice was not made based on discriminatory grounds.

[68] In view of the evidence as a whole, I am satisfied that the Respondent has discharged its burden with regard to this position, and has provided a reasonable explanation for the conduct

complained of. The Respondent was able to explain the reasons that caused it to select Ms. Lemelin-Sarny instead of the Complainant as the incumbent, and nothing about those explanations suggests that the Complainant's race or ethnic origin were a consideration.

[69] Consequently, the burden shifts back to the Complainant, who must now show that the Respondent's explanation was a pretext and that the true motivation behind the Respondent's actions was discriminatory.

[70] In *Folch, supra*, the Tribunal thought it important to note that "[w]here subjective criteria are used, it may be necessary to scrutinize the hiring decisions more carefully to ensure that subjective assessments are not being used to mask discrimination."

[71] It is true that discrimination is often invisible, and that people who discriminate generally do not realize they are doing so. This does not mean that others are unaware of the discrimination, however. Based on all the circumstances, can a "subtle scent of discrimination", as the Tribunal so aptly described in *Basi, supra*, be shown to exist? Does the Complainant's testimony provide evidence of this "scent"? In my opinion, it does not. Other than impressions, perceptions and the fact that he was convinced he was the best candidate, the Complainant has provided no evidence that the decision was based on considerations of race or colour. Nor does the context of the competition and the interviews provide any evidence that race was a factor that the Respondent considered in its decision.

[72] There is no evidence in support of the Complainant's contention that the question of race or ethnic origin was taken into consideration in the selection process. The race and ethnic origin of the Complainant were not "in the background" of the selection process as they were in *Brooks (supra, at para. 119)*.

[73] In light of the foregoing, I find that the Complainant's allegations of discrimination in the hiring process for the position of FSL instructor are unfounded.

B. The Position of Bilingual Communications Officer

[74] In August 1999, the Respondent advertised a vacancy for a bilingual communications officer. The deadline for submitting applications was set at August 6, 1999. The position was initially advertised only in Saskatchewan. Since no satisfactory candidate was found, the position was advertised again, nationally, on October 7, 1999.

[75] The incumbent for the position of bilingual communications officer is a member of a team responsible for internal communications, media relations, speech writing and annual report preparation. The position requires an intimate understanding of the Canadian media and a degree in Journalism or Arts. Fluency in both written and oral English and French is essential; in fact, based on the Respondent's classification system, the position requires a "professional" level of written and oral English and French.

[76] The position of bilingual communications officer was not included in the Complainant's original complaint. At the hearing, it was said that the Commission decided not to pursue the complaint because the Investigator determined that the Complainant did not appear qualified for the position. The Investigator was not called to testify and the bases of her findings were not tendered in evidence.

[77] I would note, however, that on August 25, 2000, the Commission sent the Complainant a letter along with his complaint form. Among other things, the letter informed him that the Commission did not accept his allegations regarding the position. At the hearing, the Complainant said he had never seen the letter before. He explained that he decided in July 2000 to resettle in Belgium, and he did resettle there for a time. Yet, on September 24, 2000, he signed the complaint form enclosed with the letter, without asking that it be amended by adding the position of bilingual communications officer. I must admit that I have trouble believing the Complainant's statement that he never received or saw the Commission's letter prior to the hearing, considering that he does admit receiving and signing the complaint form enclosed with the letter. I do not accept the Complainant's testimony on this point.

[78] I note other inconsistencies in the Complainant's testimony regarding this allegation. In the course of interviews with the Canadian Human Rights Commission Investigator, the Complainant contended the position was initially announced as a French communications officer position and was only categorized as a bilingual communications officer position when the second competition was announced. At the hearing, the Complainant admitted that this information provided to the Commission was incorrect.

[79] Despite these facts which are unfavourable to the Complainant's credibility, I have decided, as explained above, to consider his complaint regarding the position in issue.

[80] According to the Complainant, Ms. Kenny followed the Complainant in the hallway after his interview for the FSL instructor position on August 19, 1999. She allegedly asked him if he was interested in the position of Bilingual Communications Officer; if his application for the instructor position was not successful, she could forward his resume to Pam Bristol, who was in charge of the bilingual communications officer position. The Complainant says he already knew about the position from the want ads, and that he had, in fact, submitted his application for the position. However, he says he did not give this information to Ms. Kenny because he feared it would interfere with his application for the position of FSL instructor. He says he accepted Ms. Kenny's offer with misgivings as he was [Translation] "under the impression that he was being pushed out of the competition for the position of instructor", though he nuanced this statement somewhat under cross-examination.

[81] According to Ms. Kenny, this conversation did not occur on the date the Complainant claims it did. Rather, she says it occurred a few days later, when Ms. Kenny phoned the Complainant and notified him that his application for the teaching position had not been successful. Ms. Kenny adds that she also told the Complainant that the Respondent was looking for a bilingual communications officer, and asked him if she could send his resume to the person responsible for staffing that position. Ms. Kenny went to see Pam Bristol and handed the resume to her in person. Ms. Bristol confirmed this at the hearing.

[82] The Complainant was invited to take the oral and written tests for the position.

[83] The circumstances surrounding the position of bilingual communications officer trigger the criteria in *Israeli*, which apply where the complainant was not hired and where the respondent continued to look for a candidate. In order to establish a *prima facie* case in these situations, the Complainant must show that he belongs to one of the groups subject to discrimination under the Act. In this instance, we need not give this criterion lengthy consideration; the Complainant has shown that he met the criterion. Despite certain inconsistencies in the evidence, I also find that the Complainant applied for the position.

[84] As noted, the Tribunal must not take the respondent's answer into account at the stage where it is determining whether a *prima facie* case has been made out: *Lincoln v. Bay Ferries Ltd, supra*. Consequently, since the Complainant was invited to take the oral and written tests, I find that, for the purpose of establishing a *prima facie* case, he qualified for the position which the employer wished to fill, and that his application was rejected. The employer then continued to look for candidates with the complainant's qualifications.

[85] Since a *prima facie* case of discrimination has been established, the burden shifts to the Respondent, who must provide a reasonable explanation for the conduct complained of. In the present case, Ms. Bristol and the selection committee met with the Complainant. According to Ms. Bristol, the Complainant had an impressive "portfolio" of articles written in French. Ms. Bristol says he had an agreeable personality and adds that the interview went well. Consequently, the Complainant went on to the next stage in the selection process: the English communication test. Ms. Bristol specifies that the position requires the incumbent to write documents primarily in English, because the client base is primarily English-speaking. Ms. Bristol is the person who corrected the Complainant's test. Upon correcting the test, she claims to have realized that while the Complainant's English skills were good, they were not at the level required for the position. His application was therefore rejected.

[86] At the hearing, the Complainant produced a document which was not disclosed earlier and which he said he found in a box of documents that he had just received from Saskatchewan. The document records an exchange of e-mails between Pam Bristol and the Complainant. In his e-mail message, the Complainant inquires about the status of his application for the position of bilingual communications officer. Pam Bristol replies on September 8, 1999, notifying him that the Respondent is in the process of checking the other candidate's references. She says the other candidate did better on the oral and written English tests and that the position requires the incumbent to work in English 70% of the time and that English skills are therefore very important.

[87] A few days later, Ms. Bristol contacted the Complainant again, this time by telephone, to inform him that his application for the position had not been retained. She said that his English writing skills were not of "publishable quality." She added that the Complainant appeared disappointed but unsurprised with the results. Since the other candidate's application was rejected after the reference check as well, the position was advertised again.

[88] After the second vacancy announcement, the position was offered to Yves Breton. Mr. Breton took the same oral and written tests as the Complainant.

[89] I find that the Respondent has given a reasonable explanation of the reasons it decided to reject the Complainant's application. Ms. Bristol was of the opinion that the Complainant's oral and written English skills did not meet the standards required of the position. Moreover, the evidence submitted at the hearing shows that the Canadian Human Rights Commission was of the same opinion and that when the Complainant signed his complaint form without requiring an amendment, he was acknowledging the merits of the decision.

[90] Consequently, the burden shifts back to the Complainant. He must show that the Respondent's explanation was a pretext and that the true motivation behind the Respondent's actions was discriminatory. The Complainant adduced no evidence in this regard. In fact, the only relevant evidence is that of Pam Bristol, who asserts that when she informed the

Complainant of her decision, he seemed disappointed but not surprised about the outcome. The Complainant did not contradict this in his evidence or in his cross-examination of Ms. Bristol.

[91] The Complainant's allegations, to the effect that he was discriminated against when the position of Bilingual Communications Officer was staffed, are dismissed.

C. The Position of Diversity Advisor

[92] An advertisement was placed in the May 11, 2000, issue of *L'Eau vive*, to announce a vacancy for the position of diversity advisor. The diversity manager was seeking someone to assist in the planning, implementation and evaluation of the Respondent's initiatives in this area. The candidates were to have a university degree in human resources or a related field and at least three years of solid experience in diversity, employment equity and project management in the workplace. The applications and resumes were to be submitted to Human Resources by May 19, 2000.

[93] Martine Noël-Maw, the Diversity Manager, testified by affidavit. In her affidavit, she specified that she was looking for a qualified person with experience in diversity and equity because the position was short-term and she absolutely needed someone with knowledge of the relevant laws.

[94] The Complainant said he applied for the position. On June 30, 2000, he received a letter signed by Pat Seidler, Administrative Assistant to the Vice President, Human Resources, on behalf of Misha Fafard. The letter states that, for the moment, there [Translation] "are no positions available that match your skills and experience." Ms. Fafard states that she was not aware of this letter, but adds that the Human Resources office automatically sends this form letter in the event of "unsolicited" resumes.

[95] The Complainant states that this was roughly the time that he began recording his conversations with representatives of the Respondent. He says he did this because he felt there were [Translation] "readily noticeable irregularities that suggest that marginalization was

occurring.” In his view, each time he applied for a position, he was told either that the resume did not get to the person in charge or that it had been lost in the bureaucratic machinery. However, based on the evidence, I cannot find that the [Translation] “readily noticeable irregularities” to which the Complainant refers exist. On the contrary, the circumstances as a whole tend to show that the Complainant has an improper understanding of the process for staffing the Respondent’s position and, as the facts have demonstrated, that the Complainant tends to exaggerate the facts. I admit that the Complainant was going through a difficult period, but nothing in the evidence presented enables me to conclude that discrimination was involved.

[96] After receiving the letter of June 30, 2000, the Complainant phoned Ms. Fafard. The first person he spoke to was receptionist Laurie Cinq-Mars, whom he asked whether she had given his resume to Ms. Fafard. In the recording of this conversation, which was played at the hearing, Ms. Cinq-Mars acknowledged that she received the resume and said she gave it to someone she did not identify. She added that if a position was available, the Complainant would be contacted. She then transferred the call to Ms. Fafard. Here are the relevant parts of the transcript of this conversation, which was prepared based on the playing of the cassette at the hearing:

[Translation]

...

Mr. Kasongo: Um, I’m calling you because, well, you told me that you did not receive my resume.

Ms. Fafard: Mm-hmm.

Mr. Kasongo: Did...

Ms. Fafard: You were supposed to send it by fax...

Mr. Kasongo: Um, well you see...

Ms. Fafard: ...last week, wasn’t it?

[97] Indeed, the Complainant had contacted Ms. Fafard earlier to find out if she had received his resume for the position of diversity advisor. She apparently answered that she had not, and the Complainant apparently told her that he had submitted it to the reception desk. Ms. Fafard then apparently suggested that the Complainant fax in a new copy. Based on the conversation recorded by the Complainant, it appears that he never did so.

[98] The recording continues:

[Translation]

Mr. Kasongo: Yes, But in fact I wanted to check... I checked with the receptionist...

...

Mr. Kasongo: ...who told me that she handed you my resume [In the recording of the conversation with Ms. Cinq-Mars, which was heard at the hearing, she did not say that she had submitted the Complainant's resume to Ms. Fafard.] It's been a month already since I submitted the resume for the position of employment equity officer and I have received no news. That's why...

Ms. Fafard: Which... which job? Sorry?

Mr. Kasongo: It was... There was an opening. You advertised it in *L'Eau vive*...

...

Mr. Kasongo: ...for an officer responsible for employment equity...

Ms. Fafard: Oh! Yes, yes.

Mr. Kasongo: ...Equity Program. Yeah?

Ms. Fafard: Yes. Um, the... that position is already filled...

Mr. Kasongo: Yes.

Ms. Fafard: ...but I spoke to you last week, and I think I told you to send your resume because we have a position at this time for a tran... a translator.

Mr. Kasongo: Yes, yes.

Ms. Fafard: Are you interested in that one?

Mr. Kasongo: Sure! Of course! But I was interested in the other one, eh, but, well, I spoke to Laurie, and I wanted to confirm. She said she already gave you my resume.

Ms. Fafard: O.K.

Mr. Kasongo: Yes, and I ...

Ms. Fafard: That one was for the other position.

Mr. Kasongo: Yes, it was for the other position...

Ms. Fafard: Yes.

Mr. Kasongo: ...and the resumes are kept for six months at your organization.

Ms. Fafard: Yes.

Mr. Kasongo: Yes. So, do I have to send another resume again?

Ms. Fafard: Oh! No, I can look for the other one.

Mr. Kasongo: You can look for the other resume?

Ms. Fafard: Yes.

Mr. Kasongo: But why did you not call me for... at least, for the other position? I also wanted... That's why I applied.

Ms. Fafard: Well, it's Martine Noël-Maw who... who was in charge of that... of that position. So I don't know why she didn't call. Normally, we don't call candidates, unless they have... they are selec... um, are chosen for an interview.

...

Ms. Fafard: That's the way we... we... it says this on all our...

...

Ms. Fafard: ...our advertisement in the paper.

...

Ms. Fafard: It says that you are... you are contacted...

...

Ms. Fafard: ... if you are chosen for an interview.

Mr. Kasongo: O.K. So I wasn't chosen for that?

Ms. Fafard: Yes.

Mr. Kasongo: O.K. Can you find the resume for the translator position?

Ms. Fafard: Yes. Yes. I... I can... I can indeed use it for the... for that position.

Mr. Kasongo: O.K. So there is no need for me to send you another resume?

Ms. Fafard: No.

Mr. Kasongo: O.K. O.K. That's what I wanted to find out from you, in any case.

...

[99] The Complainant confirms that he was never invited to take the written exam or attend an interview for the diversity advisor position. Martine Noël-Maw says that she selected two people for interviews: a woman who was working for the Saskatchewan government in a capacity that involved equity, and the second person, an Aboriginal named Don Racette, who was ultimately given the position. Ms. Noël-Maw says she never received the Complainant's resume. However, after seeing his resume, she adds that she would not have called him for an interview because he had neither the skills nor the experience sought for the position, in her view. The Complainant chose not to cross-examine Ms. Noël-Maw and her evidence on this subject was never contradicted.

[100] Once again, the Complainant must first establish a *prima facie* case as described above. As far as this position is concerned, the Complainant did not meet this burden because he was

unable to establish that he had the academic skills and experience needed to qualify. He does not have a university degree in human resources or a related field, and he did not adduce evidence of at least three years of solid experience in diversity, employment equity and project management in the workplace.

[101] The Complainant's allegations regarding this position are therefore dismissed.

D. The Position of Translator

[102] The Complainant never applied for this position. Rather, Ms. Fafard submitted the Complainant's resume to Ms. Kenny for inclusion. Indeed, Ms. Fafard testified that, following her aforementioned telephone conversation with the Complainant, she found the Complainant's resume in the file where resumes not accompanied by a cover letter are kept, and handed it to Ms. Kenny so she would consider it for the translator position.

[103] The translator's job is to translate various documents, originating from all the organization's divisions, from English to French (80% of the time) and from French to English (5% of the time).

[104] According to Ms. Kenny, even though the Complainant did not have a Bachelor's degree in translation, she decided to consider him for the position. The Complainant was invited to take the written tests for the translator position. On July 4, 2000, he took the written test. Ms. Kenny said he failed it. She said his translation contained errors of terminology and agreement as well as anglicisms.

[105] At the hearing, the Complainant said that the successful candidate did not take the same test as he did. However, he provided no evidence, other than suspicions, in support of his determination that there were irregularities. Without concrete evidence, I cannot accept these allegations by the Complainant. Impressions and suspicions do not constitute evidence.

[106] Ms. Kenny testified that the written test is the same for everybody. It was done electronically. The applicants are asked to prepare their answer and save it to a diskette, which is then remitted to Ms. Kenny. For candidates unable to attend, e.g. out-of-province candidates, the test is done over the Internet and Louise Beaudoin, Ms. Kenny's Assistant, administered the test by sending it to the candidate. The candidate has two hours to complete the test. The candidates who pass the written test are invited to an interview.

[107] Shortly after completing the test, the Complainant spoke on the phone with Marie-France Kenny. He recorded the conversation. Here are a few excerpts:

...

Ms. Kenny: . . . I was calling you because I looked at your translation test again. . . . And unfortunately, I did not grant you an interview. And if you like, I'm prepared to share the corrections with you . . . or even to send them to you, and you will see for yourself . . . There are several things. There were several anglicisms — things like that — and even though you're a good French teacher . . . I'm sure that Nicole, on the same translation test . . . that there were apparently also . . . because you don't teach anglicisms, etcetera. . . . That's why we were asking for a Bachelor's degree in translation, because there are things that you learn when you do a Bachelor's degree in translation. . . which you don't necessarily learn when you teach French, do a certificate or, whatever — your Bachelor's . . . in French Second Language. . . . So if you want, I have no problem sending you your test . . . I can even send you an electronic copy if you want. . . and I put "track changes" on. So you can see what I added and what I struck out. So it will be very visible to you, then . . . so you can see it. So that's why I called you. I corrected it, but I wanted to speak to you in person about it, you see. I didn't want to send you a letter. I wanted to speak to you about it directly.

Mr. Kasongo: **Exactly. Pour for the translation, I ... I completely agree with you. I just wanted to give it a try, and. ... It's not, um, my specialty.**
[Emphasis mine.]

...

[108] Based on this recording, which he tendered in evidence himself, the Complainant acknowledges that translation is not his specialty and that he was simply "giving it a try" when

he applied. He also says that he agrees with Ms. Kenny's comments regarding his written test. The Complainant did not seek to temper or explain these statements when he presented his evidence.

[109] Based on the facts, I must conclude that the Complainant has been unable to make out a *prima facie* case of discrimination for the translator position. In other words, he was unable to satisfy the Tribunal that he was qualified for the position.

IV. Decision

[110] For the foregoing reasons, the Complainant's complaints of discrimination based on race, national or ethnic origin and family status in contravention of section 7 of the *Canadian Human Rights Act*, R.S. (1985), c. H-6, cannot succeed.

[111] In his submissions, counsel for the Respondent, citing subsection 50(6) of the Act, asked that the Tribunal order the Complainant to pay the witness fees if the complaint is dismissed.

[112] Subsection 50(6) provides:

Any person summoned to attend the hearing is entitled in the discretion of the member or panel to receive the same fees and allowances as those paid to persons summoned to attend before the Federal Court.

[113] I do not believe that this subsection is intended to enable a party to seek costs. Its objective is to ensure that witnesses who have been summoned can obtain some form of compensation, and nothing more. To grant the Respondent's request would be to distort the meaning of the provision. Perhaps the Tribunal has the power to award the parties costs under certain circumstances, but this subsection is certainly not the source of that power.

Signed by

Michel Doucet
Tribunal Member

Ottawa, Ontario
June 21, 2005

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T932/5204

Style of Cause: Daniel Kasongo v. Farm Credit Canada

Decision of the Tribunal Dated: June 21, 2005

Date and Place of Hearing: January 4 to 7, 2005

Ottawa, Ontario

January 21, 2005

Via video conference
(Ottawa, Moncton, Regina)

Appearances:

Daniel Kasongo, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Roger Lepage, for the Respondent