Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Ray Davidson

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Health Canada

Respondent

Ruling

Member: Edward P. Lustig
Date: January 16, 2012
Citation: 2012 CHRT 1

[1] This is a Ruling respecting a Motion by the Respondent for a determination by the Tribunal that documents relating to the assessment of candidates for the selection process 05-NHW-CE-CCID-047 (the "selection process") with the Respondent are not relevant to the present Complaint and that the Tribunal should not receive such evidence pertaining to the Complainant's assessment for the selection process.

[2] In his Complaint, the Complainant alleges that the Respondent discriminated against him on the basis of his race, sex and color in refusing to hire him, contrary to s. 7 (a) of the *Canadian Human Rights Act* (the "Act"). As part of his case the Complainant alleges that during a competition for a job with the Respondent, he was marked unreasonably hard in comparison to other candidates involved in the selection process so as to rank him fifth out of five eligible candidates; that the other four candidates were hired and he was not hired despite evidence of a need for his services and his qualifications for the job; and that the Respondent continued to seek other candidates.

[3] In the Complainant's list of documents included with his Statement of Particulars, he has indicated that he intends to rely on records concerning questions, responses, and assessment tools that were used for the selection process in order to show that he was marked unreasonably hard.

[4] The selection process was the subject of two appeals initiated by the Complainant to the Public Service Commission Appeal Board (the "PSCAB") for which Decisions were rendered on August 17, 2006 and March 27, 2007 wherein the question of whether the Complainant was marked unreasonably hard was considered.

[5] The Respondent's position in seeking this Ruling as set out in its letter to the Tribunal of November 23, 2011 is as follows:

> The issue of whether or not the Complainant was properly assessed during the selection process has already been addressed twice by the Public Service Commission (PSC) Appeal Board. After the Complainant's second appeal to the PSC, the Appeal Board clearly concluded that the assessment of candidates was reasonable, and that the Complainant had not been marked unreasonably hard in

> comparison to other candidates. It is therefore unnecessary for the Tribunal to review the Complainant's assessments once again. Furthermore, since the PSC is a specialized appeal board tasked to review selection processes to ensure fairness, it would not be inappropriate for the Tribunal to rely on the findings of the PSC.

[6] On August 17, 2006, the PSCAB rendered its first decision concerning the appeal of the Complainant against the appointments in the selection process. In that decision, the PSCAB examines the Complainant's allegation as follows: "Allegation #1, "The marking of the interview was unreasonably hard causing loss of points on some questions". Specifically, the Complainant took issue with the marking of interview questions 1, 6, 7, 8 and 9. The PSCAB found that the Respondent's Selection Board was not unreasonable in its assessment of the Complainant's answers to questions 1, 6 and 9. With respect to question 7, the PSCAB found the opinion of the Selection Board to be unreasonable as it arbitrarily used a negative marking system for the question. For question 8, the PSCAB found that the Respondent failed to provide evidence to demonstrate that the expected answers were in concordance with the question asked and that these expected answers actually measured the sub-factors they were intended to measure. As a result of this decision, the PSCAB ordered the Respondent to implement corrective measures to address the issues identified in the appeal, including: re-assess all candidates; ensure that the defect identified for questions 7 and 8 are not repeated and that candidates who have already been appointed to these positions do not receive an unfair advantage; and, should changes be required to the eligibility list as a result of this re-assessment, issue an amended list with appropriate appeal rights.

[7] Following the implementation of the corrective measures, a new eligibility list was issued and was added to the list as the fifth successful candidate. The Complainant appealed the implementation of the corrective measures to the PSCAB.

[8] On March 27, 2007, the PSCAB rendered its second decision on the appeal of the Complainant against appointments in the selection process. The PSCAB examined the Complainant's allegation that "Compared to the other successful candidates, I believe I was marked unreasonably hard causing loss of points on some questions." Specifically, the

Complainant alleged that the Selection Board was unreasonably hard in marking questions 1, 3 and 4 of his exam compared to the other successful candidates. According to the PSCAB, it carefully reviewed the written exam of all the successful candidates, including the Complainant, and saw no reasons to intervene. The PSCAB was satisfied with the explanations provided by the Respondent regarding the way the marks were awarded to the candidates and why the Complainant did not score as well as the other candidates. From the evidence adduced at the hearing, the PSCAB was convinced that the Selection Board met its obligation to ensure that the questions assessed what they were designed to assess; that the questions and expected answers were linked to the Statement of Qualifications established for the position; and, that the Selection Board could demonstrate that the assessment of the candidates was done in a fair and equitable manner.

[9] In common law, the doctrines of *issue estoppel*, abuse of process and collateral attack "exist to prevent unfairness by preventing abuse of the decision-making process" as stated in British Columbia *(Workers' Compensation Board) v. Figliola*, 2011 SCC 52, at para. 34 *[Figliola]*. In *Figliola,* the *issue estoppel*, abuse of process and collateral attacks follows:

- It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk,* at para. 18; *Boucher*, at para. 35).

- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City),* at paras. 38 and 51).

- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review

mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).

- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).

- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

(Figliola at para. 34)

Based on these principles, the Court held that a tribunal determining whether the substance of a complaint has been appropriately dealt with should ask itself the following:

- whether there was concurrent jurisdiction to decide human rights issues;

- whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and,

- whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself.

(Figliola at para. 37)

[10] The Supreme Court added: “At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute” (*Figliola* at para. 37).

[11] In following the application of the *Figliola* principles, the Federal Court of Appeal has recently set aside a decision of the Tribunal for not "...considering the unfairness inherent in serial forum shopping" in *Canada (Human Rights Commission) v. Canadian* Transportation Agency, *2011* FCA 332, at para. 28.

[12] In *Figliola*, relying on its decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, the Supreme Court stated that "absent express language to the contrary, all administrative tribunals have concurrent jurisdiction to apply human rights legislation" (*Figliola* at para. 45). The Complainant's appeals to the PSCAB were made pursuant to section 21 of the repealed *Public Service Employment Act,* R.S.C. 1985, c. P-33 (the *PSEA*). Pursuant to section 7.4 of the *PSEA*, a board established to hear an appeal under section 21 has, in relation to the matter before it, the powers of a commissioner under Part II of the *Inquiries Act*, R.S.C., 1985, c. 1-11. There is no express language in either the *PSEA* or the *Inquiries Act* which removes the concurrent jurisdiction of a PSCAB to apply the *Act*. Therefore, in this case, the PSCAB had concurrent jurisdiction to decide human rights issues.

[13] In the present case, the Complainant alleges that he was qualified and not hired during the selection process with the Respondent because "the Respondent marked the Complainant down in order to ensure there would be no change to the candidates already appointed". The details of this allegation relate to the assessment of candidates following the corrective measures implemented by the Respondent following the PSCAB's August 17, 2006 decision. The Complainant also contends that the March 27, 2007 decision of the PSCAB, which examined the assessment of candidates following the corrective measures implemented by the Respondent, was influenced by negative comments regarding the Complainant made by the Respondent. The Complainant's other allegations relate to the fact that shortly after the expiry of the eligibility list for the selection process with the Respondent, the Complainant continued to seek applicants with the Complainant's qualifications.

[14] In the employment context, in cases where a Complainant alleges to have been refused employment on a prohibited ground of discrimination, a *prima facie* case has been described as requiring proof of the following elements:

> a) that the complainant was qualified for the particular employment;
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> b) that the complainant was not hired; and
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> c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (ie. race, color etc.) subsequently obtained the position.
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> (See *Shakes v. Rex Pak Limited* (1982), 3 C.H.R.r. D/1001 at p. D/1002 [*Shakes]*)

[15] Applying the *Shakes* analysis to the Complainant's allegations regarding the selection process, there does not appear to be a dispute that the Complainant was qualified, but not hired, for the selection process. However, the Complainant must also provide proof that someone no better qualified, but lacking the distinguishing feature of race, color and sex, subsequently obtained the position. The Complainant's proof in this regard is that he was "marked down" in order to ensure there would be no change to the candidates already appointed. The Complainant made essentially the same allegation in his second appeal to the PSCAB: that he was marked unreasonably hard causing loss of points on some questions. The PSCAB's March 27, 2007 decision reviewed the written exams of all the successful candidates, including the Complainant, and was satisfied that the assessment of the candidates was done in a fair and equitable manner. Although the Complainant did not allege that he was the victim of discrimination before the PSCAB, if the Tribunal were to examine the Complainant's allegations regarding the assessment of candidates during the selection process, it would have to perform essentially the same analysis that the PSCAB did in its March 27, 2007 decision: comparing the exams of all the successful

candidates with that of the Complainant's to determine if the assessment was done in a fair and equitable manner. While the Complainant now claims that the PSCAB's March 27, 2007 decision was influenced by negative comments regarding the Complainant made by the Respondent, the Tribunal's role is not to " ...judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome" (*Figliola* at para. 38). Before the PSCAB, the Complainant had an opportunity to present his case regarding the assessment of candidates during the selection process. Therefore, it does not make sense to expend public and private resources on the re-litigation of what is essentially the same allegation.

[16] In the result, I hereby allow the Respondent's motion that documents relating to the assessment of candidates for the selection process are not relevant to the present Complaint and the Tribunal will not receive such evidence pertaining to the Complainant's assessment for the selection process. In short, I will not hear or receive evidence on whether or not the Complainant was marked harder than other candidates in the selection process.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
January 16, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1495/4110

Style of Cause: Ray Davidson v. Health Canada

Ruling of the Tribunal Dated: January 16, 2012

Appearances:

Ray Davidson, for himself

No one appearing, for the Canadian Human Rights Commission

Marie-Josée Montreuil et Abigail Martinez, for the Respondent