Federal Court of Appeal  Cour d'appel fédérale

Date: 20170106

Docket: A-482-15

Citation: 2017 FCA 2

CORAM: **NADON J.A.**
SCOTT J.A.
WOODS J.A.

BETWEEN:

LEVAN TURNER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 21, 2016.

Judgment delivered at Ottawa, Ontario, on January 6, 2017.

REASONS FOR JUDGMENT BY: SCOTT J.A.

CONCURRED IN BY: NADON J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

SCOTT J.A.

[1] Levan Turner (the appellant) is appealing from the October 26, 2015 judgment of the Federal Court (2015 FC 1209) whereby O'Reilly J. (the Judge) allowed the application for judicial review filed by the Attorney General of Canada and ordered the Canadian Human Rights Tribunal (the Tribunal) to reconsider its ruling that the appellant had made out a case of discrimination against the Canada Border Services Agency.

[2] This Court must determine whether the Judge made a reviewable error when he found that the Tribunal reached unreasonable factual conclusions, particularly on the issue of witness credibility.

[3] For the reasons that follow, I would dismiss this appeal.

I. Facts

[4] On February 8, 2005, the appellant filed a complaint under section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA) alleging that he had been the victim of discriminatory treatment during two hiring processes conducted in 2003 and 2004 by his former employer, Canada Customs and Revenue Agency (CCRA), known since 2003 as the Canada Border Services Agency (CBSA). He alleged discrimination based on the prohibited grounds of age, race, colour, and size (or perceived disability).

[5] The appellant worked as a seasonal customs inspector for five consecutive summers, from 1998 to 2003. With a background in law enforcement as an auxiliary officer with the Toronto Police, the appellant felt that the position of customs inspector was a good fit for him. His performance reviews at CCRA were always excellent, and, each year, he was marked by his supervisors as a candidate for re-hire the following year.

[6] The first negative performance-related conversation that the appellant had at CCRA occurred on September 26, 2003 (Appeal Book, Vol. 17 at p. 4991ff.). The appellant's supervisor, Superintendent Terry Klassen, informed him that, among the supervisors at CCRA,

there existed "a perception" that the appellant sometimes took the easy way out or avoided some of the more difficult tasks. The appellant was astonished to hear of this perception of him, and he vowed to take note of this problem in the future. Superintendent Klassen also inquired into the appellant's increased use of his sick days and family leave days that summer; the appellant explained that his girlfriend had been ill during that period due to a back injury.

[7] These concerns and the appellant's responses were not recorded in the appellant's performance review; rather, they were sent, through two emails, to four fellow superintendents at CCRA on October 4 and October 12, 2003 (Appeal Book, Vol. 2 at p. 489-490, 501).

[8] The appellant applied for four different indeterminate positions as a customs inspector in Victoria and Vancouver. He was not selected for any of them. Only two competitive processes form the basis of his complaint before the CHRT; that being said, all four were discussed before the Tribunal.

A. *Victoria competition 7003*

[9] Applications opened on October 11, 2003 for "Permanent/Term/Anticipatory" positions as "Customs Inspector, Victoria/Sidney, BC" (Appeal Book, Vol. 2 at p. 492). The appellant passed a written test, which required him to describe situations in which he had displayed seven competencies necessary for that position. Having obtained passing marks on the four written competencies that were assessed, the appellant was invited for an interview.

[10] On December 18, 2003, the appellant was interviewed by a selection board composed of Superintendents Trevor Baird, his former supervisor; Kathryn Pringle and Janet Sabo (Tribunal's decision at paragraph 90). In the week before the applications opened, both Baird and Pringle had received the emails sent out by Superintendent Klassen regarding the way the appellant was perceived at work (Appeal Book, Vol. 17 at p. 4995). The appellant, like all other interviewees, was asked to elaborate on the three remaining competency scenarios he had written about. The applicant's answers to these questions involved describing work experiences that involved two colleagues, Nina Patel and Ken Moore, with whom some of the panel members had also worked. The panel was left with the impression that the appellant had played up his own role in his recollections, thereby making his colleagues look bad.

[11] A month later, Superintendent Baird called Nina Patel to inquire about her recollection of the events the appellant had recited. She agreed that the appellant had described a behavior that was untypical of her, but she could not remember the specific event.

[12] On March 5, 2004, the appellant was informed by letter that he was unsuccessful in the competition because he was "not found to have met all of the assessment criteria required for the position" (Appeal Book, Vol. 3 at p. 796).

B. *Vancouver competition 1002*

[13] On June 9, 2003, applications opened for the position of "Customs Inspector, Vancouver International Airport District, Metro Vancouver District, Pacific Highway District" (Appeal Book, Vol. 2 at p. 471). That position was subject to an eligibility restriction that read as follows:

"Applicants who have been interviewed for this position since January 1, 2002 will not be eligible for this process" (*ibidem*). The appellant did not consider that this applied to him, reading "this position" to mean a position in Vancouver (Tribunal's decision at paragraph 96). He applied and received a competency package to fill out.

[14] On April 26, 2004, the appellant was interviewed by a panel composed of Superintendents Ron Tarnawski, Mark Northcote, and Karen Morin (Tribunal's decision at paragraph 95). Superintendent Tarnawski had previously interviewed the appellant for one of the Victoria processes that are not the subject of the appellant's complaint.

[15] Less than a week later, the appellant received phone calls from both Superintendents Morin and Tarnawski informing him that he had been disqualified from the competition because the eligibility restriction applied to him. The appellant questioned that interpretation of the restriction, and asked for Superintendent Tarnawski's reasons in writing.

II. Proceedings

A. *Canadian Human Rights Tribunal's decision (2010) – Member Sinclair*

[16] On June 10, 2010, Member Sinclair dismissed the appellant's complaint "[T]hat the decisions of the selection boards were tainted by discriminatory considerations, namely considerations of his race, national or ethnic origin and age, contrary to s. 7 of the *Canadian Human Rights Act*" (*Turner v. Canada Border Services Agency*, 2010 CHRT 15 at paragraph 5 [*Member Sinclair's decision*]). After a careful review of the evidence before him, Member

Sinclair inquired whether a *prima facie* case of discrimination had been made out (*idem* at paragraph 148). He chose not to make a ruling on this matter, but rather to "assume that Mr. Turner has shown a *prima facie* case of discrimination" (*idem* at paragraph 163). Member Sinclair went on to conclude that, even if a *prima facie* case of discrimination had been made out, the CBSA's explanation for the selection boards' decisions not to hire Mr. Turner was reasonable and not a pretext (*idem* at paragraph 183).

B. *Federal Court (2011) and Federal Court of Appeal (2012) decisions*

[17] On June 24, 2011, O'Reilly J. of the Federal Court dismissed the appellant's judicial review application of *Member Sinclair's decision* in *Turner v. Canada (Attorney General)*, 2011 FC 767, 204 A.C.W.S. (3d) 121.

[18] On May 30, 2012, this Court set aside the Federal Court's decision, allowed the appeal, and returned the decision to the Tribunal for reconsideration (*Turner v. Canada (Attorney General)*, 2012 FCA 159, 431 N.R. 327 [*Turner - FCA*]). Mainville J.A., as he then was, writing for this Court, concluded that the Tribunal had failed to consider one of the appellant's alleged grounds of discrimination—perceived disability due to weight. Having determined that the Tribunal was under a duty to consider the ground of perceived disability, Mainville J.A. returned the matter to the Tribunal for reconsideration so that it could take into account the complainant's submissions on perceived disability and the way in which that ground of discrimination may have intersected with the other grounds alleged (*idem* at paragraphs 46-50).

C. *Canadian Human Rights Tribunal's decision (2014) – Member Craig*

[19] On March 7, 2014, the Tribunal's Member W. Craig rendered its decision after having reconsidered the appellant's complaint. It concluded that the appellant had made out a *prima facie* case of discrimination on the combined grounds of age, race or nationality, and perceived disability. Based on several key factual findings, the Tribunal concluded that the respondent's explanation of the CBSA's actions was not persuasive. The Tribunal determined that the balance of probabilities favoured the appellant's explanation of events.

[20] The Tribunal's decision was based on the evidence originally adduced in 2009, at the earlier Tribunal hearing, including testimony, exhibits, and arguments of counsel. The parties also made fresh oral arguments before the Tribunal in November 2013.

[21] First, the Tribunal identified the relevant law regarding whether a *prima facie* case of discrimination has been made out. The Tribunal chose to follow the test set out in *Florence Shakes v. Rex Pak Limited*, [1982] 3 C.H.R.R. D/1001 [*Shakes*] to determine if a *prima facie* case of discrimination in hiring has been made out:

> (1) the complainant was qualified for the particular employment;
>
> (2) the complainant was not hired; and
>
> (3) someone obtained the position who was not better qualified than the complainant, but lacked the attribute on which the complainant based their human rights complaint.
>
> (Tribunal's decision at paragraph 25).

[22] If the *Shakes* test is satisfied, the respondent must then demonstrate that it had a reasonable explanation for its conduct—that is, that its actions were not discriminatory. If a reasonable explanation is provided, the appellant must demonstrate that it is pretextual (*idem* at paragraphs 20-21). The Tribunal also cited the case law of the CHRT and of the Supreme Court regarding perceived disability, intersectionality of grounds of discrimination, and racism and stereotyping in Canada.

[23] The Tribunal then discussed each witness's testimony in turn, quoting from the transcript of the original hearing which led to the June 10, 2010 decision. The Tribunal assessed the strength of each witness's testimony and determined their overall credibility (Tribunal's decision, see especially paragraphs 64, 109-110, 121, 135, 141, 152, 160, 161, 181, 191, 196-211, 257).

[24] The Tribunal ruled that the appellant had made out a strong *prima facie* case of discrimination. On the one hand, it determined that the appellant's testimony, especially in cross-examination, was highly credible, that his testimony alone established a *prima facie* case of discrimination on a balance of probabilities (Tribunal's decision at paragraph 109). On the other hand, the Tribunal found the respondent's witnesses unconvincing, and sometimes biased. The Tribunal was particularly critical of witness Superintendent Trevor Baird (*idem* at paragraphs 135, 141, 152, 161-162, 208-210).

[25] The Tribunal concluded that Victoria competition 7003 had been conducted in a discriminatory fashion: the selection board members' conduct revealed that they viewed the

appellant as a stereotypically lazy and dishonest black man. The Klassen emails sent several weeks before the interviews and received by Superintendents Baird and Pringle, likely prejudiced the selection board against the appellant. Furthermore, Superintendent Baird's negative assessment of the appellant during his interview and Mr. Baird's later phone call to Nina Patel convinced the Tribunal that, on a balance of probabilities, it was more likely than not that discrimination on a prohibited ground took place in the Victoria competition.

[26] With regard to the Vancouver competition, the Tribunal determined that Superintendent Tarnawski perceived Mr. Turner to be dishonest when the latter responded to his question about the eligibility restriction during the appellant's interview. That perception of dishonesty, according to the Tribunal, tainted the manner in which Superintendent Tarnawski applied the restriction to the appellant (Tribunal's decision at paragraphs 227-230). The Tribunal also concluded that there was no factual basis for this perceived dishonesty since it stemmed from a misunderstanding; it was thus more likely than not that Superintendent Tarnawski acted on the basis of a similar stereotype that characterized the appellant as lazy and dishonest.

[27] Finding that the *Shakes* test was met for both hiring processes and that the respondent's explanations were inadequate, the Tribunal concluded that the appellant's allegation of discrimination on prohibited grounds had been made out (Tribunal's decision at paragraph 262).

D. *Federal Court's decision (2015) – The Judge's decision*

[28] The Federal Court allowed the respondent's application for judicial review of the Tribunal's decision and concluded that the matter should be referred back to another Tribunal for

reconsideration. The Judge concluded that "[T]he Tribunal's findings are not supported by the evidence that was before it. Therefore, its conclusion that the appellant had established a case of discrimination did not fall within the range of defensible outcomes based on the facts and the law" (Judge's reasons at paragraph 53).

[29] The Judge identified three questions: (1) Did the Tribunal err when it reviewed the fairness of the selection processes? (2) Did the Tribunal err in basing its decision on the original record of the Tribunal? (3) Was the decision unreasonable?

[30] The first alleged error was that the Tribunal had considered whether these hiring processes were fair to the appellant, rather than the narrower question whether the selection boards had discriminated against him. The respondent argued that since these hiring processes had previously been reviewed by the Public Service Commission of Canada (PSC) for nonconformity with the merit principle, the Tribunal should have refrained from reviewing the fairness or adequacy of these hiring processes. The Judge concluded that "[T]he Tribunal did not overstep its jurisdiction" since the selection processes were reviewed for a different reason by the Tribunal than they had been by the PSC—that is, for possible discrimination rather than possible unfairness to all candidates (Judge's reasons at paragraph 25).

[31] Second, the Judge confirmed that the Tribunal acted reasonably in basing its decision on the original record. Because the Tribunal has discretion over its procedure, and the parties had consented to reconsideration based on the previous record, the Judge found that the Tribunal made no error in basing its decision on the previous record (Judge's reasons at paragraph 27).

[32] On the third issue, the reasonableness of the decision, the Judge ruled that the decision was unreasonable. He identified the issue before the Tribunal as "whether the evidence compiled by the first tribunal showed that [the appellant] had been discriminated against as a result of perceived disability, or as a result of that ground in combination with other grounds, such as race and age" (Judge's reasons at paragraph 29). He characterized this issue as "a relatively narrow one" (*ibidem*).

[33] The Judge rejected the Tribunal's adverse credibility "findings for which I cannot find support in the evidence" (Judge's reasons at paragraph 30). He strongly chastised the Tribunal for having "seriously impugned the character of witnesses and ascribed to them blatantly prejudicial attitudes". These findings were not only unsupported by the facts, but "[t]he first tribunal made no adverse credibility findings after hearing all of the witnesses in person having the benefit of observing the witnesses' demeanour" (Judge's reasons at paragraph 31).

[34] The Judge went on to identify a number of errors in the Tribunal's decision. The first and third relate to the Tribunal's disagreement with the selection boards regarding the criteria they used to assess an applicant's qualifications (Judge's reasons at paragraphs 47 and 49). The Judge concluded that the Tribunal substituted its own assessment of qualifications and hiring criteria in an inappropriate manner.

[35] The other errors were factual. The Tribunal found a fact that was unsupported by the evidence record. For instance: "[T]he tribunal wrongly found that there were other candidates who should have been found ineligible for the Vancouver competition. …. Again, the Tribunal

drew an adverse inference from the fact that candidates who had less experience tha[n] Mr Turner were found to be qualified in that competition" (Judge's reasons at paragraph 48). Moreover, the Tribunal incorrectly stated that the respondent had conceded that "Mr Turner would have been placed on a list of qualified employees if not for the eligibility criterion that applied to the Vancouver competition" (*idem* at paragraph 51). The respondent never made that concession.

[36] Finally, the Judge concluded that the Tribunal failed to explain how it had come to what the Court determined to be scathingly negative credibility findings. While the Tribunal was entitled to make credibility findings, "it had an obligation to explain them, which it did not" (Judge's reasons at paragraph 50).

III. Issues

1) Did the Federal Court judge apply the appropriate standard of review?

2) Did the Federal Court judge apply the standard correctly?

A. *Positions of the parties*

(1) The appellant's position

[37] The appellant submits that the Judge correctly identified the standard as reasonableness but that he applied that standard incorrectly (appellant's Memorandum of Fact and Law at paragraph 41). The Judge re-weighed the evidence before the Tribunal, in effect conducting correctness review in disguise. The appellant submits that the Tribunal's decision falls within a range of possible, acceptable outcomes.

[38] The appellant submits that the Judge made several errors in his application of the reasonableness standard to the Tribunal's decision. One was to compare the original findings that have been rejected by this Court of Appeal in 2012 (*Turner – FCA* at paragraph 42) with those of the Tribunal. The Tribunal was called to render a new decision on a different set of grounds than those that were reflected in the reasons of the June 2010 decision and to make its own independent factual determinations.

[39] In the appellant's view, the Judge's second error was to suggest that the Tribunal had made a finding of deliberate discrimination against the appellant (Judge's reasons at paragraph 50). While the Tribunal found that some witnesses lacked credibility and that some of them had behaved poorly "Member Craig was clear that his findings of discrimination were based on inferences that CBSA's actions were influenced by negative racial stereotypes" (appellant's Memorandum of Fact and Law at paragraph 50). At the hearing, the appellant pointed to the Klassen emails and Superintendent Baird's assessment of the appellant's qualifications as important pieces of circumstantial evidence that support the Tribunal's findings. In further support of his position, the appellant also directed this Court to the shifting explanations provided by the CBSA's witnesses as to why he was screened out from the Vancouver competition.

[40] The appellant also underlines the fact that evidence of direct discrimination is not required by law with respect to a complaint under section 7 of the CHRA.

[41] Next, the appellant argues that the Judge misread the Tribunal's reasoning when he suggested that it had quibbled with the selection criteria chosen by the selection panels. The appellant asserts that the Tribunal was entitled to come to its own conclusion about the appellant's qualifications for the position, and to use evidence of his past performance reviews to do so. Since two parts of the *Shakes* test pertain to the complainant's qualifications, the Tribunal was required to form an opinion on the subject. According to the appellant, it was therefore open to the Tribunal not to rely on the selection panel's assessment.

[42] The appellant explains away one error of fact that the Judge identified: that no other candidates ought to have been screened out by the Vancouver eligibility restriction. In fact, there was one candidate in the Vancouver process who had been unsuccessful in the Victoria process but had not been screened out. As a witness for the respondent, Ms. Sharma, explained this was because the other candidate had not even made it to the interview stage, and "[T]he eligibility restriction applied only to those who unsuccessfully interviewed in a prior competition". In other words, "Mr. Turner would have had a better chance in the Vancouver competition had he done worse in Victoria" (appellant's Memorandum of Fact and Law at paragraph 69). The appellant submits that the Tribunal was entitled to view this applicant as someone to whom the restriction should have been applied, but was not.

[43] Finally, the appellant submits that even if the Tribunal erred in finding that the employer had conceded that "but for the eligibility restriction Mr. Turner was qualified for the position", the error was not determinative (appellant's Memorandum of Fact and Law at paragraph 80). The Tribunal also relied on the appellant's performance reviews, excerpts from the appellant's

testimony and that of another witness as evidence sufficient to ground its finding that a *prima facie* case of discrimination had been made out.

[44] In sum, the appellant takes the position that the decision was reasonable and amply supported by the evidence.

(2) The respondent's position

[45] The respondent submits that the Judge correctly identified the standard of review as that of reasonableness (respondent's Memorandum of Fact and Law at paragraphs 36, 40). That being the case, the respondent argues that this Court ought to defer to the Judge's application of the standard, interfering only in the case of a palpable and overriding error.

[46] The respondent is in total agreement with the Judge concerning the unreasonableness of the Tribunal's decision, pointing out that the appellant has failed to satisfy the first part of the *Shakes* test.

[47] The respondent's other grounds pertain to the Tribunal's findings of fact, particularly regarding the credibility of witnesses, given that it did not have the benefit of *viva voce* testimony (respondent's Memorandum of Fact and Law at paragraphs 6, 27, 34), as opposed to the original decision which made very different credibility findings. According to the respondent, the Tribunal's reasons require more robust explanation than was offered. The respondent adds that since all of the evidence before the Tribunal was also before the Judge, the latter had "an identical vantage point from which to consider the evidential [sic] record and review Member

Craig's findings against a reasonableness standard" (respondent's Memorandum of Fact and Law at paragraph 40). In effect, the Tribunal's assessment of the testimony of the CBSA's witnesses and its adverse credibility findings are not entitled to any deference at all according to the respondent.

[48] The respondent further alleges that the Tribunal erred in finding that the appellant was a victim of discrimination under sections 7 and 10 of the CHRA, since section 10 never formed part of the original complaint. In unilaterally expanding the scope of his statutory mandate, the Tribunal came to conclusions unsupported by the record. At the hearing before us, the appellant conceded that section 10 was not invoked before the Tribunal but added that since section 7 had been made out, the Tribunal's error was not fatal.

[49] The respondent also pointed out that the criteria for a *prima facie* case for discrimination were not met. The Tribunal, having substituted its opinion of the appellant's qualifications for the opinions of the selection boards, ruled the selection processes to be inadequate; hence, it was bound to find that the appellant ought to have been hired and was not. According to the respondent, the Tribunal failed, however, to relate the failings of the two selection boards to discrimination on a prohibited ground, which is what the law requires for section 7 to apply. The respondent also underlined that the selection processes at issue were open competitions and that it is normal practice not to consider past experience since it would have provided an unfair advantage to the appellant. The criteria applied in the selection processes were normal for an open external competition.

[50] Finally, the respondent drew this Court's attention to paragraph 217 of the Tribunal's reasons as evidence of the Tribunal's arbitrary conclusions drawn in the absence of any evidentiary basis and based on its disagreement that the appellant's past experience should have been considered.

IV. Analysis

A. *The standard of review of the Federal Court's decision*

[51] On an appeal from a judicial review judgment rendered by the Federal Court, this Court must decide whether the Federal Court chose the correct standard and applied it correctly. In effect, this Court must step into the shoes of the Federal Court judge and focus on the underlying decision: (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraph 46). The Judge reviewed the Tribunal's decision on the applicable standard, *i.e.* that of reasonableness.

B. *The Judge did not err in finding the Tribunal's decision to be unreasonable.*

[52] When reviewing a decision as for reasonableness, the Court may follow the steps propounded in *Canada (Attorney General) v. Boogaard*, 2015 FCA 150 at paragraph 36, 474 N.R. 121 [*Boogaard*]):

> First, we are to identify the precise issue before the administrative decision-maker and the decision-maker's legal power to decide it. Then we must consider the range of acceptability and defensibility or margin of appreciation the decision-maker enjoys. In some cases, the range or margin is broad, in others narrow. … Finally, having regard to the evidentiary record that was before the decision-maker and the applicable law, we must decide whether the decision was within that range or margin.

[53] While these steps are not mandatory, I believe they are helpful in this case, as the Judge followed a similar framework.

(1) What was the precise question before the decision-maker?

[54] The Tribunal had to determine whether the appellant was the victim of a discriminatory practice. According to the language of section 7 of the CHRA, the issue is whether the CBSA, directly or indirectly, refused to employ or continue to employ the appellant on a prohibited ground of discrimination.

(2) What was the margin of appreciation enjoyed by the decision-maker?

[55] I agree with the Judge that the issue before the Tribunal was "a relatively narrow one" (Judge's reasons at paragraph 29).The Tribunal was required to make a fact and policy-laden decision on the basis of the previous record and submissions from the parties at an oral hearing. The Tribunal's task contained a number of subdivisions, requiring the Tribunal to determine whether a *prima facie* case of discrimination was made out; in the affirmative, whether the employer offered a reasonable alternative explanation; and in the affirmative, whether the complainant had demonstrated that this explanation was a mere pretext—and this for two different hiring processes. The Tribunal might have come to any number of permutations of conclusions based on the facts and the law. However, the range of reasonable outcomes here was not that wide in view of the fact that the evidence had already been compiled.

[56] I accept the view of the respondent that the Tribunal's findings as to the credibility of witnesses are due less deference than credibility findings are usually given because the Tribunal based its decision on the transcript alone without the advantage of hearing the witnesses directly and was therefore not in a position to assess their demeanour. There is no disagreement that, in an ideal world, the Tribunal should have been able to hear the witnesses afresh. The respondent, at the hearing, suggested that the Tribunal could have called witnesses if it had any doubts. I must reject that argument since the parties agreed that the extensive record would be adequate for the purposes of reconsideration. Indeed, the transcript of the parties' Case Management Conference demonstrates that both parties and the Tribunal were aware of the difficulties raised by reconsideration on the record alone. That being said, the Tribunal was required to base its credibility findings on the evidence.

[57] I agree with the appellant that if the Tribunal had explicitly or implicitly relied on Member Sinclair's findings of credibility, that would have been an error. This Court quashed that decision and clearly took some issue with those reasons. The precise question before the Tribunal was whether the appellant was the victim of discriminatory practices.

[58] As the Judge was in the same position as the Tribunal with regard to the evidence submitted by the respondent, I must therefore turn to the record to determine whether the Tribunal's decision and, more specifically, its factual determinations and adverse credibility findings are supported by the record and decide whether the Tribunal's decision is reasonable. First, I will turn to the errors raised by the parties and by the Judge. Second, I will consider the decision as a whole, stepping into the shoes of the Judge.

C. *Did the Tribunal err, and were such errors determinative?*

[59] At the hearing, the appellant conceded an error that had been raised by the respondent. Section 10 of the CHRA was not pleaded before the Tribunal, only section 7 appears on the appellant's original complaint form (Appeal Book, Vol. 1 at pages 212-219). Therefore, the Tribunal should have restricted its discussion to section 7. That being said, this error was not dispositive inasmuch as the Tribunal's discussion pertaining to section 7 stands.

[60] The second error raised by the respondent is that the Tribunal substituted its opinion of the appellant's qualifications for that of the selection boards. I conclude that it did and that it was unreasonable. The Tribunal did not agree with the selection boards' approach, which determined competency exclusively on a candidate's answers in an interview (Tribunal's decision at paragraphs 217 and 218). The Tribunal's task was not to agree or disagree, but to inquire as to whether, in the application of the criteria as selected, a written exam followed by an interview, the appellant suffered discrimination. The fact that these were open competitions where past experience could not be considered in order to ensure a level playing field did not, in my view, justify a determination that the appellant had been a victim of discrimination. As explained by one of the witnesses, Ms. Sharma, this is a common practice in open competitions.

[61] The two factual errors committed by the Tribunal and identified by the Judge are equally important because the combination of these errors reflects, in my view, the Tribunal's intention to justify a finding of discrimination. Since that conclusion is based in part on factual errors, the reasonableness of the Tribunal's determination is undermined.

[62] The first of these errors is that "[T]he tribunal wrongly found that there were other candidates who should have been found ineligible for the Vancouver competition" (Judge's reasons at paragraph 48). Having reviewed the record, I must reject the appellant's submission that there was evidence of at least one candidate who should not have even made it to interview in Victoria and who was not screened out. Ms. Sharma did acknowledge that the eligibility criterion for the Vancouver competition was drafted poorly. That being said, that factor was not a sufficient ground to conclude that the whole process had been conceived to disqualify the appellant. I must also point out that the agency was in a transition mode and not very familiar with the public service requirements for the conduct of open competitions as the record indicates.

[63] The second error identified by the Judge relates to the respondent's alleged concession that "Mr Turner would have been placed on a list of qualified employees if not for the eligibility criterion that applied to the Vancouver competition. The record shows no such concession" (Judge's reasons at paragraph 51). That is indeed an error, as the transcript shows (Appeal Book, Vol. 11 at page 3583). The respondent conceded that the eligibility restriction was the only reason why the appellant was disqualified, not that it was the only reason for which he might have been disqualified since he may not have passed the second interview, for instance. This final error is significant, the Tribunal determined that a *prima facie* case had been made out based on its assessment of the appellant's qualifications for the two positions taking into consideration the past performance assessments, the appellant's testimony, and the alleged concession (see Tribunal decision paras 217, 236). In fact, the first part of the *Shakes* test was not satisfied as the concession was never made and the past performance assessments should not have been considered. Does that decision fall within a reasonable range of possible outcomes?

[64] Turning to the record, I agree with the Judge that the law and the facts before the Tribunal do not reasonably lead to a finding of discrimination. The Tribunal's decision is inflammatory at times and not justified in view of the factual material that was before it. The task of the reviewing Court is not to inquire as to the correctness of the conclusion reached, but to determine whether the record before the decision-maker is capable of justifying the decision. In my opinion, the record does not support the Tribunal's conclusions.

[65] The Tribunal determined in paragraph 217 of its decision that the Victoria "Review Board's decision to determine competency based solely on Mr. Turner's answer in the interview made the interview process arbitrary, discriminatory and pretextual". In coming to that determination, the Tribunal relied heavily on the testimony of Mr. Baird, who chaired the Victoria Selection Board. The Tribunal drew negative inferences therefrom, arguing that Mr. Baird refused to bring into the interview process the fact that he had given positive reviews of Mr. Turner's work but decided to assess Mr. Turner, as well as all the other candidates, only on his answers in the interview (Tribunal's decision at paragraphs 211 and 215). It ignored evidence by Ms. Sharma who testified that performance evaluations are not considered in external processes in order to ensure a level playing field.

[66] The Tribunal went on to impugn Mr. Baird's credibility because he did not remember seeing the Klassen emails explaining that he was too busy at the time. The Tribunal qualified his testimony as paradoxical, verbose rather than direct.

[67] With respect to Vancouver competition 1002, the Tribunal states that Superintendent Tarnawski, who chaired that Selection Board, used the appellant to demonstrate his interviewing skills and found that the appellant had been discriminated against on a misapprehension of the evidence. The Tribunal concluded that the selection board had disqualified the appellant because he had lied about having been interviewed before. In the Tribunal's view, the selection board should have questioned the appellant about his interpretation of the eligibility restriction (Tribunal's decision at paragraphs 189, 206, 228, and 230). The Tribunal was not present at the interview and was not in a position to assess the conduct of the board nor to make a finding based on its view of what was appropriate in these circumstances.

[68] The Tribunal concluded that Mr. Tarnawski's testimony became "inconsistent and argumentative when tested by rigorous cross examination" (Tribunal's decision at paragraph 206). It went on to conclude that: "[A]s Chairman of the Vancouver competition 1002 Review Panel [Mr. Tarnowski] exhibited intransigence and was vexatious in deciding to disqualify Mr. Turner…." (Tribunal's decision at paragraph 233). Those findings are based on an error of fact and a fundamental misapprehension of the evidence. In paragraph 230 of its decision, the Tribunal found that Mr. Turner was the only candidate screened out of the Vancouver competition because of the eligibility restriction. As explained above, it is an error to rely on this as an example of differential treatment. That error was also repeated by the Tribunal in regard to the third part of the *Shakes* test. In fact, the record shows that the appellant is the only candidate who should have been declared ineligible in view of the restriction which was meant to eliminate applicants who had previously been unsuccessful further to an interview for a similar position.

[69] The Tribunal could not, in my view, apply the rule of *contra proferentum* (interpretation against the drafter) so as to interpret the eligibility restriction in favour of the appellant. The law is well settled: the rule of *contra proferentum* is only applicable in contractual matters.

[70] Those errors convince me that the Tribunal's decision is not supported by the record. I conclude that the Tribunal substituted its assessment of the appellant's qualifications for that of the selection board's when it held that the appellant had been discriminated against. It is apparent when reading the Tribunal's decision that it disagreed with the criteria used by the selection boards and made a fundamental error in concluding that the first part of the *Shakes* test had been met based, in part, on a concession that was never made by the respondent (Tribunal's decision at paragraphs 168, 189, 195, 212, and 220).

[71] I must also point out that, in my view, there is no basis for the adverse credibility findings made by the Tribunal in regards to the respondent's witnesses, particularly Mr. Tarnawski (Tribunal's decision at paragraphs 181, 189, 228 and 233) and Mr. Baird (*idem* at paragraphs 135, 141, 149, 152, 252, and 253) and certainly no justification for the pejorative adjectives employed. Having reviewed the transcript, it is clear that the Tribunal's credibility findings are not supported by the record.

V. Conclusion

[72] For all these reasons, I conclude that the Tribunal's decision does not fall within a range of defensible outcomes based on the facts and the law. Accordingly, I would dismiss the appeal with costs.

"A.F. Scott"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
J. Woods J.A."

ANNEX I
LEGISLATION

***Canadian Human Rights Act*, R.S.C. 1985, c. H-6**	***Loi canadienne sur les droits de la personne*, L.R.C. (1985), ch. H-6**
Discriminatory Practices	**Actes discriminatoires**
Employment	**Emploi**
7 It is a discriminatory practice, directly or indirectly,	**7** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(*a*) to refuse to employ or continue to employ any individual, or	*a*) de refuser d'employer ou de continuer d'employer un individu;
(*b*) in the course of employment, to differentiate adversely in relation to an employee,	*b*) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-482-15
APPEAL FROM A JUDGMENT OF O'REALLY J. OF THE FEDERAL COURT DATED OCTOBER 26, 2015, DOCKET t-864-14	
STYLE OF CAUSE:	LEVAN TURNER v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 21, 2016
REASONS FOR JUDGMENT BY:	SCOTT J.A.
CONCURRED IN BY:	NADON J.A. WOODS J.A.
DATED:	JANUARY 6, 2017

APPEARANCES:

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