Federal Court of Appeal | Cour d'appel fédérale

Date: 20120530

Docket: A-275-11

Citation: 2012 FCA 159

CORAM: **EVANS J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

LEVAN TURNER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on May 2, 2012.

Judgment delivered at Ottawa, Ontario, on May 30, 2012.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: EVANS J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from a judgment of the Federal Court (cited as 2011 FC 767) dismissing a judicial review application challenging a decision of a member of the Canadian Human Rights Tribunal ("Tribunal") (cited as 2010 CHRT 15) which dismissed the appellant's complaint alleging that the Canada Border Services Agency ("CBSA") refused to employ him on prohibited grounds contrary to section 7 of the *Canadian Human Rights Act*, R.S.C., 1985 c. H-6.

[2] Though the appellant raised numerous arguments in support of this appeal, I need only address the failure by the Tribunal to consider perceived disability as a ground of discrimination.

The appellant indicated in his oral submissions that this was his principal ground of appeal, and his arguments on this ground are well-founded.

Background

[3] The appellant describes himself as a large black male. He is currently employed with Service Canada. The appellant's complaint arises out of two competitions for full-time regular customs inspector positions with the Canada Customs and Revenue Agency ("CCRA"), to which the Canada Border Services Agency was a successor. At the time he applied for each competition, he was working as a seasonal customs inspector in Victoria, British Columbia, and had done so from 1998 to 2003. As a seasonal customs inspector, the appellant had always received positive written performance reviews from his supervisors.

[4] The first competition, posted by the CCRA on June 9, 2003, was for a customs inspector position in Vancouver. The second competition, posted on October 11, 2003, was for a similar position in Victoria ("Victoria 7003").

[5] In addition to the usual criteria to be satisfied, an eligibility restriction was added for the Vancouver competition, which provided that "[a]pplicants who have been interviewed for this position since January 1, 2002 will not be eligible for this process" (Appeal Book ("AB") at p. 822). Because the appellant had not been interviewed for a customs inspector position in Vancouver, he considered himself eligible for the competition and thus applied. He passed the Customs Inspector Test required of all candidates. The next phase in the competition process involved two interviews.

The appellant was invited to the first interview, which was held on April 26, 2004 and which he passed. However, one of the members of the interview panel recognized the appellant as having previously been unsuccessfully interviewed for customs inspector positions in Victoria. Although the appellant was successful in the first interview for the Vancouver position, he was subsequently disqualified from the competition because he was deemed to fall within the ambit of the above-described eligibility restriction.

[6] The appellant was the only candidate disqualified from the Vancouver competition on the basis of the eligibility restriction. At least one other candidate had also unsuccessfully applied for customs inspector positions in Victoria. In one case, the candidate had failed the paper review of her portfolio of competencies for a position in Victoria and had thus not proceeded to an interview for the Victoria position. This candidate was not disqualified from the Vancouver competition. Another candidate bearing the same name as someone who had failed an interview for a Victoria competition was also not disqualified from the Vancouver competition; however, there was some confusion as to his identity.

[7] In light of this, the appellant questioned the reasons for his disqualification, and requested further information from the CCRA. He received no reply to his inquiry.

[8] The appellant qualified for the Victoria 7003 competition, but he failed to pass the interview for this competition. That interview was held on December 13, 2003. The selection board for the

competition failed him on two competencies: (a) effective interactive communication and (b) teamwork and cooperation.

[9] Prior to these interviews, his supervisor had sent a long email to a number of members of the CCRA management group setting out the perceived failings of the appellant. The email was dated October 4, 2003, and was thus sent out approximately two months before the appellant's interview for the Victoria 7003 competition and a little less than seven months prior to his interview for the Vancouver competition. That email noted that the appellant was perceived as someone who "sometimes shies away from the harder tasks, or knows the right procedure (a difficult task) to take but ask to supt [*sic*] for 'advise' [*sic*] hoping the supt [*sic*] will use their discretion and go the easier way. It was also pointed out how other inspectors had complained that he had left cash outs for others to do instead of doing them on his shift." The email also noted that "there is a portion of [the appellant] that does look for the easy way out. . .": AB at pp. 321-22.

[10] The appellant strongly denied the allegations made in that email, which contradicted the positive formal written evaluations that all his supervisors had given him, including the supervisor who had drafted the email. The appellant was the only seasonal employee who was the subject of such an email.

[11] In light of his years of service as a seasonal customs inspector in Victoria, his positive employment evaluations, and his past experience in law enforcement-related activities, the appellant formed the belief that his disqualification from the Vancouver competition and his failure to pass

the interview for the Victoria 7003 competition were the result of his being unfairly stereotyped within the CCRA as a big lazy black man. He consequently filed a complaint pursuant to the *Canadian Human Rights Act*, which was subsequently referred to the Tribunal by the Canadian Human Rights Commission ("Commission").

The Tribunal's decision

[12] In its reasons, the Tribunal treated the complaint as raising discrimination on the grounds of race, national or ethnic origin and age. No mention was made of perceived disability on the basis of weight.

[13] After setting out the facts and reviewing the *viva voce* testimony, the Tribunal found that the evidence did not support a *prima facie* case of age discrimination: Decision at paras. 144 to 146.

[14] The Tribunal went on to find that there was no evidence of direct discrimination on the basis of race or of national or ethnic origin: Decision at para. 147. The Tribunal recognized that, in order to make a *prima facie* case of discrimination on these prohibited grounds, the appellant had to rely on circumstantial evidence and inferences as to discrimination: Decision at para. 148. However, the Tribunal made no findings as to a *prima facie* case of discrimination on these grounds, preferring to simply "assume that Mr. Turner [the appellant] has shown a *prima facie* case of discrimination": Decision at para. 163.

[15] This approach is problematic in that the Tribunal made no findings of fact regarding some of the key issues raised by the appellant. I note in particular that no findings were made as to the truthfulness of the alleged failings of the appellant set out in his supervisor's email, or as to how and to what extent that email may have influenced the selection processes: Decision at paras. 152 to 154.

[16] Having decided to assume a *prima facie* case of discrimination on the grounds of race or national or ethnic origin without making any findings of fact supporting such a case, the Tribunal then proceeded to consider whether the employer had provided reasonable explanations for disqualifying the appellant from the Vancouver competition and for failing the appellant in the Victoria 7003 competition.

[17] The Tribunal found that, even though there were serious questions as to the way in which the restriction in the Vancouver competition was drafted and unresolved questions concerning at least one other candidate who should have been disqualified, but was not, the explanation provided for the disqualification of the appellant was nevertheless reasonable. That explanation was that selection boards were interviewing the same unsuccessful candidates in successive competitions, and that the purpose of the restriction was to avoid interviewing the same candidates and to give them more time to develop customs inspector skills: Decision at paras. 103, 104 and 168 to 170. Even though the appellant was the only candidate to be disqualified on the basis of the new restriction, the Tribunal did not consider this a discriminatory act. Rather, the Tribunal concluded

that "[i]f CBSA did not want to hire Mr. Turner for discriminatory reasons, it would have been much easier to do so by assigning him a failing mark for his first interview": Decision at para. 171.

[18] The Tribunal also found that the refusal to answer the appellant's request for explanations following his disqualification from the competition resulted from an excessive bureaucratic attempt to control workload rather than from a discriminatory act, even though the appellant appeared to be entitled to an answer: Decision at paras. 81 to 84 and 173.

[19] Regarding the Victoria 7003 competition, the Tribunal found that the selection board's reasons for failing the appellant at his interview were reasonable: Decision at paras. 179 to 182. This conclusion was reached even though the appellant's prior evaluations as a seasonal customs inspector were all positive; the Tribunal presumably accepted the CBSA's view that these evaluations were not pertinent for assessing candidates for indeterminate positions: Decision at para. 89.

The Federal Court judgment

[20] The Federal Court judge found that the Tribunal had stated the correct test and applied the relevant legal principles correctly. The judge rejected all the appellant's contentions concerning the treatment of the evidence by the Tribunal, and found the Tribunal's reasons to be adequate. The appellant's application for judicial review was consequently dismissed.

The Issue

[21] As noted above, no mention is made in the Tribunal's reasons of perceived disability on the basis of weight. In the Federal Court, the appellant challenged the decision on various grounds, including notably on the ground that the Tribunal had failed to address his complaint of discrimination on the basis of perceived disability. This ground of review was rejected by the Federal Court judge for the following reasons:

> [33] As for the Tribunal's failure to consider perceived disability as a ground of discrimination, I note that Mr. Turner's original complaint did not put forward that allegation. It seems to have been the subject of oral argument before the Tribunal, but little, if any, evidence was presented to the Tribunal on the subject. I cannot conclude that the Tribunal erred by failing to address it specifically in its reasons.

[22] The appellant's principal ground of appeal challenges this finding of the Federal Court judge. The appellant submits that, by failing to make any findings on the allegation of discrimination on the ground of perceived disability, the Tribunal breached the principles of procedural fairness. The appellant adds that the Federal Court judge erred in not properly identifying this issue of procedural fairness, in failing to review it on a standard of correctness, and in failing to correct it.

Analysis

The appellant raised the issue before the Tribunal

[23] The appellant notes that the allegation of perceived disability on the basis of weight was included in his initial complaint. The narrative of the complaint filed with the Commission ends with the following paragraph:

> I lay the blame solely on the Chief of Customs in Victoria…[a]nd her possibly spreading information about me to the other recruiting unit. I believe that racial discrimination and discrimination on weight was the ultimate factor in my demise of a customs career. I am currently employed in another government position where I placed first on the competition list. I just find it interesting that I only have a problem with customs. I have been deliberately failed on competitions, passed over for promotions, denied employment in Victoria in 2004 and screened out improperly in Vancouver in 2004.
>
> AB at p. 80 (emphasis added).

[24] Moreover, it is apparent from the record of the Tribunal that the ground of perceived disability on the basis of weight was raised and discussed on many occasions during the proceedings.

[25] In his opening statement to the Tribunal, the appellant's counsel clearly identified perceived disability based on weight as a ground of discrimination (emphasis added):

> He's an older, black male. And it's his position that those factors, as well as his size, were the reasons why he was denied this employment: AB at p. 2904, lines 1 to 3.
>
> And at the end of the day what I think you will find, sir, that it's the perception of an older, black male who is large. And you'll see from the complaint form as well that Mr. Turner's size is identified as a basis as well: AB p. 2906, lines 14 to 18.
>
> But, if you have a process that can so easily fail to respect some of the basic rules governing staffing in the Federal Public Service, it's not surprising that the process would allow somebody to be disqualified because he's an older, black, overweight employee. This is not a rigorous system that the Agency employs: AB at p. 2913, lines 2 to 8.
>
> And the *prima facie* case is that there is no other explanation but for the employee's race or age. Or perceived disability, which is his weight: AB at p. 2914, lines 7 to 9.

[26] During various exchanges in the course of the hearing, the Tribunal member indicated that he understood that perceived disability was being raised by the appellant. As an example, the member noted the following in addressing counsel for the CBSA:

> THE CHAIR: ". . . Really what's really interesting - - what would be really interesting is, if you've got the evidence, though, that would refute the allegation of age discrimination, the hiring staffing practises. Because that's really one of the issues here.
>
> MR. STARK: Mm-hmm. Yes.
>
> THE CHAIR: Or disability or disability, age and race. We're just focussing on age."
>
> AB at p. 3107, lines 2 to 9 (emphasis added).

In another exchange with counsel for the appellant, the Tribunal member set out as follows his understanding of the argument being made:

> THE CHAIR: And so your argument is going to be, he [the appellant] applied to become indeterminate other than through a competition, he was denied that opportunity and managers hired students through the Bridging Program and therefore, he was discriminated on the basis of disability, his race or his age?
>
> MR. YAZBECK: Yes, except that I think the word "applied" might be not quite accurate. He certainly had expressed an interest in that, in his ---
>
> AB at p. 3955, lines 14 to 21(emphasis added).

In yet another exchange with counsel for the appellant, the Tribunal member again stated that disability was one of the issues he had to deal with:

> MR. CHAMP: . . . But in this process here before the Tribunal you will be asked at the end to find was it likely or probable or highly probable that Mr. Turner would have gotten that job. That is going to be part of your submissions, and I think properly so. And I just think - -
>
> THE CHAIRPERSON: That's not what I am going to be asked, I hope. I hope I am going to be asked - -
>
> MR. CHAMP: Was it probable.
>
> THE CHAIRPERSON: -- whether Mr. Turner didn't get the job because of his race, age or disability.
>
> MR. CHAMP: That's right . . .

> AB at p. 4923, lines 18 to 25, and p. 4924, lines 1 to 4 (emphasis added).

This also appears to be how the Tribunal member understood the issues before him in subsequent exchanges with counsel for the CBSA:

> THE CHAIRPERSON: You see, the issue, as I understand the issue, is going to be circumstantial because nobody says Mr. Turner didn't qualify for the Victoria process because he is black, he has a disability, or because of his age. So there has to be some sort of inference drawn from the evidence; right?
>
> AB at p. 4966, lines 17 to 22 (emphasis added).
>
> THE CHAIRPERSON: And to me the issue is whether that restriction [in the Vancouver competition], which on its face didn't seem to exclude him [the appellant] and he didn't think he was excluded, was applied in a different fashion. And that's the issue that maybe was improperly applied or interpreted improperly. But that's nothing that this tribunal can deal with. It has to be demonstrated that it was applied to Mr. Turner as a subterfuge so that he wouldn't get the position because he is black or has a disability or is too old.
>
> AB at p. 4968, lines 6 to 15 (emphasis added).

[27] During the Tribunal's inquiry some discussion also took place as to the impact the "Complaint Summary" prepared by the Commission could have on the alleged ground of discrimination based on perceived disability. That administrative summary (reproduced at p. 76 of the Appeal Book) set out race, national or ethnic origin, colour and age as the relevant grounds of discrimination, but did not mention disability or perceived disability. The following exchange between counsel for the appellant and the Tribunal member is instructive:

> MR. YAZBECK: If you look at the Page 3 of 3 of the complaint, the last paragraph, the second line on the right. Now "I believe that racial discrimination and discrimination of weight was the ultimate factor in my demise of a customs career."
>
> THE CHAIR: But that's the narrative though. I'm looking at the cover page from the Commission, Complaint Summary, Race, National or Ethnic Origin, Colour and Age, Section 7. So that's what I'm going by. I don't see any claim for disability here.

MR. YAZBECK: Mr. Turner has referred to weight as a basis -- there was an objection when the Commission didn't deal squarely with that. But the complaints that were referred on the Statement of Particulars includes [*sic*] an allegation of perceived discrimination based on perceived disability.

THE CHAIR: Yes. But are we supposed to read through the complaint and figure out what the complaint is about? And what we get from the Commission is a Complaint Summary. Do you see that? Have you got that?

MR. YAZBECK: I do have that, yes.

THE CHAIR: Do you see where it says Relevant Grounds?

MR. YAZBECK: Yes.

THE CHAIR: I mean are we supposed to go, the Tribunal, and talk [*sic*] through the complaint and figure out if there's more grounds than what is stated in the referral from the Commission?

MR. YAZBECK: Well, Mr. Chair, I know that you're aware of the fact that complaint documents should not be read narrowly. The benefit of the doubt needs to be given to the complainant. And obviously, this is not a professionally-drafted document.

The allegation is there. The allegation is in the Statement of Particulars. And if required, I can bring a motion to add this, to amend the complaint accordingly.

THE CHAIR: Well, I think it's too late. Do you set out anywhere in the Statement of Particulars, Mr. Turner's Statement of Particulars?

MR. YAZBECK: If you go to Paragraph 33 and 34, "by finding the complainant unqualified in Victoria and Vancouver processes and failing to appoint him to a permanent position."

And I pause, that it's more than just the two processes. It's the failure to give him other opportunities that's at issue.

"The respondent discriminated against the complainant on the grounds of race, age and perceived disability."

And there's a similar allegation in Paragraph 34.

THE CHAIR: What was referred to the Commissioner? Was it Section -- was disability referred?

> MR. YAZBECK: Well, the summary, of course, that's prepared by the Commission identifies -- it doesn't identify ---
>
> THE CHAIR: Disability.
>
> MR. YAZBECK: Disability.
>
> THE CHAIR: And there was an amendment. In the Statement of Particulars, there's -- the complainant is going to -- wants to amend and prove section 10. I don't know if that came forward or not.
>
> I mean this is not a case where -- I realize Mr. Turner didn't have a lawyer as his counsel at the time. He also had a lengthy motion that we had to deal with, that they wrote a decision on and it was withdrawn.
>
> So I mean we've got a lot of back-ing and forth-ing in this complaint, Mr. Yazbeck, which is not the issues [*sic*] we're dealing with here.
>
> But anyway, let's get back to the statistics.
>
> AB at pp. 3941 to 3943.

[28] Counsel for the CBSA also asked questions indicating that he understood that the appellant's weight was included in the complaint and was part of the Tribunal's inquiry. Thus, in cross-examining the appellant, counsel for the CBSA asked the following questions:

> Q. . . . Now Mr. Turner, you've indicated and the basis of your Complaint is that there was something wrong. <u>Your employer had some issue with you, correct, in terms of either weight</u> ---
>
> <u>A. Yes</u>.
>
> Q. --- age ---
>
> A. Right.
>
> Q. --- race?
>
> A. Yes – sorry.
>
> AB at p. 3539, lines 15 to 23 (emphasis added).

> Q. But, essentially, if your employer CBSA or officials within had a calculated intent to treat you differently on grounds of weight, race, or age, you would expect that to start showing up in your performance evaluations, wouldn't you?
>
> A. No, I would not, necessarily.
>
> AB at p. 3540, lines 23 to 24, and p. 3541, lines 1 and 2 (emphasis added).

Counsel for the CBSA started the examination of his first witness for the respondent by framing as follows the issues raised by the appellant's complaint:

> Q. Now, you're aware that the matter that brings you before the Tribunal today is a complaint in which a former employee of the Canada Revenue Agency, Levan Turner, says that he was subjected to discrimination when he is found not to be qualified in two specific job competitions, the position of border services officer, formerly customs inspector on grounds of race, perceived disability, his weight and his age. You're aware of that?
>
> A. I'm aware of that.
>
> AB at p. 3778, lines 1 to 10 (emphasis added).

[29] Evidence was also submitted to the Tribunal on behalf of the appellant dealing with his weight and how this affected the manner in which he was perceived within the CCRA. One witness, Christopher James Hughes, testified that CCRA staff commented on numerous occasions about the appellant's weight and made jokes about overweight individuals: AB at p. 2922, lines 2 to 18. This witness stated that there was an unfounded perception among CCRA staff who had not worked with the appellant that he was lazy and that, because of his size, he could not do his job: AB at p. 2925, lines 13 to 25; see also AB p. 3044, line 25 to p. 3045, line 9. The appellant himself also testified that his supervisor used a nickname for him that referred disparagingly to his weight: AB at p. 3437, line 20 to p. 3439, line 12.

[30] In the written submissions to the Tribunal made on behalf of the appellant, the ground of discrimination on the basis of perceived disability was clearly raised: see paras. 1, 13, 14, 39 and 88 of the "Complainant's Outline of Argument", reproduced at pp. 5135, 5140-41, 5149, 5165 of the AB. In these submissions, emphasis was placed on the subtle aspects of discrimination and how intersecting grounds of discrimination (such as race and perceived disability) are important to consider. Specific reference was made to the unanimous decision of the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665 calling for a multi-dimensional approach to defining disability that includes a socio-political dimension and which places emphasis on human dignity, respect and the right to equality rather than on simple biomedical conditions. As noted by L'Heureux-Dubé J. at para. 77 of the reasons in that case, "this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a "handicap". In fact, a person may have no limitation in everyday activities other than those created by prejudice and stereotypes."

[31] The Complainant's Outline of Argument also referred to, and quoted from, the British Columbia Human Rights Tribunal's decision in *Radek v. Henderson Development (Canada) Ltd. and Securiguard Services Ltd. (No. 3)*, 2005 BCHRT 302 ("*Radek*") emphasizing the importance of intersecting or compound grounds of discrimination. As stated in *Radek* at paras. 464 and 465:

> [464] The interrelationship between a number of intersecting grounds of discrimination is sometimes described as "intersectionality". The concept of intersectionality has been discussed in a number of recent decisions, including: *Morrison v. Motsewetsho* (2003), 48 C.H.R.R. D/51 (Ont. H.R.T.), *Comeau v. Cote*, [2003] BCHRT 32, and *Baylis-Flannery v. DeWilde (No. 2)* (2003), 48 C.H.R.R.

> D/197 (Ont. H.R.T.). As described in *Baylis-Flannery*, "[a]n intersectional analysis of discrimination is a fact-driven exercise that assesses the disparate relevancy and impact of the possibility of compound discrimination": at para. 143. Speaking there in a case of sexual harassment against against [*sic*] a Black woman, the Tribunal stated that an awareness of the effect of compound discrimination is necessary in order to avoid:
>
> > reliance on a single axis analysis where multiple grounds of discrimination are found, [which] tends to minimize or even obliterate the impact of racial discrimination on women of colour who have been discriminated against on other grounds, rather than recognize the possibility of the compound discrimination that may have occurred. (at para. 144)
>
> [465] The same could be said in the present case with respect to race, colour, ancestry and disability. While the primary focus of Ms. Radek's individual complaint is her race, colour and ancestry, the analysis of those grounds must not ignore her disability, and the possibility of the compound discrimination which may have occurred.

[32] The respondent mounted a two-pronged challenge to these arguments in his own “Outline of Argument” submitted to the Tribunal. First, while recognizing that the allegation of discrimination on the ground of perceived disability had been raised by the appellant in his statement of particulars, the respondent contended that it had not been canvassed by the Commission in its investigation of the complaint, and therefore could not be dealt with by the Tribunal: paras. 6, 8 and 9 of the appellant’s “Outline of Argument”, reproduced in the AB at pp. 5174-75. Second, in the event the Tribunal found that it did have jurisdiction, the respondent submitted that the appellant had not met his burden of establishing a *prima facie* case of discrimination on the ground of perceived disability: *ibid*., at para. 8, reproduced in the AB at p. 5175.

The Tribunal did not address the issue

[33] In this context, the complete silence of the Tribunal on the issue of perceived disability is troubling. Did the Tribunal refuse to consider this ground of discrimination on the basis that it lacked jurisdiction to do so? Or was the Tribunal of the view that perceived disability involving weight does not constitute a ground of discrimination contemplated by the *Canadian Human Rights Act*? Or did the Tribunal find that the appellant had failed to establish a *prima facie* case of discrimination on this ground? And if so, why did the Tribunal disregard the arguments of the appellant concerning the importance of intersecting or compound grounds of discrimination, and the principles set out in *Radek*? Or did the Tribunal simply forget to address these issues? In the absence of any discussion in the Tribunal's reasons, we simply do not know the answers to these questions.

[34] If the Tribunal was of the view that it lacked jurisdiction to consider the ground of perceived disability, as the respondent invites this Court to find (respondent's memorandum at paras. 7 and 71), serious questions could be raised as to the propriety of such a finding in light of the Tribunal's own past jurisprudence, particularly where, as here, the ground of perceived disability was raised in the complaint made to the Commission and included in the statement of particulars before the Tribunal: *Cook v. Onion Lake First Nation*, [2002] C.H.R.D. No. 12 (QL) at paras. 26-27; *Gaucher v. Canada (Armed Forces)*, [2005] C.H.R.D. No. 1 (QL) at paras. 10-11. Fairness concerns would also be raised in light of the explicit request of the appellant to be allowed an opportunity to submit an amendment in the event of such a finding. However, in view of the silence of the Tribunal, a

judicial review of such a jurisdictional finding and its implications for the fairness of the proceedings would be simply speculative.

[35] If the Tribunal was of the view that perceived disability on the basis of weight is not a prohibited ground of discrimination contemplated by the *Canadian Human Rights Act*, then such a finding of law cannot be properly reviewed in the absence of any reasons from the Tribunal. Again, the judicial review would be dealing in speculation.

[36] Moreover, if the Tribunal found that the appellant had failed to establish a *prima facie* case of discrimination on the ground of perceived disability, it failed to state the reasons for reaching such a conclusion. It is somewhat curious that the Tribunal would have taken the time to explain why the appellant had not made out a *prima facie* case of age discrimination (see paras. 144 to 146 of the Decision), but would have ignored the ground of perceived disability. But here again, I am speculating.

[37] Finally, perhaps the Tribunal simply forgot to address the issue of perceived disability. Unfortunately, neither the Tribunal's decision nor the record of the proceedings allows a reviewing court to determine with any degree of certainty how the Tribunal treated this alleged ground of discrimination.

The standard of review

[38] There is some uncertainty over what standard of review to apply to a situation where, as here, the Tribunal has failed to consider one of the grounds which the appellant raised in his complaint and which he pursued before the Tribunal. Should this be dealt with as an issue related to the adequacy of reasons to be addressed within the framework of the reasonableness analysis: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at paras. 14 to 22 ("*Newfoundland Nurses' Union*")? Or should this be viewed as an issue of procedural fairness to be reviewed on a standard of correctness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817?

[39] Two germane points are clear from the jurisprudence.

[40] First, an administrative tribunal need not address each and every argument made. As noted by Dickson J. in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.*, [1975] 1 S.C.R. 382 at p. 391: "A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion. The role of the Court in a case such as this is supervisory, not appellate". This point has been reiterated many times, and most recently in *Newfoundland Nurses' Union* at para. 16. However, the reasons provided, having regard to the record before the tribunal, must "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes . . .", *ibid.*

[41] Second, an administrative tribunal must consider the important points in issue, and its reasons must reflect consideration of the main relevant factors: *Via Rail Canada Inc. v. National Transportation Agency (C.A.)*, [2001] 2 F.C. 25 at para. 22. However, the burden is on the applicant to demonstrate that any point or factor was of such importance that the administrative tribunal was legally bound to consider it: *Stelco Inc. v. British Steel Canada Inc. (C.A.)*, [2000] 3 F.C. 282 at paras. 24 to 26.

[42] Consequently, when an applicant establishes that it raised an important relevant point before an administrative tribunal, and where, taking into account the record as a whole, the reasons of the tribunal do not allow a reviewing court to understand why the point was disregarded, a reviewable error may be found to exist.

[43] The issue of whether an administrative tribunal has a legal obligation to consider an argument made before it as part of its duty of procedural fairness is to be determined on a standard of correctness. A reviewing court cannot defer to the choice of an administrative tribunal not to consider an argument where procedural fairness compels it to do so. Consequently, whether the point or argument made before an administrative tribunal was of such importance as to require the tribunal to consider it is a matter to be dealt with on a standard of correctness.

[44] Once it has been determined that an argument or point must be considered, whether the tribunal actually dealt with it is, however, a matter to be decided on a standard of reasonableness, as the Supreme Court of Canada indicates in *Newfoundland Nurses' Union*. The reasons provided by

the Tribunal must thus be canvassed with due regard to the record, together with the outcome of the proceedings, for the purpose of assessing whether or not the argument or point was effectively dealt with.

[45] In the absence of reasons on a point or argument which procedural fairness requires to be addressed, the reviewing court may not be in a position to determine if the decision on that point or argument falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law. In such circumstances, the decision will usually be found to be unreasonable, unless the reviewing court can itself reasonably find that the outcome of the proceedings would not have changed even if the point or argument been dealt with by the tribunal one way or the other.

Application to this case

[46] I shall now apply these principles to this case. The appellant raised perceived disability as a contributing factor both in his complaint to the Commission and in his statement of particulars before the Tribunal. This ground was an issue in the proceedings before the Tribunal, and was discussed on many occasions by both counsel and by the Tribunal member. It was clearly argued as an important point in the appellant's written submissions to the Tribunal.

[47] The Federal Court and this Court are ill-equipped to speculate on how the ground of perceived disability may have influenced the Tribunal's perception of the evidence had it been considered. Moreover, without a determination on whether the ground of perceived disability was properly before the Tribunal, the conclusion that a non-discriminatory explanation existed may be

questioned, since this conclusion may have been reached in circumstances where not all of the alleged grounds of discrimination were properly addressed.

[48] In his written submissions to the Tribunal, the appellant also referred to the concept of intersecting grounds of discrimination, which, at a basic level, holds that when multiple grounds of discrimination are present, their combined effect may be more than the sum of their individual effects. The concept of intersecting grounds also holds that analytically separating these multiple grounds minimizes what is, in fact, compound discrimination. When analyzed separately, each ground may not justify individually a finding of discrimination, but when the grounds are considered together, another picture may emerge.

[49] As noted in *Radek* above, though the primary focus of a complaint of discrimination may be race, the analysis of that primary ground must not ignore the other grounds of complaint, such as disability, and the possibility that compound discrimination may have occurred as a result of the intersection of these grounds. Moreover, section 3.1 of the *Canadian Human Rights Act* specifically provides that a discriminatory practice includes a practice based on the effect of a combination of prohibited grounds.

[50] In my view, the appellant's complaint that he was also discriminated against on the ground of disability was before the Tribunal and was sufficiently significant that the Tribunal was under a

duty to deal with it or to explain why it did not. In the absence of any reasons in the Tribunal's decision or of a clear answer in the record, it is not the role of a reviewing court to speculate as to why the Tribunal did not deal with the issue of perceived disability or what conclusion the Tribunal would have reached if it had addressed the issue. Insofar as the reviewing court has reasonable concerns as to the potential outcome of the proceeding had the issue been addressed by the Tribunal, the judicial review application should be allowed.

Conclusions

[51] For these reasons, I would allow this appeal, set aside the judgment of the Federal Court, and giving the judgment that the Federal Court ought to have given, I would allow the application for judicial review, set aside the decision of the Tribunal, and refer the appellant's complaint back to the Tribunal for a new determination by a different member. I would also award the appellant his costs in this Court and in the Federal Court.

"Robert M. Mainville"
J.A.

"I agree.
John M. Evans J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-275-11
APPEAL FROM A JUDGMENT OF MR. JUSTICE O'REILLY DATED JUNE 24, 2011 (docket number T-1094-10).	
STYLE OF CAUSE:	Levan Turner v. Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 2, 2012
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	EVANS J.A. TRUDEL J.A.
DATED:	May 30, 2012

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