Federal Court  Cour fédérale

Date: 20090512

Docket: T-1633-07

Citation: 2009 FC 495

Ottawa, Ontario, May 12, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

SURESH KHIAMAL

Applicant

and

THE CANADIAN HUMAN RIGHTS COMMISSION
and GREYHOUND CANADA TRANSPORTATION CORPORATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application made by Suresh Khiamal (Mr. Khiamal or the Applicant) pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of the decision by the Canadian Human Rights Tribunal (the "Tribunal") to dismiss the Applicant's complaint of discrimination in employment on the basis of race, ethnic or national origin, and colour.

[2] Mr. Khiamal is a long term employee of Greyhound Canada Transportation Corporation (Greyhound or the Respondent) who applied for the posted position of Night Shift Maintenance Foreman. Greyhound interviewed the Applicant and another non-minority candidate and offered the position to the other candidate.

[3] Mr. Khiamal filed a complaint against Greyhound with the Tribunal alleging discrimination on the basis of race, national or ethnic origin, colour, age and disability. The Tribunal agreed the Applicant established a *prima facie* case for discrimination but ruled the impugned conduct was the product of workplace animosity and not discrimination based on race, national or ethnic origin, or colour. Mr. Khiamal now seeks judicial review of that Tribunal decision. He does not challenge the part of the Tribunal's decision dismissing his claim of discrimination on the basis of age or disability.

[4] The issue is whether the Tribunal erred in dismissing the Applicant s claim of discrimination on the basis of race, ethnic or national origin, and colour by the Respondent in its hiring of a Night Shift Maintenance Foreman for the Edmonton garage.

[5] I conclude that the Tribunal decision is flawed such that the matter should be referred back without narrowing the issues on re-determination. My reasons in this judicial review follow.

BACKGROUND

[6] Mr. Khiamal was 58 years old and of South Asian descent. During his 22 years of employment with the Respondent, the Applicant was often appointed as Lead Hand. The duties of a lead hand are similar to that of a foreman in that the lead hand supervises other mechanics to ensure that the work that needs to get done is completed.

[7] In July 2002, Mr. Khiamal applied for the posted position of Night Shift Maintenance Foreman (Foreman) in the Greyhound Edmonton garage. The interview was conducted by Steven Watson, Maintenance Manager (Mr. Watson or the Manager), and Charles Seeley, a foreman. After interviewing the Applicant for Foreman, Greyhound awarded the position to another candidate, Kenneth Mullan, a non-minority employee.

[8] Mr. Watson and the Applicant had been friends when Mr. Watson was Mr. Khiamal's journeyman apprentice. Around 1990, Mr. Watson became a foreman and eventually Maintenance Manager in the Greyhound Edmonton garage. The relationship between the two changed after Mr. Watson became the Applicant's supervisor.

[9] After the appointment of Mr. Mullan as Foreman, the Applicant filed a complaint against Greyhound alleging discrimination on the grounds of race, national or ethnic origin, color, age and disability because he was not promoted to Foreman.

DECISION UNDER REVIEW

[10] The Tribunal organized the Applicant's allegations in the following manner:

1. Allegation #1 deals with the complainant's application for the position of Night Shift Maintenance Foreman, and the respondent's decision not to hire him for this position. The complainant alleges that the Respondent's decision was tainted by discrimination on the ground of disability, age, race, colour, or national or ethnic origin.

2. Allegation #2 deals with a series of incidents, or aspects of his workplace experience, that in the complainant's view constitute harassment on the ground of race.

3. Allegation #3 focuses on one of the above incidents (i.e. the respondent's refusal to approve training and courses for the complainant) and asserts that this refusal constituted adverse differentiation and the denial of employment opportunities, based on race.

Allegation 1 – Night Shift Maintenance Foreman Job Posting of July 2002

[11] The Tribunal noted that, at the time of the Foreman job posting, the Applicant was 53 and Mr. Mullan, the successful candidate, was 43 years of age. The Tribunal found no evidence that age was a factor in selecting the successful candidate for Foreman. The Tribunal decided that the Applicant had not established that his age played a role in the Respondent's decision not to hire him. The Tribunal then considered whether the Applicant has established a *prima facie* case of discrimination based on race, national or ethnic origin, or colour.

[12] The Tribunal heard evidence that Mr. Khiamal's application for Foreman was the first made by him for a promotion since arriving at the Edmonton garage in 1980. The reason he did not apply earlier was that he did not feel that the Respondent was ready for a "coloured foreman as yet".

[13] The written application submitted by the Applicant contained the following:

> Equipped with 22 years of experience as a mechanic/lead hand I am applying for the position of maintenance foreman.
>
> I have reviewed the qualifications needed for the position and have the qualifications for all items listed on the job posting. If any further information is needed, I will furnish it upon your request.

The Applicant explained that he did not provide any further information because he had been at the Edmonton garage for 22 years and that Mr. Watson was aware of all of his certifications. The Tribunal was of the view that, while Mr. Watson may not have had full recall of the Applicant's certifications, he would have been fully conversant with the Applicant's job performance and all other related qualities needed for the Foreman position.

[14] Mr. Mullan, the successful candidate, testified that the interviewers, Mr. Watson and Mr. Seeley, knew him well enough given that he had been working there for five years.

[15] The Tribunal heard from witnesses that the Applicant was highly skilled, conscientious, interacted well with co-workers, and had leadership qualities. He had 17 years seniority over the other candidate. Mr. Mullan was considered by co-workers to not be as skilled, nor as cooperative, or competent.

[16] The Tribunal found that there was sufficient evidence that the Applicant was qualified, that Mr. Mullan was less qualified or no better qualified than the Applicant, and that the distinguishing character between the two candidates was race. The Tribunal held that Applicant had established a *prima facie* case of discrimination.

[17] The Tribunal stated that it was incumbent on the Respondent to explain why its actions were not discriminatory. The Respondent offered four explanations as to why the Foreman position was offered to Mr. Mullan:

- Mr. Mullan was the best candidate for the job;
- Hiring Mr. Mullan for the Foreman position allowed the Respondent to accommodate his physical disability;
- The decision to hire Mr. Mullan was made by individuals in the Respondent's Calgary office; and
- To the extent that the Applicant was treated unfairly in the job application process, this was due to personal animosity between the Applicant and Mr. Watson that had nothing to do with discrimination.

[18] The Tribunal rejected the Respondent's explanation that Mr. Mullan was the best candidate for the job. The Respondent was unable to demonstrate that Mr. Mullan was more qualified than the Applicant.

[19] The Respondent submitted that by placing Mr. Mullan, who suffered from arthritis, in the less physically demanding job of Foreman, it served to accommodate his disability. However, Mr. Mullan testified that his arthritis did not prevent him from full heavy duty mechanic duties and that he did not self-identify as disabled nor did he ask to be accommodated. The Tribunal found the Respondent's explanation that Mr. Mullan was hired to accommodate his disability was pretextual.

[20] The Respondent attempted to portray the hiring as non-discriminatory because the decision was made by management in Calgary. The Tribunal was of the view that Mr. Seeley and Mr. Watson decided on Mr. Mullan, and then presented their interview findings to Calgary management in such a way as to effectively direct that Mr. Mullan be hired. The Tribunal rejected this submission by the Respondent.

[21] The Respondent submitted that there is a history of conflict between Mr. Watson and the Applicant and that Mr. Khiamal was not hired because of personal differences and not because of a prohibited ground of discrimination.

[22] The Tribunal concluded that the evidence supported the conclusion that Mr. Watson did not want to deal with the Applicant on a more frequent basis due to the personal conflict and consequent animosity. The Tribunal also commented that the "[Applicant], for his part, felt victimized by supervisor Steven Watson's animus toward him, which would appear on the evidence to be justified."

[23] The Tribunal found that "given their previous close personal relationship, the preponderance of evidence suggests that the tensions that arose between them were non-discriminatory in nature." The Tribunal found that the personal conflict between the Applicant and Mr. Watson improperly influenced the hiring process for the Foreman position.

[24] The Tribunal heard extensive evidence about a 1992 workplace incident between Mr. Watson and the Applicant. The Tribunal found that the 1992 conflict was too remote in time to be a proper consideration in the 2002 hiring.

[25] The Tribunal accepted that the nexus between the impugned action and discrimination can be inferred through circumstantial evidence, but stated that the inference of discrimination must be more probable than other possible inferences. Ultimately, the Tribunal concluded that there was no nexus between the conduct under scrutiny – the hiring of Mr. Mullan over the Applicant – and the prohibited ground of discrimination.

[26] The Tribunal relied on *Hill v. Air Canada*, 2003 CHRT 9, at para. 132, 164-165, and 169, for the proposition that the *Canadian Human Rights Act*, R.S. 1985, c. H-6, (CHRA) is not engaged where a complainant's negative workplace experiences are due solely to a personality conflict with a supervisor.

[27] The Tribunal found that while the Applicant had established a *prima facie* case of discrimination in the hiring process, the impugned conduct was satisfactorily explained by the personal animosity between Mr. Watson and the Applicant. The Tribunal concluded that the animosity was based on "the interactions and respective career paths" of the two men, (adopting the language in *Hill*) and had nothing to do with the Applicant's race. According to the Tribunal, the Respondent was able to provide a reasonable explanation other than discrimination based on race for the failure to hire the Applicant.

Allegation 2 - Historic and Ongoing Harassment by Co-Workers and Managers

[28] The Applicant presented evidence of eight incidents or aspects of his workplace experience which he alleged formed a pattern of harassment based on race as set out in section 14 of the CHRA:

- Workplace harassment by then-Foreman, Bruce Morrison, commencing 1984
- False accusation against Applicant of threatening Mr. Watson in the 1992 incident
- Deliberate alteration of the Applicant's 2000 holiday request
- Mr. Watson's threat to fire the Applicant if he won the Foreman position
- Harassment by a co-worker
- Denial of training courses
- Denial of overtime
- Historical and ongoing workplace discrimination

Workplace harassment by then-Foreman, Bruce Morrison, commencing 1984

[29] The Applicant led evidence regarding workplace harassment against him by a previous foreman commencing about 1984 and continuing for several years. These incidents were the subject the Applicant's human rights complaint against the Respondent on the basis of age, race and disability which was dismissed in 1994. The Tribunal did not consider these incidents as part of a pattern of harassment.

False accusation against the Applicant of threatening Mr. Watson in the 1992 incident

[30] Mr. Watson filed a formal complaint against the Applicant as a result of a March 11, 1992 argument between them. The Applicant acknowledged the incident but denied being disciplined. The Tribunal preferred the evidence of Mr. Watson. It observed that due to the closeness of their past relationship, Mr. Watson was quite emotional and agonized over whether to report the matter, which would bring disciplinary action upon the Applicant. The Tribunal held that the incident took place as outlined by Steve Watson, and that the Applicant did receive a reprimand.

[31] The Tribunal found that the incident had nothing to do with harassment because of race but rather originated from personal animosity between Mr. Watson and the Applicant. The animosity was denied by both parties on the stand, but the Tribunal was of the view that it was evident in their respective testimonies.

Deliberate alteration of the Applicant's 2000 holiday request

[32] By virtue of his seniority in the Edmonton garage, the Applicant had first choice for vacation dates. The Applicant testified that he had submitted his 2000 vacation application to Mr. Seeley and received a phone call from Mr. Watson informing him that he had bid for the wrong year. Mr. Khiamal's application for June 17-June 30, 2000 had been altered, the last zero in '2000' crossed out and replaced by a '1'. No evidence was adduced as to who might have altered the application.

[33] The Applicant protested and approached the Union Executive and a Senior Labour Relations Manager to get the holiday he requested. The Tribunal found that the Applicant's holiday application was altered and held that management did not act appropriately to rectify the situation once they were made aware that the Applicant was not responsible for the alteration.

[34] However, the Tribunal decided the incident needed to be based on a prohibited ground of discrimination to constitute harassment under section 14 of the CHRA. According to the Tribunal, there was no evidence which suggested that the Applicant's holiday leave alteration or management's initial unhelpful response was based on the Applicant's race.

Mr. Watson's threat to fire the Applicant if he won the Foreman position

[35] The Applicant was told by Mr. Watson that he would fire the Applicant if he got the Foreman position since the Applicant would no longer be in the Union. Mr. Watson denied making this statement but the incident was corroborated by a witness.

[36] The Tribunal found that the Mr. Watson did make the statement. The Tribunal noted that the Applicant's witness testified that he did not feel that Mr. Watson was joking when he made the comment. However, the Applicant testified that he believed Mr. Watson "was joking" and not "that serious". The Tribunal reasoned that if the Applicant thought the comments made by Mr. Watson were a joke, it raises the issue of whether he perceived them as being "unwelcome".

[37] The Tribunal concluded that even if the comment was unwelcome communication that poisoned the work environment, it was not demonstrated that the threat was connected to the Applicant's race or any other prohibited ground of discrimination. As a result, the threat incident could not be viewed as an instance of discrimination.

Harassment by a co-worker

[38] The Applicant testified that in October 2005, another mechanic harassed him at work by calling him names. The Applicant filed a complaint in writing and received a letter from the investigator stating that the mechanic admitted to harassing him and acting against Greyhound's relationship policy. The Applicant testified that he felt the harassment was retaliation instigated by Mr. Watson because of the Applicant's human rights complaint.

[39] The Tribunal found that the Applicant's belief was pure conjecture and held that the Applicant had not demonstrated that the incident could be considered an instance of harassment under section 14 of the CHRA.

Denial of training courses

[40] The Applicant testified that on numerous occasions he requested specialized courses. In addition, the Applicant claimed he was denied the opportunity in 2001 to obtain his Class 2 license and that he suspected that Mr. Watson influenced the instructor to give him a failing grade when he took an air conditioning course in 2003.

[41] The Tribunal concluded there was evidence that the Applicant was not given the more extensive courses that he had requested but dismissed the allegation that the Manager induced the instructor to give the Applicant a failed grade in the air conditioning course. With respect to obtaining a Class 2 license, the Tribunal stated:

> It was not disputed that several mechanics achieved their Class 2 license, but when the [Applicant] asked Steven Watson to take the course, he was told that they had sufficient numbers with the new classification. He never did get this training, and to date cannot now test buses unless he gets somebody with a Class 2 license to go with him. As the most senior mechanic at the garage, often with Lead Hand duties, this is a real restriction on his ability to do duties he could do previously. Many mechanics who work under the [Applicant] as Lead Hand, have these Class 2 Licenses now.

Denial of overtime

[42] The Applicant testified that Mr. Watson denied him overtime opportunities. The Tribunal found that while the Applicant may, at times, have been denied overtime, his evidence was unclear on the dates and time periods involved. It held that the Applicant did not present enough evidence demonstrating even on a *prima facie* basis that his race played a role in decisions to deny him overtime.

Historical and ongoing workplace discrimination

[43] The Applicant's evidence was that "there is discrimination everywhere". The Applicant made general statements about comments made behind his back and the like, but made no specific allegations. The Tribunal found that the Applicant did not make out a *prima facie* case on this general alleged manifestation of harassment.

[44] In sum, the Tribunal did not find that the eight incidents constitute harassment within the meaning of section 14 of the CHRA. The Tribunal held that, for harassment to be found, there must be a connection between the pattern of unwelcome conduct and a prohibited ground. According to The Tribunal decided nothing in the evidence suggested that such a connection can be inferred in regard to the eight incidents as a whole, or as a subgroup to harassment due to discrimination.

Allegation 3 – Denial of Training and Courses

[45] The Tribunal found that the Applicant was denied the Class 2 license course, as well as the Electronic Analyzer course, and that for several years he was denied the opportunity to take the Air Conditioning course. The Tribunal stated: "In fact, the lack of courses has compromised the Complainant's ability to do his work at the Edmonton Garage despite his seniority and experience. All of the courses at issue were offered to other mechanics in the Edmonton Garage, often those who continued to work under the Complainant's direction".

[46] The Tribunal found that the Applicant had put forth *prima facie* evidence that the Manager did pursue a practice of denying courses and training that deprived the Applicant of employment opportunities. The Tribunal was of the view that the evidence indicated that the personal conflict between the Applicant and Mr. Watson improperly influenced the latter's decisions relating to the courses and training that were made available to the Applicant. The personal conflict between the Applicant and Mr. Watson, in the Tribunal's view, had nothing to do with the Applicant's race, age or disability.

[47] In conclusion, the Tribunal dismissed all three allegations. No costs were awarded.

ISSUES

[48] The following issues are pertinent to this application for judicial review:

1. *Did the Tribunal err in finding that the impunged conduct alleged to be discriminatory in respect of hiring and training was satisfactorily explained by the Respondent as arising solely because of the animosity between the Manager and the Applicant?*

2. *Did the Tribunal err in failing to consider whether the evidence supported an inference that the impugned conduct was discrimination based on race, national or ethnic origin, or colour?*

3. *Did the Tribunal err in not addressing the statistical evidence of minority under-representation in the Respondent's workforce?*

STANDARD OF REVIEW

[49] The issues deal with applying the legal test for discrimination to the fact. The Tribunal was faced with firstly determining the facts and secondly, applying the legal test for discrimination to the impugned conduct in order to decide whether conduct constituted discrimination based on race, national or ethnic origin, or colour. The questions are therefore those of mixed fact and law.

[50] In *Canada (Human Rights Commission) v. Canada (Armed Forces)*, [1999] 3 F.C.653, at paras. 24-27, Justice Tremblay-Lamer determined that the standard of review for applying the legal test for sexual harassment to a set of facts was reasonableness *simpliciter*.

[51] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 53, the Supreme Court of Canada held that the reasonableness standard will apply to the review of questions where the legal and factual issues are intertwined and cannot be easily separated.

[52] In this case, the Tribunal heard considerable evidence relating to the allegation of discrimination. It was required to assess the credibility of witnesses and draw inferences from the factual evidence presented in making its determination as to the existence of discrimination. I conclude the standard of review should be reasonableness.

[53] Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, at para. 47).

LEGISLATION

[54] The CHRA provides that race, national or ethnic origin, colour, age and disability are prohibited grounds of discrimination. The relevant provisions are:

Prohibited grounds of discrimination	Motifs de distinction illicite
3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has	**3.** (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou

been granted.	la déficience.
Employment	Emploi
7. It is a discriminatory practice, directly or indirectly, (*a*) to refuse to employ or continue to employ any individual, or (*b*) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects : *a*) de refuser d'employer ou de continuer d'employer un individu; *b*) de le défavoriser en cours d'emploi.
Discriminatory policy or practice	Lignes de conduite discriminatoires
10. It is a discriminatory practice for an employer, employee organization or employer organization (*a*) to establish or pursue a policy or practice, or (*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.	**10.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale : *a*) de fixer ou d'appliquer des lignes de conduite; *b*) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.
Harassment	Harcèlement
14. (1) It is a discriminatory practice, (*a*) in the provision of goods, services, facilities or accommodation customarily available to the general public,	**14.** (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu : *a*) lors de la fourniture de biens, de services, d'installations ou de moyens d'hébergement destinés

(*b*) in the provision of commercial premises or residential accommodation, or (*c*) in matters related to employment, to harass an individual on a prohibited ground of discrimination.	au public; *b*) lors de la fourniture de locaux commerciaux ou de logements; *c*) en matière d'emploi.

ANALYSIS

The Law

[55] Section 3 of the CHRA designates race, national or ethnic origin, or colour as a prohibited ground of discrimination. Section 7 makes it a discriminatory practice to refuse to continue to employ an individual because of a prohibited ground of discrimination. Section 14 makes it a discriminatory practice in employment matters to harass an individual on a prohibited ground.

[56] The burden of proof is on an applicant to establish a *prima facie* case of discrimination. In *Ontario Human Rights Commission v. Simpson Sears Limited, (O'Malley),* [1985] 2 S.C.R. 536, at para. 28, Justice McIntyre wrote that a *prima facie* case, is one which, if believed, is complete and sufficient to justify a decision in favour of the applicant.

[57] Generally, in this context, it will be sufficient for the complainant to prove: that the complainant was qualified for the particular employment; that the complainant was not hired;

and that someone no better qualified but lacking the distinguishing feature (ie: race, colour etc.) subsequently obtained the position, (*Shakes v. Rex Pak Limited* (1982), 3 CHRR D/1001 at D/1002).

[58] If the employer does provide a reasonable explanation for otherwise discriminatory behaviour, the applicant has the burden of demonstrating that the explanation was pre-textual, and that the true motivation was discriminatory.

[59] It is difficult to prove allegations of discrimination by way of direct evidence. As was noted by the Tribunal in *Basi v. Canadian National Railway Co.* (1988), 9 CHRR D/5029 (CHRT):

> Discrimination is not a practice which one would expect to see displayed overtly, in fact, there are rarely cases where one can show by direct evidence that discrimination is purposely practiced. (at D/5038)

A tribunal is therefore tasked to consider all of the circumstances to determine if there exists what was described in the *Basi* case as the "subtle scent of discrimination".

[60] The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. In *Proving Discrimination in Canada*, (Toronto: Carswell, 1987) at p. 142, Vizkelety outlines the test for cases of circumstantial evidence as follows:

> An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses

[61] Finally, discrimination does not need to be the only reason for the impugned action for an applicant to succeed. It is sufficient that discrimination be one factor in the impugned employment decision. (*Holden v. Canadian National Railway*, [1990] F.C.J. No. 419, (FCA).

Did the Tribunal err in finding that the impugned conduct alleged to be discrimination in respect of hiring and training was satisfactorily explained by the Respondent as arising solely because of the animosity between the Manager and the Applicant?

[62] The Applicant submits that the Tribunal erred by accepting the Respondent's explanation that a prior social relationship existed between the Applicant and Mr. Watson, and that the deterioration of the relationship resulted in the arbitrary and inappropriate conduct by Mr. Watson when he failed to promote the Applicant as Foreman.

[63] The Applicant contends that the Tribunal failed to consider whether race was a factor in the tension that arose between Mr. Watson and the Applicant after Mr. Watson was promoted.

[64] The Respondent argues that the Tribunal's determination that the adverse prior social relationship was the reason behind the Respondent's decision not to promote the Applicant is a finding of fact and therefore ought to be granted deference by this Court.

[65] According to the Respondent, the Tribunal reasonably concluded that the animosity between the Applicant and Mr. Watson was caused by personal factors and was not related to the race, colour or national or ethnic origin, or colour of the Applicant. Such a finding was based on the Tribunal's appreciation of the evidence, particularly the testimony of the Applicant and Mr. Watson.

[66] The Respondent submitted that an employer is not liable under the CHRA if any negative experiences or unfair treatment results from interpersonal conflict unrelated to any of the enumerated grounds.

[67] The Tribunal appears to reason that because there was a prior close relationship between the Applicant and Mr. Watson there can be no adverse racial bias. In other words, the Manager could not be racially prejudice since he had once been close friends with the Applicant. This analysis is simplistic.

[68] The Tribunal failed to have regard for other possible explanations for the change in the personal relationship after Mr. Watson became the Applicant's superior. The Tribunal must assess the evidence without prematurely narrowing its analysis to a single theory.

[69] The Tribunal found instances of improper treatment but seemed to require direct proof of discrimination. The Tribunal failed to complete a thorough analysis of the evidence to determine if the evidence supported an inference of discrimination.

[70] The Tribunal described Mr. Watson's treatment of the Applicant during the interview process for the Foreman position and set out the test it applied:

> 81 Similarly, I find that Mr. Watson sought to undermine the Complainant's candidacy by using the 1992 workplace conflict against him. There was evidence from Steven Watson that any employee had the right to look at his own personnel records in Mr. Watson's office upon request. Upon a review of his personnel records, any employee has the right to destroy or cause to be destroyed any disciplinary or similar records after a five year time period. Accordingly, while it

> is true the workplace conflict occurred, it occurred ten years prior to the Complainant's application for promotion to Foreman; it was therefore remote in time and irrelevant to the job competition. Despite the foregoing, there was evidence it was an incident that Steven Watson continued to hold against the Complainant personally. In the context of their soured friendship, this is more than likely.
>
> 82 The evidence supports the conclusion that Mr. Watson did not want to be dealing with the Complainant on a more frequent basis as supervisor to Foreman, due to the personal conflicts between the two men in the past and the consequent suspicion and animosity between them. The Complainant, for his part, felt victimized by supervisor Steven Watson's animus toward him, which would appear on the evidence to be justified.
>
> 83 However, there has to be a nexus between the conduct under scrutiny and a prohibited ground of discrimination. The nexus can be inferred through circumstantial evidence, but the inference of discrimination must be more probable than other possible inferences. Failing that, there may be other workplace, union, and civil remedies open to the Complainant, but the standard needed to establish a human rights complaint will not have been met.
>
> (emphasis added)

[71] The Tribunal relied on *Hill*, for the proposition that an employer is not liable under the CHRA if any negative experiences or unfair treatment results from interpersonal conflict unrelated to any enumerated ground. However, the factual situation in *Hill*, is readily distinguishable from the case at bar.

[72] In *Hill*, the complainant, a visible minority, alleged that the employer discriminated against him on the basis of race under section 7 of the CHRA by failing to provide him with technical on-the-job training, by undermining his work, by denying him a promotion, by monitoring him more closely than other employees and by failing to provide him with a harassment free workplace. The tribunal stated:

> …I am not, however, prepared to infer from this that Mr. Hill was discriminated against in his own attempts to advance in his career. I say this because the evidence as a whole establishes that the problems Mr. Hill encountered were a product of his own making.
>
> The Commission has also cited Basi v. Canadian National Railway Co. (1988), 9 C.H.R.R. 5029 (C.H.R.T.) and Holden v. Canadian National Railway (1991), 14 C.H.R.R. 12 (F.C.A.) as authorities for the principle that it is sufficient if race was one of the factors in what occurred to Mr. Hill. I accept this principle but do not find it helpful in the immediate case. In my view, the personality conflict that developed between Mr. Hill and Mr. Ryan was not a product of race, whatever racial views Mr. Ryan might have held. It was a product of Mr. Hill's attitude towards his work, his resentment of authority and his tendency to project his problems on to other people.
>
> (emphasis added)

[73] In this case, the Tribunal did not make a factual finding that the Applicant was the source of problems in the workplace. The Tribunal noted that fellow employees thought Mr. Khiamal was highly skilled and conscientious; he interacted well with co-workers and had leadership qualities. The Tribunal also found that the Applicant was justifiably aggrieved by the Manager's treatment.

[74] The Applicant's conduct does not correspond with the conduct of the complainant in *Hill*. The Tribunal erred in its reliance on *Hill* for accepting the Respondent's explanation.

[75] The Tribunal's analysis leaves the door open for employers to assert that conduct was not discriminatory since it was merely supervisor hostility towards the employee. A respondent must prove that the non-discriminatory explanation is reasonable on the balance of probabilities based on the evidence.

[76] Mr. Watson does not say the Applicant was not hired as Foreman because of his dislike or animus toward the Applicant. Mr. Watson's explanation was that he was accommodating the other candidate's disability. He does not confirm the Respondent's explanation of animus toward the Applicant.

[77] The evidence of animus was equivocal. While there were clashes between the two over the years, the evidence of the deterioration of friendship between the Applicant and Mr. Watson was limited:

- The Applicant testified that he and Mr. Watson were always friends and are still friends.
- The Applicant testified that the change in Mr. Watson's position had no effect on their friendship.
- An independent witness testified that after the 1992 incident, the Applicant and Mr. Watson were no longer friends, but still friendly to each other.
- Mr. Watson testified that while he and the Applicant were closer friends prior to the 1992 incident and that their relationship had changed since then, they still engage in "small talk" and talk about general things.

[78] In the face of Mr. Watson's failure to confirm his hostility toward the Applicant when making the hiring decision, the Tribunal cannot simply accept the Respondent's explanation of animus as proven on the balance of probabilities. When the Tribunal inferred the animus from the testimony of Mr. Watson and the Applicant, it did so unreasonably without regard to the evidence before it.

Did the Tribunal err in failing to consider whether the evidence supported an inference that the impugned conduct was discrimination based on race, national or ethnic origin, or colour?

[79] The Applicant submits that the Tribunal erred by failing to realize that discrimination based on race, national or ethnic origin, or colour need be only one factor in the termination of the Applicant. The Applicant relies on *Schulyer v. Oneida Nation*, 2005 CHRT 10, at para. 7 for this proposition:

> The issue raised is not so much whether her dismissal was unjust but rather whether retaliation against the filing of the Disability Complaint constituted at least one of the factors in the alleged conduct against her, in violation of section 14.1 of the *Act*. This is precisely the form of discrimination contemplated by this provision.
>
> (emphasis added)

[80] In *Holden*, the Federal Court of Appeal stated that "as the case law establishes, it is sufficient that the discrimination be a basis for the employer's decision." Discrimination need only be one factor in the Respondent's decision not to promote the Applicant.

[81] The Tribunal is tasked with discerning if discrimination is a factor in the failure to hire. To do so, the Tribunal must consider all of the circumstantial evidence, make findings of facts and determine whether the inference that may be drawn from the facts support a finding of discrimination on the balance of probabilities.

[82] The Tribunal recognized it had to decide if evidence existed to support an inference of discrimination: It stated:

> However, there has to be a nexus between the conduct under scrutiny and a prohibited ground of discrimination. The nexus can be inferred through

> circumstantial evidence, but the inference of discrimination must be more probable than other possible inferences. Failing that, there may be other workplace, union, and civil remedies open to the Complainant, but the standard needed to establish a human rights complaint will not have been met (emphasis added).

[83] In making an inference, the fact at issue must be proved by other facts. Each piece of evidence need not alone lead to the conclusion. The pieces of evidence, each by themselves insufficient, are combined to provide a basis for the inference that the fact at issue exists. In doing so, care must be taken not to exclude individual pieces if they are being tendered as part of a larger combination. (John Sopinka, *The Law of Evidence in Canada*, 2nd ed., Toronto: Butterworths Canada Ltd., 1999, at para. 2.72, 2.77)

[84] In *Morris v. Canada (Armed Forces)*, [2001] C.H.R.D. No. 41 at paras. 134-144; aff'd 2005 FCA 154, the tribunal found that discrimination had occurred based on direct, anecdotal, circumstantial and statistical evidence.

[85] There is no indication that the Tribunal considered whether discrimination based on race, national or ethnic origin, or colour may also be a factor in the Respondent's failure to hire Mr. Khiamal. In focusing on the animosity between the Applicant and Mr. Watson, the Tribunal did not carry out a full analysis.

[86] While the Tribunal accepted that the Applicant had established a *prima facie* case of discrimination, it did not contextually analyze historical, differential, and statistical treatment evidence before it. The Tribunal compartmentalized its analysis, separating the evidence by the

various complaints advanced. It did not consider the discrimination hiring issue in the context of all of the evidence.

[87] Moreover, the Tribunal did not go beyond the Manager's personal conduct to consider Greyhound's role in regard to matters that are properly the employer's business:

- the hiring was done by Mr. Watson and Mr. Sealy and there was no evidence that Mr. Sealy bore any personal hostility towards the Applicant;
- the unexplained alteration of Greyhound's business records, that is the Applicant's vacation application;
- the denial of training for the Applicant which impacts on Greyhound's operations in the Edmonton garage;
- the improper adverse treatment by a superior of an employee;
- the statistical data indicating under- representation of minorities in supervisory positions.

These situations would ordinarily call for Greyhound to take remedial measures, yet there is no evidence the Respondent reviewed the flawed hiring process, attempted to find out who altered the vacation record, or deal with either the question of why the Applicant was denied training or why the Applicant was the subject of adverse treatment by his supervisor.

[88] The Tribunal had to consider the possibility that discrimination based on race, national or ethnic origin, or colour was a coexisting factor and to assess that possibility based on the evidence before it. I find that the Tribunal did not consider all of the evidence to assess whether

discrimination based on race, national or ethnic origins, or colour was a factor in the Respondent's failure to hire the Applicant.

Did the Tribunal err by not addressing the statistical evidence of minority under-representation in the Respondent's workplace?

[89] The Applicant submits that the Tribunal failed to address the statistical evidence before it regarding the under-representation of visible minority supervisors/foremen. The Applicant submits that the Tribunal did not consider how that was consistent with the Applicant's failure to obtain a promotion into the Foreman position and his experience of feeling historically racially discriminated against by the Respondent and its management at the Edmonton garage.

[90] The Respondent's Employment Equity Report and the Employment Equity Compliance contain statistical data that indicates minority members are under-represented in supervisory positions in Greyhound's employee work force. The statistical data represents a relatively small number of positions. Nevertheless it corresponds to the issue in this case and is relevant, even if not by itself determinative.

[91] The statistical evidence indicates that the under-representation of visible minorities in Greyhound's national workforce was as follows:

Senior, Middle and Other Managers	-3
Supervisors	-1
Supervisors: Crafts & Trades	**-3**
Intermediate Sales & Service	-1
Semi-skilled Manual Workers	-28

(emphasis added)

[92] The Respondent submits that the weight given to the statistical employment equity evidence is a question of fact and thus is to be afforded the highest level of deference by the reviewing Court. The Respondent further submits that the Tribunal did not err in not addressing the statistical issues of under-representation of visible minority supervisors in its decision, since it did not support the allegation of discrimination and was irrelevant to the claim of discrimination being adjudicated.

[93] The Respondent relies on the Federal Court of Appeal's decision in *Lincoln v. Bay Ferries Ltd*., 2004 FCA 204, at paras. 26-27. In that decision, the Federal Court of Appeal, in providing guidance with respect to the relationship between the *Employment Equity Act* and the CHRA, held that the former operates independently of a claim under section 7 of the latter which deals with discrimination in an employment setting:

> It thus appears that the Employment Equity Act was intended to operate independently and to impose on the employers to which it applies duties and obligations that are specific to that legislation, that are to be enforced pursuant to that legislation, and that are unrelated to a complaint under section 7 of the Canadian Human Rights Act. (emphasis added)

[94] The fact that the Respondent is in compliance with the *Employment Equity Act* is not equivalent to stating that the Respondent has a representative workforce. Rather, it means that the Respondent is in the process of implementing an equity plan that will allow it to achieve equitable representation.

[95] Whether the statistical data submitted by the Applicant was relevant to the issue and supported the allegation of discrimination is a finding to be made by the Tribunal. There is no doubt that this evidence was before the Tribunal.

[96] In my view, use of statistical data contained in the Employment Equity Report can be distinguished from the attempted use of the legislation in *Lincoln Bay*, above. In this case, the Applicant is not speaking to the operation or enforcement of the *Employment Equity Act*. Rather, the Applicant is attempting to advance its discrimination case using data collected pursuant to the *Employment Equity Act*. It is the inference that may be drawn from the statistical data which is of significance. The weight to be attributed to it is to be determined by the Tribunal.

[97] In *Canada (Human Rights Commission) v. Canada (Department of National Health and Welfare)*,[1998] F.C.J. No. 432, (*re Chopra)*, Justice Richard, cited the tribunal in *Blake v. Minister of Correctional Services* (1984), 5 C.H.R.R. D/2417, regarding the use of statistical information in human rights cases:

> 20 The Board, in the Blake case, fully reviewed the law in respect of the introduction of statistical evidence in human rights cases. The Board noted, at paragraph 20094:
>
> > Often discrimination is not overt. Rarely does an employer expressly state that it refused to hire a qualified applicant because she was a woman. Acts of discrimination and intent to discriminate are often proved by circumstantial evidence (Re: Windsor Board of Education and Federation of Women Teachers' Associations of Ontario (1982), 3 L.A.C. (3d) 426, at 430). "Statistical evidence is an important tool for placing seemingly inoffensive employment practices in their proper perspective" (Senter v. General Motors Corp., 532 F. 2d 511 (1976)) ...
>
> 21 Under the heading "Circumstantial Evidence", the Board continued:
>
> > ... Statistics show patterns of conduct rather than specific occurrences. Statistics represent a form of circumstantial evidence from which inferences of discriminatory conduct may be drawn (Davis v. Califano, 613 F. 2d 957 (1979) at 962). It is within the rubric of "circumstantial evidence" that statistical evidence in human rights cases should be considered. Like all circumstantial evidence, statistics are to be considered along with all surrounding facts and circumstances (International Brotherhood of Teamsters v. U.S., 97 S.Ct. 1843 (1977), at 1857). [Paragraph 20096]
> >
> > Statistical evidence may be used in a number of ways to buttress both complainants' and respondents' cases. Statistics may show racial or sexual

> disparities in decisions to hire, promote (Teamsters, supra; Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138 (1977); Rich v. Martin Marietta Corp., 467 F. supp. 587 (1979)) or dismiss (Ingram v. Natural Footwear Ltd. (1980), 1 C.H.R.R. D/59) employees. They may show disparities between the number of women employed in a particular job and the number of qualified women in the labour market (Offierski v. Peterborough Board of Education (1980), 1 C.H.R.R. D/33; Windsor, supra). They may show that subjective and discretionary decisions by employers are being made in a discriminatory manner ... [Paragraph 20097]
>
> (emphasis added)

[98] Ultimately, in *re Chopra*, Justice Richard concluded that the tribunal had erred by disallowing the applicants from adducing general evidence of a systemic problem as circumstantial evidence to infer that discrimination probably occurred in that case as well.

[99] While the Tribunal, in this case, did not disallow the Applicant from submitting statistical evidence, there is no indication whether it had regard to any possible inferences to be made from the statistical data submitted.

[100] The Tribunal had statistical data on minority under-representation in supervisory positions before it. This evidence is reliable given that it originates from the Respondent. It was the subject of submissions by both the Applicant and the Respondent. It was open to the Tribunal to consider what weight, if any, to give to the statistical data.

[101] The Tribunal did not make any reference to the statistical data nor did it offer any reason as to why the statistical evidence was not considered. It is unclear whether the Tribunal turned its

mind to this evidence. (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, at paras. 15 and 17)

[102] In my view, the conclusion that the inference of discrimination is less probable than other possible inferences is flawed in that the Tribunal does not appear to consider the inference to be made from the statistical data before it.

Other Issues

[103] The Tribunal dismissed the Applicant's harassment complaint on an incomplete analysis. For example, the Tribunal did not address the Applicant's altered vacation date. It also found the Manager's threat poisoned the workplace but left off that analysis after deciding the Applicant was not cowed from applying for the Foreman position. The Tribunal does not consider if these untoward events support any inference one way or the other.

[104] After the Tribunal had found the Applicant had not been harassed in the denial of courses, it found the Applicant had made a *prima facie* case for employment discrimination on the same facts. The Tribunal then found the Respondent reasonably explained that the denial of training opportunities was because of the Manager's animus toward the Applicant, an analysis I have found to be flawed.

[105] Given these questions about the dismissal of the Applicant's harassment complaint, any re-determination must address harassment as well as discrimination.

CONCLUSION

[106] I conclude that the Tribunal's decision is unreasonable: firstly, because the Tribunal erred in assessing the issue of animus between the Manager and the Applicant; secondly because the Tribunal failed to consider whether discrimination was a contributing factor in the Respondent's failure to hire; and thirdly, because the Tribunal did not refer to relevant statistical data or give reasons why it did not consider that evidence relevant. Furthermore, I also conclude that the harassment issue must be revisited.

[107] Given Mr. Khiamal's success in the judicial review and the circumstances of this case, I consider it appropriate to award costs to the Applicant.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.
2. The matter is remitted back for re-determination on all issues before a differently constituted tribunal.
3. Costs are awarded to the Applicant.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1633-07
STYLE OF CAUSE:	SURESH KHIAMAL v. CANADIAN HUMAN RIGHTS COMMISSION and GREYHOUND CANADA TRANSPORTATION CORPORATION
PLACE OF HEARING:	Edmonton, AB
DATE OF HEARING:	August 13, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	May 12, 2009

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