Federal Court  Cour fédérale

Date: 20130121

Docket: T-372-12

Citation: 2013 FC 49

Ottawa, Ontario, January 21, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

NORMAN MURRAY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Murray asks the Court to quash a decision of the Public Service Staffing Tribunal [PSST] dismissing his request to submit post-hearing evidence and dismissing his complaint of discrimination in a staffing process undertaken by the Immigration and Refugee Board [IRB] in 2006. The focus of this application is the reasonableness of the decision of the PSST not to accept into evidence the Public Service Commission of Canada report entitled *Audit of the Immigration and Refugee Board of Canada: A report by the Public Service Commission of Canada*, October 2009 [PSC Audit]. The PSST's decision on the merits of the complaint will stand or fall with this Court's review of the decision on admission of the post-hearing evidence.

[2] This is the second occasion that Mr. Murray has challenged a decision of the PSST relating to his complaint of discrimination in the IRB staffing process in 2006. The first resulted in a judgment of this Court in his favour: *Murray v Canada (Attorney General)*, 2011 FC 542 [*Murray I*]. The facts giving rise to his complaint of discrimination are summarized at paragraphs 3 to 5 of *Murray I*:

> [3] Norman Murray is an African-Canadian man who has been employed with the Immigration and Refugee Board (IRB) in Toronto since 1989. Since commencing his employment he has worked as a Case Officer (CO) at the PM-01 level, except for a three-year acting assignment as a Refugee Protection Officer (RPO) at the PM-04 level from 2002 to 2005.
>
> [4] In October 2006, the IRB announced plans to reorganize. Its goal was to avoid layoffs that could have resulted from the lower caseload of the Refugee Protection Division of the IRB after September 11, 2001. As part of the reorganization, current RPO positions at the PM-04 level were to be replaced by Tribunal Officer (TO) positions at the PM-05 level. RPOs who qualified for the new TO position were appointed using a non-advertised appointment process. Those who failed to qualify remained at the PM-04 level as Development Tribunal Officers, and were provided with training with a view to becoming RPOs at the PM-05 level. Mr. Murray did not qualify as his acting PM-04 appointment had ended.
>
> [5] Mr. Murray filed a complaint with the PSST alleging that the non-advertised appointment process used to appoint the TOs discriminated against him on the basis of race and that the process constituted systemic discrimination and created a job barrier for the visible minority employees in CO positions who were clustered at the PM-01 level.

[3] At issue in *Murray I* was whether the PSST breached procedural fairness by failing to address whether to admit the PSC Audit as evidence. It was made public after the hearing and was

submitted to the PSST and the IRB by Mr. Murray in October 2009. This was roughly one year after the PSST heard Mr. Murray's complaint, but it was before a decision was rendered. The PSST did not respond to Mr. Murray's request to have the PSC Audit considered, nor, in its reasons rejecting Mr. Murray's complaint, did it make any reference to this audit.

[4] In *Murray I*, the Court found the PSST's failure to acknowledge or consider the PSC Audit to be a breach of procedural fairness. The Court quashed the PSST's December 21, 2009, decision and remitted the matter for reconsideration in accordance with instructions that the PSST hear submissions by the parties on the relevance of the PSC Audit to the applicant's complaint and, after considering these submissions, rule on whether to receive the PSC Audit as evidence.

[5] Submissions were made to the PSST regarding the relevance of the PSC Audit to Mr. Murray's complaint and whether it should be accepted into evidence by Mr. Murray, the IRB and the PSC. By decision dated November 30, 2011, the PSST held that it would not accept the PSC Audit into evidence and dismissed the complaint for the reasons given in *Murray I*.

[6] The parties agreed that the three-part test summarized in *Whyte v Canadian National Railway*, 2010 CHRT 6 [*Whyte*], which followed that used in *Vermette v Canadian Broadcasting Corporation*, [1994] CHRD 14, should be used. The test is the following:

> 1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial;
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> 2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and

> 3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[7] The parties and the PSST agreed that the first and third prongs of this test were met. The issue for determination was whether the PSC Audit satisfied the second prong: Would it probably have an important influence on the result of the case?

[8] The PSC Audit made the following observation at paragraph 19 regarding representativeness, which concerns whether "appointment processes are conducted without bias and do not create systemic barriers to help achieve a public service that reflects the Canadian population it serves:"

> We found that the IRB put in place mandatory PSC appointment policies. We found IRB-approved policies for area of selection, revocation and corrective action and the criteria for choosing non-advertised processes. The IRB's criteria on the Use of Non-Advertised Appointment Processes and the Policy on Area of Selection were not completely consistent with the PSC's Appointment Policy on the Choice of Appointment Process. The guiding value of representativeness was not identified in these two policies. The IRB provided a revised draft which addressed this issue, however it had yet to approve the policy changes. With the exception of this omission, the policies met the PSC requirements. [emphasis added]

[9] In other words, according to the PSC Audit, the IRB put in place the appointment policies required by the PSC and these policies met PSC's requirements, except on the issue of representativeness, "which was not identified in these policies." Not surprisingly, given its omission from IRB's relevant staffing policies, the PSC Audit "found no rationales [among the

IRB's written rationales for the non-advertised appointment processes it surveyed] that addressed [the] value [of representativeness]."

[10] The PSC Audit also concluded that of the thirty-five appointments sampled in the first sample – which was "selected arbitrarily to represent a cross-section of the IRB's regions and divisions, key occupational groups as well as collective and non-collective processes" – merit was either not met or not demonstrated in seven instances. Of these thirty-five appointment processes, fourteen were "non-advertised," as was the process complained of by Mr. Murray. Of the fourteen non-advertised processes, merit was either not met or not demonstrated in four cases. Of these four, two lacked any documentation as to whether merit was met, and in one case merit was demonstrably not met. In other words, merit was either not met or not demonstrated in 29% of the non-advertised processes surveyed in the PSC Audit. For comparison, in the advertised processes sampled, merit was either not met or not demonstrated in fewer cases – three out of twenty-one, or in 17% of the time.

[11] The PSC Audit also continued with criticisms of higher-level staffing processes (e.g. GIC appointments and executives), where "preferential treatment" was identified as a problem, and other human resources issues of a more general nature, such as planning, data gathering, monitoring, and not following the advice of human resource advisors.

[12] The PSST held that the PSC Audit did not satisfy the second prong of the *Whyte* test for the following reasons:

22 The result of the case in *Murray* 2009 was that the Tribunal found that the complainant has not established a *prima facie* case of discrimination in the respondent's choice of a non-advertised process and, even if he had, the respondent provided a reasonable non-discriminatory explanation for choosing the non-advertised process. In other words, the result of the case was that the complainant had not proven discrimination and, therefore, abuse of authority in the choice of process.

23 The Tribunal thoroughly reviewed the PSC audit, and all the arguments put forth by the parties to determined whether this evidence, if given, would probably have an important influence, although not decisive, on the result of the case.

24 The Tribunal finds that no conclusions can possibly by drawn from the PSC audit samples to support the complainant's *prima facie* case. No relevant generalizations can be made from the first sample, and the second sample focused on former GIC and EX positions or equivalent. Moreover, the PSC audit cannot be considered as evidence the respondent's staffing actions through non-advertised processes in general and, more importantly, the specific non-advertised processes at issue in this complaint, lacked representativeness. The most that can be drawn from this evidence is that the written rationales omitted to explain how the staffing value of representativeness was met in these processes.

25 The PSC audit reviewed staffing files and found some deficiencies in how some appointment processes were documented. It did not conclude that the appointments did not respect the PSC's staffing value of representativeness. Rather, the PSC audit found that in those staffing actions reviewed, the document explaining the rationale for proceeding with a non-advertised process did not address the value of representativeness (see page 15 of the PSC audit).

26 At the hearing of Mr. Murray's complaint, the written rationale for the specific non-advertised appointment process in question was entered into evidence, and the parties had an opportunity to examine and cross-examine witnesses on this document. While the written rationale did not explain how the staffing values had been met in proceeding by way of non-advertised processes, the Tribunal found that the respondent provided a reasonable non-discriminatory explanation for its choice of process (see *Murray* 2009, at para.115).

> The finding of the PSC audit that no rationales addressed the value of representativeness would have no influence on the result of this case. [emphasis added]

[13] Mr. Murray submits that the PSST erred at paragraph 24 of its reasons by holding that no conclusions could be drawn from the samples in the PSC Audit to support his *prima facie* case. He submits that the PSC Audit supports his *prima facie* case in two ways:

> Firstly, the audit provides evidence of an organizational culture and/or employment systems at the Immigration and Refugee Board (IRB) that supports a finding of systemic discrimination as an indicator of a barrier to full participation and promotion of employees within the IRB. Secondly, the PSC audit provides evidence that is relevant to the allegation that the ghettoization or "bottlenecking" of employees within the Applicant's cohort is not neutral and therefore represents circumstantial evidence of discrimination in respect of the non-promotion and advancement of racialized visible minority CMOs at the PM-01 level.

[14] I do not accept the submission of the respondent that it was reasonable for the PSST to conclude that the PSC Audit could not have had an influence on the case because that audit "does not provide any evidence to support a finding of systemic racial discrimination." In my view, the PSC Audit could support a finding of systemic racial discrimination in staffing at the IRB for the reasons given by the PSC at paragraphs 31 and 32 of its submissions to the PSST:

> It is difficult to conclude that the Audit has no relevance whatsoever to whether there was systemic discrimination in the respondent's employment practices and procedures, given that it does deal with an analysis of the respondent's employment systems during a time period parallel to the appointment process at issue. It does conclude that there were serious deficiencies in merit and values being met or demonstrated in a number of files and that there were shortcomings in monitoring. It also found that two of the respondent's staffing

> policies did not expressly mention the value of representativeness (as noted in para. 7, above), the latter which is required by PSC policy.
>
> Case law recognizes that where established staffing rules are applied less rigorously, or not at all, this can leave room for more informal approaches more susceptible to bias, and therefore to discrimination.

[15] However, although I agree with the applicant that the PSC Audit may have provided relevant and perhaps important evidence of systemic discrimination at the IRB with respect to staffing, that alone would not render the decision under review unreasonable.

[16] A finding of systemic discrimination might provide evidence that Mr. Murray suffered discrimination; however, it is circumstantial evidence: *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113, at para. 24. Therefore, even if accepted, the PSST would have to determine whether to infer from the PSC Audit that there was systemic discrimination and whether, coupled with the other evidence offered by Mr. Murray, discrimination probably occurred in Mr. Murray's case. In *Murray I*, the PSST accurately captured this point:

> The evidence must establish first that systemic barriers exists, and, secondly that there is a link between the evidence of systemic barriers and evidence of individual discrimination against the compliant, based on his race. Both evidentiary steps are necessary. Without both, there is no *prima facie* case.

[17] In *Murray I*, and in the decision under review, the PSST held that this link was not established because "the respondent provided a reasonable non-discriminatory explanation for its choice of process." That reasonable non-discriminatory explanation was stated in *Murray I* at paragraph 115 as follows: "[P]roceeding by way of non-advertised processes eliminated the

requirement to declare employees who had been substantive RPOs surplus and, therefore, ensured their ongoing employment."

[18] In the decision under review, the PSST provided little reason why its assessment of the respondent's explanation might not have been altered by virtue of the PSC Audit findings. However, the Court must, when assessing whether a decision is reasonable (as described in *Dunsmuir v. New Brunswick*, 2008 SCC 9), ask whether the reasons allow it to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. Examining the record, including the PSC Audit, the findings made by the PSST in the decision under review, and the reasons in *Murray I*, which were re-adopted, I cannot find that the decision of the PSST that the PSC Audit "would not probably have an important influence on the result of the case" is unreasonable.

[19] I reach this conclusion primarily for two reasons. First, the PSC Audit does not find that the staffing processes in place at the IRB constitute systemic discrimination. Accordingly, the PSST would still have had to find systemic discrimination if it were to use that as a basis for finding that Mr. Murray had presented a *prima facie* case. Such a finding based on the PSC Audit is speculative, at best. Second, the explanation the IRB offered as to why in the particular staffing process under review, a non-advertised process was used, appears to the Court to have been a reasonable and very likely explanation. There is no suggestion made by the applicant that it was specious or fabricated. Thus, there is nothing to suggest that the explanation offered was

not credible or that the addition of the PSC Audit would change that assessment. Thus, neither alone nor in combination with a finding, had there been one made, of systemic discrimination, would the tribunal's acceptance of the offered rationale likely have changed.

[20] Accordingly, this application must be dismissed.

[21] I concur with the parties' agreement that costs ought to be fixed at $3,000.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs payable to the respondent, fixed in the amount of $3,000.00, inclusive of fees, disbursement, and taxes.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Yavar Hameed	FOR THE APPLICANT
Martin Desmeules	FOR THE RESPONDENT

SOLICITORS OF RECORD:

HAMEED & FARROKHZAD Barristers & Solicitors Ottawa, Ontario	FOR THE APPLICANT
WILLIAM F. PENTNEY Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT