

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20140404**

**Docket: A-332-11**

**Citation: 2014 FCA 91**

**CORAM: NOËL J.A.  
PELLETIER J.A.  
MAINVILLE J.A.**

**BETWEEN:**

**RAMAN AN THAMBIAH**

**Appellant**

**and**

**MARITIME EMPLOYERS  
ASSOCIATION/L'ASSOCIATION DES  
EMPLOYEURS MARITIMES**

**Respondent**

**and**

**SYNDICAT DES DEBARDEURS DU PORT  
DE MONTRÉAL**

**Intervener**

Heard at Montréal, Quebec, on February 24, 2014.

Judgment delivered at Ottawa, Ontario, on April 4, 2014.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

NOËL J.A.  
MAINVILLE J.A.

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**REASONS FOR JUDGMENT**

**PELLETIER J.A.**

[1] Mr. Thambiah appeals from a decision of the Federal Court, reported as *Thambiah v. Maritime Employer's Association*, 2011 FC 727, which dismissed his application for judicial review of a decision of a tribunal appointed pursuant to *Canadian Human Rights Act* R.S.C 1985, c. H-6 (the Tribunal). The Tribunal's decision is reported at 2010 CHRT 8.

[2] Mr. Thambiah is a longshoreman in the Port of Montréal, employed by the Maritime Employers Association (MEA). The longshoring workforce is divided into 3 groups: employees with job security, and employees in the first and second reserves, with pay and benefits increasing as one rises from one level to the next. Mr. Thambiah was in the second reserve when he was given the opportunity to qualify for the first reserve. In order to do so, he needed to pass two tests: one to demonstrate proficiency in the handling of a lift truck (OLIFT) and one to demonstrate proficiency in the handling of a truck (OTUGM). He passed the OLIFT test without incident. He failed the OTUGM test a first time and was allowed to take it a second time. He failed it the second time. He asked to be allowed to take the test a third time and was refused on the basis of the MEA's policy which limits applicants to two tries. Mr. Thambiah complained that he was aware of individuals who had been allowed a third chance to take the test. Nonetheless, he was refused another opportunity to take the test.

[3] Mr. Thambiah's union, the Syndicat des débardeurs du port de Montréal (the Union), made inquiries of the employer's representative and decided not to grieve the matter on Mr. Thambiah's behalf. Mr. Thambiah complained to the Canada Industrial Relations Board (CIRB) that the Union had failed in its duty of fair representation. The Union filed a reply to the complaint (Reply) in which the following appeared:

Lors de la dernière évaluation, monsieur Thambiah a accroché et trainé sur près de 10 pieds un conteneur avec le camion.

On the last test, Mr. Thambiah struck a container with the truck and dragged it for nearly 10 feet.

[Translation by the Court]

[4] The CIRB decided Mr. Thambiah's complaint without an oral hearing, relying on the record filed by the parties. According to Board's decision, Mr. Thambiah acknowledged that he had failed the test but explained that it was due to being distracted (Appeal Book, page 23). The CIRB dismissed Mr. Thambiah's complaint on the basis that it was made out of time but went on to say that, in any event, it would have dismissed the case on the merits as the Union had done all that it was required to do in Mr. Thambiah's case. The CIRB made no comment with respect to Mr. Thambiah's credibility.

[5] Unsatisfied with this result, Mr. Thambiah complained to the Canadian Human Rights Commission (the Commission) that he had been discriminated against on the grounds of ethnicity, age and family status. The Commission referred the matter to the Tribunal. Several days prior to the beginning of the hearing, counsel for the MEA advised counsel for Mr. Thambiah that the allegation contained in the Union's Reply to the effect that Mr. Thambiah had dragged a container over a distance of 10 feet was incorrect and that no evidence would be led to that effect. In the course of the hearing, counsel for the MEA advised the Tribunal that it was not taking the position that Mr. Thambiah had dragged a container it for 10 feet and, should that allegation appear in any documents put before the Tribunal, the Tribunal should ignore it.

[6] The Tribunal heard evidence over a period of 5 days, from January 11-15, 2010. The MEA's representative who administered the tests to Mr. Thambiah gave evidence and was cross examined, but not with respect to the allegation contained in the Union's Reply. No union representative testified. At the close of evidence, counsel for Mr. Thambiah abandoned the allegations of discrimination on the basis of ethnicity and age. As a result, the only issue before the Tribunal was whether Mr. Thambiah was discriminated against on the basis of family status due to nepotism. That issue arises only in the context of the MEA's refusal to give Mr. Thambiah a third test.

[7] Early in its reasons, the Tribunal addressed the question of Mr. Thambiah's credibility. Since counsel for Mr. Thambiah made this the principal question on appeal, it is worth quoting the Tribunal's reasons:

[45] We note a great many contradictions in the Complainant's testimony and consider it useful to reproduce some of the more significant ones here.

[46] At one point the Complainant admitted that he had failed the two truck driving tests, at another point he denied it, and finally he tried to justify his failure by advancing unverified and unverifiable hypotheses that changed over time.

[47] Finding the consequences of his failure so disproportionate to the error held against him, he tried desperately to find a way out of this impasse.

[48] He gave the impression of someone overwhelmed by the consequences of his failure, who was trying desperately to understand what could possibly have happened to him. During the hearing, he gave voice to his thoughts and advanced a number of hypotheses.

[49] In his view, discrimination and sabotage by the trainer and the evaluator partly explained his two failed tests. Several outside factors also explained the failed tests. His testimony therefore went in all directions. His hypotheses were sometimes hard to imagine and even harder to verify.

[50] Lastly, the Complainant advanced few substantive facts to support his position and mainly hid behind conjecture or hearsay.

[51] By his testimony, the Complainant clearly showed that he had difficulty distinguishing between the facts of his case and hypotheses that might explain those facts.

[52] In the final analysis, it is difficult to give much weight to the Complainant's version when compared with that of a witness testifying about facts of which he or she has personal knowledge.

[53] In short, in our opinion, the Complainant's credibility is very low.

[8] The Tribunal went on to examine the circumstances of the tests and concluded that Mr. Thambiah struck a container and was unable to properly back up a truck. The Tribunal found that Mr. Thambiah's explanations for these lapses were not persuasive. The question of a container being dragged for 10 feet did not arise. The Tribunal then turned to the "2 test maximum rule" and concluded at paragraph 99 of its reasons that the 2 test maximum rule was applied "regardless of the candidate's age, ethnicity and family ties to members of the MEA". The Tribunal found that the rule was applied to Mr. Thambiah without discrimination. Finally, the Tribunal examined all the cases in which it was alleged that a candidate was offered a 3rd chance to take a test. In each case, the Tribunal found that there was either evidence of exceptional circumstances or that the allegation was based on misinformation. The Tribunal concluded that there was no evidence of nepotism at the MEA: paragraphs 140-144 of the Tribunal's reasons. As a result, Mr. Thambiah's complaint was dismissed.

[9] Unhappy with this result, Mr. Thambiah applied for judicial review of the Tribunal's decision. The Federal Court, as noted above, dismissed his application. In summary, the Court noted that the standard of review of the Tribunal's decision was reasonableness and that, having regard to record before it, including the Tribunal's assessment of Mr. Thambiah's credibility; it was not its function to substitute its assessment of the evidence for the Tribunal's. In the Court's view, the

Tribunal's conclusion was supported by the record before it and fell within the range of acceptable outcomes which are defensible in respect of facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47.

[10] Mr. Thambiah now brings this appeal of the Federal Court's decision. The only argument made on his behalf by counsel is that no deference is owed to the Tribunal or to the Federal Court because their decisions were based upon deliberate lies by the MEA's representative or the Union or both. These lies tainted Mr. Thambiah's credibility which, in turn, coloured the Tribunal and the Court's view of his evidence. We are asked to allow the appeal and to set aside the decision of the Tribunal.

[11] This line of argument is singularly without merit. Mr. Thambiah's counsel argues that the lies began with the Union's Reply in which it is said that Mr. Thambiah struck and dragged a container for 10 feet. This statement, now acknowledged to be incorrect, played no part in the CIRB's decision. The CIRB proceeded on the basis that Mr. Thambiah acknowledged that he had failed the tests: see Supplementary Appeal Book, at p. 17. Furthermore, the CIRB's decision makes no comment whatsoever as to Mr. Thambiah's credibility.

[12] The Union's Reply was not evidence before the Tribunal. Counsel for Mr. Thambiah appeared to attribute the statements in the Union's reply to the MEA's witness which is clearly wrong. In any event, that witness, who was repeatedly called a liar in argument before us, was not cross-examined on the statement in the Union's Reply or how it came to be made. It is patently



unfair to assert, at this stage, that he did not tell the truth when the opportunity to cross-examine him on the relevant facts was available and was not taken.

[13] The Tribunal's reasons for questioning Mr. Thambiah's credibility arose entirely from Mr. Thambiah's own evidence. He contradicted himself as to whether or not he had failed the tests. He offered explanations for his failure which were "hard to imagine and even harder to verify". He was unable to marshal any facts to support his version of events and resorted to conjecture and hearsay. Perhaps the Tribunal's most telling comment was that Mr. Thambiah "had difficulty distinguishing between the facts of his case and hypotheses that might explain those facts": Tribunal's reasons at paragraphs 49, 51.

[14] There was no basis in law for the Federal Court to interfere with the Tribunal's decision. Nothing in the record and nothing which was said to us in argument would justify any interference with the Federal Court's decision.

[15] In the course of the hearing of this appeal, Counsel for Mr. Thambiah repeatedly and without any shadow of proof, called an MEA witness a liar, and suggested, once again without any proof, that the witness was motivated by racism. This type of pleading is totally unacceptable and deserves to be denounced by this Court. If a witness' integrity is to be challenged, the witness must be given the chance to explain himself: see *R v. Giroux*, 2001 O.A.C. 50, [2006] O.C.J. 1375 (C.A.) (Q.L.) at paragraphs 40-49, applying *Browne v. Dunn*, (1893), 6 R. 67 (H.L.) In this case, there was an opportunity to cross-examine the witness at the tribunal on the testimony which counsel found

objectionable, but it was not taken. In those circumstances, it was improper for counsel to make the attacks he did.

[16] I would dismiss the appeal with costs to the respondent.

"J.D. Denis Pelletier"

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J.A.

"I agree  
Marc Noël J.A."

"I agree  
Robert M. Mainville J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-332-11

**STYLE OF CAUSE:** RAMAN AN THAMBIAH v.  
MARITIME EMPLOYERS  
ASSOCIATION/L'ASSOCIATION  
DES EMPLOYEURS MARITIMES  
AND SYNDICAT DES  
DEBARDEURS DU PORT DE  
MONTRÉAL

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** FEBRUARY 24, 2014

**REASONS FOR JUDGMENT BY:**

PELLETIER J.A.

**CONCURRED IN BY:**

NOËL J.A.  
MAINVILLE J.A.

**DATED:** APRIL 4, 2014

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