

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS
DE LA PERSONNE

WILLIAM G. M. SHMUIR

- and -

CANADIAN HUMAN RIGHTS COMMISSION

- and -

CARNIVAL CRUISE LINES

Complainant

Commission

Respondent

DECISION

MEMBER: Edward P. Lustig 2010 CHRT 18
2010/06/24

I. THE COMPLAINT

II. FINDINGS OF FACT

III. LAW

A. Establishing a Prima Facie case of discrimination

B. Reversal of burden of proof and justification

IV. ANALYSIS

A. Has the Respondent discriminated against the Complainant contrary to S. 7 (a) of the Act by denying the Complainant equal access to employment on the basis of his physical disability?

B. Has the Respondent provided a reasonable (non-pretextual) explanation in answer to the prima facie case of discrimination?

V. DECISION

I. THE COMPLAINT

[1] The Complainant Mr. William Shmuir filed a complaint with the Canadian Human Rights Commission (the "Commission") on March 21st, 2007 alleging that the Respondent Carnival Cruise Lines ("Carnival") discriminated against him contrary to s. 7 (a) of the *Canadian Human Rights Act* (the "Act") by refusing to employ him on the basis of a physical disability.

[2] Mr. Shmuir's complaint alleges that on October 11th, 2006 he attended a job presentation and interview session (the "job fair") in Toronto, ON that he had been invited to by Cast-a-Way, the recruiting employment agency for Carnival, for a position of Corporate Trainer with Carnival. He alleges that he advised Carnival through Cast-a-Way that he was visually impaired prior to receiving the invitation and attending the job fair. At the job fair, following a presentation by Carnival, a required multiple choice basic skills test was distributed to attendees with a scantron answer sheet. A scantron answer sheet contains "bubbles" that must be shaded in to identify the correct multiple choice answer to allow for a computer to read answers. Mr. Shmuir indicated to Carnival that he could not fill out the scantron answer sheet because of his visual impairment and requested the opportunity to fill it out by writing answers on the sheet. He alleges that Carnival refused him the opportunity to take the required test in a manner that would accommodate his visual impairment as he had requested, by circling his chosen answers on the question sheet. He alleges that he was told by a representative of Carnival that because of his visual impairment and the requirements of the job, there was no point in him pursuing the job opportunity for the Corporate Trainer position. He further alleges that he was then asked to leave the job fair thereby effectively denying him the opportunity to obtain employment.

II. FINDINGS OF FACT

[3] Mr. Shmuir has High Myopia and Congenital Familial Nystagmus in both eyes, resulting in significantly subnormal vision. His best corrected visual acuities measure 20/200 in both eyes. In essence, this means that with high myopic correction glasses he can see in each eye at 20 feet what a person with 20/20 (normal vision) can see at 200 feet. His eyes are not able to stay in focus and move about involuntarily. He cannot hold a vehicle driver's licence as a consequence of his visual impairment. The Tribunal observed that he was able, however, to haltingly walk to the witness stand without assistance and to read slowly at close range documents presented to him.

[4] Mr. Shmuir is 37 years of age. Despite his life long disability he has lived independently since he was a young man. He currently lives in Hamilton and works without pay for a not-for-profit corporation called Community Functionality Facilitation Inc. That organization, according to Mr. Shmuir, facilitates disabled individuals in obtaining services and accommodations within their community. His only source of income comes from an Ontario Disability Subsidy that pays him between \$13,000.00 and \$14,000.00 per year including a small meal subsidy of about \$200.00 a month. He

obtained a Child and Youth Worker Diploma from Mohawk College in 2003 after successfully completing a three year program. Other than his current unpaid work with Community Functionality Facilitation Inc., it does not appear that he has been employed except with a contractor doing small renovation jobs such as painting during the mid 1990's. He also claims to have had some experience working with children with developmental disabilities and with young offenders.

[5] Cast-a-Way is the employment agency that Carnival and other Cruise Lines usually engage to assist with recruitment. Cast-a-Way is a separate company from Carnival. It was not a party in these proceedings. In or about 2006 Cast-a-Way advertised a number of positions for various Cruise Line companies. Additionally, as part of its recruitment efforts for Shipboard Corporate Trainers, in the Spring/Summer of 2006 Carnival also placed advertisements in Toronto newspapers seeking applications for candidates for those positions. The position was described specifically as "Shipboard Corporate Trainer", indicating that the duties of the position would be performed onboard one of its cruise ships while at sea. The advertisement stated that the position required previous group training experience, and excellent presentation, communication, and public speaking skills.

[6] Mr. Shmuir submitted a general résumé to Cast-a-Way in or about July of 2006. Receipt of Mr. Shmuir's résumé was confirmed by an e-mail by Mr. Eric Theriault on July 6, 2006. In Mr. Theriault's e-mail he stated that Cast-a-Way would be looking for qualified youth counsellors for Disney Cruise Lines in the Fall of 2006.

[7] Mr. Shmuir's evidence was that with his résumé there was also a cover letter submitted that, among other things, pointed out to Cast-a-Way that he was a disabled individual with low vision. Mr. Shmuir's evidence was that both he and his work colleague and friend Mr. Ben Bishop e-mailed this cover letter with the résumé on at least two occasions to Cast-a-Way. Mr. Bishop gave evidence that in addition to e-mailing the cover letter, he also faxed it to Cast-a-Way on or about July 4, 2006. The cover letter did not have a date, nor did it reference the inclusion of a résumé with it. There was no documented evidence of the cover letter having been forwarded by e-mail or fax nor was there any evidence of it having been received by Carnival or Cast-a-Way. Cast-a-Way's correspondence referred only to receipt of the résumé. The résumé did not refer to any disability. Representatives of Carnival and Cast-a-Way who gave evidence at the Hearing denied that they had ever received the cover letter or that they had any indication of Mr. Shmuir's disability prior to October 11, 2006, when the job fair was held for a Corporate Trainer position with Carnival.

[8] There was no follow up by Cast-a-Way for the Disney Cruise Lines youth counsellor job after Mr. Theriault's e-mail, but at some time before October 2, 2006, Ms. Nicola Barton of Cast-a-Way called Mr. Shmuir to discuss a Corporate Trainer position with Carnival.

[9] Mr. Shmuir's evidence was that during the call from Ms. Barton he mentioned his visual impairment to her. Ms. Barton's evidence was that he did not mention his disability to her. Her evidence was that she reviewed Mr. Shmuir's experience to ensure that he could meet some of the basic job requirements, particularly in terms of work experience.

She claimed that she explained to him what was required of a candidate before he or she could work on a ship to determine whether the candidate would be suited to living and working at sea. Her evidence was that she told Mr. Shmuir during the telephone conversation that one of the fundamental requirements for working on the ship was that he would have to have a thorough medical examination and that he must be physically fit and able in accordance with Carnival's medical policy and safety at sea policies.

[10] Mr. Shmuir's evidence was that he followed up Ms. Barton's call to him a day or so later with a telephone call to her for the express purpose of confirming again his visual impairment, to make sure she was clearly aware of it. Mr. Shmuir contended that she told him that she was not concerned with his visual impairment and as long as he could get to the ship he would be fine. Ms. Barton gave evidence that she had no recollection of such a conversation.

[11] Ms. Barton sent an e-mail dated October 2, 2006 to Mr. Shmuir in which she indicated that he had been selected to attend Carnival's Corporate Trainer presentation and interviews. The e-mail indicated that the presentation would be held on Wednesday, October 11, 2006 starting at 9:00 a.m. in the Mount Pleasant room of the Grand Hotel on Jarvis Street in Toronto. The e-mail also indicated that Mr. Shmuir should dress professionally in business attire, that the presentation would take one hour but that he should plan to spend the day, given that interviews would be conducted after the presentation. The letter also requested that Mr. Shmuir bring a copy of his passport, an updated résumé, photograph, and a criminal background check.

[12] On October 11, 2006 Mr. Shmuir got up early in the morning to go from his home to attend at the Grand Hotel for the Corporate Trainer job presentation and interviews. He was driven there by Mr. Bishop.

[13] In attendance at the job fair on October 11, 2006 were Mr. Scott Nelson representing Carnival, and Ms. Nicola Barton of Cast-a-Way.

[14] Mr. Shmuir's evidence was that upon entering the Mount Pleasant room before the session started, he "registered" by telling Ms. Barton that he was present and advising her of his visual impairment. He was followed by Mr. Bishop who he described as his "ride" to the session. He sat at the back of the room at a table, as the other tables closer to the front were occupied by other candidates who had already arrived. Mr. Bishop sat close by him on a couch to his right side near the entrance door to a hallway outside the room. Ms. Barton, in her evidence, denied that Mr. Shmuir had told her of his visual impairment before the session started.

[15] I accept the evidence of Carnival that it did not have prior information concerning Mr. Shmuir's visual impairment before the start of the job fair on October 11, 2006. My finding on this point is based on both the curious absence of any documented proof concerning the sending of the cover letter or its receipt, as previously referred to, and my assessment that Mr. Nelson and Ms. Barton were more credible witnesses than Mr. Shmuir based upon their general demeanour at the hearing, their clarity in recalling facts, and my impression of the probability of their versions of the evidence.

[16] The job fair started at about 9:00 a.m. on October 11, 2006. Mr. Scott Nelson, Carnival's Director of Shipboard Training conducted the job fair. Mr. Nelson has had almost 20 years experience in his field and has himself held the position of a Shipboard Corporate Trainer. There were approximately 21 candidates invited to the job fair. Mr. Nelson was hoping to hire a number of candidates for positions as corporate trainers on Carnival's fleet of 22 cruise ships. Carnival operates around the world with about 33,000 employees. Its home base is in Miami, Florida. Its ships vary in size, carrying approximately 3,000 to 4,000 passengers with crews of approximately 900 to over 1,000 members. All of its on-board employees are considered to be seafarers and have some responsibilities for safety and emergency response.

[17] The schedule for the job fair included a group informational session for the first two hours in the morning including videos and question and answer sessions, followed by a 20 minute basic skills test. After a 1 hour lunch the afternoon was devoted to interviews of all invited candidates, including a 2 minute presentation by each candidate on topics selected by them.

[18] The topics covered in the group informational session included: Firstly, information about Carnival Cruise Lines including its history, its fleet of ships, its personnel, its ports of call, its type of guests and style of cruising, and its corporate vision. Secondly, information about living and working on board a ship including cabins and having a cabin mate, food, cultural diversity, time off and approximate work hours, approximate contract length, leisure time and organized crew activities, benefits, how the role of corporate trainer was viewed on board and hospitality expectations. Thirdly, information about safety responsibilities on board the ship including how safety was the number one priority, how all team members were responsible for safety on board, how a corporate trainer was responsible for conducting various safety-related training activities including crowd management, crisis management, leadership, vessel familiarization, and how corporate trainers were expected to take an active role in shipboard safety committees and initiatives as well as safety drills and training. Fourthly, information about corporate training job functions.

[19] In the information session Mr. Nelson highlighted the tasks, responsibilities and requirements that were expected of a corporate trainer hired by Carnival. Some of the tasks that were highlighted included the following: Delivering a wide range of training programs and educational resources; Representing the Corporate Training department in a professional and positive manner; Effectively communicating with peers, Training & Development Manager, Senior Training & Development Manager, Director Shipboard Training and all shipboard management; Facilitating all onboard training programs and maintaining accurate records thereof; Day-to-Day running and administration of the Crew Training Centre; Attending and actively participating in bi-monthly safety meetings; Maintaining the Crew Training Centre; Producing accurate and timely reports, and adhering to set standards for record keeping and other Corporate Training functions; Attending all seminars and training programs as directed by Corporate Training Management and participation in emergency response situations including fire suppression and ship evacuation.

[20] The pay for a corporate trainer position is \$1,800.00 per month U.S. The job is a contract position for 6 months to be undertaken within a 10 month time frame. Following the 6 month term crew members are required to be off without pay for 2 months before commencing another 6 month term if rehired to a subsequent 6 month contract. The extra 2 months in the 10 month time frame provides added flexibility to schedule the 6 month work term.

[21] During the information session Mr. Nelson tried to point out to the attendees in a realistic way some of the challenges of being in a ship environment away from family and friends for long periods of time. Mr. Nelson gave evidence that most of the corporate trainers did not last with Carnival for more than two 6 month terms owing to the rigors and conditions of the job. He asked the attendees to make sure that they understood all of the challenges and told them that it was really their decision if they were selected as to whether or not they wanted to commit themselves to that kind of life. He stressed that safety and emergency response were the highest priority tasks for all crew members in order to protect the lives of the passengers, other crew members and themselves. If selected based on their relevant experience, qualifications and presentation skills at the session, they would have to undergo a medical examination to ensure that they met required standards for seafarers and for safety requirements set by the company and by international conventions for seafarers and by coast guard regulations.

[22] It was pointed out in the information that Carnival provided that it would be advantageous that applicants for the Corporate Trainer position have relevant educational qualifications, previous group training experience, excellent presentation, communication and public speaking skills and an outgoing guest service oriented personality.

[23] Following the presentation, the schedule for the job fair provided for a 20 minute general skills test. The evidence of what occurred during this phase of the job fair on October 11, 2006 diverges as between the testimony of Mr. Shmuir and Mr. Nelson.

[24] Mr. Shmuir's evidence of what occurred was as follows. The general skills test discussion began after lunch on October 11, 2006. When Mr. Nelson began to describe the test and alluded to the scantron sheet for filling out answers, Mr. Shmuir raised his hand to advise Mr. Nelson that because of his visual impairment he would not be able to use the scantron test to answer the questions since the "bubbles" were too small for him to read. He asked Mr. Nelson for the opportunity to write the answers or circle the answers to the multiple choice questions on the question sheet. Mr. Nelson initially told him that he would get back to him on his request and continued to explain the test to the other attendees. Thereafter, Mr. Nelson began to distribute the test/answer sheet. At this point Mr. Shmuir again raised his hand and reminded Mr. Nelson of his problem with the test. Mr. Nelson then came back to where he was sitting at the back of the room at a table and began to discuss the matter with him. Mr. Shmuir told Mr. Nelson that he needed to be accommodated in writing the test because of his visual impairment. Mr. Nelson then spoke to an unidentified "Afro- American" man who was in the room and said that Mr. Nelson would "take care of it". Mr. Nelson then went to speak with Ms. Barton and the two of them returned to where Mr. Shmuir was sitting and asked him to follow them outside of the Mount Pleasant room to the adjacent hallway. Mr. Bishop was sitting on the couch at the back of the room to his right during this time. Mr. Shmuir followed Ms.

Barton and Mr. Nelson out of the room to the hallway near to the entrance door which was left open. Mr. Bishop also moved to this area close to where Mr. Shmuir, Ms. Barton and Mr. Nelson were standing. Mr. Nelson told Mr. Shmuir that as a consequence of regulations related to cruise ships at sea, Coast Guard inspections and various problems that he would encounter on board including seeing the various signs, he would not be able to qualify for the job as a Corporate Trainer because of his visual impairment. Mr. Nelson asked Mr. Shmuir to leave. Mr. Shmuir told Mr. Nelson that in 90% of his job applications he was denied opportunities because of his sight impairment. After he was told to leave by Mr. Nelson, Mr. Shmuir and Mr. Bishop went into the room and got their coats and then left. They were followed by two men in dark suits who appeared to be escorting them out of the hotel to the street at very close quarters. He felt that the experience of being asked to leave and being followed out of the building was demeaning and made him feel like a second class citizen. He did not ask Mr. Nelson whether Mr. Bishop could join him on the cruise ship to attend and assist him with his job.

[25] Mr. Nelson's account of what occurred on October 11, 2006 was as follows. The general skills test discussion took place before lunch. As Mr. Nelson was describing the test and the process for taking the test to the attendees, Mr. Shmuir raised his hand. Mr. Shmuir did not mention his disability or any difficulty in writing the test at that time and Mr. Nelson told him that he would attend to him after distributing the test. After he had distributed the test he went to the back of the room to where Mr. Shmuir was seated at a table and he spoke with him. Mr. Bishop was seated next to Mr. Shmuir at the table. He crouched down between Mr. Shmuir and Mr. Bishop to ask Mr. Shmuir what he wanted to talk about and it was at that time that Mr. Shmuir told him that he could not read the test because of his visual disability. Mr. Nelson then went to see Ms. Barton to ask her if she knew anything about Mr. Shmuir's situation. Ms. Barton told him that she knew nothing about Mr. Shmuir's disability. Mr. Nelson then went back to speak with Mr. Shmuir and asked him to follow him and Ms. Barton to the hallway to discuss the matter further. Mr. Nelson felt that it was appropriate to go to the hallway with Mr. Shmuir in order to avoid disturbing the other attendees who were now writing the test and to spare Mr. Shmuir any embarrassment. There were no men in dark suits for security or other purposes in the room nor was there any man present who could have been described as "Afro-American". The only people present in the Mount Pleasant Room were the other candidates, Mr. Shmuir, Mr. Bishop, Ms. Barton and Mr. Nelson. Mr. Nelson, Ms. Barton, Mr. Shmuir and Mr. Bishop all went outside the room into the hallway and closed the door. Mr. Nelson spoke with Mr. Shmuir in the hallway and tried to explain to him some of the challenges he might face with his visual impairment in doing the job as a Corporate Trainer on board a cruise ship at sea. He mentioned the Coast Guard inspections, regulations and requirements and signage. He told Mr. Shmuir that it was his choice as to whether or not he wanted to pursue this job opportunity. He did not ask him to leave or discourage him from continuing to participate in the process in any way and, in fact, specifically asked him if he wanted to continue. Mr. Shmuir did not ask Mr. Nelson to accommodate him in the writing of the test. Mr. Shmuir asked Mr. Nelson whether Mr. Bishop would be allowed to join him on board the ship in order to assist him and Mr. Nelson told him that that would not be possible. Mr. Shmuir indicated to Mr. Nelson that he did not want to continue with the application process and that he wanted to

leave. He thanked Mr. Nelson for the information. Mr. Shmuir and Mr. Bishop went into the room and got their coats and left without anyone following them.

[26] I accept the evidence of Mr. Nelson that he did not discourage Mr. Shmuir from continuing his attendance at the job fair and that he did not ask him to leave. Mr. Nelson was an excellent witness who was very clear in his evidence. He is very experienced in his job. Mr. Shmuir seemed to have some difficulty in remembering events. For example, after mentioning that he had applied for a number of positions he could not actually specify any positions that he had applied for in particular other than one. His story about the two men in dark suits and the unidentified "Afro-American" man seemed improbable to me. None of these individuals were identified by Mr. Nelson or Ms. Barton as being present and one would hardly expect such people to be hired for security or similar purposes for a job fair for a corporate trainer position. In my view, Mr. Nelson tried to properly advise Mr. Shmuir about what he might face on board a cruise ship at sea as a Corporate Trainer who was visually impaired. I believe that had he been asked to accommodate Mr. Shmuir in the writing of the test he would have done so. If Mr. Nelson had truly been inclined to discriminate against Mr. Shmuir on the basis of his disability he could easily have had Mr. Shmuir continue to participate at the job fair and then allow the medical testing or the assessment of his qualifications and experience for the job to end his application. I believe that Mr. Shmuir's decision to leave the job fair was completely voluntary and at that point he himself ended his application for employment. Ms. Barton, who was also a credible witness, corroborated Mr. Nelson's account of the events at the job fair.

III. LAW

A. Establishing a *Prima Facie* case of discrimination

[27] Section 7 of the *CHRA* states:

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.

Disability is a prohibited ground of discrimination under s. 3 of the *CHRA*.

The evidence in this case established that the Complainant has low visual acuity and is considered to be legally blind.

[28] The initial onus is upon the Complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a decision in favour of the Complainant, in the absence of an answer from the Respondent. The Respondent's answer should not be considered in the determination of whether the Complainant has made out a *prima facie* case of discrimination. (*See Ontario (Human Rights Commission) and O'Malley v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536; and *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204.)

B. Reversal of burden of proof and justification

[29] Once a *prima facie* case of discrimination is established, the burden of proof shifts to the Respondent to demonstrate by providing a reasonable (non-pretextual) explanation that the alleged discrimination either did not occur as alleged, or that the conduct was somehow non-discriminatory or justified. It is not necessary that the discriminatory considerations be the sole reason for the actions in issue for a Complainant to succeed. It is sufficient that the discrimination be but one basis for the employer's actions or decisions. (*Maillet v. Canada (Attorney General)*, 2005 CHRT 48, paras. 4-5; *CHRA*, s. 15). See also *Canada v. Lambie* 1996 CanLII 3940 (F.C.).

IV. ANALYSIS

A. Has the Respondent discriminated against the Complainant contrary to S. 7 (a) of the Act by denying the Complainant equal access to employment on the basis of his physical disability?

[30] On the evidence of the Complainant alone, without considering the answer by the Respondent, I find that the Complainant has established a *prima facie* case of discrimination on the basis of disability, namely his visual impairment which constitutes a disability under the Act. Mr. Shmuir's evidence was that his application for employment was terminated by the Respondent effectively not allowing him to continue in the process because of his visual impairment.

B. Has the Respondent provided a reasonable (non-pretextual) explanation in answer to the prima facie case of discrimination?

[31] The Respondent's answer to the Complainant's allegation with respect to what actually happened in the Mount Pleasant Room following the distribution of the skills test and in the discussion in the hallway thereafter, satisfies me that the Respondent did not, in any way, terminate the application for employment by the Complainant. Rather, my finding is that the Complainant himself terminated the application voluntarily when he decided to leave. As such there was no refusal to employ that ever arose in this case since the application for employment if there ever was one, was terminated voluntarily by the Complainant before any decision could be made by the Respondent on whether or not to hire the Complainant.

V. DECISION

[32] For the foregoing reasons, I dismiss the complaint, as it has not been substantiated.

"Signed by"

OTTAWA, Ontario
June 24, 2010

Edward Peter Lustig

PARTIES OF RECORD

TRIBUNAL FILE:	T1423/4909
STYLE OF CAUSE:	William G.M. Shmuir v. Carnival Cruise Lines
DATE AND PLACE OF HEARING:	January 18, 19, 20, 21, 2010 Hamilton, ON
DECISION OF THE TRIBUNAL DATED:	June 24, 2010
APPEARANCES:	
Ben Bishop	For the Complainant
Sheila Osborne-Brown	For the Canadian Human Rights Commission
David L. Rice/ Linda Nguyen	For the Respondent