

TRANSLATION FROM FRENCH

TD 6/ 85

Decision rendered on September 5, 1985

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

GUILLAUME KIBALE, Complainant,

- and

TRANSPORT CANADA Respondent.

BEFORE: Stanley H. HARTT, Chairman

APPEARANCES: RENE DUVAL and ANNE TROTTIER, Counsel for the Canadian Human Rights Commission, GUILLAME KIBALE, Complainant,

JEAN- MARC AUBRY and JAMES M. MABBUTT, Counsel for the Respondent, TRANSPORT CANADA.

> DECISION

The facts surrounding the case involving Mr. Guillaume Kibale, complainant, and the Ministry of Transport of Canada, respondent, date back to 1981. Since then the following events have taken place:

- an investigation by the Anti- Discrimination Directorate of the Public Service Commission;
- a request before the Federal Court of Canada (Trail Division and, later, the Court of Appeal) for a writ of mandamus;
- an investigation by the Canadian Human Rights Commission; and, finally, - on July 6, 1984, the appointment of the undersigned as Chairman of a Human Rights Tribunal with the task of examining the May 3, 1984, complaint brought against Transport Canada by Mr. Kibale and determining whether the events described in that complaint constitute discriminatory practice on a prohibited ground of discrimination, which is forbidden under section 7 of the Canadian Human Rights Act.

The complaint reads as follows:

[TRANSLATION] After submitting an application for the position of "Economist, Strategic Analysis, ES- 4" with Transport Canada (position T- EX- 5171), I was called for an interview in

Ottawa, Ontario, on July 15, 1981. The members were Jean Boulakia (Chief, Strategic Analysis, Transport Canada) and John Sylvester (Project Director, Systems Planning, Transport Canada).

Judged the best candidate for the position of "Economist, Strategic Analysis" (I was the only candidate deemed to be qualified by both members of the selection committee, Mr. Boulakia and Mr. Sylvester), I was invited to meet with Mr. Haritos (Mr. Boulakia's supervisor) in Ottawa on July 28, 1981, to discuss the conditions of employment.

During the meeting, however, Mr. Haritos asked me about a number of things, including my wife's ethnic and racial background.

A short time later, in August 1981, I was informed during a telephone conversation with Mr. Haritos that I was not found to be qualified for the position of "Economist, Strategic Analysis". Mr. Haritos explained quite spontaneously: "... don't be surprised that I'm refusing you the job; I myself was discriminated against when I first came to Canada...".

Furthermore, an assistant to Mr. Gravel at Transport Canada told me during a telephone conversation in Ottawa around the same time that there were certain projects at Transport Canada on which blacks could not work because they concerned South Africa.

Another employee of the same department, Mr. Bisillon (Personnel Officer, Transport Canada), explained to me by telephone that Mr. Haritos had approached another person about the position of "Economist, Strategic Analysis" - an Anglophone woman of Greek origin (NB: Mr. Haritos is of Greek origin).

I therefore have reasonable and probable grounds to believe that by refusing me the position of "Economist, Strategic Analysis", the Ministry of Transport Canada committed an act of discrimination against me because of my race, colour (black) and ethnic origin (French), and that it contravened section 7 of the Canadian Human Rights Act.

The complainant also produced a statement and supporting affidavit. The statement was later amended with the permission of the Tribunal. The amended statement was produced on July 10, 1985.

Sections 7 and 3(1) of the Canadian Human Rights Act read as follows: > - 3 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.

3(1) For all purpose of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

It should be noted that language is not one of the prohibited ground of discrimination.

The Tribunal held hearings in Ottawa on October 30 and 31 and November 1, 1984, and on March 26, 27, 28 and 29, June 20, 21 and 25, and July 22, 1985, as well as other hearings for procedural purposes.

The complainant replied to a notice of public competition (reference number 81-NCRSO-TC-10) for the position of Economist, Strategic Analysis, at the ES-4 level (position number T-EX-5171). A considerable number of people submitted applications, and, following a preliminary screening, eleven candidates were called to Ottawa for an interview. The complainant was the ninth candidate interviewed.

It is important to remember that the status of the persons the candidates met on July 10, 14 and 15, 1981, is one of the main points under dispute. Normally, according to the Public Service Commission's staffing rules, the members of a pre-selection or selection committee are officially appointed for these purposes and sign a statement to the effect that they promise to carry out faithfully and honestly the duties assigned to them as committee members, and not to divulge the results of the committee's deliberations to any person, with the exception of persons authorized by the Public Service Commission. The evidence showed that selection committees prepare a signed report for the officers to whom staffing authority is delegated so that the latter can offer a position in the Public Service of Canada to the best candidate.

In this particular case, the evidence revealed that at Transport Canada, the authority delegated to the Deputy Minister by the Public Service Commission (and subsequently delegated by the Deputy Minister) was granted exclusively to officers in Personnel. Thus, if the normal process had been followed, Personnel, having checked the references and conducted an investigation on the requirements with respect to national security, would have given the position to the most deserving candidate.

The purpose of all these regulations is to ensure the proper degree of formality in staffing within the Public Service, to eliminate favoritism, and to apply the merit principle enshrined in the Public Service Employment Act [s. 17(4)].

The selection committee prepares a list of questions designed to evaluate the candidates' qualifications in relation to the requirements of the position; the questions are weighted to reflect their relative importance. To qualify for the position, a candidate must receive a minimum number of points. The entire process of developing questions and assigning point values is overseen by a representative from Personnel to ensure the merit principle is respected. In addition, a Personnel Officer takes part in one or more of the interviews to make certain that the committee asks the agreed questions.

The problem stems from the fact that in the staffing procedure in question these rules were not followed in a number of respects.

First, the interviews were conducted by two Transport Canada officers, Dr. Jean Boulakia and Mr. John Sylvester. Dr. Boulakia's role on the committee was very questionable because his

supervisor, Dr. Zissis Haritos, reserved the right to interview the candidate or candidates deemed qualified by the committee who received the most points. According to Dr. Boulakia, the fact of according Dr. Haritos the right to interview one or more of the candidates after the committee's interviews was simply a courtesy to his Director General. In his opinion, the desire to meet with and get to know the best qualified candidates had no official status in the hiring process. Further, Dr. Boulakia stressed that at no time did he consider Dr. Haritos part of the selection committee, any more than he saw his work as a pre-selection procedure. In other words, he viewed Dr. Haritos's interest as being outside the staffing process and did not consider the possibility that Dr. Haritos would change the committee's decision.

Dr. Haritos stated that he had made his intentions clear to Dr. Boulakia from the outset and that the final decision was his. He cannot explain why Dr. Boulakia did not understand this. According to witnesses with experience in staffing matters and in Personnel (including the Public Service Commission), it is not unheard of, although it is not the rule, for a senior management to reserve the right to make the final decision. Such a practice does not contravene any of the rules or customs of the staffing system as long as the senior manager signs both the statement and the committee's report. In this particular case, the only thing Dr. Haritos signed was a report on the reasons for his decision, made after the complainant filed a complaint against the department with the Public Service Commission.

There is clear evidence that Dr. Boulakia was aware of the fact that Dr. Haritos had reserved the right of interview long before the interviews began (even if there was a misunderstanding between himself and Dr. Haritos over the official status of this right). The parties do not agree as to when Dr. Boulakia made this fact known to Mr. Sylvester. Mr. Sylvester died after the first hearing was held and therefore did not testify. His written statement dated April 16, 1982 (Exhibit C-11), indicates that he believed it was up to the selection committee - made up of himself and Dr. Boulakia - to make the final decision, and that no other person was qualified or authorized to change that decision. However, Exhibit C-9, dated June 21, 1982, indicates that Mr. Robert Bisailon, the staffing officer present at the first interview, heard Dr. Boulakia telling Mr. Sylvester before the first candidate came in that Dr. Haritos had reserved the right of final decision. Dr. Boulakia apparently told Mr. Sylvester that any candidate they chose would have to be approved by Dr. Haritos before an offer of employment could be made. Mr. Bisailon claimed to have been very surprised.

In my view, since the misunderstanding between Dr. Haritos and Dr. Boulakia has been established as existing before the interviews were held, it is of little import to determine the exact moment Mr. Sylvester was informed of this. Perhaps Mr. Sylvester would have refused to sit on the committee if its decision were not final, but there are very specific motives for Mr. Sylvester's participation that would have explained such refusal. For this reason, one cannot presume that his refusal would have been entirely the result of his indignation at Dr. Haritos's interference with the committee's mandate.

Mr. Sylvester's role on the committee is even stranger. Because staffing in the Public Service is complicated and time-consuming, a process called piggy-backing - superimposing one staffing process on another - is used so that two managers can fill similar positions with the same requirements and qualifications. Once a list of eligible candidates have been established, there is

no reason why other managers should not be allowed to take advantage of it to find candidates without having to go through the whole staffing process.

Mr. Sylvester took advantage of this opportunity to fill two positions in his own section (T- EX- 5163, Program Officer, and T- EX- 5183, Analyst), and that is why he was part of the selection committee.

Unfortunately, the evidence shows that the qualifications Mr. Sylvester was looking for were not at all like those sought by Dr. Haritos for the position being filled in Dr. Boulakia's section - that is, those of a theoretical economist responsible for analysing the effects on strategy of the policies recommended to the government. Mr. Sylvester, on the other hand, was looking for program managers. That the positions being filled by Mr. Sylvester should never have been piggy- backed with Dr. Haritos's position is made strikingly clear by the fact that Mr. Sylvester and Dr. Boulakia were unable to agree on the results of the interviews. While Dr. Boulakia judged two candidates to be qualified (Mr. Kibale and Mr. Datta), Mr. Sylvester felt five were qualified (the two accepted by Dr. Haritos, Mr. Bartucci, Mr. Schubert and Mr. Morris). Mr. Sylvester added, however, that although Mr. Kibale was stronger in economics from an academic standpoint and had experience as a policy adviser, these attributes were not among the main requirements of the positions he was concerned with. Mr. Datta was an established and experienced macro- economist, but according to Mr. Sylvester he would not fit in well with his team of systems analysts (Exhibit C- 7). The competition results as established by Mr. Sylvester were as follows: Mr. Kibale first with 71.5 points; Mr. Morris second, 70; Mr. Schubert third, 69; Mr. Bartucci fourth, 68; and Mr. Datta fifth, 64.5. Thus, Mr. Sylvester contradicted himself in deciding that Mr. Kibale placed first among the qualified candidates but that he did not meet the requirements of the position that Mr. Sylvester was looking to fill. If Mr. Sylvester's positions were truly suited to piggy- backing and if the questions were developed and weighted so as to find the candidate or candidates capable of holding these positions, the candidate with the best results would of necessity have been the most highly qualified for all the jobs involved in the competition. Clearly, in his attempt to save time Mr. Sylvester abused the piggy- backing procedure, because he was in no way looking for people with qualifications like those sought by Mr. Haritos.

On the basis of the results of this irretrievably irregular competition, Dr. Boulakia presented two candidates to Dr. Haritos to be interviewed: Mr. Kibale and Mr. Datta. Dr. Haritos decided that neither candidate was qualified for the position in Dr. Boulakia's section. No eligible list was prepared. Mr. Kibale received a letter dated August 27, 1981, and signed by Lise Dagenais, a staffing officer, advising him that none of the candidates had been selected. However Mr. Sylvester's two positions were offered to Mr. Schubert (T- EX- 5163) and Mr. Bartucci (T- EX- 5183). It appears that Mr. Morris refused the offer because he had managed to find a job elsewhere. Mr. Kibale asked the Tribunal to find Dr. Haritos, Mr. Sylvester, or both, guilty of a discriminatory practice forbidden under the Canadian Human Rights Act for having refused to employ him on a prohibited ground of discrimination, that is, race, national or ethnic origin, and/ or colour.

The Tribunal may receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not such evidence or information is or

would be admissible in a court of law (s. 40(3)(c) of the Canadian Human Rights Act). It follows then that the Tribunal has the right to accept indirect evidence, and it is perfectly normal for it to be asked to draw certain conclusions from the facts submitted in evidence. The legal problem the Tribunal must resolve here is whether the failure to follow the normal staffing procedures - or even the procedures set out in the Act - opens the way, under the circumstances, for any presumption in favour of the complainant or enables the Tribunal to conclude that the actions of the department's representatives were motivated by discrimination.

It should first be pointed out that the burden of proof before the Tribunal rests with the complainant, and that this burden is the same as in civil matters - that is, the complainant must convince the Tribunal that the balance of probabilities weighs in his favour. The complainant certainly made a number of allegations which, had he been able to prove them, would have made it possible for the Tribunal to determine that there had been a negative attitude towards the complainant's race, national or ethnic origin and/ or colour. However, with one exception that will be discussed later, none of the allegations was proven beyond the simple statements made by the complainant and/ or his wife; the claims were denied by each and every one of the independent witnesses to whom the statements were presented in the form of questions. It seems very dangerous to me to establish a rule whereby if there is an irregularity or outright illegality in the administration of the staffing process of the Public Service of Canada, a Human Rights Tribunal must presume that the irregularity or illegality arises from a discriminatory practice, without other evidence linking this irregularity or illegality to a prohibited ground of discrimination. The failure or refusal of government employees to comply with the rules established to limit their discretionary power and their room to manoeuvre can be explained by a host of human flaws other than discrimination. Dr. Haritos reserved the right of final decision among the qualified candidates, but Dr. Boulakia misunderstand these instructions. If the Tribunal were to conclude, without further proof, that Dr. Haritos was motivated by some desire to act on a prohibited ground of discrimination, it would be making a presumption in favour of the complainant that is not allowed under the Act.

As far as Mr. Sylvester is concerned, it is clear that all the objections he made following the competition and all the allegations about the pressure exerted on him to change his scores or reconcile his report on the interviews with Dr. Boulakia's were not based on a prohibited ground of discrimination, but on his abuse of piggy-backing and the unanticipated (by Mr. Sylvester) possibility that Dr. Haritos (whose role was unknown to Mr. Sylvester until the very last moment) would not hire Mr. Kibale, the result being that Mr. Sylvester would be obliged to offer him one of the two positions open in his section instead of offering them to the candidates he preferred (Mr. Morris, Mr. Schubert and Mr. Bartucci). He was completely frustrated by the trap he had fallen into, although it was not caused by any attempt to discriminate against Mr. Kibale. On the contrary, he never should have deemed Mr. Kibale qualified for the positions in his own section. In fact, he would not have done so if the questions asked at the interview had really been designed to exclude theoretical economists or strategic analysts and to identify those candidates who had the required program management skills. In my view, the attempts to put pressure on Dr. Boulakia and Mr. Sylvester following this irregular competition grew out of a desire to remedy at least some of the problems with the staffing process. The purpose of this pressure was to get the two men to agree on the results so that a single list could be drawn up that would enable Personnel to offer Dr. Haritos's position to the first person on the list and Mr. Sylvester's

positions to the next two. It should be noted that Dr. Haritos reserved the right to act as a member of the final selection committee without having interviewed Mr. Schubert, Mr. Bartucci or Mr. Morris.

The Human Rights Tribunal does not have the power to monitor and supervise the operation of the staffing process under the Public Service Employment Act and the regulations made by virtue of the Act. This authority rests with the Federal Court of Canada. Mr. Kibale went before the Federal Court to seek a writ of mandamus, but this request was denied in a judgment handed down by Mr. Justice Marceau on November 3, 1981. Although the Human Rights Tribunal found irregularities in the hiring process, its powers are limited to stating whether or not these irregularities were motivated by a prohibited ground of discrimination.

Another matter concerns the single piece of concrete evidence offered by the complainant to prove that discrimination against blacks exists at Transport Canada. Mr. Kibale claims (and testified) that after his second visit to Ottawa - at which time he met with Dr. Haritos for his second interview - there was a delay in sending him a cheque covering his travel expenses. Because he needed this money, he telephoned the department to find out when he would be paid. According to his testimony, he was told that his cheque had been sent to the Montreal office of Transport Canada by mistake. He went there to pick up his cheque and returning home, opened the envelope in front of his wife. Again according to Mr. Kibale, when he opened the envelope a small handwritten note fell out; the note read "No blacks in Transport Canada". He says he did not pay too much attention to the note and made no mention of it in his complaint or in the statement he made on the advice of representatives of the Commission and other agencies he contacted. We should point out that Mr. Charles Lafrenière, Director General of the Human Rights Commission for the National Capital Region, who appeared at the Commission's request, did not recall having discussed such a note with the complainant.

At the request of counsel for the Ministry of Transport and the Commission, the note was sent to the RCMP's forensic laboratories so that the writing could be analysed. The report by a Mr. Gaudreau of the Document Section indicated that comparison of the writing on the note with the reference specimens revealed unexplained points and similarities. Consequently, the writing on the note was neither identified nor eliminated as Mr. Kibale's own handwriting.

An interpreter called by counsel for the Department of Justice told the Tribunal that during lunch hour on June 20, 1985, she heard Mr. Kibale in the cafeteria of the building asking his wife if it was really possible to determine how old the ink on Exhibit C- 15 was and saying, "In any event, the die is cast."

The Tribunal finds that there is no evidence that the note produced as Exhibit C- 15 is a forgery. However, there is also no evidence linking the note to those who are accused of discrimination - that is, Dr. Haritos and/ or Mr. Sylvester. One could easily speculate on how the note found its way - if indeed it did - into the envelope containing the travel cost reimbursement cheque, and why Mr. Kibale did not think it very important. One cannot, however, conclude that the fact the note exists is an indication of discriminatory practice against blacks at Transport Canada.

One other point remains: at the hearings, the Tribunal took under advisement objections to the admissibility of two documents; one, produced by Mr. Kibale, was a report prepared by the Anti-Discrimination Directorate of the Public Service Commission; the other produced by Transport Canada, was the November 24, 1983, report by Mr. Trefflé Lacombe, a Commissioner with the Public Service Commission of Canada. Since both reports dealt with the same facts as were laid before the Tribunal; since, at the time, the matter came under the shared jurisdiction of the Public Service Commission and the Human Rights Tribunal; since no conclusion reached in either of the two Public Service Commission reports should influence the Tribunal; and since the rules governing evidence, burden of proof and presumptions available to the complainant could differ for the purpose of a study by the Public Service Commission on the one hand and a hearing before the Tribunal on the other the Tribunal decided it best not to admit these two documents in evidence and not to be influenced in any way by the conclusions drawn by these bodies.

For all these reasons, the Tribunal finds that although the complainant established before the undersigned the existence of a series of irregularities in the hiring process used in his case, he failed to discharge the burden of proof which lies upon him. The Tribunal is not convinced that the actions of Dr. Haritos, Mr. Sylvester and other representatives of the Ministry of Transport were motivated by a prohibited ground of discrimination. The Tribunal therefore dismisses the complaint as unsubstantiated. Each party will pay its own costs.

Signed in Montreal on August 30, 1985.

Stanley H. Hartt