**Date: 20100127**

**Docket: A-217-09**

**Citation: 2010 FCA 29**

**CORAM: NOËL J.A.**
**PELLETIER J.A.**
**LAYDEN-STEVENSON J.A.**

**BETWEEN:**

**ABDUR-RASHID BALOGUN**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**
**MINISTER OF NATIONAL DEFENCE**

**Respondents**

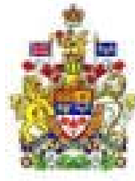
Heard at Toronto, Ontario, on January 25, 2010.

Judgment delivered at Toronto, Ontario, on January 27, 2010.

REASONS FOR JUDGMENT BY: LAYDEN-STEVENSON J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

Federal Court of Appeal



Cour d'appel fédérale

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**Appellant**

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**MINISTER OF NATIONAL DEFENCE**

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**REASONS FOR JUDGMENT**

**LAYDEN-STEVENSON J.A.**

[1] The appellant applied for judicial review of a decision of the Canadian Human Rights Commission (the Commission) dismissing his complaint under the *Canadian Human Rights Act*, R.S. 1985, c. H-6 (CHRA). Justice Russell of the Federal Court concluded there was no reviewable error in the Commission's decision and dismissed the application. The appellant now appeals to this Court. I am of the view that the appeal should be dismissed.

[2] At the outset of the hearing, the appellant advised the Court that he had "filed" correspondence in August of 2009 wherein he sought permission to amend his notice of appeal to include an appeal of the costs award issued by Justice Russell on August 2, 2009. Counsel for the respondent had no recollection of ever having seen the correspondence. Counsel's first notice of any issue regarding costs occurred upon review of the appellant's memorandum of fact and law on this appeal. Whatever may have happened to the appellant's letter, he did not move to amend his notice of appeal nor did he put before us the record in the Federal Court on the issue of costs. As a result, we are not in a position to address this issue.

Background

[3] The appellant describes himself as a black African Muslim. He applied to be a Canadian Forces Reserve Officer in February of 2001. In February of 2004, he complained to the Commission that the difficulties and delays in the application process were as a result of discrimination based on his race, religion and national/ethnic origin.

[4] The Commission investigator determined that the processing and delay with respect to the application was not connected to any prohibited ground of discrimination. Consequently, he felt that the complaint should not be referred to a tribunal. The Commission accepted the investigator's recommendation and dismissed the complaint. The appellant applied to the Federal Court for judicial review of the Commission's decision.

[5] Justice Russell consolidated the appellant's various arguments into four issues: the section 7 complaint; the debt issue; the section 10 complaint; and the procedural fairness issue. He concluded that it was reasonable for the Commission to dismiss the appellant's complaint. It is this decision that is the subject of the appeal.

Standard of Review

[6] The role of an appellate court, when hearing an appeal with respect to an application for judicial review, is to determine whether the reviewing court identified the applicable standard of review and applied it correctly: *Dr. Q v. College of Physician and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; *Canada Revenue Agency v. Telfer*, 2009 FCA 23, 386 N.R. 212. Justice Russell, in accordance with the established jurisprudence of this Court and the Federal Court, properly identified the standard of review of reasonableness as that applicable to the Commission's decision to dismiss the complaint: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 54.

Discussion

[7] Section 7 of the CHRA provides that it is a discriminatory practice to refuse to employ an individual on any prohibited ground of discrimination. Section 10 of the CHRA relates to discriminatory policies and practices. The text of these provisions is attached to these reasons as Schedule "A".

[8] The appellant's arguments are primarily founded on the "debt issue". He claims that the credit check and the manner in which the Canadian Forces (CF) dealt with it were improper and

discriminatory. More specifically, he alleges that the CF used the excuse of bad debts to keep him out of the CF. Since the credit check is related to both sections 7 and 10 of the CHRA, it is useful to examine it first.

[9] After some delay (which I will address later in these reasons) in the processing of the appellant's application to the CF, by the summer of 2002, the requisite checks had been completed. A credit check revealed an Equifax report of bad debts in relation to two retail establishments. The appellant, who was otherwise regarded as an "above average" applicant, was told that he would need to address these debts prior to enrolment with the CF. The appellant's reactions to this direction were seen by the CF as unsatisfactory and extreme while the CF's demands were viewed by the appellant as unreasonable.

[10] The appellant vehemently argues that the credit check could not be regarded as a necessary qualification for the position for which he applied. Rather, it must be justified as a *bona fide* occupational requirement. Further, the credit check cannot be said to be functionally required for the position in question. According to the appellant, the investigator was wrong to conclude otherwise; consequently, the Commission's decision must be set aside.

[11] The investigator concluded that the appellant's enrolment was not rejected because of his bad debts; rather, it was temporarily put on hold. The appellant was not qualified for the employment opportunity at the relevant time. The investigator also found that the CF requires all candidates to complete an enhanced reliability security check. Among other things, a credit check is

part of this assessment which is used in the evaluation process to determine a candidate's suitability. Although the bad debts do not preclude enrolment in the CF, the manner in which the debts issue is handled may have an impact. The investigator concluded that the appellant's recruitment was placed on hold because he did not provide documentation demonstrating that the bad debts had been dealt with until January 26, 2005.

[12] Justice Russell reviewed the investigator's report and conclusions. He specifically noted that the report provided a thorough examination of the evidence and arguments on both sides of the issue. He concluded that the investigation and findings were not unreasonable. He clarified that the credit check was simply one component of the mandatory reliability check. At paragraph 152 of his reasons for judgment, he stated:

> The evidence suggests to me that the debt issue could have been handled better on both sides. CF could have looked at the outstanding debt in the context of Dr. Balogun's general financial situation. At the same time, Dr. Balogun's reaction to the debt registrations and his taking their existence as a personal affront caused a polarization to occur. CF had no way of knowing why the debts were registered or whether Dr. Balogun's protestations and speculations had any substance to them. It was his responsibility to resolve the reliability concerns that arose as a result of the debts registered against him. He did not do this and we still do not know how those debts came to be registered against him, even though the registrations were eventually discharged.

After finding the investigator's conclusion – that the complaint was not linked to a prohibited ground of discrimination – reasonable, Justice Russell then explained that, since no *prima facie* case of discrimination was made out, it was not necessary for the CF to justify this requirement.

[13] In relation to the policy, Justice Russell incorrectly stated that the investigator found there was no need to investigate the section 10 component of the appellant's complaint (reasons for judgment at para. 118). In fact, the investigator addresses the policy at pages 11 and 12 of the investigation report. However, this error is not material to the result because Justice Russell ultimately determined the issue in the same manner as the investigator. That is, the policy was concerned with reliability status and encompassed the manner in which the appellant proposed to rectify the debt situation.

[14] The National Defence Security Policy and Recruiting Directive deal with reliability checks for CF enrolment. The Recruiting Directive states that it is a mandatory condition of eligibility for enrolment in the CF that a recruit successfully obtain enhanced reliability status. The enhanced reliability check includes verification of personal data, professional and educational qualifications, trade certification or accreditation, employment data, and an assessment of reliability confirmed, where possible, by references and previous employers, criminal records name check and credit check (appeal book vol. II, p. 298).

[15] The appellant contends that he was not afforded an opportunity to address the issue of reliability status in the court below. He claims that Justice Russell's comment at paragraph 125 that "reliability is the issue and there is no argument before me that reliability is not a functional requirement for an officer" confirms his position. I disagree with the appellant's submission. The record is replete with references to the reliability assessment. I read Justice Russell's comment as nothing other than an indication that the appellant chose to focus his submissions singularly on the

credit check, to the exclusion of its status as a component of the reliability assessment. Notably, the appellant took the same approach before this Court.

[16] I can see no error in Justice Russell's application of the applicable standard of review or his conclusion that the investigator's report and findings were reasonable. Nor do I find fault with his determination that underlying the credit issue lay the reliability concerns which remained unresolved. As Justice Russell observed, it is always possible to disagree. However, disagreement with a result does not render the result unreasonable.

[17] As for the issue of delay, the investigator found that the delay in the processing of the appellant's application was based partially on administrative failures of the CF and partially on factors not attributable to the CF at all. Although Justice Russell found that the delay was frustrating for the appellant and regrettable, he considered the investigator's determination that it was not linked to a prohibited ground of discrimination to be reasonable. I am not persuaded that he erred in arriving at that decision.

[18] With respect to the appellant's allegation of breach of procedural fairness, Justice Russell thoroughly reviewed his arguments with respect to witnesses, overlooking evidence, disclosure and bias. Justice Russell found that the investigator had looked into matters and had provided a neutral and thorough report. There was no breach of procedural fairness. Rather, as stated at paragraph 150 of the reasons for judgment, "the Commission simply could not, on the evidence and after a

thorough investigation, connect [the appellant's] experiences to a proscribed ground." I agree with that observation.

[19] There being no error in Justice Russell's conclusion that warrants intervention, I would dismiss the appeal with costs.

"Carolyn Layden-Stevenson"
J.A.

"I agree
Marc Noël J.A."

"I agree
J.D. Denis Pelletier J.A."

## SCHEDULE "A"

*Canadian Human Rights Act* (R.S., 1985, c. H-6)
*Loi canadienne sur les droits de la personne* (L.R., 1985, ch. H-6)

Employment

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.
1976-77, c. 33, s. 7.

Emploi

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.
1976-77, ch. 33, art. 7; 1980-81-82-83, ch. 143, art. 3.

Discriminatory policy or practice

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.

R.S., 1985, c. H-6, s. 10; 1998, c. 9, s. 13(E).

Lignes de conduite discriminatoires

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.

L.R. (1985), ch. H-6, art. 10; 1998, ch. 9, art. 13(A).

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-217-09 |

**(AN APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE RUSSELL OF THE FEDERAL COURT DATED APRIL 23, 2009 IN FEDERAL COURT FILE NO. T-152-08.)**

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| **STYLE OF CAUSE:** | ABDUR-RASHID BALOGUN v. HER MAJESTY THE QUEEN MINISTER OF NATIONAL DEFENCE |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JANUARY 25, 2010 |
| **REASONS FOR JUDGMENT BY:** | LAYDEN-STEVENSON J.A. |
| **CONCURRED IN BY:** | NOËL J.A.<br>PELLETIER J.A. |
| **DATED:** | JANUARY 27, 2010 |

**APPEARANCES:**

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|---|---|
| ABDUR-RASHID BALOGUN | FOR THE APPELLANT (Self-Represented) |
| LIZ TINKER | FOR THE RESPONDENTS |

**SOLICITORS OF RECORD:**

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|---|---|
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