Date: 20100719

Docket: A-453-09

Citation: 2010 FCA 192

CORAM: **NADON J.A.**
SHARLOW J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

ALI TAHMOURPOUR

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on June 23, 2010.

Judgment delivered at Ottawa, Ontario, on July 19, 2010.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: NADON J.A.
LAYDEN-STEVENSON J.A.

Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20100719

Docket: A-453-09

Citation: 2010 FCA 192

CORAM: **NADON J.A.**
SHARLOW J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

ALI TAHMOURPOUR

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

SHARLOW J.A.

[1] On March 21, 2001, Mr. Ali Tahmourpour filed a complaint with the Canadian Human Rights Commission against the Royal Canadian Mounted Police, alleging violations of sections 7 and 14 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. Mr. Tahmourpour's complaint led to a hearing before the Canadian Human Rights Tribunal in August and September of 2007. In a decision dated April 16, 2008, the Tribunal concluded that the complaint was substantiated in a number of respects and ordered the RCMP to take certain remedial action (2008 CHRT 10). The RCMP applied to the Federal Court for judicial review of the decision of the Tribunal. That application was granted and, in a judgment dated October 6, 2009, a Federal Court judge set aside

the order of the Tribunal and referred the complaint back to the Tribunal for rehearing by a different member (2009 FC 1009). Mr. Tahmourpour now appeals that judgment. For the reasons set out below, I would allow his appeal on all of the issues but one, relating to an element of the Tribunal's award for financial compensation.

Statutory framework

[2] The provisions of the *Canadian Human Rights Act* that are most relevant to this appeal read as follows:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.	**3.** (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.
…	[…]
7. It is a discriminatory practice, directly or indirectly,	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(*a*) to refuse to employ or continue to employ any individual, or	*a*) de refuser d'employer ou de continuer d'employer un individu;
(*b*) in the course of employment, to differentiate adversely in relation to an employee,	*b*) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	
...	[...]

14. (1) It is a discriminatory practice,

(*a*) in the provision of goods, services, facilities or accommodation customarily available to the general public,

(*b*) in the provision of commercial premises or residential accommodation, or

(*c*) in matters related to employment,

to harass an individual on a prohibited ground of discrimination.

...

14. (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu :

a) lors de la fourniture de biens, de services, d'installations ou de moyens d'hébergement destinés au public;

b) lors de la fourniture de locaux commerciaux ou de logements;

c) en matière d'emploi.

[...]

50. (1) After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

(2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.

(3) In relation to a hearing of the inquiry, the member or panel may

…

(*c*) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;

50. (1) Le membre instructeur, après avis conforme à la Commission, aux parties et, à son appréciation, à tout intéressé, instruit la plainte pour laquelle il a été désigné; il donne à ceux-ci la possibilité pleine et entière de comparaître et de présenter, en personne ou par l'intermédiaire d'un avocat, des éléments de preuve ainsi que leurs observations.

(2) Il tranche les questions de droit et les questions de fait dans les affaires dont il est saisi en vertu de la présente partie.

(3) Pour la tenue de ses audiences, le membre instructeur a le pouvoir :

[…]

c) de recevoir, sous réserve des paragraphes (4) et (5), des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il estime indiqué, indépendamment de leur admissibilité devant un tribunal judiciaire;

…

(*e*) decide any procedural or evidentiary question arising during the hearing.

...

53. (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(*a*) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(*b*) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(*c*) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(*d*) that the person compensate the victim for any or all additional costs

[…]

e) de trancher toute question de procédure ou de preuve.

[...]

53. (2) À l’issue de l’instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l’article 54, ordonner, selon les circonstances, à la personne trouvée coupable d’un acte discriminatoire :

a) de mettre fin à l’acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) d’adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) de présenter une demande d’approbation et de mettre en oeuvre un programme prévus à l’article 17;

b) d’accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l’acte l’a privée;

c) d’indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l’acte;

d) d’indemniser la victime de la totalité, ou de la fraction des frais

of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and	supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;
(*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.	*e*) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.
...	[...]
53. (4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.	**53.** (4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

Facts

[3] The relevant facts are stated at length in the Tribunal decision and are summarized in the judge's reasons. They need not be repeated here. The facts relating specifically to each ground of appeal will be summarized in the discussion below. At this point it is enough to say that the acts and circumstances that were the subject of Mr. Tahmourpour's complaint occurred in 1999 in relation to his status as a trainee at the RCMP Training Academy in Regina, Saskatchewan (known as the Depot). Mr. Tahmourpour arrived at the Depot in July of 1999. In October of 1999, his training contract was terminated. In December of 1999, a recommendation was made that he not be permitted to re-enrol.

[4] The findings of the Tribunal are summarized as follows in paragraphs 25 to 30 of the judge's reasons:

(A) Discriminatory remarks, hostile treatment and verbal abuse

25. The Tribunal found that Mr. Tahmourpour was subjected to discriminatory remarks, hostile treatment and verbal abuse by his instructors at the Depot. Specifically, it found:

> a) that the RCMP Dress and Hygiene Instructions, and an announcement made by Sergeant Hébert to Troop 4 that the complainant was permitted to wear his religious jewellery in physical education class adversely discriminated against him on the basis of his religion;
>
> b) that Corporal Boyer discriminated against him based [on] his ethnic or national origin in making a derogatory comment about Mr. Tahmourpour's signature, which he made in the Persian style right to left; and
>
> c) that Corporal Boyer adversely discriminated against Mr. Tahmourpour on the basis of his race, religion and national or ethnic origin by being especially verbally abusive and hostile towards Mr. Tahmourpour.

(B) Discriminatory performance evaluation

26. The Tribunal found that Mr. Tahmourpour's performance evaluation was done, in part, on the basis of discriminatory grounds. Specifically, it found:

> a) that although the assessment of the RCMP in the September 8, 1999 Feedback document as to his failings in communication skills was an accurate reflection of Mr. Tahmourpour's performance, the discriminatory treatment he was receiving at the Depot was a factor in the difficulty he was having in developing and demonstrating acceptable communication skills;
>
> b) that the reference in the September 8, 1999 Feedback document as to Mr. Tahmourpour not being present during a pepper spray exercise on August 26, 1999 was factually inaccurate as the video evidence showed that he was present and conducted himself appropriately;
>
> c) that parts of the September 8, 1999 Feedback document were prepared on that date but additions were later made on September 9 or 10, 1999 and that parts were fabricated or inaccurately prepared in response to an incident that occurred on September 9, 1999 between Corporal Boyer and Mr. Tahmourpour when the latter challenged Corporal Boyer's assessment that his pistol was not cleaned properly;
>
> d) that he was not given immediate verbal feedback on his performance, contrary to standard practice at the Depot; and
>
> e) that Mr. Tahmourpour's race, religion and/or ethnic or national background was a factor in Corporal Boyer's assessment of the cleanliness of Mr. Tahmourpour's pistol on both September 9 and 28, 1999.

(C) Discriminatory termination

27. The Tribunal found that the decision to terminate the cadet contract was based on recommendations that were based on discriminatory assessments of Mr. Tahmourpour's skills and were based on an evaluation of his performance where he was not given an equal opportunity to develop and demonstrate his skills at the Depot.

(D) Discriminatory decision to preclude re-enrolment

28. The Tribunal found that the decision to prevent him from re-enrolling in the training program was made on the basis of a medical opinion that was given without having met him and that his facilitators were instrumental in ensuring that he would not be permitted to re-enrol, based in part on his race, religion and/or ethnic or national background.

(E) Harassment

29. The Tribunal found that Mr. Tahmourpour was not subject to harassment on the basis of a prohibited ground of discrimination.

Remedy Ordered

30. The Tribunal ordered the following as a remedy for the discriminatory actions of the RCMP:

a) The RCMP was to offer Mr. Tahmourpour the opportunity to re-enrol in the Cadet Training Program and his program will be based on a fair assessment of the areas where training is required;

b) He shall be paid the lost salary and benefits for the first 2 years and 12 weeks of work as an RCMP officer after graduating from the Depot, discounted by 8%;

c) He shall be paid the difference between the average industrial full-time wage for persons of his age in Canada and the salary he would have earned as an officer in the RCMP until the time he accepts or rejects re-enrolment in the training program;

d) He shall be paid the average amount of overtime paid to other constables who graduated from the Depot in 1999, discounted by 8%;

e) All compensation must reflect a promotion to Corporal after 7 years;

f) $9,000.00 for pain and suffering caused by the discriminatory conduct of the RCMP;

g) $12,000.00 as special compensation under section 53(3) of the Act;

h) $9,500.00 in compensation for expenses incurred in minimizing his losses; and

i) Interest and reimbursement of legal expenses incurred.

Discussion

[5] The following findings of the Tribunal favouring Mr. Tahmourpour were not challenged in the Federal Court. First, the RCMP Dress and Hygiene Instruction was discriminatory because it prohibited the wearing of jewellery during physical training classes but did not provide accommodation for religious jewellery. Second, an instructor named Corporal Boyer discriminated against Mr. Tahmourpour by swearing at him and ridiculing him for signing his name in the Persian style, and by being especially verbally abusive and hostile toward him. Third, the fact that racist jokes made during the sensitivity training at the Depot were condoned by the instructors made Mr. Tahmourpour feel vulnerable to racism. Fourth, many of Mr. Tahmourpour's performance reviews were fabricated and influenced by discriminatory attitudes. Fifth, a memorandum in Mr. Tahmourpour's file stating that he was not to be considered for re-enrolment due to his alleged unstable mental condition, although he had never seen the staff psychologist, amounted to discrimination.

[6] Mr. Tahmourpour argues that, because a large number of substantive findings in his favour were permitted to stand, the judge should not have set aside the entire Tribunal decision as he did. The Crown disagrees, arguing that at least some of these findings are inextricably linked to findings that the judge found to be flawed. The judge did not explain why he concluded that the decision of the Tribunal should be set aside in its entirety, despite the fact that a number of its conclusions were not challenged. It might have been helpful if he had done so. However, since I disagree with all but one of the conclusions reached by the judge, I do not consider it necessary to deal with this issue.

Discussion

a) Standard of review

[7] Mr. Tahmourpour argues that the judge erred in a number of respects in the application of the correct standard of review. The judge concluded, based on *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, that the standard of review for decisions of the Tribunal is reasonableness on findings of fact and correctness on questions of law or questions of mixed law and fact. In my view, the judge erred on this point.

[8] Most elements of a decision of the Tribunal are reviewed on the standard of reasonableness, including questions of law involving the Tribunal's interpretation of its own statute or questions of general law with respect to which the Tribunal has developed a particular expertise (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, *Chopra v. Canada (Attorney General) (F.C.A.)*, [2008] 2 F.C.R. 393, 2007 FCA 268, and *Brown v. Canada (National Capital Commission)*, 2009 FCA 273). The role of this Court, where the judge has not chosen the correct standard of review or has not applied it correctly, is to consider the application for judicial review *de novo*: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at paragraph 44.

b) Test for adverse differential treatment

[9] This ground of appeal relates to the Tribunal's conclusion that an announcement made by Sergeant Hébert to Mr. Tahmourpour's troop that he was permitted to wear his religious jewellery in physical training class adversely discriminated against him on the basis of his religion. The

Tribunal deals with this part of Mr. Tahmourpour's complaint as follows at paragraphs 13 to 27 of its decision:

> 13. On July 12, 1999 Mr. Tahmourpour attended his first day of Physical Training (PT) at Depot. The Instructor, Sergeant Paul Hébert (now Superintendent), instructed the cadets to change into their fitness clothing and to remove all jewelry and watches. Mr. Tahmourpour approached Sergeant Hébert to explain that he wore a religious pendant and that he did not want to remove it. Sergeant Hébert replied that this was acceptable.
>
> 14. Mr. Tahmourpour requested that Sergeant Hébert keep the information about his religious pendant confidential; he did not want to be singled out as different on the basis of his religious affiliation. Mr. Tahmourpour testified that contrary to his request, Sergeant Hébert announced to all of the cadets in Troop 4 that "there was no jewelry to be worn during Physical Training, except for Ali here, who's allowed to wear his religious pendant". He stated that Sergeant Hébert made the comment in a loud, sarcastic and condescending voice while rolling his eyes in the direction of Mr. Tahmourpour.
>
> 15. Mr. Tahmourpour testified that for several days after this incident he was questioned by his troop mates about his religion and the reason he wore a pendant. He stated that this made him feel uncomfortable and concerned that he had been identified as "different".
>
> 16. On October 14, 1999, Mr. Tahmourpour had a conversation with Sergeant Hébert during which Sergeant Hébert apologized for his comment regarding the religious pendant. According to Mr. Tahmourpour, Sergeant Hébert stated that he would employ a different method for dealing with exemptions for religious jewelry in the future.
>
> 17. The RCMP Dress and Hygiene Instructions provided to the cadets at the time that Mr. Tahmourpour was at Depot stipulated that no jewelry was to be worn, except for medic alert bracelets. It did not provide exceptions for religious jewelry. This put cadets in a position where they either had to remove their religious jewelry, or approach the instructor as, Mr. Tahmourpour did, to request an exemption.
>
> 18. On the basis of this evidence, I find that Mr. Tahmourpour has established a *prima facie* case that the RCMP Dress and Hygiene Instructions, and the announcement made by Sergeant Hébert in front of Troop 4, adversely differentiated against him on the basis of his religion.
>
> *The Respondent's Explanation*
>
> 19. Sergeant (now Superintendent) Paul Hébert testified on behalf of the RCMP. He admitted that he made an announcement to Troop 4 that no jewelry was to be worn in PT, except for Mr. Tahmourpour, who would be permitted to wear his religious pendant.
>
> 20. Sergeant Hébert explained that he made the announcement to all the cadets because he did not want them to give Mr. Tahmourpour a hard time because he was not following the rule. Normally, if a cadet neglected to take jewelry off for PT, the troop would be required to do push ups as a reminder. To avoid this, the cadets would remind one and other to remove their jewelry. Sergeant Hébert felt he should announce to Troop 4 that

> Mr. Tahmourpour was permitted to wear his religious jewelry so that the cadets would not remind him to take it off before PT class.
>
> 21. Sergeant Hébert stated that Mr. Tahmourpour did not tell him that he wanted the information to be kept confidential. Had he known this, he would not have made the announcement to the entire troop. He would have told only the right marker. The right marker makes sure that the whole troop is on time for class and in proper uniform. It would be necessary to tell the right marker that an exception had been made to the uniform rule so that he or she would not give the cadet a hard time for not being in proper uniform.
>
> 22. Sergeant Hébert's admission that he would not have made the announcement to the entire troop had Mr. Tahmourpour asked him not to, undercuts his explanation that it was necessary to provide this information to everyone.
>
> 23. Sergeant Hébert also acknowledged that a better practice would have been to publicly inform the cadets about the rule and the exceptions for religious jewelry and medic alerts, without mentioning any names. Then, if there were problems arising from the use of jewelry in PT class, the instructor could approach the cadet(s) on an individual basis and discretely discuss the situation.
>
> 24. Sergeant Hébert stated that his tone of voice during the announcement would have been loud because it was a noisy environment. However, he would not have used a sarcastic voice because he respected people's beliefs and values.
>
> 25. I accept Sergeant Hébert's testimony that the announcement was made publicly to Troop 4, but in a neutral manner. This does not, however, change the fact that Mr. Tahmourpour felt that he had been identified as being different from the rest of the troop on the basis of his religion. Although several of his troop mates testified on behalf of the RCMP that they did not know about his Muslim background, this does not mean that Mr. Tahmourpour was not questioned about his religion by other cadets who did not testify.
>
> 26. One of the challenges that Mr. Tahmourpour faced in this case was to present evidence from his former troop mates who are now RCMP officers. Mr. Tahmourpour stated that he had difficulty finding individuals who would testify against the RCMP in this case.
>
> 27. Moreover, Mr. Tahmourpour's own perception that he had been identified as different is sufficient for me to find that, although unintended, the effect of the RCMP's policy with respect to dress and hygiene and Sergeant Hébert's announcement about Mr. Tahmourpour's religious pendant was to adversely differentiate against Mr. Tahmourpour on the basis of his religion. This allegation is therefore, substantiated, on a balance of probabilities.

[10] The judge found this part of the Tribunal’s decision to be based on an error of law. He concluded that, in the absence of evidence that Sergeant Hébert’s announcement resulted in

Mr. Tahmourpour being treated differently than his troop mates in the physical training classes, or adversely affected his relationships with his troop mates, his instructors or his performance as a cadet, “there was no basis on which the Tribunal, properly instructed in the law, could reasonably conclude that the statement made by Sergeant Hébert constituted adverse differentiation or discrimination...”

[11] This conclusion was based on the judge’s understanding, from paragraph 27 of the Tribunal’s decision, that Mr. Tahmourpour’s complaint about the announcement was substantiated *solely* by Mr. Tahmourpour’s perception that the announcement identified him as different. However, the Tribunal’s reasoning cannot be assessed fairly on the basis of paragraph 27 alone. It is necessary to read paragraphs 13 to 27 in their entirety.

[12] The immediate result of Sergeant Hébert’s announcement at the first physical training class at the Depot was to make the whole class aware of Mr. Tahmourpour’s religion and his request for accommodation in relation to his religious pendant. The evidence of that announcement established the element of differentiation on the basis of religion, but it did not by itself establish discrimination. Discrimination requires something more, which the judge correctly described as something harmful, hurtful or hostile. The judge concluded that there was nothing more, but in my view that conclusion was based on an unduly narrow view of the record.

[13] The Tribunal found no hostility in Sergeant Hébert’s announcement, but accepted Mr. Tahmourpour’s submission that it was hurtful to Mr. Tahmourpour. That finding was based on Mr. Tahmourpour’s testimony about his subjective reaction to the announcement. However, that

evidence was given in the light of a particular factual context which the Tribunal undoubtedly took into account, as it was obliged to do. The relevant contextual factors included the policy set out in the RCMP Dress and Hygiene Instructions and also the fact that the announcement was made at the very first physical training session, the fact that it resulted in Mr. Tahmourpour being immediately singled out from the other cadets, and the fact that it resulted in Mr. Tahmourpour being questioned uncomfortably, over a couple of days, about his religious practices. It was also relevant that Sergeant Hébert admitted at the Tribunal hearing that it would have been better to publicly inform the cadets about the rule and the exceptions, without mentioning any names, so that any resulting issues could be dealt with discreetly.

[14] The record discloses that the announcement caused Mr. Tahmourpour, however briefly, to be treated differently than his troop mates in the physical training class, and also that it adversely affected his relationships with his troop mates for a short time afterward. I conclude that it was reasonable for the Tribunal to conclude, as it did, that Mr. Tahmourpour's complaint about Sergeant Hébert's announcement was substantiated. I would allow the appeal on this issue.

[15] This aspect of Mr. Tahmourpour's complaint was minor compared to the remainder of his complaint. It would not by itself have justified a remedy apart from the obvious (and apparently undisputed) need for a change in the protocol for dealing with a request for accommodation on religious grounds in relation to the wearing of jewellery during physical training. It was acknowledged that the Tribunal's conclusion on this point did not factor very much into the overall decision (see page 14 of the appellant's memorandum of fact and law). If I had agreed with the

judge that the Tribunal erred in law on this point, I would have concluded that this error could not by itself justify an order setting aside the entire decision.

c) Raw data used as the foundation for expert evidence, and the analysis of other data

[16] This ground of appeal relates to the judge's conclusion that the Tribunal erred in law in relying on raw data contained in the report of Dr. N. Scot Wortley, an expert testifying for Mr. Tahmourpour, because the raw data itself was not in evidence, having been expressly excluded from the record in the circumstances described in the next paragraph. On a related point, the judge concluded that the Tribunal was wrong in its analysis of other data that was in evidence.

(i) The raw data

[17] Prior to the hearing, a report was prepared by two RCMP employees, Dr. Michael Rannie and Dr. Garry Bell, expressing their opinion in response to the allegation of Mr. Tahmourpour that there were disproportionate terminations of visible minority cadets at the Depot and that this bias was caused by systemic racism. The first part of the Rannie/Bell report consists of their analysis of three tables (entitled "Sample 1", "Sample 2" and "Sample 3") they prepared from information derived from RCMP records.

[18] The three tables from the Rannie/Bell report contain data about all cadets in training at the Depot during five fiscal years (1998/99 to 2002/03). Despite the titles given to the tables, the data does not reflect "samples" in the usual sense of a small data set extracted from a larger population. Rather, it reflects the entire population of cadets for the relevant years.

[19] "Sample 1" gives the number of cadets attending the Depot in each of the relevant years who passed, and the number who failed. For each year, this would have included some cadets who enrolled in that year after having failed in a prior year, and some who failed in that year and re-enrolled in a subsequent year. "Sample 2" gives the number of cadets attending the Depot for the *first* time in each of the relevant years who passed in that year, and the number who failed in that year. "Sample 3" gives the number of cadets attending the Depot for their *final* time in each of the relevant years who passed in that year, and the number who failed in that year.

[20] In each table, the cadets are categorized as "visible minority" (meaning those who self-identified as being of a visible minority) and "Caucasian" (meaning those who self-identified as Caucasian and those who did not self-identify as "visible minority"). For reasons that are not clear, Aboriginal cadets apparently were assigned to neither category but were reflected in the total; it has not been suggested that this presents a problem in the analysis of the data.

[21] Dr. Rannie and Dr. Bell relied on the raw data in their three tables to conclude that Mr. Tahmourpour's allegation of adverse impact or systemic discrimination is unfounded, assuming that "adverse impact is indicated when the success rate of the designated group is 4/5th (80%) less than the comparison group".

[22] The Rannie/Bell report was provided to Mr. Tahmourpour some months before the Tribunal hearing. Dr. Wortley prepared a report in which he criticized the methodology and conclusions stated in the Rannie/Bell report, including the "80% rule". Dr. Wortley also relied on the raw data in

the tables in the Rannie/Bell report to support his opinion that racial bias may exist within the RCMP and could have played a role in Mr. Tahmourpour's termination.

[23] No one has suggested that the raw data in the tables appended to the Rannie/Bell report is inaccurate, or that there is any legal or other reason why Dr. Wortley should not have relied on that raw data as a basis for his opinion.

[24] At the hearing, Dr. Wortley testified during the presentation of Mr. Tahmourpour's case. Later, during the presentation of the RCMP's case, Dr. Bell was produced as an expert witness for the RCMP. The Tribunal did not permit Dr. Bell to testify, for reasons that are explained as follows at paragraph 156 of the Tribunal's decision:

> The RCMP denied the existence of systemic racism at Depot. It presented Dr. Garry Bell, an RCMP employee, as an expert witness to respond to the analysis of the data on attrition rates provided by Dr. Wortley. Dr. Bell was the Acting Officer in Charge of Cadet Training who agreed with the recommendation that Mr. Tahmourpour not be considered for re-enrollment at Depot. Given the closeness of his connection to one of the parties in the case, and to one of the questions being litigated, the Tribunal was of the view that the probative value of Dr. Bell's opinion evidence would be significantly outweighed by its prejudicial effect. Therefore, the Tribunal did not permit Dr. Bell to testify as an expert in this case.

[25] The Rannie/Bell report was marked for identification but the Tribunal did not permit the report to become part of the record.

[26] The RCMP argued in the Federal Court that the Tribunal erred in law in refusing to admit the Rannie/Bell report, and in refusing to permit Dr. Bell to testify. The judge concluded that the Tribunal made no error in rejecting Dr. Bell as an expert based on his connection with

Mr. Tahmourpour's case. However, the judge concluded that the Tribunal erred in law in accepting the evidence of Dr. Wortley that was based on the raw data in the Rannie/Bell report, because the raw data was not in evidence. In my view, the judge erred in law on this point.

[27] It is true that Dr. Wortley's report is based in part on raw data provided by the RCMP that was not otherwise in evidence. However, it does not follow that the Tribunal was required as a matter of law to disregard that raw data. On the contrary, it was open to the Tribunal to admit evidence of that data as it appeared in Dr. Wortley's report, if it concluded that evidence of the data was reliable (see, generally, Alan W. Bryant, Sydney N. Lederman and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd edition (Toronto: LexisNexis Canada Inc., 2009) at §12.159 – 12.177, pages 834-43).

[28] The Tribunal's assessment of the reliability of the raw data in the tables appended to the Rannie/Bell report is a determination that must be reviewed on the standard of reasonableness. The Tribunal noted (at paragraphs 150-2 of the reasons) that Dr. Wortley relied on three sets of statistics provided by the RCMP with respect to attrition and failure rates at the Depot, one of which was the raw data in the three tables appended to the Rannie/Bell report. The Tribunal went on to conclude (at paragraph 153) that the data upon which Dr. Wortley relied constituted the best information available and was reliable. In my view, that was a reasonable conclusion in the circumstances. It is clear from the record that Dr. Wortley had no means of obtaining this information except from the RCMP. And, as mentioned above, there is no suggestion that the data is inaccurate. The fact that it is capable of being interpreted differently by different experts does not make it unreliable.

[29] Even if the raw data from the Rannie/Bell report was inadmissible under the applicable principles of the law of evidence, it would not necessarily follow that the Tribunal was not entitled to rely on it. By virtue of subsection 50(3) of the *Canadian Human Rights Act* (quoted above), the Tribunal is entitled to receive and accept any evidence as it sees fit, whether or not that evidence is or would be admissible in a court of law, subject only to two exceptions that have no application in this case (evidence protected by any privilege and evidence from a conciliator appointed to settle the complaint).

(ii) The Tribunal's analysis of other data

[30] The judge also found that the Tribunal erred in law in relying on other data properly in evidence to conclude that in the year that Mr. Tahmourpour's contract was terminated at the Depot, the attrition rate for visible minorities was 16.98%, and for non-visible minorities it was 6.88%. From that evidence and circumstantial evidence of discriminatory attitudes towards visible minority members and cadets, the Tribunal inferred that the October assessment of Mr. Tahmourpour's abilities was based, at least in part, on his race, religion and/or ethnic or national origin.

[31] The judge accepted the argument of the RCMP that it was an error for the Tribunal to rely on the statistical evidence of attrition rates without adjusting for cadets who left training for personal reasons such as family illness, injury, medical reasons, or a change of mind, and whose contracts were not terminated by the RCMP. The judge opined that the only evidence that the Tribunal ought to have considered was that of visible minority cadets who were in the same position as Mr. Tahmourpour – those whose contracts were terminated by the RCMP.

[32] The relevance and probative value of the RCMP's attrition rate statistics are questions of fact for the Tribunal, which are to be reviewed on the reasonableness standard. In my view, the judge erred in failing to defer to the Tribunal in this regard.

[33] Given the statistical evidence and other evidence in the record (including the opinion of Dr. Wortley), it was reasonable for the Tribunal to treat the total cadet attrition figures for 1999/2000 as evidence that, in that year, there were in fact differential attrition rates for visible minority cadets and others. Since Mr. Tahmourpour was a cadet during that period, it was reasonable for the Tribunal to go further and infer, as it did, that the evidence of differential attrition rates provided some support for Mr. Tahmourpour's specific allegation of discrimination in the RCMP's assessment of his abilities.

d) Whether there was evidence that discrimination affected Mr. Tahmourpour's performance

[34] Various assessments of Mr. Tahmourpour's performance at the Depot indicate that he did not perform well. However, the Tribunal concluded that in a number of respects the evaluation of Mr. Tahmourpour's performance was false and fabricated. Those conclusions are not challenged.

[35] The Tribunal also found that, although the assessment of Mr. Tahmourpour's failings in communication skills was an accurate reflection of Mr. Tahmourpour's performance at the Depot, the discriminatory treatment Mr. Tahmourpour received at the Depot was a factor in the difficulty he was having in developing and demonstrating acceptable communication skills. That conclusion is expressed as follows in paragraph 171 of the Tribunal's decision:

> I accept Corporal Bradley's testimony that she had real concerns about Mr. Tahmourpour's communication skills, judgment and ability to solve problems. She

> did not think that he would be able to do police work because of these deficiencies. The problem with this explanation, however, is that in a training environment where derogatory comments about race are condoned and directed at people like Mr. Tahmourpour, where evaluations are inaccurate and improper, and where instructors take pride in being "politically incorrect", it is difficult for someone like Mr. Tahmourpour to develop and demonstrate his skills in these areas. I find it reasonable to infer that such conditions erode one's confidence and ability to perform well. Therefore, the Respondent's explanation that Mr. Tahmourpour's performance at Depot was weak is not satisfactory. Mr. Tahmourpour's performance was more likely than not affected by the discrimination to which he was exposed.

[36] This is a factual conclusion and is subject to review on the standard of reasonableness.

[37] The judge concluded that there was no evidentiary foundation at all for the conclusion that Mr. Tahmourpour's performance was affected by the treatment he received. In this Court, the RCMP defends the judge's conclusion on this point mainly by referring to Mr. Tahmourpour's own assertions, repeated many times, that he performed well at the Depot. However, I am prepared to take judicial notice of the fact that few people are capable of assessing their own performance.

[38] The record contains evidence that, before making his complaint under the *Canadian Human Rights Act*, Mr. Tahmourpour approached Corporal Boyer to complain that his performance in firearms training was adversely affected by Corporal Boyer's abusive treatment. Mr. Tahmourpour also testified at the Tribunal that he felt uncomfortable, alienated and vulnerable as a result of racist comments made by other cadets and condoned by instructors. Most importantly, Sergeant Brar, an instructor at the Depot, testified as to his personal observation that Corporal Boyer's abusive behaviour was apparent with most cadets but was noticeably worse with visible minority cadets, and that his abuses had a negative effect on the performance of the cadets to whom it was directed. It is no great leap to infer that Mr. Tahmourpour would have been similarly affected. In my view, there

was evidence from which the Tribunal could reasonably infer that Mr. Tahmourpour's performance was probably affected by the treatment he received. I conclude that the judge erred in finding otherwise.

e) Remedy: damages for loss of income

[39] In the Federal Court, the RCMP alleged a number of errors in the remedy awarded by the Tribunal. Most of those allegations were rejected. However, the judge agreed with the RCMP that the Tribunal should have determined a cap or limitation in relation to one element of the Tribunal's award for monetary compensation.

[40] The relevant part of the Tribunal award reads as follows (from paragraph 267 of the Tribunal's decision):

> (iii) The Respondent shall pay Mr. Tahmourpour compensation for salary and benefits he lost for the first 2 years plus 12 weeks of work as an RCMP officer after graduating from Depot. The compensation shall be discounted by 8%.
>
> (iv) The Respondent shall pay Mr. Tahmourpour the difference between the average full-time industrial wage in Canada for persons of his age, and the salary that he would have earned as an RCMP officer until such time as Mr. Tahmourpour accepts or rejects an offer of re-enrolment in the training program at Depot. …

[41] As I understand this part of the award, it establishes two different time periods for the purpose of monetary compensation. The first time period, which the parties sometimes refer to as the "grace period", runs for 2 years and 12 weeks starting with the date on which Mr. Tahmourpour would have graduated from the Depot but for his termination. For the grace period, Mr. Tahmourpour was held to be entitled to an amount equal to the compensation he would have received as an RCMP officer less 8%.

[42] The second time period begins immediately after the grace period and ends on the date on which Mr. Tahmourpour accepts or rejects an offer of re-enrolment. During that second time period, Mr. Tahmourpour is entitled to further compensation, which I will call the "top-up", determined as the difference between what he would have earned during the second time period if he had been employed at the average full-time industrial wage in Canada and the amount he would have earned during the second time period as an RCMP officer, with the difference discounted by 8%. (The award stipulates a further adjustment to reflect the Tribunal's assumption that Mr. Tahmourpour would have earned overtime and been promoted during the second time period, but those stipulations can be ignored for the purpose of this discussion.)

[43] The end date of the second time period necessarily would occur at some time after the date of the Tribunal award on April 16, 2008. That means that the second time period would run for at least 6 years (i.e., from sometime in 2002 until at least April 16, 2008).

[44] It is not clear from the record whether the second time period has ended, or when it is likely to end. If this part of the remedy is read literally and Mr. Tahmourpour simply declines to accept or reject an offer of re-enrolment, the second time period may never end unless, as counsel suggested at the hearing of this appeal, the offer of re-enrolment is made subject to a condition that it must be accepted within a stipulated time or be deemed to have been rejected.

[45] The RCMP argued in the Federal Court, and the judge agreed, that the top-up portion of the award of compensation is not consistent with the principle that the Tribunal must find a causal link between the discriminatory practice and the loss claimed (see *Chopra* (cited above), at paragraph

37). Mr. Tahmourpour argues that the top-up as awarded is reasonable and that the judge erred in concluding otherwise.

[46] It is clear that the Tribunal was aware of *Chopra* and the principles relating to damages as stated in that case. In that regard, the Tribunal made a number of factual findings which I summarize as follows. The RCMP's discriminatory treatment of Mr. Tahmourpour denied him the opportunity to complete his training at the Depot and to make his living as an RCMP officer. He must be compensated for the loss of wages that he would have earned. Non-visible minority cadets had a 93% chance of completing training. That justifies some discount from the compensation to be awarded (justifying a 7% discount). A further 1% discount is warranted because the average rate of attrition for regular members during the first 20 years of employment is 1%. No discount is warranted to reflect the chance that Mr. Tahmourpour's demonstrated weaknesses increased the likelihood that he would not graduate, because it is not possible to know to what extent his weaknesses were caused by discriminatory treatment. It is necessary to take into account Mr. Tahmourpour's obligation to mitigate his losses. Mr. Tahmourpour did not make sufficient efforts to minimize his losses from the time he left the Depot until the commencement of the hearing. However, from 2000 to 2002, it was difficult for him to work because of the psychological impact of his experiences at the Depot, and because of the time necessarily spent by him on his complaint. On that basis, the "grace period" was established at 2 years and 12 weeks. However, Mr. Tahmourpour could have been gainfully employed after that time.

[47] As I understand the Tribunal's decision, there were no other facts that were taken into account in determining the amount of the monetary compensation awarded to Mr. Tahmourpour. I

am unable to discern from the Tribunal's decision why the Tribunal chose, as the end point of the second time period, the date on which Mr. Tahmourpour accepts or rejects an offer of re-enrolment, as opposed to an earlier fixed date. I agree with the judge that the Tribunal did not put its mind to the question of when, after the end of the grace period, the discrimination suffered by Mr. Tahmourpour ceased to have an effect on his income earning capacity. In the absence of an explanation from the Tribunal, that part of the Tribunal's award providing for the top-up cannot be found to be reasonable.

[48] As there is one ground of appeal on which I agree with the judge, a question arises as to whether the remedy ordered by the judge (that the matter be returned to the Tribunal for rehearing) should be permitted to stand. In my view, the question as to what cap or other limitation should be placed on the top-up is a question that must be answered by the Tribunal. Therefore, I would return this matter to the Tribunal only for the purpose of considering the imposition of a cap or limitation on the top-up.

Conclusion

[49] For these reasons, I would allow the appeal except on the question of the cap or limitation on the top-up portion of the compensation award. I would set aside paragraphs 2 and 3 of the judgment of the Federal Court, and replace them with the following:

> 2. The application for judicial review is allowed only in respect of the first sentence of item (iv) of paragraph 267 of the decision of the Canadian Human Rights Tribunal made April 16, 2008, and is otherwise dismissed.
>
> 3. This matter is referred back to the Tribunal for reconsideration of the first sentence of item (iv) of paragraph 267 in accordance with the reasons for judgment of the Federal Court of Appeal in A-453-09.

[50] As Mr. Tahmourpour was successful on most of the issues on appeal, I would award him costs in this Court and in the Federal Court.

"K. Sharlow"
J.A.

"I agree
M. Nadon J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-453-09
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE ZINN DATED OCTOBER 6, NO. 2009 FC 1009 (DOCKET NUMBER: T-768-08))	
STYLE OF CAUSE:	Ali Tahmourpour v. Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 23, 2010
REASONS FOR JUDGMENT BY:	Sharlow J.A.
CONCURRED IN BY:	Nadon J.A. Layden-Stevenson J.A.
DATED:	July 19, 2010

APPEARANCES:

Paul Champ Anne Levesque	FOR THE APPELLANT
Kathryn Hucal	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Champ & Associates Ottawa, Ontario	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT