



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2007-0127
Issued at: Ottawa, November 30, 2011

NORM MURRAY

Complainant

AND

THE CHAIRPERSON OF THE IMMIGRATION AND REFUGEE BOARD OF CANADA

Respondent

AND

OTHER PARTIES

Matter	Request to submit post-hearing evidence
Decision	Request is denied
Decision rendered by	Guy Giguère, Chairperson
Language of Decision	English
Indexed	<i>Murray v. Chairperson of the Immigration and Refugee Board of Canada</i>
Neutral Citation	2011 PSST 0036

Reasons for Decision

Introduction

1 On May 11, 2011, the Federal Court issued *Murray v. Canada (Attorney General)*, 2011 FC 542, concerning Norm Murray's request to submit post-hearing evidence related to his complaint before the Public Service Staffing Tribunal (the Tribunal). The Court set aside the Tribunal's decision on the complaint, subject to the following:

- (i) This matter is remitted back to Chairperson Guy Giguère to hear submissions by the parties to the complaint as to the relevance of the *Audit of the Immigration and Refugee Board of Canada: A report by the Public Service Commission of Canada, October 2009* (PSC audit) to the matters at issue before the PSST in the applicant's complaint;
- (ii) After considering the submissions of the parties as to the relevance of this evidence, Chairperson Guy Giguère shall decide whether to accept this evidence;
 - i. If he considers that this evidence should be accepted, then he shall consider further submissions from the parties as to whether additional evidence or argument is necessary to address that evidence prior to rendering a new decision on the merits of the complaint of Mr. Murray; and
 - ii. If he considers that this evidence should not be accepted, then he shall provide his reasons for that decision and shall also render a decision on the merits of the complaint of Mr. Murray, which may be in the form of his Reasons for Decision dated December 21, 2009.

Background

2 The hearing of Mr. Murray's complaint concluded in November 2008. On October 18 and 20, 2009, the complainant submitted to the Tribunal as information relevant to his complaint, a copy of the *Audit of the Immigration and Refugee Board of Canada: A report by the Public Service Commission of Canada, October 2009* (the PSC audit). He indicated that his counsel was prepared to make submissions on this new information. On October 23, 2009, counsel for the respondent replied that it was not able to take a position on this request as it was not clear for what purpose the document was being submitted. No further correspondence followed.

3 On December 21, 2009, the Tribunal issued a decision on the merits of Mr. Murray's complaint: *Murray v. Chairperson of the Immigration and Refugee Board of Canada*, 2009 PSST 0033 (*Murray* 2009). The complaint was dismissed as it was

determined that the complainant had not established a *prima facie* case of discrimination in the choice of a non-advertised process. The Tribunal further found that even if the complainant had established *prima facie* discrimination, the respondent provided a reasonable non-discriminatory explanation for choosing a non-advertised process, and that the explanation was not pretextual.

4 In its reasons for decision, the Tribunal did not refer to the complainant's submission of the PSC audit.

Issue

5 The Tribunal must determine whether the PSC audit should be accepted.

Summary of the arguments of the parties

A) Complainant's arguments

6 The complainant submits that the PSC audit is relevant. He argues that a significant portion of it relates directly to the appointment process and non-advertised processes conducted by the Immigration and Refugee Board.

7 According to the complainant, the PSC audit corroborates and provides further evidence of racial discrimination by way of clustering of visible minorities at lower levels of the PM occupational group. The appointments examined in the PSC audit reflect a pattern of clustering visible minority employees at lower levels, and impeding their progression to higher levels.

8 The complainant also seeks to introduce a Canadian Human Rights Commission investigation report released in March 2011 (the CHRC report). He argues that the PSC audit directly complements the specific evidence contained in the CHRC report.

B) Respondent's arguments

9 The respondent submits that the PSC audit is not relevant as it does not contain evidence to demonstrate any systemic racial discrimination in any of the appointment processes audited and, more particularly, in the appointment process in question.

Furthermore, the PSC audit does not contain any information regarding individual racial discrimination, or that could lead to a finding of such in relation to the complainant.

10 The respondent objects to the complainant's attempt to introduce the CHRC report and submits that it falls outside the scope of the Federal Court's judgment in *Murray*.

C) Public Service Commission's arguments

11 The PSC submits that the proper test to apply for a request to admit evidence post-hearing is set out in *Whyte, Kasha v. Canadian National Railway*, 2010 CHRT 6 (CanLII).

12 The PSC argues that the PSC audit submitted by the complainant does not meet the test since it does not have the necessary degree of relevance to the matters at issue. According to the PSC, the first sample of the PSC audit was not statistically representative and, therefore, accurate generalizations cannot be made from this sample. As for the second sample, the PSC submits that it has limited relevance as it was focussed on different categories of positions: former Governor in Council (GIC) appointees and appointments to EX and equivalent positions.

13 The PSC also objects to the complainant's attempt to introduce the CHRC report as being improper at this stage.

D) Complainant's reply arguments

14 The complainant agrees that the test set out in *Whyte* applies. The complainant submits that the PSC audit adds meaningful context, detail and examples capable of influencing the Tribunal's finding relative to the significance of deficiencies in the appointment process, which bear on its ultimate finding on systemic discrimination.

15 The complainant submits that the Tribunal must assess the PSC audit, at least in part, with respect to whether it would be able to influence the Tribunal's finding that the circumstantial evidence advanced at the hearing was insufficient to support a finding of systemic discrimination.

16 The complainant argues more specifically that the PSC audit's finding of deficiencies in the written rationales weighs in favour of a finding of seriousness of the deficiency. The complainant further emphasizes that the value of representativeness was not even mentioned in the written rationale for the appointment process at issue.

17 Finally, the complainant submits that the admissibility of the CHRC report as part of the post-hearing record should be determined once the relevance of the PSC audit is established by the Tribunal. It is, therefore, not improper to reference the CHRC report in these submissions, as it may be led at a later stage to establish how the PSC audit may assist the Tribunal.

Analysis

18 There are very few decisions on the issue of admitting new evidence once a hearing has concluded. The principles drawn from case law can be used to guide the Tribunal's decision on this matter. As case law highlights, reopening a hearing to accept new evidence is a matter of discretion that should be exercised sparingly and prudently. Finality of a hearing is critical in our justice system and only where the interest of justice requires it may a hearing be reopened for further evidence. See *671122 Ontario Ltd v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII).

19 The complainant seeks to introduce evidence post-hearing, but prior to the issuance of reasons. In determining whether to accept the PSC audit, the Tribunal will apply the test articulated in *Whyte*. This test requires that the following three conditions be fulfilled in order to accept new evidence where a tribunal has not yet reached its final conclusion:

1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the hearing;
2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

20 The parties all agree that the first and third conditions of the *Whyte* test are met. The Tribunal finds that these conditions are met. The PSC audit was published after the hearing had concluded and could not have been obtained with reasonable diligence before or during the hearing of this complaint. The PSC audit states at the outset that all of the work in the report was conducted in accordance with the legislative mandate and audit policies of the PSC. The Tribunal is satisfied that the PSC audit is evidence that is presumably to be believed. The PSC audit is apparently credible, although it is not incontrovertible.

21 However, for the reasons that follow, the Tribunal is not satisfied that the PSC audit meets the second condition of the *Whyte* test.

22 The result of the case in *Murray* 2009 was that the Tribunal found that the complainant had not established a *prima facie* case of discrimination in the respondent's choice of a non-advertised process and, even if he had, the respondent provided a reasonable non-discriminatory explanation for choosing the non-advertised process. In other words, the result of the case was that the complainant had not proven discrimination and, therefore, abuse of authority in the choice of process.

23 The Tribunal thoroughly reviewed the PSC audit, and all the arguments put forth by the parties to determine whether this evidence, if given, would probably have an important influence, although not decisive, on the result of the case.

24 The Tribunal finds that no conclusions can possibly be drawn from the PSC audit samples to support the complainant's *prima facie* case. No relevant generalizations can be made from the first sample, and the second sample focused on former GIC and EX positions or equivalent. Moreover, the PSC audit cannot be considered as evidence that the respondent's staffing actions through non-advertised processes in general and, more importantly, the specific non-advertised processes at issue in this complaint, lacked representativeness. The most that can be drawn from this evidence is that the written rationales omitted to explain how the staffing value of representativeness was met in these processes.

25 The PSC audit reviewed staffing files and found some deficiencies in how some appointment processes were documented. It did not conclude that the appointments did not respect the PSC's staffing value of representativeness. Rather, the PSC audit found that in those staffing actions reviewed, the document explaining the rationale for proceeding with a non-advertised process did not address the value of representativeness (see page 15 of the PSC audit).

26 At the hearing of Mr. Murray's complaint, the written rationale for the **specific** non-advertised appointment process in question was entered into evidence, and the parties had an opportunity to examine and cross-examine witnesses on this document. While the written rationale did not explain how the staffing values had been met in proceeding by way of non-advertised processes, the Tribunal found that the respondent provided a reasonable non-discriminatory explanation for its choice of process (see *Murray* 2009, at para.115). The finding of the PSC audit that no rationales addressed the value of representativeness would have had no influence on the result of this case.

27 Therefore, the Tribunal concludes that the PSC audit would not have had an important influence, whether decisive or not, on the result of the case. The Tribunal will not accept this evidence.

28 Since the Tribunal has concluded that it will not accept the PSC audit into evidence following the hearing, it is unnecessary to rule on the admissibility of the CHRC report as part of the post-hearing record.

Decision

29 The post-hearing request by the complainant for the Tribunal to accept the PSC audit is denied.

30 The Tribunal dismisses the complaint as per its Reasons for Decision dated December 21, 2009 in *Murray* 2009.

Guy Giguère
Chairperson

Parties of Record

Tribunal File	2007-0127
Style of Cause	<i>Norm Murray and the Chairperson of the Immigration and Refugee Board of Canada</i>
Hearing	Written request; decided without the appearance of parties
Date of Reasons	November 30, 2011