Dhanjal v. Canada (Human Rights Commission), 1997 CanLII 5751 (FC)

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Date: 19971124

Docket: T-1034-96

**BETWEEN:**

**DALJIT DHANJAL**

**Applicant**

**- and -**

**AIR CANADA**

**Respondent**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Intervenor**

     **REASONS FOR ORDER**

**MCGILLIS, J.**

[1]      Despite the very able argument of counsel for the applicant, I have concluded that the application for judicial review of the decision of the Canadian Human Rights Tribunal ("Tribunal") must be dismissed.

**THE TRIBUNAL'S DECISION**

[2]      Following a twenty-five day hearing, the Tribunal released a lengthy and detailed decision in which it concluded that the applicant had failed to establish, under [paragraphs 7](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-h-6/latest/rsc-1985-c-h-6.html#sec7_smooth)(b) and [14](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-h-6/latest/rsc-1985-c-h-6.html#sec14_smooth)(c) of the [*Canadian Human Rights Act*, R.S.C. 1985, c. H-6](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-h-6/latest/rsc-1985-c-h-6.html), as amended, a *prima facie* case of discrimination or harassment based on race or religion. In its analysis, the Tribunal carefully considered the evidence adduced by the parties, and made express findings with respect to the credibility of the various witnesses in relation to each of the allegations made by the applicant. The Tribunal provided detailed and cogent reasons in support of all of its findings of credibility, and made specific observations concerning the demeanour of several of the witnesses, including the applicant. A review of the decision, in its totality, indicates that the Tribunal found the applicant to be lacking in credibility in relation to major aspects of his evidence for a myriad of reasons, all of which were carefully explained.

**ALLEGED ERRORS OF FACT**

[3]      In attacking the Tribunal's decision, counsel for the applicant submitted, among other things, that the Tribunal erred by making erroneous, perverse or capricious findings of fact in at least three different areas of its analysis. I have carefully reviewed the evidence in the record, and have considered the detailed arguments of all counsel. In my opinion, the factual findings and inferences made by the Tribunal in its decision were reasonably supported by the evidence.[1](https://www.canlii.org/en/ca/fct/doc/1997/1997canlii5751/1997canlii5751.html?autocompleteStr=Dhanjal%20v.%20Air%20Canada%2C%20(1997)%2C%20139%20.R&autocompletePos=1" \l "ftn1)Furthermore, even if I were to accept the argument that there were some factual errors in the decision, my review of the evidence in its totality indicates that the decision was reasonably open to the Tribunal.[2](https://www.canlii.org/en/ca/fct/doc/1997/1997canlii5751/1997canlii5751.html?autocompleteStr=Dhanjal%20v.%20Air%20Canada%2C%20(1997)%2C%20139%20.R&autocompletePos=1" \l "ftn2) In arriving at this conclusion, I am also mindful of the very negative comments made by the Tribunal concerning the demeanour of the applicant as a witness.

**ALLEGED ERRORS OF LAW**

[4]      Counsel for the applicant further challenged the decision on the basis that the Tribunal erred in law by failing to find that the applicant had established a *prima facie* case of discrimination based on race. In particular, he argued that the Tribunal erred in the following respects:

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|          i)      by failing to determine whether a pattern of differential conduct or discrimination existed; |                  |

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|          ii)      by imposing an improper threshold test for a *prima facie* case; and, |                  |

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|          iii)      by failing to consider the applicant's "wrongful dismissal" from his employment. |                  |

[5]      In support of his submission that the Tribunal erred in law by failing to determine whether a pattern of discrimination or harassment existed, counsel for the applicant pointed to the fact that the Tribunal had considered the evidence separately in the six discrete "categories of conduct" alleged by the applicant to have constituted discrimination or harassment. As a result, he argued that the Tribunal failed to appreciate the pattern that existed in relation to the treatment accorded to the applicant. I cannot accept that submission. Given the length of the hearing and the volume of information, the Tribunal cannot be faulted for analyzing the evidence of the witnesses under separate headings concerning each of the six "categories of conduct" alleged by the applicant to constitute discrimination or harassment. To the contrary, the manner in which the Tribunal approached its analysis ensured that it made the necessary factual findings in relation to all of the allegations made by the applicant. Furthermore, nothing in the decision supports the assertion that the Tribunal failed to consider all of the acts collectively in assessing the applicant's claim.

[6]      Counsel for the applicant further submitted that the Tribunal erred in law by imposing an improper threshold test for the existence of a *prima facie* case. I cannot accept that submission. In my opinion, the decision, when read in its totality, indicates that the Tribunal applied the proper legal test. In particular, the Tribunal clearly understood that the allegations made by the applicant had to be credible in order to support a conclusion that a *prima facie* case existed.[3](https://www.canlii.org/en/ca/fct/doc/1997/1997canlii5751/1997canlii5751.html?autocompleteStr=Dhanjal%20v.%20Air%20Canada%2C%20(1997)%2C%20139%20.R&autocompletePos=1" \l "ftn3)

[7]      The Tribunal rejected the evidence of the applicant with respect to all of the allegations of discrimination or harassment, save and except in relation to one remark with a racial connotation uttered by his supervisor. Having found that a remark with a racial connotation had been made to the applicant, the Tribunal proceeded to consider whether this "isolated incident", for which the supervisor had immediately apologized, was sufficient to constitute a *prima facie* case of discrimination or harassment based on race. In its analysis on that point, the Tribunal outlined its view of the law, and applied the law to the incident in question. I have not been persuaded that the Tribunal committed any error in its statement or its application of the law. However, at one point in its lengthy decision, the Tribunal used wording which was somewhat confusing. After finding at page 14 of its decision that the applicant had established the existence of one incident with a racial connotation, the Tribunal later stated at page 43 that, since there was a "...*prima facie* case of an incident with a racial connotation...", it was necessary to determine whether the applicant was the victim of discrimination or harassment based on race. Following its review and application of the law, the Tribunal concluded at page 54 that the applicant had not been the victim of harassment, and that no *prima facie* case had been established. I am satisfied from my review of the decision as a whole that, although the Tribunal used some inappropriate and confusing wording in its reference at page 43 to a *prima facie* case of an incident with a racial "connotation", its overall finding that there was no*prima facie* case of discrimination or harassment was nevertheless clear and unequivocal.

[8]      As his final point with respect to the existence of a *prima facie* case, counsel for the applicant argued that the Tribunal erred in law in failing to consider, as part of the *prima facie* case, the applicant's "wrongful dismissal" from his employment. A review of the decision as a whole indicates that the Tribunal found as a fact that the offer of early retirement made to the applicant by the respondent was not based, in whole or in part, on his race, colour or religion. In my opinion, that factual inference was reasonably open to the Tribunal on the basis of the evidence in the record. In the circumstances, it cannot be said that the Tribunal erred in law in failing to consider the alleged "wrongful dismissal" as part of the *prima facie* case.

**ALLEGED BIAS AND PROCEDURAL UNFAIRNESS**

[9]      In his written submissions, counsel for the applicant argued that the Tribunal was biased against the applicant, and that it committed certain breaches of procedural fairness. At the outset of the hearing, I raised with counsel my concern that the applicant had failed to adduce any evidence in his affidavits to establish the facts relevant to those allegations, as required by Rule 1603(1) of the *Federal Court Rules*. Counsel for the applicant, who did not represent the applicant at the time the materials were filed with the Court, submitted that the facts were revealed in the record, and that the Court should entertain the submissions concerning bias and procedural fairness. I reserved my decision on the procedural question, and heard the submissions of counsel on those issues. Having considered the matter, I am of the opinion that the applicant's failure to establish the proper evidentiary framework in accordance with the requirements of Rule 1603(1) of the *Federal Court Rules* precludes him from advancing the issues concerning bias and procedural fairness. Despite my conclusion on that point, I wish to indicate that I nevertheless heard and considered the submissions of counsel for the applicant on those issues. Even if I am wrong in determining that the applicant has failed to adduce the required evidence to support his allegations, I am satisfied, on the basis of the oral and written submissions made by counsel for the applicant, that the arguments concerning bias and the alleged breaches of procedural fairness have no merit.

**DECISION**

[10]      The application for judicial review is dismissed.

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|                                          Judge |

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1The Canadian Human Rights Tribunal is a specialized tribunal which is accorded a high degree of curial deference in relation to its findings of fact. [See *Canada (A.G.) v. Mossop* , [1993 CanLII 164 (SCC)](https://www.canlii.org/en/ca/scc/doc/1993/1993canlii164/1993canlii164.html), [1993] 1 S.C.R. 554, 577-578]. In*Aguebor v. Minister of Employment and Immigration* (1993), 160 N.R. 315 (F.C.A.), Decary, J.A. commented as follows on the approach to be taken in reviewing the findings of fact made by a specialized tribunal:
     There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In *Giron*, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, *Giron* in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn.

2See *Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.), in which Heald, J.A. indicated at pages 36-37 that a tribunal's reasons should not be read microscopically, but rather "...in the context of the totality of the evidence before it."

3See *Ontario Human Rights Commission and Theresa O'Malley v. Simpsons-Sears Limited et al* , [1985 CanLII 18 (SCC)](https://www.canlii.org/en/ca/scc/doc/1985/1985canlii18/1985canlii18.html), [1985] 2 S.C.R. 536, 558.