

File No.: 39000

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF PRINCE EDWARD ISLAND)

BETWEEN:

NOEL AYANGMA

APPLICANT
(Appellant)

AND:

**PRINCE EDWARD ISLAND HUMAN RIGHTS COMMISSION and
ENGLISH LANGUAGE SCHOOL BOARD**

RESPONDENTS
(Respondents)

**RESPONDENT ENGLISH LANGUAGE SCHOOL BOARD'S MEMORANDUM OF ARGUMENT
IN RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)**

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TABLE OF CONTENTS

Memorandum of Argument

PART I – OVERVIEW & STATEMENT OF FACTS	1
Overview	1
Factual Background	1
PART II – QUESTIONS IN ISSUE	5
PART III – STATEMENT OF ARGUMENT	6
Question #1	6
Question #2	8
Conclusion	10
PART IV - SUBMISSIONS REGARDING COSTS	10
PART V - ORDER SOUGHT	11
PART VI – TABLE OF AUTHORITIES & STATUTORY AUTHORITIES.....	12

PART I – OVERVIEW & STATEMENT OF FACTS

Overview

1. This case does not raise any jurisprudential issues of national or public importance, nor does the PEI Court of Appeal's decision create any uncertainty in the applicable law.
2. The Applicant seeks leave to appeal to this Court on the discrete issue of whether the PEI Court of Appeal erred in its finding as to whether the Applicant was denied procedural fairness by the Executive Director of the PEI Human Rights Commission.
3. This case lacks the element of national public importance needed to warrant granting leave to appeal. There would be little, if any, precedential or jurisprudential value in reviewing the PEI Court of Appeal's decision in this particular matter.
4. In light of the foregoing, the Respondent English Language School Board (the "Respondent") submits that this is not an appropriate case for leave to appeal to be granted.

Factual Background

5. In or about September 2013, the Respondent English Language School Board (the "ELSB") determined that it had a vacancy and wished to fill the position of Director of Human Resources. To do so, the ELSB struck a Selection Board who reviewed the needs of the ELSB for this position and determined the minimum education and experience requirements that a candidate would have to possess in order to be considered for the position. The position was then advertised publicly.
6. The job posting for the position included the following "Minimum Qualifications":

Education and Training:

- Must have a university degree, preferably at the Masters level, in a related area with considerable training in human resources

- CHRP designation would be an asset

Skills and Experience:

- Extensive and successful experience in a senior human resource management role in a complex unionized environment in areas such as labour relations, recruitment and retention, policy development, HR planning, classification, etc.
- Managerial experience is required
- Proven conflict management and mediation skills
- Demonstrated superior interpersonal, collaborative and team building skills
- Excellent oral, written and presentation skills are essential
- Ability to use word processing, spreadsheets, HR information systems, presentations software, e-mail

Ayangma v. HRC & ELSB, 2019 PECA 20 [Court of Appeal Decision] at para 3

7. In response to the posting, the ELSB received ten applications for the position. One of those applications was that of the Applicant.

Court of Appeal Decision, *supra*, at para 5

8. The Selection Board then met on two occasions to review the applications received. Of the ten applications received, seven were screened out of the competition as they did not meet either the stated minimum experience or education requirements for the position. An "Applicant Screening Tool" was used by the Selection Board to track the Board's determinations of which candidates met the minimum qualifications to be considered for the position.

Court of Appeal Decision, *supra*, at para 5

9. The "Applicant Screening Tool" shows that the Applicant was screened out of the competition by the Selection Board because he lacked the required Minimum Qualification in the area of "Relevant Experience". The Selection Board determined that the Applicant had no experience in a senior human resource management role in a complex unionized environment.

10. The Applicant was notified via letter on October 23, 2013, that the successful applicant in the Director of Human Resources competition was a candidate by the name of Wayne Noseworthy
11. The Applicant filed his complaint with the PEI Human Rights Commission on October 18, 2013.
12. On December 19, 2013, the Executive Director directed the matter to be held in abeyance pending the outcome of a related judicial review proceeding in *Ayangma v. Commission Scolaire de Langue Francaise*, 2014 PESC 18 (Court File No. S1-GS-25721).
13. Between August 2014 and January 2015, both the Applicant and Respondent ELSB made submissions to the Executive Director on the merits of the Complaint. In particular, the ELSB requested that the Executive Director make a commonsense assessment of the evidence and find that the Applicant had not established a *prima facie* case of discrimination.
14. Throughout his submissions, the Applicant requested disclosure of all application materials for each of the three applicants who had been screened in and interviewed for the Director of Human Resources position.
15. The ELSB declined to disclose to the Applicant on the basis of privacy concerns for the individual applicants but invited the Executive Director to review the application materials for all ten candidates.
16. On October 27, 2016, the Executive Director reviewed the application materials of each applicant, including those who were screened in and granted an interview. During the course of her investigation, the Executive Director also met (separately) with the Applicant and then Ron MacLeod, a member of the Selection Board.

17. The only documents requested by the Applicant that were not disclosed to him were the full applications of the two screened-in but unsuccessful candidates.
18. By decision dated April 10, 2017, the Executive Director dismissed the Complaint pursuant to section 22(4) of the *Human Rights Act*, RSPEI 1988, H-2 (the "Act"), as it was without merit.
19. On April 27, 2017, the Applicant requested that the Chairperson review the Executive Director's Decision, pursuant to section 25(1) of the Act. The Chairperson issued his review decision on August 11, 2017. The Chairperson upheld the Executive Director's Decision to dismiss the Complaint on the basis that the Complaint is without merit under section 22(4) of the Act.
20. On August 25, 2017, the Applicant filed an Amended Amended Notice of Application for judicial review seeking to set aside the decisions of the Executive Director and the Chairperson on the basis that the Respondent PEI Human Rights Commission erred in the determination and application of the legal tests at the investigative stage and denied procedural fairness and natural justice in the conduct of its investigation and decision-making.
21. The Judicial Review Application was heard by Justice James W. Gormley on June 26, 2018. Justice Gormley issued his decision on December 21, 2018, wherein he dismissed the Application.
22. On January 14, 2019, the Applicant delivered a Notice of Appeal to the Respondents PEI Human Rights Commission and ELSB. The Applicant appealed on two grounds: (1) that the decision maker misidentified and misapplied the test to ascertain whether or not a prima facie case had been made out; (2) that the decision maker erred in law and denied him procedural fairness because the HRC refused to provide him with the full resumés of all three applicants who were screened in.

23. The Appeal was heard by the PEI Court of Appeal on June 24, 2019. The Court of Appeal issued its decision on July 25, 2019, wherein it dismissed the Applicant's appeal.

PART II – QUESTIONS IN ISSUE

24. The Applicant frames the issue(s) on this leave application in a variety of ways throughout his materials. In short, the Applicant appears to raise the following issues for appeal:
- a. Whether the Applicant was denied procedural fairness when he was denied access to the resumes of the candidates screened into the relevant job competition; and
 - b. Whether the Applicant was subjected to a higher standard of proof in establishing his *prima facie* case of discrimination because he was not allowed to review the resumes of the other candidates screened into the job competition.
25. The Respondent submits that the only issue to be determined on this leave application is whether or not any ground raised by the Applicant with respect to the PEI Court of Appeal's findings raise any issues of public or national importance. The Respondent submits they do not.

PART III – STATEMENT OF ARGUMENT

26. The Respondent submits that the issues raised in this application do not raise questions of public importance, or important issues of law (or mixed fact and law) of such a nature or significance to reach the threshold necessary for leave to be granted.
27. Rather, the Respondent submits that the issues raised by the Applicant in this application show only that he disagrees with the Court of Appeal's findings and seeks to have the remedies granted by the Court of Appeal, and all other decision makers below them, re-litigated.
28. The central issues in this case deal with the application of well-settled legal principles in a specific set of factual circumstances.

Question #1 – Was the Applicant Denied Procedural Fairness?

29. The Respondent submits that the PEI Court of Appeal did not err in any way in finding that the Applicant was not denied procedural fairness in the course of the Executive Director's investigation.
30. In particular, the Respondent argues that he required disclosure of the application materials of all candidates who were interviewed for the ELSB position in order to demonstrate that he was equally or better qualified than those candidates screened in for an interview.
31. The Court of Appeal accepted that the Executive Director of the PEI Human Rights Commission owes a duty of fairness to the parties when investigating a complaint under the *Human Rights Act*, RSPEI 1988, H-12.

Court of Appeal Decision, *supra*, at para 51

32. The Court of Appeal correctly found that the content of the duty of fairness at the Executive Director's investigation stage is not the same as it is at the adjudicative stage.

Court of Appeal Decision, *supra*, at para 57

33. The Court of Appeal relied on the findings of this Honourable Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 SCR 817, to hold that the purpose of the participatory rights contained in the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure with an opportunity for those affected by the decision to put forward their views and evidence fully and have them be considered by the decision maker.

Court of Appeal Decision, *supra*, at para 62

34. The Court of appeal reviewed the relevant sections of the *Human Rights Act, supra*, to determine that in an investigation, the Executive Director may compel "production for examination of records and documents" and she may copy those records and documents but must keep them "in confidence except as required for the purposes" of the *Human Rights Act*.

Human Rights Act, RSPEI 1988, H-12, ss. 23(1),

35. The Court of Appeal found that these powers give the Executive Director, at the investigation stage, a discretion to disclose documents, notwithstanding provincial freedom of information legislation, where doing so is required for the purposes of the *Human Rights Act*. However, the Court of Appeal went on to find that in doing so, the privacy considerations of affected individuals is still one of the factors the Executive Director must consider in this exercise.

Court of Appeal Decision, *supra*, at para 63

36. The Respondent submits that the Court of Appeal was correct in finding that, in this case, the Executive Director did not fail to provide procedural fairness to the Applicant by

declining to order the requested disclosure. The Court of Appeal found that the Executive Director's investigation was independent and thorough.

Court of Appeal Decision, *supra*, at para 66

37. The Respondent submits that this issue is not one which raises an issue of national or public importance or creates a legal uncertainty requiring intervention from this Court, nor is there any basis to support a finding that the Applicant's alleged lack of procedural fairness is of such a nature that it would bring the justice system into disrepute.
38. The Applicant has not demonstrated a public importance or national interest. Further, there is no suggestion that this Court must provide guidance to lower courts on the issue.

Question #2 – Higher Standard of Proof

39. The Applicant argues that he was somehow held to a higher standard of proof to establish a *prima facie* case of discrimination because he was not provided the application materials of the other candidates who applied to the ELSB job posting.
40. The Respondent submits that the Court of Appeal correctly found that the Applicant was given ample opportunity to put his case forward and that he took full advantage of that.

Court of Appeal Decision, *supra*, at para 66

41. The Court of Appeal considered the spirit of the *Human Rights Act, supra*, the statutory scheme it sets out, and the importance of the issue to the parties, and found that procedural fairness at the investigative stage under the *Human Rights Act, supra*, requires the parties be informed of the substance of the evidence obtained by the investigator, and that the parties have the opportunity to respond to the evidence and make representations thereto.

Court of Appeal Decision, *supra*, at para 65

42. The Respondent submits that it is clear from a review of the Court of Appeal decision, and the decisions that underlie it, that the Applicant had sufficient information from which to argue the merits of his complaint.

43. More importantly, the Executive Director had access to all of the evidence necessary for her to make a common-sense assessment of the Applicant's claim to determine whether he could establish a *prima facie* case of discrimination.

44. The Respondent provided to the Applicant and the Executive Director a redacted copy of the "Applicant Screening Tool" used by the Selection Board to keep track of candidates' qualifications and to determine which candidates met the minimum qualifications. The Respondent submits that this Screening Tool clearly demonstrated that the Applicant, along with seven other candidates, were screened out on the basis that they did not meet the minimum qualifications to be considered for the position.

Court of Appeal Decision, *supra*, at para 5

45. Further, the Applicant was provided with the full application materials of the successful candidate.

Court of Appeal Decision, *supra*, at para 12

46. The Executive Director had this same evidence before her, including the resumes of the Applicant and the screened-in candidates. Further, she considered the explanation of a member of the Selection Board, as to how the Screening Tool was applied.

Court of Appeal Decision, *supra*, at para 12

47. Therefore, the Respondent submits that the Executive Director had sufficient evidence before her to reasonably conclude that the reason the Applicant was not offered an interview was because nothing on his resume stood out to the Selection Board to indicate he possessed the required qualifications.

48. In reviewing the underlying decisions, the Court of Appeal correctly found that they are transparent, intelligent and fall within the range of possible acceptable outcomes which are defensible in respect of the facts and law.

Court of Appeal Decision, *supra*, at para 42

49. The Respondent submits that the Applicant's arguments on this issue demonstrate only that the Applicant disagrees with the ultimate decision of the Selection Board that he was not qualified for the position. As such, he disagrees with the decisions of the Executive Director, and ultimately the Court of Appeal, and seeks to have the remedies granted by the Court of Appeal re-litigated.
50. This issue does not raise any issues of national public importance or create any legal uncertainty requiring intervention by this court.

Conclusion

51. The Respondent respectfully submits that none of the issues raised in this leave application are issues which require, comment, direction, or re-visitation by this Court, either generally, or in the unique set of circumstances in this case.
52. As such, the Respondent submits that this is not an appropriate case for leave to appeal to be granted.

PART IV - SUBMISSIONS REGARDING COSTS

53. The Respondent states that costs should follow the cause and therefore, in accordance with this Court's usual practice, if the Application is dismissed it should be dismissed with costs payable by the Applicant to the Respondent.

PART V - ORDER SOUGHT

54. The Respondent requests that the Application for Leave to Appeal be dismissed with costs to the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of January, 2020.



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PART VI - TABLE OF AUTHORITIES & STATUTORY AUTHORITY

Case Law

N/A

Statutory Authority

[*Human Rights Act, RSPEI 1988, H-12, s. 23\(1\)*](#)