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February 5, 2018

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Re: **Jack v. Ontario (Community Safety and Correctional Services)**
HRTO File Number: 2010-07633-I

Please find enclosed a decision of the Tribunal in this matter, dated February 5, 2018.

HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Michael Jack

Applicant

-and-

Her Majesty the Queen in Right of Ontario, as represented by the Ministry of Community Safety and Correctional Services operating as the Ontario Provincial Police

Respondent

DECISION

Adjudicator:	Keith Brennenstuhl
Date:	February 5, 2018
File Number:	2010-07633-I
Citation:	2018 HRTO 144
Indexed as:	**Jack v. Ontario (Community Safety and Correctional Services)**

APPEARANCES

Michael Jack, Applicant	)	Lloyd Tapp, Representative
Her Majesty the Queen in Right of Ontario, as represented by the Ministry of Community Safety and Correctional Services operating as the Ontario Provincial Police, Respondent	)	Mimi Singh, Bill Manuel, Heidi Blutstein, and Lynette D'Sousa, Counsel

INTRODUCTION

[1] This Application alleges discrimination with respect to employment because of race, ancestry, citizenship, ethnic origin, and association with a person identified by a protected ground contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"). The applicant also alleges reprisal or threat of reprisal.

[2] On July 18, 2008, the applicant (sometimes referred to as "Jack") was offered a one year appointment with the Ontario Provincial Police ("OPP") at its Peterborough County Detachment as a probationary constable. According to the terms of the offer, Jack would be eligible for a permanent position if he could successfully meet the requirements of a probationary constable during the course of his probationary period.

[3] In his Application, Jack self-identifies as being "a member of a racialized minority group" because he is a "Russian-Jew who speaks English with a thick Russian accent". In his Application he alleges that during his probationary period he was subject to discrimination, harassment and a poisoned work environment. He claims that this was part of a plan that was put in place to discredit him so that it would seem he could not achieve the level of competence required of a probationary constable. On December 15, 2009 Jack tendered his resignation.

[4] The Tribunal heard from twenty witnesses over the course of twenty-two non-consecutive hearing days on the liability portion of the claim between May 22, 2012 and September 15, 2016. By Case Assessment Direction dated May 8, 2012 the hearing was bifurcated between liability and remedy. The Tribunal had extensive documentary evidence before it. The parties filed written final submissions and relevant case law.

DECISION

[5] The Application is dismissed. I do not find that he applicant has established that the respondent's actions were discriminatory contrary to the *Code*. I am satisfied that the respondent has provided credible non-discriminatory explanations for its actions.

LEGAL FRAMEWORK

[6] Subsections 5(1) and 5(2) of the *Code* provide that:

> 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.
>
> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

[7] To establish discrimination, an applicant must be able to show that they are a member of a *Code*-protected group, that they were subject to adverse treatment and that the *Code*-protected ground in question was a factor in that adverse treatment (see *Peel Law Association v. Pieters,* 2013 ONCA 396 ("*Pieters*") at paras. 56 and 126. The applicant bears the legal onus of establishing discrimination on a balance of probabilities, (*Pieters,* at para. 83), and the task of the Tribunal is to decide whether the applicant has met this legal burden based on all the evidence before it, (*Pieters,* at paras. 83 and 87).

[8] The Supreme Court of Canada confirmed in *F.H. v. McDougall,* 2008 SCC 53, that in order to satisfy the "balance of probabilities", standard of proof evidence must be "sufficiently clear, convincing and cogent".

[9] To determine whether the *Code* was violated in the present case, I must also assess the credibility of the witnesses and their evidence. In making my credibility assessment, I have relied on the principles established in *Faryna v. Chorny,* [1952] 2 DLR 354 (BC CA), and in particular the following comments:

> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of truth. The test

must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (...) Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken (p. 356-357).

[10] I have also been assisted by the observations on credibility assessment made by Justice Green in *R. v. Taylor,* [2010] OJ No. 3794, where he states as follows at paras. 58 to 60:

> "Credibility" is omnibus shorthand for a broad range of factors bearing on an assessment of the testimonial trustworthiness of witnesses. It has two generally distinct aspects or dimensions: Honest (sometimes, if confusingly, itself called "credibility") and reliability. The first, honesty, speaks to a witness' sincerity, candour and truthfulness in the witness box. The second, reliability, refers to a complex admixture cognitive, psychological, developmental, cultural, temporal and environmental factors that impact on the accuracy of a witness' perception, memory and, ultimately, testimonial recitation. The evidence of even an honest witness may still be of dubious reliability.
>
> All of this has been said many times before, including by Doherty J.A. for the court of Appeal in *R. v. Morrissey* 1995 CanLII 3498 (ON CA), 97 C.C.C. (3d) 193, at 205:
>
> > Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with the witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.
>
> Depending on the circumstances, some portions of a witness's testimony may be more credible or worthy of belief than other portions. Accordingly,

> I can, with good reason accept all, some or none of any witness' evidence: see *R. v. R.E.M.,* 2008 SCC 51 (CanLII), [2008] 3 S.C.R. 3, at para. 65.

[11] It was evident at the hearing that the applicant has an excellent command of the English language, both spoken and written, and that he speaks with an accent, self-described as Russian. His spoken English is readily comprehensible although when excited, he tended to speak quickly which, at times, made it somewhat difficult to fully understand what was being said.

[12] It also was evident that the applicant took pride in his work and sincerely believed that he performed his job well during his probationary period. He sincerely believed that the respondent repeatedly treated him unfairly when he performed his work because he was a Russian-Jew and because he spoke English with an accent and that he was treated differently than other probationary constables. Indeed, at the very end of his cross-examination the applicant stated that "my whole statement I made is based on my belief." In concluding the narrative in his Application, the applicant wrote:

> I believe I was targeted and discriminated against by members of the Detachment due to my place of origin, ethnic origin, racial status, strong Russian accent.

[13] However, I do not find the evidence supports the applicant's understanding of what happened. I find, as I will detail further, that while the applicant may genuinely believe the respondent's actions were biased, in some measure on his Russian-Jewish identity and his Russian accented English, the oral and documentary evidence before me supports the respondent's version of events.

[14] In making my decision to dismiss the applicant's Application I am mindful of the applicant's contention that the alleged incidents of discrimination represent an ongoing effort to impeach his integrity and that the officers at the Detachment conspired to have him terminated. The applicant submits that the sheer number and frequency of these incidents are evidence of the continuous discrimination he was subject to. I am also mindful that the applicant alleges that the epithet "Crazy Ivan", a term some of his

colleagues allegedly used in reference to the applicant, was racist which was reflected in their treatment of him.

[15] However, I do not accept the applicant's theories of the case. The applicant has not provided cogent evidence to support his contention that his race, ancestry, citizenship, ethnic origin and place of origin were factors in the adverse treatment he received and his failure to succeed as a probationary constable. In my view, the respondent provided persuasive non-discriminatory reasons for its actions which outweigh the applicant's perceptions that these actions were related to the grounds cited.

BACKGROUND

[16] The applicant was offered a position as a 5th Class Recruit Constable with the OPP in a letter dated July 18, 2008, which he accepted on July 24, 2008. In accepting the offer, the applicant also accepted the conditions attached to the appointment.

[17] The respondent also sent a memo to the applicant dated August 25, 2008 setting out the "performance and Conduct Requirements of a Recruit Constable", which among other things advised as follows:

> In order for your employment with the OPP to be confirmed beyond the probationary period, the evaluation of your work performance and conduct must demonstrate that you meet the requirements of this position. A recommendation to confirm your appointment as a Provincial Constable will be made after the tenth (10) month of your probationary period.
>
> Pursuant to the Public Service of Ontario Act, a recommendation that you be released from employment for failure to meet the requirements of your position, based on unsatisfactory work performance or inappropriate conduct, may be made at any time during your training and probation period.

[18] Once appointed, the applicant was required to successfully complete training at both the Ontario Police College and the OPP Provincial Police Academy. The applicant did complete the training although he initially failed the Police Vehicle Operations

requirement. With respect to the failed attempt, the assessor's comments were as follows:

> This candidate demonstrated acceptable proficiency in each of the driving skills components, but did experience significant difficulty when attempting to apply some of these skills in a motor vehicle pursuit simulation. At a later date, this candidate was given an opportunity to repeat this exercise and again was unable to operate the vehicle in a reasonably safe and proficient manner. Therefore, this candidate has not successfully completed this area of training. Further instruction and evaluation will be made available upon your request.

The applicant did subsequently pass the Police Vehicle operations component of the training.

[19] Having successfully completed the Ontario Police College and OPP Provincial Police Academy training, the Applicant then commenced his one year probationary period at the Peterborough County OPP detachment (the "Detachment") in January 2009. As a probationary constable, the applicant was assigned a coach officer to assist with his on-the-job training and whose responsibility it was to assess and document his performance. Nine detailed Performance Evaluation Reports ("PER") were prepared in relation to the applicant's performance over the duration of his placement at the Detachment.

[20] The PERs for probationary constables are standardized and are used for assessing all probationary constables. The PER contains 7 broad areas of assessment which are further broken down into 28 more specific sub-areas of assessment.

[21] In each area, the probationary constable is rated with one of the following ratings: meets requirements; does not meet requirements; or, no basis for rating. As part of the PER process, Work Improvement Plans may be developed to further assist the probationary constable to achieve a satisfactory level of performance in areas where concerns have been identified.

[22] The applicant received copies of all of his PERs during his probationary period. Work Improvement Plans were also developed in relation to the applicant. The applicant refused to sign several of his later PERs when they started to contain negative comments.

[23] Based on a review of the ratings in his PERs it is evident that the applicant was progressing well in his first 5 months at the Detachment but his performance then began to decline significantly with only very modest improvements.

[24] The applicant was advised of the respondent's decision not to offer him a permanent position and the applicant tendered his resignation on December 15, 2009.

EVIDENCE AND FINDINGS

Nicknamed "Crazy Ivan" due to his Russian heritage

[25] The applicant seeks to make much of the evidence that some unnamed officers in the Detachment referred to him as "Crazy Ivan". Indeed, it would appear that his whole case centres on this allegation.

[26] In any event, the use of vulgar terms does not necessarily give rise to discrimination pursuant to the *Code*: *Hughes v. Ontario Provincial Police,* 2012 HRTO 609. This case involved an allegation that the applicant was called a "fat Welsh bastard" by members of the OPP. The application was dismissed on the basis that there was no reasonable prospect of success [para. 21] and the Tribunal commented:

> In any event, the use of vulgar terms does not necessarily give rise to discrimination within the meaning of the *Code.* Further the purpose of the *Code* is not to police the respondent's every comment, nor does a person's hurt feelings, anxiety or upset about a situation mean that the *Code* was violated. [para. 19]

[27] First, the applicant had no direct evidence to offer on this point. In fact he testified that he was never called "Crazy Ivan" to his face and nor did he ever overhear the use of the term. He indicated that he only became aware of the term "Crazy Ivan"

almost a year following his resignation from the OPP in a conversation with another police officer in a restaurant. The police officer wrote the term on a paper napkin.

[28] Another police officer at the detachment testified that some unnamed officers used the name behind the applicant's back. No other OPP witness heard the applicant referred to as "Crazy Ivan".

[29] Mr. Greco, a para-legal, testified on behalf of the applicant. He claimed to be the applicant's friend. He indicated that he was working out at the gym when, Marc Gravelle, a police officer from the applicant's detachment, approached him and suggested that he should not be representing the applicant in a highway traffic matter, told him that they called the applicant "Crazy Ivan" and then mocked the applicant's Russian accent.

[30] In my view, the evidence provided by Mr. Greco indicating that Mr. Gravelle told him that the applicant was known as "Crazy Ivan" and that Mr. Gravelle mocked the applicant's accent is not reliable. One would reasonably expect that had Mr. Greco been made privy to the sobriquet "Crazy Ivan" as indicated and had Mr. Gravelle mocked the applicant's accent as explained, Mr. Greco would have passed this information along to the applicant who was, according to Mr. Greco, a friend who was having a difficult probationary period with the OPP. However, we know, in light of the applicant's testimony that he did not learn about the "Crazy Ivan" moniker until more than a year after this gym incident when, in a restaurant, a police officer presented him with a napkin inscribed with the moniker. The failure of Mr. Greco to relay this information to the applicant under the circumstances leads me to conclude, on a balance of probabilities, that Mr. Gravelle did not inform Mr. Greco that the applicant was called "Crazy Ivan" or that he mocked the applicant's accent.

[31] I note that in cross examination Mr. Greco confirmed that he made no mention in his will-say statement that Mr. Gravelle ever used the expression "Crazy Ivan" or that he mocked the applicant's accent. Mr. Greco testified nevertheless that he remembered it very clearly at that moment, despite the passage of seven years since the incident, and

after having demurred earlier in his testimony that he could not remember "word-for-word", "because of how many years have gone by".

[32] I find that the applicant has not made out a case of discrimination based on the nickname "Crazy Ivan". The evidence of its use, if at all, is relatively weak. There is no evidence it was ever used by any of his coach, mentoring or supervisory officers at the Detachment. Moreover, the nickname "Crazy Ivan" could not have had a negative effect on the applicant during his employment with the OPP as he admits that he did not learn of it until several months after he left the Detachment.

Russian Accent

[33] The applicant alleged that officers ridiculed his Russian accent and that one officer told him to speak with a Canadian accent.

[34] The onus is on the applicant to present sufficient facts to support a finding that language is being used as a proxy for racial or ethnic discrimination, which in this case, I find the applicant has failed to discharge. (See *Chau v. Olymel SEC/LP,* 2009 HRTO 1386 ("*Chau*") and *Howard v. 407 ETR Concession Company,* 2011 HRTO 1511, ("*Howard*").

[35] In *Chau,* the Tribunal considered alleged comments made by a supervisor stating that the Applicant had an unintelligible accent and poor English skills. It concluded that even if it accepted that the comments had been made, the mere fact of those comments was not enough to establish a *prima facie* case of racial discrimination. In *Howard,* the Tribunal made the same finding after the applicant alleged that her employer had questioned whether customers would be able to understand her because of her accent. Again, the Tribunal found that the mere fact of such comments is not sufficient to establish a *prima facie* case of racial discrimination.

[36] The applicant points out that the respondent noted in his first two PERs that he was aware that he spoke with an accent. He alleges that another officer told him to

speak with a "Canadian accent", however, this officer denied ever saying this although she agreed that she had difficulty understanding the applicant over the car radio due to the radio quality and the applicant's accent.

[37] As previously determined, Mr. Greco's evidence suggesting that Mr. Gravelle mocked the applicant's Russian accent at the gym is not reliable.

[38] The applicant testified that he knew that people found it difficult to understand him at times and that other officers had told him so.

[39] In my view, the applicant has not presented sufficient facts to support his allegation of discrimination as it may relate to his accent. It is clear from the jurisprudence that merely commenting on the fact of an individual's accent and questioning whether the individual could be understood is not discriminatory conduct.

Differential Treatment

[40] In the narrative of his Application the applicant writes:

> During my twelve month probationary period I was also subjected to differential treatment by my supervisor(s) and colleagues.
>
> The following are but a few examples of the differential treatment that I received while at the Detachment:
>
> 1. I observed that other rookies, who were not minorities and did not speak with an accent, were welcomed and supported by their respective coach officers within the Detachment. Whereas, from the very beginning my coach officer Cst. Filman was completely disinterested in my training and development as an officer.
>
> For example, when we were on the road, most of the time he would be operating the cruiser while I was sitting in the front passenger seat observing him constantly either text messaging or talking on his mobile phone. I truly felt like a burden to him.
>
> Despite the fact that the role of a coach officer is to ensure that the new recruits under their supervision are properly prepared to handle the

situations with which they are presented, I was almost wholly left to my own devices to figure out how to conduct interviews, arrests, complete reports, etc.

Cst. Filman exhibited a consistent unwillingness to train me or to share his knowledge with me, which was his duty. His persistent refusal to properly train me made me feel that I was not welcome.

2. I was the only one reprimanded in incidents involving other officers.

An example of this involved an incident that took place on January 30, 2009, only a few weeks after being placed at the Detachment. While working a day shift and accompanied by Cst. Jeff Gilliam, in an attempt to stop a speeding motorist I misread the U-turn and put the nose of the cruiser in the ditch with no resulting damage to the cruiser.

A passing motorist stopped to render assistance by offering to pull the cruiser out of the ditch. The motorist used his own personal rope to tie to the rear axle of the cruiser which was still up on the shoulder of the road. Cst. Gilliam and myself got back into the cruiser before the motorist began pulling the cruiser out. In the process of removing the cruiser from the ditch, the cruiser struck a metal cautionary road sign and sustained damage.

Sgt. Flindall attended at the scene of the accident. Due to the failure to follow OPP policy to call a tow truck in a circumstance such as this, Sgt. Flindall issued what is known as a 233-10 (a negative internal report) against me. The document rebuked me for "inadequate operation of a police vehicle". As a result, I was also negatively rated in the Police Vehicle Operations section of my Month 2 performance evaluation.

Despite the fact that I was accompanied by a more senior officer (2 years experience) who was familiar with the OPP policy, I was the only one to be reprimanded and negatively documented for the incident.

Furthermore, my coach officer Cst. Filman never discussed the accident with me apart from uttering something to the effect that it was not his coaching in the presence of other officers, thereby subtly poisoning my work environment.

3. There were other occasions where I handled investigations but my work and any commendations therefore were credited to other officers as though I had no involvement in the investigation.

An example of this was the investigation I conducted with respect to a break and enter on August 6, 2009. Constable D'Amico was commended for the work that was assigned to and completed by me. Further, despite my integral involvement and the fact that I led the investigation (while not

being credited for my work), I was the only officer to receive a negative review while all of the other officers involved received positive commendations from Sgt. Flindall.

4. I was scorned by senior officers for offering my assistance. Once during a morning briefing in the spring of 2009, I offered my assistance in developing a digitized system to prepare Crown Briefs. Having a solid background in the Computer Science field I saw an opportunity to put my skills to use and be recognized as a team player.

However, not only were my efforts not appreciated, following the shift briefing I was told by Cst. Mary D'Amico who was second in command at the time in a vexatious manner and in the presence of other Platoon "A" officers, "You should keep quiet when a senior officer speaks. You might come across as knowing too much and it is not good for your career. Cst. D'Amico further told me that there had been another officer who "knew too much" and that he no longer worked at the Peterborough Detachment.

I viewed Cst. D'Amico's comments as a threat, especially given her seniority and level of influence in the Detachment. As a result of her comments, I feared expressing my opinion or offering my assistance.

5. .....

6. I was also singled out by Sgt. Flindall as allegedly being incapable of handling even the simplest of calls.

For example, on December 8, 2009, while working a night shift I was dispatched to a motor vehicle collision in which a truck struck a deer. I had attended and dealt with a dozen of those on my own before. However, when I asked Cst. Postma, the officer in charge of the shift, what his orders were with respect to handling the call, he advised me that he had spoken with Acting Staff Sgt. Robert Flindall and that I was not allowed to attend the accident on my own.

Cst. Postma further added that he knew I could handle a simple motor vehicle collision "car vs. deer" by myself and that it was embarrassing for me to be accompanied by another officer for such a simple call, but that he had to comply with Acting Staff Sgt. Flindall's orders.

7. Throughout my tenure at the Detachment, I worked more shifts and took less vacation time than any other officer in the Detachment. Further, as a result of this fact, despite being a new recruit, I was often left on my own in violation of the training protocols advocated by the Ontario Provincial Police Association.

8. During the first 8 months of my probationary period I only received two progress meetings despite that these meetings were supposed to take place on a monthly basis.

9. Fellow officers would often publicly reprimand me and belittle me.

As an example of this derogatory treatment, on July 1, 2009, I was yelled at by Cst. Payne for a completely illegitimate reason in the presence of other officers. As part of her rampage, Cst. Payne made a point of stating that Cst. Filman tried really hard to coach me and that despite this fact "I sucked". When I attempted to defend myself, she immediately cut me off and yelled "do not interrupt me because I am senior to you".

10. Finally, on a few occasions I was ordered by Cst. Filman to lay charges that were not properly substantiated by the evidence at the time the charges were laid. I was left to then suffer the humiliation and shame of having laid unsubstantiated charges once the matters were thrown out of court. These incidents were also counted against me as a probationary officer

[41] The allegations set out above are largely in dispute by the respondent. However, even if I were to accept these allegations as truthful, in my view there is no basis to conclude that the applicant was subject to discrimination on any of the grounds pleaded.

[42] It is well settled that in a *Code* case before the Tribunal, the applicant has the burden to establish, on a balance of probabilities, that he or she was a member of a group protected by the *Code;* that he was subjected to adverse treatment; and that his or her race, colour, ancestry, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, disability, place of origin or ethnic origin was a factor in the adverse treatment.

[43] As explained by Justice Abella in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de l'hopital General de Montreal,* [2007] 1 SCR 161, the applicant's burden of proving discrimination is not discharged by impugning an employer's conduct on the basis that it had a negative impact on the applicant who is a member of a protected group, at para. 49:

> ... there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative

impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. It is the claimant that bears this threshold burden.

At the heart of discrimination is the idea that people should not be subjected to an arbitrary disadvantage because of an irrelevant personal characteristic enumerated in the *Code.*

[44] The Tribunal heard evidence over 22 days. Notwithstanding the volume of evidence and disclosure, the applicant failed to offer any evidence to link the above allegations of adverse treatment as a probationary constable at the Detachment to any *Code*-protected ground. His assertions of discrimination are mere accusations. The applicant obviously believes that he was treated unfairly by his colleagues. However, the Tribunal does not have the power to deal with general allegations of unfairness. Under the circumstances, the above allegations must be dismissed.

Charges under the *Highway Traffic Act*

[45] Again I turn to the applicant's narrative:

22. I was charged by my sergeant (Robert Findall) under the *Highway Traffic Act* for "Failing to Yield on Through Highway". The conduct complained of would have been more efficiently and appropriately dealt with by way of a conversation with my superior. As I was later advised, the charge was harsh and uncalled for.

23. The specifics of the incident are as follows:

On August 15, 2009, I was working a day shift. At approximately 11:30 am. Sgt. Flindall, Cst. Payne, Cst. D'Amico, Cst. Moran and I attended a family dispute call. We drove to the call with lights and sirens on. The call turned out to be nothing and was cleared as non-reportable to my badge.

While enroute from the call to Detachment I was charged by Sgt. Findall under the *Highway Traffic Act* for "Fail to Yield to Traffic on Through Highway". Sgt. Flindall also issued a 233-10 which accused me of "inadequate operation of police vehicle".

Due to the nature of the charge I requested and promptly obtained OPPA approval to cover the costs of the legal assistance to contest the allegation. The legal fees were approved by Vice President of the 8th Branch of the OPPA Sgt. Paul Ziggel, from the Northumberland Detachment.

Upon discussing the incident with Sgt. Ziggel, he indicated that his reason for approving my request for coverage of my legal fees was that after reviewing the synopsis he believed the matter could have been handled differently by Sgt. Flindall.

As a result of the compulsory disclosure obligations I later learned that it was Cst. Payne who orchestrated the laying of the charge.

I was exonerated of the charge by Justice of the Peace Carl Young on August 12, 2010. Nevertheless, the effect of the charge on my career was evidenced in Month 8 performance evaluation, wherein Sgt. Flindall negatively rated me in two separate sections, namely, the Police Vehicle Operations and Personal Accountability sections.

In the Personal Accountability section Sgt. Flindall accused me of not taking any responsibility for my actions with respect to receiving the Provincial Offences Notice. This accusation was based on the fact that I refused to simply plead guilty to the charge and instead sought to clear my name through the justice system as I was entitled to do.

It is my opinion that these kinds of negative reviews in my performance evaluations demonstrate the amount of animosity that I experienced and was subjected to by my supervisor(s) and peers at the Peterborough Detachment.

Performance evaluations such as these re-enforced my feelings of hopelessness and despair as a result of my status as a foreigner and a minority who spoke with a thick accent and one that few officers wanted to associate with. Further, I am of the belief that this charge was specifically orchestrated for the purpose of poisoning my workplace environment and building up a file to justify the termination of my employment.

[46] Sgt. Flindall gave evidence that according to OPP Policy on Police Vehicles: "employees are always accountable for their driving behaviour, and may be called upon to justify deviation from the law..." The Policy allows the laying of an HTA charge together with issuing a negative 233-10 documentation for the same event.

[47] There was uncontroverted evidence that the applicant had poor driving skill consistent with him making an unsafe driving maneuver. In my view, there was enough evidence to lay the charge. Although the applicant may not "believe" that any motorist was required to brake to avoid colliding with his cruiser, despite the evidence of two officers to that effect, he admits that in turning onto the highway he accelerated into the northbound (oncoming traffic) lane before being able to merge back into the southbound lane. The charge was laid and after that it was in the hands of the Crown.

[48] There is absolutely no evidence that the laying of the charge was based on the applicant's race, ethnic origin, place of origin, ancestry or citizenship. Charges can be dismissed for any number of reasons. The fact that the charge was dismissed does not allow an inference to be drawn that the laying of the charge was malicious, improper or racially motivated. Such an inference is not supported by the evidence.

[49] Apart from the applicant's "opinion" and "belief", there is no evidence that would allow the Tribunal to infer that Sgt. Flindall's laying of the charge was intended to poison the applicant's workplace. The fact that the charge was dismissed is not probative of the question whether the charge was intended to justify the applicant's termination based on racism.

[50] The allegations with respect to the HTA charge are dismissed.

Failure to Address Conduct

[51] The applicant alleges that he complained to Cst. Filman, Sgt. Flindall, Cst. Payne, Staff Sergeant Kohen and Cst. German about the "discriminatory conduct" but the "discriminatory conduct itself was never addressed". In my view, however, there was no evidence to support this allegation.

[52] Cst. Filman testified that the applicant never complained to him that he felt harassed or discriminated against.

[53] Sgt. Flindall testified that he never observed or received a complaint from the applicant that he was being subjected to discrimination while on his platoon. He recalled a meeting on August 19, 2009 with the applicant and the applicant's OPPA representative, where Staff Sergeant Campbell encouraged the applicant to bring forward his concerns. He also recalled the applicant stating that he "felt abandoned" and intimating that inappropriate things were said by officers but that he refused to elaborate or identify the individuals.

[54] Cst. Payne denied that the applicant ever told her that the applicant felt discriminated against or targeted.

[55] The staffing advisor for OPP Human Resources and lead facilitator for performance management relating to the probationary constable program for Ontario, Staff Sergeant Kohen, was provided with all PERs for all probationary recruits across the province, including the applicant's. She testified that the applicant never complained to her that he was being harassed and discriminated against. She indicated that the applicant told her that his sergeant told him he could be charged under the *Public Service Act* for improper conduct and insubordination and that she told the applicant to contact the OPPA. She recalled that she called Central Region Headquarters to determine if there were performance issues with the applicant and determine how she could help. According to the witness, Inspector Lee told her that he was not aware of any performance issues.

[56] A representative of the OPPA, Cst. German, testified that the applicant never raised discrimination with her. She denied, contrary to the applicant's allegation, that she conducted an investigation into the applicant's treatment at the Detachment. She opined that the applicant and others were being targeted by Staff Sergeant Campbell for performance issues. In response to the question in cross-examination whether there "was any indication, in your experience with those internal complaints, that any of them were based on a prohibited ground of discrimination?", she replied "No sir".

[57] Staff Sergeant Campbell's evidence was that he felt the applicant was "under increased scrutiny" by Sgt. Findall and that Sgt. Findall had lost objectivity as a mentor. He testified that he had no basis to believe that the applicant was being harassed or discriminated against and that the applicant never made such complaint to him. He also indicated that the applicant did not raise workplace harassment, discrimination or poisoned work environment in his detailed rebuttal to his six month PER.

[58] The applicant's allegation that he complained to various officers at the Detachment about discriminatory conduct is not supported by the evidence. There is no basis upon which the Tribunal can find that the evidence of Cst. Filman, Sgt. Flindall, Cst. Payne, Staff Sergeant Kohen, Cst. German and Staff Sergeant Campbell was not trustworthy or reliable on this issue. Beyond the applicant's indirect allegation about the conduct of his peers at the August 19, 2009 meeting, there is no evidence to support this ground.

Reprisals through Negative Performance Reviews

[59] The very lengthy testimony of the applicant was largely devoted to his negative performance evaluations and the officers who prepared his PERs. Underlying his testimony was the misapprehension that if he can succeed in establishing a wrongful dismissal, he discharges his onus in a discrimination claim under the *Code.* Of course, this is not the case.

[60] I turn to the narrative of the applicant's Application where he details the allegations he relies on in support of his claim with respect to negative performance reviews:

> 31. The probationary period of my employment lasted a period of approximately 12 months during which I was evaluated monthly over a spectrum of 27 core competencies. My first few monthly performance evaluations were mixed with mainly positive and some negative ratings. However, not long after I started, I was subjected to an unusual amount of negative documentation in comparison to my cohorts whose performance was the same as my own.

32. On August 20, 2009, I was presented with my Month 6 & 7 performance evaluation by Sgt. Flindall. There were 10 "Does Not Meet Requirements" ratings.

33. The evaluator's name on the PCS-006P form was Cst. Filman (who was on vacation at the time) yet the evaluation was prepared by Sgt. Flindall personally and all the negative comments were thoroughly documented by Sgt. Flindall.

34. The majority of comments in the evaluation in addition to being false, frivolous, vexatious and made in bad faith, dealt with the information which I had divulged in confidence with other colleagues. I was the only police officer at the Peterborough Detachment at that time being subjected to this type of treatment and unusual and extraordinary demands for my level of police experience by my supervisor(s).

35. Sgt. Flindall also handed me two in-house 233-10s which accused me of "inadequate conduct". It was at that time that I realized that I was being reprised for standing up for my rights. I realized that I had been under the constant surveillance by several of my colleagues immediately following my conversation with Sgt. Flindall wherein I advised that I was going to contact the OPPA.

36. The number of negative ratings in my monthly performance reviews increased contemporaneously with my assertion to the OPPA that I was not being properly coached and my complaints over the lack of assistance I received in complicated investigations.

[61] Although much of this is disputed by the respondent, I will assume for the purpose of my analysis that all the allegations are true.

[62] I am mindful of fact that evidence of racial discrimination is often circumstantial and depends on the decision-maker inferring from the circumstances that discrimination took place. However, an inference has to be supported by the evidence. The applicant has not produced any evidence that could support that a ground pleaded by the applicant was a factor in the negative ratings he received. Perhaps, he did not deserve the negative ratings. Clearly the applicant sees it that way. However, for there to be a finding of *Code*-related discrimination there must be a link between these negative performance reviews and the ground(s) of discrimination the applicant has pled. The applicant has not provided any evidence that would demonstrate that link. His belief that

his identity as a Russian-Jew was a factor in the negative performance reviews, however sincerely held, is not evidence.

Transfer to Platoon D

[63] The applicant was re-assigned from Platoon A to Platoon D in August 2009 and was given a new Coach Officer, Cst. Nie, under the command of Sgt. Butorac. Staff Sgt. Campbell testified that he decided to transfer the applicant to get "a fresh set of eyes" and give the applicant every chance to succeed.

[64] Cst. Nie testified that he prepared three PERs for the applicant. In the first evaluation for month nine, Cst. Nie testified that the applicant improved in eight categories from the previous month. Cst. Nie's opinion in October was that "he could fix some of the categories" but "you can't teach common sense". By month ten, Cst. Nie was of the view that because only one category had improved from the previous month, "that we had flatlined".

[65] The applicant alleges that Cst. Nie's evaluations were "illegitimate" and "unsubstantiated". He writes in the narrative of his Application:

> No matter what I did or how I did it, Cst. Nie almost always found a problem with me. I grew fearful of his presence next to me. I was afraid of asking him questions. Every time I asked him a question I anticipated that he would find something wrong with either the question or with me.
>
> ...
>
> Sgt. Butorac failed to address my concerns surrounding the discriminatory treatment and specific targeting that I was enduring from Cst. Nie. The conduct was allowed to continue and my performance evaluations were among the tools used to malign my reputation.

[66] The applicant raises again poor performance evaluations and suggestions of being bullied. That being said, the applicant provides no evidence which logically supports an inference that the Applicant's race, ethnic origin, place of origin citizenship

ancestry or association with a person identified by a protected ground was a factor in the alleged mistreatment at the hands of Cst. Nie or Sgt. Butorac.

[67] Accordingly, these allegations must be dismissed as well.

***Police Services Act* Investigation**

[68] The applicant addresses the allegation in his narrative as follows:

> 49. On September 23, 2009, following my transfer to the Platoon D shift, I was served with a Notice of Internal Complaint regarding an internal complaint that had been filed against me on or about September 11, 2009. The complaint alleged that I was associating with undesirables and indicated that as a result I was under investigation by the OPP's Professional Standards Bureau (hereinafter the "PSB")
>
> 50. The complaint was filed in contravention of section (1)(a)(vi) of the Police Services Act R.S.O. 1990, c.P.15.
>
> In early December 2009, I received a formal memorandum (dated November 25, 2009) from PSB Commander Chief Superintendent Ken C. Smith that the file was closed as the complaint that I was associating with undesirables was unsubstantiated due to a lack of sufficient evidence.

[69] The applicant's view is that the complaint was filed for the purpose of building up a file to justify the termination of his employment "maligning my reputation".

[70] Cst. Brockley gave evidence about the incidents that led up to the PSB investigation. He worked on the Drug Unit at the Detachment. He testified that while working on a shift with the applicant, he heard the applicant running a license plate. He testified that this caught his attention because the vehicle that the applicant was running was known to be an undercover police vehicle. Cst. Brockley was aware of an investigation by the R.C.M.P. and OPP in relation to people who had been convicted of drug trafficking. Cst. Brockley recalled that earlier, the applicant had brought a picture of himself posing with these individuals at the gym to the Detachment. The applicant had told Cst. Brockley earlier that he worked out with two of these same individuals at the gym. Cst. Brockley was also aware that the applicant made thirteen calls to one of

the individuals who was being investigated. In evidence was the fact that the applicant had asked one of the individuals to purchase a rifle scope for him in the United States. It was well known that the applicant had an extensive gun collection and was an excellent marksman.

[71] Sgt. Butorac explained that "one of the requirements of police officers is that we do not associate with undesirables... [who] are people with criminal records".

[72] In my view, contrary to the applicant's allegation, there was a reasonable basis for investigating the applicant's association with organized crime. He was known to have associated in the past with individuals allegedly involved with organized crime; was thought to have run the license plate of an undercover police cruiser; and had asked an individual known to be associating with organized crime, to purchase a rifle scope for him. The fact that the PSB charges were ultimately unsubstantiated does not mean that an investigation was not warranted. More importantly, it does not mean that the investigation was racially motivated.

[73] In my view, legitimate concerns were raised and they were looked into. Upon an investigation, the complaint was not substantiated. This is not an unusual process and it clearly does not, in my view, betoken any prohibited ground of discrimination.

Termination of Employment

[74] In his closing submissions the applicant alleges that "I was brought down on my knees and then executed". In his Application he claims "my resignation was coerced" and "my dismissal from employment was orchestrated by a few officers from the Peterborough Detachment who were biased against me...."

[75] There is no evidence that the applicant was brought to his knees and executed. I interpret this as an extreme metaphor for termination of his employment.

[76] There is no evidence that he was coerced into resigning. On December 15, 2009 the applicant met with Chief Superintendent Armstrong in the presence of two OPPA representatives. The Chief Superintendent told the applicant that he reviewed his performance and that the applicant had not met the requirements of his probation and that he would not be offered a position as a permanent constable. The Chief Superintendent testified that he told the applicant his options were to resign or be dismissed. The applicant testified that he chose to resign because he did not want to jeopardize his reputation. There is no evidence which supports an inference that any *Code*-protected ground was a factor in the OPP's decision not to offer the applicant a permanent position.

CONCLUSION

[77] In the Tribunal's decision in *Lewis v. Toronto Transit Commission,* 2015 HRTO 256 (*"Lewis"),* the Tribunal dismissed the application because the applicant was unable to connect his complaints about the way he was treated to any prohibited ground. In that case, the applicant was alleging discrimination with respect to employment on the basis of race, colour, place of origin and reprisal. The Tribunal noted the applicant's submission that the sheer number and frequency of allegedly discriminatory incidents was evidence of continuous discrimination to which he was subjected. In that case, the Tribunal states at para. 43:

> As additionally noted elsewhere in this decision, I am mindful that one must be cautious not to parse out individual allegations where one is, at least in part, being asked to draw an inference of differential treatment or a pattern of perhaps subtle differential treatment from a number of different interactions.

[78] As in the *Lewis* case, the applicant in the present case has failed to establish that his numerous allegations of mistreatment from several different members of the OPP amount to a pattern of discriminatory, differential treatment. The applicant has failed to connect any of his allegations to a prohibited ground under the *Code.* What is clear based on the evidence is that the applicant was a highly regarded recruit who initially received numerous accolades for his academic achievements, his fitness tests and his

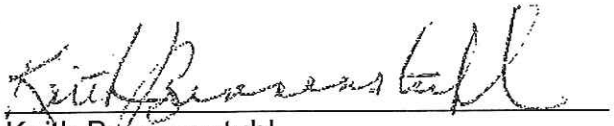
gunmanship. However, even at the beginning of his career there were concerns about his performance and his judgment and, as time went on, the concerns became more pronounced and new issues arose. There is clearly an abundance of documentary evidence, not to mention personal statements, to show the performance concerns that the respondent had with the applicant. Under these circumstances, the applicant was not recommended for permanent employment with the OPP.

[79] In *Lewis* the Tribunal noted that the applicant was convinced that his work was consistently competent and consequently the way in which he was managed and disciplined was uncalled for and must be related in some way to a *Code*-protected ground. However, in that case the Tribunal disagreed with the applicant's views of his own conduct and performance and his perceptions concerning the motivation and actions of others. As in *Lewis,* the applicant in this case has failed to provide clear, convincing and cogent evidence to support his perception that he was subject to discriminatory treatment.

[80] In making my decision I am mindful both of the subtle nature of discrimination and the applicant's contention that the ongoing manner in which he was treated was discriminatory. However, even when I consider the applicant's allegations collectively, I find no basis to draw an inference of discrimination. In my view, the respondent had repeatedly attempted to coach and support the applicant. For those times it has disciplined the applicant it had provided a clear and documented rationale.

[81] For all these reasons the Application is dismissed.

Dated at Toronto, this 5th day of February, 2018.



Keith Brennenstuhl
Vice-chair