Federal Court  Cour fédérale

Date: 20150121

Docket: T-98-13

Citation: 2015 FC 78

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 21, 2015

Present: The Honourable Madam Justice Gagné

BETWEEN:

CAMILLE DUBÉ

Applicant

and

CANADIAN BROADCASTING CORPORATION

Respondent

JUDGMENT AND REASONS

[1] Camille Dubé, a career sports journalist, is seeking judicial review of a decision of the Canadian Human Rights Commission [the Commission] rejecting his complaint of discrimination on the basis of age and mental disability. The Commission found (i) that the Canadian Broadcasting Corporation [CBC] had not terminated his employment; and (ii) that, in light of the investigation report submitted and in accordance with subparagraph 44(3)(*b*)(i) of the

Canadian Human Rights Act, RSC 1985, c H- 6 [Act], an inquiry into the applicant's complaint was not warranted.

[2] Mr. Dubé is representing himself and essentially argues that the CBC did not prove beyond a reasonable doubt that in April 2007, he represented such a danger to CBC staff that the CBC had good cause to exclude him and ban him from the premises. He also submits that the CBC has been trying to exclude him for some time now and took advantage of his absence on short-term medical leave, which began in February 2006, to do so.

[3] For the reasons that follow, this application for judicial review will be dismissed.

I. Facts

[4] The applicant was employed by the French-language service of the CBC (Radio-Canada) from 1969 until his retirement on December 31, 2009. During his final years with the CBC, he was a member of the Syndicat des communications de Radio-Canada (FNC-CSN) and subject to a collective agreement between the Syndicat des communications de Radio-Canada (FNC-CSN) and the CBC, in force from March 17, 2006, to March 29, 2009, during which period most of the events relevant to this case unfolded.

[5] The applicant began experiencing some problems in his workplace in 2003. In May of that year, the programming director at RDI, the CBC's French-language news channel, allegedly told him that there was no work for him, and in autumn 2003, he was passed over for the coverage of the ceremonies at which the Cy Young Trophy was awarded to baseball player Éric

Gagné. In autumn 2005, he was not selected to be part of the team that was to go cover the Olympic Games in Turin in February 2006 or to host a special daily series to be broadcast on RDI during the Games. He heard that people were saying to stay away from him because he was an "écraseur de relève", that is, someone who gives younger employees a hard time.

[6] Such was the situation when, in February 2006, he took a leave of absence to have surgery on his right shoulder. During that time, he received short-term disability benefits from group insurer Great-West Life, and he was expected to return to work on April 24, 2006.

[7] His short-term sick leave was extended several times, and on August 23, 2006, he was placed on long-term disability leave. He did not return to work before his retirement on December 31, 2009, the year he turned 65.

[8] In May and June 2006, the CBC offered the applicant retirement incentive packages, which he refused because he intended to work until he turned 65.

[9] In September 2007, the Régie des rentes du Québec, Quebec's pension plan, accepted his application for a disability pension, retroactive to May 2006. He received this pension until his retirement.

[10] However, in December 2006, a meeting was held to discuss the applicant's eventual return to work. The applicant, his union representative and some representatives from the CBC

and Great-West Life attended. During the meeting, the applicant was aggressive and rude and threatened one of his supervisors.

[11] Given his attitude, Great-West Life asked that he undergo a psychiatric evaluation to assess his fitness to return to work. The applicant met with Dr. Bich Ngoc Nguyen on January 16, 2007, and the doctor submitted her report on January 18, 2007. As she stated in this report that the applicant should not have any contact with his employer or the people he had threatened, the CBC decided to ban him from the premises.

[12] There was no contact between Mr. Dubé and the CBC in 2007 or 2008.

[13] In early April 2009, the CBC launched its voluntary retirement incentive plan [VRIP]. Since the positions of employees on long-term disability leave cannot be abolished, thereby saving the CBC money, such employees are not eligible for the VRIP.

[14] Because the applicant had turned 65 in December 2009, he stopped receiving disability benefits in the beginning of January 2010. He took his retirement and signed the documentation regarding his severance pay.

II. Impugned decision

[15] The reasons for the Commission's decision are in the investigation report (*Canada (Attorney General) v Sketchley*, 2005 FCA 404 [*Sketchley*] at para 37; *Din Ali c Canada (Attorney General)*, 2013 FC 30 at para 20 [*Din Ali*], aff'd 2014 FCA 124). The report states that

the applicant complained that the respondent had initially tried to dismiss him because of his mental disability but in the end forced him into retirement because of his age.

[16] The investigator noted that the practices about which the applicant was complaining, [TRANSLATION] "adverse differential treatment" and [TRANSLATION] "failure to provide a harassment-free workplace", are covered by sections 7 and 10 of the Act.

[17] The investigator explained that his task was to examine whether there was sufficient evidence to support the complainant's allegations, namely, (i) that he worked for the respondent; (ii) that the respondent terminated his employment; and (iii) that his dismissal related to one or more prohibited grounds of discrimination.

[18] Since the investigator concluded that the respondent had not terminated the applicant's employment, he saw no reason to continue his analysis. In his view, the evidence showed that, after he underwent a psychiatric evaluation ordered by Great-West Life, the applicant chose to take advantage of an extended period of disability leave that was recommended to him.

[19] The investigator also concluded that the applicant left his employment voluntarily at the age of 65:

> [TRANSLATION]
> The documentary evidence contains numerous exchanges between the complainant and the respondent regarding the benefits that he was to receive upon retirement. Although these exchanges illustrate the complainant's dissatisfaction regarding the content of the offer, no mention is made of adverse differential treatment based on his age. Moreover, the complaint recognizes that he had made clear that he intended to retire at 65 and that he did not ask

> the respondent, when he was about to turn 65, if he could continue working beyond that age.

[20] The Commission's investigator gathered the following evidence:

- A letter from the CBC to the applicant, containing his retirement incentive offer;
- Handwritten notes taken by two CBC employees at the meeting in December 2006. These notes mention the applicant's rude remarks regarding his supervisor and state that he threatened him;
- A summary of that same meeting, prepared by the representative from Great-West Life, which notes that the insurer [TRANSLATION] "is concerned by the insured's remarks", that it fears for the safety of other CBC employees and that it was agreed to [TRANSLATION] "substantiate the insured's fitness for work through an expert psychiatric opinion";
- The expert opinion of Dr. Bich Ngoc Nguyen, which notes, among other things, the complainant's aggression towards certain managers, recommends that his disability leave be extended by at least three months and reports that [TRANSLATION] "the psychiatric illness (major depression) and the alcohol abuse justify the disability";
- The details of the respondent's VRIP;
- A letter from Great-West Life to the applicant, dated June 29, 2009, informing him that his disability benefits would end on December 31, 2009, given that he was turning 65;
- Two letters from the CBC to the applicant, dated August 25 and September 11, 2009, informing him of the various employee benefit plans applicable to him upon

retirement and passing on to him the calculations related to his retirement benefits;

- The notes from the interview between the investigator and the applicant, which mention that, when he was about to turn 65, the applicant did not ask his employer if he could continue working beyond that age.

[21] The report notes that the investigator did not think it relevant to interview the respondent's representatives and contact the eight witnesses who could corroborate the applicant's statements regarding the grievances he filed between 2003 and 2006, attesting that he was ready to return to work after his surgery in February 2006 and regarding his refusal of the retirement incentive offer made in June 2006. According to the report, the applicant's allegations on [TRANSLATION] "these points are not in doubt, and the events forming the basis of the complaint relate more to the complainant's behaviour at a meeting after his injury, on December 14, 2006, and are very well documented".

III. Issues and standard of review

[22] The applicant argues that the Commission made a reviewable error in rejecting his complaint pursuant to subparagraph 44(3)(*b*)(i) of the Act

(1) because it breached a principle of procedural fairness in not conducting a sufficiently thorough investigation; and

(2) because it was unreasonable to conclude that the applicant had not produced sufficient evidence to justify referring his complaint to the next level.

[23] The standard of review applicable to a breach of procedural fairness by the Commission is correctness (*Attaran c Canada (Attorney General)*, 2013 FC 1132 [*Attaran*] at para 39; *Sketchley*, at para 53), while the standard applicable to the second issue raised by this application is reasonableness (*Din Ali* at paras 10 and 11). The latter issue concerns the Commission's decision whether to rule on a complaint under the procedure set out in subsection 44(3) of the Act, which is a discretionary decision. The following remarks are helpful (*Rabah v Canada (Attorney General)*, 2001 FCT 1234):

> 9 The standard of review of a decision of the Commission on receipt of an investigation report is a highly deferential one. The Commission does not have an adjudicative function, but is an administrative and screening body, whose role it is to decide if an inquiry is warranted through assessing the sufficiency of the evidence before it . . . .

IV. Analysis

A. *Procedural fairness*

[24] The applicant argues that the investigator's findings are erroneous because of omissions he made. First, he challenges the investigator's finding that he took no action to correct the situation that gave rise to the complaint and submits, rather, that the investigator had evidence to the contrary in his possession. Second, the applicant argues that the investigator telephoned him only once, strictly for the purpose of questioning him on when he planned to retire. According to the applicant, this evidence was not relevant to his complaint.

[25] The respondent, on the other hand, submits that the investigation process was fair, neutral and thorough and complied in every respect with the duties of procedural fairness. The

investigator had access to the parties' written submissions and to an abundance of documentary evidence. There is nothing to indicate that the investigator disregarded any obviously crucial evidence.

[26] I agree with the respondent. In this context, procedural fairness required that the investigation be neutral and thorough, and it was. Only where unreasonable omissions have been made, such as the failure to investigate obviously crucial evidence, is judicial review warranted (*Robinson v Canada (Canadian Human Rights Commission*) (1995), 90 FTR 43 at para 21). The investigator's report address the fundamental or essential aspects of the applicant's complaint, namely, that the respondent allegedly tried first to dismiss him and then to force him into retirement because of his age and mental disability.

[27] The parties were given the opportunity to comment on the investigator's report. In *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 [*Slattery*] at para 57, this Court concluded that "parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker". In the case at hand, the applicant submits that the report does not address the harassment he allegedly suffered, starting in 2003, whereas the evidence of this is indeed included in the summary of his complaint to the Commission, dated March 31, 2010. In that complaint, the applicant alleges that he was humiliated in his workplace, for example, when he was passed over for assignments that traditionally went to him, or when the programming director referred to him as a [TRANSLATION] "former commentator" in front of his colleagues. The applicant had the opportunity to comment on the investigation report and any omission made by the investigator, to which the respondent replied by pointing out the

applicant's failure to avail himself of the complaint process set out in the anti-harassment policy, and the fact that the applicant did not raise these events until several years after the fact. It was therefore entirely reasonable to conclude that the Commission did indeed consider the applicant's harassment allegations but did not think it necessary to investigate them because they were not central to the applicant's complaint.

[28] As my colleague Justice Strickland noted, "[t]his Court is concerned, not with perfection, but with ensuring that the Applicant was treated fairly in the investigation and his discrimination complaint was considered" (*Attaran* at para 100). She also pointed out that "[t]he Court should not dissect the investigator's report on a microscopic level or second-guess the investigator's approach to his task".

[29] Finally, the fact that the investigator did not question the witnesses listed by the applicant is not fatal (*Slattery* at para 70). The investigator justified his choice in his report, and this evidence clearly would not have added anything to the debate because the facts which these testimonies would have concerned were not contested or did not regard evidence relevant to the applicant's complaint.

B. *Reasonableness of the decision*

[30] The applicant alleges that the respondent has not proven beyond a reasonable doubt that, starting in 2007, he was sufficiently dangerous to warrant being excluded from his workplace. He adds that it was the respondent who made him ill by humiliating him and falsely labelling him as dangerous, which constitutes prohibited discrimination within the meaning of

paragraph 7(*a*) of the Act. He argues that the respondent used only certain sections of the psychiatric report to exclude him, and that it deliberately ignored the passages that showed that he was not dangerous.

[31] The respondent, on the other hand, submits that the applicant did not prove *prima facie* discrimination and that, with regard to sections 7 and 14, the initial burden of proof lies on the employee (*Bateman v Canada (Attorney General)*, 2008 FC 393 at para 25). Contrary to the applicant's allegations, the investigator consulted an abundance of documentary evidence and considered the respective positions of the parties.

[32] The respondent also argues that it was reasonable to find the applicant to be dangerous on the basis of his behaviour at the meeting in December 2006 and the psychiatric report, which it had to take seriously. The respondent therefore had good reason to restrict the applicant's access to the premises and did not rely on a prohibited ground based on disability to do so. The evidence shows that the applicant was not dismissed since a person who is not an employee cannot receive short- or long-term disability benefits. The respondent did not force the applicant to retire in 2006 when it offered him retirement incentives. This offer could have been refused, and it was, without any further discussion. Finally, it was the applicant who asked to take his retirement when he was no longer eligible for long-term disability benefits.

[33] I find that the investigator provided a reasonable explanation as to why he preferred to accept the employer's version of the facts and its interpretation (see *Dupuis v Canada (Attorney General)*, 2010 FC 511 at paras 4 and 38). The psychiatric report ordered by the insurer contains

enough information for a reasonable employer, placed in the same circumstances, to chose to exclude the employee from the workplace, and for a reasonable insurer to agree to maintain the insured's long-term disability benefits. The report states that in summer 2006, the applicant armed himself and thus represented a risk to himself and certain supervisors. Contrary to the applicant's arguments, the proof of his dangerousness, which did not have to be beyond a reasonable doubt, was based on sufficient evidence to justify the insurer's recommendation and the respondent's decision.

[34] The Commission's finding that the applicant was not dismissed but simply kept on long-term disability leave until he voluntarily retired is not only reasonable, but well founded. Long-term disability benefits are not paid unless there is an employment relationship, and the fact that the applicant was denied access to the CBC's premises changes nothing.

[35] When it decided not to refer the applicant's complaint to the next level, the Commission properly exercised its discretion and made a decision based on the evidence before it.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicant's application for judicial review is dismissed;

2. Costs are awarded to the respondent.

"Jocelyne Gagné"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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