

Federal Court



Cour fédérale

**Date: 20150428**

**Docket: T-233-13**

**Citation: 2015 FC 541**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, April 28, 2015**

**PRESENT: The Honourable Madam Justice Gagné**

**BETWEEN:**

**MARIE-ANNE JEAN**

**Applicant**

**and**

**CANADIAN BROADCASTING  
CORPORATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Marie-Anne Jean is seeking judicial review of a decision of the Canadian Human Rights Commission, dated January 3, 2013, dismissing her complaint under subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act]. The Commission concluded that,

having regard to the information gathered as part of its investigation, an inquiry into the allegations of discrimination based on the applicant's age was not warranted.

[2] The applicant argues that the Commission did not satisfy procedural fairness requirements and that its conclusion that there was insufficient evidence to support her allegations of discrimination was unreasonable.

[3] For the following reasons, the application for judicial review shall be dismissed.

I. Facts

[4] Ms. Jean has been an employee of the Canadian Broadcasting Corporation [CBC] since 1992 and works as an assignment assistant in the newsroom listening centre.

[5] In March 2007, the CBC advertised for a caption editor, a position requiring applicants to have certain qualifications and to undergo skills tests.

[6] After applying for the position, the applicant was asked to perform a general knowledge and a French test. The French test was divided into two parts, the first containing 71 errors to correct and the second, 24. Each of the two parts was weighted 50%.

[7] In May 2007, the CBC's human resources department notified the applicant in writing that she had been eliminated from the caption editor competition because she had obtained only 41.5% in the French test. Surprised at this result, Ms. Jean and her union representative met with

Line Tanguay, Senior Labour Relations Advisor at the CBC, and Ghislain Tremblay, Site Supervisor, Closed Captioning Department, in order to obtain more information. The day after, Ms. Jean sent an email to Mr. Tremblay and to her union representative to thank them for the meeting the day before.

[8] Nineteen months later, Ms. Jean filed a complaint with the Commission under section 7 of the Act. In this complaint, she submits that the CBC discriminated against her because of her age by refusing to consider her for an employment opportunity.

[9] In May 2012, investigator Robert Cantin produced his report and recommended that the Commission dismiss Ms. Jean's complaint under subparagraph 44(3)(b)(i) of the Act.

[10] In the following months, the parties exchanged written representations on the investigation report, and in January 2013, the Commission dismissed Ms. Jean's complaint on the basis that the evidence gathered did not justify an inquiry.

## II. Impugned decision

[11] As is the custom in such matters, the reasons for the Commission's decision are part of Mr. Cantin's investigation report (*Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 37 [*Sketchley*]; *El Din Ali v Canada (Attorney General)*, 2013 FC 30 at para 20, aff'd 2014 FCA 124). The report begins with a summary of the facts and each party's arguments. It reveals that Ms. Jean accuses Mr. Tremblay of [TRANSLATION] "deliberately failing her in the French exam, with the tacit agreement of Human Resources [HR]" by modifying the marking

scheme after the fact and claims that she was [TRANSLATION] “undoubtedly the only applicant who was assessed on her proficiency in 19th-century French”. Ms. Jean notes that in the letter dated May 27, 2007, informing her of her results, the statement [TRANSLATION] “French test: 41.5%” is in a different font, and she infers from this that her actual grade, higher than 60%, was replaced by a [TRANSLATION] “doctored grade of 41.5%”.

[12] The CBC denied these allegations and submits that the position was given to the person with the best result, that all the exams were marked according to the same scheme and that with respect to the statement in the letter dated May 27, 2007, a different font may have been used inadvertently when entering the personal information. It adds that the marking schemes or the percentage of points allocated to each part of the French test are clearly set out in the relevant documents.

[13] The investigator reviewed the notes made by hand while marking the tests and concluded that the three applicants for the caption editor position were assessed according to the same criteria, with each of the two parts of the French test being worth 50%. The investigator states that he questioned Mr. Tremblay, who denied saying, at the May 2007 meeting, that the marking schemes had been modified. The applicant’s union representative confirmed that the scheme was discussed at the meeting, but that there had been no mention of it having been modified. He confirmed that Ms. Jean did not speak of discrimination at that point and that he had even suggested that she file a grievance, which she refused. The investigator did not feel it necessary to interview Ms. Tanguay, who left the CBC in December 2009, but who had attended the May 2007 meeting. The parties did not provide him with Ms. Tanguay’s contact information, and his online searches to find her were unsuccessful. The investigator also reviewed two emails

from Ms. Jean, addressed to respectively Mr. Tremblay and her union representative, and dated June 20, 2007. In these emails, she essentially thanked Mr. Tremblay and her union representative for the meeting held in May 2007 and told them that she was willing to retake the tests. The investigator points out that Ms. Jean admitted sending these two emails. He reports that she did not question the explanations she was given at the meeting because she wished to remain on good terms with the Human Resources representatives in the hope of obtaining the position she wanted in the future. It was not until fall 2008, after recovering from psychological distress, that Ms. Jean made the decision to express her doubts about the objectivity of the selection process for the caption editor position.

[14] In these circumstances, the investigator recommended dismissing the complaint, on the grounds that (1) there was no documentary evidence establishing that the marking schemes or the percentage of points allocated to the different parts of the French tests were modified after the fact; (2) the documentary evidence suggested that the three applicants were assessed according to the same criteria; (3) the testimonies of Mr. Tremblay and the applicant's union representative did not support the position that the marking criteria were modified; (4) the two emails sent by Ms. Jean on June 20, 2007, establish that she recognized her errors; (5) the CBC's explanation regarding the font used for entering the personal information was plausible; and (6) the complainant did not establish a link between her age and the fact that she did not obtain the desired position.

### III. Issues and standard of review

[15] This application for judicial review raises the following issues:

1. Did the Commission's investigator breach his duty of procedural fairness?
2. Did the Commission err in concluding that the evidence gathered as part of the investigation did not support the applicant's age-based discrimination complaint?

[16] The standard of correctness applies to the first issue (*Guerrier v Canadian Imperial Bank of Commerce (CIBC)*, 2013 FC 937 at para 7 [*Guerrier*]; *Big River First Nation v Dodwell*, 2012 FC 766 at para 33; and *Sketchley*, at para 53). The second issue, on the other hand, must be examined on a standard of reasonableness (*Attaran v Canada (Attorney General)*, 2015 FCA 37 at para 14).

#### IV. Analysis

##### A. *Procedural fairness*

[17] The applicant argues that the investigator's decision not to interview Ms. Tanguay, a key witness in the case, was an error on his part and a breach of the principles of procedural fairness. She adds that the investigator did not describe all of the evidence she filed and that he incorrectly indicated in his report that she had recognized being the author of two emails sent to Mr. Tremblay and to her union representative in June 2007. The applicant also argues that the investigator had a duty to disclose to her all the evidence produced by the respondent and by her union, as and when he received it. Lastly, she submits that the investigator should have obtained Mr. Tremblay's version of the facts regarding each of the allegations in her affidavit.

[18] The Commission's investigation must satisfy two conditions, neutrality and thoroughness (*Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 at p 600 [*Slattery*]). In *Slattery*, the Court fully explains the content of this duty of thoroughness:

In determining the degree of thoroughness of investigation required to be in accordance with the rules of procedural fairness, one must be mindful of the interests that are being balanced: the complainant's and respondent's interests in procedural fairness and the CHRC's interests in maintaining a workable and administratively effective system. Indeed, the following words from Mr. Justice Tarnopolsky's treatise *Discrimination and the Law* (Don Mills: De Boo, 1985), at page 131 seem to be equally applicable with regard to the determination of the requisite thoroughness of investigation:

With the crushing case loads facing Commissions, and with the increasing complexity of the legal and factual issues involved in many of the complaints, it would be an administrative nightmare to hold a full oral hearing before dismissing any complaint which the investigation has indicated is unfounded. On the other hand, Commission should not be assessing credibility in making these decisions, and they must be conscious of the simple fact that the dismissal of most complaints cuts off all avenues of legal redress for the harm which the person alleges.

Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted. Such an approach is consistent with the deference allotted to fact-finding activities of the Canadian Human Rights Tribunal by the Supreme Court in the case of *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

[19] The investigator is master of his own procedure, and in the absence of a finding that the investigation was "clearly deficient", the Court should not allow judicial review (*Slattery* at p 605). This Court also held in *Bateman v Canada (Attorney General)*, 2008 FC 393 at para 29

[*Bateman*], that an investigation that dealt with “all of the fundamental issues raised in the applicant’s complaint” is an investigation that was sufficiently thorough.

[20] In *Slattery*, the Federal Court of Appeal further explained that the investigator is not required to interview all the witnesses proposed by the parties. This Court must therefore determine whether Ms. Tanguay’s testimony was required in the circumstances and whether the investigator’s failure to interview her means that his investigation was not sufficiently thorough.

[21] According to the applicant, Ms. Tanguay was a key witness because she attended the meeting at which Mr. Tremblay allegedly admitted that he had modified the exam marking schemes after the fact. Even though the parties did not provide him with her contact information, and even though he nonetheless attempted to reach her, the investigator concluded that Ms. Tanguay’s testimony was not essential to his analysis of the complaint.

[22] The investigator had the handwritten notes of Ms. Tanguay in which she explained the method used to mark the exams and how the feedback meeting in which she participated with the applicant and her union representative unfolded. The investigator also relied on the testimony of Mr. Tremblay, who corrected the exams of the three applicants for the caption editor position, and on that of the applicant’s union representative. Both attended the May 2007 meeting.

[23] In these circumstances, it is my opinion that Ms. Tanguay’s testimony was not “obviously crucial evidence” and that the investigator’s failure to interview Ms. Tanguay did not undermine the thoroughness of his investigation.



[24] Regarding the other alleged breaches of procedural fairness, I share the respondent's opinion that the investigator did not have the duties the applicant claims he had.

[25] First, the investigator did not have to describe in his report every single piece of evidence submitted by the parties. In *Slattery*, at pages 600 and 601, Justice Nadon notes that the omission to deal with certain allegations in the investigator's report or in the Commission's decision does not mean that these allegations were not considered. Consequently, this is not a reviewable error. It is my opinion that, in this case, the investigator sufficiently considered the evidence submitted and that he based his conclusions on this evidence.

[26] Furthermore, the investigator was not obliged to send the parties all the evidence filed; he simply had to inform them of the substance of this evidence (*Syndicat des employés de production du Québec et de l'Acadie v Canada (Human Rights Commission)*, [1989] 2 SCR 879 at p 902). The investigator satisfied this requirement by describing in his report the substance of the evidence on which he relied and by giving the parties the opportunity to submit representations (*Canada (Minister of Environment Canada) v Hutchinson*, 2003 FCA 133 at paras 47-50 and 53).

[27] The investigator stated that the applicant recognized in an interview that she was the author of the emails sent in June 2007 to Mr. Tremblay and to her union representative. She denies this in her written representations and stated before me that all the stakeholders, including her union representative and the investigator, had lied or given false testimony. There is nothing before me to suggest this.

[28] Lastly, the investigator did not have to seek Mr. Tremblay's version of each of the allegations contained in the applicant's affidavit; he merely had to obtain his version of the relevant aspects of the applicant's complaint. There is no evidence that he did not do so.

B. *Reasonableness of decision*

[29] The applicant believes that the Commission's decision should be set aside since the evidence on the record clearly establishes that she was discriminated against because of her age.

[30] In contrast, the respondent argues that the investigator and the Commission were warranted to conclude that the evidence gathered did not support the applicant's allegations. It adds that the applicant did not demonstrate a link between her age and the respondent's refusal to consider her for an employment opportunity and that the applicant was not treated differently from the two other candidates who applied for the same caption editor position.

[31] In this respect, the applicant does not believe that two other applicants were interested in the position or that they had to perform the French test she had to undergo. She feels that this is a subterfuge on the part of the respondent to disqualify her from the position because of her age.

[32] In an investigation led by the Commission, the onus lies on the complainant to prove *prima facie* discrimination. Once discrimination has been established, the employer must demonstrate that the discrimination is a *bona fide* occupational requirement (*British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3; *Bateman* at para 25).

[33] It is my opinion that the Commission did not err in concluding that the evidence gathered did not support the applicant's complaint that she was discriminated against because of her age by being refused to be considered for an employment opportunity. The applicant did not establish a link between her age and the fact that she did not obtain the position she desired. There is no evidence on the record that even remotely supports the applicant's allegations that the CBC's representatives, her union representative and the investigator made false representations to cover up the discrimination she alleges to have suffered. In these circumstances, the Commission's decision is reasonable, and the reasons in the investigation report fully support the investigator's conclusions.

V. Conclusion

[34] In light of the above, the applicant's application for judicial review shall be dismissed, and costs shall be awarded in favour of the respondent.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. The applicant's application for judicial review is dismissed;
2. Costs are awarded in favour of the respondent.

“Jocelyne Gagné”

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Judge

Certified true translation  
Johanna Kratz, Translator

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-233-13

**STYLE OF CAUSE:** MARIE-ANNE JEAN v CANADIAN  
BROADCASTING CORPORATION

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** FEBRUARY 23, 2015

**REASONS FOR JUDGMENT:** GAGNÉ J.

**DATED:** APRIL 28, 2015

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