Federal Court  Cour fédérale

Date: 20150611

Docket: T-1835-14

Citation: 2015 FC 735

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 11, 2015

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

GUY LAFOND

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review filed by Guy Lafond [the applicant] pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, following the dismissal of his complaint by the Canadian Human Rights Commission [CHRC] under subparagraph 44(3)(*b*)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act].

II. Facts

[2] The applicant has been employed by the Department of Citizenship and Immigration Canada since September 7, 2001. On April 30, 2012, he filed an internal complaint with the International Region Branch [IR] of Citizenship and Immigration Canada [CIC] against two supervisors, namely, Nathalie Smolynec and Roswitha Diehl-MacLean. On January 21, 2013, that complaint was declared to be unfounded.

[3] On April 25, 2013, the applicant filed a complaint with the CHRC on the grounds that he had been subjected to differential treatment in the course of employment by reason of his age, his sex and a disability. On April 24, 2014, investigator Anick Hébert [the investigator] submitted her report on the allegations included in the report. She recommended that the complaint be dismissed under subparagraph 44(3)(*b*)(i) of the Act. On May 4, 2014, the applicant submitted his written representations in response to the investigator's report to the CHRC. On June 27, 2014, the respondent submitted his written representations to the CHRC in response to the applicant's representations. On July 30, 2014, the CHRC dismissed the applicant's complaint under subparagraph 44(3)(*b*)(i) of the Act. That dismissal is the impugned decision.

III. Impugned decision

[4] The CHRC dismissed the applicant's complaint after reviewing the investigator's report and the representations provided by the two parties. The CHRC's reasons can be found in the report (*Dubé v Canadian Broadcasting Corporation*, 2015 FC 78 at para 15 [*Dubé*], citing *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 37 [*Sketchley*]; *Din Ali v Canada*

(Attorney General), 2013 FC 30 at para 20 [*Din Ali*] aff'd by the Federal Court of Appeal in *El Din Ali v Canada (Attorney General)*, 2014 FCA 124).

[5] First, the investigator noted that the applicant claimed to have suffered harassment and discrimination because of his age, sex and disability.

[6] Regarding the applicant's allegations that he was subjected to differential treatment when he made his internal complaint, the investigator concluded that the applicant had not specified how the process had been applied differently to him and had not submitted any evidence in support of his allegations. The investigator also concluded that the evidence on record did not support his allegations that he had been humiliated by Ms. Smolynec. The applicant also claimed that Ms. Smolynec had criticized him for no good reason and had not taken into consideration his vision problems, namely, that he suffers from cataracts. The investigator, however, noted in her report that Ms. Smolynec was aware that the applicant had problems with his eyes because he had to take time off work, although she did not know what the exact problem was. The investigator also wrote that the applicant confirmed that he had not requested any accommodations for his eye problems. On this point, the investigator concluded that the evidence did not support the applicant's position. The applicant also claimed that he had asked his supervisor multiple times for changes. The investigator concluded that the applicant no longer worked for Ms. Dielh-MacLean and Ms. Smolynec and now reports to another supervisor, Terry Brown, and to another manager, André Voltaire. Indeed, this request had been fulfilled. The applicant alleged that he had been discriminated against in 2011 when he was passed over for a posting to Pretoria, in South Africa. The investigator concluded that the evidence did not

support this allegation. Finally, the applicant submits that he has had administrative problems since returning to work. The investigator concluded that there were indeed several problems but noted that they were beyond management's control.

[7] The investigator therefore concluded that the evidence did not show that the applicant had been subjected to differential treatment by reason of his age, sex or disability. Accordingly, she recommended that the CHRC dismiss the complaint under subparagraph 44(3)(*b*)(i) of the Act, given that, having regard to all the circumstances of the complaint, an inquiry into the complaint by a tribunal was not warranted.

IV. Applicant's arguments

[8] The applicant submits that there is an error in the date of the report, specifically, that it is stated that the complaint was filed on July 9, 2009, when it was actually filed on April 25, 2013. He also submits that the investigator did not inquire into why he was forbidden to return to work on April 30, 2012, that she incorrectly assessed the contents of the letter dated May 14, 2012, from Ms. Dielh-MacLean to his family doctor, and that Ms. Dielh-MacLean had also refused to help him when he returned to his analyst position in December 2012.

[9] The applicant further submits that the investigator declined to consider evidence that he submitted with his complaint to the IR on December 27, 2012. The applicant also claims that the investigator did not take into account what he had submitted in support of his harassment complaint against Sharon Chomyn. Moreover, he argues that the finding that he had not been discriminated against when he was passed over for a posting to Pretoria was incorrect. The

applicant also questions the investigator's finding that the performance standard's requirements did not constitute harassment because the standard is not clearly defined by the Treasury Board Service. He also claims that he has suffered further retaliation since filing his complaint.

[10] Furthermore, the applicant claims that it took more than 12 months for his complaint to be processed and that the investigator did not consider his explanations as to why he was forbidden to return to work on April 30, 2012. Finally, he explains that Anita Biguzs had confirmed in writing on May 30, 2014, that she would not be making any additional representations in response to the investigator's report but then did in fact file some on June 27, 2014. He submits that he was not given an opportunity to comment on the allegations made by Ms. Biguzs. In his view, this constitutes a breach of procedural fairness.

V. Respondent's arguments

[11] The respondent submits that, contrary to the applicant's allegations, the investigator assessed all the evidence that was presented to her and reviewed all the documents she was given. He claims that the CHRC considered the report, as well as the representations made by the parties, before rendering its decision. The respondent says that the investigator was not required to comment on all the incidents of discrimination submitted by the applicant and that the flaws in the report do not vitiate the CHRC's decision, insofar as they are not so fundamental that they cannot be remedied by the parties' written representations.

[12] The respondent also explains that the twelve (12)-month delay was reasonable. He submits that the applicant did not file any evidence that he had suffered any harm as a result of this delay.

[13] Finally, the respondent says that the applicant did not file any evidence that the CHRC had forbidden him to file a response to the representations of Ms. Biguzs and that his request had been denied.

VI. Issues

[14] Having reviewed the parties' arguments and their respective records, I frame the issues as follows:

- Is the CHRC's decision to dismiss the complaint under subparagraph 44(3)(*b*)(i) of the Act reasonable?
- Did the CHRC breach its duty of procedural fairness in not giving the applicant the opportunity to file a response to the respondent's representations?
- Does the CHRC's twelve (12)-month delay in investigating the applicant's complaint and rendering its decision constitute a breach of procedural fairness?

VII. Standard of review

[15] Whether it was reasonable for the CHRC to dismiss the applicant's complaint is a question of mixed fact and law and must be assessed on the reasonableness standard (*Dupuis v Canada (Attorney General)*, 2010 FC 511 at para 10 [*Dupuis*], referring to *Bredin v Canada*

(Attorney General), 2008 FCA 360 at para 16 and *Davidson v Canada Post Corporation*, 2009 FC 715 at para 54). The standard of review applicable to a decision of the CHRC on receipt of an investigation report is a highly deferential one (*Rabah v Canada (Attorney General)*, 2001 FCT 1234 at para 9). This Court will therefore intervene only if the decision is unreasonable, that is, if it does not fall within the range "of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[16] The two issues regarding procedural fairness must be assessed on the correctness standard (*Dupuis*, above at para 11, referring to *Lusina v Bell Canada*, 2005 FC 134 at para 29; *Bateman v Canada (Attorney General)*, 2008 FC 393 at para 20; *Sketchley*, above at para 53).

VIII. Analysis

A. *Is the CHRC's decision to dismiss the complaint under subparagraph 44(3)(*b*)(i) of the Act reasonable?*

[17] Subparagraph 44(3)(*b*)(i) of the Act states that, "[o]n receipt of a report referred to in subsection (1), the Commission [CHRC] . . . shall dismiss the complaint to which the report relates if it is satisfied . . . that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted".

[18] Justice Kane recently summed up the complaint process and the role of the CHRC in *Alkoka v Canada (Attorney General)*, 2013 FC 1102 [*Alkoka*]:

> [40] In the recent decision in *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at para 60, [2013] FCJ No 230 [*CUPE*], Justice Mactavish addressed

the standard of review and summarised all of the relevant principles governing Commission Investigations. As these principles address the very issues raised in the present case, and refer to jurisprudence cited by the applicant and respondent, I have set them out below:

> [60] The role of the Canadian Human Rights Commission was considered by the Supreme Court of Canada in *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854. There the Court observed that the Commission is not an adjudicative body, and that the adjudication of human rights complaints is reserved to the Canadian Human Rights Tribunal.
>
> [61] Rather, the role of the Commission is to carry out an administrative and screening function. It is the duty of the Commission "to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it": *Cooper*, above, at para. 53; see also *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] S.C.J. No. 103, [1989] 2 S.C.R. 879 [*SEPQA*].
>
> [62] The Commission has a broad discretion to determine whether "having regard to all of the circumstances" further inquiry is warranted: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paras. 26 and 46; *Mercier v. Canada (Human Rights Commission)*, [1994] 3 F.C. 3, [1994] 3 F.C.J. No. 361 (F.C.A.).
>
> [63] Indeed, in *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113, [1998] F.C.J. No. 1609 [*Bell Canada*], the Federal Court of Appeal noted that "[t]he Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report": at para. 38.

[19] I am of the opinion that the applicant is simply unhappy with the investigator's report and the decision of the CHRC. In this case, the investigator's report gives an adequate explanation for her recommendation that the CHRC dismiss the applicant's complaint. Before rendering its decision, the CHRC had, in addition to the report, the parties' representations, including the very same representations that the applicant is repeating on judicial review. The CHRC had good reason to dismiss the complaint for lack of evidence (*Cooper v Canada (Canadian Human Rights Commission)*, at para 53; *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 16 [*Hébert*]; *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879, at page 899). Moreover, the investigator was not obliged to address each and every incident alleged by the applicant in her report (*Miller v Canada (Human Rights Commission)*, [1996] FCJ No 735 (T.D.); *Murray v Canada (Canadian Human Rights Commission)*, 2002 FCT 699, [2002] FCJ No 1002 [*Murray*] at para 24, aff'd *Murray v Canada (Canadian Human Rights Commission)*, 2003 FCA 222). The parties also had the opportunity to respond to the report in their representations, which the CHRC considered before dismissing the applicant's complaint. As explained in *Slattery v Canada (Human Rights Commission)*, [1994] FCJ No 181 (T.D.)(QL), aff'd [1996] FCJ No 385 (CA), deference must be given to administrative decision-makers to assess the probative value of the evidence and to decide whether or not a further inquiry is warranted. The Court owes deference to the CHRC with respect to its assessment of the fact in the record (*Sketchley*, above at para 38). In this case, the investigator produced a very detailed report and recommended that the complaint be dismissed. The CHRC's decision to dismiss the complaint is therefore reasonable in light of the test in *Dunsmuir*, above. The Court's intervention is unwarranted.

B. *Did the CHRC breach its duty of procedural fairness in not giving the applicant the opportunity to file a response to the respondent's representations?*

[20] The applicant argues that the CHRC erred in not allowing him to file a response to the respondent's representations. He bases this argument on the fact that Ms. Biguzs, in a letter dated May 30, 2014, states that she does not intend to submit any representations regarding the complaint or the report. However, in a letter dated June 27, 2014, Ms. Biguzs does indeed make her representations, having been informed that the applicant had submitted comments on the report. The applicant thus argues that he did not have the opportunity to respond to the representations by Ms. Biguzs. This argument must fail.

[21] In the present case, procedural fairness required that the applicant know the allegations against him and have an opportunity to respond to them (*Canada (Attorney General) v Cherrier*, 2005 FC 505 [*Cherrier*] at para 22; *Alkoka*, above at para 67). Moreover, "[t]he screening process of the Commission [CHRC] is not adversarial. The case the applicant must meet is set out in the Report" (*Khapar v Air Canada*, 2014 FC 138 [*Khapar*] at para 56). In the case at bar, the applicant was aware of the report's findings and of the investigator's recommendation. He had the opportunity to respond to the report to address any gaps or bring to the investigator's attention any important missing evidence (*Alkoka*, above at para 68). A response to the respondent's representations was therefore not necessary.

[22] Furthermore, the applicant did not submit any evidence that he had asked to file a response and that the CHRC had refused his request. The applicant therefore had the opportunity to argue his point of view and present his evidence before the investigator handed in her report.

The applicant also had the opportunity to make his representations before the CHRC decided to dismiss his complaint. The applicant was therefore aware of the contents record and had the opportunity to respond. In light of these circumstances, there was no breach of procedural fairness in this case (*Cherrier*, above at para 45).

C. *Does the CHRC's twelve (12)-month delay in investigating the applicant's complaint and rendering its decision constitute a breach of procedural fairness?*

[23] The applicant suggests that the CHRC took too long a time, twelve (12) months, before rendering its decision. At issue, therefore, is whether this delay was reasonable, and if so, whether the delay caused the applicant any harm (*Murray*, above at para 24; see also *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at para 120 [*Blencoe*]). In the case at bar, the delay was reasonable and did not cause the applicant any harm.

[24] According to the applicant, between the filing of his complaint and the filing of the investigation report, four (4) persons contacted him regarding his complaint (AR at page 131 at para 9). In *Murray*, above, there was a delay of nearly four (4) years between the filing of the complaint and the filing of the report, which was found to be unreasonable. However, the Court noted that although this delay constituted a breach of procedural fairness, the CHRC would have arrived at the same result (at para 34). The Court also cited the Supreme Court of Canada's decision in *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, [1994] SCJ No 14 (SCC), to the effect that it "is justifiable to disregard a breach of natural justice 'where the demerits of the claim are such that it would in any case be hopeless'" (*ibid*.). In the present case, the parties, the investigator and the other people involved in the

complaint process were in constant communication, and a delay of twelve (12) months is not so inordinate as to amount to an abuse of process (*Blencoe*, above at para 132).

[25] Regarding the harm done, the applicant explains that he had family problems and separated from his wife as a result of filing the complaint with the CHRC and that he is now trying to retain shared custody of his daughter. Although such events can weigh heavily on an individual, they do not constitute harm related to the twelve (12)-month delay in question. Moreover, the applicant did not present any evidence demonstrating harm related to this delay. I am of the opinion that the delay does not provide any basis for setting aside the decision in this case and did not cause the applicant any harm.

IX. Conclusion

[26] The CHRC's decision to dismiss the applicant's complaint under subparagraph 44(3)(*b*)(i) of the Act is reasonable. There was no breach of procedural fairness with regard to the parties' representations or the twelve (12)-month delay between the filing of the complaint and the CHRC's decision. This Court's intervention is not required.

JUDGMENT

THIS COURT'S JUDGMENT is that:

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

2. With costs to the respondent.

"B. Richard Bell"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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