Federal Court  Cour fédérale

Date: 20160411

Docket: T-294-15

Citation: 2016 FC 400

Toronto, Ontario, April 11, 2016

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

FRANCIS ABOAGYE

Applicant

and

ATOMIC ENERGY OF CANADA LIMITED

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The present Notice of Application dated February 26, 2015 and filed on that date by the Applicant, an unrepresented litigant, is based on the following ground:

> This is an application for Judicial Review in respect of: 7-page Police report which was never made known to applicant in regards to the decision of the Canadian Human Rights Commission (The Commission) on December 12, 2013. The Commission dismissed applicant's complaint with file number 20121378 against Atomic Energy of Canada [AECL] because the evidence does not support

> that the complainant was treated in an adverse discriminatory manner and dismissed from his employment because of his race, national or ethnic origin and colour.
>
> The decision was communicated to the applicant on December 16, 2013.
>
> The applicant makes application for:
>
> 1. Judicial Review of the 7-page Police document sent to the Commission by Port Hope Police Service to influence the decision of the Commission.
>
> 2. Judicial Review of the decision of the Canadian Human Rights Commission.
>
> The grounds for the application are:
>
> 1. breaching a principle of procedural fairness:
>
> […]

[2] The present Application was commenced on the Applicant's belief that an undisclosed 7-page police report (7pReport) was sent to the Canadian Human Rights Commission (Commission), and in rendering the decision presently under review pursuant to the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (*Act*), the Commission used the 7pReport to his detriment. Thus, the present Application is focussed on the Applicant's argument that the Commission breached a duty of fairness owed to him by failing to disclose the 7pReport prior to rendering the decision.

[3] As context for the argument, the salient features of the Applicant's human rights complaint, and the Investigator's opinion and recommendation to the Commission with respect to it, are described in the Investigation Report as follows:

> It is undisputed that the complainant was hired by the respondent and commenced his employment on May 29, 2012 as an Industrial

> Relations Specialist. As a new employee, he was subject to a probationary period of 120 working days. His employment was terminated for cause on December 12, 2012.
>
> At issue in this complaint is whether the respondent treated the complainant in an adverse differential manner and terminated his employment on the grounds of race, national or ethnic origin and colour. The complainant self identifies as Black of African origin.
>
> The investigation of this complaint includes: review of the complainant and respondent's positions and supporting documentation; review of relevant documentation including the complainant's performance appraisal, written communications between the complainant and respondent, AECL workplace harassment policy and Code of Conduct, job descriptions, complainant's job offers, police reports, copy of the respondent's internal investigation report summary interviews with relevant witnesses [...]
>
> Notwithstanding the performance issues, the evidence shows that the complainant was dismissed because of a breakdown in the employment relationship following the results of the respondent's internal investigation. This investigation shows that the complainant had misrepresented relevant information which would have been pertinent to the selection process and his Security Clearance.
>
> It is recommended that, pursuant to subparagraph 44 (3)(b)(i) of the *Canadian Human Rights Act*, that the Commission dismiss the complaint because: the evidence does not support that the complainant was treated in an adverse discriminatory manner and dismissed from his employment because of his race, national or ethnic origin and colour.
>
> [Emphasis added]
>
> (Investigation Report, September 5, 2013, paras. 8, 1, 7, 134, and 140.

II. As to Process: Jurisdiction and the Conduct of the Present Application

[4] The Respondent’s response to the Application is framed as follows:

> Statement of the Points in Issue:
>
> There is only one question to be addressed in the current application - can the application proceed given it was not brought within 30 days of the CHRC Decision and the applicant has been previously denied an extension of time [in the previously filed Application T-899-14]?
>
> If this Court proceeds to consider the merits of the Applicant's application for judicial review, it is AECL's position that the Application is without merit or evidence to prove any of the elements claimed by the Applicant.
>
> Respondent's Submissions
>
> The Applicant's Application is precluded by the doctrine of *res judicata* and is alternately an abuse of process.
>
> (Respondent's Written Submissions dated July 22, 2015, Respondent's Record, pp. 373 – 374).

[5] The analysis of three issues determines the merit of the Respondent's argument

A. ***The Relevance of the Application T-899-14 to the Present Application***

[6] By Notice of Application T-899-14 filed April 9, 2014, Counsel then acting for the Applicant applied for judicial review of the Commission's decision stated to have been made on December 12, 2013 and communicated to the Applicant on January 2, 2014. Because the Application was not filed within the required 30 days from the date upon which the decision was communicated to the Applicant, a motion for an extension of time to file the Application was made on the grounds that "the applicant was and is unemployed and had no means to retain a lawyer. The applicant also suffers from the depressive disability arising from being terminated unjustly from his employment". (Respondent's Record in the present Application, pp. 18 – 21)

[7] By order dated July 8, 2014, the motion for an extension of time was dismissed by Justice Mosley on its merits (Respondent's Record, pp. 279 – 281). The Applicant's motion for reconsideration was also dismissed on the basis that none of the grounds warranting reconsideration as specified in Rule 397 of the *Federal Courts Rules* had been met. (Respondent's Record in the present Application, pp. 354 - 356).

[8] As mentioned, the Respondent relies on Justice Mosley's orders to argue that the Court has no jurisdiction to proceed to determine the present Application. However, it is important to note that, after the filing of the present Application, the Respondent did not bring a motion to strike the Application; the Application proceeded forward unhindered.

B. ***Amendment to the Style of Cause***

[9] Indeed, the Respondent acted in aid of the present Application. The Application as filed named the Respondents as "Chief Commissioner David Langtry, Canadian Human Rights Commission (CHRC)". On March 20, 2015, the Respondent filed a Notice of Motion for: an Order amending the style of cause to remove the Respondents as named and to add Atomic Energy of Canada Limited as the Respondent; and an Order specifying that all delays under the *Federal Courts Rules* should run from the time of service as though a new Application for judicial review was filed on March 20, 2015. The Orders were granted by Prothonotary Tabib on April 21, 2015, and an Amended Notice of Application was filed on April 27, 2015.

C. ***Motion for an Extension of Time: Requisition for Hearing***

[10] The next step in the process towards a judicial review hearing was a Motion filed by the Applicant on September 21, 2015, for an extension of time to file a requisition for hearing. At that point in the process, the Respondent presented the following arguments:

> AECL submits that the present application for judicial review is *res judicata* and therefore has no merit. AECL submits that the decision of Mr. Justice Mosley which dismissed the Applicant's first request for an extension of time is final and conclusive for the purposes of the Application before this Court. As such, the Applicant's attempt to re-litigate matters finally decided by Justice Mosley satisfies the requirements of cause of action estoppels and the Application is therefore precluded by the doctrine of res *judicata*.
>
> The Applicant has brought varied litigation against AECL based on the same facts and evidence adduced to the CHRC. The Applicant's continuous litigation against AECL amounts to an abuse of process, and in the specific circumstances of this case, the continued litigation in multiple forums prejudices AECL.
>
> (Respondent's Written Submissions on the Motion, paras. 36 and 37)

[11] On December 1, 2015, Prothonotary Milczynski delivered the following order:

> UPON MOTION in writing on behalf of the Applicant filed September 21, 2015, pursuant to Rule 369 of the *Federal Courts Rules* for an extension of time within which to file the Requisition of Hearing, *nunc pro tunc*, in respect of the within application for judicial review;
>
> AND UPON receiving the motion materials this day, and reviewing the motion record of the Applicant and the Respondent's motion record filed October 1, 2015, opposing the motion;
>
> AND UPON being satisfied that the relief sought should be granted having regard that the Applicant is self-represented and has provided an explanation for the delay;

> AND UPON noting that the Application Records in this matter have been filed, including the Respondent's Record which was filed on July 22, 2015, and further noting that the Applicant has prepared the Requisition for Hearing dated September 21, 2015, a copy of which has been received by the Respondent, there being no information, however, regarding whether the appropriate filing fee for the Requisition has been tendered to the Court Registry:
>
> THIS COURT ORDERS that the Applicant is granted an extension of time of ten (10) days from the date of this Order to file, with proof of service and payment of filing fee, the Requisition for Hearing.
>
> [Emphasis added]

[12] The Respondent did not appeal Prothonotary Milczynski's order.

D. *Conclusion*

[13] Thus, the Respondent's *res judicata* and abuse of process arguments with respect to the Application proceeding to hearing were considered by Prothonotary Milczynski and were dismissed on a *nunc pro tunc* determination. As a result, I find that, by Prothonotary Milczynski's order, the Court has accepted the Applicant's Application retroactive to the date of filing. Further as a result, I dismiss the Respondent's jurisdictional *res judicata* and abuse of process arguments advanced at the hearing of the present Application.

III. As to the Merits: The Fairness Argument

[14] The existence and content of the 7pReport, and whether it was before the Commission when it rendered the decision under review, are the central issues for determination arising from the Application.

A. *About the Existence of the 7pReport*

[15] In the course of the hearing of the present Application, the Applicant made an oral request for production by the Commission of the 7pReport. At the Court's request, Counsel for the Commission voluntarily appeared to assist in locating and producing the 7pReport. Following an investigation, Counsel for the Commission produced affidavit evidence and made representations with respect to relevant documentation in the possession of the Commission. The following is a chronology of the documentation events.

[16] On November 16, 2012, the Applicant filed his discrimination complaint with the Commission.

[17] On January 30, 2013, the Freedom of Information Branch of the Port Hope Police Service (Port Hope) responded to a request made by the Applicant under the Ontario *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 for disclosure of police reports in support of his complaint. Port Hope provided disclosure of two Supplementary Reports plus one General Occurrence Report dated September 13, 2012. The General Occurrence Report

had one paragraph redacted from the version sent to the Applicant. (Affidavit of Milena Gonzalez dated March 8, 2016 (Gonzalez Affidavit): Exhibit A, pp. 0007 - 0008). As described below, it is this one paragraph in un-redacted form that, ultimately, the Applicant seeks to be disclosed.

[18] On February 28, 2013, the September 13, 2012 General Occurrence Report, with the redacted paragraph, was filed as part of the Applicant's submissions to the Commission. (Gonzalez: Exhibit A, p. 0007)

[19] On September 20, 2013, the Commission disclosed the Investigation Report to the Applicant and the Respondent; the Investigation Report was dated and signed September 5, 2013 with respect to the Applicant's claim under the *Act*. (Gonzalez Affidavit: para. 5)

[20] On September 26, 2013, the Commission received a letter by fax dated September 26, 2013, from Port Hope, answering questions from the Commission's investigator; and on September 27, 2013, the Commission received a letter by fax dated September 27, 2013, from Port Hope that included an un-redacted version of the General Occurrence Report dated September 13, 2012. (Gonzales Affidavit: paras. 6 and 7)

[21] On December 12, 2013, the Commission delivered its decision not to deal with the Applicant's human rights complaint. (Gonzalez Affidavit: para. 8)

[22] On June 12, 2014, the Applicant made the following request of the Commission pursuant to the *Access to Information Act*, R.S.C., 1985, c. A-1:

> Request every information on my file (20121378). These include everything from myself, the Canadian Human Rights Investigator, Atomic Energy of Canada, The Police, and anything else I am not aware of.

By an interim response dated July 28, 2014, and a final response dated September 15, 2014, the Commission provided document disclosure (Access Record), however some pages were withheld. The pages withheld pursuant to s.13(1)(d) of the *Access to Information Act* were those received by the Commission from Port Hope noted as "Pages 122 to 123" and "Pages 118 to 120". On September 23, 2014, the Applicant made a complaint to the Office of the Information Commissioner of Canada regarding the Commission's failure to disclose the entire record. The January 20, 2015 response confirmed that the Applicant had reduced the scope of his complaint to pages 117 to 123, and also explained that, since pages 117 to 123 were obtained in confidence from Port Hope, they were properly excluded. (Exhibit A, K, and L of the Applicant's Affidavit dated April 27, 2015)

[23] With respect to the present Application dated February 26, 2015, pursuant to Rule 317 of the *Federal Courts Rules*, the Applicant requested the record before the Commission when it rendered its decision on his complaint (Tribunal Record), including the undisclosed content of pages 117 to 123 of the Access Record. (Commission's Representations (Reps.), paras. 8 and 9)

[24] Counsel for the Commission describes the content of pages 117 to 123 of the Tribunal Record as follows:

> The seven pages include one two page police report, fax cover sheets and correspondence. They were provided in confidence by a municipal authority. Pages 117 to 120 (one fax cover sheet, a cover letter and a two-page Police Report from the Port Hope Police Service) of the Access Record were received by the Commission on September 27, 2013. Pages 121 to 123 of the Access Record (a fax cover sheet and a letter) were received by the Commission on September 26, 2013.
>
> There is no seven page police report in the possession of the Commission (Affidavit of Milena Gonzalez, dated March 8, 2016, at para. 11)
>
> The Commission answered Mr. Aboagye's request under Rule 317 of the Federal Courts Rule in a letter dated March 19, 2015, then Commission Counsel objected under Rule 318 of the Federal Courts Rules to the request and provided the material that was before the Commission when it made its decision. As to the specific request for the seven pages (pages 117 to 123 of the Access Record), then Commission Counsel indicated that:
>
> > (...) this document belongs to a third party and was sent to the Commission in confidence. The Commission must ensure that it only discloses documents in a manner that is authorized or required by law. Therefore, a redacted version of the requested document, which was provided to the Commission by Port Hope Police Services and authorised for disclosure, is enclosed (...).
>
> A copy of one of the documents, with one paragraph blacked out, was provided to the Applicant along with the material that was before the Commission. Those two pages correspond to pages 119 and 120 of the Access Record, without the redacted paragraph. The Port Hope Police report is in respect of an incident that was reported and entered on September 13, 2012.
>
> (Commission’s Reps., paras. 12 - 15)

[25] Counsel for the Commission confirms the following fact:

> The Police Report at pages 119 and 120 of the Access Record is another copy of the same document provided earlier by the Complainant and which was in the possession of the Investigator when the Investigation Report was completed on September 5,

> 2015. The version found at pages 119 and 120 of the Access Records is slightly different in that the last paragraph is un-redacted in the version disclosed confidentially to the Commission on September 26, 2015.
>
> (Commission's Reps., para. 22)

The Applicant had no evidence that rebutted or contradicted the Commission's information on this point.

[26] Thus, I find that the only document that constitutes the 7pReport is the un-redacted version of the September 13, 2012 General Occurrence Report provided to the Applicant in redacted form by Port Hope on January 30, 2013.

B. ***About the Evidence Before the Investigator and the Commission***

[27] As to evidence before the Investigator, Counsel for the Commission reasons that the documents at pages 117 to 123 of the Access Record were received by the Commission on September 26 and 27, 2013. Therefore, they could not be before the Investigator when the Investigation Report was completed on September 5, 2013. (Commission's Reps., para. 19).

[28] However, the Applicant argues that there is evidence that the un-redacted version of the September 13, 2012 General Occurrence Report was before the Investigator in August 2013, was considered, was an element of the Investigation Report sent and considered by the Commission, and it is relevant evidence which requires an order for production. This argument is based on passages in two letters: September 27, 2013, from Mr. Robert Grandy, Port Hope Coordinator,

Information and Privacy, to Mr. Chamberlin of the Commission (Gonzalez Affidavit: Exhibit C); and March 18, 2015, Mr. Grandy to Mr. Jonathan Bujeau of the Commission (Gonzalez Affidavit: Exhibit E).

[29] The relevant passage from the September 27, 2013 letter is:

> Pursuant to this, I am enclosing an unedited version of the General Occurrence Report, as requested in Ms. Holt's [the Investigator] letter of August 14th, 2013. I would ask however that this unedited version NOT be shared with Mr. Aboagye [Emphasis added].

And the relevant passage from the March 18, 2015 letter is:

> In my letter to Mr. John Chamberlin of the Commission dated September 27th, 2013, I requested that the original unedited copy of the General Occurrence Report in question NOT be released to Mr. Aboagye, as it was sent to a Ms. Holt (as per her prior request) in confidence for her use only in August 2013 [Emphasis added].

[30] The Applicant argues that the emphasised statement in the letter of March 18, 2015 is evidence that the Investigator used the unedited copy of the General Occurrence Report in reaching the Investigation Report delivered to the Commission. I find that the argument is not based on a fair reading of the evidence. It is clear that the Investigator requested the document in question on August 14, 2013 but it was not sent until September 27, 2013. As a result, the words "for her use only in August 2013" fairly must be taken to mean that the Investigator wanted to consider the document in late August and it was sent for that purpose, albeit late, and after the Investigation Report was completed. As a result, I dismiss the Applicant's argument.

[31] Therefore, the un-redacted version of the September 13, 2012 General Occurrence Report provided to the Applicant in redacted form by Port Hope on January 30, 2013, and delivered to the Investigator was the only “police report” before the Investigator.

[32] As to evidence before the Commission itself at the time the decision under review was rendered, Counsel for the Commission makes the following representations:

> As appears from the Court Record, the material provided in the Commission Certificate under Rule 318(1)(a) of the *Federal Courts Rules* included the following:
>
> > Investigation Report dated September 5th, 2013 with Appendices; Amended Summary of Complaint Form dated March 13th, 2013;
> >
> > Summary of Complaint Form dated November 16th, 2012;
> >
> > Complaint Form;
> >
> > Submissions from the Complainant concerning the Investigation Report, undated, with attachment;
> >
> > Submissions from the Respondent dated October 18th, 2013 with an attachment;
> >
> > Complainant's response to the Respondent's submissions, undated, with attachments; and
> >
> > Respondent's response to the Complainant's submission dated November 12, 2013.
>
> The Commission's Rule 318 Certificate does specify that this is the material that was before the Commission when it rendered its decision on December 4th, 2013 in complaint 20121378 (ie. Mr. Aboagye's complaint).
>
> (Commission Reps., paras. 16 and 17)

[33] On the evidence, I find that the un-redacted version of the September 13, 2012 General Occurrence Report was not before the Commission. As a result, I find that no duty of fairness owed to the Applicant was breached.

C. *The Applicant's Access to the* un-redacted version of the September 13, 2012 General Occurrence Report

[34] Because the un-redacted version of the September 13, 2012 General Occurrence Report was not before the Commission when it rendered its decision, I find it is not relevant with respect to the present Application. As a result, I deny the Applicant's request for production.

IV. Costs

[35] The Respondent requests an order for costs. In my opinion, because the Respondent's singular adamant jurisdictional argument in response to the present Application did not succeed, an award of costs as requested is not warranted.

JUDGMENT

THIS COURT'S JUDGMENT is that for the reasons provided, the present Application is dismissed.

As a courtesy, Counsel for the Commission provided an un-redacted version of page 119 of the Access Record, under seal, to allow a determination to be made of its evidentiary value if it was found to be relevant to the present Application.

Given the finding that the document is not relevant, I direct that the document, still under seal as provided, be returned to Counsel for the Commission.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-294-15
STYLE OF CAUSE:	FRANCIS ABOAGYE V ATOMIC ENERGY OF CANADA LIMITED
PLACES OF HEARING:	TORONTO, ONTARIO (IN-PERSON) AND VANCOUVER, BRITISH COLUMBIA (VIA VIDEO-CONFERENCE)
DATES OF HEARING:	FEBRUARY 16-17, 2016 (TORONTO) AND MARCH 17, 2016 (VANCOUVER)
JUDGMENT AND REASONS:	CAMPBELL J.
DATED:	APRIL 11, 2016

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