Federal Court

Cour fédérale

Date: 20200306

Docket: T-1404-18

Citation: 2020 FC 341

Ottawa, Ontario, March 6, 2020

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

PAUL A. GUNN

Applicant

and

HALIFAX LONGSHOREMEN'S ASSOCIATION, ILA LOCAL 269

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review brought by Paul Gunn challenging a decision of the Canadian Human Rights Commission (Commission) made on June 6, 2018 dismissing his human rights complaint against the Halifax Longshoremen's Association, ILA Local 269 (Local 269).

[2] In dismissing Mr. Gunn's complaint, the Commission applied paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC, 1985, c H-6, which provides that a complaint may be refused if it is found to be "vexatious". In this case, the Commission declined to deal with the matter because Mr. Gunn had earlier made the same allegations of discrimination against Local 269 to the Canada Industrial Relations Board (CIRB), where the complaint was dismissed on the merits.

[3] The Commission's reasons are set out in the report of its investigator dated February 20, 2018 recommending the dismissal of Mr. Gunn's complaint. It has been accepted that an investigator is considered to be an extension of the Commission such that, where the investigator's recommendation is adopted, those reasons constitute the Commission's reasons: see *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37, [2005] FCJ No 2056 (QL).

[4] In 2007, Mr. Gunn began working as a longshore worker on the Halifax waterfront. Unfortunately, he was seriously injured in 2008 and, in the result, he was unable to work again on the waterfront until 2013.

[5] Even after returning to work Mr. Gunn had physical limitations that prevented him from carrying out the most demanding aspects of longshore work. For a period of time the employer, the Halifax Employers' Association (HEA), accommodated Mr. Gunn by assigning him to light duties.

[6] In September 2015, Mr. Gunn's physical limitations were lifted by his physician and he returned to full duties. Shortly thereafter, however, he was re-injured and his physician again requested lighter duty accommodation. The HEA agreed to this request on a temporary basis but, on December 8, 2015, it advised Mr. Gunn that this accommodation would not be applied to the pending process, in which Mr. Gunn was participating, to qualify for future employment in the labour pool known as the Cardboard. Although Mr. Gunn had applied to Local 269 to be included in that hiring process, on December 23, 2015 he asked that his application be put "on hold for some time" because he could not "continue at the waterfront". On December 30, 2015, the HEA wrote to Mr. Gunn, advising that it had removed him from the qualification process because he was unfit to perform a required strength and endurance test. That test was a proxy for the work of high climb lashing (ie. the securing and unsecuring of cargo containers).

[7] Bound up in this history is an allegation by Mr. Gunn that the President of Local 269 interfered with his request for accommodation and posted a note in the Union dispatch office on November 21, 2015, directing that Mr. Gunn not be referred to the HEA for any employment. According to Mr. Gunn, this event followed a disagreement with the Union President about Mr. Gunn's claim to be disabled and in need of accommodation. It is this incident that appears to have precipitated Mr. Gunn's complaint to the Commission.

[8] The standard of review applying to the Commission's decisions made under paragraph 41(1)(d) of the *Canadian Human Rights Act* is, presumptively, reasonableness.

[9] In *Bergeron v Attorney General of Canada,* 2015 FCA 160, [2015] FCJ No 834 (QL) [*Bergeron*], the Court applied that standard to the review of the Commission's decision dismissing a complaint under paragraph 41(1)(d) where the matter had already been adjudicated in the context of a grievance. The Court described the scope of the Commission's discretion in the following way:

> [47] Further, in considering the breadth of the margin of appreciation to which the Commission is entitled, I note that the Commission's task under paragraph 41(1)(*d*) is to screen out complaints where adequate redress elsewhere has been had. The concept of adequacy is highly judgmental and fact-based, informed in part by the policy that the Commission should not devote scarce resources to matters that have been, in substance, addressed elsewhere or that could have been addressed elsewhere. On this last-mentioned point, a failure to pursue adequate redress elsewhere or to pursue that adequate redress to its full extent can be invoked under paragraph 41(1)(*d*).

[10] In *British Columbia (Workers' Compensation Board) v Figliola,* 2011 SCC 52 at paras 37-38, [2011] 3 SCR 422 at paras 37-38 [*Figliola*], the Court discussed the underlying rationale for a human rights commission declining to hear a complaint that has already been resolved in another forum:

> [37] Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.

> [38] What I do *not* see s. 27(1)(f) as representing is a statutory invitation either to "judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only *be* final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

[11] It is also of some significance in this case that Mr. Gunn did not challenge the CIRB decision but, instead, sought to obtain a different outcome in the context of a human rights complaint. As Justice Thomas Cromwell observed in *Figliola*, above, at para 94:

> "… Failure to pursue appropriate means of review will generally count against permitting the substance of the complaint to be relitigated in another forum."

[12] I accept that the Commission has the discretion to refer a complaint to the Tribunal even where it has been dealt with in another adjudicative forum. That discretion, however, must be exercised in a principled way with a focus on a comparison of the two processes: see *Bergeron*, above, at para 46. Laying at the heart of that comparison is a concern for procedural fairness, and not whether the earlier decision-maker got it right or had the requisite expertise: see *Figliola*, above, at paras 49-53.

[13] The reasonableness of the Commission's decision must be examined with the above considerations in mind.

[14] It is quite clear that the Commission understood its mandate under paragraph 41(1)(d) including the possibility that Mr. Gunn's complaint might be entertained. At paragraphs 11 to 14 of its decision, it considered the relevant jurisprudence and it listed the factors that applied to the issue of relitigation. Among other things, it considered the following matters:

a) whether the CIRB process was final and finished;

b) whether the same human rights issues were raised and fully addressed before the CIRB;

c) whether due process was observed;

d) whether rights of appeal or review from the CIRB decision were exercised; and

e) whether reasonably equivalent remedies were available.

[15] From this nuanced comparison, the Commission found that Mr. Gunn's attempt to relitigate the issue of discrimination was vexatious. Specifically, the Commission found that the CIRB had the independent authority under s 37 of the *Canada Labour Code*, RSC, 1985, c L-2, to decide if Local 269 had acted in a discriminatory manner and had, in fact, dealt with the same allegations that Mr. Gunn was attempting to raise again before the Commission.

[16] The Commission went on to quote those passages from the CIRB decision that dismissed, as not made out, Mr. Gunn's complaint that Local 269 had colluded with the HEA to deny him reasonable accommodation. The Commission was satisfied that the CIRB had followed a fair process not significantly different or deficient from that employed under the *Canadian Human Rights Act*. The Commission concluded its assessment in the following way:

> 30. The complainant filed a complaint to the *Canada Labour Code* that raised essentially the same allegations as those raised in the present complaint. Specifically that the union discriminated against the complainant based on his

> disability. The CIRB dismissed that complaint pursuant to sections 37 and 69 of the *Canada Labour Code* in a decision dated March 6, 2017.
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> 31. The Supreme Court of Canada has said that the Commission must respect the finality of the decisions made by other administrative decision-makers with concurrent jurisdiction to decide human rights issues where "the previously decided legal issue was essentially the same as what is being complained of". The CIRB has the authority to decide issues of discrimination by unions against their members. The CIRB dealt with the substance of the present complaint. This complaint is therefore vexatious within the meaning of section 41(1)(d) of the Act, and the Commission should not dealt with it.

[17] I am satisfied that the Commission's decision not to deal with Mr. Gunn's complaint was fairly reached and substantively reasonable. Indeed, the decision conformed to the applicable jurisprudence indicating that a human rights complainant ought not to be able to shop around for a different outcome when the matter has been heard and decided on the merits in an earlier proceeding. Mr. Gunn had his complaint adjudicated before the CIRB and, as the Commission held, he was not entitled to have it heard again.

[18] For the foregoing reasons, this application is dismissed.

[19] The Respondent seeks costs of $1,500. Ordinarily, that would be a reasonable award. In this situation, however, I am troubled by Mr. Gunn's evidence of unfair treatment at the hands of the Local 269 President. The public posting of a note in the dispatch office that Mr. Gunn should not be referred for any form of employment was cavalier and disrespectful. In the absence of a satisfactory explanation for that conduct, I decline to award any costs to the Respondent.

JUDGMENT in T-1404-18

THIS COURT'S JUDGMENT is that this application is dismissed without costs to either party.

"Robert L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1404-18
STYLE OF CAUSE:	PAUL A. GUNN v HALIFAX LONGSHOREMEN'S ASSOCIATION, ILA LOCAL 269
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APPEARANCES:

Paul A. Gunn	FOR THE APPLICANT (ON HIS OWN BEHALF)
George Franklin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

George Franklin	FOR THE RESPONDENT