Federal Court  Cour fédérale

Date: 20200511

Docket: T-950-18

Citation: 2020 FC 608

Ottawa, Ontario, May 11, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

BILAL SYED

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Canadian Human Rights Commission (the "Commission") to dismiss the Applicant's human rights complaints, under subsection 44(3)(b) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the "*Act*"). In his complaints, the Applicant had alleged that the Correctional Service of Canada ("CSC") discriminated against him on the

basis of his religion and family status, and that CSC failed to provide a harassment-free workplace.

[2] The Commission found that CSC had provided a reasonable explanation for its actions, and that it was not a pretext for discrimination based on religion. The Commission also found that the Applicant failed to provide evidence that he could not meet his childcare obligations in Grande Cache, and that his preference for his children to attend a religious school was distinct from his duty to perform legal parental obligations.

[3] On this application for judicial review, the Applicant submits that the Commission breached procedural fairness by restricting the scope of the investigation report to the most recent complaints. The Applicant also submits that the Commission erred in finding that he was not discriminated against on the basis of his religion or family status.

[4] For the reasons that follow, this application for judicial review is dismissed.

II. **Facts**

A. *The Applicant*

[5] Mr. Bilal Syed (the "Applicant") is a former member of the CSC. On May 3, 2010, the Applicant was offered a position as a Correctional Officer at CSC's facility in Grande Cache Institution ("GCI"). This was the Applicant's first employment with CSC. At the time when he

applied to CSC, the Applicant had been residing in Regina, Saskatchewan with his wife and their eight children. Grande Cache is roughly 14 hours by car from Regina.

[6] The Applicant was employed at GCI from May 3, 2010 to April 29, 2015, after which he took leave. The Applicant did not return to GCI. He remained on leave, both authorized and unauthorized, other than having a brief acting assignment as a Parole Officer at CSC's Oskana Centre in Regina from August to October 2015.

[7] On or about April 6, 2016, the Applicant made a complaint to the Commission alleging that CSC had discriminated against him in his employment on the basis of religion and family status. The Applicant alleged adverse differential treatment, discriminatory policy or practice, and the failure to provide a harassment-free workplace.

[8] By letter dated May 2, 2017, the Commission decided to deal with the Applicant's complaint. On June 8, 2017, the Commission referred the Applicant's claim for investigation. The investigation was completed on December 21, 2017. A human rights investigator (the "Investigator") reviewed the parties' positions and all documentary evidence submitted during the course of the investigation, and conducted telephone interviews with the Applicant and other individuals.

B. *Investigation Report*

[9] After receiving the parties' positions, the Investigator prepared a report setting out the basis of the complaint, an analysis, and a recommendation for the Commission's consideration (the "Report").

[10] The Report summarized the Applicant's complaint as employment discrimination on the grounds of adverse differential treatment, discriminatory policy or practice, and the failure to provide a harassment-free workplace. The Report identified the key issue as the following:

> ...whether the respondent treated the applicant in an adverse differential manner in employment and pursued a discriminatory policy/practice because of family status (ill wife and parent of minor children) and/or religion (he self identifies as Muslim). Also, whether the respondent failed to provide the applicant with a harassment-free workplace based on religion (Muslim) and/or colour (visible minority).

[11] However, the issue of discrimination on the basis of colour was not pursued, as the Investigator found no evidence or particulars to support this allegation.

[12] Also, while the Applicant had alleged that the discrimination had occurred since 2010, the Investigator only investigated incidents that had arisen within one year prior to the complaint. As the earlier incidents had occurred more than three years prior to the most recent ones and involved different individuals at a different institution, the Investigator found that they could be severed from the recent allegations. These earlier incidents were only considered as background information to provide context to the complaints.

(1) **Alleged Adverse Differential Treatment**

[13] The Applicant alleged that CSC treated him in an adverse differential manner when they (a) reassigned him from an acting assignment as a Parole officer to work in the warehouse, and then to front desk duties at GCI on March 19, 2015; and (b) initiated a disciplinary action in March 2015. The Applicant alleged that the reassignment and disciplinary action were triggered by his accusations of CSC's unfair treatment toward Muslim inmates.

[14] On March 17, 2015, the Applicant had provided a letter to Inmate K, which stated: "I have been observing and have reasonable ground to believe that [the Muslim group] as a whole is being treated unfairly and especially [Inmate K]." The inmate had requested this letter from the Applicant on the basis that he wished to file a human rights complaint or grievance.

[15] On March 18, 2015, the Applicant had also sent an email titled "community volunteer observation report" to five members of GCI management, the Chaplain who worked at GCI, and an Imam who visited GCI on a monthly basis. The email stated that the Chaplain demanded that inmates call him "Father", including a specific Muslim inmate ("Inmate K"). In the email, the Applicant noted, "I have observed and have reasonable grounds to believe that [the Muslim group] as a whole is being treated unfairly."

[16] In response, CSC alleged that the Applicant's email to GCI management and to individuals outside the organization, and his letter for Inmate K constituted a breach of security and the Code of Discipline, which contained provisions about staff relationships with inmates.

CSC noted that the email and the letter had accused the Chaplain and staff of racism against the inmate and the Muslim group. CSC became concerned that the Applicant was being compromised or manipulated by an inmate, and thus the Applicant was reassigned to a different area at GCI.

[17] CSC provided the Applicant with a Notification of Disciplinary Action on March 25, 2015. A disciplinary hearing was held on March 31, 2015. CSC provided the Investigator with the minutes of the disciplinary hearing. According to the CSC's minutes, the Applicant accepted responsibility for his actions and agreed that he should have talked to his supervisor before providing a letter to Inmate K, and sending the email to the Chaplain and the Imam.

[18] However, the Investigator noted that in the complaint to the Commission, the Applicant denied that he had accepted responsibility for his actions at the meeting.

[19] Nonetheless, the Investigator found that although CSC's decision to reassign the Applicant and pursue disciplinary proceedings was linked to religion, CSC had provided a reasonable explanation for its actions. Based on the evidence, the Investigator found that CSC's actions were not a pretext for discrimination based on religion.

(2) **Alleged Adverse Impact**

[20] The Applicant alleged that CSC discriminated against him by not supporting his transfer to locations closer to home. Specifically, the Applicant referred to (a) CSC's revocation of a deployment offer in April 2015 to Regional Psychiatric Centre in Saskatoon; and (b) CSC's

refusal to grant the Applicant's subsequent requests for relocation based on family status and compassionate grounds.

[21] The Applicant and his wife have eight children between the ages of 11 and 23. The Applicant stated that after he moved his family to Grande Cache in August 2010, he discovered that the town lacked essential services like a "desirable school" and "religious practice facilities". The Applicant stated that there were no Muslim families, religious schools, or medical services in the surrounding area. As a result, the rest of the Applicant's family returned to Regina after a few weeks.

[22] The Applicant further alleged that it was difficult for him to fulfil his childcare responsibilities. As his wife was sick, the Applicant stated that he had to be in Regina to assist his wife, and thus had to take several leaves of absence. Moreover, the Applicant noted that his wife and one of his sons required the care of a neurologist, and that two of his daughters required orthodontic treatment as they wore braces.

[23] The Investigator determined that the Applicant had made the decision to relocate to Grande Cache knowing that it was a remote community. The Investigator found no evidence that the Applicant could not meet his childcare obligations in Grande Cache, nor evidence that his family's medical or educational needs could not be met there. The notes provided by the Applicant in support of his request for accommodation did not indicate that the family needed to stay in Regina, but only that it would have been better if the Applicant could be with his family.

[24] Based on the evidence, the Investigator noted that while the Applicant requested for accommodation to work in Regina so that his children could access medical services, the Applicant had not provided evidence that such services were not available in or near Grande Cache. Furthermore, in the Applicant's request for deployment in 2015, the Applicant only referenced his need to "be with family" and the lack of a university in Grande Cache—there was no reference to his desire for the children to attend a religious school.

[25] The Investigator concluded that the Applicant chose not to move his family because there was no religious school in Grande Cache. The Investigator found that the Applicant could have met his childcare obligations by moving the family and assisting his wife with childcare. While the Applicant preferred that his children attend a religious school and a college where they lived, the Investigator found that the choice of school would not encompass legal "childcare obligations". The Investigator cited *Canada (Attorney General) v Johnstone*, 2014 FCA 110 (CanLII) [*Johnstone*] for the proposition that general parenting duties—such as the choice of schools—is distinct from the duty to perform legal parental obligations, the prevention of which would constitute discrimination based on family grounds. Additionally, the Investigator found that the Applicant had not cooperated with CSC in the search for accommodation.

[26] The Investigator concluded that CSC had accommodated the Applicant between 2010 and 2015 by providing him with various leaves, including a leave for personal needs, leave for care and nurturing of pre-school children, leave with income averaging, and a short-term assignment at Oskana Centre. Moreover, the Investigator noted that CSC had offered the Applicant with a position in Edmonton, but that the Applicant had declined this offer.

[27] Ultimately, the Investigator recommended that the Commission dismiss the complaint.

[28] On the basis of the Report, by decision dated April 18, 2018, the Commission dismissed the Applicant's complaint pursuant to subparagraph 44(3)(b)(i) of the *Act*. Having regard to the circumstances of the complaint, the Commission found that further inquiry was not warranted.

[29] This is the underlying decision on this application for judicial review.

III. **Preliminary Issue: Admissibility of Evidence**

[30] The Respondent submits that no weight should be given to the Applicant's affidavit as it is an improper use of extraneous information that was not before the decision-maker. The Respondent submits that the Applicant has put a number of facts and documents into evidence relating to the substantive issues in his human rights complaint through his affidavit, including:

- Background information about the circumstances in which CSC hired him;
- Background information about workplace harassment in CSC;
- Information about his interactions with "Inmate K";
- Information about his attempts to mediate with CSC;
- Information about CSC suspending his family dental benefits and access to internal job postings.

[31] It is well-established that an application for judicial review is conducted on the basis of the record that was before the original decision-maker. Generally, additional evidence may only

be admitted under exceptions, such as issues of procedural fairness and jurisdiction (*Ontario Assn. of Architects v Assn. of Architectural Technologists of Ontario*, 2002 FCA 218 (CanLII), [2003] 1 FC 331 at para 30).

[32] As the Respondent correctly pointed out, the documents attached to the affidavit do not form a part of the materials that were before the decision-maker. While new evidence may also be introduced upon judicial review if it adds general background information and does not go to the merits of the issue, I agree with the Respondent that in the present case, the Applicant's affidavit evidence is not admissible on judicial review (*Sharma v Canada (Attorney General)*, 2018 FCA 48 (CanLII) at paragraph 8). Asking this Court to consider information concerning the Applicant's reasons in accepting a position in Grande Cache, his interactions with Inmate K, and workplace harassment at CSC is akin to requesting a *de novo* hearing.

[33] Therefore, the Applicant's affidavit is inadmissible and will not be considered in this judicial review.

IV. **Issues and Standard of Review**

[34] The following issues arise on this judicial review:

A. Did the Commission breach procedural fairness by restricting the scope of the Report to the most recent complaints?

B. Is the Commission's decision to dismiss the Applicant's complaint reasonable?

[35] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], it was well-established that the decision of the Canadian Human Rights Commission on receipt of an investigation report is a highly deferential one that must be assessed on the reasonableness standard: *Lafond v Canada (Attorney General)*, 2015 FC 735 (CanLII) at para 15; *Dupuis v Canada (Attorney General)*, 2010 FC 511 (CanLII) at para 10; *Bredin v Canada (Attorney General)*, 2008 FCA 360 (CanLII) at para 16; *Davidson v Canada Post Corporation*, 2009 FC 715 (CanLII) at para 54; *Rabah v Canada (Attorney General)*, 2001 FCT 1234 at para 9. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[36] As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

[37] Pre-*Vavilov*, issues of procedural fairness were reviewable on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 72). The correctness standard continues to apply to issues of procedural fairness.

V. **Relevant Provisions**

[38] Subsection 41(1) of the *Act* provides as follows:

Commission to deal with complaint
41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

[…]

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

Irrecevabilité
41 (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants:

[…]

e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[39] Subsections 44(1) and 44(3) of the *Act* provide as follows:

Report
44 (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

Idem
44 (3) On receipt of a report referred to in subsection (1), the Commission

> **(a)** may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied
>
> > **(i)** that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and
> > **(ii)** that the complaint to which

Rapport
44 (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

Idem
44 (3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission:

> **a)** peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue:
>
> > **(i)** d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,
> > **(ii)** d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en

the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

b) rejette la plainte, si elle est convaincue:

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

VI. **Analysis**

A. *No Breach of Procedural Fairness*

[40] The Applicant submits that the Investigator erred in restricting the scope of the Report to the Applicant's most recent complaints. The Applicant submits that the Investigator's failure to consider the earlier complaints misrepresents the religious suppression that he experienced at GCI and fosters a false narrative of the Applicant as a "disgruntled employee". In other words, the Applicant takes the position that his complaint was related to a series of events and that the Commission inappropriately severed his earlier allegations from the more recent ones.

[41] The Respondent submits that the Investigator reasonably declined to consider the Applicant's older complaints, as they occurred more than a year before the complaint was received and more than three years prior to the most recent allegations, pursuant to subsection

41(1)(e) of the *Act*. Moreover, the earlier allegations appeared unrelated to the most recent ones. The Respondent submits that the Investigator severed the earlier allegations in a fair and impartial manner, with reasons. The Respondent argues that it was in the Commission's discretion not to investigate the other allegations, and that there was no breach of procedural fairness (*Gauthier v Canada (Attorney General)*, 2018 FCA 96 (CanLII) at paras 3-4).

[42] It is well established that where the Commission adopts the recommendation in a report and does not provide separate reasons for doing so, the report constitutes the Commission's reasons for decision (*Liddiard v Canada Post*, 2016 FC 758 (CanLII) at para 36; *Carroll v Canada (Attorney General)*, 2015 FC 287 (CanLII) at para 28). As such, the Investigator's Report constitutes the Commission's reasons in the case at bar.

[43] In my view, the Commission did not err by severing the Applicant's earlier allegations, and only considering those that fell within the one-year time frame. When incidents form a continuous pattern of discrimination, it may be unreasonable for the Commission to decline investigating such incidents, even when they fall outside the one-year time frame (*Khanna v Canada (Attorney General)*, 2008 FC 576 (CanLII) at para 27-29; *Heiduk v Whitworth*, 2013 FC 119 (CanLII) at para 17 and 28).

[44] However, the Commission is given the discretion to sever complaints when there are "breaks in the continuum of events in the workplace," (*Cheng v Canada Post Corporation*, 2006 FC 1304 (CanLII) [*Cheng*] at para 7). In *Cheng*, the Court found that earlier matters involving different people, facilities, and circumstances were severable from the applicant's later events,

which had taken place during the year prior to the filing of his complaint—there had been "breaks" in the continuum of events.

[45] In the present case, the Investigator did not err by severing the incidents that occurred at the Edmonton Institution, as they involved different individuals at a separate institution. There had been a break in "the continuum of events in the workplace". The Investigator (and the Commission) reasonably declined to consider the Applicant's earlier complaints, as they occurred more than a year before the complaint was received. Furthermore, the Report reasonably outlined reasons on why the Investigator did not formally consider the earlier allegations. The Report noted that the Investigator had in fact considered these earlier incidents, including comments made to the Applicant in 2010, as background context.

[46] Therefore, I find that there was no breach of procedural fairness in the case at bar.

B. *Reasonableness of the Decision*

[47] The Applicant submits that the Commission erred in finding that CSC's actions were not a pretext for discrimination based on religion. In essence, the Applicant argues that CSC's disciplinary actions against him constituted religious discrimination because Inmate K had been a Muslim, and his email to the Chaplain and Imam had alleged discrimination against Muslims at CSC.

[48] Moreover, the Applicant submits that the Commission erred in finding that CSC had not discriminated against him when they revoked an offer of deployment from GCI in April 2015,

and when CSC refused to grant the Applicant's subsequent requests for relocation based on family status and compassionate grounds.

[49] The Respondent submits that the Report provides thorough reasons for the Commission's decision to dismiss the Applicant's complaints. The Respondent argues that the Report addressed the Applicant's arguments in detail, and provided a reasonable basis for concluding that alternate means were available to the Applicant, based on the information that was before the Investigator.

[50] At the outset, I wish to reiterate for the benefit of the Applicant, that the standard of review in this issue is reasonableness. It is not the Court's role to reweigh the evidence nor is this a *de novo* hearing.

[51] I agree with the Respondent that the Commission's decision is reasonable. The Report, which constitutes the Commission's reasons for its decision, provided sufficient and reasonable explanations on the investigation into the Applicant's complaints, which led to the Commission's ultimate dismissal of the complaints. CSC had explained that the Applicant's actions via his email and letter raised concerns of a breach of security and a violation against the Code of Discipline. It was reasonable for the Investigator to conclude that although CSC's decision to reassign the Applicant and pursue disciplinary proceedings was linked to religion, CSC had provided a reasonable explanation for its actions.

[52] With regard to the Commission's reasons on the alleged adverse impact and the allegation of discrimination on the basis of family status, the Investigator reasonably determined that the Applicant had not provided evidence to support his allegations. The Commission also provided thorough reasons to support its decision (through the Report). The Applicant had not indicated that his family needed to stay in Regina, and there was no evidence that the Applicant could not meet his childcare obligations in Grande Cache, or that his family's medical or educational needs could not be met there. The Commission found that the Applicant had not made reasonable efforts to meet his childcare obligations through reasonable alternative solutions, such as having his family move to Grande Cache. For example, the Applicant had not investigated the availability of orthodontic treatment in Grande Cache, despite having claimed that his children could not access such services there.

[53] Furthermore, the evidence led the Investigator to conclude that the Applicant chose not to move his family to Grande Cache due to the lack of a religious school, although he could have met his childcare obligations by moving the family. As noted by the Federal Court of Appeal, childcare obligations that are protected under the ground of family status are those "parental obligations which engage the parent's legal responsibility for the child, such as childcare obligations, as opposed to personal choices," (*Johnstone* at para 74). While the Applicant may have desired for his children to attend a religious school, this preference constituted a "personal choice", which is distinct from legal parental obligations. It did not engage the Applicant's legal responsibility for his children, and thus could not form a basis for discrimination on the ground of family status.

[54] Overall, I am not persuaded that the Applicant has demonstrated how the Commission erred in its findings. Based on the record, I find that the Commission's decision is reasonable.

VII. **Conclusion**

[55] The Commission did not breach procedural fairness, and the Commission's decision is reasonable.

[56] This application for judicial review is dismissed with no costs.

JUDGMENT in T-950-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No costs are awarded.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-950-18
STYLE OF CAUSE:	BILAL SYED v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	FEBRUARY 28, 2020
JUDGMENT AND REASONS:	AHMED J.
DATED:	MAY 11, 2020

APPEARANCES:

Bilal Syed	FOR THE APPLICANT (ON HIS OWN BEHALF)
Marcia E. Jackson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Saskatoon, Saskatchewan	FOR THE RESPONDENT