Federal Court  Cour fédérale

Date: 20230120

Docket: T-1139-22

Citation: 2023 FC 88

Ottawa, Ontario, January 20, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

SYED NAQVI

Applicant

and

DEFENCE RESEARCH AND DEVELOPMENT CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Syed Naqvi, seeks judicial review of the Canadian Human Rights Commission's decision to dismiss his complaint that he experienced discrimination in employment under the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *Act*).

[2] After an investigation and an attempt to settle the matter, the Commission dismissed his complaint under section 44 of the *Act*, on the basis that a further inquiry was not warranted. The Applicant says that he was denied procedural fairness because the Commission's investigation

was not sufficiently thorough. He also claims the decision is unreasonable because the Commission failed to provide a satisfactory explanation for its treatment of his case.

[3] For the reasons that follow, I am persuaded that the decision is unreasonable and must be quashed.

I. Background

[4] The Applicant worked for the Respondent (which is part of the Department of National Defence that undertakes specialized research activities) in its Toronto research centre. He complained that beginning around 2013, he experienced a series of incidents of discrimination based on race, national or ethnic origin, colour, religion, and disability. His complaint referred to various examples of differential treatment and harassment, including being forced to move offices so that he was closer to his supervisor, being assigned meaningless and repetitive tasks and having his work products ignored, being undermined as a manager because his supervisor contacted his staff directly, and being excluded from meetings and denied important information relating to his work. He also referred to negative comments that were included in his performance appraisals.

[5] In his complaint, the Applicant stated that this pattern of differential treatment by his supervisors affected his mental health and caused his physical ailments to intensify, specifically his fibromyalgia. He began sick leave in April 2014, and over the next three months, he received many work-related emails and telephone calls from his supervisor. In addition, he says that his remote access to work was denied. His attempt to return to work was not successful, and he said

that his manager told him he was going to be “under the microscope.” The Applicant went on sick leave, and eventually retired because of his medical condition.

[6] The Applicant filed a complaint with the Commission setting out two main claims: he claimed that he had been subjected to differential treatment and harassment. The Commission appointed an investigator to gather the evidence, and at the completion of that process both the Applicant and Respondent were given the opportunity to comment on the report before it went to the Commission for decision. The Respondent raised a number of arguments about why the complaint should be dismissed at a preliminary screening stage, including that the complaint was filed after the expiry of the time limit, and the Applicant had an adequate alternative recourse available through the grievance process.

[7] The Investigator’s Report reviews the submissions on the preliminary screening questions, noting that the Commission has a discretion to not deal with complaints under section 41 of the Act. The Investigator recommended that the Commission not reject the complaint under section 41, and went on to assess the substance of the complaint. This part of the Investigation Report focuses on the remedies sought by the Applicant, which included an apology, retraction of the negative comments in his performance appraisal, financial compensation, reinstatement, and damages for pain and suffering for both him and his family.

[8] The Investigator recommended that the Commission not send the complaint to the Human Rights Tribunal for a hearing, because several of the remedies he was seeking were not available. The Report states that reinstatement is a moot point because the Applicant had retired

on medical grounds and was in receipt of a Canada Pension Plan Disability benefit; similarly, the Report notes that the Tribunal cannot award an apology or order the retraction of the negative performance reviews, which in any case is also a moot point because the Applicant was no longer employed by the Respondent.

[9] On the issue of financial compensation, the Investigator noted that although the Tribunal can make such awards, the Commission assesses the public interest in deciding whether to expend the limited public funds available to support discrimination claims. The Investigation Report concludes with a recommendation that the Commission not refer the matter to the Tribunal under section 44 of the *Act*, because:

> [I]t appears that the complaint is not likely to succeed at the Tribunal and there does not appear to be any practical remedies that could be awarded, apart from monetary damages and the retraction of adverse remarks in the performance evaluations… which is a moot point.

[10] The Investigation Report was disclosed to both parties, who made submissions to the Commission. On August 24, 2020, the Commission accepted the recommendation to deal with the complaint under section 41. However, it did not accept the recommendation to dismiss the complaint under section 44, but instead decided to refer the matter to conciliation in an effort to help the parties settle. The Commission offered the following explanation for its decision:

> It is also the Commission's view that it would be worthwhile to afford the parties an opportunity to attempt to reach a settlement through conciliation. The complainant medically retired from the public service in May 2018. As the complainant has noted in his post-disclosure submissions, dated April 27, 2020, the Report contains no analysis of the allegation that the "harassment of the employer… since 2014 onwards caused me to fall sick

> psychologically, mentally and physically, rendering me totally disabled…" Of the five remedies sought by the complainant in his complaint, as cited at paragraph 79 of the Report, one remedy ("Restitution of gainful employment") is no longer possible, given the complainant's medical retirement and another remedy ("retraction of adverse remarks in the illegal performance evaluations") has been rendered moot by the medical retirement. In the event that the complainant's allegations with regard to the harassment of the respondent causing him to fall sick and become permanently disabled can be proven, the remaining remedies may all merit consideration.

[11] During the conciliation process, the Respondent put forward an offer to settle, through a lump sum payment of $20,000 (the maximum amount under the *Act* for pain and suffering). The Applicant did not accept the offer, and so the matter was returned to the Commission for decision. The parties both made further submissions at this stage of the process, and the Commission decided to dismiss the complaint pursuant to subparagraph 44(3)(b)(i) of the Act, "because having regard to all the circumstances of the Complaint, an inquiry by the Tribunal is not warranted."

[12] The Applicant seeks judicial review of this decision.

II. Issues and Standard of Review

[13] The Applicant submits that the Commission's decision to dismiss his complaint is unreasonable and that he was denied procedural fairness because the investigation into his complaint was insufficient.

[14] The standard of review that applies to Commission decisions is reasonableness, under the framework set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] (see recently *Carrasqueiras v Sunwing Airlines Inc.*, 2022 FC 1714 [*Sunwing*] at paras 21-25).

[15] The ultimate question for a Court addressing issues related to procedural fairness is whether the procedure was fair in all the circumstances. This is similar to a correctness review (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56; see also *Canada (Attorney General) v Ennis*, 2021 FCA 95 at para 45).

III. Analysis

[16] Several points are not contested here:

- The Commission plays a screening function under sections 41 and 44. Its "duty is to decide if… an inquiry is warranted having regard to all the facts. The central component of the Commission's role… is that of assessing the sufficiency of the evidence before it." (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 53;

- In assessing whether a Commission decision is reasonable, the decision letter must be read in conjunction with the Investigation Report, because the latter document sets

out the chain of analysis and reasoning that supports the Commission's conclusion (*Rosianu v Western Logistics Inc*., 2021 FCA 241 [*Rosianu*] at paras 70-73); and

- The Commission has a very wide discretion whether to send a complaint for hearing before the Tribunal, and its exercise of that discretion is deserving of deference by a reviewing court (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 21 and 25; *Walsh v Canada (Attorney General)*, 2015 FC 230 at para 19).

[17] In my view, the Commission's decision is unreasonable because the problem it identified when it sent the case to conciliation – namely that the Investigation Report did not deal with the core elements of the Applicant's complaint – was never remedied. To the extent that the Commission's final decision rests, in large part, on the reasoning set out in a fundamentally flawed Investigation Report – and those flaws were not otherwise addressed – the decision is unreasonable.

[18] This is consistent with the jurisprudence of this Court, and it is not necessary to discuss these cases in detail here because their findings are so clear and so clearly applicable here. The point was succinctly expressed by Justice Mactavish (now Mactavish J.A.) in *Dupuis v Canada (Attorney General)*, 2016 FC 1137 at paragraph 37:

> [I]f the Commission decides to dismiss a complaint based upon a deficient investigation, that decision will be deficient because '[i]f the reports were defective, it follows that the Commission was not

> in possession of sufficient relevant information upon which it could properly exercise its discretion.'

(See also *Sunwing* at para 22, *Canada (Attorney General) v Ennis*, 2021 FCA 95 at para 62, and *Nepp v KF Aerospace*, 2019 FC 1169 at paras 25, 26, and 33).

[19] In some cases the inadequacy of the investigation has been found to constitute a denial of procedural fairness: *Boychyn v Canada (Royal Mounted Police),* 2018 FC 1185 at para 32; see also *François-Jumelle v Canada Post Corporation*, 2019 FC 1601 at para 27. Given my finding that the inadequacy of the Investigation Report in this particular case makes the Commission's decision unreasonable, it is not necessary to discuss the procedural fairness argument.

[20] The Respondent points to the case-law that states that not every trivial lapse or error in an Investigation Report will prove to be fatal, and the onus was on the Applicant to demonstrate that the omission in this case was so fundamental that it could not be rectified by further submissions by the parties, citing *Slattery v Canada (Human Rights Commission)*, 1996 CanLII 20123 (FCA) at para 58, and *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 38.

[21] I am not persuaded that these authorities assist the Respondent here, because on any measure, the complete failure by the Investigator to investigate or analyze the core allegations set out in the Applicant's human rights complaint must constitute a fundamental omission. Absent any investigation using the powers, authorities, and processes available to the Commission under the *Act*, it is difficult to see how the Applicant could "fill in the blanks" to overcome the deficiencies in the Investigation Report.

[22] It bears repeating here that the Commission itself acknowledged those very deficiencies when it decided to send the matter to conciliation. Following the unsuccessful effort to settle the matter, the case was referred back to the Commission for decision. The parties made submissions, and the Commission decided that "having regard to all of the circumstances" a further inquiry was not warranted. The problem with the decision, however, is that an essential element of the "circumstances" the Commission was required to consider was whether one or more of the essential elements of the Applicant's complaint was substantiated by the evidence and analysis set out in the Investigator's Report. That was not done here because, as the Commission, itself acknowledged, "the [Investigation] Report contains no analysis of the allegation that the harassment of the employer… since 2014 onwards caused [the Applicant] to fall sick…"

[23] Under the *Vavilov* framework, 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). In the absence of any reasons to explain how the Commission came to the conclusion that a further inquiry was not warranted, despite the glaring omission in the Investigation Report, the decision is not justified, and therefore it is not reasonable.

[24] The Commission had several options available to address the question: for example, it could have sent the case back for further investigation, or it could have noted in its final decision that it decided, despite the omission it had identified earlier, a further inquiry was not warranted.

It did not do any of these things however, and in the absence of any explanation of its reasoning, it is impossible to know how the Commission concluded that the complaint should be dismissed.

[25] For these reasons, the application for judicial review is granted.

[26] The Applicant requested an order in the nature of *mandamus*, referring his complaint to the Tribunal for hearing. In my view, such an order is not warranted in this case. Instead, the decision will be quashed and the matter will be sent back to the Commission, so that the omission can be rectified, either through further investigation or by some other means.

[27] The parties made a joint submission that the successful party should receive lump sum costs in the amount of $2,500, all-inclusive. In exercise of my discretion under Rule 400, and considering the nature of this case, I agree that this is an appropriate amount of costs.

JUDGMENT in T-1139-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The Canadian Human Rights Commission decision dated May 6, 2022,dismissing the Applicant's complaint of discrimination, is quashed.

3. The matter is remitted back to the Commission.

4. The Respondent shall pay to the Applicant lump sum, all-inclusive costs, in the amount of $2,500.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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