Date: 20070905

Docket: T-1209-02

Citation: 2007 FC 884

Ottawa, Ontario, September 5, 2007

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

FRANÇOIS ALAIN MOUSSA

Applicant

and

THE PUBLIC SERVICE COMMISSION AND THE IMMIGRATION AND REFUGEE BOARD

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] François Moussa, (the applicant) is an employee of the Immigration and Refugee Board (the IRB) who, in this judicial review application, seeks to set aside three investigation reports dated June 28, 2002, prepared by an investigator of the Public Service Commission (PSC) who inquired into and found unsubstantiated his harassment and other claims against the management of the IRB's Vancouver office.

[2] The hearing of this application was originally scheduled for last year in Vancouver but was adjourned in order to enable the applicant to retain legal counsel after the counsel who prepared his judicial review material was allowed to be removed from the record.

[3] The duty to investigate complaints of personal harassment made by employees of the Public Service of Canada was tasked to the PSB by Order-in-Council (SI/86–194) made pursuant to section 5(f) of the *Public Service Employment Act* of 1986.

[4] The applicant raises the following grounds to justify the setting aside of the investigator's report:

1. The investigator was biased;

2. The investigation was carried out in a manner which was procedurally unfair;

3. His complaints were not mediated;

4. His complaint of discrimination on account of his race was not investigated;

5. His complaint about being forced to pay bribes to IRB management in Vancouver should have been fully investigated.

[5] During his reply, counsel for the applicant attempted to raise another issue not covered in his notice of application or in his memorandum of argument. That issue concerned whether the investigator breached Mr. Moussa's linguistic rights in the manner he conducted the investigation. I asked for written representations and will discuss this matter in these reasons.

[6] The respondent raised a preliminary issue on the receipt of new evidence not before the decision-maker.

FACTS

[7] Mr. Moussa started his employment with the IRB in August, 1999. He had previously worked in a federal department.

[8] In January of 2001, he filed his first complaint of harassment against his immediate supervisor. His complaint was filed in accordance with Treasury Board's Policy on the Prevention and Resolution of Harassment in the Workplace (the Policy). In early February, 2001, Gary Larocque was assigned to investigate this complaint.

[9] For each relevant federal organization, the Policy is administered by a delegated manager who is a senior executive accountable to the deputy head for the harassment complaint process. A delegated manager is expected to assign a mandate to the investigator (if one is appointed) and ensure such person is qualified and impartial. A delegated manager is expected to ensure disciplinary measures are taken where warranted.

[10] If an investigator is appointed, under the Policy, he/she must provide the delegated manager with a written report that includes his or her findings and conclusions. Upon the receipt of the investigator's report, it is the delegated manager who reviews the report and decides what action to take (see respondents' authorities, Tab 5).

[11] In March of 2001, Mr. Moussa filed a second harassment complaint this time against the Regional Director and the Regional Human Resources Manager of the IRB in Vancouver, again pursuant to the Policy.

[12] On January 8, 2002, Mr. Moussa responded to a preliminary case report prepared by the investigator with respect to his harassment complaint against his supervisor. He alleged in that rebutted improprieties against the three individuals he had previously complained about. The investigator considered he should investigate this allegation separately. Mr. Moussa alleged his three superiors at the IRB, Vancouver lured him to seek employment there; had required favours of him in the form of gifts of bottles of liquor and had acted improperly in their treatment of him in his employment at the Documentation Centre.

[13] As noted, in early February, 2001, the investigator, Greg Larocque, was appointed. He investigated the three complaints because of the commonality involved. However, he produced separate reports one for each complaint determining all three complaints were unfounded.

[14] The investigator carried out his investigation in accordance with the IRB's Personnel Management Manual Policies and Guidelines on harassment (respondents' record, page 146), which states the investigation process will normally include the following steps:

> • Consulting and/or communicating with the complainant to ensure that allegations, circumstances and description of incidents outlined in the complaint are clear and complete;
>
> • Gathering of evidence and generally assessing if there is substance to the complaint;
>
> • Giving the respondent the opportunity to reply to the allegations with an observation the investigator may wish to disclose a respondent's reply to the complainant immediately or wait until the end of the fact-finding phase;
>
> • Interviewing witnesses named by both the complainant and the respondent or any other person the investigator deems appropriate;

• Providing both parties with an opportunity to comment on the findings before the report is finalized;

• Preparing a report and forwarding it to the delegated anti-harassment coordinator. The report will include all relevant background information, facts, findings, analysis and conclusions and;

• Forwarding a copy of the final report to the complainant and the respondent.

[15] The respondents' record discloses the investigator generally followed the guidelines in the conduct of his investigation in respect of Mr. Moussa's three complaints. These steps were:

• Step 1 - the receipt of opening submissions from both Mr. Moussa and the target of the complaint spelling out the essential allegations of the complainant and the respondents' reply;

• Step 2 – embarking on the fact-finding phase of the investigation with the investigator drawing up a list of potential witnesses to be interviewed from the persons named in the complaint or in the respondents' reply coupled with an invitation from the investigator to both parties for the input of additional names of persons who might be in a position to provide relevant information to the investigator on the events the complainant identified as incidents of harassment. The investigator made it clear that any name selected by him were not the complainant's witness nor the respondents' witness but rather the investigator's witness;

• Step 3 – individual interviews of the witnesses selected by the investigator. Each interview was conducted under oath but not in of the presence of the parties nor their representative;

• Step 4 – each witness was provided by the investigator with a written statement of his/her interview and was asked by the investigator to verify the written statement in terms of the accuracy of what was recorded;

• Step 5 – the preparation by the investigator for each complaint of a preliminary case report outlining the complainant's allegations, the respondents' reply, the witnesses interviewed, the submissions of each party with respect to each allegation and the information provided by each witness in respect of each allegation;

• Step 6 – the forwarding by the investigator of the preliminary case report to each party with a request they review the contents of the report and comment on the accuracy of its contents. For each of Mr. Moussa's complaints, the investigator received comments from both parties;

> • Step 7- for each complaint, the finalization by the investigator of a final case report where the investigator would make changes, if appropriate, to the preliminary case report and would provide his analysis and conclusion dealing with such matters as the meaning of harassment, the burden of proof, his analysis of each allegation and his conclusion in respect of each allegation.

Analysis
I The standard of review

[16] The respondents' made lengthy submissions on the standard of review citing the well-known jurisprudence from the Supreme Court of Canada on the four factors which make up the pragmatic and functional analysis leading to the selection of one of three standards of review, namely, correctness, reasonableness or patent unreasonableness.

[17] After discussion with the Court, the parties recognized the following:

> 1. No deference is owed to the investigator where breach of fairness, including bias on the part of the investigator, is alleged;
>
> 2. Where factual findings of the investigation report are attacked, the standard of review is as set out in section 18.1(4)(d) "a finding of fact made in a perverse or capricious manner or without regard for the material before it", a standard of review analogous to patent unreasonableness;
>
> 3. Where a breach of a statutory requirement is alleged, such allegation raises an error of law reviewable on the standard of correctness;
>
> 4. Where a question of mixed law and fact is raised, any alleged error is reviewable on the standard of reasonableness.

2. Discussion
1. The preliminary issue

[18] I mention briefly a preliminary objection raised by counsel for the respondents in her memorandum of argument which she characterized as the introduction by the applicant, through his affidavit, of new evidence not before the decision-maker.

[19] In oral argument, counsel for the respondents nuanced her written argument by stating the applicant's affidavit was labelled by the applicant himself as an affidavit of documents listing "relevant documents that are under the applicant's possession, power or control and over which no privilege is claimed." She argued the simple listing of documents was unnecessary and superfluous and should not be given any weight because they were already reproduced in the certified tribunal record.

[20] I ruled at the hearing where the documents listed in the applicant's affidavit labelled affidavit of documents are merely duplicative of what is contained in the certified tribunal record, there is no need to refer to the applicant's affidavit. To the extent the applicant's affidavit goes beyond merely listing documents but offers a commentary on the documents themselves and provided they are not new evidence not before the investigator which is the normal rule in the judicial review process subject to specified exemptions, those comments may be taken into account by the Court.

2. No mediation

[21] Counsel for the applicant states Mr. Moussa was never offered mediation of his complaint against his immediate supervisor despite the requirements of the Policy where mediation is an integral part of the process of resolving disputes on harassment in the workplace. He points to the Policy's expectation that employees will be encouraged to participate in a problem-resolution process before proceeding with the complaint process. In terms of the complaint process, the Policy states as step 4, after a review of the complaint, if the harassment complaint remains unresolved, the delegated manager must offer mediation and if the parties agree to mediation, the delegated manager obtains mediation services as provided for in the Policy.

[22] The record before the Court reveals Mr. Moussa was offered mediation shortly after he filed his complaint against his immediate supervisor and before the investigation started. This offer was made before the investigation started. At respondents' record, volume 3, page 816, is a letter to Mr. Moussa dated January 17, 2001, from the Anti-Harassment Co-ordinator at the IRB in which such offer was clearly proposed in the last paragraph of the first page. That offer of mediation remained on the table throughout the unfolding of the investigation process. This is clear from the sentence appearing at line 2 of page 2 of that same letter. Mr. Moussa did not take up the offer which by extension necessarily covers his other complaints.

[23] There is no substance to Mr. Moussa's argument on this point.

3. Failure to consider racial harassment and discrimination

[24] Counsel for the applicant recognizes when Mr. Moussa filed his first complaint against his immediate supervisor, the Policy, then in existence, provided the PSC had a duty to investigate personal harassment complaints other than harassment covered under the *Canadian Human Rights Act*. Mr. Moussa was specifically advised because of the Policy, as it stood, this aspect of his complaint would not be reviewed by the investigator.

[25] The parties agree as of June 1, 2001, a new Treasury Board Policy was adopted. By its terms, an allegation of racial discrimination and racial harassment could be investigated by the PSC.

[26] Counsel for the applicant complains the investigator erred in not embarking upon that aspect of Mr. Moussa's complaint which related to racial harassment.

[27] Yet, a review of the record before the Court indicates the preliminary case report issued by the investigator in all three complaints addressed the issue. The preliminary case report for the first complaint is dated December 3, 2001; for his second complaint, the preliminary case report is dated May 6, 2002, and the third report is dated May 31, 2002. Those preliminary case reports indicate that to address the issues related to racism, the complainant was offered the opportunity to have the allegations investigated by the PSC after the new Policy allowed the PSC to investigate such matters. A statement is made in each report the complainant did not accept to have the PSC investigate these issues.

[28] I saw nothing in Mr. Moussa's rebuttal statements to the preliminary case reports where he challenged the investigator's statement. Moreover it was on July 13, 2001, Mr. Moussa filed a complaint with the Canadian Human Rights Commission alleging the IRB discriminated against him on the grounds of race. The CHRC refused to deal with his complaint on the basis that it could properly be dealt with by a procedure provided for under another Act of Parliament. That decision was set aside by my colleague Justice Teitelbaum in a decision dated July 26, 2006, reported as [2006] F.C.J. No. 1169 with the result the Commission investigated his complaint of discrimination on account of race.

[29] It is also noted in the final case reports on Mr. Moussa's complaints, all dated June 28, 2002, the same statement is made concerning the opportunity offered to Mr. Moussa to have his racial harassment complaint dealt with by the PSB.

[30] Under the circumstances, Mr. Moussa has not persuaded me the investigator improperly declined to investigate the racial harassment aspect of his complaint.

4. Unfairness in the investigation process

[31] The points raised by Mr. Moussa in support of this allegation were:

• Despite his promise to conduct his interview of witnesses in the presence of the applicant and the respondents, the investigator changed the process and excluded his presence as well as the presence of those persons he complained about. The applicant argues by reference to exhibit 14 to his affidavit, the investigator was not justified in doing in order to placate the concerns of reluctant witnesses;

• As a subset to the first point, the applicant argues the procedure originally established by the investigator contemplated the witnesses giving oral testimony with the right of cross-examination by the applicant or the respondents or their representative;

• The investigator failed to interview the persons the applicant had identified as potential witnesses while favouring interviewing witnesses suggested by the respondents. The applicant alleged the investigator only interviewed one person

whom he had suggested while interviewing thirteen of the respondents' suggested witnesses;

• The investigation failed to include him in on a telephone conference call he had with the respondents on March 1, 2002.

[32] It is trite law that the content of the rules of natural justice are variable and are to be determined in the context of each case with the underlying objective being to ensure that decisions are made using a fair and open procedure appropriate to the decision being made and respectful of the statutory, institutional and social context while at the same time providing an opportunity for those affected by the decision to put forward their views and evidence fully and to have them considered by the decision-maker (see the Supreme Court of Canada's decision in *Baker* v. *Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at paragraph 21.

[33] The investigator had a duty to conduct a fair investigation into Mr. Moussa's complaints providing Mr. Moussa with an opportunity to fully present his case. It is evident that the descriptions of steps 1 through 6 provided Mr. Moussa with that opportunity. He interviewed the persons the applicant had mentioned in his complaints.

[34] As a matter of law, Mr. Moussa was not entitled to be present when each witness was being interviewed by the investigator: he had no right to an oral hearing before the investigator where witnesses would testify and be subject to cross-examination and to the extent the investigator promised to Mr. Moussa he could be present at the interview, he changed his mind

citing concerns expressed to him by potential witnesses as to Mr. Moussa's presence during his interview with them, (see note to file, Respondents' record, volume 5, page 1371). He explained this to Mr. Moussa. I do not see how the investigator could be criticized in terms of fairness by coming to this conclusion.

[35] He was that master of how he conducted his interview of each witness: the witness statements were disclosed to Mr. Moussa who commented on each error he saw in the witness statements.

[36] There is no substance to Mr. Moussa's claim the investigator interviewed only one of the witnesses he suggested, (see note to file, Respondents' record, volume 5, page 1371). This was pointed out to counsel for the applicant who withdrew this point from his argument. In any event, Mr. Moussa did not show to the Court how the investigator's failure to interview any specific witness would have materially affected the investigator's conclusions. (see, *Ruckpaul* v. *Department of Citizenship and Immigration* 2004 FC 149).

[37] Finally, the fact Mr. Moussa did not participate in the March 1, 2002, teleconference appears to be an error in communication, and, in any event, did not affect the Applicant's ability to respond since that telephone call occurred after the issuance of the first preliminary case report and before the issuance of the second and third report in respect of which the Applicant responded.

[38] As an aside, the procedure followed by the investigator largely mirrored the procedure which the Canadian Human Rights Commission follows when it appoints an investigator to investigate a complaint. The procedure followed has been validated in a number of decisions by the Supreme Court of Canada, by the Federal Court of Appeal and by this Court, (see, *Slattery* v. *Canada & Canadian Human Rights Commission* [1996] F.C.J. No. 385 (C.A.), for example and the cases referred to in *Ruckpaul*, above).

5. Bias

[39] Mr. Moussa alleges the investigator's reports and the process leading to it demonstrate a reasonable apprehension of bias on his part. He states the test for reasonable apprehension of bias is set out in the Supreme Court of Canada's decision in *Committee for Justice and Liberty* v. *Canada* (*National Energy Board*) [1978] 1 S.C.R. 369, where Justice De Grandpré stated at page 394:

> "The apprehension of bias must be the reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically–and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously would not decide fairly?"

[40] In written representations, his counsel wrote that the applicant "perceived the investigator as biased and complained about it". Counsel adds the selection of witnesses and the lack of cross-examinations were examples of the investigator's bias. Counsel also cites exhibit 66 as further evidence of bias. Counsel submits exhibit 66 is an E-mail indicating the investigator had a closed mind and had drawn conclusions based not on the evidence before him arguing the E-mail was written before the investigator had entered the second phase of his investigation.

[41] On the other hand, counsel for the respondents argues the test is not the one set out by the applicant because the investigator conducting the investigation is required merely to be "amenable to persuasion or not to have a closed mind and not appear to have a conflict of interest". She argues when the nature of the decision is preliminary, that is, part of the procedure for instituting an adjudication, making a recommendation, or the taking of a first step by a public official, the Courts are likely to impose a less demanding standard of impartiality than that applied to the exercise of "judicial" powers determining the rights of individuals.

[42] In *Newfoundland Telephone Company Limited* v. *The Board of Commissioners of Public Utilities* [1992] 1 S.C.R. 623, the Supreme Court of Canada adopted the "open mind" test as the proper criteria to determine bias in the case of a Public Utilities Board Commissioner's public statements during the investigative process but before the hearing had commenced.

[43] The content of the "open mind" test has been defined by the Supreme Court of Canada in *Old St. Bonafice Residence Association Inc*. v. *Winnipeg (City)*, [1990] 3 S.C.R. at 1170 where Justice Sopinka stated that a party alleging disqualifying bias: … must establish that there is a pre-judgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of a municipal council while they may very well give rise to an appearance of bias will not satisfy the test unless the Court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.

[44] I agree with counsel for the respondents the test for bias in this case in the closed mind test. He seeks to quash the investigator's report to the delegated manager who is the decision-maker. In any event, he has not made out the more stringent test of reasonable apprehension of bias.

[45] The evidence the applicant mustered in support of either test is weak. As indicated, the selection of witnesses and the lack of cross-examination do not evidence bias or lack of fairness. Exhibit 66 in context is insufficient to support Mr. Moussa's plea. The March 1, 2002 incident has been explained.

5. No proper investigation on seeking favours

[46] The investigator's third report concerns Mr. Moussa's allegations his immediate supervisor, the Regional Director and the Manager of Human Resources at the IRB, Vancouver solicited favours from him. In the written argument prepared by former counsel she states the investigator "wilfully ignored one aspect of the solicitation of favours being the solicitation of narcotic substances." Current counsel in oral argument pursued this alleged error.

[47] In my view, the applicant's claim must be rejected. The certified tribunal record does not evidence anywhere he made any claim his managers solicited narcotics from him. It does not appear in his rebuttal to the preliminary case report where no such claim is identified (see respondents' records, page 1474 and 1523).

6. Should this court entertain the applicant's late claim?

[48] As noted, the applicant raised for the first time in reply to the respondents' argument a breach by the investigator of his linguistic rights.

[49] I agree with counsel for the respondents it would be improper for this Court to entertain the applicant's claim at this late stage for the following reasons:

- The applicant's claim came to this Court too late. To entertain it the Court would be obliged, out of fairness, to call for additional written representations and hold an additional hearing; in other words, start a new case;

- The applicant's judicial review is brought under section 18 of the *Federal Courts Act*. Parliament has set up a mechanism in the *Official Languages Act* to deal with complaints of breaches of that statute and has prescribed remedies;

- The applicant has not demonstrated to the Court there is any merit to his claim on this score. See the President of the IRB's letter of January 28, 2002, to the applicant in which he indicated it was the applicant who asked that the investigation be conducted in English with an opportunity, if need be, to sometimes express his concerns in French. The President stated to Mr. Moussa "to my knowledge you have not been denied such an opportunity." (See applicant's record, page 81). I note the applicant's reply of February 4, 2002 to the President's letter.

[50] For all of these reasons the applicant's challenge to the investigator's reports must be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT this judicial review application is dismissed.

"François Lemieux"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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