Date: 20080303

Docket: T-326-06

Citation: 2008 FC 288

Ottawa, Ontario, March 3, 2008

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

MARIA TERESA TAGLIABUE

Applicant

and

MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is a Canadian citizen of Chilean ancestry who worked at the Canadian Embassy in Buenos Aires (the Embassy) as a locally engaged staff member from 1990 to 2000. In February of 1999, she accepted a position as a level 5 Administrative Assistant to Col. Richard Ryan. He served as the Canadian Armed Forces Attaché at the Embassy and the Applicant reported directly to him.

[2] The Applicant's position with Col. Ryan was hybrid in nature in that, although she was employed by the Respondent (DFAIT), her position was funded by the Department of National Defence (DND). On July 26, 2000, the Applicant was terminated effective December 29, 2000

because her position was eliminated by DND. Thereafter, for one year, she was given priority status which meant that, as long as she was qualified, she was not required to participate in a competition to be offered a new position at the Embassy.

[3] On July 2, 2003, the Applicant filed a complaint (the Complaint) with the Canadian Human Rights Commission (the Commission) against DFAIT alleging that she had been sexually harassed by the Canadian Ambassador to Argentina (the Ambassador) in December 1999 and February 2000 and that, in a meeting with the Ambassador on November 10, 2000, she was treated in an adverse differential manner because of her Chilean ethnicity.

[4] The Applicant admits that she did not report the sexual harassment or the discrimination to management at DFAIT. DFAIT first learned of her allegations when it was advised of the Complaint. As well, the Applicant did not complain to workplace colleagues at the time of the alleged events.

[5] On January 24, the Commission dismissed the Applicant's Complaint pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act). This application is for judicial review of that Decision.

THE DECISION

[6] The Commission's decision letter of January 24, 2006 (the Decision) mentioned four conclusions about the sexual harassment aspect of the Complaint. It said:

> The evidence establishes that:
>
> - the respondent did not consent to the alleged harassment;
> - the respondent exercised all due diligence to prevent the alleged harassment from being committed;
> - as the respondent was unaware of the alleged harassment, it could not mitigate its effects; and
> - there does not appear to be a link between the alleged harassment and the termination of the complainant's employment.

[7] As the Decision shows, the Commission ultimately concluded that the complaint of sexual harassment had not been made out because the alleged conduct had not detrimentally affected the Applicant's employment. Specifically, there was no link between the alleged harassment and her termination or the fact that she was not rehired during her one year period of priority status.

[8] As well, when it dismissed the Complaint, the Commission dismissed the allegation that there had been discrimination. This was not specifically discussed in the Decision but the Investigator's final report of December 15, 2005 (the Final Report) says the following at paragraph 105:

> Finally, the evidence gathered does not appear to support that the complainant was treated in an adverse differential manner because of her national or ethnic origin.

THE ISSUES AND THE STANDARD OF REVIEW

(i) The Failure to Interview the Ambassador

[9] The Applicant says that the Commission failed to conduct a fair and thorough investigation because the Ambassador was not interviewed. On this issue of procedural fairness, no deference is owed. See: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 100.

(ii) The Error in Law

[10] The Applicant also says that the Commission erred in law when it misapplied subsection 65(2) of the Act. On this issue, there is no reason to depart from the normal rule that questions of law will be considered using "correctness" as the standard of review.

DISCUSSION AND CONCLUSIONS

Issue 1 The Failure to Interview the Ambassador

[11] The Ambassador first learned of the Complaint when he was contacted by DFAIT on December 23, 2004. At that time, he was serving as the Canadian Ambassador to Switzerland. He

promptly provided DFAIT with lengthy and comprehensive written responses to the Applicant's allegations. The material he provided included:

- A four page chronology and three pages of narrative dated December 31, 2004.
- A one page letter of December 31, 2004 dealing with the reasons for the Applicant's termination.
- A six page response to the Complaint dated January 21, 2005.
- A two page letter of February 2005.

This material will be described as the Evidence.

[12] DFAIT in turn provided the Ambassador's Evidence to the Investigator. The record is not complete as it relates to contacts between DFAIT and the Investigator but it is clear and the Applicant concedes that, when one reads the material provided to DFAIT by the Ambassador and compares it to the Final Report, it is obvious that (except for one immaterial error) the Investigator received a complete and accurate account of the Ambassador's Evidence on all the issues.

[13] In her Final Report, the Investigator said:

> The investigator asked the respondent on several occasions in July, August and September 2005, for the contact information for Ambassador Hubert, however, this information was not provided in time for the completion of this report.
>
> …
>
> The respondent has advised that Ambassador Hubert is aware of this complaint and they have provided a response to the allegations on his behalf.

[14] It is noteworthy that the Investigator expressed no concern that the Final Report was incomplete or that her investigation was prejudiced because she did not speak with the Ambassador. In my view, this is explained by the fact that she had received the Evidence from DFAIT.

[15] This fact also explains why, when the Investigator and her advisory team met to review a draft of the Final Report (the Draft Report), they agreed that the Final Report should recommend dismissal of the Complaint even though the Ambassador had not been interviewed. However, they made the following suggestion:

> …Investigator should also continue to attempt to contact Ambassador Hubert... If no contact by the end of next week, disclose and note in report that attempts were made to contact him, and outline them.

[16] The Draft Report includes notations which show that, if the Ambassador had been interviewed, he would have been asked about eight paragraphs in the Draft Report. Two paragraphs dealt with the Applicant's termination and one dealt with the conversation in which the Applicant's Chilean ancestry was mentioned. Five of the paragraphs related to the Ambassador's conduct at the time of the alleged sexual harassment. These topics were all covered in the Ambassador's Evidence and, for the reasons given below, I have determined that it was not necessary to interview him before the Final Report was released.

The Termination

[17] The Applicant did not work with or for the Ambassador, she worked for Col. Ryan. He was her direct supervisor and he was interviewed for the Final Report. His evidence was that the Applicant's termination occurred because DND had decided that, in all Canadian Embassies, assistants to Military Attachés would be military rather than civilian personnel. The Ambassador's Evidence confirmed Col. Ryan's evidence in this regard.

[18] Col. Ryan was present when the Ambassador handed the Applicant her termination letter which said that her position had been cancelled. The letter was signed by the Ambassador but Col. Ryan said that neither he nor the Ambassador had had any involvement in making the decision.

[19] The Applicant said that, during the termination meeting with the Ambassador and Col. Ryan, the Ambassador commented that the termination was not because she was "prettier or uglier". Col. Ryan did not recall this comment and the Ambassador denied that it was made.

[20] Given that the Investigator had an accurate version of the Ambassador's Evidence and that the Ambassador was not the Applicant's employer and did not decide to terminate her employment, it is my view it was not necessary to interview the Ambassador about the Applicant's termination.

The Alleged Discrimination

[21] In November 2000, before the Applicant's termination took effect, the Ambassador offered her a comparable position as a level 5 secretary in the Embassy's Immigration Section. This new position involved no change in her salary, benefits or vacation entitlement. The offer was genuine. The Ambassador considered the Applicant to be qualified for the position and fulfilled his obligation to offer it to her by reason of her priority status. According to the Complaint, the Ambassador told the Applicant that she would have more responsibilities and opportunities to progress in the Immigration Section.

[22] However during his discussion with her, the Ambassador indicated that the move to the Immigration Section might be particularly good for her because there were people in the Embassy who did not like her because she was Chilean. In his Evidence, the Ambassador admitted bringing this fact to the Applicant's attention.

[23] The Applicant acknowledged in her Complaint that she was already aware of the problem. She knew that an accountant at the Embassy had said several times that he hated Chilean people.

[24] The Ambassador also told the Applicant that if she did not take the position, he had someone else in mind.

[25] These comments angered the Applicant and she rejected the position. However, the Investigator concluded that the Applicant had not experienced any discrimination.

[26] Against this background, the question is whether the Ambassador should have been personally interviewed because he would have offered additional crucial evidence. In my view, the Final Report shows that the Complainant and the Ambassador agreed on the text of his comments about Chileans and on the terms of the offer. In these circumstances, I cannot conclude that any crucial matters were overlooked in the investigation because the Ambassador's Evidence was provided in correspondence rather than in a telephone interview.

The Priority Period

[27] The Applicant alleges that, during her period of priority status from December 2000 to December 2001, she did not obtain a position because she had rejected the Ambassador's sexual advances. However, the Investigator discovered the following:

- In November 2000, as described above, the Ambassador offered her a level 5 position which she rejected.
- In February 2001, she was offered a position at level 4 which she rejected on the basis that she was overqualified.
- The Complainant said that she was refused four other postings available in June, July, August and October 2001. The Investigator noted that the Applicant was not qualified for two of the positions because they were four and five levels above the

position she had held with Col. Ryan. With regard to the third position, she refused to take a required linguistic test and she failed the French test for the fourth position.

[28] The Investigator noted that the Ambassador left the Embassy on July 5, 2001 for another assignment. This meant that he was not present for the last three postings.

[29] The Investigator concluded that the Applicant's complaint that she was not rehired due to her rejection of the Ambassador's advances was unfounded. In the circumstances described above, I can see no crucial evidence or area of disagreement between the Applicant and the Ambassador which might have been explored in a telephone interview with the Ambassador.

The Sexual Harassment

[30] The Allegations are as follows:

(i) At the Embassy Christmas Party in December 1999 (the Party), the Applicant says that the Ambassador rubbed his leg against her leg while they were seated at a table and that the Ambassador ran his fingers over her back in a massaging motion;

(ii) On the day of the Party, the Ambassador told her about an affair he had had with a Chilean woman and described his sexual prowess (the Affair);

(iii) In February 2000, the Ambassador complimented the Applicant on her suntan and asked if it covered her entire body (the Suntan).

[31] Regarding the Party, the Ambassador denied the allegations in his Evidence and, since there were no independent witnesses, the Final Report stated that “This Investigation has been unable to determine whether these alleged incidents actually occurred because there were no witnesses.”

[32] Regarding the Affair, the Ambassador acknowledged in his Evidence that he might have told the Applicant about an affair he had had with a Chilean woman named Marilu when he was a student in Chile in 1965. However, he denied that he had described his sexual experiences with Marilu. Again, the Investigator was unable to conclude whether the conversation included sexual content because there had been no witnesses.

[33] Regarding the Suntan, the Ambassador acknowledged that he might have admired her post-holiday tan and asked it was “bronzage intégral”. His evidence was that he did not intend his remark to be offensive.

[34] The question again is whether a telephone interview with the Ambassador would have uncovered additional crucial evidence. In my view, the answer is clearly “no”. Once Col. Ryan’s evidence about the termination by DND and DFAIT’s evidence about the priority period was accepted, any further evidence from the Ambassador about the alleged harassment became immaterial. Given that the Investigator concluded that the Ambassador’s conduct (whatever it might have been) was not linked to the Applicant’s termination or failure to be rehired, the sexual harassment Complaint was bound to be dismissed (see *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. at para. 29).

Issue 2 The Error in Law

[35] Section 65 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 reads as follows:

65. (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

65. (1) Sous réserve du paragraphe (2), les actes ou omissions commis par un employé, un mandataire, un administrateur ou un dirigeant dans le cadre de son emploi sont réputés, pour l'application de la présente loi, avoir été commis par la personne, l'organisme ou l'association qui l'emploie.

(2) La personne, l'organisme ou l'association visé au paragraphe (1) peut se soustraire à son application s'il établit que l'acte ou l'omission a eu lieu sans son consentement, qu'il avait pris toutes les mesures nécessaires pour l'empêcher et que, par la suite, il a tenté d'en atténuer ou d'en annuler les effets.

[36] The Applicant's submission focuses on subsection 2 and the Commission's conclusion that DFAIT exercised all due diligence to prevent the alleged harassment. This conclusion was based on the Investigator's finding that DFAIT had an anti-harassment policy which included instructions about how to complain to Ottawa about harassment by an ambassador.

[37] However, the Applicant says that DFAIT was not diligent in responding to the Commission's investigation of her Complaint. The Applicant says that DFAIT is not entitled to the

benefit of subsection 65(2) because its failure to treat sexual harassment and discrimination as serious matters in response to the Complaint had the effect of suggesting to DFAIT's employees that they, in turn, need not treat such issues seriously.

[38] Without deciding whether DFAIT was diligent and without considering whether subsection 65(2) applies to an employer's post-termination conduct, it is my view that, because proceedings before the Commission are confidential, DFAIT's employees would have no means of knowing how it responded to the Applicant's Complaint. In these circumstances, the Applicant's submission is without merit.

[39] For all these reasons, this application will be dismissed with costs.

JUDGMENT

UPON reviewing the material filed and hearing the submissions of counsel for both parties in Toronto on Monday, December 17, 2007;

AND UPON being advised at my request in a post-hearing email from counsel for the Respondent that proceedings before the Commission are confidential.

NOW THEREFORE THIS COURT ORDERS AND ADJUDGES that, for the reasons given above, this application is hereby dismissed with costs.

"Sandra J. Simpson"
JUDGE

FEDERAL COURT

SOLICITORS OF RECORD

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