Date: 20080623

Docket: T-1377-07

Citation: 2008 FC 789

Ottawa, Ontario, June 23, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

PAUL E. RICHARD

Applicant

and

TREASURY BOARD OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision (the impugned decision) rendered by the Canadian Human Rights Commission (the Commission), dated June 21, 2007, in which the Commission decided not to deal with the applicant's complaint of sexual discrimination against the Treasury Board of Canada pursuant to paragraph 41(1)*(e)* of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the CHRA).

[2] The complaint was initially filed by the applicant on August 5, 2005 and is based on alleged facts that took place from 1978 to August 31, 1985. On March 5, 2007, the applicant was advised by

letter signed by the Deputy Secretary General of the Commission that "[the] complaint will be presented to the Commission with a recommendation that, pursuant to section 41(1)*(e)* of the CHRA, the Commission not deal with the complaint, because the last alleged discriminatory act occurred in August 1985, and [the applicant] did not contact the Commission until August 2005." In this letter, the Deputy Secretary General invited the applicant to submit comments regarding the recommendation and suggested that the applicant "may wish to include in [his] submission the reasons [he] delayed in filing [his] complaint."

[3] The Deputy Secretary General also sent a similarly worded letter to the respondent, outlining the recommendation and inviting the respondent to submit a response. The Deputy Secretary General suggested: "[s]hould [the respondent] be of the view that the delay in filing the complaint would affect [its] ability to mount a defence, [it] may wish to include the following information in [its] submission: whether or not [the respondent was] aware that discrimination was alleged or that a complaint was likely to be filed; the availability of witnesses and/or documentary evidence; and any harm that could be caused by the delay. "

[4] Both parties filed written submissions.

[5] The record before the Commission when it rendered the impugned decision comprised the applicant's complaint form; a complaint summary; the letters from the Deputy Secretary General to the applicant and to the respondent; the applicant's submissions and attachments; and, the respondent's submissions. After reviewing the materials, the Commission informed the applicant on

June 21, 2007 that it had decided not to deal with his complaint because it was filed outside the one-year limitation period prescribed under paragraph 41(1)*(e)* of the CHRA.

[6] In the letter of refusal, the Commission wrote:

> Before rendering its decision, the Commission reviewed the analysis and the recommendation contained in the letter sent to you previously by the Investigations Branch, and any submission(s) filed in response to the letter. After examining this information, the Commission decided, pursuant to paragraph 41(1)(e) of the *Canadian Human Rights Act*, not to deal with the complaint because
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> i. it is based on acts which occurred more than one year before the filing of the complaint.
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> Accordingly, the file on this matter has now been closed.

[7] Paragraph 41(1)*(e)* of the CHRA provides:

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 […]	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) 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. […]	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. […]

[8] As can be seen, paragraph 41(1)*(e)* of the CHRA does not specify the criteria for exercising the discretion to extend the one-year time limit. Therefore, it is left to the Commission to devise any relevant criteria pertaining to the exercise of its discretion. According to the jurisprudence, the criteria used by the Commission may be similar, albeit not identical, to the criteria used by the courts: "[a]mong these, particularly, whether the delay was incurred in good faith and the weighing of any prejudice or unfairness to the respondent caused by the delay" (*Bredin v. Canada (Attorney General)*, 2006 FC 1178, at paragraph 51) (*Bredin*)). This supposes that findings of fact are to be made by the Commission with respect to the good faith of the complainant, the reasonableness of her or his explanations for the delay, and/or the existence of some harm or prejudice caused to the respondent by the delay.

[9] Each request for an extension of the time limit must be assessed by the Commission on its own merits. The particular weight to be given to any relevant factor may vary from case to case. Further, the list of factors or criteria to extend the time limit is not exhaustive. The length of the delay and the particular nature of the allegation of discrimination (*i.e.*, whether it is exceptional or not and whether it was isolated or continuous), combined with the fact that the complainant is acting in good faith and is not bringing a trivial, frivolous or vexatious complaint, may also be relevant considerations in the Commission's exercise of its discretion to extend the one-year delay. Considering the objectives of the CHRA and the possible harm and prejudice that may be caused to victims of discrimination, a lengthy delay in bringing a complaint may not, in and of itself, constitute reasonable grounds to refuse to extend the one-year time bar. This is especially so if, for

example, the complainant has a reasonable explanation for the delay or the respondent will not suffer any prejudice.

[10] The impugned decision not to deal with the applicant's complaint is reviewable on the reasonableness standard: *Khanna v. Canada (Attorney General)*, 2008 FC 576, [2008] F.C.J. No. 733 (QL), at paragraph 24. In so doing, the Court must consider the justification, transparency and intelligibility of the decision-making process: *Dunsmuir v. New-Brunswick*, 2008 SCC 9, at paragraph 47 (*Dunsmuir)*.

[11] Indeed, the Commission's decision to dismiss complaints under section 41 of the CHRA should be subject to closer review than decisions to refer complaints to the Canadian Human Rights Tribunal: *Larsh v. Canada (Attorney General)*, [1999] F.C.J. No. 508 (QL), at paragraph 36 (*Larsh*). As stated by Justice Evans (as he then was) in *Larsh*: "[a] dismissal is, after all, a final decision that precludes the complainant from any statutory remedy and, by its nature, cannot advance the overall purpose of the Act, namely protection of individuals from discrimination, but may, if wrong, frustrate it."

[12] Paragraph 42(1) of the CHRA states:

42. (1) Subject to subsection (2), when the Commission decides not to deal with a complaint, it shall send a written notice of its decision to the complainant setting out the reason for its decision.	42. (1) Sous réserve du paragraphe (2), la Commission motive par écrit sa décision auprès du plaignant dans les cas où elle décide que la plainte est irrecevable.

[13] In this regard, reasons for a decision ensure a “fair and transparent decision-making”, reduce “to a considerable degree the chances of arbitrary or capricious decisions”, reinforce “public confidence in the judgment and fairness of administrative tribunals” and “foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out”: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraphs 38 and 39.

[14] That being said, given the cursory nature of Commission decisions, investigation reports may also be read as the Commission’s reasons: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 (QL), at paragraph 37. In the case at bar, the investigator’s report, if any, that was submitted to the Commission comprised one sheet entitled “Summary of Complaint” (Tribunal’s Record, page 5). According to this document, apart from general information with respect to the parties and provisions of the act involved, there is no mention or analysis of the complaint, nor is there any explanation for the lengthy delay. This document simply mentions that the date of the alleged conduct is “1978 to August 31, 1985”.

[15] The parties respectively provided a number of arguments for the granting or the refusal of an extension of delay which may be summarized as follows: 1) from the applicant’s perspective, he had reasonable explanations (some of which were medical) for the lengthy delay and his case against the respondent was a very strong one considering the fact that he experienced “serious long-term financial, physical and emotional disability as a result of the systemic continuous and incessant

discrimination and homophobia at the hands of the Federal Public Service during his whole career"; 2) from the respondent's perspective, an extension would be prejudicial considering the difficulty to identify potential witnesses and the ability of these witnesses to remember the alleged events which occurred more than 20 years ago.

[16] As appears from the refusal letter, the Commission summarily decided not to deal with the complaint simply because it is based on acts which occurred more than one year before the filing of the complaint. However, the Commission nonetheless failed at the same time to deal with the applicant's substantiated request that the Commission exercise its power to extend the one-year time limit.

[17] Even if I assume, as pressured to do so by the respondent, that the Commission has implicitly dealt with the applicant's request for an extension, I am of the view that the lack or insufficiency of the reasons provided by the Commission for its alleged refusal to exercise its discretionary power renders the impugned decision unreasonable (*Khanna*, at paragraphs 25 and 29; *Bredin*, at paragraphs 58 and 61).

[18] Indeed, in the impugned decision and the summary of complaint prepared by the Investigations Branch, there is no mention or weighing of the criteria used by the Commission, nor is there any analysis of the representations and evidence submitted by the parties with respect to the delay. The two letters previously sent to the parties by the Deputy Secretary General do not qualify as reasons and do not deal with any of the arguments subsequently made by the parties in response

to the Investigations Branch recommendation to the Commission not to deal with the complaint "because the last alleged discriminatory act occurred in August 1985, and [the applicant] did not contact the Commission until August 2005". In particular, there is no actual finding by the Commission that the explanations for the delay are not reasonable or that the respondent will suffer prejudice because of the delay.

[19] What was said by Justice Blanchard in *Bredin*, at paragraphs 55 to 58 equally applies in this instance:

> Given the nature of the record before me, it is impossible to ascertain, whether the Director turned his mind to the factors that required consideration by the Commission in the exercise of its discretion. What is clear, however, is that the Director's recommendation, that the Commission not receive the complaint, was made without the benefit of submissions made by the parties on the Commission's exercise of discretion to extend time.
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> In its decision letter, the Commission states that it reviewed the analysis and recommendation of the Investigations Branch and submissions filed in response thereto and decided not to deal with the complaint because it is based on acts which occurred more than one year before its filing. The Commission, in its decision, essentially adopts the Director's recommendation without expressly considering the parties' arguments on the Commission's discretion to extend time. The Commission fails to deal with the above-noted factors relating to the exercise of its discretion that, in the Applicant's submissions, would support a positive decision by the Commission regarding the extension of time to receive the complaint.
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> In my review of the materials, particularly the decision letter, there is no way of knowing whether the Commission turned its mind to the exercise of its discretion, let alone whether the discretion was properly exercised. The investigation report did not deal with the issue since its recommendation was made before the parties submitted their arguments on the factors pertaining to the exercise of the Commission's discretion. It appears that the Commission's

> negative decision turns solely on the complaint being time barred. I am left to conclude that the Commission failed to exercise its discretion. In proceeding as it did, the Commission committed a reviewable error. The decision will consequently be set aside.
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> The Commission's decision is equally flawed by reason of the insufficiency of its reasons. Section 42(1) of the Act states :
> […]
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> The reasons in the circumstances of this case are inadequate. The decision letter fails to meet the standard that has been established in the jurisprudence for s. 42(1) of the Act. See *Kidd v. Greater Toronto Airports Authority*, [2004] F.C.J. No. 859, 2004 FC 703. The Commission did not provide any explanation, not even a brief one for its determination that it would not exercise it discretion to extend the time period and receive the complaint beyond paraphrasing the legislative provision. The decision letter is also insufficient as reasons for the decision under review pursuant to the principles of natural Justice. See *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.) at paragraphs 17-19.

[20] In conclusion, it appears that the Commission's negative decision turns solely on the complaint being time barred. I am therefore simply left to assume that the Commission failed to exercise its discretion pursuant to paragraph 41(1)*(e)* of the CHRA. As such, the impugned decision lacks the justification, transparency and intelligibility required of a reasonable decision.

[21] As a consequence, the application for judicial review is allowed, with costs. The impugned decision is set aside and the matter is referred back for determination in accordance with the following directions that the Court considers appropriate in the present circumstances.

ORDER

THIS COURT ORDERS that

1. The application for judicial review is allowed, with costs;

2. The June 21, 2007 decision of the Commission is set aside and the matter is remitted to the Commission for re-determination in accordance with the following directions;

3. The Commission shall provide both parties with an opportunity to submit any additional evidence or written representations with respect to the exercise of the Commission's discretion to extend the one-year time limit to submit a complaint. Supplemental reports and recommendations, if any, of the Investigations Branch shall be provided to the parties for comment;

4. The Commission's decision (or supplemental reports and recommendations, if any, of the Investigations Branch) shall provide the following: reasons for the decision to grant or refuse the applicant's request for an extension of the one-year time limit; the criteria considered (or to be considered) in the exercise of the Commission's discretion to extend the one-year time limit; and, a rationale why same are met or not in this case.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1377-07
STYLE OF CAUSE:	PAUL E. RICHARD v. TREASURY BOARD OF CANADA
PLACE OF HEARING:	Montreal, Québec
DATE OF HEARING:	June 16, 2008
REASONS FOR ORDER AND ORDER:	MARTINEAU J.
DATED:	June 23, 2008

APPEARANCES:

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Me Nicholas Banks	FOR THE RESPONDENT

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