Date: 20080724

Docket: T-1333-07

Citation: 2008 FC 904

Ottawa, Ontario, July 24, 2008

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

LAURA GAINER

Applicant

and

EXPORT DEVELOPMENT CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Laura Gainer (the Applicant) seeks Judicial Review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of a decision by the Canadian Human Rights Commission (the Commission) dated June 21, 2007 dismissing her complaint pursuant to paragraph 44(3)(*b*) of the *Canadian Human Rights Act*, 1985, c. H-6 (the Act).

[2] The Applicant was represented by counsel when she filed her Complaint and during the preparation of the two applications for Judicial Review described below. She was only self-represented on the hearing days.

BACKGROUND

[3] The Applicant was a Senior Business Development Manager (Manager) for Export Development Canada (EDC).

[4] EDC provides insurance to Canadian companies against the risk of non-payment by foreign customers and provides loans to foreign buyers to finance purchases of products from Canadian exporters. Managers market EDC's insurance and loans. Senior Managers, such as the Applicant, generally have higher sales targets and receive higher incentive payments than regular managers.

[5] In December 2001, the Applicant began to complain about pay inequity between male and female Managers. EDC says it looked into her complaints but did not find any discrepancies. Eventually, in May 2003, EDC commissioned a report by Mercer Human Resource Consulting which was completed in December 2003. It found evidence of pay inequity in the years 2000, 2001 and 2003. As a result, EDC admitted that it had been wrong in its initial assessment of the pay equity issue, apologized to the Applicant and paid her $2,754 ($1,347.75 after deductions) to correct the discrepancies.

[6] The Applicant said that after she complained to EDC, she was subject to reprisals and retaliation and that she therefore resigned on May 16, 2003.

[7] She subsequently filed a complaint with the Commission dated November 20, 2003 (the Complaint). Therein, she described five events which she alleged were reprisals for her complaints at EDC about inequity.

[8] The Commission investigated and, on June 10, 2005, it released its report which recommended a dismissal of the Complaint (the First Report). On September 27, 2005, the Complaint was dismissed (the First Decision).

[9] The Applicant applied for Judicial Review of the First Decision (the First Judicial Review). She raised three issues in her application:

1. Whether there had been a breach of procedural fairness in the failure to conduct the investigation in a thorough and neutral manner;
2. Whether the Commission erred in law by failing to correctly apply section 11 of the Act and the *Equal Wages Guidelines, 1986*, SOR/86-1082; and
3. Whether the Commission erred by failing to consider, interpret and correctly apply section 14.1 of the Act with respect to five specified allegations of reprisal. They were:

    - Allegation 2: After complaining about pay equity concerns, my compensations package, relative to others became worse.

    - Allegation3: I was subject to reprisals, including lower performance appraisals than I deserved in 2001 and 2002.

    - Allegation 4: Although the Ontario Region was reorganized in January 2003 into 14 supposedly equal territories, in a subsequent further reorganization of the territories, mine was the only territory reduced in size.

> - Allegation 5: I was subject to inappropriate personal attacks in meetings with the respondent's management.
>
> - Allegation 6: In 2002, I applied for a position of Regional Vice-President, Ontario Region, a position for which I more than suitably qualified given my demonstrated sales leadership. However I was not even considered for the position, which remained unfilled until June 2003.

[10] The Applicant conceded that all these alleged acts of reprisal occurred before she filed the Complaint.

[11] Section 14.1 of the Act reads as follows:

14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.	**14.1** Constitue un acte discriminatoire le fait, pour la personne visée par une plainte déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée.

[12] In his reasons for Order and Order dated June 26, 2006 on the First Judicial Review, Mr. Justice Konrad von Finckenstein granted the application with respect to the third issue only. His reasons are reported in *Gainer v. Export Development Canada*, 2006 FC 814, 295 F.T.R. 137.

[13] They read, in part, as follows:

> **54** For all these reasons, I find that the conclusions of the underlying Report, as adopted by the Commission, in so far as they relate to the allegations of reprisals do not meet the palpable and overriding error standard.
>
> **55** Accordingly, the decision of the Commission, in so far as they relate to the allegations of reprisals, is set aside and sent back for reconsideration subsequent to an investigation by a different

> investigator. That investigator shall only focus on the allegations of reprisal made by the Applicant.
>
> **ORDER**
>
> **THIS COURT ORDERS that** this application for judicial review be allowed. The decision of the Commission as it relates to the issue of reprisals is set aside. The matter is to be sent back for an investigation by a different investigator solely on the issue of the allegations of reprisal.

[14] In response to Justice von Finckenstein's decision, a different Commission investigator (the Second Investigator) conducted an investigation (the Second Investigation) and prepared a Supplementary Investigation Report dated March 27, 2007, which dealt only with the question of reprisals and retaliation. Although the parties were able to make new submissions, the Second Investigator relied on the evidence the Commission had on file and did not conduct fresh interviews.

[15] In the Second Report, the Second Investigator noted the decision of the Federal Court of Appeal in *Dubois v. Canada (Attorney General)*, 2006 FCA 127, 346 N.R. 390 (the Dubois Decision) which had not been brought to the attention of von Finckenstein J. In that decision, Madam Justice Karen Sharlow, speaking for a unanimous panel of the Federal Court of Appeal, held that section 14.1 of the Act, as set out above, applies only to events that happen after a complaint is filed with the Commission. In this case, all the retaliation alleged by the Applicant pre-dated her Complaint.

[16] In light of the Dubois Decision, the Second Report concluded, *inter alia*, that the Applicant's allegations did not constitute retaliation under the Act and on June 21, 2007, the

Commission again dismissed the Complaint (the Second Decision). The present application is for judicial review of the Second Decision.

PRELIMINARY ISSUE

[17] A preliminary issue is whether, in view of the Dubois Decision, the Second Investigation should have been ordered.

STANDARD OF REVIEW

[18] Whether the Dubois Decision meant that the Second Investigation was unwarranted is a question of law which, in my view, requires the application of reasonableness as the standard of review when the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*¸ 2008 SCC 9 is applied. In my view, the implementation of Court decisions dealing with the application of the Act is within the expertise of the Commission.

DISCUSSION

[19] The Dubois Decision makes it clear that, to qualify as acts of reprisal under 14.1 of the Act, retaliatory actions must take place after a complaint is filed with the Commission. In this case, all the events mentioned in the First Application for judicial review predated the Complaint. For this

reason, the Second Investigation should not have been ordered and, once underway, could only have resulted in a dismissal of the Complaint based on the Dubois Decision.

CONCLUSION

[20] In view of this conclusion on the preliminary issue, any errors which may have occurred during the Second Investigation would be immaterial because a decision dismissing the Complaint was the only possible outcome. In other words, in view of the Dubois Decision, it was not legally possible to forward the Complaint to the Tribunal under section 14.1 of the Act.

OTHER ISSUES

[21] The Applicant says that once the Second Investigator concluded that the Dubois Decision applied, an obligation arose to consider whether other sections of the Act might apply to the acts of reprisal. Section 59 was singled out in oral submissions as the most relevant provision.

[22] It reads as follows:

59. No person shall threaten, intimidate or discriminate against an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Part, or because that individual proposes to do so.

59. Est interdite toute menace, intimidation ou discrimination contre l’individu qui dépose une plainte, témoigne ou participe de quelque façon que ce soit au dépôt d’une plainte, au procès ou aux autres procédures que prévoit la présente partie, ou qui se propose d’agir de la sorte.

[23] The transcript of the hearing makes it clear at page 35 that the Applicant never told EDC that she was going to make the Complaint. The Applicant said that EDC should have inferred that she would complain to the Commission given the fact that it knew that she retained counsel when she resigned. However, I do not think section 59 can be applied based on an inference.

[24] Further, as counsel for EDC noted, section 59 is not a provision about a discriminatory practice that is dealt with during a normal Commission investigation. Rather, it is a quasi-criminal provision. It would apply following a separate complaint and only if the Attorney General consented to a prosecution under section 60 of the Act.

[25] The Applicant's memorandum of argument also suggests that the Commission should have investigated the retaliatory acts under sections 2 (the purpose clause), 27 (the powers, duties and functions provisions) and paragraph 14(1)(*c*) which says that harassment of an individual on a prohibited ground of discrimination in matters related to employment is a discriminatory practice.

[26] Section 2 and 27 do not apply but I will consider paragraph 14(1)(*c*). It reads as follows:

14. (1) It is a discriminatory practice, … (*c*) in matters related to employment, to harass an individual on a prohibited ground of discrimination.	**14.** (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu : […] *c*) en matière d'emploi.

[27] In her Complaint (which was prepared with legal assistance) the Applicant used the terms reprisals and harassment interchangeably in the opening paragraphs. For example:

> Paragraph 1: …My further ground of complaint is that, after I addressed the issue of pay inequity with the management of EDC, I was subjected to over a year of harassment, which I believe was direct reprisal.
>
> Paragraph 2: …My decision to resign was a direct result of the harassment to which I had been subjected since January 2002…
>
> Paragraph 3: …and I suffered such serious reprisals that I was forced to resign. The reprisal and harassment that I have suffered continued from January, 2002 until May, 2003, when I resigned from EDC.
>
> [my emphasis]

[28] However, when she provided specifics of the conduct about which she complained, she described it as reprisals. Paragraph 5 of the Complaint said:

> 5. Not only did my compensation package, relative to other BDMs, become worse rather than improve after I raised the pay equity alarm, management also took a number of reprisal actions against me from January, 2002 to May, 2003. These reprisals included a lower performance appraisal than I deserved in 2001 and a much lower performance appraisal than I deserved in 2002. Both of these appraisals were based on pretextual factors or misinformation as set out in detail below. In 2002 I applied for the position of Regional Vice-President, Ontario Region, a position for which I was more than suitably qualified given my demonstrated sales leadership. I was not even considered for the position, which remained unfilled until June 2003. I was also subjected to inappropriate personal attacks in meetings with EDC management, including criticism for retaining a lawyer and unfounded allegations that my coworkers were complaining about me. Even while senior management was punishing me for raising pay equity concerns, I continued my superior sales performance, and EDC continued to rely on me to motivate and lead the sales efforts of others.
>
> [my emphasis]

[29] These are the allegations described as numbers 2-6 in the First Report and are those which Justice von Finckenstein described as the "allegations of reprisals".

[30] I am satisfied that, when read in context, the allegations were in fact of reprisal and not harassment because no connection was made between the acts of reprisal and a prohibited ground. I have therefore concluded that the Second Investigation was not required to consider the Applicant's Complaint under paragraph 14(1)(*c*) of the Act.

[31] The Applicant submits that the Dubois Decision is a precedent for ordering an investigation under 14(1)(*c*) when retaliation is not shown. However, in that case it appears that the appeal was dismissed because the Crown acknowledged that the acts complained of might fall within subsection 14(1). There is no such acknowledgment in the present case.

MATTERS NOT IN ISSUE

[32] I have not considered the Applicant's submission that the First Investigator breached Commission Guidelines by interviewing witnesses in the presence of Respondent's counsel. In my view, this issue was raised as a fairness question before Justice von Finckenstein and he ruled that a lack of fairness had not been shown because "…There is no indication or allegation that counsel interfered with the investigation" (see paragraph 29).

[33] I also explained to the Applicant that allegations which were not before the Commission could not be considered on judicial review. For this reason, I declined to hear her fresh submissions about alleged acts of retaliation which occurred after she made her Complaint.

JUDGMENT

UPON hearing the submissions of the self-represented Applicant and counsel for the Respondent in Toronto on February 14, 2008;

AND UPON reviewing a post-hearing letter from counsel for the Respondent dated February 14, 2008 dealing with a question posed by the Court during the hearing.

THIS COURT ORDERS AND ADJUDGES that, for the reasons given above, this application for judicial review is dismissed with costs.

"Sandra J. Simpson"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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