Date: 20081110

Docket: T-1595-03

Citation: 2008 FC 1251

Ottawa, Ontario, November 10, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

DENNIS NOWOSELSKY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In 1997, Mr. Dennis Nowoselsky complained to the Canadian Human Rights Commission that he had been dismissed from his job with the Correctional Service of Canada because of discrimination on the grounds of disability. The Commission decided not to deal with his complaint at that point because the issues Mr. Nowoselsky raised were also the subject of grievances he had presented to the Public Service Staff Relations Board. After the Board dismissed his grievances, Mr. Nowoselsky asked the Commission to reactivate his complaint. Once an investigation had been carried out, and upon receiving further submissions from the parties, the Commission declined to deal with the complaint because it had been adequately addressed by the Board.

[2] Mr. Nowoselsky argues that the Commission erred in failing to refer his complaint for a hearing before a tribunal. I can find no basis on which to overturn the Commission's decision and must, therefore, dismiss this application for judicial review.

[3] The sole issue is whether the Commission's decision was reasonable.

I. Factual Background

[4] After a childhood accident, Mr. Nowoselsky had one finger amputated and had limited use of another. Clearly, this disability affects his ability to type. He alleges that CSC terminated him because he was unable to perform clerical duties associated with his job as a parole officer in Prince Albert, Saskatchewan. He had asked to be given a voice-activated computer, but was refused. Thereafter, he claims that steps were taken by CSC to have him fired, including placing him on suspension. Indeed, in November 1998, CSC terminated his position.

[5] Mr. Nowoselsky first approached the Commission in 1997. In August 1998, the Commission informed him that he should pursue his outstanding grievances against his employer, which were proceeding before the Public Service Staff Relations Board, and to come back to the Commission when they had been decided. At various times, Mr. Nowoselsky asked the Commission to deal with his complaint, but the Commission continued to tell him that it would await the outcome of the grievances. After hearing eleven days of testimony from fourteen

witnesses, the Board released its decision in February 2001 dismissing Mr. Nowoselsky's grievances.

[6] The Board concluded that Mr. Nowoselsky had been dismissed for misconduct. The Board also found that it had the jurisdiction to consider Mr. Nowoselsky's allegation that he had been dismissed because of his disability. It concluded that CSC could have done better in responding to Mr. Nowoselsky's concerns about his typing responsibilities, but it also found that Mr. Nowoselsky did not do enough to pursue the issue with his employers. For example, he had failed to attend a meeting with his supervisor, as well as a medical assessment.

[7] Mr. Nowoselsky returned to the Commission in March 2002 and signed a formal complaint against CSC. The Commission assigned an investigator and asked CSC to respond to the complaint. The investigator recommended that the Commission not deal with Mr. Nowoselsky's complaint because it would not be in the public interest to do so. The investigator considered that the same issues had already been considered by the Board, there were no other issues that remained to be decided, and Mr. Nowolselsky had failed to provide a good reason why the issues required further investigation. The investigator's report was provided to the parties, who both made submissions in response to it.

II. The Commission's Decision

[8] In July 2003, relying on s. 41(1)(*d*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA; see Annex), the Commission decided not to deal with Mr. Nowoselsky's complaint. After reviewing the investigator's report and recommendation, as well as the parties' submissions in response to that report, it concluded that "the matters complained of before the Commission have been addressed by a procedure provided for under another Act of Parliament (the PSSRB)."

III. Was the Commission's Decision Reasonable?

[9] Mr. Nowoselsky argues that the Commission erred by deferring to the decision of the Board, rather than referring his complaint of discrimination for a hearing before a tribunal. In effect, he argues, the Commission failed to exercise its statutory jurisdiction over human rights complaints and, instead, allowed a non-specialized decision-maker (the Board) to do its job for it. In addition, he argues that the Board incorrectly assumed jurisdiction over the allegations of discrimination that were subsumed in his grievances.

[10] Given that the issues here touch on the relationship between the Commission and the Board, Mr. Nowoselsky argues that the proper standard of review of the Commission's decision is correctness (citing *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at para. 61). However, in my view, the Commission's decision is more accurately characterized as one involving the interpretation of its own statute and the exercise of its screening function in relation to complaints. Accordingly, the proper standard of review is reasonableness. In other words, I can overturn the Commission's decision only if I find that it was unreasonable in the sense that it falls outside the "range of

possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47).

[11] The legal framework surrounding the Commission's decision not to deal with a complaint was reviewed by Justice Robert Décary in *Canada Post Corp.* v. *Barrette*, [2000] 4 F.C. 145 (F.C.A.). There, an arbitrator had dismissed the complainant's grievance, yet the Commission decided to deal with the complaint anyway. Justice Décary found that the Commission had not taken very seriously the screening process in s. 41 of the CHRA. He stated that "the Commission must turn its mind to the decision of the arbitrator, not to determine whether it is binding on the Commission, but to examine whether, in light of that decision and of the findings of fact and credibility made by the arbitrator, the complaint may not be such as to attract the application of paragraph 41(1)(*d*) (at para. 28)."

[12] Mr. Nowoselsky argues, however, that the Board should not have dealt with the issue of discrimination at all. In turn, therefore, the Commission should not have concluded that his complaint had been properly addressed by the Board.

[13] In particular, Mr. Nowoselsky points to s. 91(1) of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (PSSRA; now repealed; see Annex), which provided that employees may present grievances "in respect of which no administrative procedure for redress is provided in or under an Act of Parliament". In other words, grievances should not relate to matters that are dealt with under other statutes. Therefore, the Board was wrong to deal with Mr. Nowoselsky's allegation

of discrimination because a remedy for discrimination is provided in the CHRA. In support of this argument, he points to *Chopra* v. *Canada*, [1995] 3 F.C. 445 (T.D.). There, Justice Sandra Simpson concluded that an adjudicator had correctly decided that he did not have jurisdiction over a grievance based on an allegation of discrimination. Justice Simpson concluded that, in light of s. 91(1) of the PSSRA, the Commission had jurisdiction over the issue.

[14] *Chopra* involved a judicial review of an adjudicator's decision not to deal with a grievance. Thus, the propriety of the adjudicator's decision was squarely before Justice Simpson. Here, I am reviewing the Commission's decision alone. Whether the Board should have refrained from dealing with Mr. Nowoselsky's allegation of discrimination is not an issue that I can decide. The only way to impugn the Board's decision would be to challenge it by way of judicial review. I note that Mr. Nowoselsky sought judicial review of the Board's decision but his application was dismissed for delay (*Nowoselsky* v. *Canada (Treasury Board)*, 2004 FCA 418, [2004] F.C.J. No. 2077).

[15] I must also note, however, that the Board did consider whether it had jurisdiction over Mr. Nowoselsky's allegation of discrimination and concluded that it did, notwithstanding the application of s. 91(1) of the PSSRA. The Board was clearly aware of the effect of the provision, as well as the case law interpreting it.

[16] Accordingly, I cannot find that the Commission's decision was unreasonable. The Commission discharged its screening responsibility as articulated in the *Canada Post Corp.* case and concluded that Mr. Nowoselsky's complaint had already been addressed by the Board.

[17] Mr. Nowoselsky made a further submission regarding the evidence supporting his complaint. He argued that since neither the investigator nor the Commission referred to his evidence, one should infer that they did not consider it. Mr. Nowoselsky relies on the case of *Canadian Broadcasting Corp*. v. *Paul*, 2001 FCA 93, [2001] F.C.J. No. 542. There, Justice Edgar Sexton held that where the Commission had specifically identified the evidence it had relied on, one could infer that it did not consider other evidence. That is not the situation here. The Commission specifically stated that it had reviewed the investigator's report and the submissions it had received in response to the report. Included in those submissions was a letter from Mr. Nowoselsky pointing out what he believed to be the errors and omissions of the investigator. In the circumstances, I can see no error on the part of the Commission in its treatment of the evidence.

IV. Conclusion and Disposition

[18] In my view, the Commission's decision not to refer Mr. Nowoselsky's complaint to a tribunal was reasonable. It properly turned its mind to the question whether the basis for his complaint had already been dealt with. It considered the report of an investigator and the respective submissions of the parties, as it was bound to do. Therefore, I must dismiss this application for judicial review, with costs.

JUDGMENT

THIS COURT'S JUDGMENT IS that

1. The application for judicial review is dismissed with costs.

"James W. O'Reilly"
Judge

Annex

Canadian Human Rights Act, R.S.C. 1985, c. H-6

Commission to deal with complaint

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

…

(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith; or

Public Service Staff Relations Act, R.S.C. 1985, c. P-35

Right to Grievance
Right of Employee

91. (1) Where any employee feels aggrieved

(*a*) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award, or

(*b*) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (*a*)(i) or (ii),

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled,

Loi canadienne sur les droits de la personne, L.R. C.1985, ch. H-6

Irrecevabilité

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 :

[…]

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

Relations de travail dans la fonction publique, L.R.C. 1985, ch. P-35

Droit de déposer des griefs
Droit du fonctionnaire

91. (1) Sous réserve du paragraphe (2) et si aucun autre recours administratif de réparation ne lui est ouvert sous le régime d'une loi fédérale, le fonctionnaire a le droit de présenter un grief à tous les paliers de la procédure prévue à cette fin par la présente loi, lorsqu'il s'estime lésé :

a) par l'interprétation ou l'application à son égard :

(i) soit d'une disposition législative, d'un règlement -- administratif ou autre --, d'une instruction ou d'un autre acte pris par l'employeur concernant les conditions d'emploi,

(ii) soit d'une disposition d'une convention collective ou d'une décision arbitrale;

b) par suite de tout fait autre que ceux mentionnés aux sous-alinéas *a*)(i) ou (ii) et

subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

Limitation

(2) An employee is not entitled to present any grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies, or any grievance relating to any action taken pursuant to an instruction, direction or regulation given or made as described in section 113.

Right to be represented by employee organization

(3) An employee who is not included in a bargaining unit for which an employee organization has been certified as bargaining agent may seek the assistance of and, if the employee chooses, may be represented by any employee organization in the presentation or reference to adjudication of a grievance.

Idem

(4) No employee who is included in a bargaining unit for which an employee organization has been certified as bargaining agent may be represented by any employee organization, other than the employee organization certified as bargaining agent, in the presentation or reference to adjudication of a grievance.

portant atteinte à ses conditions d'emploi

Restrictions

(2) Le fonctionnaire n'est pas admis à présenter de grief portant sur une mesure prise en vertu d'une directive, d'une instruction ou d'un règlement conforme à l'article 113. Par ailleurs, il ne peut déposer de grief touchant à l'interprétation ou à l'application à son égard d'une disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

Droit d’être représenté par une organisation syndicale

(3) Le fonctionnaire ne faisant pas partie d'une unité de négociation pour laquelle une organisation syndicale a été accréditée peut demander l'aide de n'importe quelle organisation syndicale et, s'il le désire, être représenté par celle-ci à l'occasion du dépôt d'un grief ou de son renvoi à l'arbitrage.

Idem

(4) Le fonctionnaire faisant partie d'une unité de négociation pour laquelle une organisation syndicale a été accréditée ne peut être représenté par une autre organisation syndicale à l'occasion du dépôt d'un grief ou de son renvoi à l'arbitrage.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1595-03
STYLE OF CAUSE:	DENNIS NOWOSELSKY v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	May 16, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	O'REILLY J.
DATED:	November 10, 2008

APPEARANCES:

Bob Hrycan	FOR THE APPLICANT
Chris Bernier	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BALFOUR MOSS LLP Regina, Sask.	FOR THE APPLICANT
JOHN SIMS, Q.C. DEPUTY ATTORNEY GENERAL Toronto, ON	FOR THE RESPONDENT