

Date: 20090206

Docket: T-717-07

Citation: 2009 FC 124

Ottawa, Ontario, February 6, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KRISTOFER DRAGUNOWSKI

Applicant

and

ONTARIO POWER GENERATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, R.S., 1985, c. F-7 of a decision of the Canadian Human Rights Commission (Commission), dated March 26, 2007 (Decision), wherein the Commission, pursuant to section 44(3)(b) of the *Canadian Human Rights Act*, R.S., 1985, c. H-6 (CHRA), dismissed the Applicant's complaint because the investigation results did not support the allegations of harassment to the point of illness and employment termination because of his age, national or ethnic origin and disability.

BACKGROUND

[2] The Applicant arrived in Canada from Poland in 1972.

[3] At the time of the complaint, the Applicant was a temporary employee of Ontario Power Generation (OPG) where he worked from February 19, 2003 to March 31, 2004. He held the position of “draftsperson” and worked in the Plant Design Pickering B Drawing Office. He was represented by the Power Workers’ Union (PWU)-the Canadian Union of Public Employees (CUPE) CLC Local 1000 at all material times.

[4] The terms and conditions of employment of temporary employees are governed by the provisions of the collective agreement between OPG and the PWU. The collective agreement provides that temporary employees can be employed for 12 months and, in limited circumstances, can be employed for up to an additional three months.

[5] Mr. Lagambina, one of the Applicant’s managers, did not recommend an extension of the Applicant’s contract after December 31, 2003. However, the Applicant was hired by the Section Manager, Brian Finnie, who extended the Applicant’s contract until March 31, 2004. The Applicant’s contract was not extended beyond March 31, 2004 because the major design projects on which he worked had ended by the end of 2003.

[6] The Applicant alleges that, as a temporary employee, he was subjected to name calling and harassment by Mr. Lenny Lagambina because of his national and/or ethnic origin and age. He says this resulted in him being off work in March 2004 due to stress and depression. He says he was ridiculed with discriminatory remarks such as “pole,” “stupid,” “slow,” and that Mr. Lagambina

also made fun of his dress and mimicked his Polish accent. It is also alleged that Mr. Lagambina harassed the Applicant about his lunch breaks and his going home early. He repeatedly told the Applicant that he would be hard to keep because of his age and that he could be replaced by a younger and cheaper employee. Mr. Lagambina denies any and all of the allegations of harassment and/or differential treatment of the Applicant during his employment with OPG.

[7] The Applicant alleges that he was not made aware of employment benefits at OPG. Although he provided medical reports from his physicians, his employment was terminated. Since then, he says he has been unable to work due to his disability.

[8] The Applicant also alleges that, as a temporary employee, he was not able to file a grievance under the Collective Agreement. Although he tried to contact the OPG's Human Resources Department to file an internal complaint, he did not receive any response. Ms. Judy Wakeman, an OPG Human Resources Consultant, says that there is no record of the Applicant's having contacted the Human Resources Department regarding harassment from Mr. Lagambina during his employment with OPG.

[9] In or about 2004, the Applicant consulted with OPG's Ombudsperson who considered his allegations respecting harassment and discrimination. After looking into the matter, including interviewing witnesses, the Ombudsperson declined to support the Applicant's allegations.

[10] On or about September 26, 2004, the Applicant filed a complaint with the Ontario Human Rights Commission, which was transferred to the appropriate federal jurisdiction sometime in March 2005.

[11] The Respondent addressed the complaint in a letter dated October 6, 2005 and the Commission appointed an investigator to consider the matter. On or about October 7, 2005, the Commission wrote to the Applicant asking for a response to the Respondent's response. The Applicant responded by a letter dated October 14, 2005.

[12] In or about February 2006, an investigator was appointed by the CHRC. On or about February 20, 2006, the Applicant provided the CHRC with a list of his witnesses. On or about August 1, 2006, the CHRC wrote to the OPG requesting interviews with certain employees and asked for certain information and documentation to be sent to them. This request was accommodated by OPG.

[13] The investigator interviewed witnesses he identified, as well as those identified by the Applicant. On or about December 4, 2006, the Commission issued the report of the investigator, which recommended that the Commission dismiss the complaint.

[14] The Applicant was given the opportunity to make further representations in respect to the investigator's report and he did so on or about January 14, 2007. On or about March 26, 2007, the

Commission dismissed the complaint because the investigation results did not support the allegations.

DECISION UNDER REVIEW

[15] The Commission dismissed the complaint pursuant to paragraph 44(b) of CHRA because further inquiry was not warranted. The investigation results did not support any of the allegations of harassment to the point of illness or employment termination because of the Applicant's age, national or ethnic origin and disability.

Witnesses

[16] The Commission interviewed the Applicant's ten witnesses, nine of whom were his co-workers (one was also the union steward) and an external witness who was a friend of the Applicant. None of the nine co-worker witnesses witnessed any of the alleged remarks made by Mr. Lagambina regarding the Applicant's national or ethnic origin, age or any other factor as alleged by the Applicant. None of them witnessed any harassment of the Applicant by Mr. Lagambina, nor did they think that he treated the Applicant differently. None of the witnesses experienced any harassment from Mr. Lagambina because of their national or ethnic origin, age or any other factor. Eight of the nine witnesses were not aware that the Applicant was away from work sick until he contacted them and informed them of his complaint.

[17] The Commission notes that Mr. Ed Lau, a union steward, said that the Applicant chose to approach him about Mr. Lagambina although Mr. Don Picola was the Applicant's union steward. The Applicant did not tell Mr. Lau about any of the alleged remarks, differential treatment and/or harassment by Mr. Lagambina. Instead, the Applicant stated that "Mr. Lagambina put him down and asked why Mr. Lagambina treated everyone like shit?" Although Mr. Lau offered to represent the Applicant to discuss his concerns with Mr. Lagambina and mediate to resolve any of the alleged treatment by Mr. Lagambina, the Applicant refused any involvement by the union. The Applicant told Mr. Lau that "as a temporary employee he did not want to rock the boat."

[18] Mr. Lau said that when the Applicant was no longer an employee, the Applicant telephoned him and informed him that his employment was terminated and that he had medical problems caused by the stress of Mr. Lagambina's treatment of him. Since it was after the fact and the Applicant's temporary term had ended, the union did not file a grievance on his behalf.

[19] Mr. Lau's evidence was confirmed by the chief steward, Mr. Steve Labash. Mr. Picola, the other union steward, confirmed that the Applicant did not approach him regarding Mr. Lagambina. Instead, the Applicant called Mr. Picola after his contract ended and asked him what his rights were under the Collective Agreement.

[20] Mr. Picola says that he was also a First Line Manager Assistant (FLMA) and assigned work to the Applicant. The Applicant was slow and inaccurate in his work. Mr. Picola had to check the Applicant's work quite a bit, and so he gave him small and simple jobs to do.

[21] Mr. Lagambina was described by some of the witnesses as “bossy”. The Applicant’s nine co-workers testified that the workforce at OPG is diverse. Employees have various ethnic origins and ages. Also, OPG’s permanent employees are older with many years of service and are due to retire. The external workers tended to be younger.

[22] The Applicant’s non-co-worker witness stated that the Applicant was stressed out because of Mr. Lagambina’s treatment of him. As well, he said that the Applicant’s disposition changed during 2003-2004.

[23] The Ombudsperson, Ms. Mundy McLaughlin, was interviewed by the Commission and her report indicated that the Applicant filed a human rights complaint with the OPG Ombudsperson after his temporary contract had ended and he was no longer an employee of the OPG. Ms. McLaughlin investigated the Applicant’s allegations of harassment and discrimination. The investigation included interviews with Mr. Lagambina, the witnesses that the Applicant provided to the Commission, as well as union representatives. Not one of the witnesses supported any of the Applicant’s allegations. The Ombudsperson’s report found that there was a total absence of abusive behaviour by Mr. Lagambina. The report also states that the Applicant’s behaviour changed significantly in early 2003. He became withdrawn, nervous and distressed. This change coincided with some family problems the Applicant was having.

Disability

[24] The Applicant alleged that his employment was terminated because he was off on sick leave from March 4, 2004 due to stress at work. The Respondent said that the Applicant's employment was not terminated because of his disability. Rather, his temporary employment ended in accordance with the specific terms of the Collective Agreement with the PWU that governs temporary employees. Temporary employees with the OPG are employed for a maximum of 12 months. In limited cases, employment can be extended for another three months, for a total of 15 months. Once the three-month extension elapses, employees are made either regular employees or their employment ends.

[25] Two Medical Absence Reports (MAR) dated March 8, 2004 indicated that the Applicant suffered from anxiety and depression. The first MAR, from the Applicant's physician, Dr. David Wong, indicated that the Applicant's diagnosis was "anxiety and depression" and that the Applicant "was presently unfit for any type of work." The second MAR came from a specialist, Dr. Dennis Martin, whose diagnosis of the Applicant was that he had an "anxiety state with depression entirely work related" and that the Applicant was "presently unfit for any type of work."

[26] The Commission interviewed Dr. Wong and his interview confirmed the MAR dated March 8, 2004 that the Applicant was diagnosed with anxiety and depression. Dr. Wong saw the Applicant in October 2004 who indicated that he was better. This was the Applicant's last visit with Dr. Wong.

[27] Dr. Dennis Martin was also interviewed and he said that the Applicant's medical file was given to him when he retired in May 2006. He did not recall seeing the Applicant before his retirement and, because the Applicant had other problems, he also could not say that the Applicant's anxiety disorder was the sole result of his new boss's harassment. He recalled that the Applicant was later offered a job after he left work at OPG but did not accept it because it was too far to commute.

Employment Benefits

[28] The Commission noted that the Applicant was a member of PWU and free to speak to his union representative at any time with respect to concerns or questions he had about the OPG health benefit plan. The Applicant did not discuss the benefits issue with either Mr. Lau or Mr. Finnie.

[29] The Applicant never approached anyone within OPG Human Resources with any questions or concerns about the health benefit plan. As well, there is an orientation session at the time employees are hired and their benefits are explained to them. Temporary employees do get sick leave and vacation and they can purchase additional benefits at a cost, but this is rarely requested.

Post Complaint Issue: Denied Security Clearance to Work for External Contractor

[30] The Applicant says that sometime in 2005, he was denied a security clearance even though he had one previously. This meant he could not work for an external contractor at OPG. Once an

employee's employment is finished with OPG, the security clearance/pass is revoked because the employee is not active.

[31] Unsatisfied with the Ombudsperson's report, the Applicant wrote to OPG chairman Mr. Jake Epp expressing his concerns and threatening to take various steps if the matter was not resolved. The Applicant also alleged that OPG had an unsafe work environment in Pickering. The Applicant called his colleagues to obtain information about Mr. Lagambina and OPG. One or more of his colleagues complained to Mr. Lagambina about the Applicant's calls.

[32] The Respondent told the Commission that Mr. Scott Martin, Director-Corporate Safety, investigated the matter and found no safety violations. The witness that the Applicant named who worked for the external contractor did not support the Applicant's allegations and attested that OPG's safety standards and practices are anything but relaxed. Given these incidents, OPG did not clear the Applicant. It was not clear whether the Applicant was offered a job by an external contractor who had a contract with OPG. Based on these incidents, the Applicant was not given a security clearance by OPG.

Findings of the Commission

[33] The Commission found that the Applicant was hired as a temporary Senior Draftsperson-Electrical to assist with Electrical Design for a specific period, with an end date which was extended once. The Applicant's contract was not extended further when the work was completed and four

temporaries who had not been doing design work were extended for an additional three months to complete the work.

[34] Although the Applicant provided medical reports from his family doctor and a specialist that he was diagnosed with an anxiety disorder on March 8, 2004, the medical evidence did not link his alleged disability of anxiety disorder solely to the alleged stress at work.

[35] The Applicant alleges that he was harassed on the job to the point of illness by his First Line Manager, Mr. Lenny Lagambina, because of his age, national and ethnic origin and disability. He also alleges that his employment was terminated because of his disability. The testimonial and documentary evidence, however, does not support these allegations.

[36] The Applicant's allegation that his supervisor, Mr. Lagambina, harassed him to the point of illness-anxiety disorder is not supported by the witnesses. The medical evidence indicates that his diagnosis of anxiety disorder was not solely linked to the alleged stress at work and that he was also treated for other problems.

[37] The Applicant could not file a grievance at OPG because he was a temporary employee, and he declined union intervention to resolve the alleged problem with his manager. The parties did not participate in mediation.

[38] The Applicant requests his full benefits and salary until retirement age along with full medical costs and compensation for pain and suffering totalling over \$1,000,000.00, as he is disabled and unable to work. The Respondent offered \$3000.

[39] The public interest is engaged in this complaint to the extent that it deals with the employer's obligation to provide a harassment-free work environment.

ISSUES

[40] The following issues are raised by this application:

- 1) What is the appropriate standard of review?
- 2) Did the Commission commit a reviewable error?
- 3) Should the Court disregard evidence presented by the Applicant that was not part of the record before the Commission?

STATUTORY PROVISIONS

[41] The following provision of the CHRA is applicable in this proceeding:

44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

...

(3) On receipt of a report

44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

...

(3) Sur réception du rapport

referred to in subsection (1), the Commission	d'enquête prévu au paragraphe (1), la Commission :
...	...
(b) shall dismiss the complaint to which the report relates if it is satisfied	b) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).	(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41(c) à (e).

STANDARD OF REVIEW

[42] The appropriate standard of review with respect to a Commission's decision has been reasonableness *simpliciter*: *Corbiere v. Wikwemikong Tribal Police Services Board*, [2007] F.C.A. 97; *Garvey v. Meyers Transport Ltd.*, [2005] F.C.J. No. 1684 (F.C.A.) and *Lindo v. Royal Bank of Canada*, [2000] F.C.J. No. 1101 (F.C.T.D.) (*Lindo*).

[43] In *Dunsmuir v. New Brunswick* 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of

review” (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[44] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[45] Thus, in light of the Supreme Court of Canada’s decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to this issue to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at paragraph 47). Put another way, the Court should only intervene if the Decision 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.”

[46] Procedural fairness issues are reviewed on a standard of correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

ARGUMENTS

The Applicant

[47] The Applicant has provided the court with a Memorandum of Fact and Law. However, he has presented no legal arguments in this memorandum, which is merely a recitation of the facts in his affidavit.

The Respondent

Reviewable Error

[48] The Respondent submits that the Commission complied with the rules of procedural fairness. The Commission appointed an investigator who interviewed people identified by the Respondent and the Applicant. The investigator prepared a report and allowed both parties to review and make submissions. Before coming to its final conclusion, the Commission reviewed those submissions.

[49] The Respondent states that by providing the investigators' report to the Applicant, by allowing him to respond to it, and by considering that response before reaching its Decision, the Commission complied with its duty of fairness when dismissing the complaint: *Slattery v. Canada (Canadian Human Rights Commission)*, [1996] F.C.J. No. 385 (F.C.A.).

[50] The Respondent submits that a great deal of deference is usually given to investigators and to a decision of the Commission. Only where unreasonable omissions are made is judicial review warranted. The Applicant has not pointed to any unreasonable omissions made by the investigator or the Commission: *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] F.C.J. No. 181 (F.D.T.D.), affirmed [1996] F.C.J. No. 385 (F.C.A.).

[51] The Respondent goes on to say that the Applicant's request that a hearing be held so that his identified witnesses could testify was before the Commission when it made its Decision. Further inquiry was not warranted and it is reasonable to conclude that the Commission took that concern into consideration and dismissed it: *Lindo*.

[52] The Respondent also submits that the Commission is entitled and obliged to subject the evidence to a hard look before deciding whether, in the circumstances of the case, a Tribunal hearing is warranted. The CHRA does not provide for an automatic right to a hearing: *Lindo*; *Morisset v. Canada (Canadian Human Rights Commission)*, [1991] F.C.J. No. 946 (F.C.T.D.); *Williams v. First Air*, [1998] F.C.J. No. 1844 (F.C.T.D.); *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1986] F.C.J. No. 718 (F.C.A.), affirmed by SCC, [1989] S.C.J. No. 103 and *Larsh v. Canada (Attorney General)*, [1999] F.C.J. No. 508 (F.C.T.D.).

[53] The Respondent submits that the Commission exercised its discretion reasonably and that this application should be dismissed.

Disregard of Evidence

[54] The Respondent submits that a judicial review of a tribunal's decision is confined to reviewing a matter on the basis of the material that was before the tribunal when it made its decision. The post-decision affidavits submitted by the Applicant should not be referred to in this application. The Certificate of the Canadian Human Rights Commission is an accurate record of what was before the Commission: *Mianowski v. Ontario (Human Rights Commission)*, [2003] O.J. No. 3790 (Ont. Div. Ct.).

[55] The Respondent concludes by requesting that this application be dismissed with costs.

ANALYSIS

[56] The Applicant has represented himself throughout in this matter and appeared at the judicial review hearing in Toronto on December 16, 2008.

[57] Unfortunately, the Applicant has misconceived the nature of a judicial review application. He disagrees with the Commission's Decision and would like the Court to investigate the whole matter *de novo* and reach a conclusion favourable to him.

[58] I have closely reviewed the Commission's Decision and the evidence and reasons in the Investigator's report. I have also carefully reviewed the Applicant's written submissions (such as

they are) and questioned him in open Court regarding his dissatisfaction with the Decision and the basis upon which he would like the Court to intervene and grant him relief.

[59] The Applicant says that the Commission only represented the interests of OPG and completely disregarded all the important facts in his case. He also says that his witnesses and their testimonies were ignored as well as the medical evidence. He says that the most important witnesses were not questioned and the testimonies of the one's who were "were twisted." He says that all of the witnesses were intimidated by OPG management to prevent them from telling the truth. They were afraid they might lose their jobs.

[60] Notwithstanding the Applicant's dissatisfaction with the whole process, the record shows that his complaint was investigated, his witnesses were interviewed, medical and other evidence was reviewed, and the Applicant's own comments were taken into account. There is no evidence before the Court that witnesses were intimidated. In fact the Applicant has filed additional affidavits from two witnesses as part of this application. Neither witness provides evidence of intimidation and neither witness provides evidence that undermines the Commission's Decision.

[61] The Applicant has presented nothing to the Court (either in his written or oral submissions) to suggest that the Decision is unreasonable or that the Court should intervene for any reason other than his own unproven assertions. The Applicant's complaints have been investigated, his witnesses have been interviewed and he has been given a full opportunity to state his case and comment upon the report. Naturally, he does not like the Decision because it deprives him of benefits to which he

believes he is entitled. However, he has presented no basis upon which the Court can intervene or find a reviewable error in the Decision.

[62] In *Lindo* at paragraph 11, Justice Gibson recited the procedure required for a fair hearing of a complaint before the Commission:

Based upon the decisions of this Court in *Slattery v. Canadian Human Rights Commission* and *Miller v. Canadian Human Rights Commission et al.*, the content of the duty of fairness required of the Commission in respect of decisions such as that here under review is reasonably limited. The investigation conducted on behalf of the Commission must be fair, mindful of the interests of the parties involved, and thorough. It must reflect neutrality. The investigative report must be provided to the parties before it is transmitted to the Commission and the parties must be given a reasonable opportunity to comment in writing on the investigative report. Any comments submitted must be transmitted to the Commission for its consideration in conjunction with the investigative report itself.

[63] The evidence before me is that all of this was done. The Applicant was given the opportunity to comment upon and criticize the report that went to the Commission. The Applicant does not like the result, but that does not make the Decision unreasonable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application is dismissed with costs to the Respondent, Ontario Power Generation.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-717-07

STYLE OF CAUSE: **KRISTOFER DRAGUNOWSKI and**
ONTARIO POWER GENERATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: 16-DEC-2008

REASONS FOR : RUSSELL J.

DATED: February 6, 2009

APPEARANCES:

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MELANIE D. MCNAUGHT FOR THE RESPONDENT

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