Federal Court		Cour fédérale

Date: 20100201

Docket: T-463-08

Citation: 2010 FC 110

Ottawa, Ontario, February 1, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

YURI BOIKO

Applicant

and

NATIONAL RESEARCH COUNCIL

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] This is an application for judicial review of a decision by the Canadian Human Rights Commission (Commission) dated February 26, 2008 that the applicant's complaint is beyond the jurisdiction of the of the Commission pursuant to paragraph 41(1)(c) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act) and barred by the 1-year limitation period pursuant to paragraph 41(1)(e) of the Act.

FACTS

Background

Employment

[2] The applicant was a scientist employed by the respondent, the National Research Council of Canada (NRC).

[3] On November 16, 2001 the applicant accepted a probationary offer of employment from the NRC as an Associate Research Officer in the Radiation Standards and Optics section, Optics Group. The applicant's employment was for a period of three years, terminating on November 24, 2004. Dr. Chander Grover was the applicant's supervisor. Dr. Grover conducted four performance reviews during the applicant's period of employment.

[4] The first performance review found the applicant's performance during the first four months of his employment to be "satisfactory". The remaining three reviews concluded that the applicant's performance was "unsatisfactory". On July 19, 2004, three months before the end of the probationary period, the applicant was terminated for "unsatisfactory" performance.

The complaint dated July 31, 2006

[5] The applicant alleges that Dr. Grover harassed him on the basis of his Slavic ethnic origin, his Russian nationality, and his status as an unmarried man. On July 31, 2006 the applicant complained to the Commission that the NRC retaliated against him for filing human rights

complaints and grievances against Dr. Grover and the NRC by failing to investigate his grievances against Dr. Grover.

The applicant's history of filing complaints and grievances from his employment at the NRC

[6] Between September 30, 2003 and August 3, 2004 the applicant filed 12 workplace grievances against the NRC. The Applicant has also filed three complaints to the Canadian Human Rights Commission, two against the NRC and one against his superior, Dr. Chander Grover.

Four applications for judicial review before the Federal Court by Mr. Boiko, three from decisions of the Commission, one from a decision of the NRC

[7] The applicant has also filed four applications for judicial review before the Federal Court, including one which was recently decided on December 18, 2009 by Madam Justice Danièle Tremblay-Lamer in *Boiko v. Grover*, 2009 FC 1291, dismissing the judicial review of a decision by the Commission which dismissed a complaint of harassment by the applicant against his supervisor, Dr. Grover.

[8] The applicant also commenced an action in the Federal Court against the NRC which was struck out on January 14, 2008.

First application T-136-08 (decided by the Federal Court on December 18, 2008)

[9] This application to review a decision of the Commission with respect to a complaint was filed on October 22, 2004 against the applicant's supervisor, Dr. Grover. This was a decision by the

Commission which declined to refer to the Canadian Human Rights Tribunal a complaint for harassment against Dr. Grover on the basis of national or ethnic and marital status. This application was heard on December 7, 2009 by Madam Justice Danièle Tremblay-Lamer in *Boiko*, *supra*, who then rendered her judgment on December 18, 2009. In that case the Commission declined to investigate allegations of harassment based on marital status, but investigated allegations based on race or ethnic origin. Justice Tremblay-Lamer held at paragraph 23 that there was no need to investigate the allegations of harassment based on marital status:

> ¶23 I agree with the Respondent's position on the need for an investigation. Investigating the Applicant's allegations on this point would not have helped him, since the Commission did not actually doubt that the facts that he described took place. The Commission concluded that the Respondent's words and actions had nothing to do with the Applicant's marital status and that they did not amount to harassment. In my opinion, this conclusion is not unreasonable.

Justice Tremblay-Lamer found the applicant's arguments "unpersuasive", "lack evidence" and to be "logically flawed": *Boiko*, *supra*, at paragraph 32. Justice Tremblay-Lamer concluded at paragraph 37 that the applicant could not adduce sufficient evidence to substantiate his claim of discrimination or harassment:

> ¶37 But, unfortunately the Applicant did not submit enough evidence to persuade the Commission that he may have been a victim of discrimination or harassment, so that a referral to the Canadian Human Rights Tribunal was warranted. Further, he also failed to convince this Court that the decision of the Commission was unreasonable.

<u>Second application T-137-08</u>

[10] This application is for review of the Commission's decision dismissing a complaint filed August 13, 2004, against the respondent, the NRC, on the same grounds as the complaint against Dr. Grover. This application has been dismissed by the Court on procedural grounds.

<u>Third application T-463-08 (the application at bar)</u>

[11] This application is for review of a second complaint against the NRC, filed July 31, 2006, which the Commission held was beyond its jurisdiction and time-barred pursuant to paragraphs 41(1)(c) and 41(1)(e) of the Act. This is the application at bar.

<u>Fourth application T-735-08</u>

[12] This application, filed May 8, 2008, is for review of the NRC's decision to terminate Dr. Boiko's employment. A hearing date for this application has been requisitioned but not yet set by the Court.

<u>Dr. Boiko's Human Rights complaint against the NRC which is the subject of this application</u>

[13] On July 31, 2006 Dr. Boiko filed a complaint which begins:

> This complaint is about *(sic)* retaliatory nature of the dismissal of my appeal to National Research Council's (NRC) administration in June 2005 and failure to resume the internal investigation in November 2005 – June 2006.

[14] The narrative of the complaint continues for three pages, single-spaced on 14" long paper. It is difficult to comprehend. However, the Commission Report dated November 28, 2007 (the

Report), which constitute the reasons for the decision in this case, accurately and generously summarize the factual basis of the complaint at paragraph 20 of the Report, which reads as follows:

> ¶20 In this complaint the complainant alleges that the following retaliatory acts took place:
>
> 1. November 3, 2005 – the respondent decided not to proceed with one of his grievances;
>
> 2. June 25, 2005 – the respondent refused the complainant's request to proceed with an internal investigation;
>
> 3. July 2004 – an external investigator hired by the respondent "intimidated" the complainant at a "mediation" session.

[15] On the third page of the complaint narrative the applicant states in the last paragraph:

> <u>This retaliation is motivated in part by the fact of my filing the complaint with the Commission as well as at least in part my national origin.</u>
>
> (Underlining added for emphasis)

[16] The applicant sought the following remedy:

> 1. letters of apology from the participants of the retaliation;
>
> 2. dismissing the investigator, Phil Chodos, from the investigation;
>
> 3. appointing a new investigator;
>
> 4. completing it in a timely manner;
>
> 5. temporary reinstatement in the position until the completion of the investigation.

Decision under review

[17] The Commission set out the following grounds pursuant to paragraphs 41(1)(c) and 41(1)(e) of the Act for not dealing with the applicant's complaint:

> 1. the complaint is based on acts which occurred more than one year before the complaint was filed; and
>
> 2. the allegations made in the complaint are beyond the Commission's jurisdiction.

See Commission letter, dated February 26, 2008 and Report dated November 28, 2007.

[18] The Commission defined retaliation at paragraphs 15 to 19 of the Report. Its analysis is summarized as follows:

> i. retaliation is a form of discrimination prohibited under section 3 of the Canadian Human Rights Act;
>
> ii. an action by the NRC that has adverse or prejudicial outcome for Dr. Boiko may be considered a form of retaliation and this could include intimidation or discrimination against Dr. Boiko for filing a human rights complaint; and
>
> iii. Dr. Boiko must have reasonable grounds for believing that the NRC has engaged in retaliatory acts and the threshold for reasonable grounds while low, must go beyond speculation or assertion. Allegations which are clearly lacking any reasonable basis will not be entertained by the Commission.

~~[19]~~ The Commission identified three retaliatory acts which the applicant alleged, and set them out at paragraph 20 of the Report (which I repeat for ease of reference):

> ¶20 In this complaint the complainant alleges that the following retaliatory acts took place:

> i. November 3, 2005 – the respondent decided not to proceed with one of his grievances;
>
> ii. June 25, 2005 – the respondent refused the complainant's request to proceed with an internal investigation;
>
> iii. July 2004 – an external investigator hired by the respondent "intimidated" the complainant at a "mediation" session.

[20] With respect to the first retaliatory act, the Commission held that the NRC's November 3, 2005 decision not to proceed with the grievance complaint against Dr. Grover was not retaliatory in nature based on the following reasons set out by the Commission at paragraph 22 of the Report:

> ¶22 The complainant lacks reasonable grounds for alleging that the respondent's decision on November 3, 2005, not to proceed with his grievance was retaliatory in nature, for the following reasons:
>
> i. The complainant filed 12 grievances (see chart attached as Appendix "A" to the respondent's submissions);
>
> ii. The respondent made separate decisions regarding how to proceed with respect to each individual grievance;
>
> iii. With respect to the grievance in question, the respondent decided not to proceed because the subject of the grievance is being addressed by the Commission in another complaint filed by the complainant.
>
> iv. There is no indication that the complainant will be precluded from proceeding with the grievance at the conclusion of the Commission's process.

[21] The evidence before the Court established that the NRC wrote to Dr. Grover on November 2, 2005 to state that upon his scheduled return to the workplace on November 1, 2005, the investigation of Dr. Boiko's complaint against Dr. Grover will resume and the investigator will contact "you directly for your involvement". The other evidence is that Dr. Grover only returned to

the workplace for 30 non-consecutive days over the course of a three month period. Dr. Grover had been on sick leave and the NRC could not investigate the complaints against him when he was on sick leave and away from the office. Accordingly, the evidence was that the NRC did not fail to proceed with the investigation on November 3, 2005, which is the date that Dr. Grover returned to the workplace, not for reasons of retaliation against the applicant, but because Dr. Grover was never in the office available for the investigator to schedule meetings with him. Accordingly, there was no evidentiary basis for a reasonable complaint of retaliation arising from the November 3, 2005 return to the workplace by Dr. Grover and the NRC's failure to resume the investigation of the complaint by Dr. Boiko against Dr. Grover.

[22] The second alleged retaliatory act identified by the Report in paragraph 20 is "June 25, 2005 – the respondent refused the complainant's request to proceed with an internal investigation". This allegation arises from a letter dated June 28, 2005 to Dr. Boiko from the NRC stating that his complaint against Dr. Grover remains active and that the investigator will complete the investigation upon Dr. Grover's return to the workplace. Accordingly, this alleged retaliatory act is the same as the retaliatory act described above and again the evidence discloses no reasonable grounds for concluding that this could be considered a retaliatory act. The NRC in fact intended to proceed with the investigation but Dr. Grover only returned sporadically for a short time to his office. On the evidence, this was the reason that the internal investigation did not proceed. However, the Commission dismissed this aspect of the complaint because the complaint form was filed more than a year after the June 28, 2005 "refusal" to proceed with an internal investigation. In fact, the Court will not need to decide whether the Commission directly found this aspect of the complaint to

be time barred by the one year limitation period due to the complaint actually being dated July 31, 2006 because the underlying facts demonstrate that there was no reasonable basis for concluding from the June 28, 2005 letter that the NRC refused to proceed with the internal investigation. Rather, the letter stated that the internal investigation would resume as soon as Dr. Grover returned to the office.

[23] The third alleged retaliatory act in the complaint is entitled "July 2004 – An external investigator hired by the Respondent" "intimidated" the complainant at a "mediation" session". This incident purportedly occurred before any human rights complaints were filed by Dr. Boiko. The Commission found that this incident happened well past the one-year limitation period. The complaint was filed on July 31, 2006 which is two years after the alleged intimidation without any explanation by Dr. Boiko for the delay.

LEGISLATION

[24] Subsection 14.1 of the *Canadian Human Rights Act* prohibits a person against who a human rights complaint has been filed to retaliate against the individual who filed the complaint:

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.

[25] Section 40 of the Act requires a complainant to have reasonable grounds for believing that a person has engaged in discriminatory conduct:

40. (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.	40. (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

[26] Paragraph 41(1)(e) of the Act allows the Commission to decline to deal with human rights complaints pursuant to certain grounds:

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 … (*c*) the complaint is beyond the jurisdiction of the Commission; … (*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.	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 : … *c*) la plainte n'est pas de sa compétence; … *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.

[27] Subsection 42(1) of the Act requires the Commission to set out its reasons for not dealing with a human rights complaint:

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.

ISSUE

[28] The main issue before the Court is whether the Commission reasonably rendered its decision with respect to the following:

i. Did the NRC retaliate against Dr. Boiko when on November 3, 2005 the NRC decided not to proceed with one of his grievances?

ii. Did the NRC retaliate against Dr. Boiko when on June 25, 2005 the NRC refused Dr. Boiko's request to proceed with an internal investigation?

iii. Did the NRC retaliate against Dr. Boiko when in July, 2004 an external investigator hired by the NRC "intimidated" the complainant at a "mediation" session?

STANDARD OF REVIEW

[29] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[30] The standard of review of a decision pursuant to paragraph 41(1)(c) of the *Canadian Human Right Act* where the Commission finds that there is no basis for the underlying complaint is reasonableness: *Hatjes v. Canada (Attorney General)*, 2008 FC 380, per Justice Snider at para. 21.

[31] In reviewing the Commission's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "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; *Khosa*, *supra*, at para. 59.

ANALYSIS

[32] At the outset, the Court has before it the December 18, 2009 Reasons for Judgment and Judgment of Madam Justice Tremblay-Lamer in *Boiko*, *supra*. This case was heard on December 7, 2009. Madam Justice Tremblay-Lamer held:

1. Dr. Boiko, following his firing, filed a complaint against the NRC with the Commission. (That complaint was not before Justice Tremblay-Lamer or before myself.);
2. On August 22, 2004, Dr. Boiko filed a complaint against his supervisor, Dr. Grover, alleging harassment. The Commission dismissed the complaint and concluded at paragraph 13, that the evidence was "insufficient" to demonstrate racial discrimination. As discussed above, Justice Tremblay-Lamer found at paragraph 32 that the applicant's arguments were "not persuasive; evidence to support them is lacking; and there logic is flawed". Justice Tremblay-Lamer concluded at paragraph 37:

> ¶37 … the applicant did not submit enough evidence to persuade the Commission that he may have been a victim of discrimination or

> harassment, so that a referral to the Canadian Human Rights Tribunal was warranted. Further, he has also failed to convince this Court that the decision of the Commission was unreasonable.

[33] The issues before this Court in this application for judicial review arise from another complaint by Dr. Boiko where it was alleged that the NRC took retaliatory action against Dr. Boiko for filing a complaint against the NRC. Dr. Boiko filed a complaint against the NRC on August 13, 2004 and the complaint against Dr. Grover on October 22, 2004. The complaints alleged that the NRC, through Dr. Grover, discriminated against Dr. Boiko.

[34] The test for refusing to deal with a human rights complaint was set out by Justice Rothstein (as he then was) in *Canada Post Corp. v. Canada (Canadian Human Rights Commission)* (1997), 130 F.T.R. 241, at paragraph 3:

> ¶3 A decision by the Commission under section 41 is normally made at an early stage before any investigation is carried out. Because a decision not to deal with the complaint will summarily end a matter before the complaint is investigated, the Commission should only decide not to deal with a complaint at this stage in plain and obvious cases. The timely processing of complaints also supports such an approach. A lengthy analysis of a complaint at this stage is, at least to some extent, duplicative of the investigation yet to be carried out. A time consuming analysis will, where the Commission decides to deal with the complaint, delay the processing of the complaint. *If it is not plain and obvious to the Commission that the complaint falls under one of the grounds for not dealing with it under section 41, the Commission should, with dispatch, proceed to deal with it.*
>
> [Emphasis added]

[35] Under section 14.1 of the Act, there are two ways to establish a retaliation complaint. The first is where there is evidence that the respondent intended the act to serve as retaliation; and the

second is where the applicant reasonably perceives the act to be retaliation for the human rights complaint: *Wong v. Royal Bank of Canada*, [2001] C.H.R.D. No. 11 at paragraph 219. For the reasons that follow, the Court concludes that it is plain and obvious to the Court that the Commission reasonably found that the facts did not substantiate a retaliation complaint.

Issue No.1: Did the NRC retaliate against Dr. Boiko when on November 3, 2005 the NRC decided not to proceed with one of his grievances?

[36] The evidence establishes that the NRC did not make this decision. It intended to resume the investigation of the grievance when Dr. Grover returned to his office from sick leave. In fact Dr. Grover did return but so sporadically that the investigation was not able to proceed. The applicant's allegations of retaliation consist of outright speculation which cannot form the basis for a human rights complaint: *Singaravelu v. Canada (Attorney General)*, 2009 FC 1103 per Justice Harrington at paragraph 23. It is plain and obvious to the Court that the Commission reasonably found that the facts did not substantiate a retaliation complaint. There is no factual basis for this allegation and there is no basis for supporting a retaliation complaint on any reasonable basis that would meet the low threshold for accepting the complaint. Accordingly, the decision of the Commission that the complaint is outside its jurisdiction because it does not meet the low threshold to establish a reasonable ground for retaliation was reasonably open to the Commission.

Issue No.2: **Did the NRC retaliate against Dr. Boiko when on June 25, 2005 the NRC refused Dr. Boiko's request to proceed with an internal investigation?**

[37] Dr. Boiko states that on June 25, 2005 the NRC refused to proceed with an internal investigation about Dr. Grover's conduct toward Dr. Boiko. In fact the June 25, 2005 letter (which is in fact dated June 28, 2005) stated that the internal investigation will resume when Dr. Grover returns to the office. The applicant's allegations rest entirely on speculation attributing *mala fides* to the NRC. Again these facts demonstrate that it was plain and obvious that there was no reasonable basis for the Commission deciding that the low threshold required for a retaliation complaint has been met. This decision was reasonably open to the Commission.

Issue No.3: **Did the NRC retaliate against Dr. Boiko when in July, 2004 an external investigator hired by the NRC "intimidated" the complainant at a "mediation" session?**

[38] Dr. Boiko states that in July 2004 an external investigator hired by the NRC "intimidated" Dr. Boiko at a "mediation" session. At first, the Commission decided that this complaint is outside the one year limitation period. Dr. Boiko's complaint was filed on July 31, 2006 which is two years after this alleged incident. Moreover, on the facts, this alleged incident could not have been retaliation by the NRC against Dr. Boiko for filing the complaint against the NRC because Dr. Boiko only filed the complaint against the NRC on August 13, 2004, one month after this alleged intimidation. Again it is plain and obvious to the Court that the Commission reasonably concluded that the facts did not substantiate a retaliation complaint.

CONCLUSION

[39] The Court is sympathetic to Dr. Boiko. He is probably a scientific genius, but as a self-represented litigant, he provided the Court with a record that was difficult to comprehend and at times incomplete. In fact, Dr. Boiko continually referred to the National Research Council Motion Record as a source of relevant documentation for his case. Moreover, the Court found that Dr. Boiko did not have reasonable grounds to allege that the NRC acted in a retaliatory and therefore discriminatory manner against Dr. Boiko because he filed a complaint against the National Research Council. It was plain and obvious that the facts could not substantiate the retaliation complaint which the Commission reasonably chose not to deal with. Dr. Boiko's application for judicial review of that decision must therefore be dismissed.

COSTS

[40] The National Research Council has requested legal costs in accordance with the Tariff including costs awarded to the NRC on the applicant's motion to compel answers on cross-examination. This Order by the Prothonotary was dated October 23, 2008. The NRC has submitted a detailed Bill of Costs which is in correct form subject to some adjustments since the hearing lasted 3.5 hours, rather than 7 hours as scheduled. The applicant has stated that he is unemployed and has returned as a student with a student loan and is not in a position to pay any legal costs. In the application before Justice Tremblay-Lamer, legal costs were awarded at $3,000 against Dr. Boiko payable forthwith.

[41] Dr. Boiko also submitted that he requested that these applications before the Court be consolidated so that he would not be exposed to more than one set of legal costs. The Court will offer no comment on the wisdom of the decision refusing to consolidate. However, the National Research Council clearly did not support consolidation which means that the National Research Council is going to be exposed to a multiplicity of proceedings and the compounding the legal costs which the NRC will have to bear to defend itself against Dr. Boiko.

[42] The total fees and disbursements submitted by the NRC total $7,208.41 which counsel for the respondent quickly pointed out includes 3.5 extra hours for the hearing. This equates to $1,137.50. Accordingly, the total fees and disbursements submitted by the NRC is $6,070.91. In view of Dr. Boiko's unemployment status and in view of the fact that Dr. Boiko asked that these matters before the Court be consolidated so that he would not be exposed to a number of legal costs, I will fix the costs, as Madam Justice Tremblay-Lamer did, in the application before her last month, at $3,000 payable forthwith by Dr. Boiko to the National Research Council.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed with costs in the amount of $3,000 payable forthwith.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-463-08
STYLE OF CAUSE:	YURI BOIKO v. NATIONAL RESEARCH COUNCIL
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 18, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
DATED:	February 1, 2010

APPEARANCES:

Mr. Yuri Boiko	FOR THE APPLICANT (SELF-REPRESENTED)
Ms. Laura Stewart Ms. Stephanie Pearce	FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A	FOR THE APPLICANT (SELF-REPRESENTED)
Gowling Lafleur Henderson LLP Ottawa, Ontario	FOR THE RESPONDENT