

Federal Court



Cour fédérale

Date: 20100422

Docket: T-1586-09

Citation: 2010 FC 436

Ottawa, Ontario, April 22, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

PAUL E. RICHARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision rendered by the Canadian Human Rights Commission (the Commission), dated August 19, 2009, in which the Commission decided not to deal with the applicant's complaint of 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 Act).

Factual Background

[2] Paul E. Richard (the Applicant), initially filed his complaint with the Commission on November 21, 2006. His complaint is based on alleged facts that took place from 1978 to 1985. He

claims that he was subject to discrimination on the basis of sexual orientation while in the employ of Treasury Board. On June 21, 2007, the Commission informed the Applicant that his complaint would not be heard as it fell outside of the one- year limitation period prescribed under paragraph 41(1)(e) of the Act. That refusal was reviewed by this Court. Judicial review was granted on the basis of insufficiency of reasons and Justice Martineau issued the following order and directions on June 23, 2008 (*Richard v. Canada (Treasury Board)*, 2008 FC 789, 330 F.T.R. 236)

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.

[3] Following that decision, both the Applicant and Treasury Board made further submissions in respect to the one-year time limit and the Commission's discretionary power to extend it. In a decision dated August 19, 2009, the Commission decided not to deal with the complaint pursuant to paragraph 41(1)(e) of the Act because Treasury Board had demonstrated that the delay would

seriously prejudice its ability to respond to the complaint. That decision is now the subject of the present judicial review.

Impugned Decision

[4] As previously noted, the Commission decided not to deal with the complaint because it concluded that Treasury Board had demonstrated that the more than 20 year time lapse since the acts took place would seriously prejudice its ability to respond to the complaint.

[5] The reasons for the decision are detailed in both the *Record of Decision under Sections 40/41* and the *Section 40/41 Report* (Applicant's Record, pages 24 to 33). In reaching its decision, the Commission considered a number of factors.

[6] With regard to the reasons for the delay, relying on a psychological assessment provided by the Applicant, the Commission accepted that he had established that there was a reasonable basis for determining that he was unable to pursue the complaint for reasons related to his health. As for possible prejudice to Treasury Board, the Commission noted the submission that Treasury Board would, in all probability, be unable to locate relevant documentation as in accordance with the "Retention Guidelines for Common Administrative Records of the Government of Canada" (December 11, 2006, Respondent's record, page 70), it would have been destroyed.

[7] The complaint refers to performance evaluations, job descriptions and records of reorganizations and staffing actions which would not have been retained as Treasury Board was not aware of the complaint any earlier.

[8] Treasury Board also submitted that it would be prejudiced due to the likelihood that the majority of the potential witnesses mentioned in the complaint will have moved, retired or even passed away at this point. Treasury Board confirmed that a search of the Government Electronic Directory Services (GEDS) showed that none of these individuals are listed as being employed with the federal public service. Treasury Board further submitted that it is improbable that the witnesses, even if they could be located, could provide credible evidence regarding events that took place from 1978 to 1985.

[9] The Commission notes that the Applicant responded to the argument regarding the witnesses and claimed he easily located five of the witness using internet searches. However, Treasury Board replied that there was no confirmation that the named individuals were indeed those named in the complaint and that it was still highly unlikely that they could accurately recall events that occurred 21 to 28 years ago. The Commission also refers to a decision, submitted by Treasury Board, where an 18 year delay was found to be unacceptable (*Grover v. National Research Council of Canada*, 2009 CHRT 1, [2009] C.H.R.D. No. 1 at paragraphs 86, 87, 94 and 96 (QL)).

[10] Based on these factors, the Commission decided that Treasury Board had demonstrated that the delay in signing the complaint seriously prejudiced its ability to respond and, accordingly, the Commission would not deal with the complaint.

Question at Issue

[11] Was the decision rendered by the Commission, on August 19, 2009, reasonable?

Relevant Legislation

[12] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

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

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

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

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 :

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

c) la plainte n'est pas de sa compétence;

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

(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.

Analysis

Preliminary Issue

[13] The Respondent raises a preliminary issue with regard to medical information contained at Appendix E of the Applicant's affidavit. These documents are not part of the Tribunal Record as such. They are referred to in Dr. Reesor's psychological report dated November 7, 2008, which report was included in the Tribunal's Record (Certificate under Rule 318). Dr. Reesor provided extensive details of these documents, analyzed and based his opinion on them.

[14] I dealt with the issue of these documents in my order of April 16, 2010 on a motion by the applicant to file a supplementary record under Rule 312.

Standard of Review

[15] The Supreme Court of Canada has held that "an exhaustive review is not required in every case to determine the proper standard of review" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 57). It is not necessary to conduct a complete standard of review analysis where the jurisprudence has already determined the standard in a satisfactory manner (*Dunsmuir* at paragraph 62).

[16] The jurisprudence of this Court clearly shows that the Commission's decisions under paragraph 41(1)(e) of the Act are held to the standard of reasonableness (*Richard* at paragraph 10; *Bredin v. Canada (Attorney General)*, 2008 FCA 360, 383 N.R. 192 at paragraph 16). Thus, the Court must look "into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. (...) But it is also concerned 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).

Was the decision rendered by the Commission, on August 19, 2009, reasonable?

[17] The Applicant urges that the Commission's decision is unreasonable as it is based on speculation and assumptions and Treasury Board failed to adduce specific evidence to demonstrate the prejudice that it would suffer. He argues that although there is a policy pertaining to the destruction of documents, there is no indication that there are any documents that existed at the time of the alleged facts that would be relevant to Treasury Board's defence. Also, with regard to potential witnesses, the Applicant emphasizes that he was able to identify coordinates for several of the witnesses and that Treasury Board has not shown which witnesses would be unavailable and the contribution they would have made to their defence. The Applicant submits that in order to substantiate such a claim, Treasury Board must adduce specific evidence and this was not done in this case.

[18] The Respondent emphasizes that decisions made pursuant to paragraph 41(1)(e) of the Act are discretionary and, under the legislation, there are no specified criteria which the Commission must consider before exercising its discretion. Two factors which are commonly considered are whether the delay was in good faith and the weighing of any prejudice to the respondent caused by the delay. In making the decision whether or not to exercise its discretion, the Commission is supposed to make certain factual findings including "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" (*Richard* at paragraph 8). The Respondent submits that these issues were specifically addressed by the Commission.

[19] The Respondent reiterates the prejudices claimed before the Commission with regard to destroyed documents and possible difficulties in mustering witnesses. The Respondent agrees that specific evidence of the prejudice must be provided and submits that in this case it was. The Respondent points to the submissions made to the Commission as showing the prejudice. The Respondent urges that without the relevant documents, it would be unable to make a full answer and defence to the complaint. Furthermore, the Respondent advances that if it cannot locate or identify potential witnesses, it will be seriously prejudiced. In light of these submissions, the Respondent concludes that the Commission's decision is reasonable.

[20] In the present case, the Applicant does not dispute that his claim was out of time and there is no dispute as to when the alleged discriminatory acts took place. Therefore, the issue before me is whether or not the Commission's decision not to exercise its discretion was reasonable. The

discretionary nature of a decision made pursuant to paragraph 41(1)(e) is well accepted by this Court (*Canada (Attorney General) v. Burnell* (1996), 118 F.T.R. 90 at paragraphs 18 to 20 (F.C.T.D.)). It is clear that the text of the Act does not provide any criteria for exercising the discretion to deal with a time barred complaint. As stated in the decisions of this Court in *Richard* and *Bredin v. Canada (Attorney General)*, 2006 FC 1178, 300 F.T.R. 234, those factors can include the good faith of the complainant, the reasonableness of his explanations for the delay and the existence of some harm or prejudice caused to the respondent due to the delay. As emphasized in *Richard*, each case must be assessed on its own merits and the particular weight given to each factor will vary (at paragraph 9).

[21] The Commission's reasons clearly show that it acknowledged and accepted that the Applicant was in good faith in making his complaint. Furthermore, it accepted that he had established that there was a reasonable basis for determining that he was unable to pursue the complaint for reasons related to his health. However, the Commission was ultimately "persuaded by the submissions of the respondent that the delay has seriously prejudiced its ability to respond to the complaint" (Applicant's Record, page 26). The Applicant argues that the prejudices alleged by Treasury Board were not proven by specific evidence and the Respondent's submissions were speculative and theoretical. He suggests that this renders the decision unreasonable in light of the other factors.

[22] In *Burnell*, it was held that "[a] claim of prejudice is not a self-evident truth. In order to substantiate such a claim, specific evidence must be adduced to support it. (...) To simply point to a

lengthy delay does not lead inexorably to the conclusion that prejudice will be suffered. Rather, there must be some concrete basis in fact which demonstrates the delay is so unacceptable or disabling in nature so as to preclude a fair and complete investigation from being conducted” (at paragraph 27). In that case, the respondent had argued that the eight to ten years since the events would make evidence difficult to obtain and witness evidence would be unreliable which would impair the defence. That however was not found to be sufficient by the trial judge.

[23] Although the Court is certainly sympathetic to the Applicant’s case and understands that he is frustrated by the Commission’s decision, I have reached the conclusion that the evidence is sufficient to support the Commission’s findings and the Court’s intervention is not warranted. The alleged facts in this case took place between 1978 and 1985 and the complaint was made more than some twenty years later.

[24] A reading of Mr. Richard’s complaint shows that it is based on conversations that he had with certain individuals as well as numerous staffing and reorganisation decisions. With regard to the documentation, all pertinent documentation would clearly have been destroyed pursuant to policy and, in light of that, I do not see how the Respondent could be expected to adduce evidence as to how the documents could have been relevant to its defence when it has no knowledge of what documents might have ever existed and would have been destroyed many years ago.

[25] As for the witnesses, the Respondent showed that none of them are in the employ of the Public Service and that it would be difficult, if not impossible to locate them. Although, the

Applicant claims to have found some of them doing internet searches, as the Respondent submitted to the Commission, there is no way to know if these are actually the same people. In addition, due to the lack of documentation, the issues in this case – which mainly involve discriminatory attitudes and behaviours - would rest entirely on the recollections and memories of those witnesses. As submitted to the Commission, it is unlikely that the witnesses would be able to accurately recall the specific incidents and this would seriously prejudice the Respondent's ability to build a defence as it will be the only evidence available to it.

[26] I am satisfied that the Respondent's submissions do more than simply point to a lengthy delay and that there is a factual basis for the Commission's conclusion that there would be a serious prejudice to the Respondent's ability to defend itself. The general function of a time limitation period relates to the gathering of credible evidence (*Price v. Concord Transportation Inc.*, 2003 FC 946, 238 F.T.R. 113). Based on the submissions before the Commission and the investigation report, I find that the Commission's decision is reasonable. As highlighted, in *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 (C.A.), the Court is most reluctant to interfere with the discretion given to Commission. To this effect, the Federal Court of Appeal has stated that “[t]he Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report. (...) [I]t may safely be said as a general rule that Parliament did not want the courts at this stage to intervene lightly in the decisions of the Commission” (at paragraph 38).

[27] In light of the above conclusions, this application for judicial review must be dismissed.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No costs are awarded.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1586-09

STYLE OF CAUSE: **PAUL E. RICHARD and
ATTORNEY GENERAL OF CANADA**

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: April 21, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

DATED: April 22, 2010

APPEARANCES:

Paul E. Richard
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Marie-Josée Bertrand FOR THE RESPONDENT

SOLICITORS OF RECORD:

Not applicable FOR THE APPLICANT

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