

Federal Court



Cour fédérale

Date: 20100823

Docket: T-129-10

Citation: 2010 FC 837

Toronto, Ontario, August 23, 2010

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CHRIS HUGHES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Chris Hughes seeks judicial review of a decision of the Canadian Human Rights Commission dismissing his complaint against Human Resources and Skills Development Canada. Amongst other things, Mr. Hughes asserts that he has a reasonable apprehension that the Commission was biased against him, and that the investigation into his complaint was neither neutral nor thorough.

[2] For the reasons that follow, I have concluded that the investigation carried out by the Canadian Human Rights Commission was not sufficiently thorough. Consequently, the application for judicial review will be allowed.

Background

[3] Mr. Hughes has been employed in the Federal Public Service since 1999 in a series of term positions at the CR-04, PM-01 and acting PM-02 levels. In 2000, he was involved in a whistle-blowing incident involving the Canada Revenue Agency and the Canada Border Service Agency. Mr. Hughes says that this caused him to develop depression, anxiety and stress.

[4] In the spring of 2006, Mr. Hughes applied as an external candidate in a competition for CR-05 Service Delivery Agent II positions at HRSDC. He evidently qualified for the positions, and was placed in a “pre-qualified pool”.

[5] On July 25, 2006, a message was sent to “All Staff” from the Service Canada Management Board which announced that CR-05 Service Delivery Agent II positions were being reclassified to “Payment Service Agent” (PM-01) positions effective September 14, 2006. As a result of this reclassification, the Statement of Merit Criteria for the position also changed. External candidates were now required to have post-secondary education or a university degree. Mr. Hughes was an external candidate and did not have post secondary education.

[6] Mr. Hughes applied for CR-03 and CR-04 positions at HRSDC through competitions held in August of 2007. He was fully qualified for the CR-03 position, but did not receive a job offer. He also qualified for the CR-04 position, and commenced term employment with HRSDC on September 13, 2007. Mr. Hughes' term was extended three times, and his employment with HRSDC ultimately terminated on June 27, 2008.

[7] Mr. Hughes filed an initial complaint with the Canadian Human Rights Commission on August 8, 2007 alleging that HRSDC had refused to hire him from a pool of candidates, or keep him employed in a term position because of his disability. This complaint alleged differential treatment by HRSDC between March of 2006 and May 22, 2007. Mr. Hughes subsequently withdrew this complaint after he was offered the CR-04 position with HRSDC.

[8] Mr. Hughes filed a new human rights complaint against HRSDC on January 27, 2008. This complaint covered the period from March of 2006 to January of 2008, and once again alleged adverse differential treatment in employment on the basis of a mental disability. Mr. Hughes says that although he qualified for CR-05 and CR-03 positions with HRSDC, he was not hired because of his disability. He further alleges that although he was one of the most productive employees working as a CR-04 in his area, he was denied assignments afforded to other, non-disabled employees.

[9] Mr. Hughes' complaint was investigated by the Canadian Human Rights Commission. In an investigation report dated July 29, 2009, the investigator recommended that the Commission dismiss Mr. Hughes' complaint because it appeared that the HRSDC did not hire Mr. Hughes for reasons other than his disability. The Commission accepted this recommendation, and Mr. Hughes' complaint was dismissed on December 23, 2009, pursuant to subsection 44(3) of the *Canadian Human Rights Act* on the basis that further inquiry into the complaint was not warranted.

[10] Mr. Hughes challenges this decision, asserting numerous errors on the part of the Commission investigator, many of which relate to alleged deficiencies in the thoroughness of the investigation. In addition, Mr. Hughes alleges bias against him on the part of the Commission generally. Mr. Hughes also challenges decisions made during the course of the investigation, including the decision not to merge two complaints filed by Mr. Hughes against HRSDC, the failure of the Commission to disclose a Treasury Board policy to him, and the refusal of the investigator to accept new documents from Mr. Hughes near the end of the investigatory process.

Standard of Review

[11] The majority of Mr. Hughes' arguments relate to the thoroughness of the Commission's investigation. This involves issues of procedural fairness. As the Federal Court of Appeal observed in *Canada (Attorney General) v. Sketchley*, 2005 FCA 404, [2005] F.C.J. No. 2056, the task for the Court in such cases is to determine whether the process followed by the Commission satisfied the level of fairness required in all of the circumstances: at paras. 52 and 53.

[12] Mr. Hughes' allegation of bias on the part of the Commission also raises a question of procedural fairness. As such, the standard of review analysis also does not apply: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 100. Instead, it is for the Court to determine whether the requirements of natural justice and procedural fairness were met in this case.

[13] Mr. Hughes also challenges the refusal to merge his two human rights complaints against HRSDC, the refusal to allow an amendment to the complaint, and the refusal to accept new documents at the end of the investigation. These decisions involve the exercise of the broad discretion conferred on the Commission in the investigation of complaints: see *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] 2 F.C. 574; affirmed (1996), [1996] F.C.J. No. 385, 205 N.R. 383 (F.C.A.). As such, these procedural choices made by the Commission should be accorded deference, and are reviewable against the reasonableness standard.

[14] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47, and *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para. 59.

Analysis

[15] As was noted earlier, Mr. Hughes has challenged the Commission's decision on several different grounds, alleging numerous errors on the part of Commission staff. While I have carefully considered each and every allegation advanced by Mr. Hughes, I am satisfied that it is only necessary to address some of them.

[16] The most serious allegation made by Mr. Hughes is his claim to have a reasonable apprehension that the Commission was biased against him. This issue will be addressed first.

i) *Was the Canadian Human Rights Commission Biased against Mr. Hughes?*

[17] Mr. Hughes initially alleged actual or apprehended bias on the part of the Commission's Deputy Commissioner, who had signed the letter to Mr. Hughes communicating the Commission's decision to dismiss his complaint. However, over the course of the hearing, Mr. Hughes resiled from his claim that the Deputy Commissioner was personally biased against him, submitting instead that he had a reasonable apprehension of bias on the part of the Canadian Human Rights Commission as an institution.

[18] As I understand Mr. Hughes' submissions, his past experience with his own human rights complaints, together with the treatment that he has observed being accorded to other individuals by the Commission and the conduct of the Commission in this case, reasonably leads him to conclude that he is held to a higher standard by the Commission than are other people seeking to pursue human rights complaints through the Commission process.

[19] Mr. Hughes points out that two of his previous human rights complaints were dismissed by the Commission, only to have those decisions set aside by this Court on judicial review. Moreover, Mr. Hughes says that he has assisted other individuals with their own human rights complaints. Those complaints were referred to the Canadian Human Rights Tribunal for hearing, whereas his complaints are always dismissed by the Commission. Finally, Mr. Hughes points to the refusal of the Commission to merge two of his complaints or to make independent inquiries of the Public Service Commission regarding staffing procedures as further evidence of bias on the part of the Commission.

[20] The test for determining whether actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: that is, the question for the Court is what an informed person, viewing the matter realistically and practically - and having thought the matter through – would conclude. That is, would he or she think it more likely than not that the decision-maker, either consciously or unconsciously, would not decide fairly: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394. See also *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at paragraph 74.

[21] The burden of demonstrating either the existence of actual bias, or of a reasonable apprehension of bias, rests on the person alleging bias. An allegation of bias is a serious allegation, which challenges the very integrity of the decision-maker whose decision is in issue. As a consequence, a mere suspicion of bias is not sufficient: *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para.

112; *Arthur v. Canada (Attorney General)* (2001), 283 N.R. 346 at para. 8 (F.C.A.). Rather, the threshold for establishing bias is high: *R. v. R.D.S.*, at para. 113.

[22] The Canadian Human Rights Commission is clearly subject to the duty of fairness when it is exercising its statutory powers to investigate human rights complaints: *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (“*SEPQA*”). This requires that the Commission and its investigators be free from bias.

[23] That said, because of the non-adjudicative nature of the Commission’s responsibilities, it has been held that the standard of impartiality required of a Commission investigator is something less than that required of the Courts. That is, the question is not whether there exists a reasonable apprehension of bias on the part of the investigator, but rather, whether the investigator approached the case with a “closed mind”: see *Zündel v. Canada (Attorney General)* (1999), 175 D.L.R. 512, at paras.17-22.

[24] As the Court stated in *Canadian Broadcasting Corp. v. Canada (Human Rights Commission)*, (1993), 71 F.T.R. 214 (F.C.T.D.), the test in cases such as this:

[I]s not whether bias can reasonably be apprehended, but whether, as a matter of fact, the standard of open-mindedness has been lost to a point where it can reasonably be said that the issue before the investigative body has been predetermined.

[25] The fact that Mr. Hughes's previous complaints may have been dismissed by the Commission does not, in my view, establish that the Commission approached this complaint with a "closed mind": see *Arthur v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 1000 (F.C.A.). Nor is an institutional "closed mind" demonstrated by the fact that in at least one of those cases, the Commission decision was tainted by procedural unfairness.

[26] The treatment accorded to complaints brought by other individuals also does not show a closed mind on the part of the Commission in relation to Mr. Hughes' complaint. Virtually no information has been provided with respect to these other complaints, and there is thus no way of determining whether a different standard was applied to those cases than was applied in relation to Mr. Hughes's complaints.

[27] Insofar as the conduct of the investigation in this case is concerned, Mr. Hughes points out that the investigator assigned to his case had described herself as "a novice" in matters relating to Public Service staffing, and that she relied entirely on HRSDC's explanations with respect to the staffing process. I agree with Mr. Hughes that it would be preferable for someone unfamiliar with all of the ins and outs of what is undoubtedly a very complex process to obtain background information in this regard from a neutral source such as the Public Service Commission, rather than from an interested party. That said, I am not persuaded that seeking information from HRSDC regarding staffing procedures evidenced a closed mind on the part of the investigator.

[28] As will be explained below, Mr. Hughes has persuaded me that the investigation into his human rights complaint fell short of the standard of thoroughness required of Commission investigations by the jurisprudence. These shortcomings do not, however, demonstrate that the Commission approached Mr. Hughes' human rights complaint with a closed mind such that it can reasonably be said that the outcome of his complaint was predetermined.

ii) *Was the Commission Investigation Sufficiently Thorough?*

[29] Before turning to consider the allegations made by Mr. Hughes with respect to the alleged inadequacies in the Commission investigation, it is helpful to start by examining the nature and extent of the obligations on the Canadian Human Rights Commission when investigating a human rights complaint.

[30] The role of the Canadian Human Rights Commission was described by the Supreme Court of Canada in *Cooper v. Canada (Human Rights Commission)* (1996), 140 D.L.R. (4th) 193. There, the Supreme Court observed that the Commission is not an adjudicative body, and that the adjudication of human rights complaints is reserved to the Canadian Human Rights Tribunal. Rather, the duty of the Commission "is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it": at para. 53. See also *SEPQA*.

[31] The Commission has a broad discretion to determine whether “having regard to all of the circumstances” further inquiry is warranted: *Mercier v. Canada (Human Rights Commission)*, [1994] 3 F.C. 3 (FCA). However, in making this determination, the process followed by the Commission must be fair.

[32] In *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] 2 F.C. 574; affirmed (1996), aff’d 205 N.R. 383 (F.C.A.) this Court discussed the content of procedural fairness required in Commission investigations. The Court observed that in fulfilling its statutory responsibility to investigate complaints of discrimination, investigations carried out by the Commission must be both neutral and thorough.

[33] Insofar as the requirement of thoroughness is concerned, the Court in *Slattery* observed that “deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly”. As a consequence, “[i]t should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted”: at para 56.

[34] The requirement for thoroughness in investigations must also be considered in light of the Commission's administrative and financial realities. With this in mind, the jurisprudence has established that some defects in the investigation may be overcome by providing the parties with the right to make submissions with respect to the investigation report. As the Federal Court of Appeal observed in *Sketchley*, the only errors that will justify the intervention of a court on review are

“investigative flaws that are so fundamental that they cannot be remedied by the parties’ further responding submissions”: at para. 38.

[35] A decision to dismiss a complaint made by the Commission in reliance upon a deficient investigation will itself be deficient as “[i]f the reports were defective, it follows that the Commission was not in possession of sufficient relevant information upon which it could properly exercise its discretion”: see *Grover v. Canada (National Research Council)*, [2001] F.C.J. No. 1012, at para. 70. See also *Sketchley*, previously cited, *Garvey v. Meyers Transport Ltd.* [2005] F.C.J. No. 1684 (C.A.), *Singh v. Canada (Attorney General)*, [2002] F.C.J. No. 885, 2002 FCA 247 (C.A.) at para. 7 and *Kollar v. Canadian Imperial Bank of Commerce*, [2002] F.C.J. No. 1125, 2002 FCT 848 at para. 40.

[36] With this understanding of the role and responsibilities of the Canadian Human Rights Commission in dealing with the investigation of complaints of discrimination, I turn now to consider the arguments advanced by Mr. Hughes as to the inadequacy of the investigation in this case.

[37] The first question relates to whether the HRSDC personnel involved in the CR-03 and CR-05 competitions were aware that Mr. Hughes had suffered from a mental disability. This was an important issue. Obviously, if those involved in the competitions were not aware of Mr. Hughes’ past disability, it could not have been a factor in their hiring decisions.

[38] The investigator had herself identified this issue as being central to the case. That is, in a June 10, 2009 email to an HRSDC representative, the investigator stated “What is important in this investigation is the link to Mr. Hughes’ disability and if the respondent knew that Mr. Hughes had a disability at the time of the alleged conduct”.

[39] In her report, the investigator noted inconsistencies in Mr. Hughes’ evidence as to when he had advised HRSDC representatives involved in the hiring process of his past disability. The investigator also noted that the representatives in question “vehemently den[ied] they knew anything about Mr. Hughes having a disability”: investigation report at para. 50. It should be noted that several of these individuals were involved in both competitions.

[40] There is, however, documentary evidence in the certified tribunal record indicating that those involved in the hiring process for both the CR-03 and CR-05 competitions were made aware of the fact that Mr. Hughes had previously suffered from a disability.

[41] By way of example, a reference check carried out with respect to the CR-05 competition notes that Mr. Hughes is “currently not working, ‘medical issues’ last few years”. This clearly indicates that Mr. Hughes had suffered from long-standing health problems in the past.

[42] Even clearer is the disclosure made by Mr. Hughes himself in the course of the CR-03 competition. Right in his application form is the statement that “I have been sick for most of the

time since March 2006. My illness falls under a category in the *Canadian Human Rights Act*.” It is hard to imagine how Mr. Hughes could have been any clearer than that.

[43] Counsel for HRSDC concedes that “in a perfect world” it would have been better if the investigator had at least brought these documents to the attention of the HRSDC witnesses and asked them to explain the discrepancy between the documentary record and their evidence. However, counsel submits that the investigator was entitled to rely upon the comments of the witnesses, to evaluate their credibility, and to believe that they were unaware of the fact that Mr. Hughes had previously suffered from a disability.

[44] I do not agree with this submission. The documents identified above cast serious doubt over the claims of those involved in the CR-03 and CR-05 competitions that they were unaware that Mr. Hughes had previously suffered from a disability. Not only does the investigator fail to come to grips with an important discrepancy in the record, she never even put the documents in question to the witnesses. Instead, she seems to have simply to have accepted the denials of the personnel involved in the competitions that they had any knowledge of Mr. Hughes’ disability.

[45] Indeed, the investigator clearly favoured the evidence of the HRDSC witnesses over that of Mr. Hughes, going so far as to say in her report that “[t]he only time that Mr. Hughes presents himself as disabled is when he does not get a job or when he receives negative feedback...”. This is an unfair comment which is not borne out by the documentary record.

[46] While Mr. Hughes did draw the attention of the Commissioners to the contrary evidence in his submissions, these submissions could not undo the fact that the investigator's negative view of Mr. Hughes' credibility and her positive view of the evidence of HRSDC's witnesses clearly permeated her entire analysis.

[47] There are other troubling aspects to the investigation.

[48] Mr. Hughes was hired by HRSDC at the CR-04 level to work on the "CEP program". He says that he had not disclosed the fact that he had previously suffered from a disability during this hiring process, which involved different HRSDC representatives from those involved in the CR-03 and CR-05 competitions. However, he says that his supervisors subsequently became aware of his past disability after he began his employment with the CEP program.

[49] Mr. Hughes alleges that the CR-04 position with the CEP program was a "dead-end" job, as the work involved was time-limited, and not ongoing. Many of the individuals working with Mr. Hughes were offered other positions with the Old Age Security / Canada Pension Plan processing section. Mr. Hughes alleges that he was left working in a program with a limited lifespan so the HRSDC would be able to get rid of him.

[50] The respondent says that nine people were selected to transfer to the CPP program, and that the selection was based on interviews and current work performance. An email to staff from the CEP manager explains that individuals were to be identified for these positions based upon the

competencies demonstrated during the initial hiring, as well as current reference information from the individuals' managers. Mr. Hughes says that although he was one of the top producers in his area and his manager was prepared to give him a positive reference, he was the only CR-04 not kept on.

[51] The investigator asked HRSDC representatives about Mr. Hughes' allegation in this regard. In a written response, an HRSDC representative advised that "The Manager of CEP will need to respond to this question, as I am not sure if other employees were not renewed before their specified term".

[52] There is nothing in the file to suggest that the investigator ever followed up with the CEP manager about this. Moreover, no analysis was ever done to compare the "competencies demonstrated during the initial hiring", and the "current reference information from the individuals' managers" for Mr. Hughes to the competencies and references of the successful candidates. Thus there is no way of knowing if the individuals transferred to the CPP positions were any more or less qualified than Mr. Hughes.

[53] Furthermore, although Mr. Hughes says that he was told that his manager would give him a positive reference, no such reference was produced by HRSDC, who says that Mr. Hughes' manager was "unable to give a recommendation". The investigator never spoke to Mr. Hughes' manager. She was obviously a key witness, given that the quality of his performance was in issue.

Instead, the investigator appears to have simply accepted the word of an HRSDC witness that Mr. Hughes did not get any of the other positions because of merit.

[54] It is therefore clear that the investigator failed to investigate “obviously crucial evidence” in this regard: *Slattery*, at para. 56; *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113 at para. 8).

[55] The result of these deficiencies is that the investigation in this case does not meet the standard of thoroughness mandated by the jurisprudence. As a result, the Commission’s decision to dismiss Mr. Hughes’ complaint will be set aside, and the matter remitted to the Commission for re-investigation by a different investigator and re-determination by the Commission.

Other Matters

[56] Mr. Hughes has raised a number of other concerns with respect to the conduct of the Commission, which may have a bearing on the re-investigation of his complaint, and thus require comment.

[57] One such issue is the fact that the Commission investigator refused to merge this complaint with a subsequent complaint filed by Mr. Hughes against HRSDC. The reason given for refusing to merge the two complaints was that the investigation into this complaint was nearly complete at the time that the request was made, whereas the investigation into the other complaint was still ongoing. While that decision was a reasonable exercise of the investigator’s discretion at the time that it was

made, it may need to be re-visited in the context of the re-investigation, depending upon the status of the other complaint.

[58] Mr. Hughes will have the opportunity to address the Treasury Board policy produced by HRSDC and not previously disclosed to him in the course of the new investigation, and he will also have the opportunity to provide the investigator with additional documents, if he deems it appropriate. It will also be open to Mr. Hughes to renew his request to amend his human rights complaint to include allegations of discrimination on the basis of a physical disability and allegations of systemic discrimination under section 10 of the *Canadian Human Rights Act*. Ultimately, it will be for the Commission to determine if such amendments are appropriate.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is allowed, with costs. The decision of the Canadian Human Rights Commission dismissing Mr. Hughes' human rights complaint is set aside, and the matter is remitted to the Commission for re-investigation and re-determination in accordance with these reasons.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-129-10

STYLE OF CAUSE: CHRIS HUGHES v.
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Victoria, B.C.

DATE OF HEARING: July 28, 2010

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

DATED: August 23, 2010

APPEARANCES:

Chris Hughes SELF-REPRESENTED APPLICANT
Malcolm Palmer FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nil FOR THE APPLICANT
MYLES J. KIRVAN FOR THE RESPONDENT
Deputy Attorney General of Canada