Federal Court  Cour fédérale

Date: 20120516

Docket: T-1377-11

Citation: 2012 FC 591

Ottawa, Ontario, May 16, 2012

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

AIR CANADA PILOTS ASSOCIATION

Applicant

and

ALBAN ERNEST MACLELLAN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by the Air Canada Pilots Association (Association) challenging a decision of the Canadian Human Rights Commission (Commission) to accept the Respondent's discrimination complaint notwithstanding the fact that it was brought out-of-time.

Background

[2] When the Respondent, Alban Ernest MacLellan, reached the age of 60, his employment as a pilot with Air Canada was terminated on the basis of a compulsory retirement condition in the

collective agreement between Air Canada and the Association. That termination took effect on June 1, 2004.

[3] It was not until September 2006 that Captain MacLellan complained to the Commission that his forced retirement was the result of a discriminatory practice. In his letter of complaint, he asked the Commission to investigate the matter and to appoint a tribunal. Copies of the letter were sent to Air Canada and to the Association. On October 4, 2006, the Commission wrote to Captain MacLellan advising him of the following:

> As per our conversation, where we discussed the George Vilven vs. Air Canada complaint which is going to be presented to the Tribunal in January 2007, for decision. I explained to you that since this complaint is policy related, that if a decision was made in favour of the Air Canada Pilots, the remedy would apply to Air Canada Pilots, therefore there is no value added to you pursing a complaint at this time. Furthermore, as your termination date with Air Canada was on May 31, 2004, I must advise you that pursuant to section 41(1)(e) of the Act, the Commission could refuse to deal with your complaint because it was filed more than a year after the alleged discriminatory acts.

[4] On November 30, 2009, Captain MacLellan again contacted the Commission through his solicitor and the Commission sent out the forms required to formalize a complaint. It took until May 6, 2010 for Captain MacLellan to submit a complaint in a form acceptable to the Commission. Because the complaint was initiated more than one year after the alleged discrimination, the Commission assigned an investigator to look into the circumstances of the delay and to recommend whether relief under subsection 41(1)(e) of the *Canadian Human Rights Act*, RSC 1985, c H-6[the Act], was appropriate. The Commission invited the parties to make submissions to the investigator but only Captain MacLellan elected to do so.

[5] The investigator's report to the Commission recommended that Captain MacLellan's complaint be referred to a tribunal. The investigator set out the history of the complaint and identified the issues that were relevant to the exercise of the discretion to extend time including whether Captain MacLellan exercised "due diligence" in pursuing the matter. Other identified considerations included the nature and seriousness of the issues raised, the length of the delay, the reasons for the delay, the Respondent's awareness of the complaint and any resulting prejudice to the Respondent by extending time.

[6] Among other things, the investigator's report noted the Commission's 2006 advice to Captain MacLellan that there was "no value added" by pursuing a policy related complaint in the face of similar cases already before the Commission. The investigator also noted Captain MacLellan's explanation that he had not pursued a complaint within 12 months of his termination because he was living outside of Canada and because he was unaware of the applicable time limitation.

[7] In the absence of a submission from the Association, its position is not referenced in the investigator's report beyond the advice to the Commission to consider the Respondent's position regarding the consequences of a decision to pursue the complaint. The investigator concluded with the following recommendation:

> It is recommended, having regard to all the circumstances of the complaint, that the Commission request the appointment of a Human Rights Tribunal to inquire into the complaint because the Tribunal is already seized of another complaint having substantially the same issues.

[8] On March 8, 2011, the Commission sent the investigator's report to the parties and invited further submissions. Counsel for the Association initially asked the Commission to send copies of correspondence from Captain MacLellan's legal counsel referenced in the investigator's report. When nothing was forthcoming, a substantive response was sent to the Commission on April 12, 2011. In that submission, the Association emphasized the substantial delay that had occurred and argued that Captain MacLellan's explanation was insufficient to justify the granting of an extension. The Commission disagreed and, in a decision issued on July 6, 2011, referred the complaint for a hearing on the merits. The decision stated:

> The Commission decided for the reasons identified below, to deal with the complaint under section 41(1) of the *Canadian Human Rights Act*.
>
> The Commission further decided to request the Chairperson of the Canadian Human Rights Tribunal, pursuant to section 49 of the *Canadian Human Rights Act*, to institute an inquiry into the complaint because the Tribunal is already seized of another complaint having substantially the same issues.
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> Material considered when decision made
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> The following documents were reviewed:
> a. complaint form dated May 6, 2010
> b. section 40/41 report dated March 8, 2011
> c. submission from the complainant regarding 41(1)(e) report dated March 17, 2011
> d. submission from the respondent regarding 41(1)(e) report dated March 16, 2011
> e. cross-disclosure submission from the respondent dated April 12, 2011.
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> Reasons far decision
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> The last alleged discriminatory act occurred more than one year before receipt of the complaint by the Commission, however, it is appropriate to deal with the complaint because the respondent has

> not demonstrated that the delay in signing the complaint has seriously prejudiced its ability to respond to the complaint.

It is from this decision that this application arises.

Issues

[9] Was the Commission's decision to extend time unreasonable?

[10] Did the Commission breach a duty of procedural fairness?

Analysis

[11] Subsection 41(1)(e) of the Act conveys a discretion to the Commission to receive an untimely complaint during "such longer period of time as the Commission considers appropriate in the circumstances…". This language is indicative of a fairly soft limitation in the sense that the Commission is given a broad authority to extend time in appropriate situations.

[12] A decision to extend time is a type of screening decision that requires deference on the part of a reviewing Court. The question is whether the Commission reasonably concluded that it was appropriate, in the circumstances, to receive Captain MacLellan's complaint: see *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 40,[2012] SCJ no 10 (QL).

[13] The Association complains that the Commission's reasons, as set out in its Record of Decision, are inadequate because they focus solely on the absence of any serious prejudice to its

ability to respond to Captain MacLellan's complaint. According to the Association, the Commission is required to consider other factors in the exercise of its discretion under subsection 41(1)(e) of the Act, most notably the adequacy of Captain MacLellan's explanation for the delay. The Association says that, in the absence of any referenced assessment of Captain MacLellan's conduct in the Commission's decision, this factor must have been overlooked.

[14] The fundamental weakness with the Association's argument is that it has been well-established in the jurisprudence that in cases where the Commission adopts the views of its investigator, the investigator's report is considered to be part of the decision: see *Sketchley v Canada (AG)*, 2005 FCA 404 at para 37, [2006] 3 FCR 392.

[15] Furthermore, in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 15-18, [2011] 3 SCR 708, the Supreme Court of Canada has provided the following advice to reviewing courts with respect to the adequacy of reasons:

> 15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
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> 16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the

> conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> 17 The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.
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> 18 Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:
>
> > When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum - the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]
>
> [Emphasis added]

It therefore seems to me that the Court is not limited in its review of the Commission's decision to what is contained in its admittedly perfunctory Record of Decision. The Court is permitted to examine the record before the Commission including the investigator's report to see if a rationale for the decision can be identified either expressly or by implication: see *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 at para 27, [2011] 4 FCR 425.

[16] It is clear from the Record of Decision that the Commission considered Captain MacLellan's complaint, the investigator's report and the submissions from the parties in response to the investigator's report before making its decision. There is no basis to conclude that the Commission somehow misapprehended the scope of its statutory discretion.

[17] The fact that the Commission referred only to the existence of another similar complaint and to the absence of prejudice to the Respondent in its decision does not lead to a conclusion that other relevant considerations were overlooked or that the onus of proof was reversed. The investigator's report identified the factors and evidence that were relevant to the exercise of the Commission's discretion under subsection 41(1)(e) of the Act and, in the context of a case where the evidence was almost entirely undisputed, the Commission's decision cannot be impugned.

[18] While I accept that cases involving significant factual disagreements may require the Commission to provide an evidentiary analysis sufficient to justify its conclusion, this is not such a case. Captain MacLellan's complaint was one of many identical complaints arising out of a common and allegedly discriminatory employment policy. The Association did not allege that it would be disadvantaged in mounting a defence to the claim beyond the loss of its technical limitations defence. Captain MacLellan offered an explanation for the delay that implicated the Commission in part – an explanation the Association did not seek to discredit beyond arguing that it was insufficient to justify an extension. It is also noteworthy that both Air Canada and the Association were aware of Captain MacLellan's concern as early as September 12, 2006 when they were copied with his initial letter of complaint to the Commission.

[19] It is implicit in the Commission's decision that it weighed the evidence and concluded that Captain MacLellan's explanation for the delay was sufficient in all of the circumstances to justify an extension. The Association argues at paragraph 20 of its Memorandum of Fact and Law that Captain MacLellan's assertions "do not establish a reasonable basis for the delay". This is, however, an invitation to reweigh the evidence and that is not the role of the Court on judicial review. There was a compelling basis for granting an extension of time to receive Captain MacLellan's complaint and, given the level of deference that is owed to decisions of this sort, there is no basis to set it aside.

[20] The Association's argument that the inadequacy of the Commission's reasons constitutes a breach of procedural fairness is also untenable. I accept that where reasons are a procedural requirement, a breach of fairness may arise where none are forthcoming. But according to the decision in *Newfoundland and Labrador Nurses' Union,* above, an argument that a set of reasons is insufficient (ie. lacking justification, transparency or intelligibility) must be assessed on the standard of reasonableness and not correctness.

[21] The Association also argues that the Commission breached a duty of procedural fairness by refusing to provide copies of the submissions made on behalf of Captain MacLellan to the Commission in 2006. According to this argument, this evidence would have disclosed information to the Association that was prejudicial to the request for an extension of time including the fact that Captain MacLellan was represented by legal counsel and aware of the one-year limitation. This argument has no merit. The record discloses that the principal piece of correspondence sent to the

Commission in 2006 was copied to Air Canada and to the Association. Therefore, the Association had the information that it says it required and cannot complain that it was treated unfairly.

[22] For the foregoing reasons, this application for judicial review is dismissed with costs payable to the Respondent under Column III.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed with costs payable to the Respondent under Column III.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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