

Federal Court



Cour fédérale

Date: 20120605

Docket: T-1827-11

Citation: 2012 FC 692

Ottawa, Ontario, June 5, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

WILLIAM A. LAWRENCE

Applicant

and

CANADA POST CORPORATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application by William A. Lawrence (Mr. Lawrence), pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC, 1985, c F-7, for judicial review of a decision rendered by the Canadian Human Rights Commission [CHRC] on October 12, 2011, wherein the CHRC decided not to deal with Mr. Lawrence's complaint under paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [the Act].

[2] Mr. Lawrence is asking this Court to award him compensation for pain and suffering, and special compensation due to differential treatment. He is also requesting an order forcing the Canada Post Corporation (Canada Post) to recognize Mr. Lawrence's inability to work night shifts and a written apology from them.

[3] For the following reasons, this application for judicial review is dismissed.

II. Facts

[4] Mr. Lawrence is an employee of Canada Post.

[5] On September 29, 2010, the Canadian Union of Postal Workers [CUPW] filed a grievance on behalf of Mr. Lawrence. The grievance states that Canada Post violated articles 2, 5, 54 and 56 of the *Act* and failed to accommodate Mr. Lawrence.

[6] CUPW filed a second grievance on October 7, 2010. It reads "the Union grieves on behalf of William Lawrence that the employer has violated Article 10 and all other provisions of the Collective Agreement. By letter dated October 3, 2010, informing Bill Lawrence of his termination upon receipt of said letter by HMPP Manager Mary Pretty. The griever was importuned, reprimanded and terminated from employment, without just, reasonable and sufficient cause".

[7] CUPW filed a total of eight grievances on behalf of Mr. Lawrence.

[8] On December 13, 2010, Mr. Lawrence filed a complaint with the CHRC alleging he was discriminated due to his “race and medical issues which would also be considered an adverse differential treatment” (see Respondent’s Record, Tab 1, pages 8 to 11).

[9] The CHRC concluded, in its Section 40/41 Report dated April 8, 2011, that Mr. Lawrence was covered by a Collective Agreement and had full access to another redress procedure. The CHRC also found that it did not have any information regarding a final decision in the other redress procedure but understood that the grievance was proceeding and that arbitration had been scheduled for April 5, 2011 (see Applicant’s Record, page 14). The CHRC made the following recommendation:

. . . It is recommended, pursuant to paragraph 41(1)(a) of the *Canadian Human Right Act*, that the Commission not deal with the complaint at this time:

as the complainant ought to exhaust the grievance or review procedures otherwise reasonably available. At the end of the grievance or review procedure, the complainant may ask the Commission to reactivate the complaint (see Respondent’s Record, Tab 1, page 25).

[10] On May 12, 2011, Mr. Lawrence’s grievances were resolved and a Memorandum of Settlement was executed by CUPW on behalf of Mr. Lawrence and Canada Post. The terms of the settlement are as follows:

1. The Corporation agrees to remove letters dated August 6, 11, 20, 26; September 14, 22 and October 3, 2010, from the grievor’s file and return to the grievor his substantive position of a full-time PO4 in the Distribution Parcel Section with an assignment on shift 3 as of May 15, 2011.

2. The Corporation agrees that letters sent to Mr. Lawrence since October 3, 2010, regarding an overpayment shall be disregarded and all issues of wages, benefits and benefit arrears owing will be dealt with in this memorandum.
3. The Corporation will amend the grievor's leave accounts with the following credits to be used in the future: 80 hours of vacation leave; 80 hours of sick time. Further, because this vacation should have been taken in the 2010/2011 leave year, Mr. Lawrence will be able to use these weeks outside the regular vacation pick of his section and will only have to give the Corporation reasonable advance notice of ten (10) working days to be granted these days off.
4. The Corporation will compensate the grievor with a lump sum of \$25,000 as compensation for all wages missed from August 1, 2010 through May 13, 2011. Further, from this lump sum, the employer will repay Employment Insurance the sum of \$11, 425.00 and the remaining amount of the lump sum will be subject to statutory deductions, such as income tax, union dues and benefits.
5. The grievor is considered to be an employee for the period August 1, 2010 through May 13, 2011. The Corporation will pay the employer's portion of pension and benefits for the above period. Further, the grievor will be responsible to pay for his portion of pension and benefits for the same period. If Great West Life refuses coverage to the grievor for the above-noted period, the Corporation will compensate the grievor for the coverage he was entitled to.
6. Arbitrator MacLellan shall remain seized in the event there are any difficulties between the parties with the implementation of this settlement.

[11] On June 9, 2011, Mr. Lawrence requested that his Complaint be reactivated with the CHRC on grounds that Canada Post had never acknowledged that he cannot work night shifts due to his medical condition.

[12] The CHRC issued a supplementary report dealing with Mr. Lawrence's request to reactivate his complaint. The Commission decided not to deal with the Complaint because "it appears that all of the human rights allegations were addressed and that all the remedies sought were awarded.

While the Complainant is concerned by the lack of a provision recognizing that he cannot work overnight shifts, this alone is not sufficient for the Commission to deal with the complaint. If the complainant wishes, he may choose to raise the issue with the arbitrator who oversaw the settlement, which would appear to be the more appropriate body to deal with the matter at this point” (see Respondent’s Record, Tab 1, page 49).

[13] On September 26, 2011, Mr. Lawrence provided his comments regarding the CHRC’s supplementary report. He made submissions regarding his medical conditions and alleged that he had provided Canada Post with medical evidence to clearly establish his inability to work overnight shifts.

[14] On October 31, 2011, the CHRC considered Mr. Lawrence’s complaint and concluded that it did not have to deal with the complaint pursuant to paragraph 41(1)(d) of the *Act*.

[15] On November 8, 2011, Mr. Lawrence filed the present application for judicial review of the CHRC’s decision not to deal with his complaint under paragraph 41(1)(d) of the *Act*.

III. Legislation

[16] Paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 provides as follows:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that

41. (1) Sous réserve de l’article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu’elle

complaint it appears to the
Commission that

...

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

estime celle-ci irrecevable
pour un des motifs suivants :

[...]

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

IV. Issues and standard of review

A. Issues

1. *Is the Court empowered to grant Mr. Lawrence's request for relief under section 18.1 of the Federal Courts Act?*
2. *Did the CHRC err in deciding not to deal with Mr. Lawrence's complaint pursuant to paragraph 41(1)(d) of the Act.*

B. Standard of review

[17] In *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] SCR 160 at para 26, the Supreme Court of Canada specified that “reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunals enabling (or “home”) statute or “statutes closely connected to its function, with which it will have particular familiarity”.

[18] This Court determined, in *Chan v Canada (Attorney General)*, 2010 FC 1232, that the reasonableness standard must be applied to the CHRC's decisions not to deal with a complaint under paragraph 41(1)(d) of the *Act*.

[19] In conducting a review under the reasonableness standard, the Court is mostly concerned “with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law” (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47).

V. Parties’ submissions

A. Mr. Lawrence’s submissions

[20] Mr. Lawrence requests an Order from this Court quashing or setting aside the CHRC’s decision not to deal with his complaint.

[21] Mr. Lawrence also seeks a letter from Canada Post stating that it agrees to a permanent shift accommodation. He further demands financial “compensation for pain and suffering and for differential treatment which was wilful and reckless” (see Mr. Lawrence’s Application Record, page 2).

[22] He requires also a letter of apology from Canada Post and costs for this application.

[23] In support of his application for judicial review, Mr. Lawrence adduced a copy of his doctor's recommendation and an affidavit supporting his need for a permanent shift accommodation (see Applicant's Record, pages 32, 33 and 39).

B. Canada Post's Submissions

[24] Canada Post argues that remedies available in judicial review are limited to those set out in subsection 18.1(3) of the *Federal Courts Act*. It cites *Whitehead v Pelican Lake First Nation*, [2010] 2 CNLR 371. At para 53, Justice Shore wrote that "It is well-known that the Federal Court has no jurisdiction to grant damages on an application for judicial review".

[25] Accordingly, Canada Post submits that the Court lacks jurisdiction to award any form of compensation for damages in this application nor can it order Canada Post to provide Mr. Lawrence with a written apology since this remedy does not fall within the scope of subsection 18.1(3) of the *Federal Courts Act*.

[26] Canada Post further submits that the CHRC considered the grievance process and the settlement and properly concluded that all of the human rights allegations were addressed and that all the remedies sought were awarded. The CHRC made the following remark:

While the complainant is concerned by the lack of a provision recognizing that he cannot work overnight shifts, this alone is not sufficient for the Commission to deal with the complaint.

If the complainant wishes, he may choose to raise the issue with the arbitrator who oversaw the settlement, which would appear to be the more appropriate body to deal with the matter at this point (see Respondent's Record, Tab 1, page 58).

[27] Canada Post claims that the CHRC's decision is reasonable as the Commission found that the allegation of discrimination had been resolved before the arbitrator. As a result, the CHRC properly discharged its screening function pursuant to section 41 of the *Act*. It relies on *English-Baker v Canada (Attorney General)*, 2009 FC 1253, [2009] FCJ No 1604, in support of that proposition.

[28] It also relies on *Canada Post Corp. v Barette*, [2000] FCJ No 539, [2000] 4 FC 145 at para 28) to assert that the CHRC reasonably turned its mind to the arbitrator's decision.

[29] Canada Post disputes the Applicant's claim that the remedies he is seeking are not available under the grievance process. It contends that Mr. Lawrence could have sought these remedies before the arbitrator. As evidenced by the decision of *Calgary Board of Education v Alberta Teachers' Assn. (Mackonka Grievance)*, [2002] AGAA No 10, arbitrator Ponak awarded a written apology as a remedy.

[30] Canada Post also refers to *Ontario Public Service Employees Union v Ontario (Ministry of Community Safety and Correctional Services) (Latimer Grievance)*, [2004] OGSBA No 30. In that case the arbitrator awarded the grievor \$7,500.00 in damages for pain and suffering and directed the employer to provide a written apology to the grievor.

[31] Canada Post maintains that Mr. Lawrence had an alternative avenue for redress in the grievance process. If he is unsatisfied with the implementation of the terms of the Settlement

Agreement, arbitrator MacLellan remains seized of the matter. The arbitrator has the power to apply and determine obligations under the Act (see *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324*, [2003] 2 SCR 157, 2003 SCC 42 [*Parry Sound*]).

VI. Analysis

1. *Is the Court empowered to grant Mr. Lawrence's request for relief under section 18.1 of the Federal Courts Act?*

[32] Mr. Lawrence explained to this Court that his situation is not settled because he has no guarantee that Canada Post will not send him back on the night shift. He never received a letter of apology or adequate financial compensation and part of the settlement package is still to be implemented.

[33] The Court is unable to grant part of the relief Mr. Lawrence is seeking.

[34] As stated in his notice of application dated November 8, 2011, Mr. Lawrence is asking the Court to award him the following relief:

1. Pain and suffering compensation
2. Special compensation due to differential treatment which was wilful and reckless
3. Canada Post Corporation recognize in writing I cannot work overnight shifts to prevent this differential treatment from repeating in the future
4. A written apology from Canada Post Corporation
5. An order for the cost of this application

6. An order quashing or setting aside the Canadian Human Rights decision and referring the decision back to the Canadian Human Rights Commission

[35] Subsection 18.1(3) of the *Federal Courts Act* reads as follows:

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| <p>18.1 (3) On an application for judicial review, the Federal Court may</p> <p>(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or</p> <p>(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.</p> | <p>18.1 (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :</p> <p>a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;</p> <p>b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.</p> |
|---|--|

[36] It is well known that the Court has no jurisdiction, under subsection 18.1(3) of the *Federal Courts Act*, to award damages in judicial review proceedings (see *Canada (Attorney General) v TeleZone Inc*, [2010] 3 SCR 585; *Al-Mhamad v Canada (Canadian Radio-Television and Telecommunications Commission)*, 2003 FCA 45, [2003] FCJ No 145 at para 3). Under subsection 18.1(3) of the *Federal Courts Act*, the Court's main concern is to determine whether the tribunal under review properly exercised the powers conferred by its authorizing statute. Consequently, the

Court cannot grant any damages nor can it Order Canada Post to recognize in writing Mr. Lawrence's inability to work overnight shifts. Moreover, it is not empowered to order Canada Post to present a written apology to Mr. Lawrence.

[37] In the present case the Court can review the CHRC's decision and determine whether it properly exercised its duty to Mr. Lawrence when it decided not to deal with his complaint and make a pronouncement as to costs on this application.

2. *Did the CHRC err in deciding not to deal with Mr. Lawrence's complaint pursuant to paragraph 41(1)(d) of the Act?*

[38] The CHRC did not err when it decided not to deal with Mr. Lawrence's complaint, for the following reasons.

[39] In order to determine whether the CHRC properly dealt with Mr. Lawrence's complaint the Court reviewed the authorities cited by the Respondent and existing case law.

[40] In *Boudreault v Canada (Attorney General)* (1995), 99 FTR 293, [1995] FCJ No 1055, Justice Tremblay-Lamer relied on *Burke v Canada (Canadian Human Rights Commission)* (1987), 125 NR 239 (FCA) and *Pitawanakwat v Canada (Human Rights Commission)* (1987), 125 NR 237 (FCA) to affirm that if an applicant "has taken advantage of the available internal remedies, the Commission may not refuse to exercise its jurisdiction on the ground that the matter has already been decided".

[41] In the Court's opinion, after a thorough review of the documents filed, it is apparent in the present case that, when the CHRC declined to exercise its discretion, it did not merely rely on a previous decision but carefully analysed the settlement agreement. As indicated in the CHRC's Supplementary Report:

. . . the only term the settlement appears to be lacking is a clause recognizing that the complainant cannot work overnight shifts. This alone however, does not appear to constitute a sufficiently strong reason for the Commission to deal with the complaint at this point; the omission of the clause does not in and of itself constitutes an act of discrimination, and it appears that the complainant is currently not working overnight shifts... In the meantime should the complainant be seriously concerned about the omission of the clause, the arbitrator that oversaw the settlement remains seized of the matter and may be asked to address the issue. (see Respondent's Record, Tab 1, page 49)

[42] In his memorandum, Mr. Lawrence alleges that his doctor requested he be accommodated to the evening shift which Canada Post refused to do (see Applicant's Record, page 69). However, this request was dealt with in clause number 1 of the Settlement Agreement dated May 12, 2011.

[43] It was reasonable for the CHRC not to deal with Mr. Lawrence's complaint. If Mr. Lawrence is looking for a declaration that he be permanently accommodated to the evening shifts, clause number 6 provides that "arbitrator MacLellan shall remain seized in the event there are any difficulties between the parties with the implementation of this settlement" (see Respondent's Record, Tab 1, page 28). This request is not related to any act of discrimination and ought to be dealt within the grievance process before the arbitrator.

[44] Moreover, the Court does not agree that remedies sought by Mr. Lawrence were not available in the grievance process. “An arbitrator has a broad authority to provide a remedy for breach of a collective agreement” (see *Greater Toronto Airports Authority v Public Service Alliance of Canada, Local 0004*, 2011 ONSC 487 at para 45).

[45] In *Parry Sound*, the Supreme Court of Canada held that an arbitrator has the power to apply and determine obligations under the human rights legislation. It is clear that the CUPW could have negotiated such relief with Canada Post and arbitrator MacLellan.

[46] The financial compensation and letter of apologies are not part of the settlement. That does not mean the parties to the settlement agreement never discussed these issues. By its very nature a settlement is a compromise.

VII. Conclusion

[47] This application for judicial review is dismissed. The CHRC reasonably concluded not to deal with Mr. Lawrence’s complaint before he had exhausted all his remedies before the arbitrator.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed;
2. Each party shall pay his own costs.

"André F.J. Scott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1827-11

STYLE OF CAUSE: WILLIAM A. LAWRENCE
v
CANADA POST CORPORATION

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: April 12, 2012

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

DATED: June 5, 2012

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