

Federal Court



Cour fédérale

**Date: 20121220**

**Docket: T-760-12**

**Citation: 2012 FC 1526**

**Ottawa, Ontario, December 20, 2012**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**JACK CHOMICZ**

**Applicant**

**and**

**CANADIAN BROADCASTING  
CORPORATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. INTRODUCTION**

[1] Mr. Chomicz had his complaint to the Canadian Human Rights Commission [Commission] dismissed because the acts complained of occurred more than one year previously and the Commission declined to exercise its discretion to extend that period. The Applicant, a self-represented litigant, seeks judicial review of the Commission's decision.

[2] Mr. Chomicz put his case clearly and succinctly. He is obviously a man of pride in his work and has a strong desire to keep working – admirable qualities to be certain.

[3] Unfortunately, the Commission's decision was reasonable and therefore not a matter in which this Court should intervene.

## II. BACKGROUND

[4] Mr. Chomicz is a professional engineer who specialized in information technology and telecommunications since the 1990s. He was a contract employee at CBC from 1995 to 2003 and a permanent employee thereafter until 2009.

[5] During his time at CBC he studied and became qualified on the CBC videoconferencing system. He eventually became the Videoconference System Administrator.

[6] In April 2009, just before his 66<sup>th</sup> birthday, the Applicant received an offer to retire. And on May 27, 2009, he received notice that his position had been declared redundant and his employment terminated on September 30, 2009 if no similar alternative appointment was available. Mr. Chomicz sent a number of e-mails to CBC personnel protesting the elimination of his position.

[7] In early September 2009 Mr. Chomicz received formal notice of termination effective September 30 along with an offer of severance pay settlement of \$63,000 in exchange for a release of liability. Given 24 hours to accept, Mr. Chomicz, with advice from counsel, refused the offer.

[8] Mr. Chomicz seemed particularly concerned when he was told that two other individuals accepted the severance offer, the position was eliminated and then a managerial position was transferred into his department.

[9] CBC contends that it was required by budget cuts to eliminate positions. In so doing it followed the collective agreement and Mr. Chomicz had less seniority in his position than others resulting in his lay-off. It insists that age was not a factor in its decision to eliminate the position and terminate the Applicant's employment.

[10] After receiving the lay-off notice, Mr. Chomicz took the following steps:

- Retained a lawyer who wrote a letter to CBC and then began preparing the case. Mr. Chomicz lost confidence in his counsel and severed the relationship.
- He then started to handle his case himself by contacting Ontario's Ministry of Labour (which had no jurisdiction), the Canada Industrial Relations Board and finally the federal Labour Program Office which could not help him.
- He contacted another lawyer who refused to take the case.
- He contacted his union which also refused to proceed.

[11] Finally, on August 17, 2011, the Applicant filed his complaint with the Commission. This was the first time that age discrimination was alleged. In accordance with usual procedure, the matter was investigated, and the results of the investigation are contained in a report made pursuant to sections 40 and 41 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [Section 40/41 Report or Report].

[12] The Commission's decision was dated March 7, 2012. The file also contained the Section 40/41 Report that summarized the case of both parties and the issues for decision. The Commission found that except for the Applicant's complaint of age discrimination, there was no other evidence in the file to suggest that age was a motivating factor. The connection between the CBC's actions and the discriminating grounds was considered tenuous.

[13] On the issue of the limitation period, the Section 40/41 Report outlined the Applicant's facts and positions in detail and accurately. This is important to this matter because one of the Applicant's submission letters was not in the Certified Tribunal Record and could have led to a procedural fairness issue.

[14] The Commission concludes that the Applicant did not do everything that a reasonable person would have done to pursue his complaint. The Commission finds a lack of diligence causing a delay of over one year and is a matter that was within Mr. Chomicz's control.

[15] Mr. Chomicz concedes that he was unaware of the one-year limitation period until it was raised by the Commission in-take personnel when Mr. Chomicz made his first contact with the Commission.

[16] The true issues before the Court are:

- (a) Was the failure to include the Applicant's September 25, 2011 letter in the Decision, a breach of procedural fairness or a failure to consider relevant material?

(b) Was the Decision reasonable?

### III. ANALYSIS

#### A. *Standard of Review*

[17] The issue of the missing submission and whether it was considered by the decision-maker is a matter of law and procedural fairness subject to a correctness standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190). This was also the conclusion of Justice Barnes in *Jeevaratnam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1371, 215 ACWS (3d) 962, on the specific issue of a missing document.

[18] As to the decision itself, Justice Cromwell in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364 at paragraph 17, held:

... the reasonableness standard of review, applied in the context of proposed judicial intervention at this preliminary stage of the Commission's work, may be expressed as follows: is there a reasonable basis in law or on the evidence for the Commission's conclusion that an inquiry is warranted?

The decision at issue occurred at the screening stage of the Commission's process. The Court of Appeal in *Bell Canada v Communications, Energy and Paperworkers Union of Canada* (1998), [1999] 1 FC 113 (FCA) at paragraph 38, confirmed the broad discretion granted in respect of matters under s 41:

The Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report. Subsections 40(2) and 40(4) and sections 41 and 44 are replete with expressions such as "is satisfied", "ought to", "reasonably available", "could more appropriately be dealt with", "all the circumstances", "considers appropriate in the circumstances" which leave no doubt as to the intent of Parliament.

B. *Procedural Fairness*

[19] The September 25, 2011 letter of submissions is missing from the Certified Tribunal Record but it was clearly received by the Commission. It is specifically mentioned in the Report and commented on in paragraphs 24-27.

[20] There is no specific record of the conversation between the Applicant and the in-take officer in which, the Commission says, the Applicant was informed about the missed deadline and his intent to proceed in any event. However, the Applicant does not deny that he was given notice that he was out of time for filing. He specifically addressed the issue in submissions to the Commission.

[21] Therefore, there is no issue of adequacy of notice as to the deadline. The fact that the Applicant was initially unaware of the one-year limitation period is irrelevant as everyone is presumed to know the law and his status as unrepresented does not heighten the duty owed to the Applicant. In fairness to Mr. Chomicz, he never suggests that as an unrepresented litigant, he was entitled to special treatment.

[22] As to whether the September 25, 2011 letter was considered, while the Commission does not list it as a document considered, it is evident from the Report that it was received and its contents mentioned. The Report would have been read by the decision-maker and given its finding, there is nothing to suggest that the contents of the September 25, 2011 letter were not considered as reflected in the Report. The Report is an accurate summary of the Applicant's position.

[23] I therefore conclude that there has been no breach of procedural fairness or failure to consider relevant material.

C. *Reasonableness of Decision*

[24] The Commission's decision is entitled to a high level of deference. Its finding that the Applicant did not do all that was reasonable and that the missed deadline was within his control was reasonably open to the Commission. Deference means at least recognition by a Court that even if the Court might exercise its discretion one way, it could be reasonable to exercise that discretion another way.

[25] In this case, the Applicant started on a reasonable path by retaining a lawyer. It is impossible to assess the basis for the Applicant losing confidence. He took no action against the lawyer and more importantly did not complain to the Law Society about alleged incompetence. It is too easy to try to explain away problems by blaming counsel and yet taking no remedial steps consistent with a person harmed by professional incompetence.

[26] Having dismissed counsel, having both another counsel and his union refuse to take up his cause, Mr. Chomicz did not take the most direct step, if age discrimination was truly the issue, of approaching the body that has jurisdiction over this subject-matter.

[27] People have a right to represent themselves but they also take on the responsibility for any of their own missteps along the way. Mr. Chomicz missed a deadline because he did not know it existed. He is responsible for that misstep.

[28] It was not unreasonable for the Commission to reach that conclusion and to find that there are no circumstances which would justify extending the one-year limitation period.

[29] To the extent that adequacy of reasons was still a live issue, there is no basis for this challenge. As an issue it does not stand apart from the reasonableness of the decision. The basis for the decision was clear. Mr. Chomicz's quarrel is with the result and reasoning not with its opaqueness.

#### IV. CONCLUSION

[30] Therefore, this judicial review will be denied. The Respondent graciously accepted the Court's suggestion that a costs award against Mr. Chomicz is not required. None will be made.



**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the application for judicial review is denied.

“Michael L. Phelan”

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Judge

**ANNEX**

*Canadian Human Rights Act, RSC, 1985, c H-6*

**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.

(2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.

(3) Where the Commission has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, the Commission may initiate a complaint.

(3.1) No complaint may be initiated under subsection (3) as a result of information obtained by the Commission in the course of the administration of the *Employment Equity Act*.

(4) If complaints are filed jointly or separately by more

**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.

(2) La Commission peut assujettir la recevabilité d'une plainte au consentement préalable de l'individu présenté comme la victime de l'acte discriminatoire.

(3) La Commission peut prendre l'initiative de la plainte dans les cas où elle a des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire.

(3.1) La Commission ne peut prendre l'initiative d'une plainte qui serait fondée sur des renseignements qu'elle aurait obtenus dans le cadre de l'application de la *Loi sur l'équité en matière d'emploi*.

(4) En cas de dépôt, conjoint ou distinct, par plusieurs individus

than one individual or group alleging that a particular person is engaging or has engaged in a discriminatory practice or a series of similar discriminatory practices and the Commission is satisfied that the complaints involve substantially the same issues of fact and law, it may deal with the complaints together under this Part and may request the Chairperson of the Tribunal to institute a single inquiry into the complaints under section 49.

(5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice

(a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;

(b) occurred in Canada and was a discriminatory practice within the meaning of section 5, 8, 10, 12 or 13 in respect of which no particular individual is identifiable as the victim; or

(c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence.

ou groupes de plaintes dénonçant la perpétration par une personne donnée d'actes discriminatoires ou d'une série d'actes discriminatoires de même nature, la Commission peut, pour l'application de la présente partie, joindre celles qui, à son avis, soulèvent pour l'essentiel les mêmes questions de fait et de droit et demander au président du Tribunal d'ordonner, conformément à l'article 49, une instruction commune.

(5) Pour l'application de la présente partie, la Commission n'est valablement saisie d'une plainte que si l'acte discriminatoire :

a) a eu lieu au Canada alors que la victime y était légalement présente ou qu'elle avait le droit d'y revenir;

b) a eu lieu au Canada sans qu'il soit possible d'en identifier la victime, mais tombe sous le coup des articles 5, 8, 10, 12 ou 13;

c) a eu lieu à l'étranger alors que la victime était un citoyen canadien ou qu'elle avait été légalement admise au Canada à titre de résident permanent.

(6) Where a question arises under subsection (5) as to the status of an individual in relation to a complaint, the Commission shall refer the question of status to the appropriate Minister and shall not proceed with the complaint unless the question of status is resolved thereby in favour of the complainant.

(7) No complaint may be dealt with by the Commission pursuant to subsection (1) that relates to the terms and conditions of a superannuation or pension fund or plan, if the relief sought would require action to be taken that would deprive any contributor to, participant in or member of, the fund or plan of any rights acquired under the fund or plan before March 1, 1978 or of any pension or other benefits accrued under the fund or plan to that date, including

(a) any rights and benefits based on a particular age of retirement; and

(b) any accrued survivor's benefits.

(6) En cas de doute sur la situation d'un individu par rapport à une plainte dans les cas prévus au paragraphe (5), la Commission renvoie la question au ministre compétent et elle ne peut procéder à l'instruction de la plainte que si la question est tranchée en faveur du plaignant.

(7) La Commission ne peut connaître, au titre du paragraphe (1), d'une plainte qui porte sur les conditions et les modalités d'une caisse ou d'un régime de pensions, lorsque le redressement demandé aurait pour effet de priver un participant de droits acquis avant le 1er mars 1978 ou de prestations de pension ou autres accumulées jusqu'à cette date, notamment :

a) de droits ou de prestations attachés à un âge déterminé de retraite;

b) de prestations de réversion.

**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

*(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.

(2) The Commission may decline to deal with a complaint referred to in paragraph 10(a) in respect of an employer where it is of the opinion that the matter has been adequately dealt with in the employer's employment

**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)* 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.

(2) La Commission peut refuser d'examiner une plainte de discrimination fondée sur l'alinéa 10a) et dirigée contre un employeur si elle estime que l'objet de la plainte est traité de façon adéquate dans le plan

equity plan prepared pursuant to section 10 of the *Employment Equity Act*.

d'équité en matière d'emploi que l'employeur prépare en conformité avec l'article 10 de la *Loi sur l'équité en matière d'emploi*.

(3) In this section, "employer" means a person who or organization that discharges the obligations of an employer under the *Employment Equity Act*.

(3) Au présent article, « employeur » désigne toute personne ou organisation chargée de l'exécution des obligations de l'employeur prévues par la *Loi sur l'équité en matière d'emploi*.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-760-12

**STYLE OF CAUSE:** JACK CHOMICZ  
and  
CANADIAN BROADCASTING CORPORATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 26, 2012

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

**DATED:** December 20, 2012

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