

Federal Court



Cour fédérale

Date: 20131204

Docket: T-759-13

Citation: 2013 FC 1220

Ottawa, Ontario, December 4, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

CLEMENT HICKS

Applicant

and

CANADIAN NATIONAL RAILWAY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision of the Canadian Human Rights Commission [the Commission]. The Commission dismissed a complaint by the Applicant pursuant to subsection 41(1)(e) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act].

I. Issue

[1] The issue raised in the present application is:

A. Was the Commission's decision not to extend the one year time limit to hear the Applicant's complaint under subsection 41(1)(e) of the Act reasonable?

II. Standard of Review

[2] The parties agree that the standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 44-49, 54-57, 62, 64; et al).

III. Background

[3] The Applicant was employed by the Respondent as a railway mechanic from April, 1990, until February 19, 2002, when he was terminated after being found to have been in violation of the Respondent's drug and alcohol policy. The Applicant was a member of the CAW Local 100, Rail Division [the Union] at the time of his dismissal.

[4] With encouragement from the Union, the Applicant subsequently attended various treatment programs for addiction from 2002 until 2006, in an effort to gain reinstatement. In 2006, as an alternative to arbitration, the Respondent suggested that the Applicant be evaluated by Dr. Sutton, an addictions specialist retained by the Respondent. The Applicant agreed to this evaluation, which was conducted on February 7, 2006. Dr. Sutton gave a negative evaluation of the Applicant.

[5] From March, 2006 to December, 2008, the Applicant worked as a welder. He has also supplied evidence that he worked on a short term basis in 2004.

[6] In February, 2009, the Applicant suffered a ruptured aortic aneurism. The Applicant alleges that he suffers ongoing impaired concentration and memory as a result. In addition, the Applicant alleges that he has seen a psychiatrist, Dr. Doyle, who has prescribed medication for anxiety, depression and anti-psychotic drugs, as a result of the stress caused by his dismissal and the difficulties encountered in seeking reinstatement. The Applicant claims he left work in December, 2008, as a result of his health issues.

[7] On October 13, 2009, the Applicant was informed by the Union that they would not be assisting him with further reinstatement requests and considered his case closed.

[8] On September 18, 2012, the Applicant filed a complaint with the Commission [the Complaint]. The Complaint alleged that the Respondent had discriminated against him on the basis of a disability. The last of the alleged discriminatory acts occurred during his visit with Dr. Sutton, on February 7, 2006.

[9] On November 28, 2012, the Commission released a Section 40/41 Report [the Report], which recommended that the Applicant's complaint not be dealt with pursuant to section 41(1)(e) of the Act, because the complaint was based on acts that occurred more than one year before the complaint was filed.

[10] On December 12, 2012, the Applicant wrote a letter to the Commission in response to the Report. Included in this letter were statements that he telephoned the Commission in 2008, but was

told he was not permitted to pursue his complaint until all union grievances were exhausted. This is not required by the Act. Also in his letter he made a number of assertions which apparently relate to why he was unable to promptly file a complaint following the October 13, 2009, letter from his Union.

[11] On February 13, 2013, the Applicant submitted another letter in response to the Report. In this letter, the Applicant states that he called the Commission as early as 2002 and 2006 for assistance in seeking redress for the alleged discrimination, and was told both times to pursue all grievance options prior to filing a complaint. As for the delay after the 2009 letter from the Union, he states that “it was never an option for a person in my situation.”

[12] In a Record of Decision dated March 20, 2013, the Commission decided that it would not deal with the Applicant’s complaint, pursuant to section 41(1)(e) of the Act. The Commission’s decision states:

The last alleged discriminatory act occurred more than one year before receipt of the complaint by the Commission and it is not appropriate to deal with the complaint because the complainant did not do everything that a reasonable person would do in the particular circumstances to proceed with the complaint.

[13] The Commission considered, among other things, the Report and the Applicant’s letters. The Report stated a number of factors it used in considering the application of section 40(1)(e). These factors include:

- a) The date of the last discriminatory act was on February 7, 2006;
- b) That the series of discriminatory acts are alleged to be linked;
- c) First recorded contact with the Commission by the Applicant was in June, 2008;

- d) The Applicant submitted his complaint on September 18, 2012, more than six years after the last alleged discriminatory act was committed, and he gave no specific reason for the delay between the initial contact he had with the Commission and the initializing of his complaint; and
- e) He did not file a grievance while the discrimination was occurring because he was concerned about workplace consequences, though he asserts that correspondence from his Union received in 2008 suggests he had little chance of success;

[14] In exercising its discretion to hear a complaint where more than one year has elapsed, the Commission notes that the following factors should be considered:

- a) The nature and seriousness of the issues raised, and the impact on the public interest;
- b) The length of delay, reasons for it, and the degree to which the complainant was responsible for that control;
- c) Whether the complainant was represented at any time;
- d) Whether the delay due to the complainant pursuing another redress procedure;.
- e) Whether the respondent had notice of the complainant's intention of filing a complaint; and
- f) Whether the respondent's ability to defend the complaint would be seriously prejudiced.

[15] The Commission concluded that:

The complainant is not able to provide evidence that any of the allegations might be severed from the remainder, nor is the complainant able to give many concrete indications of his diligence in pursuing the complaint. It would appear likely that after a period of ten years, the preparing of a defence to the complainant would pose significant challenges for the respondent relative to both the

memory of potential witnesses and the retrieval of relevant documents.

[16] For reasons that follow, this application is dismissed.

IV. Analysis

[17] The Applicant argues that the discretionary power under section 41(1)(e) of the Act must be used with consideration to the good faith of the complainant, the reasonableness of his explanations for the delay and the existence of some harm or prejudice to the Respondent due to the delay (*Bredin v Canada (Attorney General)*, 2006 FC 1178, at para 55; *Richard v Attorney General of Canada*, 2010 FC 436, at para 20 [*Richard*]).

[18] The Applicant also argues that disability was a major factor responsible for the delay in filing his complaint with the Commission, and the Commission was aware of this disability based on the information submitted regarding his heart attack, various attempts at alcohol rehabilitation, and mental health issues. Despite this awareness, the Commission did not consider this in deciding not to exercise its discretion under section 41(1)(e) of the Act as it should have (*Bredin v Attorney General of Canada*, 2007 FC 1361, at para 31).

[19] Finally, the Applicant argues that the Commission had no evidence of prejudice to the Respondent by reason of the delay alone, and delay itself is not evidence of prejudice (*Richard*, above, at para 22; *Canada (Attorney General) v Burrell*, [1997] 131 FTR 146, at paras 26-27).

[20] The Respondent asserts in the Record of Decision dated March 20, 2013, that it considered all correspondence from the Applicant. However, there is no indication of such consideration, as neither the Report nor the Record of Decision analyzes the potential impact of the health issues faced by the Applicant. I agree with the Applicant to the extent that the Commission failed to explicitly analyze his alleged disabilities.

[21] The question then becomes whether this omission renders the Commission's decision unreasonable. The case most relevant to this context is *Bredin*. In *Bredin*, the Applicant's complaint was denied on the basis of untimeliness pursuant to subsection 41(1)(e), after the Applicant filed her complaint more than 21 months after the last alleged instance of discrimination. At paras 31-32, Justice Frenette states:

Among the circumstances to be considered by the Commission, is the disability factor. If this disability has hindered the filing of the complaint motion, the prescribed delay [sic]. The Commission must take it into account to reach a decision, see *Lukian v. Canada National Railway Co. (CNR)*, [1994] F.C.J. No. 727.

It seems that there is no case reported relating to a psychological disability in determining any extension of a time. In principle, I see no logical basis for not considering such a disability if it is established that it rendered the complainant unable to file a complaint within a year limit set by law.

[22] The *Bredin* case relies on *Lukian v Canada National Railway Co*, [1994] FCJ No 727 [*Lukian*]. However, *Lukian* does not specifically prescribe disabilities as a factor that must be considered. Para 8 from *Lukian* is relevant:

What the law requires is the Commission to consider each individual case before it, to act in good faith, to have regard to all relevant considerations and not be swayed by irrelevant ones, and to refrain from acting for a purpose contrary to the spirit of its enabling legislation or in an arbitrary or capricious manner.

[23] In this case, it is not clear that the Applicant's submissions as to his alleged disabilities are relevant to the delay in submitting his complaint. Unlike in *Bredin* at para 39, where a medical report was submitted which "...demonstrated that during the delay period the applicant was diagnosed with major depression and unable to focus and concentrate, complete tasks in a timely manner, and lost interest in matters," no medical evidence was presented to the Commission.

[24] Moreover, the Applicant was able to deal with the Union over the period of time in question, and yet did not file a complaint with the Commission.

[25] Instead, the Applicant submitted various letters which alluded to various health and substance abuse problems. While it is not this court's role to re-weigh evidence, it is necessary to examine the letters to determine whether the Commission ought to have considered this evidence. From such a review, it is evident that these submissions do not show that the delay was a result of his disability. This is compounded by the Applicant's failure to submit any supporting medical evidence.

[26] Given the real question of the applicability of the Applicant's alleged disabilities in causing the lengthy delays and the unlikelihood that they were responsible for a delay of either ten or six years in filing his complaint, I do not think the Commission was under an obligation to expressly consider the Applicant's alleged claims of disability in determining whether to hear his complaint under subsection 41(1)(e). The Commission did reference the Applicant's disabilities, directly or indirectly, in paragraphs 7, 10, 14 and 17 of the decision.

[27] The Applicant also takes issue with the fact that the Commission found that the Respondent would suffer prejudice due to the length of time that has elapsed and the potential prejudice this has had on relevant witnesses. Considering the alleged discrimination began in 2002, more than ten years have passed since those events. I do not think it is purely speculative to find that such a length of time would prejudice the Respondent. The potential inability for witnesses to accurately recall specific incidents could prejudice the Respondent's ability to build a defence. That being said, the evidence was weak at best in supporting the allegation of prejudice due to the delay.

[28] Given the above, the Commission's decision was justified, transparent and intelligible and within the range of possible, acceptable outcomes.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's application is dismissed.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-759-13

STYLE OF CAUSE: Hicks v Canadian National Railway

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 27, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** MANSON J.

DATED: December 4, 2013

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