

Federal Court



Cour fédérale

Date: 20140903

Docket: T-1522-13

Citation: 2014 FC 840

Montréal, Quebec, September 3, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

EMERENCE MIAKANDA-BATSIKA

Applicant

and

BELL CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Emerence Miakanda-Batsika (EMB), alleges several instances of discrimination and harassment by her employer, Bell Canada (BC), and several employees of BC. In 2011, she brought these allegations to the attention of the Canadian Human Rights Commission (CHRC) in the form of a complaint. In 2013, the CHRC decided to dismiss EMB's complaint because:

- the evidence gathered does not support the allegations of the complaint; and
- having regard to all the circumstances of the complaint, further inquiry by the Canadian Human Rights Tribunal is not warranted.

[2] Before me, EMB asks that I set aside the CHRC's decision. Her arguments can be broken down into two categories:

- (i) she was not given procedural fairness; and
- (ii) the decision of the CHRC was unreasonable in light of the information that had been provided to it.

[3] Questions involving the fairness of the procedure adopted by the CHRC in deciding whether to dismiss complaints have been held by the Federal Court of Appeal to amount to questions of procedural fairness and subject to the correctness standard of review: *Ayangma v Canada (Attorney General)*, 2012 FCA 213 [*Ayangma*] at para 56; *El Din Ali v Canada (Attorney General)*, 2014 FCA 124 [*El Din Ali*] at para 11.

[4] The review of the CHRC's determination of the facts and sufficiency of evidence in decisions to dismiss complaints has been reviewed on a standard of reasonableness: *Ayangma* at para 56; *El Din Ali* at para 11.

[5] For the reasons set out below, I dismiss this application for judicial review. The CHRC's decision should not be set aside.

II. Background

A. *Facts*

[6] EMB alleges that she has been subject to discrimination and harassment at work since as early as 2006. The allegations made in her complaint to the CHRC can be divided into the following categories:

- Denial of a promotion in 2007 by her then supervisor, Alain Lemay.
- By her next supervisor, Lionel Nicholas-Etienne (LNE),
 - exclusion from a clique of other employees formed in 2008,
 - failure in 2008 to recognize EMB's certification,
 - other disrespectful conduct in 2009.
- By her next supervisor, Troy Hand (TH),
 - undue scrutiny given to EMB's credentials,
 - various acts of harassment in 2010 and 2011, including yelling at her.

[7] On May 23, 2012, the investigator at the CHRC assigned to investigate EMB's complaint wrote to both EMB and BC to request that they provide certain information and documents. She requested a response by June 23, 2012.

[8] BC responded by letter dated June 22, 2012. Among other things, BC's letter suggested that the investigator communicate with the following individuals: LNE, TH and Tina Spadafora, another Bell employee who had investigated a related complaint by EMB.

[9] From EMB, the investigator requested the following details:

- the e-mail in which she alleges others were promoted over her,
- the clique she claims she was excluded from,
- specific examples regarding her allegations against LNE,
- specific examples regarding her allegations against TH, including details of when he yelled at her,
- details of the differential treatment surrounding BC's request for information about EMB's credentials.

[10] In the absence of a response from EMB within the requested time, the investigator followed up with a telephone message to her counsel on June 27, 2012 and a letter on July 9, 2012. In the letter, she forwarded BC's response and invited rebuttal and/or comments. She also indicated that she would call to discuss BC's response. She also reiterated her request for details as set out in her letter of May 23, 2012. This time she requested that the details be provided by August 3, 2012.

[11] On July 31, 2012, EMB's counsel submitted 325 pages of documents with a suggestion that the investigator review them and return them. The investigator tried numerous times thereafter to contact EMB or her counsel before writing to her counsel on November 20, 2012 to return the documents and advise that it is EMB's responsibility to explain the significance of documents that she cites. In response to this letter, EMB's counsel advised that he would respond the following week.

[12] Still having received nothing from EMB or her counsel, the investigator wrote again to her counsel on December 6, 2012 advising that, where the CHRC is not able to communicate with a complainant, it is obliged to complete its investigation without the benefit of the complainant's participation.

[13] This letter finally elicited a detailed response, also dated December 6, 2012.

[14] An interview with EMB was arranged for April 8, 2013 and then postponed to April 15, 2013 because EMB's counsel was stuck in traffic. The interview was complicated somewhat because EMB preferred to be interviewed in French and the investigator could not communicate with her in French. A translator was therefore arranged. EMB alleges that the investigator was upset with the request for a translator, and that one had to be pulled from his lunch, unprepared, to participate. EMB also alleges that she had difficulty understanding the translator and that the translator had difficulty understanding her.

[15] At that hearing before me, EMB (representing herself) explained that it was agreed that the interview would be re-scheduled for another day. However, no further interview took place and the investigator issued her report on May 17, 2013.

B. *The investigator's report and the CHRC's decision*

[16] The investigator's report recommended that the CHRC dismiss the complaint for the reasons set out at the beginning of this decision. The letters accompanying the investigator's

report invited comments by June 13, 2013. EMB's counsel provided comments in a letter dated July 3, 2013. BC responded to these comments in a letter dated July 15, 2013.

[17] The CHRC's decision to dismiss the complaint (for the reasons recommended by the investigator) was communicated to the parties by letters dated August 22, 2013. These letters indicated that the CHRC had taken account of the investigator's report as well as the submissions of the parties in response thereto.

[18] The investigator's report indicates that the investigator reviewed a number of documents that were provided to her, and interviewed the three individuals who were suggested to her by BC. The report also indicates that the investigator interviewed EMB. There is no indication of any issue with the interview that would have warranted a follow-up interview.

[19] The report addresses all of the issues raised in EMB's complaint. The investigator deals with the allegations in the following categories:

- The denied promotion
- Allegations against LNE
- Allegations against TH
- Allegations of harassment

[20] With regard to the allegation of a denied promotion, the report concludes that EMB did not provide details as to how it could be characterized as differential treatment warranting further consideration.

[21] With regard to allegations of adverse differential treatment by LNE and TH, the report discusses the allegations and concludes that EMB did not provide evidence indicating that they treated her in a differential manner.

[22] With regard to allegations of harassment, the report notes that they were not raised until it was suggested to EMB that her allegations did not appear to be linked to a ground within the jurisdiction of the CHRC. Based on this, as well as the lack of supporting documentation, details or witnesses, and the layout of the workplace, the investigator concludes that the harassment likely did not occur.

III. Analysis

A. *Did the investigation fail to show procedural fairness?*

[23] As I understand it, there are two aspects to EMB's argument that she was denied procedural fairness. Firstly, she alleges that her input was not properly received by the investigator because of the difficulty of communication during her interview. Secondly, and also arising out of the communication difficulties during EMB's interview, she was never asked to provide the names that had been requested of the witnesses who could support her allegations. Without the names of those witnesses, EMB submits, the investigation of EMB's complaint was compromised.

[24] In respect of both aspects of EMB's concerns about procedural fairness, I am of the view that she was not denied procedural fairness. Even if she was prevented from providing names of

witnesses during her interview with the investigator, she had an opportunity to indicate in comments after the issuance of the report any additional information that she felt were necessary for the CHRC to have, including the names of witnesses. The information provided in her counsel's letter of July 3, 2013 was considered by the CHRC but did not change its decision. That letter did not name any witnesses. Instead, it stated that there were witnesses who did not wish to be named. Without identification of witnesses, the investigator could hardly be faulted for failing to interview them. The investigator clearly indicated that the failure to name witnesses could prevent the matter from proceeding further, and EMB understood this, as acknowledged in her counsel's letter of July 3, 2013.

[25] In her affidavit in support of the present application for judicial review, EMB identified two witnesses who, I understand, had not been identified to the investigator. These were Lawrence Ashimey and Dr. Eddie Lo. At the hearing before me, EMB explained that Mr. Ashimey is a fellow BC employee with whom she has discussed the events relevant to the present judicial review. EMB acknowledged that Mr. Ashimey had not personally witnessed any of the events of which she complains. EMB also explained that Dr. Lo is a physician who treated her for health problems that she has suffered during the period addressed in the present judicial review. Though he might be able to provide information about the state of EMB's health, he would not be in a position to assist an investigator in trying to determine whether any health problems were caused by discrimination or harassment at the hands of BC or its employees. Accordingly, I conclude that, even if the names of these witnesses had been given to the investigator during her investigation, and the investigator had interviewed those witnesses, the recommendation in her report would not have changed.

B. *Was the CHRC unreasonable in assessing the information provided to it?*

[26] Having read the investigator's report and EMB's comments thereon, I am of the view that the investigation was thorough and the analysis of the information and documents gathered entirely reasonable. The investigator adequately identified the various allegations made by EMB, and indicated the lack of information and details to support the allegations.

[27] EMB's counsel's letter of July 3, 2013 commenting on the investigator's report essentially details a difference of opinion over the analysis of information and documents that were gathered by the investigator and a difference of opinion over how to address the possible existence of witnesses who could corroborate EMB's allegations but who did not wish to be named. I have indicated above why I disagree with EMB on how to address the possible existence of unnamed witnesses. As regards the investigator's analysis of the information and documents provided to her, I have seen nothing that convinces me that it was unreasonable.

[28] Before concluding, I feel compelled to raise another point concerning EMB's counsel's letter of July 3, 2013. Having been unsuccessful in pressing her allegations of discrimination and harassment against her three successive supervisors at BC during the period from 2006 to 2011, she then turns on her union (alleging that it "joined the employer to harass her" when it failed to support her complaint) and on the investigator (alleging repeatedly that she was biased against EMB in her investigation). This string of allegations gives the impression that EMB is prepared to level accusations of impropriety against anyone with whom she has a disagreement.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed with costs.

“George R. Locke”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1522-13

STYLE OF CAUSE: EMERENCE MIAKANDA-BATSIKA v BELL CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JULY 21, 2014

JUDGMENT AND REASONS: LOCKE J.

DATED: SEPTEMBER 3, 2014

APPEARANCES:

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