Federal Court of Appeal | Cour d'appel fédérale

Date: 20161114

Docket: A-403-14

Citation: 2016 FCA 278

CORAM: **NADON J.A.**
STRATAS J.A.
RENNIE J.A.

BETWEEN:

EMERENCE MIAKANDA-BATSIKA

Appellant

and

BELL CANADA

Respondent

Heard at Toronto, Ontario, on October 12, 2016.

Judgment delivered at Ottawa, Ontario, on November 14, 2016.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: STRATAS J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] Before us is an appeal by the appellant, Emerence Miakanda-Batsika, of a judgment dated September 3, 2014 rendered by Mr. Justice Locke of the Federal Court (the Judge) dismissing her judicial review application which challenged a decision of the Canadian Human Rights Commission (the Commission) dated August 22, 2013, 2014 FC 840.

[2] More particularly, the Commission held, pursuant to subparagraph 44(3)(*b*)(i) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act) that the evidence before it did not support the appellant's complaint of harassment and discrimination against her employer and that, having regard to all of the circumstances surrounding the complaint, further inquiry was not warranted. In concluding as it did, the Commission relied on the investigation report of Deirdre Hilary dated May 17, 2013 and on the submissions made by the parties in response to the investigation report.

[3] The complaint before the Commission was that the appellant had been subject to harassment and discrimination on the basis of race, national or ethnic origin and colour in the course of her employment with the respondent, Bell Canada. More particularly, the appellant complained that the conduct of three of her supervisors, namely Alain Lemay, Lionel Nicholas-Etienne and Troy Hand, had resulted in adverse differential treatment. She also complained that because of her supervisors' conduct, her employer had failed to provide her with a harassment-free workplace. At paragraph 6 of his reasons, the Judge sets out the specifics of the appellant's complaint against her three supervisors:

> EMB [the appellant] 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.

[4] After summarizing the evidence, the Judge reviewed both the investigator's report and the Commission's decision. He then dealt with the questions before him, beginning with the issue of procedural fairness. In his view, the appellant had not been denied procedural fairness by the investigator. The Judge's rationale for that conclusion appears at paragraphs 23 to 25 of his decision where, after setting out the appellant's grounds for her submission that she was denied procedural fairness by the investigator, he explains why the appellant's allegations are without merit. Paragraphs 23 to 25 of the Judge's reasons read as follows:

> [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.

[5] The Judge then turned to the question of whether the Commission's decision was unreasonable in light of the evidence gathered by the investigator. At paragraph 26 of his reasons, he indicated that he was satisfied that the investigator had properly investigated the appellant's complaint and that she had carefully analyzed all of the information submitted to her both by the appellant and by the respondent.

[6] In my view, the Judge made no reviewable error either in respect of the procedural fairness issue or with regard to the reasonableness of the Commission's decision.

[7] In concluding, as I do, that the Judge made no reviewable error, I have carefully examined the investigator's report. The investigator begins her report by identifying the nature of the appellant's complaint. At page two of her report, she sets out the complaint in the following terms:

> The complainant, who self-identifies as a Black African woman from the Congo, alleges adverse differential treatment and failure to provide a harassment-free workplace on the basis of race, colour, and national or ethnic origin. The

> complainant has been employed by the respondent, Bell Canada, since 2003 in several different capacities.

[8] The investigator breaks down the appellant's complaint into two parts, namely adverse differential treatment and failure to provide a harassment-free environment. With respect to adverse differential treatment, the investigator examined the treatment which the appellant received from her three supervisors. She began with the allegation made against Alain Lemay and concluded that "The complainant did not provide details about this allegation, and how it could be characterized as differential treatment. As such, this allegation need not be pursued further" (paragraph 7 of the report).

[9] She then turned to the appellant's allegation against Lionel Nicholas-Etienne and she concluded that the appellant had not provided any evidence supporting her allegation that Mr. Nicholas-Etienne had treated her in a differential manner. Consequently, the investigator concluded that that allegation would not be pursued.

[10] Lastly, she examined the allegation made by the appellant against Mr. Troy Hand, her manager at the time of the complaint. Again, the investigator concluded that the evidence submitted by the appellant was not sufficient to support her allegation that she had been treated differently by Mr. Hand. Thus, the investigator concluded that this allegation would not be pursued.

[11] The investigator then turned her attention to the second part of the appellant's complaint, *i.e.*, the failure to provide her with a harassment-free environment. At paragraph 24 of her report, she sets out her conclusion regarding that part of the complaint:

> 24. The complainant has not provided any evidence to support her allegations. Further, the allegations of racial harassment were not raised until it was suggested to the complainant that her allegations did not appear to be linked to a ground of the CHRA. The complainant did not provide supporting documentation, details or witnesses, and in light of the layout of the workplace, it is unlikely that the allegations occurred as alleged. As such, the allegations relating to harassment need not be pursued further.

[12] Then, at paragraphs 25, 26 and 27 of her report, the investigator sets out her final conclusions regarding the appellant's complaint and, at paragraph 28, she sets out her recommendation to the Commission as to how it should deal with the appellant's complaint:

> 25. The complainant alleges that she was harassed and treated in an adverse differential manner by her managers because she is a black woman from the Congo.
>
> 26. The respondent denies the allegations and states that she was treated fairly at all times. The respondent denies that there was workplace harassment.
>
> 27. The evidence gathered in investigations does not support the complainant's allegations.
>
> 28. It is recommended, pursuant to sub-paragraph 44(3)(*b*)(i) of the *Canadian Human Rights Act*, that the Commission dismiss the 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 into the complaint is not warranted

[13] As this is an appeal from a judgment of the Federal Court pertaining to an application for judicial review, the role of this Court is to determine whether the Judge identified the appropriate

standard of review and whether he applied that standard to the issue before him (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, 2013 SCC 36, at paragraphs 45 to 47).

[14] At paragraphs 3 and 4 of his decision, the Judge indicated that with regard to the issue of procedural fairness, the appropriate standard was that of correctness and that with regard to the Commission's determination of the facts and the sufficiency of the evidence before it, the appropriate standard was that of reasonableness. There can be no doubt that the Judge properly identified the applicable standards of review.

[15] After consideration of the parties' written and oral arguments, I come to the view that the Judge made no error in applying the applicable standard of review to the issues before him. It is clear from the appellant's written and oral submissions that she disagrees with the investigator's assessment of the evidence gathered during the course of the investigation and that she is not satisfied with the manner in which the investigator gathered that evidence. However, in my respectful opinion, her criticisms find no support in the evidence. The investigator examined the relevant documents, including the exchange of office e-mails submitted by the applicant, and interviewed the appellant, Mr. Nicholas-Etienne, Mr. Troy Hand and Miss Tina Spadafora, a Bell Canada employee who conducted an internal investigation following a previous harassment complaint made by the appellant in May, 2011. It is clear from the investigation report that the investigator was satisfied that the evidence presented to her did not support the complaint. In my view, in light of the evidence, the investigator's conclusion is entirely reasonable.

[16] I should point out that prior to the filing of her complaint with the Commission, the appellant had filed a grievance against her employer alleging that she had been harassed by her supervisors. Following Ms. Spadafora's investigation, it was determined that the grievance was unfounded. Hence, the appellant's Union decided not to pursue the grievance.

[17] I should also point out that before the investigator finalized the report on which the Commission relied for its decision, both the appellant and the respondent were given ample opportunity to provide to the investigator information and comments with regard to the matters under investigation.

[18] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 (*Dunsmuir*), the Supreme Court of Canada, at paragraph 47 of its reasons, explains the concept of reasonableness as follows:

> Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility with 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 the law.

[19] In light of the Supreme Court's decision in *Dunsmuir*, this Court, in *Keith v. Canada (Correctional Service)*, 2012 FCA 117, 431 N.R. 121, at paragraph 48, sets out the approach that the Federal Court and this Court should take in reviewing a decision of the Commission:

> In my view, a reviewing court should defer to the Commission's findings of fact resulting from the section 43 investigation, and to its findings of law falling within its mandate. Should these findings be found to be reasonable, a reviewing court should then consider whether the dismissal of the complaint at an early stage pursuant to paragraph 44(3)(*b*) of the Act was a reasonable conclusion to draw having regard to these findings and taking into account that the decision to dismiss is a final decision precluding further investigation or inquiry under the Act.

[20] When it made its decision to dismiss the Appellant's complaint, the Commission, as I indicated earlier, relied on the investigator's report and on the submissions made by the appellant and the respondent in response to the report. After consideration thereof, the Commission concluded that the evidence did not support the appellant's allegations of harassment and discrimination and that, having regard to all of the circumstances, further inquiry into the appellant's complaint was not warranted.

[21] I see no basis on which I could conclude that the findings made by the investigator could be characterized as being unreasonable. Consequently, in relying on the investigator's report, the Commission's decision to dismiss the appellant's complaint is a decision that clearly falls within the range of possible acceptable outcomes which are defensible in respect of the facts and the law. Although the appellant disputes many of the findings made by the investigator, that is not sufficient to justify intervention on our part.

[22] Before concluding, I wish to make the following remarks. During her oral presentation, the appellant argued that her interview with the investigator was flawed because she and the interpreter could not understand each other in the French language. Meanwhile, the investigator notes at paragraph three of her report that "the report was filed in English", while "the interview with the complainant was conducted in French as requested by the complainant". As there is no evidence in the record which shows or tends to show that because of language issues, the appellant was unable to present proper evidence in support of her complaint or that she was unable to make adequate submissions in that regard, I can only conclude that she was not denied procedural fairness by the investigator by reason of language difficulties.

[23] Even though, for the purpose of this appeal, we need only determine whether the investigator's findings and the Commission's decision, which relied on these findings, are reasonable, it is my view that the evidence clearly does not support the allegations of discrimination and harassment which the appellant makes.

[24] Consequently, I would dismiss the appellant's appeal with costs.

"M Nadon"
J.A.

"I agree.
David Stratas J.A."

"I agree.
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-403-14

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE LOCKE OF THE FEDERAL COURT DATED SEPTEMBER 3, 2014 DOCKET NUMBER T-1522-13)

STYLE OF CAUSE:	EMERENCE MIAKANDA-BATSIKA v. BELL CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 12, 2016
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	STRATAS J.A. RENNIE J.A.
DATED:	NOVEMBER 14, 2016

APPEARANCES:

Emerence Miakanda-Batsika	FOR THE APPELLANT (SELF REPRESENTED)
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SOLICITORS OF RECORD:

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