

Date: 20081103

Docket: A-576-07

Citation: 2008 FCA 340

**CORAM: DÉCARY J.A.
SEXTON J.A.
SHARLOW J.A.**

BETWEEN:

GLEN MORRISON

Appellant

and

HSBC BANK OF CANADA

Respondent

Heard at Toronto, Ontario, on October 2, 2008.

Judgment delivered at Ottawa, Ontario, on November 3, 2008.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

**DÉCARY J.A.
SEXTON J.A.**

Date: 20081103

Docket: A-576-07

Citation: 2008 FCA 340

**CORAM: DÉCARY J.A.
SEXTON J.A.
SHARLOW J.A.**

BETWEEN:

GLEN MORRISON

Appellant

and

HSBC BANK OF CANADA

Respondent

REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal of the judgment of Justice Gibson (2007 FC 1232) dismissing the application of Mr. Glen Morrison for judicial review of a decision of the Canadian Human Rights Commission that dismissed his discrimination complaint against HSBC Bank of Canada. For the reasons that follow, I would dismiss this appeal without costs.

Facts

[2] Mr. Morrison is a Canadian citizen of Caribbean descent. Between June of 2004 and September of 2005 he was a customer of the bank at its branch in Mississauga, Ontario, where he

maintained an account in British currency (a GBP account). At the relevant time, the branch had 9,000 customers, 75 of whom had a GBP account as their only account. The policy of the bank was not to issue a bank card to a customer whose only account was a foreign currency account. For that reason, Mr. Morrison had never been issued a bank card. Nevertheless, Mr. Morrison transacted business at the bank branch many times without encountering any problems.

[3] On September 16, 2005, Mr. Morrison went to the bank in person. He says that a number of customers were there, but he was the only black person. He joined the line of customers. When it was his turn he approached the counter, gave a customer service representative his passbook and asked to withdraw \$2,500 in cash. Normally, a customer wishing to withdraw cash is asked to sign a transaction document. A customer service representative uses the bank's centralized computer system to check the customer's signature and account balance. No sample signature cards are maintained at the branch.

[4] However, the bank's centralized computer system was not functioning on September 16, 2005. There is a dispute as to whether the customer service representative told Mr. Morrison that the computer system was down. He says that if he had been told that, he would have left and come back on another day. In any event, the fact that the computer was down meant that the customer service representative was required to use an alternative procedure for verifying Mr. Morrison's identity. She asked Mr. Morrison to produce two items of photo identification. He produced his driver's license and his citizenship card, which bore his photo and his signature but had been issued over 30 years ago.

[5] Mr. Morrison says that he did not notice any other customers being asked to produce identification documents. Of course, he cannot have known whether the other customers had been asked to produce such documents or whether they had a bank card or were personally known to the bank staff. Nor can he have known whether they were withdrawing cash of a magnitude comparable to the withdrawal made by Mr. Morrison.

[6] Mr. Morrison's perception was that the customer service representative scrutinized his identification documents very closely, "as if she was an immigration officer at an airport". She may well have looked at them closely, but that might have been because she was blind in one eye, a fact that was not known to Mr. Morrison at the time. In any event, she took his documents and conferred with another bank employee, subsequently identified as the senior customer service manager, for a period of time that Mr. Morrison perceived to be lengthy.

[7] The customer service representative returned to the counter and asked Mr. Morrison to sign a transaction document. He did so. The customer service representative said that his signature did not resemble the signature on his citizenship card. Although he pointed out that he had signed his citizenship card some 30 years ago, she was not satisfied and asked him to sign three more times. By this time, Mr. Morrison felt that he was the subject of attention from the other customers. He felt humiliated because he thought he was being treated like someone attempting to commit a forgery.

[8] Mr. Morrison explained to the customer service representative that he had been a customer of the branch for over 15 months and had been there many times, and asked for an explanation. He

claims that the customer service representative muttered under her breath “you all look alike”. Later, the customer service representative was asked about that allegation and denied making that statement, or anything like it. The customer service representative asked for another signature, which he refused to give. Finally she gave him his money and he left.

[9] Mr. Morrison attributed his treatment at the bank to his race, colour, or national or ethnic origin. He decided to complain to the bank. With that in mind, he returned to the bank a few days later and asked to see the manager. He was told that the manager was not in. Mr. Morrison expressed his complaint to the senior customer relations manager, and then closed his account.

[10] Mr. Morrison filed his discrimination complaint with the Canadian Human Rights Commission on September 26, 2005, alleging that the manner in which he was treated at the bank led him to believe that he had been subject to discrimination on the basis of race, colour or national or ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[11] Mr. Morrison’s complaint was assigned to an investigator. She interviewed the customer service representative who dealt with Mr. Morrison on the day in question, the manager with whom she conferred on that day, the branch manager, and another customer service representative. The investigator also considered a number of bank records, including the bank’s business principles and code of ethics, the bank’s “know your customer” policy, its identification policy, and the performance reviews of the customer service representative who dealt with Mr. Morrison.

[12] In a report dated August 14, 2006, the investigator reported that, according to the bank, Mr. Morrison was one of a number of bank customers who was required to sign documents more than once during the time the bank's computer system was down. The bank also said that the customer service representative who dealt with Mr. Morrison had never been the subject of any similar complaints. The bank's position was that the interactions between Mr. Morrison and the customer service representative on September 16, 2005 were in accordance with the bank's policies and procedures. The bank denied that any of the actions taken by the customer service representative were affected by Mr. Morrison's race, colour or national or ethnic origin.

[13] The investigator also noted in her report that the evidence does not indicate that Mr. Morrison suffered adverse consequences as a result of this incident, except that the withdrawal of his money took longer than normal. Mr. Morrison does not challenge that conclusion.

[14] The investigator concluded that the complaint should be dismissed because the evidence did not support his allegations of discrimination, or a link between the alleged incidents and the statutory grounds of discrimination. Mr. Morrison was invited to comment on the report, which he did on September 5, 2006, submitting among other things that the investigation was not thorough and did not fairly consider his complaint. The bank also filed a response.

[15] By letter dated November 30, 2006, the Commission advised Mr. Morrison that it had dismissed his complaint on the grounds stated by the investigator. It is common ground that, in

these circumstances, the Commission is presumed to have adopted the conclusion and reasoning of the investigator.

[16] Mr. Morrison applied to the Federal Court for judicial review of the Commission's decision. He questioned the thoroughness and the neutrality of the investigation. He also argued that the Commission did not correctly apply the legal test of discrimination, and had made factual errors.

[17] Justice Gibson dismissed the application for judicial review. As I read his reasons, he did so because he concluded, first, that the investigation was thorough and fair, and second, that it was reasonably open to the investigator, and therefore the Commission, to find no link between the facts stated in the complaint and a prohibited ground of discrimination.

Appeal

[18] The grounds of appeal as argued by Mr. Morrison's counsel were somewhat different from the grounds of appeal stated in the appellant's memorandum of fact and law. The respondent did not object to that. The issues will be discussed in the order in which they were presented at the hearing of the appeal.

(1) Assessment of credibility by the investigator

[19] Counsel for Mr. Morrison argued that the investigator reached her conclusions and made her recommendation on the basis of her assessment of the credibility of Mr. Morrison and the bank employees she interviewed, and for that reason the report and the decision of the Commission

cannot stand. This argument is based on the proposition that it is improper for an investigator to assess credibility. I express no opinion on whether that proposition is sound as a matter of law. In my view, this ground of appeal must fail because the report discloses no basis for finding that the investigator assessed anyone's credibility.

[20] The investigator was required to conduct a fair and thorough investigation to find evidence relevant to the complaint, and to assess that evidence with a view to recommending whether the complaint should be dismissed or permitted to proceed to a hearing. That necessarily required a determination of whether the evidence was capable of being believed and whether, if believed, it was capable of proving a fact that was relevant because it could support or defeat the complaint.

[21] In the case of evidence in documentary form, the investigator may consider the authenticity of the document (an issue that did not arise in this case), and whether and how the contents of the document were relevant to the complaint. For example, in this case the investigator considered documents purporting to represent the bank's policies in relation to a number of issues, including the bank's code of ethics and its instructions to bank staff about the manner in which the identity of a customer is to be verified. The investigator implicitly concluded that the documents were relevant because they addressed the standard by which the bank conducted its affairs, and also the standard by which the acts of the customer service representative were to be assessed.

[22] Similarly, the investigator was required to assess evidence received in the form of the oral and written statements made to her. In that regard, it was necessary for the investigator to consider

whether the statements of Mr. Morrison and the bank employees were capable of being believed and whether, if believed, they were capable of proving a relevant fact.

[23] In this case, the investigator was faced with conflicting evidence in relation to two points. First, Mr. Morrison said that the customer service representative muttered a comment that Mr. Morrison interpreted as a racial slur, but the customer service representative denied making the comment. Second, Mr. Morrison said that he was not told that the bank's computer system was down, but the customer service representative says that he was told. It was and remains the position of Mr. Morrison that the alleged muttered comment was proof that the behaviour of the customer service representative on the day in question was motivated by racial prejudice, and that the lack of an explanation offered on that day supports the same conclusion. It was and remains the position of the bank that the customer service representative did not make the remark attributed to her, and that Mr. Morrison was given an explanation for the request for identification documents and signatures.

[24] The investigator described in her report the statements of Mr. Morrison and the statements of the customer service representative that disclosed the two factual disputes. She also summarized the evidence about the bank's computer, its breakdown for a number of days in September of 2005 (including the day in question), and the bank's policies and practices, including its customer identification policy. However, the investigator did not say or suggest that she engaged in an assessment of the credibility of Mr. Morrison or the customer service representative, or that either of the factual disputes should be resolved in favour of the bank. As I read the investigator's report, she decided to recommend the dismissal of Mr. Morrison's complaint primarily on the basis of evidence

from the bank that, in asking Mr. Morrison for proof of his identity and for sample signatures, the bank treated Mr. Morrison as they would have treated any bank customer in similar circumstances.

[25] The consequence of the approach taken by the investigator is that the disputed facts, even if they had been decided in Mr. Morrison's favour, would not overcome the bank's evidence that it was normal, in the circumstances as they existed on September 16, 2005, for a customer service representative to request and scrutinize identification documents and sample signatures. It was those requests that were at the heart of Mr. Morrison's complaint.

[26] Justice Gibson concluded that the recommendation made by the investigator was reasonably open to her, and that it was reasonably open to the Commission to accept that recommendation. In my view, his conclusion is not based on any error of law or any other error that warrants the intervention of this Court.

(2) Thoroughness of the investigation

[27] Counsel for Mr. Morrison argued that the investigator failed to conduct a thorough investigation because she did not appreciate the significance of the discourteous treatment of Mr. Morrison, or the significance of the fact that Mr. Morrison was asked for two items of photo identification, when the bank's policy required only one item of photo identification, plus one other item of identification such as a credit card with a signature. He argued that the investigator should have attempted to verify Mr. Morrison's allegation that no other bank customers were treated as he was, that she should have attempted to identify other customers who might have witnessed the

incident or who might have been asked for sample signatures while the bank's computer was down, and that she should have attempted to find out why the customer service representative asked for two items of photo identification.

[28] As I read the bank's identification policy, it gave a certain degree of discretion to customer service representatives. I am not persuaded that it was a breach of the policy to ask for two items of photo identification.

[29] As to the identification of other bank customers, the investigator's report did not say whether she asked the bank to identify these other customers. Nor did the report say or suggest that it would have been difficult or impossible for the bank to provide that information. Counsel for the bank argued that it could be inferred that difficulties would have arisen because the computer system was down and also because disclosing the identities of other bank customers would have raised difficult privacy questions. I am not prepared to draw any such inference in the absence of evidence that the question of attempting to identify other customers was at least raised in the course of the investigation.

[30] The question, therefore, is whether the investigation was fatally flawed by the investigator's failure to attempt to identify the other bank customers. In my view, the answer to that question is no.

[31] It is now well established that the investigation of a complaint under the *Canadian Human Rights Act* must be neutral and thorough. However, the Commission is entitled to deference in

relation to the scope and depth of an investigation. An investigator is not required to turn over every possible stone, but an investigation is not thorough if the investigator fails to investigate obviously crucial evidence: *Slattery v. Canada (Human Rights Commission) (T.D.)*, [1994] 2 F.C. 574, at paragraph 55 (affirmed (1996), 205 N.R. 383 (F.C.A.)), *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113, at paragraph 8.

[32] The investigation of Mr. Morrison's complaint might well have been more thorough if the investigator had attempted to identify other customers. However, given the nature of the complaint and the body of evidence before the investigator, I cannot conclude that the failure to identify the other customers resulted in an investigation that lacked evidence that was obviously crucial. I conclude that Justice Gibson made no error in finding the investigation to be thorough and fair.

(3) The judge's comments about another case

[33] Justice Gibson noted in his reasons that, on the day before the hearing of Mr. Morrison's application, he heard another application involving a similar complaint, which he allowed (*Powell v. TD Canada Trust*, 2007 FC 1227). He made some comments about the differences between the two applications. It is argued for Mr. Morrison that it was unfair for Justice Gibson to attempt to distinguish the two cases on factual grounds without giving Mr. Morrison an opportunity to make submissions on the point. At the same time, however, counsel for Mr. Morrison did not suggest that the two cases were so similar that they should have resulted in the same outcome. I see no merit in this ground of appeal.

Conclusion

[34] I would dismiss this appeal. As costs were not sought, none should be awarded.

“K. Sharlow”

J.A.

“I agree.

Robert Décary J.A.”

“I agree.

J. Edgar Sexton J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-576-07

**(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE GIBSON
DATED NOVEMBER 23, 2007, DOCKET NUMBER T-2219-06.)**

STYLE OF CAUSE: Glen Morrison v.
HSBC Bank of Canada

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 2, 2008

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DÉCARY J.A.
SEXTON J.A.

DATED: November 3, 2008

APPEARANCES:

Barry Weintraub FOR THE APPELLANT

Vincent P. Johnston FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rueter Scargall Bennett LLP
Toronto, Ontario FOR THE APPELLANT

Harris & Company
Vancouver, B.C. FOR THE RESPONDENT