Federal Court of Appeal | Cour d'appel fédérale

Date: 20101104

Docket: A-171-10

Citation: 2010 FCA 292

CORAM: **BLAIS C.J.**
NOËL J.A.
PELLETIER J.A.

BETWEEN:

PAUL E. RICHARD

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on November 1, 2010.

Judgment delivered at Montréal, Quebec, on November 4, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: BLAIS C.J.
NOËL J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This is an appeal from a decision of Beaudry J. of the Federal Court (the Applications Judge) dismissing an application for judicial review brought by the appellant, Mr. Paul E. Richard against a decision of the Human Rights Commission (the Commission) holding that the Mr. Richard's complaint against Treasury Board would not be dealt with because the events giving rise to the complaint occurred more than 20 years ago.

[2] Paragraph 41(1)(*e*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act) provides in this respect:

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	**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 :
…	[…]
(*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.	*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.

[3] This is the second time the Commission has declined to proceed with the Mr. Richard's complaint. On June 21, 2007, the Commission informed him that it would not hear his complaint as it fell outside the one-year limitation period prescribed by paragraph 41(1)(*e*) of the Act. Mr. Richard sought judicial review and Martineau J. returned the matter to the Commission for a fresh evaluation: see *Richard v. Canada (Treasury Board*), 2008 FC 789, 330 F.T.R. 236 [*Richard*].

[4] Following Martineau J.'s decision, Mr. Richard and the Attorney General made further submissions to the Commission on the issue of the limitation period and the Commission's discretionary power to extend it. On August 19, 2009, the Commission decided not to deal with the complaint because it was satisfied that the Attorney General would be prejudiced in his ability to respond adequately to the complaint because more than twenty years had elapsed between the

events giving rise to the complaint and the filing of the complaint. Mr. Richard filed an application for judicial review of that decision.

[5] The Applications Judge came to the conclusion that “the evidence is sufficient to support the Commission’s findings and the Court’s intervention is not warranted” (Reasons at para. 23). In response to the appellant’s argument that the Attorney General had not led evidence that Treasury Board would be prejudiced by the delay, the Applications Judge found that in light of Treasury Board’s guidelines as to document retention and destruction, he was unable to see how the Attorney General “could be expected to adduce evidence as to how the documents could have been relevant to its defence when it has no knowledge of what documents might have ever existed and would have been destroyed many years ago” (Reasons at para. 24).

[6] As for the witnesses identified by the Mr. Richard in his complaint, the Applications Judge concluded that the Attorney General had shown that it would be difficult, if not impossible to locate them. Furthermore, due to the lack of documentation, the complaint would rest entirely on the recollections of those memories; in his view, it was unlikely that those witnesses would accurately recall events that occurred some 20 years ago.

[7] On appeal to this Court, Mr. Richard reiterates the submissions made before the Applications Judge. He argues that the Attorney General has not provided evidence that demonstrates that he would be significantly prejudiced in his ability to defend himself due to the delay.

[8] On an appeal from a decision disposing of a judicial review, the question for the appellate court is whether the reviewing court selected the correct standard of review and whether it applied that standard correctly: *see Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19 at para. 43.

[9] In the case at bar, the Applications Judge correctly selected the standard of reasonableness: see *Bredin v. Canada (Attorney General)*, 2008 FCA 360 at para. 16; *Richard* at para. 10; *Khanna v. Canada (Attorney General)*, 2008 FC 576 at para. 24.

[10] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47 [*Dunsmuir*], the Supreme Court of Canada wrote that that a decision is reasonable if it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[11] Given this criteria, the appeal cannot succeed.

[12] In order to properly appreciate the issue of prejudice, it is necessary to refer to Mr. Richard's complaint which is based on sexual orientation. In it, Mr. Richard sets out his employment history with the Federal Government from 1977 to 1985. He describes 6 staffing decisions in which he suffered adverse results, and one work place conflict. Some of the staffing decisions occurred in the context of departmental reorganizations. He attributes these outcomes to homophobia on the part of certain named individuals. In order to properly investigate these complaints it would be necessary to

access information about the staffing competitions to determine if the results could be explained by factors other than the homophobia identified by Mr. Richard. The documentation relating to these transactions would be critical to such an inquiry. The investigation of the work conflict situation is heavily dependent upon the recollection of events which occurred more than 20 years ago by persons who may or may not be traceable.

[13] In my view, the Applications Judge properly held that the Attorney General would be prejudiced in his ability to mount a defence to the complaint because the relevant documents have likely been destroyed in accordance with the Retention Guidelines for Common Administrative Records of the Government of Canada, which provide for the retention of routine administrative records for 2 years after all administrative actions are complete. Mr. Richard argues that the Attorney General has not even attempted to prove that his personnel file has actually been destroyed.

[14] However as was noted by the Applications Judge at paragraph 24 of his reasons:

> … all pertinent documentation would clearly have been destroyed pursuant to policy and, in light of that, I do not see how the [Attorney General] could be expected to adduce evidence as to how the documents could have been relevant to its defence when it has no knowledge of what documents might have ever existed and would have been destroyed many years ago.

It is true that in saying this the Applications Judge assumed that the document retention policy had been applied according to its terms. But in light of the evidence that Treasury Board had no inkling of Mr. Richard's grievances until it received a copy of his complaint to the Commission, it is

reasonable to assume that the policy was applied to Mr. Richard's file and to all the files relevant to the investigation.

[15] With respect to the witnesses, Mr. Richard claims that it is not difficult to locate many of them. Indeed, through Internet searches he found five of them. In its decision, the Commission pointed to the Attorney General's submission that there was no way to know if the people located by Mr. Richard on the Internet were actually the same people mentioned in his complaint. The evidence is that Treasury Board was able to locate three persons with the same names as persons named in Mr. Richard's complaint but none of them were the persons with whom Mr. Richard dealt.

[16] More compelling however is the fact that absent documentation, Mr. Richard's entire case relies on the recollections and memories of the witnesses. What is more, Mr. Richard does not point to overt acts of discrimination against him. His complaint is founded on conclusions he has drawn from a series of events involving a number of different actors. Consequently, the task of assessing whether Mr. Richard was the victim of discriminatory treatment would necessarily involve an appreciation of the entire context in which he worked, a difficult thing to do even when dealing with recent events. As noted by the Applications Judge, the "general function of a time limitation period relates to the gathering of credible evidence (*Price v. Concord Transportation Inc.*, 2003 FC 946, 238 F.T.R. 113)" (Reasons at para. 26; my emphasis).

[17] Mr. Richard invoked certain decisions of the Federal Court in support of his position. He relied particularly upon the case of *Canada (Attorney General) v. Burnell*, [1997] F.C.J. No. 931 for

the proposition that "A claim of prejudice is not a self-evident truth. In order to substantiate such a claim, specific evidence must be adduced to support it.": see paragraph 27. That said, the passage of time, long periods of time, is not without incidence. The more remote the events in issue, the easier it is to find evidence of prejudice, to the point where there arises what has been called a rebuttable presumption of prejudice: see for example the reasons of Robertson J.A. in *Canada v. Aqua-Gem Investments Ltd*, [1993] 2 F.C. 425 (F.C.A.), [1993] F.C.J. No. 103 at p. 471. See also *Ring v. Canada*, [1973] F.C.J. No. 1007 at para.18, *Nichols v. Canada*, [1990] F.C.J. No. 567 (F.C.), *Kearns v. Chrysler Canada*, [1996] F.C.J. No. 1484 (F.C.) at para. 10, *Smith v. Via Rail Canada Inc*., 2007 FCA 286 at paragraph 13. The passage of time in this case lightens the burden of proof on the defendant.

[18] Mr. Richard also relied upon a very recent decision of the Supreme Court of Canada, *Christensen v. Roman Catholic Archbishop of Quebec*, 2010 SCC 44, which deals with the running of limitation periods. In *Christensen*, the Supreme Court decided that the Quebec courts had erred in concluding, on a motion to strike the plaintiff's claim as statute barred, that the period at which the limitation period began to run against the plaintiff could be determined on the basis of the motion record. The Supreme Court sent the matter back in order for the Quebec Superior Court for trial. No such issue arises here.

[19] Lastly, Mr. Richard argues that the Commission's decision is unreasonable because it failed to weigh the prejudice to the Attorney General relative to the prejudice Mr. Richard will suffer if his complaint does not proceed. Such an argument highlights the finality of the decision not to

proceed with a complaint but limitation periods, by their very nature, contemplate that claimants can be deprived of their remedy by the passage of time. This is such a case.

[20] I would dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree.
Blais C.J."

"I agree.
Noël J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-171-10
(APPEAL FROM A JUDGMENT OR ORDER OF THE FEDERAL COURT DATED APRIL 22, 2010, DOCKET NUMBER T-1586-09)	
STYLE OF CAUSE:	PAUL E. RICHARD v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 1, 2010
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	BLAIS C.J. NOEL J.A.
DATED:	November 4, 2010

APPEARANCES:

Paul E. Richard	FOR THE APPELLANT
Jean-Robert Noiseux	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT