Federal Court of Appeal | Cour d'appel fédérale

Date: 20141001

Docket: A-323-13

Citation: 2014 FCA 214

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

BETWEEN:

RAVI LALLY

Appellant

and

TELUS COMMUNICATIONS INC.

Respondent

Heard at Vancouver, British Columbia, on June 11, 2014.

Judgment delivered at Ottawa, Ontario, on October 1, 2014.

REASONS FOR JUDGMENT BY: SCOTT J.A.

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

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REASONS FOR JUDGMENT

SCOTT J.A.

[1] This is an appeal from the judgment of Martineau J. of the Federal Court (the Judge), who dismissed Ms. Ravi Lally's (the appellant) application for judicial review of the decision of the Canadian Human Rights Tribunal (the Tribunal) dated October 25, 2012 (2012 CHRT 27).

[2] For the reasons which follow, I would dismiss this appeal.

I. Facts and proceedings

[3] The appellant filed a complaint under the *Canadian Human Rights Act*, R.S.C. 1985, c H-6 (*CHRA*), subsection 3(1) and paragraph 7(*b*) against the respondent Telus Communications Inc. She alleged discrimination based on a disability, namely clinical depression. The Canadian Human Rights Commission investigated her complaint and referred it to the Tribunal.

[4] The appellant alleged discrimination on the basis of the following events: 1) the respondent's refusal to pay her a severance package which had been promised by Mr. Holt, acting vice-president of the respondent; 2) harassing telephone calls from her immediate supervisor, Mrs. Joni Kert, when she ceased working; and 3) written comments made to an independent medical examiner by Ms. Shaine Rajwani, employed in the respondent's Corporate Health Services.

[5] A two-week hearing was scheduled for October 9 to 12 and October 22 to 26, 2012 by the Tribunal. On October 12, immediately following the appellant's testimony and cross-examination, the respondent presented a motion to dismiss for failure to make out a *prima facie* case of discrimination. At that time the appellant was not represented by counsel.

[6] The appellant did not present arguments responding to the motion. The appellant only asked that Ms. Rajwani be compelled to attend the Tribunal since she had been properly served with a summons on August 28, 2012. The member was uncertain as to whether he had the

authority to compel that witness to attend. At the end of the day, the appellant did not press the issue. The Tribunal member then took the motion to dismiss under advisement.

[7] The hearing resumed on October 22, 2012. At that time, the appellant was represented by counsel, but he did not present arguments on the motion either.

[8] The Tribunal rendered its decision on the motion to dismiss as neither the appellant nor her counsel had sought to be heard on that motion. The Tribunal granted the motion because it was not satisfied that the attempts by the respondent to contact the appellant after she stopped work on October 17, 2007 constituted harassment or discrimination.

[9] In addition, the Tribunal found that the respondent was unaware that the appellant suffered from clinical depression until October 29, 2007. It hence ruled that there could be no discriminatory practice based on disability before that date. The Tribunal also concluded that there was no harassment or discrimination in the manner in which the respondent's employees processed the appellant's entitlement to short and long term disability.

II. Federal Court decision

[10] The appellant filed an application for judicial review of the Tribunal's decision in the Federal Court. She raised three issues pertaining to procedural fairness and also argued that the decision was erroneous on the merits. The Judge ruled that the standard of review applicable to the issues of procedural fairness was correctness and reasonableness as for the application of the law to the facts.

[11] The appellant alleged that she was prevented from making an opening statement and that the Tribunal refused her request to compel the attendance of a proposed witness. She also argued that the Tribunal failed to hear her argument as to whether she had made out a *prima facie* case of a discriminatory practice.

[12] On the first issue, the opportunity to make an opening statement, the Judge noted that the appellant was offered such an opportunity, but that she implicitly declined to do so.

[13] As for the appellant's second submission, the Tribunal's refusal to compel the witness' attendance, the Judge concluded that the appellant had waived her right to call another witness.

[14] With respect to the appellant's third issue, the Tribunal's refusal to hear her argument, the Judge found, after a detailed analysis of the evidence presented, that the Appellant had waived her rights.

[15] The Judge then considered the appellant's submission that the Tribunal erred in ruling that she had not made out a *prima facie* case of discrimination. The Judge noted that there was no allegation that the Tribunal applied the wrong legal test. Therefore, it was the application of that legal test to the facts of the case that was at issue and so the decision should be given deference.

[16] The Judge ruled that the Tribunal's findings were not unreasonable. More specifically, he noted that the Tribunal accepted that the respondent was unaware of the appellant's disability

until October 29, 2007. The Judge concluded that, on the balance of probabilities, the Tribunal could reasonably conclude that there was insufficient proof to make out a *prima facie* case of discrimination based on disability.

III. Discussion

[17] Before this Court, the appellant repeated in essence the same submissions that she had presented to the Federal Court, namely: a) that the Tribunal violated procedural fairness; and b) that it erroneously ruled that she had failed to make out a *prima facie* case of discrimination. This second issue turns more specifically on the question of the adequacy of the Tribunal's reasons.

[18] Having carefully considered the appellant's oral and written submissions, the record before us and the Judge's reasons, I am of the view that this Court's intervention is not warranted. On the substantive merits of the Tribunal's decision, the Judge identified the proper standard of review and applied it correctly to the Tribunal's decision: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47. I also agree that there were no violations of procedural fairness.

A. *Procedural fairness*

[19] The appellant submits that the Tribunal violated procedural fairness by: 1) refusing her request to make an opening statement; 2) not affording her the opportunity to respond to the *prima facie* issue; and 3) not using its authority to compel the attendance of a prospective witness who had been served with a summons.

[20] I agree with the Judge that the appellant was afforded the opportunity to make an opening statement but that she declined to do so. I also reject the appellant's contention that the Tribunal strongly dissuaded her from making one, as is evident from this part of the transcript:

> Ravi Lally: I'd prefer to stay here but could I also have 10 minutes of the court's time to say my opening statements that I've prepared?
>
> Member Craig: Sure, you can, but you might be better off to do it under oath through evidence. It's up to you. Go ahead. He's had the opportunity.
>
> Ravi Lally: Okay.
>
> (See Appeal Book, volume III, Transcript of Canadian Human Rights Tribunal Hearing, page 352, lines 1 to 7)

[21] After receiving these directions from the Tribunal, the appellant freely decided to proceed to testify rather than make an opening statement. That was her personal choice.

[22] I must also reject the appellant's allegation that the Tribunal's decision should be set aside because it refused to allow her to argue that she had made out a *prima facie* case. The appellant benefited from behind-the-scenes guidance of counsel even though he was not present during the first week of the hearing. As stated in her affidavit (see Appeal Book, volume I, Affidavit of Ravi Lally sworn December 18, 2012, page 53, para. 33) and as noted by the Judge, the appellant had a lawyer prepare a written argument and a case brief which she reviewed on October 11. The hearing adjourned for ten days, on October 12, after counsel for the respondent argued his motion to dismiss. The appellant had ample time to consult her lawyer regarding any concerns she had with respect to the motion for dismissal, and to raise objections when the hearing reconvened. She did not.

[23] Since both the appellant and her counsel failed to raise the issue of their right to present arguments on the motion to dismiss when the hearing resumed, I agree with the Judge that the appellant waived her right to do so. Furthermore, in view of the record, when the appellant asked to make submissions after the respondent argued his motion, it is apparent from the transcript that she raised an issue totally different from her right to make a submission (see Appeal Book, volume IV, pages 817 and 818, lines 44 to 47):

> Ravi Lally: May I make my submissions?
>
> Member Craig: No, I don't need to hear from you on the –
>
> Ravi Lally: No, it's regarding the witness for next week.

[24] The Judge was also correct in concluding that the appellant waived her right to call her witness, Ms. Rajwani. I note that she asked to call her witness after her case was closed and after the respondent had made submissions on its motion to dismiss for failure to meet the *prima facie* test. Furthermore, the Judge rightly noted that even if the appellant's witness Ms. Rajwani had testified, this would not have changed the Tribunal's conclusions, because the medical examiner did not take into consideration the negative comments she had made about the appellant's work performance.

[25] Waiver of a right to object can be inferred from a party's conduct. Where a party, with knowledge of his or her right, fails to object at the earliest opportunity, that will be construed as a waiver (see *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 F.C. 85 at para. 14).

[26] In view of the record, the appellant in this instance, though self-represented, benefited from the guidance of counsel. She had in her possession a written submission and case brief on the *prima facie* test which was prepared by her lawyer. Her counsel was present when the hearing reconvened after a ten day adjournment. She cannot be said to be unaware of her right to make submissions on the *prima facie* case issue, nor of her right to make an opening statement or to compel the attendance of her witness. In view of the fact that neither counsel nor the appellant advised the Tribunal member that they wished to make submissions on these rights, I am of the view that the Judge correctly ruled that she had waived them.

[27] Finally, I note in passing that tribunals, such as the Canadian Human Rights Tribunal, frequently deal with complainants who are self-represented. Tribunal members need to be alert to the fact that, often, self-represented litigants are not familiar with the Tribunal's processes. Hence, it is the responsibility of members to ensure that self-represented complainants understand the procedure and rules to be followed from the very commencement of a hearing. In *Wagg v. Canada*, 2003 FCA 303, [2004] 1 F.C.R. 206, this Court held, at paragraph 33, that: "A trial judge who is dealing with an unrepresented litigant has the right and the obligation to ensure that the litigant understands the nature of the proceedings. This may well require the judge to intervene in the proceedings".

[28] In this case, the Tribunal member did intervene and the appellant was fully aware of the procedure and rules to be followed, as she had access to counsel throughout the proceeding.

B. *Adequacy of reasons*

[29] At the hearing, the appellant argued that the Tribunal did not refer to any portions of her testimony in its decision but improperly relied on her cross-examination. The appellant submits that the Tribunal did not test her credibility and only considered the respondent's arguments. I cannot agree, for the following reasons.

[30] The Judge correctly ruled that the standard of review applicable to questions involving the application of law to the facts, such as the question of a *prima facie* case of discrimination, is that of reasonableness. I also agree with the Judge that it was reasonable in this instance for the Tribunal to rule that the appellant failed to make out a *prima facie* case of discrimination based on her disability.

[31] The Tribunal heard the appellant's testimony on the grounds underlying her complaint. It failed, however, to convince the Tribunal that a *prima facie* case of discrimination based on her clinical depression had been made out. It was open to the Tribunal to consider the respondent's evidence adduced through its cross-examination of the appellant. The cross-examination shed light on the facts alleged by the appellant and whether or not they established a nexus between the actions of the respondent and the appellant's medical condition.

[32] The appellant testified as to actions that she perceived to be discriminatory based on her clinical depression. The Tribunal considered her testimony, but concluded that the respondent was unaware of her medical condition before October 29, 2007 and therefore determined that the appellant was unable to establish the necessary nexus between the alleged actions and her clinical depression.

[33] Although I am of the view that the Tribunal's reasons could have been more detailed, the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 S.C.R. 708, at paragraph 15, confirms that a reviewing court may look to the record to assess the reasonableness of the decision under review. Having reviewed the record, and in particular the cross-examination of the appellant, I am of the view that the basis for the Tribunal's decision is discernable.

[34] I would, therefore, dismiss the appeal with costs.

"A.F. Scott"

J.A.

"I agree
M. Nadon J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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