

Federal Court



Cour fédérale

**Date: 20150427**

**Docket: 14-T-36**

**Citation: 2015 FC 539**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

**Ottawa, Ontario, April 27, 2015**

**PRESENT: The Honourable Mr. Justice LeBlanc**

**BETWEEN:**

**FAOUZI BERRADA**

**Moving Party**

**and**

**WESTJET**

**Respondent**

**ORDER AND REASONS**

**I. Introduction**

[1] The applicant (Mr. Berrada) is seeking, by way of an application for judicial review, to challenge a decision of the Canadian Human Rights Commission (the Commission) dismissing the complaint he had filed against the respondent (WestJet) in relation to an incident that had taken place on an aircraft operated by that airline. Because his application was not filed within

the 30-day time limit set by section 18.1 of the *Federal Courts Act*, Mr. Berrada is seeking an extension. The respondent opposes the extension.

[2] For the following reasons, the motion for an extension of time is denied.

## **II. Background**

[3] On March 19, 2012, the applicant, who was in Montreal, boarded WestJet flight 453 to Edmonton. During a stopover in Toronto, during which passengers were required to remain on board the aircraft while waiting for passengers in transit, Mr. Berrada asked a flight attendant whether he could move into the empty window seat next to him. The flight attendant said yes, but a few minutes later, a passenger in transit arrived and told the applicant that the window seat was his. Mr. Berrada tried to explain to him that he had been given permission to take the seat. It was no use. Mr. Berrada, a francophone Muslim, then approached two members of the cabin crew to tell them about the incident and ask for a new seat to avoid any confrontation with the other passenger.

[4] However, they had difficulties communicating. The discussion began in French, in which none of the crew was fluent, and continued in English, which was spoken poorly by Mr. Berrada. The situation escalated. What Mr. Berrada presents as a balanced and respectful attempt to change seats was perceived by the cabin crew as disruptive. Mr. Berrada was ultimately removed from the aircraft on the basis that he had become, in the eyes of the cabin crew, an “unruly passenger” within the meaning of WestJet’s passenger safety policies.

[5] In September 2012, believing that he had been discriminated against based on race, ethnic origin, religion and language, Mr. Berrada filed a complaint with the Commission. After a failed attempt at mediation, the complaint was referred to the Commission's Investigations Division.

[6] On January 21, 2014, the Commission provided the parties with the investigation report. The report concluded that the investigation had revealed no information indicating that Mr. Berrada's race, colour, religion, or national or ethnic origin were factors in the incidents resulting in his expulsion from the aircraft. The investigator summarized his understanding of the facts as follows:

17. The complainant sat in a seat that was not his. The holder of the ticket for that seat claimed it. The complainant took offence, became agitated, spoke of violence and demonstrated to the flight attendants that he was unfit to fly. The flight attendants called the police to have him removed.

[7] The investigator recommended that the Commission dismiss Mr. Berrada's complaint on the basis that, having regard to all the circumstances, an inquiry into the complaint by the Canadian Human Rights Tribunal (the Tribunal) under section 49 of the *Canadian Human Rights Act* (the Act) was not warranted.

[8] On May 9, 2014, the Commission, having reviewed the investigation report and the parties' comments on the report, adopted its investigator's recommendation and dismissed Mr. Berrada's complaint.

[9] Mr. Berrada did not become aware of this decision until July 9, 2014, when he returned from a two-month stay in Morocco. A week later, on July 16, 2014, he filed this motion for an extension of time.

### **III. Issue**

[10] The issue is whether this motion for an extension of time should be granted. The test for this type of motion is well established (*Canada (Attorney General) v Hennelly*, 244 NR 399, [1999] FCJ No 846 (QL) [*Hennelly*] at para 4). Mr. Berrada must establish (i) a continuing intention to pursue the application; (ii) that the application has some merit; (iii) that no prejudice arises from the delay; and (iv) that a reasonable explanation for the delay exists.

[11] WestJet concedes that Mr. Berrada has established his continuing intention to contest the Commission's decision and that the delay has not subjected it to any prejudice. However, it argues that the contestation of the Commission's decision has no reasonable chance of success and that Mr. Berrada did not provide a reasonable explanation for the delay.

[12] As the parties have observed, the test must be applied with some flexibility to ensure that "justice is done between the two parties" (*Canada (Attorney General) v Pentney*, 2008 FC 96 at para 34; *Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 85). Concretely, this means that the weight to be assigned to each factor may vary depending on the circumstances of each case. It also means that the power to grant an extension of time remains discretionary in nature, and the four factors, while providing a framework for the exercise, are not intended to fetter it (*Pentney*, above, at para 35; *Larkman*, above, at para 62).

#### IV. Analysis

##### A. *Justification for delay*

[13] On May 9, 2014, when the Commission rendered its decision, Mr. Berrada was on vacation in Morocco. In the affidavit he filed in support of this motion, he explained that, having no idea how long it would take for the Commission to render its decision, he planned to take a vacation from April 22 to July 8, 2014. He said that he had left Edmonton, his city of residence, on April 23, stopped over in Montreal for one week and boarded a plane for Morocco on May 1. He explained that he had returned on June 29 and, after another stay in Montreal, had arrived in Edmonton on July 9. Mr. Berrada states that one of the main reasons he spent so much time in Morocco was to visit and care for his ailing mother.

[14] The affidavit also states that on July 9, 2014, upon Mr. Berrada's return to Edmonton, the superintendent of the building where he lived gave him the envelope containing the Commission's decision. The Court record shows that Mr. Berrada filed this motion a few days later, on July 16, 2014.

[15] WestJet argues that this explanation is inadequate. It is of the view that because it was reasonable to believe that the Commission might render its decision while he was away from his residence, Mr. Berrada should have made arrangements with a trustworthy individual who could have at least informed him of the delivery of the Commission's letter while he was in Montreal or Morocco. According to WestJet, the fact that he failed to take this precautionary measure weighs against granting the extension of time.

[16] I disagree. Mr. Berrada acted quickly as soon as he became aware of the Commission's decision. That is what counts in the circumstances. Given that he did not know when the Commission would render its decision and had been given no indication that it would be imminent once WestJet had stated its position with respect to the investigator's report on April 5, 2014, it was unreasonable to expect Mr. Berrada to remain close to his place of residence until he had received the Commission's letter. Even if one were to suppose that he was required out of prudence to have somebody survey his mail during his absence, it is unclear how he, a self-represented applicant, could have filed a motion for an extension of time from his location.

[17] I am therefore of the view that there is a reasonable explanation for Mr. Berrada's delay in filing his motion for an extension of time.

**B. *Chance of success of Mr. Berrada's application***

[18] Litigants seeking an extension must establish that the application for which it is sought has a reasonable chance of success (*Leblanc v National Bank of Canada*, [1994] 1 FC 81). Obviously, he is not required to convince the Court that his application will succeed; however, he must do more than merely state that the decision he wishes to challenge has no merit or repeat the grounds for review set out in section 18.1 of the *Federal Courts Act*, RSC (1985), c. F-7.

[19] In this case, Mr. Berrada did not file, in support of his motion for an extension, a draft application for judicial review, which could have helped the Court understand the specific grounds for the challenge he wishes to bring against the Commission's decision. We must

therefore look elsewhere in the record. In his written submissions in support of his motion for an extension, Mr. Berrada devotes a single paragraph to this factor. That paragraph reads as follows:

10. I respectfully submit that my application (case before the Human Rights Commission) is well founded. I believe that the interventions of the WestJet flight attendants were justified by a special bias [sic] of insecurity and violence based on my ethnic origin and religious beliefs.

[20] The other document that may shed some light on the challenge that Mr. Berrada is planning to bring in this case is his reply to WestJet's response to the motion for an extension. In that document, Mr. Berrada begins by complaining that the response had been served on him in English, which he interprets as a tactic to cause a delay that would deprive him of his right to a judicial review. He then recounts the incident that led to his expulsion from the aircraft and reiterates that he was subjected to discriminatory conduct by WestJet. In particular, he complains that the statements of the flight attendants who met with the Commission investigator do not reflect what really occurred, and he reiterates the difficulties he experienced in communicating his grievances to the flight attendants on account of the language barrier. He reiterates that he did not threaten anybody. In conclusion, he notes that the Commission investigator did not interview him before recommending that the Commission dismiss his complaint, emphasizes his relatively weak position given the means available to WestJet to defend itself, and seeks the Court's intervention so that it might [TRANSLATION] "refresh the record and review all the details and read between the lines the important elements that will support the applicant's claim."

[21] Is it enough to establish that the application for judicial review that Mr. Berrada wishes to bring is not doomed to failure? I do not believe so. In this respect, it is important to define the

Commission's role and the limits of the Court's power to intervene when the Commission renders a decision such as that rendered in this case.

[22] The Act sets out a complete mechanism for dealing with human rights complaints, and the Commission is central to this mechanism (*Cooper v Canada (HRC)*, [1996] 3 SCR 854 at para 48). On receiving a complaint, the Commission, under sections 43 and 44 of the Act, appoints an investigator to investigate and prepare a report of its findings for the Commission. On receiving the investigator's report, it provides copies to the parties and invites them to comment on it. It then reviews the report and the parties' comments and takes one of the following steps: (i) it refers the complaint to the Tribunal if it believes an inquiry is warranted; (ii) it appoints a conciliator; (iii) it refers the complainant to the appropriate authority; or (iv) it dismisses the complaint if it does not believe that an inquiry by the Tribunal is warranted (*Cooper*, above, at para 49).

[23] However, the Commission is not an adjudicative body. In other words, it is not the job of the Commission to decide if the complaint is made out; that is the role of the Tribunal. Rather, its duty is to decide whether, under the provisions of the Act, an inquiry is warranted having regard to all the facts (*Cooper*, above, at para 53). It has a "remarkable degree of latitude" when it is performing its screening function, and courts do not intervene lightly in its decisions (*Bell Canada v. Communications, Energy and Paperworkers Union of Canada (C.A.)*, [1999] 1 FC 113).

[24] This means that the Court must show deference to the Commission's decisions regarding whether or not to refer a complaint to the Tribunal for inquiry, intervening only when such



decisions are unreasonable, in recognition of the Commission's specialized function and resulting expertise. The party challenging the Commission's decision therefore faces a heavy burden. It must be established that the Commission's decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47). In other words, it is not enough to disagree with the decision and ask the Court to reweigh the evidence in the hope that it will reach a different conclusion, because that is not its role (*Nekoie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 363, 407 FTR 63 at para 40; *Thambiah v Maritime Employers Association*, 2011 FC 727 at para 13; *Bourassa v Canada (Department of National Defence)*, 2014 FC 936 at para 68).

[25] That is the burden that Mr. Berrada bears. Unfortunately for him, even a generous reading of his written submissions does not reveal a specific criticism of the Commission's decision, let alone a criticism that would support an argument of unreasonableness. The Commission was of the view that the investigation had not shown that Mr. Berrada had been discriminated against based on his race, national or ethnic origin, colour or religion. It made this finding on the basis of its review of the investigator's report and the parties' submissions regarding the content of that report. Recall that the investigator concluded from his investigation that Mr. Berrada had been evacuated from the aircraft because the flight attendants judged that he was unfit to fly following the incident involving the ticket-holder for the seat that Mr. Berrada was occupying and that this had nothing to do with the latter's race, colour, religion or national or ethnic origin. To reach this finding, the investigator interviewed Mr. Berrada, two of the flight attendants on duty at the time of the incidents and WestJet's Advisor, Security Operations and Investigations.

[26] Therefore, the Commission must have reviewed the events. In so doing, it clearly opted for the version of the facts provided by the WestJet flight attendants. This is a finding of fact, and for the Court to intervene, it must be persuaded that, in the words of paragraph 18.1(4)(d) of the *Federal Courts Act*, it was made in a perverse or capricious manner or without regard for the material before the Commission.

[27] However, nothing in the written submissions filed by Mr. Berrada in respect of his motion for an extension even remotely points to a criticism of this nature, or even to a broad criticism of the unreasonableness of the Commission's decision. He merely reiterates that his complaint is well founded, implicitly expressing his disagreement with the Commission's decision. As discussed above, that is insufficient (*Maqsood v Canada (Attorney General)*, 2011 FCA 309 at para 15).

[28] With respect, I am of the view that Mr. Berrada misunderstands the role that this Court can play in this case. His reply to WestJet's response is revealing in this respect, in that he states that he is seeking the Court's intervention so that it may [TRANSLATION] "refresh the record and review all the details and read between the lines the important elements that will support the applicant's claim." As stated above, this is not the appropriate role of the Court in an application for judicial review. It is not meant to reweigh the evidence and draw the conclusions it believes the Commission should have drawn. It is not a substitute for the Commission. Its role is to intervene to the extent that it is convinced that the Commission's decision not to refer Mr. Berrada's complaint to the Tribunal for inquiry is unreasonable.

[29] The law is the same for all and does not vary because a litigant chooses to represent him- or herself (*Kalevar v Liberal Party of Canada*, 2001 FCT 1261, [2001] FCJ No 1721 (QL) at para 24; *Cotirta v Missinipi Airways*, 2012 FC 1262 at para 13, affirmed: 2013 FCA 280). In its present form, this motion for an extension of time does not establish that the applicant's application for judicial review has a reasonable chance of success. Rather, as it stands, the application is bound to fail.

[30] Even though Mr. Berrada satisfies three of the four conditions to be relieved of his failure to bring the application within the time frame provided in the Act, the final condition, relating to the application's chance of success, is, in my view, the deciding factor in the circumstances of this case.

[31] The motion for an extension of time will therefore be dismissed, but without costs to Mr. Berrada.

**ORDER**

**THIS COURT ORDERS that the motion be dismissed, without costs.**

“René LeBlanc”

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Judge

Certified true translation  
Francie Gow, BCL, LLB

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** 14-T-36

**STYLE OF CAUSE:** FAOUZI BERRADA v WESTJET

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** HEARD BY WAY OF MOTION IN WRITING R-369

**ORDER AND REASONS:** LEBLANC J.

**DATED:** APRIL 27, 2015

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