

Federal Court



Cour fédérale

Date: 20160204

Docket: T-520-15

Citation: 2016 FC 135

Vancouver, British Columbia, February 4, 2016

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SARVESH SHARMA

Applicant

and

CANADIAN PACIFIC RAILWAY

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application under section 18.1 of the *Federal Courts Act*, R.S.C., 1985 c. F-7 for judicial review of a decision of the Canadian Human Rights Commission (hereafter the Commission). For the reasons that follow, the application is dismissed.

[2] The Applicant, Mr. Sarvesh Sharma, represented himself in this matter. At the hearing on January 27, 2016, he was accompanied by his brother-in-law, Mr. Veda Prakash, a non-lawyer. Mr. Sharma was unable to make oral submissions to the Court in a comprehensible manner. Given the circumstances, Mr. Prakash was allowed to address the Court to explain why Mr. Sharma could not be understood. Mr. Prakash was also permitted to make some brief comments regarding Mr. Sharma's personal history.

[3] At the conclusion of the hearing, the parties were advised that the application was dismissed with a judgment and reasons to follow.

II. Background

[4] Mr. Sharma worked for the Canadian Pacific Railway (CP) from June 9, 1994, until his dismissal on December 14, 2012. He was dismissed "for conduct unbecoming an employee of CP rail" following an investigation into allegations that Mr. Sharma had made against other CP employees.

[5] Mr. Sharma sought redress against his dismissal with the British Columbia Industrial Relations Board, WorkSafeBC and the Workers Compensation Appeal Tribunal. None of these efforts were successful. The Applicant was advised by the Industrial Relations Board to file a complaint with the Commission. He called the Commission on January 10, 2013, and was sent a "complaint kit" on January 14, 2013. The instructions provided in the kit indicated in bold and underlined: "[y]ou must file a complaint within 12 months of the situation that you are complaining about."

[6] On February 12, 2013, the Commission received a complaint from Mr. Sharma. It was not in a form acceptable to the Commission as it was more than three pages in length. On March 5, 2013, the Early Resolution Analyst sent a letter to the Applicant advising him that his complaint did not meet the requirements of a complaint under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act) and that his file had been closed. The letter advised that the Applicant could resubmit his claim in the proper format, and reminded him of the one-year time limit for filing complaints.

[7] The Commission received a second complaint from Mr. Sharma on February 14, 2014. Again it was not in a form acceptable to the Commission. The Early Resolution Analyst spoke with Mr. Sharma over the phone and explained that he needed to modify his claim into the required three-page format. On February 26, 2014, the Commission received a complaint from Mr. Sharma that was hand written and not fully legible. Commission staff typed up the allegations and sent them to Mr. Sharma for review and signature. The complaint was received by the Commission in an acceptable form on March 5, 2014.

[8] On December 10, 2014, a report was issued under s 40 of the *Act*. The section 40 report recommended that pursuant to paragraph 41 (1) (e) of the *Act*, the Commission should not deal with the complaint because it was based on events that occurred more than one year prior to its filing. Mr. Sharma and CP were invited to provide submissions in reply. Mr. Sharma's response acknowledged that the delay occurred. The reason he provided for the delay was that he was using another complaint process (the Workers Compensation Appeal Tribunal). Additionally, Mr. Sharma noted that he thought the complaint was filed the first time he submitted his facts.

III. Decision under Review

[9] On March 11, 2015, the Commission advised Mr. Sharma and CP that it would not deal with the complaint under paragraph 41 (1) (e) of the *Act* because it is based on events that occurred more than one year before the complaint was filed.

[10] In the Commission's final record of decision, Acting Chief Commissioner David Langtry adopted the conclusion set out in the report:

The date of the last alleged act of discrimination is November 21, 2012. This complaint was received in a form acceptable to the Commission on March 5, 2014, more than fifteen (15) months after the last alleged act of discrimination. The complainant did not raise his termination as an allegation in his complaint, but even if he had, he was terminated on December 17, 2012, more than fourteen (14) months before his complaint was received in a form acceptable to the Commission. The delay in filing was within the complainant's control. He was advised of the statutory one-year time limit, but he did not submit his complaint in a form acceptable to the Commission until approximately three (3) months after the statutory time limit set out in the *Act*. The complainant was not diligent in filing his complaint in time, and therefore, the Commission should not deal with it.

IV. Issues

[11] The issues raised by the Applicant in his memorandum of fact and law relate solely to the merits of his underlying discrimination claim and do not address the Commission's decision.

[12] The Respondent raised two preliminary issues:

- 1) whether the Applicant's affidavit and memorandum of fact and law are admissible in these proceedings; and

2) whether the Applicant's application should, therefore, be dismissed summarily.

[13] Should the Court decide to address the merits of the Application, the Respondent submits that the sole issue is the reasonableness of the Commission's decision not to consider the complaint because it was out of time.

V. Argument and Analysis

[14] With regard to the preliminary issues, the Respondent contends that the Applicant's memorandum of fact and law, included in his affidavit as Exhibit N, is not relevant to these proceedings and that Mr. Sharma's affidavit contravenes the rules of evidence. As a result, they request that the affidavit, the sole evidence produced by the Applicant, be struck in its entirety.

[15] The Respondent submits that the Applicant's memorandum of fact and law makes a single reference to the Commission's decision not to deal with his complaint on the basis of subsection 41 (1) (e). The only reference is found at page 111 of the application record:

The Canadian Human Rights Commission too should have seen that in my case the justice is not denied barely on the pretext [*sic*] of time limitation on submission of complain[*sic*]. "Is time more important than justice?"

[16] I would also note that there is a brief reference in paragraph 16 on page 99 of the application record where Mr. Sharma notes:

I was advised to refer my case with Canadian Human Rights Commission. I did so but the case got rejected as it was not filed within the stipulated time of one year.

[17] The Respondent argues that the remainder of the Applicant's affidavit addresses his alleged assaults, the inadequacy of the CP investigation, and his request for reinstatement.

[18] Rule 81 of the *Federal Courts Rules*, SOR 98/106 [the Rules], provides:

81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

81 (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

[19] Much of Mr. Sharma's affidavit is irrelevant and is best described as argument. The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions, or where the Court is convinced that admissibility would be better resolved at an early stage so as to allow the hearing to proceed in a timely and orderly fashion: *McConnell v Canadian Human Rights Commission*, 2004 FC 817 at para 80; aff'd 2005 FCA 389. Where it is impossible to separate the admissible from the

inadmissible evidence, the Court should reject the entire affidavit: *Foodcorp v Hardee's Food Systems Inc*, [1982] F.C.J. No. 29, at para 3.

[20] Portions of the Applicant's affidavit consist of evidence not submitted to the Commission as part of his complaint. In *Bernard v Canada (Revenue Agency)*, 2015 FCA 263, Mr. Justice Stratas explained the rationale for the general rule that evidence which could have been before the administrative decision maker but was not is inadmissible before the reviewing Court. He also laid out the three recognized exceptions to this rule, including the background information exception which may assist the Court in understanding the history and nature of the case that was before the administrative decision-maker. Such information may be admissible so long as it does not engage in advocacy. Care must be taken to ensure that the affidavit does not go further and provide fresh evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider.

[21] While the Respondent was prepared to concede that some of Mr. Sharma's affidavit is background information, I am not satisfied that it falls within this exception. It is new information going to the merits of the original complaint which was not before the decision-maker. Even if I were to accept that the affidavit is admissible, it does not address the subject-matter of this application – the decision of the Commission to reject the complaint as out of time.

[22] Courts frequently allow self-represented litigants some latitude when they fail to comply with the Rules to enhance an individuals' access to justice: *Thom v Canada*, 2007 FCA 249, at

para 13. That does not mean, however, that the Rules do not apply. As stated by Mr. Justice Pelletier in *Nowoselsky v Canada (Treasury Board)*, 2004 FCA 418, at para 8:

The obligation to comply with the Rules weighs more heavily on those who do not have the benefit of professional advice. But that fact alone does not justify the Court in dividing litigants into two classes: those who are bound by the Rules and those who are not. Everyone is bound to comply. The imperatives of the Rules may be mitigated somewhat by the grace of counsel facing an unrepresented litigant, or by the Court's judicious exercise of the discretion to excuse compliance, but these are remedial measures and not a licence for non-compliance.

[23] In this matter, Mr. Sharma's affidavit not only presents evidence that was not before the decision-maker, but it is also largely irrelevant and argumentative. I agree with the Respondent that it is impossible to separate the admissible from the inadmissible evidence, or even the argument from the evidence. As a result, the Applicant's entire affidavit is struck.

[24] As noted above, even if the affidavit were found to be admissible, it and the Applicant's memorandum of fact and law bear no resemblance to the grounds set out in the application for judicial review. Further, Mr. Sharma is seeking relief in the way of reinstatement with full seniority at CP, a remedy not available to the Court in these proceedings.

[25] The Court may strike an application in exceptional cases: *Pharmacia Inc v Canada (Minister of National Health & Welfare)*, [1994] F.C.J. No 1629. In particular, the Court may strike an application where the Court is unable to grant the relief sought: *Canada (Minister of National Revenue - M.N.R.) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250. The Court is limited to the remedies in the *Federal Courts Act* and any remedies associated with its

inherent jurisdiction. In this case, the Court is unable to provide Mr. Sharma with the remedy he seeks.

[26] In a review of the Commission's decision not to deal with a complaint filed outside the time limit, the Applicant must establish, on a balance of probabilities, that it was not reasonable: *Khaper v Air Canada*, 2015 FCA 99, at para 16. The very limited amount of relevant material in the Applicant's affidavit does not provide enough substance to support a finding that the Commission's decision was unreasonable.

[27] The Applicant's only submission related to the Commission's findings is that justice is being denied on the basis of time limitations. Mr. Sharma does not suggest in his written argument that the delay in filing was because he was pursuing a workers compensation claim, although he mentioned that justification in his reply to the Commission's section 40 report. Even if he had, this Court has held that a complainant is still obliged to contact the Commission within the one-year time frame while he or she pursues alternative avenues of redress: *Bredin v Canada (Attorney General)*, 2007 FC 1361, at para 40.

[28] It is "plain and obvious" that Mr. Sharma's complaint was untimely and thereby fell into one of the five enumerated exceptions in paragraphs (a) to (e) of ss 41 (1) of the *Act*. While the Commission retains the discretion to deal with complaints that are otherwise out of time, the Court will not interfere with the exercise of that discretion unless it is demonstrated to be unreasonable: *Arias v Canada (RCMP)*, [2014] F.C.J. No. 1367.

[29] It is clear that the delay in filing was completely within the Applicant's control. He has not provided a reasonable explanation for failing to file his complaint on time, and he was not diligent in filing his complaint.

VI. Decision

[30] While I understand that Mr. Sharma may find the outcome harsh, according to the standard set by the Supreme Court of Canada, the Commission's decision was reasonable. It is a decision that falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47. Accordingly, this application is dismissed.

[31] Although the Respondent is seeking its costs in this matter, the Court is satisfied that Mr. Sharma is impecunious and would be unable to satisfy a cost award. Under these circumstances, no costs will be awarded against him.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No costs are awarded.

“Richard G. Mosley”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-520-15

STYLE OF CAUSE: SARVESH SHARMA v CANADIAN PACIFIC
RAILWAY

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JANUARY 27, 2016

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DATED: FEBRUARY 4, 2016

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