Federal Court  Cour fédérale

Date: 20180731

Docket: T-569-15

Citation: 2018 FC 808

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 31, 2018

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

DAVID LESSARD-GAUVIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, David Lessard-Gauvin, filed six discrimination complaints with the *Canadian Human Rights Commission*, which were deemed inadmissible because they were frivolous or beyond the Commission's jurisdiction under paragraphs 41(1)(c) and (d) of the *Canadian Human Rights Act*, RSC 1985, c. H-6 [CHRA]. All the complaints were based on grounds of discrimination not enumerated in section 3 of the CHRA: language, social condition and political opinion [the three new grounds of discrimination].

[2] The legal progression of this application for review was delayed by the filing of a number of cross-motions, many of which were dismissed (see *Lessard-Gauvin v. Canada (Attorney General)*, 2015 FC 807; *Lessard-Gauvin v. Canada (Attorney General)*, 2016 FC 418 [*Lessard-Gauvin* 2016]; *Lessard-Gauvin v. Canada (Attorney General)*, 2017 FCA 77). In particular, note that the Court already denied the applicant public interest standing (see *Lessard-Gauvin* 2016, at paragraphs 14-30).

[3] Essentially, the applicant is seeking a declaration that section 3 of the CHRA is unconstitutional because it violates the equality rights guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter]. He is also asking the Court to incorporate the three new grounds of discrimination into section 3 of the CHRA through the "reading-in" technique—unless the Court prefers to order another constitutional remedy, such as a declaration of inoperability. Consequently, the impugned decisions should be set aside, and the Commission should examine the complaints on their merits.

[4] For the reasons that follow, the application for judicial review is dismissed.

I. Background

[5] The applicant's discrimination complaints are against various federal institutions. They stem from the fact that his application was not selected in three competitions in which he participated.

[6] A selection process was opened for a benefits clerk position in western Canada and the Prairies at Employment and Social Development Canada. The duties of the position were to be performed in English. The applicant says that he was evaluated more strictly than the other candidates because his mother tongue is French. As a result, he filed three complaints with the Commission against Employment and Social Development Canada, the Public Service Commission and the Treasury Board Secretariat.

[7] The second selection process concerns the Border Services Agency. During a security interview required to obtain a position to which he was applying, he was asked to provide information on his involvement in recourse against the State, which he says had nothing to do with his reliability or the security of the State. The applicant claims that this is discrimination on the grounds of his political beliefs.

[8] Lastly, the applicant claims that he was excluded from a selection process for a position at Industry Canada, which was not open to student employees. Consequently, he filed a complaint against Industry Canada as well as against the Treasury Board Secretariat, which issued this hiring policy that he claims constitutes discrimination on the grounds of social condition.

II. Submissions of the parties

[9] Essentially, the applicant is arguing that the omission of the grounds of language, social condition and political opinion from section 3 of the CHRA is a violation of subsection 15(1) of the Charter, a violation that was not justified in this case under section 1. The applicant filed a

notice of constitutional question pursuant to section 57 of the *Federal Courts Act*, RSC 1985, c. F-7.

[10] In short, the applicant argues that language, social condition and political opinion are "analogous grounds" for the purposes of section 15 of the Charter. In order to interpret the Charter in accordance with international law, the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified (see *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, at paragraph 64). The applicant relies in particular on Article 2 of the International Covenant on Economic, Social and Cultural Rights, which Canada has ratified and which includes language, political opinion and social origin in its list of prohibited grounds of discrimination. Economic and social status are also included in its list of "analogous" grounds by the words "or other status."

[11] Moreover, the applicant contends that the Court should deviate from the test set out by the Supreme Court in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere* with references to SCR]) and the subsequent decisions to determine a new analogous ground. He considers the immutability criterion problematic. Two situations allow inferior courts to deviate from precedents: when a new legal issue is raised and when a change in the circumstances or evidence fundamentally shifts the parameters of the debate (see *Carter v. Canada (Attorney General)*, 2015 SCC 5, at paragraph 44 citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at paragraph 42). In this case, the applicant is

arguing that the incorporation of international law constitutes a new legal issue that enables the Court to deviate from *Corbiere*.

[12] The applicant claims that once these three new grounds are added, the test in subsection 15(1) of the Charter is satisfied: there is a distinction based on an enumerated or analogous ground, and that distinction is discriminatory given the relevant factors (citing *Vriend v. Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend* with references to SCR]; *Quebec (Attorney General) v. A*, 2013 SCC 5, at paragraphs 319 *et seq.*). The rejection of the complaint at the admissibility stage constitutes differential treatment: any person who experienced discrimination based on language, political opinion or social condition would have their complaint deemed inadmissible. Moreover, by refusing protection from discrimination on the basis of these three grounds, section 3 of the CHRA perpetuates the disadvantages for various sub-groups of the population characterized by one of these grounds. The simple fact that language, social condition and political opinion are considered recognized grounds of discrimination in international law attests to the historical disadvantages experienced by those characterized by any of the three new grounds of discrimination. The burden was on the respondent to demonstrate that this violation of the Charter is justified by section 1, and the respondent filed no evidence in this regard. The applicant thus argues that the Court should use the “reading-in” technique and include the grounds of language, social condition and political opinion in section 3 of the CHRA (see *Vriend*, at paragraphs 129 *et seq.*). It follows that the Commission’s decisions must be set aside so that it can examine the six discrimination complaints.

[13] As can be expected, the respondent has a completely different perspective.

[14] Firstly, the respondent argues that the Court should refuse to examine the applicant's constitutional challenge given the factual vacuum in which it is presented and the fact that the applicant does not have public interest standing (see *Lessard-Gauvin* 2016). The analysis of the constitutional question, and particularly the characterization of the grounds of discrimination, must be based on specific facts (see *Mackay v. Manitoba*, [1989] 2 SCR 357, at pages 361-362, 61 DLR (4th) 385 [*Mackay* with references to SCR]; *Worthington v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1546, at paragraphs 24-25 affd by 2006 FCA 30). Here, the applicant is describing the grounds of discrimination in a general and abstract manner, which distorts the judicial review.

[15] In the alternative, if the Court nevertheless decides to examine the constitutional question, it should reformulate the three grounds of discrimination raised by the applicant. Competency in an official language, student status and the existence of recourse against the government should take the place of language, social condition and political opinion. In this regard, the respondent argues that the applicant failed to demonstrate that the CHRA gives rise to a distinction based on an enumerated or analogous ground. According to *Corbiere* at paragraph 13, an "analogous ground" is an immutable personal characteristic changeable only at unacceptable cost to personal identity (see also *Withler v. Canada (Attorney General)*, 2011 SCC 12, at paragraph 33 [*Withler*]).

[16] Parliament's intention was clear with respect to excluding language from the regime of the CHRA. The respondent reminds the Court that a full regime to protect language rights already exists under sections 16 to 23 of the Charter and under the *Official Languages Act*, RSC 1985, c. 31 (4th Supp.) [OLA]. This regime essentially constitutes an exception to section 15 (see *Mahe v. Alberta*, [1990] 1 SCR 342, at page 369, 68 DLR (4th) 69 [*Mahe* with references to SCR]). That is why language cannot be an analogous ground, as several courts of appeal have confirmed (see *R v. Mackenzie*, 2004 NSCA 10, at paragraph 33 [*Mackenzie*]). The scope of language rights cannot be broadened through subsection 15(1) (see *Mahe*; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 SCR 839, at page 857, 100 DLR (4th) 723 [*Schools Act*]; *Lalonde v. Ontario (Commission de restructuration des services de santé)*, 56 OR (3d) 505, 2001 CanLII 21164 (ONCA) [*Lalonde*]; *Westmount (Ville de) v. Québec (Procureur Général du)*, [2001] RJQ 2520, 2001 CanLII 13655, at paragraph 149 (QC CA) [*Westmount* with references to CanLII], leave to appeal to SCC refused; etc.).

[17] Moreover, the respondent argues that competency in a language is related to the merit and abilities of an individual, rather than an immutable or changeable characteristic. Furthermore, student status is not an immutable characteristic, either. Rather, it is a temporary status freely chosen by an individual. The courts have already refused to recognize professional status as an analogous ground (see, for example, *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989, at paragraph 44, 176 DLR (4th) 513 [*Delisle*]). Lastly, seeking legal recourse is not an immutable personal characteristic, and this sub-group of individuals is in no way discriminated against or disadvantaged (see *Rudolph Wolff & Co. v. Canada*, [1990] 1 SCR 695, at page 702, 69 DLR (4th) 392) [*Rudolph*].

[18] In summary, the respondent concludes that the test in subsection 15(1) of the Charter is not satisfied in this case. The fact that various international instruments protect against discrimination based on language, social condition and political opinion is not a decisive factor in this case. The respondent points out that these are not the grounds at issue and that, in any case, the Court is not bound by international instruments that are not incorporated into a Canadian statute (see *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, at paragraph 60, 38 DLR (4th) 161). Therefore, the respondent concludes that the applicant failed to discharge his burden to demonstrate that there was a violation of subsection 15(1) of the Charter. Alternatively, with regard to the justification test under section 1of the Charter (according to the test in *R. v. Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200), the respondent points out that the purpose of the CHRA is to preserve equal opportunity independent of considerations based on discriminatory grounds, within the limits of federal jurisdiction. Thus, the omission to include the grounds in question is justified by a real and urgent objective. Furthermore, there is a logical connection between the objective to protect against discrimination and the refusal to grant this protection to individuals who are not part of a group that is disadvantaged. The respondent limits itself to examining minimal impairment with respect to the omission of language, and makes no specific submissions on proportionality. The omission of the ground of “language” would cause minimal impairment to the law, given the existence of a factual regime of language rights.

III. Analysis

[19] Firstly, I am prepared to recognize that the applicant has a particular interest in the dispute, his complaints having been deemed inadmissible, but his request for a declaration of

unconstitutionality must have a developed factual basis (see *Mackay*, at pages 361-362). An applicant cannot simply rely on vague and theoretical arguments, particularly in the context of an application for judicial review, which, it must be kept in mind, is to be based exclusively on the particular facts of the case (see, for example, *Bekker v. Canada*, 2004 FCA 186, at paragraph 11). Therefore, I agree with the respondent that this Court should not examine this application for review on the basis of general and theoretical "analogous" grounds, given that the record is incomplete and that the applicant was denied public interest standing by the Court (*Lessard-Gauvin* 2016). This is not a declaratory action, and I find that in the case at bar, the Court does not have, in the record as presently constituted by the parties, sufficient evidence to address the complex and hotly debated issues raised in the notice of constitutional question in a definitive manner.

[20] In this case, the Commission did not act illegally, or unreasonably, by deeming the discrimination complaints inadmissible. This reason alone warrants dismissing this application. That being said, I will nevertheless make the following additional observations, in the event that an appeal court was of the opinion that this Court, in exercising its discretion, should have ruled on the merit of the applicant's general constitutional arguments.

[21] As the Supreme Court recently reiterated in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, at paragraph 25 citing *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at paragraphs 19-20:

> The test for a *prima facie* violation of s. 15 proceeds in two stages: does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds; if so, does the law impose "burdens or denies a benefit in a manner that has

> the effect of reinforcing, perpetuating, or exacerbating . . . disadvantage" . . . .

[22] In *Vriend*, where the complainants were contesting Alberta's *Individual's Rights Protection Act* because it did not list sexual orientation as a prohibited ground of discrimination, the Supreme Court concluded that "[t]he IRPA in its underinclusive state creates a distinction which results in the denial of the equal benefit and protection of the law on the basis of sexual orientation . . ." (*Vriend*, at paragraph 107). In this case as well, the failure to include an enumerated or analogous ground in section 3 of the CHRA could, from a theoretical standpoint, lead to a distinction in how a complainant who has been subject to a prohibited practice based on that ground is treated under the CHRA. However, is that sufficient in this case?

[23] I have serious doubts in the case at bar. The fundamental issue is that the applicant has not demonstrated with objective and convincing evidence how, in his particular case, language, student status or recourse against the Crown constitute "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity" (*Withler*, at paragraph 33, citing *Corbiere*, at paragraph 13). Moreover, if a parallel is to be made with student status and the fact that the applicant has sought recourse against the State, I note that the Supreme Court has already clearly stated that "professional status" and "individuals claiming relief against the Federal Crown" do not constitute analogous grounds (see *Delisle*, at paragraph 44; *Baier v. Alberta*, 2007 SCC 31, at paragraph 65 [*Baier*]; *Rudolph*, at page 702). Indeed, professional status or employment did not constitute "functionally immutable characteristics in a context of labour market flexibility" (*Delisle*, at paragraph 44; see also *Baier*,

at paragraph 65). Moreover, individuals claiming relief against the Crown are not a uniform disadvantaged group (*Rudolph*, at page 702). The first part of the test is not satisfied in this case.

[24] However, I am willing to concede that the case law is much more nuanced when it comes to language. Does it concern a mother tongue, a second language, either official language, an Indigenous or foreign language? In short, the question as to whether or not to include language as a ground of discrimination is a very complex issue that cannot be definitively resolved in the absence of particular facts and a specific factual context. Keep in mind that in the case at bar, the duties of the benefits clerk position at Employment and Social Development Canada were to be performed in English. In this case, considering the applicant's complaint that he was apparently evaluated more strictly than the other candidates during the selection process because his mother tongue is French, I am satisfied that the applicant had adequate recourse under the OLA to exercise his rights. Furthermore, I find the constitutional question in this case to be moot, given the Commission's authority to decline to examine a discrimination complaint when other recourse is already available.

[25] That being said, the Supreme Court has never officially ruled on whether language could be considered an analogous ground within the meaning of subsection 15(1) of the Charter. The cases were decided on other issues, namely, under paragraph 2(b) of the Charter protecting freedom of expression or under the Quebec *Charter of human rights and freedoms*, CQLR c. C-12 (see *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577; *Devine v. Quebec (Attorney General)*, [1988] 2 SCR 790, 55 DLR (4th) 641; *Forget v. Quebec (Attorney General)*, [1988] 2 SCR 90, 52 DLR (4th) 432). Of course, the respondent can rely on certain

precedents suggesting that the existence of a specific language rights regime necessarily excludes, by implication, language from the protection provided by section 15 of the Charter (see *Mahe*, at page 369; *Schools Act*, at page 857; *Mackenzie*, at paragraph 33; *Westmount*, at paragraph 149; *Lalonde*). However, that position is not unanimous, and the question is far from being resolved today.

[26] For example, in *Reference re French Language Rights of Accused in Saskatchewan Criminal Proceedings*, 58 Sask R 161, 44 DLR (4th) 16, at paragraph 74, the Saskatchewan Court of Appeal stated that the existence of a language rights regime and the omission to include language as an enumerated ground in subsection 15(1) do not necessarily have the effect of excluding any distinction based on language from protection. The Supreme Court seems to have followed that position in 2005 in *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, at paragraph 12. It also cited a decision of the Superior Court of Quebec, *Québec (Procureure générale) v Entreprises WFH Ltée*, [2000] RJQ 1222, 2000 CanLII 17890, at paragraph 223 (QC CS), affd by [2001] RJQ 2557, 2001 CanLII 17598 (QC CA), leave to appeal to SCC refused, where Justice Bellavance presumed that mother tongue was an analogous ground. However, it is true that the Supreme Court refused to address the issue, but perhaps a door was opened. This is, at least, the view of certain commentators (see, for example, Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville (QC), Éditions Yvon Blais, 2014, at page 1228; Alexandre Morin, *Le droit à l'égalité au Canada*, Montréal, LexisNexis Canada Inc., 2008, at pages 134-135 [Morin]). Morin even goes so far as to state that [TRANSLATION] "there is every indication that, if the question was posed to it directly, the [Supreme] Court would identify language as an analogous ground of discrimination"

(Morin, at page 134). Former Supreme Court Justice Michel Bastarache and Professor Michel Doucet also consider legal recognition a possibility [TRANSLATION] "in certain very specific cases" (see Michel Bastarache and Michel Doucet, *Les droits linguistiques au Canada*, 3rd ed., Cowansville, Éditions Yvon Blais, 2013, at pages 103 and 911).

[27] Regardless, and as interesting as the question the applicant raises may be, it must be concluded in this case that he does not present any new or convincing constitutional law argument that would explain why this Court should substitute itself for the Supreme Court of Canada and declare *ex post facto* that language should now be considered an analogous ground under section 15 of the Charter. The applicant is asking this Court to deviate from the immutability criterion in *Corbiere* in favour of international law. The applicant is trying to justify this deviation with the rule of *stare decisis*, by claiming that, according to *Carter*, the incorporation of international law constitutes a new legal issue. The Court fails to see how that would be the case here. The same question remains: what constitutes an analogous ground? According to the current majority case law, which is clear, this Court cannot create a new law in this regard. There is no cause to deviate from the approach in *Corbiere*. The situation is very different from that in *Bedford* as well.

[28] In short, alternatively, the applicant has not demonstrated to this Court's satisfaction that the distinction caused by section 3 of the CHRA, which does not include language, social condition or political opinion, is one that subsection 15(1) of the Charter aims to protect: it is not based on enumerated or analogous grounds (see, in general, *Withler*, at paragraph 33). Therefore, there is no need to move to the second part of the analysis, which consists of determining

whether the legislation has a discriminatory effect because it perpetuates a prejudice or stereotype. In the absence of a violation of section 15 of the Charter, it is also unnecessary to determine whether a hypothetical violation is justified under section 1.

IV. Conclusion

[29] For the reasons stated above, this application for judicial review is dismissed.

[30] The respondent is asking the Court to award costs in its favour, in order to deter abusive behaviour (see *Bristol-myers Squibb Canada Co. v. Teva Canada Limited*, 2016 FC 991, at paragraph 5). The applicant is asking the Court to issue declarations that were already denied, namely including granting him public interest standing (*Lessard-Gauvin* 2016, at paragraphs 14-30). The applicant is seeking to have the application dismissed without costs. His recourse did raise issues of public interest (see *Caron v. Alberta*, 2015 SCC 56, at paragraphs 109 *et seq.*).

[31] In exercising my discretion, considering all the circumstances, including the applicant's conduct and specific situation, I consider the lump sum of $1,500, inclusive of disbursements, proposed by the respondent to be reasonable and I will award it to the respondent.

JUDGMENT in T-569-15

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

The respondent is entitled to costs in the amount of $1,500.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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