

Federal Court



Cour fédérale

Date: 20181204

Docket: T-224-18

Citation: 2018 FC 1217

Ottawa, Ontario, December 4, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

KOVARTHANAN KONESAVARATHAN

Applicant

and

**UNIVERSITY OF GUELPH RADIO / RADIO
GRYPHON / CFRU-FM**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision by a Director at the Canadian Human Rights Commission [the Commission] dated December 6, 2017, not to deal with the Applicant's human rights complaint brought against the Respondent, pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the CHRA].

II. Background

[2] The Applicant, Kovarthanan Konesavarathan, is a Canadian citizen who resides in Guelph, Ontario. He is a racialized person.

[3] The Respondent, University of Guelph Radio / Radio Gryphon / CFRU-FM [CFRU], is a non-profit corporation that operates a community radio station in Guelph, Ontario. The Applicant joined CFRU as a volunteer member in 2015.

[4] The CFRU 93.3 FM Bylaws [the Bylaws] dictate that the affairs of CFRU shall be managed by a board of 12 voting directors [the Board] that exhibits a number of characteristics, including:

- a) At least 80% of the directors shall be Canadian citizens who reside within CFRU's broadcast area;
- b) Not less than 50% of the directors shall be students at the University of Guelph; and
- c) Not less than 50% of the directors shall be women.

[5] At CFRU's annual general meeting on or about November 24, 2015 [the AGM], the Applicant put himself forward to become a member of the Board.

[6] An election was held at the AGM to fill four open seats on the Board for males who were either members of the community or faculty at the University of Guelph. There were six candidates vying for the four open seats. Each candidate had the opportunity to speak and present

their qualifications for election. Following this, the attendees voted; the Applicant was not elected.

[7] There were two additional seats on the Board that were not opened up for election at the AGM, despite being unfilled, because they were designated for women and there were not enough female candidates seeking a spot on the Board.

[8] On or about February 17, 2016, the Applicant filed a complaint with the Commission, alleging that CFRU's election procedure discriminated against him on the basis of disability, race, national or ethnic origin, and colour [the Complaint].

[9] In a letter dated May 31, 2016, the Commission wrote to the Applicant, advising him that the Commission would be preparing a Section 40/41 Report to address whether paragraph 41(1)(d) of the CHRA applied to his Complaint, and offering him the opportunity to prepare a letter stating his position on this issue.

[10] Section 40 of the CHRA provides that, subject to certain limitations, any individual having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file a complaint with the Commission.

[11] Subsection 41(1) requires the Commission to deal with any complaint filed unless it appears to the Commission that:

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(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.

[Emphasis added]

[12] In a letter dated August 8, 2016, the Applicant made extensive submissions on why his Complaint did not fall under paragraph 41(1)(d) of the CHRA.

[13] There was also significant correspondence between the Applicant and the Commission in or around this time, addressing both whether paragraph 41(1)(d) applied to the Complaint, as well as whether the Commission should address the Complaint under section 5, 7, or 10 of the CHRA.

[14] The Commission prepared a Section 40/41 Report dated July 19, 2017 [the Report], which recommended that the Commission not deal with the Complaint on the basis that it is frivolous, pursuant to paragraph 41(1)(d) of the CHRA.

[15] In a letter dated August 23, 2017, the Applicant made further submissions to the Commission regarding the Report.

[16] In a decision dated December 6, 2017, which incorporated the Report, the Commission dismissed the Complaint on the grounds that it was frivolous pursuant to paragraph 41(1)(d) of the CHRA [the Decision].

III. Issues

[17] The issues are:

- A. Did the Commission violate the Applicant's right to procedural fairness by:
 - i. Following an incorrect process; or
 - ii. Misapprehending a key submission in the Complaint.
- B. Was the Commission's Decision unreasonable because:
 - i. The Commission erred in its application of the CHRA; or
 - ii. The Commission unreasonably concluded that the Complaint was frivolous.

IV. Standard of Review

[18] The parties agree that questions of procedural fairness should be reviewed on a correctness standard, and substantive review should be undertaken using the reasonableness standard.

[19] A decision made by the Commission under subsection 41(1) of the CHRA is discretionary and entitled to significant deference (*Georgoulas v Canada (Attorney General)*, 2017 FC 446 at para 17 [*Georgoulas*]).

V. Analysis

A. *Did the Commission violate the Applicant's right to procedural fairness?*

[20] The procedural rights which should be properly afforded to the Applicant fall at the low end of the spectrum (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21– 28).

(1) Procedure followed by the Commission

[21] The Applicant challenges the procedure followed by the Commission, arguing that the Commission asked misleading questions and spun his submissions inappropriately. The Commission gave the Applicant a multitude of opportunities to express his views, and prepared a thorough Section 40/41 Report, as well as the Decision itself. While the Applicant may disagree with the outcome the Commission arrived at, the evidence establishes that the Commission did not deprive the Applicant of his procedural fairness rights.

(2) Misapprehension of a key submission

[22] The Applicant also alleges that the Commission mischaracterized his argument, and therefore dismissed the Complaint on an improper basis.

[23] In the Complaint, the Applicant wrote:

Theory of my Case: Based on the story, one would find that the election was not a strict requirement. Because, when the board did not have enough representation of a code protected group, nominees from that code protected group were selected without having to run in the election. The Human Rights Code provides that no one Code ground is superior to another.

Although I was a person from the visible minority, I was forced to compete with other nominees from the majority white community. More than 90% of the eligible voters were from the majority white community. Rather than, selecting the candidates based on merits, the majority white voters selected the white candidates. It demonstrated two issues: 1) the voting members did not have the competency on Human Rights. 2) The board was not able to identify and address the barriers face by the code protected individuals to ensure the inclusion or representation of code protected individuals.

[24] The Applicant then highlights the following passage from the Decision:

The key question in deciding whether the Commission should deal with this complaint is whether there are reasonable grounds to believe that in reserving seats for women and, when some of those seats remained unfilled, not offering those seats for general election, the respondent discriminated against the complainant on the basis of disability and/or race, national or ethnic origin or colour. The Commission agrees with the conclusion in the report that the complainant has not provided a sufficient foundation for his complaint to proceed.

[25] The Applicant submits that the above passages evidence the mischaracterization of his argument. The Applicant further submits that this error taints the entirety of the Decision and renders it unreasonable.

[26] The thrust of the Applicant's argument in the passage above appears to be that he should not have been forced to stand for election, given that some women were appointed to the Board

without having been elected. In oral argument, the Applicant focused his submissions on the election itself, and argued that he was more qualified than the male candidates who were ultimately elected.

[27] In either case, the Applicant inappropriately isolates one passage from the Decision without considering the Commission's reasons as a whole. The Applicant's argument is addressed extensively in paragraphs 16 – 19 and 23 – 27 of the Report, and the Report is explicitly incorporated into the text of the Decision. As this Court has previously held, if the Commission adopts the recommendations contained in a Section 40/41 Report, that report is to be considered part of the Commission's reasons (*Georgoulas*, above).

[28] I find that there was no misapprehension by the Commission as to the nature of the Complaint or any deprivation of procedural fairness on this basis.

B. *Was the Commission's Decision unreasonable?*

(1) Did the Commission err in its application of the CHRA?

[29] The Applicant argues before this Court, as he did before the Commission, that the Complaint should have been considered under sections 7 and 10 of the CHRA, rather than section 5.

[30] The Commission provides a well-reasoned analysis at paragraphs 4-7 of the Report as to why the Complaint should be considered under section 5 of the CHRA. This analysis and conclusion were reasonable.

[31] Additionally, as the Commission highlighted in the Decision, when faced with this exact argument, this Court previously held in *Panacci v Canada (Attorney General)*, 2010 FC 114 at paragraphs 55-56, that it is immaterial which section grounds the Commission's jurisdiction:

[55] Sections 5, 7 and 10 in this case are the grounds which give the Commission jurisdiction to investigate and to refer on to the Tribunal if appropriate. There has never been any serious challenge to the Commission's jurisdiction to deal with the case.

[56] In any event, it is immaterial which section of the Act was used to ground the Commission's jurisdiction. The Commission correctly concluded that it had jurisdiction and proceeded to investigate the existence of discriminatory acts.

(2) Was the Commission unreasonable to conclude that the Complaint is frivolous?

[32] The Applicant also alleges that the Commission was unreasonable in dismissing the Complaint pursuant to paragraph 41(1)(d) of the CHRA because: (1) a *prima facie* standard should not have been applied by the Commission to dismiss his Complaint; (2) the Commission erred in its application of the *prima facie* standard; and (3) in the alternative, the outcome of the Decision was unreasonable.

[33] The test for determining whether or not a complaint is frivolous within the meaning of paragraph 41(1)(d) is whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed (*Hérolt v Canada Revenue Agency*, 2011 FC 544 at para 35). For

the purposes of this analysis, the allegations of fact in the Complaint must be taken as true (*Keith v Canada (Correctional Service)*, 2012 FCA 117 at para 51).

[34] As the Respondent points out, this test and the decisions cited above were articulated for the Applicant's benefit in the Report. It is unclear on what basis the Applicant challenges the test applied by the Commission. I find that the Commission applied the correct legal framework.

[35] The outcome of the Decision, namely that the Complaint should be dismissed as frivolous, is also reasonable, and falls well within the range of outcomes justifiable by the facts and the law. I note in particular that:

- a) The Applicant provided no evidence, either before the Commission or before this Court, to support an allegation that he was discriminated against with respect to the election process;
- b) The Commission was reasonable to conclude that policy in the Bylaws of having an equal number of men and women as board members, as well as the decision to implement this policy by way of a nomination process rather than election, was not discriminatory within the meaning of the CHRA; and
- c) The Commission was reasonable to decline to deal with a complaint based only on bald, unsubstantiated assertions (*Love v Canada (Privacy Commissioner)*, 2014 FC 643 at para 71).

[36] I find that the Applicant's complaint is frivolous and vexatious, and it was plain and obvious that he had no prospect of success.

[37] The application is dismissed with costs to the Respondent.

JUDGMENT in T-224-18

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended to correct the spelling of the Respondent's name from "CFRU 93.3 FM" to "University of Guelph Radio / Radio Gryphon / CFRU-FM".
2. The application is dismissed with costs to the Respondent in accordance with Tariff B in the amount of \$6000.00.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-224-18

STYLE OF CAUSE: KOVARTHANAN KONESAVARATHAN v
UNIVERSITY OF GUELPH RADIO / RADIO
GRYPHON / CFRU-FM

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 3, 2018

JUDGMENT AND REASONS: MANSON J.

DATED: DECEMBER 4, 2018

APPEARANCES:

Kovarathanan Nonesavarathan

FOR THE APPLICANT,
ON HIS OWN BEHALF

Michael Vrantsidis

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gibbs & Associates
Toronto, Ontario

FOR THE RESPONDENT