Date: 20060503

Docket: T-1034-05

Citation: 2006 FC 554

Toronto, Ontario, May 3, 2006

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

MS. DORETTE SUCKOO

Applicant

and

BANK OF MONTREAL

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission dated May 11, 2005 dismissing the complaint of the Applicant Dorette Suckoo. She complained that she was discriminated against by reason of race or colour which resulted in her dismissal from the Respondent Bank of Montreal.

[2] The Applicant (complainant) began her employment with the Respondent on June 26, 2000 occupying a probationary position in the lending area. She was part of a team of approximately

fifteen persons. For training purposes each team was assigned a Mentor, Assistant Team Leader and a Team Leader. The Applicant's employment was terminated on June 12, 2001. Notwithstanding a considerable delay on the part of the Applicant, the Commission agreed in October 2003 to deal with the Applicant's complaint.

[3] An Investigator was assigned to look into the complaint and produced a Draft Report dated January 20, 2005 a copy of which was provided to the Applicant for comments. The Applicant provided written comments dated March 4, 2005. The Respondent provided comments by letter dated March 29, 2005. The Commission, by letter dated May 11, 2005, notified the Applicant of its decision, the substantive portion of which reads:

> *Before rendering their decision, the members of the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to paragraph 44(3)(b) of the Canadian Human Rights Act, to dismiss the complaint because:*
>
> * *the evidence does not support the complainant's allegation that the respondent discriminated against her based on race or colour; and*
>
> * *the evidence does indicate that there were work performance concerns regarding the complainant, which did not improve and ultimately resulted in the termination of her employment.*
>
> *Accordingly, the file on this matter has now been closed.*

[4] The Applicant, in her Memorandum before this Court, raised the following issues for judicial review:

a) The investigation was fundamentally flawed;
b) The decision did not reflect the evidence;
c) Her witnesses were never interviewed; and

> *d) The investigation was conducted in an incomplete and sloppy manner; therefore the findings are biased against her.*

[5] At the hearing, counsel for the Applicant raised a further issue, not in the Memorandum, namely that the Applicant, being a black person, should have been treated differently so as to preclude any effect of negative stereotyping.

Degree of Deference

[6] A preliminary issue in cases of judicial review is that of the degree of deference to be afforded to the decision of the tribunal under review. Applicant's counsel says that in this case the degree is that of correctness, but gives no authority for that proposition. Respondent's counsel says that the degree is that of patent unreasonableness citing *McConnell v. Canada (CHRC)* 2004 FC 817 at paragraph 87. In *Lindo* v. *Royal Bank of Canada* [2000] F.C.J. No. 1101 at paragraph 14 the Court concluded that the standard was that of reasonableness *simpliciter*. I prefer to follow *Lindo* in this regard thus must submit the decision under review to a somewhat probing examination while giving appropriate deference to the expertise of the tribunal.

Was the Investigation Proper

[7] At the hearing, Applicant's counsel's argument as to the propriety of the investigation was directed to essentially a single point namely, did the investigator fail to interview witnesses whose first names only were given by the Applicant to the Investigator. The Applicant's counsel relied on *Tahmourpour v. Canada*, 2005 FCA 113 at paragraphs 39 and 40:

> *[39] Any judicial review of the Commission's procedure must recognize that the agency is master of its own process and must be afforded considerable latitude in the way that it conducts its investigations. An investigation into a human rights complaint*

> *cannot be held to a standard of perfection; it is not required to turn every stone. The Commission's resources are limited and its case load is heavy. It must therefore balance the interests of complainants in the fullest possible investigation and the demands of administrative efficacy: see, for example, Slattery v. Canada (Human Rights Commission) at para. 55; Canadian Human Rights Commission, Annual Report for 2001 (Ottawa: Minister of Public Works and Government Services, 2002), p. 33.*
>
> *[40] Nonetheless, I am satisfied that this is an exceptional case. In failing to investigate and analyse the statistical data, and to interview other cadets in Mr. Tahmourpour's troop or Mr. Solomon, the investigator failed to investigate "obviously crucial evidence". The investigation of Mr. Tahmourpour's complaint thus fails to meet the test of thoroughness prescribed in Slattery. Accordingly, the Commission's dismissal of the complaint should be set aside as being in breach of the duty of fairness.*

[8] These paragraphs must be read with the paragraphs that precede them in mind, namely paragraphs 36 to 38 which say:

> *[36] Counsel for Mr. Tahmourpour submitted that the investigator seems to have been troubled by, and to have attached weight to, the fact that Mr. Tahmourpour did not complain about harassment until after his employment was terminated. Counsel infers this from the fact that the report contains four references to Mr. Tahmourpour's failure to complain promptly.*
>
> *[37] Mr. Tahmourpour responded to the investigator's draft report on March 10, 2003, and stated that, while still in active training as a member of the troop, he had complained of harassment to the local Member of Parliament, Mr. John Solomon. Mr. Tahmourpour informed the Commission that other cadets who were members of ethnic and other minorities had also complained to Mr. Solomon about racism and discrimination in the RCMP. Mr. Tahmourpour stated that Mr. Solomon had verified these statements to the press.*
>
> *[38] If, as seems to have been the case, the investigator attached importance to Mr. Tahmourpour's failure to complain before his termination, he ought to have contacted Mr. Solomon, particularly since Mr Tahmourpour had advised the Commission*

> *that the Member had also received complaints of discrimination from other cadets.*

[9] In the present case it is clear that the Investigator made efforts to interview those persons who were likely to have evidence material to the case. In paragraphs 12 to 15 of the Report the Investigator says:

> *12. For the purposes of this investigation, the following individuals were interviewed. Jason Kay, the complainant's Team Leader; Clementine Sansalone, the complainant's Mentor; and Lydia Ridd, a Senior Manager and Mr. Kay's Supervisor. None of these witnesses is a racial minority. The complainant's Assistant Team Leader at the material time, Harpreet Sandhu is no longer employed with the respondent and although efforts were made to contact her, she has moved and her contact information cannot be ascertained.*
>
> *13. The complainant provided the names of two former co-workers, whom she submits would support her position. Veronica Hill and Marvia Grenville. Neither of these individuals worked in the same group as the complainant. Veronica Hill, who was interviewed during the course of the investigation, is still employed with the respondent.*
>
> *Because Ms. Hill was not in the same department as the complainant, nor was she on Mr. Kay's team with the complainant, she could not comment on the complainant's allegations regarding Mr. Kay and her other team members. Attempts were made to contact Marvia Grenville but proved unsuccessful.*
>
> *14. The complainant provided the names of additional witnesses, specifically white colleagues whom she alleged were treated in a more favourable manner by Mr. Kay. However, the complainant was unable to identify these witnesses by their last names and as such, they could not be located for the purposes of this investigation.*
>
> *15. The complainant was questioned about the absence of firm witnesses contact information as concerns her allegations. The complainant however, maintained her position that she had been treated differentially and dismissed based on her race and colour.*

[10] Applicant's counsel says that the Investigator failed to follow up and determine who the persons were whose first names only were known to the Applicant, and obtain their testimony. However, Applicant's counsel could not say that such evidence would have been relevant or, if obtained, would even have been of assistance in arriving at a proper decision. As stated at paragraph 90 of *McConnell supra* and in *Murray v. Canada (CHRC)* 2002 FCT 699 at paragraph 24, affirmed at 2003 FCA 222, the Investigator is not obliged to interview each and every witness that the Applicant would have liked, nor each and every incident of discrimination. Unlike *Tahmourpour* there is no suggestion that critical evidence was overlooked or an important witness ignored.

[11] I find no basis for setting aside the decision on this ground.

Was the Investigator Sufficiently Sensitive to the Fact that the Complainant was Black

[12] The Applicant did not raise this squarely as an issue in her Memorandum. At the hearing, Applicant's counsel referred in argument to the Supreme Court of Canada decision in *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at paragraph 46 for a proposition that judicial notice must always be taken, where a party is black, so as to guard against negative stereotyping or systemic prejudice.

> *46 The reasonable person, identified by de Grandpré J. in Committee for Justice and Liberty, supra, is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the Canadian Charter of Rights and Freedoms. Those fundamental principles include the principles of equality set out in s. 15 of the Charter and endorsed in nation-wide quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the Charter's equality provisions. These are matters*

> *of which judicial notice may be taken. In Parks, supra, at p. 342, Doherty J.A., did just this, stating:*
>
> > *Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.*

[13] Further, in reply Applicant's counsel referred to *Smith v. Ontario (Human Rights Commission),* [2005] O.J. No. 377 at paragraphs 8 and 9:

> *8 The real issue in the appeal is, therefore, whether the finding that race was not a factor in the dismissal is sustainable. In determining that issue, it is instructive to read the Tribunal's language in the context of the undisputed facts, the objects of the Code and the difficulty recognized in the case law of proving discrimination.*
>
> *9 The basis for requiring that race be only a factor in the termination is the recognized difficulty in proving allegations of race discrimination by way of direct evidence. As was noted in Basi v. Canadian National Railway Co. (No. 1) (1988), 9 C.H.R.R. D/5029 (C.H.R.T.) at para. 38481: Discrimination is not a practice which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practiced.*

[14] These paragraphs however, must be read in the context of the preceding paragraph 6:

> *6 We are all of the view that the findings made by the Tribunal, which led it to conclude that Smith was subjected to a poisoned workplace, are inconsistent with the finding that the respondents were not wilful or reckless in their infringement of Smith's right to be free from the poisoned atmosphere. Those findings of subjection to the poisoned atmosphere were grounded on the failure of an area manager, the directing mind, to do anything about complaints from Smith that he was the victim of racial slurs. The evidence in support of those findings was overwhelming. The Tribunal's failure to provide a reason for the finding that the respondents were not wilful or reckless is an error of law. See Northwestern Utilities Ltd. v. City*

> *of Edmonton, [1979] 1 S.C.R. 684 at 705; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; J.M. Evans et al., Administrative Law: Cases, Text and Materials, 3rd ed.; and Section 41(1)(b) of the Code. On this record, the only finding available to the Tribunal was that the respondents were at least reckless in their infringement of Smith's right to be free from the poisoned atmosphere. Accordingly, the appeal on this ground must be allowed and the finding that the respondents were not wilful or reckless set aside.*

[15] In this case it is clear that the Investigator was aware that the Applicant (complainant) was a black person, for instance at paragraphs 15 to 19 of the Report:

> *15. The complainant was questioned about the absence of firm witness contact information as concerns her allegations. The complainant however, maintained her position that she had been treated differentially and dismissed based on her race and colour.*
>
> ***Racial Composition of Lending Department***
> *16. The complainant submits that she was the only black employee in her department at the material time of the complaint.*
>
> *17. The respondent submits that it does not have formal records, regarding specifically which employees at the time in question, either within the complainant's team or department were black. The respondent submits that it's formal tracking of racial minorities is done on a voluntary, self-identification basis and that this information is only monitored and reported on at the Vice-Presidential level and higher.*
>
> *18. Mr. Kay, Ms. Sansalone and Ms. Ridd indicated their recollection that the complainant was not the only black employee in her department. The complainant's witness, Veronica Hill indicated that both at the material time and currently, the respondent's workforce in her location is racially diverse.*
>
> *19. A workforce profile of the complainant's department for the year 2000, indicate that out of fifty employees, nineteen were considered to be racial minorities. Two of these individuals were on Mr. Kay's team with the complainant.*

[16] Applicant's counsel says that the other employees are described as racial minorities and not necessarily black. This is not relevant, what is relevant is that it is clear that the Inspector was aware of and sensitive to the Applicant's colour.

[17] The Investigator in the paragraphs following paragraph 19 which lead to the recommendation set out in paragraph 103 of the Report, carefully reviews each and every instance of discrimination and maltreatment raised by the Applicant (complainant) with great sensitivity. I find that the Investigator was fully aware of and sensitive to any issues as to colour and race that may have arisen in this case. Applicant's counsel could not draw my attention to any matter in which the colour of the Applicant, or failure to consider that colour, would have had a material impact upon matters as set out in the Investigator's report or the decision of the Commission.

[17A.] During the course of the hearing of this matter Counsel for the Applicant objected to the evidence of certain exhibits to the affidavit of Dunnell. I ordered that Exhibit "C" be removed from the Record.

[18] Accordingly, the application for judicial review is dismissed. The Respondent does not ask for costs, thus none will be awarded.

JUDGMENT

UPON APPLICATION made before me on the 1st day of May, 2006 for judicial review of a decision of the Canadian Human Rights Commission dated May 11, 2005 wherein the Applicant's complaint as to the basis of her dismissal from the Respondent, was dismissed.

AND upon reviewing the Records herein;

AND upon hearing from Counsel for the parties;

FOR the Reasons provided herewith;

THIS COURT ADJUDGES that

1. The application is dismissed.

2. No costs to any party.

3. Exhibit "C" to the affidavit of Dunnell be removed from the Record.

"Roger T. Hughes"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1034-05
STYLE OF CAUSE:	DORETTE SUCKOO Applicant and BANK OF MONTREAL Respondent
PLACE OF HEARING:	TORONTO, ONTARIO
DATES OF HEARING:	MAY 1, 2006
REASONS FOR JUDGMENT AND JUDGMENT BY:	HUGHES J.
DATED:	MAY 3, 2006

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