Federal Court  Cour fédérale

**Date: 20190628**

**Docket: T-1356-18**

**Citation: 2019 FC 877**

**Ottawa, Ontario, June 28, 2019**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**RAY DAVIDSON**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Ray Davidson—a federal employee and a self-represented litigant—had good intentions. He went to great lengths and devoted considerable time to raise an issue of public importance: namely, questions of systemic discrimination in the federal recruitment process.

[2] Mr. Davidson filed an application to judicially review a decision by the Canadian Human Rights Commission [the "Commission"], where it dismissed his complaint as "frivolous" and

falling outside of its jurisdiction. In his complaint, Mr. Davidson alleged that federal departments were not hiring black individuals for senior positions and that he had statistical evidence to prove it. The Commission found that, among other issues, Mr. Davidson did not meet the *prima facie* test for discrimination and dismissed his complaint.

[3] As laudable as Mr. Davidson's intentions were, the evidence did not his support case. For the reasons that follow, I find that the Commission's decision was reasonable and fell within a range of possible, acceptable outcomes defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

## II. **Background**

### A. *Mr. Davidson's Complaint*

[4] On December 30, 2015, Mr. Davidson filed a complaint with the Commission in which he alleged that the Treasury Board of Canada Secretariat ("TBS") was engaging in discrimination by not hiring racialized individuals, thereby contravening sections 7 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 ("*CHRA*").

[5] Mr. Davidson is a Senior Access to Information and Privacy Analyst with the federal government. He identifies as black.

[6] Mr. Davidson's complaint to the Commission was twofold.

[7] First, he applied to several ministries for a promotion and/or new positions and he was unsuccessful. He did not, however, apply for a position at the TBS, nor was he ever employed there.

[8] In his complaint, Mr. Davidson focused on the following unsuccessful job applications to federal agencies and the reasons provided to him as to why he was unsuccessful:

- Department of Fisheries and Ocean (2010): Mr. Davidson was unsuccessful at the interview stage of the recruitment process;
- Department of Fisheries and Ocean (June, 2016): application was unsuccessful because Mr. Davidson lacked "sufficient proof of experience";
- Innovation, Science and Economic Development Canada (date not provided): Mr. Davidson was unsuccessful because he provided incorrect responses;
- Heritage Canada (August, 2016): Mr. Davidson was unsuccessful because he provided an inadequate answer to one question; and
- Library and Archives Canada (September, 2016): Mr. Davidson was unsuccessful because his "answers were not as complete as that expected by the Board."

[9] Second, Mr. Davidson obtained data through access-to-information requests to the Public Service Commission of Canada ("PSC"). He claimed that the data he received demonstrates that while visible minorities are hired by the federal government, black individuals are seldom hired or promoted to senior positions in federal ministries.

[10] To that end, Mr. Davidson emphasized one data point: while visible minorities are sometimes appointed (12.2%), people who identify as black are almost never appointed.

Mr. Davidson noted that in his data, 3.1% of the candidates were black, but none of them were hired for senior positions.

[11] For Mr. Davidson, the above factors established that there was systemic discrimination at play in the federal government and that the TBS was further perpetuating it.

B. *Commission's Decision*

[12] In dismissing Mr. Davidson's complaint, the Commission focused on two main issues.

[13] First, the Commission found that pursuant to the *CHRA*, Mr. Davidson's complaint was frivolous. Paragraph 41(1)(d) of the *CHRA* provides that the Commission is to deal with a complaint unless it is "trivial, frivolous, vexatious or made in bad faith." The Commission explained that "frivolous" has been interpreted as a complaint, among others, lacking a reasonable basis for believing that the complainant was discriminated against and that it is plain and obvious that the complaint cannot succeed: *CHRA*, s. 41(1)(d); see also *Hérold v Canada Revenue Agency*, 2011 FC 544 at para 35 [*Hérold*].

[14] In this case, the Commission found that Mr. Davidson "did not offer any information or facts to support" that he was "treated differently based on his colour." Moreover, the Commission concluded that merely making bald assertions—based on rudimentary statistics—does not necessarily make a complaint "reasonable."

[15] Second, the Commission found that as provided in paragraph 41(1)(c) of the *CHRA* it was not required to deal with the complaint as it did not have the jurisdiction to hear it. The Commission determined that it lacked jurisdiction because paragraph 40.1(2)(b) of the *CHRA*

provides that no complaint may be dealt with by the Commission where "the complaint is based solely on statistical information that purports to show that members of one or more designated groups are underrepresented in the employer's workforce." The Commission found that Mr. Davidson based his complaint on statistical evidence without clarifying how he was personally discriminated. He did not provide any information as to how he was allegedly discriminated against in his various job applications. Therefore, the Commission found that it was barred from considering this complaint by its governing legislation.

## III. **Preliminary Issues**

### A. *Style of Cause*

[16] The style of cause names the Respondent as the "President of the Treasury Board of Canada Secretariat." Mr. Davidson insisted during the hearing that this was the correct federal body to name for the purposes of this application for judicial review. However, he noted that he was amenable to altering the style of cause if it had no bearing on the issues before the Court.

[17] The Attorney General of Canada notes, and I agree, that the style of cause should be amended to the "Attorney General of Canada." Rule 303(1)(a) of the *Federal Courts Rules*, SOR/98-106 provides that an applicant must name as a respondent every person directly affected by the order sought in the application. The president of the TBS is not directly affected by the issue Mr. Davidson raises.

[18] Moreover, Rule 303(2) states that the Attorney General of Canada shall be named as a respondent when, in an application for judicial review, there are no persons who can be named in accordance with Rule 303(1).

[19] The style of cause is therefore amended and "The Attorney General of Canada" is substituted as the proper respondent in place of the "President of the Treasury Board of Canada Secretariat."

B. *Striking the Applicant's Affidavit*

[20] The Respondent sought to strike parts of Mr. Davidson's affidavit and nearly all of his exhibits on the basis that they are argumentative and/or contain information that was not before the Commission. Most of these arguments are technical in character.

[21] Given that this application involves a self-represented litigant, I am mindful of Mr. Justice Phelan's statements in *Murray v Canada (Human Rights Commission)*, 2004 FC 1541. In that case, the Commission had dismissed Ms. Murray's complaint of discrimination by the Canada Revenue Agency. On judicial review, the Respondent sought to strike portions of Ms. Murray's affidavit, who was also a self-represented litigant. Mr. Justice Phelan at paragraphs 3 and 4 said the following:

> CRA brought a motion to strike portions of Murray's affidavit because those portions are either hearsay, speculative, argumentative, irrelevant, or contain legal conclusions and arguments. Rule 81 of the Court's Rules must be read in light of the general proposition that hearsay is admissible if it is necessary, relevant and cogent. <u>While the Respondent may have a technical basis for its objections, there is no prejudice to CRA in allowing Murray, a self-represented party, certain leeway in putting forward her case…</u>
>
> The Court therefore dismisses CRA's objection to those portions of the affidavit; the Court has given the offending portions such weight as is appropriate.
>
> [Emphasis added]

[22] I note that virtually all of the exhibits challenged by the Respondent are communications to and from the Commission. The impugned exhibits are of negligible help to the Court and are certainly within the knowledge of the Commission. In this case, nothing turns on them.

[23] In light of the foregoing, I will not strike paragraphs 2–5, 9, and 10–12 or exhibits B, C, D, E, F, G, I and L of Mr. Davidson's affidavit. However, Exhibit J is struck since it is an email chain that postdates the Commission's decision.

## IV. **Issue**

[24] This application for judicial review raises one issue: was the Commission's decision to dismiss Mr. Davidson's complaint reasonable?

## V. **Legislation and Jurisprudence**

[25] Subsection 41(1) of the *CHRA* accords discretion to the Commission to dismiss a complaint under certain circumstances. Subsection 41(1) provides the following:

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| **Commission to deal with complaint** | **Irrecevabilité** |
| 41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that | 41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants : |
| (a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available; | a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts; |
| (b) the complaint is one that could more appropriately be | b) la plainte pourrait avantageusement être instruite, |

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| dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act; | dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale; |
| (c) the complaint is beyond the jurisdiction of the Commission; | c) la plainte n'est pas de sa compétence; |
| (d) the complaint is trivial, frivolous, vexatious or made in bad faith; or | d) la plainte est frivole, vexatoire ou entachée de mauvaise foi; |
| (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. | e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances. |

[26] In *Canada Post Corporation v Barrette*, [2000] 4 FC 145 [*Barrette*], the Federal Court of Appeal held at paragraph 22 that subsection 41(1) empowers the Commission to serve a "screening function" in order to ensure that a complaint warrants its investigative attention. In interpreting *Barrette*, Mr. Justice Near in *English-Baker v Canada (Attorney General)*, 2009 FC 1253 stated at paragraph 18 that "the Commission is not under a duty to investigate every complaint at this stage. They are to examine, on a *prima facie* basis, whether the grounds set out in subsection 41(1) are present, and if so, to decide whether to deal with the complaint nevertheless."

## VI. **Standard of Review**

[27] It is settled law that the screening decisions by the Commission under subsection 41(1) of the *CHRA* are reviewed on a standard of reasonableness: *Zulkoskey v Canada (Employment and Social Development)*, 2016 FCA 268 at para 15.

[28] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

## VII. **Parties' Positions**

[29] Mr. Davidson argues that his "complaint cannot be frivolous […] because there is a confirmed direct link to identifiable individuals." He contends that while the data that he provided is anonymized to protect privacy interests, the numbers nevertheless refer to actual racialized people who were unsuccessful in securing a position in the federal government. Moreover, he suggests that he was personally unsuccessful at securing a position at various federal agencies because of his race. For Mr. Davidson, these two factors prove that his complaint is not frivolous.

[30] The Respondent says that Mr. Davidson's "complaint cannot be frivolous […] because there is a confirmed direct link to identifiable individuals" regarding the impugned conduct: namely, the lack of appointment of black individuals to various government positions. Mr. Davidson, according to the Respondent, has not provided "any material facts" to support the

claim that his race—a prohibited ground of discrimination—was the reason he was unsuccessful in the selection process.

## VIII. **Analysis**

[31] I agree with the Respondent and find that the Commission's analysis on the issue of the complaint being frivolous was reasonable. There are three reasons for this finding.

[32] First, the Commission identified and applied the correct test in determining that Mr. Davidson's complaint was frivolous. This Court has endorsed on a number of occasions that the test from *Hérold* is determinative concerning how to interpret the term "frivolous" in paragraph 41(1)(d) of the *CHRA*: *Hagos v Canada (Attorney General)*, 2014 FC 231 at para 38; *O'Grady v Bell Canada*, 2012 FC 1448 at para 60; *Konesavarathan v University of Guelph Radio*, 2018 FC 1217 at para 33. In *Hérold*, Mr. Justice Rennie stated the following at paragraph 35: "…the test for determining whether or not a complaint is frivolous within the meaning of paragraph 41(1)(d) of the Act is whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed."

[33] In this case, the Commission identified the test from *Hérold* after noting that subsection 40(1) of the *CHRA* provides that to file a complaint an individual must have reasonable grounds to believe a discriminatory practice had occurred.

[34] Second, in applying the test, the Commission correctly noted the need for evidence. In *Love v Office of the Privacy Commissioner of Canada*, 2014 FC 643, Mr. Justice Russell stressed the following at paragraph 69:

> While a complainant is not expected to put forward evidence at the pre-investigation stage, the requirement to establish reasonable grounds for the complaint means that they cannot rely on bald allegations either…The complainant does not need to prove that what they say is true, but they must allege facts that, if believed, would establish a link to a prohibited ground of discrimination. He or she cannot merely assert that such a link exists.
>
> [Emphasis added]

[35] In Mr. Davidson's case, he needed to provide some evidence that he was not selected for a senior position in the federal government because of his race. Mr. Davidson provided a list of jobs (summarized above at paragraph 8) for which he applied but was not selected. In most instances, he was provided with reasons as to why he was not selected, including but not limited to: he gave incorrect responses to interview questions; there was a lack of evidence regarding the necessary experience required for the job opening; and he failed to provide thorough answers. Beyond these reasons and a list of jobs he applied to, Mr. Davidson provided no evidence that he was personally discriminated against in his job search as a result of his race.

[36] Faced with a body of evidence that essentially was comprised of Mr. Davidson's assertions, it was reasonable for the Commission to find that his "allegations appear to be bald assertions and are unsupported by any facts."

[37] Third, with regard to the data that Mr. Davidson provided, there are two issues: (1) it is difficult to interpret; and, (2) what it establishes is unclear. Even Mr. Davidson acknowledged during the hearing that the data is not readily accessible for decision makers.

[38] Most importantly, Mr. Davidson expressed during the hearing, on multiple occasions, that visible minorities are being hired and are thriving at federal agencies. The problem he sees is that black individuals are not being promoted to senior positions within the federal bureaucracy.

[39] Toward that end, Mr. Davidson provided charts that show the number of visible minority applicants. One column contains the number of visible minorities who have been appointed. There are also columns entitled "VISMIN [visible minority] applicants who self-declared BLACK" and "VISMIN [visible minority] appointments who self-declared BLACK."

[40] The charts do not support Mr. Davidson's argument that black applicants are not being hired by federal agencies. The problem is that there is a muddying effect caused by self-identification as black.

[41] When relying on a sub-category (black) in a dataset (visible minorities), it is essential to ensure that the broader category is accurately coded. In the charts that Mr. Davidson provided it is not obvious that when a column indicates 0% of self-reported black applicants were appointed, this means that no black applicant secured a senior position with the government.

[42] Mr. Davidson agreed that it is conceivable that of the visible minorities who applied and were appointed, some of them may have been black individuals who chose not to "self-declare" their race. The result is that it is possible, if not likely, that the visible minority column contains black individuals who decided not to identify their race.

[43] Moreover, even if the above issues did not exist with the data, it would not assist Mr. Davidson because the *prima facie* test for discrimination requires that he personally face

discriminatory conduct based on a prohibited ground. Guidance on this issue is provided in *Stukanov v Canada (Attorney General)*, 2018 FC 854 [*Stukanov*]. Mr. Justice Ahmed noted that it is incumbent on a complainant to "cite material facts that are capable of establishing a link between the impugned conduct and a prohibited ground of discrimination…[The complainant] must do more than demonstrate membership in a protected group and the existence of general prejudices to that group; the claimant must put forward sufficient evidence to show a link between his or her individual treatment and the prohibited ground of discrimination" : *Stukanov,* at para 18.

[44] As reviewed above, Mr. Davidson did not provide enough information regarding how he was personally discriminated against to prove his claim. What he did provide was a list of job openings where he was unsuccessful and the *prima facie* valid and non-discriminatory reasons he received as to why he had been unsuccessful. Beyond these assertions, the Commission was not provided with any evidence or indicators demonstrating that Mr. Davidson was unsuccessful in the federal recruitment process because he was black or due to any discriminatory practices.

[45] In addition, data on purported systemic discrimination would not fill the evidentiary gap concerning how Mr. Davidson was personally discriminated.

[46] Having found that the Commission was reasonable in its assessment that Mr. Davidson's allegations are frivolous, there is no need to consider whether the Commission's alternative ground—lack of jurisdiction—for dismissing Mr. Davidson's complaint is reasonable.

## IX. **Conclusion**

[47] Mr. Davidson passionately believes that there is systemic discrimination within the federal recruitment process. He is commended for his efforts to shine a light on a perceived injustice. However, absent the necessary evidence, it was reasonable for the Commission to dismiss Mr. Davidson's complaint under subsection 41(1) of the *CHRA*.

[48] The health of a society's institutions is in part predicated on whether those institutions reflect the diversity and differences of society. Although Mr. Davidson has not been successful in this application, the broader concerns of inclusion he has raised concerning hiring decisions related to senior management positions in the federal government will hopefully be examined.

**JUDGMENT in T-1356-18**

**THIS COURT'S JUDGMENT is that:**

1. The application is dismissed; and
2. The style of cause is amended to name The Attorney General of Canada as the Respondent.

"E. Susan Elliott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1356-18 |
| **STYLE OF CAUSE**: | RAY DAVIDSON v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 19, 2019 |
| **JUDGMENT AND REASONS:** | ELLIOTT J. |
| **DATED:** | JUNE 28, 2019 |

**APPEARANCES:**

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| Mr. Ray Davidson | FOR THE APPLICANT (ON HIS OWN BEHALF) |
| Ms. Vanessa Wynn-Williams | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |