Federal Court  Cour fédérale

Date: 20191009

Docket: T-1903-18

Citation: 2019 FC 1278

Ottawa, Ontario, October 9, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

RAY DAVIDSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] In June 2016, the applicant filed a complaint with the Canadian Human Rights Commission alleging that his employer, Immigration, Refugees and Citizenship Canada [IRCC], had discriminated against him on the basis of race, national or ethnic origin, and colour. The applicant self-identifies as Black and as African-Canadian. Broadly speaking, the applicant alleged that between February 2015 and June 2016 he had been passed over for several advancement or development opportunities in the Access to Information and Privacy Division of IRCC on discriminatory grounds.

[2] The complaint was referred to a Commission investigator in August 2016. During the course of the investigation, the investigator interviewed the applicant as well as eight individuals who had worked with the applicant at IRCC. (A tenth interviewee was an external member of the selection committee for a position the applicant had competed for unsuccessfully.)

[3] On June 12, 2018, the investigator issued an Investigation Report in which she recommended that the Commission dismiss the applicant's complaint under section 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c H-6, because, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted. The investigator summarized her conclusions as follows:

> In the main, the complainant describes events and occurrences which he alleges constitute adverse differential treatment on the basis of his race, colour and national and ethnic origin. The witnesses interviewed, including those suggested by the complainant himself, do not support any of his allegations. In fact, most witnesses, including two Black employees, support the respondent's explanations. Given the whole of the circumstances, further inquiry is not warranted.

[4] Under cover letters dated June 18, 2018, the Investigation Report was shared with the applicant and with IRCC. The letter to the applicant stated that the Commission will consider the report when it reviews his complaint and makes its decision. The letter advised the applicant to read the report carefully. It went on to say that if he disagreed with the report, "it is important that you make a written submission." The letter also stated: "**You can submit up to a total of 10 pages. If you have any attachments, they count as part of the total. The Commission will read the first 10 pages only**" (emphasis by bold and underlining in original).

[5] The applicant provided a detailed ten page written response dated July 13, 2018. He took issue with many aspects of the Investigation Report, including, it must be said, several peripheral matters. However, the substance of his response was directed at demonstrating what he maintained was the lack of veracity in the exculpatory explanations for his treatment that his colleagues had provided to the investigator. In reaching her recommendation that further inquiry was not warranted, the investigator had accepted the applicant's colleagues' versions of material events rather than the applicant's. The applicant was particularly concerned that his colleagues had attributed his experiences to alleged issues with his skills and performance when these issues had never been brought to his attention before.

[6] In support of his response, the applicant cited a large number of documents which he did not include with his submission due to the ten page limit but which he stated were available for the Commission's review. Indeed, the applicant specifically asked the Commission to review all the documents he had referred to, suggesting that this should be done with his assistance in a face-to-face meeting. The applicant submitted that this was necessary for the Commission to have a proper understanding of his response to the Investigation Report. For the most part, the documents the applicant referred to were emails generated in the course of his employment with IRCC. Many involved the other IRCC employees who had been interviewed by the Commission investigator.

[7] I note parenthetically that, because the supporting documents were not submitted to the Commission, they do not form part of the record that was before the Commission when it decided this matter. In response to a request from the applicant to file these documents in

support of the present application for judicial review, on May 10, 2019, I issued a Direction permitting the documents to be filed without prejudice to the right of the respondent to object to their admissibility at the hearing. In the end, I have considered the documents only to the extent that they provide the necessary context for the applicant's allegation that there was a breach of procedural fairness (cf. *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 25).

[8] In a decision dated October 5, 2018, the Commission dismissed the complaint. The substance of the letter informing the applicant of the decision states:

> Before rendering the decision, 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 subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, to dismiss the complaint because having regard to all the circumstances of the complaint, further inquiry is not warranted.

The letter does not mention or address in any way the applicant's request that the Commission consider the documents referred to in his response to the Investigation Report.

[9] The applicant now applies for judicial review of this decision under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The applicant has raised several grounds for judicial review but in my view it is necessary to address only one of them – namely, that the Commission breached the requirements of procedural fairness by refusing to consider responding submissions which exceeded ten pages in length.

[10] The standard of review I should apply to this issue is not in dispute here. Questions of procedural fairness, including whether the Commission's investigation was sufficiently thorough, are determined on the standard of correctness. What this means is that I must determine for myself whether the process the Commission followed satisfied the level of fairness required in all the circumstances (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at paras 54 and 56). Specifically, did the applicant know the case he had to meet and did he have a full and fair chance to respond?

[11] Generally speaking, no deference is owed to the Commission on issues of procedural fairness (*Wong v Canada (Public Works and Government Services)*, 2018 FCA 101 at para 19 [*Wong*]). That being said, on the question of whether there has been a breach of procedural fairness in a particular case, it must be kept in mind that the Commission's investigative process is not akin to a hearing and the parties are thus not entitled, as of right, to insist that everyone whom they put forward will be interviewed by a Commission investigator (*Wong* at para 23). I would hold that the same principle applies to every document a party might wish to submit to the Commission. The Commission has a legitimate interest in "maintaining a workable and administratively effective system" (*Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at para 67; see also *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113 at para 39). To that end, it may adopt measures such as restrictions on the length of submissions from the parties. The imposition of a page limit is not, in and of itself, a breach of procedural fairness (*Gandhi v Canada (Attorney General)*, 2017 FCA 26 at para 15; *Ritchie v Canada (Attorney General)*, 2017 FCA 114 at paras 43-45). Procedural choices made by the

Commission are entitled to respect from the reviewing Court, so long as the procedure does not contravene the duty of fairness (*Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 119 [*Sketchley*]). An investigation by the Commission "may be set aside for being procedurally unfair only where unreasonable omissions are made, such as where the investigator failed to examine obviously crucial evidence" (*Wong* at para 14).

[12] In considering whether there has been an unreasonable omission on the part of the Commission in this case, it is helpful to recall that reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision 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). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). These *dicta* concern the substance of decisions but reasons can be of critical importance with respect to matters of procedure as well.

[13] In the present case, the Commission imposed a categorical rule on the applicant – his responding submissions could not exceed ten pages in length. If he submitted more than ten pages, the Commission would read only the first ten pages.

[14] Although this is the rule that was imposed on the applicant, it is not the general rule adopted by the Commission. Rather, paragraph 9.4 of the *Canadian Human Rights Commission Dispute Resolution Operation Procedures* provides as follows:

> **9.4** Subject to 9.6, a submission will not exceed ten (10) pages in length, including attachments. The Commission, on notice to the party, may refuse to place those parts of the submission in excess of ten pages before the Commissioners for consideration. Where the Commission places submissions longer than ten pages before the Commissioners for consideration, it shall provide notice to the other parties and give them the opportunity to file submissions of equal length and then place those submissions before the Commission.

[15] Paragraph 9.6, which concerns accommodations to promote barrier-free access, has no application here. As well, while the document refers to dispute resolution operating procedures in its title, it sets out rules and guidelines for all aspects of the filing of a complaint with the Commission.

[16] While paragraph 9.4 is worded awkwardly (". . . a submission <u>will not</u> exceed . . ." [emphasis added]), it is clear from reading the provision as a whole as well as a comparison with the French version (". . . *les observations ne doivent pas dépasser* . . .") that what is meant is that a submission <u>should not</u> exceed ten pages. Further, the Commission expressly reserves to itself the discretion to place before the Commissioners submissions that exceed ten pages in length in a given case. If it declines to exercise this discretion, it must do so on notice to the party whose submissions exceeded the page limit. If it chooses to exercise this discretion, it must provide notice to the other parties and give them the opportunity to file submissions of equal length, all of which would then be placed before the Commissioners. To exercise this discretion fairly and reasonably, presumably the Commission would have to consider the submissions that exceed the

usual limit. Only then would it be in a position to determine whether to make an exception in the case at hand or not.

[17] In the present case, the Commission did not follow its own procedure. Rather than considering whether to exercise its discretion in the applicant's favour and permit a longer-than-usual response, it applied a categorical rule that permitted only one outcome. This is a classic example of fettering of discretion (cf. *Delta Air Lines Inc. v Lukács*, 2018 SCC 2 at paras 13 and 18). Moreover, the Commission never responds to the applicant's request to provide submissions that exceed ten pages before sending the matter on for a decision. The letter informing the applicant of the Commission's decision is silent about this as well. (Obviously, considering the Investigation Report to be part of the reasons for the decision (cf. *Sketchley* at paras 37-38) will not assist since that report was written before the applicant's responding submissions.) The absence of any explanation whatsoever from the Commission for why the applicant's additional materials would not even be considered despite the fact that the Commission has the discretion to accept submissions longer than ten pages leaves the decision to do so lacking in justification, transparency and intelligibility. As a result, the refusal even to consider the supporting material is an unreasonable omission on the part of the Commission amounting to a breach of procedural fairness.

[18] The question that now arises is what remedy should be ordered for this breach of procedural fairness. The failing I have identified occurred at a very late stage of a protracted investigation. The applicant also argued on this application for judicial review that the Commission's investigation as a whole was biased but this submission is without merit. In my

view, the appropriate solution is effectively to re-set the clock to the point where the applicant was invited to provide a response to the Investigation Report. The applicant should be permitted to submit a new response that is in accordance with paragraph 9.4 of the *Canadian Human Rights Commission Dispute Resolution Operation Procedures*. That is to say, his new response should be no longer than ten pages in length. If, as seems likely, the applicant concludes that supporting documents that would bring his submission over ten pages in length are necessary to state his response to the Investigation Report fully and fairly, he should include them for the Commission's consideration along with a request to this effect and an explanation of why the documents are material. Whether or to what extent submissions that exceed ten pages are put before the Commission when it makes its decision will then be for the Commission to determine.

[19] The applicant represented himself in this application and, indeed, throughout the process before the Commission. He has been well-served by his skills as an access to information professional. That being said, the record he assembled in support of his original response to the Investigation Report is formidable. To assist the Commission in discharging its important responsibilities, I would urge the applicant to take a hard look at what evidence is truly necessary to support the essential elements of his rebuttal before responding anew to the Investigation Report.

[20] Finally, the applicant originally named Immigration, Refugees and Citizenship Canada as the respondent on this application. The correct respondent is the Attorney General of Canada (see Rule 303(2) of the *Federal Courts Rules*, SOR/98-106, and *Abi-Mansour v Canada*

(Attorney General), 2015 FC 882 at para 23). Accordingly, as part of this Court's judgment, the style of cause will be amended to name the correct respondent.

[21] The applicant did not seek costs so none will be awarded.

JUDGMENT IN T-1903-18

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to reflect the Attorney General of Canada as the correct respondent.
2. The application for judicial review is allowed in part.
3. The decision of the Canadian Human Rights Commission dated October 5, 2018, is set aside.
4. Within thirty (30) days of the date of this judgment (or such longer period of time as the applicant and the Commission may agree to as between themselves) the applicant may file a new response to the Investigation Report dated June 12, 2018.
5. Within such time after receipt of the applicant's response as the Commission may determine, Immigration, Refugees and Citizenship Canada may respond to the applicant's response.
6. Following receipt of the parties' responses, the final disposition of the applicant's complaint to the Commission shall be reconsidered by a different decision-maker.
7. No costs are ordered.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1903-18
STYLE OF CAUSE:	RAY DAVIDSON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 21, 2019
JUDGMENT AND REASONS:	NORRIS J.
DATED:	OCTOBER 9, 2019

APPEARANCES:

Ray Davidson	ON HIS OWN BEHALF
Susanne Wladysiuk	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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