Federal Court Cour fédérale

Date: 20200401

Docket: T-448-18

Citation: 2020 FC 468

Toronto, Ontario, April 1, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

JOSEPH D. YUE

Applicant

and

BANK OF MONTREAL

Respondent

JUDGMENT AND REASONS

[1] Mr. Yue challenges the decision of the Canadian Human Rights Commission [Commission] not to reactivate his human rights complaint [Decision] against the Bank of Montreal [BMO], his former employer. These Reasons explain why this was a reasonable outcome and why, as a result, this judicial review is dismissed.

I. Background

[2] Mr. Yue began his employment with BMO in 1982. For much of his time with BMO, he commuted from his home in Barrie to his workplace in downtown Toronto.

[3] In the fall of 2011, BMO agreed to permit Mr. Yue to work from Barrie two days a week until a particular project was completed. In February 2012, Mr. Yue asked BMO to accommodate his health issues by allowing him to work from Barrie five days a week and provided a physician's note in support of this request, which stated that his "illness is aggravated by inadequate rest and travelling between Barrie and Toronto. It is advisable for him to work in Barrie five days a week".

[4] In March 2012, Mr. Yue was involved in a car accident. Mr. Yue's request for accommodation was denied later that month, and a gradual return to work plan was suggested. Mr. Yue applied for short-term disability in April 2012, which was denied shortly thereafter. Mr. Yue was advised that he could appeal by providing necessary documentation within 30 days. He claims that he attempted to do so but was unable to comply with this timeline.

[5] Mr. Yue then informed BMO that he would be taking a medical leave of absence. BMO replied that it would deem Mr. Yue as taking unauthorized unpaid leave as of April 2, 2012.

[6] Mr. Yue never returned to work, and ultimately resigned in 2015. Mr. Yue grieved and otherwise litigated his situation both before and after his employment came to an end with BMO.

As the Commission's Decision not to reopen his complaint is one in a series of rulings, I will provide a short history of the other relevant proceedings.

A. *Procedural History*

(1) The Unjust Dismissal Complaint

[7] In April 2012, Mr. Yue filed a complaint against BMO pursuant to section 240 of the *Canada Labour Code*, RSC 1985, c L-2 [CLC], alleging that he had been unjustly dismissed by BMO. The CLC complaint was heard by an adjudicator over a period of nine days between August 2013 and April 2014. The main issue was whether BMO's denial of Mr. Yue's request for accommodation amounted to a constructive dismissal.

[8] In July 2014, adjudicator Leonard Marvy [the Adjudicator] dismissed the CLC complaint in a robust, 20-page decision. The Adjudicator determined that BMO did not constructively dismiss Mr. Yue since (1) the medical documentation did not support a requirement to accommodate Mr. Yue by allowing him to work full-time from Barrie; and (2) even if it did create such a requirement, Mr. Yue failed to act reasonably in addressing BMO's offer of accommodation.

[9] Mr. Yue sought judicial review of the Adjudicator's decision before this Court. The Court found that decision to be reasonable in an August 26, 2015 judgment that reviewed both the factual and legal findings of the Adjudicator (Court file T-1687-14).

[10] Mr. Yue appealed the Federal Court judgment to the Federal Court of Appeal [FCA], which in turn dismissed the appeal in an April 2016 decision, *Yue v Bank of Montreal*, 2016 FCA 107, finding nothing unreasonable in the Adjudicator's decision based on the medical evidence tendered. Justice Gleason, speaking for the FCA, held that it was open to the Adjudicator to find that the evidence did not support the need to work from Barrie. She also found that the Bank did not fail in its duty to accommodate given the lack of substantiation of the medical claims, and the "precipitous filing of the unjust dismissal complaint immediately following the denial of his application for disability benefits" (at para 7). Justice Gleason further found at paragraph 8 that:

> Further, we disagree that the adjudicator failed to consider the impact of the potential alteration of the appellant's temporary schedule that allowed him to work two or three days a week from Barrie on a temporary basis. That issue was canvassed by the adjudicator at paragraphs 52-53 of the award, and there is nothing unreasonable in his treatment of the issue. Even if the Bank ended the arrangement for working out of Barrie prematurely, there is nothing unreasonable in holding that there was no constructive dismissal, which requires a substantial unilateral change to a fundamental term of the employment contract by the employer, as the Supreme Court of Canada held in *Farber v. Royal Trust*, [1997] 1 S.C.R. 846 at paragraph 24, 210 N.R. 161. There is nothing unreasonable in declining to find a few weeks' change to a temporary work location a constructive dismissal, especially in light of the appellant's insistence that he needed to work from Barrie five days per week.

(2) The Canadian Human Rights Act Complaint

[11] In December 2012, Mr. Yue filed a complaint with the Commission alleging that BMO discriminated against him on the basis of age and disability. In May 2013, the Commission decided not to deal with the complaint in light of the ongoing CLC complaint. The parties were

advised that they could ask the Commission to reactivate the complaint at the end of the CLC process, which Mr. Yue did in May 2016.

[12] The Commission advised the parties in June 2016 that paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], might apply to the complaint because, since the same issues may have already been dealt with through the CLC process, the complaint could be deemed "vexatious". The Commission invited submissions on this issue, which the parties provided.

[13] In October 2017, a Human Rights Officer of the Commission [Investigator] issued a section 40/41 Report [Report] to the parties. In this comprehensive Report of 14 single-spaced pages, the Investigator identified eight allegations in the CHRA complaint that had been clearly dealt with by the CLC Adjudicator. The Investigator made recommendations, including that the Commission need not deal with these complaints, in light of the similarities between the Commission's complaint process and the CLC adjudication process.

[14] The Investigator then listed seven allegations which were not directly dealt with by the Adjudicator. However, after considering these allegations, the Investigator recommended that the Commission refuse to deal with them (and thus the complaint) under paragraph 41(1)(d) of the CHRA, on the basis that the allegations could have been addressed through another process, i.e. the CLC complaint. The Report concluded that Mr. Yue could and should have raised these new allegations in his CLC complaint, either before or during the CLC hearing, noting that Mr. Yue was represented by legal counsel at that hearing.

[15] Despite these findings, the Investigator nonetheless proceeded to evaluate the allegations. She concluded that they were bald allegations, in that Mr. Yue had not offered any evidence to show that the alleged discrimination was linked to his age or any disability.

[16] As a result of the findings with respect to both the repeat and new allegations, the Investigator recommended that the Commission not deal with the complaint because it is vexatious within the meaning of paragraph 41(1)(d) of the CHRA.

[17] The Investigator provided an opportunity for the parties to respond to this Report, which they once again did, and which the Commission considered before rendering its final Decision, the subject of this judicial review.

B. *Decision under Review*

[18] On January 17, 2018, the Commission adopted the Investigator's recommendations in their entirety and decided not to deal with the complaint on the ground that it was vexatious. In its Decision, the Commission agreed with the Investigator's findings that the CLC Adjudicator considered some of the complaint's allegations, and that all of the remaining issues could have been included in the CLC complaint and dealt with under that process. The Commission characterized Mr. Yue's argument that he could not have raised all relevant human rights issues in the CLC proceedings as "speculation". The Commission determined that even if that were not the case, it would still exercise its discretion not to deal with the complaint because Mr. Yue had failed to provide any foundation for his allegations. Mr. Yue now challenges this Decision.

II. Issues and Standard of Review

[19] Mr. Yue raises a plethora of issues which he argues are legal and factual errors made by not only the Commission, but are rooted in the Adjudicator's original decision. At the hearing of the judicial review, he returned time and again to the errors he felt the Adjudicator had made in the July 6, 2014 decision arising from the CLC unjust dismissal complaint. Mr. Yue also filed a Notice of Constitutional Question [*Notice*] late in the proceedings. In this *Notice*, he raised a number of arguments under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The *Charter* arguments attracted scant comment from either party at the hearing; I will address those comments at the end of these Reasons.

[20] At the hearing, I repeatedly reminded Mr. Yue that the focus of this judicial review is on the Commission's Decision of January 2018, including the Investigator's Report of October 2017, and not the July 6, 2014 decision. The latter is a closed matter, given the FCA's dismissal of Mr. Yue's appeal. I further explained to Mr. Yue that the focus of this judicial review is not on the prior errors that he strongly alleged his former counsel had not properly canvassed before the Adjudicator, and which he explained he had been unable to properly address at that time due to his disability.

[21] Mr. Yue nonetheless stated that he did understand that the applicable standard of review is reasonableness. This is because none of the exceptions to that standard apply in this case (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 33 [*Vavilov*]).

[22] Under reasonableness review, the role of this Court on judicial review is to determine whether the Decision was rational and justified in light of the legal and factual constraints (*Vavilov* at paras 83, 86 and 99). If it is, this Court must defer to the Commission. Mr. Yue has the onus to demonstrate the Decision was fatally flawed such that it is unreasonable (*Vavilov* at para 100). I will explain below why he has not satisfied that burden.

III. Analysis

A. *Reasonableness of the Decision*

[23] Subsection 41(1) of the CHRA provides as follows:

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 dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	**b)** la plainte pourrait avantageusement être instruite, 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.

[24] Under these provisions, which give the Commission discretion to dismiss a frivolous or vexatious complaint, "vexatious" has been interpreted to mean that the matter has or could have been appropriately dealt with in another proceeding (see *Zulkoskey v Canada (Employment and Social Development)*, 2016 FCA 268 at para 18 [*Zulkoskey*]). Vexatious in the sense of the CHRA is interpreted broadly and flexibly to prevent a multiplicity of proceedings and a waste of resources associated with relitigation (*Zulkoskey* at para 24; *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 36 [*Figliola*]). As the Supreme Court stated in *Figliola*, "Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved" (at para 36).

[25] The key factors to assess under CHRA section 41 *vis-a-vis* relitigation were summarized in *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 50 [*Bergeron*]:

1. was there concurrent jurisdiction to decide human rights issues?

2. was the legal issue in the alternate forum essentially the same as the legal issue in the human rights complaint?

3. did the complainant have the opportunity to know the case to meet and have a chance to meet it?

[26] The Investigator's Report set out the factors the Commission may consider in determining whether paragraph 41(1)(d) of the CHRA applies. These included the following:

1. did the decision-maker in the other process have the authority to decide human rights issues?

2. were the issues raised during the other process essentially the same as the issues in this complaint?

3. did the complainant have a chance to raise all relevant human rights issues?

[27] The factors listed by the Investigator are consistent with those outlined in *Bergeron* (above) and *Figliola* (at paras 46-54). The Commission, adopting the Investigator's Report in its entirety, comprehensively considered these factors and decided that the elements necessary to make a "frivolous" finding were met, including the fact that the Adjudicator, an independent decision-maker, made a final decision addressing many of the same issues raised before the Commission. The allegations that the Adjudicator considered, but rejected, included that the Respondent had failed to accommodate, constructively dismissed Mr. Yue, and unfairly reduced his pay in April 2012.

[28] As for Mr. Yue's request to reactivate his CHRA complaint, the Commission reasonably determined that the substance of his CHRA complaint had been "appropriately dealt with" in the CLC adjudication, in that the Adjudicator had dealt with key facts and allegations underlying the CHRA complaint, namely:

(i) the 2003 office change from Barrie to Toronto;

(ii) Mr. Yue's additional workload;

(iii) Mr. Yue's failure to receive a merit increase in 2010/2011 despite being highly rated;

(iv) after asking for a promotion in 2011, Mr. Yue's manager and director reacting with threats of demotion;

(v) failing to provide a laptop or a phone to Mr. Yue that was not "dysfunctional";

(vi) rejecting Mr. Yue's request to work full time at the Barrie office rather than commute to Toronto following a March 2012 car accident;

(vii) declaring Mr. Yue's medical leave as unauthorized, unapproved and unpaid; and

(viii) after rejecting Mr. Yue's short term disability application, retroactively cutting his pay to April 1, 2012.

[29] On the other hand, the Commission found that the Adjudicator's decision did not directly deal with the following CHRA allegations:

(i) the Executive Vice President "trimming", reducing and replacing employees 55 years of age and older, and Mr. Yue becoming a "target for trimming" in 2010;

(ii) no appreciation and/or public recognition for Mr. Yue's employment achievements, despite others receiving this;

(iii) seven years of isolation from Mr. Yue's team, sitting "with a lot of empty desks";

(iv) BMO's delaying Mr. Yue's employment record for more than two weeks, which caused him five weeks without income;

(v) BMO's forcing Mr. Yue to pay the life insurance fee for eight months, and for disability benefits despite being barred from them;

(vi) no help given to Mr. Yue by BMO's sales team staff when Mr. Yue filed his 2012 "constructive dismissal" claim; and

(vii) lack of a severance package which Mr. Yue feels that he was entitled to.

[30] Having reviewed the numerous allegations – new and old – the Commission determined that the Adjudicator was able to hear and decide human rights issues as they related to unjust dismissal allegations (see *MacFarlane v Day & Ross Inc*, 2010 FC 556 at para 74). It concluded that there is not a significant difference between the Commission's complaint process and the CLC adjudication process because in adjudicating claims of unjust dismissal, adjudicators are able to remedy human rights issues that are related to the alleged unjust dismissal. Given this, justice did not require that the Commission deal with the allegations in the present complaint that were either considered by the Adjudicator or that ought to have been raised through that process. This finding was intelligible, transparent and justified in relation to the relevant facts and law.

[31] In any event, the Commission also determined Mr. Yue's new allegations were lacking in facts to support the assertion that any allegations were linked to his age or disability. Specifically, the Commission found that Mr. Yue failed to demonstrate a link between allegations (ii) through (vii) and the protected ground of age, and allegation (i) lacked support, making it a bald assertion. Finally, the disability-based discrimination allegations were likewise unconnected. Several of these allegations related to symptoms that arose after the allegedly discriminatory conduct. The others were not supported by evidence establishing a link between the conduct and Mr. Yue's disability.

[32] I find that it was reasonable for the Commission to have concluded that it was plain and obvious that these allegations could not succeed and that the complaint was therefore frivolous. The Commission has broad discretion to dismiss as "frivolous" allegations where it appears plain

and obvious that the complaint cannot succeed (*Davidson v Canada (Attorney General)*, 2019 FC 877 at paras 13 and 32).

[33] Furthermore, in my view, it is important to keep in mind that the function of the Commission acting under section 44 of the CHRA is one of screening, analogous to the role of a judge presiding over a preliminary inquiry (*McIlvenna v Bank Of Nova Scotia (Scotiabank)*, 2019 FC 1610 at para 16). In carrying out this authority, the Commission is owed deference (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 40, and *Joshi v Canadian Imperial Bank of Commerce*, 2014 FC 552 at para 54).

[34] I fully agree with the Respondent's submission that it should not have to continue expending resources litigating matters pertaining to Mr. Yue's cessation of employment. As noted by this Court in *Klimkowski v Canadian Pacific Railway*, 2017 FC 438 at para 63:

> Justice does not require that the Commission deal with the complaint even though the complainant is dissatisfied with the outcome. The Commission is not an appeal mechanism for arbitration decisions and the adjudication of the complaint will not advance the purpose of the act.

B. *Charter Arguments*

[35] At the end of his arguments before the Court, I asked Mr. Yue if he wished to address the arguments raised in his *Notice*, which he had neither addressed in his oral arguments nor his memorandum of fact and law. Mr. Yue very briefly commented that his sections 7, 12 and 15 *Charter* rights were breached, without specifying how these breaches took place. He relied on the written arguments contained in his *Notice*.

[36] Counsel for BMO responded that he was unsure how to answer to the *Notice* given the nature of the issues before the Court on judicial review. Even assuming that the *Notice* was valid (which he did not concede), counsel argued that the *Charter* grounds pleaded had no bearing on the judicial review because the *Charter* was not implicated in the circumstances, and because these issues were not raised before the Commission and thus could not be raised for the first time on judicial review.

[37] Given the scant time Mr. Yue spent addressing his *Charter* arguments, and the imprecise nature of the *Notice*, I will do my best to decipher and address the arguments contained in his *Notice,* ambiguous as they are. The *Notice* appears to boil down to allegations that (i) the Commission breached Mr. Yue's sections 7, 12 and 15 *Charter* rights and, in doing so, breached the principles of procedural fairness; and (ii) BMO also breached his sections 7 and 12 – and possibly 15 – *Charter* rights.

[38] Before examining the merits of the *Notice*, I note that procedurally, the notice was non-compliant with the Federal Court rules. This is because rather than challenging the constitutional validity, applicability or operability of legislative provisions under section 52 of the *Charter* (which is the intended purpose of the notice requirement under section 57 of the *Federal Courts Act*, RSC 1985, c F-7), the *Notice* contains alleged unconstitutional actions under subsection 24(1) of the *Charter*. The subsection 24(1) *Charter* breaches could and should have been argued in the Applicant's record – specifically in Mr. Yue's memorandum of fact and law.

[39] In spite of his late filing, this Court may exercise its discretion to allow new arguments made late in the proceeding (*Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22 at para 12 [*Al Mansuri*]). In *Al Mansuri*, the applicant raised a series of *Charter* arguments, for the first time, in their further memorandum of fact and law. Justice Dawson (as she then was) provided a non-exhaustive list of considerations relevant to the exercise of this discretion to consider late arguments, including those based on the *Charter* (*Al Mansuri* at para 12). These *Al Mansuri* factors have been applied on numerous occasions, including in both the immigration context (which gave rise to *Al Mansuri* – see, for instance, *Lakatos v Canada (Citizenship and Immigration)*, 2019 FC 864 at paras 26-29), and in the non-immigration contexts (see, for instance, *Jama v Canada (Attorney General)*, 2018 FC 219 at paras 21-26). The non-exhaustive list of *Al Mansuri* factors includes the apparent strength of the new issues, as well as whether:

> (i) all of the facts and matters relevant to the new issue or issues were known (or available with reasonable diligence) at the time the application for leave was filed and/or perfected;
>
> (ii) there is any suggestion of prejudice to the opposing party if the new issues are considered;
>
> (iii) the record discloses all of the facts relevant to the new issues;
>
> (iv) the new issues are related to those in respect of which leave was granted; and
>
> (v) allowing the new issues to be raised will unduly delay the hearing of the application.

[40] Mr. Yue falls short on the first two factors given that he would have known the relevant facts at the time he filed his judicial review. Although his application for leave and judicial review mentioned that he would be making certain *Charter* arguments in a later filing, he did not

expand upon these arguments until he filed his *Notice*. However, I am mindful that Mr. Yue represents himself. Being a self-represented litigant is never easy, particularly when it comes to the complexity of raising *Charter* arguments. Thus, I will exercise my discretion to consider Mr. Yue's arguments on the basis of the three other *Al Mansuri* factors, and now move on to address those arguments.

(1) Did the Commission breach Mr. Yue's *Charter* rights?

[41] Mr. Yue alleges that the Commission breached his *Charter* rights by, for example:

(i) deeming his complaint to be frivolous and vexatious despite the fact that no human rights violations by BMO "were discussed at the Federal Labour Adjudication nor at any other court", which ignored written evidence regarding BMO's actions;

(ii) using a part of the Adjudicator's decision to "wipe out all BMO human rights violations that occurred in March-April/2012";

(iii) ignoring Mr. Yue's disability accommodation requirement as stated by his neurologist; and

(iv) twisting "the BMO induced work stoppage" into its unfounded assessment.

[42] Based on these alleged breaches, Mr. Yue argues that the Commission violated his section 7, 12 and 15 *Charter* rights, as well as his rights to procedural fairness. Accordingly, Mr. Yue asks the Federal Court for a remedy under subsection 24(1) of the *Charter*.

[43] Much of the *Notice* comprises Mr. Yue's explanation as to why the Commission's Decision is wrong and unfair to him. However, unless driven by a *Charter* breach such as unlawful discrimination, the Commission's decision not to reactivate Mr. Yue's human rights complaint against his former employer does not violate Mr. Yue's *Charter* rights. *Charter*

litigation, a complex and technical area, requires specifically identifying the *Charter* right or value at issue, precisely how that right has been violated and, if it has, whether there is any justification for the *Charter* breach by the government actor. I find these elements to be absent here. Simply put, and as will be explained next in the context of each *Charter* claim, Mr. Yue has failed to meet his burden to show any violation.

[44] First, regarding section 7, Mr. Yue writes in his *Notice* that the Commission deprived him of his "human rights for disability accommodation" and "did not re-direct the never resolved BMO's Human Right Violations back to Canada Labour to address". He further writes that the Commission's action left him "in limbo and their action allowed BMO to become over and above the Canadian Civil laws". Section 7 rights, however, protect the life, liberty and security of the person. Mr. Yue does not substantiate any of the three protected interests under section 7.

[45] Second, Mr. Yue argues in his *Notice* that the Commission violated section 12 of the *Charter* by ignoring evidence that BMO mistreated him "with cruelties by their multiple civil disobedience towards the Canada Labour Code, Canadian Human Rights Act and Constitution Act". However, I note that section 12 protects individuals from cruel and unusual punishment. The fact that Mr. Yue did not have his complaint proceed to a tribunal hearing does not constitute such punishment. While some might feel a punitive aspect to not getting something to which one feels entitled, that is certainly not the type of punishment that engages section 12. Mr. Yue provided no authorities indicating that section 12 has the scope he argues. His is not a situation of, for instance, post-deportation torture, such as in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 51.

[46] Third, in terms of section 15, Mr. Yue argues that he should not be deprived of his "entitlement on equal protection and equal benefit under the law as listed within Canada Labour Code 239.1 1985", and again, that the Commission failed to "re-direct the never resolved BMO's Human Right Violations back to Canada Labour to address". Mr. Yue provided no further elaboration upon this argument. He did not indicate how he has been treated differently from others by the Commission on the basis of any of the *Charter*-protected grounds (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability), nor on any analogous grounds. The only ground which might have been implicated in Mr. Yue's situation is physical disability. However, his *Notice* does not indicate how he has been treated differently by the Commission because of his particular disability. He appears to equate discrimination with not getting what he believes he is entitled to from the Commission.

[47] Looking at the *Charter* allegations another way, Mr. Yue has failed to provide a proper factual foundation to substantiate any of these *Charter* claims (*Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at 1099 [*Danson*]). In *Thurrott v Canada (Attorney General)*, 2018 FC 577, where the applicant asked this Court to assess the constitutionality of the Canadian Forces' summary trial procedure, Justice Boswell wrote (at paras 37-38):

> In this case, the Applicant has established neither the necessary adjudicative nor legislative facts to ground a challenge to the constitutionality of the summary trial regime. The Applicant's arguments as to the alleged lack of independence or *Charter*-compliance of the summary trial process are vague and unsupported by case law, and some are demonstrably inaccurate such as the Applicant not being subject to the possibility of imprisonment, a substantial fine, or other harsh punishment by virtue of article 108.17(1) of the *QR&O*. None of the Applicant's evidence (to the extent there is any at all) can reach the threshold established in *Danson* for a proper factual foundation to support a constitutional challenge.

> Indeed, the Applicant has not even established that his own *Charter* rights were engaged. The Applicant's arguments that his rights under sections 7 and 12 of the *Charter* can be readily dismissed. The $1,000 fine did not in any way engage his right to life, liberty, or security of the person and it certainly does not meet the high threshold for cruel and unusual punishment.

(2) Did BMO breach Mr. Yue's *Charter* rights?

[48] Mr. Yue's *Notice* states that the Commission's Decision "wiped out all the above BMO's Human Rights Violations" and "granted BMO with supreme power to violate Canada Labour Code, Canadian Human Right Act and the Constitution Act without any consequences". Among other things, Mr. Yue writes that BMO's actions were cruel – they mistreated him "with cruelties by their multiple civil disobedience towards the Canada Labour Code, Canadian Human Rights Act and Constitution Act", which he appears to state would engage his section 12 *Charter* rights; BMO also allegedly carried out "an unusual treatment prohibited by the Constitution Act Section 7".

[49] These alleged *Charter* violations could – and should – have been raised before the Commission or the Adjudicator. Pursuant to subsection 50(2) of the CHRA, the Canadian Human Rights Tribunal has jurisdiction to consider and apply the *Charter* and provide remedies for breaches thereof in accordance with its powers under the CHRA (see *R v Conway*, 2010 SCC 22 at paras 81-82). In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, the Supreme Court affirmed that courts have discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so. Justice Rothstein wrote for the majority that "[g]enerally, this discretion will not be

exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal" (see paras 22-26).

(3) Did the Commission breach Mr. Yue's rights to procedural fairness?

[50] Mr. Yue in his *Notice* alleges that as the "CHRC decision also violated the Federal Court Act Section 18.1", he intimates bias and suggests that the Commission acted in bad faith. These are not by themselves *Charter* violations, but rather allegations regarding natural justice or procedural fairness breaches. Clearly, what Mr. Yue is doing by raising these issues is advancing arguments that should have been made in his memorandum of fact and law, rather than in a Constitutional Notice filed after all pleadings and responses were complete.

[51] Even if these allegations were to have been timely filed, I find that they are lacking in details and evidence to substantiate these claims. Mr. Yue did nothing to expand on them in oral argument. Based on the record before this Court, I find no evidence of a reasonable apprehension of bias: an informed (i.e. reasonable) person, viewing the situation realistically and practically and having thought the matter through, would not conclude "that it is more likely than not that [the Commission], whether consciously or unconsciously, would not decide fairly" (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 20, citing *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 2015 SCC 25 at 394). The threshold for bias, whether real or perceived, is high. The grounds for finding a reasonable apprehension of bias must be substantial, rather than coming from the viewpoint of a "very sensitive or scrupulous conscience" (*Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 76).

[52] I note that bias allegations are not to be taken lightly. I certainly find nothing to suggest any bias, failure to provide full participatory rights, bad faith, or other procedural impropriety in the Commission's conduct. In short, Mr. Yue's procedural fairness claims in the *Notice* are nothing more than unsubstantiated and bare assertions.

(4) Remedy

[53] In terms of the remedy Mr. Yue seeks, he writes in his *Notice* that "I, the Applicant, therefore, is [*sic*] claiming a remedy under subsection 24(1) of the Canadian Charter of Rights and Freedoms in relation to an act or omission of the Government of Canada, namely CHRC and Federal Labour Program".

[54] However, the fact that Mr. Yue is unsatisfied with the results from the Commission and the CLC Adjudicator does not constitute a basis, without more, for *Charter* breaches or remedies.

(5) Conclusion on the *Notice*

[55] Finally, given the nature of his *Notice*, I have noted that Mr. Yue alleges that he suffered *Charter* breaches in the application of the law, as opposed to challenging the constitutionality of the CHRA itself. To the extent that Mr. Yue might have intended to challenge section 41 itself in his *Notice* and/or oral submissions, once again I note that he could have done so before the Commission (*Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 3).

[56] Ultimately, I note that much like his primary arguments for this judicial review canvassed above, Mr. Yue anchors his *Charter* arguments in factual and legal errors that he asserts – without a sufficient factual basis – were made but ignored within the CLC complaint and adjudication process. As already explained, that CLC and appellate process ended with the FCA decision, and cannot now be relitigated before this Court. As for the claimed *Charter* breaches arising out of the Commission's Decision and BMO's conduct, these amount to bare assertions which do not raise arguable issues.

IV. Conclusion

[57] Mr. Yue's approach to this judicial review has primarily consisted of attacking the previous CLC proceedings that were concluded by the FCA's ruling in 2016. Those matters are not the subject of this judicial review: Mr. Yue had his opportunity to challenge those proceedings. His attempts to revisit the factual and legal findings made by the Adjudicator are therefore misplaced.

[58] As for the matter now before the Court, while Mr. Yue has pointed to weaknesses he perceives in the Commission's Decision, he has failed to demonstrate that as a whole, or even in part, it is unreasonable. The Commission's analysis led logically to its conclusion. The Decision, when read as a whole, is entirely transparent, intelligible and justified, and Mr. Yue has not met his burden of demonstrating flaws in the Commission's or Investigator's reasons. Finally, the *Charter* allegations have not been substantiated. The judicial review will accordingly be dismissed.

V. Costs

[59] Each side requested costs in the amount of $2,000. At least coming from the Respondent, this was an eminently reasonable amount given the amount of work that went into this judicial review, including the involvement of two counsel in the preparation and hearing of the judicial review. The Respondent will accordingly be awarded a lump sum in the amount of $2,000, payable forthwith by the Applicant.

JUDGMENT in T-448-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. Costs in the amount of $2,000 are payable forthwith by Mr. Yue to the Respondent.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-448-18
STYLE OF CAUSE:	JOSEPH D. YUE V BANK OF MONTREAL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 27, 2020
JUDGMENT AND REASONS:	DINER J.
DATED:	APRIL 1, 2020

APPEARANCES:

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Frank Cesario Julia M. Nanos	FOR THE RESPONDENT

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