Federal Court  Cour fédérale

Date: 20220209

Docket: T-752-21

Citation: 2022 FC 162

Ottawa, Ontario, February 9, 2022

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MICHAEL CHRISTOFOROU

Applicant

and

JOHN GRANT HAULAGE LTD.

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the Remedies Decision of the Canadian Human Rights Tribunal [CHRT/Tribunal] which followed a Liability Decision in which the Tribunal concluded that the Respondent discriminated against the Applicant. In the Remedies Decision, the Applicant was awarded compensation for discrimination by the Respondent in respect of his age related disability.

[2] The two principal conclusions in the Remedies Decision with which the Applicant takes issue are (1) that the Applicant failed to mitigate his damages; and (2) the Tribunal did not order reinstatement of employment.

[3] This whole matter at the Tribunal was the subject of egregious maladministration and delay for which neither party is responsible. The member originally responsible for the complaint simply stopped working after having conducted a hearing in 2016 and 2017 but failed to render a decision by the end of 2019. That member stopped responding to the Tribunal Chair's inquiries. The Tribunal appointed another member [Member] to complete the file and render both the Liability Decision and the Remedies Decision. This all resulted in a delay of more than four years. The Tribunal has acknowledged this situation in both Decisions and rendered the decisions as well as was possible in the circumstances.

[4] The issues raised before this Court are restricted to the Member's Remedies Decision. The problems at the Tribunal were not part of this judicial review.

II. Background

A. *General*

[5] The Applicant is approximately 70 years old. As the Tribunal found, he was a commercial truck driver. He was a member of a union and worked for the Respondent for 33 years transporting cement. On May 6, 2010, he was suspended after requesting that his work

hours be reduced due to disability from age-based health limitations. Medical advice recommended that he only work 40-42 hours per work.

[6] The Respondent, assuming that the Applicant had a disability that rendered him unsafe to drive, refused to accommodate these reduced hours and employment was terminated on August 9, 2010. The termination was phrased as "voluntary".

[7] In the Liability Decision, the Tribunal allowed the Applicant's complaint on the basis of the Respondent's refusal to accommodate. The issue of remedies was dealt with separately in part because it was unclear whether the Applicant still requested reinstatement given the extensive procedural delay and the possibility of changed circumstances.

B. *Remedies Decision*

(1) Process

[8] The Applicant claimed approximately 11 years of lost wages and contended that there was no cut-off date for calculations until he was reinstated and that he be awarded special damages for pain and suffering as well as a public interest remedy.

[9] In describing the steps taken toward the decision, the Member outlined the task in respect of wage loss compensation as the Tribunal's obligation:

> … to turn its mind to the question of when, after the end of the recovery period, the discrimination suffered by the complainant ceased to have effect on his income earning capacity.

[10] To assist the parties in their remedies submissions, the Member provided a non-exhaustive list of authorities including *Chopra v Canada (Attorney General)*, 2007 FCA 268 [*Chopra*] and *Hughes v Canada (Attorney General)*, 2019 FC 1026 [*Hughes*].

[11] The Member described her task as coming to a decision that "is justified, transparent and intelligible based on an internally coherent and rational chain of analysis that is justified under the relevant facts and law". The Member was evidently aware of the reasonableness test and requirements from *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

(2) Lost Wages and Benefits

[12] The Tribunal did not accept the claim of $539,573 for wages from the Applicant's suspension on May 10, 2010 to February 15, 2021, when the Applicant filed submissions in response to questions from the Tribunal.

[13] The Tribunal concluded that the Applicant was entitled to lost wages from May 10, 2010 to March 3, 2011 covering two periods: (1) before termination on August 9, 2010; and (2) post termination to allow for recovery time and reasonable time for the limited job search that the Applicant conducted. The Tribunal found that the Respondent was not responsible for losses post March 31, 2011, because the Applicant had failed to mitigate his losses.

[14] The Tribunal did recognize a longer recovery period than normally given based on the fact that the Applicant was a long standing employee whose accommodation was refused

outright. Given his health concerns, it was reasonable to have waited until the end of 2010 to return to the job market.

[15] Consistent with governing legal requirements (see *Chopra*), the Tribunal considered when the discrimination ceased affecting the Applicant's income earning capacity based upon a rational connection between a cut-off date and the factual record. The Tribunal found the Applicant failed to mitigate his losses based on his scant and narrow job search that only included him calling six different companies despite his long period in the trucking business and his likely contacts. The Applicant waited months between calls and restricted his search to cement delivery companies despite the jobs being limited and his ability to drive other types of trucks.

[16] The Tribunal found the Applicant to be a trained and experienced commercial truck driver with transferrable skills, and therefore able to drive other types of vehicles and make comparable earnings.

[17] It is also noted that the Applicant worked in a comparable position in another transport company and that this employment broke the causal connection between discrimination and lost wages.

(3) Other Remedies

[18] While the lost wages issue was a key matter along with reinstatement, the Tribunal went on to also award vacation pay, RRSP entitlement and adjustment for early withdrawal, tax gross

up, pension adjustment, other expenses, pain and suffering, special compensation, interest and a public interest remedy requiring the Respondent to revise its anti-discrimination policy.

[19] On the other key issue of reinstatement, the Tribunal found it not to be an appropriate remedy in this case because the Applicant had planned to retire in 2015. It found that he was not forced into retirement in 2015 because he had not looked for another job in any event – "it is difficult to have a job if you do not look for one" (Remedies Decision at para 96).

III. Analysis

A. *Standard of Review*

[20] The Applicant submits that there are two issues: 1) whether the Tribunal made a legal error in reversing the burden of proof of mitigation to the Applicant; and 2) whether the Remedies Decision is unreasonable.

[21] The first issue is a question of mixed law and fact and as such is governed by the same standard of review as the second issue.

[22] In my view, the standard of review is governed by the teachings of *Vavilov* which sets reasonableness as the default standard in respect of issues of fact and mixed law and fact. The Applicant erroneously argues that correctness is an applicable standard here based on the appellate review discussed in paragraphs 36-37 of *Vavilov*, where the legislature has created an

appeal right. However, in the present case, the right to court oversight is grounded in judicial review under s 18 of the *Federal Courts Act*, RSC 1985, c F-7, not a legislated appeal right.

[23] In any event, even if the appellate standard were applicable to the issue of reversal of the burden of proof, it is evident from the Remedies Decision that the issue is one of mixed law and fact and therefore the Applicant would have to establish palpable and overriding error which, for reasons below, it could not do.

[24] The Tribunal kept in mind its obligation to render a decision which met the standard of justification, transparency and intelligibility – the hallmarks of a reasonableness analysis.

[25] The Tribunal properly and thoroughly engaged with each ground of potential remedy and consistently provided the Applicant with awards at the higher end of the applicable range. It consistently emphasized the high handed conduct of the employer.

B. *Lost Income*

[26] The Applicant continued to insist that there was no end date for the Respondent's obligation to compensate him because he had a job protected by a collective agreement from which he could only be terminated for just cause. The Applicant failed to appreciate that this was not a labour case governed by collective agreements nor a wrongful termination case under common law or employment standards legislation. Human rights cases, while importing some aspects of labour and employment law, have a different focus including a public interest component.

[27] The Tribunal correctly outlined its duty to discern the cut-off date when, after a grace period, the discrimination stopped having an effect on the Applicant's earning capacity.

> [51] The Tribunal must consider when, after the end of a grace period, the discrimination suffered by the victim stopped having an effect on his or her income-earning capacity (see *Tahmourpour* at para 47). There must be a rational connection between a cut-off date and the factual record (see *Hughes* at paras 42, 72); *Canada (Attorney General) v Morgan*, 1991 CanLII 8221 (FCA) [*Morgan*] at paras 4, 16). A reviewing judge must be able to discern from the Tribunal's decision why the Tribunal chose the cut-off date in question (see *Tahmourpour* at para 47). That date will not necessarily coincide with the date of instatement or reinstatement, if ordered (see *Hughes* at para 43).

[28] The Tribunal followed the teachings in *Chopra* which addressed the imposition of a limit to losses caused by the discriminatory conduct. In this respect, the Tribunal followed established legal principles.

[29] The Tribunal reasonably concluded that this principled basis for establishing a cut-off date for compensation included the application of the principle of mitigation. In doing so, it adopted the comment from *Chopra* at para 40:

> … Society has an interest in promoting economic efficiency by requiring those who have suffered a loss to take steps to minimize that loss as it is not in the public interest to allow some members of society to maximize their loss at the expense of others, even if those others are the authors of the loss: …

[30] In establishing the cut-off date, the Member applied the limit addressed in *Canada (Attorney General) v Morgan*, 1991 CanLII 8221, [1992] 2 FC 401 (FCA), that there must be a link between the discriminatory practice and the loss claimed. The Tribunal found March 2011 as the cut-off date after which the Applicant had a duty to mitigate.

[31] I find nothing unreasonable in that conclusion. As noted by the Member, the Applicant received an additional three months of lost wages because of his long term employment with the Respondent.

[32] As such, the Tribunal reasonably and on a principled basis rejected the Applicant's contention of a virtually unlimited time period for loss of wages.

C. *Mitigation*

[33] The Applicant argues that the Tribunal erred in its mitigation analysis by not accepting the Applicant's view of "comparable work" and by reversing the burden of proof given the paucity of the Respondent's direct evidence of available jobs such that the Applicant had the onus to prove that he had taken reasonable steps to mitigate.

[34] In examining these points, the Tribunal identified the Applicant's job as that of a commercial truck driver. The Applicant more narrowly viewed his job as that of a cement truck driver having a secure union protected job available to work 42 hours per week and earning in excess of $22 per hour.

[35] There is nothing unreasonable in the Tribunal's description of the Applicant's job and therefore what a comparable job would constitute. The Tribunal looked at what type of truck driving the Applicant could do and in fact did when he found work at S & J Transport.

[36] It was reasonable also to consider the very limited efforts of the Applicant to seek out comparable employment having approached no more than six potential employers, and thereafter engaging in limited follow-up to those contacts.

[37] The Applicant's argument that the Tribunal reversed the onus to establish mitigation is unsupportable. It is evident from the Remedies Decision that the Member was aware of the Respondent's burden. The Applicant quarrels with how the Tribunal applied the principles of mitigation.

[38] The Applicant says that the Respondent did not put in sufficient evidence of the Applicant's non-mitigation, including comparable jobs which were available.

[39] However, the Respondent can meet its burden by taking evidence of the Applicant (who knows best what efforts he expended), evidence established in cross-examination and evidence of the industry in constructing the profile of mitigation efforts – or lack thereof. All of this type of evidence existed in the Tribunal's file.

[40] As held in *Rowe v General Electric Canada Inc*, 1994 CanLII 7389, 52 ACWS (3d) 812 (ONSC) at para 14, there must be direct evidence or evidence sufficient to support an inference of omission. In this case, the Tribunal had both direct evidence from the Applicant and surrounding circumstantial evidence of persons engaged in the industry, sufficient to draw an inference that the Applicant had engaged in a desultory search for employment.

[41] It was reasonable for the Tribunal not to accept the Applicant's submission that no Ontario trucking company would hire him based on his condition when the Applicant was able to secure comparable employment from S & J Transport in 2013 when he was older than when he was terminated, particularly where his limiting condition was age related.

[42] In my view, the Tribunal's consideration of mitigation was appropriately principled and reasonable. There was no reversal of the onus or burden of proof.

D. *Reinstatement*

[43] The Applicant claims that reinstatement is the Applicant's real remedy or alternatively lost wages through to 2015.

[44] The Tribunal denied that reinstatement remedy because of the Applicant's own admission that he had told S & J Transport of his intention to retire in 2015 which had been his understanding with S & J Transport from the beginning. As now admitted, the desire for reinstatement appears to stem from being bored with retirement.

[45] In *Hughes*, particularly relied upon by the Applicant, Leblanc J (as he then was) outlined at paras 36 and 37 that the remedy for discrimination may include reinstatement in order to return the victim to the position pre-discrimination.

[46] The decision is noteworthy on a number of points related to the present case, as the Tribunal recognized when it provided its citation (along with other precedents) to counsel before

the remedies hearing. At para 37 of *Hughes*, the Court emphasized the need for a causal connection between the discrimination and the loss of income.

[47] Moreover, the discussion of reinstatement was in the context of the wide array of remedies available to the CHRT in the exercise of its discretion (see *Hughes* at paras 34-35).

[48] The Tribunal's refusal to order the remedy of reinstatement here was an exercise of its discretion – as was the order to grant the Applicant greater loss compensation than is usual in similar circumstances.

[49] As an exercise of discretion, the Tribunal is to be accorded deference to its reasonable assessment of appropriate remedies. In this regard, the Tribunal engaged proper legal principles and given the facts, its conclusion was reasonably open to it. There is no basis for this Court to interfere in the Tribunal's decision.

IV. Conclusion

[50] For all of the above reasons, this judicial review will be dismissed with costs at the usual scale.

JUDGMENT in T-752-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed with costs at the usual scale.

2. The Canadian Human Rights Commission is removed as a Respondent.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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