Federal Court  Cour fédérale

Date: 20220310

Docket: T-1609-19

Citation: 2022 FC 331

Ottawa, Ontario, March 10, 2022

PRESENT: Madam Justice Walker

BETWEEN:

DOUG DIXON

Applicant

and

TD BANK GROUP

Respondent

JUDGMENT AND REASONS

[1] Mr. Dixon's application to the Court challenges a decision of the Canadian Human Rights Commission dated September 6, 2019 (the Decision). The Commission informed Mr. Dixon in the Decision that it had decided not to deal with his complaint of discriminatory treatment (the Complaint) because the Complaint is frivolous within the meaning of paragraph 4l(1)(d) of the *Canadian Human Rights Act* (CHRA).

[2] I have carefully considered Mr. Dixon's submissions and arguments but he has not persuaded me that there is a basis for this Court to intervene in the Decision. The Commission's conclusion that Mr. Dixon failed to meet the requirement to link the acts he complains of and a prohibited ground of discrimination is reasonable. Further, Mr. Dixon has not established that the Commission lacks jurisdiction to determine that a complaint is frivolous, nor has he established that the Decision breaches any constitutional provision or principle. Finally, Mr. Dixon has not alleged or established an evidentiary basis in support of a breach of his Charter rights. Consequently, the application for judicial review will be dismissed.

I. Overview

[3] Mr. Dixon filed the Complaint with the Commission on March 29, 2019. He alleged that that TD Bank Group or, properly the Toronto-Dominion Bank (TD or the Bank), discriminated against him on the basis of his race, national or ethnic origin, colour, religion, age and disability. Mr. Dixon listed the period of the alleged discrimination as February 2, 2019 to March 17, 2019.

[4] Mr. Dixon alleges that, during a visit to a TD branch in Toronto on February 2, 2019, another customer was served before him despite the fact Mr. Dixon was first in line. At the time, one teller and two overseers were on duty. Mr. Dixon states that the second customer arrived carrying what appeared to be a $50 bill and approached the teller. Mr. Dixon also states that he was subject to verbal abuse by the second customer when he pointed out he was first in line. The teller on duty called Mr. Dixon forward, ignored the second customer and apologized to him for the customer's abuse. Mr. Dixon informed the teller that he had an arrangement with the Bank that the branch manager "quantified an apology(s)". As Mr. Dixon's transactions were being

processed by the teller, one of the two overseers changed the second customer's bill, with the result that he was served before Mr. Dixon.

[5] In his Complaint, Mr. Dixon described himself as a white Anglo-Saxon elderly male with a physical disability who requires a cane and/or leg brace to walk. He set out the basis of his claim of discrimination as follows:

> The Teller, the two overseers and the second customer did not appear to be of White Anglo-Saxon origin and could possibly have been related to each other and/or were familiar with the second customer and his origin to perhaps justify discriminating against me.

[6] Following his experience, Mr. Dixon complained through TD's complaint process. He alleges that, during the course of that process, the branch manager, Ms. Rover, was rude to him. After communications between Mr. Dixon and the Bank's complaint personnel in February and March 2019, Mr. Dixon received a letter discontinuing his financial services with TD, a confirmatory telephone call, and a letter from a Customer Care manager and transcription of his telephone call with the Customer Care manager. The transcription indicates the Customer Care manager informed Mr. Dixon that TD believed he had made racist remarks and had been abusive towards TD staff members and would be exited from the Bank. Mr. Dixon discontinued his complaint escalation process and complained to the TD Ombudsman's office.

[7] Further factual and procedural background to this application is set out in (1) my order dismissing Mr. Dixon's interlocutory motion requesting a subpoena in respect of documents, records and attendance of representatives of the Bank (2020 FC 1054) (the Walker Order); and (2) the order of Justice Norris dismissing Mr. Dixon's appeal of an order of Prothonotary

Furlanetto (as she then was) refusing Mr. Dixon's motion that she recuse herself from this matter because of an alleged conflict of interest (2021 FC 101) (the Norris Order).

[8] An investigator was assigned to the Complaint in accordance with subsection 43(1) of the CHRA. The investigator prepared a report dated June 26, 2019 (Report) in which they recommended that the Commission not deal with the Complaint on the basis that it is frivolous within the meaning of paragraph 41(1)(d).

[9] The investigator set out Mr. Dixon's allegations of treatment in an adverse differential manner by the Bank on the grounds of age, colour, disability, national or ethnic origin, and race, as follows:

a) A failure to intervene on his behalf when another of its customers verbally abused him;

b) The service of his alleged abuser before him; and,

c) The discontinuance of the Bank's services to him, alleging, among other things, that he had made racist remarks to one of its staff members.

[10] Based on the information submitted by Mr. Dixon, the investigator concluded that:

1. The Complaint does not establish a link to a prohibited ground of discrimination;

2. It is plain and obvious that the Complaint cannot succeed; and

3. Mr. Dixon does not have a reasonable basis for believing that TD's conduct was discriminatory under the CHRA.

[11] The investigator noted that a complainant bears the burden of providing sufficient information or evidence to persuade the Commission there is a link between the alleged facts and a prohibited ground of discrimination. Although the Commission is required to take the facts as

alleged as true, it is not required to accept bald assertions. The complainant must demonstrate a reasonable basis for their complaint.

[12] Taking the facts as recounted by Mr. Dixon in the Complaint as true, the investigator found that Mr. Dixon had not offered any information or facts to support his allegations that the Bank treated him differently based on his age, colour, disability, national or ethnic origin, and race. In the investigator's opinion, Mr. Dixon's allegations of discrimination are bald assertions unsupported by any facts set out in the Complaint. The investigator concluded that Mr. Dixon had not demonstrated that a reasonable person in his situation would believe that the Bank discriminated against him on the prohibited grounds of discrimination referred to in the Complaint.

[13] On June 26, 2019, the Commission wrote to Mr. Dixon and the Bank enclosing a copy of the Report and providing both parties the opportunity to make submissions on or before July 24, 2019.

[14] Mr. Dixon responded to the Commission in a letter dated July 13, 2019. He disagreed with the conclusions set forth in the Report, notably the application of paragraph 41(1)(d) of the CHRA to his Complaint. Mr. Dixon reiterated his position that the Bank had engaged in discriminatory practices against him and stated that it was incredible that a reasonable person would deny the Bank discriminated against him on the grounds alleged.

[15] The Bank chose not to provide responding submissions to the Commission.

II. The Decision under review

[16] The Decision consists of a letter and the Report which provides the Commission's reasoning for its decision (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37; *Anani v Royal Bank of Canada*, 2020 FC 870 at para 30).

[17] In its September 6, 2019 letter, the Commission indicated that it had reviewed the Report and the submissions filed in response to it. After examining the information, the Commission determined not to deal with the Complaint because it is frivolous, pursuant to paragraph 41(1)(d) of the CHRA.

III. Preliminary issues

Allegations of bias

[18] By way of email to the Registry prior to the hearing, Mr. Dixon raised the issue of bias on my part due to my order, the Walker Order, dismissing his motion requesting a subpoena in respect of documents, records and attendance of representatives of the Bank. He requested that I be removed as the presiding judge and another judge appointed in my stead.

[19] At the hearing, I raised the issue of conflict of interest and bias and indicated that I was not offended by the concern raised. I provided Mr. Dixon and TD's counsel the opportunity to make submissions.

[20] After considering the parties' submissions, I stated that I would not recuse myself from this matter. Mr. Dixon's disagreement with the Walker Order is alone not capable of supporting

an allegation of bias (*Blank v Canada (Justice)*, 2017 FCA 234 at para 5; see also the Norris Order at paras 9, 15). The hearing then proceeded.

Named respondent(s)

[21] Mr. Dixon named the Bank and "TD Canada Trust Ms. Jacqueline Rover" as respondents in his Notice of Application. The Bank submits that Ms. Rover is not a proper respondent as she is an employee only and is not directly affected by the order sought in the application. The Bank relies on two cases to argue that employees named in a complaint to the Commission are not proper respondents in an application for judicial review (*Anderson v Canada (Attorney General)*, 2018 FC 834 at para 29; *Davidson v Canada (Attorney General)*, 2019 FC 877 at para 17).

[22] Rule 303(1) of the *Federal Courts Rules*, requires an applicant to name as a respondent every person directly affected by the order sought in the application. In his Notice of Application, one of the remedies sought by Mr. Dixon is a quantified personal apology from Ms. Rover in the amount of $1,000.00.

[23] As stated above, Mr. Dixon has requested that the Court order a remedy that would, if granted, directly affect Ms. Rover. However, the Court's role in this application is to review the Decision, the law and the parties' submissions, and determine whether the Decision should be set aside and the Complaint returned to the Commission for reconsideration. Even were Mr. Dixon to be successful, the Court does not have the authority to require Ms. Rover to make a payment to him in the guise of a quantified apology.

[24] Judicial review is a confusing concept for many people and self-represented litigants sometimes seek recourse from the Court that is beyond the purview of an application for judicial review. The fact that Mr. Dixon has requested a remedy directly against Ms. Rover does not mean that she is or could be "directly affected by the order" he seeks.

[25] As a result, I will order that the style of cause in this matter be amended by removing "TD Canada Trust Ms. Jacqueline Rover" as a respondent.

Admissibility of Mr. Dixon's new evidence

[26] Mr. Dixon filed an affidavit as part of his Application Record to which he attached 26 exhibits, many of which were not before the Commission when it made its Decision. The information in the affidavit and exhibits recount Mr. Dixon's interactions with TD and the Commission, and include the Report, Mr. Dixon's submissions in response to the Report, the Decision and the Notice of Application.

[27] The Bank submits that the information and documents that were not before the Commission are not admissible and that the Court should limit its consideration of Mr. Dixon's application to the materials that were before the Commission.

[28] The general rule in an application for judicial review is that the Court's review proceeds on the evidentiary record before the administrative decision maker, the Commission in the present case. Judicial review is not an opportunity to produce additional evidence that could have been placed before the original decision maker.

[29] The rule respects Parliament's decision to entrust the matter in question to the decision maker and not the reviewing court (*Association of Universities and Colleges of Canada v Access Copyright*, 2012 FCA 22 at para 19 (*Access Copyright*); *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-28; *'Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 at para 7). The decision maker decides the case on its merits based on the evidence before them. The reviewing court reviews the overall legality of the contested decision in light of that evidence and does not engage in a new trial of the questions at issue (*Access Copyright* at paras 17-19).

[30] There are three recognized exceptions to the general rule. They permit the admission of new evidence that: provides general background information; addresses procedural fairness issues; or, highlights the complete absence of evidence before the administrative decision maker (*Access Copyright* at para 20).

[31] Mr. Dixon submits that he has introduced evidence that is relevant to his Complaint and that TD's position is disrespectful.

[32] I have carefully reviewed Mr. Dixon's affidavit and exhibits against the information that was before the Commission when it made the Decision. I find that the exhibits to Mr. Dixon's affidavit contain some general background information relevant to the Complaint. This information is admissible. However, the exhibits also contain new evidence that is not admissible in this application. The new information and exhibits can be viewed as an attempt to supplement the record before the Commission.

[33] Therefore, in reaching my conclusions in this application, I have ignored the inadmissible information and exhibits introduced by Mr. Dixon and focused my analysis on the information before the Commission and the background information in the exhibits.

IV. Notice of Constitutional Question

[34] The Applicant served and filed a Notice of Constitutional Question in accordance with section 57 of the *Federal Courts Act* and Rule 69 of the *Federal Courts Rules*. None of the 14 Attorneys General served responded or sought to intervene in this proceeding.

[35] Mr. Dixon asserts that paragraph 41(1)(d) of the CHRA is inconsistent with subsections 52(1) and 52(2) of the *Constitution Act, 1982* (the Constitution Act), results in a remedial request under subsection 24(1) of the *Canadian Charter of Rights and Freedoms (*the Charter), and is contrary to the rule of law and of no force or effect. He argues that the Commission does not have the jurisdiction to find a complaint frivolous. In his view, that jurisdiction rests with the Court and the justice system. Mr. Dixon relies on two cases in support of his jurisdictional argument: *Leonardis v Canada Post Corporation*, (2002) CHRD No 24, 2002 CanLII 45934 (CHRT) at para 23 (*Leonardis*); *Côté v Canada (Royal Canadian Mounted Police)*, 2003 CHRT 32 at para 13 (*Côté*).

[36] TD submits that Mr. Dixon has cited no substantive provisions of the Constitution Act or the Charter in his application. TD argues that subsection 24(1) of the Charter and subsections 52(1) and (2) of the Constitution Act are remedial in nature rather than substantive, and cannot be breached as alleged by Mr. Dixon.

[37] I agree with the Bank. Subsection 24(1) of the Charter provides that anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just. Mr. Dixon has not alleged any infringement or denial of a Charter right or freedom in or by the Commission's Decision, nor has he put before the court a sufficient factual or evidentiary record in support of a Charter claim.

[38] Subsection 52(1) of the Constitution Act provides that the Constitution of Canada is the supreme law of Canada, and that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Subsection 52(2) identifies the components of the Constitution.

[39] Mr. Dixon submits that paragraph 41(1)(d) of the CHRA is inconsistent with subsection 52(1) of the Constitution Act but has cited no constitutional provision that has been violated by the paragraph. Subsection 52(1) provides a remedy if a provision of the Constitution has been violated. In other words, Mr. Dixon must first establish that paragraph 41(1)(d) violates a particular provision of the Constitution; only then may he turn to subsection 52(1) to strike down the paragraph. He has not done so.

[40] Mr. Dixon relies on the decisions in *Leonardis* and *Côté* to argue that the Commission has no jurisdiction to determine that his Complaint is frivolous and that the Decision does not follow the rule of law. There are two issues with this position.

[41] First, Mr. Dixon has misinterpreted the findings in both cases. In *Leonardis* (at para 23), the Canadian Human Rights Tribunal (the Tribunal) noted that paragraph 41(1)(d) of the CHRA relates to the Commission's discretionary power to decide whether or not to deal with a complaint. The Tribunal then stated that the review of such a decision, a decision of the Commission, "is a matter for the Federal Court of Canada and not for this Tribunal". In *Côté* (at para 13), the Tribunal confirmed that it does not exercise supervisory jurisdiction over the actions and decisions of the Commission and that such jurisdiction lies with the Federal Court. Neither decision establishes the principle that the Commission does not have jurisdiction to exercise its mandate under the CHRA, one aspect of which is to determine whether a complaint is frivolous within the meaning of paragraph 41(1)(d). Rather, they confirm that Mr. Dixon has pursued the correct avenue of recourse in requesting judicial review of the Commission's Decision by this Court.

[42] Second, Mr. Dixon's case does not engage the principles of the rule of law. His arguments focus on the Commission's authority to consider his Complaint and not on a breach of the Constitution Act. The Supreme Court of Canada recently confirmed in a majority decision that unwritten constitutional principles, including the rule of law, cannot be used to invalidate legislation (*Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 49-60, 69-73, 78 (*City of Toronto*)). In its earlier decision in *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 (cited in *City of Toronto*), the Supreme Court stated (at para 59):

> [59]… it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second

> principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded.

[43] The CHRA expressly confers jurisdiction on the Commission to review Mr. Dixon's Complaint of discrimination and to determine whether it is frivolous within the meaning of paragraph 41(1)(d) of the CHRA. Mr. Dixon has made no persuasive argument that the Commission lacks jurisdiction to do so. He has not established a breach of any constitutional provision or principle. In addition, Mr. Dixon has not alleged or established an evidentiary basis in support of a breach of his Charter rights.

V. Is the Decision reasonable?

[44] Mr. Dixon challenges the substance of the Decision itself. He disagrees with the Commission's finding that his Complaint is frivolous and its decision not to proceed with the Complaint.

[45] A decision by the Commission under paragraph 41(1)(d) of the CHRA is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*); *Stukanov v Canada (Attorney General)*, 2021 FC 49 at para 28). Where the Court reviews an administrative decision for reasonableness, its role is to examine the reasons given by the decision maker and determine whether the decision "is based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The party challenging the decision has the onus of demonstrating that the decision is not reasonable.

[46] Paragraph 41(1)(d) of the CRHA provides that the Commission shall deal with any complaint filed unless, in respect of that complaint, it appears to the Commission that "the complaint is trivial, frivolous, vexatious or made in bad faith".

[47] The nature and extent of the Commission's role has been described in the jurisprudence many times. In *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 (*Cooper*), the Supreme Court described the Commission as a screening and administrative body that has no appreciable adjudicative role. The Commission does not determine whether discrimination has occurred but whether further inquiry by the Canadian Human Rights Tribunal into a complaint is warranted. The central component of the Commission's role is to assess the sufficiency of the evidence before it (*Cooper* at para 53; see also *Ritchie v Canada (Attorney General)*, 2017 FCA 114 at para 38).

[48] The legal meaning of frivolous for purposes of paragraph 41(1)(d) is not its ordinary meaning. The test for determining whether a complaint is frivolous within the meaning of the paragraph is "whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed" (*Hérold v Canada (Revenue Agency)*, 2011 FC 544 at para 35; see also *Love v Canada (Privacy Commissioner)*, 2015 FCA 198 at para 23 (*Love*)). In other words, the Commission will consider whether the complaint has some likelihood of success if the complainant's factual allegations are accepted as true. The meaning of frivolous in this context has also been described as "having no prospect of success" (*Zulkoskey v Canada (Employment and Social Development)*, 2016 FCA 268 at para 24).

[49] In assessing whether a complaint is frivolous, the Commission may look to the absence of a claimed link between the impugned conduct and a ground of discrimination under the CHRA. As Justice Gleason explained in *Love*, "where a complainant fails to assert a link between the conduct complained of and a prohibited ground of discrimination – or, to put the matter another way, fails to explain why the adverse treatment was connected to one of the grounds prohibited under the CHRA – then the Commission may reasonably conclude that it is plain and obvious that a complaint could not succeed" (*Love* at para 24, citing *McIlvenna v Bank of Nova Scotia*, 2014 FCA 203 at para 14). The threshold is low but the complainant bears the burden of demonstrating the claimed link (*Ozcevik v Canada (Revenue Agency)*, 2021 FC 13 at para 23).

[50] It is apparent from my review of the record that Mr. Dixon's information and submissions in the Complaint did not identify a link between the events he described and the grounds of discrimination he cites. The authorities Mr. Dixon relies on do not assist him. His assertions of discrimination are bald assertions unsupported by the facts set out or any documentary evidence. Accepting the facts as recounted by Mr. Dixon as true, he was subjected to an unpleasant encounter due to the actions and words of another customer during his visit to the TD branch on February 2, 2019. The teller on duty moved to assist Mr. Dixon with no appreciable delay while one of her colleagues dealt with the second customer. The teller offered an apology on behalf of the Bank for the actions of the second customer and provided service to Mr. Dixon without issue. On these facts, Mr. Dixon alleges discrimination by the Bank on the basis of age, colour, disability, religion, national or ethnic origin, and race.

[51] The investigator referred in the Report to Mr. Dixon's statement that TD discontinued its services to him on the basis that he had made racist remarks to one of its staff members. The facts as recounted by Mr. Dixon referred to rude and disrespectful treatment by the branch manager. He does not state that her behaviour was discriminatory but is clearly concerned with his treatment during the course of the Bank's complaint process and its allegation of racist behaviour on his part. I find no reviewable error in the investigator's consideration of this aspect of the Complaint that warrants the Court's intervention.

[52] In light of the foregoing analysis, the Commission reasonably concluded that Mr. Dixon failed to show any connection between the acts of the Bank or its employees during his visit to the branch, or during the TD complaint process, and the prohibited grounds of discrimination he relies on. The alleged common race, national origin and/or colour of the Bank employees present and the second customer establishes no reasonable basis for believing that the employees' conduct was discriminatory. It was reasonable for the Commission to accept the findings in the Report and to not deal with the Complaint because it is frivolous.

[53] I will briefly address one final point. Mr. Dixon challenges the Bank's decision not to respond to the Commission's letter inviting comment on the Report. Contrary to Mr. Dixon's submissions, the Bank had no obligation to respond to the Commission's invitation and no adverse inference can be taken from its decision. The burden of proof of his allegations rests on Mr. Dixon. The Commission's June 26, 2019 letters to the parties provided an opportunity to make comments on the Report if either party disagreed with the information it contained. The letters did not require comments.

[54] For all of the reasons set out in this judgment, I will dismiss this judicial review application.

VI. Costs

[55] As the successful party in this application, the Bank is entitled to costs in the normal course. At the hearing of the application, the Bank's counsel requested a lump-sum award of costs in the amount of $1,500.00 all inclusive. They submit that the requested amount is reasonable taking into account that the Bank has not sought costs in the two procedural motions brought by Mr. Dixon or in his appeal of Prothonotary Furlanetto's recusal Order. Counsel notes that the Bank reserved the right to seek its costs for the appeal at the conclusion of the hearing of the underlying application for judicial review. Mr. Dixon indicated that he would seek an assessment of the Bank's costs if the Bank was the successful party.

[56] I have considered the parties' submissions regarding costs. Taking into account the factors set out in Rule 400(3) of the *Federal Court Rules*, I will exercise my discretion under Rule 400(1) and award costs in the lump sum amount of $1,500.00 to the Bank.

JUDGMENT IN T-1609-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The style of cause in this matter is hereby amended by removing "TD Canada Trust Ms. Jacqueline Rover" as a respondent.

3. Costs are awarded to the Bank in the lump sum of $1,500.00 inclusive of all disbursements and taxes, if any.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1609-19
STYLE OF CAUSE:	DOUG DIXON v TD BANK GROUP
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 18, 2021
JUDGMENT AND REASONS:	WALKER J.
DATED:	MARCH 10, 2022

APPEARANCES:

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Bonny Mak	FOR THE RESPONDENT

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