Section de première instance de la Cour fédérale du Canada

Federal Court of Canada Trial Division

T-2992-93

Between:

LORAINE C. ENNISS,

Applicant,

- and -

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT,

Respondent.

REASONS FOR ORDER

Muldoon, J.

By originating notice of motion, the applicant moves the Court, for the purpose of obtaining:

> an Order setting aside and referring back for determination in accordance with such directions as it considers to be appropriate, the Decisions of the Commission dated November 15, [*sic*] 1993.

[The applicant herself provides copies of decisions both dated November 22, 1993.]

The notice of motion goes on to allege that:

> The Decisions were received by the Applicant on November 26, 1993. The Decisions arose out of two complaints to the Canadian Human Rights Commission. Conciliation was recommended for both complaints by the Investigators, and the appointment of a Tribunal was recommended by the Director of Compliance. By her complaint, the Applicant maintained that the Department of Indian Affairs and Northern Development, had acted contrary to sections 7 and 10 of the ***Canadian Human Rights Act.***

The grounds alleged next, are complete and classical.

The motion, or application, is supported by the following material:

(a) the affidavit of the Applicant

(b) exhibits including Investigation Reports from the Public Service Commission, 'supposed' vacancies used in conspiracy to continue racial discrimination, arbitrator's ruling confirming that **racial discrimination** was not and could not have been examined,

(c) such further material as Applicant may advise.

It may be observed that there appears to be a fatal procedural defect in the originating notice which was not espied by either side's counsel until the opening of the hearing in this matter in the morning of June 10, 1997. Rule 1602(4) asserts, regarding judicial review proceedings:

> 1602.(4) The notice of motion shall be in respect of a single decision, order or other matter only * * *.

The applicant's originating notice of motion, filed (if not composed) by her personally on December 21, 1993, manifestly seeks relief against two same-day decisions of the original respondent, the Canadian Human Rights Commission, since struck out in favour of the present respondent. If the Court could have proceeded with jurisdiction intact upon the consent of both counsel, that would have occurred. However, having raised rule 1602(4) ***ex mero motu***, the Court supplied the remedy in the same manner in light of the civilized attitude of counsel, by invoking rule 303, thus:

> 303.(1) For the purpose of determining the real question in controversy, or of correcting any defect or error, the Court may, at any stage of a proceeding, and after giving all interested parties an opportunity to be heard, order any document in the matter to be amended on such terms as seem just, and in such manner as it may direct.
>
> (2) This Rule does not apply to a judgment or order.

The applicant's counsel undertook to file a second notice of motion, with the Court's permission ***nunc pro tunc*** and the respondent's consent or, at least, abstinence from objecting.

At the hearing, the Court orally pronounced an enabling order, with which the applicant's counsel undertook to comply, and did comply, by filing two new notices. The Court homologates such filings, made on June 12, 1997, despite the lapse of time.

The originally named respondent the CHRC, does not intervene in this procedural matter.

The applicant's counsel stated to the Court that the single issue here is "whether the CHRC breached its duty of procedural fairness by failing to notify the applicant of the content of the respondent's submissions in response to the investigation report, by reversing the strong recommendation [to establish a tribunal to hear both complaints] contained in that report, and by failing to provide any reasons for its decision to reverse that strong recommendation."

(transcript: pp. 10-11)

The assertion about a strong recommendation can be seen to be verified in a memorandum to the Commissioners from P. Alwyn Child, Director of Compliance, dated August 18, 1993. (Applicant's record [hereinafter AR] pp. 42-45.) Some passages from that memo are worth reciting:

> These complaints are brought before the Commission for a decision as to whether a Tribunal inquiry is warranted.
>
> The complainant was employed by the respondent as a teacher. In complaint E02393, she alleges that the respondent denied her the opportunity to compete for the position of Vice-Principal, and gave the position to a less qualified white teacher. Investigation revealed that the eligibility list used to extend the white teacher's acting assignment may have been invalid, that the respondent rejected a recommendation of the Public Service Commission to open the position to competition, and that a respondent supervisor did not want the complainant in the position. The Investigation Report on the complaint was presented to the Commission in September, 1990, at which time the Commission decided to appoint a conciliator.
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> In April, 1992, a Conciliation Report was presented to the Commission, the complainant having refused an offer of settlement. The Commission stood the complaint down to give the complainant another opportunity to consider the respondent's offer. She subsequently agreed to accept the offer. The respondent, however, withdrew the offer, noting that the complainant had, in the interim, filed a second complaint. The Commission thereafter decided to stand the complaint down, with instructions that settlement discussions should recommence once the investigation of the second complaint was complete.
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> The second complaint, T41661, deals with the termination of the complainant's employment. The complainant alleges that after she queried the respondent's decision to give the Vice-Principal position to a less qualified white teacher, she was given negative performance appraisals, suspended repeatedly, and eventually dismissed.
>
> The Investigation Report on complaint T41661 was disclosed to the parties on March 25, 1993, with a recommendation for conciliation. The conciliator subsequently contacted the respondent to determine whether there was an interest in settling both complaints. The respondent has indicated that it is not willing to make an offer of settlement on either complaint.
>
> I recommend that the Commission request a Tribunal inquiry into these complaints, by adopting the following resolutions:

Mr. Child thereupon provided to the Commission standard forms of particular resolutions requesting the president of human rights tribunals to appoint one tribunal to enquire into the applicant's two complaints, E02393 of July 31, 1987, and T41661 of November 15, 1991.

On November 22, 1993 the CHRC wrote two letters to the applicant (AR pp. 8 and 9) telling her that it had decided that a tribunal enquiry was not warranted. It also informed her however that it had exercised its discretion pursuant to paragraph 41(*e*) of the ***Canadian Human Rights Act*** to extend the time limit for filing complaint T41661, and to deal with it even though it was more than a year old. However, no further proceedings were warranted.

These letters evince two characteristics of note. They mention "careful consideration of the documents submitted", but not by whom, or having regard to all the circumstances of the complaint" but not by whom related. That is one. The second is that "an enquiry into the complaint by a Tribunal pursuant to section 49 of the ***Canadian Human Rights Act*** is not warranted" and that is just statutory language, so in fact no reasons are rendered. That was common practice on the CHRC's part despite various admonitions from this Court, but the procedure has since been revised.

As can be seen quite clearly on pp. 39 and 40 of the AR the applicant herself committed certain misconduct in her job and stated that new requirements imposed on all teachers "were solely implemented to build a case of progressive discipline against her (AR p. 39, para. 39). That may be a manifestation of paranoia brought on by the discriminatory treatment which the investigator, Derrick McLennon, says he found.

Truly, the applicant was no paragon of perfection. Indeed she admits to some misconduct of an insubordinate kind. However, and despite the

respondent's emphasis of such admission, it is not relevant to the issue to be resolved in this proceeding.

The investigator's report dated November 24, 1989, referred to in the new originating notice regarding complaint E02393 is reproduced at AR p. 24. The report dated March 23, 1993, regarding complaint T41661 commences on p. 33.

The sequence of events goes thus, as recorded in the hearing transcript at page 33:

> First, a conciliation officer recommended to the Applicant that she accept a settlement offer by the Respondent?
>
> MR. ANAND: On Complaint No. 1.
>
> HIS LORDSHIP: She rejected that but then changed her mind --
>
> MR. ANAND: Correct.
>
> HIS LORDSHIP: -- and when she said she would accept it, the offer was withdrawn?
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> MR. ANAND: Yes.
>
> HIS LORDSHIP: All right. And then, I suppose, was it when Complaint No. 2 had been formulated, again a conciliation officer contacted the Respondent to see if there was any use talking, and they said no.
>
> MR. ANAND: Correct.
>
> HIS LORDSHIP: No offer?
>
> MR. ANAND: That's right.
>
> HIS LORDSHIP: All right, I've got that, thank you.
>
> MR. ANAND: That's what Mr. Child says in his memo; that's the information that I have.

The point of contention urged by the applicant's counsel is that she and her employer were invited to make written submissions to the CHRC, but were denied access each to the other's submissions, and of course, she was denied any opportunity to reply to her employer's written submissions prepared by one, Dan E. Goodleaf, the Deputy Minister at that time. (AR, second pp. 73 & 74). Now the CHRC purports to have perused the written material submitted to it, but made no comment on the fact that a 23-page Public Service Staff Relations Board document submitted on behalf of the employer had no even-numbered pages!

(transcript: pp. 39-44.) The perusers must have ignored that document, or they are or were clairvoyant speed-readers. (Commission's record pp. 01485-96.) Some person or persons through whose hands that PSSRB decision passed had highlighted at least the odd numbered pages, thus ensuring shading or obliteration of the text on the photocopy. The department did acknowledge that there was "a possibility that a staffing error may have occurred" but denied having discriminated against the applicant. In any event, the applicant never received a copy of Mr. Goodleaf's submission, and was never invited to reply to it.

The foregoing is the basis of the applicant's complaint against the CHRC: that it denied her procedural fairness when it failed to disclose to her the respondent employer's submissions to the Commission, and without providing any reasons for doing so, reversed the recommendations in the investigator's report of March 23, 1993, and in the report dated August 18, 1993 of the director of compliance.

So while the applicant may well have thought that referral to an aborted conciliation would surely mean the appointment of a tribunal, Mr. Goodleaf, in counsel's words, sought "to relitigate" the first complaint regarding promotion.

Mr. Goodleaf's posture is stated on the first page, third paragraph of his letter of April 23, 1993. (AR, p. 73; Commission's record, p. 1478). He re-iterated a previous denial of discrimination. This first complaint had already passed the CHRC's scrutiny and had been referred to conciliation, but the employer chose to take issue with such reference. If later the Commission accepted the employer's bare unique traverse, then it must have considered its earlier referral to conciliation to have been wrong. If there had been no discrimination, as the employer again asserted, why was conciliation ordered in the first place?

Since the applicant did not receive a copy of Mr. Goodleaf's April 23 letter, she did not mention the matter of the first complaint's referral to conciliation or the re-litigating of that matter, because there was no reason to believe it was still an issue. Logically, when a complaint is referred to conciliation and that is impossible or unsuccessful because the applicant first rejected the respondent's offer, which was withdrawn when she changed her mind and would have accepted it, the consequence ought to be to take the complaint before a tribunal. It was unfair of the CHRC to reverse its prior decision without ever notifying the applicant of the employer's submission which apparently persuaded the Commission to reverse its earlier decision about getting a resolution of the complaint.

In regard to the second complaint Mr. Goodleaf, whose submission was kept from the applicant, first raised the matter of the more-than-a-year time lapse. This matter is now of no concern because the CHRC decided against that contention.

About this second complaint, Mr. Goodleaf raised the finding of the PSSRB expressed on only half of its original pages, which half-copied decision the Commission professed to have perused in coming to its impugned decision of November 22, 1993. The Commission's secretary Lucie Veillette certified that defective document on May 18, 1994.

By the time she filed her originating notice of motion herein the applicant had become aware of the respondent's passing the [half] PSSRB decision to the CHRC. In her supporting affidavit, sworn December 21, 1993, the applicant swore:

> (7) That the claim by the Department of Indian Affairs and Northern Development that the adjudicator examined and found no racial discrimination was erroneous, this information was presented to the Commissioners when they made their decision.

> (8) That Article M-16 [of my collective agreement] which provided for a grievance on the basis of racial discrimination, could only have been examined by the adjudicator if I was represented by the Union. Since the union did not represent me at the start of the hearing this grievance was dismissed without any examination. This, the Department of Indian Affairs was well aware of but presented in a deceitful manner to the commissioners.
>
> (AR, p. 5)

Because Ms. Enniss was not cross-examined on her affidavit, the above stated facts, must be taken to be true. Only the union could bring forward a complaint of racial discrimination according to the collective agreement then in force. Since the union did bring forward the applicant's complaint or grievance it was dismissed but not on the merits, if any, by the PSSRB.

However, because she was not provided with a copy of the respondent's submission, the applicant did not know that her credibility was in issue, but the truthfulness of her complaint had been traversed. She did not provide a copy of the PSSRB award, and she did not know that half of it (every second page) had been provided to the CHRC which obviously did not read it thoroughly (an impossibility) but accepted it as if that document were whole. So, in such a bizarre situation, the applicant was not alerted to any need to provide the CHRC with a copy of her collective agreement and a letter from the union on the subject of not carrying her grievance before the PSSRB. It would seem clear that the grievance right was not really hers; it was the union's.

The applicant's counsel conceded that if there had been a fully adjudicated hearing of that grievance by the PSSRB, and it had been dismissed, such would have been a relevant factor of which the Commission could have taken into account. Although it is somewhat speculative, one can draw the inference that the CHRC did take into erroneous account the dismissal of the applicant's grievance by the PSSRB when the CHRC reversed the investigator's and the compliance director's recommendations for conciliation, and ultimately a tribunal enquiry, because the CHRC seemed not to notice that it had only alternate pages

of the PSSRB's non-substantive decision, a defective document, included even in the records certification by the Commission's secretary.

So, in summation, the applicant was kept from any knowledge of the Goodleaf submissions: (i) that the CHRC's previous decision in favour of conciliation should be reversed; and (ii) the PSSRB's decision was to dismiss her grievance. The Commission had no response to the employer's submissions, but nevertheless simply reversed and rejected the staff recommendations before it, without reasons. The applicant was kept ignorant of the fact that the employer even made submissions until she applied for judicial review.

What, then, is the law applicable in such circumstances? The parties cite orally, at least, much of the same jurisprudence: ***Radulesco v. CHRC*** [1984] 2 S.C.R. 407; ***Labelle v. Treasury Board*** (1987) 25 Admin.L.R. 10 (F.C/A); ***Syndicat des Employés de production du Québec et de l'Acadie v. CHRC*** [1989] 2 S.C.R. 879; ***Mercier v. Canada*** [1994] 3 F.C. (F.C/A); ***Brochu v. Bank of Montréal*** (1994) F.C.J. No. 614 [a poor, esoteric manner of citation]; ***Madsen v. Canada (Att'y. Gen'l.)*** (1996) 39 Adm.L.R. 248 (F.C.T.D.).

The respondent's counsel argued, and not incorrectly, as follows:

> The respondent submits that a breach of natural justice occurs where the submissions are not exchanged between the parties that contain new facts or where they were a determinative factor in the Commission's decision or, alternatively, where credibility is at issue, that is, that the parties should be given an opportunity to respond to submissions in those three instances: new facts, credibility is at issue or where the facts alleged are determinative of the issue.
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> (transcript: p. 155)

The foregoing factors are all stated in the jurisprudence. How to apply them is the key to the issue herein, but in addition there is a general consideration which the CHRC seems, at last to be heeding.

It may seem to be unthinkable to some, that a deputy-minister's submission to the CHRC on an employee's complaint would be misleading. What

then would be the result in law if the deputy-minister just copied or ratified one of his underlying's misleading assertions? On June 23, 1992, one Madeleine Parisien, a senior staff relations adviser of the respondent wrote:

> It should be noted that the issue of discrimination was addressed at the hearing held pursuant to the provisions of the ***Public Service Staff Relations Act*** and that the adjudicator ruled that the allegations of racial and sexual discrimination as well as the allegations of favouritism brought forth by Ms. Enniss, were not supported by the evidence.
>
> (CHRC record, p. 01481)

On January 5, 1993, in one of her communications with the CHRC, the applicant wrote about the PSSRB decision mentioned above by Ms. Parisien:

> Since preparing the other section of this submission on the 31st December, 1992, I have been thinking of a question that I think concerns more than just one individual. I have waited all these years on the Commission because it was my impression that there were vast differences between an investigations conducted by the Human Rights Commission and other bodies that investigate labour or work related issues. I think that it is very important that I be told what the main differences are between these groups. In other words, how is the Commission different from an arbitration Board? Or how would an investigation conducted by Mr. Cantin (an arbitrator), be different from one done by Mr. Yalden (a Commissioner of the Human Rights) in relation to examination of the evidence? As I stated earlier I was very disappointed when my arbitration hearing appeared to be used extensively, by the human rights officer in trying to decide whether my firing was on racial discrimination on the specific grounds stated in the law expect their investigation to not be a duplicate of the ones conducted by any other body. Now if the evidence is used in a similar manner it may appear as duplication. More important to my question is the entire claim of trying to stamp out systemic discrimination etc. Is it possible that something could be legally correct but wrong from a Human Rights point of view? In other words, I note that some, if not all of the commissioners are also lawyers, my question is, do you look at the evidence presented in an identical or closely similar manner when wearing the hat of a lawyer, as when serving in the role of commissioner?
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> (CHRC record, p. 1505)

Considering that the applicant is not a lawyer, but one who writes, wordy emotional and rhetorical texts, one can nevertheless see that she is questioning the use of Mr. Cantin's PSSRB decision. Included in Mr. Cantin's odd-numbered-pages-only, one-half, tendered decision from which the Court infers that all the folks at the CHRC neglected to read it, was this one-page gem by J. Maurice Cantin, Q.C. of the PSSRB:

> This reference to adjudication related to the interpretation or application of a collective agreement.
>
> As can be seen from the decision of October 17, 1988, the bargaining agent advised on October 5, 1988 that it was no longer representing the grievor and that it was withdrawing its assistance and support.
>
> This case was rescheduled to be heard with other cases, commencing on January 17, 1989.
>
> On January 17, 1989, the bargaining agent was not present and the employer asked for the dismissal of the grievance.

In view of the above, the grievance is dismissed.

J. Maurice Cantin, Q.C.
Vice-Chairman.

OTTAWA, February 28, 1988

(CHRC record, p. 01484)
(AR, p. 73)

So the applicant had questioned the use of the decisions of the "arbitrator", Mr. Cantin, which Ms. Parisien had characterized as a ruling "that the allegations of racial * * * discrimination * * * brought forth by Ms. Enniss, were not supported by the evidence", just as if that were a weighed adjudication on the merits! The Court gives Ms. Parisien the benefit of being negligent or ignorant, since her above quoted statement appears otherwise to be a lie, and certainly misleading.

Then along comes the deputy-minister on April 23, 1993, with the last misleading word (which the applicant had already questioned on January 25, 1993); and he repeats that which looks like an out-and-out lie, and certainly misleading to an asleep-at-the-switch CHRC, which either did not read the decisions of Mr. Cantin or incredibly complacently just accepted without comment a written decision consisting of odd-numbered pages only. Mr. Goodleaf repeated Madeleine Parisien's highly misleading assertion, ***verbatim***! And, the CHRC left Ms. Enniss totally in the dark about Mr. Goodleaf's repetition of Ms. Parisien's earlier questioned, highly misleading statement about the applicant's complaint of racial discrimination being "not supported by the evidence", when Mr. Cantin reported that it had not been adjudicated on the merits at all by him.

Hopefully these circumstances are all just negligence and ignorance on the respondent's part and nothing more sinister, but they are still malodorous, and misleading to a somnolent CHRC. Such circumstances must be unique because there is no precedent in the jurisprudence but these circumstances just as effectively obstruct natural justice as do those which are mentioned in the jurisprudence.

One matter which the case law does mention is, that what is revealed in the employer's undisclosed submission to the Commission, is determinative of whether it ought to have precipitated a tribunal enquiry. Here, the respondent's reiterated misleading assertion about the PSSRB decision must have been, after strong staff recommendations for a tribunal enquiry, ***a fortiori*** determinative for the CHRC simply ignored the recommendations and did the opposite without reasons which they are not obliged to give. Here the Court infers that whereas the Commission did not bother to peruse the documentation from Mr. Cantin, it did read Mr. Goodleaf's last, misleading word, and it was misled. Furthermore, it allowed the applicant's credibility to be impugned because whereas she complained of racial discrimination, the CHRC was told by Mr. Goodleaf that Mr. Cantin dismissed that complaint because "it was not supported by the evidence."

Clearly the CHRC's practice of keeping the contending parties in the dark about each other's submissions has been just plain silly. The historical notion of natural justice has always been to permit contending parties openly to confront each other's submissions to the adjudicatory tribunal. This is the Court's general consideration of the CHRC's practice, which it seems at last to be heeding. The Court considers that the law has developed to this point. Such development is needed since the effective, (if only negligent) misleading of the Commission, found here, cannot forever remain unique. So it is silly to keep contending parties wondering about the other side's final submissions and trying to reason, or to guess at, what must be the target(s) for reply. Enough!

For all of the foregoing reasons the CHRC's two decisions numbered E02393 and T41661 of November 15, 1993 are to be quashed. That is the part of ***certiorari***.

If it were so certain that in these circumstances, the Commission is clearly, legally obliged to seek the appointment a human rights tribunal to

adjudicate the two complaints such would be ordered. That would be the part of ***mandamus***. This Court intuitively feels that a tribunal should be appointed, but such intuition is not good enough for the purpose of overriding the CHRC's discretion in that matter. So Ms. Enniss' application for ***certiorari*** is allowed, but her application for ***mandamus*** is denied, even although it would be granted, if the Court exercised the same discretion as does the CHRC. In any event, the matter is referred back to the Commission to exercise its discretion and to make its new decisions.

No costs are awarded for or against either party.

Judge

Ottawa, Ontario

August 13,1997