Federal Court Cour fédérale

Date: 20230823

Docket: T-887-22

Citation: 2023 FC 1126

Ottawa, Ontario, August 23, 2023

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MARCUS WILLIAMS

Applicant

and

THE BANK OF NOVA SCOTIA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Mr. Williams, represented himself in this hearing though he has had counsel on his other Federal Court appearances related to this matter. The decision is the Canadian Human Rights Commission (the "Commission") reconsideration decision dated March 28, 2022.

II. Background

[2] A history of the proceedings is necessary to better understand this Judicial Review. After working for the Bank of Nova Scotia ("Scotiabank") for about two and a half years as a casual employee, the Applicant's employment was terminated by Scotiabank. The Applicant identifies as a black man and submitted a human rights complaint to the Commission on November 15, 2017, alleging Scotiabank discriminated against him in a manner contrary to section 7 of the *Canadian Human Rights Act,* RSC 1985, c H-6 [*CHRA*]. He submitted a revised complaint on April 10, 2018 because the Commission did not accept his initial complaint since it did not identify a nexus between the alleged mistreatment and a prohibited ground of discrimination.

[3] The Applicant complained to the Commission, alleging he was discriminated against in the course of his employment at Scotiabank on the grounds of colour, national or ethnic origin, race, sex or age. As justification for his complaint, the Applicant indicated that he applied for 15 contract and non-casual positions and approximately 200 internal job postings and was unsuccessful with all of them, he did not receive annual bonuses nor a pay raise, and his employment was terminated for discriminatory reasons.

[4] On March 13, 2019, a Human Rights Officer's initial screening report recommended the complaint be dismissed as frivolous. The Commission rejected this recommendation on June 12, 2019, and decided to deal with the complaint. Scotiabank sought judicial review of the Commission's decision, which was dismissed by Justice McHaffie as premature on December 7, 2020: *Bank of Nova Scotia v Williams*, 2020 FC 1127 [*Williams 1*].

[5] The complaint therefore moved forward; another Human Rights Officer (the "Officer") completed an investigation report (also referred to as "Report for Decision") on September 11, 2020, finding that some of the Applicant's allegations of discrimination were untimely because they occurred more than one year before he complained to the Commission. The Officer recommended the timely aspects of the complaint be referred to the Canadian Human Rights Tribunal (the "Tribunal") for inquiry, severing the rest of the Applicant's complaint. The Commission did not follow the recommendation to sever the complaint, instead referring it in its entirety to the Tribunal on November 4, 2020.

[6] Scotiabank once again sought judicial review of the Commission's decision. It challenged the Commission's findings that the Applicant's complaint was not frivolous, not vexatious, and timely in its entirety. On October 21, 2021, Justice Fothergill rejected Scotiabank's first two arguments but allowed the application for judicial review in part since the Commission did not sufficiently explain its departure from the report's recommendation on timeliness: *Bank of Nova Scotia v Williams*, 2021 FC 1122 at paras 26, 34, 38–43 [*Williams 2*].

[7] The Commission reconsidered its decision, as ordered by Justice Fothergill. On March 28, 2022, it essentially agreed with the investigation report and severed the untimely aspects of the Applicant's complaint, referring only the timely aspects (the "Decision"). It is this decision for which the Applicant seeks judicial review in this case.

[8] The Applicant also had a *Canada Labour Code*, RSC, 1985, c L-2 [*Canada Labour Code*] hearing for unjust dismissal. The complaint was heard on June 28, and July 13, 2018 and

the Applicant's complaint was dismissed and it was found that he was terminated for lack of work or discontinuance of a function pursuant to section 242(3.1) of the *Canada Labour Code*.

III. Issue

[9] The only is issue is whether the decision is reasonable.

IV. Standard of Review

[10] The applicable standard of review for the Commission's decision is that of reasonableness: *Givogue v Canada (Attorney General)*, 2023 FC 864 at para 22, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 33 and *Bergeron v Canada (Attorney General)*, 2022 FCA 209 at para 22.

V. Analysis

[11] The relevant legal provisions are in Annex A.

[12] Unfortunately, the Applicant's written and oral argument rarely pertained to the Decision for which he seeks judicial review and are mostly related to overturning Justice Fothergill's decision (in part where he was unsuccessful). This judicial review is whether the Applicant's complaint should be the subject of an inquiry by the Tribunal, in whole or in part, based on Scotiabank's timeliness argument. This Decision is the result of Justice Fothergill's order allowing in part the Commission's previous decision relating to the Applicant's case. However,

the Applicant is arguing Justice Fothergill's decision to allow the previous judicial review in part was "peculiar, illogical and unfair". In effect, the Applicant presents arguments explaining why the Commission's first decision to refer to the Tribunal was reasonable and that Justice Fothergill's decision was not reasonable. The Applicant does not understand how the November 16, 2020 decision that already addressed all of this does not stand. He said the Commission's decision is not in the public interest and lacks integrity and unfairness.

[13] In his oral argument he said because he was successful in two out of three issues in the decision by Justice Fothergill that means that he should have been successful in the application and the "success" not split into two. This argument is a mathematical calculation that does not apply to legal determinations and are arguments that are related to an appeal of Justice Fothergill's decision.

[14] The Applicant argues the "decision to deal with [his] complaint was reasonable" because (i) it was reasonable for the Commission to conclude his complaint is not frivolous, (ii) the Commission was not required to respond to Scotiabank's timeliness argument, and (iii) the Commission's reasons were adequate. The first argument is not relevant to this Application, which does not deal with the issue of whether the Applicant's complaint is frivolous. The second argument is not responsive to this Application as the Decision directly deals with Scotiabank's timeliness argument, as opposed to the first decision to refer to the Tribunal, which did not. The Applicant's argument on this point seems to be a response to Justice Fothergill's conclusion that the Commission's decision was unreasonable since it did not respond to the timeliness argument. The third argument suggests the reasons of "the Decision" were adequate, but this argument

evidently confuses the Decision with the Commission's first decision to refer to the Tribunal, chiefly because it would not be in the Applicant's interest in this judicial review to argue that the Decision is "reasonable".

[15] If the Applicant disagrees with *Williams 2* and believes Scotiabank's judicial review application should have been "dismissed in its entirety" since allowing the application in part was "not only peculiar but illogical and unfair" to him, the appropriate procedure to undertake would have been to appeal *Williams 2*. It was confirmed at the hearing that no such appeal was made. Thus *Williams 2* stands and is subject to *res judicata*: see *Régie des rentes du Québec v Canada Bread Company Ltd*, 2013 SCC 46 at para 55.

[16] Paragraph 41(1)(*e*) of the *CHRA* indicates the Commission should only deal with complaints related to acts or omissions, the last of which occurred a year or less from the date of the complaint, although the Commission has the discretion to extend this period. This is important for each of the three conclusions reached by the Officer in the Decision.

[17] First, determining the date of the filing of the complaint affects when the one-year window ends. Second, if all the allegations, including the ones outside the one-year window, are part of a larger pattern of discrimination by Scotiabank, then the related untimely allegations are still to be dealt with since it need only be the last of the acts or omissions that need to occur a year or less before the complaint. Third, should the Applicant wish to extend the window to longer than one year, he must establish why it is appropriate for the Commission to use its

discretion to do so here. Scotiabank argued it would be prejudicial to it for such discretion to be used to extend the window.

[18] The Commission chose to calculate the one-year period from April 10, 2018, rather than November 15, 2017, which is favourable to the Applicant. Scotiabank accepts the November 15, 2017 date was a reasonable choice, though it does not necessarily agree with the conclusion.

[19] The Applicant asserts that Scotiabank used a consistent pattern of differential treatment indicating the likelihood of an inference of discrimination. The Applicant has maintained this position from the outset. The Applicant submits that not only (1) each allegation (i.e., each unsuccessful job application, each time he was passed over for a bonus, the lack of a response to his pay increase request, and his termination of employment) was the result of discrimination, but also that (2) all the allegations, taken together, demonstrate a pattern of discrimination. If that is the case, it would then be inappropriate to sever the untimely allegations.

[20] Scotiabank argues it was reasonable for the Commission to conclude that the allegations are separate and distinct rather than a continuous chain of events. Scotiabank points to numerous factors supporting this finding: (i) different recruiters were involved in the review of the various job applications; (ii) each job posting was unique and required different qualifications; (iii) the basis for the Applicant's lack of success varied depending on the job position; (iv) there is no connection between the allegations relating to the job applications and the other allegations; (v) in many cases, the Applicant's race was unknown to the recruiter when his application was dismissed, as he was dismissed at the recruitment phase; (vi) there was no evidence that a

protected ground was a factor in the decision or that the Applicant had included any information about his race, colour or ethnic origin in the applications; and (vii) there was a certain lapse between events since the allegations span a number of years.

[21] The Certified Tribunal Record shows that the Commission asked Scotiabank for specific information on May 20, 2020, related to the job applications, and the Applicant's qualifications. Scotiabank's response to this email provided: the name of the positions for which the Applicant applied; the date and reason for the Applicant's lack of success in each job application; the stage at which the Applicant's applications were rejected, which demonstrated that in the vast majority of the cases, the recruiter rejecting his application was unaware of any protected ground like his race; and the Applicant's curriculum vitae, which did not indicate any protected characteristics.

[22] In light of the above, I am satisfied Scotiabank's arguments before this Court are not supplementing the Decision. There is a presumption the decision-maker considered the entirety of the evidence in the record before it: see, *Estrada Alejandro v Canada (Citizenship and Immigration)*, 2022 FC 1073 at para 19. Therefore, there is a presumption that the Commission considered the aforementioned evidence and submissions. In my view, this presumption should be even stronger since the Commission specifically asked Scotiabank for this information.

[23] There is limited jurisprudence from this Court in reviewing what would or would not reasonably be a "pattern of discrimination." *Alcock v Canada (Armed Forces)*, 2022 FC 708 [*Alcock*] involved a complainant who alleged discrimination on certain grounds (race, colour, religion, national or ethnic origin and family status) based on certain untimely events, and

discrimination on the ground of disability based on timely events. This Court concluded it was reasonable for the Commission to sever the untimely allegations since they involved different people, facilities and circumstances (the former involved events like stereotypical comments, whereas the latter involved events like workplace accommodation issues): *Alcock* at para 44; *Syed v Canada (Attorney General)*, 2020 FC 608 at paras 1, 12, 45; Cheng v Canada Post Corporation, 2006 FC 1304 at para 7.

[24] By contrast, in *Khanna v Canada (Attorney General)*, 2008 FC 576 [*Khanna*], this Court concluded it was unreasonable for the Commission to follow the investigation report's recommendation to sever the untimely events. While the factual scenario is a bit more complicated than necessary with respect to the chosen filing date, what is important is that Mr. Khanna had a one-year contract, and the filing date was such that only the last two months of this contract fell within the one-year window. Mr. Khanna explained in his complaint a series of events during the entirety of his contract that he faced on the basis of his national or ethnic origin and his perceived sexual orientation. Many, but not all, of these events involved a superior and a colleague, which were both named as respondents in the human rights complaint: *Khanna* at paras 3-5. This Court concluded there was no explanation why there were two distinct time periods in Mr. Khanna's case, as such the decision was unreasonable: *Khanna* at paras 27-29.

[25] The Applicant's case falls somewhere in the middle between the jurisprudence. While it is unlike *Alcock*, where the untimely events rely (essentially or explicitly) on different protected grounds, it is also unlike *Khanna* in which it was always the same people. *Cheng* speaks of different people, facilities, and circumstances. In the Applicant's case, the people varied

depending on the allegation, and the circumstances varied. This is especially so considering the manual nature (direct managers as the hiring managers) of recruitment prior to the SuccessFactors (centralized, automated job applications system) rollout on June 26, 2017.

[26] *Alcock* does underscore, however, that the Commission can sever a complaint "where there are breaks in the continuum of events in the workplace, such as events involving different people, facilities or circumstances": *Alcock* at para 42, citing *Cheng* at para 7.

[27] The lack of a continuous pattern of discrimination was not an unreasonable conclusion. It was reasonable for the Commission to conclude the allegations were separate and independent events. The Decision takes into account the evidence Scotiabank provided. This evidence supports Scotiabank's argument that each allegation is separate and distinct, since there were so many changing variables from one allegation to the other. There is no contradictory or responding evidence by the Applicant to suggest that there was nonetheless a pattern of continuous discrimination. I can clearly follow the Commission's reasoning from the evidence to the conclusion without finding any logical fallacies.

[28] The Applicant argued Scotiabank would not be prejudiced by an inquiry into the untimely allegations since the adjudicator did not address these allegations in the unjust dismissal hearing, meaning there was no decision as to the reason for the dismissal. Said differently, the Applicant's submission is that the prejudice stems from responding to the same allegations twice, which he contends Scotiabank would not have to do here if the untimely allegations proceeded to the inquiry. He also said that given he provided all the information to

Scotiabank regarding his applications so they would be able to find all the employees past or present as well as other documentation. He included in his spreadsheet all of the jobs he applied for, the hiring manager and his cover letters. He does not understand how Scotiabank would suffer prejudice given what information he has given them as well as their own records. The Applicant argued at the hearing that Scotiabank had a cloud based system implemented in June and not January so they can get the records.

[29] In response, Scotiabank asserts it made extensive submissions to the Commission on the significant prejudice it would face. It points to evidence and submissions that were before the Commission. This evidence notes difficulties related to the job applications that predated the transition to the centralized system: some original job postings could not be located; no email correspondence pertaining to many job applications was found; the successful job applicant was determined in only four cases; for 27% of the applications, the hiring manager is no longer with Scotiabank; for 15% of the applications, the Applicant submitted his application to a general hiring email address, which meant Scotiabank could not locate the hiring manager. Scotiabank further suggests difficulties relating to the issues of bonus denial and oversight of pay raise, notably that the Applicant's direct manager, a critical witness, is no longer employed at Scotiabank. Scotiabank again pointed to *Williams 2* at para 39, which mentions some of the difficulties it would face. Scotiabank argues the Commission's finding that it would face a significant prejudice is entitled to deference as a finding of fact.

[30] Moreover, it argues the Decision to decline to exercise its discretion to extend the limitation period is fair in light of other factors, notably the significance of the delay without any adequate explanation for it.

[31] I note that the *CHRA* presents no specific criteria through which the Commission should determine whether it should exercise its discretion. However, this Court's decisions pertaining to paragraph 41(1)(e) indicate that the Commission can consider the good faith of the complainant, their explanations for the delay, whether the complaint is trivial, frivolous, or vexatious, and any prejudice or unfairness the delay caused the respondent: *Temate v Canada (Attorney General)*, 2018 FC 1004 [*Temate*] at para 26, citing *Richard v Canada (Treasury Board)*, 2008 FC 789 [*Richard*] at paras 8-9.

[32] I have some issues with the idea that a company could be immune from complaints because of difficulties created by their own chosen procedures (such as their chosen recruitment structure), or circumstances wholly out of the complainant's hands (such as a critical witness leaving the company). That being said, Scotiabank was not asking to be immune from the complaint; it was only exercising the discretion to extend the one-year window not be exercised. Indeed, when the Commission asked for information about job applications, it searched its records, seemingly in good faith, to find much of the information even though its chosen procedures created certain difficulties. It was reasonable for the Commission to consider the difficulties as a factor.

[33] The Commission rather quickly rejected the Applicant's explanation for the delay (that he was fearful of reprisals while he was still employed as a casual employee). I do think she could have explained her reasoning in more detail. She simply wrote that "[a]lthough [Mr. Williams] was fearful of reprisals, he could have come to the Commission earlier to file a complaint on the earlier allegations". The Decision does not discuss this point directly.

[34] While I have some uncertainty as to whether this dismissal of his fears is fully transparent, looking at the ability to file a complaint seems to be on point with at least another decision from this Court. In *Bredin v Canada (Attorney General)*, 2007 FC 1361 [*Bredin*], this Court opined a psychological disability was a valid reason for the delay if it "established that it rendered the complainant unable to file a complaint within a year" [emphasis added]: *Bredin* at para 32, aff'd 2008 FCA 360. Other decisions where applications were allowed on this point admonish the lack of any consideration of the complainant's submissions: see *Temate* at para 33; *Richard* at para 16. In this case, the Commission did at least consider the Applicant's explanation, and then made its decision, which should be afforded deference: see *Temate* at para 32 and cases cited therein. While the reasons on this point may not be perfect, they are not problematic such that it renders the Decision unreasonable.

[35] I find that the Decision and the Investigation Report consider the prejudice Scotiabank would face and the Applicant's explanation for the delay. The prejudice favours Scotiabank, as does the lack of explanation.

[36] At the hearing, the Applicant indicated that this matter has gone on too long. I agree that he needs to deal with the merits of his complaint (currently in abeyance) at the Commission.

VI. Conclusion

[37] The Applicant's application for judicial review is dismissed. The Commission reasonably determined the complaint filing date, concluded the lack of a continuous pattern of discrimination, and declined to exercise its discretion to extend the one-year window contemplated in paragraph 41(1)(e).

VII. Costs

[38] The Respondent sought costs as it defended its position without including frivolous arguments that expended judicial resources or the Applicant's time, and it acted in good faith, including by consenting to extensions of time for the Applicant's materials. The Respondent provided a bill of costs in the amount of fees and taxes of $6,339.39. Factors to consider include that the Applicant represented himself and has a valid case that has been in the Commission since 2017 and because of several court procedures has not been heard yet. The Applicant appears to be unemployed and said he could not afford a lawyer. After balancing the factors I will award costs to the Respondent in the lump sum amount of $200.00 inclusive of taxes and disbursements payable forthwith by the Applicant.

JUDGMENT in T-887-22

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. Costs are awarded to the Respondent in the lump sum amount of $200.00 inclusive of taxes and disbursements payable forthwith by the Applicant.

"Glennys L. McVeigh"
Judge

ANNEX A

Sections 7, 41(1)(*e*), 44(3)(*a*) of the *CHRA* are relevant in this case:

Employment	**Emploi**
7 It is a discriminatory practice, directly or indirectly,	**7** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	**a)** de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee,	**b)** de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	
[…]	[…]
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 :
[…]	[…]
(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.
[…]	[…]

Report	**Rapport**
44 […]	**44** […]
Idem	**Idem**
(3) On receipt of a report referred to in subsection (1), the Commission	**(3)** Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied	**a)** peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and	**(i)** d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,
(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or	**(ii)** d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);
[…]	[…]

Paragraphs 242(3)(*a*) and 242(3.1)(*a*) of the *Canada Labour Code*

242 […]	**242** […]
Decision of the Board	**Décision du Conseil**
(3) Subject to subsection (3.1), the Board, after a complaint has been referred to it, shall	**(3)** Sous réserve du paragraphe (3.1), le Conseil, une fois saisi d'une plainte :
(a) consider whether the dismissal of the person who made the complaint was unjust	**a)** décide si le congédiement était injuste;

and render a decision thereon; and	
[…]	[…]
Limitation on complaints	**Restriction**
(3.1) No complaint shall be considered by the Board under subsection (3) in respect of a person if	**(3.1)** Le Conseil ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :
(a) that person has been laid off because of lack of work or because of the discontinuance of a function; or	**a)** le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste;
[…]	[…]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-887-22
STYLE OF CAUSE:	MARCUS WILLIAMS v THE BANK OF NOVA SCOTIA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 6, 2023
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	AUGUST 23, 2023

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