Federal Court  Cour fédérale

Date: 20240523

Docket: T-2520-23

Citation: 2024 FC 781

Ottawa, Ontario, May 23, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

WILLIAM ROSS MILLER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant was a public servant in the federal government from 2007 to 2021. After applying unsuccessfully to approximately nine executive level competitions within the federal public service, he filed a complaint against the Privy Council Office [PCO] with the Canadian Human Rights Commission [Commission]. The Applicant alleged that the PCO discriminated adversely against him on the basis of race, national or ethnic origin, colour and sex through their employment policies and practices, contrary to sections 7 and 10 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [*Act*].

[2] In his complaint form, the Applicant claimed there are discriminatory practices embedded in the employment policies and practices of the federal public service of Canada. Specifically, he alleged that the Clerk of the PCO and the PCO promoted systemic discrimination by promoting hiring that exceeds the equity targets for members of employment equity groups, thereby discriminating against individuals not in an employment equity group. In support of his complaint, the Applicant cited statistics from a variety of federal government reports showing that women are overrepresented in the public service and have a higher promotion rate when compared to men, as well as another report showing that for a number of years "all four employment equity groups in the federal public service have met or exceeded their workforce availability". The Applicant complained that he did not have equal opportunity for advancement in his previous employment with the federal government and was unfairly discriminated against as a non-member of an employment equity group.

[3] In response to the complaint, the PCO raised a number of objections pursuant to sections 40.1(2) and 41(1) of the *Act*. Following receipt of a reply from the Applicant, a Human Rights Officer [Officer] issued a Section 40/41 report, dated March 27, 2022, which recommended that the Commission not deal with the complaint pursuant to paragraph 41(1)(d) of the *Act* because it was frivolous. The Officer concluded that it was plain and obvious that the complaint could not succeed, as: (i) there was not enough information to support that a sufficient nexus in employment exists between the Applicant and the PCO for the purpose of a human rights complaint; and (ii) the Applicant had not provided sufficient information or facts to show there is a link between the allegations and prohibited grounds of discrimination under the *Act*.

[4] In a decision dated November 1, 2023, the Commission adopted the Officer's recommendation and decided not to deal with the complaint pursuant to paragraph 41(1)(d) of the *Act*.

[5] On this application, the Applicant seeks to judicially review the Commission's refusal to deal with this complaint, asserting that the Commission's findings that there was an insufficient nexus of employment, and that the complaint does not establish a clear link to a prohibited ground of discrimination, were both unreasonable.

[6] The sole issue for determination on this application is whether the Commission's decision not to deal with the complaint was reasonable.

[7] The parties agree, and I concur, that a decision by the Commission under paragraph 41(1)(d) of the *Act* is subject to review by this Court against the standard of reasonableness [see *Dixon v TD Bank Group*, 2022 FC 331 at para 45 [*Dixon*]]. When reviewing for reasonableness, the Court must take a "reasons first" approach and determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified [see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 8, 61-62]. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85].

[8] Since the Commission adopted the Officer's reasons, the report along with the Commission's decision collectively constitute the reasons for decision of the Commission [see

Rosianu v Western Logistics Inc, 2021 FCA 241 at paras 70-74; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37].

[9] The Commission is a screening and administrative body that has no appreciable adjudicative role [see *Cooper v Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 SCR 854 at paras 53-54 [*Cooper*]]. The Commission does not determine whether discrimination has occurred, but rather decides whether further inquiry into a complaint by the Tribunal is warranted. The central role of the Commission is therefore to assess the sufficiency of evidence before it [see *Dixon*, *supra* at para 47; *Cooper*, *supra* at para 53; *Ritchie v Canada (Attorney General)*, 2017 FCA 114 at para 38].

[10] Paragraph 41(1)(d) of the *Act* provides that the Commission shall deal with any complaint filed, unless it appears to the Commission that the complaint is "trivial, frivolous, vexatious or made in bad faith." This Court summarized the legal test for determining whether a complaint is frivolous in *Dixon*, as follows:

> [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).

[11] When performing its screening function, this Court has held that the Commission is "to be afforded great latitude in exercising its judgment and in assessing the appropriate factors when considering the application of paragraph 41(1)(d)" of the *Act* [see *Bergeron v Canada (Attorney General)*, 2013 FC 301 at para 39].

[12] As noted above, the Applicant's complaint is based on sections 7 and 10 of *Act*. Section 7 prohibits discriminatory practices in the context of employment as follows:

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

[13] Section 10 prohibits employers, employee organizations and employer organizations from engaging in certain discriminatory practices:

Discriminatory policy or practice **10** It is a discriminatory practice for an employer, employee organization or employer organization **(a)** to establish or pursue a policy or practice, or	**Lignes de conduite discriminatoires** **10** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour

> **(b)** to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

> l'employeur, l'association patronale ou l'organisation syndicale :
>
> **a)** de fixer ou d'appliquer des lignes de conduite;
>
> **b)** de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

[14] The Commission found that it was plain and obvious that the complaint could not succeed, as there was not enough information to support that a sufficient nexus in employment exists between the Applicant and the PCO for the purpose of a human rights complaint. The Applicant does not dispute that he was never employed by the PCO and that none of the executive level competitions he applied for were positions with the PCO.

[15] Rather, the Applicant asserts that the Commission's finding was unreasonable because the Clerk of the PCO, as Head of the Public Service, directed and promoted the allegedly discriminatory policies and practices, which the Deputy Head(s) of the department(s) where the relevant appointments occurred were required to follow. The Applicant argues that the Clerk directed the Deputy Heads that diversity targets were the floor and not the ceiling, which, in the Applicant's view, is not consistent with the spirit and intent of the *Employment Equity Act*, SC 1995, c 44. For this reason, the Applicant asserts that the PCO did not need to have a direct role in the individual staffing actions at issue in order for there to be a sufficient nexus of employment. The Applicant further asserts that the Commission disregarded evidence of the linkages between the PCO and the Deputy Heads in rendering this portion of its decision.

[16] I reject the Applicant's assertions. The report correctly stated that for the Commission to have jurisdiction over an employment or service complaint, the respondent must either be an employer or service provider within the meaning of the *Act*. The report recognized that courts have found that employment relationships can exist outside of the traditional employer-employee relationship, citing *Canada (Attorney General) v Rosin*, 1990 CanLII 12957 (FCA), [1991] 1 FC 391 and *Canadian Pacific Ltd v Canada (Human Rights Commission)*, 1990 CanLII 12536 (FCA), [1991] 1 FC 571. However, there was no evidence before the Commission of circumstances indicating a non-traditional employer-employee relationship between the PCO and the Applicant, such as control, remuneration, benefit or the utilization of the Applicant in any way.

[17] The Commission reasonably concluded that the PCO had no control over hiring the Applicant (as they were not his employer) and no control over his work environment or workload. While the PCO promotes special programs encouraging departments to hire individuals from employment equity groups, the Commission reasonably found that the PCO has no authority or control over the hiring practices of the departments implementing these programs.

[18] Contrary to the Applicant's submissions on judicial review, it is clear that the Commission explicitly considered the role of the Clerk of the PCO as Head of the Public Service, as well as the nature of the linkages between the PCO and the Deputy Heads, as evidenced by the report. Moreover, the Applicant has not directed this Court to any evidence that would contradict or undermine the Commission's conclusion on the nature of his employment relationship with the PCO. I agree with the Respondent that the Applicant's assertion that the Commission disregarded evidence amounts to a request for this Court to reweigh and reassess the evidence considered by

the decision-maker, which is not the proper role of this Court on judicial review [see *Vavilov*, *supra* at para 125].

[19] In light of the reasons and the record, I find that it was reasonable for the Commission to conclude the Applicant failed to provide enough information to support that a sufficient nexus in employment existed between him and the PCO. Thus, it was reasonable for the Commission to conclude that it was "plain and obvious" the complaint could not succeed and consequently, to decide that the complaint was frivolous in accordance with paragraph 41(1)(d) of the *Act*. This finding is dispositive of this application and thus, I need not go on to consider the Commission's remaining finding. Accordingly, the application for judicial review shall be dismissed.

[20] I would note that in his written representations, the Applicant sought a declaration that "there is a reasonable apprehension of bias by the Commission with respect to the treatment of members of non-employment equity groups". However, the Applicant made no written submissions in support of this relief. At the hearing, I advised the Applicant that if he sought to pursue this remedy, he would need to make substantive submissions in his oral argument, which he did not do. Accordingly, I find that the Applicant has abandoned this request for relief. That said, I find that there would have been no merit to the allegation, as there is nothing in the record before me to support a finding that there was a reasonable apprehension of bias.

[21] On the issue of costs, I see no reason to depart from the general principle that the successful party should be entitled to their costs. The Respondent seeks costs in the amount of $2,568.02 based on the upper end of Column III of Tariff B (after adjustment for the shorter hearing of this application than originally anticipated). I am not satisfied that this case warrants costs at the upper

end of Column III, given the limited materials required to be prepared by the Respondent. Rather, I find that costs in the amount of $1,500.00 in accordance with the lower end of Column III are reasonable and shall be awarded to the Respondent.

JUDGMENT in T-2520-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The Applicant shall pay to the Respondent costs of the application in the amount of $1,500.00.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2520-23
STYLE OF CAUSE:	WILLIAM ROSS MILLER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 15, 2024
REASONS FOR JUDGMENT AND JUDGMENT:	AYLEN J.
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APPEARANCES:

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