

Date: 20071203

Docket: T-502-07

Citation: 2007 FC 1268

Ottawa, Ontario, December 3, 2007

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

**YARINDER BRAR and
THE CANADIAN HUMAN RIGHTS COMMISSION**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] By this application, the Attorney General of Canada seeks judicial review of an interlocutory decision of the Canadian Human Rights Tribunal. The Tribunal dismissed the Royal Canadian Mounted Police's request to limit Yarinder Brar's ability to advance certain allegations at the hearing of his human rights complaint. The Attorney General submits that in allowing Sgt. Brar to advance issues that had not been investigated by the Canadian Human Rights Commission, the Tribunal exceeded its jurisdiction.

[2] For the reasons that follow, I am satisfied that the Attorney General's application for judicial review should be dismissed as it is premature.

Background

[3] Sgt. Brar is a Canadian citizen of East Indian origin, who began working for the RCMP in 1989. In 1992, he filed a complaint with the Canadian Human Rights Commission in which he alleged that he had been discriminated against in the course of his employment. This complaint was settled in 1995.

[4] As part of the settlement, the RCMP agreed to remove all information from Sgt. Brar's Personnel and Discipline File relating to the incidents giving rise to his complaint, including any references to disciplinary action that had been taken against him, as well as any references to the settlement itself.

[5] In 2002, Sgt. Brar filed a second human rights complaint in which he alleged that he had continued to experience discrimination and harassment in the workplace after the settlement of his first complaint. Sgt. Brar identified a series of incidents which he says amounted to discriminatory practices within the meaning of sections 7, 10 and 14 of the *Canadian Human Rights Act*.

[6] Sgt. Brar further asserted that the RCMP had retaliated against him for filing his 1992 complaint, contrary to the provisions of section 14.1 of the *Act*.

[7] Finally, Sgt. Brar asserted that the discriminatory conduct attributed to the RCMP was ongoing.

[8] The Commission investigated Sgt. Brar's complaint. In the course of the investigation, Sgt. Brar provided the Commission with evidence regarding additional incidents of discriminatory conduct on the part of the RCMP allegedly occurring after he had filed his 2002 human rights complaint.

[9] Contemporaneous correspondence from Sgt. Brar's counsel to the Commission noted that counsel had asked the Commission Investigator whether it was necessary to amend Sgt. Brar's human rights complaint to make specific reference to these additional allegations. According to counsel's letters to the Commission, Sgt. Brar had been advised that an amendment to the complaint was not necessary.

The Investigation Report

[10] An Investigation Report with respect to Sgt. Brar's complaint was completed on January 12, 2005. The Report concluded that the evidence did not support his allegations of discrimination and harassment due to his race and national and ethnic origin. The Investigator further found that the evidence did not support Sgt. Brar's allegations of differential treatment and harassment based upon his disability.

[11] The Investigation Report did find, however, that information relating to Sgt. Brar's first human rights complaint had been shared with RCMP employees, and had been used against Sgt. Brar at a disciplinary hearing.

[12] The Investigation Report concluded by recommending that Sgt. Brar's complaint be referred to the Canadian Human Rights Tribunal for hearing, pursuant to paragraph 44(1)(a) of the *Canadian Human Rights Act*, as the evidence indicated that Sgt. Brar's treatment by the RCMP appeared to have been influenced by the fact that he had previously filed a human rights complaint.

[13] The Attorney General of Canada's arguments in this case hinge on the sixth paragraph of the Investigation Report, where the Commission Investigator stated that:

After the filing of his complaint and during the investigation, the complainant raised and continues to cite several other incidents of alleged discriminatory conduct. **These further incidents do not form part of this report, and the complainant was advised that a new complaint would have to be filed to address these further issues.** [emphasis added]

The Commission Decision

[14] After the completion of the Investigation Report, both sides provided the Commission with additional submissions in writing. In the case of Sgt. Brar, these submissions were quite lengthy, and contain a great deal of information regarding both the incidents specifically described in his human rights complaint form and the discriminatory practices allegedly occurring after he had filed his second human rights complaint.

[15] The matter was then placed before the Commissioners for a decision. The Commissioners decided that Sgt. Brar's case would be referred to the Canadian Human Rights Tribunal for a hearing.

[16] A copy of Sgt. Brar's human rights complaint was then sent to the Chairperson of the Canadian Human Rights Tribunal. Accompanying the complaint was a referral letter sent by the Secretary to the Canadian Human Rights Commission, the substantive portion of which provided that:

After examining this information, the Commission decided, pursuant to section 49 of the *Canadian Human Rights Act*, to request that the Chairperson of the Canadian Human Rights Tribunal **institute an inquiry into the complaint** as it is satisfied that, having regard to all the circumstances, an inquiry is warranted. [emphasis added]

The Tribunal Decision

[17] A number of preliminary issues arose between the parties at the pre-hearing stage, which resulted in a joint motion being brought before the Tribunal seeking, amongst other things, an order or direction from the Tribunal "clarifying the nature and scope of the complaint".

[18] The RCMP also sought an order prohibiting Sgt. Brar from calling certain witnesses, limiting the ambit of other witnesses' testimony, and striking a number of paragraphs in Sgt. Brar's Statement of Particulars which dealt with his allegations of discriminatory practices allegedly occurring after the filing of his 2002 human rights complaint.

[19] The parties' motion was dealt with by the Tribunal Chairperson at a case management conference. The Chairperson gave an oral decision, which was subsequently reduced to a written Order by the parties themselves.

[20] The RCMP's request to preclude Sgt. Brar from advancing his allegations of discriminatory conduct allegedly occurring after 2002 was dismissed. In particular, the Tribunal dismissed the RCMP's request to strike out a number of paragraphs of Sgt. Brar's Statement of Particulars.

[21] The Tribunal's order in this regard was specifically made without prejudice to the RCMP's right to object to any of the allegations being advanced at the hearing, on the basis of prejudice or any other basis.

[22] The Tribunal Order further provided that the RCMP's request to preclude Sgt. Brar from calling certain witnesses at the hearing was dismissed, again without prejudice to the RCMP's right to object to the basis of the evidence on the basis of relevance, timeliness, prejudice or immunity. Similarly, the RCMP's request to limit the ambit of the testimony of other witnesses was dismissed, again without prejudice to its right to object to the evidence in the course of the hearing.

[23] In his oral decision, the Tribunal Chairperson explained the basis for his decision, observing that:

[T]he reason I made this decision is because it is my view that there is a link between the allegations that I am allowing the Complainant to pursue and the complaint. Having come to this conclusion, this is not to preclude, once the hearing has started, and in the context, and

more fulsome evidence – this does not preclude the Respondent from objecting to any of these allegations going forward, or any of the witnesses coming forward to support these allegations on the basis of relevance, or on the basis of prejudice, or whatever other objection the Respondent may seek to put forward at the time of the hearing.

As I said, I am reluctant to eliminate allegations in a Statement of Particulars or put into a Statement of Claim, unless it is apparent that there is no relevance, or that they have absolutely nothing to do with the facts alleged in the complaint.

[24] While a number of matters were dealt with at the case management conference, this application is restricted to challenging the Tribunal's refusal to limit the ambit of Sgt. Brar's complaint. At this point in time, the RCMP does not take issue with the Tribunal's decision not to limit the list of witnesses, their testimony, or the RCMP's disclosure obligations.

Issues

[25] While the Attorney General has raised several issues, I am satisfied that the question of prematurity is dispositive of the matter.

Is the Application Premature?

[26] The Attorney General submits that the ability of the Canadian Human Rights Tribunal to address issues at a hearing that were not investigated by the Canadian Human Rights Commission and were explicitly excluded from consideration in the Investigation Report relating to the complaint goes straight to the Tribunal's jurisdiction. As such, the application is not premature, and should be decided in advance of the Tribunal hearing.

[27] In this regard, the Attorney General relies on paragraph 44(3)(a) of the *Canadian Human Rights Act*, which provides that on receipt of an investigation report, the Commission:

[M]ay 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

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(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) ... [emphasis added]

[28] According to the Attorney General, it is clear from paragraph six of the Investigation Report that the Report does not relate to events occurring after Sgt. Brar filed his human rights complaint in 2002. As a consequence, the Canadian Human Rights Tribunal is without jurisdiction to consider these events, and immediate judicial review should be available.

[29] As a general rule, in the absence of special circumstances, interlocutory rulings made by administrative tribunals should not be challenged until the tribunal has rendered its final decision: see, for example, *Sherman v. Canada (Customs and Revenue Agency)*, 2006 FC 715 at ¶39, *Zündel v. Canada (Human Rights Commission)* [2000] 4 F.C. 255, 256 N.R. 125 (C.A.), at ¶10 and *Szczecka v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 934, 116 D.L.R. (4th) 333 at 335.

[30] There are a number of reasons why this is so, including the fact that the application may be rendered moot by the ultimate outcome of the case, and the risk of the fragmentation of the process, with the accompanying costs and delays. Also of concern is the absence of a full record at the

preliminary stage, with the resultant inability to see how the ruling actually played out in the ultimate determination of the case. There is also the possibility that the tribunal may end up modifying its original ruling as the hearing unfolds.

[31] The fact that an issue may arguably relate to the tribunal's jurisdiction does not automatically justify immediate judicial review: see *Air Canada v. Lorenz*, [2000] 1 F.C. 494 ¶13. See also Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998), at 3:4100.

[32] Many of the underlying policy concerns which support the principle that interlocutory decisions of inferior tribunals should not ordinarily be subject to immediate judicial review arise in this case.

[33] In particular, it is clear that the ruling of the Tribunal Chairperson did not finally determine the scope of the hearing to be held before the Canadian Human Rights Tribunal. Indeed, the Chairperson was very careful to reserve the final decision in this regard to the Tribunal member ultimately dealing with the merits of Sgt. Brar's complaint.

[34] That is, the Chairperson specifically preserved the right of the RCMP to object to particular post-complaint allegations being advanced by Sgt. Brar on whatever basis it deemed appropriate, deferring the final determination of the scope of the hearing to the hearing on the merits.

[35] As a consequence, it is entirely possible that the concerns raised by the Attorney General may end up being moot if the RCMP's objections in this regard are sustained by the Tribunal member presiding over the hearing.

[36] Moreover, even if the presiding member ultimately allows Sgt. Brar to advance allegations of discrimination arising after the filing of his 2002 human rights complaint, these allegations may end up being dismissed.

[37] Even if the question of the Tribunal's jurisdiction remains a live one at the end of the hearing, a reviewing Court will undoubtedly benefit from receiving a fully developed record, including the reasons of the Tribunal member finally dealing with the matter. In particular, it will be useful for a reviewing Court to have an understanding of the relationship or nexus between the post-complaint allegations of discrimination and the allegations set out in Sgt. Brar's complaint form.

[38] Finally, counsel for the Attorney General submits that the interests of efficiency and administrative economy support the Court's immediate intervention in this matter. That is, counsel says that the parties are currently facing a lengthy hearing – one which will be significantly abbreviated if it is determined that the scope of the complaint should be limited in the manner suggested by the Attorney General.

[39] The fact that the hearing into Sgt. Brar's complaint may be shortened by an immediate ruling from this Court is not determinative. In this regard, I note that in the *Lorenz* case, Justice Evans declined to entertain an application to judicially review a decision regarding an allegation of bias, preferring to wait until the Board had rendered its final decision. This notwithstanding the fact that there were several weeks of hearing left to go, which would have been invalidated, had the allegations of bias ultimately been sustained.

[40] Moreover, as was the case in *Lorenz*, I am of the view that the possibility of waste in this case is mitigated by the fact that it is not plain and obvious that the Tribunal is without jurisdiction to entertain the allegations in issue.

Conclusion

[41] For these reasons, I have not been persuaded of the existence of special circumstances in this case that would warrant the Court's intervention at this time. I therefore decline to exercise my discretion to grant relief on the basis that the application for judicial review is premature, and the application for judicial review is dismissed.

Costs

[42] Sgt. Brar contends that this application for judicial review was clearly premature, and should never have been brought. As a result, he says that he should be entitled to his solicitor and client costs.

[43] In contrast, the Attorney General argues that the issues raised by this case are novel. As a consequence, counsel for the Attorney General submits that if the application is dismissed, Sgt. Brar should only be entitled to his costs on the ordinary scale.

[44] While the Commission Investigator's treatment of Sgt. Brar's allegations of post-complaint discrimination may have been unusual, the provisional nature of the Tribunal Chair's ruling was quite clear. As a consequence, I agree with Sgt. Brar that the application for judicial review should not have been brought at this time.

[45] Therefore, having regard to all of the circumstances, as well as the factors referred to in Rule 400(3), and in the exercise of my discretion, I find that Sgt. Brar should have his costs of this application at the upper end of column 5 of Tariff B.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and
2. Sgt Brar should have his costs of this application at the upper end of column 5 in
Tariff B.

“Anne Mactavish”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-502-07

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v.
YARINDER BRAR and
THE CANADIAN HUMAN RIGHTS COMMISSION

PLACE OF HEARING: Ottawa, Ontario

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**REASONS FOR JUDGMENT
AND JUDGMENT:** Mactavish J.

DATED: December 3, 2007

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