Date: 20071205

Docket: T-1832-05

Citation: 2007 FC 1275

Ottawa, Ontario, December 5, 2007

PRESENT: The Honourable Justice Frenette

BETWEEN:

SIAMAK A. RAUFI

Applicant

and

FEDERAL EXPRESS CANADA LIMITED

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision rendered by the Canadian Human Rights Commission (the Commission) on September 21, 2005 in which the Commission declined to refer the Applicant's complaint to a tribunal for consideration on its merits. The Commission made this decision pursuant to section 41(1)(e) of the *Canadian Human Rights Act*, R.S. 1985, C. h-6 (CHRA), after determining that the complaint was based on acts which occurred more than one year before the complaint was filed.

FACTS

[2] The Applicant was an employee of Federal Express Canada Limited (FedEx) since 1986, as a Customs specialist. In 1998, his position was eliminated due to restructuring and he was assigned to a new position. The Applicant states that he was promoted to Operations Support Representative. The Respondent states that the Applicant was assigned the substantive duties of a Senior Customs Broker but was given the title of Operations Support Representative, because this latter position had a pay rate equal to or higher than his previous position. The pay rate of a Senior Customs Broker was apparently below the Applicant's previous pay rate. In other words, the Respondent argues that the Applicant was not promoted, just reassigned at an equal pay rate level.

[3] The Applicant's position required use of the telephone for several hours per day. Between 1999 and 2000, he complained of vocal cords problems and was temporarily assigned other duties. After he reported several problems with his voice, he presented a note from his doctor on August 12, 2002 stating that he had partial vocal cord paralysis, and that he should permanently avoid excessive use of his voice. He had submitted several notes previously, including one which stated "Mr. Raufi has a L vocal cord paralysis and cannot work on the telephone."

[4] Because the complaint was diagnosed as being of a permanent nature and seemed to present a "permanent limitation to fulfilling the essential duties of his regular job," the Applicant was referred to the internal Disability Review Committee (DRC) to facilitate finding him a new position which he could perform without overusing his voice. The DRC offered him three positions, one of which was a night shift Senior Customs Broker position. The Applicant claims that he was forced to

take one of these three, or lose his job and that this action was discriminatory. The Respondent stated that he voluntarily accepted that position and began on October 7, 2002. By this time, the pay rate of a Senior Customs Broker had apparently caught up with that of an Operations Support Representative. As a result, his job title was changed to reflect his actual position as a Senior Customs Broker.

[5] On November 30, 2002, the Applicant provided another medical note from Dr. S. Vojvodich, dated November 21, 2002, stating that his vocal cord paralysis had resolved itself (exam had revealed normal, mobile, vocal cords), and that he could return to his previous (day-shift) position.

[6] FedEx offered the Applicant a day-shift Senior Customs Broker position, albeit at a different but nearby location in December 2002. The Applicant did not accept this offer and chose to remain at his night-shift position. In an email, dated January 9th 2003, the Applicant wrote that he had taken "an informed decision" and added "I would like to thank you for being a caring Personnel Rep. within Co.s' policies and practices. I am proud of you too".

[7] One year later, the Applicant requested to follow up through an internal grievance process called the Guaranteed Fair Treatment Procedure (GFT) with regards to his placement on the night-shift as a Senior Customs Broker. The Applicant's request was denied because decisions of the DRC are not subject to the GFT process. The Applicant was advised of another formal process which did apply to his situation, the Open Door, but he did not pursue it.

[8] In an inter-office memo to the Applicant, dated April 29th 2004, P. Starnito, V.P., states that he was disturbed by the admission of the Applicant that he did not have a throat problem. The Applicant denies this statement.

[9] On October 17, 2004, the Applicant was hired for a day-shift Senior Customs Broker, a position for which he had applied.

[10] The Applicant had first contacted the Commission on May 13, 2004. His complaint was formally submitted on November 10, 2004, alleging discrimination on the basis of disability. He also submitted other complaints which were beyond the jurisdiction of the CHRA. He stated in his complaint that he never had a disability and that "having some occasional hoarseness in my voice had no hardship or negative effect on my job performance." He stated that upon getting his "clean bill of health," FedEx refused to reinstate him into his old position, and that they offered him a "downgraded" position instead. He maintains that the position which he accepted in October 2004 was also a downgraded position which involved performing a lot of telephone calls.

[11] The Respondent denies this affirmation, saying that he voluntarily chose the same position he had before at a higher rate of pay than before.

I. Investigators report – November 10, 2004

[12] The investigator summarized the Applicant's complaint and in particular states that on December 21, 2002, his Senior Broker position had been upgraded and was then doing the same job as before, and at the salary grade as the Operation Support Representative.

[13] On October 19th 2004, he successfully bid for a day shift Senior Broker duties and he continues in that function currently.

[14] The Applicant has provided no evidence explaining why there was a delay in filing his complaint with the Commission, except what he had "written" in a letter stating "nobody can expect from me as a rank and file person to be aware of laws and their respective time limits…". The investigator concluded that there was no link between the ground of discrimination relating to the acts which occurred in April and October of 2004, since the Applicant admitted he did not have any disability at that time. He recommended that the complaint not be dealt with because it exceeded the one year time limit set by law.

II. The delay involved

[15] The Applicant's medical examiner's opinion, dated November 30, 2002, writes that the "disability" was resolved. The Applicant's complaint to the commission was filed on November 15th 2004 (i.e. a delay of 23 ½ months).

[16] Section 41 (1)(e) of the Act sets a limit of one year unless a longer record of time is considered appropriate in the circumstances before receipt of a complaint.

[17] The Commission, on the basis of an Investigator's Report, declined to consider the complaint on its merits. The investigator found that the Applicant had been offered a transfer but refused it in December 2002. He noted that the only alleged incidents which could be linked to a CHRA ground of discrimination occurred prior to October 7, 2002. Since this was nearly 2 years prior, and the limitation period for the CHRA is 12 months (although the Commission has discretion to consider events beyond 12 months), the investigator recommended that the Commission dismiss the complaint pursuant to sections 41 and 44 of the CHRA, see below. The Commission exercised this power as recommended.

RELEVANT LEGISLATION

[18] *Canadian Human Rights Act*, R.S. 1985, C. h-6:

Prohibited grounds of discrimination	Motifs de distinction illicite
3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.	3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.
[…]	[…]
7. It is a discriminatory practice,	7. Constitue un acte

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.

[…]

"disability"

"disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug;

[…]

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

[…]

(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.

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.

[…]

«déficience »

«déficience » Déficience physique ou mentale, qu'elle soit présente ou passée, y compris le défigurement ainsi que la dépendance, présente ou passée, envers l'alcool ou la drogue.

[…]

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) 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

[...]

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

[…]

(3) On receipt of a report referred to in subsection (1), the Commission

[…]

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

circonstances.

[…]

44. (1) L’enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l’enquête.

[…]

(3) Sur réception du rapport d’enquête prévu au paragraphe (1), la Commission :

[…]

b) rejette la plainte, si elle est convaincue :

i) soit que, compte tenu des circonstances relatives à la plainte, l’examen de celle-ci n’est pas justifié,

(ii) soit que la plainte doit être rejetée pour l’un des motifs énoncés aux alinéas 41c) à e).

ISSUES

[19] The Applicant raises a number of questions that can be dealt with under the following headings:

(a) What is the standard of review for a decision to dismiss a complaint pursuant to section 44 of the CHRA?

(b) Did the Commission commit a reviewable error in determining that the complaint had been filed beyond the 12-month limit?

(c) If not, did the Commission commit a reviewable error in not using their discretion to consider the complaint notwithstanding that it was filed beyond the limitation period?

(d) Did the Commission breach any principles of fundamental justice?

(a) Standard of Review

[20] The standard of review with respect to section 44 of the CHRA has been discussed at length by the Federal Court of Appeal in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 and more recently by the Federal Court in *Clark v. Canada (Attorney General)*, 2007 FC 9, [2007] F.C.J. No. 20. In both cases, a full pragmatic and functional analysis was completed and the standard of review was determined to be that of correctness.

[21] However, in my opinion, those cases ought to be distinguished. The case at bar deals with a question of fact: whether or not the 12-month time limit had expired. This is squarely within the expertise of the Commission, as is their discretionary power to extend this limit. In contrast,

Sketchley, above, and the cases following it deal with questions of law such as whether or not a *prima facie* case for discrimination was made. In my opinion, *Price v. Concord Transportation Inc.*, 2003 FC 1202, [2003] F.C.J. No. 1202 and more recently in *Thompson v. Canada (Royal Canadian Mounted Police)*, 2007 FC 119, [2007] F.C.J. No. 161, are more appropriate precedents, as they both deal specifically with section 41(1)(c) time limits. These two cases both stand for a standard of review of patent unreasonableness. This is also the position taken by the Respondent. In any case, I think the outcome would be the same even on a more demanding standard of review.

[22] As a result, the standard of review is that of patent unreasonableness. Of course, the third issue in this case is a question of procedural fairness for which no pragmatic and functional approach is necessary: *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195. On issues of procedural fairness, the Court is required only to determine whether the rules and duty of procedural fairness have been followed (see *Ha*, above at para. 44).

(b) Did the Commission err in finding that the complaint had been filed beyond the 12-month limit?

[23] The Applicant submits that the discrimination did not end when he submitted the last medical note, and in fact has been ongoing since then. In a letter to the Commission, he seems to suggest that he was forced to work the night-shift until October, 2004 and that his apparent demotion to daytime Senior Customs Broker demonstrates that the discrimination is ongoing. The Applicant submits that, had the Commission taken the time to interview his witnesses and conduct a full inquiry, they would have understood why the position was a demotion and thus that he had been continually discriminated against.

[24] The Applicant also pled ignorance of time limits in his letter to the Commission:

> …but to a degree that I have been adversely treated despite existing Canadian laws, nobody can expect from me as a rank and file person to be aware of laws and their respective time limits and thus have been able to protect myself."

[25] The Respondent submits that neither the initial decision nor any ongoing behavior could have been considered discrimination. It points out the offer made in December 2004 to place the Applicant in a day-shift position and argues that it was therefore the Applicant's choice to remain on the night-shift. It also disputes the allegation that the position of Senior Customs Broker is a demotion.

[26] Contrary to his allegations, the Applicant was not forced to work the night-shift for 2 years. He was offered a day-shift position with the same title, pay and benefits shortly after he so requested, and he declined that opportunity. The Applicant did not provide any substantive argument as to why the position offered would have been a demotion, as he alleged. The investigator considered all of the submitted facts and concluded that the Applicant's continued position on the night-shift could not be interpreted as discrimination. The investigator committed no error in that assessment.

[27] The investigator also considered two other incidents, an April 2004 meeting and the October 2004 day-shift posting and determined that neither of them was discriminatory in nature. The Applicant had not alleged in his complaint to the CHRA that the April meeting was discriminatory;

he merely complained that its outcome was not favourable to him and that his employer was rude. The contents of this meeting seem to be substantially in dispute, but regardless, the investigator's conclusion that there no discrimination occurred seems clearly not in error.

[28] In his submissions to the Commission, the Applicant stated that his posting in October 2004 "is not proper accommodation because it is a demotion and requires a lot of phone calls." However, the Applicant provided the medical note stating that he had no disability to FedEx in November 2002, and he advised the Commission that his condition had never affected his job performance. Since he was clearly not disabled in 2004, accommodation is not a relevant consideration. Regardless, the Applicant did not put forward any valid argument to explain why this position was a demotion. Nor did he advance any suggestion that perceived disability may have been an issue. The investigator committed no error in concluding that this posting, for which the Applicant himself applied, was discriminatory in nature.

[29] In short, the Applicant did not make any credible argument that any discrimination may have occurred after October 7, 2002. As a result, the Commission was not patently unreasonable in determining that the 12-month time limit began at the latest on October 7, 2002 and thus expired significantly (23 ½ months, without explanation) before his complaint was filed in November 2004.

(c) Did the Commission err in determining that they should not exercise their discretionary power to extend that one-year limit?

[30] The Respondent submits that it was not patently unreasonable for the Commission to decide not to exercise their discretion to consider the merits of this complaint. I agree with this argument. The decision to consider a complaint made beyond the limitation period of the CHRA is one of the utmost discretion. There are no guidelines or provisions established to guide its application. In the face of such great discretion on the part of the Commission, there is no basis for a finding that their decision not to consider the merits of the complaint was patently unreasonable.

(d) Did the Commission breach any duties of procedural fairness?

[31] The Applicant submits that the Commission breached the principles of fundamental justice in failing to interview any person who was vitally connected and/or any person on the Applicant's witness list. The Applicant submits that this could lead to an inference of pre-judgment on the part of the investigator. The Applicant also alleges that the Commission rendered a decision without regard to the evidence before it.

[32] The Respondent submits that there was no such breach. It refers to the following excerpt from *Tse v. Federal Express Canada Ltd.,* [2005] F.C.J. No. 741:

> 19 In the context of the Commission and the exercise of its jurisdiction to consider whether an inquiry is warranted, the Federal Court of Appeal has held that procedural fairness does not require that members of the Commission examine the complete record of the investigation. Instead, they are entitled to rely upon the investigator's report. To this are added at least three requirements.

> 20 First, the investigator who prepares the report must be neutral and thorough. Judicial interference is warranted where an investigator fails, in the words of Mr. Justice Nadon in *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (T.D.) at paragraphs 41 through 60; affirmed (1996), 205 N.R. 383 (F.C.A.), to investigate "obviously crucial evidence". See also: *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113; [2005] F.C.J. No. 543 at paragraph 8 and following.
>
> 21 Second, the Commission is required to inform the parties of the substance of the evidence obtained by the investigator and placed before the Commission. This requirement is met by the disclosure of the investigator's report to the parties. See: *Canadian Broadcasting Corp. v. Paul* (2001), 198 D.L.R. (4th) 633 (F.C.A.) at paragraphs 39 through 44.
>
> 22 Third, the Commission is required to provide the parties with the opportunity to make all relevant representations in response to the investigator's report and to consider those responses when it makes its decision.
>
> [emphasis added]

[33] The Respondent submits that the Commission satisfied all of these criteria.

[34] Again, I think that the Respondent's position is essentially correct. The excerpt from *Tse*, above, applies. The Commission relied on the investigator's report which demonstrated the consideration of multiple submissions made by the Applicant, including his response after the time limit issue was specifically brought to his attention. The report was provided to both parties. The Applicant did send additional comments after receiving a copy of the investigator's report. There is no allegation that the Commission failed to consider those responses.

[35] The Applicant alleged that the investigator failed to consider a number of factors. My analysis follows each of them:

(a) The elapsed time between the act and the date the complaint was filed

[36] The investigator did consider this, as discussed previously in this decision.

(b) The elapsed time between the act and the date that the Respondent was notified of the Applicant's complaint

[37] The Applicant did not explain why this time period (October 7, 2002 to December 20, 2004) might be relevant and there is no obvious reason to consider this as a factor.

(c) The reasons for delay

[38] The only explanation given by the Applicant, for the 23 ½ is his ignorance of the deadlines. The Federal Court and the Federal Court of Appeal have held on a number of occasions that ignorance of the law is no excuse for delay: see for example *Kibale v. Canada (Transport Canada),* [1988] 103 N.R. 387 (F.C.A.); *Mutti v. Canada (Minister of Citizenship and Immigration),* 2006 FC 97 at para. 4.

(d) Case law

[39] The Applicant's counsel relied upon decision in *Katchen v. Canada (Canadian Food Inspection Agency),* 2005 FC 162, [2005] F.C.J. No. 203. In that case, Dr. Katchum had filed a complaint with the Human Rights Commission in July 2003, alleging harassment and

discrimination on the part of co-employees following incidents which occurred in May 2002, and were ongoing.

[40] Justice MacTavish decided that the Commission should not have dismissed the complaint in May 2003, because the events were ongoing.

[41] In *Good v. Canada (Attorney General)*, 2005 FC 1276, [2005] F.C.J. No. 1556, Justice Blanchard dismissed a complaint because it has been lodged two years after the alleged event and the reasons explaining the delay did not justify an exception.

[42] In *Johnston v. Canada Mortgage Housing Corp.*, 2004 FC 918, [2004] F.C.J. No. 1121, the application was dismissed because a delay of three years had elapsed between the alleged incident and the date of the complaint.

[43] Recently, Justice Blais granted the judicial review where the Human Right Commission had refused a complaint about alleged acts and omissions which happened less than a year before the deposit of the complaint, see *Thompson v. Canada (Royal Canadian Mounted Police)*, 2007 FC 119, [2007] F.C.J. No. 161.

[44] It may be useful here to recall the words of Lord Denning in *Kiriri Cotton Co. v. Dewani*, [1960] A.C. 192, at p. 204:

> It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing

> his duty by saying that he did not know the law on the matter. Ignorantia juris neminem excusat.

(e) That there was no prejudice caused to the Respondent;

[45] The investigator specifically reached this as a conclusion in his report. That does not mean that it had to be determinative of the decision. The Applicant provides no evidence that this factor was not considered other than that the final outcome of the decision was not in his favour.

(f) That the Applicant was attempting to exhaust grievance and review procedures within FedEx.

[46] The Applicant provided no evidence of this to the Commission. He did provide evidence that he wanted (in November, 2003) to follow the GFT process regarding his acceptance of the night-shift position, but was told that it did not apply to his situation. He did not make any attempts to pursue the Open Door process. It is not clear what other procedures he may have tried to pursue.

[47] Finally, the Applicant seems to allege bias on the part of the investigator. The test for reasonable apprehension of bias is set out in the Supreme Court of Canada decision in *Committee for Justice and Liberty v. Canada* (*National Energy Board*), [1978] 1 S.C.R. 369, in which Justice De Grandpré stated at page 394:

> …the apprehension of bias must be the reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through -- conclude. Would he think that it is mor likely than not that Mr. Crowe, whether consciously or unconsciously would not decide fairly.

[48] There is simply no evidence in the investigator's report, or any where else, to suggest to a reasonable and right-minded person that the investigator would not decide fairly. Therefore, there is no reasonable apprehension of bias to be found in the investigation or the report.

CONCLUSION

[49] The Applicant argued before the Commission that he was never disabled but that he was discriminated against (by demotion) on the grounds of perceived disability. However, the Applicant did not demonstrate, even *prima facie* that any demotion had occurred and in fact, the Commission found that the last possible discriminatory act occurred in October 2002. This conclusion was not patently unreasonable and, in fact, I would even uphold it on a standard of correctness. The Commission chose not to exercise its discretion to disregard the limitation period, a decision which was entirely within the realm of reasonableness. There was no evidence of any violation of procedural fairness. The evidence showed that the Respondent took reasonable measures to try to accommodate the Applicant's concerns.

[50] In conclusion, I cannot identify any reviewable error in the Commission's decision. This application for judicial review is therefore dismissed.

COSTS

[51] The Respondent has withdrawn its demand for costs if the application was dismissed. Therefore no cost will be awarded.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed without costs.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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