

Date: 20071207

Docket: T-519-07

Citation: 2007 FC 1289

Ottawa, Ontario, December 7, 2007

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MARJORIE WALLACE

Applicant

and

SYMCOR

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, S.C. 2002, c. 8 of a decision of the Canadian Human Rights Commission, dated February 9, 2007, wherein the Commission dismissed the applicant's complaint on the basis that the evidence did not support her allegations and that an inquiry into the complaint was not warranted.

[2] Ms. Wallace represented herself on this application. She describes herself as an African Canadian of Caribbean origin. In 2003 she was employed from an agency for part time work at Symcor, a firm which processes financial transactions, such as cheques, for major Canadian banks.

In August 2004, she was hired on a permanent part-time basis on a 9:00 p.m. to 3:00 a.m. shift. She also worked full-time during the days for a retail company.

[3] Ms. Wallace claims that she was discriminated against at Symcor on the basis of her race or ethnic origin and treated in an adversely differential manner. Her affidavit in this proceeding contains a list of allegedly discriminatory treatment by co-workers and supervisors, which includes comments about her hair, a reference to a colleague's black baby sitter, an alleged incident with a co-worker in traffic, being required to wash dishes after a send-off party, being sent home early and not being transferred into a different department.

[4] In July 2005 Ms. Wallace brought her concerns to the attention of the Chief Executive Officer of Symcor who immediately arranged to have them investigated by senior officers of the company. After some discussion, which did not produce the settlement she was seeking, Ms. Wallace attempted to take short term disability leave. The benefit claim was denied by the insurer as Ms. Wallace apparently failed to provide evidence of a disability and continued to work at her day job. That decision was not appealed. The respondent states that its officers made efforts throughout the summer to resolve the situation. Ms. Wallace did not return to work and her employment was terminated on October 15, 2005 for abandonment of her position.

[5] In September, 2005, Ms. Wallace filed a complaint with the Commission. She alleged discrimination on the basis of race, colour, national or ethnic origin and a failure to provide a workplace free of harassment. Her complaint details many of the same allegations as in her affidavit in the current case, plus claims such as 'physical abuse' suffered by the throwing of elastics and

slapping of backs at her workplace. Mediation was unsuccessful, and an investigator was assigned. The Investigator added discrimination on the basis of disability to the list of complaints to consider, based on a problem which Ms. Wallace says affected her bowels and breath.

[6] Both parties filed responses to the complaint. The Investigator reviewed the allegations of Ms. Wallace in detail and interviewed eight of the ten people mentioned in her complaint, four of whom no longer worked for Symcor. In the end, the Investigator found that there was insufficient evidence to support her claim. There was no evidence provided by Ms. Wallace to establish that she had a disability, for example, and all those interviewed expressed a lack of knowledge of such disability. Ms. Wallace may have expected some of the persons she named to support her claims of discrimination. They did not do so.

[7] The Investigator's report, dated November 14, 2006, was accompanied by an invitation for further submissions to be placed before the Commission alongside the report. The response of Ms. Wallace to the report was filed at the hearing of this matter. The Commission accepted the Investigator's recommendation to dismiss the complaint, and Ms. Wallace filed for judicial review on March 27, 2007.

ISSUES:

[8] The issues raised in this matter are:

1. Has the applicant met her onus of establishing a reviewable error?
2. Was natural justice breached?

RELEVANT STATUTORY PROVISIONS:

[9] Subsections 3 and 4 of section 18.1 of the *Federal Courts Act*, R.S., 1985, c. F-7, read as follows:

<p>18.1 (3) On an application for judicial review, the Federal Court may</p> <p>(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or</p> <p>(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.</p> <p>(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal</p> <p>(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;</p> <p>(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;</p> <p>(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;</p> <p>(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;</p>	<p>18.1 (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :</p> <p>a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;</p> <p>b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.</p> <p>(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :</p> <p>a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;</p> <p>b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;</p> <p>c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;</p> <p>d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;</p>
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(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d’agir en raison d’une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

ANALYSIS:

[10] Procedural fairness is to be assessed with a critical eye. Following a declaration that the review of procedural fairness questions is distinct from those in which the pragmatic and functional test must be applied, Justice Allen M. Linden, in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056, states the following at paragraph 53:

This procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty.

[11] The Commission’s assessment of evidence and evaluation of the need for further investigation, however, is to be accorded deference: *Slattery v. Canada (Human Rights Commission) (T.D.)*, [1994] 2 F.C. 574, [1994] F.C.J. No. 181. The appropriate standard of review for this aspect of the Commission’s decision is reasonableness.

Has the applicant met her onus of establishing a reviewable error?

[12] The onus is on an applicant to show that there exist sufficient grounds under section 18.1 of the *Federal Courts Act* to permit the Court to provide the relief outlined therein. As noted by Justices Louis LeBel and Morris J. Fish in *May v. Ferndale Institution*, 2005 SCC 82, [2005] S.C.J.

No. 84 at paragraph 71, “on judicial review, the onus is on the applicant to demonstrate that the “federal board, commission or other tribunal” has made an error: s. 18.1(4) of the FCA”.

[13] Ms. Wallace appears not to have understood the admittedly technical difference between a judicial review, as in the instant case, and an appeal. As was acknowledged during the hearing she was under the impression that I could examine the evidence that was before the Commission and arrive at a different conclusion as to its significance. My role is to examine the means by which the Commission came to its decision to dismiss the complaint for errors, not to substitute my opinion for that of the Commission or to sit in judgment on the conduct of Symcor or any of its employees while Ms. Wallace worked there.

[14] Ms. Wallace urged the Court to conclude that the Commission erred in not finding that the evidence disclosed subtle forms of racial discrimination which may not have been apparent to other observers, such as the eight persons interviewed. I note that the allegations made by Ms. Wallace in her complaint were of largely of overt not subtle acts of discrimination and that Ms. Wallace claimed in her response to the Investigator’s report that persons interviewed were guilty of fabrication. Ms. Wallace has failed to provide any substantiation of those allegations and has put forward at this review essentially the same evidence as was before the Investigator.

[15] The Commission has expertise in identifying acts of discrimination, both overt and subtle, and is entitled to considerable deference from the Court with respect to its findings of fact in this area. In my view, based on the evidence gathered by the Investigator, the decision not to proceed

with the complaint was reasonable. The applicant has not met her onus of showing some reviewable error and is therefore not entitled to relief on that ground.

Was natural justice breached?

[16] Ms. Wallace alleges that the Commission failed to do a thorough job of investigation; that Symcor was never forthright with the information they provided to the Commission; that Symcor never attempted to resolve the problem; and, that she was never allowed to provide a detailed report of what happened to her at Symcor. When asked at the hearing what it was that she was not allowed to provide she repeated the claims that are contained in her complaint to the Commission.

[17] After some exploration of this question, it appears that Ms. Wallace believes that she was denied fairness because the Investigator did not interview her to draw out more details about her experience at Symcor. The investigation was being conducted at the screening stage of the complaint at which there is no right to an oral hearing: *Grivas v. Air Canada*, 2006 FC 793, [2006] F.C.J. No. 1096.

[18] The applicant also complained during the hearing that the mediation attempted by the Commission was ineffective because she considers that she was not allowed to attempt to negotiate a better settlement from Symcor in that process. That is not a matter properly before the Court on this review.

[19] The duty of fairness owed by the Commission is described in *Slattery* at paragraphs 48 and 49 to include neutrality and thoroughness. A review of the Investigator's report shows that each incident complained of by the applicant was addressed and that the Investigator's findings were fully and clearly set out. There is no evidence that the Investigator was denied access to any information he sought. None of the witnesses interviewed by the Investigator corroborated the applicant's allegations. The Investigator was, on the evidence before me, both neutral and thorough.

[20] Furthermore, the applicant filed her lengthy complaint, took the opportunity to respond to the respondent's submission and also commented on the Investigator's report. She therefore had several opportunities to provide detailed specifics of her claim, which she is now asserting were not granted to her. There is no indication of any action taken by the Investigator or the Commission preventing the applicant from 'doing justice to her case'. Ms. Wallace's contention that she was not allowed to present her full case to the Commission is unfounded on the evidence before me.

[21] Finally, the applicant's assertion that Symcor was not forthright is a serious allegation and one which is unsubstantiated by evidence. Also, the claim that Symcor never attempted to resolve the problem is both unrelated to any proper ground of judicial review and contradicted by both the applicant's affidavit and the documentary evidence. An application for judicial review in this Court is not the appropriate place to address issues between the applicant and Symcor. My role is to assess the procedure of the Commission in coming to its decision, not to reweigh the evidence which was before it.

[22] I find that the applicant has not shown that there was a breach of procedural fairness in the Commission's handling of her case. I will, therefore, dismiss the application.

[23] The respondent has requested costs in order to signal to the applicant that litigation has consequences. I agree that such a gesture is warranted in this matter as the application in my view was without merit. I will impose nominal costs against the applicant in the amount of \$100.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is dismissed. Costs are awarded to the respondent in the amount of \$100.

“Richard G. Mosley”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-519-07
STYLE OF CAUSE: MARJORIE WALLACE
AND
SYMCOR

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: December 5, 2007

REASONS FOR JUDGMENT: MOSLEY J.

DATED: December 7, 2007

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