

Date: 20080506

Docket: T-1206-07

Citation: 2008 FC 576

Ottawa, Ontario, May 6, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ANDY KHANNA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Canadian Human Rights Commission decided not to deal with a portion of Andy Khanna's human rights complaint against his former employer, the Canadian Border Services Agency, because it concluded that part of the complaint was based on acts which occurred more than one year before the filing of the complaint.

[2] For the reasons that follow, I am satisfied that the Commission's decision was unreasonable. As a consequence, the application for judicial review will be allowed.

Background

[3] On June 20, 2004, Mr. Khanna began working as a Customs inspector with the CBSA. He was hired on a one-year term contract.

[4] Mr. Khanna alleges that in the course of his employment, he was subjected to ongoing and continuous harassment and discrimination from his colleagues and superiors, because of his national or ethnic origin and his perceived sexual orientation. Mr. Khanna's complaint also alleges discrimination on the basis of disability.

[5] In particular, Mr. Khanna's complaint refers to a series of events, many of which involved either a CBSA Superintendent or an Inspector, both of whom are named as individual respondents in his human rights complaint.

[6] The first of the events specifically identified in the complaint allegedly took place on July 9, 2004. According to the complaint, the discriminatory conduct continued up until June 20, 2005, when CBSA informed Mr. Khanna that he would not be offered a new contract.

[7] Mr. Khanna first contacted the Canadian Human Rights Commission with respect to his allegations against the CBSA on May 16, 2006. He did not, however, file his formal complaint with the Commission until September 1, 2006.

[8] Mr. Khanna has suffered from depression since 2000. He asserts that his depression worsened as a result of the treatment to which he was subjected at the CBSA, which negatively affected his ability to pursue his human rights complaint. In support of his claim, he provided the Commission investigator with medical evidence indicating that Mr. Khanna was incapacitated for a period of time after the termination of his employment with the CBSA.

The Commission Investigation

[9] Mr. Khanna's human rights complaint was not filed until approximately 14 months after he left his employment with the CBSA. Section 41(1)(e) of the *Canadian Human Rights Act* allows the Commission to decline to deal with human rights complaints, where the complaint in question is based on acts or omissions the last of which occurred more than one year before receipt of the complaint.

[10] As a result, after receiving Mr. Khanna's complaint, the Commission carried out a "section 41 investigation", to assist the Commissioners in deciding whether or not to exercise their discretion to deal with the complaint.

[11] After consulting with Mr. Khanna and the CBSA, the investigator prepared a brief report, which concluded with the recommendation that the Commission not deal with events occurring between the commencement of Mr. Khanna's employment in June of 2004, and April of 2005. The investigator did, however, recommend that the Commission deal with allegations relating to May and June of 2005.

[12] This recommendation was subsequently accepted by the Commission. In its May 24, 2007 decision letter, the Commission stated that the Commission would not deal with the allegations relating to the period between June of 2004 and April of 2005 because “the[y] are based on acts which occurred more than one year before the filing of the complaint”. With respect to the allegations relating to the period in May and June of 2005, the Commission said that it would deal with these allegations because “it appears that the complainant was unable to pursue the complaint for reasons related to his health”.

[13] Given the cursory nature of Commission decisions, investigation reports must be read as the Commission’s reasons: see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at ¶ 37.

[14] In this regard, the operative portion of the investigation report provides that:

10. The documentation shows that the alleged acts took place from July 2004 to April 2005, and from May 2005 to June 2005. The complainant initially contacted the Commission [on] 16 May 2006 and the complaint was accepted [on] 01 September 2006. Allegations in time could date back to 16 May 2005.

11. The evidence supports that the allegations from July 2004 to April 2005 fall outside of the one year time limit. Medical documentation does not support that the complainant was unable to deal with his complain[t] during this time. Evidence does show that the complainant was able to consult with his Union and file a grievance as required in June 2005.

12. Medical documentation submitted does support that the complainant may have been ‘incapacitated’ and unable to deal with his complaint during the Fall of 2005 and therefore further inquiry may be

warranted into the allegations from May 2005 to June 2005.

Standard of Review

[15] Mr. Khanna argues that the Commission does not have the jurisdiction to ‘sever’ complaints. That is, he contends that, as a matter of law, it was not open to the Commission to decide to deal with part of his complaint, and not to deal with the rest of the complaint. As a question of law, Mr. Khanna says that the Commission’s decision is reviewable against the standard of correctness.

[16] However, in argument, Mr. Khanna conceded that complaints could be severed in certain circumstances, that is, where different aspects of the complaint dealt with different time periods, and involved different people. As a consequence, it appears that what Mr. Khanna really takes issue with is the Commission’s determination as to when the limitation period started to run, and how the Commission exercised its discretion in this case.

[17] Prior to the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, a determination as to when the limitation period contained in section 41 of the *Canadian Human Rights Act* started to run was subject to review on the standard of reasonableness *simpliciter*, whereas the exercise of the Commission’s discretionary power to extend the time limit was reviewable against the standard of patent unreasonableness: see, for example *Bredin v. Canada (Attorney General)*, 2006 FC 1178, at paragraph 47.

[18] However, as a result of *Dunsmuir*, there are now only two standards of review: reasonableness and correctness. According to *Dunsmuir*, a reviewing Court must go through a two-stage analysis in order to ascertain which of these standards should apply in a given case.

[19] Firstly, the Court must determine whether the degree of deference to be accorded to the type of question in issue has already been identified by the jurisprudence. If this has been done, it is not necessary to carry out a complete standard of review analysis.

[20] Where, however, no such an analysis has previously been carried out, the second stage of the inquiry requires that the Court consider the traditional standard of review factors. These are the presence or absence of a privative clause, the purpose of the decision-maker in question, the nature of the question at issue, and the relative expertise of the decision-maker: see *Dunsmuir* at paragraphs 57, 62, and 64.

[21] There has been no post-*Dunsmuir* judicial consideration of the standard of review to be applied to Commission decisions taken under section 41 of the *Canadian Human Rights Act*. However, *Dunsmuir* teaches that where the question in issue involves the exercise of discretion, deference will usually apply automatically, and the standard of review will generally be one of reasonableness: see *Dunsmuir* at paragraphs 51 and 53.

[22] Moreover, a review of the four factors relevant to the standard of review analysis leads to a similar conclusion.

[23] In this regard, it should be observed that there is no privative clause in the *Canadian Human Rights Act*, nor is there any statutory right of appeal. A decision whether to extend the time limits to deal with a complaint has a significant factual component to it, and, as noted above, involves the exercise of discretion. While the purpose of the legislation is to give effect to the fundamental Canadian value of equality, the Act grants the Commission a remarkable degree of latitude when it is performing its screening functions. Finally, while the Commission has considerable expertise in human rights matters, and in balancing the competing interests of the parties to a complaint, it has no greater expertise than the Court in ascertaining when a limitation period starts to run.

[24] Taking the relevant factors into account, I am satisfied that both the Commission's determination as to when the limitation period started to run, and the exercise of the Commission's discretionary power to extend the time limit are reviewable under the reasonableness standard.

[25] In reviewing a decision against the reasonableness standard, a reviewing court must consider the justification, transparency and intelligibility of the decision-making process. The Court must also consider whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and law: see *Dunsmuir* at paragraph 47.

[26] Mr. Khanna also argues that the Commission's section 41 investigation was not sufficiently thorough. In light of the Court's conclusion on the first issue, it has not been necessary to address this argument.

Analysis

[27] There are several reasons why I have found that the Commission's decision not to exercise its discretion to consider the portions of Mr. Khanna's human rights complaint relating to the period before May of 2005 to be unreasonable.

[28] The first of these concerns the investigator's finding at paragraphs 3 and 10 of the investigation report that the complaint involved two discrete periods - that is the period from July of 2004 to April of 2005, and a second period from May to June of 2005. A review of the complaint form discloses an alleged pattern of abusive behaviour involving certain named employees of the CBSA, which is said to have continued throughout the duration of Mr. Khanna's employment.

[29] The investigator has provided no explanation for the finding that the complaint involved two distinct time periods, and it is not apparent on the face of the record how this conclusion was arrived at. As a consequence, the decision lacks the justification, transparency and intelligibility required of a reasonable decision.

[30] The second problem with the decision is the investigator's focus on Mr. Khanna's capacity to file a human rights complaint during the time that he was employed by CBSA. This is reflected at paragraph 11 of the investigation report, where the investigator observes that:

The evidence supports that the allegations from July 2004 to April 2005 fall outside of the one year time limit. Medical documentation does not support that the complainant was unable to deal with his complain[t] *during this time*. Evidence does show that the complainant was able to consult with his

Union and file a grievance as required in June 2005.
[Emphasis added]

[31] With respect, the question to be determined was not whether Mr. Khanna had been able to file a complaint with respect to the conduct that he was allegedly experiencing in the workplace while it was ongoing. Rather, the investigator was required to consider Mr. Khanna's capacity to pursue the matter in the period from the date of the last incident complained of, namely June of 2005, and September 1, 2006, which was the date on which the complaint was actually filed with the Commission.

[32] The final problem is the investigator's finding at paragraph 10 of the investigation report that "Allegations in time could date back to 16 May 2005".

[33] Section 41(1)(e) of the *Canadian Human Rights Act* requires that the Commission deal with human rights complaints, unless a complaint is based on acts or omissions *the last of which* occurred more than one year before receipt of the complaint. In such cases, it is up to the Commission to decide whether to extend the time limit. If allegations relating to events allegedly occurring on or after May 16, 2005 were "in time", as the investigator has found, then it would follow that the whole complaint should have been dealt with, as the last several events complained of occurred "in time".

[34] In light of the foregoing findings, the Court is satisfied that the decision under review was unreasonable. As a consequence, the application for judicial review is allowed, with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, with costs. The May 24, 2007 decision of the Canadian Human Rights Commission is set aside, and the matter is remitted to the Commission for re-determination in accordance with these reasons.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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THE ATTORNEY GENERAL OF CANADA

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