

Federal Court



Cour fédérale

Date: 20090827

Docket: T-985-08

Citation: 2009 FC 851

Ottawa, Ontario, August 27, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

THE CANADA REVENUE AGENCY

Applicant

and

KATHERINE MCCONNELL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 18(1) of the *Federal Courts Act*, R.S. 1985, Chap. F-7, for judicial review of a decision of the Canadian Human Rights Commission (the Commission) dated April 9, 2008 to exercise its discretion to extend the one year limitation set out in paragraph 41(1)(e) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 and deal with complaints 20041466 and 20050312.

[2] The applicant, Canada Revenue Agency (CRA) applies for:

1. An order that the Commission's decision be set aside and for the same matter to be referred back to the Commission to be determined in accordance with directions.
2. An order for the costs of this application.

[3] The grounds for judicial review in this application are that the Commission made the following errors in exercising its discretion to extend the period of time for filing complaints 20041466 and 20050312:

1. The Commission erred in law in failing to consider all of the relevant factors;
2. The Commission erred in law in considering irrelevant factors; and
3. The Commission 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.

It is also alleged that in light of all the evidence before the Commission, the decision to extend the time was unreasonable.

Background

[4] Katherine McConnell filed a complaint (Complaint No. 20000775) on November 18, 2000, against what was formerly called the Canada Customs and Revenue Agency (CCRA), now the Canada Revenue Agency (CRA), alleging discrimination on the basis of race, national/ethnic origin and disability, all in contravention of the *Canadian Human Rights Act*, R.S.C. 1985 c. H-6 (the Act).

[5] This complaint (the first complaint) was investigated and dismissed by the Commission in December of 2002. Ms. McConnell sought leave for judicial review of the Commission's decision. This Court dismissed her application for judicial review on June 8, 2004 (*McConnell v. Canada (Canada Human Rights Commission)*, [2004] F.C.J. No. 1005) and leave was not granted to appeal before the Federal Court of Appeal in 2005.

[6] On December 7, 2004, Ms. McConnell filed two further written complaints (Complaint Nos. 20041466 and 20050312 or the complaints). The complaints allege discrimination on the basis of disability, sex and race arising from two incidents of alleged sexual harassment.

[7] The alleged conduct of Complaint No. 20041466 occurred from December 1997 to September 2002. The alleged conduct of Complaint No. 20050312 occurred from March 1999 to September 2002.

[8] On June 8, 2005, the Commission dismissed Ms. McConnell's complaints on the basis that they were out of time pursuant to paragraph 41(1)(e) of the Act. Ms. McConnell applied for leave to judicially review this decision to the Federal Court.

[9] On May 17, 2007, Mr. Justice Martineau allowed Ms. McConnell's appeal in part. He upheld the Commission's decision that the complaints were made outside the one year limitation period set out in the Act. He concluded, however, that the Commission did not consider whether the

one year time period should be extended. The matter was sent back to the Commission to determine:

1. Whether it should exercise its discretion to extend the time period; and if so;
2. Whether it should only investigate the new allegations pertaining to sexual harassment, retaliation and employment termination.

Commission's Decision:

[10] On May 20, 2008, the Commission informed Ms. McConnell of its decision to hear the complaints outside of the one year limitation period set out in the Act. The Commission also found that allegations made in the first complaint would not be included in the second hearing as they had already been dismissed in 2002. The Commission decided that it would only investigate new allegations pertaining to sexual harassment, retaliation and employment termination.

[11] In making its decision to extend the one year deadline set out in paragraph 41(1)(e) of the Act, the Commission considered the following factors:

1. What is the nature and seriousness of the issues raised by the complainant?
2. How is the public interest affected by the issues raised in the complaint?
3. Was the complainant's initial contact with the Commission within one year of the last alleged discriminatory practice?
4. How long is the delay (both the overall delay and the delay in filing after initial contact with the Commission)?

5. What are the reasons for the delay in filing a complaint?
6. Was the delay within the complainant's control?
7. Did the CRA have notice of the complainant's intention to file a complaint, or was the CRA made aware of the complainant's allegations at an earlier date?
8. Will the CRA's ability to defend the complaint be seriously prejudiced, for example, by the destruction of documents or the death of key witnesses, if the complaint proceeds?

[12] The Commission concluded that in consideration of these factors and the material before them, "... the Complainant has provided persuasive and compelling reasons for the Commission to exercise discretion to extend the time for the filing of the within complaints".

[13] The Commission added that "[a]llegations of sexual harassment, termination of employment based on prohibited grounds, and retaliation are, of course, very serious allegations and no issue is raised by the Respondent as to this."

[14] The Commission stated that CRA's argument that they would be prejudiced was not strong enough in the face of serious allegations and "the fact that the individuals were questioned by the police as to the allegations, the matter was raised in a lawsuit by amendment in 2003, and in the complaints filed in 2004..." suggested to the Commission that the individuals involved have had the allegations in front of them "on many occasions over the years, and the likelihood of 'serious prejudice' due to fading memories is not strong enough to cause the Commission not to exercise its discretion".

[15] The Commission acknowledged the CRA's concern that there are some employees who have retired or left their employment that are involved in the allegations involving termination of employment and retribution. However, the Commission maintained that the CRA will not be 'seriously prejudiced' to the extent that they should not exercise their discretion in this manner.

[16] The Commission states that the CRA was "well aware" of the allegations against it and the CRA has not suggested otherwise.

[17] The Commission stated that Ms. McConnell raised "new or further" allegations on a "regular and continuous" basis with the Commission. Some of these allegations were added to the first complaint but many were not and survived the first complaint's dismissal.

Issues

[18] The CRA raises the following issues:

1. Did the Commission commit an error of law by failing to consider relevant factors when determining whether it would exercise its discretion to hear the complaints outside the one year limitation period prescribed by paragraph 41(1)(e) of the Act?

2. In the alternative, was the 2008 decision unreasonable?

[19] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Commission commit a reviewable error when it chose to exercise its discretion to hear the complaints outside the one year limitation period prescribed by paragraph 41(1)(e) of the Act?

CRA's Submissions

[20] The relevant statutory framework for the filing of complaints includes the granting of discretion to accept complaints made beyond the one year limitation. Section 40 of the Act states that “an individual who has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file a complaint with the Commission”. Paragraph 41(1)(e) then states that “the Commission shall deal with any complaint filed unless it appears that the complaint is based on acts or omissions 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”.

[21] The standard of review, according to the CRA, is reasonableness because determinations under paragraph 41(1)(e) are discretionary in nature. However, the CRA contends that “if in the course of making its decision under paragraph 41(1)(e) the Commission commits an error of law, the decision becomes subject to the correctness standard”.

[22] The CRA submits that the Commission did commit an error of law when it failed to apply the necessary legal criteria when considering whether to extend the one year time period. For this reason, the CRA submits, correctness is the appropriate standard of review.

[23] The CRA submits that an error of law is committed when a tribunal fails to consider “main relevant factors” (see *Canada (Dir. Of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748 at paragraphs 23 to 41 and *Via Rail Canada Inc., v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25 (F.C.A.)).

[24] The CRA cites *Bredin v. Canada*, 2006 FC 1173, [2006] F.C.J. No. 1478 and *Canada (Canadian Human Rights Commission) v. Canadian Broadcasting Corp. (re: Vermette)*, [1996] F.C.J. No. 1274 for authority that the Commission must consider the reasons for the complainant’s delay, whether the delay was incurred in good faith and prejudice caused the delay. There is a further requirement for the Commission to make findings of fact with respect to the reasonableness of the complainant’s explanations for the delay (see *Richards v. Canada*, [2008] F.C.J. No. 989).

[25] The CRA submits that the Commission informed Ms. McConnell before she submitted her arguments that it would be considering the issue of delay.

[26] The CRA states that the Commission did not actually undertake any consideration of the reasons for Ms. McConnell’s delay in filing her complaints, although the Commission gave detailed reasons for “why there was no good reason for [Ms. McConnell’s] delay. The CRA also submits

that the Commission did not consider any delay issue that had been written in the reports or recommendations of the investigators at the Commission.

[27] The CRA also submits that the Commission did not consider the extent of the delay or the reason for the delay.

[28] In addition, the CRA submits that the decision “appears to be based on a conclusion that the complaints may have been made on time” as a continuous complaint by Ms. McConnell.

[29] The CRA submits that this is contrary to the finding of the Commission in dismissing the first complaint and contrary to the evidence of the Commission’s investigator, Jacinta Belanger, who stated that Ms. McConnell did not raise the issue of sexual harassment in the first complaint. It is also contrary to the evidence of Ms. McConnell who stated in an affidavit that the letters she sent in the first complaint did not refer to sexual harassment. The CRA states that the evidence indicates that the complaints of sexual harassment were first brought to the Commission’s attention when she filed the second complaints in December of 2004.

[30] The CRA also submits that the Commission’s decision is contrary to Mr. Justice Martineau’s 2007 order. In Mr. Justice Martineau’s order, the complaints were found to be out of time but the decision to extend was to be re-examined by the Commission. The CRA submits that the Commission extended the time on the basis that the complaints were made on a timely basis and were as such *res judicata* and outside the jurisdiction of the Commission.

[31] The CRA states that making complaints to various venues does not absolve Ms. McConnell from the need to file with the Commission on a timely basis.

Ms. McConnell's Submissions

[32] Ms. McConnell submits that the decision of the Commission was just and reasonable as, in exercising its discretion; it considered all of the relevant factors.

[33] Ms. McConnell submits that the very fact that she was pursuing her complaints in a number of forums suggested that she intended to pursue these allegations at the Commission as recognized in the decision.

[34] Further, Ms. McConnell submits that the Commission recognized the pattern of continuing to notify the Commission of new and further allegations, some of which were in the first complaint and some of which were not. In fact, some of the allegations were not included in the first complaint despite the efforts of Ms. McConnell to have them included.

[35] Regarding the issue of “serious prejudice” to the CRA, Ms. McConnell submits that the Commission was reasonable. While the Commission recognizes this issue as a significant one, it notes that the seriousness of the allegations warrant exercising their discretion in this case.

[36] Ms. McConnell submits that although the CRA suggests that prejudice will occur because some individuals have left their employment or retired, the CRA admits that the relevant individuals are nevertheless available. Ms. McConnell states that in addition, no records have been destroyed and the seriousness of these allegations suggests that these issues have not faded over time in the minds of the individuals involved.

[37] Finally, Ms. McConnell states that the Commission did take into account the delay and reasons for the delay, and points out that the CRA was well aware of the allegations being made at the Commission and other venues.

Analysis and Decision

Issue 1

What is the appropriate standard of review?

In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Supreme Court of Canada stated at paragraph 62:

In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[38] In this category of question, namely administrative decisions at the Commission regarding one-year limitation periods under paragraph 41(1)(e) of the Act, jurisprudence has already

determined in a satisfactory manner the degree of deference to be accorded. In *Richard v. Canada (Treasury Board)*, [2008] F.C.J. No. 989, Mr. Justice Martineau states:

10. The impugned decision not to deal with the applicant's complaint is reviewable on the reasonableness standard: *Khanna v. Canada (Attorney General)*, 2008 FC 576, [2008] F.C.J. No. 733 (QL), at paragraph 24. In so doing, the Court must consider the justification, transparency and intelligibility of the decision-making process: *Dunsmuir v. New-Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, at paragraph 47 (*Dunsmuir*).

11. Indeed, the Commission's decision to dismiss complaints under section 41 of the CHRA should be subject to closer review than decisions to refer complaints to the Canadian Human Rights Tribunal: *Larsh v. Canada (Attorney General)*, [1999] F.C.J. No. 508 (QL), at paragraph 36 (*Larsh*). As stated by Justice Evans (as he then was) in *Larsh*: "[a] dismissal is, after all, a final decision that precludes the complainant from any statutory remedy and, by its nature, cannot advance the overall purpose of the Act, namely protection of individuals from discrimination, but may, if wrong, frustrate it."

[...]

13. In this regard, reasons for a decision ensure a "fair and transparent decision-making", reduce "to a considerable degree the chances of arbitrary or capricious decisions", reinforce "public confidence in the judgment and fairness of administrative tribunals" and "foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraphs 38 and 39.

[39] The CRA suggests that if in the course of making its decision under paragraph 41(1)(e) the Commission commits an error of law, the decision becomes subject to the correctness standard. Then the CRA suggests that the Commission did commit an error of law when it failed to apply the necessary legal criteria when considering whether to extend the one year time period, and as such,

correctness is the appropriate standard of review. This is not in accordance with the standard of review laid out in *Dunsmuir* above. Questions of mixed law and fact, as is the case in this judicial review, are reviewable on a standard of reasonableness *Dunsmuir* above.

[40] **Issue 2**

Did the Commission commit a reviewable error when it chose to exercise its discretion to hear the complaints outside the one year limitation period prescribed by section 41(1)(e) of the Act?

The CRA submits that the Commission did not consider all the relevant factors in exercising its discretion under paragraph 41(1)(e). *Richards* above, however, points out that there are no specific criteria for exercising discretion under this section:

8 As can be seen, paragraph 41(1)(e) of the CHRA does not specify the criteria for exercising the discretion to extend the one-year time limit. Therefore, it is left to the Commission to devise any relevant criteria pertaining to the exercise of its discretion. According to the jurisprudence, the criteria used by the Commission may be similar, albeit not identical, to the criteria used by the courts: "[a]mong these, particularly, whether the delay was incurred in good faith and the weighing of any prejudice or unfairness to the respondent caused by the delay" (*Bredin v. Canada (Attorney General)*, [2006] F.C.J. No. 1478, 2006 FC 1178, at paragraph 51) (*Bredin*). This supposes that findings of fact are to be made by the Commission with respect to the good faith of the complainant, the reasonableness of her or his explanations for the delay, and/or the existence of some harm or prejudice caused to the respondent by the delay.

9 Each request for an extension of the time limit must be assessed by the Commission on its own merits. The particular weight to be given to any relevant factor may vary from case to case. Further, the list of factors or criteria to extend the time limit is not exhaustive. The length of the delay and the particular nature of the allegation of discrimination (*i.e.*, whether it is exceptional or not and whether it was isolated or continuous), combined with the

fact that the complainant is acting in good faith and is not bringing a trivial, frivolous or vexatious complaint, may also be relevant considerations in the Commission's exercise of its discretion to extend the one-year delay. Considering the objectives of the CHRA and the possible harm and prejudice that may be caused to victims of discrimination, a lengthy delay in bringing a complaint may not, in and of itself, constitute reasonable grounds to refuse to extend the one-year time bar. This is especially so if, for example, the complainant has a reasonable explanation for the delay or the respondent will not suffer any prejudice.

[41] I am satisfied that the Commission considered the salient issues in its decision to exercise discretion including the length of the delay and the particular nature of the allegation as well as the issue of prejudice to the CRA and that its decision had the “justification, transparency, and intelligibility” required of the reasonableness standard set out in *Dunsmuir* above.

[42] I find it is reasonable that the Commission found that ‘serious prejudice’ would not occur. It was not the case that these complaints came to the attention of the CRA years after they happened. Ms. McConnell filed a number of allegations with the Commission. The CRA has been aware of these allegations and the various venues Ms. McConnell engaged to seek redress for her alleged complaints.

[43] The CRA submits that the Commission erred in making a decision based on a belief that the complaints were not outside the one year limitation period but complaints that have existed on a continuous basis with the Commission. The Commission stated, however, that:

Upon considering all of the material before it, and the foregoing factors, the Commission determines that the Complainant has

provided persuasive and compelling reasons for the Commission to exercise its discretion to extend the time for the filing of the within complaints.

[44] I cannot agree that the Commission was not exercising its discretion. While the Commission may have also suggested that there were allegations that were never included in the first complaint and as such, survived the dismissal based on a one year limitation period in the first complaint, it nevertheless regarded the allegations as requiring an exercise of discretion in this manner.

[45] In *Larsh v. Canada (Attorney General)*, [1999] F.C.J. No. 508 at paragraph 36, Mr. Justice Evans articulates the importance of this analysis:

[a] dismissal is, after all, a final decision that precludes the complainant from any statutory remedy and, by its nature, cannot advance the overall purpose of the Act, namely protection of individuals from discrimination, but may, if wrong, frustrate it.

In this case, it was reasonable of the Commission to use its discretion, given its mandate to address discrimination, so that the serious allegations made by Ms. McConnell are addressed before the tribunal.

[46] I would therefore not allow the judicial review on this ground.

[47] The application for judicial review is dismissed with costs to the respondent, Katherine McConnell.

JUDGMENT

[48] **IT IS ORDERED that** the application for judicial review is dismissed with costs to the respondent, Katherine McConnell.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

Canadian Human Rights Act, R.S. 1985, C. H-6

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

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.

2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées 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, la déficience ou l'état de personne graciée.

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.

...

10. It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(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.

...

40.(1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

...

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 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.

...

40.(1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

...

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

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(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.

...

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 :

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

c) la plainte n'est pas de sa compétence;

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

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 circonstances.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-985-08

STYLE OF CAUSE: THE CANADA REVENUE AGENCY
- and -
KATHERINE MCCONNELL

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: March 10, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: August 27, 2009

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