Federal Court  Cour fédérale

Date: 20120330

Docket: T-38-11

Citation: 2012 FC 378

Ottawa, Ontario, March 30, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

ALI TAHMOURPOUR

Applicant

and

ATTORNEY GENERAL OF CANADA (ON BEHALF OF THE ROYAL CANADIAN MOUNTED POLICE)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Ali Tahmourpour, seeks judicial review of a decision of the Canadian Human Rights Tribunal (the Tribunal), dated December 13, 2010. The Tribunal found that there were no facts, reasons or causal connection that would justify a particular remedial order and the continuation of compensation for lost wages beyond the grace period of two years and twelve weeks (2010 CHRT 34).

I. Background

[2] The Applicant is a Canadian citizen of Iranian origin and Muslim faith. In 1999, he was dismissed from the Royal Canadian Mounted Police (RCMP) as a training cadet after being subjected to racist jokes and verbal abuse.

[3] He brought a human rights complaint against the RCMP claiming that he had been unfairly evaluated and terminated for discriminatory reasons related to his race, ethnicity and religion contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *Act*). Although the Commission initially dismissed the complaint, the Federal Court of Appeal remitted the matter back for re-determination in 2005 (see *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113, [2005] FCJ no 543).

[4] In a decision dated April 16, 2008, the Tribunal found that the Applicant had been terminated from the RCMP for discriminatory reasons (2008 CHRT 10). It also ordered several remedies, including:

> (iii) The Respondent shall pay Mr. Tahmourpour compensation for salary and benefits he lost for the first 2 years plus 12 weeks of work as an RCMP officer after graduating from the Depot. The compensation shall be discounted by 8%;
>
> (iv) The Respondent shall pay Mr. Tahmourpour the difference between the average full time industrial wage in Canada for persons of his age, and the salary that he would have earned as an RCMP officer until such time as Mr. Tahmourpour accepts or rejects an offer of re-enrollment in the training program at Depot. The Respondent shall compensate Mr. Tahmourpour for the average amount of overtime paid to other constables who graduated from Depot in 1999, unless otherwise agreed upon by the parties. The compensation shall be discounted by 8%;

[5] The Respondent's application for judicial review of the decision was allowed by Justice Russel Zinn of this Court (see *Tahmourpour v Canada (Royal Canadian Mounted Police)*, 2009 FC 1009, [2009] FCJ no 1220). On appeal from the Applicant, however, Justice Zinn's judgment was overturned with the exception of the "question of the cap or limitation on the top-up portion of the compensation award" as provided in remedial order (iv) (*Tahmourpour v Canada (Royal Canadian Mounted Police)*, 2010 FCA 192, [2010] FCJ no 877). Justice Karen Sharlow, writing for the Court of Appeal, provided at paragraph 49 that "this matter is referred back to the Tribunal for reconsideration of the first sentence of item (iv) of paragraph 267 in accordance with the reasons for judgment of the Federal Court of Appeal in A-453-09." She summarized her reasons for doing so as follows:

> [44] It is not clear from the record whether the second time period has ended, or when it is likely to end. If this part of the remedy is read literally and Mr. Tahmourpour simply declines to accept or reject an offer of re-enrolment, the second time period may never end unless, as counsel suggested at the hearing of this appeal, the offer of re-enrolment is made subject to a condition that it must be accepted within a stipulated time or be deemed to have been rejected.
>
> […]
>
> [46] [...] It is necessary to take into account Mr. Tahmourpour's obligation to mitigate his losses. Mr. Tahmourpour did not make sufficient efforts to minimize his losses from the time he left the Depot until the commencement of the hearing. However, from 2000 to 2002, it was difficult for him to work because of the psychological impact of his experiences at the Depot, and because of the time necessarily spent by him on his complaint. On that basis, the "grace period" was established at 2 years and 12 weeks. However, Mr. Tahmourpour could have been gainfully employed after that time.
>
> [47] As I understand the Tribunal's decision, there were no other facts that were taken into account in determining the amount of the monetary compensation awarded to Mr. Tahmourpour. I am unable

> to discern from the Tribunal's decision why the Tribunal chose, as the end point of the second time period, the date on which Mr. Tahmourpour accepts or rejects an offer of re-enrolment, as opposed to an earlier fixed date. I agree with the judge that the Tribunal did not put its mind to the question of when, after the end of the grace period, the discrimination suffered by Mr. Tahmourpour ceased to have an effect on his income earning capacity. In the absence of an explanation from the Tribunal, that part of the Tribunal's award providing for the top-up cannot be found to be reasonable.
>
> [48] […] In my view, the question as to what cap or other limitation should be placed on the top-up is a question that must be answered by the Tribunal. Therefore, I would return this matter to the Tribunal only for the purpose of considering the imposition of a cap or limitation on the top-up.

[6] In light of the Federal Court of Appeal's decision, the Director, Registry Operations of the Tribunal, in a letter dated September 29, 2010, issued the following direction:

> The parties are invited to provide written submissions to the Tribunal by Tuesday, October 19, 2010 on the issue of how to proceed with this matter. The Tribunal requests that submissions and supporting authorities be provided in duplicate, with authorities highlighted or page numbers referenced. Once we receive the parties' submissions, the Tribunal will thereafter review the need for a scheduled Case Management Conference Call regarding this matter.

[7] In response, Applicant's counsel requested that the Tribunal Member who originally heard the case hear the issue. He stated that the "parties could file brief submissions and make oral arguments before Ms. Jenson and this matter could be concluded expeditiously and fairly, hopefully bringing an end to a legal odyssey that has lasted a decade."

[8] While counsel for the Respondent reserved the right to make further submissions on any new issues arising from the Applicant's submissions, she took the position that "[n]o new or further evidence is required nor appropriate, as this determination was required to be made at the time on

the record as it then stood. Therefore there is no merit or benefit to having a hearing to call evidence on this issue."

[9] In a letter dated November 25, 2010, the Tribunal informed the parties that the Member who originally heard the case was not available and the matter had been assigned to Tribunal Member Wallace Craig. This Member would review the material submitted and "thereafter issue directions and/or a ruling on how to proceed."

[10] Tribunal Member Craig released his final decision regarding remedial order (iv) as directed by the Federal Court of Appeal on December 13, 2010 without any further communication with counsel for the parties. This decision is now before the Court.

II. Decision Under Review

[11] Beginning with the decision of the Federal Court of Appeal, the Tribunal reviewed the determinations in relation to the remedy. For example, it considered the conclusions of Justice Sharlow that the "top-up" in remedial order (iv) be reviewed by the Tribunal to impose a cap or other limitation.

[12] It also noted the comments of Justice Zinn in the Federal Court decision regarding the determination in *Morgan v Canada (Canadian Armed Forces)*, [1992] 2 FC 401 (CA) that an error resulted from the failure to establish a cap or cut-off point for the compensation period independent of the reinstatement order.

[13] Considering the factual findings in the Tribunal's decision, Member Craig referred to Mr. Tahmourpour's weak evidence in attempting to minimize his losses, his lack of real efforts to pursue gainful employment and that he could have been gainfully employed until the present time as there was no permanent damage to his ability to work.

[14] The Tribunal recognized that there was some inconsistency in its previous reasons regarding the time period for which Mr. Tahmourpour was to be compensated. While the Tribunal initially required the RCMP to pay the "top-up" from the end of the "grace-period" until the date of her decision, the remedial order required the "top-up" to be paid until such time as Mr. Tahmourpour accepted or rejected an offer of re-enrollment in the RCMP training program.

[15] At paragraph 9 of its reasons, the Tribunal therefore concluded:

> Bearing in mind the decisions of the Federal Court of Appeal in *Morgan* and *Chopra*, and having examined the judgment of the Tribunal on this issue, in particular the Tribunal's findings that Mr. Tahmourpour could have been gainfully employed from the time of the expiry of the "grace period" until the date of the Tribunal's decision, that there was no evidence that the discriminatory conduct caused any permanent damage to Mr. Tahmourpour's ability to work, and that Mr. Tahmourpour did not make sufficient efforts to minimize his losses, I am unable to identify any facts, reasons or causal connection that would justify remedial order (iv) and the continuation of compensation for lost wages beyond the grace period of two years and twelve weeks.

III. Issues

[16] This application raises the following issues:

(a) Did the Tribunal breach natural justice or procedural fairness by making a determination without giving the parties an opportunity to make further submissions?

(b) Did the Tribunal err in law by finding that the Applicant was not entitled to loss of income compensation beyond the two years and twelve weeks he was awarded in lost wages?

IV. Standard of Review

[17] As determined in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43, issues of natural justice and procedural fairness require the correctness standard of review.

[18] By contrast, Tribunal decisions are reviewed based on reasonableness, including in relation to questions of law involving the Tribunal's interpretation of its own statue or questions of general law in which the Tribunal has particular expertise (see *Tahmourpour*, 2010 FCA 192, above at para 8; *Brown v Canada (National Capital Commission)*, 2009 FCA 273, 2009 CarswellNat 2931; *Chopra v Canada (Attorney General)*, 2007 FCA 268, [2008] 1 FCR 393).

[19] Unless the decision fails to accord with the principles of justification, transparency and intelligibility or is outside the range of possible, acceptable outcomes, this Court should not intervene (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Analysis

A. *Did the Tribunal Breach Natural Justice or Procedural Fairness by Making a Determination Without Giving the Parties an Opportunity to Make Further Submissions?*

[20] The Applicant submits that the Tribunal violated his right to be heard and the audi alteram partem rule by not providing him an opportunity to make submissions on the substantive issue to be decided, namely the duration of the loss income compensation referred to in remedial order (iv). According to the Applicant, this also amounts to a violation of his legitimate expectations. His initial submissions were confined to procedural matters and he was awaiting directions from Tribunal Member Craig on how the matter would be handled based on the letter dated November 25, 2010. By way of subsection 50(1) of the *Act*, he is to be provided every "full and ample opportunity" to "present evidence and make submissions."

[21] The Respondent highlights provisions in the Tribunal's Rules of Procedure that all proceedings are to be "conducted as informally and expeditiously as possible" and jurisdiction is retained to decide those matter not specifically provided for in the Rules. It also notes that the Federal Court of Appeal directed the Tribunal to reconsider the issue of quantum, but did not provide that parties would have the opportunity to make related submissions. After reviewing the

submissions regarding process, the Tribunal implicitly decided that no further submissions were warranted.

[22] I agree with the Respondent that there was no breach of procedural fairness in not providing an opportunity to make further submissions on the substantive issue. Based on the reasons of the Federal Court of Appeal, the Tribunal was to reconsider one aspect of the remedial award. Both parties were previously heard on the issue of remedy.

[23] The Tribunal can adopt the most expeditious procedures in dealing with the matters before it. In this instance, the parties were able to provide input on the process they considered most suitable. While the Applicant assumed that oral submissions would be presented, the Respondent insisted that there is "no merit or benefit to having a hearing to call evidence on this issue" but continued to reserve the right to make further submissions arising from the Applicant's arguments.

[24] The decision of the Tribunal to proceed without further submissions suggests the Respondent's position was adopted. Given the submissions presented, the Applicant would have been alerted to the possibility that the Tribunal was being asked to proceed without a further hearing.

[25] Prior to the release of the decision, communication from the Tribunal indicated that the Member would "issue directions and/or a ruling on how to proceed." While the Applicant assumed that further communication would be forthcoming, this was not necessarily required. Interpreting

these words, the release of the Tribunal's decision constituted the ruling on how to proceed regarding the remedial order.

[26] More importantly, there was no legitimate expectation created that there would be an opportunity to make further submissions on the substantive issue. Apart from the request for submissions on process, there is no indication in the judgment of the Court of Appeal or the communication with the tribunal that submissions on the issue were expected or required.

[27] To create legitimate expectations on future submissions, there would have to be some clear, unambiguous and unqualified conduct or representations in this regard (see for example *Worthington v Canada (Minister of Citizenship and Immigration)*, 2008 FC 409, [2008] FCJ no 673 at paras 64-65). Since this was not the case, the Applicant was accorded procedural fairness and there was no violation of legitimate expectations and the right to be heard.

B. *Did the Tribunal Err in Law by Finding that the Applicant was not Entitled to Loss of Income Compensation Beyond the Two Years and Twelve Weeks he was Awarded in Lost Wages?*

[28] The Applicant asserts that the Tribunal erred by denying him compensation beyond the initial grace period. As a victim of discrimination, human rights law provides that he is to be made whole. He takes issue with Tribunal Member Craig's finding that a failure to mitigate justifies the complete denial of further compensation when the key question is whether the Applicant would have been earning more as an RCMP officer but for the discrimination.

[29] He also insists that the Federal Court of Appeal's concern was with the open-ended nature of the Tribunal's initial ruling. He proposes that the remedial order only be limited until the date he is offered re-enrolment.

[30] The Respondent contends that the Applicant simply disagrees with the Tribunal's decision and consequently asserts that he should be awarded lost wages until he is once again employed. He does not explain how his unemployment to date is causally connected to the discrimination he suffered while in training in 1999.

[31] The Tribunal has to discretion to make an order for any or all wages lost of a result of a discriminatory practice. Regardless, there must be a causal connection between the discriminatory practice and the losses claimed (see *Chopra v Canada (Attorney General)*, 2007 FCA 268, [2007] FCJ no 1134 at para 37).

[32] Admittedly, the Federal Court of Appeal referred to the imposition of a cap or limitation on remedial order (iv). However, on a review of the materials the Tribunal reasonably recognized that there was no evidence of permanent damage to Mr. Tahmourpour's ability to work and that he did not make sufficient efforts to minimize his losses that would support a causal connection as described in *Chopra*, above, for the continuation of a "top-up" beyond the initial "grace period."

VI. Conclusion

[33] There is no clear breach of procedural fairness or legal error in finding that compensation would not be provided beyond the initial grace period of two years and twelve weeks. The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-38-11**
STYLE OF CAUSE:	**TAHMOURPOUR v AGC (ON BEHALF OF THE ROYAL CANADIAN MOUNTED POLICE)**
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