Federal Court  Cour fédérale

Date: 20120827

Docket: T-1433-10

Citation: 2012 FC 1017

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 27, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

BAH BOUBACAR CABA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of four decisions rendered by the Canadian Human Rights Commission ("Commission") dated July 7, 2010, and communicated to the applicant by way of a letter dated July 26, 2010. The applicant alleged having been the victim of discrimination on the part of his employer, the Canada Border Services Canada Agency("CBSA"), on the basis of race,

national or ethnic origin or colour, contrary to subsection 3(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (Act).

[2] For the reasons that follow, the Court is of the view that its intervention is not warranted and that the Commission's decision not to hear the applicant's complaint was reasonable.

1. Facts

[3] The applicant, who is representing himself, claimed in his complaint dated November 27, 2008, that the CBSA had discriminated against him during the course of his employment by reason of his race, his national or ethnic origin, and his colour. At the time of the incidents that led to the filing of the complaint with the Commission, the applicant was working as a multidisciplinary inspector at the Food, Plant and Animal Imports Unit at Toronto's Pearson International Airport.

[4] On November 6, 2004, while he was on duty, the applicant left his workstation and went to the offices of the airport's Immigration section to inquire about someone named Boubacar Delli Dramé, who, like himself, was from Guinea, and to offer his assistance in processing the refugee claim. The immigration officer told him to leave the restricted immigration zone and to return to his workstation, which the applicant did without further discussion.

[5] The CBSA found the applicant's intervention in Mr. Dramé's file suspicious. The Royal Canadian Mounted Police (RCMP) and the CBSA's Internal Affairs Service each conducted an investigation into the incident. The purpose of both investigations was to determine (1), whether the applicant was operating an immigration consulting business that was contrary to the Values and

Ethics Code for the Public Service, and (2), whether he was facilitating the illegal entry of foreign nationals into Canada.

[6] Upon the completion of both investigations, neither of the two showed any evidence to the effect that the applicant was acting as an immigration consultant or that he was involved in an attempt to help foreign nationals enter Canada illegally. However, the CBSA's Director of Internal Affairs, Mr. Wardhaugh, dismissed these findings and asked a senior investigator at Internal Affairs (Jean-Pierre Thériault) to draw up a report for him, which he later submitted to the Regional Director. This investigation report concluded that Mr. Bah had placed himself in a conflict of interest when he intervened in the immigration process, and that information obtained during the course of the investigation might have led one to believe that he was involved in an attempt to have a foreign national enter Canada illegally. Following this report, the applicant received, on January 31, 2006, a notice of disciplinary action and was suspended without pay for ten days.

[7] That same day, the applicant filed a grievance with the Public Service Labour Relations Board (PSLRB) against the disciplinary action. On August 3, 2007, the grievance was referred to adjudication, and at the time the impugned decisions were rendered by the Commission, namely, on July 26, 2010, the PSLRB had yet to hear the grievance. Subsequent to this, the CBSA chose not to present any evidence before the adjudicator despite the fact that it bore the onus of refuting the applicant's allegations, without admitting to any fault on its part in the way it had treated the applicant. On February 24, 2011, the adjudicator had no other alternative than to allow the applicant's grievance and order that he be compensated for the loss of wages he had incurred.

[8] In the meantime, namely, on November 27, 2008, the applicant filed a complaint with the Commission against Mr. Thériault and Mr. Wardhaugh. In his complaint, the applicant claimed that the investigator and the Director of Internal Affairs had acted in bad faith, obstructed the process and discriminated against him by reason of his race, ethnic origin, colour and nationality. Here is some of what Mr. Bah wrote in this regard in his complaint form to the Commission:

> In this report (destined for the Regional Director) Mr. Wardhaugh and Mr. Thériault:
>
> [TRANSLATION]
>
> 1. refused to accept the findings of the thorough and detailed investigation conducted by professionals from the RCMP that exonerated Bah of all charges of assisting the illegal entry foreign nationals. Nowhere in their investigation report was it noted that the RCMP had indicated that Mr. Bah is completely innocent. A voluntary and deliberate omission on the part of the investigators to cast doubt on black manager who demonstrated professional ambition. Would they have done so for a Caucasian?
>
> 2. refused to accept the findings of Ms. Laurin, their own investigator, who found that there was insufficient evidence to conclude that Bah was guilty of anything. Worse still, they altered Laurin's findings;
>
> 3. treated the testimony of Caucasian witnesses differently from that of Mr. Bah, who is black. Furthermore, they accepted without discussion the false and easily refutable statements of the Caucasian witnesses, while falsifying biographical information on Mr. Bah pour refute his statements and cast doubt on his credibility;
>
> 4. refused to believe Mr. Bah's statements about his father when that information was easily verifiable;
>
> 5. considered Mr. Bah as a foreigner rather than a Canadian throughout the investigation when Bah is in fact a Canadian who has taken the oath of citizenship in addition to being a security officer on Canadian territory who has held a rigorous security authorization since 1991;

> 6. found it normal that there was only a 15-years age difference between Mr. Bah and his "father"! Would they have found it normal if it were white people?
>
> 7. told the RCMP, without evidence, that they were convinced that Mr. Bah is guilty" when the facts proved otherwise. The RCMP officers had clearly indicated to them that in their opinion, Bah had been the victim of a plot to tarnish his reputation and they were closing the file;
>
> …
>
> Respondent's Record, Vol. I, Affidavit of Michelle Ratpan, Exhibit "B", Complaint Form, p 53.

[9] The investigator, Kathryn Lavery, of the Commission's Resolution Services Division, was tasked with conducting an investigation into, and drafting a report on, the applicant's complaint. She was to determine whether or not the Commission should deal with the complaint on the basis of one of the grounds set out at paragraphs 41(1)(*b*), (*c*), (*d*) or (*e*) of the *Canadian Human Rights Act*. These provisions read as follows:

PART III	PARTIE III
DISCRIMINATORY PRACTICES AND GENERAL PROVISIONS	ACTES DISCRIMINATOIRES ET DISPOSITIONS GÉNÉRALES
Commission to deal with complaint	Irrecevabilité
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	**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 :
…	[…]
(*b*) the complaint is one that could more appropriately be dealt with, initially or	*b*) la plainte pourrait

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. …	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. […]

[10] Having regard to paragraph 41(1)(*b*) of the Act, the investigator determined that the complaint could be the subject of a grievance under the *Public Service Labour Relations Act*, SC 2003, c 22, s. 2 (PSLRA). In fact, paragraph 209(1)(*b*) of the PSLRA allows for the applicant to submit a grievance related to a disciplinary action resulting in a suspension to the PSLRB. The investigator also noted the fact that the applicant had submitted such a grievance on January 31, 2006, and stated that the PSLRB may grant the same relief as that provided for under the Act, pursuant to section 226 of the PSLRA.

[11] As for the grounds for refusing to deal with the complaint set out at paragraph 41(1)(*c*) of the Act, the investigator was of the view that the applicant had not established that there were reasonable grounds to believe that the CBSA had discriminated against him on account of race,

national or ethnic origin, or colour. Although the applicant suggested that a white employee would not have been treated the same way in similar circumstances, he provided no example in support of his claims. Moreover, even if the treatment he was subject to did constitute a reprisal following a grievance he had filed in relation to the advertisement of a position, it would not be a proscribed discriminatory act under the Act because such a reprisal would not have been based on one of the prohibited grounds of discrimination enumerated at subsection 3(1) of the Act.

[12] The investigator also determined that the applicant's complaint was not trivial, frivolous, vexatious or made in bad faith within the meaning of paragraph 41(1)(*d*) of the Act. In her view, the CBSA's investigation, the internal investigation process launched by the CBSA was neither impartial nor independent.

[13] Lastly, the investigator noted that the last discriminatory act in support of the complaint had occurred in February 2006. But the applicant had first contacted the Commission on September 28, 2007. Thus, the applicant had not shown reasonable diligence when he submitted his complaint to the Commission after the one-year time limit set out at paragraph 41(1)(*e*) of the Act.

2. Decision under review

[14] After having reviewed the investigator's report, the Commission rendered a decision that essentially reiterated the investigator's recommendations. It found that the complaint was well-founded and was based on certain grounds. That said, however, it decided not to deal with the complaint pursuant to paragraphs 41(1)(*b*), (*c*) and (*e*) of the Act. Accordingly, the Commission decided to close the applicant's complaint file.

3. Issues

[15] This case raises the following issues:

a. What is the applicable standard of review?

b. Are the affidavit submitted by the applicant in his application for judicial review and attached exhibits admissible?

c. Was the Commission's decision not to deal with the complaint reasonable?

4. Analysis

(a) What is the applicable standard of review?

[16] The case law consistently holds that decisions of the Commission made under section 41 of the Act are reviewable on a standard of reasonableness: see, for example, *Gardner v Canada (Attorney General)*, 2005 FCA 284 at paragraph 21, [2005] FCJ No 1442; *Canada (Revenue Agency) v McConnell*, 2009 FC 851 at paragraphs 38-40, [2009] FCJ No 1523; *Cameco Corp. v Maxwell*, 2007 FC 260 at paragraph 13, [2007] FCJ No 329. The reasons for this are essentially because the Commission has a great deal of expertise in administering a quasi-constitutional human rights statute, that the Act recognizes that it has considerable latitude in the exercise of its investigative functions, and that the issue before it was one of mixed fact and law.

[17] Consequently, the Court must verify the justification of the decision, as well as the transparency and intelligibility of the reasons. The Court will intervene only if the decision does not fall within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190.

(b) Are the affidavit submitted by the applicant in his application for judicial review and attached exhibits admissible?

[18] Counsel for the respondent maintained that the Court should disregard the applicant's affidavit and attached exhibits, first, because the affidavit was not sworn, and second, because the exhibits the applicant sought to adduce as evidence were not before the Commission when it made its decision.

[19] Subsection 80(1) of the *Federal Courts Rules*, SOR/98-106 (Rules) sets out that an affidavit must be prepared in accordance with Form 80A, which requires that it be signed by a commissioner of oaths. Furthermore, subsection 81(1) stipulates that affidavits shall be confined to facts within the deponent's personal knowledge. In this case, the document submitted by the applicant does not meet these requirements. Not only is it not signed by a commissioner of oaths, to make matters worse, it essentially reiterates the same arguments that were made by the applicant and that are contained in his Memorandum of Fact and Law.

[20] As for the exhibits the applicant attempted to introduce into evidence by means of this affidavit, these too fail to meet the requirements set out at subsection 80(3) of the Rules and are therefore improperly submitted. More fundamentally, these exhibits had not actually been submitted to the Commission and were not part of the material transmitted by the Commission in accordance with section 318 of the Rules. Moreover, at the hearing, the applicant agreed not to refer to these documents, even though he claimed that they had been brought to the Commission's attention.

[21] In light of the above, the Court will therefore not consider the applicant's affidavit or the exhibits attached thereto.

(c) Was the Commission's decision not to deal with the complaint reasonable?

[22] The applicant put forward two main arguments to challenge the Commission's decision not to deal with his complaint under paragraph 41(1)(*a*) of the Act. First, he claims to have established a clear link between the CBSA's actions and the prohibited grounds of discrimination set out in subsection 3(1) of the Act. The applicant lists (in a non-exhaustive manner) twenty or so alleged discriminatory acts committed against him by the CBSA. He maintains that these allegations constitute evidence; by refusing to deal with his complaint, the Commission had therefore lost an opportunity to consider additional evidence of discrimination in support of his complaint.

[23] It would undoubtedly have been preferable, as counsel for the respondent acknowledged at the hearing, for the Commission to have referred to the examples submitted by Mr. Bah in its decision. However, the fact remains that Mr. Bah's allegations lack rigour and provide few details. It was not the Commission's role to seek further information with respect to the examples provided by Mr. Bah. Given the lack of detailed evidence, the Commission could reasonably conclude that Mr. Bah had not established a clear link between his alleged treatment by the CBSA and his race, ethnic or national origin or colour. It is not enough to make allegations; one must still be able to substantiate those allegations with detailed facts, a burden which the applicant has not discharged in this case.

[24] Second, the applicant contends that the Commission erred in finding that the alleged reprisals against him did not constitute discrimination within the meaning of the Act. This argument appears to me to be without merit. Reprisals taken against a person who has filed a grievance do not constitute discrimination under the Act, in the absence of evidence that the reprisals were based on

one of the prohibited grounds set out in the Act. The Commission could therefore reasonably conclude that the reprisals allegedly taken against the applicant did not, in and of themselves, constitute discrimination under the Act.

[25] With respect to the decision not to deal with the complaint pursuant to paragraph 41(1)(*e*) of the Act, the applicant maintains that his complaint was not out of time because the actions he complained about were not isolated incidents, but were part of an ongoing situation. From that standpoint, the one-year time frame would never have taken effect because the CBSA's actions had never ceased.

[26] The complaint submitted by the applicant on November 27, 2008, relates to specific incidents that unfolded between December 2005 and February 2006 and concerns two individuals identified by name. The complaint is based on an isolated incident that allegedly took place at Pearson Airport in November 2004. However, the applicant's first contact with the Commission was by letter dated September 28, 2007, and he only submitted his complaint 33 months after the last incident of "discrimination". Furthermore, the applicant provided no reason to explain why he waited so long before contacting the Commission and submitting his complaint. He did attempt to explain that he had had difficulty obtaining certain documents from the CBSA; but this cannot satisfactorily explain why he was unable to file his complaint within the one-year time limit set out in the Act. Consequently, the Commission could reasonably find that the complaint was out of time. At any rate, the applicant can always submit other complaints to the Commission if he feels he has been the subject of further discrimination.

[27] Lastly, the Court is of the view that the Commission did not err in concluding that the issues raised in the applicant's complaint could have been more appropriately dealt with, initially or completely, according to a procedure provided for under another Act of Parliament, namely the PSLRA. Paragraph 41(1)(*b*) of the Act clearly establishes that a complaint should not make it past the screening stage if the Commission determines that it could more appropriately be dealt with under a procedure provided for in another Act of Parliament: see *Moussa v Canada (Immigration and Refugee Board)*, 2006 FC 918 at paragraph 35, [2006] FCJ No 1169.

[28] In the context of this complaint, the Commission could reasonably conclude that the applicant's complaint raised essentially the same issues as those that were raised in his grievance submitted to the PSLRB, namely, that his 10-day suspension without pay constituted discrimination within the meaning of the Act. It was also open to the Commission to find that the PSLRB had the authority to award him the same remedies as those available under the Act, as set out in paragraph 226(*h*) of the PSLRA. Following the PSLRB's decision dated February 24, 2011, the applicant had in fact obtained the same relief he would have obtained from the Human Rights Tribunal had it decided to hear his complaint.

[29] For all of the aforementioned reasons, the Court is therefore of the view that Mr. Bah's application for judicial review must be dismissed. Upon careful consideration of the arguments of both parties and the evidence in the record, the Court finds that the Commission did not err and could reasonably find that it would not deal with the applicant's complaint on the basis of paragraphs 41(1)(*b*), (*c*) and (*e*) of the Act.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed, without costs.

"Yves de Montigny"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1433-10
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APPEARANCES:

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