Federal Court Cour fédérale

Date: 20130201

Docket: T-256-12

Citation: 2013 FC 119

Vancouver, British Columbia, February 1, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

DAN HEIDUK

Applicant

and

JONATHAN WHITWORTH OF THE WASHINGTON MARINE GROUP/SEASPAN MARINE CORPORATION

Respondents

REASONS FOR ORDER AND ORDER

[1] In February 2011, Mr. Heiduk filed a complaint against his employer, Seaspan International Ltd., with the Canadian Human Rights Commission. He set out a number of incidents from 2003 through to April 2010, which in his view constituted a discriminatory practice in his employment. He was, he said, adversely differentiated and harassed, contrary to sections 7 and 14 of the *Canadian Human Rights Act*. The alleged prohibited ground of discrimination was sexual orientation. He was perceived to be gay.

[2] He also stated that since his union had not taken up his case, he was pursuing a claim against it. The Commission initially investigated whether it should proceed with the complaint, which it had to do unless, as per section 41(1)(a) of the Act and (e) which read:

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

[3] The Commission held that the portion of the claim which had been made within one year would be held in abeyance pending the outcome of Mr.Heiduk's complaint against his union before the Canada Industrial Relations Board. The Board has now heard and dismissed his complaint. Consequently, the Commission will investigate the incidents which occurred on 31 March and 1 April 2010. It only awaits a decision from this Court as to whether its investigation should extend to the incidents which occurred before then.

[4] As to the incidents which occurred earlier, the Commission held:

> The complaint alleges a series of discriminatory acts, and some of the alleged acts occurred more than one year before receipt of the complaint by the Commission. These allegations, being those that occurred prior to March 31, 2010, are separate and independent of the more recent discriminatory acts alleged in the complaint and it is not appropriate to deal with the complaint because the complainant did not do everything that a reasonable person would do in the particular circumstances to proceed with a complaint regard those incidents.

[5] Therefore, this judicial review is limited to whether it was open to the Commission to sever from Mr. Heiduk's complaint the incidents which occurred prior to 31 March 2010.

[6] The record is very compact. It comprises the complaint form, the investigator's sections 40 and 41 report and the respondent's submissions.

[7] Both sides agree that the reasonableness standard of review applies. Nevertheless, the applicant's argument smacks of a correctness standard. Mr. Heiduk submits that if the last act or omission occurred within one year, as here, section 41(1)(e) of the Act does not apply and, therefore, the Commission is statutorily obliged to deal with the entire complaint.

THE FACTS

[8] In 2003, one deckhand on the "Seaspan Master" told another he believed Mr. Heiduk was homosexual, which the second deckhand passed on to another. This same deckhand enquired of the skipper "where is the fag?"

[9] In 2005, a captain called him "princess". Then in December 2006, after a telephone conversation with one of the deckhands in the 2003 incident, another master embarked on a campaign to make Mr. Heiduk's life miserable, and had him removed from the ship. Mr. Heiduk complained to no avail.

[10] In 2008, he again took up that complaint.

[11] Then on another ship after one of the deckhands who caused him difficulty in 2003 came on board, the formerly friendly master treated him poorly. In response to his request for a new assignment he was suspended.

[12] In the winter of 2007/08, a master and a deckhand called him "brokeback" and that word later appeared on a bridge abutment next to the ship's tie up. That graffiti was later painted over.

[13] In November 2008, he took leave to be treated for clinical depression.

[14] In the spring of 2009, he was sent back to work without the company addressing the harassment issues.

[15] On March 31, 2010 – April 1, 2010, various incidents occurred on the “Seaspan Venture” which led to disputes with respect to disability insurance payouts.

[16] The employer took overall umbrage with the allegations. Among other things, it alleged that the December 2006 incident was a workplace dispute, and the spring 2009 incident related to a return to work from disability.

THE INVESTIGATOR’S REPORT

[17] As regards the only section of the Act now relevant, section 41(1)(e), the issue was whether the earlier acts were linked to the last alleged act. Were the acts separate and independent of one another or were they part of a continuous pattern of discrimination? Did the complainant do everything that a reasonable person would do in the circumstances, i.e. since a series of discriminatory acts were alleged, why was a complaint not filed earlier?

[18] He noted the gaps in time between the incidents, some two years between the 2003 and 2005 incidents, up to 15 months between the autumn 2005 and December 2006 incidents, and gaps of around a year or less between the remaining incidents. He was of the view that there might be a sufficiently strong pattern between the December 2006 incident and the subsequent ones for the Commission to exercise its discretion to deal with them. His recommendation however was that the Commission not deal with the 2003 and 2005 incidents because of insufficient connection.

THE COMMISSION'S DECISION

[19] The decision was the Commission's to make, not the investigator's. As aforesaid, it considered that the incidents which occurred prior to March 31, 2010 were separate and distinct, and that the complainant did not do everything that a reasonable person would do. I take this to mean that a reasonable person would have filed a complaint with respect to the earlier incidents, within a year of their occurrence.

ANALYSIS

[20] At this stage the facts alleged are taken to be true, which means, to state the obvious, that most of the events took place more than a year before the complaint was filed. Mr. Heiduk submits that the Commission should investigate his complaint unless it is "plain and obvious" that he has no case. He should not be driven from the judgment seat now (*Canada Post Corp v Canada (Human Rights Commission)*, 130 FTR 241, [1997] FCJ No 578 (QL); *Canada (AG) v Maracle*, 2012 FC 105, 404 FTR 173, [2012] FCJ No 121 (QL)). I agree. That is precisely why the Commission is investigating the 2010 incidents.

[21] However, the issue here is the linkage to the events which occurred earlier. There is not much in the way of Federal Court jurisprudence on point. In *Khanna v Canada (AG)*, 2008 FC 576, [2008] FCJ No 733 (QL), the events occurred between July 2004 and June 2005. The formal complaint was not filed until September 2006. The Commission exercised its discretion with respect to the period of May and June 2005 as it appeared that the complainant was unable to pursue the complaint due to health reasons. However, it severed the earlier events because they had occurred more than one year previous to the filing of the complaint.

[22] Madam Justice Mactavish said at paragraph 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".

[23] The other case is *Zavery v Canada (Human Resources Development)*, 2004 FC 929, 256 FTR 124, [2004] FCJ No 1122 (QL). There it was found that the various incidents were not connected. At paragraph 37, Madam Justice Snider acknowledged that if the incidents had been linked and one had occurred within the year, an argument could be made that the Commission should deal with all of them. She also pointed out that it would be illogical and potentially unfair to respondents to shoehorn long-standing grievances into a Commission investigation based on a more recent incident.

[24] Mr. Heiduk also referred to a series of cases dealing with a continuing contravention as defined by the Manitoba Court of Appeal in *Manitoba v Manitoba (Human Rights Commission)* (1983), 2 DLR (4th) 759, [1983] MJ No 223 (QL) at p 764:

> To be a “continuing contravention”, there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination which could be considered a separate contravention of the *Act*, and not merely one act of discrimination which may have continuing effects of consequences.

[25] Mr. Heiduk submits that the decision is not reasonable as per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, [2008] SCJ No 9 (QL), as there is a lack of justification, transparency and intelligibility, and the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (para 47).

[26] The Supreme Court went on to say in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, [2011] SCJ No 62 (QL), that in determining whether a decision is reasonable in light of the outcome the Court must show deference or respect for the decision-maker both in regards to the facts and to the law (at para 15).

> This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[27] The Court added in *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65:

> For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable."

[28] Taking up that invitation, and mindful that the Commission was dealing with its home statute (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 39), I find the decision to be reasonable. It is not at all obvious to me that the earlier incidents were all connected. One may well be a workplace dispute, and another as to when Mr. Heiduk could return to work. Although the analogy is far from perfect, in order to get an extension of time from this Court one usually has to establish that there was a continuing intention to pursue the matter, that it has some merit, that no prejudice will be suffered by the other

side because of the delay, and that a reasonable explanation for the delay exists (*Canada (AG) v Hennelly* (1999), 244 NR 399 (Fed CA), [1999] FCJ No 846 (QL)). In my opinion, it was not unreasonable for the Commission to sever incidents which had occurred years before. This was not a case of incidents straddling the one-year time bar. Some had occurred seven years earlier.

COSTS

[29] Mr. Heiduk had submitted a draft bill of costs in support of an order for a lump-sum payment. The Court encourages lump-sum payments. Costs usually follow the event, and I see no reason why they should not in this case. Adjusting that draft to take into account the actual time required for the hearing, the respondents' costs shall be fixed at $2,500, inclusive of all applicable taxes.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that this application is dismissed with costs in favour of the respondents in the amount of $2,500, all inclusive.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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