

Date: 20090211

Docket: A-360-08

Citation: 2009 FCA 38

**CORAM: NOËL J.A.
NADON J.A.
PELLETIER J.A.**

BETWEEN:

STEPHEN LEUNG

Appellant

and

CANADA REVENUE AGENCY

Respondent

Heard at Toronto, Ontario, on January 27, 2009.

Judgment delivered at Ottawa, Ontario, on February 11, 2009.

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

**NOËL J.A.
PELLETIER J.A.**

Date: 20090211

Docket: A-360-08

Citation: 2009 FCA 38

**CORAM: NOËL J.A.
NADON J.A.
PELLETIER J.A.**

BETWEEN:

STEPHEN LEUNG

Appellant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision of Mr. Justice Mandamin of the Federal Court, 2008 FC 704, dated June 4, 2008, which dismissed the appellant's judicial review application of a decision rendered by the Canadian Human Rights Commission (the "Commission") on August 11, 2006, in respect of a human rights complaint made against his employer, the Canada Revenue Agency (the "employer").

[2] The appellant's complaint is that his employer retaliated against him for having filed a human rights complaint in May 2000. More particularly, he says that his employer denied him

promotion without competition by creating, following a reorganization which made his existing position redundant, a new finance position of Assistant Director, Finance (FI-04), in respect of which he was obliged to compete. The appellant says that he should have been promoted without competition to the position of Assistant Director, Finance (FI-04) because the new job was simply a reclassification upward of his substantive position of Manager, Finance (FI-03).

[3] In response, the employer says that a classification review committee decided that the new position (FI-04) was a newly-created one which had no link to the appellant's former FI-03 job. Thus, it was not a reclassification upward and a competition was necessary to fill the position.

[4] The Commission dismissed the appellant's complaint on the ground, *inter alia*, that there was no evidence to support his complaint that his employer had retaliated against him because he had filed an earlier human rights complaint.

[5] The Commission's letter of August 11, 2006, informing the appellant that his complaint had been dismissed, reads, in part, as follows:

Before rendering their decision, the members of the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to paragraph 44(3)(h) of the *Canadian Human Rights Act*, to dismiss the complaint because

- the evidence does not support the complainant's allegation that the respondent retaliated against him for filing a human rights complaint;
- the complaint form does not establish a link between the alleged incidents and the grounds of discrimination based of [*sic*] race and national/ethnic origin, pursuant to section 7 of the *Act*;
- the complaint form does not raise any policy issues pursuant to section of the *Act*.

[Emphasis added]

[6] The report referred to above in the Commission's letter is the report of an investigator assigned by the Commission to investigate the appellant's retaliation complaint. The report, which the investigator released on March 24, 2006, recommended to the Commission, pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, R.S., 1985, c. H-6, the dismissal of the appellant's complaint.

[7] There can be no doubt that the Commission adopted in full the recommendations of the investigator and that the report constitutes the Commission's reasons for its decision. In fact, the reasons given by the Commission in its letter of dismissal are identical to those given by the investigator in her report in recommending that the complaint be dismissed.

[8] In my view, the investigator's report was flawed in a crucial respect. Specifically, the report fails to shed any light on the classification committee's determination that the new FI-04 job (identified as job F10011) was a new job with no link to the applicant's old one and for which he would thus have to compete. This determination by the classification committee is at the heart of the appellant's complaint. In effect, as I have already indicated, the appellant says that because of an earlier human rights complaint, his employer retaliated by creating a position said to be new, i.e. without any link to his former position, rather than reclassifying his former position upward. In the appellant's view, as his former position and the new position were substantively the same, he should not have been obliged to compete for this position.

[9] Although the investigator states in her report, on two occasions, that in the fall of 2001, a classification review committee decided that the new position of Assistant Director had no significant link to any former regional F1 position, the report provides no details regarding the committee's deliberations, nor any details regarding its membership. We do know, however, from the investigator's interview notes, that Mr. Ray Leblanc was in charge of the classification committee, but it does not appear that he was interviewed. That is the extent of the information regarding those who participated in the committee.

[10] All there is in the record is an undated and unsigned document, entitled "Committee Report and Rationale Job F10011, Assistant Director, Finance, Regional Office, CRA", according to which the Committee would have met on September 17, 2001. Whether the investigator relied on this document or some other documents, I cannot tell. In any event, the investigative report does not disclose any information with regard to the meeting which is said to have taken place on September 17, 2001.

[11] To complicate matters, it appears that the above Committee's decision is at odds with that of another Committee which recommended that the appellant's FI-03 position be upgraded to the new FI-04 position. As evidence of this is a document, referred to at paragraph 29 of the investigator's report, entitled "September 19, 2001, AD, F&A Committee Results", which lists the result of the review of 33 management positions throughout the country by the classification review committee in question. Under the FI jobs, the document reads:

JOB	CURRENT CLASS.	COMMITTEE RECOMMENDATION
-----	----------------	--------------------------

Soro – Manager, Finance	FI-3	FI-4
-------------------------	------	------

(See Appeal Book, Vol. 1, p. 94)

[12] The investigator questioned Mr. Steve Hertzberg, the appellant's immediate supervisor, concerning the above recommendation and Mr. Hertzberg provided the following answer:

Mr. Hertzberg was asked if he knew why at some point in time, the FI-03 was recommended by management for reclassification at the FI04 and in the final submission the FI-04 was proposed as a new position? He believes the document submitted by the complainant might have been a draft proposal made during the consultation process which was eventually changed. Mr. Hertzberg does not remember specifically why and when this would have been proposed.

[See Investigative Report, p. 6, in Appeal Book, Vol. 1, p. 38]

[13] That, as far as the investigator is concerned, appears to have been the end of the matter. No follow-up questions or investigations were made to determine why a proposal for reclassification in respect of the appellant's job was not followed and that a decision was ultimately made that the FI-04 job would be considered as a new position requiring competition. Again, there is absolutely no information regarding those who participated in the decision to recommend reclassification, nor any information regarding the deliberations of the decision makers.

[14] I should say here that the document referred to at paragraph 11 of these Reasons was obtained by the appellant through the *Access to Information Act*, R.S., 1985, c. A-1.

[15] Thus, in my view, the investigator failed to properly investigate an issue that goes to the essence of the complaint, in that she failed to make a proper inquiry into the classification process

which resulted in the appellant having to compete for the new position. It is difficult to understand why the record remains obscure on this matter, considering that the information required to clarify the matter should be readily available from the employer.

[16] For example, what decisions were actually made in the fall of 2001 by one or more classification committees? Who were the members of these committees, were they the same persons or different ones? In my view, this information is crucial to determine whether there was retaliation or not on the part of the appellant's employer.

[17] I am obviously not saying, nor suggesting, that the Commission or this Court have the power to intrude into the employer's classification process, nor into the making of appointments to jobs. However, because the investigator failed to conduct a proper inquiry, a cloud remains over the legitimacy of the classification process which led to the creation of a job for which the appellant had to compete.

[18] I am therefore of the view that the Judge ought to have intervened. Consequently, his decision cannot stand.

DISPOSITION

[19] For these reasons, I would therefore allow the appeal with costs, set aside the decision of the Federal Court and, rendering the decision which ought to have been rendered, I would allow the

appellant's judicial review application with costs and I would return the matter to the Commission for reconsideration of the appellant's complaint in accordance with these Reasons.

“M. Nadon”

J.A.

“I agree.

Marc Noël J.A.”

“I agree.

J.D. Denis Pelletier J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-360-08

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE MANDAMIN
DATED JUNE 4, 2008, NO.T-1631-06**

STYLE OF CAUSE: STEPHEN LEUNG v.
CANADA REVENUE AGENCY

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 27, 2009

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

DATED: FEBRUARY 11, 2009

APPEARANCES:

Glenn Stuart FOR THE APPELLANT

Gillian Patterson FOR THE RESPONDENT

SOLICITORS OF RECORD:

Glenn M. Stuart FOR THE APPELLANT
Toronto, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada