

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20090513

Docket: A-468-08

Citation: 2009 FCA 154

**CORAM: EVANS J.A.
LAYDEN-STEVENSON J.A.
RYER J.A.**

BETWEEN:

LAURA GAINER

Appellant

and

EXPORT DEVELOPMENT CANADA

Respondent

Heard at Toronto, Ontario, on May 13, 2009.

Judgment delivered from the Bench at Toronto, Ontario, on May 13, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

EVANS J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on May 13, 2009)

EVANS J.A.

[1] This is an appeal by Laura Gainer from a decision of the Federal Court (2008 FC 904) in which Justice Simpson dismissed her application for judicial review to set aside a 2007 decision of the Canadian Human Rights Commission to dismiss her complaint against her previous employer, Export Development Canada (“EDC”). Accepting the recommendation of its investigator, the Commission concluded that the evidence did not support Ms Gainer’s allegation that EDC had retaliated against her for filing a pay equity complaint against it: paragraph 44(3)(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (“Act”).

[2] The Commission had undertaken this investigation pursuant to an Order of Justice von Finckenstein of the Federal Court who had granted Ms Gainer's application for judicial review of the Commission's initial dismissal of her complaint in 2005. In his reasons for decision (2006 FC 814), Justice von Finckenstein identified three deficiencies in the Commission's investigation of Ms Gainer's complaint that EDC had retaliated against her contrary to section 14.1 of the Act. Accordingly, in his Order, he set aside the decision of the Commission "as it relates to the issue of reprisals" and sent the matter back for investigation by a different investigator "solely on the issue of the allegations of reprisal."

[3] The allegations of reprisal before Justice von Finckenstein related to incidents that took place before Ms Gainer filed her complaint with the Commission in 2003. However, counsel appearing before Justice von Finckenstein did not draw his attention to a then recent decision of this Court interpreting section 14.1 of the Act as applying only to acts occurring after a complaint had been filed: *Dubois v. Canada (Attorney General)*, 2006 FCA 127. When the matter went back to the Commission pursuant to the Order of Justice von Finckenstein, the investigator relied on *Dubois* when recommending that Ms Gainer's complaint be dismissed.

[4] In this appeal, counsel for Ms Gainer advances two principal arguments. First, he urges us to depart from the Court's decision in *Dubois* and to adopt the interpretation of section 14.1 which the Court specifically rejected, namely that section 14.1 refers to acts committed before and after the filing of a complaint. However, we see no basis for reconsidering this decision, especially since none of the limited circumstances outlined in *Miller v. The Queen*, 2002 FCA

370, 220 D.L.R. (4th) 149 is present here. Nor do we agree that the Court's conclusion in *Dubois* on the interpretation of section 14.1 should be treated as *obiter dicta* and therefore as not precedential.

[5] Second, counsel argues that the order of Justice von Finckenstein did not restrict the Commission to investigating Ms Gainer's allegation that EDC had retaliated against her contrary to section 14.1, and that the investigator did not conduct a thorough investigation of Ms Gainer's complaint regarding her allegations of harassment and reprisals. We disagree. Like Justice Simpson, we are of the view that, when read in the context of his reasons, Justice von Finckenstein's Order is restricted to section 14.1.

[6] Having rejected Ms Gainer's first two grounds of review, namely that the Commission had breached the duty of fairness and had misinterpreted the pay equity provisions in section 11 of the Act, Justice von Finckenstein started his analysis of the third and final ground under the heading, "Did the Commission err by failing to consider, interpret and correctly apply s. 14.1 of the Act?" It was in connection with this ground that he found the deficiencies in the Commission's investigation on which he based his decision to quash the dismissal of the complaint. See also paras. 10 and 40 of his reasons. Subsequent references in his reasons, as well as the Order of the Court, to reprisals or retaliation should be understood as references to allegations of a breach of section 14.1.

[7] Given the limited nature of the scope of the investigation that the Commission was ordered to undertake, it was not open to Ms Gainer to argue before Justice Simpson or this Court that EDC's conduct breached other provisions of the Act. Nor may counsel rely on section 14.1 with respect to alleged acts of retaliation that occurred after Ms Gainer had filed her complaint because they were not raised before Justice von Finckenstein and were therefore outside the narrow scope of the investigation that he ordered.

[8] For these reasons, and despite the able arguments of counsel, the appeal will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-468-08

(APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE SIMPSON DATED JULY 24, 2008, DOCKET NO. T-1333-07)

STYLE OF CAUSE: LAURA GAINER v.
EXPORT DEVELOPMENT
CANADA

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 13, 2009

REASONS FOR JUDGMENT OF THE COURT BY: (EVANS, LAYDEN-
STEVENSON & RYER
J.J.A)

DELIVERED FROM THE BENCH BY: EVANS J.A.

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