Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 21
Date: December 30, 2016
File No.: T2081/8214

Between:

Michael Pequeneza

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Post Corporation

Respondent

Ruling

Member: Susheel Gupta

I. Introduction

[1] The Respondent in this case, Canada Post Corporation, brings a motion for an order dismissing a portion of the complaint, on the ground that it is not compliant with s. 41(1)(e) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 ("*CHRA*"). This provision allows the Canadian Human Rights Commission ("Commission" or "CHRC") to refuse to deal with complaints that are filed over one year after the occurrence of the acts or omissions alleged therein. I have decided to dismiss the motion, for the reasons below.

II. Background

[2] In a complaint filed November 23, 2009, the Complainant alleged adverse differentiation in the course of employment, within the meaning of s. 7(b) of the *CHRA*, on the ground of disability. The allegations span a period commencing on April 22, 2008 and continuing to the date of filing of the complaint. The alleged acts generally relate to the Complainant's medical restrictions and what he views as the Respondent's failure to assign him duties that respected those restrictions, as well as the management of his return to work following a disability-related absence.

[3] It appears that the Commission did not immediately deal with the complaint, as it was of the opinion that the Complainant ought to exhaust grievance procedures that were otherwise reasonably available to him. This procedure is contemplated in s. 41(1)(a) of the *CHRA*.

[4] The Commission ultimately decided to deal with the complaint and referred it for investigation in 2013. Upon receipt of the Investigator's Report, the Acting Chief Commissioner, on February 25, 2015, requested that the Chairperson of the Canadian Human Rights Tribunal ("Tribunal") institute an inquiry into the complaint, as it was satisfied that, having regard to all the circumstances, an inquiry was warranted.

III. Legal Framework

[5] Section 41(1)(e) of the *CHRA* reads as follows:

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

[…]

(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.

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 :

[…]

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.

[6] In *Canada (C.H.R.C.) v. Canadian Broadcasting Corp. (re Vermette)* (1996) 28 C.H.R.R. D/139 (F.C.T.D.) ("*Vermette*"), the Federal Court dismissed a judicial review application, on the ground that an adequate alternative remedy existed. In *obiter* (see paras. 22-23), the Court held that s. 41(e), as it was then called, created a substantive right that could be invoked before the Tribunal:

> [28] Why should that be the Court's interpretation of para. 41(e)? It is because Parliament enacted the one-year datum as a substantive right of, or benefit to, those against whom complaints are made, but the Commission does not deal with complaints by dealing with anyone's substantive rights. Tribunals, however, do determine substantive rights in according full hearings pursuant to powers provided in s. 50, and in concluding whether complaints be substantiated against respondents, or not pursuant to s. 53.
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> [29] Full, fair hearings are those in which the persons against whom complaints are made are accorded each the opportunity to make a full answer and defence to the complainant's case. Clearly, being prevented from benefiting from the one-year limitation can be raised in a full answer and defence. This is the tribunals' province, because they, in the normal course of the litigation, hear (or read) all, inevitably more, of the evidence

> and more of the circumstances than does the Commission in its preliminary role…

[7] The Court in *Vermette* went on to hold that while the Commission might make a preliminary and procedural decision under s. 41(e), this was not "etched in everlasting stone" but was subject to being modified according to a Tribunal's appreciation of what was appropriate, at the Tribunal's hearing, in order to determine the respondent's substantive right to the benefit of the limitation period (see para. 33).

[8] The Court was careful to point out that, while it might seem that the Tribunal was reviewing the Commission's decision under s. 41(e), in essence the Tribunal was determining the respondent's substantive rights in the circumstances of the "levying" of the complaint (see para. 34).

[9] The *Vermette* judgment was later discussed in the case of *I.L.W.U. (Marine Section), Local 400 v. Oster* [2002] 2 FCR 430 ("*Oster*"). In *Oster*, the Court observed that s. 41(1)(e) effectively confers a discretion on the Commission to extend the one-year time limitation for the filing of a complaint, which is incompatible with the notion that s. 41 created a legal right not to be investigated in specific circumstances. The *Oster* Court noted that the exercise of the Commission's discretion under s. 41(1)(e) was judicially reviewable by the Federal Court, and that the "substantive rights" approach in *Vermette* was incongruous with the existence of this judicial review jurisdiction:

> [29]…the position adopted by Mr. Justice Muldoon in *Vermette* [*Canada (Canadian Human Rights Commission) v. Canadian Broadcasting Corp. (re Vermette)* (1996), 1996 CanLII 11865 (FC), 120 F.T.R. 81 (F.C.T.D.)] and adopted by the Tribunal in this matter could lead to what I regard as a rather anomalous result: this Court could judicially review a time extension by the Commission and affirm it and yet the same decision of the Commission would be open to substantive review by the Tribunal in the event that the Commission referred the complaint to the Tribunal. In the absence of specific statutory language demonstrating that Parliament intended such a result, I conclude that it did not so intend.
>
> [30] In the result, I conclude that the Tribunal erred against a standard of correctness, in assuming jurisdiction with respect to the Union's preliminary objections. The Union, having decided not to seek judicial review before this Court of the Commission's discretionary decision to extend the time limit

> under paragraph 41(1)(e) of the Act, was simply precluded from adopting the alternative recourse that it chose, that being to raise precisely the same issues that it could have raised on judicial review, before the Tribunal.

[10] In addition to the *Oster* case, where the Tribunal's assumption of jurisdiction was overruled, the Tribunal has been invited to interpret the scope of s. 41 of the *CHRA* on a number of other occasions.

[11] For example, in *Wall v. Kitigan Zibi Education Council*, 1997 CanLII 1251 (CHRT), the Tribunal's jurisdiction was questioned on the ground that certain necessary preliminary steps had not been taken by the Commission. In particular, it was argued that the Commission had not specifically addressed the issue of whether the complainant should be required to exhaust an internal appeal mechanism, and that this step was necessary under s. 41(a) of the *CHRA*, as it then was then called. The Tribunal solicited submissions from the parties "…as to the nature and extent of the Tribunal's power, if any, to review the actions <u>or inactions</u> of the Commission while the complaint was before it." [emphasis added]

[12] The Tribunal in *Wall* ruled that "…it did not have the power to examine the conduct of the Commission or to review decisions that the Commission had taken, <u>or indeed the fact that decisions may not have been taken</u>." [emphasis added] It went on to hold that its jurisdiction was a limited one, based upon the authority conferred upon it by the *CHRA*, and in particular, by s. 50 (1), which mandated it to inquire into the complaint.

[13] In *Dumont v. Transport Jeannot Gagnon*, 2001 CanLII 38314 (CHRT), the complaint had been filed in 1998 in relation to matters occurring in 1996. The Tribunal observed that:

> [2] …The Canadian Human Rights Commission <u>evidently</u> exercised the discretion conferred on it by Section 41 (1) (e) of the Act, and decided to deal with Mr. Dumont's complaint, notwithstanding that the complaint appears to relate to matters occurring more than one year prior to the filing of the complaint. [emphasis added]

[14] It later held as follows:

> [7] The Canadian Human Rights Tribunal does not have the power to review the way in which the Canadian Human Rights Commission chooses to exercise its discretion pursuant to Section 41 (1) (e) of the *Act*. This is a matter within the exclusive purview of the Federal Court. The fact that the Commission made its decision to deal with Mr. Dumont's complaint, apparently without the benefit of submissions from TJG, may well have been of some significance. It is noteworthy, however, that there is no indication that TJG has attempted to judicially review the Commission's decision to deal with Mr. Dumont's complaint… [footnotes omitted; emphasis added]

[15] The Commission and Respondent in the present case have both made reference to the Tribunal's decision in *Leonardis v. Canada Post Corporation*, 2002 CanLII 45934 (CHRT), where the respondents before the Tribunal sought the dismissal of the case pursuant to s. 41(1)(e) due to the complaints having been filed over a year after the last alleged incident. In particular, the *Leonardis* respondents argued that this provision had the effect of conferring on them the benefit of a one-year limitation period, which the Tribunal characterized as an assertion of a "substantive right." The Tribunal in *Leonardis* examined both the *Vermette* and *Oster* judgments discussed above, after which it concluded that "…[s]ubsection 41(1) cannot be interpreted as providing additional substantive rights to respondents that can be decided upon by this Tribunal." (para. 7)

[16] In *Cremasco v. Canada Post Corporation*, 2002 CanLII 61852 (CHRT), aff'd on other grounds in 2004 FC 81, the Tribunal accepted the argument put forward by the Commission that the Tribunal does not have jurisdiction to deal with submissions from the respondent that were based on the exercise of the Commission's discretion under s. 41 (see paras. 5-6).

[17] In *Syndicat des employés d'exécution de Québec-téléphone section locale 5044 du SCFP c. Telus communications (Québec) inc.*, 2003 CHRT 31 ("*Telus*"), the Tribunal, in dismissing a s. 41(1)(e) objection, observed that when the person against whom a complaint is made believes that the complaint was filed after the time limit, the person may raise this point before the Commission. However there was nothing to indicate in the record that the respondent argued its claims before the Commission as to the lateness of the complaint (see paras. 49-50).

[18] In *Warman v. Northern Alliance*, 2009 CHRT 10, the Tribunal observed that: "…a decision by the Commission to request an inquiry by the Tribunal where the alleged conduct occurred more than a year before the complaint was filed is contemplated by ss. 41 (1) (e) and 44 (3) of the *Act*… [I]n these circumstances, the Tribunal is required to hold a hearing" (see para. 8).

IV. Analysis

[19] The Respondent in the present motion asserts that the Complainant's allegations spanning the period from April 22, 2008 to July 15 2008 should be dismissed for non-compliance with s. 41(1)(e), as they predate the filing of the complaint by over a year. To the extent the decisions in *Oster* and *Leonardis* could be invoked to argue that the Tribunal has no jurisdiction to entertain its motion, the Respondent asserts that these authorities are distinguishable:

> "*Oster* and *Leonardis* are distinguishable from this case because in both of those cases, the respondent challenged an express decision by the CHRC to extend the time limit under Section 41(1)(e). No such express decision was made by the CHRC in this case which is why those cases are not applicable." (Reply, para. 2)

[20] Instead, in situations where the Commission does not provide a reasonable justification for extending the time limit under s. 41(1)(e), the Respondent argues that the *Vermette* judgment applies. According to the Respondent, the Commission provided no such justification in the current matter "…because there was no decision at all...." Neither the Investigation Report nor the decision referring the complaint to the Tribunal expressly indicates that the Commission extended the one-year time limit. It appears to the Respondent that the CHRC did not turn its mind to the issue when investigating the complaint, so there is no CHRC decision for the Tribunal to arguably review, and; moreover, in the absence of a CHRC decision, the Respondent could not judicially review this issue (Notice of Motion, para. 14; Reply, para. 3).

[21] The Respondent correctly points out that the *Vermette* judgment—endorsing in *obiter* the Tribunal's s. 41 jurisdiction—has not been overturned or overruled by the

Federal Court of Appeal. However, it would be fair to say that the Court in *Oster* adopted a different approach to the application of s. 41(1)(e) by the Tribunal. In *Vermette*, the Court held that s. 41 created substantive rights to which the Tribunal could give effect if the evidence and circumstances justified such a result. In *Oster*, the Court notes that the discretionary nature of s. 41(1)(e) is incompatible with the notion that this provision should be interpreted as if it created a legal right not to be investigated. Furthermore, the *Oster* Court expressed the view that the approach espoused in *Vermette* could lead to an anomalous result, in the sense that the same CHRC decision under s. 41 could be subject to judicial review by the Federal Court, and to substantive review by the Tribunal.

[22] The Respondent implies that the two decisions do not conflict: rather, *Oster* governs situations where the CHRC has decided to extend the time limit in s. 41(1)(e), and *Vermette* applies where there has been no decision by the Commission under this provision, or no reasonable justification for extending the time. This alleged distinction, however, is not borne out by the judgments themselves. For the following reasons, I find that *Vermette* and *Oster* are conflicting judgments that cannot be reconciled by the absence or presence in each respective case of a s. 41 decision by the Commission.

[23] Firstly, there is no indication in the *Vermette* judgment that Muldoon J.'s holdings were limited to situations where the Commission had failed to provide a reasonable justification for, or any decision at all in regards to, "extending the time limit." On the contrary, the Court in *Vermette* specifically contemplated not one but two s. 41 decisions: the first decision would be made by the Commission but would be of a preliminary and procedural nature—"neither substantive nor ultimate"; the second decision would be made by the Tribunal and would substantively adjudicate whether the Respondent was inappropriately deprived of "…the benefit of the limitation period stated by Parliament" (see paras. 26-29, 33-34). Thus, the reasoning in *Vermette* does not presume the absence of a Commission decision.

[24] Secondly, it is not entirely clear that Gibson J.'s holdings in the *Oster* judgment were contingent upon the presence of a Commission decision to extend time. It is true that the record in *Oster* clearly revealed the Commission's consideration of s. 41(1)(e), leading to a decision to deal with the complaint. The Court noted that this decision could

have been subject to judicial review, generating a potentially anomalous result where the Tribunal decides the same issue. However, the core holding in *Oster* is arguably Gibson J's disagreement with the Court in *Vermette* as to whether s. 41 confers substantive rights that can be advanced before the Tribunal. Had the Court truly believed that *Vermette* was distinguishable on its facts, based on the supposed absence of a s. 41(1)(e) decision in that case, Gibson J. could have so indicated. But no such indication is found in the judgment.

[25] In short, neither judgment indicates that the result would have been different had the Commission issued—or not issued—a clearly articulated set of reasons under s. 41(1)(e). The factual dichotomy proposed by the Respondent to reconcile *Oster* and *Vermette* is not supportable.

[26] The better view of these judgments, and one that the Tribunal has adopted in the past, is that they conflict with each other as to the nature of s. 41, and what it empowers the Tribunal to do or not do. Thus, in *Leonardis*, the Tribunal found that the Court in *Oster* had "…reached a different conclusion" from the Court in *Vermette*, and opted to follow *Oster* to the effect that s. 41(1) cannot be interpreted to provide additional substantive rights that can be decided upon by the Tribunal (para. 7). Notably, the Tribunal in *Leonardis* based its decision on Gibson J's findings of law in *Oster*, and not on the presence of a s. 41(1)(e) decision by the Commission. In fact, while the Respondent asserts that in *Leonardis* there was an express decision made by the Commission under this provision which was "challenged", this detail is not mentioned in the Tribunal's ruling, let alone relied upon as a reason for following *Oster*, as opposed to *Vermette*.

[27] *Leonardis* is not the only decision in which the Tribunal found that *Vermette* and *Oster* are irreconcilable. In *Cremasco*, the Tribunal noted that *Vermette* "…has been eclipsed by later developments" and that the reasoning in *Oster* was preferable (see para. 45).

[28] Like the Tribunal Members in *Leonardis* and *Cremasco*, I believe that *Vermette* and *Oster* take two different interpretive approaches to s. 41 that cannot be reconciled, and that the approach taken in *Oster* is preferable.

[29] It is also important to note that the Respondent's reliance on the alleged factual dichotomy between *Vermette* and *Oster* is not consistent with the scheme of s. 41. The Respondent's assertion in the present case (in an attempt to get around *Oster*), that the Commission has apparently made "no decision at all" regarding timeliness, obscures the central outcome of section 41 decision-making, namely, a decision by the Commission to either deal with the complaint, or not deal with the complaint. Section 41(1) imposes a positive duty on the Commission to deal with complaints, except if it appears to the Commission that one of the enumerated circumstances applies: "Subject to section 40, the Commission <u>shall deal with</u> any complaint filed with it <u>unless</u> in respect of that complaint it appears to the Commission…" [emphasis added]. Thus, if the Commission decides to deal with a complaint filed over a year after the fact, it has at the very least implicitly decided to extend the time for filing under s. 41(1)(e).

[30] Section 41(1)(e) empowers the Commission to deal with complaints that have been filed after "…such longer period of time as the Commission considers appropriate in the circumstances...." The Respondent supports a disjunctive interpretation of s. 41(1)(e), as if this wording establishes a separate step in the s. 41 decision-making process that is divorced from the decision to "deal with" the complaint. Granted, it would appear from the above decisions that in some cases the Commission issues reasons that expressly address time extension, and in some it does not. However, the Tribunal is not required to—and generally declines to—embark upon an examination of the Commission's administrative decision-making to address the impact of these variations.

[31] In *Wall*, *Dumont*, *Cremasco*, *Telus*, and *Warman*, the Tribunal did not focus on the presence or absence of a Commission decision under each paragraph of s. 41(1). Rather, it deferred to the Commission's discretionary decision to "deal with" the complaint.

[32] In *Wall*, where it was alleged the Commission failed to address s. 41(a) of the *CHRA*, the Tribunal made it clear that it had no jurisdiction to review decisions that were taken, or the fact that decisions may not have been taken.

[33] In *Dumont*, there appears to have been some degree of uncertainty as to whether the Commission issued a formal decision under s. 41(1)(e) to extend time. The Tribunal

concluded that "evidently" such decision had been made, allegedly without hearing submissions from the respondent. This however, was a matter for judicial review of the Commission's decision, which the respondent in *Dumont* apparently did not pursue. The Tribunal ruled it did not have jurisdiction to review "…the way in which…" the Commission chooses to exercise its s. 41(1)(e) discretion.

[34] In *Cremasco*, the Tribunal expressed itself similarly, observing that the Tribunal does not have jurisdiction to deal with preliminary objections based on the exercise of the Commission's discretion under s. 41.

[35] In *Telus*, the Tribunal also surmised that "evidently" the Commission did not deem the complaint to be not receivable, having assigned an investigator and then referred the complaint to the Tribunal (see para. 47). After noting that the respondent was entitled to make submissions to the Commission on the late filing of the complaint, it noted that there was no indication in the record that the respondent made this argument before the Commission. The Tribunal ultimately rejected the respondent's argument under s. 41(1)(e).

[36] At the end of the day, the basis upon which the Commission decides to "deal with" a complaint under s. 41 does not shape the way in which the Tribunal exercises its own jurisdiction; the germane consideration from the Tribunal's perspective is that the Commission has made a request under s. 49 that a Tribunal inquiry be instituted. Section 41 decisions, as well s. 49 decisions, can definitely be challenged, but the venue for such challenges is the Federal Court, in an application for judicial review.

[37] This clear division of responsibilities between Court, Commission and Tribunal—as enacted in the *CHRA* and the *Federal Courts Act*, R.S.C. 1985, c. F-7—is fully reflected in the *Oster* judgment, which is why it constitutes the preferable approach. The Tribunal simply has no jurisdiction to apply s. 41.

[38] To this must be added the same caveat found in similar Tribunal decisions declining jurisdiction over s. 41 objections: the Tribunal retains jurisdiction to address issues pertaining to how delay in the proceedings impacts the fairness of the hearing, (*Grover v. National Research Council of Canada*, 2009 CHRT 1, para. 42, aff'd *Grover v.*

Canada (A.G.), 2010 FC 320 ("*Grover-FC*")). In its reply submissions, the Respondent asserts that it has been prejudiced by the delay in the filing of the complaint, and that "…evidence of same is set forth in the Investigation Report, which was attached as Exhibit B to the Respondent's Notice of Motion." According to the Respondent, certain individuals alleged to have engaged in discrimination, when interviewed by the Investigator, said they could not recall some of the events in question, and their recollections of other events had faded. Another individual did not even remember working with the Complainant. Thus, the delay has severely impacted the Respondent's ability to defend itself against the allegation that prompted the present motion (see Reply, para. 6).

[39] In *Grover-FC*, the Court noted that in order to obtain a stay of proceedings, there must be proof of "…a significant prejudice" and that when that prejudice is said to result from a party's inability to have a fair hearing, that party must be prepared to adduce evidence to substantiate its claim (see para. 30). The Court described the *Grover* Tribunal's evidentiary assessment as follows:

> [31]…The Tribunal heard considerable evidence relating to the issue of delay and the diminished recollections of witnesses. It assessed the credibility of the witnesses and drew inferences for the purposes of determining whether the evidence demonstrated prejudice of a "sufficient magnitude to impact on the fairness of the hearing" (*Blencoe*, above, at para. 104) justifying a dismissal of the complaints…

[40] In the current matter, to make out a case of prejudice, the Respondent has relied upon statements in the Investigator's Report recounting conversations with three potential witnesses. While undoubtedly the Tribunal can accept hearsay evidence (s. 50(3)(c))—in this case double-hearsay—the limited probative value of such evidence is manifest, especially in the context of a motion to summarily dismiss an allegation of discrimination. There is no way to assess the veracity, accuracy, extent or impact on the inquiry of the statements allegedly made to the Investigator on the basis of the present motion record. Moreover, the prejudice argument—to the extent it is a separate argument grounded in the fairness of the inquiry—was only put forward in reply; the original motion was framed in terms of s. 41. The submissions on prejudice are insufficient to permit proper consideration of this argument as a separate ground for dismissal.

[41] For all of the foregoing reasons, the Respondent’s motion is dismissed.

Signed by

Susheel Gupta
Tribunal Vice-Chairperson

Ottawa, Ontario
December 30, 2016