Date: 20071221

Docket: T-461-07

Citation: 2007 FC 1361

Ottawa, Ontario, December 21, 2007

PRESENT: The Honourable Orville Frenette

BETWEEN:

CAROLYN BREDIN

APPLICANT

and

ATTORNEY GENERAL OF CANADA

RESPONDENT

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission dated February 17, 2007 wherein the Commission decided not to deal with the applicant's complaint because the complaint was out of time as it was based on acts that occurred more than one year prior to the date on which it was filed and because the reasons for the delay were insufficient for the Commission to exercise its discretion to accept the complaint.

[2] The applicant argues that the Commission erred by refusing to exercise its discretion by relying on incomplete evidence because of the investigator's failure to provide the parties with an

opportunity to make submissions prior to making its recommendation. Furthermore, the applicant submits that the Commission did not assess its duty to consider and accommodate her disability when determining whether it should exercise its discretion.

THE FACTS

[3] A comprehensive review of the facts that give rise to this application are provided in the applicant's first application for judicial review: see *Bredin v. Canada (Attorney Genera)*, 2006 FC 1178. Facts central to this application are reviewed here.

[4] The applicant began her career in 1979 as an employee of Citizenship and Immigration Canada. She subsequently transferred to the Department of Justice effective April 30, 2001. In 1992, she was diagnosed with major depression and took disability leave. In October 1993, the applicant returned to work on a graduated basis and returned full time in November 1995.

[5] The applicant was informed by her compensation and benefits advisor in October 1993 that a delay in her pay would result if she was listed as a full-time employee, but that, at the time, she was listed as a part-time employee. The applicant also states that she was told that being listed as a part-time employee would not negatively affect her ability to buy back her pension during the time she was on leave without pay.

[6] Prior to July 4, 1994, the *Public Service Superannuation Regulations*, C.R.C., c. 1358 did not allow employees to be contributors to the pension plan if their assigned hours of work were less

than 30 hours per week. However, an amendment to these Regulations subsequently allowed part-time employees before that date to become contributors to the Superannuation Pension Plan. Contributors on that date could elect to buy back any or all prior part-time service that occurred after December 31, 1980.

[7] The applicant applied to buy back pension time, but her application was denied on December 18, 2001 by the Superannuation Directorate. She was informed that she was not eligible to buy back her pension entitlements for those periods of leave without pay because of her part-time employment status. The applicant made further submissions to the Directorate and requested that it treat her employment from October 4, 1993 to November 29, 1995 as full time. Her request was denied on March 6, 2002.

[8] On April 10, 2003, Françoise Girard, the Acting Director General of the Human Resources Directorate at the Department of Justice wrote to her counterpart at CIC to request that the applicant's employment status be amended from part-time to full-time for the period of October 4, 1993 to November 29, 1995 so that this period could be considered for pension purposes.

[9] In May 2003, the applicant became ill and took a period of disability leave.

[10] On July 11, 2003, Ms. Gravel refused the request to change the applicant's employment status because she did not believe that the circumstances supported the applicant's allegation that she had been misinformed by her compensation and benefits advisor at the time as to the impact of

her being listed as a part-time employee. Ms. Girard was invited to contact the Director of Workplace Effectiveness of CIC, Anne Wallis, on behalf of the applicant, which she did, seeking a detailed explanation from Ms. Wallis before Ms. Girard rendered her final decision. The applicant alleges that as a result, Ms. Wallis contacted her personally and suggested that she would personally review her case. She also indicated that that CIC was seeking a legal opinion as to whether it could consider additional information submitted by the applicant in 2003 in respect of her 1993 employment status. She attempted to remedy what she perceived as an administrative error, through an internal process.

[11] These investigations culminated with a letter sent to the applicant on June 14, 2005, wherein Ms. Gravel confirmed that she believed CIC had correctly concluded that the applicant was working part-time and that her request to change her employment status had been rightly refused.

[12] On May 10, 2005, the applicant filed a human rights complaint with the Commission alleging that by refusing to amend her employment status, CIC and the Treasury Board of Canada treated her in an adverse and discriminatory manner, contrary to sections 7 and 10 of the *Canadian Human Rights Act*, R.S., 1985, c. H-6 (the "Act").

[13] An investigator was appointed by the Commission who conducted an inquiry into the applicant's complaint. After receiving submissions from both parties and examining the medical reports and documents, the investigator recommended to the Commission that it not deal with the complaint because it was filed out of time. On November 18, 2005, the Commission informed the

applicant that it had decided not to deal with her complaint because it was filed outside the one-year limitation period prescribed under paragraph 41(1)(e) of the Act.

[14] The applicant sought judicial review of the Commission's decision. On October 4, 2006, Justice Blanchard granted the application and referred the matter back to the Commission. He held that the applicant had filed her complaint beyond the one year limitation period and confirmed that it was on July 11, 2003 when the applicant's alleged adverse differential treatment crystallized. However, Justice Blanchard determined that the Commission's reasons for its decision were inadequate and insufficient to establish whether it had turned its mind to the exercise of its discretion to refer the complaint despite the fact that it was filed out of time.

THE COMMISSION'S DECISION

[15] On November 5, 2006, an investigator completed a section 41 analysis report and recommended that the Commission not deal with the applicant's complaint because it was out of time and because the reasons for the applicant's delay did not appear to be sufficient justification for the Commission to exercise its discretion to accept the complaint.

[16] The investigator found that the one-year time limitation period began with the respondent's letter to the applicant dated July 11, 2003 in which she was informed that her request to amend her employment status from part-time to full time had been dismissed. Therefore, the applicant, who only contacted the Commission in April 2005 (ie. 21 months later), was well beyond the time limitation period.

[17] The investigator rejected the respondent's submission that it would be prejudiced if the complaint were to proceed because the events underlying the complaint dated back to October 1993. The respondent suggested that some witnesses would either be unavailable or unable to recall important details. However, the investigator noted that the complaint was not witness-driven and it appeared that the respondent possessed the necessary documentary evidence to establish her disability mount a defence.

[18] On this point, the important evidence was the medical evidence and two medial reports were filed by the applicant relating to her state in 2003-2005.

[19] However, the investigator also rejected the applicant's explanation as to why she had not filed her complaint in time. Although it was acknowledged that she had been suffering from major depression since May 2003, she had maintained contact with her current employer during this time and pursued an informal review process. This suggested that the applicant could have filed a complaint with the Commission within the one-year time frame.

[20] The investigator concluded that although the delay was incurred in good faith, there is no requirement in the Act that a complainant exhaust an alternate redress before filing a complaint. Therefore, there was nothing preventing the applicant from submitting a complaint to the Commission at any time immediately after being informed of the respondent's decision.

[21] Finally, the investigator recommended that, pursuant to paragraph 41(1)(e) of the Act, the Commission not deal with the complaint because it was out of time, as it was based on acts that occurred more than one year before the filing of the complaint and because the reasons for the delay did not appear to be sufficient justification for the Commission to exercise its discretion and bring the complaint into time.

[22] By a letter dated February 12, 2007, addressed to the applicant, the Commission examined the file and adopted the investigator's recommendation and informed her that the Commission would not deal with her complaint.

LEGAL FRAMEWORK

[23] The Commission can refuse to deal with a complaint where it is filed more than one year after the last incident of alleged discrimination, unless the Commission exercises its discretion to allow for a longer filing period.

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;
(b) the complaint is one that could more appropriately be	b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des

dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	procédures prévues par une autre loi fédérale;
(c) the complaint is beyond the jurisdiction of the Commission;	c) la plainte n'est pas de sa compétence;
(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or	d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
(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.

[24] The Federal Court of Appeal has held that in exercising this preliminary screening function, the Commission should only dismiss a complaint in plain and obvious cases, since this determination will summarily end the matter: *Canada Post Corp. v. Canada (Human Rights Commission)*, [1997] F.C.J. No. 578 (QL), aff'd [1999] F.C.J. No. 705.

ISSUES

[25] The applicant submits the following two issues:

1. What is the standard of review of the Commission's exercise of its discretion pursuant to paragraph 41(1)(e) of the *Act*?

2. Did the Commission commit a patently unreasonable error when it decided not to exercise its discretion to accept her complaint?

THE PROCESS BY WHICH A COMPLAINT IS FILED WITH THE HUMAN RIGHTS COMMISSION

[26] I believe it is useful to scrutinize section 41 of the Act which sets out the process through which a complaint proceeds before the Human Rights Commission. The Commission must first perform a preliminary screening of the complaint by determining if *prima facie*, it falls within the exclusionary subsections of article 41. The Commission does not review the merits if the complaint at this stage.

[27] Once the Commission determines that one of the subsections of section 41(1) applies, such as the one year time limit, it must then decide if it will exercise its discretion under section 41(1)(e) to, in the circumstances, grant or refuse a longer period of time to file the complaint.

[28] In *Price v. Concord Transportation Inc.*, 2003 FC 946, [2003] F.C.J. No. 1202, it was stated:

> Further, section 41(1)(e) recognizes that a black-and-white time bar would not be appropriate. The Commission's fact finding expertise is fairly and appropriately put to work by the added discretion to extend such time limitation if the Commission considers it "appropriate in the circumstances".

[29] In principle, the Commission must consider if the delay was incurred in good faith and it must weigh any unfairness or prejudice caused by the delay. It must also consider the objective of

the Act and the effect upon the complainant if the complaint is dismissed, see *Larsh v. Canada (Attorney General)*, [1999] F.C.J. No. 508, at para. 36.

[30] If there is no valid reason justifying the delay, the Commission will dismiss the complaint at the preliminary screening stage.

> *Price*, supra;
> *Good v. Canada (Attorney General)*, 2005 FC 1276, [2005] F.C.J. No. 1556;
> *Davey v. Canada*, 2004 FC 1496, [2004] F.C.J. No. 1840;
> *Tse v. Federal Express Canada Ltd.*, 2005 FC 598, [2005] F.C.J. No. 740.

THE DISABILITY FACTOR

[31] Among the circumstances to be considered by the Commission, is the disability factor. If this disability has hindered the filing of the complaint motion, the prescribed delay. The Commission must take it into account to reach a decision, see *Lukian v. Canada National Railway Co. (CNR)*, [1994] F.C.J. No. 727.

THE DISABILITY FACTOR FOR PSYCHOLOGICAL REASONS

[32] It seems that there is no case reported relating to a psychological disability in determining any extension of a time. In principle, I see no logical basis for not considering such a disability if it is established that it rendered the complainant unable to file a complaint within the year limit set by law.

[33] The question then becomes one of deciding if the facts alleged and substantiated, establish such an inability. This flows from a simple reading of section 2 of the Canadian Human Rights Act,

where the main purpose of the Act is to provide equality and non-discrimination for all individuals, including “disabled” ones, see *Besner v. Canada (Correctional Service)*, 2007 FC 1076, [2007] F.C.J. No. 1391.

ISSUES

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ANALYSIS

Standard of Review

[35] Both parties agree that the question of whether or not the Commission properly exercised its discretion in not allowing the applicant’s out-of-time complaint to nevertheless proceed is to be considered on the standard of patent unreasonableness.

[36] On this same question in the applicant’s first judicial review application, Justice Blanchard conducted a complete pragmatic and functional analysis and concluded that the matter should be reviewed on the patent unreasonableness standard, see *Bredin v. Canada*, previously cited. As he noted, this is in line with previous decisions of this Court, see *Cape Breton Development Corp. v. Hynes*, [1999] F.C.J. No. 340 (QL), *Price v. Concord Transport Inc.*, 2003 FC 946, *Johnston v.*

Canada Mortgage and Housing Corp., [2004] F.C.J. No. 1121 (QL) and *Davey v. Canada* (2004), 257 F.T.R. 316 and *Zavery v. Canada (Human Resources Development)*, 2004 FC 929, [2004] F.C.J. No. 1122. Consequently, I will review this question on the patent unreasonableness standard.

[37] However, the applicant also suggests that the Commission failed to provide the parties with an opportunity to make submissions before the section 41 report was completed. Properly framed, this is an issue of procedural fairness, and consequently it should be reviewed as a question of law. That is, either the Commission complied with the content of the duty of fairness or it has not: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404.

Exercise of the Commission's discretion

[38] The applicant submits that the serious consequences of this decision require the investigator to seek submissions from the parties on the reasons for the delay and whether there would be any prejudice to the respondent to extending the one year time limit. Furthermore, these submissions must be solicited prior to completing the section 41 report. Instead, the investigator relied on the submissions of the parties that formed the basis of the original flawed decision. Consequently, the applicant submits that she was restricted to making reply submissions which themselves were subject to significant restrictions in length and content.

[39] As a result, the applicant submits that the investigator failed to interview Ms. Wallis, and to inquire into the nature and extent of their correspondence, the delays caused by the CIC in responding to her request for reconsideration and the CIC's stated concerns about its failure to

consider evidence submitted by the applicant. The applicant also submits that the investigator erred by concluding that she could have filed a complaint in a timely manner because she assumed that the applicant's disability had no impact on her ability to file a complaint. She argues that there was no evidence to support this conclusion, particularly troublesome because the investigator never interviewed the applicant's doctor, employer or CIC management to test this assumption. In fact, the applicant's psychiatrist provided contrary information which demonstrated that during the delay period the applicant was diagnosed with major depression and unable to focus and concentrate, complete tasks in a timely manner, and lost interest in matters.

[40] The respondent contends, however, that there was sufficient evidence already before the Commission, including medical evidence. Furthermore, the applicant chose to pursue her complaint in an informal manner by communicating with her employer. There is nothing that negates a complainant's obligation to contact the Commission within the one year time frame where he or she seeks to pursue alternate avenues of redress. Although this Court may not have reached a similar conclusion, the evidence is sufficient to support the Commission's finding and no intervention is warranted.

[41] In the applicant's first judicial review application, Justice Blanchard noted that there were "[c]omprehnsive submissions" from the applicant in respect of the Commission's exercise of discretion under paragraph 41(1)(e) of the Act (at ¶ 58). These submissions were made only after the Director of the Investigation Branch had recommended to the Commission not to deal with the complaint. Given that the record before Justice Blanchard was incomplete and the investigation

report notably absent, he could not ascertain whether the Commission had ever considered these submissions and the factors that would allow it to exercise its discretion.

[42] According to the second extensive investigation report, it appears that the "comprehensive submissions" referred to by Justice Blanchard in the first judicial review application were reviewed by the second investigator. The second investigator states in her section 41 report that she considered submissions made by both parties to the first referral decision that was subsequently overturned by Justice Blanchard.

[43] Once the second investigator completed her report, she invited further submissions from the parties. Both the applicant's union, the Public Service Alliance of Canada and CIC replied to the Commission's invitation. Craig Spencer, legal counsel for PSAC presented his submissions for the applicant in the form of a ten page letter in which he addressed the main issues including the Commissions treatment of the ground of "disability" and the discretion to extend the time limit to lodge a complaint to the Commission.

[44] In *Slattery*, the Court considered the degree of thoroughness of investigation required to satisfy the rules of procedural fairness:

> In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker. Therefore, it should be only where complaints are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's

> omissions would include: (1) where the omissions is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it; or (2) where the fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it.

[45] In *Canadian Imperial Bank of Commerce v. Kollar*, 2003 FC 985, Justice Kelen was presented with a motion for an interlocutory injunction prohibiting the Canadian Human Rights Tribunal from proceeding with an inquiry into a complaint pending a judicial review application. The investigator had relied solely on information contained in a report completed by another investigator which had been successfully challenged by judicial review. Although in *obiter*, Justice Kelen noted:

> I note that it is the Commission's decision, not the investigator's report, which is the proper subject of the judicial review application. The applicant was afforded the opportunity to submit new evidence to the Commission after the investigator circulated her report. It failed to take advantage of that opportunity and cannot now claim it as a ground for judicial review.
>
> [emphasis added]

[46] The applicant submits that it was denied the opportunity to make any submissions to the second investigator prior to the completion of her report. Further, she was limited to a maximum of ten pages in reply to that report.

[47] The second investigation report indicates that it is based on the parties' submissions submitted to the first investigator, Justice Blanchard's decision, and the parties' responses to the second investigation report.

[48] The applicant submits that the second investigator should have also solicited submissions from the parties and conducted a more thorough investigation prior to issuing her report. Specifically, the applicant argues that she has been denied an opportunity to provide evidence as to the reasons for her delay in filing her complaint, notably evidence of her interaction with Ms. Wallis and senior management at CIC as well as medical evidence addressing the applicant's medical state and ability to file a human rights complaint.

[49] However, it is clear from the record that the applicant was able to put forward this very evidence to the investigator.

[50] First, the applicant's complaint provides a comprehensive review of her communication with human resource employees and senior management of DOJ and CIC. In fact, a significant part of the applicant's complaint form reviews her lengthy exchanges with Ms. Wallis.

[51] Insofar as the applicant suggests that the investigator failed to conduct a complete investigation by not interviewing Ms. Wallis or her psychiatrist, I note that an investigator need not interview every witness proposed by the complaint: *Slattery* at ¶ 68. Furthermore, it is evident that the applicant presented two medical reports and a letter from Dr. D.J. Vervaeke outlining the psychiatrist's diagnosis and her symptoms. A letter from PSAC in the period involved, confirmed the depressed state of the applicant. The near totality of the arguments advanced by the applicant here, were extensively analyzed by Justice Blanchard in the decision of October 4, 2006.

[52] Therefore, I am satisfied that the applicant was able to disabuse herself of any concerns raised by the second investigation report and had an adequate opportunity to present the Commission with evidence she believed was relevant to its decision.

[53] The applicant also suggests that in administering her complaint, the Commission failed to accommodate her disability. That is, she submits that the Commission must consider whether the reasons for the delay were incurred in good faith and whether any prejudice would be suffered by the respondent when deciding whether to exercise its discretion under paragraph 41(1)(e) of the Act. This includes whether the complainant had a disability and if so, whether that disability may have contributed to the delay, see *Besner*, supra. When this is the case, the Commission may be required to accommodate the complainant by extending the delay.

[54] The applicant submits that in this case, the Commission's conclusion that there was no reason to extend the time for filing was inconsistent with the medical evidence. Instead, the evidence demonstrated that the applicant's disability was a significant factor in the delay in filing her complaint. Therefore, the Commission was required to consider whether it would cause undue hardship to the respondent to accommodate the applicant by exercising its discretion to extend the time for filing the complaint. Having already concluded that extending the time would cause no prejudice to the respondent, the Commission should have done so.

[55] No doubt the Commission, or the Canadian Human Rights Tribunal, as the principal administrators of the Act, would be required to respect the principle of equality would not or be permitted to discriminate in the execution of their functions.

[56] However, I do not need to decide in what circumstances the Commission would be required to accommodate a claimant in all cases and to the point of undue hardship because it is clear that in the circumstances the investigator was reasonably satisfied that her disability had no impact on her ability to make a complaint.

[57] The investigator acknowledged that the applicant had been diagnosed with severe depression in May 2003 and that she submitted that her disability rendered her incapable of making a formal human rights complaint. However, Dr. Vervaeke's letter does not specifically state that the applicant's condition was such that she would be unable to participate in the Commission's complaint process.

[58] The investigator also noted that the applicant continued to pursue the matter of her employment status informally. She received a letter and had two telephone conversations during this period of time. Moreover, I would note that the applicant was diagnosed with severe depression in May 2003; she has subsequently returned to work in June 2005. She was able to file her complaint on May 10, 2005 but she did not establish when she was well enough to be able to file her complaint. In the meantime, she was communicating with her employee in an informal way.

SUMMARY OF THE EVENTS IN THIS CASE

[59] It seems to me crucial to briefly review all the episodes and facts in this case to grasp a complete picture.

[60] The applicant suffered a major depression illness which caused her to be absent from work from May 2003 to June 2005. During that time, she communicated with her employer for other issues, such as part-time work and pension benefits; in 2003, 2004 and 2005.

[61] She filed her complaint on May 18th 2005 and on September 4th 2005, she was advised that the time limit was expired and she was invited to submit her comments or representations. A decision to reject her complaint was issued by the Commission on November 18th 2005. She then applied for a judicial review which she successfully obtained in a decision by Justice Blanchard, on October 4th 2006.

[62] Justice Blanchard, with his usual thoroughness analyzed al the components of the case and granted the review solely because of the insufficiency of its reasons of the Commission's decision.

[63] The Commission's decision of November 15th 2005 was based upon the file but particularly upon the investigator's report of Jennifer Marakam, November 5th 2006 recommending the dismissal of the complaint due to expiry of the time limit.

[64] Following Justice Blanchard's decision, after representation of the parties or their counsels, a new investigator's report was prepared, wherein the entire file was reviewed in conjunction with Justice Blanchard's decision.

[65] The applicant's complaint was thoroughly re-examined with much emphasis upon her disability and her communication with her employer pursuing an informed form of redress of her complaint.

[66] I also must repeat that the Commission also had the applicant's counsel's then page letter of December 5th 2006 elaborating all the issues and the arguments favorable to the applicant. The Commission reviewed and analyzed all of the materials of the file including the representations of the parties and Justice Blanchard's decision of October 4th 2006. The Commission had the two investigators' reports and the applicant's reply to the second report. It is after considering all of this material that the Commission rendered its decision of February 17th 2007.

[67] In my opinion, the applicant received a complete and fair hearing of the issues raised by her complaint. The Commission was entitled to rely on the investigator's report but they did more, in that they considered other material as related previously.

[68] In these circumstances, can one conclude that the Commission's decision was patently unreasonable? That is, made on bad faith or capriciously or cannot be sustained by a reasonable analysis of the facts. It is trite law to repeat that the role of the court is not re-assess the evidence, or

to substitute its opinion to the one which is the object of the judicial review. Its role is to decide whether the Commission's decision is or is not patently unreasonable in the circumstances. In this case, I cannot reach that conclusion.

[69] Therefore, the application for judicial review must be dismissed.

JUDGMENT

THEREFORE, THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed without costs.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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