

Federal Court



Cour fédérale

Date: 20091021

Docket: T-1978-08

Citation: 2009 FC 1067

Ottawa, Ontario, October 21, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ROYAL BANK OF CANADA

Applicant

and

MEERA BHAGWAT

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application by the Royal Bank of Canada (RBC) challenges a decision by the Canadian Human Rights Commission (Commission) to refer a complaint by Meera Bhagwat (the Complainant) to the Canadian Human Rights Tribunal (Tribunal) for an inquiry. The RBC

contends that this decision was made in breach of the principles of natural justice and procedural fairness and is otherwise unreasonable.

a. Background

[2] The Complainant is an employee of the RBC who claims to have suffered from discrimination in the workplace. In the course of the Commission's investigation, a request was made to interview a number of RBC employees. This request was answered by the RBC's outside legal counsel who asked that she be permitted to attend the interviews. In a letter dated April 11, 2008, the Commission denied this request for the following reasons:

The role of the Commission with respect to the complaints process is to conduct a thorough and fair investigation which respects the rules of procedural fairness. Procedural fairness requires that parties know the substance of the evidence before the Commission and that they have an adequate opportunity to understand the case that must be met, to answer it and to put forward their own position.

With respect to the conduct of interviews, the Commission is of the view that procedural fairness does not require, nor does it provide, an automatic right for a respondent or a complainant representative to be present during an interview. There is nothing to suggest that either party would be prejudiced or that the requirements of procedural fairness would not be met if representatives of either side are excluded from being present during witness interviews. Information gathered during interviews is reflected in the investigation report. Therefore, both sides will have the opportunity to provide comments when the report is disclosed to them.

It is extremely important that the Commission ensure that a witness be able to speak freely in an interview. The presence of a representative of either side could result in a chilling effect on the witness and could impede the Commission's ability to gather all relevant information. Past experience has shown that few employees, for example, will be comfortable objecting to management representatives being present and, therefore, the Commission's policy removes this burden from the witness.

Consequently, a request from a respondent or a complainant representative to be present during witness interviews will be denied. An exception may be made if the witness is being interviewed to clarify a respondent's policy or the third party is the witness' personal or legal representative. In such instances, the third party is present as observer only.

In conclusion, your request to be present during the witness interviews in the complaint filed by Ms. Meera Bagwat [sic] is denied. Mr. Parekh will shortly resume his investigation and I trust that you will continue to provide your full cooperation in this matter.

[3] A further exchange of correspondence ensued, but the Commission remained steadfast in its refusal to permit RBC's legal counsel to be present during the proposed witness interviews.

Notwithstanding an explicit warning from the Commission that it would continue with its investigation without the benefit of this evidence, the RBC declined to make its two principal witnesses available for an interview except on condition that its legal counsel be present. There is no question on the record that it was also the wish of the two employees that the RBC counsel be present.

[4] On August 29, 2008 the Commission's Investigator recommended that part of the complaint go forward because of an inability to conduct a thorough and complete investigation into matters involving credibility. The RBC responded to this recommendation by asserting that it was legally justified in refusing to make its employees available in the absence of RBC's legal counsel.

Notwithstanding that argument, on November 12, 2008 the Commission decided to refer the complaint in its entirety to the Tribunal for an inquiry for the following reasons:

There are many disputed facts in this case, many of which turn on the credibility of the Complainant and her manager. In addition, the statement of several other witnesses may also be relevant to the determination of this complaint as they may be able to provide some insight on the working relationship between the Complainant and her supervisor as well as to situation [sic] in the workplace at the time in question.

The Commission notes that the the [sic] Respondent refused to comply with the Commission's policy on third party presence at interviews, and did not permit the Investigator to interview the manager and all other witnesses currently employed with the Respondent. For this reason, the Investigator was unable to conduct a thorough and complete investigation.

Given that there remain issues of credibility, which cannot be determined by the Commission, and given the Respondent's failure to cooperate in the investigation, by allowing the Investigator to interview key witnesses without the Respondent being present, and having regard to all of the circumstances of the complaint, the Commission is satisfied that an inquiry by a Tribunal into the complaint is warranted.

II. Issues

- [5] (a) Did the Commission breach its duty of fairness by refusing to conduct employee interviews in the presence of RBC legal counsel?
- (b) Was the Commission's decision to refer the complaint in its entirety to the Tribunal adequately supported by reasons and was the decision reasonable?

III. Analysis

[6] The issues of procedural fairness raised in this proceeding must be reviewed on the basis of correctness and the challenge to the substance of the Commission's decision is subject to the deferential standard of review of reasonableness: see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at paras. 40 to 57.

[7] The Commission's denial of the RBC's request was based on the application of its procedural policy, the relevant portions of which state:

6.6.3.2 Third party presence during interviews

The issue of third party presence during an interview usually arises when:

- i. a witness wants a companion or advocate to be present;
- ii. a respondent wants its representative or legal counsel to represent management employees speaking for the respondent, or wants a representative to accompany an employee for the purpose of offering explanation of company policy; or
- iii. a respondent wants its representative or legal counsel to attend or observe all interviews with current or previous employees who will be interviewed.

The general rule is that third parties are excluded from witness interviews. The principle behind the rule is to ensure that witnesses are comfortable to speak frankly and freely. Requests from a Respondent that their representative or legal counsel attend or observe all interviews with employees should be denied in all cases.

Exceptions to the general rule may arise in the following four circumstances:

Situation A:

- the witness is a manager or employee of the respondent who has also been named as a respondent and his or her behaviour is alleged to be discriminatory; and
- the individual respondent requests the presence of a third party (his legal counsel or the corporate respondent's legal counsel or representative).

Situation B:

- the witness is a management representative being questioned on a policy of the respondent;
- the witness gives consent to the respondent representative's presence; and,
- the investigator is confident that this agreement is given voluntarily.

Situation C:

- the witness requests that an advisor (e.g. shop steward, relative, personal counselor, friend, etc.), other than a respondent representative or respondent legal counsel, be present;
- the investigator is confident that the request is made voluntarily; and,
- the advisor is not a party to the proceedings or is not likely to be interviewed as a witness or be adverse to the interests of the complainant or witness.

Situation D:

- the witness requests that a respondent representative or respondent legal counsel be present;
- the situation is provided for in a regulation adopted pursuant to the *Canadian Human Rights Act*.

The conditions under which an interview takes place, including the location, method of interview (telephone or face to face) and the

possible presence of third parties, should serve to enhance the witness' ease and ability to respond openly to the investigator's questions. When permitted, a third party must not be allowed to interfere in any way with the interview process. [...]

[8] The RBC contends that the Commission erred in denying its request for legal representation during the Investigator's proposed interviews with its employees. This, it says, constituted a breach of procedural fairness because, as a corporate Respondent and notwithstanding the above policy, it had a fundamental right to counsel during a process that could affect its rights and reputation and because the Commission's policy makes an unfair and arbitrary distinction between individual respondents and corporate respondents. It also complains that the Commission's policy has been inconsistently applied in the past and that the Commission's failure to provide it with a complete version of its policy was unfair because the missing information contained an exception that would have allowed for the presence of its counsel.

[9] I do not agree that the RBC had any right to have its counsel present during interviews with its employees or that any duty of fairness was breached by the Commission.

[10] The RBC conceded that it had no legal right to impose on this process over the objections of a witness. It is only where an employee witness requests the involvement of the RBC's counsel that the RBC claims this entitlement. This position is inconsistent with a rule of procedural fairness based on RBC's corporate interests as a named respondent. What the RBC is essentially arguing for is the right of its affected employees to retain counsel of their choosing without interference from the Commission. The RBC's claim to protection fails because in the context of a preliminary

investigation neither its rights nor those of its employees include any rights of representation beyond what is provided for in the Commission's policies.

[11] A thorough analysis pertaining to the right to counsel as a principle of procedural fairness can be found in *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, [1987] S.C.J. No. 7 (QL) (S.C.C.). That decision recognized that fairness is a flexible concept with a content that will vary according to the nature of the inquiry and the consequences for the parties involved. At the stage of information gathering and where the investigator's findings are not publicly available, the Court recognized that full rights of participation and legal representation may not be required. There the inclination of the court was said to be away from intervention and in favour of the right of the investigator to control its own process. These general principles were later applied in *Nova Scotia (Human Rights Commission) v. MacDonald* (1999), 180 N.S.R. (2d) 379, 94 A.C.W.S. (3d) 333 (N.S. S.C.) where the Commission's decision to exclude the respondent's counsel from a witness interview was challenged. In that case as in this one, the witness had been permitted to retain independent counsel, but not counsel for one of the parties. After a thorough review of the authorities Justice Jack Davison upheld the Commission's decision on the following basis:

23 When you consider these principles, it is inconceivable to me that the legislature intended a witness to dictate the procedures the Commission must follow in searching for facts. The manner in which information is to be furnished under s. 30 (a) is for the Commission to decide.

24 To suggest a witness could simply write out a statement or answer programmed interrogatories gives no thought to the need of the Commission to exercise care in being thorough with respect to their inquiries. The procedure must be flexible and an interview gives

the Commission opportunity to respond to and follow up the information given by the witness with further inquiries.

25 In my view the submission of Mr. Duplak that s. 30 (a) only requires Mr. MacDonald to furnish information in the manner in which he sees fit to furnish such information or to suggest it be done by written statement or by interrogatories is, to use the words of Justice MacIntyre in the *Re Ontario Human Rights Commission et al. and Simpson-Sears Limited* case (supra), placing the "narrowest interpretation of the words employed" in the Act and ignores the remedies intended as expressed in the context of the Act.

26 In my view, the refusal of Mr. Ian MacDonald to attend an interview unless Mr. Duplak is present is a refusal to furnish information under s. 31(1) and an order can issue under s. 31(2) for Mr. Ian MacDonald to attend for the interview with the right, if he wishes, to bring counsel who is completely independent of the issues in the proceeding. In other words, the remedy sought in the originating notice dated September 29, 1999 will be granted.

27 With respect to the remedy sought in the originating notice dated October 27, 1999, it seems to be a broad request and perhaps superfluous when it is stated the Commission can adopt its own procedure for investigating the relevant facts as long as it does not contravene the Act. I do not grant the remedy set out in the originating notice dated October 27, 1999.

I agree with this analysis of the law and I can identify no principled basis in fact or law for distinguishing this decision. I specifically reject the argument that the *MacDonald* decision, above, should be ignored because the RBC is vicariously liable under ss. 65(1) of the *Canadian Human Rights Act* for the actions of its employees and, therefore, its procedural rights at the investigative stage are elevated. The liability of a corporate respondent can only be established on the strength of evidence elicited before the Tribunal. The fact that a witness may have given a preliminary statement does not deprive a respondent of the full panoply of procedural rights that arise on adjudication.

[12] I do agree with counsel for the RBC that there are aspects to the Commission's policy regarding the involvement of legal counsel at the investigation stage that appear somewhat inconsistent or vague.

[13] For instance, it is not entirely clear that an employee witness would not be entitled to the assistance of legal counsel under Situation C provided that the counsel proposed was not also counsel for the respondent employer. That guideline does not state that lawyers cannot assist in such circumstances and I cannot think of any valid reason for denying such legal representation if requested. Indeed, counsel for the Commission indicated that independent legal assistance was contemplated by this guideline. However, Situation C has no application here because these witnesses insisted on the presence of RBC's counsel and when that was refused no request was made for independent representation or for some other permitted form of assistance.

[14] Similarly, if the Commission is concerned that the presence of the employer or its legal counsel might give rise to some unease on the part of an employee or detract from a frank and free exchange, it is somewhat inconsistent that the policy permits an employee who is a named respondent to be assisted by the employer's legal counsel. The same risk is present in both instances. Nevertheless, counsel for the Commission justified this distinction by noting that this was an attempt at balancing competing interests in a situation where the employee, as a named party, was personally at risk.

[15] The only apparent rationale for the inflexibility of the Commission's current approach is that it requires a firm position in all situations including those where the employer's presence may not be as benign as would be the case here. I think this is a legitimate concern because the involvement of the employer or its legal counsel during an employee interview may give rise to pressures, either unintended or quite deliberate, which the investigator may not perceive and which may adversely influence the outcome. Even though the guidelines do allow an investigator in some situations to assess the voluntariness of such a request, such an evaluation will never be perfect and allowing for more exceptions can lead to its own set of problems including complaints by employers of arbitrariness. In addition, the fact that the Commission may not have universally applied its guidelines in the past is of no legal significance here where a renewed policy of strict compliance had been implemented. It should be understood, though, that an ongoing inconsistent application of procedural policies may give rise to a breach of fairness on the basis of a party's reasonable expectations.

[16] While there is a certain bluntness to the Commission's guidelines in situations like this one, I do not find that their application in this case gave rise to any procedural unfairness. I doubt whether at common law any obligation of fairness arises in favour of a non-party witness who is subject to a voluntary interview conducted at the investigation stage of a complaint under s. 43 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. Generally a non-party witness who testifies under compulsion is only entitled to separate legal representation where there is a risk of self-incrimination or where the witness' fundamental rights might be infringed: see *Vapour Canada Ltd. v. MacDonald (No. 2)* (1971), [1971] F.C. 465, 22 D.L.R. (3d) 607 (F.C.T.D.). Even if a duty

of fairness does arise, it is surely satisfied by the fairly generous rights afforded to employees by Situation C. One can, of course, question whether a blanket prohibition of corporate legal assistance to a willing employee is strictly necessary. But this I believe falls within the permissible range of procedural options that a decision-maker can choose in the control of its own processes.

[17] The RBC argues that the Commission had a duty to advise it of the exception to its policy created by Situation D. That provision, it says, allows for the attendance of respondent's counsel at an interview upon the request of a witness.

[18] Situation D in the Commission's policy states:

Situation D:

- the witness requests that a respondent representative or respondent legal counsel be present;
- the situation is provided for in a regulation adopted pursuant to the *Canadian Human Rights Act*.

[19] The RBC's argument is premised on a disjunctive interpretation of the above two clauses which, superficially at least, is supported by the absence of the conjunction "and".

[20] Although Situation D is poorly worded, the context establishes that the two phrases were intended to be read conjunctively. Any other interpretation would completely undermine the qualification in Situation C which expressly disqualifies a respondent's legal counsel from acting in such a capacity. It is to be expected that policies or guidelines of this sort will not always meet the

grammatical standards that one could expect from a statutory instrument and they should not be read as rigorously as the RBC contends.

[21] The RBC also complains that the Commission's decision to deal with the complaint in its entirety (notwithstanding the Investigator's qualified recommendation) is not supported by adequate reasons and is otherwise unreasonable. I do not agree.

[22] The Commission was entirely justified in finding that the RBC's lack of cooperation at the investigation stage was a compelling basis for referring the complaint to the Tribunal. The RBC took an unjustified position with respect to its witnesses. While the decision to withhold evidence seems to have been made in good faith, the RBC, nevertheless, courted the risk that its refusal to cooperate might attract adverse consequences. A party can hardly expect that its strategic interests will be enhanced by a decision to withhold evidence particularly where the witnesses involved are the alleged perpetrators of a human rights complaint. In this situation many of the Complainant's allegations came before the Commission unchallenged and it was not an error to find that a full hearing was necessary to resolve all of the outstanding issues of credibility.

IV. Costs

[23] Neither party is seeking costs against the other and, in the result, no costs are awarded.

JUDGMENT

THIS COURT ADJUDGES that this application is dismissed without costs.

“ R. L. Barnes ”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1978-08

STYLE OF CAUSE: RBC
v.
Bhagwat
v.
CHRC

PLACE OF HEARING: Toronto, ON

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**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Mr. Justice Barnes

DATED: October 21, 2009

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