

Date: 20091218

Docket: T-136-08

Citation: 2009 FC 1291

Ottawa, Ontario, December 18, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

YURI BOIKO

Applicant

and

CHANDER GROVER

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to Section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and Rule 300(a) of the *Federal Courts Rules*, SOR/98-106, for judicial review of a decision by the Canadian Human Rights Commission (the “Commission”), dismissing a complaint for harassment, on the basis of national or ethnic origin and marital status, made by Dr. Yuri Boiko (the “Applicant”) against Dr. Chander Grover (the “Respondent”).

BACKGROUND FACTS

[2] As a result of the Respondent’s successful battle before the Commission and the Canadian Human Rights Tribunal (the “CHRT”), the NRC created the Radiation Standards and Optics

Section with the Institute of National Measurement Standards, specifically in order to appoint the Respondent as its Director. The tale was told in some detail by, among others, Justice Sean Harrington in *Canada (Attorney General) v. Grover*, 2004 FC 704, [2004] 252 F.T.R. 244; Justice Rutherford in *Grover v. Canada (Attorney General)*, 78 O.R. (3d) 126; and Justice Michel Shore in *Canada (Attorney General) v. Grover*, 2007 FC 28, 307 F.T.R. 294. These cases arose from further human rights complaints by the Respondent against the NRC.

[3] The Radiation Standards and Optics Section was comprised of four groups, one of which was the Optics Group. The Respondent was responsible for hiring for the Optics Group, as well as for another, the Photonics Group.

[4] The Applicant joined the Optics Group as a research officer in November 2001. The Respondent was his supervisor. The Applicant's employment was subject to a probationary period of three years. On July 17, 2004, he was fired by the NRC.

[5] Over the course of the Applicant's time with the NRC, a series of incidents led him to believe that the Respondent "exhibited racial hatred and contempt towards whites, Slavic ethnicity and Russians in particular" and also harassed him because of his marital status (as a single man).

[6] Following his firing, on August 13, 2004, the Applicant filed a complaint against the NRC with the Commission. That complaint is not at issue in this application.

[7] On October 22, 2004, the Applicant also filed a complaint against the Respondent, alleging harassment on grounds of national or ethnic origin and marital status, contrary to paragraph 14(1)(c) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. The Commission declined to investigate allegations of harassment based on marital status, but investigated those based on national or ethnic origin. However, it dismissed the complaint and did not refer it to the CHRT. The Applicant seeks judicial review of that decision.

[8] The Applicant has not included the Commission's decision itself in the record. However, the Commission's investigator's report (the "Report") has been filed and, as the Respondent conceded, the report sets out the Commission's reason for decision.

[9] The Report sets out both parties' versions of events that gave rise to the complaint, where there is dispute as to the facts, as well as both parties' interpretations of those events.

[10] On the subject of the allegations of harassment on the ground of marital status, there is no dispute about the facts. In all four incidents described, the Respondent encouraged or required the Applicant to interact with women (whether present or prospective colleagues or, in one case, a visiting researcher). The Applicant alleged that these interactions were not necessary or even useful, and claims that the Respondent's motive in encouraging them was biased against him as a single man.

[11] The Commission did not investigate these incidents. The Report concluded that they had no objective link to the Applicant's marital status, and that even if they did, a reasonable single man would not have understood them as harassment. The Report stated that interactions between women and men of the type described by the complainant are common occurrences in Canadian workplaces. Consequently, they would not, in all likelihood, cause offence to the average single male.

[12] The Commission did investigate the claim of harassment on the basis of race or ethnicity. The claim was mostly based on comments which the Respondent allegedly made about Russians and about vodka. The facts, however, were disputed. The Applicant stated that the Respondent made comments to the effect that Russians all knew each other, and that in the context in which they were made, these comments were contemptuous. The Respondent denied making the comments imputed to him by the Applicant. There were no witnesses to the incidents in which the comments were allegedly made. The situation is the same with respect an alleged comment linking the Applicant to vodka because he is Russian: the Report concluded that "the subject of vodka was raised between the parties ... although their evidence conflicts about who said what to whom;" again, there were no witnesses.

[13] The Commission concluded that evidence was insufficient to demonstrate that the Respondent ever uttered contemptuous comments about Russians. As for the comment about vodka, even if it was made, it was not serious, and in its context, could not amount to harassment.

[14] Another comment made by the Respondent that the Commission investigated in the context of harassment based on national or ethnic origin was to the effect that efforts to “groom” the Applicant had been unsuccessful. The Applicant claimed that the Respondent was making fun of his national origin and marital status and staging a failure and undermining his actual performance. The Respondent did not deny making the comment, but rejected the Applicant’s interpretation of it, stating that to “groom” the Applicant meant to prepare him for assuming greater responsibilities at the NRC. The Report concluded that the comment could not amount to harassment on a prohibited ground as there is nothing to link that particular comment to the Applicant being either a single man or of Russian origin.

PRELIMINARY ISSUE

[15] The Respondent submits that the Applicant’s record suffers from irregularities and portions of it should be struck. Specifically, he takes issue with the Applicant’s affidavit and documents attached thereto, and with significant portions of the Applicant’s Memorandum of Fact and Law.

[16] It is trite law that on judicial review, the Court’s only concern is whether the Commission’s decision can stand, on the appropriate standard of review, with regard to the applicable law and the evidence before it. Extrinsic evidence may be accepted only on issues of jurisdiction or procedural fairness (see *e.g. Alberta Wilderness Assn. v. Canada (Minister of Environment)*, 2009 FC 710, [2009] F.C.J. No. 876 at par. 30).

[17] With respect to the proceedings in Dr. Zhou's case, the Respondent argues that a court cannot treat as evidence in the present proceedings what is asserted in another proceeding unless it be introduced into evidence by the normal means, and relies on *Tekyi v. Canada (Minister of Citizenship and Immigration)*, [1995] 28 Imm. L.R. (2d) 60 (F.C.T.D.), [1995] F.C.J. No. 225 (QL). I agree. However, I will point out that this Court can take notice of the fact that these proceedings are ongoing, and of Justice Phelan's conclusion in *Zhou, supra*, that the Commission's decision to refer the matter to the CHRT was not unreasonable.

ISSUES

1. *Did the Commission err in not investigating the allegations of harassment based on marital status?*
2. *Did the Commission conduct a sufficiently thorough investigation of the allegations of harassment based on national origin?*

STANDARD OF REVIEW

[18] Discretionary decisions of the Commission are reviewable on the standard of reasonableness, although issues related to procedural fairness, such as the thoroughness of the Commission's investigation in this application, attract review on the standard of correctness, *Canada v. Zhou*, 2009 FC 164.

ANALYSIS

1. *Did the Commission err in not investigating the allegations of harassment based on marital status?*

[19] The Applicant submits that the Commission's investigator misunderstood his allegations of harassment based on his marital status and failed to investigate them for that reason. He claims that he did not object to interaction with females; rather he objected to "grooming" activities of the Respondent, who unnecessarily provoked and forced interactions with females resorting to objectionable methods of accomplishing that.

[20] The investigator further misunderstood the significance of the Respondent's activities by failing to note that each of the attempts to force the Applicant to interact with females was followed by a negative evaluation of the Applicant's performance.

[21] Finally, the Applicant rejects the interpretation of the "grooming" comment as relating to improvement of performance because in his opinion there were no measures taken by the Respondent which objectively were favouring working conditions of the Applicant.

[22] For his part, the Respondent submits that the Commission's investigator's decision not to investigate allegations of harassment based on marital status was reasonable. There was, in fact, no need for an investigation, since the Report was based on the assumption that the facts as alleged by the Applicant were true. The reason why the Commission dismissed the Applicant's complaint on

this point is that the Report established no link between the facts as alleged and the prohibited ground of discrimination, and further concluded that these facts could not amount to harassment.

[23] I agree with the Respondent's position on the need for an investigation. Investigating the Applicant's allegations on this point would not have helped him, since the Commission did not actually doubt that the facts that he described took place. The Commission concluded that the Respondent's words and actions had nothing to do with the Applicant's marital status and that they did not amount to harassment. In my opinion, this conclusion is not unreasonable.

[24] I simply fail to see any objective link between the incidents described by the Applicant and his marital status. The Applicant did not suggest that the Respondent actually referred to the fact that the women involved were single, and indeed there is no proof that all of them were; and even if such proof existed, there would still be no basis for the inference that the Respondent's behaviour was in any way an effort at match-making. The fact that the "grooming" comment was made in the context of a performance review supports, rather than makes less plausible, the conclusion that it related to the Applicant's job performance, and not to his marital status.

2. *Did the Commission conduct a sufficiently thorough investigation of the allegations of harassment based on national origin?*

[25] The Applicant makes several arguments the gist of which is that the Commission's investigation of his claims of harassment based on his national origin was not thorough or disregarded material evidence. Thus the Applicant faults the Commission for not having met with Phil Chodos, an internal investigator for the NRC who was familiar with the Applicant's allegations and had, according to the Applicant, a great deal of relevant evidence.

[26] The Applicant further faults the Report for not considering an allegation that another NRC employee heard the Respondent say that he wanted no more East Europeans.

[27] The Applicant also argues that the Commission disregarded an obvious connection between his case and that of Dr. Zhou, which also involved allegations of racial discrimination by the Respondent, and which the Commission decided to refer to the CHRT. The Applicant submits that since the NRC's argument to the effect that the Commission could not have referred Dr. Zhou's case after it had dismissed the Applicant's was rejected, the reverse reasoning must apply: having referred Dr. Zhou's case to the CHRT, the Commission could not dismiss the Applicant's.

[28] Finally, the Applicant submits that the Commission erred in disregarding false statements made by the Respondent and accepting those false statements as true.

[29] With respect to the Commission's failure to meet with the NRC's internal investigator, the Respondent notes that Mr Chodos was not a witness to any of the incidents at issue, and that the Applicant could and should have tried to introduce or rely on the allegedly helpful information gathered by Mr Chodos before the Commission.

[30] As for the claim that another NRC employee heard the Respondent make a derogatory remark about East Europeans, it is not introduced by way of evidence, and cannot be considered in the application for judicial review.

[31] The Respondent also argues that there is no evidence in the record on the Zhou complaints, nor is there any affidavit evidence that properly explains how or why they are connected. The Court, therefore, should not entertain the Applicant's argument.

[32] The Applicant's arguments are not persuasive; evidence to support them is lacking, and their logic is flawed.

[33] First, I note that the Applicant did not even mention Mr Chodos as a potential witness (or indeed at all) in his original complaint to the Commission. He only brought up the subject in his comments on the Commission's report. In any event, Mr Chodos would not have been an important witness, since it is not alleged that he had first-hand knowledge of any of the incidents on which the Applicant's complaint was based. Presumably Mr Chodos spoke to the parties, and perhaps to other NRC employees who may have witnessed the events. But there is no reason why the Applicant

could not have pointed the Commission to the persons, if any, who had first-hand knowledge of the events.

[34] Second, the claim that the Respondent made a derogatory remark about East Europeans was also not in the Applicant's original complaint; the Applicant raised the subject in his comments on the Report, but did not explain who actually witnessed that comment, and how the matter could have come to the investigator's attention since he himself did not bring it up in his complaint. This allegation is not supported by evidence before this Court. In any case, the Commission had no grounds to investigate the matter, and its alleged failure to do so cannot be said to be a breach of its duty of fairness.

[35] Third, with respect to the Dr. Zhou's case, while the Court can take notice of Justice Phelan's decision in *Zhou*, the logic of the Applicant's argument is flawed. As Justice Phelan observed, the two cases are distinct, even though both involve allegations of discrimination on the same prohibited ground by the same person. While different decisions in the two cases "may raise questions, without an assessment of that decision (a matter not before the Court), all that one can conclude is that in one case the harassment and discrimination may be linked to human rights grounds; in the other, there was no such link." (*Zhou, supra*, at par. 31.). Each "complaint must stand and be assessed on its own merits; not 'piggybacked' on someone else's."

CONCLUSION

[36] It may well be, judging by the endless litigation surrounding it, that the atmosphere at the Radiation Standards and Optics Section of the NRC's Institute of National Measurement Standards is unhealthy. It may yet be proven, in other cases, that racial discrimination is part of that unhealthy atmosphere.

[37] But, unfortunately the Applicant did not submit enough evidence to persuade the Commission that he may have been a victim of discrimination or harassment, so that a referral to the Canadian Human Rights Tribunal was warranted. Further, he also failed to convince this Court that the decision of the Commission was unreasonable.

[38] For these reasons, the application for judicial review is dismissed, with costs, for the application and the remaining motions, fixed at \$3,000 payable forthwith.

JUDGMENT

[39] **THIS COURT ORDERS that** the application for judicial review be dismissed, with costs, for the application and the remaining motions, fixed at \$3000 payable forthwith.

“Danièle Tremblay-Lamer”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-136-08

STYLE OF CAUSE: TURI BOIKO v. CHANDER GROVER

PLACE OF HEARING: OTTAWA

DATE OF HEARING: DECEMBER 7, 2009

REASONS FOR JUDGMENT: TREMBLAY-LAMER J.

DATED: DECEMBER 18, 2009

APPEARANCES:

Mr. Yuri Boiko FOR THE APPLICANT

Mr. Paul Champ FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Yuri Boiko FOR THE APPLICANT
(self- represented)

Mr. Paul Champ FOR THE RESPONDENT
Champ and Associates