Federal Court  Cour fédérale

Date: 20100603

Docket: T-1521-09

Citation: 2010 FC 605

Ottawa, Ontario, June 3, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THOMAS TINNEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Tinney's complaint to the Canadian Human Rights Commission that his employer, Correctional Services of Canada (CSC), discriminated against him in his employment and failed to accommodate his disability was referred by the Commission to a Tribunal; or was it?

[2] In the unique facts underlying this application, there are two issues that require the Court's determination. First, whether the Commission was *functus officio* and without jurisdiction when it

purported to "correct" its earlier advice to Mr. Tinney that it was referring his complaint to a Tribunal and second, if it was not *functus officio*, whether it erred in dismissing his complaint.

[3] These very discrete issues are dealt with separately; however, for the reasons that follow, I find in favour of the respondent on both.

I. Whether the Commission Was Functus

Background

[4] Mr. Tinney filed his complaint of discrimination with the Commission on December 28, 2007. In keeping with its usual process, the Commission assigned one of its staff members to investigate the complaint.

[5] On December 16, 2008, the investigator completed his investigation, and wrote a report recommending that the complaint be dismissed. His report was distributed to the parties and, in keeping with the Commission's usual practice, the parties were invited to make submissions in response; both did.

[6] By letter dated March 12, 2009, the Secretary to the Commission writes to the parties. She stated that she is "writing to inform you of the decision taken by the Canadian Human Rights Commission." She stated that the Commission reviewed the investigator's report and the submissions filed by the parties and then says:

> After examining this information, the Commission decided, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, to request the Chairperson of the Canadian Human Rights Tribunal to institute

> an inquiry into the complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.

[7] Shortly thereafter, Mr. Tinney received correspondence from the Commission's Director and Senior Counsel of its Litigation Services Division advising him that the Commission would not be participating in the Tribunal's hearing on the merits of his complaint. He also received correspondence from the Registrar of the Tribunal informing him that his complaint "has been referred by the Canadian Human Rights Commission, to the Canadian Human Rights Tribunal for inquiry and decision." It goes on to inform him of the Tribunal's process and that a case management conference call with the parties is to be held on April 22, 2009. Matters appeared to this point to be proceeding in the normal and usual course; however, this was soon to change.

[8] On April 16, 2009, Legal Counsel to the Commission wrote to the parties informing them of an "error" on the part of the Commission. His letter provides as follows:

> In a letter from Lucie Veillette dated March 12, 2009, you were advised of the Commission's decision to refer the complaint in this case to the Canadian Human Rights Tribunal.
>
> It has since been brought to our attention that there had been an error in the drafting of the decision and that, as a result, the decision did not express the manifest intention of the Commission to dismiss the complaint in this case.
>
> I write to advise the parties and the Tribunal that, in the circumstances, the complaint will be resubmitted to the Commission with a recommendation (1) that the Commission reconsider its decision and (2) that the complaint be dismissed. The parties will be given the opportunity to present written submissions to the Commission before it renders its decision.
>
> We apologise for the inconvenience this may cause the parties and the Tribunal. We hope that, pending the Commission's decision, the

> parties will continue settlement discussions in this matter and we would be happy to participate or host any mediation in this respect.

[9] Upon receipt, Mr. Tinney wrote to the Commission requesting copies of the minutes of the Commission meeting at which his complaint was decided. The Commission responded, providing the chart of the six cases submitted to the Division 2 Member Meeting (redacted to omit personal information) and the recommendation made in each. Mr. Tinney's complaint was identified as file No. 20071443. Also provided was a copy of an email dated March 4, 2009 from David Langtry, Deputy Chief Commissioner, one of the two members who sat at that meeting, instructing Ian Fine, Director General and Senior General Counsel, that "Commissioner Bell and I have read and discussed at March 4 10h00 Division II cases (20071512 through 20061443) and concur with the recommendations made in each and every case, with the exception of case 2008064 and 20061443 as set out below."

[10] The Commission's letter goes on to explain how the "error" occurred:

> The Secretary to the Commission advised the parties of the Commission's decision. In the present case, the decision should have been the dismissal of Mr. Tinney's complaint. The error, [*sic*] stems from the fact that two files hold almost the same number, differing by one number only, the year of their filing. Mr. Tinney's file number of **2007**1443 and Ms. Ng Man Chuen is **2006**1443. The latter file was one of the two exceptions where the Commission did not follow the investigator's recommendation and decided to refer the complaints to the Tribunal.
>
> [emphasis in the original]

[11] The applicant takes the position that "the Commission was *functus officio* and without jurisdiction to reconsider its March 12, 2009 decision." The respondent submits that the "Commission accidentally sent the wrong letter … [that its] intention was always to dismiss the

Applicant's complaint [and that] the Commission was not *functus officio* and had jurisdiction to correct an administrative error."

Analysis

[12] The parties and the Court are agreed that the question of whether the Commission was *functus officio* or not is a question of law and the applicable standard of review is correctness.

[13] The parties and the Court are also agreed that the leading authority on the doctrine of *functus officio* is the decision of the Supreme Court of Canada in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. In *Chandler*, the Court held that once an administrative tribunal, such as the Canadian Human Rights Commission, has made a final decision, it is then *functus officio* and cannot revisit the decision, except where (a) "there had been a slip in drawing it up" or (b) "there was an error in expressing the manifest intention" of the tribunal. The respondent submits that both exceptions apply in the present circumstances.

[14] The process to be followed by the Commission when considering the report of an investigator into a complaint and the options available to it are set out in section 44 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 which is reproduced in Annex A. The statute provides that upon receipt of the investigator's report the Commission "may" request the Chairperson of the Tribunal to institute an inquiry into the complaint if it is satisfied that an inquiry is warranted or it "shall" dismiss the complaint if it is satisfied that an inquiry is not warranted (subsection 44(3)). The Commission is also required to "notify in writing" the parties of which "action" it has taken (Subsection 44(4)). Accordingly, the letter dated March 12, 2009 is the written notification of the

action taken as required by subsection 44(4); it is not, in itself, the decision of the Commission under subsection 44(3). The decision of the Commission under subsection 44(3) was that made by Deputy Commissioner Langtry and Commissioner Bell on or before March 4, 2009.

[15] It is unfortunate that there were no minutes taken of the meeting of the Commission that is referenced in the email from the Deputy Commissioner dated March 4, 2009. There is nothing in the Act that requires that the Commission maintain written minutes of its meetings nor is there anything in the record before the Court that indicates that such is required. Nevertheless, the better practice would be to have a written record of individual decisions made by the Commission under section 44 of the Act. Email correspondence, while convenient, is lacking in the formality one expects from a tribunal tasked with such important decisions. Further, had formal minutes been made, the "error" that happened here may not have occurred.

[16] I am satisfied, based of the record before the Court, that on or before March 4, 2009, the Commission made a final decision concerning the applicant's complaint. That decision was to dismiss his complaint. In my opinion, this decision is evident from the email message sent on March 4, 2009. There is nothing in the record, aside from the letter sent to the parties on March 12, 2009, that is evidence of any different decision and that letter is mere notification, it is not, in itself, the decision.

[17] There is no provision in the Act that permits the Commission to reconsider a final decision that it has made. As such, I am of the view that the reconsideration by the Commission described in its letter dated April 16, 2009 was not only inappropriate but the "reconsidered decision" referenced

in the Commission's letter dated August 11, 2009 was without jurisdiction and was a nullity. What the Commission ought to have done when it discovered that the notification of its decision as contained in its letter dated March 12, 2009 was inaccurate, was to inform the parties in writing of that error and to have corrected it by notifying them of the decision that the Commission had made, which was to dismiss the complaint.

[18] I am satisfied that the letter dated March 12, 2009 contained an error in drawing up the decision made earlier and that this error could be corrected by the Commission.

II. Whether the Commission Erred in Dismissing the Complaint

Background

[19] Mr. Tinney was a Food Services Officer employed by CSC in a correctional institution preparing meals and supervising inmates in food preparation. In July 2004, and again in August 2005, he was accused by two inmates of having inappropriately touched them (sexual assault). Investigations were conducted by his employer and the Ontario Provincial Police; both found the allegations to be unfounded.

[20] In September 2005, Mr. Tinney took a leave of absence for medical reasons. He was subsequently diagnosed with post traumatic stress disorder (PTSD). Dr. Little, his physician, provided notes to CSC supporting his absence. In his note dated October 6, 2005 he states that Mr. Tinney would benefit from returning to work but at a location other than Bath or Millhaven where the allegations of abuse had been made.

[21] Alternative positions were offered to Mr. Tinney throughout his absence but are rejected by him. There is a dispute between the parties as to whether these positions met his medical restriction or were in fact *bona fide* offers of positions. Dr. Lille in his last note dated January 11, 2006 writes that Mr. Tinney may return to work but "he should not return to any correctional institution." Mr. Tinney is then offered and he accepts a position outside the perimeter of the institution on February 22, 2006 and he later accepts a position at Regional Headquarters in records management.

[22] On December 28, 2007, Mr. Tinney files his complaint with the Commission. He alleged that he had been treated in a manner different from other employees because of his disability. Specifically, he alleged that CSC, upon receipt of the first complaint, moved him to Millhaven, rather than transfer the inmate and that CSC failed to inform him for three days of the second complaint during which time he worked with the inmate who had accused him of assault. He alleges that this delay caused or contributed to his PTSD.

[23] The investigator found this aspect of the complaint to be unfounded. He accepted the explanation of CSC for its actions but importantly found that "when the respondent made those decisions, the complainant did not have a disability." Because Mr. Tinney did not have a disability at the time these decisions were made, whether he was treated differently than others or not, the treatment was not because of his subsequent disability and thus there was no breach of the Act. In my view, the investigator's reasoning is unassailable.

[24] Mr. Tinney also complained that CSC had not accommodated his disability. CSC replied that it was not until January 11, 2006 when it received the final note from Doctor Little that Mr.

Tinney could not return to work in an institution, that it was aware of his actual limitation and that it then located alternative employment outside a correctional institution. It submitted that it attempted previously to accommodate his disability based on information provided to it from time to time by Dr. Little. Based in large measure on statements made to the investigator by Mr. Tinney, the investigator concluded "that the complainant's understanding of his disability evolved during the five months that followed the filing of the second complaint and it was only in January 2006, that he was able to identify with his doctor which accommodation measures he really required."

[25] The investigator found the complaint that CSC had failed to accommodate Mr. Tinney's disability to be unfounded. He wrote in his report:

> The complainant's understanding of his disability grew as time passed and as the respondent presented offers of accommodation to him. The respondent's offers always corresponded to the medical restrictions the complainant communicated. As the respondent made offers to the complainant, the complainant realized that these offers were not for him and he sought further medical clarification. The respondent cannot be held responsible for not being able to offer the right job to the complainant without complete medical information.

[26] The investigator provided his report to the parties and invited their submission. Mr. Tinney, through his union representative provided eight pages of submissions.

[27] Mr. Tinney submits that the report was flawed because the investigator failed to conduct a thorough investigation. The lack of thoroughness, he submits is evident because:

a. the investigator failed to interview Dr. Little;

b. the investigator failed to interview any of the CSC representatives; and

c. the investigator failed to interview any of Mr. Tinney's union representatives.

Analysis

[28] The jurisprudence is clear: There is no requirement that a human rights investigator interview every witness proposed or identified by the parties: *Miller v. Canada (Canadian Human Rights Commission)* (1996), 112 F.T.R. 195. However, it is equally clear that an interview is required where a reasonable person would expect evidence useful to the investigator in his determination would be gained as a result of the interview (*Egan v. Canada (Attorney General)*, 2008 FC 649) or where there is a witness that may have information that could address a significant fact and where no one else has been interviewed that could resolve that important and controversial fact (*Busch v. Canada (Attorney General)*, 2008 FC 1211).

[29] In spite of Mr. Raven's forceful submissions, I agree with the respondent that none of the witnesses and their purported evidence meet this test.

[30] No employer attempting to accommodate a disabled employee can act on information other than that which is provided to it. In this case, the information changed over time. Dr. Little's opinion as to the required accommodation is set out in his various notes to CSC. The applicant seems to suggest that an interview with the doctor was required in order to conclude, as was done by the investigator, that Mr. Tinney "communicated different messages at different times because his own understanding and his doctor's understanding of his needs evolved during his leave of absence." However, the notes speak for themselves and they do contain differing restrictions. Further, it was the applicant himself who informed the investigator that it was only in January 2006

that he was able to identify with his doctor the accommodation measures he really required and it is noted that the PTSD diagnosis was only communicated to CSC by the doctor in November 2005 when Dr. Little wrote that as a result he should have no "direct contact with inmates" but "could return to work in a different environment."

[31] Perhaps Dr. Little knew more and perhaps he could expand on the advice offered in his notes but the fact remains that his advice to CSC, as it understood it, is exactly what was set out in those notes and there can be nothing controversial about that advice or anything useful that he might provide through an interview because what is relevant is only what the employer knew at that time.

[32] Mr. Tinney further submits that an interview with Dr. Little was required before the investigator could conclude that the employer's offers always corresponded to the medical restrictions provided. In particular, the applicant says that an interview to determine such compliance is required "given the employer's repeated offers of work within Bath and Millhaven institutions directly contradict Dr. Little's October 6, 2005 note, which expressly states that Mr. Tinney should not work in those institutions." The October 6, 2005 note does not expressly or otherwise state any such thing. It states that "it is my professional opinion that he would benefit from returning to work in an institution other than Bath or Millhaven." It was only on January 11, 2006 when Dr. Little advised that Mr. Tinney should not return to any institution that it was clear that accommodation would have to be sought elsewhere.

[33] The applicant submits that it was necessary to interview his union representatives and representatives of CSC given the dispute between the parties as to whether the proposed

accommodation offers satisfied Mr. Tinney's medical restrictions. I fail to see how the representatives of either party could provide any factual evidence that would assist in that determination. The facts of the restrictions are set out in the notes from Dr. Little and the relevant detail of the positions advanced are not in any real dispute. All that is in dispute is the conclusion to be reached as to whether those offers met the stated conditions. That is a conclusion that must be reached by the investigator based on the evidence. I am of the view that the investigator's conclusion that they matched the restrictions was reasonably open to him based on the facts.

[34] In summary, the investigator was thorough in his job and his conclusions were reasonable, based on the evidence before him. This application must be dismissed.

[35] Both parties asked for costs and were agreed that a reasonable amount would be an award of $3000, inclusive of fees, disbursements and taxes. The Commission is largely responsible, in my view, for the situation before the Court because of its error in the initial notification to the parties of its decision. In the circumstances, I exercise my discretion not to award costs.

JUDGMENT

THIS COURT ORDERS that:

1. This application is dismissed; and

2. No costs are awarded.

"Russel W. Zinn"
Judge

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ANNEX A

Canadian Human Rights Act

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.	44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête. Suite à donner au rapport
(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied	(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :
(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or	a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,	b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.
it shall refer the complainant to the appropriate authority.	
(3) On receipt of a report referred to in subsection (1), the Commission	(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied	a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(4) After receipt of a report referred to in subsection (1), the Commission

(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and

(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

b) rejette la plainte, si elle est convaincue :

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

(4) Après réception du rapport, la Commission :

a) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des paragraphes (2) ou (3);

b) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1521-09
STYLE OF CAUSE:	THOMAS TINNEY v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 4, 2010
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