Federal Court  Cour fédérale

Date: 20110118

Docket: T-885-10

Citation: 2011 FC 56

Ottawa, Ontario, January 18, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

KALPANA GUPTA

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Gupta asks the Court to review and set aside a decision of the Canadian Human Rights Commission (CHRC) dismissing her complaint against her employer, Indian and Northern Affairs Canada (INAC). Ms. Gupta alleges that she was discriminated against because she was denied employment and training opportunities and subjected to harassment on the basis of race, national ethnic origin, colour, and sex.

[2] The CHRC appointed an investigator to investigate the applicant's complaint. After conducting an investigation, the investigator wrote a report recommending that the complaint be dismissed. The applicant was provided with a copy of the report and an opportunity to respond. After receiving additional submissions from the applicant, the CHRC decided to follow the investigator's recommendation and dismissed the complaint pursuant to s. 44(3)(b)(i) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, because it was satisfied "that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted."

[3] I am not convinced that the decision of the CHRC was unreasonable or that there was an error of law made in the process leading to its decision; accordingly, for the reasons that follow, this application is dismissed.

Background

[4] The applicant began her employment with INAC in 1998 as a Data Base Clerk CR-04, and from 2005 to 2007 worked as a Post-Secondary Support Clerk CR-04. She applied for or expressed interest in nine substantive or acting positions and two training opportunities but says that her applications were denied as a result of adverse differential treatment and discrimination. She also says that she was subjected to discriminatory harassment in the workplace. The investigator found that none of these allegations were supported by the evidence.

[5] The investigator did not address the following issues that had been raised in the complaint due to a lack of evidence: allegations relating to membership in employee organizations under s. 9 of the Act; allegations relating to discriminatory policies or practices under s. 10 of the Act;

allegations relating to pay equity under s. 11 of the Act; and allegations of discrimination based on age. No issue is raised by the applicant with the investigator's decision in this regard.

[6] In conducting her investigation, the investigator interviewed nine individuals, including the applicant and her representative, Dr. Noel Ayangma, and three other persons suggested by the applicant. In addition, she also reviewed a large number of documents that are described in the report. The investigator examined the alleged lost job opportunities, the alleged lost training opportunities and the alleged harassment.

Job Opportunities

[7] The investigator considered, in some detail, each of the positions which the applicant unsuccessfully expressed interest in or applied for. In each case, the investigator found that the evidence did not support a finding that the applicant was treated differently, as summarized below:

- Compliance Officer PM-02 (September 2004): The investigator found that the competition for this position was cancelled. The applicant and 47 other applicants for the position were informed of this fact. The investigator found that "the evidence does not support [the allegation that] the complainant was treated differently from other applicants."

- Compliance Co-ordinator PM-04 (November 2004): The applicant alleged that she was screened-out of the competition because she was found to lack experience in two areas. She said that she provided further information regarding her experience that was not accepted, although further information was accepted from a Caucasian male. The respondent stated in its response to the complaint that the Selection

Board for the position considered the applicant's additional information but that it did not enhance her qualifications. The investigator found that the applicant was given an opportunity to provide further information and an opportunity to appeal the hiring process. The investigator found that "the evidence does not support [the allegation that] the complainant was treated differently from other candidates."

- Compliance Officer PM-02 (February 2005): The applicant was screened-in to write the test for the position and invited to write an "Officer's simulation 425 test," which she failed. She alleged that the test was similar to the "428 test," which some candidates had already written as part of an application for another position, and that accordingly, other candidates had an advantage. The officer noted, incorrectly, that the applicant grieved the results of the 425 test to the Public Service Labour Relations Board and the Federal Court of Appeal.[1] The investigator noted that, as per the Appeal Board decision, the candidate who was ultimately successful had not previously written the 428 test. The investigator found that "the evidence does not support [the allegation that] the complainant was treated differently from other candidates."

- Estate and Governance Officer (anticipatory) PM-02 (May 2005): The applicant placed first in a competition for this anticipatory position and was placed on an eligibility list, but the list expired without her being appointed to a permanent position. The respondent presented evidence that anticipatory positions are created

[1] The applicant actually challenged the hiring process and the use of the 425 test before the Public Service Commission Appeal Board. The applicant unsuccessfully applied to the Federal Court, not the Federal Court of Appeal, with respect to an interlocutory decision of the Board; see *Gupta v. Canada*, 2006 FC 1262.

to staff positions which may become open in the future, and that in this case the position did not become open. However, the complainant was selected to occupy this PM-02 position on an "acting" basis on two occasions on the basis of the eligibility list. The eligibility list was eventually invalidated under the mandatory provisions of the new *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 [*PSEA*]. The investigator found that "the evidence does not support [the allegation that] the complainant was treated differently from other employees."

- "Acting" AS-03 position in Lands and Governance and "Acting" AS-02 position in Corporate Services (May 2006): The applicant said she was denied appointment to these positions despite expressing interest. The respondent stated that the applicant, along with others, was denied the opportunity to work in certain acting positions because of a "realignment initiative" taking place at the time. The applicant was appointed to other "acting" positions before and after the realignment. The investigator found that "the evidence does not support [the allegation that] the complainant was treated differently from other employees."

- "Acting" AS-05 appointment and vacant AS-02 opportunity (July 31, 2006): The applicant said she was denied appointment to these positions despite expressing interest. The respondent provided evidence that it appointed someone to act in the AS-05 position for less than four months, in accordance with its policies, and stated that the applicant did not apply for either the AS-05 or AS-02 permanent positions. The investigator found that "the evidence does not support [the allegation that] the

complainant was treated differently in that she was not appointed to the AS-05 or AS-02 position, nor did she apply."

- Compliance Officer PM-02 (July 2006): The applicant said she was denied appointment to this position despite expressing interest. The respondent provided evidence that while the hiring process was underway for this position several candidates, including the applicant, were selected to act as PM-02 Compliance Officers. The applicant was offered an extension of her position but refused the offer unless the extension would be for at least two years. The respondent's policy provides that acting appointments for more than one year are advertised and subject to its hiring processes, and accordingly this demand was denied. The investigator found that "the evidence does not support [the allegation that] the complainant was treated differently from other employees."

[8] The investigator also considered the applicant's allegation that after the eligibility list for the Estate and Governance Officer position expired, the respondent advertised a Compliance Officer PM-02 position. The applicant failed the test for this position, but argued that she should have been appointed nonetheless because she had been doing similar work in her position as Post-Secondary Support Clerk CR-04 and was on the aforementioned eligibility list. The investigator determined, based on the respective job descriptions for the Estate and Governance Officer and Compliance Officer positions, that the experience and knowledge required for the positions were different. The investigator also considered the applicant's statement that Mr. Kevin McKeever was appointed as a Compliance Officer despite not participating in the Compliance Officer PM-02 competition, but found that this was because Mr. McKeever was an aboriginal person appointed under a specific

provision of the *PSEA*. The investigator reviewed the process for creating eligibility pools and hiring from different units, but concluded that she could not link the applicant's non-appointment to the Compliance Officer position to the applicant being treated differently than other employees. The investigator found that she "could not link the complainant's lack of appointment to Compliance Officer PM-02 to the complainant being treated differently from other employees."

[9] The investigator considered the applicant's complaint that although she was appointed to "acting" positions, unlike her fellow employees she was never ultimately appointed to indeterminate or permanent positions. The investigator reviewed the nature of "acting" appointments in the public service, specifically noting that such appointments serve as training and professional development opportunities, do not require appointees to be qualified to "act" in a certain position, and do not guarantee a permanent position because candidates must still successfully complete job competitions based on merit criteria.

[10] The investigator reviewed organizational charts for the respondent's Manitoba region and determined that not every person acting in a position was ultimately permanently appointed to that position. The investigator found that the applicant was not appointed to a permanent position from her "acting" positions because these positions were filled according to the respondent's hiring practices. The investigator found that "the evidence does not support [the allegation that] the complainant was treated differently from other employees."

Training Opportunities

[11] In June 2006, the applicant requested an opportunity to attend a "train the trainer" session as part of the First Nations and Inuit Transfer Payment project. She was denied permission to attend due to realignment issues within the department. The investigator noted evidence that for a period of four months in 2006, a number of people in the applicant's unit were denied training or acting opportunities. The investigator found that "the evidence does not support [the allegation that] the complainant was treated differently from other employees."

[12] In June 2008, the applicant was approved to attend the Joint Learning Program (JLP) 5-day workshop aimed at training participants to act as "facilitators" to improve labour relations between union members and management in the workplace. However, after reviewing the applicant's request, the applicant's supervisor, Mr. Fred Mills, denied the request on the grounds that (i) the training was more suited to human resources practitioners, managers, and union representatives, and (ii) there was a backlog in the processing of the reports for which the applicant was responsible. The investigator found that (i) the applicant was treated differently from other employees in that she was first approved for training and then denied, and (ii) the treatment involved negative consequences for the applicant in that she was not able to advance her career aspirations, and accordingly the investigator proceeded to consider whether the applicant was treated differently based on characteristics related to one or more prohibited grounds of discrimination. The investigator reviewed the evidence gathered from the various witnesses, specifically noting (i) acting and training requests were often denied during the high business cycle of the unit, (ii) the decision on whether to approve an employee for participation in the JLP rests solely with the employee's supervisor, (iii) according to the applicant there was always a backlog of work, and the backlog was outside her responsibility and not within her ability to fix, and (iv) the respondent

focused on those involved with the union in considering JLP requests. Ultimately, the investigator concluded that "the evidence does not link the denial of the training to the complainant self-identifying as an East Indian woman."

Harassment

[13] The investigator considered the applicant's allegations that she was subjected to harassment by her managers, specifically noting:

- that the applicant's supervisor during an "acting" opportunity gave her a poor evaluation, which she had never had before;
- that during a meeting, the Director of Funding Services stated that the applicant could not be appointed to the Compliance Officer PM-02 position from the Band and Estates Governance PM-02 position because the job criteria were incompatible and because the applicant had previously failed the applicable test, and that the applicant found these comments "disrespectful and belittling"; and
- that the applicant's supervisor's manager, denied the applicant's request to volunteer at a career fair and, in another incident, questioned her use of time in relation to a presentation she had given at a conference.

[14] After reviewing these allegations, the investigator determined that "the incidents as reported by the complainant with documentation provided by the complainant supported the respondent's assertion that its managers were acting within established guidelines." The investigator found that "the evidence does not support [the allegation that] the complainant was subject to harassment by the respondent's managers."

[15] The investigator recommended that the CHRC dismiss the complaint because:

- "The evidence gathered does not indicate the respondent denying the complainant training and career opportunities is linked to the fact that she is an East Indian woman; [and]
- The evidence gathered does not indicate the respondent failed to provide a harassment-free environment."

[16] The applicant provided submissions in response to the investigation report, and after examining both the report and the submissions, the CHRC dismissed the complaint on the basis that there was not sufficient evidence to warrant further inquiry by the Canadian Human Rights Tribunal. The CHRC addressed the applicant's submission that the report excluded Dr. Ayangma's evidence, noting that the Dr. Ayangma was the applicant's representative during the investigation and that the applicant did not fill any gaps in the evidence with information from Dr. Ayangma. The CHRC also considered the applicant's correction of the inaccurate information regarding her grievance included in the investigation report, as reflected at footnote 1 above, but determined that this information did not form the basis for its decision to dismiss her complaint.

Issues

[17] The applicant raises the following issues:

a. Whether the investigator exceeded her jurisdiction by conducting herself as a Tribunal; and

b. Whether the investigator conducted a thorough and neutral investigation into the complaint?

[18] The parties and the Court are agreed that the standard of review of these issues is correctness. The thoroughness and neutrality of an investigator's report are issues of procedural fairness: *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (T.D.), aff'd [1996] F.C.J. No. 385 (C.A.). at paras. 48-49; *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113, at para. 8. Accordingly, this issue is reviewed on the correctness standard. The jurisdictional issue is a question of law and is also reviewable on the correctness standard.

Whether the investigator exceeded her jurisdiction by conducting herself as a Tribunal

[19] The applicant submits that the investigator exceeded her jurisdiction by conducting herself as if she were the Tribunal. She says that neither the Commission nor an investigator has the power to determine whether discrimination actually occurred, but that the Commission's role, and hence an investigator's role, is only to determine whether a complaint requires further investigation by the Tribunal. The applicant says that the questions posed by the investigator purporting to examine the allegation of adverse differential treatment is equivalent to determining if the complaint is made out, and therefore made findings on important issues that should have been left for the trier of fact.

[20] The questions posed by the investigator in her report, with respect to discrimination, were as follows:

> **Investigation of Alleged Differential Treatment in Employment**
>
> **Step 1:** The investigation will examine whether there is support for the complainant's allegation of adverse differential treatment by considering:

> i. in relation to the conduct complained of, whether the complainant was treated in a manner different as compared to other employees;
> ii. whether this treatment involved negative consequences for the complainant;
> iii. whether the complainant was treated differently based on characteristics that relate to one or more prohibited grounds of discrimination.
>
> **Step 2:** Depending on the investigator's findings, the investigation may also consider:
>
> i. whether the respondent can provide a reasonable explanation for its actions that is not a pretext for discrimination on a prohibited ground.

The investigator provided a similar set of questions with respect to the alleged harassment.

[21] The applicant also submits that in concluding that the evidence did not support her allegation that she was treated differently, the investigator exceeded her jurisdiction since this was a determination to be made by the Tribunal after weighing the evidence.

[22] The applicant notes that at the investigative stage of a proceeding under the Act a complainant need only make out a *prima facie* case of discrimination to establish a complaint has merit, and that an investigator's assessment of whether the *prima facie* case has been established must be made without weighing the evidence. The applicant submits that to reach the conclusions she did, the investigator must have weighed the evidence, and that doing so constitutes a reviewable error.

[23] I find that the investigator did not usurp the role of the Tribunal in conducting her investigation. Although the applicant has seized upon language she says indicates that the

investigator acted as an adjudicator by weighing evidence and making final determinations, a review of the report as a whole does not support this assertion.

[24] The applicant has failed to appreciate the important distinction between assessing the weight of evidence and assessing the sufficiency of evidence. Assessing the weight of evidence involves assessing the evidentiary value of the evidence – in this exercise the decision-maker assesses the persuasiveness of particular evidence in comparison with other evidence. Assessing the sufficiency of evidence involves considering the probative value of the evidence – in this exercise the decision-maker assesses whether the evidence has a tendency to prove or disprove some allegation, such as allegations of discrimination and harassment. It is generally accepted that it is not within the Commission's or the investigator's authority to weigh the evidence: *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879 [*S.E.P.Q.A.*]. It is, however, within their power to assess the probative value of the evidence: *Slattery*, above, at para. 56; *Tan v Canada Post Corp.*, [1995] F.C.J. No. 899 (T.D.), at para. 25; *Bell Canada v Communications, Energy and Paperworks Union*, [1997] F.C.J. No. 207 (T.D.), at para. 27.

[25] When considering whether to refer a complaint to the Tribunal for an inquiry, the Commission must consider whether an inquiry is "warranted"; this process involves evaluating the sufficiency of evidence. It has been analogized to a preliminary inquiry: *Cooper v Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 53, *S.E.P.Q.A*, above, and more recently in *Herbert v Canada (Attorney General)*, 2008 FC 969, at para. 16.

[26] Here, the investigator accepted the evidence as true but determined that no inference of discrimination could be drawn from the evidence offered by the applicant. The investigator did not assign value to the evidence or prefer the evidence of the respondent over that of the applicant. Rather, she considered all of the evidence and determined that it was insufficient to support a finding of discrimination. In her report, the investigator concludes that the evidence "does not support" a finding of differential treatment, that the evidence "does not identify" differential treatment, that she "could not link" the evidence to differential treatment, or self-identification as an East Indian woman, and lastly that the applicant's evidence with respect to discrimination supported the respondent's position. These findings were all determinations regarding the probative value of the evidence, not the weight to be given to it. Upon reading the report as a whole I find that the investigator accepted the evidence presented, but determined that it did not establish discrimination.

Whether the investigator conducted a thorough and neutral investigation

[27] The applicant submits that there is "ample evidence" that the investigation lacked thoroughness and neutrality and that the decision was made without regard to some of her submissions and materials. In particular, the applicant says that the Commission erred in law by failing to consider or address important issues raised in her post-investigation submissions, including her allegation that the investigator exceeded her jurisdiction by acting as the Tribunal, and that such a failure to address important issues in an applicant's rebuttal is a reviewable error: *Busch v Canada (Attorney General)*, 2008 FC 1211, para. 17.

[28] Contrary to the applicant's submission, I find that the Commission did not fail to consider the issues raised in her post-investigation submissions. The Commission:

- considered the applicant's jurisdictional argument, explained the role of the investigator and Commission, and explained the requirement that there be sufficient evidence to support a further inquiry;
- noted that the report considered each element of the allegations;
- noted that Dr. Ayangma was the applicant's representative but found that the applicant did not fill any gaps in the evidence with information from Dr. Ayangma; and
- noted the applicant's corrections to the information at paras. 36-39 of the report, and explained that while it may be inaccurate, it formed no basis for the Commission's decision to dismiss her complaint.

[29] *Busch*, above, is clearly distinguishable. In *Busch*, Justice Snider, at para. 11, specifically noted that the Commission's decision made no specific reference to Ms. Busch's response to the report, but was merely a "boilerplate" statement that her submissions had been considered. Here, in the four ways noted in paragraph 28, the Commission specifically and effectively addressed the applicant's response to the report.

[30] The applicant also submits that the investigator erred by failing to consider relevant information provided to her by the applicant's witnesses, Dr. Ayangma and Archie McGillivray. The applicant says that although the investigator interviewed Dr. Ayangma, her report clearly excludes Dr. Ayangma's evidence.

[31] The investigator did not fail to consider relevant information provided by Dr. Ayangma or Mr. McGillivray. The investigator interviewed both of these witnesses. In her report, she noted Dr. Ayangma's opinion that once the applicant was given an acting appointment, there was an expectation that she would be given the job permanently. She also repeatedly referred to Mr. McGillivray's evidence. The investigator need not refer to every single piece of the applicant's witnesses' evidence; any omissions were not of a "fundamental nature" and did not concern "obviously crucial" evidence (*Slattery*, above). Much of the "evidence" presented by Dr. Ayangma and Mr. McGillivray was mere personal belief and was highly circumstantial. Dr. Ayangma was the applicant's "advocate" but had no direct or personal knowledge of the circumstances giving rise to this case, and there is no basis for the applicant's argument that the investigator excluded Dr. Ayangma's evidence because it supported the applicant's case. Furthermore, although Mr. McGillivray asserts that the applicant suffered discrimination, he did not present any evidence of this discrimination beyond descriptions of what he clearly believed was a flawed management style employed by managers at INAC.

[32] The applicant further argues that the fact that 47 other applicants were also informed of the cancellation of the Compliance Officer PM-02 competition in September 2004 was not a sufficient justification for why the competition was cancelled after she passed a written test or for why the cancellation of the competition was not discriminatory. The applicant asserts that by failing to consider this issue further under the test the investigator laid out, the investigator erred in law and failed to conduct a thorough and neutral investigation.

[33] I find this submission to be without merit. The decision the applicant complains of was the same one that affected all 47 other applicants; because she received the same treatment as all other applicants, there was no differential treatment.

[34] Lastly, the applicant submits that the investigator's findings regarding the Compliance Officer PM-02 competition and the challenge to the competition she launched were made in total disregard for the material that was before the investigator, thus raising doubts as to the thoroughness, reliability, neutrality, and objectivity of the report.

[35] The errors in the report relating to the applicant's earlier challenge to the Compliance Officer PM-02 competition (February 2005) was merely a minor error in detail and did not affect the decision. The Commission made specific note of this error.

[36] In my assessment, the report went into considerable detail and examined all of the incidents of purported discrimination alleged by the applicant. It was thorough. There is nothing to support the applicant's allegation that the report was not neutral.

[37] For these reasons this application must be dismissed. The respondent informed the Court that it was not seeking its costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed, without costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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