

Federal Court



Cour fédérale

**Date: 20120504**

**Docket: T-1081-11**

**Citation: 2012 FC 537**

**Ottawa, Ontario, May 4, 2012**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**168886 CANADA INC.**

**Applicant**

**and**

**WALTER REDUCKA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of the decision of the Canadian Human Rights Commission (the “CHRC”) dated March 25, 2011 whereby the CHRC exercised its discretion to deal with the Respondent’s complaint of discrimination on the grounds of physical and mental disability, pursuant to subsection 41(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act].

## **FACTS**

### Employment History

[2] The Respondent had been employed by Sears Canada and 168886 Canada Inc., operating as SLH Transport Inc. from September 1977 until May 14, 2009. In the spring of 2005, the Respondent applied for the position of Operations Manager. His application was not successful.

[3] Shortly thereafter, the Respondent commenced medical leave on the basis of severe depression as a result of being overlooked for the position. The Respondent received short-term disability benefits until September 2005 and long-term disability benefits until September 2007.

[4] In December 2007, the Respondent wrote a letter to the Applicant suggesting a possible gradual return to work. He went on to complain that he was not the successful applicant for the Operations Manager position. He concluded that he wanted a severance package paid to him.

[5] The parties were unsuccessful in negotiating a severance package. Since the Respondent had also indicated that he might consider returning to work, however, the Applicant made repeated requests for medical assessments to determine whether accommodation was possible. The Respondent never provided these assessments.

[6] On May 14, 2009, the Respondent's employment was terminated. In October 2009, the Respondent indicated for the first time his intention to file a human rights complaint.

Human Rights Complaint History

[7] On May 7, 2010, the Respondent filed a complaint against three interrelated companies, Sears Canada Inc., 168886 Canada Inc. and SLH Transport Inc., to the Alberta Human Rights Commission (the “AHRC”). On May 14, 2010, the AHRC recommended that Mr. Reducka make a comparable complaint with the CHRC, since all three respondents appeared to be federally regulated. In correspondence dated the same day, the Respondent informed the CHRC of his intention to bring a comparable complaint to cover any respondents under federal jurisdiction. At the request of the CHRC, the Respondent sent to the CHRC a copy of his AHRC complaint.

[8] On June 7, 2010, the CHRC advised the Respondent how to proceed with his complaint and indicated a deadline of July 9, 2010 for receipt of documentation. On July 7, 2010, the Respondent filed his complaint before the CHRC. On July 13, 2010, the CHRC informed the Respondent that his complaint did not meet the requirements under the *Act*: the complaint form exceeded three pages in length; the form made reference to attachments; and the form referred to Sears Canada, a provincially-regulated company.

[9] On September 13, 2010, the Respondent sent a revised copy of the complaint form to the CHRC. Counsel for the Respondent explained that the delay was due to the office being closed for the months of July and August.

[10] As a preliminary matter, the CHRC had to determine whether to use its discretion under paragraph 41(1)(e) of the *Act* to hear the complaint, as it was filed after the prescribed period of one

year. The CHRC appointed an investigator to issue a recommendation. The investigator recommended that the CHRC exercise its discretion to hear the complaint.

### **IMPUGNED DECISION**

[11] The CHRC agreed with the investigator and determined that the failure of the Respondent to file a complaint was due to his uncertainty with respect to the jurisdictional nature of the Applicant. The CHRC found it reasonable to use its discretion and to extend the one year filing period regarding the events of 2009, while refusing to consider prior allegations.

[12] Additionally, the CHRC found that the Applicant had not demonstrated any serious prejudice to its ability to respond to the complaint as a result of the delay in signing the complaint.

### **ISSUES**

[13] This application for judicial review essentially raises two issues:

- a) What is the appropriate standard of review?
- b) Did the CHRC commit a reviewable error when it chose to exercise its discretion to deal with the Respondent's complaint?

### **ANALYSIS**

[14] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court indicated that an exhaustive review is not always required to determine the applicable standard of review. When the analysis has already been performed, it need not be repeated.

[15] After a careful review of the case law, and applying *Dunsmuir*, Justice O’Keefe determined that the discretionary decision to hear a complaint despite the fact that it has been filed outside the one year limitation period prescribed by paragraph 41(1)(e) of the *Canadian Human Rights Act* involves a mixed question of law and fact and, as such, calls for the standard of reasonableness (*Canada (Revenue Agency) v McConnell*, 2009 FC 851 (available on CanLII)). Accordingly, this Court shall not intervene unless the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[16] Paragraph 41(1)(e) of the *Act* establishes a preliminary stage of inquiry for human rights complaints. At this stage, the CHRC does not examine the substance or the merits of the complaints (*Good v Canada (Attorney General)*, 2005 FC 1276, 142 ACWS (3d) 1019). The purpose of this section is to ensure the timely filing of complaints. In the event that the CHRC determines that the complaint was not filed within the one year prescribed period, it may exercise its discretion to hear an “out of time” complaint (*Good*, above at para 21; *Tse v Federal Express Canada Ltd*, 2005 FC 598, 273 FTR 242).

[17] In the matter at bar, through the use of its discretion, the CHRC clearly indicated that the act forming the basis for the Respondent’s complaint occurred more than one year before the complaint was filed. Regardless, the CHRC exercised its discretion in favour of the Respondent. For the reasons that follow, I am of the view that the CHRC acted unreasonably in exercising its discretion.

[18] The CHRC grounded its decision to deal with the Respondent’s complaint, essentially on the basis of his uncertainty as to the proper forum to file a human rights complaint. However, as the

Applicant argues, the CHRC failed to take into account that the Respondent was, at all times, represented by counsel. Counsel for the Respondent ought to have been familiar with the jurisdiction of the AHRC and the CHRC, or, at the very least, to conduct adequate research into the Applicant's enabling statutory authority in order to determine the appropriate jurisdiction for the filing of the complaint. This Court has held that it is inappropriate to extend the limitation period when a complainant has the benefit of legal representation (*Zavery v Canada (Human Resources Development)*, 2004 FC 929 at para 26, 256 FTR 124; *Johnston v Canada Mortgage and Housing Corporation*, [2004] FC 918 at paras 9-11, 132 ACWS (3d) 107).

[19] In a similar fashion, counsel for the Respondent ought to have been aware of the CHRC's required format for complaints. In a letter dated June 7, 2010, the CHRC provided the Respondent with the following documentation:

- (a) A complaint form;
- (b) An instruction and tips sheet;
- (c) A checklist of information that must be provided; and
- (d) A sample of a completed complaint form.

(Respondent's Record, Affidavit of Walter Reducka, Exhibit "D", p 7)

[20] On July 7, 2010, counsel for the Respondent submitted the complaint to the CHRC (Respondent's Record, Affidavit of Walter Reducka, Exhibit "E", p 9). On July 13, 2010, the CHRC indicated that the form did not meet the requirements of the *Act* (Respondent's Record, Affidavit of Walter Reducka, Exhibit "F", pp 10 and 11). Aside from the fact that the complaint was clearly out of time at the date of these exchanges, it is important to mention, as the Applicant argues,

that for a complaint to be deemed compliant with the *Act*, it must be “in a form acceptable to the Commission” (*Rhéaume v Canada (Attorney General)*, 2007 FC 919 at para 33, 324 FTR 159). Nevertheless, it was not until September 13, 2010 that the Respondent filed an “acceptable” complaint form, nearly four months after the prescribed deadline as per section 41(1)(e) of the *Act*. By counsel for the Respondent’s own admission, Mr. Reducka’s intention to file a human rights complaint was formed in October of 2009, nearly seven months before the prescribed filing deadline under both federal and provincial legislation. Given that the Respondent had seven months of preparation time and the benefit of legal representation, there can be no reasonable explanation for his failure to submit his complaint to the correct authority, in the correct format, within the prescribed filing deadline.

[21] It cannot be said that the Respondent was unable to submit his complaint in a timely fashion for reasons outside his control. Sixteen months passed from the date that Mr. Reducka was terminated, to the date when the complaint was filed. However, counsel for Mr. Reducka waited until one week before the expiry of provincial human rights legislation to file a complaint, and first contacted the CHRC to file a complaint at the one year prescribed filing deadline. Mr. Reducka failed to bring his complaint to the CHRC until the last day of the prescribed filing deadline. Furthermore, his complaint was filed with errors and when he was advised to correct his errors, he failed to do so for another two months. Counsel’s explanation for not filing the complaint was that his office was closed for the months of July and August. This delay was not therefore caused by extenuating circumstances, but by counsel’s unavailability.

[22] The Commission should also have considered the entirety of the complaint, including any mischief contained therein (see *Richard v Canada (Treasury Board)*, 2008 FC 789 at para 9, 330 FTR 236). On the face of it, the complaint does not seem very serious, as Mr. Reducka has repeatedly failed to provide any medical information as requested by the Applicant, in order to determine whether accommodation was possible. It should be noted that the Respondent made no allegation of discrimination while pursuing a claim for unjust dismissal and during settlement negotiations with the Applicant. As admitted by counsel for the Respondent, it was only when viable settlement instructions were not forthcoming from the Respondent that the Applicant was advised that the Respondent intended to pursue a human rights claim.

[23] For all of the above reasons, I agree with the Applicant that this is not a situation where extraordinary circumstances prevented Mr. Reducka from issuing a complaint in accordance with the *Act*. The Respondent has failed to provide justifiable reasons why he was unable to bring his complaint in a timely manner, and this is inexcusable given that he had the benefit of legal representation throughout. The CHRC erred and acted unreasonably in focusing on the alleged misunderstanding of the Respondent with respect to the jurisdictional issues, without giving proper consideration to the fact that he had retained counsel.

[24] Moreover, the CHRC did not consider all the relevant factors to a decision under section 41(1)(e) that are listed in the investigator's own report. There is no consideration, in particular, of the nature and seriousness of the issues raised in the complaint.



[25] Accordingly, the intervention of this Court is warranted, this application for judicial review is granted, and the decision of the CHRC to deal with the time-barred complaint of the Respondent is quashed and set aside.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is granted, and the decision of the CHRC to deal with the complaint of the Respondent is quashed and set aside.

"Yves de Montigny"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1081-11

**STYLE OF CAUSE:** 168886 CANADA INC. v WALTER REDUCKA

**PLACE OF HEARING:** Edmonton, AB

**DATE OF HEARING:** December 13, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** de MONTIGNY J.

**DATED:** May 4, 2012

**APPEARANCES:**

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