

Federal Court



Cour fédérale

Date: 20120620

Docket: T-1403-11

Citation: 2012 FC 789

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 20, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

ANNE-MARIE LAMOLINAIRE

Applicant

and

BELL CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Anne-Marie Lamolinaire (the applicant) is seeking a judicial review of a decision dated July 29, 2011, by which the Canadian Human Rights Commission (the Commission) dismissed the discrimination and harassment complaint she had filed against her former employer Bell Canada (the respondent), pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the Act). The applicant is representing herself in the present case.

Factual background

[2] The applicant began working for the respondent in October 1999 transcribing texts for services for the hard of hearing (Relay Service). The applicant later worked in the long-distance service (Mega office) from June 2001 until April 2004.

[3] As part of her employment, the applicant was covered by the collective agreement between Bell Canada and the Communications, Energy and Paperworkers Union of Canada (CEP).

[4] The applicant filed a grievance on May 17, 2004, under the agreement, alleging that she had been the victim of harassment and discrimination in the course of her employment.

[5] On October 21, 2004, the applicant also filed a complaint with the Commission. In her complaint, the applicant claimed that she was subjected to differential treatment in the course of her employment at Bell Canada and that she had experienced harassment and discrimination on account of her national or ethnic origin (her French nationality) contrary to sections 7 and 14 of the Act.

[6] A first report pursuant to paragraph 41(1)(a) of the Act was presented to the Commission, recommending that it rule on the applicant's complaint after she had exhausted all other courses of action available to her. That decision was communicated to the applicant on April 13, 2005.

[7] Following an investigation in December 2005, the CEP determined that the applicant had not been subjected to harassment or discrimination on the basis of her national or ethnic origin. The CEP decided not to proceed with the applicant's grievance.

[8] In December 2005, the applicant filed an unfair labour practice complaint pursuant to section 37 of the *Canada Labour Code*, RSC 1985, c L-2 (Code), with the Canada Industrial Relations Board (CIRB). The applicant argued that the union had acted in an arbitrary manner and in bad faith in handling her grievance.

[9] On July 24, 2009, the CIRB dismissed the applicant's complaint. The CIRB explained that the applicant had failed to establish that the CEP had breached section 37 of the Code and that the CEP's investigation had not been conducted in a superficial or inadequate manner. That decision was not challenged by the applicant.

[10] Around August or September 2009, the applicant informed the Commission that she had exhausted all of the grievance procedures available to her and that she wished to reactivate her complaint. The Commission invited the parties to submit their comments on the applicant's allegations of discrimination and harassment.

[11] The applicant and the respondent submitted comments in December 2009 and in January 2010.

[12] On July 16, 2010, the Commission decided to rule on the applicant's complaint pursuant to subsection 41(1) of the Act and this decision was communicated by letter on August 11, 2010.

[13] The complaint was sent to Pascale Lagacé at the Commission's Investigations Directorate, who contacted the respondent in order to obtain its response to the allegations contained in the applicant's complaint.

[14] On April 26, 2011, the Commission sent its investigation report, which recommended the dismissal of the complaint, to the parties. However, the investigator once again invited the parties to submit their written comments about the report's findings. Following the disclosure of the investigation report, a second witness, Joseph Sohmer, was identified by the applicant. An addendum to her investigation report was sent, however, the investigator determined that there was no need to change the initial recommendation for the Commission to dismiss the complaint.

[15] In her investigation report, the investigator made the following findings (Dossier de la Commission, p 14, para 65):

65. It appears that, although the complainant may have had difficult relationships with some co-workers, the behaviour she complained of does not seem to be a prohibited ground of discrimination. Moreover, it appears that the treatment of the complainant and the decision not to rehire her were related to performance problems and not related in any way to her national or ethnic origin.

[16] On May 11, 2011, the applicant submitted her comments to the investigator with respect to the investigation report. In addition, the applicant's witness, Murielle Bouchard, wrote a letter with her comments which the applicant submitted to the Commission. These observations were

communicated to the respondent, and, on June 28, 2011, the respondent submitted its comments to the investigator.

[17] The Commission rendered its decision to dismiss the complaint in a letter dated July 29, 2011.

[18] The applicant filed the present application for judicial review on August 30, 2011.

Decision under review

[19] Pursuant to subparagraph 44(3)(b)(i) of the Act, the Commission decided to dismiss the complaint and close the file relating to the complaint for the following reasons:

- The evidence does not support the allegations that the complainant was subjected to harassment and/or differential in the course of her employment because of her national or ethnic origin ;
- The decision not to rehire the complainant does not appear to be related to her national or ethnic origin;
- Having regard to all of the circumstances of the complaint, a review of the complaint by the Canadian Human Rights Tribunal is not warranted.

(Respondent's Record, Tab 18, p. 12.)

Issue

[20] The Court is of the view that the issue in this case is the following:

Was the Commission's decision to dismiss the applicant's complaint unreasonable?

Relevant legislation

[21] Section 44 of the *Canadian Human Rights Act* states the following:

PART III

PARTIE III

DISCRIMINATORY
PRACTICES AND GENERAL
PROVISIONS

ACTES
DISCRIMINATOIRES ET
DISPOSITIONS GÉNÉRALES

Investigation

Enquête

Report

Rapport

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.

Action on receipt of report

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, it shall refer the complainant to the appropriate authority.

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.

Idem

Idem

(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

(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).

Notice

(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

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) 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).

Avis

(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);

<p>(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).</p>	<p>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).</p>
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Applicable standard of review

[22] The Court notes that the applicable standard of review in this case is reasonableness (*Gerrard v Canada (Attorney General)*, 2010 FC 1152 at paragraph 24, [2010] FCJ No 1436 (*Gerrard*); *Balogun v Canada (Minister of National Defence)*, 2009 CF 407, [2009] FCJ No 526, affirmed in 2010 FCA 29 (*Balogun*); *Ibrahim v Shaw Cablesystems G.P.*, 2010 FC 1220 at paragraph 16, [2010] FCJ No 1525). Reiterating the comments of Justice de Montigny in *Gerrard* at paragraph 24, the Court notes that “reasonableness is a deferential standard, concerned with the "existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *New Brunswick v Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47”.

Applicant’s position

[23] In general, the applicant claims that she was subjected to harassment and discrimination during her employment with the respondent. She contends that she was the subject of discriminatory remarks, derogatory comments, unbearable and destabilizing working conditions, threats of dismissal and psychological torture. Furthermore, the applicant claims to have lost seven Quebec pension plan years as a result of the respondent’s actions.

[24] The applicant contends that the Commission's decision was unreasonable because there was no thorough investigation. Specifically, the applicant suggests that the Commission's investigator did not conduct her investigation in a satisfactory manner because she neglected to report a number of facts – namely, those submitted by the applicant's two witnesses, Murielle Bouchard and Joseph Sohmer. She criticizes the Commission for having preferred the version of facts presented by Claire Ouellette, the CEP representative chosen by the respondent, despite the fact that Ms. Ouellette had infringed upon the applicant's rights and the fact that her credibility had been called into question. Furthermore, the applicant also criticizes the investigator for having taken the CIRB's erroneous decision into account. In addition, the applicant asserts that the Commission disregarded crucial evidence and took into consideration some evidence she claims was falsified, specifically, the applicant's union sheets.

Respondent's position

[25] The respondent argues that the investigator appointed by the Commission conducted her investigation in a thorough, unbiased and neutral manner (see *Balogun*, above, and *Slattery v Canada (Canadian Human Rights Commission)* (T.D.), [1994] 2 FC 574, [1994] FCJ No 181, affirmed in 2005 NR 383, [1996] FCJ No 385 (*Slattery*)). The respondent maintains that the Commission's decision is reasonable, justified and within its jurisdiction under subsection 44(3) of the Act. The respondent submits that the Commission dismissed the applicant's complaint on the basis of the findings of the investigation report and the evidence adduced by the applicant. The respondent notes that the investigator considered the comments and observations of each party and interviewed witnesses suggested by the parties, specifically Ms. Ouellette, Ms.

Bouchard and Mr. Sohmer. The respondent maintains that the Commission did not disregard important elements of the evidence adduced by the applicant or given by her witnesses.

Analysis

[26] In *Canada (Attorney General) v Davis*, 2009 FC 1104, [2009] FCJ No 1346 (*Davis*),

Justice Harrington made the following observations with respect to the purpose of the *Canadian Human Rights Act* and the process of dealing with complaints:

[15] The purpose of the *Canadian Human Rights Act* is to give effect, in the federal sphere, to the principle that all should be able to make for themselves the lives they are able and wish to make, without being hindered or prevented by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex or other factors. ...

[16] On receipt of a complaint the Commission may do a number of things. In accordance with section 41 and following it may refuse to deal with the complaint if, for instance, it should be more appropriately dealt with elsewhere, if it is beyond the Commission's jurisdiction (i.e. not a federal matter), if it is trivial frivolous, vexatious or made in bad faith or if it is based on a situation occurring more than one year earlier.

...

[20] The Commission then appointed its own investigator. At the conclusion of the investigation, the Act provides that after considering the report the Commission may either refer the complaint to the Tribunal or dismiss it if "... satisfied that, having regard to all the circumstances of the complaint, an inquiry ... is warranted ...", or not warranted as the case may be.

[27] In accordance with the reasonableness standard, the Court must show some deference to the Commission. However, if the Commission's decision fails to observe the rules of procedural fairness or shows bias or lacks thoroughness, the Court may intervene. In *Slattery*, above, at paragraph 56, this Court stated that: "[d]eference must be given to administrative decision-

makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted.”.

[28] In this case, the applicant casts doubt on the neutrality and thoroughness of the investigation conducted by the Commission’s investigator. However, after reviewing the matter, the Court is not convinced that the applicant’s arguments are well-founded and cannot accept her claims.

[29] First, with regard to the issue of procedural fairness, the Court feels that each of the parties had numerous opportunities to submit their observations and make their arguments regarding the allegations of discrimination and harassment put forth by the applicant. The Court notes that the applicant submitted her observations to the Commission on December 5, 2009 and on January 20, 2010. Similarly, the respondent submitted its comments on December 15, 2009 and on January 29, 2010. After receiving the investigation report, the applicant was given an opportunity to contact the Commission on May 11, 2011. She then submitted her comments with respect to the investigation report to the investigator. In addition, the applicant’s witness, Ms. Bouchard, signed a letter with her comments which was sent to the Commission. All in all, the Court finds that the applicant was provided with several opportunities to participate in the decision-making process and, consequently, the Court cannot conclude that there was any lack of procedural fairness.

[30] Second, as for the issue of neutrality and thoroughness, the applicant's arguments must also be dismissed.

[31] The evidence in fact shows that the investigator interviewed the applicant and the witnesses proposed by her, specifically Murielle Bouchard and Joseph Sohmer. The investigator also analyzed the documents and evidence adduced by the applicant. Although the applicant criticizes the investigator for having preferred Ms. Ouellette's version of the events surrounding her grievance, the Court cannot conclude that this adversely affected the neutrality and thoroughness of the process. The Court reiterates that it is up to the investigator and the Commission to assess the probative value of the evidence and to draw conclusions from it. In this case, the applicant criticizes the Commission for having preferred some evidence over other evidence. In this context, the Court adopts the comments offered by Justice Harrington in *Davis*, above, at paragraph 56: "[i]n any event, most of the commentary was argumentative and urged the investigator to prefer one body of evidence over the other. It is not the function of the investigator, or the Commission, to make credibility determinations, but rather only to determine whether or not there is evidence which, if believed, would justify the complaint."

[32] Thus, the Court finds that the investigator did not selectively analyse the evidence and did not fail to investigate obviously crucial evidence. Most of the applicant's arguments were centred on the handling of her grievance by the union and the CIRB as well as the evidence submitted in this context, specifically the union sheets. However, the Court notes that it cannot re-examine this process in terms of the labour law and that the only issue before it is the judicial review of the Commission's decision. The Court further notes that the CIRB's decision was not challenged by the

applicant and that it was therefore reasonable in the circumstances for the investigator to accept some of the related evidence and documentation.

[33] Lastly, it is important to emphasize that the Commission's mandate was to determine whether there was evidence that would allow it to conclude that the applicant had suffered harassment or discrimination in the course of her employment on account of her national or ethnic origin and whether her not having been rehired was the accumulation of this harassment and discrimination. Essentially, the investigator determined that the evidence adduced did not support the allegations of harassment and discrimination on the basis of the applicant's national or ethnic origin.

[34] The investigator made the observation that the applicant had been unable to provide names and/or specific details regarding the allegations. The investigator also concluded that Ms. Bouchard, one of the applicant's witnesses, had raised one single comment as evidence of harassment, but that Ms. Bouchard admitted that she did not know the context in which the comment was made. The investigator further observed that neither Ms. Bouchard nor Mr. Sohmer were able to show that the applicant had been the victim of harassment or discrimination on account of her national or ethnic origin. Rather, the investigator found that the applicant had shown that she had performance difficulties as an employee of the respondent. The applicant has not convinced the Court that the Commission's findings were unreasonable.

[35] The Court sympathises with the applicant's situation, but, in light of the arguments of the parties, the evidence in the record and the parameters established by the jurisprudence, the Court

is of the view that the Commission's decision is reasonable. The investigation was conducted in a fair, neutral and impartial manner and the investigator drew reasonable conclusions.

Consequently, the Court is of the view that it was reasonable for the Commission to have adopted the investigator's recommendations and to have dismissed the applicant's complaint (*Gerrard*, above, at paragraph 28; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 37, [2005] FCJ No 2056).

[36] For all of these reasons, the application for judicial review will be dismissed. At the hearing before this Court, the parties agreed to bear their own costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The present application for judicial review is dismissed.
2. Each party shall bear their own costs in this matter.

“Richard Boivin”

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1403-11

STYLE OF CAUSE: Anne-Marie Lamolinaire
v Bell Canada

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REASONS FOR JUDGMENT: BOIVIN J.

DATED: June 20, 2012

APPEARANCES:

Anne-Marie Lamolinaire

FOR THE APPLICANT
(ON HER OWN BEHALF)

Mireille Bergeron

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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FOR THE RESPONDENT