Date: 20080404

Docket: A-255-07

Citation: 2008 FCA 127

CORAM: **SEXTON J.A.**
SHARLOW J.A.
PELLETIER J.A.

BETWEEN:

DAVID BIRKETT

Appellant

and

CANADIAN HUMAN RIGHTS COMMISSION

Respondent

and

SUE GOODWIN

Respondent

Heard at Toronto, Ontario, on April 2, 2008.

Judgment delivered at Ottawa, Ontario, on April 4, 2008.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: SEXTON J.A.
SHARLOW J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This is an appeal from the dismissal of an application for judicial review of the decision of a tribunal (the Tribunal) established under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act). The Tribunal found that the facts alleged by the complainant were true, that they constituted sexual harassment within the meaning of the Act and awarded the complainant compensation. The appellant challenged this decision by way of judicial review, alleging that the acts complained of, even if proven, did not amount to sexual harassment and that he was denied procedural fairness in the conduct of the hearing.

[2] In a decision reported as *Goodwin* v. *Birkett*, 2007 FC 428, [2007] F.C.J. No. 592, the application judge dismissed the application for judicial review. This appeal from his decision was limited to the issue of procedural fairness as the finding as to the characterization of the conduct giving rise to the complaint was not appealed.

[3] In so far as the allegation of denial of procedural fairness is concerned the appellant raised the following arguments.

[4] The appellant complained that the Tribunal erred in failing to allow him to tender the tape recorded evidence of another employee. The application judge noted that both the complainant and the appellant wanted to call this employee but that he could not be found: see paragraph 25 of his reasons. The Tribunal declined to hear the tape recorded evidence because the complainant would be denied the opportunity for cross-examination. The application judge found that this was an eminently reasonable conclusion. Before us, without identifying what the employee could or would have said which was material to the complainant's credibility, the appellant argued that this ruling deprived him of the opportunity to challenge the complainant's credibility. This ground of appeal has no merit.

[5] The appellant also complains that the Tribunal erred in failing to allow him to call the complainant's former husband as a witness to say that the complainant had no difficulty calling the police in relation to his alleged misconduct, which could raise a doubt as to the complainant's explanation for her failure to call the police after the events giving rise to the complaint. The

Tribunal established that the complainant was prepared to admit all that her ex-husband had to say on relevant issues and then asked the appellant if he was satisfied with that result. He said that he was: see paragraph 24 of the application judge's reasons. As a result, the ex-husband was not called to give evidence. The application judge found that this did not give rise to a remedy.

[6] The appellant now says that he was not allowed to call the complainant's ex-husband and that in addition to the evidence already described, the latter would have testified as to her general character. The application judge noted that the Tribunal had found that the complainant had not put her character in issue: see paragraph 24 of his reasons. Leaving aside that the decision not to call the complainant's ex-husband was made with the appellant's apparent consent, the fact remains that, since the complainant did not put her character in issue, it would have been improper to allow evidence of general character in any event: see *R.* v. *Beland*, [1987] 2 S.C.R. 398. While administrative tribunals are not bound by the strict rules of evidence, they ought, nonetheless, to be especially careful when an attempt is made to refute an allegation of a sexual misconduct by evidence of the victim's character. We find no error in the application judge's disposition of this question. As for the issue of the complainant's willingness to call the police, the relevant facts were admitted and the appellant was free to make what he could of them.

[7] The appellant's final complaint is that the Tribunal erred in failing to refer in its reasons to the evidence given by a witness who worked with the complainant at another place of employment months after the incident giving rise to the complaint. In order to show that the complainant's evidence was untrustworthy, the appellant called this witness to testify that the complainant had said

to her and to others that she had been the victim of a sexual assault of a character completely different than what she alleged against the appellant. On further questioning, however, it became clear that this more serious sexual assault was unrelated to her complaint against the appellant. This witness then went on to give evidence of the appellant's reputation for being untruthful. In addition, this witness gave evidence that the complainant expected to receive a large payment in settlement of her complaint, thus suggesting a financial motive for making a false complaint.

[8] On the latter point, one of the appellant's grounds of appeal with respect to procedural fairness was that the Tribunal was unfair to him by inducing the complainant to demand monetary compensation when she initially declined to do so. Now the appellant says that the complainant's position before the Tribunal was simply an artful ruse which she adopted when she became aware of the tenor of the evidence which would be given against her. This argument is so far-fetched as to be unworthy of any credit.

[9] The application judge held that the reasons for decision of a tribunal are not a summary of the hearing itself so that it was not necessary to refer to irrelevant testimony. Before us, it was argued that this evidence was critical to an assessment of the complainant's credibility and that it was an error for the Tribunal to fail to give it any weight.

[10] As noted, the Tribunal found that the complainant had not put her character in issue. In those circumstances, evidence of her general reputation for truthfulness or honesty was not only irrelevant, it was unfairly prejudicial to the complainant. The Tribunal committed no error by

ignoring it, though, having decided to hear it, it would have been preferable for the Tribunal to explain why it gave it no weight.

[11] In the end result, I find no error in the application judge's disposition of the application for judicial review.

[12] I would therefore dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-255-07

(An appeal from the Canadian Human Rights Tribunal dated August 20, 2004. This decision was rendered by the Chairman Athanasios D. Hadjis, Trial file No. T-1701-04.)

STYLE OF CAUSE:	*David Birkett and Canadian Human Rights Commission and Sue Goodwin*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 2, 2008
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	SEXTON J.A. SHARLOW J.A.
DATED:	April 4, 2008

APPEARANCES:

Charles Roach	FOR THE APPELLANT
Daniel Poulin	FOR THE RESPONDENT

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Canadian Human Rights Commission Ottawa, Ontario	FOR THE RESPONDENT