Federal Court of Appeal

Cour d'appel fédérale

Date: 20120420

Docket: A-84-11

Citation: 2012 FCA 119

CORAM: **SHARLOW J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

RACHEL EXETER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on March 21, 2012.

Judgment delivered at Ottawa, Ontario, on April 20, 2012.

REASONS FOR JUDGMENT BY: DAWSON J.A.

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

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal of a decision of the Federal Court cited as 2011 FC 86, 383 F.T.R. 106. A judge of the Federal Court dismissed an application for judicial review of the decision of the Canadian Human Rights Commission whereby the Commission decided, pursuant to paragraph 41(1)(*d*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, not to deal with a complaint made to it by Rachel Exeter against her former employer.

[2] The principal basis of the Commission's decision was that Ms. Exeter had entered into a settlement agreement with her former employer in which she agreed, among other things, to

withdraw her complaint to the Commission. In the Commission's view, in light of all of the circumstances before it, the settlement agreement barred Ms. Exeter from proceeding with her complaint before the Commission. While Ms. Exeter argued before the Commission that she signed the settlement agreement under duress, fear and anguish, the Commission noted that Ms. Exeter had not provided evidence to support this contention and that she had been represented by counsel throughout the negotiation of the settlement agreement.

[3] On the application for judicial review of the Commission's decision, the Federal Court found that the decision was reasonable and that it was reached without any breach of the duty of procedural fairness owed to Ms. Exeter.

[4] Before this Court Ms. Exeter raised a number of issues in respect of the Federal Court decision. She argued that the Judge failed to consider relevant evidence, misapprehended relevant evidence, considered irrelevant evidence, made findings of fact that were not supported by the evidence and drew improper, speculative inferences. Despite Ms. Exeter's detailed and articulate submissions, for the reasons that follow I have concluded that the appeal should be dismissed.

[5] I begin consideration of the issues raised by Ms. Exeter by noting that on an appeal to this Court from an application for judicial review in the Federal Court, we are required to determine whether the Federal Court identified the appropriate standard of review and then applied the standard correctly (*Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, 386 N.R. 212 at paragraphs 18 to 19).

[6] At paragraphs 16 to 19 of her reasons the Judge correctly identified the standards of review: correctness on questions of procedural fairness and reasonableness for the substance of the Commission's decision.

[7] To consider the Judge's application of these standards, I will review the various errors asserted by Ms. Exeter.

[8] The relevant evidence the Judge is said to have ignored is Ms. Exeter's own evidence that she signed the settlement agreement under duress, fear and anguish. Ms. Exeter characterizes her evidence as categorical statements of fact that, if believed, could invalidate the settlement agreement. She asserts there were no conflicting or opposing views to her evidence.

[9] In my respectful view, Ms. Exeter is in error when she states that there was no information before the Commission which contradicted her assertions of duress, fear and anguish. Her former employer's letter of September 8, 2009 to the Commission (sent in response to Ms. Exeter's reply to the investigator's report) stated that the allegation that the settlement agreement was entered into under duress, fear and anguish was "not true" (appeal book at page 114). The former employer noted that while the settlement agreement was signed on February 11, 2009, Ms. Exeter never advised that she wanted "out" of the settlement and that the first time allegations of duress, fear and anguish were made was in Ms. Exeter's August 19, 2009 reply to the investigator's report. Among other things noted by the former employer were that Ms. Exeter was represented by counsel

throughout the proceedings that led to the signing of the settlement and that at no time in the process did Ms. Exeter advise that she wished to stop or postpone the negotiations.

[10] Based on this material, the Commission found that Ms. Exeter had not provided evidence (other than her own statement) of duress, fear and anguish. This was significant to the Commission particularly in light of the fact that Ms. Exeter was represented by counsel throughout the negotiations.

[11] On the application for judicial review, the Judge did not ignore Ms. Exeter's allegations of duress, fear and anguish. On the record before her it was correct for the Judge to observe that Ms. Exeter "led no independent evidence" of duress (reasons, paragraph 35).

[12] Ms. Exeter also says the Judge ignored her claim that the Commission's investigator was biased. To establish bias, Ms. Exeter relies upon an e-mail sent by the investigator to the former employer on June 25, 2009.

[13] The portion of the email Ms. Exeter points to as establishing bias is as follows:

> If, as I understand it, there was a settlement agreement that incorporated the issues raised in the complainant's human rights complaint, a copy of the settlement agreement would be a vital document for the Commission to review. If the settlement agreement is confidential, the respondent redact[s] any information unrelated to the withdrawing of, or settling of, the complainant's human rights complaint.

[14] This e-mail is said to show bias on its face. Ms. Exeter also points to the fact the e-mail was removed from the record and that it shows the investigator was giving advice to the former employer.

[15] At the outset, I note that it is not clear from the record that this was an issue Ms. Exeter raised squarely before the Judge. In any event, the June 25, 2009 e-mail, in my view, falls far short of establishing bias.

[16] The test for bias is well-settled: the apprehension of bias must be a reasonable one, held by a reasonably informed person with knowledge of the relevant circumstances. The question to be answered is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude." (*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at page 394). The grounds upon which an allegation of bias is made must be substantial (*Committee for Justice and Liberty* at page 395).

[17] Ms. Exeter has not provided substantial evidence of bias arising from the text of the e-mail. A properly informed person viewing the matter in the required manner would not conclude the investigator was motivated by any real or perceived bias. The investigator was simply gathering relevant information. She gave no improper advice to the former employer. Nothing can flow from the absence of the e-mail from the certified tribunal record in circumstances where Ms. Exeter was able to obtain a copy of the e-mail and put it in evidence before the Court.

[18] The Judge's alleged misapprehension of relevant evidence relates to Ms. Exeter's allegation that the Judge ignored documents which Ms. Exeter submitted to the Commission to show her former employer did not do a proper "fact-finding exercise" with respect to her charges of discrimination and harassment, and also ignored evidence that showed the Commission's investigative process was unfair.

[19] The Judge wrote as follows with respect to the fact-finding exercise:

> 29. The Section 40/41 Report gives a thorough account of these considerations. While the Applicant attempted to attack the credibility and fairness of the fact-finding exercise and the agreement, she provided no evidence in her submissions before the Commission to support these claims. On the other hand, the Respondent provided considered explanations for each of the Applicant's concerns about the conduct of the fact-finding exercise.

[20] Ms. Exeter replies that her former employer "responded with fabricated information, which the Applications Judge considered that as 'evidence' to be believable. Should credence be given to fabricated rhetoric? No! The Applications Judge finding is patently unreasonable."

[21] Having read the eight documents Ms. Exeter relies upon (found at pages 93-94, 97 and 103-110 of the appeal book), I see no palpable and overriding error in the Judge's assessment of the evidence. At best, Ms. Exeter provided documents in which she made assertions with respect to the fact-finding exercise.

[22] With respect to the Commission's investigative process, the Judge wrote at paragraph 36 of her reasons:

> With respect to the Applicant's submissions that the Commission ought to have made her aware that it may not accept her submissions concerning the integrity of the fact-finding exercise or duress in signing the agreement, the exchange of submissions and cross-disclosure submissions makes it clear that these matters were in dispute. The Applicant had the opportunity to address these issues in her submissions.

[23] Ms. Exeter states in response that the investigator improperly terminated the cross-disclosure so that she did not in fact have the chance to respond to the September 8, 2009 submission of her former employer to the Commission. However, the September 8, 2009 submission of the former employer was simply the employer's response to Ms. Exeter's reply to the investigator's report. There is nothing improper or unfair in not allowing a party to file a sur-reply to another party's reply. The Judge made no error.

[24] The irrelevant evidence the Judge is said to have relied upon is the settlement agreement reached between Ms. Exeter and her former employer.

[25] In my view, the Judge made no error in her appreciation of the relevance of the settlement agreement to the reasonableness of the Commission's decision not to deal with Ms. Exeter's complaint. As a matter of law, the settlement agreement was a relevant consideration to the Commission's decision not to deal with Ms. Exeter's complaint (see *Gee v. Canada (Minister of National Revenue)*, 2002 FCA 4, 284 N.R. 321). Therefore, the settlement agreement was relevant to the issue of the reasonableness of the Commission's decision and the Judge made no error in considering it.

[26] The allegations that the Judge made a finding which was not supported by any evidence and drew an unreasonable inference relate to Ms. Exeter's contention that the Commission failed to seek information from two material witnesses she identified: her counsel and the Public Service Labour Relations Board adjudicator who facilitated the settlement process which led to the signing of the settlement agreement.

[27] The judge dealt with this at paragraphs 32 to 34 of her reasons, where the Judge wrote:

> 32. It is trite law to say that the Commission is the master of its own procedure. In *Busch v. Canada (Attorney General)* (2008), 71 C.C.E.L. (3d) 178 the Court said the following at para.15:
>
> > ... not all persons on a complainant's list of possible witnesses must be interviewed; an investigator has considerable discretion in deciding how to conduct an investigation. However, where a witness may have information that could address a significant finding of the Investigator and where no one else is interviewed that could resolve a controversial and important fact, it seems to me that failure to interview that person may result in an investigation that is not complete [citations omitted].
>
> 33. It must be kept in mind that the Section 40/41 Report in this case is a report that was prepared following the execution of the Memorandum of Agreement by the Applicant and her former employer, Statistics Canada. At the initial investigation level, the Commission was focused on whether to reactivate the Applicant's complaint, in light of the surrounding circumstances, including the execution of this Memorandum of Agreement. In *Tinney v. Canada (Attorney General)*, 2010 FC 605, the Court summarized the standard of procedural fairness relative to interviewing proposed witnesses at para. 28 as follows:
>
> > The jurisprudence is clear: There is no requirement that a human rights investigator interview every witness proposed or identified by the parties. 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 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 [citations omitted].
>
> 34. Having regard to this standard, I find that a reasonable person would not expect the Applicant's purported witnesses to be useful sources to substantiate her claim of duress or that they could have information that would help resolve this issue. I am satisfied that no breach of procedural fairness occurred in this regard.

[28] Ms. Exeter claims that the Judge erred by applying the *Tinney* decision because the report at issue in *Tinney* led to the dismissal of a complaint under section 44 of the Act, whereas in the present case the complaint was dismissed pursuant to paragraph 41(1)(*d*) of the Act. Ms. Exeter also argues that the Judge erred by applying the reasonableness standard of review (not the correctness standard) to her allegation of breach of procedural fairness and by finding that a reasonable person would not expect the two witnesses to support Ms. Exeter's claim of duress.

[29] Again, for the following reasons, I can find no error on the part of the Judge.

[30] First, in my view, *Tinney* is applicable to all investigative reports placed before the Commission whether they lead to the dismissal of a complaint under section 41 or section 44 of the Act. There is no principled basis on which to argue that an investigative report must be more thorough where a complaint is dismissed under section 41 of the Act.

[31] Second, it is clear from the text of paragraphs 16, 33 and 34 of the Judge's reasons that she applied the correctness standard of review to the allegation of breach of procedural fairness.

[32] Finally, I accept the submission of the respondent that both Ms. Exeter's counsel and the adjudicator would be in breach of their professional obligations if they knowingly permitted Ms. Exeter to sign a settlement agreement under duress. There was no credible evidence before the Commission that would have led a reasonable person to expect they would support Ms. Exeter's claim of duress. The Judge did not draw any unreasonable inference in reaching this conclusion.

[33] Finally, Ms. Exeter argues that a complaint may only be dismissed under paragraph 41(1)(*d*) of the Act if it is "trivial, frivolous, vexatious or made in bad faith" and the Judge erred by failing to conclude that Ms. Exeter's complaint did not fall within those criteria.

[34] In my view, the prior decision of this Court in *Gee* is dispositive of this argument. In *Gee*, this Court held that a settlement agreement is a relevant consideration when the Commission decides whether to dismiss a complaint. Where a party wishes to litigate issues that have previously been settled it is open to the Commission to find that the complaint is "trivial, frivolous, vexatious or made in bad faith". This is so because the relitigation of issues previously resolved or settled can constitute an abuse of process, which would permit the relitigation to be characterized as vexatious.

[35] Before concluding these reasons, I wish to briefly mention the decision of the Public Service Labour Relations Board in *Exeter v. Deputy Head (Statistics Canada)*, 2012 PSLRB 25 which the respondent sought to reply upon. This decision was made after the decision of the Federal Court now under appeal and, we were advised, is being challenged. For those reasons, I have given no consideration to the decision.

[36] For the reasons set out above, I would dismiss the appeal with costs.

"Eleanor R. Dawson"
J.A

"I agree.
K. Sharlow J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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