Federal Court of Appeal | Cour d'appel fédérale

Date: 20200526

Docket: A-195-19

Citation: 2020 FCA 95

CORAM: **DE MONTIGNY J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

PAMELA HARVEY

Appellant

and

VIA RAIL CANADA INC.

Respondent

Heard by online video conference hosted by the registry on May 13, 2020.

Judgment delivered at Ottawa, Ontario, on May 26, 2020.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: WOODS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal of a decision of Justice Simpson of the Federal Court (2019 FC 569), (the Reasons) in which she dismissed the appellant Pamela Harvey's application for judicial review of a decision of the Canadian Human Rights Commission (the Commission) declining to request that the Canadian Human Rights Tribunal initiate an inquiry into the appellant's complaint of individual discrimination and harassment by her former employer Via Rail Canada

Inc. (the respondent). The Commission requested that the Tribunal institute an inquiry solely into the systemic discrimination component of the complaint, though this element is not pertinent to the present proceedings.

[2] The appellant was hired on September 30, 2011 by the respondent as one of 16 trainees in the respondent's Locomotive Engineer Training Program (the Program). The Program was designed to last approximately 12 months, during which time the appellant was deemed to be a temporary employee, earning $1,200 per week. Continuation in the Program was conditional upon the successful completion of training modules, and upon passing written and simulated locomotion control exams with a grade of 90% or greater. The appellant failed both the written and the simulator tests on January 27, 2012. According to the evidence as found by the Commission's Investigator, the appellant obtained a grade no higher than 88% on the written test, and a grade of 88% on the simulator test. As a result, the appellant was terminated on February 1, 2012.

[3] On September 19, 2013, the appellant filed a complaint with the Commission, which was referred for investigation on March 15, 2015. She later provided particulars and expanded her complaint on May 1, 2015. She alleged that the respondent maintained discriminatory policies and treated her in an adverse differential manner with respect to her employment because of sex, contrary to sections 7, 10 and 14 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, (CHRA) which culminated in the unjust termination of her employment. She claimed, among other things: 1) that one of the Program instructors, Mr. Laberge, falsified her final simulator test results by switching her passing results with those of her test partner, whom she observed to have

performed poorly on the test, resulting in a failing grade; 2) that she did pass the written exam and simulator test on January 26, 2012 with a score of 94% on the simulator test; 3) that Mr. Laberge harassed her during the Program by making sexist comments and unwanted approaches; and 4) that despite being entitled to medical benefits pursuant to her employment letter, she received a letter two weeks before the test denying her right to those benefits (the Benefits Letter).

[4] The Investigation Report was disclosed to the parties on February 22, 2017. The appellant responded to the Commission's invitation and provided the Investigator with written submissions in response to the report on April 27, 2017. The respondent did not have any comments with regard to the report nor with regard to the appellant's submissions. The Commission eventually accepted the Investigator's conclusions without reasons of its own, such that the Investigation Report constitutes the reasons for the Commission's decision (*Canada (Attorney General) v. Sketchley*, 2005 FCA 404, [2006] 3 F.C.R. 392 at para. 37 [*Sketchley*]).

[5] The Investigator interviewed the appellant, two former trainees and two former instructors (including Mr. Laberge) who had worked with the appellant in the Program. She found that none of the witnesses interviewed confirmed the allegations of harassment against Mr. Laberge, and thus that the allegations could not be supported. These conclusions have not been challenged by the appellant in the current proceedings.

[6] With respect to the allegation of discrimination, the Investigator examined whether the respondent could provide a reasonable explanation for the appellant's termination of

employment without a pretext for discrimination on a prohibited ground. After having thoroughly examined all the evidence, the Investigator found that Mr. Laberge had not falsified the appellant's test results and that she failed to pass both the written and simulator tests. Based on that evidence, the Investigator concluded that "the reason why the [appellant]'s employment was terminated is linked to her performance and not a prohibited ground of discrimination" (Investigation Report, at para. 73; Appeal Book, at p. 120).

[7] On judicial review, the appellant made a number of claims relating to both the thoroughness and the procedural fairness of the investigation. In well reasoned and extensive reasons, the Federal Court rejected all of those claims. Of particular relevance for this appeal are the following findings:

- It is reasonable and of little significance that no extensive investigation has been conducted into the appellant's termination letter, which wrongly indicated that she was dismissed due to failing the January 26, 2012 exams, rather than failing the January 27, 2012 exams. It is clear from the evidence that the events of January 27, 2012 constitute the reason for dismissal. Moreover, that error was not mentioned by the appellant in either her complaint or her response (Reasons, at paras. 22, 24-26);
- The Investigator's conclusion that the evidence does not support the allegations of falsification of the appellant's test results by Mr. Laberge is also reasonable, as she found that the documentary evidence of her test results and previous performances, as well as the witness' testimony of the events were both reliable and credible (Reasons, at paras. 28-32);

- It was reasonable for the Investigator to conclude that she could not identify which trainee was paired with the appellant during the simulator test because the evidence presented by six different witnesses was inconsistent and incomplete (Reasons, at paras. 34-35);
- The appellant's procedural fairness rights were not breached by the Investigator's failure to interview a witness that the appellant had suggested in her response to the Investigation Report. That witness was not directly involved in the case and was unable to provide first-hand information. As such, in light of the applicable case law, his evidence was not "obviously crucial" (Reasons, at para. 39);
- The appellant's procedural fairness rights were not breached by the Investigator's failure to consider the Benefits Letter. A letter which was written almost two weeks before the appellant failed her tests and was issued by a person unrelated to the Program or the instructor, Mr. Laberge, could not be evidence of an intention to terminate her in the future on a prohibited ground (Reasons, at para. 40).

[8] On appeal before this Court, the appellant reiterated many of the arguments that she put forward in the Federal Court. She claimed, essentially, that the Federal Court erred in concluding that the Commission's decision not to refer her complaint to the Tribunal was reasonable because the crux of her complaint was overlooked, and because the Investigator was unable to determine with whom she was paired in the final simulator test. The appellant also contended that her right to procedural fairness was breached because the Benefits Letter was not considered, and because the witness she had suggested was not interviewed.

[9] At the hearing, counsel for the appellant argued for the first time that some of the appellant's written submissions never made it to the Investigator. Counsel relies for that proposition on the fact that two letters sent to the Commission by the appellant's previous counsel, dated December 10, 2013 and May 1, 2015, are not part of the material that was before the Commission as listed in the Certificate pursuant to Rule 318(1)(*a*) of the *Federal Courts Rules*, S.O.R./98-106. In my view, this ground of appeal cannot be entertained as it was never raised before and is not even spelled out in the appellant's memorandum, as acknowledged by counsel. In any event, even if one were to accept that these letters were not before the Investigator or the Commission, it has not been established that their content added anything to the original complaint or to the appellant's response to the Investigation Report. Consequently, the appellant has not been deprived of her right to procedural fairness on that ground.

[10] It is clear that on appeal from a Federal Court decision in judicial review proceedings, this Court must consider whether the judge of first instance has chosen the appropriate standard of review and whether that standard has been properly applied. In other words, the focus of our attention must be the underlying decision (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47; *Ritchie v. Canada (Attorney General)*, 2017 FCA 114, 19 Admin L.R. (6th) 177 at para. 15 [*Ritchie*]). There is no doubt in my view that the Federal Court judge did not err in reviewing the decision of the Commission to dismiss the appellant's complaint on a reasonableness standard, and in applying the correctness standard when dealing with the thoroughness of the investigation. This is consistent with past jurisprudence (see e.g. *Attaran v. Canada (Attorney General)*, 2015 FCA 37, 80 Admin. L.R. (5th) 24 at paras. 9-14; *Ritchie*, at para. 16).

[11] The recent decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 59 Admin. L.R. (6th) 1 [*Vavilov*], has reiterated that substantive review of administrative decisions is to be done on a standard of reasonableness. Absent exceptional circumstances, therefore, a reviewing court will not interfere with the factual findings of a decision maker (*Vavilov*, at para. 125). As both this Court and the Federal Court have said in the past, screening decisions under section 41 of the CHRA are to be reviewed with "a high degree of deference" (*Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006 at paras. 90-99; *Sketchley*, at para. 38; *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 99 Admin. L.R. (5th) 1 at para. 45; *Canadian Union of Public Employees (Airline Division) v. Air Canada*, 2013 FC 184, 53 Admin. L.R. (5th) 1 at paras. 60-73). This jurisprudence is consistent with the notion that "reasonableness is a single standard that takes its colour from the context", espoused by the Supreme Court in *Vavilov* (at para. 89); in other words, the range of reasonable decisions in the context of a gate-keeping function will be broader than in the context of pure adjudicative decisions.

[12] Having carefully considered the representations made by counsel for the appellant, I am unable to find any reviewable error in the Investigation Report or the Commission's decision, or in the Federal Court's judicial review of that decision. For the most part, the appellant continues to disagree with the findings of fact made by the Investigator and reiterates the submissions made before the Federal Court, but this is not sufficient to succeed in her appeal.

[13] In my view, the Investigator and the Commission could reasonably come to the conclusion that the termination of the appellant was linked to her poor performance on the various tests required by the Program, rather than to any form of discrimination. Such a finding is amply supported by the record. Not only did the appellant acknowledge that she would have failed the written test even with the corrections made to eliminate two questions from the exam, the documentary evidence shows that most comments described the appellant as nervous and unable to multitask throughout her simulator tests. There is also evidence that all the instructors and the training manager recommended that the appellant not proceed when they met to discuss the trainees' performances. The concluding paragraph of the portion of the Investigation Report dealing with the appellant's individual complaint reads as follows:

> 73. The Investigator is unable to determine who was paired with the complainant. That being said, the evidence supports that the complainant did not achieve the pass mark on both the written examination and the simulator testing. The evidence also shows that another employee was given permission to retake the exam because of circumstances relating to a legal decision. The evidence indicates that the complainant struggled through the simulation tests when she was not coached. Therefore, it appears that the reason why the complainant's employment was terminated is linked to her performance and not a prohibited ground of discrimination.
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> (Appeal Book, at p. 120)

[14] The appellant claims, as she did before the Federal Court, that the Commission's decision is vitiated because the Investigator did not scrutinize the incorrect date appearing on her termination letter, and was unable to establish with whom she was paired for the final simulator test. For the reasons given by the Federal Court, the error in the date on which the appellant passed the tests and the Investigator's inability to establish the pairing do not render the Commission's decision unreasonable. As rightfully pointed out by the Federal Court, nowhere in her complaint did the appellant allege that she was terminated even though she passed the test on

January 26, 2012 or suggest that this fact required investigation. Moreover, the Investigation Report indicates that the appellant passed a simulator test but no written test on January 26th, whereas she failed both a simulator and a written test on January 27th. There is clearly no basis to interfere with these factual findings, and the Federal Court could certainly infer from these facts that the date of the termination letter was a typographical error.

[15] As for the alleged breaches of procedural fairness resulting from the fact that the Investigator did not consider the Benefits Letter and did not interview the witness put forward by the appellant, they have simply not been substantiated. Once again, I agree with the Federal Court that neither the witness' testimony nor the letter terminating the appellant's benefits can be considered as "obviously crucial evidence" within the reasoning of *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574, 73 F.T.R. 161, aff'd 205 N.R. 383 (F.C.A.). The evidence in the record does not substantiate any link between the Program itself and the letter. The suggested witness was not involved in the evaluation process, and the information he could have provided would be hearsay.

[16] For all of the above reasons, I would dismiss the appeal, without costs.

"Yves de Montigny"

J.A.

"I agree.
Judith Woods J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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