Federal Court of Appeal | Cour d'appel fédérale

Date: 20221121

Docket: A-343-19

Citation: 2022 FCA 198

CORAM: **PELLETIER J.A.**
STRATAS J.A.
RIVOALEN J.A.

BETWEEN:

CRISPIN KEMP

Appellant

and

DEPARTMENT OF FINANCE CANADA

Respondent

Heard at Winnipeg, Manitoba, on November 3, 2022.

Judgment delivered at Ottawa, Ontario, on November 21, 2022.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

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

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] Mr. Kemp appeals from the decision of the Federal Court (*per* Grammond J.) dismissing his application for an extension of time to file a notice of application challenging a decision of the Canadian Human Rights Commission (the Commission). In its decision dated June 28, 2019,

the Commission decided not to deal with Mr. Kemp's complaint that he had been discriminated against on the basis of his age.

II. Facts

[2] Like many prudent Canadians, Mr. Kemp has been saving for his retirement years by contributing a portion of his earnings to a Registered Retirement Savings Plan (RRSP). However, in 2018, Mr. Kemp's plans were disrupted, leading him to file a complaint with the Canadian Human Rights Commission which said:

> I am a Canadian citizen, working full time, born 8 January 1946. I do not plan on retiring until my 75th year. I have been saving in one form or another, putting aside monies for my retirement.
>
> At the end of my 71st. year, i.e., the 1 January 2018, the Federal government, in the form of the Canada Revenue Agency, requires that a prescribed amount of monies from the monies I am saving for my retirement be withdrawn annually and added to my employment income.
>
> This action by the Federal government is blatant discrimination based purely on my age.

[3] At this point, it may assist the reader to have before them the relevant portions of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act). Part I of the Act deals with Proscribed Discrimination. The prohibited grounds of discrimination are set out in section 3:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been	**3.** (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques

granted or in respect of which a record suspension has been ordered.	génétiques, l'état de personne graciée ou la déficience.

[4] The prohibited grounds of discrimination are relevant to the definition of "discriminatory practice" which is dealt with in sections 5 to 14.1 of the Act. These discriminatory practices all involve discrimination on a prohibited ground (as set out in section 3) in the course of certain activities, namely, the provision of goods, services, facilities or accommodation customarily available to the general public (s. 5), the provision of commercial premises or residential accommodation (s. 6), employment (s. 7), employment applications, advertisements, policies, practices, agreements and wages (ss. 8, 10, 11), membership in employee organizations (s. 9), publication or display of notices, signs, symbols, emblems or other representation (s. 12), and harassment (s. 14).

[5] In this case, the relevant discriminatory practice is set out in section 5, reproduced below:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual,	b) de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	

[6] Section 4 of the Act, which reads as follows, is critical to the outcome of this case:

4. A discriminatory practice, as described in sections 5 to 14.1, may	**4.** Les actes discriminatoires prévus aux articles 5 à 14.1 peuvent faire

be the subject of a complaint under Part III and anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in section 53.	l'objet d'une plainte en vertu de la partie III et toute personne reconnue coupable de ces actes peut faire l'objet des ordonnances prévues à l'article 53.

[7] The significance of section 4 is that it defines what may be the subject matter of a complaint, namely, a discriminatory practice. Section 40 of the Act confirms this:

40. (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.	**40.** (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

[8] Section 41 of the Act deals with the processing of complaints and was the trigger for the Commission's decision in this case not to deal with Mr. Kemp's complaint:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	**41.** (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

(c) the complaint is beyond the jurisdiction of the Commission;	c) la plainte n'est pas de sa compétence;
(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or	d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
…	…

[9] Against that background, I return to the facts of Mr. Kemp's complaint. The Commission assigned Mr. Kemp's claim to a human rights officer who reviewed the claim to see if it came within one of the circumstances set out in section 41 of the Act that permit the Commission to decline to deal with the complaint.

[10] The human rights officer characterized Mr. Kemp's complaint as one of age discrimination made against Finance Canada in the provision of a service pursuant to section 5 of the Act. After some preliminary comments, she described the issue before her as follows:

> Is the complaint frivolous in the sense that the alleged conduct that is not discriminatory according to the Act because the conduct is not a discriminatory practice described in sections 5 to 14.1 of the Act? (my emphasis)
>
> Appeal Book at Tab 1-12

[11] The human rights officer then considered whether the facts set out by Mr. Kemp would constitute a discriminatory practice under section 5, specifically, a discriminatory practice in relation to the provision of services customarily available to the public. The human rights officer cited a decision of the Supreme Court of Canada (*Gould v. Yukon Order of Pioneers*, 1996 CanLII 231, [1996] 1 S.C.R. 571) as establishing that "service" under section 5 of the Act has a transitive connotation in that the service must pass from the service provider to the member of the public.

[12] The human rights officer then considered whether federal laws can be a service under section 5 of the Act and, thus, can be the subject of a complaint. On this, she considered *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230, which was directly on point and binding (the *CHRC* case). In the *CHRC* case, the Supreme Court confirmed the jurisprudence which held that lawmaking does not have a transitive connotation, which means that lawmaking or legislation is not a service under section 5 that can give rise to a discriminatory practice: *CHRC* case at paras. 61-64. In light of this binding authority, the human rights officer concluded that section 5 does not permit challenges to discriminatory impacts when those discriminatory impacts flow directly from the unambiguous wording of federal legislation.

[13] Based on this analysis, the human rights officer concluded that complaints that directly challenge legislation have no reasonable prospect of success. In Mr. Kemp's case, she found that the "requirement to 'cash out' RRSPs beginning at age 71 is determined by the unambiguous, non-discretionary wording of section 146 of the *Income Tax Act*": Appeal Book at Tab 1-13. Since the complaint was a challenge to the legislation, which could not succeed, it was frivolous within the meaning of the Act. As a result, the human rights officer recommended that the Commission not deal with Mr. Kemp's complaint.

[14] The human rights officer's report (the Section 40/41 Report) was forwarded to Mr. Kemp for his response. After considering his response, the Commission advised him that it had decided, pursuant to paragraph 41(1)(*d*) of the Act, not to deal with his complaint because it was frivolous and that it was closing his file. The decision, communicated via letter dated June 28,

2019, concluded by advising Mr. Kemp of his right to have the Federal Court review the Commission's decision by making an application for judicial review within 30 days of the date of receipt of the decision.

[15] As a result of Mr. Kemp's absence from home for a portion of the 30 day period, he was unable to file his notice of application in time and so, he applied by motion for a 60 day extension to file his notice of application so as to allow him to pursue his remedy. The Federal Court dismissed his motion.

III. The decision under appeal

[16] The Federal Court relied on this Court's decision in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, [2012] FCJ No. 880 (QL) at para. 61 [*Larkman*], which set out the test to be applied in applications for an extension of time. Those factors were listed as:

(1) Did the moving party have a continuing intention to pursue the application?

(2) Is there some potential merit to the application?

(3) Has the Crown been prejudiced from the delay?

(4) Does the moving party have a reasonable explanation for the delay?

[17] The Federal Court immediately turned to the question of the potential merit of the application. It explained that its function was not to judge the application itself, but that it was important that the scarce resources of the judicial system not be expended on a case that was bound to fail. This is why an applicant in a motion for an extension of time must show that their case has "some potential merit". To this I would add that if a case has potential merit, it is not the

motions judge's responsibility to decide whether it will ultimately succeed or fail, which is very likely what the Federal Court had in mind when it referred to not judging the application.

[18] The Federal Court then commented that Mr. Kemp had not provided any information as to the decision which he wished to challenge in his application. The Court noted that he did not file the decision but that the respondent had done so. Mr. Kemp disputes this. In any event, the document identified as the decision in the affidavit filed by the respondent was not, in fact, the decision but the Section 40/41 Report prepared by the human rights officer. While this Court has recognized that this report can be treated as the reasons for the Commission's decision (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at para. 37; *Zulkoskey v. Canada (Employment and Social Development)*, 2016 FCA 268, [2016] FCJ No. 1339 (QL) at para. 16), the actual decision is the Commission's letter dated June 28, 2019. Nothing turns on this error, though Mr. Kemp was critical of the lack of care by those who prepared the affidavit putting forward the Section 40/41 Report as the decision and those who accepted it as such.

[19] The Federal Court noted the Commission's position that Mr. Kemp's complaint related to the fact that he was required to begin "cashing out" his RRSP at age 71, which Mr. Kemp characterized as age discrimination. The Court further noted the Commission's conclusion that this was mandated by section 146 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). As a result, the Court noted that the Commission found it could not consider Mr. Kemp's complaint because it had no jurisdiction to deal with complaints that were solely aimed at the validity of legislation. The Court observed that Mr. Kemp denied that his complaint was aimed solely at the

relevant provisions of the *Income Tax Act* but determined that he failed to show how his complaint went beyond the rule that he was required to begin to "cash out" his RRSP at age 71.

[20] In the end, the Federal Court found that it could not distinguish Mr. Kemp's proposed application from the facts that were before the Supreme Court of Canada in the *CHRC* case. The rationale of that case, as found by the Court, is that the Commission only has jurisdiction over discriminatory practices, whereas the adoption of legislation cannot be considered to be a "service" and so could not give rise to a discriminatory practice. According to the Court, this reasoning would doom Mr. Kemp's application should he be given an extension of time to proceed. As a result, his request for an extension of time was dismissed without costs.

IV. Analysis

[21] The decision under appeal is a discretionary decision of a motions judge. Following this Court's decision in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 79, the standard of review is the appellate standard set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law, except where an extricable question of law arises.

[22] In his oral submissions, Mr. Kemp argued with force that the Commission failed in its duty when it did not consider whether he was a victim of discrimination and if he was, when it failed to decide if the discrimination was permitted by the law and, if so, to take the appropriate

steps. He wished to proceed with his application for judicial review so that this error could be corrected.

[23] The difficulty is that the Act, which is the law of the land that binds us all, requires the Commission to undertake a different analysis. The Act contemplates that the Commission will only deal with complaints about discrimination on a prohibited ground if the conduct in question constitutes a discriminatory practice.

[24] Mr. Kemp's complaint alleged a prohibited ground of discrimination but did not specifically allege a discriminatory practice. The human rights officer identified the provision of services as the discriminatory practice in the Act that most closely resembled the facts which Mr. Kemp put before the Commission. This appears at page 2 of her report, at Tab 1-12 in the Appeal Book, where she quotes section 5 of the Act and discusses the notion of a service which is customarily available to the general public. In the circumstances, this was the only choice realistically available to the human rights officer since it is clear that Mr. Kemp's complaint could not be characterized as one concerning residential accommodation or employment, or any of the other discriminatory practices described in sections 5 to 14.1 of the Act.

[25] It is important to understand that in proceeding as she did, the human rights officer was attempting to bring Mr. Kemp's complaint within the terms of the Act so that the Commission would have jurisdiction to deal with it. Unfortunately, the best fit, "services", does not assist Mr. Kemp because of the decision in the *CHRC* case in which, as noted earlier, the Supreme Court confirmed that "law-making" or legislation is not a service provided to the public. As a result,

Mr. Kemp's complaint about the discriminatory effects of the *Income Tax Act* did not disclose a discriminatory practice.

[26] Since the complaint in its original form or as restated by the human rights officer did not disclose a discriminatory practice, it was doomed to fail, given the limitations found in the Act. In *Hérold v. Canada (Revenue Agency)*, 2011 FC 544, [2011] FCJ No. 683 (QL) Rennie J. (as he then was) wrote at paragraph 35:

> Third, the test for determining whether or not a complaint is frivolous within the meaning of section 41(1)(d) of the *Act* is whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed.

[27] Thus, an application which clearly cannot succeed is said to be frivolous. When used in this way, "frivolous" refers to the application and not to the applicant and in this specialized legal context means an application that is doomed to fail. Mr. Kemp, thinking of the non-legal meaning of this term, has taken offence at its use. Nothing in this file suggests that the Commission or the Federal Court thought that Mr. Kemp made his complaint frivolously in the sense of being thoughtless or unserious. He is obviously a thoughtful, serious person making an honest, if doomed, complaint. The difficulty is that his complaint cannot succeed under the terms of the Act so that it is, in the technical sense used in this legislation, frivolous.

[28] Given the factors to be considered in deciding whether to grant an extension of time to bring an application, a finding that a claim cannot succeed is fatal to such a request. While it is not necessary that all four factors set out in *Larkman* be resolved in the applicant's favour, a finding that the application is doomed to fail is fatal because allowing the application to go forward would simply lead to a hearing whose outcome is pre-ordained. This is a wasteful use of

resources for all concerned. It was not an error on the part of the Court to abstain from considering the other factors.

[29] As a result, the Federal Court's decision declining to grant Mr. Kemp an extension of time to file his application for judicial review was reasonable and does not justify our intervention.

[30] For these reasons, I would dismiss Mr. Kemp's appeal without costs.

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

"I agree.
David Stratas J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-343-19
STYLE OF CAUSE:	CRISPIN KEMP v. DEPARTMENT OF FINANCE CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	NOVEMBER 3, 2022
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	STRATAS J.A. RIVOALEN J.A.
DATED:	NOVEMBER 21, 2022

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