Ingamo Hall v. *Bergeron*, 2003 NWTSC 44

Date: 2003 07 30
Docket: S-001-CV 2002 000183

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE matter of the *Fair Practices Act*, R.S.N.W.T. 1988, c.F-2, as amended;

AND IN THE matter of a complaint filed with the Fair Practices Officer by Bette-Lou Bergeron against Ingamo Hall Friendship Centre dated 18 April 2001;

BETWEEN:

INGAMO HALL FRIENDSHIP CENTRE

Appellant

- and -

BETTE-LOU BERGERON

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an appeal from a decision of the Fair Practices Officer, dated May 17, 2002, made as a result of a complaint of discrimination pursuant to the *Fair Practices Act*, R.S.N.W.T. 1988, c.F-2 (as amended).

[2] The Act's purpose is the prevention and elimination of discrimination in employment, accommodation and services. It is akin to human rights legislation found in other Canadian jurisdictions: see *Re Simonson and Hodgson* (1975), 63 D.L.R.(3d) 560 (N.W.T.S.C.); and *Keewatin Regional Health Board* v. *Peterkin*, [1997] N.W.T.R. 93 (S.C.). It sets up a procedure for the investigation of complaints of discrimination. Fair Practices Officers are appointed by the Commissioner-in-Executive Council to receive and investigate complaints, to mediate disputes, and to hold hearings. Officers have the powers of a board or inquiry and are given a broad mandate to expeditiously determine

any issues before them. They have extensive remedial powers. Section 7.8(1) of the Act provides that the Fair Practices Officer may "make any order or decision that (he or she) considers just". An order or decision may be filed with the Clerk of the Territorial Court and may be enforced in the same manner as a judgment of that court.

[3] In this case, the respondent made a complaint on April 18, 2001, alleging discrimination leading to her dismissal from employment. The relevant provision of the Act is s.3(1):

> 3(1) No employer shall refuse to employ or refuse to continue to employ a person or adversely discriminate in any term or condition of employment of any person because of the race, creed, colour sex, marital status, nationality, ancestry, place of origin, disability, age or family status of that person or because of a conviction of that person for which a pardon has been granted.

[4] The context for the complaint is critical. The employer, the appellant here, is a "Friendship Centre", located in Inuvik, whose purpose is the delivery of social and education services to the aboriginal population of that community. Its employees are primarily aboriginal as well. In fact, during the relevant time period in this case, all the employees were aboriginal with the exception of the respondent.

[5] The respondent was originally hired in November, 1999, on a six-month term. She was again hired in June, 2000, on a casual basis. On August 28, 2000, she was given the position of "project officer" on a youth wellness programme for a one-year term. At about the same time, Ms. Jamie White-Stewart was hired as the programme co-ordinator and was the respondent's direct supervisor. Difficulties between the two of them arose very quickly.

[6] On October 28, 2000, the respondent complained to the Centre's executive director about Ms. White-Stewart's "attitude". Her complaint identified a lack of communication from Ms. White-Stewart. A similar complaint was made on February 16, 2001. She complained about her supervisor's lack of communication. She noted that this was affecting not only herself but others on staff. During this period the executive director told the respondent to address these concerns to her supervisor. As a result there was a steady flow of memos between the respondent and Ms. White-Stewart. The respondent expressed concerns about her supervisor's lack of communication and support; Ms. White-Stewart expressed criticism about the respondent's absenteeism and inappropriate behaviour. The employer eventually decided to bring in an outside mediator to try to resolve matters. Two mediation sessions were held in early March, 2001, and

the mediator thought they were productive. Nevertheless, complaints soon resumed between the respondent and her supervisor.

[7] On March 26, 2001, the respondent wrote again to the executive director with a copy to a member of the Centre's board of directors. The substantive portions of this correspondence are as follows:

> On Thursday, March 21, 2001, Jamie White had a discussion with a person that is not employed with Ingamo Hall downstairs on this afternoon about two employees at Ingamo Hall. I was approached by an adult female today and she stated to me that you told her in these words: "Before I leave here, I am going to get Jo-Jo and Bette-Lou fired, and that we were toxic people". This is a very malicious statement for a program co-ordinator. It is inappropriate and unprofessional . . .
>
> It has been my goal to promote healthy relationships in the community and maintain good working relationships with my peers and co-workers in the sixteen months of employment here at Ingamo. Since the beginning of Jamie's employment at Ingamo I have attempted on many occasions to have a working relationship with her however, this does not appeal to her for some reason. I have gone as far as to request mediation to settle out our differences in a positive manner, but that obviously has had no success. *This is discrimination and harrassment*. I will not tolerate this unprofessional conduct from Jamie any longer. Being in the position of authority does not mean that she is authorized to abuse this position of power. *It is quite apparent that Jamie discriminates against me and I am treated unfairly*: unlike other employees at Ingamo Hall. It is unethical to engage in malicious gossip and ridicule. In addition, *the disparagement of her behaviour towards me is a form of Racism . . .*
>
> In the last month, I have been receiving notices to petty accusations, assumptions that I am doing things that are not all factual. I have been employed here for sixteen months with no problems with anyone! I have contributed so much of my creativeness, energy, and honest hard work at Ingamo. In the last month, my morale is down considerably and because of the unsupportive attitude towards me from Jamie, I no longer feel safe, and relations between staff are rocky, not harmonious as before. Please, could you resolve this scenario once and for all! I enjoy being at Ingamo, and very proud to be a part of the staff. It is my desire to continue to work at Ingamo and assist people in the community, maintain the relationships at work, and have the drive to come to work energized and feel validated/supported once again. (Emphasis added)

[8] This correspondence was not, on its face, copied to Ms. White-Stewart. The respondent did, however, on the same date, send a memo to Ms. White-Stewart. This

memo makes no mention of these complaints but instead deals with a controversy concerning hours of work.

[9] On April 3, 2001, the respondent received a letter terminating her employment. The letter referred to a "lay-off" due to a lack of funding to continue with the position occupied by the respondent. There was some evidence provided by the appellant confirming a cutback in funding. The respondent was given two weeks' severance pay.

[10] On April 5, 2001, the respondent wrote to the executive director and board of directors complaining about the lay-off. She claimed to have been wrongfully dismissed and wanted to appeal to the board. The chairman of the board's personnel committee eventually wrote back to the respondent on May 18, 2001, informing her that an investigation had been conducted and her appeal was denied. This letter referred to insubordination as cause for terminating the respondent's employment.

[11] In the meantime, on April 18, the respondent had transmitted a complaint to the Fair Practices Officer. In it she outlined many points, most of which concern details of her employment, but among them she alleged that Ms. White-Stewart had made racist and disparaging remarks about "white people" in her presence. She claimed that her supervisor had said that she "hated white social workers". The respondent is educated in social work. The employer responded to this by categorically denying that any such specific statements had been made and if any disparaging remarks had been uttered then the respondent was taking them out of context. Essentially, the employer took the position that the complaint was an airing of issues that were basically dealing with work relationships and compensation as opposed to fundamental human rights issues.

[12] The Fair Practices Officer set up an effort at mediation which failed. She then directed a hearing. The Officer took the approach that the initial onus was on the respondent to establish discrimination based on one of the prohibited grounds enumerated in s.3(1) of the Act. If that onus was met, then it would be up to the employer to counter that allegation. After considering the evidence, the Officer found in favour of the respondent. Her conclusions were as follows:

> I find, based on the facts as presented to me at the hearing, that the Complainant, a non-aboriginal person, was discriminated against in the context of her employment with the Respondent because of her racial background. I further find that the employer failed to take even the most basic of steps to investigate or deal with the allegations of discrimination raised by the Complainant and, in fact, perpetrated the discrimination further by dismissing

> her from her employment within a week of her having filed a written complaint of discrimination.
>
> In the circumstances, I make the following order:
>
> a. the Respondent shall, within six months of the date of this Order, develop and implement a zero-tolerance policy of non-discrimination within the workplace, acceptable to the Fair Practices Officer and shall ensure that all employees are provided with a copy of the policy.
>
> b. the Employer shall, within six months of the date of this Order, arrange for and provide sensitivity training to all of its employees to address the issues of all forms of discrimination in the workplace;
>
> c. the Employer shall, within 45 days of the date of this Order, pay to the Complainant the sum of $5,000.00 in partial compensation for lost wages and humiliation. I base this figure on approximately two months of net salary based on the Complainant's original contract.

[13] From these finding and directions, the employer appealed to this court.

Nature of the Appeal:

[14] I have outlined the background of this case in detail because of the nature of the appeal to this court. The Act provides a broad right of appeal:

> 8(1) Any person affected by an order or decision of a Fair Practices Officer may, at any time within 30 days after service of the order, appeal by way of notice of appeal to a judge of the Supreme Court to vary or set aside the order or decision.
>
> . . .
>
> (4) The hearing of an appeal under this section shall be by trial *de novo*.
>
> (5) The decision of the judge of the Supreme Court is conclusive and not subject to further appeal.

[15] Appellant's counsel submitted that the provision for a trial *de novo* means that this court can take a true second look at the case, one unencumbered by the findings of the Fair Practices Officer. This is certainly the traditional view of the scope of an appeal

when it is said to be a hearing *de novo*. The role of the appellate judge in this scenario is to come to his or her own decision based on the evidence and submissions made on the appeal hearing.

[16] I am not convinced, however, that this is still the appropriate approach. Recent cases from the Supreme Court of Canada suggest, in the area of administrative law, the emergence of a unified theory of review of administrative decision-makers, whether such review be by way of judicial review or by way of a statutory right of appeal.

[17] In the two most recent cases, *Law Society of New Brunswick* v. *Ryan*, [2003] S.C.J. No.17, and *Dr.Q* v. *College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No.18, the Supreme Court has held that a court must always determine the appropriate standard of review, using the pragmatic and functional approach, even when there is an appeal on the merits. The pragmatic and functional approach, as outlined in *Pushpanathan* v. *Canada*, [1998] 1 S.C.R. 982, requires consideration of four factors: the presence of a privative clause or an appeal right, expertise of the tribunal, the purpose of the Act, and whether the nature of the problem is one of law or fact. This analysis determines the degree of deference to be accorded to the administrative decision-maker which in turn determines the appropriate standard of review, i.e., correctness, reasonableness *simpliciter*, or patent unreasonableness.

[18] The *Dr.Q* case illustrates the approach. That was an appeal of a decision by a medical disciplinary body. The relevant statute provided for a right of appeal "on the merits" to the court. The appellate judge was of the view that since the statute provided a full right of appeal the judge need not determine the appropriate standard of review but could review the evidence and make his or her own evaluation of it. The Supreme Court held that this was error. In dealing with what the Court called the erroneous assumption that a statutory right of appeal means one need not consider the usual principles pertaining to standard of review, Chief Justice McLachlin held (at para.21) that (a) in cases of judicial review, the court must apply the pragmatic and functional approach, and (b) the term "judicial review" embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal. This applies in every case where a statute delegates power to an administrative decision-maker.

[19] One may well ask if the Supreme Court meant to include, within the ambit of this broad principle, statutory appeals by way of a trial *de novo*. After all, what clearer expression can there be of a legislature's intent to allow the reviewing court to form its own opinions and conclusions? Yet, until the next case to go up to the Supreme Court says otherwise, one must take its pronouncements to mean exactly what they say. In the

Dr. Q. case, in particular, the Court emphasized that it is no longer sufficient to merely slot a particular statutory provision into a "pigeon-hole of judicial review" (see para.25).

[20] I note as well that even past administrative law cases did not always consider an appeal by way of trial *de novo* or a rehearing to be a completely stand-alone exercise without any reference to the decision under appeal, particularly where the original administrative decision-maker is expected to have some expertise: see, for example, *Lamb* v. *Canadian Reserve Oil & Gas Ltd.*, [1977] 1 S.C.R. 517. The appeal is in the form of a new hearing at which new evidence may be adduced, but the appellate judge is still entitled to consider the findings of the administrative decision-maker and give them the weight they deserve.

[21] If I undertake the analysis called for by the pragmatic and functional approach in this case, I am led to the conclusion that the appropriate standard to apply is one of correctness. This may be, in effect, no different than the approach urged on me by appellant's counsel but it is a more nuanced analysis which does not result in completely ignoring the findings and conclusions of the Fair Practices Officer.

[22] First, generally speaking, a statute that permits appeals, particularly a broad right of appeal on all issues of fact and law, indicates that less deference is due to the original decision-maker. If an appeal "on the merits" (as in the *Dr. Q.* case) or an appeal on "a question of fact or law" (as in the *Ryan* case) imply a more rigorous standard of review, then surely a hearing *de novo* would imply the most rigorous standard. An appeal on the merits is very much like an appellate court reviewing the findings of a trial judge. The standard depends on the type of issue: issues of law trigger a standard of correctness; issues of fact require a demonstration of palpable or overriding error. An appeal in the way of a hearing *de novo* means that the reviewing judge must assess the evidence and submissions presented to him or her and reach his or her own decision but still be entitled to consider the findings of the original decision-maker. After all, an appeal by way of trial *de novo* is still an appeal and does not take place in a vacuum.

[23] Second, the factor of expertise is really one of the relative expertise of the court and the administrative tribunal whose decision is under review. It is a question of the court's own expertise relative to that of the tribunal. In this case, the Act does not require a specialized knowledge or expertise on the part of the persons appointed to be Fair Practices Officers. Indeed the statute sets out no special qualifications. It is not a full-time job. Further, the role of the Officer is to investigate complaints. This involves fact-finding and, as in this case, credibility assessments. In this sense, the Officer is no more

expert than a court in the context of a hearing *de novo*. Thus a low degree of deference is warranted here as well.

[24] Third, with respect to the purpose of the Act, it is one aimed at implementing a public policy of non-discrimination. But the Fair Practices Officer is not expected, in resolving a complaint, to balance competing policy objectives or the interests of various constituencies. The Officer is expected to resolve a particular complaint concerning a violation of the general prohibition against discrimination. The Officer's decision is binding only on the parties to the complaint. In its nature, the proceedings before the Officer approximate the judicial paradigm of a *lis inter partes* and therefore warrant less deference.

[25] Finally, the nature of the problem here is primarily factual. Thus it would ordinarily call for deference towards the Officer's decision. This is affected, however, by the type of appeal. Generally speaking, the original decision-maker would enjoy the advantage of having heard the evidence. On a hearing *de novo*, the reviewing judge can hear the evidence as well. So this advantage is minimized, if not altogether eliminated. Hence less or no deference is warranted here.

[26] For these reasons, I conclude that the appropriate standard of review is one of correctness. As I previously indicated, this may be no different in effect than what appellant's counsel suggested at the beginning. But it seems to me that the instruction of the Supreme Court applies to this case, where the right of appeal is by way of a trial *de novo*, as much as it does to any other case where the court is the second level of decision-making in an administrative law context.

[27] There is a further complicating factor on this appeal. The respondent took no part in the appeal. She did not file materials nor was she present at the hearing before me. She was served with everything presented to me on the hearing. And, appellant's counsel provided some evidence that the respondent wanted to have nothing to do with the appeal. She even signed a letter consenting to the evidence being presented in affidavit form.

[28] The mere fact that the respondent wishes to take no part in the appeal cannot determine the appeal. The statute requires a trial *de novo*. So a hearing must be held. There is no default mechanism. As in ordinary civil appeals, an appellant may abandon an appeal or a respondent may consent to the reversal or variation of the decision appealed from, but the mere non-participation of a respondent cannot decide the appeal

on its merits. Hence the appeal proceeded before me as a complete hearing (albeit with no one appearing to oppose).

Merits of the Appeal:

[29] The issues are (a) whether the respondent was exposed to acts of racial discrimination in the work environment, and (b) whether the termination of her employment was motivated in whole or in part by discriminatory considerations. The Fair Practices Officer found, as a fact, that the respondent was discriminated against because of her race and that discrimination was "perpetrated" (to use the Officers's word) by the employer by dismissing the respondent within a week of her complaint of discrimination.

[30] The question of what constitutes discrimination and the applicable burden of proof were set out by an Ontario Board of Inquiry, established pursuant to that province's *Human Rights Code*, in *Parsonage* v. *Canadian Tire Corp*. (1995), 28 C.H.R.R. D/5, at paras.5-7:

> **DISCRIMINATION**
>
> [5] The term "discrimination" has been authoritatively discussed by the Supreme Court of Canada in *Andrews* v. *Law Society of British Columbia* (1989), 10 C.H.R.R. D/5719 at D/5746 [para.41769], by Justice McIntyre.
>
> > [D]iscrimination may be described as a distinction, whether intentional or not, but based on grounds relating to the personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group, not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.
>
> [6] A useful short definition of the term "discrimination" is that set out in *Insurance Corporation of British Columbia* v. *Heerspink*, [1978] 6 W.W.R. 702 at 708 (B.C.C.A.):
>
> > Discrimination is treatment or consideration of, or making a distinction in favour of, or against a person, based on the group, category, or class to which that person belongs, rather than on individual merit.
>
> **THE BURDEN OF PROOF**

> [7] The burden of proof in cases involving discrimination in employment is that set out in *Basi* v. *Canadian National Railway Co.* (1988), 9 C.H.R.R. D/5029 at [D/5037] para.38474. That is, the complainant(s) must establish a *prima facie* case of discrimination; if this is done successfully, the burden then shifts to the employer to provide a reasonable explanation for the behaviour complained of. Once an explanation has been provided, the eventual burden rests on the complainant to show that the explanation provided is a pretext, and that the behaviour complained of occurred in whole or part, consciously or unconsciously, because of discrimination on an unlawful basis. The ordinary civil standard of proof, a preponderance of evidence on the balance of probabilities applies . . .

[31] Upon reviewing all of the evidence, I am not satisfied, on a balance of probabilities, that any acts of discrimination did occur. Nor is there any reasonable basis for concluding that the termination of the respondent's employment was motivated in whole or in part by discrimination. It was labelled a "lay-off" due to financial cutbacks (something which was true) but it was in reality a dismissal for alleged cause (insubordination). There was ample evidence that there were various concerns about the respondent's job performance over many months (insubordination, absenteeism, disregard of instructions). So there is an evidentiary basis for saying that discrimination was not the motivating factor. Whether there was cause for termination is not the issue. This is not a wrongful dismissal action. Nor is it a breach of contract case (I say this because the Fair Practices Officer's monetary award was apparently based on two months' salary pursuant to what she described as the "original contract").

[32] The evidence reveals a history of difficulties between the respondent and her supervisor. But it is telling that none of the complaints made by the respondent (prior to March 26, 2001) alleged racial discrimination. They were all complaints about the supervisor's attitude and how that had a detrimental effect on the workplace. And, the respondent included her fellow employees (all of whom were aboriginal) as ones who, along with her, suffered from this situation. It was not until her communication of March 26th that the respondent mentioned discrimination. But if one reads through that communication (reproduced previously), one can notice that there are no particulars given of alleged discriminatory acts. Indeed, the words "discrimination" and "racism" are used very generally, in the context of her complaints about her supervisor's conduct, and what she considers to be unfair treatment. She may indeed have been treated "unfairly" but that does not necessarily equate to being discriminated against on account of race. And nowhere in the March 26th communication does the respondent say that. The dominant

impression that I am left with is that the respondent was tossing these words around very loosely.

[33] The one specific allegation of racism that the respondent did make came only when she complained to the Fair Practices Officer. She alleged in her written complaint as follows:

> "Jamie White indirectly and directly has demonstrated her racist discriminitery [sic] behaviore [sic] towards me right from the beginning of her date of hire @ (K.F.C.) As a undergraduate social worker and white origin (French Canadian) she stated to me that "she hated white social workers". There were many comments made out aloud [sic] "white people", racial slanderous jokes and racial slurs how white people are trash and no good. Jamie White is half-white (mother's side) and her father is a native from Alexander Reserve in Alberta. Unfortunately, I did not document these statements; as I did not think or feel that it would esculate [sic] in the near future. However, it did."

[34] Ms.White-Stewart denied ever making these statements. All of the other witnesses denied that these statements were made. The executive director said that if any comments were made about "white social workers" then the respondent was taking them out of context. This is how the executive director put it in a written submission to the Fair Practices Officer (and confirmed in her affidavit evidence placed before me):

> "The allegation that Jamie White stated to Bette-Lou that "she hated white social workers" was totally taken out of context. Staff members were gathered for a break where a discussion arose about an incident in Toronto where a Social Workers' lack of knowledge of the culture had a detrimental effect on the client and family. Staff members expressed their frustration over incidents such as this but at no time did Jamie White tell Bette-Lou Bergeron that she hated white social workers."

[35] The Fair Practices Officer accepted the respondent's evidence. This she was entitled to do. But nowhere does the Officer explain why. It seems to me that where there is a preponderance of evidence going in one direction, it is incumbent on any decision-maker to rationally explain why the uncorroborated evidence of one witness, going the other way, is to be preferred.

[36] Even if certain comments were made by Ms. White-Stewart, I think it was incumbent on the Fair Practices Officer to consider whether these were isolated or off-the-cuff remarks or whether they demonstrated some discriminatory bias. An isolated comment does not necessarily amount to a violation of the Act: see *Parsonage (supra)*, at para.112.

[37] When I review the Officer's decision in this case it is readily apparent that she was very concerned over what she described as a failure on the part of the appellant to investigate the allegations of racial discrimination made by the respondent on March 26th and the subsequent lay-off of the respondent "with no satisfactory explanation as to why". The Officer stated that it was incumbent on the employer to ensure a workplace free of discrimination yet, in this case, "no attempt was made by the employer to address the legitimately held concern" of the respondent. She also went on to find that "there was a pervading attitude within the workplace which indicated a disrespect and even a dislike of non-aboriginal employees".

[38] I certainly agree that an employer has an obligation to ensure that its workplace is free of discrimination. But I fail to find any evidence to support the other conclusions drawn by the Fair Practices Officer. In particular, the evidence demonstrated that the employer had tried to address the respondent's concerns through a process of mediation. There was also evidence as to the culminating events that led to the respondent's lay-off. These were related to specific incidents of alleged insubordination and absenteeism. Finally, there was no evidence whatsoever placed before me to suggest that the workplace was rife with an anti-white bias. And, it should be noted that I had evidence from the same people as had the Fair Practices Officer.

[39] For these reasons, the appeal is allowed, the decision of the Fair Practices Officer dated May 17, 2002, is set aside, in its entirety, and the respondent's complaint pursuant to s.3(1) of the Act is dismissed.

[40] Some may be justifiably tempted to ask why I have gone on at such length in this judgment over what was nothing more than an uncontested appeal. As I explained previously, even though uncontested, the appeal still had to be decided on its merits. Furthermore, I think any complaint of discrimination is a serious matter that requires careful consideration. Also, I think it would have been disrespectful of the efforts of the Fair Practices Officer to simply set aside her decision without a detailed explanation. I may have come to different conclusions but that in no way should be taken as disparagement of her work in this case. The legislature has created the position of Fair Practices Officer to carry out an important role in implementing the public policy articulated by the Act.

[41] There will be no costs of the appeal.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT,
this 30th day of July 2003

Counsel for the Appellant: Adrian C. Wright
No one appeared for the Respondent

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MEMORANDUM OF JUDGMENT OF
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