

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20150427**

**Docket: A-440-13**

**Citation: 2015 FCA 109**

**CORAM: RYER J.A.  
NEAR J.A.  
RENNIE J.A.**

**BETWEEN:**

**CLEMENT DUNCAN HICKS**

**Appellant**

**and**

**CANADIAN NATIONAL RAILWAY**

**Respondent**

Heard at Toronto, Ontario, on April 16, 2015.

Judgment delivered at Ottawa, Ontario, on April 27, 2015.

**REASONS FOR JUDGMENT BY:**

**RENNIE J.A.**

**CONCURRED IN BY:**

**RYER J.A.  
NEAR J.A.**

Federal Court of Appeal



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**REASONS FOR JUDGMENT**

**RENNIE J.A.**

[1] In a decision dated March 20, 2013, the Canadian Human Rights Commission (the Commission) dismissed a complaint made by Mr. Hicks (the appellant) against his former employer, Canadian National Railway (the respondent).

[2] The appellant was a railway mechanic with the respondent until 2002, when he was dismissed for violating the respondent's alcohol and drug policy. With the encouragement of

CAW Local 100, Rail Division (the union), and with the assistance of the respondent's employee assistance program, from 2002-2006, the appellant sought reinstatement through attendance at addiction treatment programs including at the Credit Valley Hospital. The appellant states that in December 2005, Dr. Doyle, an addiction specialist at Credit Valley, considered him fit to return to work. The respondent, however, sought an opinion from a doctor retained by it. Dr. Sutton examined the appellant on behalf of CN and gave him a negative evaluation on February 7, 2006.

[3] On October 13, 2009, the union informed the appellant that no grievance would be filed against the respondent or further efforts made to seek reinstatement.

[4] Three years later, on September 18, 2012, the appellant filed his complaint with the Commission, alleging discrimination on the basis of disability. In that complaint, the appellant identified the February 7, 2006 evaluation by Dr. Sutton as the last of the alleged discriminatory acts which formed the basis of the complaint.

[5] The Section 40/41 Report (the report) released by the Commission on November 28, 2012 recommended dismissing the appellant's complaint pursuant to section 41(1)(e) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *Act*), because the complaint was based on acts that occurred more than one year before the complaint was filed.

[6] In response to the report, the appellant made various representations to the Commission, in which he explained his delay in filing his complaint as attributable to his reliance on union grievance mechanisms and problems arising from his disability. He also alleged that he had

communications with the Commission to the effect that he should exhaust internal recourse mechanisms before proceeding with a complaint.

[7] After reviewing the report and the parties' submissions made in response, the Commission dismissed the appellant's complaint on the grounds that the last discriminatory act occurred more than one year before receipt of the appellant's complaint, and that it was "not appropriate to deal with the complaint because the complainant did not do everything that a reasonable person would do in the particular circumstances to proceed with the complaint."

[8] On December 4, 2013, Justice Manson of the Federal Court (the judge) dismissed Mr. Hicks' application for judicial review of the Commission's decision (2013 FC 1220). Importantly, the judge found that the Commission failed to analyze whether the appellant's disabilities may have affected the appellant's capacity to file his complaint within the time limits. However, he found this error to be of no consequence given that no medical evidence was presented to the Commission. The judge also held that the Commission's finding that the delay would prejudice the respondent was not purely speculative.

[9] Subsequent to the judge's decision, Sharlow JA granted the appellant's motion to introduce new evidence on appeal, consisting of medical reports from 2009 and 2013.

[10] In an appeal of a judgment concerning a judicial review application, the role of this Court is to determine whether the application judge correctly identified and properly applied the

standard of review to the Commission's decision (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 47).

[11] The judge correctly identified the standard of review as reasonableness. The Federal Court's task involved a determination as to whether the Commission's decision, viewed as a whole, was reasonable (*Exeter v Canada (Attorney General)*, 2012 FCA 119 at para 6).

[12] I am of the view that the Commission's decision was unreasonable and therefore the appeal should be allowed. I reach this conclusion for three reasons.

[13] First, the Commission was under a duty to consider whether the applicant's failure to file his complaint within the one year time period following his meeting with Dr. Sutton in February, 2006, or following the exhaustion of internal remedies in late October 2009, could be explained by the appellant's disability. The judge found, and I agree, that the Commission failed to analyze the appellant's disability and the possible impact of this disability on the delay in filing.

[14] The respondent contends that the Commission's failure to examine this issue is of no consequence because there was no medical evidence which would support a conclusion that the appellant's disability affected his ability to file. In my view, there was evidence before the Commission, albeit not in the form of formal medical reports, but in the documents and submission before the Commission attesting to the appellant's continuing treatment and therapy for mental illness. There is also the fresh evidence on appeal, which was not before the Federal Court. This evidence suggests that the appellant had undergone surgery for an aneurism in 2009.

In sum, there was evidence before the Commission, now supplemented by fresh evidence, which if considered, could have lead the Commission to conclude that his failure to file was attributable to a medical disability.

[15] Second, the appellant contended before the Commission that he did not file because he understood, based on discussions with the Commission, that the Commission would not consider his complaint until he exhausted recourse and grievance remedies available to him under his collective agreement.

[16] In assessing the period of delay the Commission did not consider this explanation. This affects the reasonableness of the exercise of discretion, as it was not until October 13, 2009, that the union advised the appellant that it would not pursue his reinstatement further and considered the matter closed. On the basis of this evidence, the period of delay was not the 10 years assumed by the Commission, but rather began on October 13, 2009.

[17] Finally, while the Federal Court judge concluded that the evidence of prejudice was “weak at best”, there was no evidence of prejudice. CN’s submission to the Commission as to prejudice did not include any evidence of witnesses or documents no longer available; rather CN simply stated that it would be “unreasonable” to ask it to respond to a complaint under the circumstances.

[18] In sum, these three reasons, when considered together, are sufficient for me to conclude that the decision of the Commission was unreasonable.

[19] Accordingly, I would allow the appeal, with costs at \$350.00, all inclusive, set aside the order of the Federal Court, dated December 4, 2013, and making the order that the Federal Court could have made, I would allow the application for judicial review and refer the matter of the timeliness of the appellant's complaint back to the Commission for reconsideration in accordance with these reasons.

"Donald Rennie"

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J.A.

"I agree"

C. Michael Ryer

"I agree"

D.G. Near

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**(APPEAL FROM A JUDGMENT OR ORDER OF THE HONOURABLE MR. JUSTICE  
MANSON DATED 04-DEC-2013 IN FEDERAL COURT DOCKET NO. T-759-13)**

**DOCKET:** A-440-13

**STYLE OF CAUSE:** CLEMENT DUNCAN HICKS v.  
CANADIAN NATIONAL  
RAILWAY

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 16, 2014

**REASONS FOR JUDGMENT BY:** RENNIE J.A.

**CONCURRED IN BY:** RYER J.A.  
NEAR J.A.

**DATED:** APRIL 27, 2015

**APPEARANCES:**

Clement Duncan Hicks APPELLANT

Corrado De Stefano FOR THE RESPONDENT

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