Federal Court Cour fédérale

Date: 20150819

Docket: T-1832-14

Citation: 2015 FC 989

Toronto, Ontario, August 19, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

VIA RAIL CANADA INC.

Applicant

and

MARCIA CANNON

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision [Decision] of the Canadian Human Rights Commission [Commission] dated July 16, 2014, in which the Commission determined that it would address a complaint [Complaint] filed by the Respondent, who alleges she suffered adverse differential treatment in the provision of a service offered by VIA Rail Canada Inc. [VIA, the Applicant].

II. Facts and Procedural Background

[1] The Respondent, who identifies as a transgendered person, initially contacted the Human Rights Commission in April 2012 regarding an incident in a London, Ontario VIA station washroom, whereby a VIA employee allegedly acted in a discriminatory manner inconsistent with the *Canadian Human Rights Act*, RSC 1985, c H-6.

[2] The focus of this judicial review is the procedure with which the Complaint has thus far been handled, and not with the merits of the Complaint.

[3] In general, the Applicant argues that it entered a process of Preventive Mediation under false pretenses, and was unfairly misled in an alternate dispute resolution [ADR] process, by both the Respondent and the Commission.

[4] VIA advised the Commission on October 23, 2012 that it wished to engage in Preventive Mediation. This request was, according to the evidence before me, based on the fact that (i) it had not been served with a complaint, and (ii) the purpose of the mediation was an attempt to resolve the matter, thereby avoiding the complaint process.

[5] The Preventive Mediation Agreement, signed by all parties before the first of these ADR sessions on December 13, 2013, states:

> "The participants have agreed to meet voluntarily to attempt to resolve certain issues of concern between them. The Commission is providing mediation services to help the participants resolve the issues quickly and informally. <u>The participants understand that no</u>

> complaint has been filed with the Commission under the Canadian Human Rights Act.
>
> …
>
> 8. If the matter is not resolved at mediation, the participants understand that [sic] will have the right to file a complaint under the Canadian Human Rights Act. Participants are aware that, under section 41(e) of the Act, the Commission can refuse to deal with complaints filed more than one year after the date of the alleged discrimination." (Applicant's Record [AR], at pages 45-46) (Emphasis added)

[6] At the conclusion of both the first and second Preventive Mediation sessions, held on December 13, 2012 and April 15, 2013 respectively, the Respondent asked for further time to engage in mediation. On both occasions, the evidence is that the Respondent's legal representative alluded to the prescribed one-year limit for the filing of a complaint under the Act and asked for more time to mediate, notwithstanding the impending expiry of the time limit. On the second occasion, at the conclusion of the April 15, 2013 mediation session, the Respondent's representative alluded to the imminent expiry on April 22, 2013 of the time for filing a complaint (AR, pages 18-19).

[7] The parties followed up a verbal agreement to withhold a complaint regarding the timeliness of a filing via an exchange of emails dated April 15, and May 8, 2013. This exchange confirmed VIA's undertaking to desist from objecting to the filing of a complaint, provided such a complaint was filed on or prior to June 30, 2013 (AR, at pages 49 and 51).

[8] The parties were ultimately unable to come to a resolution of the matter through Preventive Mediation.

[9] The negotiated June 30, 2013 deadline came and went without the filing of a complaint with the Commission. However, on August 6, 2013, the Commission served VIA with a copy of the Respondent's Complaint, stating the Commission had received the Complaint on August 1, 2013 (AR, pages 56-58).

[10] On September 6, 2013, VIA objected to the Commission dealing with the Complaint pursuant to paragraph 41(1)(e) of the Act, which states:

> 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
>
> ...
>
> (e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

III. Decision

[11] On May 7, 2014, the Commission issued a Section 40/41 Report [Report] in relation to the Complaint. The Report stated that the Complaint had been received in a form acceptable to the Commission on August 1, 2012, that it had been date-stamped by the Commission on the same date, and as a result, no issue as to paragraph 41(1)(e) of the Act arose (AR, pages 79-80 and 83-84).

[12] The Commission stated when it served the Respondent's Complaint (AR at page 84) that it would be appropriate to amend the Summary of Complaint form to indicate that the date on

which the Commission had received the Complaint was August 1, 2012, and not August 1, 2013, as originally stated by the Commission.

[13] In the alternative, the Commission concluded that if the Complaint was filed beyond the statutory time limit, the Commission determined that it was appropriate to exercise its discretion to deal with the Complaint in this case (AR, at page 86).

[14] In a letter dated June 5, 2014 responding to the Commission's Report, the Applicant set out the reason for its disagreement with the conclusions contained in the Section 40/41 Report, and brought to the Commission's attention (i) contradictory evidence demonstrating that there was in fact no complaint filed with the Commission throughout the duration of the mediation, (ii) the Respondent's express representations to this effect, and (iii) the Commission's own assurances and representations to the same effect (AR, at pages 89-93).

[15] On July 16, 2014, the Commission issued its Decision, affirming its Report's conclusion deciding to address the Complaint. That Decision is the subject of this judicial review.

IV. Standard of Review

[16] The Applicant submits that the Commission breached its obligations of procedural fairness and legitimate expectations in finding that it had previously accepted the Respondent's Complaint for inquiry under section 40 of the Act, despite prior assurances to the parties that no complaint had been so accepted. The appropriate standard to apply to questions relating to the Commission's failure to observe the principles of natural justice or procedural fairness is the

standard of correctness. The same standard of correctness also applies to the second ground of review, namely whether the Commission failed to identify the proper test in exercising its discretion to deal with a late-filed complaint (*Khosa v Canada (Minister of Citizenship and Immigration),* 2009 SCC 12, para 43; *B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146 at para 24).

V. Analysis

[17] The Commission is required to conduct its investigations at the preliminary stage of the complaint process in a manner that is both neutral and thorough in order to discharge its procedural fairness obligations (*Hebert v Canada (Attorney General),* 2008 FC 969 at para 18 [Herbert]).

[18] The Applicant, as explained above, was led to believe that no complaint had been filed with the Commission at the time it was involved in alternate dispute resolution proceedings. The Commission provided a chance for the Applicant to relay its concerns, which VIA did in detail in its 14-page June 5, 2014 letter. However, the Commission either ignored or overlooked them in the Decision. This Court has previously found that overlooking significant discrepancies to be problematic:

> [26] …However, where these submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all…” (*Hebert at* para 26)

[19] In my view, it was procedurally unfair for the Commission to have indicated that it had not accepted a complaint, which understandably led VIA to act in accordance with this position, and then subsequently turn around and assert a diametrically opposite position *(Huggins v Canada Post Corp,* 2005 FC 665 at para 18; *Centre hospitalier Mont-Sinaï c Québec (Ministre de la Santé et des Services sociaux),* 2001 SCC 41, paras 101-117).

[20] Finally, VIA argues that when exercising its discretion to extend the time for dealing with a late-filed complaint, the Commission is required to ensure that a complaint is worth investigating. Given my concerns on the procedural fairness of this case, I did not need to address this argument.

VI. Remedy

[21] At the hearing, the Applicant asked that the Court render an Order in the nature of a directed verdict, because it would be pointless to remit the matter back to the Commission (*Giguère v Chambre des notaires du Québec,* 2004 SCC 1 at para 29 [*Giguère*]; *Pictou Landing Band Council v Canada (Attorney General),* 2013 FC 342 at para 120 [*Pictou*].

[22] VIA's counsel acknowledged this remedy had not previously been a focus of the pleadings. I therefore provided both parties the opportunity to submit post-hearing submissions solely on the issue of remedy. Both parties subsequently filed written submissions on remedy, which I have carefully considered.

[23] The Applicant argues that whether one applies the test set out in case law (*Giguère, Pictou)*, or the relief provided in our primary statute (section 18.1(3)(b) of the *Federal Courts Act* (RSC, 1985, c F-7)), only one interpretation or conclusion is possible: that there would be no useful purpose to return the matter back to the tribunal (see also *Canada (Attorney General) v Cruden,* 2013 FC 520 at para 85).

[24] The Respondent, not surprisingly, argues the opposite. Ms. Cannon first states that procedurally, the Applicant should be precluded, pursuant to Rule 301(d) of the *Federal Court Rules,* in seeking relief not set out in the pleadings (*J.P. Morgan Asset Management (Canada) Inc. v Canada (National Revenue),* 2013 FCA 250, at para 38). The Respondent submits that there is merit in proceeding with the investigation of her complaint, which also has a broader public interest issue at stake. The directed verdict would effectively stay the proceedings, and the Respondent would lose the opportunity to have her complaints heard by the Commission (*Canadian Broadcasting Corp v Judge,* 2002 FCT 319 at para 77 [CBC]).

[25] Further, she argues that she should not be penalized for the errors of the Commission (*CBC* at para 77).

VII. Conclusion

[26] Due to the importance of the rights at stake, I agree with the Respondent that a directed verdict would be inappropriate in this case (*Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p 1134). However, given my findings on the violations of procedural fairness, I will grant the alternate remedy sought by the Applicant. The

Decision to investigate should be quashed and remitted back to the Commission for redetermination in accordance with these reasons. Having rectified the breach of procedural fairness outlined above, the Commission is free to exercise its discretion over whether to move forward with the complaint as it sees fit (*Air Canada Pilots Association v McLellan*, 2012 FC 591 at para 11).

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is allowed.

2. The Canadian Human Rights Commission Decision dated July 16, 2014 is quashed.

3. The matter is remitted back to the Commission for redetermination in accordance with these reasons.

4. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1832-14
STYLE OF CAUSE:	VIA RAIL CANADA INC. v MARCIA CANNON
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