Federal Court  Cour fédérale

Date: 20160511

Docket: T-526-15

Citation: 2016 FC 527

Ottawa, Ontario, May 11, 2016

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

PAUL RITCHIE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application by Paul Ritchie for judicial review of a decision of the Canadian Human Rights Commission (the Commission or the CHRC) dated March 10, 2015. The CHRC dismissed Mr. Ritchie's human rights complaint against the Canadian Forces (the CF) under subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c H-6.

[2] Mr. Ritchie represented himself at the hearing.

[3] In dismissing Mr. Ritchie's complaint, the CHRC relied upon an investigation report prepared by Helen Gillespie, dated December 11, 2014 (the Report).

[4] The Commission reviewed the Report, as well as the submissions of Mr. Ritchie and the CF response to the Report, and concluded that an inquiry into the complaint under the *Canadian Human Rights Act* was not warranted. As a result, the Commission declined to refer the complaint to the Canadian Human Rights Tribunal (the Tribunal).

[5] For the reasons that follow, this application for judicial review of the Commission's decision is dismissed.

II. Background to the Complaint

[6] Mr. Ritchie joined the CF in August 22, 2008 and trained at the Naval Engineering School in Halifax, Nova Scotia. Mr. Ritchie is homosexual and claims that because of this he was discriminated against and not provided with the same level of support as his peers. He claims he overheard his commanding officer remark to a lieutenant: "this should shut the faggot up" and his division often resorted to "gay-bashing" for comic relief. One of his peers overheard a lieutenant comment that "certain people are just not made for the military" in reference to Mr. Ritchie.

[7] The discrimination is alleged to have continued until Mr. Ritchie ceased training at the Naval Engineering School in 2011. The following incidents were highlighted:

- In May 2009, Mr. Ritchie was denied the opportunity to take "pre-board" exams.

- In September 2009, he was directed to attend a French Court Martial as an "escort", but Mr. Ritchie is English speaking and he claims not to have been given any official duty in this context.

- Also in 2009, he was denied "short leave" and had difficulty obtaining approval for annual leave.

- In another instance in 2009 his name was left off a "note of appreciation".

- Mr. Ritchie spent the summer of 2010 at the Naval Engineering School, while his peers pursued work opportunities on ships.

- In April of 2011, Mr. Ritchie's peers were released early for Easter weekend, but he and another student, who is also homosexual, were required to stay late and complete "duty lockup". This duty is normally only assigned to one person.

- In 2011, Mr. Ritchie was the only student to fail a specialized course, which resulted in a hearing before the CF Training Review Board. On February 2, 2011, the Training Review Board recommended that he cease training and be reassigned to a less multi-disciplined trade. Mr. Ritchie was officially removed from his course on February 7, 2011.

- Following the Training Review Board proceedings, it was discovered that an incorrect marking scheme was used for the course. On September 15, 2011, Mr. Ritchie filed an internal grievance. The grievance was initially dismissed on March 27, 2012. Mr. Ritchie retained legal counsel and challenged this decision,

which resulted in a second decision on April 3, 2013. The dismissal was reversed and Mr. Ritchie's grievance was granted in part.

[8] On June 21, 2011, Mr. Ritchie submitted a request for voluntary release as of July 8, 2011. On July 27, 2011, he sought to cancel his voluntary release. On August 3, 2011, his request to cancel his voluntary release was denied. Mr. Ritchie was released on August 22, 2012, when his obligatory service period ended.

III. Complaint to the Commission

[9] On January 23, 2012, Mr. Ritchie filed a complaint with the Commission that he had been subjected to discrimination in the CF because of his sexual orientation.

[10] On August 16, 2012, his complaint was referred to an investigator; however, little happened with the complaint at this stage.

[11] On September 19, 2014, Ms. Gillespie (the Investigator) was assigned to investigate the complaint. She commenced the investigation on September 29, 2014. During the course of her investigation, she interviewed Mr. Ritchie on October 16, 2014; October 29, 2014; November 20, 2014; and November 24, 2014. She also interviewed nine others, including Mr. Ritchie's officers, instructors, and a peer at the Naval Engineering School.

[12] On December 11, 2014, the Investigator issued the Report. In it, she recommended that the Commission dismiss the complaint. She found that reasonable explanations were provided for any adverse differential treatment, and the incidents of harassment were "not very serious."

[13] The Commission disclosed the Report to both Mr. Ritchie and the CF on December 11, 2014. Each party was invited to provide responding submissions to a maximum of ten pages.

[14] The CF, in its response of December 19, 2014, stated that it agreed with the Investigator's recommendation.

[15] On January 12, 2105, through legal counsel, Mr. Ritchie submitted a seven page response.

[16] These responding submissions were disclosed to the other parties and they were each permitted to submit further responding submissions, again to a maximum of ten pages. The CF filed further submissions on January 29, 2015. Mr. Ritchie did not file further submissions. On February 4, 2015, the CHRC provided a copy of the CF's January 29, 2015 submissions to Mr. Ritchie's legal counsel.

[17] On March 10, 2015, the Commission advised that it reviewed the Report and the submissions and concluded that further inquiry into Mr. Ritchie's complaint was not warranted.

IV. Preliminary Issues

[18] As a preliminary issue, the Respondent objects to materials filed by Mr. Ritchie in support of his application for judicial review. The Respondent requests that the following portions of the Mr. Ritchie's Memorandum be struck: paragraphs 18, 19, 34, and 49; the first line of paragraphs 26, 52, 54, 68, 77, 102 and 109; the first two lines of paragraphs 22, 27, 71, and 74; the second line of paragraph 82; and the last lines of paragraphs 20 and 70. The Respondent submits that these portions of the Applicant's Memorandum contain factual assertions unsupported by affidavit evidence or any documentary evidence in the record. I agree with the

Respondent. These portions of the Memorandum were not considered for the purpose of this judicial review.

[19] With respect to Mr. Ritchie's affidavit of July 27, 2015, the Respondent requests that the exhibits which are not contained in the Commission's Rule 318 record or supplementary record should be disregarded, as they did not form part of the record before the Commission and fall outside the scope of this judicial review. In particular, the Respondent notes that some of the exhibits post-date the decision, including exhibits 2A, 6D, 7C, 7D, and a portion of 8A.

[20] Mr. Ritchie argues that this information is relevant and should have been considered by the Investigator and therefore should have formed part of the record.

[21] There are occasions, such as when certain procedural fairness issues are raised, where evidence may be considered which was not before the decision-maker: *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities - Gomery Commission)*, 2006 FC 720 at para 50. In this case, while Mr. Ritchie does raise procedural fairness issues, the additional evidence submitted by him does not support his allegations of bias or unfairness on the part of the investigator.

[22] The voluminous record in this matter contains the material relied upon by the Investigator. It also contains material which Mr. Ritchie obtained through the CF and under the *Privacy Act*, RSC, 1985, c P-21, as well as additional information he provided consisting primarily of CF policies and procedures.

[23] Mr. Ritchie seeks to include this additional information as, he argues, it is necessary to provide context to his complaint. I disagree. In my view Mr. Ritchie had ample opportunity to

put the necessary information before the Investigator and the Commission at the appropriate times. This additional evidence is not relevant to the issues raised on this application for judicial review of the Commission's decision and has therefore not been taken into consideration.

[24] In accordance with Rule 303 of the *Federal Courts Rules*, SOR/98-106, the Respondent also requests that the style of cause be corrected to remove any reference to the Minister of National Defence and the CF.

[25] The Respondent's request is granted and the style of cause is amended accordingly.

V. Issues

[26] Mr. Ritchie has raised a number of issues for consideration which I would summarize as follows:

i) Do errors in the Report render the Commission's decision unreasonable?

ii) Was Mr. Ritchie denied procedural fairness?

iii) Was the Investigator biased?

VI. Standard of Review

[27] Standard of review refers to the approach used by this Court when asked to consider if the decision of the Commission contains reviewable errors. A judicial review is not a rehearing of the facts and evidence which Mr. Ritchie relied upon to support his claims of harassment and discrimination. Rather this Court's role is limited to looking at the decision of the CHRC and the record which formed the basis of the decision, and assessing if the process was fair to Mr. Ritchie and if the decision reached by the Commission was reasonable.

[28] The decision by the Commission to dismiss Mr. Ritchie's complaint is a question of mixed fact and law and must be assessed on the reasonableness standard: *Dupuis v Canada (Attorney General)*, 2010 FC 511 at paras 9-10 [*Dupuis*]. This standard is highly deferential: *Rabah v Canada (Attorney General)*, 2001 FCT 1234 at para 9.

[29] A reasonable decision is one which is justifiable, transparent and intelligible, and falls within the range of possible, acceptable outcomes: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[30] A court in reviewing an administrative decision considers both the outcome reached by the decision-maker and the reasons for that outcome. This is best explained by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[31] Questions of procedural fairness (issues ii) and iii) above) are to be reviewed against the standard of correctness: *Dupuis* at para 11.

VII. Analysis

A. *Do errors in the Report render the Commission's decision unreasonable?*

[32] Mr. Ritchie points out a number of factual errors in the Report, including:

a) The Investigator fails to mention the second grievance he filed with the CF;

b) He was successful on the second grievance on the exam marking issue, but this fact is not mentioned by the Investigator;

c) The Investigator incorrectly states that he failed a course;

d) The Investigator incorrectly states that he had a second "oral board"; and

e) The Investigator incorrectly states that he resigned from the CF when he was in fact released.

[33] Mr. Ritchie states that these errors demonstrate that the Investigator did not understand the true nature of his claim of harassment and in some instances she failed to look into certain aspects of his complaint. He alleges that the Investigator failed to take the time to understand the internal CF procedures, and that her lack of understanding of the CF caused her to misunderstand key parts of his claim and the information or lack of information (such as the lack of regular divisional notes) provided by the CF.

[34] Mr. Ritchie also takes issue with the Investigator taking "statements" from those she interviewed and accepting them as "truth" and not cross checking their information against the documentary evidence which, according to Mr. Ritchie, contradicts the statements. This lack of

cross-referencing was also an issue which Mr. Ritchie says impeded his ability to respond in a meaningful way to the Report.

[35] The role of the Commission upon receipt of an investigation report was outlined in *Alkoka v Canada (Attorney General)*, 2013 FC 1102, by Justice Kane as follows:

> [40] In the recent decision in *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at para 60, [2013] FCJ No 230 [*CUPE*], Justice Mactavish addressed the standard of review and summarised all of the relevant principles governing Commission Investigations. As these principles address the very issues raised in the present case, and refer to jurisprudence cited by the applicant and respondent, I have set them out below:
>
> > [60] The role of the Canadian Human Rights Commission was considered by the Supreme Court of Canada in *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854. There the Court observed that the Commission is not an adjudicative body, and that the adjudication of human rights complaints is reserved to the Canadian Human Rights Tribunal.
> >
> > [61] Rather, the role of the Commission is to carry out an administrative and screening function. It is the duty of the Commission "to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it": *Cooper*, above, at para. 53; see also *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] S.C.J. No. 103, [1989] 2 S.C.R. 879 [SEPQA].
> >
> > [62] The Commission has a broad discretion to determine whether "having regard to all of the circumstances" further inquiry is warranted: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paras. 26 and 46; *Mercier v. Canada (Human Rights Commission)*, [1994] 3 F.C. 3, [1994] 3 F.C.J. No. 361 (F.C.A.).

> [63] Indeed, in *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113, [1998] F.C.J. No. 1609 [Bell Canada], the Federal Court of Appeal noted that "[t]he Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report": at para. 38.

[36] While the Investigator may have made errors in her Investigation Report, the Report and the Commission's decision is nonetheless reviewed in accordance with the above authority and in recognition of the Commission's screening function. In this context, there is broad latitude afforded to the Commission in its assessment of the findings and recommendations in an investigation report. The Commission is entitled to a broad margin of appreciation owing to its factual and policy-based task: *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at paras 41, 45; *Dunsmuir* at para 47.

[37] The underlying investigation and resulting investigation report must be neutral and thorough, but perfection is not the standard. The Federal Court in *Slattery v Canada (Human Rights Commission)* (1994), 73 FTR 161 (TD) or [1994] 2 FC 574 [*Slattery*] addresses the question of what makes an investigation and investigation report thorough. First, the investigation report must inform the complainant of the essence of the case that he or she has to meet, so the complainant may meaningfully provide responding submissions to the Commission. Second, as Justice Nadon observed in *Slattery*, the investigation report, together with the responding submissions, must provide the Commission with an adequate basis upon which to decide whether or not to refer a complaint to the Tribunal. The first consideration raises concerns of fairness. The second goes to the reasonableness of the Commission's decision.

[38] The thoroughness of a report is to be balanced with the interests of administrative efficiency, as well as the practical constraints of time and cost: *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113 at para 39. A complainant is not entitled to a perfect investigation, and a complainant is likewise not entitled to a perfect investigation report.

[39] The safeguard against errors in an investigation report is the opportunity to respond prior to the Commission deciding whether or not to refer the complaint to the Tribunal. Importantly, parties may be able to rectify errors or omissions in an investigation report by providing responding submissions. Judicial review is only warranted where complainants are unable to rectify such flaws: *Slattery*, at paras 56-57.

[40] Here, the investigator reviews each of the incidents complained of and outlines the factual information she has considered. In some instances she did conclude that Mr. Ritchie was treated differently from others in the CF. In those instances, she then took the analysis to the next step to determine if the differential treatment was related to Mr. Ritchie's sexual orientation. Mr. Ritchie is obviously unsatisfied with the Report and the decision of the Commission. However, I conclude that the Report provides the necessary analysis and explanation for the ultimate recommendation that the complaint be dismissed.

[41] For the Commission's part, before rendering its decision, it had, in addition to the Report, responding submissions from Mr. Ritchie and the CF. As a result, when the decision of the Commission is viewed in the context of the record and the Report, the decision of the Commission to dismiss the complaint is reasonable.

B. *Were Mr. Ritchie's rights to procedural fairness respected?*

[42] Fairness required the Commission to inform Mr. Ritchie of the case he had to meet. He had to be informed of the recommendation of the Investigator and the position taken by the CF in response, and given an opportunity to respond. The case to be met is that set out in the Report: *Khapar v Air Canada*, 2014 FC 138 at paras 52, 56.

[43] The non-adjudicative role of the Commission is a factor to be taken into consideration in this analysis. In *Canadian National Railway Company v Casler*, 2015 FC 704 [*CN*], at paragraph 29, the Court noted that the role of the Commission is to determine if there is sufficient evidence to refer a complaint to the Tribunal. Following the release of the investigation report, the purpose of the parties' responding submissions is not to re-argue the substance of the complaint but rather to respond to the investigator's recommendation and underlying findings. In administering this process, the Commission is entitled to prescribe procedures in order to maintain a workable and administratively effective system, which includes setting page limits on responses: *Phipps v Canada Post Corporation*, 2015 FC 1080 [*Phipps*] at para 43, citing *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at para 67.

[44] Mr. Ritchie says he was denied a fair opportunity to respond to the Report because of the page limit (ten pages) imposed by the Commission. This Court has previously held that a page limit for responding submissions does not breach procedural fairness, provided the limit is applied equally to the interested parties: *Phipps*, at paras 43-44; *CN* at para 29.

[45] Here, both Mr. Ritchie and the CF were confined to a ten page response. Accordingly on that basis, Mr. Ritchie cannot demonstrate how a ten page limit was procedurally unfair to him alone.

[46] Mr. Ritchie also states that he was not personally provided a copy of the CF's submissions and cross-submissions following the release of the Report. However he acknowledges that the submissions were sent to the office of his legal counsel. In the circumstances, and considering his responding submissions were sent from his lawyer's office, it was fair and reasonable for the Commission to forward the submissions to his legal counsel and assume his lawyer would provide it to him. As such, he has failed to demonstrate any reviewable breach of procedural fairness on this issue.

[47] Prior to the Commission issuing its decision, Mr. Ritchie was given the opportunity to comment on the Report which recommended dismissal of his complaint, and to comment on the submissions made by the CF. In one instance, Mr. Ritchie had his lawyer prepare a letter, which enclosed a seven page response that he had prepared, and on the second opportunity he chose not to respond. That was his choice. However he cannot now complain that he was not afforded an opportunity to respond when in fact he had two separate opportunities to do so. He also cannot allege that he did not know the case he had to meet as it was clear that the Investigation report recommended dismissal of the complaint.

[48] There was no breach of Mr. Ritchie's procedural fairness rights.

C. *Was the Investigator biased?*

[49] Mr. Ritchie alleges that Investigator was biased in her investigation. He points to the first page of the Report where the Investigator notes that her role is not to "determine whether discrimination has actually occurred". Mr. Ritchie claims that this is precisely what the Investigator does as evidenced by the headers used throughout her Report. For example, he notes that the Investigator prefaced her findings with headings such as "Was the complainant treated

differently because he was gay" and "Was the complainant treated differently based on his sexual orientation".

[50] An allegation of bias is a serious allegation and Mr. Ritchie has the burden to prove bias on the part of the Investigator and on the part of the Commission. Bias may be actual or apprehended and the onus rests on the alleging party to prove that a fully-informed reasonable person would conclude the investigator favours one side or outcome for reasons of prejudice, partiality, or a closed-mind: *R v RDS* , [1997] 3 SCR 484 at para 111. A suspicion of bias will not be enough.

[51] In this case, Mr. Ritchie clearly has suspicions of bias but has not pointed to any evidence or occurrence in the course of the investigation which would lead to a finding of bias. He takes issue with the Investigator referring to matters as "allegations" however that alone does not disclose any partiality or show a closed-mind on her part. The fact that she used the headers referenced above throughout her report also does not establish bias. Further, the fact the Investigator did not interview all of the individuals identified by Mr. Ritchie does not mean she was close-minded in her approach to the complaint. As the case law referenced above confirms, Mr. Ritchie is not entitled to a perfect investigation and administrative efficiency is a factor to be considered in the breadth of the investigation.

[52] Having regard to the high threshold for a finding of bias, particularly in the non-adjudicative context of a Commission investigation, I am of the view that a fully-informed reasonable person would not find a reasonable apprehension of bias on behalf of the Investigator or the Commission.

[53] Mr. Ritchie has not established any bias on the part of the Investigator or the Commission.

VIII. Summary

[54] For the reasons outlined above, this judicial review is dismissed. Although Mr. Ritchie disagrees with the findings of the Investigator and the decision of the Commission not to refer the matter to the Tribunal, he has not established any breach of procedural fairness and I find that the decision is reasonable.

[55] In the circumstances, I decline to award costs against Mr. Ritchie.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed.

2. No costs are awarded.

3. The style of cause shall be amended to name only the Attorney General of Canada as Respondent.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-526-15
STYLE OF CAUSE:	PAUL RITCHIE v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	MARCH 15, 2016
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	MAY 11, 2016

APPEARANCES:

Paul Ritchie	FOR THE APPLICANT (ON HIS OWN BEHALF)
Melissa Chan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT