Federal Court  Cour fédérale

Date: 20160620

Docket: T-1483-15

Citation: 2016 FC 687

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 20, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ALAIN GRENIER (VETERAN)

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Alain Grenier, applies to the Federal Court for judicial review of a decision rendered on August 7, 2015, by the Canadian Human Rights Commission (the Commission), which deemed inadmissible his complaint about the treatment he allegedly received during his years in the Canadian Armed Forces.

[2] The only real issue before the Court is whether the decision rendered by the Commission was reasonable in the circumstances. The allegation that the applicant did not fully present his case was not the subject of argument. Given the many pages of submissions made by the applicant, it is clear that the allegation is without merit. So there is no need for lengthy discussion of the events alleged in the complaint filed with the Commission. After reviewing the record, the Court finds that the Commission's decision was reasonable and that the application for judicial review must be dismissed.

I. Facts

[3] The applicant joined the Canadian Forces on April 2, 2004. Prior to that, he was a private investigator and worked for a number of police forces.

[4] The applicant claims that he went through a difficult time when training at Royal Military College Saint-Jean, then at the Borden base, and when he came back to Saint-Jean. Specifically, he underwent training to join the military police. He claims that he experienced harassment and unfair treatment from his superiors, who allegedly treated him with disregard and disrespect. He was supposedly subjected to punishments he did not deserve.

[5] A grievance was formally filed on November 24, 2005, to quash a decision that had resulted in his demotion. The grievance was allowed on March 26, 2006. However, this apparently did not end the harassment and prejudice. Indeed, when the applicant arrived at the Saint-Jean Garrison after completing his training, the abuse allegedly continued. Additionally, the applicant began to experience pain in his legs and pulmonary difficulties on March 12, 2007.

It would appear that in July 2007, a military physician diagnosed him with depression, which eventually led to the diagnosis that he was unfit to continue working as a military police officer. That diagnosis was made on May 8, 2008.

[6] After going on sick leave in 2008, the applicant was to be discharged from the Canadian Forces on February 16, 2010, for medical reasons. His last medical exam was in January 2010.

[7] While contending with his health problems, the applicant took steps to apply for disability benefits. He applied on November 6, 2007. On September 22, 2008, an adjudicator denied his claim on the ground that the medical documentation on file at the time showed no objective evidence of harassment or unfair treatment by military officials to support the conclusion that they had caused the adjustment disorder with mixed mood referred to in his claim.

[8] The applicant did not let things end there. He filed an application for review that resulted in a decision on November 3, 2009. He was granted two-fifths pension entitlement for his disability, because the grievance had supposedly aggravated his psychological condition; however, the review decision maintained that it had not been established that the disorder referred to was due to unfair treatment or harassment by military officials.

[9] The applicant was once again dissatisfied and appealed to the review panel, which denied him full entitlement on June 8, 2010.

[10] The next step was to appeal to the appeal board, which upheld the review panel's decision on November 4, 2011. As a result, entitlement was maintained at two-fifths.

[11] The applicant sought judicial review of that decision in this Court. His application was allowed, and the matter was returned to the appeal board (Veterans Review and Appeal Board, or VRAB), which ruled, on November 18, 2013, that five-fifths entitlement was appropriate.

II. Contested Decision

[12] The applicant seeks judicial review of the Commission's decision not to deal with his complaint on the ground that it is inadmissible under paragraph 41(1)(*e*) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the Act), which reads as follows:

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 :
. . .	[…]
(*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.	e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[13] In this case, the decision was formally rendered on July 29, 2015. The Commission needed to satisfy itself that the last act or omission on which the complaint is based dated back

more than a year, and that an extension was not appropriate in the circumstances. The essence of the decision can be found in the second paragraph of the decision, where the Commission says:

> [TRANSLATION]
>
> The Commission notes in particular that the complainant pursued another avenue of recourse and was able to give instructions to his counsel in that regard. Although a medical note was provided in an effort to explain the long delay in filing the complaint, this note is vague, merely indicating that the complainant was incapable of filing a complaint. The note does not include an estimation of how long the complainant was incapable of filing a human rights complaint, or specify whether the complainant is capable of doing so now. The Commission also notes that, given the amount of time that has passed, the respondent has likely destroyed certain relevant documents in accordance with its record retention policies. For these reasons and those set out in the report, the Commission has decided not to deal with the complaint.

[14] As is often the case in these matters, the Commission endorsed the investigation report, which provides a great deal more information. The Commission employed a rigorous process. The complaint filed by Mr. Grenier on May 28, 2014, resulted in an investigation and in the report arguing for the application of paragraph 41(1)(*e*) of the Act. It is worth quoting in full the reason given in the complaint that warranted investigating it:

> [TRANSLATION]
>
> It was not until the decision rendered on November 18, 2013, by the VRAB appeal board (granting him full entitlement for his adjustment disorder with mixed mood) that the complainant's psychological condition became clear and he realized the extent of the discrimination and harassment he had experienced while serving in the Canadian Forces.

The investigation report is dated March 26, 2015. It was the subject of comments, submissions and representations from the applicant on May 15 and June 23, 2015, and the Department of National Defence presented its case on April 27, 2015.

[15] The report shows that the applicant began to communicate with the Commission as early as April 2012. He sent documents in March 2014, and, after a few attempts, his complaint was received on May 29, 2014. The report notes at the outset that the last alleged discriminatory practice occurred in February 2008. The complaint is, by definition, untimely.

[16] Even though Mr. Grenier argues that the discrimination dawned on him in November 2013 when he understood the extent of the alleged discrimination and harassment against him, at the time he received a favourable decision from the VRAB, this argument is not accepted. The report indicates at paragraph 25:

> [TRANSLATION]
>
> 25. It is established that, where a complainant becomes aware of a discriminatory practice after the fact, the date of the discrimination is when the complainant should have known that he or she was discriminated against. In this case, the complainant describes a situation that spans several years; the possibility that he was discriminated against should have dawned on him before November 2013. In fact, it is clear that he knew there was a problem at work before November 2013, since he filed grievances and demand letters against the respondent concerning discrimination in October 2005, February 2007 and January 2009, through his counsel.

[17] The report relies on the applicant's appealing to the VRAB over the years to show that he should have been able to file his complaint in a timely manner. The report points out:

> [TRANSLATION]
>
> 29. The complainant used another avenue of recourse, the VRAB, against the respondent to establish his disability and his disability pension rights. The VRAB ruled in his favour, finding that his diagnosis is entirely due to service factors. The respondent points out that the applicant's being able to appeal to the VRAB shows that he could have filed his complaint with the Commission in a timely manner. It should also be noted that using another avenue of recourse does not exempt the complainant from the requirement to file a complaint within the time limit.

The report says at paragraph 31:

> [TRANSLATION]
>
> 31. It appears that the complainant was not diligent in filing his complaint, which was filed more than six years after the last alleged discriminatory practice. It supposedly occurred in February 2008, but the complaint was filed in May 2014. Though he admits to filing his complaint too late, the complainant has provided no reasonable explanation for the delay. The complainant asks the Commission to use its discretion to decide his complaint in light of his condition. However, the complainant was represented by multiple lawyers, who acted on his behalf before the VRAB. In fact, the complainant and his counsel were able to pursue this other judicial process for years, which shows that they could have filed a complaint with the Commission within the statutory time limit. His counsel could have filed a complaint with the Commission on his behalf, but did not.

III. Parties' Submissions

[18] The applicant raised several issues—some repetitive—that, as I understand them, can be summarized as follows:

1. Is the applicant entitled to a presumption that the one-year time limit for filing his complaint was observed?
2. Was the Commission's decision not to extend the one-year time limit reasonable?

3. Was the applicant denied the right to be heard by the Commission because he was supposedly prevented from elaborating on the reasons for his inability to submit his complaint?
4. Is the intelligibility of the Commission's decision sufficient, having regard to the law?

[19] The applicant expanded upon his arguments at the hearing.

[20] While the applicant's memorandum of fact and law raised numerous issues which are listed at paragraph 18 of these reasons, he did not expand upon his arguments in his memorandum. At the hearing, he simply argued that the only date relevant to paragraph 41(1)(*e*) was November 18, 2013, when the VRAB granted him full entitlement, finding that his disability had been caused by the harassment experienced.

[21] In support of this argument, the applicant cited *Tamachi v. Canada (Human Rights Commission)*, 2005 FC 1534 [*Tamachi*].

[22] In response to questions from the Court, the applicant confirmed that he was not disputing the decision not to extend the time limit, as permitted by paragraph 41(1)(*e*). Moreover, using the notion of presumption was not what the applicant had in mind. He simply wanted to stress that he had not become aware of the harassment until the latest decision concerning his disability pension.

[23] I nonetheless decided to review the reasons for refusing to extend the one-year time limit, because I was not satisfied that the applicant, who does not have legal representation, fully understood the scope of the concession he was making.

[24] Not surprisingly, the respondent considers the reasons given for not extending the time limit perfectly reasonable within the meaning of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], rejecting at the outset the notion that there was a presumption that the ground of discrimination arose when the VRAB rendered its decision in November 2013.

[25] The respondent also argues that the Commission's decision was perfectly reasonable in the circumstances, citing in particular this Court's decisions in *Jean Pierre v. Canada (Citizenship and Immigration)*, 2015 FC 1423 and *168886 Canada Inc. v. Reducka*, 2012 FC 537, 408 FTR 247. At the hearing, other cases were cited. These will be discussed later.

[26] Regarding the allegation that the applicant was unable to present his case, the respondent notes that he not only filled out the complaint form but also had two opportunities to comment on what was then the draft report in this case. Lastly, the reasons given by the Commission, through the report it endorsed, are perfectly intelligible.

IV. Analysis

A. *Standard of review*

[27] There is no need for lengthy discussion of the standards of review in this matter. With regard to a potential lack of procedural fairness, the applicable standard is correctness (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 SCR 502, at paragraph 79). I am aware that in *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 [*Bergeron*], the Federal Court of Appeal noted some uncertainty as to whether a degree of deference is warranted, even when the standard

of review is correctness (see paragraphs 67 *et seq.*). In this case, no one has suggested that the standard of correctness should be applied with a degree of deference, and I see no reason to consider this possibility, because, in my view, even with the standard alone, the applicant cannot successfully argue that he did not have the opportunity to present his case.

[28] As for the application of paragraph 41(1)(*e*), the decision on whether to extend the time limit is subject to the reasonableness standard of review (*Bergeron*, above; *Zulkoskey v. Canada (Employment and Social Development)*, 2015 FC 1196; *Khaper v. Air Canada*, 2015 FCA 99). It appears that the applicant is no longer disputing the refusal to extend. However, I agree with counsel for the respondent that it merits discussion, because the applicant did not have legal representation at the hearing of the application for judicial review. Moreover, the same standard applies to the issue of when the time limit begins to run. Therefore, the Commission's decision will be measured against the standard of reasonableness. This means that paragraph 47 of *Dunsmuir* is fully applicable:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

B. *Presumption of Conformity*

[29] According to the applicant, the Act allows for a presumption that the one-year time limit was observed. No authority was cited in support of such a novel proposition, and I know of none. I must therefore conclude that there is no such presumption. In fact, such a presumption would be directly contrary to the words of the statute. If a common law presumption had indeed existed—which has not been established in any way—it would have been displaced by the statutory language. In any event, the hearing revealed that the applicant was not relying on the notion in the technical sense.

[30] Rather, the applicant argues that the discrimination he experienced dawned on him in November 2013, when the VRAB ruled in his favour. That statement is rather surprising, because the issue before the administrative tribunal was largely one of determining whether the mistreatment that the applicant had complained about for several years had caused his disability, which would warrant full entitlement.

[31] A review of the wording of paragraph 41(1)(*e*) shows that Parliament is indeed referring to a complaint based on "acts or omissions the last of which occurred more than one year. . . before receipt of the complaint." What matters is the date of the discrimination. The applicant is complaining about harassment, and it could not have continued after his discharge in 2010, or probably even after he went on leave in 2008. The steps he took were with a view to being granted different entitlement than that awarded by Veterans Affairs Canada on the basis of the harassment he said he had experienced. Clearly, the applicant had full knowledge of this

harassment. The alleged events did not occur in the year preceding his complaint. What is more, these same events gave rise to recourse sought by the applicant. They were the subject of previous litigation. The alleged discrimination ended far before the proceedings and the 2013 decision. The date referred to is that on which [TRANSLATION] "the complainant's psychological condition became clear." But that is not the issue. The issue is whether it was reasonable for the Commission to conclude that the discrimination had ended more than a year before receipt of the complaint and that the applicant had been fully aware of it.

[32] The Court thinks it reasonable to consider 2008, when the applicant was discharged from the Canadian Forces, as the date of the last act or omission on which the complaint is based. The other dates that could have been considered, namely 2010, when the applicant was discharged from the Canadian Forces, and April 2012, when he first turned to the Commission, are also far outside the statutory time limit. The facts in this case clearly support the conclusion reached by the Commission.

[33] In this regard, it is recognized in our jurisprudence that the administrative tribunal has a remarkable degree of latitude in these matters (*Bell Canada v. Communications, Energy and Paperworkers Union of Canada* (1998), [1999] 1 FCR 113, at paragraph 38 (FCA)). In this case, the applicant has failed to demonstrate why the administrative tribunal should be denied the deference it is owed. In other words, the applicant has failed to discharge the burden of proving that the decision was unreasonable. The applicant chose to appeal to the VRAB, and ultimately won. He even appealed to this Court for judicial review after being granted only partial entitlement. He first turned to the Commission in April 2012, two years before filing his

complaint, but did not pursue the matter. In *Jean Pierre v. Canada (Citizenship and Immigration)*, 2015 FC 1423, this Court said:

> Moreover, in *Good*, the Court indicated, in discussing *Johnston v Canada Mortgage and Housing Corp.*, 2004 FC 918 (CanLII), that "[t]he date when the complainant first contacts the Commission regarding a possible complaint does not stop the Clock for the one-year time limit" (*Good* at para 26).

[34] Not only did the clock continue to run, but the applicant's turning to the Commission in 2012 shows, at the very least, that he had been aware since then that he had the option of complaining to the Commission. But even if the one-year period had begun to run on that date, the complaint would have still been untimely. It is certainly possible that the applicant's prevailing before the VRAB in November 2013 led to the realization that he may be successful elsewhere. But that does not change the fact that he chose one avenue of recourse and not the other. The date on which a person realizes his or her chances of success is not the one provided for in the Act, that is, the date of the last act or omission on which the complaint is based. The decision not to file the complaint in a timely manner is fatal. The fact that he realized his chances of success in 2013 does not exempt the applicant in any way from the requirement to file within the time limit. As he himself says in his complaint, he is not claiming that the November 18, 2013 decision revealed the discrimination or harassment, but rather that he had not previously realized its extent.

C. *Refusal to Extend*

[35] Based on his response at the hearing, the applicant no longer seeks judicial review of the decision not to extend. One might think this concession is due to his assuming that time began to

run in November 2013. No extension would be required. In any event, the decision was within the range of possible, acceptable outcomes in respect of the facts and the law. Had the time limit been narrowly missed, the situation would be different. But in this case, it was reasonable for the Commission to find that the applicant had been capable of filing his complaint in a timely manner because he was pursuing recourse through another administrative tribunal on the basis of essentially the same facts.

[36] In *Donohue v. Canada (National Defence)*, 2010 FC 404 [*Donohue*], a case very similar to the one before this Court, my colleague Justice O'Keeffe concluded:

> 31 Given that the applicant filed his complaint almost a decade after the alleged incidents of discrimination took place, it would have been reasonable for the Commission to require a clear and reasonable excuse for the delay. He did not provide that. Based on the submissions from the applicant, after having his application to quash his release struck out by this Court (*Donoghue* above), the applicant's only excuse for not bringing the complaint is that he was dealing with an application at Veterans Affairs for disability benefits which he ended up receiving. It would be hard to accept that the application to Veterans Affairs kept him from making the complaint. It was not relevant to any question of whether he was discriminated against. Nor did the process involve laying blame with any of his previous superiors, the prime focus of his complaint to the Commission.

The case was appealed, and the Federal Court of Appeal (2011 FCA 50) upheld the trial judge's decision, stating as follows:

> 5 The Judge concluded that the CHRC's rejection of Mr Donoghue's complaint for delay was not unreasonable. In reaching his decision, he took particular account of the breadth of the CHRC's discretion under paragraph 41(1)(*e*), the length of the delay, the resulting prejudice to the respondent, and Mr Donoghue's active pursuit of other forms of redress before going to the CHRC.

> 6 Substantially for the reasons given by the Judge, we agree that, on the basis of the information before the CHRC when it made its decision, there is no warrant for judicial intervention in the exercise of the CHRC's discretion not to investigate Mr Donoghue's complaint because of his delay.

[37] Mr. Grenier referred to this Court's decision in *Tamachi*, cited above. That case dealt with the issue of when the one-year period begins to run. In *Tamachi*, the Court concluded that "the review and appeal process pursued by Mrs. Tamachi was not irrelevant because in this case, unlike *Zavery*, a negative decision on her pension application was a constituent element of the alleged discrimination" (paragraph 14). That is not the case here. The processes initiated to be granted greater entitlement are not an element of the alleged discrimination. Indeed, they are unrelated to the alleged discrimination. The situation is akin to that in *Zavery v. Canada (Human Resources Development)*, 2004 FC 929, where Justice Snider wrote:

> 31 Mr. Zavery also made submissions on the timeliness issue. His main argument was that he did not file a complaint sooner because he was _involved in a time-consuming and delay-inducing process through the Privacy Commissioner_. On June 29, 2000, Mr. Zavery finally obtained the decision of the Privacy Commissioner and began considering his complaint to the Commission. In my view, the fact that Mr. Zavery was pursuing a _process through the Privacy Commissioner_ is irrelevant. His grievance before the Privacy Commissioner, although related, was not the same as the allegations in his complaint to the Commission. Each process was initiated to cure two different kinds of grievances. On the facts of this case, exhausting the former process could not reasonably be a pre-requisite for initiating the latter one.

The outcome of processes for obtaining greater entitlement, an issue completely different from a discrimination complaint under the Act, can reasonably be excluded from the acts or omissions on which the discrimination complaint is based; it is not in itself a discriminatory practice.

Moreover, the Federal Court of Appeal's decision in *Donoghue*, cited above and more recent than *Tamachi,* is binding on the Court.

D. *Being Fully Heard*

[38] A medical note dated April 16, 2015, was cited in an attempt to establish that the applicant had not been fully heard. It was perfectly reasonable for the Commission to assign little weight to it, given the content of the note, which, as the Commission aptly put it, [TRANSLATION] "does not include an estimation of how long the complainant was incapable of filing a human rights complaint, or specify whether the complainant is capable of doing so now." In other words, the physician's note was equivocal, and, in any case, the applicant's condition clearly did not prevent him from pursuing other recourse elsewhere. I note that a new medical opinion was filed in the record after the Commission's decision. *Ex post facto* evidence is rarely admissible on judicial review (*Delios v. Canada (Attorney General)*, 2015 FCA 117, and, more generally, Brown & Evans, *Judicial Review of Administrative Action in Canada*, Carswell, loose-leaf, at 6:5300). It is no more admissible in this case.

[39] As for the applicant's ability to present his case, it seems obvious to me that this general argument cannot be recognized, given his submissions; they were detailed and well presented on both May 15, 2015, and June 23, 2015. Simply put, the applicant has said what he needed to say. I would add that the applicant made no mention of this at the hearing, and his memorandum says nothing on this topic. He referred to two pages of the record; one might suspect that he was talking about the medical opinion mentioned in the previous paragraph of these reasons. If so, this "evidence" was not before the Commission when it made its decision. The Commission

could not take it into account. Nor can this Court, for that matter. At any rate, it is merely an attempt to strengthen the medical evidence after the Commission deemed it inadequate.

E. *Intelligibility*

[40] The applicant raised an argument to the effect that the Commission's reasons are not intelligible. However, it is recognized that reports submitted to the Commission are part of the latter's reasons, if it endorses them, of course. That was the case here. In this regard, the leading case is *Newfoundland and Labrador Nurses' Union* v. *Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*], where the Court stated: "Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the 'adequacy' of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result" (paragraph 14). The Court went on to urge the review courts to read the reasons together with the result to determine whether the result falls within a range of possible outcomes, as required by paragraph 47 of *Dunsmuir*. Paragraph 15 says:

> 15. In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[41] In this case, there is no need to even rely on the Court's words in *Newfoundland and Labrador Nurses' Union.* This Court is satisfied that the decision was reasonable. Indeed, when the investigation report is read together with the Commission's decision, there is no doubt that it

is intelligible. The Commission clearly laid out the reasons for its finding of untimeliness, and refused to grant an extension. This explanation is sufficient.

[42] Consequently, the application for judicial review must be dismissed with costs payable to the respondent in the amount of $500.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs payable to the respondent in the amount of $500.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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