Federal Court  Cour fédérale

Date: 20180420

Docket: T-1207-17

Citation: 2018 FC 433

Ottawa, Ontario, April 20, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

GLENN FERGUSON

Applicant

and

CANADA POST CORPORATION AND CANADA POST CORPORATION AND M. FRANKLIN

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision of the Canadian Human Rights Commission (the "CHRC"). The decision, made on July 11, 2017, dismissed the Applicant's complaint against his employer, the Canada Post Corporation (the "CPC") for discrimination, deeming an inquiry was not warranted

pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the "Act").

[2] For the reasons that follow this application for judicial review is dismissed.

II. Background

[3] Glenn Ferguson (the "Applicant") was employed by CPC and worked under the supervision of Mr. Franklin (together, CPC and Mr. Franklin are the "Respondents"). The Applicant retired on June 20, 2016. While employed, he was a member of Canadian Union of Postal Workers and fell under their collective agreement.

[4] On September 6, 2012, the Applicant's physician, Dr. Kimelman, wrote a note indicating the Applicant had a permanent shoulder injury and could no longer collate flyers, as it is a repetitive motion. On April 9, 2015, the same physician wrote a note indicating that the Applicant should not have continued contact with his supervisor, Mr. Franklin, because he had presented with "distress related to the workplace".

[5] By April 14, 2015, the Applicant hadn't returned to the workplace and was granted short term disability benefits. The Applicant also submits that he was diagnosed with further disorders by other physicians in April 2015 and August 2015. As part of the short term disability program, he was treated by Dr. Mowchun of the Short Term Assessment and Treatment Unit. On November 26, 2015, Dr. Mowchun wrote a letter indicating the Applicant "should not return to

his employment at Canada Post for medical reasons." Specifics were not provided in the medical notes, but the Applicant identifies as having an adjustment disorder and major depression.

[6] On March 9, 2015, the Applicant filed a human rights complaint against CPC, claiming discrimination based on disability. The Applicant claimed that after providing Mr. Franklin with the first doctor's note in September 2012 that Mr. Franklin began micro-managing him, giving him unwanted attention, and making inappropriate comments towards him.

[7] Among the differential treatment alleged in the complaint, the Applicant pointed to a specific incident where he claims Mr. Franklin noticed his distressed mental state and asked him if he was shutting down again. The Applicant also complained that Mr. Franklin would not allow him to leave early when his work was done, although his coworkers were afforded this benefit. The Applicant also believes that after he was appointed a new supervisor, in 2014, that Mr. Franklin negatively influenced his new supervisor against him.

[8] The Applicant claimed that CPC did not assist him with his concerns with Mr. Franklin and failed to accommodate him.

[9] The CHRC appointed an Investigator who reviewed the parties' positions and all documentary evidence, interviewed the Applicant, interviewed Mr. Franklin and other employees and supervisors. On March 17, 2017, the CHRC completed its investigation and issued an Investigation Report. The Investigation Report concluded that while some of the activities occurred, there was no evidence that it was linked to the Applicant's disability because

the supervisor treated other employees similarly. In respect to the Applicant's allegation that CPC failed to accommodate him, the CHRC concluded that the evidence did not support the claim as alleged, as several accommodation options were offered to the Applicant which the Applicant rejected. The parties made submissions in relation to the Investigation Report.

[10] On July 11, 2017, the CHRC issued a decision dismissing the complaint pursuant to subparagraph 44(3)(b)(i) of the Act that, having regard for all of the circumstances, further inquiry was not warranted.

III. Legislation

44(3) On receipt of a report referred to in subsection (1), the Commission	44(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
…	[…]
(b) shall dismiss the complaint to which the report relates if it is satisfied	b) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
…	[…]

IV. Issues

A. *What is the standard of review?*

B. *Was the decision procedurally fair?*

C. *Was the decision reasonable?*

V. Analysis

A. *Standard of Review*

[11] The Applicant made no submissions on the standard of review.

[12] The Respondents submit that matters of procedural fairness are reviewable on a standard of correctness. (*Ronald Phipps v Canada Post Corporation*, 2015 FC 1080 at para 30).

[13] The Respondents also submit that Parliament intended to grant the CHRC freedom and discretion and that the Federal Court of Appeal has held that deference is owed to CHRC screening decisions; citing *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113 (CA) at paragraph 38:

> The Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report. Subsections 40(2) and 40(4) and sections 41 and 44 are replete with expressions such as "is satisfied", "ought to", "reasonably available", "could more appropriately be dealt with", "all the circumstances", "considers appropriate in the circumstances" which leave no doubt as to the intent of Parliament. The grounds set out for referral to another authority (subsection 44(2)), for referral to the President of the Human Rights Tribunal Panel (paragraph 44(3)(a)) or for an outright dismissal (paragraph 44(3)(b)) involve in varying degrees questions of fact, law and opinion (see *Latif v. Canada (Canadian Human Rights Commission) (1979)*, [1980] 1 F.C. 687 (Fed. C.A.) at 698, Le Dain J.), but it may safely be said as a general rule that Parliament did not want the courts at this stage to intervene lightly in the decisions of the Commission.

[14] The Respondents further submit that the Supreme Court of Canada in *Dunsmuir v New Brunswick,* [2008] 1 SCR 190 at paragraphs 57 and 62, held that if the standard of review has previously been determined, then a standard of review analysis need not be conducted.

[15] The Respondents argue that the standard of review of reasonableness has already been set out in the authorities. In *Lubaki v Bank of Montreal Financial Group,* [2014] FCJ No 935 at paragraph 37, the Federal Court held that a "decision not to refer a complaint to a tribunal is a discretionary one, reviewable on the standard of reasonableness." In *Shaw v Canada (Royal Canadian Mounted Police),* [2013] FCJ No 772 at paragraph 25, the Federal Court held that "it is settled that the Commission's decision to dismiss a complaint is reviewable on the standard of reasonableness." Both cases dealt with the CHRC's decision to dismiss a complaint pursuant to subparagraph 44(3)(b)(i) of the Act.

[16] I am in agreement with the Respondents' submission that matters of procedural fairness are to be determined on the correctness standard and that the determination on whether or not to refer a complaint to a Tribunal is reviewable on the standard of reasonableness. The cases submitted by the Respondent also establish that, overall, the standard of review that is applicable to the CHRC pursuant to subparagraph 44(3)(b)(i) of the Act is reasonableness.

B. *Was the decision procedurally fair?*

[17] The Applicant argues that there were numerous examples of how the investigation was flawed which leads to the process being procedurally unfair. Those examples are addressed below.

[18] The Respondents submit that the Court reviews issues of procedural fairness on a standard of correctness, however the Respondents argue that deference is given to an investigator's decision on whether to investigate a matter further. The Respondents further submit that an investigation's procedures need not be perfect to withstand review. Relying on Justice MacTavish's reasons in *CUPE v Air Canada*, 2013 FC 184 at paragraphs 66-70, the Respondents submit that the investigation was thorough and neutral and that the investigator did not fail to investigate any crucial evidence:

> [66] As to what will constitute "obviously crucial evidence", this Court has stated that "the 'obviously crucial test' requires that it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint": *Gosal v. Canada (Attorney General)*, 2011 FC 570, [2011] F.C.J. No. 1147 (F.C.) at para. 54; *Beauregard c. Postes Canada*, 2005 FC 1383, [2005] F.C.J. No. 1676 (F.C.) at para. 21.
>
> [67] The requirement for thoroughness in investigations must also be considered in light of the Commission's administrative and financial realities, and the Commission's interest in "maintaining a workable and administratively effective system": *Boahene-Agbo v. Canada (Human Rights Commission)*, [1994] F.C.J. No. 1611, 86 F.T.R. 101 (Fed. T.D.) at para. 79, citing Slattery, above, at para. 55.
>
> [68] With this in mind, the jurisprudence has established that the Commission investigations do not have to be perfect. As the Federal Court of Appeal observed in *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113, [2005] F.C.J. No. 543 (F.C.A.) at para. 39:
>
> > Any judicial review of the Commission's procedure must recognize that the agency is master of its own process and must be afforded considerable latitude in the way that it conducts its investigations. An investigation into a human rights complaint cannot be held to a standard of perfection; it is not required to turn every stone. The Commission's resources are limited and its case load is heavy. It must therefore balance the interests of complainants in the fullest

> possible investigation and the demands of administrative efficacy"
>
> [Citations omitted]
>
> [69] The jurisprudence has also established that some defects in an investigation may be overcome by providing the parties with the right to make submissions with respect to the investigation report.
>
> [70] For example, in *Slattery*, the Court observed that where, as here, the parties have an opportunity to make submissions in response to an investigator's report, it may be possible to compensate for more minor omissions in the investigation by bringing the omissions to the Commission's attention. As a result, "it should be only where complainants are unable to rectify such omissions that judicial review would be warranted". This would include situations "where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it". Judicial intervention may also be warranted where the Commission "explicitly disregards" the fundamental evidence: all quotes from *Slattery*, above at para. 57.

(1) Telephone interviews

[19] The Applicant submits that the appointed investigator, Ms. Mcbride-Anderson (the "Investigator"), conducted interviews over the phone and did not require participants to swear an affirmation or oath. The Applicant wonders how the Investigator could determine credibility and honesty through telephone interviews. The Applicant argues that at the Canadian Human Rights Tribunal all testimony must be affirmed and therefore the lack of this procedure at the commission level was a breach of procedural fairness.

[20] The Applicant further argues that the Investigator was not a direct employee of the CHRC, but a third party HR consultant, and therefore was not empowered to conduct the investigation pursuant to the Act.

[21] The Respondents argue that under section 43 of the Act, the CHRC has the authority to designate a person to be an investigator and to investigate a complaint. These designated investigators have the power and discretion over the procedure and manner in which they collect information:

43 (1) The Commission may designate a person, in this Part referred to as an "investigator", to investigate a complaint	43 (1) La Commission peut charger une personne, appelée, dans la présente loi, « l'enquêteur », d'enquêter sur une plainte.

[22] The Respondents further argue there is no evidence that the Investigator was not the CHRC's investigator or that the manner in which she conducted the investigation would be held to a different standard than any other investigator designated by the CHRC.

[23] I find that the process employed by the CHRC Investigator was procedurally fair. The Investigator was duly authorized by the CHRC to conduct the investigation and the Investigator's decision to conduct interviews by telephone was proper and thorough based on the facts. The Investigation Report summarized the evidence of all of the people interviewed by telephone and it included conclusions based on an assessment of that evidence.

(2) Decision not to interview all suggested witnesses

[24] The Applicant alleges that CPC has fabricated issues with his performance and, had the Investigator interviewed all of his suggested witnesses, this would have come to light. The Applicant suggests that some of the overlooked witnesses could have provided evidence of systemic issues within CPC.

[25] Relying on the reasons in *Slattery v Canada (Human Rights Commission)*, (1994) 73 FTR 161 at paragraph 49, the Applicant submits that procedural fairness requires that a human rights investigation be neutral and thorough. The Applicant argues that based on the facts, the investigation does not meet these criteria.

[26] The Respondents submit that the decision not to interview additional witnesses does not raise a procedural fairness concern. The Investigator interviewed eight individuals, including the Applicant. The Investigator noted in the report that she declined to interview additional witnesses because they did not observe the alleged conduct directly and were therefore not crucial to the investigation.

[27] In *Shaw v Canada (Royal Canadian Mounted Police)*, 2013 FC 711 at paragraphs 32-33, Heneghan J., concluded that the CHRC's decision not to interview persons suggested by the Applicant was reasonable since those persons could not provide new or probative evidence.

[28] The Respondents submit that the Investigator noted the Applicant's concern that he had never been formally disciplined. The Respondents further submit that it was reasonable of the Investigator not to further her line of questioning on this point, as her conclusion was that Mr. Franklin's behavior towards the Applicant was consistent with his behavior towards other employees, and therefore was not linked to his disability. The Respondents submit that this was not an omission but an investigative choice that was open to the Investigator, and therefore did not breach the Applicant's right to procedural fairness.

[29] The Investigator limited her interviews to people she considered to have witnessed the events giving rise to the complaint. This was also a reasonable approach under the circumstances as these individuals would not have provided new or probative evidence of the circumstances of this particular situation. Those who were interviewed provided the Investigator with enough information to arrive at her recommendation.

[30] The Investigator also did not pursue the further questioning into the lack of discipline by CPC related to the Applicant. I find that the Investigator concluded that some employees were treated similarly to the Applicant and that such treatment or actions were not linked to the Applicant's disability. This was a reasonable determination to make.

(3) Investigator Bias

[31] The Applicant submits that the Investigator was biased in her conclusion about the "shutting down" comment made by Mr. Franklin. The Applicant submits that the comment was in reference to the Applicant's mental health status and not, as the Respondents allege, an operational term in reference to a work process.

[32] The Applicant submits that the Investigator was biased for accepting the Respondents' version of the incident. The Applicant further submits that if the statement had been made in the context of the Applicant being on a long break, then Mr. Franklin would and should have officially disciplined the Applicant. The Applicant argues that because there was no disciplinary action, on a balance of probabilities, the Respondents' version of events is likely false.

[33] The Respondents submit that the test for bias was outlined in *Miller v Canada (Canadian Human Rights Commission) (1996),* 112 FTR 195 at paragraph 15:

> …The basic test to insure fairness and to avoid a reasonable apprehension of bias has been enshrined in the jurisprudence: it is whether reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, would perceive bias on the part of an adjudicator. The grounds of apprehension must be substantial. Mere suspicions are not sufficient.

[34] The Respondents submit that the Applicant is alleging that the Investigator showed bias in finding that the "shutting down" comment was not linked to his disability. The Respondents submit that the Investigation Report references the "shutting down" comment and concluded it was made in the context of a dispute between Mr. Franklin and the Applicant about the length of the Applicant's break. The Applicant admitted that his break had been too long.

[35] The Respondents submit the Investigator considered the context of the comment, referenced the independent witness statement, and noted the disagreement between the parties. The Respondents argue that a "right-minded" individual, taking this information into consideration would not have a perception of bias.

[36] The Respondents submit that there were no defects in the manner or scope of the investigation but if there were, the fact that the Applicant made further submissions on these points in response to the Investigation Report, and these submissions were considered by the CHRC, compensates for any omissions that may have occurred; citing *CUPE v Air Canada,* above at paragraphs 69 and 70.

[37] The Investigation Report also notes that the witness statement of Mr. Campbell indicates that when the comment was made he and the Applicant were discussing the length of breaks and had already been told to return to work.

[38] The Investigation Report notes that the parties differ in their opinion of what motivated the comment and the Investigator concluded that there was insufficient evidence to suggest that Mr. Franklin made the comment in reference to the Applicant's disability.

[39] I do not see in the record that the Investigator was biased in her handling of the "shutting down" comment. The Investigator noted the different motivations respecting the comment and that there was insufficient evidence to establish that the comment was linked to the Applicant's disability. The comment was considered by the Investigator. As stated in the case law, the grounds to establish bias are substantial and mere suspicions of bias are not enough. The Applicant has failed to provide evidence of bias on the part of the Investigator.

(4) Failure to accommodate

[40] The Applicant submits that the conclusions of the Investigator on the issue of accommodation were made in error. The Investigator concluded that CPC had offered several accommodations to the Applicant and dismissed this claim. The Applicant alleges that the accommodations, such as different positions and work locations went against the recommendation of his doctor's note from April 9, 2015, and that the Applicant was therefore forced to remain off work. The Applicant submits that such accommodations that were offered

would not have assisted him based on his health at that time. The Applicant alleges that he was constructively dismissed and forced to retire as a result.

[41] The Respondents submit that the Investigation Report accurately addresses the fact that reasonable accommodation options were provided but not accepted by the Applicant. Mediation was also offered but similarly not accepted.

[42] I agree with the Respondents' submissions. The Investigator considered the accommodation options and mediation offered by the Respondent, CPC and included those considerations in the Investigation Report.

[43] On the evidence presented, I find that the Applicant's rights to procedural fairness were not breached. I also note the fact that the parties were permitted to make submissions upon reviewing the Investigation Report which has the effect of curing any procedural unfairness issues if they had existed in this case. The case law cited by the Respondents is particularly relevant and persuasive.

C. *Was the decision reasonable?*

[44] The Applicant's submissions focused on the unfairness of the investigative procedures and he made no specific submissions on the reasonableness of the decision.

[45] The Respondents submit that the decision of the CHRC was reasonable and meets the standard of "justification, transparency and intelligibility" found in *Dunsmuir*, above at paragraph 47.

[46] I agree with the Respondents that the appropriate standard of review is reasonableness. The CHRC has discretion to refer a complaint to the Canadian Human Rights Tribunal or to dismiss a complaint. In this case, after considering the Investigation Report, the CHRC exercised its discretion to dismiss the complaint.

[47] The decision of the CHRC was based on the Investigation Report. In *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113 (CA) at paragraph 38, the Court noted that the Act grants the CHRC a remarkable degree of latitude when it is performing its screening functions on receipt of an Investigation Report (para 38). The Court went further to state that Parliament did not want the courts at this stage to intervene lightly in the decisions of the CHRC.

(1) Micromanagement and inappropriate comment

[48] The Respondents submit that the Investigation Report acknowledged that the alleged negative treatment did occur as submitted by the Applicant, in part, but found no evidence that this treatment was linked to the Applicant's disability.

[49] The Investigation Report concluded that the evidence from the Applicant, as well as other employees, confirmed that Mr. Franklin treated other employees in the same negative manner

and therefore the Applicant's perception that this treatment was linked to his disability was not supported by evidence.

[50] The Investigator determined that further analysis was not required. The Respondents submit that this conclusion was reasonable.

[51] The Investigator determined that there were negative interactions that had occurred between the Applicant and Respondent, Mr. Franklin. After conducting interviews with other staff the Investigator determined that these negative interactions were not linked to the Applicant's disability. This was a reasonable conclusion to reach.

(2) "Shutting Down" comment

[52] The Investigation Report concludes that this comment did occur. The Investigator considered the Applicant's version of events, that Mr. Franklin witnessed his "mental state" and said, "well now, are you again shutting down", and compared it to the witness statement of Mr. Campbell (another employee present), who said he heard Mr. Franklin say "I need someone to work" and then directed to the Applicant, "You're not going to shut down again".

[53] The Investigator concluded there was insufficient evidence to prove that the comment was motivated by the Applicant's disability. The Respondents submit this conclusion was reasonable.

[54] Again, the Investigator determined the statement was made and looked at the statement's context including other witnesses who were present. The Investigator's finding that the comment was not linked to the Applicant's disability was reasonable.

(3) Leaving Early

[55] The Investigation Report concluded that it was likely that the Applicant was not permitted to leave early but that this was in line with treatment of other employees in similar positions as the Applicant.

[56] Based on the evidence which included interviews of several employees, the Investigator concluded that there was no proof of a link between this treatment and the Applicant's disability. The Respondents submit this conclusion was reasonable.

[57] I find the Investigator's conclusion on this point was also reasonable. The finding was made after interviewing several employees.

(4) Influencing another supervisor

[58] The Investigator gathered evidence from Mr. Franklin and the new supervisor, Mr. Kammerlock, and concluded that there was insufficient evidence to support the Applicant's claim that Mr. Franklin tried to influence the Applicant's new supervisor against him. The Respondents submit this decision was reasonable.

[59] I find that the Investigator's decision on this point was also reasonable. The Investigator was in the best position to make this determination.

(5) Failure to Accommodate

[60] The Respondents submit that the Applicant was offered several accommodation options in May 2015. The Applicant declined these options, but they remained open to him.

[61] The Applicant declined to participate in mediation with Mr. Franklin in February 2015. Further, the Applicant was on approved medical and educational leave from April 2015 until his retirement in June 2016.

[62] The Investigator concluded that the allegation did not happen as the Applicant alleges because the evidence suggests several accommodation options were afforded him. The Respondents submit that the decision to dismiss this claim was reasonable.

[63] Based on the evidence it is clear that the Applicant found the accommodation offered insufficient or inappropriate under the circumstance. Notwithstanding the Applicant's disagreement with the conclusions made by the Investigator, I find that it was a reasonable conclusion to reach.

[64] Overall, the Investigator was in the best position to reach the conclusions she did. While the Applicant may not agree with these conclusions I can see no error on the part of the CHRC to not refer the complaint to the Canadian Human Rights Tribunal. The conclusions and the reasons

for the conclusions as well as the investigative procedure were fully explained in the Investigation Report.

[65] It is for the above reasons that the application for judicial review is dismissed. Costs will not be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no Order as to costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1207-17
STYLE OF CAUSE:	GLENN FERGUSON v CANADA POST CORPORATION, CANADA POST CORPORATION AND M. FRANKLIN
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	FEBRUARY 27, 2018
JUDGMENT AND REASONS:	FAVEL J.
DATED:	APRIL 20, 2018

APPEARANCES:

Glenn Ferguson	FOR THE APPLICANT (ON HIS OWN BEHALF)
Debra L. Rusnak	FOR THE RESPONDENTS

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