

Federal Court



Cour fédérale

Date: 20190503

Docket: T-833-17

Citation: 2019 FC 579

Toronto, Ontario, May 3, 2019

PRESENT: Mr. Justice Campbell

BETWEEN:

ELAINE PETERKIN

Applicant

and

**TORONTO DOMINION BANK TD CANADA
TRUST**

Respondent

JUDGMENT AND REASONS

[1] The present judicial review Application pursuant to s.18.1 of the *Federal Courts Act*, RSC 1985, c F-7 concerns the March 28, 2014 course of conduct between the Applicant, Ms. Peterkin, and employees of the Respondent Bank's Toronto Danforth branch. The central event of the course of conduct was Ms. Peterkin's request to withdraw funds from her bank account, and the initial rejection of this request. Ms. Peterkin is a 60 year-old black woman who maintains that racism was in play in delivering the rejection, while the Respondent maintains that its

employees were justified in not meeting Ms. Peterkin's request for the key reason that she failed to produce proper identification.

[2] As a result, on December 12, 2014, Ms. Peterkin filed a Complaint with the Canadian Human Rights Commission (Commission) pursuant to s.5(b) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *Act*) on the basis that she suffered adverse differential treatment from the Respondent because of her race.

[3] Following the filing of the Complaint, in submissions dated February 19, 2015, the Respondent argued that the Complaint is frivolous and without merit, and, therefore, the Commission should decline to deal with it pursuant to s.41(1)(d) of the *Act*. In response, an officer of the Commission prepared a report dated April 26, 2016 recommending that the Commission deal with the Complaint pursuant to s.41(1) of the *Act*. The Commission agreed.

[4] To reach a conclusion on Ms. Peterkin's Complaint, the Commission applied a standardized practice: conduct an investigation leading to a recommendation to the Commission pursuant to s.44(3)(a) or (b) to, respectively, refer the Complaint to the Canadian Human Rights Tribunal for hearing or dismiss the Complaint. Accordingly, pursuant to s.43(1) of the *Act*, on July 27, 2016, a person (the Investigator) was assigned to investigate the Complaint, and as a result an Investigation Report (Report) (CTR, pp. 1-7) was prepared for consideration by the Commission.

I. The Investigator's Report

[5] To reach a recommendation to place before the Commission, the Investigator applied the following process:

Investigation of an Alleged Denial of Banking Services

In assessing whether there is support for the complainant's allegation of discrimination in the provision of banking service, the following criteria will be considered:

Step 1:

- a)→What is the alleged service at issue?
- b) →Does the respondent provide the alleged service?
- c) →Is the service customarily available to the general public?
- d) →What is the negative treatment alleged and did it occur?
- e) →Is the alleged adverse differential treatment linked directly or indirectly to the complainant's colour, national or ethnic origin, or race?

Step 2:

- a)→Can the respondent provide a reasonable explanation for what happened that is not a pretext for discrimination on a prohibited ground? (Report, p. 2)

[6] Because there was no dispute that the Respondent provides the banking service at issue, which is customarily available to the general public, the Investigator focused on only two criteria: "what is the negative treatment alleged and did it occur" and "is the alleged adverse differential treatment linked directly or indirectly to the complainant's colour, national or ethnic origin, or race?"

A. *The Investigator's "Step 1" Analysis*

[7] In the Report under the heading "The Investigation", based on Ms. Peterkin's and the Respondent's preliminary submissions, the Investigator made the following findings of fact:

12. On March 28, 2014, at approximately 8:45 am, the complainant attended at TD Canada Trust Branch at 110 Yonge Street in Toronto. She withdrew \$5,000 in cash from her personal deposit account.

13. Between approximately 9:30 and 10:30 am, the complainant attended the respondent's branch at 890 Danforth Avenue in Toronto. She requested to withdraw \$5,000 in cash from her personal deposit account, but was advised by respondent employees that, due to the cash supply at the branch, they could provide her with \$2,500.

14. The complainant was asked to provide identification and enter her personal identification number (PIN) number.

15. The complainant states that she entered her access card into the machine at the wicket, keyed in the correct personal identification number (PIN) and presented five pieces of identification: old version of the Ontario health card, which was still valid; a University of Toronto student/library card; a credit card from another banking institution; two TD bank cards – the access card and a credit card. She provided the receipt from the earlier transaction at the Yonge street branch as well as the \$5,000 in cash that she had received there. She also wrote down her social insurance number.

16. The respondent advised the complainant that the identification that she presented was not acceptable.

17. The complainant believes that but for her personal characteristics, the respondent employees would have authenticated her identification with the information and documents that she presented. Additionally, although not her home branch, she states that she had banked at the branch on at least three occasions and some of the employees including Theoni Kardaras, the customer service representative who attended to her, were familiar with her as she tends to stand out as "six-foot tall black female". The complainant adds that when she entered the branch on March 28, 2014 Ms. Kardaras shouted to her "I love your coat!"

18. The complainant states that the identity theft or fraud to which the respondent refers in its defence was simply an error that she made in 2012 when attempting to enter her code for her TD credit card in an automated teller machine, an error about which she immediately advised the bank.

19. The parties agree that there was an argument and the police were contacted and came to the branch.

20. The parties agree that the complainant's identity was confirmed and that the respondent provided the complainant with \$2,500 in cash.

[Emphasis added]

(Report, p. 4)

[8] Under the heading "Analysis", the Investigator stated this key finding:

21. The evidence indicates that the respondent did not authenticate the complainant's identification with the identification and information that she provided, including her TD bank and credit card, and a correct PIN code. Although the complainant's believes [sic] that this treatment was due to her personal characteristics, it is unclear if there is a link.

[Emphasis added]

[9] As a result, the following "Conclusion" was reached:

22. As it is unclear if the treatment is linked to prohibited grounds, the analysis will proceed to Step 2.

[Emphasis added]

(Report, pp. 4-5)

B. *The Investigator's "Step 2" Analysis*

[10] As noted, Step 2 engaged the following question:

Can the respondent provide a reasonable explanation for what happened that is not a pretext for discrimination on a prohibited ground?

[11] The Respondent replied by providing a detailed factual statement on what happened on the day in question:

23. The respondent denies that the complainant's race or colour was a factor in the decision to require additional identification from her to identify her identity and denies that the events of March 28, 2014 amount to differential treatment, contrary to the Act.

24. The respondent explains that its retail banking personnel are trained to be vigilant to protect its customers against potential identity theft, as a result of which it must take appropriate steps to protect customers, notably if there are signs of potential identity theft, including multiple large cash withdrawals from the same account in a short time period, and at different branch locations. Additionally, retail banking personnel are trained to review notes in the Comments Service profile and to exercise caution if it has been previously noted that the customer may have been or may be at risk of being a victim of identity theft. These safeguards are in place for the protection of the respondent's customers.

25. The respondent explains that pursuant to the anti-money laundering regime, when the aggregate of all cash transactions amount to \$10,000 or more within a single day, the respondent considers this to be a large transaction. The policy specifically requires that transactions in the amount of \$5,000 or greater attract heightened scrutiny, requiring personnel to request additional, valid identification and to cross-reference it.

26. The respondent states that the Danforth branch personnel noted the following, which put them on alert with respect to the complainant's account:

a) The first withdrawal at the Yonge street branch had been made approximately one (1) hour

previously from the complainant's personal deposit account. Therefore the request for a withdrawal at the Danforth branch was the second large cash withdrawal requested from the complainant's account in a very short period of time at two separate locations;

b) A number of "alerts" were previously entered in the comments section of the complainant's account profile. One such alert, dated March 27, 2012, led the Danforth branch personnel to "use extreme caution" because the complainant was a "possible victim of identity theft".

27. The respondent states that Ms. Kardaras determined that it was appropriate to request identification from the complainant prior to allowing her to make the withdrawal. This was reasonable and was consistent with the respondent's policies, including the anti-money laundering regime, and the *Financial Services Terms* which apply to all retail banking customers regardless of race or any other enumerated ground.

28. In response to the request for identification, the complainant provided a University of Toronto student identification card, a credit card from another financial institution and an older version Ontario Health Card, which had no photograph. None were previously provided to the respondent or could be used [sic] verify the complainant's identity against the identification in the system. The complainant had previously provided the bank with her Ontario Driver's License and social insurance card as identification to verify her identity. Consistent with the policy and procedures, Ms. Kardaras requested the complainant provide either of these forms of identification to verify her identity.

29. The respondent states that Ms. Kalogiros, the Branch Manager, informed the complainant that the forms of identification she had provided were not acceptable. Her intention was to de-escalate the situation and pursue alternative means of verifying the complainant's identity, such as asking standard verification questions. Once the complainant's identity was verified, Ms. Kalogiros advised the complainant that the branch was only able to provide her with \$2,500 at that time based on the branch's available cash funds. The complainant agreed to withdraw this amount, and Ms. Kalogiros completed the withdrawal for the complainant.

Witnesses

30. Ms. Kalogiros states that on March 28, 2014, she acted in accordance with relevant regulatory and banking requirements in order to ensure that there was no potential fraud or identity theft. Ms. Kalogiros states that identification provided must be listed on the acceptable identification list, and must be current, not expired, with a photograph and a signature.

31. Ms. Kalogiros states that in cases when a customer request the withdrawal of an amount of up to \$2500, the respondent only requires the access card and PIN verification; however if employees are uncomfortable with the information provided they may request the customer to provide additional identification in accordance with the respondent's policies. When asked by the Commission Investigator if the fact that the complainant had provided the correct PIN number was not sufficient to authenticate her identification, Ms. Kalogiros noted that there are situations where access cards have been compromised and PIN numbers copied or stolen.

32. Ms. Kalogiros states that the complainant presented a health card without a photograph, a student card dated from 1982-1983 and two unsigned credit cards, one of which had expired and the other with a sticker on it which indicated that it had not been activated. When she reviewed the complainant's profile, she noted some red flags, one of which were comments on the complainant's profile indicating that she was a possible victim of identity theft. Ms. Kardaras had also expressed concerns to her about the recent history in the account which indicated a large deposit a few days prior to March 28, 2014 and a large withdrawal in the morning of March 28, 2014.

33. Ms. Kalogiros states that she advised the complainant that they would not be able to complete her transaction unless the complainant could provide other forms of identification. The complainant became irate and accused Ms. Kalogiros and Ms. Kardaras of racism towards her skin colour. The complainant's behaviour was such that she was interfering with other customers and the branch's daily activities. As a result, Ms. Kalogiros states that she used her authorization and provided the complainant with the amount of \$2500.

34. Ms. Kardaras states that she had concerns about the transaction at issue because the complainant did not provide a government issued identification, and because she was requesting a large withdrawal shortly after having made another large withdrawal at another branch that morning.

35. Ms. Kardaras states that although she recalls commenting to the complainant about her handbag (due to Ms. Kardaras' 'purse fetish'), she does not recall having attended to the complainant prior to March 28, 2014. Regardless of this, she was bound by the respondent's policies and procedures for the withdrawal of funds.

(CTR, pp. 5-7)

[12] The Investigator came to the following conclusion:

36. The evidence supports that the respondent's requirement to authenticate the complainant's identification was in accordance with standard practice and legal requirements and was not due to the complainant's race or colour. Once the complainant's identity was established the respondent allowed her to withdraw funds from her account.

[Emphasis added]

(CTR, p. 7)

37. The respondent has provided a reasonable explanation for what happened that is not a pretext for discrimination on a prohibited ground.

Summary

38. The respondent has provided a reasonable explanation for requiring the complainant to provide identification other than the forms that she presented and its actions were not a pretext for discrimination on a prohibited ground.

(CTR, p. 7)

[13] Ms. Peterkin and the Respondent were provided the opportunity to provide submissions in response to the Investigator's Report. Both filed responses, but they were not integrated into the Report sent to the Commission.

[14] By the Report dated January 17, 2017, the Investigator recommended that Ms. Peterkin's Complaint should be dismissed.

[15] In total, there were six documents before the Commission:

- 1) The Investigation Report dated January 17, 2017;
- 2) The Summary of Complaint Form;
- 3) The Complaint Form dated November 11, 2014;
- 4) The Complainant's Submission dated February 2017;
- 5) The Respondent's Submission dated February 7, 2017; and,
- 6) The Respondent's Submission dated March 21, 2017, in response to the Complainant's Submission.

(Certificate Pursuant to Rule 318(1)(a) of the *Federal Court Rules* dated January 29, 2018).

II. The Commission's Decision under Review

[16] By a decision dated May 2, 2017, the Commission dismissed Ms. Peterkin's Complaint pursuant to s.44(3)(b)(i) of the *Act*. The following is the entirety of the Commission's May 2, 2017 decision presently under review:

I am writing to inform you of the decision taken by the Canadian Human Rights Commission in your complaint (20140443) against The Toronto-Dominion Bank.

Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, to dismiss the complaint because having regard to all the circumstances of the complaint, further inquiry is not warranted.

[Emphasis added]

III. The Applicant's Primary Complaint with the Decision under Review

[17] The Applicant submits that the primary issue in this Application is whether the Commission breached procedural fairness and its statutory duty by failing to consider “all the circumstances” of the Complaint.

[18] Therefore, the Applicant submits that the appropriate standard of review for this issue is correctness. She argues that while the Commission has broad discretion, its process must be fair. In fulfilling its statutory obligation to investigate the Complaint, the Commission must be neutral and thorough.

[19] Section 44(3)(b) of the *Act* provides that:

On receipt of a report referred to in subsection (1), the Commission

[...]

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted [...]

[Emphasis Added]

[20] The Applicant argues that the Investigation Report in this case failed to consider “all the circumstances” as required by s.44(3)(b)(i) of the *Act* for two reasons. First, she argues that the Report only addressed one of two issues raised in her Complaint: it solely dealt with the Respondent's initial refusal to let her access the funds in her account, without dealing with the manner in which the Respondent treated her in the interaction. Second, she argues that it ignored

the evidence she gave, or if it did not ignore her evidence, rejected her credibility without saying so or providing any explanation for doing so. She submits that these are issues of procedural fairness, relating to the thoroughness of the investigation, and should be reviewed on a correctness standard.

[21] With respect to the Applicant's arguments regarding procedural fairness, the Respondent argues that rather than determining whether to review this issue on the basis of reasonableness or correctness, the essential question to address with respect to the Commission's Decision is whether the Investigator overlooked or failed to investigate "obviously crucial evidence" (*McIlvenna v Bank of Nova Scotia (Scotiabank)*, 2017 FC 699 at para 32). The Respondent confirms that fairness requires that the Commission's decision be both neutral and thorough (*Slattery v Canada (Commission)*, [1994] 2 FCR 574 at paras. 56-59, aff'd in (1996) 118 FTR 318 (FCA)), but argues that the Applicant has failed to point to any obviously crucial evidence that was ignored and that could not be addressed through the further submissions of the parties.

[22] However, regardless of the standard of review, I find that the Investigator overlooked or failed to investigate "obviously crucial evidence." I accept Ms. Peterkin's position on this issue for the reasons set out below.

[23] A critical feature of Ms. Peterkin's Complaint to the Commission is that her credibility was not placed in issue. As quoted above, the Investigator did not reject Ms. Peterkin's evidence

filed with her Complaint but proceeded to “Step 2” of the analysis because it was uncertain whether there was a link between her experience in the bank and a prohibited ground.

[24] With respect to the findings arising from Step 2, Counsel for Ms. Peterkin argues that the Investigator failed to not only cite, but gave no meaningful consideration to Ms. Peterkin’s evidence. Throughout her evidence in the Tribunal Record, Ms. Peterkin described the negative conduct she received from the Respondent’s employees to support her argument that she suffered adverse differential treatment on the prohibited ground of race. In the evidentiary passages that follow, the negative treatment is emphasised.

[25] There is no mention in the Report or the Commission’s decision of the following relevant excerpts of Ms. Peterkin’s own evidence, stated in the third person, supplied with the filing of her Complaint dated November 11, 2014:

10. Two uniformed officers attended at the Bank and waited outside while Ms. Peterkin continued to attempt – unsuccessfully – to negotiate the payout of the monies requested and properly due to her. One of these officers then spoke directly with the Bank manager in an attempt – which was unsuccessful – to resolve the matter.

11. Ms. Peterkin made several phone calls from the branch to supervisors at the TD head office. They requested to speak with various branch personnel, including the branch manager. All of the branch personnel refused to communicate with the supervisors, who were on the phone. In fact, one hung up on a TD head office supervisor before being able to speak with him.

12. Ms. Peterkin was never at any point requested to come into the branch manager’s office to discuss the matter in a confidential and private manner. On the contrary, discussions were held in full view and earshot of other bank customers at the branch counter, and the branch manager continued to refuse to permit Ms. Perkin [sic] to have access to the money in her account.

13. At a certain point, Ms. Peterkin was forced to wait outside with the police in the rain for a duration of approximately 2 ½ hours.

14. The bank eventually provided Ms. Peterkin with the \$2,500.00 she had been forced to accept in lieu of the \$5,000 originally requested. This only occurred, however, after she had been subjected to the afore-mentioned series of undignified, discriminatory, harassing and demeaning communications and conduct on the part of the branch manager and other branch personnel.

15. Ms. Peterkin subsequently contacted the head office of TD to ask that the incident be remedied. The TD head office refused her requests, however.

16. TD has also failed to provide any reasonable explanation for the branch's conduct toward Ms. Peterkin.

17. The reason for TD's actions was the fact that Ms. Peterkin is black – particularly given that she had attended at another TD branch earlier that day and was able without difficulty to withdraw \$5,000.00 from her account. It is inconceivable that a white person would have been treated in this manner without a satisfactory explanation.

Conclusion

18. TD's denial of banking services and denial of access to banking services to Ms. Peterkin because of her race, and its adverse differential treatment of her when she attempted to access the monies in her bank account, also on account of her race, constitute a violation of ss. 3 and 5 of the *Canadian Human Rights Act*.

19. Moreover, TD's discriminatory treatment and public embarrassment of her in front of other branch customers constitutes harassment on the basis of race, contrary to ss. 3 and 14 of the *Canadian Human Rights Act*.

20. As a result of TD's discriminatory treatment and public embarrassment and harassment of Ms. Peterkin, she has experienced significant mental distress. She has experienced this treatment as an attack on her sense of self and on her identity as a human being.

(CTR, pp. 11-13)

[Emphasis added]

[26] There is no mention in the Report or in the Commission's decision of the following statement that Ms. Peterkin provided in reply to the Investigator's decision sent to her and the Respondent for comment:

#37 CONCLUSION I disagree the Respondent provided a reasonable explanation.

The TD Bank attempts to deny and redefine my experience. The CHR Commission is aware of the difficult challenge people of colour endure proving racism. With all due respect, there exists no substantive policy to deal with racism.

THE TEST " Was I singled out for discrimination because of my race and or colour? The CHR Commission decision on January 19, 2017 determined this claim difficult to acknowledge.

If the CHR Commission asserts my skin colour was irrelevant, and the TD Bank was only trying to "protect" my account. Why then was I not treated as any "other" TD Bank client? Why was the decision of determining my identity not treated similar to that of any "other" 17 year client of the TD Bank? Any perceived suspicion by the TD Bank could have been addressed by referencing any of the many accounts I held with this institution.

I held a Chequing account, Savings account, 2 Visa accounts and a bill payment portfolio with TD Bank. I opened both my son and daughters TD Visa accounts. Both accounts were accepted upon my good history with TD Bank. At the time of the incident I was actively sharing one of my two visa accounts with my daughter.

The TD Bank treated me less favourably than someone not my race would have been treated in the same circumstance. I was racially profiled and harassed. There is no other reason for the humiliation I received by TD Bank on March 28, 2014. I was offered NO accommodation for discovery by TD Bank. Instead, I was shamefully left outside for over two hours with the Police Department.

When a "suspicious" bank client demands the Police are they not declaring innocence of an intent to defraud? I ask the CHR Commission reconsider the merits of this claim.

An elderly Black woman withdrawing \$5000.00 plus \$5000.00 must be attempting to defraud the TD Bank, she must be treated suspiciously even with Police presence, and insistence it is her

account. The denial of her funds, publicly screamed at her across her bank.

I implore the CHR Commission allow the CHR Tribunal an opportunity to review my experience. This is an "Unprecedented" case and no doubt should be considered an obvious example of differential treatment by a Banking Institution in violation of my Human Rights.

This incident should not go Unacknowledged. The Respondent attempts to dismiss evidence of differential treatment. However, if they firmly believe they treated me similar to any other client with the same circumstances. Why was I offered a settlement prior to Superior Court.

The responsibility of the CHR Commission is to not only demonstrate concern regarding racism claims, but to acknowledge evidence of differential treatment directed towards people of colour.

The TD Bank acted upon racist beliefs and practices which directly resulted in my being treated "differently". My demanding the Police had no bearing on my innocence. I was still perceived a potential thief.

This claim screams to be reconsidered by the CHRC Commission and heard by the CHR Tribunal. People of colour share these experiences daily in banking institutions in Canada. Some reported, some not. (See "Banking while Black") I referred to similar racist incidents that people of colour experienced at Bank of Montreal, Bank of Nova Scotia, Toronto Dominion Bank etc. Systemic Racism is prevalent. It has been a standard in our so called "Democracy". Currently existing policies addressing differential treatment do not support the "victim".

[Emphasis added]

(CTR: Complainant's Submission dated February 17 pp. 20-23)

IV. Conclusion

[27] The Investigator and the Commission determined Ms. Peterkin's Complaint apparently without any meaningful consideration of her initial Complaint or her submissions in response to

the Investigator's Report. In particular, her final argument provided critical factual content and perspective with respect to the way she was treated by the bank manager on the day in question. Among other issues, Ms. Peterkin alleged that she was screamed at by the bank manager, that she was not called into a private office to discuss the matter, and that she was required to wait outside in the rain while the police dealt with the matter. In my opinion, that evidence is obviously crucial as it goes to the heart of her Complaint. Yet, there is no discussion by the Investigator or the Commission of the Applicant's evidence regarding the way in which the bank employees treated her in their request for further documentation. Rather, the entire focus is on whether the requirement for identification was valid.

[28] I find that, whether Ms. Peterkin's detailed personal statements were overlooked or disregarded by the Investigator and the Commission, the result is the same: a breach of a duty of fairness to consider all of her evidence. I agree with Counsel for the Applicant that by virtue of s.18.1(4)(b) of the *Federal Courts Act*, the Commission's unfair decision-making constitutes reviewable error. As a result, the Commission's decision must be set aside and Ms. Peterkin's Complaint must be sent back to the Commission for determination.

[29] The question that now arises is how Ms. Peterkin's Complaint can be fairly determined by the Commission.

[30] The Federal Court of Appeal has held that the only errors that will justify court intervention on review are "investigative flaws that are so fundamental that they cannot be remedied by the parties' further responding submissions" (*Sketchley v Canada (Attorney*

General), 2005 FCA 404 at para 38). In my opinion, this case is such a case: the investigative flaws are of such a calibre that further argument alone on the current evidentiary record will not produce a productive result. In my view, only a hearing will achieve this objective.

[31] As an outcome to the present judicial review Application, apart from ordering that Ms. Peterkin's Complaint be referred back to the Commission for further consideration, I have no authority to direct that a hearing be held. Thus, I must leave it up to the Commission to decide how to properly discharge its obligation to provide a fair and just result.

JUDGMENT

THIS COURT'S JUDGMENT is that, for the reasons provided, the decision under review is set aside, and the matter is referred back to the Commission for determination.

"Douglas R. Campbell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-833-17

STYLE OF CAUSE: ELAINE PETERKIN v TORONTO DOMINION BANK
TD CANADA TRUST

PLACE OF HEARING: TORONTO, ONTARIO

DATES OF HEARING: JANUARY 23, 2018 AND APRIL 16, 2019

JUDGMENT AND REASONS: CAMPBELL J.

DATED: MAY 3, 2019

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