

Federal Court



Cour fédérale

Date: 20190628

Docket: T-1539-18

Citation: 2019 FC 878

Ottawa, Ontario, June 28, 2019

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

PEDRO PEDROSO

Applicant

and

WESTJET AIRLINES

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application by Mr. Pedro Pedroso, the Applicant, for judicial review of the August 9, 2018 decision of the Canadian Human Rights Commission (the Commission) to dismiss his complaint against the Respondent, WestJet Airlines, alleging discrimination based on the Applicant's age.

[2] The Applicant claims that the Respondent discriminated against him based on his age by failing to hire him for at least two job postings. The Commission's decision states that "it does not appear that the [R]espondent failed to hire the [Applicant] based on age." The Applicant requests that the Court quash the Commission's decision and refer his complaint back to the Commission, to be considered along with additional records dating from December 2018, which he attached to his Affidavit. Mr. Pedroso represented himself on this application.

[3] The Respondent asks that this application be dismissed, with costs.

[4] For the reasons that follow, the application is dismissed.

II. **Background**

[5] At the time of his complaint to the Commission, Mr. Pedroso was employed by a firm contracted to perform airplane grooming services at the Ottawa International Airport. Mr. Pedroso applied for a bilingual cabin crew member position with the Respondent in May and June 2016. His June 2016 application was selected for further processing. On July 14, 2016, the Respondent invited Mr. Pedroso for an in person interview as part of a hiring event. The email invitation indicated that the Applicant was required to bring a copy of his valid Canadian passport or copies of his valid passport and permanent resident card.

[6] The Applicant attended the hiring event on July 22, 2016. He checked in, and someone reviewed his Canadian passport to confirm it was valid. The Applicant then proceeded to the hiring event.

[7] The first portion of the event was an in-person interview with Mr. Raj Kular. Mr. Kular thought the Applicant met the required criteria and advanced him to the next phase of the hiring event, which was a group process with other potential candidates. The staff who assessed the group process did not assess the Applicant as having the skills other candidates did or as being a “good fit” for Westjet.

[8] The Respondent advised the Applicant around July 26, 2016 that he had not been successful. The Applicant filed his Commission complaint on January 25, 2017 claiming discrimination based on age, contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA]. The Applicant sought relief in the form of a job with the employer.

[9] In his complaint, Mr. Pedroso stated that he had also applied for a Guest Service Ambassador position with Westjet. Initially, he was unable to provide this application or a number for the job posting. The Applicant had apparently withdrawn that application and cancelled his profile in the Respondent’s hiring system. For that reason, the Respondent was not able to confirm the details of this further application. Because this information was not available from either party, the Commission examined only the Cabin Crew application as part of the Applicant’s complaint.

[10] The Applicant’s complaint states that he was treated differently based on his age, and specifically denied the job because he was then 60 years old and the Respondent thought he was “too old for the job.” The Applicant’s complaint centers on the fact that he was asked to bring a

photocopy of his passport to the interview, which means that the Respondent would then know his birthdate and, therefore, his age.

[11] The Applicant and the Respondent both filed submissions with the Commission. The Commission also interviewed the Applicant, the recruiter for the Cabin Crew position and Mr. Kular. Another Cabin Crew member who was also involved in the hiring process no longer worked for Westjet and could not be interviewed.

[12] The Respondent's submissions to the Commission state that a copy of a valid passport is required as a *bone fide* occupational requirement at that stage of the hiring process because of the Cabin Crew member position's extensive travel requirement. The Respondent states that requiring the document early avoids wasting time and resources on candidates who do not meet the position's requirements. The Respondent also advised the Commission that the staff member who checks candidates' passports does not review the date of birth and is not normally involved in the hiring process itself.

[13] According to statistics provided by the Respondent, it received 11,715 Cabin Crew applications in 2016 and invited approximately 1,400 candidates to hiring events. The Respondent met with approximately 980 candidates at 56 separate hiring events and hired 398 Cabin Crew members. Eighteen of these successful candidates were over the age of 50. None were over the age of 60.

[14] On May 14, 2018, the Commission concluded its investigation and produced its Investigation Report. The Report states that the Applicant had not put forward any information other than his age to suggest that he had not been hired because of a prohibited ground. The Report notes that there was no evidence of discrimination.

[15] The Report also notes that while requesting information that could reveal a candidate's age before an offer of employment does not appear to be a "best practice," an employer would nevertheless have a general idea of candidates' age in their in-person interview. The Report also notes that in the Applicant's case, a person other than the interviewer verified the passport, and the individuals who made the hiring decisions did not have access to it.

[16] Both parties provided submissions after receiving the Report. In response to the report, the Applicant took exception to the Respondent's assertion that they could not produce documentation for his Guest Service Ambassador application. He did not make any relevant submissions on how he was discriminated against based on his age, but stated that the Respondent's hiring practices could be different so as to not be discriminatory.

[17] In response to the report, the Respondent provided additional details about their selection process for Cabin Crew members, which differs from normal hiring because of the interest in the position and the number of applications they receive. The Respondent also provided additional information on why it required a passport, namely to advise holders of non-Canadian passports of the visas they would need to obtain to be eligible for the position.

[18] The Applicant provided further submissions after the Respondent's submissions. For the first time, according to the record, the Applicant stated that he witnessed Mr. Kular holding a file folder with all his documents when Mr. Kular called him into the interview. The Applicant further stated that Mr. Kular gave his document a quick look or a quick glimpse.

[19] The Respondent responded to these submissions, stating that the complaint was about whether the Applicant had been discriminated against based on age, not about the Respondent's hiring practices overall. The Respondent maintained that the Applicant had not provided any evidence that he was discriminated against based on his age.

[20] On August 9, 2018, after considering the Investigation Report and the responding submissions, the Commission dismissed the Applicant's complaint. The letter sent to the Applicant simply states that it did not appear the Applicant was not hired because of his age. The Report forms part of the reasons for the Commission's decision.

III. Issues

[21] As a preliminary matter, the Respondent has drawn the Court's attention to documents in the Applicant's record that are not in the Certified Tribunal Record (CTR) and also documents drafted in December 2018 that clearly post-date the decision challenged. The Respondent objects to the Applicant's introduction of fresh evidence, which is not provided for in the *Federal Courts Rules*, SOR/98-106: *Via Rail Canada Inc v Canada (Human Rights Commission)*, [1998] 1 FC 376, 135 FTR 214 (TD).

[22] As a general principle, the record on judicial review should be limited to the materials that were before the Commission: *International Relief Fund for the Afflicted and Needy (Canada) v Canada (National Revenue)*, 2013 FCA 178 at para 9. There are exceptions to this principle, notably when the additional evidence is required to establish a lack of procedural fairness. It was not necessary in this instance to consider the additional evidence for that purpose as the Applicant's allegations were based on the Commission's failure to consider his submissions. Accordingly, the additional materials were not given any weight in this application's determination.

[23] Having considered the parties' submissions, the issues for the Court's determination are the following:

- A. What is the appropriate standard of review?
- B. Did the Commission breach the Applicant's procedural fairness?
- C. Is the Commission's decision reasonable?

IV. **Relevant Legislation**

[24] The relevant CHRA sections are reproduced below:

Prohibited grounds of discrimination

3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex,

Motifs de distinction illicite

3 (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique,

sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Employment

7 It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

on a prohibited ground of discrimination.

Complaints

40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

Commission to deal with complaint

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

la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.

Emploi

7 Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

a) de refuser d'employer ou de continuer d'employer un individu;

Plaintes

40 (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

Irrecevabilité

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 :

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

(c) the complaint is beyond the jurisdiction of the Commission;

c) la plainte n'est pas de sa compétence;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

(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.

Designation of investigator

43 (1) The Commission may designate a person, in this Part referred to as an "investigator", to investigate a complaint.

Nomination de l'enquêteur

43 (1) La Commission peut charger une personne, appelée, dans la présente loi, « l'enquêteur », d'enquêter sur une plainte.

Report

44 (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

[Action on receipt of report]

(3) 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

Rapport

44 (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

[Suite à donner au rapport]

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

b) rejette la plainte, si elle est convaincue :

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

V. Analysis

A. *Standard of review*

[25] The Applicant provided no submissions on this issue. The Court is in agreement with the Respondent that the Commission's decision is reviewable on the reasonableness standard. The decision is reasonable if it falls within a range of possible, acceptable outcomes, defensible in respect of the facts and the law: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 11 [*Newfoundland Nurses*], quoting

Dunsmuir v New Brunswick, 2008 SCC 9 at paras 47–48. In carrying out this review, the Court must show the Commission a high degree of deference: *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113 at 137, 159 FTR 160 (CA); *McConnell v Canadian Human Rights Commission*, 2004 FC 817 at para 86.

[26] Issues of procedural fairness should be reviewed on the correctness standard: *Mission Institution v Khela*, 2014 SCC 24 at para 79. Sufficiency of reasons is not a stand-alone basis for review; so long as the reasons allow the Court to understand why the Commission decided as it did, the reasons are sufficient: *Newfoundland Nurses*, above at para 14. See also *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 for a recent restatement of the approach to be taken to procedural fairness.

B. *Did the Commission breach the Applicant's procedural fairness?*

[27] In essence, the Applicant submits that the Commission breached his procedural fairness rights by failing to consider any of his submissions. This allegation appears to be based on the letter accompanying the CTR, which states that the CTR contains “the documents that were before the Canadian Human Rights Commission when it rendered its decision.” These documents are limited to “the complaint form, the Investigation Report, and subsequent submissions by the parties,” and do not include “documents obtained as part of the gathering of facts and evidence in the complaint process.” The Applicant interprets this to mean that his materials were not considered and that the investigation was not sufficiently thorough.

[28] The Applicant misunderstands the Commission's process in assessing complaints. The process, outlined in the CHRA, calls for the investigator to review all the materials submitted and for the Commission to review the report generated by the investigator's review. An investigation is thorough so long as it is not clearly deficient and does not fail to assess any obviously crucial evidence: *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 at 600, 605, 73 FTR 161 (TD) [*Slattery*].

[29] In this instance, the investigator interviewed the relevant persons, including persons who were present during the hiring event. The Report details the investigator's assessment of the Respondent's hiring process and her consideration of the Applicant's application in particular.

[30] The investigation does not need to be perfect; the Commission must balance the Applicant and the Respondent's procedural fairness interests with the Commission's interest in "maintaining a workable and administratively effective system": *Slattery*, above at 600; *Wong v Canada (Public Works and Government Services)*, 2017 FC 633 at para 40; *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113 at para 39. There is no requirement under the CHRA that, in determining whether to dismiss the complaint, the Commission receive and review all of the Applicant's original materials and submissions.

[31] The Report makes clear that the investigator received, reviewed and assessed the materials the Applicant claims should have been before the Commission. The Report notes the Applicant's contentions that the group process assessors judged him on his ability to have fun, and that they hired candidates with whom they would most enjoy having a beer or being stuck in

an airport. This is information that was not contained in the Applicant's complaint but was contained in some of the further submissions he made to the investigator. Even if the Applicant had also disclosed this information to the investigator in the investigative interview, it is clear that the investigator considered his submissions. Thus, it is clear that his submissions were considered and included in the Report, as is the Commission's practice and as is outlined in the CHRA.

[32] It is also notable that the Respondent, wanting to ensure that some of its earlier submissions were before the Commission, reiterated them in its response to the Report. The Applicant, who did not avail himself of that possibility, cannot now claim the investigation was not sufficiently thorough on that basis. He has failed to demonstrate that the investigation was clearly deficient or that the investigator failed to assess any obviously crucial evidence, as required by *Slattery*. As such, the investigation was sufficiently thorough, and there was no breach of the Applicant's procedural fairness.

C. Is the Commission's decision reasonable?

[33] The Applicant submits in his written representations that the Commission's decision is unreasonable because the investigator failed to apply the *Meiorin* test established by the Supreme Court of Canada: *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1. The Applicant further submits that the decision is unreasonable because the investigator did not properly assess *bona fide* occupational requirements and the Commission's reasons are not sufficiently transparent, justifiable, or intelligible.

[34] The Applicant was unable to assist the Court at the hearing with any justification to apply the *Meiorin* test and it was not made out from his written representations. The test would only apply when a *prima facie* finding of discrimination had been established. Absent such a finding, as here, no requirement arose to assess the duty to accommodate: *Health Employers Assn of BC (Kootenay Boundary Regional Hospital) v BC Nurses' Union*, 2006 BCCA 57 at para 35, leave to appeal refused, 31417 (24 August 2006).

[35] The Applicant's arguments amount to a bald assertion, without support, that the decision is unreasonable. As the Report clearly outlines, the investigator did not find any evidence to suggest that the Applicant was not hired because of his age. In fact, the Report specifically notes that the Applicant did not support his complaint in any way. As this is the case, the Commission's reasons are sufficient. The decision was reasonable and there is no basis upon which this Court can intervene.

VI. Costs

[36] The Respondent has requested costs. The Applicant did not provide the Court with any reason to conclude that costs should not follow the outcome. They will be awarded according to the normal scale.

JUDGMENT IN T-1539-18

THIS COURT'S JUDGMENT is that:

1. the application is dismissed; and
2. costs are awarded the Respondent to be assessed on the normal scale.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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