

Federal Court



Cour fédérale

Date: 20211008

Docket: T-250-20

Citation: 2021 FC 1057

Ottawa, Ontario, October 8, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

RAPHAËL COHEN

Applicant

and

**PUBLIC SERVICES AND PROCUREMENT
CANADA**

Respondent

JUDGMENT AND REASONS

[1] Mr. Cohen offered his services to Public Services and Procurement Canada [the Department], but, after an interview, no offer of employment was made to him. He complained to the Canadian Human Rights Commission [the Commission] that this was the result of discrimination on the basis of age. The Commission decided not to deal with Mr. Cohen's claim. Mr. Cohen now applies for judicial review of the Commission's decision.

[2] I am dismissing Mr. Cohen's application. The Commission's decision was reasonable. There was simply no evidence, beyond mere speculation, of age discrimination. Thus, the Commission could reasonably dismiss the complaint pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act].

I. Background

[3] Mr. Cohen has extensive experience with IT analysis and project management. After reading in the media about the issues with the federal government's Phoenix pay system, he reached out to the office of the Minister of Public Services and Procurement and Accessibility, to offer his professional services.

[4] As a result, he was invited to a phone meeting with three directors of the Department to discuss his expertise and experience. The meeting took place on November 19, 2018. Mr. Cohen alleges that the directors immediately offered him a 90-day contract, subject to verification of his references.

[5] Two weeks later, one of Mr. Cohen's references confirmed to him that she had spoken with one of the directors. On December 18, 2018, after Mr. Cohen made inquiries, an official of the Department simply invited him to submit an application through the online government jobs application system. The Department never made any formal offer of employment to Mr. Cohen. The alleged verbal contract never materialized.

[6] Mr. Cohen made a discrimination complaint to the Commission. He alleged that the only conceivable reason why he was not offered employment was that, in the course of verifying his references, the directors inferred his age—he was 71 years old at the time.

[7] A Human Rights Officer of the Commission evaluated Mr. Cohen's complaint and issued a report recommending that the Commission not deal with the complaint. The Officer determined that Mr. Cohen's allegations were bald assertions unsupported by facts and therefore did not provide a reasonable basis for concluding that the Department's conduct was discriminatory.

[8] After Mr. Cohen responded to the Officer's report, the Commission adopted the conclusions of the latter in its decision dated January 22, 2020.

II. Analysis

[9] The merits of the Commission's decision are assessed according to a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Love v Canada (Privacy Commissioner)*, 2015 FCA 198 at paragraph 20 [*Love*]. This means that the Court must determine whether the Commission's decision was reasonable based on its reasons and its treatment of the evidence. In this regard, the assessment must focus on the evidence and submissions before the Commission; an applicant may not file additional evidence on judicial review: *Love*, at paragraph 17.

[10] Mr. Cohen's fundamental submission is that the Commission applied an unfair and unattainable standard of proof in evaluating his claim. As perpetrators of discrimination are

unlikely to provide direct evidence of their motives, one must necessarily rely on inferences.

Because of his stellar employment record and excellent references, Mr. Cohen infers that age discrimination is the only possible reason why he was not offered employment.

[11] The Commission relied on paragraph 41(1)(d) of the Act to dismiss Mr. Cohen’s claim:

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

...

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

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 :

...

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

[12] The Commission found that Mr. Cohen’s claim was frivolous because the evidence he submitted did not establish a reasonable basis for his claim. The test for determining whether a complaint is frivolous within the meaning of paragraph 41(1)(d) of the Act is “whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed”: *Hérolde v Canada (Revenue Agency)*, 2011 FC 544 at paragraph 35. Thus, a claim is frivolous where a claimant does not allege a link between the impugned conduct and a prohibited ground of discrimination or does not “set out any material facts in support of such a link”: *Love*, at paragraphs 23–26. As the Federal Court of Appeal mentioned in *Gregg v Air Canada Pilots Association*, 2019 FCA 218 at paragraph 7, “A complainant bears the onus of providing some credible evidence to satisfy the Commission that their complaint has merit.”

[13] Given these principles, the Commission's finding that Mr. Cohen's allegations are bald assertions unsupported by any facts is reasonable. Mr. Cohen's inference that his age was the only reason the Department did not offer him employment is mere speculation. Even accepting that the directors initially expressed interest or even made a verbal offer, the verification of Mr. Cohen's references may have revealed that he did not have the requisite skills set for the position contemplated. It may also be that the Department changed its plans for dealing with the Phoenix system while the hiring process was underway and that Mr. Cohen's services were no longer needed, or that a budget was no longer available. All of this could have happened despite what Mr. Cohen describes as his stellar employment record. While unfortunate, the fact that no reasons were given to Mr. Cohen does not justify an inference that discrimination took place.

[14] At the hearing, Mr. Cohen submitted that the content of his references could not have been a reason for the Department's decision not to employ him, because in Quebec employers are prohibited by article 2096 of the *Civil Code of Québec* from providing references beyond a confirmation that an employee was employed for a given time. Article 2096 states:

<p>2096. Upon termination of the contract, the employer shall furnish to the employee, at his request, a certificate of employment, showing only the nature and duration of the employment and indicating the identities of the parties.</p>	<p>2096. Lorsque le contrat prend fin, l'employeur doit fournir au salarié qui le demande un certificat de travail faisant état uniquement de la nature et de la durée de l'emploi et indiquant l'identité des parties.</p>
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[15] Mr. Cohen's submission is based on a misreading of article 2096. This provision requires employers to provide a certificate of employment. It does not prohibit them from providing a more fulsome reference if the employee so wishes: see, in this regard, Ministère de la

Justice, *Commentaires du ministre de la Justice - Le Code civil du Québec*, t. 2, Québec, Les Publications du Québec, 1993. Indeed, upon Mr. Cohen's reading of article 2096, his references could not have provided the highly positive appreciation on which his whole complaint is premised.

[16] Mr. Cohen also alleges that the Commission should have investigated the matter with the Department before rejecting his complaint. The Federal Court of Appeal, however, made it clear that the dismissal of a complaint pursuant to section 41 of the Act is a preliminary step that precedes any investigation: *Keith v Canada (Correctional Service)*, 2012 FCA 117 at paragraph 50. There was no procedural impropriety in the manner in which the Commission dealt with Mr. Cohen's complaint.

[17] In his written submissions, Mr. Cohen suggests that Commission staff were biased because they discouraged him from filing a complaint. At the hearing, he did not emphasize this issue. The evidence does not establish that Commission staff were biased. In any event, this did not prevent Mr. Cohen from filing a complaint.

III. Disposition

[18] As the Commission's decision was reasonable and no breach of procedural fairness occurred, the application for judicial review will be dismissed. I also note that Mr. Cohen is seeking damages, but damages are not available on an application for judicial review. The respondent is seeking its costs. In my view, an amount of \$250 is reasonable in this regard.

JUDGMENT in T-250-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The applicant is ordered to pay costs to the respondent in the amount of \$250, inclusive of taxes and disbursements.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-250-20

STYLE OF CAUSE: RAPHAËL COHEN v PUBLIC SERVICES AND
PROCUREMENT CANADA

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: SEPTEMBER 15, 2021

JUDGMENT AND REASONS: GRAMMOND J.

DATED: OCTOBER 8, 2021

APPEARANCES:

Raphaël Cohen

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Benjamin Chartrand (articling student)
Ludovic Sirois

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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FOR THE RESPONDENT