Date: 20071221

Docket: T-552-07

Citation: 2007 FC 1355

Ottawa, Ontario, the 21st day of December 2007

PRESENT: THE HONOURABLE MR. JUSTICE ORVILLE FRENETTE

BETWEEN:

DOMINIC MORIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application for judicial review by Dominic Morin (the applicant) from a decision by the Human Rights Commission (the Commission) not to deal with the complaint filed by the applicant against his employer Fisheries and Oceans Canada (FOC), on the ground that the complaint was inadmissible within the meaning of paragraph 41(1)(*d*) of the *Canadian Human Rights Act* (the CHRA).

FACTS

[2] The applicant was hired by FOC in March 1999 as a seasonal fishery officer (level GT-01) for the region of Ste-Anne-des-Monts in the Gaspé. The position of fishery officer requires an extended training period in which the employee remains on probation until the full level of the position is reached, namely officer GT-03. The applicant was promoted to level GT-02 on July 29, 1999. On July 25, 2001 the applicant was dismissed while still on probation.

[3] In August 2002 the applicant filed a complaint with the Commission, alleging that he had been dismissed because of his drinking problem and so was the subject of discrimination within the meaning of paragraph 7(*a*) of the CHRA. In September 2003 the Commission informed the applicant that an allegation of discrimination in the workplace should be the subject of a grievance before the Public Service Staff Relations Board (the PSSRB).

REASONS FOR DECISION OF GRIEVANCE ADJUDICATOR

[4] The hearing took place over a period of five days with the parties represented by counsel. The applicant testified and the employer called two witnesses.

[5] The hearing revealed, *inter alia*, the following facts:

1- the applicant had alcohol abuse problems which, following a motor vehicle accident, led to two arrests and convictions for driving an automobile while his

faculties were impaired by alcohol, namely in 2000 and 2001, and resulting in the suspension of his driving licence for a three-year period: he did not notify his supervisor of these convictions and continued to drive an FOC automobile;

2- he denied his drinking problem at the time, but he eventually sought and successfully completed treatment at the Pavillon Chaleurs alcohol rehabilitation centre;

3- he was suspended from work for serious breaches, such as inadequate note-keeping and reporting and significant breaches involving the storage of ammunition and firearms;

4- he had problems of absenteeism: he failed to attend a compulsory training session and a disciplinary hearing;

5- there were also significant deficiencies in his work performance.

[6] On March 24, 2006, in a 15-page decision, PSSRB grievance adjudicator Sylvie Matteau dismissed the applicant's grievance on the ground that his dismissal took place during his training period for reasons relating to his inability to perform the duties of his position and that FOC had not discriminated against him.

[7] She dismissed the applicant's arguments that it was a disguised disciplinary dismissal owing to his drinking problem and that the employer had offered no reasonable accommodation.

[8] On May 10, 2006 the applicant notified the Commission that he had exhausted all preliminary remedies. The Commission accordingly assigned an investigator to the matter. On November 16, 2006 the investigator submitted to the Commission her [TRANSLATION] "section 41 analysis report" (the analysis report).

[9] I consider it worthwhile to summarize the report by investigator Pascale Lagacé dated November 16, 2006.

[10] She began by summarizing the applicant's complaint, as follows:

> [TRANSLATION]
>
> 1. The complainant, who identified himself as being dependent on alcohol, alleged that the mis-en-cause discriminated against him by refusing to accommodate him and terminating his employment on account of his disability.

She then referred to the PSSRB decision dismissing the complaint on March 24, 2006, in which the same questions raised by the applicant before the grievance adjudicator in the case at bar were discussed and decided.

[11] The investigator then analyzed all the facts in the matter as well as the applicable law, concluding that the applicant had raised all the same arguments as those dismissed by the PSSRB decision of March 24, 2006. Consequently, she recommended that the latest complaint not be dealt with because it [TRANSLATION] "was based on the same facts as the grievance decided by the PSSRB and the grievance adjudicator".

IMPUGNED DECISION

[12] On February 20, 2007 the Commission adopted the investigator's recommendation and concluded that the applicant's complaint was inadmissible within the meaning of paragraph 41(1)(*d*) of the CHRA, namely that it was "trivial, frivolous, vexatious or made in bad faith," on the ground that the proceeding before the grievance adjudicator had already disposed of the allegation of discrimination against FOC and all the disputed points resulting from Mr. Morin's complaint, including that of reasonable accommodation measures. It also referred to the two remedial plan offers made to Mr. Morin, which had failed to remedy his deficiencies and work problems.

PARTIES' ARGUMENTS

[13] The applicant alleged that the applicable standard of review was that of correctness regarding the portion of the Commission's decision not to deal with the complaint, and reasonableness regarding the portion of the Commission's decision determining that the question of discrimination had been dealt with by the grievance adjudicator. In both cases, the applicant submitted that this Court should intervene to set aside the Commission's decision.

[14] The applicant argued that it was settled law that the Commission could not simply refuse to hear a complaint solely on the basis that some other jurisdiction had already ruled on an allegation contained in the complaint. In this regard, the applicant relied on the judgment of Tremblay-

Lamer J. in *Boudreault v. Canada (Attorney General)*, [1995] F.C.J. No. 1055, and the Federal Court of Appeal's judgment in *Canada Post Corporation v. Barrette*, [2000] F.C.J. No. 539.

RELEVANT LEGISLATION

Canadian Human Rights Act (R.S.C. 1985, c. H-6)

Commission to deal with complaint	**Irrecevabilité**
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 :
(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,	d) la plainte est frivole,

frivolous, vexatious or made in bad faith; or

(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.

vexatoire ou entachée de mauvaise foi;

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.

Commission may decline to deal with complaint

(2) The Commission may decline to deal with a complaint referred to in paragraph 10(a) in respect of an employer where it is of the opinion that the matter has been adequately dealt with in the employer's employment equity plan prepared pursuant to section 10 of the Employment Equity Act.

Refus d'examen

(2) La Commission peut refuser d'examiner une plainte de discrimination fondée sur l'alinéa 10a) et dirigée contre un employeur si elle estime que l'objet de la plainte est traité de façon adéquate dans le plan d'équité en matière d'emploi que l'employeur prépare en conformité avec l'article 10 de la Loi sur l'équité en matière d'emploi.

Meaning of "employer"

(3) In this section, "employer" means a person who or organization that discharges the obligations of an employer under the Employment Equity Act.

Définition de « employeur »

(3) Au présent article, «employeur » désigne toute personne ou organisation chargée de l'exécution des obligations de l'employeur prévues par la Loi sur l'équité en matière d'emploi.

Report

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation,

Rapport

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

submit to the Commission a report of the findings of the investigation.

l’enquête.

Action on receipt of report

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

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

it shall refer the complainant to the appropriate authority.

Suite à donner au rapport

(2) La Commission renvoie le plaignant à l’autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

a) que le plaignant devrait épuiser les recours internes ou les procédures d’appel ou de règlement des griefs qui lui sont normalement ouverts;

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

Idem

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

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

(i) that, having regard to all the circumstances of

Idem

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

a) peut demander au président du Tribunal de désigner, en application de l’article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) d’une part, que, compte tenu des

the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

(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, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

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,

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

Notice

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

(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and

Avis

(4) Après réception du rapport, la Commission :

a) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des paragraphes (2) ou (3);

(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).	b) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3).

[15] The applicant alleged this his complaint did not meet the criteria of CHRA paragraph 41(1)(*d*) because the grievance adjudicator had not ruled on the question of whether FOC had fulfilled its duty of accommodation. According to him, the question before the adjudicator was whether FOC had acted in bad faith or had used a subterfuge to justify the dismissal. The applicant further submitted that the reasons for the dismissal contained material related not only to his performance, but also his drinking problem. He therefore alleged that there was evidence that FOC had discriminated against him.

[16] Finally, the applicant argued that the investigator had limited herself to the grievance adjudicator's decision as a basis for her recommendation and had not analyzed all the facts of the case. In particular, she had not thoroughly considered the question of whether FOC had tried to accommodate the applicant. Accordingly, the applicant alleged that no jurisdiction had determined whether there had in fact been any attempt made to accommodate him, necessarily leading to an inference that the complaint was not trivial, frivolous, vexatious or made in bad faith within the meaning of paragraph 41(1)(*d*) of the CHRA.

[17] The Commission therefore should have proceeded under section 44 of the CHRA and reviewed Mr. Morin's complaint, even if his chances of success on the merits were slim.

[18] The respondent alleged that the standard of review applicable to the Commission's decision not to deal with the complaint was that of patent unreasonableness and that there was no basis for intervention by this Court in the case at bar. Alternatively, the respondent submitted that even if this Court found that the standard of review was that of reasonableness, its intervention would still be unwarranted since the Commission had made no reviewable error.

[19] The respondent alleged that it was reasonable for the Commission to determine that the complaint was inadmissible for being trivial, frivolous, vexatious or made in bad faith because the allegations of discrimination had first been dismissed by the grievance adjudicator for lack of supporting evidence.

[20] The respondent further submitted that, based on the investigator's report, the grievance adjudicator's decision and the submissions of the parties, the Commission had fully discharged its duty to ensure whether the complaint deserved to be dealt with. In the respondent's submission, allowing the applicant to advance the same allegations to the Commission as those he had made to the grievance adjudicator was contrary to the rule of *res judicata* and would be an abuse of process.

ISSUES

[21] Contrary to the applicant's assertions, I am of the opinion that there are only two issues in the case at bar, in the sense that I do not think it necessary to subdivide the Commission's decision into two parts. In my view, the question is only whether the Commission erred in refusing to exercise its jurisdiction and to deal with the complaint. Accordingly, the questions raised in the case at bar are the following:

(a) What standard of review is applicable to the Commission's decision?

(b) Did the Commission err in refusing to hear the applicant's complaint?

ANALYSIS

(a) Applicable standard of review

[22] The parties did not agree on the standard of review applicable to Commission decisions made pursuant to paragraph 41(1)(*d*) of the CHRA. This Court has already many times undertaken the exercise of determining, with the aid of a pragmatic and functional analysis, the standard applicable to similar decisions by the Commission. In particular, in *Brine v. Canada (Attorney General)*, [1999] F.C.J. No. 1439 (at paragraphs 47 to 57), my colleague Mr. Justice François Lemieux, after analyzing the relevant case law in detail, held that the standard of review applicable to Commission decisions made pursuant to paragraph 41(1)(*d*) of the CHRA was reasonableness or correctness, depending on the nature of the error alleged (*Brine, supra*, at paragraph 57, citing *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] F.C.J. no. 1017).

[23] More recently, in *Price v. Concord Transportation Inc.*, 2003 FC 946, my colleague Madam Justice Elizabeth Heneghan carried out a full pragmatic and functional analysis to determine the standard of review applicable to Commission decisions made pursuant to paragraph 41(1)(*e*) of the CHRA. I will therefore take the liberty of adopting the gist of my colleague's analysis, being careful to adjust the factor of the analysis concerning the nature of the point at issue in the case of paragraph 41(1)(*d*).

[24] With respect to decisions made pursuant to paragraph 41(1)(*e*), Heneghan J. held that the applicable standard of review was that of patent unreasonableness (*Price, supra,* at paragraph 42). However, CHRA paragraphs 41(1)(*d*) and (*e*) involve decisions that are very different in terms of the degree of discretion exercised by the Commission. Specifically, a decision made pursuant to paragraph 41(1)(*e*) requires a ruling only on whether the complaint was filed within the specified deadline and whether the deadline in question should be extended: this is simply a question of fact. A decision made pursuant to paragraph 41(1)(*d*), on the other hand, calls more upon the Commission's exercise of jurisdiction in that the Commission is required to decide whether or not to deal with a complaint. It is then making a decision not merely on a procedural issue (deadline compliance), but on a substantive issue (the exercise of its jurisdiction in connection with the basis of the complaint). The factor of the pragmatic and functional analysis of the nature of the point at issue thus produces a different result in the case of paragraph 41(1)(*d*), since it allows a more flexible standard of review.

[25] Apart from that clarification, I agree with Heneghan J. that, although the CHRA contains no privative clause, the discretionary nature of the review mechanism set out in subsection 41(1) requires a certain degree of restraint (*Price, supra*, at paragraph 39). Further, the Commission has a measure of expertise as the trier of fact (*Price, supra*, at paragraph 41), but conversely, its decisions which, as in the case at bar, concern the exercise of its jurisdiction, will be subject to a more flexible standard of review. Finally, although the CHRA has a public interest impact, the purpose of paragraph 41(1)(*d*) is primarily the resolution of disputes between two parties, which also favours a more flexible standard of review. For these reasons, I find that the standard of review applicable to the Commission's decision not to deal with a complaint based on paragraph 41(1)(*d*) of the CHRA is that of reasonableness. That being the case, the intervention of this Court will be warranted only if I determine that the Commission's decision "is not supported by any reasons that can stand up to a somewhat probing examination" (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paragraph 56).

COMMISSION'S ROLE

[26] The Commission's role was explained by the Supreme Court of Canada in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] S.C.J. No. 103, [1989] S.C.R. 879, *Canada (Attorney General) v. Mossop*, [1993] S.C.J. No. 20, [1993] S.C.R. 554, and *Bell v. Canada (Canadian Human Rights Commission); Cooper v. Canada (Canadian Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] S.C.R. 854.

[27] In sum, that role involves:

(1) performing administrative and screening functions with no appreciable adjudicative role;

(2) accepting, managing and processing complaints of discriminatory practices;

(3) if a complaint must be referred to a human rights tribunal, the Commission performs a screening function similar to that of a judge in a preliminary inquiry.

More fully described in *Brine v. Canada Ports Corporation*, [1999] F.C.J. No. 1439, at paragraph 39.

(b) Did the Commission err in its decision?

[28] The applicant referred to the judgment in *Boudreault v. Canada (Attorney General)*, [1995] F.C.J. No. 1055, in which Tremblay-Lamer J. held at paragraph 17 that the Commission had made an error of law by refusing to exercise its jurisdiction based on paragraph 41(1)(*d*) of the CHRA. She then allowed the application for judicial review and referred the matter back to the Commission. In *Boudreault, supra*, as in the case at bar, the plaintiff was alleging that the Commission had simply approved the decision of the appeal board instead of exercising its discretion conferred by subsection 41(1). Tremblay-Lamer J. had adopted the reasoning of the

Federal Court of Appeal in *Burke v. Canada (Canadian Human Rights Commission)*, [1987] F.C.J. No. 440, and *Pitawanakwat v. Canada (Canadian Human Rights Commission)*, [1987] F.C.J. No. 818, in which it was held that the Commission could not refuse to exercise its jurisdiction on the ground that the matter was *res judicata* if the applicant had first made use of the internal remedies available to him (*Boudreault, supra*, at paragraph 14).

[29] In *Canada Post Corporation v. Barrette*, [2000] F.C.J. No. 539, the Federal Court of Appeal ordered the Commission to re-hear the plaintiff's complaint pursuant to section 44, *supra*. Reading the facts of that case indicates that the Court of Appeal intervened because it considered that, at least on its face, the Commission's decision had not complied with its duty to ascertain whether the grounds alleged were valid before deciding to hold an inquiry.

[30] That said, in the case at bar it is clear from reading the decision of the grievance adjudicator, exercising concurrent jurisdiction over the matter at issue, and the investigator's analysis report, that contrary to the applicant's assertions, the question of his unfitness for his work and the question of FOC's discrimination and attempts at accommodation were considered in both proceedings. Further, it is clear that the investigator did not base her investigation solely on the decision by the grievance adjudicator, since her report showed that she had also considered the applicant's allegations having to do with his alcohol dependence and the question of reasonable accommodation. In particular, she noted that the applicant had failed to submit sufficient evidence to the grievance adjudicator regarding his condition, even though he had the opportunity to do so. In

the view of the investigator, therefore, the applicant was primarily attempting to compensate for this failure by seeking a hearing before the Commission.

ABUSE OF PROCESS AND FRIVOLOUS NATURE OF ACTION

[31] The concept of a frivolous or vexatious proceeding is closely bound up with the rule of abuse of process, a rule which applies both to judicial and administrative tribunals: see *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] S.C.J. No. 64, [2003] 3 S.C.R. 77, at paragraphs 43 to 45. The principle is designed to avoid wasting judicial and institutional resources and imposing unnecessary expenditure on the parties involved.

[32] Section 41 of the CHRA provides that the Commission may declare a complaint inadmissible *inter alia* if it "is trivial, frivolous, vexatious or made in bad faith".

[33] I feel that in this case we should consider primarily the question of what is frivolous, which is defined as follows in the dictionary *Petit Robert, SNL, Paris,* at p. 750: "**Frivole** qui a peu de solidité, de sérieux et par suite d'importance", and in the dictionary *The Shorter Oxford English Dictionary, 3d ed. 1986*, at p. 809: "**Frivolous:** of little weight or importance". Parliament has given the Commission the discretion to eliminate frivolous, unwarranted or pointless proceedings, and unless that discretion is exercised arbitrarily without reasonable grounds the courts may not intervene.

[34] In the case at bar, the Commission determined that the applicant's action fell within the aforesaid category, as an abuse of process. In my opinion, the facts, the proceedings and decisions fully warrant that conclusion.

[35] The case at bar differs from *Boudreault, Brine* and *Barrette, supra*, and so I cannot come to the same conclusion. In the case at bar, by accepting the investigator's recommendation not to deal with the complaint, the Commission relied on valid grounds; thus, its decision was reasonable within the meaning of *Southam, supra*. Accordingly, I do not feel that this Court's intervention is warranted. The Commission's decision of February 20, 2007 is affirmed and the application for judicial review must be dismissed.

JUDGMENT

FOR THESE REASONS, THE COURT dismisses the application for judicial review with costs.

"Orville Frenette"
Deputy Judge

Translation certified true
Stefan Winfield, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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