Date: 20090216

Docket: T-199-08

Citation: 2009 FC 164

Ottawa, Ontario, February 16, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

NATIONAL RESEARCH COUNCIL OF CANADA

Applicant

and

MING ZHOU

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review is a challenge by an employer to the Canadian Human Rights Commission's (CHRC) decision to refer a complaint of discrimination against an employee to the Canadian Human Rights Tribunal (Tribunal). The issues in this matter are 1) the absence of reasons by the CHRC, and 2) the insufficiency of evidence against the Applicant employer to support a referral to the Tribunal.

II. BACKGROUND

[2] There is a bit of history behind this case. In 1992 the Tribunal found that the National Research Council (NRC) had discriminated against a Dr. Grover. As a result, Dr. Grover was promoted to the position of Director, Radiation Standards and Optics at the NRC. The Respondent's complaint of discrimination centres on the conduct of the same Dr. Grover in his new capacity.

[3] Dr. Grover was put in charge of four groups, and for two of them he held the direct hiring responsibility. One of these two groups is Photonic Systems, of which Dr. Zhou was a member. The other group is Optics of which a Dr. Boiko was a member.

[4] In late 2004 and shortly after, Dr. Zhou filed two separate but related complaints; one against the NRC and one against Dr. Grover, both for harassment on the basis of race and national or ethnic origin (Chinese). Sometime earlier (August) in 2004, Dr. Boiko of the Optics group had filed a CHRC complaint against the NRC alleging workplace harassment and discrimination based on race (Caucasian) and national or ethnic origin (Russian/Slavic).

[5] Dr. Zhou's complaints were against Dr. Grover personally and against the NRC, both on the basis that Dr. Grover had personally harassed him and that Dr. Grover had specifically hired an all-Chinese unit because they would tolerate his abuse. These complaints were investigated concurrently.

[6] On December 21, 2007, the CHRC issued two decisions. Firstly, it dismissed Dr. Boiko's complaint because the evidence did not support the allegations. Secondly, the CHRC decided to refer Dr. Zhou's complaint against the NRC and against Dr. Grover to the Tribunal (if the parties could not settle the matter within 90 days of receipt of the decision letter).

[7] The decision to refer the complaints to the Tribunal emanate under s. 44 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (Act).

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.	**44.** (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.
(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied	(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) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or	*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) 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,	*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.
it shall refer the complainant to the appropriate authority.	

(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 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

(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

(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 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 41*c)* à *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

any ground mentioned in paragraphs 41*(c)* to *(e)*.	l'un des motifs énoncés aux alinéas 41*c)* à *e)*.

[Emphasis added]

[8] The decision letter of December 21, 2007 is brief and provides no extensive reasons. The Investigator's Report, on which the decision was based, is lengthy and detailed.

[9] The salient points of the Report are as follows:

a. there were difficulties obtaining evidence because of witnesses' fear of reprisal and because of Dr. Grover's absence and refusal to make full submissions to the investigator.

b. Dr. Zhou's complaint concerned Dr. Grover's public humiliation of him, Dr. Grover's criticism of his work, Dr. Grover's efforts to prevent him from communicating outside the group and the refusal to upgrade Dr. Zhou to the promised "indeterminate" status (essentially a permanent position).

c. aside from Dr. Grover's bad manners and possible abusive behaviour, the investigator found grounds for complaint that Dr. Grover had specifically targeted Chinese nationals to hire because, for alleged cultural reasons, they could be more easily dominated. The statistical anomaly of an all Chinese Photonic Systems group had been noted by NRC staff.

d. the investigator noted that one issue for determination was whether the NRC had taken appropriate action to deal with harassment and to prevent such conduct continuing.

e. the investigator found that the NRC had a "Harassment in the Workplace Policy" but that the policy was not fully implemented because no corrective action was taken in this case.

f. therefore, there was a recommendation that the matter be referred to the Tribunal.

[10] As indicated earlier, the Applicant argues that 1) the CHRC erred by failing to provide proper reasons for its decision, and 2) the CHRC erred in referring the complaint against the NRC to the Tribunal in view of the absence of evidence of discrimination by the NRC.

III. ANALYSIS

A. *Standard of Review*

[11] In the Applicant's Memorandum, it seems to argue that the standard of review should be "correctness" because the lack of reasons is an issue of procedural fairness and the fact that the decision to refer is "not supportable on the evidence" disentitles the CHRC to any degree of deference.

[12] In oral argument, the Applicant clarified its position that in respect of procedural fairness, the standard of review is correctness but with respect to evidence justifying a referral, the matter is

of mixed law and fact for which the standard is reasonableness. The Respondent adopts the same analysis.

[13] I concur with the parties as to the standard of review. The reference to *Bourgeouis v. Canadian Imperial Bank of Commerce* , [2000] F.C.J. No. 388 (F.C.T.D.) (QL), as authority for the proposition that the standard is correctness where "the decision is not supportable on the evidence before the Commission" is not correct nor is it placed in proper context.

[14] Justice MacKay's comments in *Bourgeouis*, above, were made against the backdrop of the three standards of review. His comment was also in reference to whether a high level of deference was due in instances of natural justice and non-supportable evidence. Justice MacKay did not hold that in respect of non-supportable evidence, the standard was correctness or that such an issue was measured on the same standard as procedural fairness/natural justice.

[15] The weight of authority (see *Niaki v. Canada (A.G.)*, 2006 FC 1104 and *Sketchley v. Canada (A.G.)*, 2005 FCA 404) is that the CHRC's assessment of evidence and conclusion to refer is entitled to a high degree of deference. This must be the case given the low threshold for a referral, being "a reasonable basis in the evidence for proceeding to the next stage" or evidence sufficient to suggest the possibility that some discrimination had occurred. For the Commission to go beyond this threshold and to deal with merits would be to usurp the Tribunal's function.

[16] The nature of the inquiry, the nature of the CHRC's decision to refer, and thus the deference owed is well set out in paragraphs 35 and 38 of *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 13 (F.C.A.):

> **35** It is settled law that when deciding whether a complaint should be referred to a tribunal for inquiry under sections 44 and 49 of the *Canadian Human Rights Act*, the Commission acts "as an administrative and screening body" (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at page 893, La Forest J.) and does not decide a complaint on its merits (see *Northwest Territories v. Public Service Alliance of Canada* (1997), 208 N.R. 385 (F.C.A.)). It is sufficient for the Commission to be "satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted" (subsections 44(3) and 49(1)). This is a low threshold and the circumstances of this case are such that the Commission could have validly formed an opinion, rightly or wrongly, that there was "a reasonable basis in the evidence for proceeding to the next stage" (*Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, *supra*, paragraph 30, at page 899, Sopinka J., approved by La Forest J. in *Cooper*, *supra*, at page 891).
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> […]
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> **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. Canadian Human Rights Commission*, [1980] 1 F.C. 687 (C.A.), at page 698, Le Dain J.A.), 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.

B. *Procedural Fairness*

[17] The Applicant objects to the *pro forma* decision letter because it alleges it did not address matters raised in its Rebuttal to the Investigator's Report. The Applicant contends that CHRC failed to give reasons why it rejected the NRC's submissions.

[18] The Applicant was given two formal opportunities to make submissions with respect to the Investigator's Report. On October 22, 2007, the NRC filed a response to the Investigator's Report. On November 14, 2007, it was given a further opportunity to respond to the Report. That further response focused principally on the effect of the dismissal of Dr. Boiko's complaint. In addition to these submissions, the Respondent made submissions in respect of Dr. Zhou's response to the Report.

[19] While *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, holds that a party is entitled to reasons for a decision, it also holds that the adequacy of reasons must be viewed in context. In *Baker*, above, a person's well being and future were at issue for final determination. In the present case, the most that can be said is that the NRC is merely required to go on to a further hearing on the merits. There is little parallel in terms of consequences and finality between this case and that of *Baker*.

[20] In *Moore v. Canada (Attorney General)*, 2005 FC 13, I held that there had been a breach of natural justice when Moore was not given the opportunity to address new facts and issues raised by another party. The decision is of no assistance to this Applicant because it did have the opportunity

to address a new fact - the dismissal of the Boiko complaint. The Applicant exercised that right in its supplementary submissions.

[21] Likewise, the decision in *Egan v. Canada (Attorney General)*, 2008 FC 649, is of no assistance to the Applicant. In *Egan*, above, the problem was that the Commission failed to carry out a proper investigation; the problem was not the failure to articulate reasons.

[22] The Applicant's position that it is entitled to detailed reasons addressing its rebuttal is tantamount to requiring the Commission to make a finding on the merits of the Applicant's position – a function which is more properly to be performed by the Tribunal.

[23] Having regard for the test applicable to the CHRC's decision to refer – whether it is phrased as requiring a reasonable basis to refer or as requiring sufficient evidence to suggest the possibility of discrimination – the Applicant had more than sufficient explanation in the Report as to the CHRC's basis for referral. The CHRC's decision, read in conjunction with the Report, met the obligation to provide reasons in this case.

C. *Absence of Evidence*

[24] The essence of the Applicant's argument is that there was no evidence of conduct by the NRC or any policy or other matter which would justify referring the complaint to the Tribunal. The Applicant pleads that it took all the corrective action it could, that it could not give Dr. Zhou what

he wanted – a permanent position – and that having dismissed Dr. Boiko's complaint, it was unreasonable to proceed with this complaint.

[25] The gravamen of the NRC's position is that it has a good defence to the allegations, including that of employer's liability under s. 65 of the Act, which it did not have a chance to raise. To accept the Applicant's position is again to address the merits of the defence – a task neither the CHRC nor the Court, at this stage, should perform. The Applicant may have an excellent defence but that is for the Tribunal to decide.

[26] The CHRC found that Dr. Grover's practice of hiring people of Chinese ethnicity for the Photonic Systems group and the statistical anomaly it produced was known with the NRC. The Applicant's witness, Dr. D'Irio, who became the Director-General of the unit "struggled with the appropriateness" of the hiring practice. These are facts which raise issues as to NRC knowledge, conduct and policies relevant to this matter – all of which may be defensible.

[27] The Applicant claims that it had no knowledge of Dr. Grover's motives for hiring Chinese scientists. However, given the statistical anomaly noted by employees of the NRC, the issue of knowledge (actual or constructive) is an obvious issue on a referral.

[28] The Applicant denies that it took no corrective steps and it highlights that it had indicated that it would take corrective action when Dr. Grover returned. It asks rhetorically what other action it could take. The corrective action the Applicant addresses is action against Dr. Grover; it does not

respond to what corrective action could be taken for its employee. In light of the purpose of the remedial provision of the Act and the liability of an employer to address the alleged "victim's" circumstances (see *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84), this is another item which could form the basis for a referral.

[29] The fact that the complainant may seek a corrective action beyond that contemplated by the Act is not dispositive of the employer's obligation to take remedial steps where required. Even if the NRC could not or would not grant Dr. Zhou indeterminate status, it may be open to the Tribunal to fashion some relief. It is not, however, a matter which the CHRC can do. Thus, this is another possible basis for a referral.

[30] The dismissal of Dr. Boiko's complaint is not necessarily a reason not to refer Dr. Zhou's case to the Tribunal. While that dismissal may raise questions, without an assessment of that decision (a matter not before the Court), all that one can conclude is that in one case the harassment and discrimination may be linked to human rights grounds; in the other, there was no such link.

[31] It is conceivable that the dismissal of Dr. Boiko's complaint is incorrect. Dr. Zhou's complaint must stand and be assessed on its own merits; not "piggybacked" on someone else's.

[32] There were more than sufficient reasons for the CHRC to reasonably conclude that there was a basis for a referral. These include the reason for the exclusive Chinese hiring, the Applicant's

knowledge and actions or lack thereof, and the responsibility pursuant to s. 65 imposed on the employer.

IV. CONCLUSION

[33] Therefore, this judicial review will be dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed with costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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