Federal Court		Cour fédérale

Date: 20100414

Docket: T-134-09

Citation: 2010 FC 404

Ottawa, Ontario, April 14, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

CLAYTON N. DONOHUE

Applicant

and

THE MINISTER OF NATIONAL DEFENSE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of a decision by the Canadian Human Rights Commission (the CHRC or the Commission), dated December 10, 2008 to not deal with a complaint filed by the applicant against the Canadian Armed Forces (the Forces) on November 30, 2007, because the complaint was based on acts that occurred more than one year before the complaint was filed.

[2] The applicant seeks an order quashing the decision of the Commission and compelling it to review the merits of his complaint filed on November 30, 2007.

Background

[3] The background to this case is summed up by Prothonotary Milczynski in *Donoghue v. Canada (Minister of National Defence)*, 2004 FC 733, [2004] F.C.J. No. 889, a previous case stemming from the same series of events (see paragraphs 8 to 27).

[4] The applicant was a reservist. Between the years 1996 to 1998, a number of incidents arose involving the applicant and other members of his unit within the Forces. These incidents were coloured by a concurrent labour dispute which was a result of the Forces' annexation of the reserves.

[5] The applicant was released from the Forces in March 1999. Despite successfully grieving his release in 2000, internal rules within the Forces meant he was offered only re-enrolment, as opposed to reinstatement. Upon completing a mandatory medical examination, the applicant was found not suitable for re-enrolment due to poor vision. The applicant took exception and attributed his vision problems to the events that transpired between 1996 and 1998. The applicant was given the opportunity to have the re-enrolment determination reheard, but in a letter dated May 30, 2001, the applicant voluntarily withdrew from the re-enrolment process.

[6] Later, the applicant requested that the official reason for his departure be changed on his record of service to “release upon request”. The Forces complied.

[7] The applicant continued to pursue his case through other channels, indicating that he would commence litigation and sent letters to successive Ministers of Defence and the Ombudsman’s Office. The applicant also initiated investigations with the Privacy Commission of Canada and the Military Police Complaints Commission, alleging that his previous superiors had conspired to injure him. It appears that both agencies took his complaints seriously, conducted investigations, compiled reports and eventually closed their respective files.

[8] In an application to this Court in 2004, the applicant sought to quash several of the decisions of the Forces that had resulted in his release. In *Donoghue* above, Prothonotary Milczynski granted a motion to strike the application for a number of reasons, concluding:

> [40] It is clear and beyond doubt that the Applicant cannot succeed on any basis claimed. The decisions identified by the Applicant to be the subject of the judicial review are not proper or final decisions that are capable of being reviewed. The first decision (Hall) does not appear to exist. The second decision (Allard) is simply a set of recommendations that the Applicant himself accepted.

[9] On November 30, 2007, the applicant filed a human rights complaint against the Forces alleging that his release and his treatment prior to May 2001 constituted discrimination on the basis of disability. The applicant described the disability stemming from incidents in 1998 as “…eye injury as a result of extreme stress due to “work place bullying””.

[10] On March 19, 2008, the applicant was advised that the Commission would likely refuse to deal with his complaint pursuant to paragraph 41(1)(e) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act), because the alleged incidents took place well over one year prior to the complaint. The applicant indicated that he still wished to pursue the complaint. Both sides were given the opportunity to make submissions solely on the issue of whether the Commission should refuse to deal with the complaint.

[11] In the first letter to the Commission on July 26, 2008, the applicant argued that his complaint was still current and attached a letter from the Forces indicating that he still had an updated and open file. It referred specifically to an application he had made to Veterans Affairs, which had recently sent him a letter indicating that his application for disability benefits had been granted.

[12] In the opinion of the Forces, the applicant's application with Veterans Affairs constituted neither a continuation of the discrimination complained of nor a reasonable explanation for the delay. On the length of time issue, the Forces responded that given the amount of time, it would be difficult to locate witnesses, memories may no longer be accurate and that critical documentation may no longer be available. The Forces also cited the applicant's voluntary withdrawal from the re-enrolment program in 2001.

[13] In a letter on September 20, 2008, the applicant considered that his proceedings with the Forces internally, the Canadian Privacy Commission, the Federal Court, the Military Police

Complaint Commission and Veterans Affairs, were all collaborated. These proceedings stemmed from the same incidents as the current complaint and had consumed his time from 1998 until November of 2007. He also stated that if any documents were missing, it was due to the Forces' own gross misconduct and that the key witnesses were all still available. As another reason for the delay, he also stated that while still with the Forces, his superiors had instructed him on several occasions not to go to the Commission or to other outside entities with his complaints.

[14] By letter dated December 10, 2008, the Commission informed the applicant that it would not deal with the complaint. A form attached had certain boxes checked stating:

> The last alleged discriminatory act occurred more than one year before the receipt of the complaint by the Commission and it is not appropriate to deal with the complaint because,
>
> the complainant did not do everything that a reasonable person would do in the circumstances to proceed with the complaint.
>
> . . .
>
> the respondent has demonstrated that the delay in signing the complaint has seriously prejudiced its ability to respond to the complaint.

Issues

[15] The issues are as follows:

1. Did the Commission offer the applicant a fair process?

2. Was the Commission's decision not to deal with the applicant's complaint reasonable?

Applicant's Written Submissions

[16] The applicant submits that the Commission's strict forms and ten page limit on paragraph 41(1)(e) submissions hampered his ability to present his case. He also claims the Forces' submissions to the Commission were misleading and unsupported by evidence.

[17] It would be unreasonable for the Commission to apply the one year rule strictly since the internal processes in the Forces following his release and regarding his medical conditions lasted well over one year. In his case, three years.

[18] The Commission was unreasonable to find that the last alleged discriminatory act occurred in 2000 or 2001. The applicant's dealing with Veterans Affairs constitutes a continuum of the discrimination, since the applicant was required to prove abuse to Veterans Affairs.

[19] The Commission's finding that the applicant had not done everything that a reasonable person would have done was unreasonable. There was a continuous link of activities going on against the Forces from 1998 to 2004. The applicant's delay should be further excused because, while still a member of the Forces, his superiors warned him not to go to the Commission.

[20] In the alternative, the Commission should have given the applicant's case special consideration due to his underlying and well documented mental health problems.

Respondent's Submissions

[21] The respondent submits that determinations of the Commission under paragraph 41(1)(e) are highly discretional and should not readily be set aside. Thus, the Commission's decision should be given an extremely high level of deference.

[22] The respondent submits the decision was reasonable and the process was fair. The Commission gave the applicant two opportunities to send ten page submissions and provided him with copies of the material it received from the Forces for him to comment on. This went beyond what is required by procedural fairness. The decision, although in a form document, indicated that the Commission had considered all the submissions and had considered whether to exercise its discretion to extend the one year limit.

[23] The respondent also submits that the decision was eminently reasonable in light of the rationale for the one year rule. The applicant filed his complaint almost a decade after the discrimination of which he complained and more than three years after this Court struck an earlier application. Further, the Forces explained that it had been unable to locate some of the documents referred to in the complaint and may not be able to locate witnesses. The applicant's application with Veterans Affairs was not sufficiently connected to this matter, such that it might explain the delay, nor did it constitute a continuation of the discrimination.

[24] With regard to the argument that the applicant's medical condition renders him other than a reasonable person, the respondent cites the numerous places he sought relief to demonstrate that his ability to seek redress for perceived wrongs does not seem to have been impaired by his mental state. With regard to warnings from his superiors not to go to the Commission, the respondent concedes that he was so warned, but there is only evidence that this happened once in 1998. Even if the other warnings occurred, the last was in 2002 and since then, the applicant was always free to pursue this complaint.

Analysis and Decision

Standard of Review

[25] The Commission's decision is appropriately reviewed against the standard of reasonableness. While the respondent suggests that such decisions are to be accorded an extremely high level of deference, I note that reasonableness is the only deferential standard (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL)).

[26] I am however, mindful of Parliament's clear intention to grant the Commission freedom and discretion. The words of the Federal Court of Appeal in *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 (C.A.), are instructive:

> [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.

I adopt these comments.

[27] Of course, where an issue of procedural fairness is brought to the Court's attention, no federal board, commission or tribunal is to be afforded deference. Administrative processes, including the Commission's, must be fair (see *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, [2001] S.C.J. No. 5 (QL) at paragraph 65, *Tomar v. Toronto Dominion Bank*, 2009 FC 595, [2009] F.C.J. No. 782 (QL) at paragraph 24). The standard of review would be correctness.

[28] **Issue 1**

Did the Commission offer the applicant a fair process?

I am satisfied that the applicant was given a fair and meaningful opportunity to take part and make submissions to the Commission. He seemed frustrated that he could not submit the entire contents of his files with the Privacy Commission and Military Policy Complaint Commission. The Commission's internal policy of putting a cap on the length of submissions at this preliminary stage

seems rational and did not prevent the applicant from summarizing the key contents of those Commissions' findings. In any event, there is no genuine issue of procedural fairness here.

[29] **Issue 2**

Was the Commission's decision not to deal with the applicant's complaint reasonable?

Turning my attention to the substance of the decision, I cannot find any basis to find it unreasonable. The applicant has not established that the decision lacks justification, transparency or intelligibility, nor can I see any lack of reasonableness. In my view, the decision easily falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[30] The rationale for the time limitation in paragraph 41(1)(e) of the Act relates to the ability to gather credible evidence, ensuring certainty and fairness for defendants and ensuring that plaintiffs exercise due diligence (see *Price v. Concord Transportation Inc.*, 2003 FC 946, 8 Admin. L.R. (4th) 87, at paragraph 38).

[31] Given that the applicant filed his complaint almost a decade after the alleged incidents of discrimination took place, it would have been reasonable for the Commission to require a clear and reasonable excuse for the delay. He did not provide that. Based on the submissions from the applicant, after having his application to quash his release struck out by this Court (*Donoghue* above), the applicant's only excuse for not bringing the complaint is that he was dealing with an application at Veterans Affairs for disability benefits which he ended up receiving. It would be hard to accept that the application to Veterans Affairs kept him from making the complaint. It was not

relevant to any question of whether he was discriminated against. Nor did the process involve laying blame with any of his previous superiors, the prime focus of his complaint to the Commission.

[32] The evidence does suggest that the applicant was warned not to go to the Commission on at least one occasion in 1998 and the applicant claims he was warned again as late as 2002. Even if this were the case, it would not be unreasonable for the Commission to determine that this was not a valid excuse for waiting until November of 2007.

[33] Similarly, there is no indication that the decision was unreasonable on the basis that the Commission ignored the applicant's psychological condition as a reason for the delay. The record clearly describes a person whose ability to seek redress for perceived wrongs is not impaired.

[34] The applicant finally argued that the Forces would not have been prejudiced by the delay. *Dunsmuir* above, at paragraph 47, teaches that reviewing courts must inquire "into the qualities that make a decision reasonable, referring to both the process of articulating the reasons and to outcomes". There was no articulation in the Commission's standard form decision, nor was the Commission required to provide more in the way of reasons. However, the passage of nearly ten years between the alleged events and the complaint, combined with the lack of any action on the matter since 2004, provide intelligible reasons for a finding that the Forces' ability to respond to the applicant's complaint would be prejudiced.

[35] I would also note that the Commission was not required to find that prejudice had been established. Just as prejudice to the respondent is a legitimate reason to refuse to deal with a complaint, so is an insufficient explanation for the delay (see *Good v. Canada (Attorney General)*, 2005 FC 1276, [2005] F.C.J. No. 1556).

[36] For the reasons above, I would dismiss this application. There shall be no order as to costs.

JUDGMENT

[37] **IT IS ORDERED that:**

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6

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, 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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-134-09
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PLACE OF HEARING:	Toronto, Ontario
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APPEARANCES:

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