

Federal Court



Cour fédérale

**Date: 20110512**

**Docket: T-1056-10**

**Citation: 2011 FC 544**

**Ottawa, Ontario, May 12, 2011**

**PRESENT: The Honourable Mr. Justice Rennie**

**BETWEEN:**

**NICOLE HÉROLD A.K.A. NORA HÉROLD**

**Applicant**

**and**

**CANADA REVENUE AGENCY (CRA)**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant seeks judicial review of the decision of the Canadian Human Rights Commission (the Commission), dated May 26, 2010, wherein the Commission decided not to refer the applicant's complaint under the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *Act*) to the Canadian Human Rights Tribunal because it was trivial, frivolous, vexatious or made in bad faith.

[2] The applicant's notice of application requests a number of different types of relief, including: costs or no order of costs against her if the judicial review is dismissed; damages for

stress, lost wages, in the amount of \$5 million; punitive/aggravated damages, in the amount of \$10 million; an inquiry into the conduct of various Canada Revenue Agency (CRA) employees, and an order striking down section 9(2) of the *Act*. These remedies are largely beyond the jurisdiction of this Court on judicial review. To the extent that the constitutional issue has been raised, it has been done without notice or evidentiary foundation and will not be considered.

[3] In my view, there is no reviewable error in the Commission's decision to dismiss the complaint. The Commission conducted a thorough and neutral investigation as required by the case law. The Commission's findings of fact were reasonably open to it on the evidence, and its conclusion that the complaint was trivial, frivolous, vexatious, or made in bad faith is a reasonable exercise of the discretion accorded to it by Parliament.

### ***The Facts***

[4] The applicant was first hired at the CRA in Vancouver in 1999 and transferred to the Toronto office in November, 2000.

[5] The applicant alleged that once she reached the age of 65 she experienced discrimination at the CRA based on her age. Specifically, the applicant alleged that she was denied promotions or transfers within the CRA, that her tasks became more repetitive, and that she was refused opportunities to participate in workplace committees. The applicant raised five different issues in her complaint form;

- i. Alleged harassment by Jean Kast;
- ii. Alleged harassment by supervisor Claudia Deluy;
- iii. The refusal of her union to represent her;

- iv. Alleged discrimination based on age while applying for jobs; and
- v. The CRA's failure to destroy two documents, a Confidential Report and supporting Chronology.

[6] The applicant viewed all five of these incidents as part of a broader conspiracy or campaign to force her to leave the CRA.

[7] A Commission investigator wrote a report on the applicant's complaint (the section 40/41 Report), to assist the Commission in deciding whether to deal with the complaint. The Report was provided to both parties, who then had the opportunity to make submissions regarding the facts and issues addressed in the Report. The applicant concedes that she was afforded this opportunity, but before this Court maintained that the investigation Report was in error because it included the viewpoint of other employees and her manager. I will summarize the findings in the Report that was placed before the Commission.

***Alleged harassment by Jean Kast***

[8] Jean Kast was a colleague of the applicant's at the CRA. The applicant alleged that Mr. Kast bullied her, spread lies and rumours about her and crumpled her printouts at the printer.

[9] The applicant first complained about Mr. Kast in 2005. The applicant initiated mediation and signed a resolution agreement with Mr. Kast in March, 2006. It appears that prior to signing this agreement the applicant approached her union, but refused union advice, and proceeded with the mediation without union involvement. The applicant attempted to re-open the matter later in

2006, saying she was dissatisfied with the results of the mediation, but was informed that the matter was closed.

[10] The applicant's complaint form also stated that she received a Notice of Disciplinary Action, and that this put an end to her dreams of getting another position. The applicant believed that Mr. Kast was somehow involved in the Notice of Disciplinary Action.

[11] As the Commission noted, apart from this incident, the applicant did not provide any evidence to support her allegation that Mr. Kast harassed her or that any alleged harassment had a link to her age. As best I understand the applicant's argument, her view is that the age discrimination came from management, not Mr. Kast, but management used the hostile climate created by Mr. Kast to further its agenda of age discrimination.

***Alleged Harassment by Supervisor Claudia Deluy***

[12] In her complaint form, the applicant alleged that her supervisor, Claudia Deluy, harassed her by finding deficiencies in her work, particularly in 2006, by pointing out a lack of knowledge of procedures and a bad attitude towards co-workers and clients. The applicant asserted that all her other team leaders were satisfied with her work, as indicated by her previous performance evaluations.

[13] However, the Report found that the applicant did have performance problems while under the supervision of other team leaders. Between 2002-2005 four different team leaders noted issues

with the applicant's work performance, including problems with communication and relating to her co-workers.

[14] Before this Court, the applicant contended that Ms. Deluy intercepted and then altered her e-mails before they were sent so as to compromise her position in the workplace. She also contended that some of her managers were not competent to make the assessment that they did about her workplace performance.

[15] The applicant also alleged that Ms. Deluy denied the applicant the opportunity to participate in the Official Languages Committee in May 2006.

### ***The Confidential Report and the Chronology***

[16] In June, 2006 the respondent directed that its Human Resources department prepare a Confidential Report and supporting Chronology of the applicant's workplace performance related issues. The Confidential Report opens with a sentence identifying the applicant as a "female francophone in her late 60's [sic]".

[17] This sentence, relating to the applicant's age, forms the foundation of the applicant's complaint of age discrimination.

[18] The Confidential Report notes that during the applicant's five and half years of employment with the Toronto Centre she demonstrated a consistent inability or unwillingness to foster positive and amicable relationships with peers and managers. Managers complained that the applicant spent

an “exorbitant” amount of time using the email system, which impacted her work performance. The Confidential Report also sets out examples of poor judgment, unacceptable conduct and comments, inappropriate use of email, and security breaches. The Confidential Report also contains suggestions to address the applicant’s performance and professional behaviour.

[19] The Chronology is a 40 page document which reviews the applicant’s employment history, with observations that are similar to the Confidential Report.

[20] The applicant relies heavily on the first sentence of the Confidential Report as evidence of age discrimination. She disputes all of the conclusions in the Confidential Report. In particular, she states that any problems with interacting with others were part of “an engineered program” to make her leave because of her age.

[21] The respondent agreed that the sentence referring to the applicant as a “female francophone in her late 60’s [sic]” was not appropriate and agreed to destroy the Confidential Report. The respondent also agreed to make some changes to the Chronology. The applicant demanded further changes to the Chronology which were not acceptable to the respondent. The respondent eventually offered to destroy both documents, but says the applicant did not respond to this offer.

### ***The Decision Under Review***

[22] The Commission decided not to deal with the applicant’s complaint under subsection 41(1)(d) of the *Act*. It found the complaint to be trivial, frivolous, vexatious or made in bad faith.

[23] The Commission's reasons were largely derivative of the section 40/41 Report. The Commission found that the reference to the applicant's age in the Confidential Report was information presented in a factual, non-discriminatory manner. The Confidential Report simply described the applicant's documented behaviours with respect to workplace behaviour, and proposed a list of suggestions to be followed to manage the applicant's performance and her professional behaviour. There was no indication in the Confidential Report that the applicant's age was an issue for her employer.

[24] I agree that the reference to the applicant's age in the Confidential Report was immaterial to the substantive content of that report, which was entirely focused on performance related issues.

[25] Moreover, the Commission noted that all parties agreed that the Confidential Report would be destroyed. The Commission therefore concluded that all of the issues raised by the reference to the applicant's age in the Confidential Report have been resolved by the respondent.

[26] The Commission concluded that the statements in the Confidential Report to the effect that there were issues with the applicant's professional behaviour were motivated by concern about performance and not age, and the respondent exercised management prerogative to have the applicant focus on tasks within her job description in order to deal with these issues. This was the sole reason the applicant was denied any work opportunities. The Commission found there was no evidence the applicant was discriminated against on the ground of age.

### *The Issues*

[27] The applicant has not specified any issues in her memorandum of fact and law. I therefore characterize the issue as whether the Commission's decision was reasonable.

### *Relevant Legislation*

[28] The *Act* contains several provisions which specifically prohibit discrimination based on age in the employment context:

- a. Section 7 of the *Act* specifies that it is a discriminatory practice to refuse to employ an individual based on a prohibited ground of discrimination, or to differentiate adversely in relation to an employee in the course of employment.
- b. Section 10 states that it is a discriminatory practice for an employer to pursue a policy or practice that tends to deprive an individual of any employment opportunities on a prohibited ground of discrimination.
- c. Section 14 states that it is a discriminatory practice to harass an individual on a prohibited ground of discrimination in matters related to employment.

[29] Section 41 sets out circumstances where the Commission is not required to deal with a complaint filed with it:

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	b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à



completely, according to a procedure provided for under an Act of Parliament other than this Act;

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

(d) the complaint is trivial, 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.

toutes les étapes, selon des procédures prévues par une autre loi fédérale;

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

d) la plainte est frivole, 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.

[30] Section 44 sets out what action the Commission shall take once an investigator has completed a report. The Commission can do one of three things: refer the complainant to a more appropriate forum for dealing with the complaint, request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint, or dismiss the complaint:

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

(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

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

(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,

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.

(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 any ground mentioned in paragraphs 41(c) to (e).

selon des procédures prévues par une autre loi fédérale.

(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 41c) 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 l'un des motifs énoncés aux alinéas 41c) à e).

[31] In this case, the Commission chose to dismiss the complaint because it found the complaint to be trivial, frivolous, vexatious, or made in bad faith, a ground mentioned at section 41(1)(d).

*Analysis*

[32] Any analysis of the discretion vested in the Commission by section 41(1)(d) is framed by four threshold points.

[33] First, the Commission has a broad discretion to dismiss complaints where it is satisfied that further inquiry is not warranted. In *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113 (CA) at para 38, the Federal Court of Appeal held that “the Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report”. In consequence Parliament did not intend the Court to intervene lightly in the decisions of the Commission.

[34] Second, the Commission is not an adjudicative body and does not draw any legal conclusions. It simply assesses the sufficiency of the evidence before it and determines whether a full Tribunal hearing is warranted. In *Slattery v Canada (Canadian Human Rights Commission)*, [1994] 2 FC 574 at para 56, Justice Nadon held that deference was owed to decision makers assessing such evidence and judicial review is warranted only when unreasonable omissions are made, such when an investigator failed to investigate crucial evidence.

[35] Third, the test for determining whether or not a complaint is frivolous within the meaning of section 41(1)(d) of the *Act* is whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed.

[36] Finally, the standard of review with respect to the Commission's decision to dismiss a complaint, rather than refer it to the Tribunal, is reasonableness: *Wu v Royal Bank of Canada*, 2010 FC 307 as it is for a decision to find a complaint trivial, frivolous, vexatious or made in bad faith: *Morin v Canada (Attorney General)*, 2007 FC 1355 at para 33.

[37] With these threshold points in mind, I turn now to an analysis of the Commission's decision.

[38] The Commission had before it a record which revealed a history of performance review issues and interpersonal conflicts between the applicant and her co-workers and supervisors. In an otherwise positive performance review, a supervisor found that the applicant "has had difficulties in dealing with some colleagues and struggles with accepting the ideas and opinions of others". The report continued to note that improving the applicant's communication skills would help her in avoiding confrontations with colleagues, and that the applicant has had difficulties with being respectful towards her colleagues. Similarly, in a later review a different supervisor wrote that:

Issues with respect to her written communication through email had to be discussed with her and addressed to ensure the value of respect is upheld when communicating in writing. This is an area requiring Nora's immediate attention.

[39] The Confidential Report largely focuses on what appear to be legitimate performance issues. Other than the opening sentence, the report does not refer to the applicant's age, nor does it indicate any preference to have the applicant leave her job, or force the applicant to retire. On the contrary, the report ends with a list of suggestions intended to manage any inappropriate behaviour, and keep the applicant in the workplace.

[40] The Commission's conclusion that the Confidential Report focused on the applicant's documented work behaviours, rather than her age, is thus a reasonable assessment of the evidence. The Commission's conclusion that the recommendation to have the applicant focus on tasks within her job description was to address issues with the applicant's behaviour in the workplace is also reasonable, and entirely within management's prerogative.

[41] The applicant was simply unable to provide any probative evidence that actions taken against her were done so because of her age or because of a campaign to force the applicant out of the CRA. The only evidence the applicant put forward regarding her age was the first sentence of the Confidential Report, and the fact that in her view, criticism of her work increased after she reached the age of 65. In the face of compelling evidence that actions taken against her were related to documented workplace performance issues commencing well before she turned 65, it was reasonably open to the Commission to find that it was plain and obvious her complaint could not succeed.

[42] Finally, I note that the Commission has complied with its duty of fairness. The Commission did not ignore an important piece of evidence or display bias against the applicant. The Commission provided all parties with a copy of the section 40/41 Report prior to making a decision, and gave both parties the opportunity to respond to the Report. In sum, the Commission carried out its statutory mandate according to legal principle and there are no grounds to intervene.

[43] The application for judicial review is dismissed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review be and is hereby dismissed.

"Donald J. Rennie"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1056-10

**STYLE OF CAUSE:** NICOLE HÉROLD A.K.A. NORA HÉROLD v. CANADA  
REVENUE AGENCY (CRA)

**PLACE OF HEARING:** Toronto

**DATE OF HEARING:** March 28, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Rennie J.

**DATED:** May 12, 2011

**APPEARANCES:**

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