

Federal Court



Cour fédérale

Date: 20111223

Docket: T-1329-10

Citation: 2011 FC 1519

Ottawa, Ontario, December 23, 2011

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CAM-LINH (HOLLY) TRAN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

THIS PROCEEDING

[1] The Attorney General of Canada [the Applicant] seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision of the Canadian Human Rights Commission [the Commission] dated July 16, 2010 [the Decision] in which it forwarded Cam-Linh (Holly) Tran's complaint to the Canadian Human Rights Tribunal [the Tribunal]. Ms. Tran [the Respondent] had complained of discrimination by the Canada Revenue Agency [CRA]

contrary to section 7 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act]. For the reasons below, the application for judicial review will be allowed.

[2] The Respondent is self-represented. She filed a record for this hearing and it has been considered. She did not appear to make oral submissions.

THE FACTS

[3] The Respondent applied for a position with CRA in August 2004. She subsequently attended an interview at which she provided CRA with an updated résumé which included a new telephone number.

[4] The Respondent was placed in a pool of qualified applicants for a position in the Vancouver Tax Services Office but was never offered the job because CRA was unable to reach her by phone. It later became clear that CRA had been using the outdated telephone number on her original résumé. As of June 27, 2007, the pool for which she had qualified expired.

[5] In September 2007, the Respondent contacted Mr. Rod Quiney [Mr. Quiney], the Regional Assistant Commissioner [Pacific Region] for CRA and asked him to hire her for a position in the Victoria office without a selection process. By then, she had learned that she had been ranked third amongst the candidates for the Vancouver position. However, Mr. Quiney replied that he could not hire her directly for the following reasons. First, she had been qualified for a position in Vancouver rather than Victoria. Second, the employment process in Vancouver had expired. Third, there was

no evidence that CRA had been aware of her new telephone number and fourth, her situation did not meet the criteria that authorized CRA to hire without a selection process. Regarding the third reason, Mr. Quiney's view was that the Respondent had not taken reasonable steps to bring her new phone number to CRA's attention when she provided the updated résumé.

THE COMPLAINT

[6] On June 10, 2008, the Respondent filed a complaint with the Commission [the Complaint] in which she said that she was the victim of (i) discrimination on the basis of family status because she is the sister-in-law of Mr. Chris Hughes, a known whistleblower at CRA, and (ii) retaliation because she had previously filed a human rights complaint against CRA.

[7] The Respondent said that the discrimination explained why she was not contacted using her updated telephone number and offered a position in Vancouver [the First Allegation] and why Mr. Quiney refused to hire her for the Victoria office [the Second Allegation].

THE INVESTIGATION

[8] The investigation began with an inquiry into the First Allegation and a report was issued recommending dismissal of the Complaint. However, the Respondent pointed out that the report was incomplete because it failed to address the Second Allegation. The Commission agreed and assigned a second investigator [the Investigator] to conduct a further investigation and prepare a supplementary report.

[9] When CRA was told of the second investigation, it advised the Investigator by fax that there had been a personnel change at CRA and that Ms. Kate Perak who had first worked on the matter had been reassigned. The Investigator was told that Mr. Kris Lam at CRA would be available to assist with the investigation. Unfortunately, this faxed advice did not reach the Investigator. Accordingly, he believed that Ms. Perak was still available to assist with his inquiries.

[10] The Investigator's notes show that he identified Mr. Quiney as the crucial witness with regard to the Second Allegation because he would be able to explain his decision not to hire the Respondent for CRA's Victoria office. However, the Investigator was unable to locate Mr. Quiney, in part because he repeatedly tried to reach him through Ms. Perak and, in part, because Mr. Quiney had retired. This meant that his name did not appear on the databases searched by the Investigator.

[11] The Investigator therefore issued his supplementary report on March 30, 2010 [the Report] without interviewing Mr. Quiney. The Report again recommended the dismissal of the First Allegation but it also recommended a referral of the Second Allegation to the Tribunal for hearing. Dealing with Mr. Quiney, the Report said:

11. [...] This Investigator contacted CRA's Human Resources Advisor, Kate Perak, on several occasions to set up an interview with Mr. Quiney, who is now retired from the CRA. However, at the time of writing this report, this Investigator has not been contacted. As well, the Investigator searched several data bases and electronic directories in order [sic] interview Mr. Quiney, but was unsuccessful in locating him.
12. It would appear from the evidence provided that Mr. Quiney had knowledge of who Mr. Hughes is and his relationship to Ms. Tran and even if this Investigator could interview Mr. Quiney, it would be Mr. Hughes' word against Mr. Quiney's

and as this Investigator is not able to assess credibility, further inquiry at tribunal is warranted.

[12] The Report was sent to CRA and to the Respondent for comment. When Mr. Lam read the Report, he realized that the Investigator had been unaware of his existence and he phoned him and offered to put him in touch with Mr. Quiney so that he could be interviewed.

[13] However, the Investigator refused to speak with Mr. Quiney and instead suggested, for reasons of expediency, that Mr. Lam interview Mr. Quiney and include a summary of his evidence in CRA's submissions responding to the Report. This suggestion was followed and CRA's letter to the Commission of May 7, 2010 said:

Mr. Quiney was contacted by telephone on April 23, 2010 and interviewed by Kris Lam, the Agency's representative in this case. Mr. Quiney stated unequivocally that his knowledge of Ms. Tran's relationship to Chris Hughes and her previous Human Rights complaint against the Agency were irrelevant to his decision not to offer her a job with the Agency.

Based on his recollection, Mr. Quiney stated that he would have asked Human Resources to look into the matter, gather information, outline options, and provide a recommendation. According to Mr. Quiney, to appoint Ms. Tran to a job would have involved appointing without selection process. Mr. Quiney was aware that he had the authority to do so. However, he stated that appointing without selection process was a practice he would not normally consider. For him to consider such an action, the circumstances would have had to be exceptional, and only of [sic] there were no alternatives. Based on the information provided to him by me, in my role as staffing consultant, he felt the circumstances did not warrant his intervention through such an extraordinary staffing action.

Mr. Quiney recalled that he would have considered a number of factors before making his decision: Ms. Tran did not contact him until after the pool had expired; the pool was past the maximum expiry date; and there was no provision to extend the pool or to reopen it. In addition, it would not have been fair to other candidates who were in similar situation to Ms. Tran's and also had not been

hired from that particular pool. Other candidates were able to successfully contact the board and update their contact information. Finally, as the CRA, including the call centre, ran external selection processes on a regular basis, Mr. Quiney felt that there were ongoing opportunities for Ms. Tran to apply on other CRA external selection processes and to be appointed through a process. [The selection process on which Ms. Tran had applied was for a PM-01 Client Services Agent at the Vancouver Tax Services Office Call Centre].

Ms. Tran is free to apply on any CRA external selection process including those at the Vancouver Island Tax Services office in Victoria. In his response to Ms. Tran, Mr. Quiney encouraged her to consult the CRA website for employment opportunities.

[14] CRA's letter also said that, in its view, the Report had been based on incomplete information because the Investigator had not interviewed Mr. Quiney.

THE DECISION

[15] By letter dated July 16, 2010, the Commission said that it had examined the submissions filed and that it was satisfied that, having regard to all the circumstances, an inquiry was warranted pursuant to paragraph 44[3][a] of the Act because "the case appears to revolve around credibility that cannot be assessed by the Investigator."

[16] Given that Mr. Lam gave the Investigator an opportunity to interview Mr. Quiney, the word "cannot" must have been used to indicate that, in the Commission's view, the Investigator had no jurisdiction to assess Mr. Quiney's credibility.

[17] Against this background, two questions must be addressed:

1. Was the Investigator obliged to assess Mr. Quiney's credibility?

2. Was the investigation thorough given the Investigator's failure to interview the crucial witness?

STANDARD OF REVIEW

[18] The first question is one of jurisdiction and, in my view, it should be reviewed using correctness as the standard, see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 59. The second question is one of procedural fairness and the law is clear that no deference is to be shown on such issues, see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 44.

Issue 1 – Jurisdiction to Assess Credibility

[19] In my view, it is now settled law that an investigator is obliged to assess credibility. In this regard, see *Larsh v Canada (Attorney General)* (1999), 166 FTR 101, 49 Imm LR (2d) 1 (FC) at paras 7, 18, and 33. and *Singh v Canada (Attorney General)*, 2001 FCT 198, 201 FTR 226 at para 14.

[20] In *Larsh*, Mr. Justice John Evans (now of the Federal Court of Appeal) dealt with the argument that only the Tribunal could assess credibility. In considering this submission, he said:

[18] Despite the attractive manner in which counsel developed her argument, I am not satisfied that it is correct. First, the argument seems to me to give insufficient weight to the broad discretion conferred on the Commission by the wording of paragraph 44(3)(b)(i): namely, that it shall dismiss the complaint “if it is satisfied” that “having regard to all the circumstances of the

complaint, an inquiry into it is not warranted”. The applicant’s contention that whenever credibility is a central issue in a human rights complaint it must be referred to the Tribunal does not seem consistent with the subjective wording of paragraph 44(3)(b)(i), not with the expertise and experience of the Commission as the specialist agency charged with investigating and screening human rights complaints.

[...]

[33] Indeed, in my opinion it would be irresponsible of the Commission not to assess the evidence before it simply because the complainant and the person complained against gave contradictory accounts of the events on which the complaint was based. The Commission is entitled and obliged to subject the evidence to a hard look before deciding whether in the circumstances of the complaint a Tribunal hearing is warranted.

[21] Justice Evan’s conclusion in *Larsh* has recently been affirmed by this Court in *Tekano v Canada (Attorney General)*, 2010 FC 818, 373 FTR 161 at para 32. In *Tekano*, Madam Justice Gauthier (now of the Federal Court of Appeal) observed that the ratio in *Larsh* is particularly germane to cases where there is a “he said, she said” situation. In other words, a conflict in the evidence does not automatically trigger a Tribunal hearing.

[22] It seems to me that an assessment of credibility may also be needed in cases in which there is no conflict in the evidence. Such cases could include those in which the evidence of a complainant or a witness appeared to be implausible.

[23] A credibility assessment is a hard look at the evidence which will oblige an investigator to consider the factors that favour and negate the evidence being assessed. While such an assessment

will usually lead to a conclusion about the reliability of the evidence, there may be cases in which an investigator will determine that he or she cannot reach a conclusion.

[24] I should note that, in deciding that an investigator is obliged to assess credibility, I have been mindful of this Court's decision in *Canada (Attorney General) v Davis*, 2009 FC 1104, 356 FTR 258 at para 56, where the opposite view was expressed. However, on the appeal in *Davis*, the Federal Court of Appeal said that, "While we do not endorse the entirety of the application judge's reasons for judgment, we are satisfied that he reached the appropriate conclusion based on the record before him", see *Attorney General of Canada v Davis*, 2010 FCA 134, 403 NR 355 at para 7. In view of this conclusion, I am not persuaded that the Court of Appeal agreed that the Commission's investigators were not to assess credibility.

[25] I have also considered paragraph 55 of Mr. Justice Marc Nadon's decision in *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574, 73 FTR 161. There he quoted from a treatise written by Mr. Justice Tarnopolsky before his appointment to the bench. It dealt with the requirements for a thorough investigation. The quoted passage said, among other things, that the Commission should not be assessing credibility. However, it appears that Mr. Justice Nadon did not accept that particular aspect of the passage because he began the next paragraph of his decision saying that, "Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly." In my view, an assessment of credibility is inherent in an assessment of the probative value of evidence and so I conclude that Mr. Justice Nadon did not agree that the Commission's investigators were not to assess credibility.

Issue 2 – The Failure to Interview Mr. Quiney

[26] In view of my conclusion that the Investigator was obliged to assess Mr. Quiney's credibility, it follows that he, and not Mr. Lam, was obliged to conduct the interview and that, without such an interview, the investigation was not thorough.

[27] The Respondent's record suggests at paragraphs 29 and 30 that Mr. Lam made notes which show that he not only agreed with the Investigator's suggestion that he interview Mr. Quiney but also agreed that his interview would remedy the problem created by the Investigator's failure to interview the crucial witness. However, I am not persuaded that Mr. Lam's notes show the latter agreement. In my view, Mr. Lam merely recorded the Investigator's opinion that an interview by Mr. Lam would be the best way to resolve the problem. In passing, I must observe that I find it odd that the Investigator proposed that a party could interview its own witness but, in any event, it was not open to Mr. Lam to agree to a procedure that frustrated a thorough investigation.

[28] The Respondent also says that, because Mr. Lam interviewed Mr. Quiney, CRA is estopped from complaining about the thoroughness of the investigation. However, in my view, on the facts of this case, there is no such estoppel. Mr. Lam only interviewed Mr. Quiney because the Investigator refused to do so and CRA raised its concerns promptly in its response to the Report.

CONCLUSION

[29] Since the Investigator failed to interview the crucial witness and since the Commission wrongly decided that the Investigator could not assess credibility, the Decision will be set aside.

JUDGMENT

THIS COURT’S JUDGMENT is that the Commission’s decision is hereby set aside and the Complaint is referred back for further investigation. This investigation is to include an interview of Mr. Quiney and an assessment of his credibility.

Since the Applicant has advised that it does not ask for costs, no such order is made.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1329-10

STYLE OF CAUSE: Attorney General of Canada v Cam-Linh (Holly) Tran

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 27, 2011

REASONS FOR JUDGMENT: SIMPSON J.

DATED: December 23, 2011

APPEARANCES:

Sally Rudolf FOR THE APPLICANT

No one appeared FOR THE RESPONDENT

SOLICITORS OF RECORD:

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