Federal Court Cour fédérale

Date: 20111107

Docket: T-555-10

Citation: 2011 FC 1266

Ottawa, Ontario, November 7, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ANTON OLEINIK

Applicant

and

THE PRIVACY COMMISSIONER OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The applicant seeks judicial review of a March 30, 2010 investigation report and decision by the Privacy Commissioner of Canada (Commissioner) which found that Mr. Oleinik's complaint against the Social Sciences and Humanities Research Council (SSHRC) was not well-founded. For the reasons that follow, the application is dismissed.

Facts

[2] The applicant is an associate professor at Memorial University in Newfoundland (MUN). In October 2007 he applied for a SSHRC Standard Research Grant (SRG). He was not successful. In April 2008, the applicant submitted an access to personal information request to SSHRC in connection with his failed SRG application. SSHRC complied with the request. Dissatisfied with SSHRC's disclosure in response to the request, the applicant filed a complaint with the Office of the Privacy Commissioner of Canada (OPC). The applicant's principal concern lay with whether "only the personal information from the institutionally approved sources had been used during the adjudication process" of his SRG application. Stated more clearly, the applicant's concern was that someone at MUN had been contacted by the SSHRC in the process of adjudicating his SRG application.

[3] In response to the applicant's complaint against SSHRC, the OPC conducted an investigation in conjunction with the Office of the Information Commissioner of Canada (OIC). It did so as some aspects of Mr. Oleinik's complaint fell under the *Access to Information Act* (R.S.C., 1985, c. A-1). The OPC determined that the applicant's complaint against SSHRC was not well-founded and that a matter regarding his membership on certain SSHRC peer review committees as posted on the SSHRC website had been resolved. Dissatisfied with the OPC's investigation and its subsequent report and recommendations, the applicant commenced this application under section 18.1 of the *Federal Courts Act*, (R.S.C., 1985, c. F-7) for judicial review of the OPC's findings and report. Specifically, the applicant seeks a *writ of certiorari* quashing the "decision" of the OPC and a *writ of mandamus* ordering the OPC to conduct an investigation according to terms supplied by the applicant in his judicial review application.

[4] While the applicant advances a number of grounds in support of his argument that the OPC's findings and recommendations ought to be set aside, they may be encapsulated in the contention that the OPC report does not have the requisite level of thoroughness. The applicant also argues that the OPC has an institutional bias against individuals and in favour of governmental organizations. He further says that the OPC had a bias against him, personally, and that the findings of the OPC ought to be set aside.

[5] By way of summary, with respect to the challenge to the investigation, I find that the applicant failed to identify particular gaps or omissions, or in the methodology of the investigation that might support a successful application. With respect to the Commissioner's recommendations, the Court does not have the jurisdiction under section 18.1 of the *Federal Courts Act* to adjudicate upon the merits of the applicant's application for judicial review of the Commissioner's decision.

Review of Recommendations

[6] The *Privacy Act,* (R.S.C., 1985, c. P-21), the OPC's enabling statute, provides two routes to this Court for the purposes of seeking judicial review. First, section 41 of the *Privacy Act* provides as follows:

41. Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to	**41.** L'individu qui s'est vu refuser communication de renseignements personnels demandés en vertu du paragraphe 12(1) et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à la protection de la vie privée peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 35(2), exercer un recours en révision de

the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.	la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[7] As Justice Tremblay-Lamer stated in *Keita v Canada (Minister of Citizenship and Immigration),* 2004 FC 626 at para 20: "The validity of the [Privacy] Commissioner's recommendations is not subject to the Court's powers of review. The precedents on this point are clear and ample." In reaching this conclusion Justice Tremblay-Lamer relied on the decision of the Federal Court of Appeal, in *Canada (Attorney General) v Bellemare*, [2000] FCJ No 2077 (FCA) at paras 11-13, which involved allegations lodged against the Information Commissioner similar to those lodged by the applicant herein against the Privacy Commissioner. Noël J.A. held:

> Section 41 does not provide for a recourse against the Information Commissioner (Wells v. Canada (Minister of Transport), T-1729-92, April 19, 1993 [(1993), 48 C.P.R. (3d) 312 (Fed. T.D.)]).
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> […]
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> In short, the Court has no jurisdiction, pursuant to section 41, to conduct a judicial review of the Information Commissioner's findings and recommendations. It was therefore not open to the motions Judge to allow the application for judicial review to continue.

[8] The applicant's proper recourse was to bring an application pursuant to section 41 of the *Privacy Act*, naming the SSHRC as the respondent. At a minimum, this application should be supported by some objective evidence to support the inference that personal information was being withheld. In this case, despite being advised clearly by the OPC in its letter of March 30, 2010 that his right of recourse lay in section 41 and the *de novo* review of the SHRCC response, and after subsequently being advised to the same effect by counsel for the OPC, the applicant persisted in

pursuit of recourse under section 18.1 of the *Federal Courts Act* challenging the OPC recommendations. In consequence, the applicant runs squarely up against the jurisprudence of the Court of Appeal and of this Court.

[9] The applicant cannot seek judicial review of the OPC's non-binding report to, in essence, challenge the SSHRC. He must address the decision making body itself, not collaterally or indirectly through the OPC. This is the procedure contemplated by Parliament.

The Investigation Process

[10] I will now turn to the aspect of this application where the Court does have jurisdiction and that is with respect to the alleged breaches of procedural fairness arising from the investigation process. The Privacy Commissioner is, by statute, given broad latitude to craft investigative processes as she sees fit and, provided that the requirements of procedural fairness are met, the Court will not substitute a different process simply because the applicant can conceive of a fairer or different process: *Tahmourpour v Canada (Solicitor General)* 2005 FCA 113 at para 39; *Slattery v Canada (Human Rights Commission)* [1994] 2 FC 574 at para 69; aff'd [1996] FCJ 385 (CA). It is only where the investigator erred by considering all available and material evidence or irrelevant matters into account that the Court will intervene.

[11] In consequence, the OPC investigation itself is amenable to review. If the report had material omissions, reached unreasonable conclusions, contained unsustainable inferences, misconstrued the factual and legal context or evinced a bias or pre-disposition on the part of the investigator, the Court could intervene. Here, however, no particular challenge is taken with the

report. Indeed, the applicant did not point to errors in the reasoning or to facts that might support intervention. The report, on its face, is balanced and thorough. No omissions, let alone material omissions, were identified by the applicant. The applicant simply seeks a different outcome.

[12] The second argument advanced by the applicant is that he did not have an opportunity to comment on the draft report. Neither, however, did the SSHRC. The Commissioner was under no obligation, as a matter of natural justice, to share a draft; rather the record indicates that the investigator had a continuous dialogue with the applicant throughout the investigation process. The aspect of procedural fairness that requires that the applicant be given a meaningful opportunity to be heard has been met.

[13] The applicant acknowledged in his supplementary affidavit and his memorandum of fact and law that the matter with respect to the posting of personal information in respect of his memberships on SSHRC committees had been resolved. Before this Court, he sought to resurrect the matter. He provided no evidence to support the contention, other than to say that certain "search engines" still produce information associating him with SSHRC. Moreover, the applicant's complaint is a new one, arising in May 2010, long after the events in question which underlie this application and is not properly the subject of this application.

Bias

[14] The applicant contends that the OPC is biased, both systemically in that it favours public bodies over private litigants, and specifically towards him by reason of his ethnicity. The burden of

establishing bias rests on the person alleging bias. Evidence must underlie it, and a mere suspicion will not suffice.

[15] There is no evidence that would meet the test of whether an informed person, viewing the matter realistically, being fully informed of all the facts and having thought the matter through, would conclude that the decision-maker was biased: *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369, at p 394.

[16] The applicant has no admissible evidence in support of his argument of institutional pre-disposition towards the interests of public bodies. The applicant sought to introduce statistical evidence derived from the OPC Annual Reports, indicating, in his view, such an institutional pre-disposition. This material, being introduced in evidence for the first time, was properly objected to.

[17] With respect to the allegation of bias against him, personally, the applicant could only point to incidents of what he fairly considered to be impolite and unhelpful conduct by the OPC staff. There was one e-mail from an OPC official with an inappropriate reference to the applicant's presumed ethnicity, for which the OPC apologised. Although admissible, this is not sufficient to establish bias, particularly where the OPC report itself appears to be a thorough, accurate and balanced analysis of the SSHRC's handling of the complaint.

Mandamus

[18] The applicant also seeks *mandamus* compelling the OPC to re-investigate the complaints in accordance with his concerns as to the lack of rigor in the investigation process. This relief cannot

be granted. The OPC has met all of its obligations under the statute; it received the complaint, investigated the complaint, and made findings which it communicated to the applicant. Again, the applicant, in essence, seeks to compel a different outcome. An order of *mandamus* will not be granted where the public duty has been discharged (as it has here), or where it seeks to compel the exercise of a duty in a certain way, as the applicant seeks: *Apotex Inc. v Canada (Attorney General)*, [1994] 3 SCR 1100.

Costs

[19] The respondent seeks an award of costs pursuant to Rule 400(1)(i). She points to ten motions brought by the applicant, all of which were dismissed. The respondent began to seek costs only after the fifth motion. In the May 19, 2011, Federal Court of Appeal decision, Mainville JA described the applicant's motion for an extension of time as "bereft of any chance of success" and "frivolous". In Prothonotary Morneau's order of February 18, 2011, the applicant's motion and relief was described as "unnecessary, vexatious, and abuse of the process of this Court."

[20] As noted, the applicant persisted in this application despite being advised that portions of it were beyond the Court's jurisdiction. The applicant brought no credible evidence in support of his argument of bias, sought to introduce new evidence at this stage, resiled from a matter previously agreed to have been satisfactorily resolved, and brought no precision to his complaints about the investigation. Nor was any broader public interest identified which would have been served by maintaining this litigation. While costs are exceptional in judicial review applications, in these circumstances, the Court, after a review of draft Bills of Costs and supporting written submissions, awards costs to the respondent which it fixes at $5,000.00.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. Costs are awarded to the respondent and are fixed at $5,000.00.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-555-10
STYLE OF CAUSE:	ANTON OLEINIK v. THE PRIVACY COMMISSIONER OF CANADA
PLACE OF HEARING:	St. John's, Newfoundland and Labrador
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APPEARANCES:

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Louisa Garib	FOR THE RESPONDENT

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