

Federal Court



Cour fédérale

Date: 20140319

Docket: T-1320-13

Citation: 2014 FC 268

Toronto, Ontario, March 19, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JOSEPH KWON

Applicant

and

FEDERAL EXPRESS CANADA LTD

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. Joseph Kwon, is seeking judicial review, pursuant to section 18(1) of the *Federal Courts Act*, RSC 1985, c F-7, of a July 5, 2013 decision by the Canadian Human Rights Commission not to deal with his complaint against Federal Express Canada Ltd. (“FedEx”), pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [“CHRA”].

[2] Mr. Kwon represented himself on this application. He is a long-standing employee of FedEx. In October 2010 he filed a complaint with the Commission (or “CHRC”) alleging that

FedEx discriminated against him on the basis of race, national or ethnic origin, or disability (a back injury and work related stress). Specifically, Mr. Kwon alleged that his manager subjected him to racial slurs and jokes, repeatedly harassed and humiliated him and treated him differently from others because of his accent and disability. Mr. Kwon also alleged that FedEx senior management condoned the behaviour by failing to respond to his complaints.

[3] In May 2011 the Commission informed the parties that the complaint had been referred to investigation. In June 2011, FedEx requested that the Commission defer its investigation until Mr. Kwon had exhausted FedEx's internal complaint and investigation process pursuant to paragraph 41(1)(a) of the *CHRA*. FedEx noted that since the applicant was out of the workplace on a leave of absence for medical reasons, the allegations referred to in the complaint (which were denied) were not ongoing. The Commission invited submissions from the parties on this request and, in a Record of Decision dated February 1, 2012, decided not to deal with the complaint because Mr. Kwon had not exhausted grievance or review procedures otherwise reasonably available to him at FedEx.

[4] On February 21, 2012, Mr. Kwon filed a complaint with FedEx pursuant to the company's Respectful Workplace Policy process ("RWP process"). The allegations were the same as those in the CHRC complaint. In the interim, the manager who was the primary focus of Mr. Kwon's complaint had left the company.

[5] The RWP process took almost a year to complete, for reasons that are not disclosed in the record, despite Mr. Kwon's repeated requests to be informed on its status and progress. In an inter-office memorandum dated January 24, 2013, Mr. Kwon was advised that the Anti-Harassment

Review Board (“Board”) had met on January 17, 2013 to review his complaint. The Board found that Mr. Kwon’s allegation of harassment based on disability, race and national/ethnic origin was not established by the evidence. Thus, it was concluded that the RWP had not been breached. However, the Board found that the company’s Acceptable Conduct Policy had been breached. No reasons were provided for this decision and no redress was offered Mr. Kwon as the manager in question had left the employ of the company.

[6] In letters dated March 6, 2013, the CHRC advised the parties that Mr. Kwon’s CHRC complaint had been reactivated. The CHRC advised it would prepare a “sections 40/41 report” and asked that the parties provide their positions on whether or not the complaint was vexatious in the sense that it had already been dealt with through an alternate process. The CHRC also advised that the sections 40/41 report would be disclosed to them before being submitted to the Commission, which would also be provided with the complaint form and any submissions to the report. The Commission would then determine whether to deal with Mr. Kwon’s complaint.

[7] The sections 40/41 report provided to the parties was dated May 16, 2013. The author of the report summarized the CHRC complaint and the background to its reactivation, noting that the report would focus on whether the CHRC complaint might be vexatious, pursuant to paragraph 41(1)(d) of the *CHRA*, in the sense that it may have been dealt with through an alternate process. The report also summarized the factors relevant to a decision under paragraph 41(1)(d) of the *CHRA* (including the case law), as well as both parties’ submissions.

[8] Among the factors set out in the report are the following:

- Mr. Kwon had the opportunity to raise the human rights issues in his CHRC complaint and indeed had pursued them through the RWP process;
- An independent investigator at FedEx had “fully investigated and addressed” Mr. Kwon’s human rights issues through its RWP process. Mr. Kwon was interviewed and participated in the process. The former manager was interviewed and therefore had the opportunity to respond to the allegations;
- The independent investigator had also interviewed witnesses to the alleged incidents and prepared a detailed report setting out the investigation findings and all relevant documents collected. This report was presented to the Anti-Harassment Review Board which determined that the RWP had not been violated, but that the manager had breached the Acceptable Conduct Policy;
- Although the investigation had been conducted internally, it was conducted and reviewed by individuals who were independent from the parties to the complaint; and
- While Mr. Kwon was dissatisfied with the outcome, a final decision had been made and Mr. Kwon’s human rights issues had been addressed through an internal complaints process that had the authority to consider human rights issues. Further, it noted that the alleged discrimination appeared to have stopped since FedEx no longer employed the manager in question.

[9] By letter dated July 5, 2013, the CHRC advised that upon reviewing the Commission’s sections 40/41 report and any submissions filed in response, it had determined that it should not deal with the CHRC complaint pursuant to paragraph 41(1)(d) of the CHRA. The reason provided for this decision was:

The complainant’s human rights allegations have been addressed by an alternate decision-maker with authority to consider human rights issues. Justice does not require that the Commission deal with the complaint.

[10] Mr. Kwon is not satisfied with that conclusion. He wants the matter sent back to the Commission with a direction that it conduct a full investigation of his allegations. He contends that he has been denied procedural fairness and that the CHRC’s decision not to deal with his complaint was unreasonable.

[11] The sole issue in my view is whether the CHRC reasonably applied paragraph 41(1)(d) of the *CHRA* to the facts of this case.

[12] The standard of review for a decision by the Commission not to deal with a complaint has been determined by the jurisprudence to be reasonableness: *English-Baker v Canada (Attorney General)*, 2009 FC 1253 [*English-Baker*] at para 13; *Chan v Canada (Attorney General)*, 2010 FC 1232 [*Chan*] at paras 14-16. I see no reason to depart from that jurisprudence on this application.

[13] Paragraph 41 (1) (d) of the Act reads as follows:

Commission to deal with
complaint

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

[...]

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

Irrecevabilité

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 :

[...]

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

[14] Mr. Kwon is dissatisfied with the procedures followed by the CHRC. He had understood from one of the first communications he received from the Commission that an investigator would be assigned to his complaint. Based on information posted on the Commission's website, he thought he was entitled to a resolution process or face-to-face mediation. Mr. Kwon was not content

that his complaint was deferred by the Commission for the alternative internal FedEx RWP process. He believes that the company did not treat him with respect during that process as evidenced by its failure to respond to his repeated requests for information and in the amount of time that it took to complete.

[15] Moreover, Mr. Kwon believes that potential witnesses would have been intimidated by the procedures followed by the company in conducting this internal RWP process. In particular, the confidentiality agreement used by FedEx in conducting a harassment investigation states that any breach of confidentiality “will result in disciplinary action up to and including termination of employment”. This, Mr. Kwon submits, had a chilling effect on any colleagues who may have been inclined to act as witnesses on his behalf. In the result, he submits, his complaint did not receive full consideration and the Commission erred in accepting the FedEx process as a reasonable alternative.

[16] While I am sympathetic to Mr. Kwon’s concerns, they are primarily aimed at his treatment by FedEx. No explanation has been offered as to why it took the Board almost a year to complete its review of his complaint and why his repeated requests for information about the status of the matter were ignored by the Human Resources manager to whom they were directed. Further, the Anti-harassment review panel provided no reasons or explanation as to why the conduct complained of did not breach the Respectful Workplace Policy but did constitute an infringement of the Acceptable Conduct Policy. I have some difficulty, therefore, understanding why this was an acceptable alternative means to address Mr. Kwon’s complaints.

[17] That being said, the reasonableness standard of review requires deference to the decisions of expert tribunals such as the Commission. In judicial review, as stated by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. The Court is also concerned with whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. This is not a standard of perfection.

[18] Contrary to Mr. Kwon's understanding and expectation, the Commission was not under an obligation to conduct its own investigation of his complaint or to attempt a resolution process or face-to-face mediation. I note that the reference to the appointment of an investigator was made before the Commission was advised of the internal complaint and review process and was asked to defer its investigation pursuant to paragraph 41(1)(a) of the CHRA. But even if it had been stated after those events had occurred, the Commission would not have been obliged to follow through with the appointment of an investigator if it determined that an alternative means to address the complaint would be preferable. The Commission controls its own procedure.

[19] With respect to Mr. Kwon's allegation that the CHRC failed to consider new evidence provided by Mrs. Charlene Thorpe in making its determination, I note that upon review of the sections 40/41 report, this does not appear to have been raised by the applicant before the CHRC as it is not included in the summary of the applicant's submissions. Furthermore, I also note that according to the respondent, it is not new evidence as the employee in question was interviewed as

part of the RWP process. Mr. Kwon's evidence of an alleged physical threat that was at least partially corroborated by Mrs. Thorpe was included in his complaint to FedEx.

[20] The Commission's obligation, when the complaint was reactivated following the RWP process, was to examine whether or not it should deal with the merits even though they had already been dealt with by an internal process. In making that decision it was required to do its work diligently and reasonably but it can not be held to stringent procedural standards: *English-Baker*, above, at para 18.

[21] The Commission based its decision on Mr. Kwon's complaint form dated August 27, 2010 and the sections 40/41 report. The sections 40/41 report included both parties' submissions on whether or not the complaint was vexatious. The Commission did not base its decision solely on the fact of the RWP process, as Mr. Kwon has suggested, but also on the parties' submissions as to whether or not that process had adequately addressed his human rights complaints. To borrow from the language of *Chan, supra*, at para 50, "it turned its mind to examine whether, in light of the previous investigation and its findings, the complaint attracted subsection 41(1)(d). It concluded that it did. I cannot say that this finding was unreasonable within the range stipulated by *Dunsmuir*, above." I have reached the same conclusion in this matter.

[22] The Commission's reasons are intelligible, transparent and justified and the decision falls within the range of outcomes acceptable in terms of the facts and the law. Accordingly, this application must be dismissed.

[23] The respondent has not requested costs. In the circumstances, none would have been awarded. It is somewhat ironic, given the name of the Respectful Workplace Policy, that FedEx does not appear to have treated Mr. Kwon with the respect due an employee of many years.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed without costs.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1320-13

STYLE OF CAUSE: JOSEPH KWON V. FEDERAL EXPRESS CANADA LTD

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 18, 2014

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

DATED: MARCH 19, 2014

APPEARANCES:

Joseph Kwon

FOR THE APPLICANT
(ON HIS OWN BEHALF)

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SOLICITORS OF RECORD:

N/A

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