Federal Court of Appeal  Cour d'appel fédérale

Date: 20150416

Docket: A-138-14

Citation: 2015 FCA 99

CORAM: **DAWSON J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

DAVINDER KHAPER

Appellant

and

AIR CANADA

Respondent

Heard at Toronto, Ontario, on December 10, 2014.

Judgment delivered at Ottawa, Ontario, on April 16, 2015.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: DAWSON J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Davinder Khaper has appealed the decision of Justice Kane (reported at 2014 FC 138). The Federal Court Judge dismissed his application for judicial review of the decision of the Canadian Human Rights Commission (CHRC) rendered on February 6, 2013 (and sent to Mr. Khaper on February 20, 2013). The CHRC dismissed Mr. Khaper's complaint, which he had filed under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (*CHRA*). Mr. Khaper had filed a complaint alleging that his former employer, Air Canada, had discriminated against him based

on his mental disability, race and national or ethnic origin in terminating his employment. For the reasons that follow I would dismiss this appeal.

Background

[2] Mr. Khaper commenced work with Air Canada on November 24, 1997. During the time that he was employed, Mr. Khaper received a number of letters of expectation and letters of discipline in relation to his conduct at work. The letters related to either his stealing time from his employer or insubordination. He would steal time by punching in before he commenced work, leaving work without punching out, or taking unauthorized breaks when he should have been working. On February 22, 2008 he was issued a "step 5" disciplinary letter which informed him that if he stole time again, his employment would be terminated. He also received a 20-day suspension. However, when that matter was grieved, the suspension was rescinded.

[3] At the grievance hearing related to the "step 5" disciplinary letter the arbitrator warned Mr. Khaper not to steal time again or else he would be fired.

[4] Almost one year later on January 22, 2009, Mr. Khaper punched in for work at 13:28 and, without notifying his supervisor, left work to attend court without punching out. He returned to work around 15:40. Following that incident, Air Canada terminated his employment, effective January 22, 2009.

[5] Mr. Khaper filed a grievance in relation to the termination of his employment. The grievance arbitration hearing was held in March 2009 and the labour arbitrator upheld Mr.

Khaper's termination of employment. Mr. Khaper did not allege discrimination at the grievance arbitration hearing.

[6] Following the dismissal of his grievance, Mr. Khaper retained legal counsel in April 2009. Approximately four months after he retained counsel, Mr. Khaper obtained a psychiatric report which, for the first time, indicated that Mr. Khaper had bipolar affective disorder. There was no indication that either Mr. Khaper or Air Canada was aware that he had this disorder prior to the diagnosis thereof in August 2009.

[7] On November 12, 2009, Mr. Khaper's union wrote to Air Canada to request that his employment be reinstated in light of this psychiatric report. This request was denied by letter dated November 23, 2009.

[8] Mr. Khaper indicated that he sent a complaint to the CHRC on January 22, 2010, alleging that Air Canada, in terminating his employment a year earlier on January 22, 2009 and in refusing to reinstate him in November 2009, had discriminated against him on the grounds of race, ethnic origin, colour and disability. This complaint was received by the CHRC on February 10, 2010.

[9] On May 26, 2010, the CHRC notified Mr. Khaper that his complaint was dismissed because there did not appear to be any link between the alleged discriminatory acts and any prohibited ground of discrimination.

[10] Mr. Khaper also requested that the arbitrator reconsider whether his discharge from Air Canada was appropriate based on the newly acquired medical report. Initially the arbitrator refused to reconsider the matter on the basis that he was *functus officio* but later he agreed to reconsider it provided that there was an independent medical examination of Mr. Khaper. Dr. Cashman performed this examination. The reconsideration hearing, which included the presentation of Dr. Cashman's report, was held in January 2012. The arbitrator upheld Mr. Khaper's discharge from his employment on the basis that the evidence did not establish that Mr. Khaper was disabled at the relevant time. No judicial review of this decision was sought.

[11] By letter dated May 30, 2012, counsel for Mr. Khaper asked the CHRC to reopen his complaint. His complaint was re-opened and the parties were invited to make submissions. An investigation report was prepared and sent to the parties. The report recommended that the complaint be dismissed because it was not filed within the time period prescribed by the *CHRA* for filing complaints and because it was vexatious. The parties were invited to respond to the report. Air Canada, by letter dated December 6, 2012, simply stated that it agreed with the report. Mr. Khaper submitted a response dated December 21, 2012. The responses were disclosed to each party with a further invitation to the parties to submit comments. Air Canada, by letter dated January 10, 2013, made submissions in relation to Mr. Khaper's response dated December 21, 2012, but Mr. Khaper did not make any submissions in relation to Air Canada's response dated December 6, 2012. Following Air Canada's submission dated January 10, 2013, Mr. Khaper requested the right to make further submissions, but that request was denied.

[12] The CHRC, by a decision dated February 6, 2013, notified Mr. Khaper that his complaint was dismissed on the basis that it was not brought within the time period for filing a complaint as set out in paragraph 41(1)(*e*) of the *CHRA*. The CHRC also informed him that it would not be exercising its discretion to extend the time period to file a complaint. In addition, the CHRC determined that Mr. Khaper's complaint was vexatious for the purposes of paragraph 41(1)(*d*) of the *CHRA*.

[13] Mr. Khaper brought an application for judicial review before the Federal Court. In that application he raised an issue of procedural fairness in relation to the denial by the CHRC of his request to respond to the submissions made by Air Canada on January 10, 2013. The Federal Court Judge found that Mr. Khaper had not been denied procedural fairness. In his notice of appeal and in his memorandum of fact and law, Mr. Khaper included arguments related to this procedural fairness issue but at the hearing of the appeal, he stated that he was no longer pursuing this procedural fairness argument.

[14] Mr. Khaper also argued before the Federal Court that the decision of the CHRC to dismiss his complaint should not be upheld. The Federal Court Judge determined that the decision to dismiss his complaint was to be reviewed on the standard of reasonableness. She found that the following findings and decisions of the CHRC were reasonable:

(a) the refusal of Air Canada to reinstate Mr. Khaper in November 2009 could not be a discriminatory act for the purposes of the *CHRA*;

(b) Mr. Khaper’s complaint was not filed within the one-year time period as provided in the *CHRA* and the time period should not be extended; and

(c) his complaint should be dismissed as it was vexatious.

Standard of Review

[15] The role of this Court is to determine whether the Federal Court Judge selected the appropriate standard of review and then applied it correctly (*Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45 to 47, approving this approach, as set out in *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212, at paragraph 18). As a result, this Court is to step into the shoes of the Federal Court Judge and focus on the decision of the CHRC (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at paragraph 247).

[16] The standard of review applicable to the decision of the CHRC to dismiss a complaint under paragraph 41(1)(*d*) or (*e*) of the *CHRA*, is reasonableness (*Exeter v. Canada (Attorney General)*, 2012 FCA 119, [2012] F.C.J. No. 489 (QL) at paragraphs 1 and 6, and *Richard v. Canada (Attorney General)*, 2010 FCA 292, [2010] F.C.J. No. 1370 (QL), at paragraph 9).

[17] With respect to the exercise of discretion to extend the time to file a complaint, as noted by Justice McDougall in *Islam v. Nova Scotia (Human Rights Commission)*, 2012 NSSC 67, [2012] N.S.J. No. 78, at paragraph 10, "[a] decision as to whether to grant an extension of time is, like a decision to advance an investigation to a Board of Inquiry, a discretionary decision 'squarely within the Commission's mandat', to which the reviewing court owes deference." Justice McDougall relied on the decision of the Nova Scotia Court of Appeal in *Nova Scotia (Human Rights Commission) v. Halifax (Regional Municipality)*, 2010 NSCA 8, at para. 14 for

this conclusion. As noted by the Supreme Court of Canada in *Halifax Regional Municipality v. Nova Scotia Human Rights Commission*, 2012 SCC 10, [2012] 1 S.C.R. 364, at paragraph 24, the provisions of the *CHRA* related to the screening role of the CHRC are similar to the provisions of the Nova Scotia legislation in this regard.

Issues

[18] At the hearing of the appeal, Mr. Khaper indicated that the only ground of discrimination that he was pursuing on this appeal was disability.

[19] As a result the issues that are to be addressed on this appeal are the following:

a) Was the CHRC's determination that no alleged discriminatory act occurred when Air Canada refused to reinstate him as an employee in November 2009, reasonable?
b) If the last possible discriminatory act occurred on January 22, 2009 when his employment was terminated, was the CHRC's decision to not exercise its discretion to extend the time to file the complaint reasonable?
c) Was the decision to dismiss the complaint on the basis that it was vexatious, reasonable?

Refusal to Reinstate

[20] Mr. Khaper submits that when Air Canada refused to reinstate him as an employee in November 2009, Air Canada committed a discriminatory act for the purposes of the *CHRA*. If this was a discriminatory act, his complaint filed in February 2010 would have been filed within

the time period for filing a complaint as set out in paragraph 41(1)(*e*) of the *CHRA*, which provides that:

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 :
…	[…]
(*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.

[21] Mr. Khaper's argument is based on the premise that Air Canada had a duty to accommodate him that survived the termination of his employment and that Air Canada breached this duty when it failed to reinstate him in November 2009. This argument is based on the following comments made in *obiter* by the majority of the arbitration board in *Ottawa Civic Hospital v. Ontario Nurses' Association*, [1995] O.L.A.A. No. 60, 48 L.A.C. (4th) 388 [*Ottawa Civic Hospital*]:

> 47 As a practical matter, little may turn upon whether knowledge of a disability is treated as an essential element of a violation or rather liability is imposed without regard to this factor and relief is restricted to losses arising after the employer is aware of a handicap. Even if the Human Rights Code is read so as not to apply to the conduct of an employer before a handicap comes to light, the Code would apply to the actions of management thereafter. At the very latest, an employer learns of a disability when a formal complaint of discrimination based on handicap is made. In the typical case, an employee makes such a complaint soon after being fired. Even if the Code does not apply to a dismissal which occurred before a handicap is known, this legislation would apply to a refusal to reinstate the complainant once the disability has been revealed.
>
> 48 In the instant case, the grievor admitted her addiction to members of management only after she was fired. The employer contends management was

> not aware of the grievor's handicap when she was terminated. Assuming this to be true, in the event the grievor has not been accommodated to the point of undue hardship, either we would find a contravention of the Code based upon the employer's refusal to reinstate her once she disclosed her addictions or we would find a violation based upon her termination and limit the remedy to losses incurred after the employer was aware of her problem or reasonably should have been.
>
> (emphasis added)

[22] Mr. Khaper also referred to *Vos v. Canadian National Railway*, 2010 FC 713, [2010] F.C.J. No. 867 (QL) [*Vos*] and *Sears v. Honda of Canada Mfg., a Division of Honda Canada Inc.*, 2014 HRTO 45, [2014] O.H.R.T.D. No. 44 [*Sears*]. However, in each of these decisions there is simply a reference to the *Ottawa Civic Hospital* case (paragraph 54 of *Vos* and paragraph 115 of *Sears*) without any indication of whether the comments referred to above which Mr. Khaper relies on in this case, would be endorsed.

[23] During oral argument, counsel for Mr. Khaper referred to the recent decision of the Nova Scotia Supreme Court in *Cape Breton Regional Municipality v. Canadian Union of Public Employees, Local 933*, 2014 NSSC 97, 342 N.S.R. (2d) 117 [*CBRM*], as further support for his position. The Nova Scotia Supreme Court dismissed an application for judicial review of the decision of an arbitrator. In that case an employee had been dismissed from her employment because of excessive absenteeism. The arbitrator found that the termination of her employment was justified based on the information that was then available. The arbitrator, however, allowed the grievor to submit evidence of her medical condition (depression) that was available prior to the termination of her employment but which had not been disclosed to the employer prior to such termination. Based on this additional evidence, the arbitrator ordered the employer to conditionally reinstate the employee.

[24] Justice Gogan, in *CBRM*, noted that:

> 67 The Arbitrator's reasoning path with respect to the duty to accommodate is clear. Having admitted the "after-acquired" evidence as to the Grievor's disability, he was of the view that a duty to accommodate would have been triggered if the information had been provided to the Employer before termination.
>
> …
>
> 78 The Arbitrator goes on to conclude at page 27 that the authorities on the point did not deprive the Grievor of the right of accommodation simply because, through no fault of her own, information supporting the need was not made available to the Employer. As I understand the reasoning, the nature of the depression prevented the Grievor from recognizing her disability and asking for accommodation. Failure to recognize the particular nature of depression would deprive the Grievor of protections afforded by the human rights legislation.

[25] There was no indication in *CBRM* that the employee had asked to be reinstated after her employment was terminated. The finding that was determined to be reasonable was that a duty to accommodate a disabled employee can arise before the employment of that person is terminated, even though the employer does not become aware of that employee's disability until after such employment is terminated. It is not necessary to express any opinion on this decision as the issue in this case is not whether Air Canada had a duty to accommodate Mr. Khaper on or before January 22, 2009. The issue in this case is whether the refusal by Air Canada on November 23, 2009 to reinstate Mr. Khaper after his disability was discovered and reported to Air Canada could be considered as a discriminatory act for the purposes of the *CHRA*. That issue was not addressed in *CBRM*.

[26] There are also other decisions of adjudicators or tribunals that suggest that there is no duty to accommodate if the employer is legitimately unaware of an employee's disability. In

Worobetz v. Canada (Canada Post Corp.), [1995] C.H.R.D. No. 1, 28 C.H.R.R. D/485, the Canadian Human Rights Tribunal stated that:

> However, when the disability underlying inadequate job performance is unknown until after the termination and such lack of knowledge is not due to such things as willful blindness or neglect on the part of the employer (which I believe to be the case here), the dismissal is not at all based upon a discriminatory ground and no prima facie case exists. To find otherwise would lead to impractical and unreasonable consequences for employers who are legitimately not aware of an employee's existing disability and may also lead to additional and unrealistic rights for such employees.

[27] This Court, in *Lever v. Canada (Human Rights Commission)*, [1988] F.C.J. No. 1062 (QL), 10 C.H.R.R. D/6488, addressed the issue of whether continuing to maintain a decision to terminate the employment of a person would be a separate discriminatory act. MacGuigan J.A., on behalf of this Court, noted that:

> The applicant first argued before us that the one-year period referred to in this paragraph of the Act started to run only with the final ministerial review decision on March 1, 1987. However, in our view this issue was decided by this Court in Latif v. Canadian Human Rights Commission, [1980] 1 F.C. 687, at 700 (per Le Dain J.):
>
> > The decision of the Department of National Revenue to adhere to its original decision, despite the finding and recommendation of the Anti-Discrimination Directorate, cannot be regarded, for purposes of the Act, as a separate and additional discriminatory practice. The discharge was an act that took place and was completed at a specific point of time. All that has happened since then can be summed up as a continued insistence that the decision was justified. Adherence to the decision cannot have the effect of making the act of discharge a continuing discriminatory practice.
>
> The applicant's complaint arose out of his employment; once his employment ceased as of the time of his discharge, no later event could give rise to a complaint relating to employment.

[28] *Lever* was not related to an unknown disability that was only disclosed after the employment was terminated. However, the principle that complaints arising out of employment must relate to acts committed before the employment relationship is terminated, is applicable in this case.

[29] Mr. Khaper's employment with Air Canada was terminated on January 22, 2009. This was the last act that was related to his employment. Even if Air Canada could be found to have a duty to accommodate him on or before January 22, 2009, this would not change the date of the last act of the employer. Would Parliament have intended, that if Mr. Khaper had not been diagnosed with bipolar affective disorder until two years after his employment had been terminated (or later), that he could then create a discriminatory act on the part of Air Canada for the purposes of the *CHRA* by requesting reinstatement (which would presumably be refused)?

[30] To find that the last act for the purposes of paragraph 41(1)(*e*) of the *CHRA* was the refusal by Air Canada to reinstate the employment of Mr. Khaper in November 2009 would mean that Mr. Khaper would have control over the commencement of the one year limitation period in paragraph 41(1)(*e*) of the *CHRA* by choosing when to submit a request for reinstatement. As well, if Air Canada had a continuing obligation to accommodate the needs of Mr. Khaper, then any subsequent refusal to reinstate him would also be a discriminatory act and he could continuously renew the limitation period by submitting additional requests to be reinstated. This could not be an intended result for the purposes of paragraph 41(1)(*e*) of the *CHRA*.

[31] It would therefore be reasonable, in the circumstances of this case, for the CHRC to determine that, for the purposes of the *CHRA*, the refusal by Air Canada to reinstate him as an employee should not be considered as a possible discriminatory act because it occurred after his employment had been terminated.

[32] In her decision, the Federal Court Judge distinguished the cases of *Ottawa Civic Hospital* and *Vos*. Mr. Khaper submitted that it was not appropriate for the Federal Court Judge to distinguish these cases because the CHRC had not adopted the part of the report in which the investigator addressed the argument that the last discriminatory act occurred when Air Canada refused to reinstate Mr. Khaper.

[33] In the section 40/41 report there is a reference to Mr. Khaper's argument that the last alleged discriminatory act occurred when Air Canada refused to reinstate him as an employee. In the analysis related to timeliness, the report states:

> 18 The last alleged event cited in the complaint would have occurred on January 22, 2009. The complaint was received on February 10, 2010. The complaint is untimely.
>
> 19 The last alleged discriminatory act is the termination of the complainant's employment on January 22, 2009, not the respondent's refusal, in its letter of November 23, 2009, to reconsider its decision. The suggestion by the complainant's representative that the last alleged discriminatory act would have occurred on November 23, 2009, cannot stand because the decision to terminate the complaint's employment was made on January 22, 2009.

[34] In its decision, the CHRC did not specifically refer to paragraphs 18 and 19 of this report. The CHRC did, however, quote the paragraph of the report that addressed the issue of extending the time to file a complaint, (which would only be relevant if the last possible discriminatory act

was the termination of the employment of Mr. Khaper on January 22, 2009). The CHRC must, therefore, have agreed with the conclusion in the report that the failure of Air Canada to reinstate Mr. Khaper on November 23, 2009 was not an act which could give rise to a new limitation period under the *CHRA*.

[35] As noted by the Supreme Court of Canada in *Sattva Capital Corp.* v. *Creston Moly Corp.*, 2014 SCC 53, 461 N.R. 335, reviewing courts should first attempt to supplement the reasons of a tribunal before they search for ways to subvert them:

> 110 In Newfoundland and Labrador Nurses' Union, Abella J. cites Professor David Dyzenhaus to explain that, when conducting a reasonableness review, it is permissible for reviewing courts to supplement the reasons of the original decision-maker as part of the reasonableness analysis:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added by Abella J.; para. 12.]
> >
> > (Quotation from D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., The Province of Administrative Law (1997), 279, at p. 304.)
>
> Accordingly, Justice Armstrong's explanation of the interaction between the Market Price definition and the "maximum amount" proviso can be considered a supplement to the arbitrator's reasons.

[36] In this case the Federal Court Judge's analysis of *Ottawa Civic Hospital* and *Vos* was performed to supplement the CHRC decision that the complaint was not filed within the time period as set out in the *CHRA*.

[37] I would find that the decision of the CHRC that, for the purposes of the *CHRA*, the last alleged discriminatory act did not occur on November 23, 2009 but rather occurred on January 22, 2009 when Mr. Khaper was dismissed as an employee, is reasonable.

Extension of Time

[38] Since the last alleged discriminatory act for the purposes of the *CHRA* occurred on January 22, 2009 and since his complaint was not received by the CHRC until February 2010 the next question is whether the decision of the CHRC to not extend the time for Mr. Khaper to file a complaint was reasonable.

[39] As noted by the CHRC, Mr. Khaper was represented by counsel long before the one year limitation period expired in January 2010. Since Mr. Khaper had focused, in his submissions to this Court, on the arguments related to whether the failure of Air Canada to reinstate him in November 2009 was a discriminatory act, he did not make any substantial submissions on why it was unreasonable for the CHRC to refuse to extend the time for filing his complaint. As a result, there is no basis upon which to find that the decision of the CHRC to not extend the time for Mr. Khaper to make his complaint was unreasonable.

[40] Since Mr. Khaper did not submit his complaint within the time period as provided in the *CHRA* and since the decision of the CHRC to not extend the time was reasonable, I would dismiss this appeal.

Was the Complaint Vexatious?

[41] Since I would find, as noted above, that the appeal should be dismissed based on the timeliness issue, I would not address the issue of whether the complaint should have been dismissed on the basis that it was vexatious.

Conclusion

[42] I would dismiss the appeal. At the conclusion of the hearing of the appeal, the parties confirmed that they had reached an agreement on costs and that the successful party was to be entitled to costs fixed in the amount of $3,000, all inclusive. I would therefore award costs to Air Canada, fixed in the amount of $3,000, all inclusive.

"Wyman W. Webb"
J.A.

“I agree
Eleanor R. Dawson J.A.”

“I agree
D. G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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