

Federal Court of Appeal



Cour d'appel fédérale

Date: 20150917

Docket: A-356-14

Citation: 2015 FCA 198

**CORAM: STRATAS J.A.
RENNIE J.A.
GLEASON J.A.**

BETWEEN:

STEVEN LOVE

Appellant

and

**OFFICE OF THE PRIVACY
COMMISSIONER OF CANADA**

Respondent

Heard at Toronto, Ontario, on September 8, 2015.

Judgment delivered at Ottawa, Ontario, on September 17, 2015.

REASONS FOR JUDGMENT BY:

GLEASON J.A.

CONCURRED IN BY:

**STRATAS J.A.
RENNIE J.A.**

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant, Steven Love, seeks to overturn the July 2, 2014 judgment of the Federal Court (made by Justice Russell) in which the Federal Court dismissed Mr. Love's application for judicial review of the August 21, 2013 decision of the Canadian Human Rights Commission [the Commission or the CHRC]. The Commission exercised its discretion under paragraph 41(1)(d) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [the CHRA] and dismissed Mr. Love's

human rights complaint on the ground that it was frivolous because he failed to put forward a reasonable basis for his allegations of discrimination.

[2] For the reasons set out below, I would dismiss this appeal, with costs fixed in the amount of \$250.00.

I. Background

[3] Mr. Love's complaint to the Commission arose from his dealings with the Office of the Privacy Commissioner of Canada [the OPC]. Mr. Love made several complaints to the OPC under the *Privacy Act*, R.S.C. 1985, c. P-21, all of which related to his interactions with Citizenship and Immigration Canada [CIC]. These interactions occurred in the context of a spousal sponsorship application in which Mr. Love had sought to sponsor his common law partner for immigration to Canada as a permanent resident. In his complaint to the Commission, Mr. Love alleged that the OPC had failed to rule on some of his complaints and that the OPC's treatment of him amounted to discrimination based on his disability and sexual orientation.

[4] Mr. Love provided no particulars of the alleged discriminatory conduct in his human rights complaint other than to detail a derogatory comment that he alleged had been made by an OPC investigator to whom the matter was originally assigned. Mr. Love alleged that this individual had referred to Mr. Love's same-sex partner as "his whatever". (Mr. Love's file was transferred to other OPC employees for investigation after Mr. Love complained about this derogatory comment.)

[5] Following receipt of Mr. Love's human rights complaint against the OPC, the Commission wrote to him and the OPC, indicating that it was considering dismissing the complaint under paragraph 41(1)(d) of the CHRA. That provision affords the Commission discretion to dismiss a complaint if it appears to the Commission that the complaint is "trivial, frivolous, vexatious or made in bad faith".

[6] In its letter to the parties, the Commission indicated that it appeared that Mr. Love's complaint might be subject to dismissal for being frivolous. The Commission set out the criteria to assess frivolousness, namely, that a non-frivolous complaint must concern conduct that is subject to regulation under the CHRA, such as a denial of a service, and that such conduct must be linked to one of the prohibited grounds of discrimination listed in the CHRA. The Commission explained that to avoid a summary dismissal under paragraph 41(1)(d) of the CHRA a complainant must do more than merely assert that he or she has been denied a service based on one of the prohibited grounds and must additionally set out the basis upon which the complainant alleges that there is a link between the impugned conduct and one of the prohibited grounds. The Commission invited Mr. Love and the OPC to make representations on these points.

[7] Mr. Love filed submissions in response to the Commission's letter, but, in terms of further particulars of the alleged discrimination, claimed only that the OPC had failed to adequately address his complaints and that his privacy concerns stemmed from the alleged misuse by CIC of his personal health information related to his disability. Apart from the derogatory comment made by the OPC investigator to whom the file was first assigned, Mr.

Love did not provide any details to support his claim that the OPC had failed to address his complaints by reason of his disability or sexual orientation.

[8] Following receipt of the parties' submissions, a CHRC investigator prepared a report that recommended dismissal of Mr. Love's complaint under paragraph 41(1)(d) of the CHRA. In it, the investigator accepted that the OPC may have denied a service to Mr. Love but found that Mr. Love had failed to set out any basis for his assertion that the denial occurred by reason of his disability or sexual orientation. The investigator determined the derogatory comment to be irrelevant in this regard as the OPC employee who allegedly made it was removed from the file early in the OPC's investigation process and played no role in the ultimate treatment of Mr. Love's complaints. Due to the absence of such a link, the investigator recommended the dismissal of Mr. Love's complaint against the OPC. In so recommending, the investigator made reference to the relevant case law, some of which is discussed below.

[9] The CHRC investigator provided her report to Mr. Love and the OPC and afforded them the opportunity to make submissions on it for consideration by the Commission. The parties did so, but, once again, Mr. Love failed to provide any further particulars of any alleged link between the OPC's treatment of his complaints and a prohibited ground of discrimination under the CHRA.

[10] In a brief letter decision, the Commission determined that it would exercise its discretion under paragraph 41(1)(d) of the CHRA and decline to deal with Mr. Love's complaint against the OPC. In such circumstances, the report of the investigator that was submitted to the

Commission is deemed to constitute the Commission's reasons for the decision: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at para. 37; *Herbert v. Canada (Attorney General)*, 2008 FC 969, 169 A.C.W.S. (3d) 393 at para. 26; *D'Angelo v. Canada (Attorney General)*, 2014 FC 1160 at para. 24.

[11] In a very thorough decision, the Federal Court considered each of the arguments raised by Mr. Love and concluded that his application for review of the Commission's decision should be dismissed. More specifically, the Court found that the standard of review applicable to the Commission's decision was reasonableness and held that the Commission's decision was reasonable as Mr. Love had provided nothing beyond bare assertions to support his claim that he had been denied services by the OPC by reason of his disability or sexual orientation. In response to several arguments made by Mr. Love, the Court also noted in comments not necessary to its decision that Mr. Love appeared to be challenging the substance of the decisions made by the OPC or its alleged failure to act. The Federal Court explained that such matters were potentially reviewable under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 [the FCA] but not by way of a human rights complaint. The Federal Court also considered and dismissed Mr. Love's claim that the Commission investigator was biased, finding there to be no evidence in support of this assertion.

II. Issues

[12] Mr. Love submits that in reaching the foregoing conclusions the Federal Court committed several reviewable errors, any one of which would warrant intervention by this Court. More specifically, he argues that the Federal Court:

- erred in law in stating that his human rights complaint was unusual in having been made against another administrative decision-maker;
- erred in law in holding that he could have filed an application under section 18.1 of the FCA to compel the OPC to act in the event it had failed to address his complaints;
- erred in law in excluding the affidavit evidence he had sought to file;
- erred in law in failing to find the Commission investigator biased because she had also investigated another human rights complaint Mr. Love had filed against CIC;
- erred in fact in finding that the OPC had addressed his complaints when they had actually only dealt with one of them;
- erred in fact in finding that he was seeking to attack the OPC's decision;
- erred in fact in concluding that the only particular of an alleged link between the OPC's denial of service and a prohibited ground of discrimination was the single derogatory comment Mr. Love raised. He argues that his complaint was sufficiently particularized as his human rights complaint concerned his personal health information related to his disability;
- erred in finding the Commission's decision to be reasonable; and
- violated his procedural fairness rights in failing to address all the issues he raised and in deciding an issue that was not raised or discussed at the hearing, namely, that his concerns about the OPC's alleged failure to act or the unreasonableness of

its decision(s) could be challenged only through an application under section 18.1 of the FCA.

[13] In many of the foregoing arguments, Mr. Love has misapprehended the nature of the Federal Court's decision. The comments made by the Federal Court about the unusual nature of Mr. Love's human rights complaint (as being against another tribunal) and on the availability of an application under section 18.1 of the FCA to challenge the OPC's failure to act or to challenge the merits of its decision(s) were surplusage and unnecessary to its decision. Thus, whether these statements are correct or erroneous is irrelevant to this appeal.

[14] Likewise, the issue of whether the Commission and the Federal Court erred in stating that the OPC had dealt with all (as opposed to only one) of Mr. Love's complaints under the *Privacy Act* is not relevant to this appeal as the Commission investigator accepted that Mr. Love's complaint disclosed sufficient grounds to set out an alleged basis for there having been a denial of a service to him by the OPC. The Commission thus found that Mr. Love had met the first branch of a non-frivolous claim by raising conduct by the OPC that is subject to regulation under the CHRA. His complaint was not dismissed on this first ground. Rather, it was dismissed on the second ground of failure to provide sufficient material facts in support of a possible link between that alleged denial of service and his disability or sexual orientation.

[15] Therefore, the issues requiring determination in this appeal are the following:

- Did the Federal Court commit a reviewable error in excluding the additional affidavit evidence that Mr. Love sought to file?

- Did the Federal Court err in finding the Commission's decision reasonable?
- Did the Federal Court err in dismissing Mr. Love's bias allegations?
- Was the Federal Court procedurally unfair to Mr. Love?

III. Analysis

[16] I find no grounds to intervene with the judgment of the Federal Court on any of the foregoing grounds.

A. *The Federal Court's Evidentiary Ruling*

[17] The Federal Court held that the affidavit material that Mr. Love sought to file was not before the Commission when it made its decision and therefore it was not admissible on the judicial review application (at para. 85). The Court made no error in law in so ruling. It is trite law that, in general, a judicial review application is to be determined based on the record that was before the administrative decision-maker. The recognized exceptions to this rule are narrow and generally involve only three types of evidence: general evidence of a background nature that is of assistance to the Court; evidence that is relevant to an alleged denial of procedural fairness by the decision-maker that is not evident in the record before the decision-maker; or evidence that demonstrates the complete lack of evidence before a decision-maker for an impugned finding: *Association of Universities and Colleges of Canada v. Canadian Copyright Licencing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paras. 18-20; *International Relief Fund for the Afflicted and Needy (Canada) v. Canada (National Revenue)*, 2013 FCA 178, 2013 D.T.C. 5161 at para. 10.

[18] Here, Mr. Love has failed to establish that the excluded evidence falls into any of these three exceptions and the Federal Court therefore did not err in excluding it. In any event, the point is moot as the Federal Court held that even if the evidence had been admissible, it was irrelevant and would not have affected its decision.

B. *The Federal Court's Evaluation of the Reasonableness of the Commission's Decision*

[19] In assessing the Federal Court's ruling that the Commission's decision was reasonable, this Court is required to step into the shoes of the Federal Court and determine whether it selected the appropriate standard of review and whether it applied that standard correctly:

Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47.

[20] It is well-settled that the reasonableness standard applies to review of decisions of this sort made under paragraph 41(1)(d) of the CHRA: *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 255 A.C.W.S. (3d) 955 [*Bergeron*] at paras. 41-45; *Hagos v. Canada (Attorney General)*, 2015 FCA 83 at paras. 7-11. Thus, the Federal Court selected the appropriate standard of review of the Commission's decision.

[21] I also believe that the Federal Court applied the reasonableness standard correctly and accordingly find no grounds to interfere.

[22] As Mr. Love correctly notes, reasonableness review requires the reviewing Court to assess whether a decision is justified, transparent and intelligible and whether the result reached is defensible on the facts and the law: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008

SCC 9 at para. 47. This, in turn, involves assessment of both the reasons given by the decision-maker (where reasons are given) and of the result reached.

[23] Here, in dismissing Mr. Love's complaint, the Commission applied well-settled human rights principles to the effect that a complaint may be dismissed for frivolousness under paragraph 41(1)(d) of the CHRA if it fails to set out a reasonable or *prima facie* basis for the allegation of discrimination. This inquiry is akin to that made by a court in the context of a motion to strike pleadings and involves accepting the facts as alleged by the claimant and asking whether it is "plain and obvious" that the complaint could not succeed: *Canada Post Corp v. Canada (Canadian Human Rights Commission)* (1997), 130 F.T.R. 241, 71 A.C.W.S. (3d) 935 (T.D.) at paras. 4-5, *aff'd* (1999), 245 N.R. 397 (C.A.); *Public Service Alliance of Canada v. Canada (Attorney General)*, 2015 FCA 174 at para. 33. These principles are set out in the investigator's report in this case, and, therefore, the Commission's adoption of them as set out in the report is reasonable.

[24] The case law further recognizes that in assessing whether a complaint is frivolous, the Commission may look to the absence of a claimed link between the impugned conduct and a ground of discrimination under the CHRA. More specifically, where a complainant fails to assert a link between the conduct complained of and a prohibited ground of discrimination – or, to put the matter another way, fails to explain why the adverse treatment was connected to one of the grounds prohibited under the CHRA – then the Commission may reasonably conclude that it is plain and obvious that a complaint could not succeed, as was recently noted by this Court in *McIlvenna v. Bank of Nova Scotia*, 2014 FCA 203, 466 N.R. 195 at para. 14. (See also, to similar

effect, *Canada (Attorney General) v. Maracle*, 2012 FC 105, 404 F.T.R. 173 at para. 41 and *Hartjes v. Canada (Attorney General)*, 2008 FC 830, 334 F.T.R. 277 at para.15.)

[25] In light of these principles, it was reasonable for the Commission to have required Mr. Love to provide particulars of an alleged link between the OPC's alleged failure to adequately address his *Privacy Act* complaints and his sexual orientation or disability.

[26] In my view, the Commission's conclusion that Mr. Love failed to set out any material facts in support of such a link is reasonable. In this regard, as mentioned above, the only evidence was the derogatory comment made by the OPC investigator early on in the investigation. But that cannot constitute discriminatory conduct by the OPC. Again, as mentioned above, the OPC investigator who made the comment was immediately removed from the file and played no role in the alleged service denial. Apart from this, Mr. Love put forward only general assertions and conclusions in support of his claim and failed to provide any material facts to indicate that he received adverse treatment from the OPC by reason of his sexual orientation or disability. Given the lack of any material facts supplied by Mr. Love to support his claim of discrimination, the Commission's determination that Mr. Love failed to show that his complaint was not frivolous is reasonable. Therefore, I concur with the Federal Court's evaluation of the reasonableness of the Commission's decision.

C. *The Federal Court's Evaluation of the Bias Claim*

[27] Mr. Love claimed that the Commission investigator was biased due to the role she played in the complaint Mr. Love had filed with the Commission against CIC. This Court has no evidence before it in support of these assertions and accordingly they must be dismissed. In any

event, Mr. Love failed to raise this issue with the Commission investigator. This vitiates any potential claim for bias. It is well-settled that allegations of this nature must be made before the administrative decision-maker and cannot be raised for the first time on judicial review: *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at 942-943, and, more generally, the cases cited in Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, loose leaf, (Toronto: Carswell, August 2015) at 11:5500.

[28] Therefore, the Federal Court did not commit any reviewable error in dismissing Mr. Love's bias allegations.

D. *Mr. Love's Rights to Procedural Fairness*

[29] Finally, there is no evidence of any denial of procedural fairness by the Federal Court in its treatment of Mr. Love.

[30] There is no evidence before us to substantiate Mr. Love's claim that Justice Russell did not raise the availability of a remedy under section 18.1 of the FCA during the hearing. Moreover, even if he did not do so, the failure to discuss this issue would not constitute a denial of procedural fairness as the Federal Court's decision does not turn on these comments. As I have explained above, they were surplusage, offered by the Federal Court to try and explain to Mr. Love – as a self-represented litigant – why his judicial review application was unmeritorious.

[31] Further, Mr. Love's allegation that the Federal Court failed to address all his arguments is likewise without merit. The record before us demonstrates that all his points were thoroughly canvassed by the Federal Court in the decision below.

IV. Proposed Disposition

[32] It follows that I would dismiss this appeal.

[33] The respondent requests at least a nominal award of costs, even though it did not seek costs before the Federal Court. It cites the unmeritorious nature of this appeal and the fact that all of Mr. Love's concerns were thoroughly and correctly dealt with by the Federal Court. In recognition of the fact that Mr. Love is self-represented, the respondent suggested costs should be fixed in the amount of \$250.00 as, essentially, a symbolic amount in recognition of the entirely unmeritorious nature of this appeal.

[34] I agree that an award in that quantum would be appropriate for the reasons given by the respondent. Therefore, I would fix costs of this appeal in the amount of \$250.00, all-inclusive.

"Mary J.L. Gleason"

J.A.

"I agree
David Stratas J.A."

"I agree
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-356-14

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OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 8, 2015

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: STRATAS J.A.
RENNIE J.A.

DATED: SEPTEMBER 17, 2015

APPEARANCES:

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