Federal Court of Appeal | Cour d'appel fédérale

Date: 20180529

Docket: A-256-17

Citation: 2018 FCA 101

CORAM: **DAWSON J.A.**
GLEASON J.A.
WOODS J.A.

BETWEEN:

MEI (VICKY) WONG

Appellant

and

PUBLIC WORKS AND GOVERNMENT SERVICES OF CANADA

Respondent

Heard at Vancouver, British Columbia, on May 15, 2018.

Judgment delivered at Ottawa, Ontario, on May 29, 2018.

REASONS FOR JUDGMENT BY: GLEASON J.A.

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

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] Ms. Wong appeals from the decision of the Federal Court in *Wong v. Public Works and Government Services Canada Inc.*, 2017 FC 633 (per LeBlanc, J.) in which the Federal Court dismissed her application for judicial review of the February 24, 2016 decision of the Canadian Human Rights Commission (the CHRC or the Commission). In that decision, the CHRC determined that an inquiry into Ms. Wong's human rights complaint was not warranted pursuant

to subparagraph 44(3)(*b*)(i) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the CHRA).

[2] For the reasons set out below, I would dismiss this appeal with costs.

I. Background

[3] In her human rights complaint, Ms. Wong alleged that she had been subject to discrimination in respect of employment by reason of sex, in violation of section 7 of the CHRA. More specifically, she alleged that she had suffered adverse differential treatment following her return to work after a second maternity leave as her supervisor had not returned her to her former duties and had subjected her to close supervision which she had not before experienced. She also claimed that she had been unfairly denied promotion to the ENG-4 level, where several of her male colleagues were classified, despite performing work at that level. She further claimed that her supervisor had told her that she would not be promoted to the ENG-4 level prior to his retirement. She also asserted that she had been disciplined as a reprisal for seeking the reclassification of her position from the ENG-3 to ENG-4 level.

[4] The CHRC initially declined to inquire into Ms. Wong's complaint as she had the grievance procedure open to her to challenge some of the matters that she raised in her complaint. She filed a grievance seeking to have her position reclassified from the ENG-3 to ENG-4 level. In connection with her reclassification request, Ms. Wong asked the respondent to conduct a desk audit of her position. It confirmed that Ms. Wong's position was appropriately

classified at the ENG-3 level. Her bargaining agent elected to not pursue the grievance to adjudication after the audit was completed.

[5] After the grievance procedure was exhausted, the CHRC determined that it would initiate an inquiry into Ms. Wong's complaint and, as in the usual course in more complex cases, appointed an investigator to conduct an investigation. The investigator interviewed several witnesses, but did not interview Ms. Wong's supervisor since he was absent on long-term sick leave when the investigation was being conducted. In her report, the investigator noted that, despite the inability to interview Ms. Wong's supervisor, there was other evidence available to support the conclusions she reached. The investigator also did not interview all the witnesses Ms. Wong put forward, determining that it was not necessary to do so because, according to Ms. Wong, they would have corroborated the information provided by the other witnesses and the investigator accepted this information as true.

[6] In her report, the CHRC investigator recommended that no inquiry be undertaken into Ms. Wong's complaint as the respondent had provided adequate non-discriminatory explanations for its conduct.

[7] More specifically, the investigator found there was evidence to substantiate that Ms. Wong had been treated differently following her return to work because she was assigned less work than she had been assigned previously and projects were assigned to some of her male colleagues. However, the investigator concluded the respondent had provided an adequate non-discriminatory explanation for the lack of work because it had provided evidence to show that:

- The classification of Ms. Wong's position at the ENG-3 level had been confirmed through the audit commenced prior to her second maternity leave and many of the projects Ms. Wong alleged she should have been assigned involved work at the ENG-4 level;

- There was less work available that Ms. Wong was capable of performing in light of her inability to attend at Correctional Services Canada (CSC) sites due to a previous traumatic experience and the fact that CSC projects were the bulk of the unit's work when Ms. Wong returned from maternity leave;

- The workload of the unit was cyclical, following the government's fiscal year, and Ms. Wong had returned to work shortly following the commencement of the year, when the unit was less busy; and

- The respondent had contracted out routine work that had previously been performed at the ENG-3 level.

[8] The investigator also determined that Ms. Wong was correct in asserting that she was subject to closer supervision after her return to work following her second maternity leave, but concluded that the respondent had offered a non-discriminatory explanation for this change by reason of the need to conform to the applicable classification standard that provided that those at the ENG-3 level work under supervision.

[9] The investigator similarly found there were non-discriminatory reasons for the reprimand that Ms. Wong had received related to conduct that could be viewed as insubordinate. The

investigator further concluded that Ms. Wong had experienced a difference in treatment in respect of the process to fill a vacancy, but concluded there was a non-discriminatory explanation for the differential treatment. The investigator moreover determined that Ms. Wong had not been denied career progression as she had declined to apply for a permanent ENG-4 position and had not accepted an offer for an acting ENG-4 position.

[10] After the investigation was completed, but prior to the CHRC making its decision, the parties agreed to proceed to conciliation before a CHRC conciliator. They signed an agreement to conciliate which provided that, in the event a settlement was not reached, the respondent could consent to have its offer of settlement disclosed to the CHRC, in which event the parties could make submissions to the conciliator about the offer that would be placed before the CHRC. They did not settle and the respondent chose to disclose the offer to the CHRC. In her submissions about the import of the respondent's settlement offer, Ms. Wong submitted that she was entitled to cross-examine her supervisor, whom she alleged had then recovered from his illness.

[11] The CHRC issued brief reasons, in which it adopted the summary of the conclusions that the investigator set out in her report. The CHRC also concluded that the respondent's settlement offer was consistent with the remedies that could be awarded by the Canadian Human Rights Tribunal (the Tribunal) if it decided to refer the complaint to it for inquiry. The CHRC therefore determined that an inquiry into Ms. Wong's complaint was not warranted.

II. The Decision of the Federal Court

[12] Ms. Wong made similar arguments to the Federal Court as she advanced before us, namely that the failure to interview her supervisor and the other witnesses she put forward violated her rights to procedural fairness and that the CHRC's determination was unreasonable because there was more than ample evidence before the Commission to support her complaint.

[13] The Federal Court disagreed, applying the correctness standard of review to the procedural fairness issue and the reasonableness standard to the other issues raised by the appellant.

[14] On the procedural fairness point, the Federal Court noted that, in accordance with *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] 2 F.C. 574, [1994] F.C.J. No. 181 (*Slattery*), a CHRC investigation may be set aside for being procedurally unfair only where unreasonable omissions are made, such as where the investigator failed to examine obviously crucial evidence. The Federal Court also noted, in accordance with *Sanderson v. Canada (Attorney General)*, 2006 FC 447, [2006] F.C.J. No. 557 and *Gravelle v. Canada (Attorney General)*, 2006 FC 251, 60 Admin. L.R. (4th) 179, that a failure to interview key witnesses who were "obvious players" may amount to a failure to examine obviously crucial evidence, but that, in accordance with *Slattery*, an investigation will not be found to be lacking in thoroughness merely because the investigator did not interview each witness put forward by a party.

[15] The Federal Court concluded that the failure to interview Ms. Wong's supervisor did not amount to a breach of procedural fairness as the complainant accepted that her supervisor was unavailable due to illness when the investigation was being conducted and did not bring the issue to the attention of the Commission after the conciliation failed. As for the other witnesses who were not interviewed, the Federal Court concluded that they could not be considered crucial as according to Ms. Wong they would provide information similar to that of witnesses whom the investigator had interviewed. The Federal Court therefore dismissed Ms. Wong's procedural fairness arguments.

[16] On the merits of the decision, the Federal Court found there was evidence to support each of the impugned findings made by the investigator and therefore concluded that the Commission's decision was reasonable. The Federal Court went on to note that Ms. Wong had put forward reasons other than her gender for the treatment she suffered, namely that management had retaliated against her for seeking to have her position upgraded from the ENG-3 to the ENG-4 level. The Federal Court stated at paragraph 61 of its reasons:

> Retaliation in the workplace is no doubt an undesirable and reprehensible practice but it does not necessarily amount to a discriminatory practice within the meaning of the Act. In light of the evidence gathered by the Investigator, it was reasonable for the Commission to conclude that the Applicant's differential treatment was not the result of discrimination based on the Applicant's gender. In other words, this finding falls, in my view, within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at para. 47).

[17] It accordingly dismissed Ms. Wong's application for judicial review.

III. Analysis

[18] In this appeal, in accordance with *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47, this Court is required to step into the shoes of the Federal Court and determine if it selected the appropriate standard of review and, if so, whether it applied that standard correctly.

[19] It is not disputed that the Federal Court was correct in its selection of the standards of review, namely, no deference for the allegations of procedural fairness and reasonableness for its assessment of the merits of the CHRC's decision.

[20] Turning to the procedural fairness issue, for essentially the same reasons as those given by the Federal Court, I believe that the CHRC did not violate Ms. Wong's procedural fairness rights. While a failure to investigate crucial evidence may well amount to a denial of a claimant's procedural fairness rights in the context of a CHRC investigation, here there was no such failure for two reasons.

[21] First, there was no need for the investigator to have interviewed the additional witnesses other than Ms. Wong's supervisor that Ms. Wong put forward as the facts they could have spoken to that were favourable to Ms. Wong had been accepted by the investigator.

[22] Second, Ms. Wong accepted in her submissions to the investigator that her supervisor was unavailable to be interviewed while the investigation was ongoing and did not clearly indicate otherwise to the CHRC. The oblique mention of her alleged right to cross-examine the

supervisor, made in a submission on the import of the settlement offer that was placed before the CHRC, falls well-short of a request that the investigator conduct such an interview. Thus, while the supervisor might have been an important witness for the investigator to have interviewed had he been available, there was no reason for the investigator to have thought him available or for the Commission to have ordered that the investigation be re-opened for the purposes of conducting such an interview.

[23] I therefore agree with the Federal Court that there was no failure of procedural fairness in this case, particularly when it is recalled that the investigative process is not akin to a hearing and parties are thus not entitled, as of right, to insist that everyone whom they put forward will be interviewed by a CHRC investigator as was held in *Slattery* at para. 70 and in *McConnell v. Canadian Human Rights Commission*, 2004 FC 817, [2004] F.C.J. No. 1005 at para. 90 (aff'd 2005 FCA 389).

[24] Turning to the reasonableness of the CHRC's decision, as noted in *Ritchie v. Canada (Attorney General)*, 2017 FCA 114, 19 Admin. L.R. (6th) 177 at paras. 38-39, decisions like the present are entitled to substantial deference as they involve an exercise of discretion by the CHRC and are entirely factually-infused. In short, it is not the role of a reviewing court to re-weigh the evidence or to substitute its opinion for that of the CHRC.

[25] Here, for some of the same reasons as were given by the Federal Court, I believe that it was open to the investigator (and therefore to the CHRC that accepted the investigator's report) to have accepted that the respondent had provided satisfactory non-discriminatory explanations

for the differential treatment Ms. Wong received following her return to work after her second maternity leave. There were facts before the CHRC to support this conclusion, including the nature of Ms. Wong's limitations that made it impossible for her to attend CSC, her need for a ramp-up period following her leave and the time of year she returned to work, when there were fewer projects available. It was likewise open to the investigator and the CHRC to have accepted that the need for closer supervision resulted from the need to conform to the classification standard following the dismissal of Ms. Wong's classification grievance and was therefore not discriminatory. Similarly, there was evidence to support the conclusion that there was no improper denial of Ms. Wong's advancement to the ENG-4 level in light of the expiry of the priority list she held a place on and her refusal to apply for a permanent ENG-4 position and to accept an acting ENG-4 level promotion. Likewise, there were credible non-discriminatory reasons advanced on the letter of reprimand Ms. Wong received.

[26] Contrary to what Ms. Wong asserts, she did not raise new facts in her response to the investigator's report that would have required the CHRC to order that the investigation be re-opened. This case is therefore distinguishable from *Herbert v. Canada (Attorney General)*, 2008 FC 969, [2008] F.C.J. No. 1209.

[27] In light of the forgoing, it cannot be said that the CHRC's decision to decline to refer Ms. Wong's complaint for an inquiry by the Tribunal was unreasonable.

[28] While this is sufficient to dispose of this appeal, I believe it important to indicate that I do not endorse the Federal Court's comments regarding retaliation. Retaliation following the filing

of a human rights complaint constitutes a discriminatory practice under the CHRA by virtue of section 14.1 of that Act, which provides in relevant part that "[i]t is a discriminatory practice for a person against whom a complaint has been filed under [the CHRA], […] to retaliate or threaten retaliation against the individual who filed the complaint […]". Thus, as the respondent conceded, had it engaged in retaliation, it may well have violated the CHRA. However, the investigator did not conclude there had been retaliation and, for the reasons noted, this conclusion was reasonably open to her.

[29] I would therefore dismiss this appeal with costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Joe Coutts	FOR THE APPELLANT
Aileen Jones	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Coutts Pulver Crawford LLP Vancouver, British Columbia	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT