

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111214

Docket: A-80-11

Citation: 2011 FCA 351

**CORAM: BLAIS C.J.
NADON J.A.
STRATAS J.A.**

BETWEEN:

LORETTA BEST

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on December 13, 2011.

Judgment delivered at Ottawa, Ontario, on December 14, 2011.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

BLAIS C.J.
NADON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment of the Federal Court (*per* Justice Martineau): 2011 FC 71. The Federal Court dismissed the appellant's application for judicial review of a decision of the Canadian Human Rights Commission dated December 23, 2009. The Commission decided not to deal with the appellant's complaint of discrimination by the Canadian Forces. The Commission found that the evidence before it did not support a finding of discrimination.

A. Reasonableness review

[2] The parties agree that reasonableness is the standard of review that must be adopted and applied when assessing the substance of the Commission's decision not to deal with the discrimination complaint. The Federal Court adopted and applied the reasonableness standard. In this regard, I agree with the parties and the Federal Court.

[3] In this Court, the appellant does not take issue with any legal principles the Commission applied. Instead, she focuses on the Commission's fact-finding and its application of the principles to the facts, and submits that the Commission reached conclusions that were unacceptable and indefensible under the reasonableness standard.

[4] The Federal Court found that the Commission's decision was reasonable, in that it fell within the range of outcomes acceptable and defensible on the facts and the law.

[5] In my view, there is no reviewable error in the analysis of the Federal Court (at paragraphs 25-32). Indeed, I substantially agree with its reasons.

B. Review for procedural fairness

[6] Here, the parties agree that correctness is the standard of review that must be applied when considering whether the Commission acted in a procedurally fair manner. This was the standard the Federal Court applied. I agree with the parties and the Federal Court.

[7] The Federal Court also held that the Commission did not breach any obligations of procedural fairness. In doing so, it properly identified relevant principles, relying upon authorities such as *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574, aff'd (1996), 205 N.R. 383 (F.C.A.), *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879 and *Deschênes v. Canada (Attorney General)*, 2009 FC 1126. It applied these principles to the facts before it (see paragraphs 19-21) and concluded that no breaches of procedural fairness occurred. In particular, it found that the Commission had investigated to the point of ensuring that “all of the fundamental issues raised in the complaint were dealt with” and the appellant had “ample opportunity to both make her primary case and respond to the investigator’s understanding of her situation” (at paragraphs 22-24).

[8] In my view, in light of the above cases, the Federal Court was correct in this case when it asked itself whether the Commission dealt with all of the fundamental issues relevant to the complaint of discrimination and whether the appellant had an adequate opportunity to assert her primary case and respond to the case against her.

[9] Before the Federal Court were three investigation reports, medical reports offered by the appellant and the Canadian Forces, and a number of submissions filed by the appellant.

Collectively, these show that the appellant had an adequate opportunity to assert her primary case and respond to the case against her.

[10] In this Court, the appellant focused upon the Commission's alleged failure to interview her on issues relating to discrimination on the basis of disability and the Commission's alleged failure to disclose documents to her.

[11] On the issue of the alleged failure to interview the appellant on disability issues, at the outset it must be observed that the Commission *did* interview the appellant. The appellant discounts this, asserting that the Commission interviewed her as part of the investigation into discrimination on the basis of gender and family status, not discrimination on the basis of disability. Judging from the title page of the first investigation report, that may well be true. But that takes nothing away from the fact that, judging by this investigation report, the interview was broad, covering territory beyond discrimination on the basis of gender and family status. In the words of the Federal Court, the interview gave the appellant "ample opportunity" to weigh in on all the issues that concerned her.

[12] An example of this is seen at paragraph 65 of the first investigation report. There, the investigator reported that the appellant asserted in the interview that the Canadian Forces were "'on a path' to terminate her employment" and when it "couldn't accomplish that through administrative means," it released her for "medical reasons," *i.e.*, her disability. The appellant also asserted this

position and the facts supporting it in her complaint and in later written submissions to the Commission.

[13] Given the information disclosed in the first investigation report about the broad ranging interview of the appellant, it was necessary for the appellant in the circumstances of this case to show that she had information that could be of use to the Commission on the issue of disability and that she was somehow inhibited or prevented during the interview from offering that information. The appellant has offered no evidence to either effect.

[14] The appellant invites us to assume the fact that, if interviewed, the appellant could have provided information of use on the issue of disability. Acceptance of that invitation – in effect, an invitation to take judicial notice of controversial fact – is not open to us.

[15] On the issue of disclosure of documents to the appellant, the investigation reports and the appellant's written submissions to the Commission show that the Commission disclosed information to the appellant that was sufficient to permit her to assert her primary case and respond to the case against her.

[16] Having reviewed carefully all of the material before the Commission, especially the Commission's investigation reports, the appellant's submissions, and medical evidence offered by the appellant and the Canadian Forces, the Federal Court's conclusions set out in paragraph 7, above are correct. The appellant's rights to procedural fairness in this case were respected.

C. Proposed disposition

[17] Therefore, I would dismiss the appeal with costs.

"David Stratas"

J.A.

"I agree
Pierre Blais C.J."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-80-11

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE MARTINEAU
DATED JANUARY 20, 2011 , DOCKET NO. T-149-10**

STYLE OF CAUSE: Loretta Best v. The Attorney
General of Canada

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: December 13, 2011

REASONS FOR JUDGMENT BY: Stratas J.A.

CONCURRED IN BY: Blais C.J.
Nadon J.A.

DATED: December 14, 2011

APPEARANCES:

Chantal Beaupré FOR THE APPELLANT

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