

Federal Court of Appeal



Cour d'appel fédérale

Date: 20120726

Docket: A-467-10

Citation: 2012 FCA 213

**CORAM: PELLETIER J.A.
DAWSON J.A.
STRATAS J.A.**

BETWEEN:

DR. NOEL AYANGMA

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Charlottetown, Prince Edward Island, on February 1, 2012.

Judgment delivered at Ottawa, Ontario, on July 26, 2012.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

PELLETIER J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment dated November 26, 2010 of the Federal Court (*per* Justice Crampton, as he then was): 2010 FC 1194. The Federal Court dismissed Dr. Ayangma's application for judicial review from the decision of the Canadian Human Rights Commission.

[2] Dr. Ayangma complained to the Commission that certain senior managers at Health Canada had discriminated against him based on his race, colour, national or ethnic origin and his culture,

contrary to sections 7 and 10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. The Commission conducted two investigations and issued three decisions, the last of which dismissed his complaint without referring it to the Canadian Human Rights Tribunal. This is the decision that was under review in the Federal Court. Dr. Ayangma appeals to this Court.

[3] For the reasons set out below, the Federal Court did not commit reviewable error in dismissing Dr. Ayangma's application for judicial review. Therefore, I would dismiss the appeal with costs.

A. The complaint: the subject-matters in issue

[4] In his complaint to the Commission, Dr. Ayangma raised three subject-matters:

- Health Canada's suspension and termination of his employment; this included matters relating to an investigation into certain claimed travel expenses;
- Health Canada's denial of various positions to him, namely certain PM-05, EX-01 and EX-02 positions; and
- discrimination in the course of his employment at Health Canada from December 1998 until May 18, 2004. The Commission, through its investigators, attempted to particularize this.

(See the Commission's "Summary of Complaint" dated May 25, 2004.)

B. The relevant provisions of the Act

[5] Under the Act, not all complaints proceed to full-scale inquiry by the Tribunal. The Commission can screen out complaints that cannot succeed, or direct them elsewhere if they belong elsewhere. Sections 41 and 44, among other sections, provide for this.

[6] Sections 41 and 44 provide as follows:

41. (1) Subject to section 40 [which deals with certain subject-matter and territorial restrictions not applicable in this case], the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

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 :

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

- (c) the complaint is beyond the jurisdiction of the Commission;
- (d) the complaint is trivial, frivolous, vexatious or made in bad faith; or
- (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.
- (2) The Commission may decline to deal with a complaint referred to in paragraph 10(a) in respect of an employer where it is of the opinion that the matter has been adequately dealt with in the employer's employment equity plan prepared pursuant to section 10 of the *Employment Equity Act*.
- (3) In this section, "employer" means a person who or organization that discharges the obligations of an employer under the *Employment Equity Act*.
- 44.** (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.
- (2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied
- c) la plainte n'est pas de sa compétence;
- d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
- 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.
- (2) La Commission peut refuser d'examiner une plainte de discrimination fondée sur l'alinéa 10a) et dirigée contre un employeur si elle estime que l'objet de la plainte est traité de façon adéquate dans le plan d'équité en matière d'emploi que l'employeur prépare en conformité avec l'article 10 de la *Loi sur l'équité en matière d'emploi*.
- (3) Au présent article, « employeur » désigne toute personne ou organisation chargée de l'exécution des obligations de l'employeur prévues par la *Loi sur l'équité en matière d'emploi*.
- 44.** (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.
- (2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du

rapport, elle est convaincue, selon le cas :

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

it shall refer the complainant to the appropriate authority.

(3) On receipt of a report referred to in subsection (1), the Commission

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(4) After receipt of a report referred to in subsection (1), the Commission

(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and

(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).

b) rejette la plainte, si elle est convaincue :

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

(4) Après réception du rapport, la Commission :

a) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des paragraphes (2) ou (3);

b) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3).

[7] In this case, relying upon sections 41 and 44 of the Act, the Commission made three separate decisions, described below. In the end result, the Commission dismissed Dr. Ayangma's complaint, finding that none of the subject-matters warranted a referral to the Canadian Human Rights Tribunal.

C. The parties' positions in the Federal Court and in this Court

[8] In both the Federal Court and in this Court, the parties agreed that in exercising its screening powers under sections 41 and 44 of the Act in this case, the Commission was obligated to investigate and deal with all of the subject-matters in Dr. Ayangma's complaint and to afford him procedural fairness throughout.

[9] In both Courts, the parties differed on whether the Commission discharged these obligations on the facts of this case. Dr. Ayangma also broadly attacked the reasonableness of the Commission's decision to dismiss his complaint.

D. The Federal Court's decision

[10] The Federal Court found in favour of the Commission, finding that the Commission ultimately investigated and dealt with all of the subject-matters raised in the complaint. It found that Dr. Ayangma was afforded procedural fairness. Finally, the Commission's decision to dismiss the complaint was reasonable – the Commission reached an outcome that was within the range of the acceptable and defensible on the facts and the law.

E. Analysis

(1) Introduction

[11] The Commission handled Dr. Ayangma's complaint in three stages, making three decisions. The first and third decisions were made on the basis of an investigator's report. The second decision was made on the basis of a report of a member of the Commission's Resolution Services Division.

[12] Dr. Ayangma did not apply for judicial review concerning the Commission's first two decisions. He sought judicial review concerning the Commission's third decision.

[13] As will be seen, the Commission's third decision can only be understood by examining the investigator's report that gave rise to it and the earlier decisions and reports. Examining all these decisions and reports, however, has been no easy task. Much confusion has been caused by the way in which the Commission considered Dr. Ayangma's complaint – examining it in multiple stages. Worse, as we shall see, the decisions and reports suffer from lack of precision and do not always relate to each other in a clear or accurate way. This greatly complicated the proceedings before the Commission, the application for judicial review before the Federal Court, and the appeal before us. I will have more to say about this at the end of these reasons.

[14] For the reasons that follow, I cannot accept certain interpretations reached by the Federal Court concerning what the Commission investigated and decided at various times. But despite that,

and despite the shortcomings of the proceedings before the Commission, I agree with the result reached by the Federal Court. Like the Federal Court, I am satisfied that the Commission's third decision – the decision under review in the Federal Court and in this case – dealt with Dr. Ayangma's complaint in a manner that was reasonable and fair. I am also satisfied that the Commission's third decision did not leave any aspects of Dr. Ayangma's complaint unaddressed. Finally, like the Federal Court, I do not find any procedural unfairness.

(2) Dr. Ayangma's complaint and Health Canada's initial objection

[15] A summary of Dr. Ayangma's complaint and Health Canada's initial objection to it appears in the report of the member of the Resolution Services Division (at paragraphs 1-3):

1. The complainant alleges that he was suspended without pay, that he was dismissed, that he did not obtain the position of Director, Policy and Programs (EX-01), and that he was not promoted to the position of Regional Program Advisor (PM-05), unlike his white colleagues in Alberta.

2. On May 25, 2004, the complainant filed a complaint with the Canadian Human Rights Commission, in which he made the following allegations:

- (1) that the respondent [Health Canada] subjected him to differential treatment in the course of his employment, suspended him without pay, and dismissed him because of his race, his colour (black) and his national or ethnic origin (Cameroon);
- (2) that in 2000, despite the complainant's allegedly successful challenge of the appointment of another person to the position of Director, Policy and Programs (level EX-01), the respondent nevertheless appointed that person to the position;
- (3) that in 2000 and 2002, when the position level of his white colleagues in Alberta was raised from PM-04 to PM-05, all such

position holders, except for him, were promoted without competition, while the respondent opened a competition in March 2003 to fill his position;

- (4) that the respondent cancelled the competition for the level PM-05 management position despite the fact that the complainant was qualified for the position and had held it previously;
- (5) that the respondent modified the work description of the PM-05 position in question to favour a particular candidate;
- (6) that the candidate in question, a friend of the regional manager's, thereby obtained the PM-05 position;
- (7) that the respondent also engaged in favouritism when the regional manager appointed an old friend to the PM-05 management position that the complainant should have obtained;
- (8) that in October 2003, the respondent, through the person appointed as a result of favouritism to the PM-05 position, launched an internal audit of all travel expenses submitted by the complainant from 1998 to 2003; and
- (9) that on December 3, 2003, the respondent suspended him without pay, and dismissed him on May 7, 2004.

3. When the complaint was filed, the respondent objected to the Commission's involvement, stating that (1) the complainant was pursuing other avenues of redress based on the same events and (2) some of the events had taken place more than a year before the complaint was filed.

(3) The Commission's first investigation and decision

[16] The Commission appointed an investigator to investigate Dr. Ayangma's complaint. In his report, this investigator, the first of two, noted that Health Canada had two preliminary objections to Dr. Ayangma's complaint (at paragraph 5):

5. The respondent objects to the holding of an investigation because the complainant is pursuing other avenues of redress in connection with the events described in the complaint, and because some of the events described in the complaint occurred more than a year before the complaint was filed.

[17] On the limitation period issue, the investigator noted paragraph 41(1)(e) of the Act, which provides for a one-year limitation period. He observed that Dr. Ayangma signed his complaint on May 18, 2004 and filed it with the Commission on May 25, 2004.

[18] The investigator summarized the various aspects of Dr. Ayangma's complaint, noting the dates and times of the events described in the complaint. The investigator's summary shows that many of these events predated May 25, 2003 and were caught by the one-year limitation period (at paragraphs 1-4 of the first investigator's report):

1. The complainant is black, and a native of Cameroon. He alleges that the respondent treated him differently while employed, suspended him without pay, and dismissed him because of his race, color [*sic*], and national or ethnic origin.
2. The complainant alleges that although in 2000 he was given judgment against the appointment of another person to the position of Director, Policy and Programs (level EX-01), the respondent, just the same, appointed that other person to the position instead of the complainant.
3. The complainant alleges that the level of his position and that of his white colleagues in Alberta was revised upward between 2000 and 2002. All the incumbents, except him, were promoted without competition, while the respondent, in March 2003, opened a competition to fill his position. In October 2003, the respondent began an internal audit of all the travel expenses submitted by the complainant from 1998 to 2003.
4. The complainant alleges that on 3 December 2003, the respondent suspended him without pay, and then dismissed him on 7 May 2004.

[19] The investigator found that the complainant did try to assert his complaint concerning the EX-01 matter in a timely way (at paragraph 24 of the first investigator's report):

24. According to the Commission's files, it appears that the complainant attempted to file a complaint in 2001, probably at the time he learned that he would not be appointed to the EX-01 position. The correspondence has been destroyed. He apparently was invited by the Commission's staff, as was usual at the time, to first exhaust the other avenues available. It seems that that is what he did and, following the unfavourable decisions of the courts, he again contacted the Commission in January 2004 to file the current complaint, which he signed on 18 May 2004. The respondent has not indicated that this delay would cause it any injury in respect of the allegations relating to this competition.

[20] Further, the investigator said that certain matters were not caught by the limitation period and "might have been investigated" but for the issue of the alternative recourses available to Dr. Ayangma. These matters were (at paragraph 26 of the first investigator's report):

...those relating to reclassification of the positions from PM-04 to PM-05 starting in March 2003 in the Atlantic Region, the internal investigation into the complainant's travel expenses, his suspension without pay, and his dismissal.

[21] It is not clear why the investigator felt that PM-05 issue escaped the one-year limitation period, given that aspects of it took place more than one year before the complaint was filed. As will be seen, a later investigator disagreed, finding that the PM-05 issue was subject to the time bar.

[22] To the extent that other aspects of the complaint were outstanding, the investigator noted that Dr. Ayangma "has not provided any reasons for his delay in bringing them to the Commission's

attention” and so the investigator considered those to be barred by the limitation period (at paragraph 25).

[23] The investigator also confirmed that Dr. Ayangma had launched grievances concerning Health Canada’s suspension and termination of his employment, including alleged mistreatment in the investigation into his travel expenses.

[24] From these facts, the investigator made a recommendation (at paragraphs 28-29 of the first investigation report). In light of the foregoing analysis, his recommendation is confusingly worded to say the least:

28. It is recommended, pursuant to paragraph 41(1)(e) of the *Canadian Human Rights Act*, that the Commission rule on the allegations regarding the one-year prescription period and on the allegations regarding the competition for the EX-01 position
 - a. because the complainant had contacted the Commission within the time period for the allegations regarding the competition for the EX-01 position
 - b. because, for the other allegations outside the time period, the complainant did not provide any valid explanation for his delay in contacting the Commission.
29. It is recommended, pursuant to paragraph 41(1)(b) of the *Canadian Human Rights Act*, that the Commission not rule on the complaint at the present time, because the complaint could more appropriately be dealt with according to a procedure provided for under another Act of Parliament. At the end of these proceedings, or if it becomes manifest that they are not normally open to the complainant, the Commission may, if the complainant so requests, choose to exercise its jurisdiction to rule on the complaint.

[25] Reading the recommendation in isolation, it is not possible to discern which parts of Dr. Ayangma's complaint are time-barred and which are not. It can only be understood from the fairly complicated analysis that precedes it.

[26] In its first decision, the Commission adopted the investigator's recommendation. Unfortunately, however, the Commission adopted most of the confusing wording of that recommendation. The material portion of the decision reads as follows:

After examining this information, the Commission decided, pursuant to subsection 41(1) of the *Canadian Human Rights Act*, to rule on the allegations regarding the one-year prescription period and on the allegations regarding the competition for the EX-01 position because:

- the complainant had contacted the Commission within the time period for the allegations regarding the competition for the EX-01 position;
- for the other allegations outside the time period, the complainant did not provide any valid explanation for his delay in contacting the Commission.

In addition, the Commission decided, pursuant to subsection 41(1)(b) of the *Canadian Human Rights Act*, not to rule on the complaint at the present time because:

- the complaint could more appropriately be dealt with according to procedures provided for under another Act of Parliament. At the end of these procedures, or if it becomes manifest that they are not normally open to the complainant, the Commission may, if the complainant so requests, choose to exercise its jurisdiction to rule on the complaint.

[27] So what did the Commission decide? I interpret the Commission's decision as adopting, wholesale, the investigator's recommendation, a recommendation that was founded upon the factual

analysis supplied by the investigator. That analysis sheds light on the content of the Commission's decision. As a result, in my view, in its first decision, the Commission ruled as follows:

- the EX-01 matter was in time because Dr. Ayangma had tried to approach the Commission earlier;
- the PM-05 matter was in time – but, as mentioned above, this is suspect because at least some aspects of it took place over a year before the receipt of the complaint by the Commission in May, 2004;
- the matters involving the internal investigation into Dr. Ayangma's travel expenses, his suspension without pay, and his dismissal were in time;
- all of the foregoing should be held in abeyance pending Dr. Ayangma's pursuit of other recourses; and
- everything else is out of time and should be dismissed.

Despite the vagueness of the Commission's first decision, Dr. Ayangma did not seek to clarify it or seek judicial review. Rather, he pursued his other recourses.

(4) The second report and the Commission's second decision

[28] Over four years passed. Dr. Ayangma then informed the Commission that he had pursued his other recourses without success. In response, a member of the Commission's Resolution Services Division looked into the matter. She issued a report.

[29] The report notified Dr. Ayangma and Health Canada that its purpose was to notify the parties that "a decision will be made by the Commission under subsection 41(1) of the Act, and to identify the factors that are relevant to that decision."

[30] The member of the Commission's Resolution Services Division also stated that the only matter before her was the issue concerning the EX-01 position because all of the other aspects of the complaint were out of time. That was palpably wrong. Other matters were before her: the allegations concerning the in-house audit of Dr. Ayangma's travel expenses, Dr. Ayangma's suspension and dismissal and the PM-05 matter. It was clear on the face of the complaint and the first investigation report that the allegations concerning the audit of Dr. Ayangma's travel expenses and his suspension and dismissal were filed in time. The PM-05 matter was the only matter in which some doubt as to timeliness persisted.

[31] Dr. Ayangma responded to the report, disagreeing with the investigator's view that only the EX-01 position was in issue.

[32] The Commission issued a decision, its second, on May 19, 2009. It wrote, « [a]près avoir examiné cette information, la Commission a décidé, en vertu du paragraphe 41(1) de la *Loi canadienne sur les droits de la personne*, de statuer sur la plainte ». (“Having examined this information, the Commission decided, by virtue of subsection 41(1) of the Canadian Human Rights Act, to rule on the complaint.” [my translation])

[33] This wording is vague. The Commission did not specify exactly what aspects of the complaint remained live.

[34] As we have seen, in reality, only the allegations concerning the EX-01 position, the in-house audit of Dr. Ayangma’s travel expenses, Dr. Ayangma’s suspension and dismissal, and the PM-05 matter remained live. I interpret the Commission’s decision as putting the parties on notice that it would consider these particular matters, now that Dr. Ayangma had pursued his other recourses.

[35] In argument before this Court, the Attorney General submitted that the Commission’s second decision allowed only the EX-01 matter to proceed. It argued that the word “complaint” must be construed in light of the first Commission decision, which allowed only the EX-01 matter to go forward once Dr. Ayangma had pursued the other recourses available to him. In support of this submission, the Attorney General cited the Federal Court’s interpretation of the second Commission decision as being concerned only with “the allegations regarding the EX-01 competition” (at paragraph 26). For the reasons set out above, I cannot accept that the

Commission's first decision only allowed the EX-01 matter to go forward, nor do I accept that the second Commission decision was concerned with only that matter.

[36] Despite the vagueness of the Commission's second decision, Dr. Ayangma did not seek to clarify it or seek judicial review. Rather, he participated in the next stage of the Commission's process – a second investigation that resulted in a third and final Commission decision.

(5) The second investigation and the Commission's third and final decision

[37] The Commission appointed a second investigator to investigate. There is no document in the record that tells us exactly what she was appointed to investigate. She produced an investigation report. It is more comprehensive and comprehensible than the other two reports.

[38] At the outset of the investigation report, the second investigator noted the vagueness in the Commission's first decision. Then, by examining the complaint and the Commission's file on the matter, she attempted to discern exactly what remained live after the Commission's two decisions. She found that the allegations concerning the EX-01 position, the in-house audit of Dr. Ayangma's travel expenses, and Dr. Ayangma's suspension and dismissal were all live, but – contrary to the above analysis – the PM-05 matter was not (at paragraph 7):

... the Commission [in its decision dated November 17, 2004] did not clearly identify the allegations that it considered to have been filed late. A thorough examination of the complaint form and other documents in the file indicates that, apart from the allegation concerning the EX-01 position upon which the

Commission specifically decided to rule, the allegations relating to the incidents that occurred between 1998 and 2000, the allegations concerning the reclassification of the complainant's colleagues between 2000 and 2002, those concerning the PM-05 competition in March 2003, and the one concerning the EX-02 positions, were made late. It also appears from the file that the complainant had offered no explanation for his delay in filing complaints about these incidents. Hence it appears that these allegations are among those upon which the Commission decided not to rule because the complainant had not provided a valid explanation for his lateness in contacting the Commission. Therefore, they will not be examined by [me].

[39] Although the second investigator did not consider the PM-05 matter to be live and said that she would not consider it, nevertheless she did consider it. This is because Dr. Ayangma placed it squarely before her in a phone call. As a result of that phone call, the second investigator considered Dr. Ayangma's position concerning the PM-05 matter, but she found that it was time-barred. She also found, mistakenly, that the Commission's first decision included the PM-05 matter within the category of allegations that were time-barred. All of this is seen in paragraph 9 of the second investigation report:

In a telephone conversation with the investigator, the complainant argues that his allegations concerning the PM-05 competition had been submitted on time because management did not decide to cancel the competition until September 2003. However, a thorough review of the complaint form and the documents submitted by the complainant indicates that the discriminatory practice charged against the respondent was that of holding a competition to staff the PM-05 position the complainant was occupying on an acting basis instead of appointing him to that position without competition. According to the documentation submitted, this decision was made in March 2003 and upheld in May 2003, as communicated to the complainant in an email on May 16, 2003. The investigator notes that although the decision to cancel the competition was not made until September 2003, the complainant had already indicated in the spring that he refused to submit to the selection process and was withdrawing his candidacy. The complaint form is dated May 18, 2004, and was not received by the Commission until May 25, 2004. The complainant has provided no explanation for the delay in filing his complaint concerning the competition initiated in March 2003. This allegation therefore seems

to be late; it is addressed in the Commission's decision of November 17, 2004 [the first decision].

[40] Accordingly, the second investigator examined the allegations concerning the EX-01 position, the in-house audit of Dr. Ayangma's travel expenses, and Dr. Ayangma's suspension and dismissal.

[41] She found that the allegations concerning the EX-01 position were litigated before the Public Service Commission Appeal Board, the Federal Court and this Court, and were dismissed (at paragraph 18 of the second investigator's report). Therefore, the EX-01 matter was *res judicata* and should be dismissed.

[42] She also recommended that the Commission dismiss the allegations concerning Dr. Ayangma's suspension and dismissal. In her view, "there is no evidence that would serve to conclude that his treatment by [Health Canada] was linked to the grounds cited in his complaint" and Health Canada provided a "reasonable explanation for its actions which does not seem to be a pretext for unlawful discrimination" (at paragraphs 42 and 47 of the second investigator's report).

[43] For these reasons, the second investigator recommended that the Commission dismiss all remaining aspects of Dr. Ayangma's complaint.

[44] Before the Commission considered the report of the second investigator, the parties had a full opportunity to make further written submissions concerning the report. Dr. Ayangma made his

submissions on October 6, 2009. His main concern was that the report did not consider issues concerning the PM-05 and EX-02 positions. These concerns were not well-founded:

- *PM-05*. As we have seen, the second investigator considered this issue: see paragraph 9 of the second investigator's report.
- *EX-02*. This issue concerns Dr. Ayangma's alleged exclusion in 2002 and later years from a hiring process for a Regional Director. As mentioned in paragraph 27 above, in its first decision the Commission found that this was time-barred. Nevertheless, in response to Dr. Ayangma's concern, the second investigator did consider the EX-02 matter. In paragraph 8 of her report, the second investigator, citing a January 15, 2001 email by Dr. Ayangma, found that Dr. Ayangma did not intend to participate in that hiring process. Therefore, Dr. Ayangma could not complain about the outcome of that process. As well, the second investigator confirmed that the EX-02 matter was time-barred.

[45] The Commission released its third decision on December 23, 2009. It accepted the investigator's recommendation to dismiss all subject-matters in Dr. Ayangma's complaint.

[46] In particular, the Commission dealt with and dismissed those aspects of the complaint that were live after its first decision:

- *The allegations concerning the EX-01 position.* The Commission held that consideration of the complaint concerning the EX-01 position was barred because it had been litigated, or could have been litigated by Dr. Ayangma in earlier proceedings in the Federal Court and Federal Court of Appeal.
- *The in-house audit of Dr. Ayangma's travel expenses and Dr. Ayangma's suspension and dismissal.* The Commission found that “the evidence does not support the complainant's allegations that he suffered adverse differential treatment in the course of his employment because of his race, colour or national or ethnic origin” and “having regard to all the circumstances of the complaint, its consideration by the Canadian Human Rights Tribunal is not warranted.”

[47] The Commission's use of the broad phrases “in the course of his employment” and “the complaint” without any qualification shows that it was dealing with the entire complaint of discrimination during the entire course of Dr. Ayangma's employment. In my view, this general description embraced the PM-05 matter, a matter that the second investigator found on the facts also to be time-barred.

(6) Consideration of the foregoing and Dr. Ayangma's submissions

[48] The only decision susceptible to review in the Federal Court and, on appeal, to this Court, is the Commission's third decision. Dr. Ayangma did not seek review of the Commission's first and second decisions.

[49] In this Court, based on the Federal Court's characterizations of the events that took place, Dr. Ayangma submitted that the Commission did not deal with all subject-matters in his complaint.

[50] I disagree. The foregoing summary of investigations and decisions – a summary that diverges somewhat from what the Federal Court found – shows that the Commission ultimately considered and determined every subject-matter in Dr. Ayangma's complaint.

[51] Dr. Ayangma also submitted that the Commission ruled that certain matters would not be screened out under section 41 or section 44 of the Act but then reopened them later. I disagree. The foregoing summary shows that the Commission did not reopen any decisions under section 41 or section 44 of the Act.

[52] Finally, in this Court, Dr. Ayangma raised several other grounds of attack against the Commission's third decision. He raised these same grounds in the Federal Court.

[53] Specifically, Dr. Ayangma argued that the Commission:

- erred in finding that the portion of the complaint dealing with the EX-01 matter was barred by *res judicata*;
- failed to investigate the complaints concerning the EX-02 competition, the PM-05 competition and related matters;
- erred in failing to refer the portion of the complaint concerning his suspension and dismissal to the Tribunal; and
- breached the principles of procedural fairness and natural justice in failing to conduct a fair and neutral investigation and analysis of his various complaints.

[54] On each of these grounds, the Federal Court determined the applicable standard of review and, in a very detailed way, considered whether the Commission had committed reviewable error. On each of these issues, the Federal Court found no reviewable error.

[55] On appeal, our task is to consider whether the Federal Court selected the correct standard of review and applied it correctly: *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at paragraph 18.

[56] In my view, in selecting correctness as the standard of review for procedural unfairness and reasonableness as the standard of review for all other matters, and in finding no reviewable error by the Commission on these matters, the Federal Court did not err. The Federal Court found that the Commission dealt with all aspects of Dr. Ayangma's complaint and was reasonable in dismissing it in its entirety. It also found that the Commission engaged in a fair and neutral investigation and analysis. Both these conclusions are supported by the evidentiary record before the Federal Court. While to some extent the Federal Court did misinterpret the Commission's decisions, these misinterpretations did not affect the Federal Court's findings on these points. But for those inconsequential misinterpretations, I substantially agree with the reasoning contained in paragraphs 59-106 of the Federal Court's reasons for judgment.

[57] I would add that this Court is permitted on judicial review to uphold a result reached by an administrative tribunal based on the reasons it could have given, not just the reasons it gave: *Public Service Alliance of Canada v. Canada Post Corp.*, 2011 SCC 57, [2011] 3 S.C.R. 572; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. A thorough review of the Commission's evidentiary record – especially the second investigator's report – demonstrates that the Commission had a basis for concluding that all aspects of Dr. Ayangma's complaint could not succeed, because they were time-barred, barred by *res judicata*, or not supported by any evidence of differential treatment based on a prohibited ground of discrimination.

[58] Given this, even if I were persuaded that some flaw existed in the course of the proceedings before the Commission, I would exercise my discretion against quashing the Commission's decision: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202. No purpose would be served in remitting it back to the Commission: based on this evidentiary record, the completeness of which has not been placed in doubt, a decision to dismiss the complaint under sections 41 and 44 of the Act would have to follow as a matter of course.

F. Postscript

[59] The Commission is one of Canada's senior, most prominent administrative bodies. Parliament has seen fit to clothe the Commission with the jurisdiction to consider matters such as Dr. Ayangma's case, ostensibly for reasons of administrative efficiency, accessibility to persons such as Dr. Ayangma, and expertise.

[60] Cases such as this – a complaint about discrimination in the workplace – are the Commission's bread and butter. It is true that this case is complicated by the number of allegations, the existence of other remedial recourses, and the presence of a self-represented litigant. But these are hardly unusual circumstances for the Commission.

[61] Yet, the Commission dealt with this case in a confusing, inefficient way.

[62] In this case, the Commission decided to apply the time bar to parts of Dr. Ayangma's complaint but defer the rest of it until later, pending pursuit of other recourses. It might have been more efficient and less confusing to defer all of it pending pursuit of other recourses and to consider the issues arising under sections 41 and 44 of the Act in just one decision. Splitting these issues into two or, as it turned out here, three different stages increases the risk of confusion, inaccuracy, and a multiplicity of time-consuming, expensive judicial reviews. Multi-stage processes, with multiple reports and multiple decisions, such as occurred here, are best avoided.

[63] There must always be clarity concerning what issues are to be investigated, what the investigator is recommending and what the Commission is deciding. This is especially the case if a multi-stage process is being pursued.

[64] Here, there was little clarity. Exactly what the Commission, its investigators, and its personnel did at various times was confused and uncertain. Basic mistakes relating to what happened earlier in the process were committed.

[65] Astonishingly, in this case the second investigator had to do more than investigate Dr. Ayangma's complaint. He had to investigate the Commission itself – specifically its own reports and decisions and the files underlying them – to determine which issues were live and which were not.

[66] Precision and clarity are necessary, especially in an administrative regime that exists to further efficiency and access to justice. Without precision and clarity, confusion and uncertainty can hold sway.

[67] Here, fortunately for the Commission, the confusion and uncertainty did not result in the quashing of its third decision. It is evident the Commission did consider all of the subject-matters in Dr. Ayangma's complaint, made a reasonable decision to dismiss the entirety of his complaint, and acted fairly throughout.

[68] Normally, as the successful litigant, the respondent would be entitled to his costs. However, in light of the peculiar circumstances of this case, I would order no costs of the appeal.

G. Proposed disposition

[69] For the foregoing reasons, I would dismiss the appeal.

"David Stratas"

J.A.

"I agree
J.D. Denis Pelletier J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-467-10

**AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE
HONOURABLE MR. JUSTICE CROMPTON, DATED NOVEMBER 26, 2010**

STYLE OF CAUSE: Dr. Noel Ayangma v. The
Attorney General of Canada

PLACE OF HEARING: Charlottetown, Prince Edward
Island

DATE OF HEARING: February 1, 2012

REASONS FOR JUDGMENT BY: Stratas J.A.

CONCURRED IN BY: Pelletier and Dawson JJ.A.

DATED: July 26, 2012

APPEARANCES:

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ON HIS OWN BEHALF

Melissa Chan

FOR THE RESPONDENT

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