

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190507

Docket: A-41-18

Citation: 2019 FCA 114

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

BETWEEN:

SUZANNE DEMITOR

Appellant

and

**WESTCOAST ENERGY INC.
(O/A SPECTRA ENERGY TRANSMISSION)**

Respondent

Heard at Vancouver, British Columbia on April 9, 2019.

Judgment delivered at Ottawa, Ontario, on May 7, 2019.

REASONS FOR JUDGMENT BY:

RIVOALEN J.A.

CONCURRED IN BY:

**DAWSON J.A.
WOODS J.A.**

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] Suzanne Demitor (the appellant) appeals from the judgment of the Federal Court dated December 20, 2017, rendered by Roy J. (the Judge) (2017 FC 1167). The Judge dismissed the appellant's application for judicial review of a decision made by the Canadian Human Rights Commission (the Commission) dated January 31, 2017 (File No. 20140770), endorsing the

recommendation made by the investigator in his report prepared pursuant to subsection 44(1) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the Act) recommending against referring the matter for inquiry before the Canadian Human Rights Tribunal (the Tribunal). In its decision, the Commission “dismiss[ed] the complaint because the respondent has provided an explanation for its actions which is not a pretext for discrimination on the basis of [f] age and/or marital status.” (Appeal Book, Vol. 1, p. 60).

[2] Before the Federal Court, the appellant did not take issue with the Commission’s decision itself. The sole issue before the Judge was whether the Commission violated procedural fairness principles. The Judge found it did not. I agree. For the reasons set out below, I would dismiss this appeal, with costs.

II. The Facts

[3] The essential background facts of this case were summarized by the Judge in paragraphs 5 to 47 of his Reasons. To provide some context to this decision, I will repeat some of the more material facts in the following paragraphs.

[4] The appellant was an employee of Westcoast Energy Inc. (o/a Spectra Energy Transmission) (the respondent) from early 1991 until the end of 1996, at which time her employment was terminated. Immediately after her termination, until July 23, 2013, the appellant worked for the respondent as a consultant under numerous consulting service agreements and, towards the later years, under a series of contracts involving various entities. The final

arrangement was with Demitor Holdings Inc. DBA Cicada Systems (Cicada Systems). On July 23, 2013, the respondent terminated its contract with Cicada Systems.

[5] Towards the end of her working relationship with the respondent, the appellant's responsibilities included the coordination of the respondent's environmental chemical inventory information management system, drinking water program, and material safety data sheets.

[6] On July 16, 2013, the appellant's husband sent an email to the respondent's Manager of Health and Safety, introducing himself as "Tim Demitor from Cicada Systems", and signing off as "Tim Demitor, Demitor Holdings, inc., Dba Cicada Systems". He copied a number of other executives working for the respondent with the email.

[7] On July 17, 2013, the appellant sent an email to the respondent's Environmental Specialist, indicating that her husband would now be "the primary contact for contracts, negotiations, or anything else business related" because "[t]hat side of the business is handled better by [him]." (Appeal Book, Vol. 2, p. 218).

[8] On July 23, 2013, the appellant received an email from the respondent's Specialist, Contract Management, notifying her that Cicada Systems' contract with the respondent was terminated.

[9] On June 24, 2014, the appellant filed a complaint with the Commission alleging that she had "reasonable grounds for believing that [she has] been the victim of discrimination on the

basis of one or more of the prohibited grounds specified in the Act.”, namely marital status and age (Appeal Book, Vol. 1, p. 82).

[10] After receipt of the complaint, the investigator conducted interviews of the appellant, her husband and two of the respondent’s staff members. During the course of his investigation, he also reviewed the parties’ positions and all documentary evidence submitted by them, including the emails exchanged between the parties referenced in the preceding paragraphs. He prepared a detailed report, the purpose of which was to assist Commission members in determining “whether: a) a conciliator should be appointed to attempt to resolve the complaint, and/or; b) further inquiry by a tribunal is warranted or; c) the complaint should be dismissed.” (Appeal Book, Vol. 1, p. 65). The report reproduced the July 16, 2013 email sent by the appellant’s husband to the respondent in its entirety. The investigator recommended that the complaint be dismissed.

[11] The report was provided to the parties who then sent their written submissions and replies to the Commission.

[12] The Commission wrote to the appellant to inform her that after examining the report and the submissions filed in response to the report, it decided that it would “dismiss the complaint because the respondent has provided an explanation for its actions which is not a pretext for discrimination on the basis o[f] age and/or marital status.” (Appeal Book, Vol. 1, p. 60).

III. The Decision of the Federal Court

[13] Before the Federal Court, the appellant, then represented by counsel, based her judicial review application on the sole argument that the Commission had violated procedural fairness principles.

[14] With this position in mind, given the appellant was not challenging the merits of the Commission's decision, the Judge focused his analysis on the alleged breaches of procedural fairness. The Judge noted that the report reproduced the entirety of the email sent by the appellant's husband on July 16, 2013. As the Judge stated at paragraph 51 of his Reasons, "[i]t is literally the centerpiece."

[15] The appellant alleged three breaches of procedural fairness before the Judge. First, she argued that the Commission did not take into consideration her email in which she attempted to correct the date on which she no longer had access to the respondent's computer system. In her written submissions to the Commission, she indicated that she had been denied access on May 31, 2013. When she realized that her access to the respondent's computer system had in fact been cut off on June 30, 2013, she attempted to correct her submissions by sending an email to the Commission to notify them of the "date correction" (Reasons, at paras. 41-43).

[16] Second, she argued that the investigation was not thorough. She repeated the "date correction" argument, but added that the investigator failed to interview a member of the respondent's staff who she viewed as a key witness. She also added that she had not held her

husband out to be her representative prior to July 17, 2013, the day after he sent the email to the respondent.

[17] Third, the appellant argued that Commission staff demonstrated a closed mind towards her complaint.

[18] In a well-reasoned decision, the Judge addressed all of the alleged breaches of procedural fairness in an orderly and thorough manner and found no such breaches for the following reasons:

- A. The date on which the appellant no longer had access to the respondent's computer system is immaterial (Reasons, at paras. 56-63);
- B. The thoroughness argument should fail on its merits because the fundamental issues raised by the complaint were considered by the investigator. The Judge found that this was not a clearly deficient investigation nor a case of failure to investigate obviously crucial evidence, and the appellant had failed to identify what more the respondent's staff member who she viewed as a key witness could bring to the case (Reasons, at paras. 64-73); and
- C. There was no evidence whatsoever of the Commission staff being closed-minded or biased towards the appellant's complaint (Reasons, at paras. 74-87).

[19] The Judge reiterated at paragraph 92 of his Reasons that the Commission's "role is a limited one: it need only be satisfied that [the respondent] did not discriminate against [the

appellant] pursuant to the Act, and not whether the termination was justified.” Having accepted the explanation for the termination as being reasonable, and not as being a pretext for discrimination, the Commission dismissed the complaint. The Judge noted that the appellant did not challenge the merits of the conclusions as being unreasonable, having chosen instead to argue that the process was flawed and that procedural fairness has been violated. The Judge found no breach of procedural fairness.

IV. The Position of the Parties before this Court

[20] Before this Court, the appellant argues that the Judge erred and requests that this Court remit her case to the Tribunal. The appellant set out thirty five grounds for appeal in her Notice of Appeal.

[21] In her Memorandum of Fact and Law and during her oral submissions she reduced her arguments largely to the following:

- A. First, the “date correction” continued to drive her appeal. She argued that the July 16, 2013 email was not threatening in nature and that she did not have access to the respondent’s confidential information at that time as her access to the computer system had been terminated on June 30, 2013;
- B. Second, she argued that she did not hold out her husband to be her representative until July 17, 2013, that is, a day after the July 16, 2013 email was sent;

- C. Third, she argued that the Judge erred in analysing the issues before him from a labour law perspective rather than from the perspective of discrimination in the context of human rights; and
- D. Fourth, she accused the respondent of fabricating a number of false statements which resulted in the Judge being misled.

[22] During her oral submissions, the appellant pointed this Court to the respondent's Memorandum of Fact and Law, at paragraph 18, where it indicated that the appellant had stated in an email to the Commission that her error with regard to the date on which her computer system access was removed "made no material difference to the [c]omplaint" where, in reality, her email stated that "the date ma[de] no difference whatsoever to anything else in [her] submission." (Appeal Book, Vol. 1, p. 168).

[23] In response to the appellant's submission that the respondent misquoted her words with regard to the materiality of the date correction, Counsel for the respondent conceded at the outset of his oral submissions that he could have been more precise in his use of language when preparing his Memorandum of Fact and Law. He brought the panel's attention to the record and pointed to the exact wording found in the appellant's email of January 9, 2017, which reads "[a]s to the issues at hand, the date also makes absolutely no difference." (Appeal Book, Vol. 1, p. 168).

[24] Save for this concession, Counsel for the respondent takes the position that the Judge properly identified and applied the standard of review of correctness throughout his Reasons. He

submits that the Judge properly considered, analysed and rejected all of the issues raised by the appellant. He reminds this Court that, before the Federal Court, Counsel for the appellant had framed her case in such a manner so as to direct the Judge to only consider the issue of procedural fairness, and argues that the Judge did so without committing any reviewable error.

V. Standard of Review and Analysis

[25] Prior to addressing the arguments raised by the appellant, it is useful to underscore the standard of review applicable in this case. In an appeal of a judgment concerning a judicial review application, the role of this Court is to determine whether the Judge identified the appropriate standard of review and applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47).

[26] Procedural fairness was the only issue before the Judge. In *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2018] F.C.J. No. 382, this Court noted that “[a] court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances” and that “[a]ttempting to shoehorn the question of procedural fairness into a standard of review analysis is ... an unprofitable exercise.” (at paras. 54-55). Although historically referred to as a review on a correctness standard, questions of procedural fairness are not decided according to any particular standard of review. Rather, it is a legal question to be answered by the Court. In assessing procedural fairness, the Court has to be satisfied that procedural fairness has been met.

[27] The Judge in his analysis appropriately focused on whether the Commission violated procedural fairness principles and whether procedural fairness had been met, having regard to all of the circumstances.

[28] Turning to the appellant's arguments, first with respect to the "date correction" issue, the appellant submits that the Judge was misled by relying on a number of material facts that were misrepresented or falsely stated by the respondent, including when the appellant's access to the respondent's computer system was removed, whether the respondent took "swift action" in removing her access to its computer system and whether she had mentioned in emails to the Commission that the date correction made no difference to her "complaint" or to her "submission". In the appellant's view, the respondent "fabricated a story" that it used as a pretext to justify her termination. In her submission, the appellant's husband did not have access to confidential information because her access to the respondent's computer system had been denied prior to the July 16, 2013 email.

[29] I find that the Judge properly considered this issue and I adopt his analysis at paragraphs 56 to 63 of his Reasons. I find that the date on which the appellant's access to the respondent's computer system was removed is not material to the Commission's dismissal of her complaint. The Commission found that "[t]he respondent acted on the assumption, whether rightly or wrongly, that the [appellant] breached her confidentiality requirements, and not on the basis of her marital status." (Investigation Report, para. 76, Appeal Book, Vol. 1, p. 77). The Judge noted that no evidence was proffered to demonstrate that the confidential information contained in the

July 16, 2013 email could only be accessed in the first two weeks of July 2013 (Reasons, at para. 58).

[30] Second, in her written submissions, the appellant relies on her email of July 17, 2013 as being the first time she held out her husband to be her representative. During her oral submissions before this Court, the appellant admitted that prior to the termination of the contract with Cicada Systems, she was aware that her husband had been having telephone conversations with representatives of the respondent, and that they “were having great conversations”.

[31] The Judge considered this argument at paragraphs 37 and 39 of his Reasons. As stated by the Judge, “[w]hether the [appellant] had held [her husband] out to be a representative or not prior to the email of July 16, 2013, is of no significance because he held himself out to be a representative of, and speaking for, Demitor Holdings Inc. Dba Cicada Systems.” (Reasons, at para. 39). More significantly, the appellant’s email of July 17, 2013 makes it clear that she was in agreement with her husband handling part of her business, including “contracts, negotiations, or anything else business related.” (Appeal Book, Vol. 2, p. 218). It was therefore reasonable for the respondent to believe that the appellant’s husband was acting as her representative. The fact that the appellant had not previously held her husband as her representative is immaterial.

[32] Third, turning to the argument that the Judge erred in analysing the issues from a labour law perspective rather than from the perspective of discrimination in the context of human rights, I note that this issue was not raised by the appellant in her Notice of Appeal nor in her Memorandum of Fact and Law. It is clear that the Judge was properly focused on the issue of

potential violations of procedural fairness in the context of the alleged discrimination, and not on labour law issues. This is specifically referenced in paragraphs 22, 52 and 53 of his Reasons. In any event, the role of this Court in this appeal is to focus on alleged breaches of procedural fairness before the Commission. As previously mentioned, in assessing procedural fairness, this Court has to be satisfied that procedural fairness has been met, having regard to all of the circumstances.

[33] Fourth, the appellant argued overall fabrications made by the respondent as a pretext to terminating her employment. It is not entirely clear to me whether these all-encompassing submissions regarding falsehoods were before the Judge. Regardless, I find that the appellant has not demonstrated that the Commission relied on any of the alleged fabrications brought to our attention to dismiss the complaint. Further, to the extent the Commission may have relied upon a statement that may not have been true, the alleged fabrications asserted by the appellant would have been immaterial to the decision of the Commission.

[34] At the heart of this case is the July 16, 2013 email sent by the appellant's husband to members of the respondent's management and executive team. The email is front and centre of the report and was the basis for the Commission's acceptance of the investigator's recommendations to not refer the matter to the Tribunal. The email is also reproduced as Appendix A to the Judge's Reasons. The Commission and the Judge accepted that the respondent found the email to be both threatening and in breach of the appellant's confidentiality requirements. I am mindful that my role is not to review whether there was discrimination or wrongful termination, but rather whether there was a breach of procedural fairness. The appellant

has not persuaded me that there were any violations of her rights to a fair hearing before the Commission.

VI. Conclusion

[35] In conclusion, I find that the Commission did not breach its duty of procedural fairness essentially for the same reasons as those of the Judge as set out in paragraphs 56-96 of his Reasons.

[36] For these reasons, I would dismiss the appeal with costs.

“Marianne Rivoalen”

J.A.

“I agree.
Eleanor R. Dawson J.A.”

“I agree.
Judith Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-41-18

STYLE OF CAUSE: SUZANNE DEMITOR v.
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SPECTRA ENERGY
TRANSMISSION)

PLACE OF HEARING: VANCOUVER, BRITISH-
COLUMBIA

DATE OF HEARING: APRIL 9, 2019

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

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

DATED: MAY 7, 2019

APPEARANCES:

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