Federal Court of Appeal | Cour d'appel fédérale

Date: 20140502

Docket: A-257-13

Citation: 2014 FCA 105

CORAM: **DAWSON J.A.**
WEBB J.A.
SCOTT J.A.

BETWEEN:

RACHEL EXETER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on March 26, 2014.

Judgment delivered at Ottawa, Ontario, on May 2, 2014.

REASONS FOR JUDGMENT BY: DAWSON and SCOTT JJ.A.

CONCURRED IN BY: WEBB J.A.

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REASONS FOR JUDGMENT

DAWSON and SCOTT JJ.A.

[1] Rachel Exeter, the appellant, made a complaint to the Canadian Human Rights Commission alleging that her former employer discriminated against her. The Commission decided not to refer the complaint to the Canadian Human Rights Tribunal. Consequently, Ms. Exeter brought an application for judicial review of the Commission's decision not to refer the complaint to the Tribunal.

[2] In her notice of application seeking judicial review, Ms. Exeter asked for production of the Commission's "entire file, including all handwritten notes, documents, interviews either transcribed and/or recorded, memoranda, email correspondences and any other materials relevant to [her] complaint" under Rule 317 of the *Federal Courts Rules*, SOR/98-106.

[3] The Commission objected to the production of the documents Ms. Exeter requested on the ground that she had failed to indicate how production of the entire file, which was not before the Commission when it made its decision, could assist the Court. As a result of the Commission's refusal to produce the requested documents, Ms. Exeter filed a motion for the production of the requested materials.

[4] In her notice of motion seeking production, Ms. Exeter specified that she was particularly interested in obtaining a 47 page document sent to the Commission by her former employer in response to her complaint.

[5] As a result, the Commission disclosed the employer's response as a courtesy to Ms. Exeter. It advised Ms. Exeter that the response was received in the course of gathering information in preparation for its investigative report; the response was not before the Commission when it made the decision to dismiss Ms. Exeter's complaint. Consequently, the Commission took the position that it was not subject to production.

[6] For reasons cited as 2013 FC 779, a judge of the Federal Court dismissed Ms. Exeter's motion for production and ordered her to pay costs in the amount of $300 forthwith. The Judge

concluded that Ms. Exeter was engaged in a "fishing expedition". The Judge was not persuaded to depart from the general rule that on application for judicial review the tribunal record should contain only the documents that were before the decision-maker.

[7] This is an appeal from an order of the Federal Court denying Ms. Exeter's request for production of the Commission's entire file.

[8] Ms. Exeter challenges the Judge's decision on five grounds, arguing that the Judge:

a) Misapprehended the nature of her request for production;
b) Ignored crucial evidence of the Commission's deceptive practices and interference;
c) Provided inadequate reasons because he failed to deal with her arguments that the Commission had misconducted itself and was biased;
d) Misconstrued the relevance of the requested material; and
e) Made errors of law in misapplying relevant jurisprudence.

[9] The respondent, the Attorney General of Canada, initially argued that the appeal was moot on the ground that the employer's response had been given to Ms. Exeter. This argument was abandoned at the hearing of the appeal. Ms. Exeter was notified the argument would be withdrawn the night before the hearing. On the merits of the appeal, the Attorney General argues that in an application for judicial review only the documents actually before the decision-maker are subject to production.

[10] Despite Ms. Exeter's detailed submissions, we have concluded that this appeal should be dismissed for the reasons that follow.

[11] Ms. Exeter attacks the decision because the Judge did not grapple with the central thesis of her argument: she says that the Commission has misconducted itself and is biased, such that the tribunal record should be expanded to contain material that would establish these allegations. Her five grounds of appeal all address the failure of the Judge to directly deal with her submissions.

[12] It would have been preferable for the Judge to have dealt expressly with each of Ms. Exeter's submissions. That said, we infer from the Judge's reference to a "fishing expedition" and from his award of costs that the Judge was not persuaded that the Commission had misconducted itself or was biased so as to justify expanding the tribunal record.

[13] Ms. Exeter points to three examples of what she characterizes to be misconduct on the part of the Commission:

1. The Commission misled her when it advised that her former employer's submission was not before the decision-maker.
2. When the Commission filed the employer's response to her complaint in the Federal Court, it provided a different version of the document to Ms. Exeter.
3. The Commission misled her when it advised that her former employer did not file any reply submission and it deprived her of cross-disclosure of that submission.

[14] In our view, for the following reasons, Ms. Exeter failed to establish it was more likely than not that the Commission misconducted itself or was biased.

[15] First, Ms. Exeter has failed to substantiate her allegation that her former employer's response to her complaint was before the decision-maker. The fact that an attachment to the employer's response was before the decision-maker does not prove that the response itself was before the decision-maker.

[16] Second, the employer's response to the complaint consisted of a fax cover sheet, a three-page letter responding to the complaint and three attachments. The attachments were documents already in Ms. Exeter's possession. In total, the employer submitted 47 pages of material to the Commission. The employer faxed this package to Ms. Exeter. She did not receive the first and third page of the employer's letter; she received two copies of the second page of the letter. These omissions are obvious on even a casual review of the document.

[17] We do not accept that this evidences any intent to deceive Ms. Exeter. No one could be deceived. The missing pages and multiple copies of page 2 are wholly consistent with accidental glitches in the process of faxing the material to Ms. Exeter.

[18] Finally, when the employer received the investigator's report it was offered the opportunity to respond to the report. The employer responded by e-mail stating that:

> With respect to these claims filed by Ms. Exeter, I would like to confirm that the Employer has nothing further to submit in terms of rebuttal. We would ask that the Commission continue to consider the objections already filed and would like to emphasize that we continue to feel that Ms. Exeter's complaints should not be

> dealt with as indicated in our filed objections.
>
> Thank you for providing Statistics Canada with the opportunity to respond. Should you require further information please do not hesitate to get in touch with me.
>
> Thank you,

[19] A copy of this e-mail was sent to Ms. Exeter for her information only. She states the Commission misled her by initially stating the employer did not file any reply.

[20] In our view, the difficulty encountered with this e-mail flows from how it is characterized. While the e-mail was sent after the employer received the investigator's report, and to that extent was a kind of reply, it had no substantive content. It added nothing to the employer's original response. Because there was no new content there was nothing Ms. Exeter needed to reply to. Ms. Exeter was not deprived of cross-disclosure and no misconduct has been established on the part of the Commission.

[21] Because Ms. Exeter has failed to provide cogent evidence of misconduct or bias on the part of the Commission, the Judge did not err by dismissing her request for production of the Commission's entire file. It follows we would dismiss the appeal.

[22] The Attorney General seeks costs of $1,400 plus disbursements of $270.18. Ms. Exeter also asks for costs based on the principle that when an application raises a novel question of law which is of public interest, the party raising that question should be entitled to costs regardless of the outcome.

[23] The legal and factual issues raised by Ms. Exeter's appeal are not novel and the case does not involve issues of importance that extend beyond the immediate interest of Ms. Exeter. Because the appeal will be dismissed, we would not award costs to Ms. Exeter. In view of the lateness of the withdrawal of the Attorney General's argument that the appeal was moot, we would not award costs to him.

"Eleanor R. Dawson"
J.A.

"A.F. Scott"
J.A.

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-257-13
STYLE OF CAUSE:	RACHEL EXETER v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 26, 2014
REASONS FOR JUDGMENT BY:	DAWSON and SCOTT JJ.A.
CONCURRED IN BY:	WEBB J.A.
DATED:	MAY 2, 2014

APPEARANCES:

Rachel Exeter	FOR THE APPELLANT (on her own behalf)
Abigail Martinez	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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