Federal Court  Cour fédérale

Date: 20151029

Dockets: T-2010-14
T-2009-14
T-2008-14

Citation: 2015 FC 1228

Ottawa, Ontario, October 29, 2015

PRESENT: The Honourable Mr. Justice Zinn

Docket: T-2010-14

BETWEEN:

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 500

Applicant

and

LESLIE PALM
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

Docket: T-2009-14

AND BETWEEN:

CLIFF WELLICOME

Applicant

and

LESLIE PALM
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

Docket: T-2008-14

AND BETWEEN:

RICHARD WILKINSON

Applicant

and

LESLIE PALM
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

JUDGMENT AND REASONS

[1] The Applicants in these three matters ask the Court to set aside a decision of the Canadian Human Rights Tribunal [the Tribunal] dismissing a motion they brought to dismiss the human rights complaints made against them.

Factual Background

[2] On March 6, 2009, Leslie. Palm filed five separate human rights complaints with the Canadian Human Rights Commission [Commission], alleging discrimination on the basis of sex. The complaints were against: the International Longshore and Warehouse Union, Local 500 [the Union], Cliff Wellicome, Richard Wilkinson, Western Stevedoring Ltd. [Western], and the British Columbia Maritime Employers' Association [BCMEA].

[3] Ms. Palm was a member of the Union. The Union's collective agreement was with the BCMEA. Western is a member of the BCMEA and was Ms. Palm's employer. Mr. Wilkinson and Mr. Wellicome were two of her male coworkers.

[4] Ms. Palm's complaints against the Applicants differ slightly, although most are based on similar facts.

[5] Her complaint against the Union alleges adverse differential treatment, failure to provide a harassment-free work environment, and discriminatory policy and/or practice. Specifically, she alleges that:

> Local 500 discriminated against Ms. Palm and harassed Ms. Palm by:
>
> 1. Creating and fostering a general environment that was hostile to females;
>
> 2. Referring Ms. Palm to driving work that equivalently qualified males would not perform;
>
> 3. Referring Ms. Palm to driving work that required her to work longer hours to make equivalent pay compared to male drivers with with [*sic*] equivalent driving experience;

> 4. Putting forward work allocation proposals to Western, in March, 2008, that deprived Ms. Palm of work opportunities as compared to males of the same ability, seniority and other relevant qualities;
>
> 5. Failing to sanction local 500 members that harassed Ms. Palm on the basis of her sex;
>
> 6. Actively condoning sex based harassment of Ms. Palm by members; and
>
> 7. Refusing to represent Ms. Palm in a subsequent harassment investigation while providing representation to and on behalf of male members.

[6] Her complaint against Mr. Wellicome alleges that he engaged in harassment of her on the basis of sex. Specifically, she alleges that:

> Mr. Willicome [*sic*] discriminated against Ms. Palm and harassed Ms. Palm by:
>
> 1. Creating and fostering a general environment that was hostile to females;
>
> 2. Organizing, proposing and promoting work allocation proposals that would limit Ms. Palm to performing driving work that equivalently qualified males would not perform;
>
> 3. Organizing, proposing and promoting work allocation proposal [*sic*] that would limit Ms. Palm to driving work that required her to work longer hours to make equivalent pay compared to male drivers with with [*sic*] equivalent driving qualifications;
>
> 4. Inciting and actively condoning sex based harassment of Ms. Palm by other members; and,
>
> 5. Inciting and causing co-worker's [*sic*] to actively discriminate against and harass Ms. Palm on the basis of her sex.

[7] Her complaint against Mr. Wilkinson alleges that he engaged in harassment of her on the basis of sex. These allegations are generally similar to the allegations made against Mr. Wellicome, but also relate to other specific incidents and conduct, including an incident in which

Mr. Wilkinson allegedly recorded Ms. Palm's work hours in a manner that made it appear as though she had worked more hours than she actually had. She claims that this was done in an effort to deprive her of weekend shifts, which were allocated to those who had worked the fewest hours during the week.

[8] Ms. Palm also filed complaints against Western and the BCMEA alleging adverse differential treatment, failure to provide a harassment-free work environment, and discriminatory policy and/or practices.

[9] Subsequent to the initial complaints against these five, Ms. Palm amended her complaints to allege retaliation against her by the Union and Mr. Wellicome for bringing her human rights complaints.

[10] The Commission referred the five complaints to the Tribunal for an inquiry on December 9, 2010. In January 2011, Western and the BCMEA settled Ms. Palm's complaints against them. On December 10, 2013, the Applicants filed a notice of motion with the Tribunal to dismiss the complaints made against them.

[11] The Applicants filed 41 pages of written submissions in support of the motion and more than 160 pages of exhibits. They characterize the basis of their motion to dismiss in this manner: "Each of the Applicants argued that Ms. Palm's complaints were legally impossible and procedurally abusive and should be dismissed prior to a full hearing on the merits." The motion

was accurately characterized by the parties as a request to dismiss the complaints as an abuse of process.

[12] The Commission provided written submissions in response to the motion as did Ms. Palm. The Applicants then provided written reply.

Issues

[13] The Applicants raise three issues: Whether the Tribunal failed to exercise its jurisdiction, whether the decision was reasonable, and whether it proceeded in a procedurally unfair manner.

A. *Jurisdiction*

[14] The Applicants submit that the Tribunal failed to exercise its jurisdiction because it failed or refused to decide the motion. I disagree.

[15] The final paragraph of the Tribunal's reasons reads as follows: "For the reasons given above, the respondent's [sic] motion to dismiss the complainant's complaints is dismissed." That statement clearly indicates that the Tribunal did decide the motion; it decided to dismiss it.

[16] The Applicants point to and rely on the following statement of the Tribunal at paragraph 68 as indicating that, notwithstanding its clear statement that the motion was dismissed, the Tribunal failed to deal with it:

> Without limiting the seriousness of the allegations and criticisms contained in the respondent's motion to dismiss in order to conclude, according to the respondent's submissions, that there is an abuse of process, the Tribunal finds that to dispose of this

> case based on this motion without giving the complainant an opportunity to fully and completely present her evidence with respect to the complaints she filed against the respondents would be significantly detrimental to the complainant's rights in this case.

[17] This statement must be read in light of the reasons of the Tribunal as a whole and not taken out of context.

[18] As a preliminary matter, there is no question that the Tribunal has jurisdiction to "determine a substantive issue in advance of a full hearing of the complaint on its merits:" *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2012 FC 445 at para 131. As was observed by the Court in *Canada (Canadian Human Rights Commission) v Canada Post Corp*, 2004 FC 81 at paras 18 and 19:

> Finally, it is hard to fathom a reason why it would be in anyone's interest to have the Tribunal hold a hearing in cases in [*sic*] where it considers that such a hearing would amount to an abuse of its process.
>
> Accordingly, I find that there is no bar in either the case law or in the statute preventing the Tribunal from dismissing by way of preliminary motion on the ground of abuse of its process a matter referred to it by the Commission, always assuming there are valid grounds to do so.

[19] The Applicants are probably correct in stating that, aside from the inherent right of a tribunal to control its own process, subsection 48.9(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 provides a statutory right to take such an action:

> Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[20] In the decision under review, the proper characterization of the Tribunal's decision when the reasons are read as a whole is that it found that the motion was premature because the Tribunal required additional evidence to make the determinations asked for in the motion. The Tribunal correctly noted that, contrary to the submissions made by the Applicants, the facts were very much in dispute and the ultimate disposition of the complaints was dependent upon factual determinations.

[21] In addition to the factual dispute, the Tribunal also held that the complexity of the Applicants' motion, and Ms. Palm's response, precluded a clear finding that an abuse of process had occurred. Moreover, the complaints themselves were quite complex, involving allegations of systemic discrimination against women. The Tribunal concluded that these complex issues and questions could not be decided without a full hearing on the merits.

B. *Was the Decision Reasonable?*

[22] The Applicants submit that the Tribunal's decision was unreasonable because:

1) Ms. Palm's complaints against them are legally impossible as a result of her settlement with Western and the BCMEA, which precludes a finding of liability against the Applicants;
2) Even if Mr. Wellicome and Mr. Wilkinson engaged in discriminatory conduct, the Union is not vicariously liable for its members' workplace conduct;
3) There is no evidence that Ms. Palm has experienced discrimination on the basis of sex;
4) Ms. Palm has abused the Tribunal's process by fraudulently altering medical documents; and

5) Ms. Palm's retaliation allegations have already been dealt with through other proceedings.

(1) The Impact of the Settlement

[23] The Applicants submit that Ms. Palm's complaints cannot legally succeed in the face of her settlement with Western and the BCMEA. It argues that the relationships between the respondents, and the similar facts underlying Ms. Palm's complaints against each of them, mean that any finding of liability on the part of the remaining respondents will necessarily entail a finding of liability on the part of those who have settled.

[24] In support of this submission, they rely on the Ontario Divisional Court's decision in *York Advertising Ltd v Ontario (Human Rights Commission)* (2005), 197 OAC 185 [*York Advertising*]. That case involved a human rights complaint made by an employee against her employer, a co-worker, and an independent contractor. She eventually settled her complaint against her employer and her co-worker, but her complaint against the independent contractor proceeded to the Tribunal. In its decision, the Tribunal made findings of fact against the employer and co-worker. It found that they had violated the Ontario *Human Rights Code*, RSO 1990, c H.19 [*Code*].

[25] The employer and co-worker applied for judicial review of the Tribunal's decision. The Court allowed the application because, in finding that the employer and co-worker had violated the *Code*, the tribunal had exceeded its jurisdiction and had breached the employer and co-worker's rights to procedural fairness. At para 21 the Court stated:

> In the circumstances of this case, the applicants were entitled to assume that, once the terms of the settlement reached had been fully finalized, they could safely disengage themselves entirely from the complaints process without fear of being in jeopardy of being the subject of adverse findings and conclusions by the Tribunal. It would be incomprehensible, and contrary to law, that a statutory procedure for the resolution of human rights complaints in Ontario could lead to findings of wrongdoing against a party who had been released from the complaints process through a settlement, and who had no formal notice of the hearing, was not a party to it, and did not participate.

The Court ordered the Tribunal to reconsider its decision and refrain from making findings or conclusions adverse to the employer or co-worker that reasonably amount to findings that they had violated the *Code*. At para 25 the Court stated:

> [I]f it is reasonably necessary to make adverse findings against the applicants solely to explain findings and conclusions against [the independent contractor], those findings should not be articulated in terms that amount to a finding of violations of the Code. [emphasis added]

[26] *York Advertising* is not authority for the Applicants' assertion that a settlement agreement prevents a human rights tribunal from making any findings that suggest that a party who has settled has breached human rights laws. Rather, it stands for the much narrower proposition that a human rights tribunal should make findings against parties who have settled only insofar as those findings are reasonably necessary to explain its findings and conclusions with respect to the parties before it and that findings as to the actions of parties who have settled should not be articulated in terms that amount to a finding of statutory breach.

[27] Moreover, given the complexity of Ms. Palm's complaints against these Applicants, it is not obvious to the Court that some of those complaints have any connection to the settled

complaints. As examples, it is not clear that Western and the BCMEA would be implicated if the Tribunal held that the Union had supported a change in work allocation in an effort to privilege its male members over Ms. Palm. Also, in her submissions on the motion to dismiss, Ms. Palm specifically denied that Mr. Wilkinson's fraudulent alteration of her work hours was done within the scope of his employment and thus that complaint appears to have nothing to do with the parties to the settlement. Thus, it is not clear whether a finding of liability against the Applicants would necessarily implicate Western and the BCMEA. In any event, to the extent that findings must be made against the parties to the settlement, all *York Advertising* requires of the Tribunal is that those findings not be articulated in terms that amount to findings of a breach of the Act.

(2) Vicarious Liability

[28] The Union submits that allegations that it is liable for the actions of Mr. Wellicome and Mr. Wilkinson cannot succeed because it is not vicariously liable for its members' actions. However, Ms. Palm denies the Union's claim that it does not control Mr. Wellicome and Mr. Wilkinson's workplace conduct. This disputed fact cannot be resolved on the basis of a legal principle in the absence of evidence.

(3) Discrimination on the Basis of Sex

[29] The Applicants also submit that there is no evidence that Ms. Palm has experienced discrimination on the basis of sex. However, Ms. Palm repeatedly claims that the events underlying her complaints are rooted in sex-based animus. She also emphasizes that, at the relevant times, she was the only female in a group of fourteen. Again, it is impossible to see how

her claim in this regard can be determined on a summary motion and in the absence of further evidence from her.

(4) Alleged Fraud

[30] The Applicants allege that Ms. Palm has altered documents in an effort to mislead the parties and the Tribunal and that her conduct makes her complaints an abuse of process. Ms. Palm vehemently denies that this is the case. While it was perhaps possible for the Tribunal to hold a shortened hearing on this allegation, the Tribunal is the master of its own proceedings. It is clear from the Tribunal's reasons that it was not of the view that this issue would necessarily be determinative of the entirety of the complaints filed by Ms. Palm. That is not an unreasonable view.

(5) Alternative Proceedings

[31] Lastly, the Applicants submit that Ms. Palm's complaints of retaliation have already been adequately dealt with through other proceedings. Again, Ms. Palm denies this. Given her position and the public interest aspects of remedies imposed for discriminatory conduct, it is not unreasonable to conclude that her complaints should not be dealt with in a summary fashion.

[32] In conclusion, given these factual disputes, and the overall factual complexity of the case, the Tribunal's decision to prefer a full hearing on the merits was reasonable.

C. *Procedural Fairness*

[33] The Applicants submit that the Tribunal acted in a procedurally unfair manner by failing to invite submissions on the nature or existence of any disputed facts, failing to hold a hearing to decide any disputed facts, and failing to provide reasons for not holding a *viva voce* hearing.

[34] I agree with the Commission that these allegations are without merit. The Tribunal provided the parties with an opportunity to be heard and considered their submissions and the relevant jurisprudence in making its decision not to dismiss Ms. Palm's complaints before a hearing on the merits.

[35] It was not incumbent on the Tribunal to specifically invite submissions on the nature or existence of disputed facts. The Applicants' submissions on its motion dealt extensively with the facts in dispute between the parties. The Applicants attempted, but failed, to convince the Tribunal that no material facts were in dispute. An explicit invitation for the Applicants to make submissions on the nature and existence of disputed facts would not have provided the Applicants with any opportunity to state their case that they did not already have.

[36] Likewise, it was not unfair for the Tribunal to decide not to hold a *viva voce* hearing to determine the disputed facts as part of the Applicants' motion. As the Applicants and the Commission both acknowledged, the Tribunal is a "master of its own procedure." The Applicants' position is that, notwithstanding the Tribunal's broad discretion, once it found that the issues raised by the Applicants' motion turned on facts in dispute, it was obliged to give the parties an opportunity to resolve those disputes, in the context of the motion, by calling *viva voce* evidence.

[37] The procedural protections that the Applicants were entitled to on their motion to dismiss must be determined in the context of the proceeding as a whole. The Tribunal did not deny the Applicants an opportunity to present *viva voce* evidence in order to resolve the facts in dispute. Instead, it held that it would be more just to hear such evidence in the context of a full hearing on the merits. The Tribunal did not say "no" to *viva voce* evidence; it simply said "not now."

[38] What the Applicants are really claiming, then, is a procedural right to a less extensive (and expensive) procedure for resolving the facts in dispute: a *viva voce* hearing on a motion to dismiss, as opposed to a full hearing on the merits. The Applicants do not cite any authority for the proposition that excessive procedural protections can amount to a violation of procedural fairness.

[39] The Supreme Court of Canada recognized in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at para 24, that "undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes." It may be possible that an onerous process could undermine procedural fairness in a case where the costs that it imposes on the parties are disproportionate to the fairness-enhancing protections that it provides. However, this is not one of those cases. In this case, the Tribunal concluded that a full hearing on the merits was a preferable procedure for resolving the issues in dispute. This was a reasonable conclusion for the reasons outlined above.

[40] Finally, the Applicants raise concerns about the Tribunal's failure to provide reasons for not holding an oral hearing. At paragraph 64 of his reasons, the Member states that "[t]he

Tribunal does not consider that a viva voce hearing is necessary to dispose of the respondent's motion for the following reasons." After that he goes on to provide reasons for why the Applicants' motion was premature, without specifically addressing the issue of the *viva voce* hearing.

[41] While the Tribunal may have failed to clearly articulate its specific reasons for declining to hold a *viva voce* hearing, it is clear that the Tribunal did not find it necessary to hear *viva voce* evidence on the Applicants' motion because it believed that it would be better to hear such evidence in the context of a full hearing on the merits. At para 70 of its reasons, the Tribunal writes:

> In light of the forgoing, and having regard to the fact that the Tribunal is the master of its own procedure as set out in *First Nations Child and Family Caring Society of Canada*, noted above, the Tribunal is of the view that a hearing on the merits would provide better compliance with the rules of natural justice and procedural fairness with respect to the complaints made by the complainant and would certainly better serve the interests of justice.

[42] For these reasons, this application is dismissed. The Commission did not seek its costs, and thus none will be ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed, without costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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