Federal Court  Cour fédérale

Date: 20170209

Docket: T-688-15

Citation: 2017 FC 159

Ottawa, Ontario, February 9, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

FALLAN DAVIS and CANADIAN HUMAN RIGHTS COMMISSION

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Attorney General of Canada seeks judicial review of a decision of the Canadian Human Rights Tribunal [Tribunal] dated December 9, 2014 (2014 CHRT 34). The Tribunal upheld, but only in part, a human rights complaint made by Teiohantathe Fallan Davis. Ms. Davis alleged that officers of the Canada Border Services Agency [CBSA] discriminated against her on

the basis of race, age and sex, contrary to s 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

[1] Ms. Davis is a member of the Akwesasne First Nation. Her complaint arose from events that occurred more than ten years ago, on November 18, 2005, at the Cornwall Island border crossing between New York State and Ontario. At that time, the border crossing was located on the Akwesasne Reserve, which straddles both sides of the Canada-United States border.

[2] Ms. Davis' complaint generated considerable litigation. The Attorney General sought judicial review of the decision of the Canadian Human Rights Commission [Commission] to refer Ms. Davis' complaint to the Tribunal. The application was dismissed by Justice Harrington, and an appeal to the Federal Court of Appeal was also dismissed (*Canada (Attorney General) v Davis*, 2009 FC 1104, aff'd 2010 FCA 134). The Attorney General then brought a motion before the Tribunal to dismiss Ms. Davis' complaint on the ground that the CBSA was not providing a service to the public when it performed inspections at border crossings, and the complaint therefore fell outside the scope of s 5 of the CHRA. The Tribunal disagreed, and the Attorney General sought judicial review of that decision. The application was dismissed by Justice Mactavish on January 16, 2013 (*Canada (Attorney General) v Davis*, 2013 FC 40).

[3] The Tribunal's inquiry into Ms. Davis' complaint began on November 13, 2012 and continued for 49 days. The Tribunal upheld only one aspect of Ms. Davis' wide-ranging complaint. It found that the general attitude of CBSA Officer Denis Demers, and the responses he provided to Ms. Davis, were sufficient to establish that Ms. Davis experienced an adverse

impact with respect to the provision of a service by the CBSA, and that Officer Demers' actions were based, perhaps unconsciously, on racial stereotyping.

[4] The Tribunal's findings of fact are at the heart of its specialized jurisdiction, and are owed a high degree of deference. This Court will interfere with a finding of discrimination only if the Tribunal's decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[5] For the reasons that follow, I have concluded that the Tribunal's decision to uphold a single aspect of Ms. Davis' human rights complaint falls within the range of possible, acceptable outcomes. However, two of the remedies ordered by the Tribunal had no rational connection to the aspect of Ms. Davis' complaint that was ultimately upheld. One of these remedies was granted without providing sufficient notice to the Attorney General or a reasonable opportunity to respond. The application for judicial review is therefore allowed in part, and two of the remedies ordered by the Tribunal are set aside.

II. Background

[6] The border crossing on Cornwall Island, which has since been closed, was a long-standing point of friction between the Government of Canada and the Akwesasne First Nation. In an attempt to ease tensions, the CBSA allocated a special lane to members of the First Nation, and adopted modified inspection procedures pursuant to the *Akwesasne Residents Remission Order*, SOR/91-412.

[7] On the morning of November 18, 2005, Ms. Davis arrived at the Cornwall Island border crossing. She was driving a sport utility vehicle [SUV]. She entered the lane that was allocated to members of the Akwesasne First Nation. A CBSA officer asked her whether she was carrying any contraband goods, and then directed her towards the nearby Vehicular and Cargo Inspection System [VACIS].

[8] The VACIS is a mobile unit deployed by the CBSA to check vehicles, particularly trucks and vans, for hidden compartments that may be used to transport drugs, weapons or other contraband. Ms. Davis was asked by a second CBSA officer to drive to the VACIS unit and exit her vehicle. Once she was outside her SUV, a third CBSA officer, Denis Demers, instructed her to wait in a designated area. There was a heated exchange between Ms. Davis and Officer Demers. A fourth CBSA officer subsequently spoke to Ms. Davis about the payment of taxes on goods she was importing from the United States.

III. Decision under Review

[9] The Tribunal found that Ms. Davis lacked credibility, and that she had significantly embellished the facts giving rise to her complaint. It held that Ms. Davis' attitude toward the CBSA officers was "clearly and definitely aggressive, disrespectful, defiant and finally, assertive of her rights as an Aboriginal person who resides on Cornwall Island." Ms. Davis was known to CBSA officers as someone who was "arrogant and critical regarding the presence of the border crossing on Cornwall Island." During a previous incident on August 6, 2005, Ms. Davis had expressed her opposition to the border crossing, and had threatened to blow it up.

[10] Ms. Davis used very strong profanity in her dealings with Officer Demers. He testified that he had never been confronted with this level of verbal abuse at any other time in his career with the CBSA. The Tribunal nevertheless held that it was incumbent upon the CBSA officers, specifically Officer Demers, to prevent the situation from deteriorating. The Tribunal found that Officer Demers did not fulfil this responsibility, and that he did not take adequate take steps to maintain control of the dialogue or calm Ms. Davis down.

[11] The Tribunal upheld Ms. Davis' complaint in part. It found that "a review of Officer Demers' conduct, in light of his attitude in general, as well as the responses he provided to [Ms. Davis] are sufficient for me to recognize that Officer Demers acted, even unconsciously, based on racial stereotype." The Tribunal based its conclusion on the following factual findings:

> (a) Prior to the facts on November 18, 2005, Officer Demers admitted that it was general knowledge that there was a dispute between the Canadian government and the Mohawk authorities regarding the territory on which the Cornwall Island border crossing was located;
>
> (b) Also in his testimony, Officer Demers admitted that he had had no specific training on knowledge gained regarding the culture and traditions of Aboriginal communities;
>
> (c) Officer Demers raised his voice in dealing with [Ms. Davis'] conduct in an attempt to assert his authority and what he called "force continuum";
>
> (d) In his discussions with [Ms. Davis], Officer Demers pointed to his badge to identify himself to [Ms. Davis], who was questioning him in that respect;
>
> (e) Officer Demers questioned [Ms. Davis] about what job she could hold, for no apparent reason;
>
> (f) In response to a direct statement by [Ms. Davis] on the territorial aspect of the location occupied by the Respondent's border crossing on Cornwall Island, the evidence clearly established that he answered by saying that he was on the "the property of Canada Customs";

> (g) Furthermore, in light of [Ms. Davis'] aggressive and defiant attitude, Officer Demers stated that [Ms. Davis'] conduct could, in his experience, be an assertion that she had done something wrong.

[12] The Tribunal awarded Ms. Davis $5,000.00 pursuant to s 53(2)(e) of the CHRA, together with interest. The Tribunal also adopted all of the remedies proposed by the Commission and one additional remedy pursuant to s 53(2)(a) of the CHRA.

IV. Issues

[13] This application for judicial review raises the following issues:

A. Was the Tribunal's finding that Officer Demers discriminated against Ms. Davis reasonable?

B. Were the remedies ordered by the Tribunal reasonable and procedurally fair?

V. Analysis

[14] In dissenting reasons, subsequently affirmed by the Supreme Court of Canada, Justice Evans of the Federal Court of Appeal acknowledged that the Tribunal's findings of fact are at the heart of its specialized jurisdiction, and are owed a high degree of deference (*Public Service Alliance of Canada v Canada Post Corporation*, 2010 FCA 56 at para 207 [*Public Service Alliance*]; *Public Service Alliance of Canada v Canada Post Corp*, 2011 SCC 57; see also *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 64). A finding of discrimination by the Tribunal is subject to review by this Court against the standard of reasonableness (*Turner v Canada (Attorney General)*, 2017 FCA 2 at para 51). The Court will

intervene only if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[15] Questions of procedural fairness are subject to review against the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

A. *Was the Tribunal's finding that Officer Demers discriminated against Ms. Davis reasonable?*

[16] The Attorney General does not take issue with the legal framework applied by the Tribunal to assess Ms. Davis' human rights complaint. The Tribunal cited *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*] at paragraph 33 for the following basic propositions:

> … complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[17] The Tribunal cited *Ont Human Rights Comm v Simpsons-Sears*, [1985] 2 SCR 536 at page 558 for the proposition that "[a] *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer." The

Tribunal also noted the Supreme Court of Canada's decision in *FH v McDougall*, 2008 SCC 53 at paragraph 46:

> [E]vidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[18] The Tribunal observed that in cases of discrimination, direct evidence is not necessarily available, and that "circumstantial evidence may lead tribunals to conclude that there was a form of discrimination" (citing *Basi v Canadian National Railway Company*, [1988] CHRD No 2). In the context of discrimination, the Tribunal stated that "[t]he focus of the enquiry is on the Respondent's actions towards the complainant" (citing *Peel Law Association v Pieters*, [2013] OJ No 2695).

[19] The Tribunal derived the following principles from the jurisprudence, including *Radek v Henderson Development (Canada) Ltd*, 2005 BCHRT 302 and *Phipps v Toronto Police Services Board*, 2009 HRTO 877:

1) the prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor;

2) there is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant;

3) the prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element;

4) there need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and

5) racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.

[20] Applying the test in *Moore*, the Tribunal found that Ms. Davis' status as an Aboriginal person satisfied the first branch, and that she had a characteristic that was protected from discrimination.

[21] With respect to the second branch, the Tribunal found that Ms. Davis experienced an adverse impact with respect to the provision of a service by the CBSA. The Tribunal held that Officer Demers' conduct and his responses to Ms. Davis "were factors that [the Tribunal considered] as being a form of differential treatment". The Tribunal also found that Officer Demers' statements to Ms. Davis appeared to be "unjustified, even aggressive, and defiant".

[22] With respect to the third branch, the Tribunal had "no doubt" that Ms. Davis' status as an Aboriginal person was a factor in the adverse impact she experienced. The Tribunal found that "all of the responses" provided by Officer Demers were prompted by Ms. Davis' "provocation relating to her Aboriginal status and to the territorial assertions she made to Officer Demers". The Tribunal found that "Officer Demers overreacted and provided responses that indicated behaviour that was marked by racist stereotyping". The Tribunal therefore concluded that a *prima facie* case of discrimination had been established.

[23] The Tribunal considered whether a comparative test should be applied by taking into account Officer Demers' conduct if he had been confronted by a white person exhibiting the same behaviour. The Tribunal concluded that a comparative analysis was not necessary: "A simple review of Officer Demers' conduct, in light of his attitude in general, as well as the responses he provided to [Ms. Davis] are sufficient for me to recognize that Officer Demers acted, even unconsciously, based on racial stereotype."

[24] The Attorney General argues that the Tribunal's decision is unreasonable for three reasons: (i) the aspects of Officer Demers' conduct identified by the Tribunal did not support a finding of racial discrimination, were unconnected to racial stereotyping, and were inconsistent with the evidentiary record; (ii) the Tribunal's finding that Officer Demers engaged in discrimination because he "overreacted" and failed to "maintain control" over Ms. Davis was unreasonable; and (iii) the Tribunal failed to consider whether racial stereotyping or prejudice provided the most probable explanation for Officer Demers' reaction to Ms. Davis' provocation.

[25] According to the Commission, "[a]t issue in this case is the degree of deference to be paid to certain targeted findings of fact, and mixed fact and law, reached by the specialized [Tribunal] after a lengthy hearing." The Tribunal's hearing lasted 49 days. It heard from 22 witnesses. Unlike this Court, the Tribunal had the benefit of hearing from Officer Demers directly and could assess his demeanour. I therefore agree with the Commission that deference is a central consideration in this application for judicial review. In the words of the Federal Court of Appeal in *Delios v Canada (Attorney General)*, 2015 FCA 117 at paragraph 28:

> Under the reasonableness standard, we do not develop our own view of the matter and then apply it to the administrator's decision,

> finding any inconsistency to be unreasonable. […] That is nothing more than the court developing, asserting and enforcing its own view of the matter – correctness review.

[26] Nevertheless, I agree with the Attorney General that the record does not support the Tribunal's finding that Officer Demers questioned Ms. Davis about what job she could hold, implying that she was either incompetent or lazy. Officer Demers testified that he simply asked Ms. Davis where she worked. This is a routine inquiry at border crossings. The Tribunal does not appear to have considered Officer Demers' explanation. Nor did it provide a basis for rejecting it.

[27] The Attorney General says that the only aspect of Officer Demers' conduct that might conceivably perpetuate a negative stereotype about Aboriginal people was the unsupported finding that he questioned Ms. Davis about what job she could hold. I disagree.

[28] In my view, Officer Demers' interaction with Ms. Davis must be assessed in the unique context of the border crossing at Cornwall Island. Officer Demers knew that Ms. Davis was a member of the Akwesasne First Nation, and that there was on ongoing dispute between the First Nation and the Government of Canada regarding the land on which the border crossing stood. He had been given no training regarding the culture and traditions of Aboriginal communities. He admitted that he raised his voice and invoked the authority of his badge in an attempt to exercise control over Ms. Davis. He responded to Ms. Davis' assertion that he was trespassing on Akwesasne land by saying that they were on the "the property of Canada Customs". The last of these statements, in particular, was a clear reference to Ms. Davis' Aboriginal status.

[29] More generally, it was open to the Tribunal to base its finding of discrimination on circumstantial evidence, recognizing that stereotypes "exist, consciously or unconsciously, voluntarily or even involuntarily and that it is through a careful analysis of the evidence that the decision-maker must be able to determine whether there are subtle scents of discrimination" (Tribunal's Decision, para 203).

[30] It is true that the Tribunal held Officer Demers to a very high standard of conduct. He was subjected to extreme profanity and verbal abuse by Ms. Davis. This was acknowledged by the Tribunal. However, the Tribunal also noted that another CBSA officer was subjected to verbal abuse from Ms. Davis, but responded in an "exemplary" manner.

[31] Ms. Davis' behaviour at the Cornwall Island border crossing on November 18, 2005 presented a serious challenge to all CBSA officers who encountered her that day. The CBSA's Code of Ethics and Conduct recognizes, particularly for customs officers responsible for enforcement, that it will sometimes be necessary to overcome "an obstinate lack of cooperation with a determined, persistent and professional stance." The Tribunal's conclusion that Officer Demers failed to meet this standard, and that his conduct resulted, if only unconsciously, from racial stereotyping, falls within the range of possible, acceptable outcomes.

B. *Were the remedies ordered by the Tribunal reasonable and procedurally fair?*

[32] The Tribunal ordered the CBSA to do the following:

> (a) take steps to ensure that its current Code of Conduct contains a specific statement to the effect that the *CHRA* prohibits Border Service Officers (BSOs) from discriminating on the

> basis of prohibited grounds when processing travelers seeking admission to Canada;
>
> (b) provide BSOs working at the Cornwall border crossing with training material regarding the range of different perspectives within the Akwesasne community, and within the CBSA itself, regarding the Warrior Society, and/or others in the Akwesasne community who may be recognized as Keepers of the Peace;
>
> (c) develop and implement a policy or directive that specifically prohibits all forms of race-based discrimination under the CHRA, including racial profiling;
>
> (d) prepare training, separate from the existing on-line Diversity and Race Relations module, that includes discussions of the new policy or directive on race-based discrimination, as well as current case law concerning the phenomenon of racial profiling;
>
> (e) retain independent consultants with appropriate expertise with respect to the above noted matters to assist in the preparation of the required materials, policies or directives; and
>
> (f) ensure that within a reasonable period of time, (i) all BSOs have been provided with the training mentioned above, (ii) adequate measures have been put into place to ensure the training is provided to new recruits, and is refreshed periodically as appropriate, and (iii) the CBSA provides confirmation to Ms. Davis and the Commission that these steps have been completed.

[33] All of these remedies were proposed by the Commission, and were adopted by the Tribunal without independent analysis. The Tribunal ordered one additional remedy:

> […] no operation of the same type as or similar to that which was conducted on November 18, 2005, shall be conducted without the direct participation of the Akwesasne Mohawk Police Service or any other Aboriginal police force elsewhere in the country.

[34] The Attorney General was given no notice of the additional remedy, and no opportunity to address its rational connection to the Tribunal's finding of discrimination or its practical implications for the CBSA.

[35] The Commission has chosen not to defend the remedy that pertains to the provision of training on different perspectives regarding the Warrior Society or others in the Akwesasne community who may be recognized as Keepers of the Peace. Nor does it defend the final remedy pertaining to the direct participation of the Akwesasne Mohawk Police Service or any other Aboriginal police force in similar operations throughout the country.

[36] Paragraph 53(2)(a) of the CHRA gives the Tribunal authority to take measures, in consultation with the Commission, to redress a discriminatory practice or to prevent the same or a similar practice from occurring in the future. Justice Evans held in *Public Service Alliance* at paragraph 301 that "[s]pecialized tribunals are owed a particularly high degree of deference in their exercise of a broad statutory discretion to fashion an appropriate remedy". Nevertheless, the remedies awarded must have a rational connection, or "causal nexus", to the complaint (*Canada (Attorney General) v Johnstone*, 2014 FCA 110 at para 113).

[37] Despite the lack of independent analysis, I am satisfied that remedies (a), (c), (d), (e) and (f) ordered by the Tribunal are rationally connected to the single aspect of Ms. Davis' complaint that was upheld. The CBSA initially disputed that the CHRA applied to customs inspections at border crossings. This Court and the Federal Court of Appeal have since confirmed that it does.

A lack of training was identified by the Tribunal as a contributing factor to the discriminatory conduct in issue.

[38] Remedy (b) was proposed by the Commission when all aspects of Ms. Davis' wide-ranging complaint were still in dispute. It is unnecessary in these reasons to review the role of "the Warrior Society, and/or others in the Akwesasne community who may be recognized as Keepers of the Peace" in the events that took place at the Cornwall Island border crossing on November 18, 2005. This aspect of Ms. Davis' complaint was dismissed by the Tribunal, and there is no rational connection between remedy (b) and the single aspect of the complaint that was ultimately upheld. This remedy must therefore be set aside.

[39] There is no dispute that the Tribunal ordered the final remedy pertaining to the direct participation of the Akwesasne Mohawk Police Service and other Aboriginal police forces in similar operations throughout the country without notice to the Attorney General. The implications of this remedy are potentially very broad. The Attorney General was given no opportunity to adduce evidence or make submissions regarding this remedy, and was therefore denied procedural fairness (*Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at para 24). In addition, I am not persuaded that there is a causal nexus between the final remedy ordered by the Tribunal and the single aspect of the complaint that was ultimately upheld. This remedy must therefore also be set aside.

VI. Conclusion

[40] The application for judicial review is allowed in part. The following remedies ordered by the Tribunal are set aside:

a) provide Border Service Officers working at the Cornwall border crossing with training material regarding the range of different perspectives within the Akwesasne community, and within the CBSA itself, regarding the Warrior Society, and/or others in the Akwesasne community who may be recognized as Keepers of the Peace; and

b) no operation of the same type as or similar to that which was conducted on November 18, 2005, shall be conducted without the direct participation of the Akwesasne Mohawk Police Service or any other Aboriginal police force elsewhere in the country.

[41] Because success on the application for judicial review is divided, no costs are payable to any party.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed in part. The following remedies ordered by the Tribunal are set aside:

    a) provide Border Service Officers working at the Cornwall border crossing with training material regarding the range of different perspectives within the Akwesasne community, and within the CBSA itself, regarding the Warrior Society, and/or others in the Akwesasne community who may be recognized as Keepers of the Peace; and

    b) no operation of the same type as or similar to that which was conducted on November 18, 2005, shall be conducted without the direct participation of the Akwesasne Mohawk Police Service or any other Aboriginal police force elsewhere in the country.

2. No costs are payable to any party.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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