

Federal Court



Cour fédérale

Date: 20170718

Docket: T-2045-16

Citation: 2017 FC 697

Ottawa, Ontario, July 18, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ANDRÉ GAUTHIER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, André François Gauthier, filed a human rights complaint with the Canadian Human Rights Commission alleging that his employer, Public Services and Procurement Canada [PSPC], discriminated against him in May 2012 on the ground of disability by denying him an advance of paid sick leave and by failing to accommodate his disabilities by not transferring him to another department. After PSPC responded to the complaint, a human rights officer released a report dated August 3, 2016, recommending that the Commission not deal with the complaint because it was based on acts which had occurred more than one year

before it was filed and the Applicant had not provided a reasonable explanation for the delay in filing. The Applicant and his employer each responded to the report and, subsequently, in a letter dated November 1, 2016, the Commission followed the officer's recommendation to not deal with the complaint. The Applicant has now applied under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, for judicial review of the Commission's decision.

I. Background

[2] In his human rights complaint, the Applicant outlined his request for an advancement of sick leave credits and his request to be transferred to another department. He submitted emails to confirm the denial of his request for advance sick leave credits and summarized the medical evidence which showed, among other things, that he suffers from diabetes mellitus, high blood pressure, and heart disease, as well as other illnesses. The evidence also included a doctor's note stating that he needs to be transferred to another department due to difficult relations with his current supervisors.

[3] In a letter dated May 17, 2016, PSPC responded to the complaint, stating that the date of the last alleged act of discrimination was May 11, 2012, when an advance of paid sick leave was denied to the Applicant at PSPC's discretion. PSPC said this was not an ongoing practice since the denial was in May 2012. PSPC noted that the delay in filing the complaint was almost four years after the alleged discrimination occurred in May 2012, and advised the Commission that although the Applicant had filed three grievances (one related to this matter) on May 24, 2012, he decided to withdraw the grievances on December 11, 2013. PSPC informed the Commission that, while the Applicant was on sick leave for extended periods during the almost four years

since he was denied an advance of paid sick leave, he was able to attend meetings with management to discuss his situation and attempted a gradual return to work on more than one occasion.

[4] PSPC advised the Commission that the Applicant was a represented employee at the time of the denial and he has been represented by a union since then. As to whether PSPC knew the Applicant intended to file a complaint, it stated that the Applicant had mentioned on various occasions over the past years that he would go to the Privacy Commissioner, the Commission or even to the media if management did not enter into an agreement with him related to the denial of the advance of paid sick leave. PSPC informed the Commission that management knew the Applicant was not satisfied with its decision but was not formally aware of the type of recourse, if any, he would choose. PSPC said the Applicant had ample opportunity and time to file his complaint within the one-year prescribed time limit, and that submitting it almost four years after the denial of advance sick leave was beyond reasonable. PSPC expressed its view that the Commission was not required to look into the complaint any further, and asked the Commission to exercise its discretion and not deal with the complaint pursuant to section 41(1)(e) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [Act].

II. The Commission's Decision

[5] The Section 40/41 Report issued by the human rights officer [the Officer] recommended that the Commission, pursuant to paragraph 41(1)(e) of the *Act*, not deal with the Applicant's complaint. The Officer summarized the Applicant's complaint that PSPC had discriminated against him by denying his request for an advance of sick leave credits and also that it had failed

to accommodate his disabilities when it did not transfer him to another department. After noting the Applicant's disabilities due to chronic coronary artery disease, high blood pressure, and diabetes, the Officer proceeded to analyse whether the Commission should not deal with the complaint pursuant to paragraph 41(1)(e) of the *Act*, which provides:

41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

...

(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.

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 :

[...]

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.

[6] The Officer reviewed the factors relevant to the Commission's decision not to hear a complaint because it was filed more than one year after the alleged act of discrimination occurred, and then proceeded to review the complaint and PSPC's submissions. The Officer acknowledged the Applicant's statement that he was unable to reasonably articulate his complaint to the Commission "on time" and "up to standard" while uncontrollably sick with diabetes, high blood pressure, coronary heart disease, as well as several new illnesses. The Officer noted that, according to the Applicant, his uncontrolled diabetes caused him to have memory and recall cognitive dysfunctions which prevented him from filing his complaint until his medical conditions were under better control. The Officer further noted the Applicant's

submission that, while he was off work from May 11, 2012 to October 26, 2015, he was too cognitively dysfunctional to make a complaint to the Commission during this period of time.

[7] The Officer then proceeded to analyze whether the Commission should not deal with the complaint pursuant to paragraph 41(1)(e) of the *Act*. The Officer found the alleged acts of discrimination occurred in May 2012 and were not ongoing, and that the Applicant did not allege any prior or later acts of discrimination. The Officer noted that the Applicant first contacted the Commission on January 4, 2016, and the one-year statutory time limit required him to file his complaint by May 2013. The Officer thus found that the Applicant had filed the complaint three years after the one-year statutory time limit.

[8] The Officer further found that the Applicant's medical conditions, and associated effects on his memory and recall abilities, did not fully explain the delay in filing. The Officer stated that:

While there is no doubt that the complainant was unwell from May 2012 to October 2015 and that his medical conditions affected his memory and recall abilities, this does not fully explain the delay in filing. The complainant was functioning in his personal life during this time period and, according to the respondent, he was able to attend meetings with management to discuss his personal situation and he attempted a gradual return to work on more than one occasion during this period. While acknowledging the seriousness of the complainant's disabilities, he has not provided any information to the Commission that would indicate that he was medically incapable of filing a complaint during the statutory time limit or until his first contact with the Commission. He also hasn't explained why he couldn't have contacted the Commission prior to January 2016. If he needed help to file a complaint due to his disabilities, the Commission could have provided that help. It is clear that he was aware of the Commission all along...It appears that the delay in filing was within the complainant's control and

that he could have contacted the Commission sooner about filing a complaint.

Furthermore, it does not appear that the complainant did everything he could have done to file his complaint as soon as possible after he was declared fit to return to work on October 6, 2015. The complainant waited three (3) months before contacting the Commission on January 4, 2016, and then did not provide a complaint in a form acceptable to the Commission until April 5, 2016, four (4) months later.... The total delay from the time the complainant was declared fit to return to work until he filed the present complaint is seven (7) months, which shows a lack of diligence on his part.

[9] The Officer remarked that the complaint was a private dispute between the Applicant and PSPC and it did not raise systemic issues that would affect the public interest. The Officer acknowledged that the Applicant was not represented by legal counsel and that, while he had initially been represented by a union representative in the grievance process, after a change of union personnel the union advised him it would not support his grievance. The Officer determined that the Applicant could have continued to pursue the grievance process to the third and final level without support from his union. Although the Officer accepted that PSPC would not be seriously prejudiced by the delay in responding to the complaint, she noted that lack of prejudice is only one factor to consider in analysing the timeliness of a complaint and a lack of prejudice does not mean the Commission has to deal with a late complaint. The Officer further noted the Applicant's explanation for the delay as being attributable to his memory and recall dysfunctions. In the Officer's view, however, the Applicant had "not demonstrated that these dysfunctions were so incapacitating that he was incapable of filing a complaint at the time." The Officer concluded that the Applicant had not provided a reasonable explanation for the three year delay in filing his complaint, and hence recommended that the Commission not deal with the complaint.

[10] In response to the Officer's Section 40/41 Report, PSPC submitted a letter dated August 11, 2016, stating that it agreed with the Officer's conclusions. On September 6, 2016, the Applicant provided written submissions to the Commission, stating that the recommendation in the Section 40/41 Report should not be followed because, among other things, his exceptional illnesses warranted his complaint being referred to adjudication and making an earlier complaint would have subjected him to a risk of retaliation by his employer or expulsion from his union. Subsequently, the Commission informed the parties in a letter dated November 1, 2016, that it had reviewed the Section 40/41 Report and the parties' submissions and had decided, pursuant to paragraph 41(1)(e) of the *Act*, not to deal with the complaint because it was based on acts which occurred more than one year before the complaint was filed and the Applicant had not provided a reasonable explanation for the delay in filing.

III. Issues

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

1. What is the appropriate standard of review?
2. Was the Commission's decision reasonable?

IV. Analysis

A. *Preliminary Matter*

[12] The Respondent argues that the Court should not consider documents submitted by the Applicant which are not part of the certified tribunal record, pointing to *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access*

Copyright), 2012 FCA 22 at para 19, 428 NR 297, where the Federal Court of Appeal stated that: “the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board.” The Respondent further argues that the Applicant’s affidavit should be given no weight because it contains arguments rather than facts, contrary to Rule 81 of the *Federal Courts Rules*, SOR/98-106. The Respondent does not, however, specify which documents in the Applicant’s Record or which portions of his affidavit should be struck.

[13] Shortly before the hearing of this matter, the Applicant filed a motion under Rule 359, seeking to file with the Court recent email correspondence between the Applicant and his employer. The Respondent objected to the timeliness of this motion in a letter dated June 21, 2017, and requested that the motion be dismissed because the new evidence the Applicant wished to submit was outside the scope of his judicial review application since it was not before the Commission at the time of its decision. I dismissed the Applicant’s motion at the outset of the hearing because the new evidence was not before the Commission when it made its decision and it did not relate to a breach of procedural fairness or natural justice by the Commission in rendering its decision.

B. *Standard of Review*

[14] In cases where the Commission adopts an officer’s recommendations and provides no reasons or only brief reasons (as is the case here), the officer’s report is deemed to constitute the Commission’s reasons (see: *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37, [2006] 3 FCR 392).

[15] The Commission's decision under section 41 of the *Act* is reviewed on the reasonableness standard (see: *Richard v Canada (Attorney General)*, 2010 FCA 292 at para 9, 327 DLR (4th) 292; *Gardner v Canada (Attorney General)*, 2005 FCA 284 at para 21, 142 ACWS (3d) 132; *Keith v Canada (Correctional Service)*, 2012 FCA 117 at para 44, 214 ACWS (3d) 529). In *Attaran v Canada (Attorney General)*, 2015 FCA 37 at para 14, 380 DLR (4th) 737, the Federal Court of Appeal explained that if the Commission's factual findings are reasonable, "then the question will be whether the decision to dismiss the complaint was reasonable, bearing in mind that the decision resulted in a termination of the matter and therefore the range of possible, acceptable outcomes may be narrower."

[16] Under the reasonableness standard, the Court is tasked with reviewing a decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a 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, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61, [2009] 1 SCR 339.

C. *Was the Commission's decision reasonable?*

[17] The Applicant contends that the Commission's decision is unreasonable. Specifically, he says the Commission unreasonably rejected his explanation for the delay in filing. According to the Applicant, the actions of PSPC and his union were responsible for the delay and, along with his illnesses, explain why his complaint to the Commission was not filed within the one-year time limit. The Applicant also complains that he was "forcibly faithful to the Union hoping it would eventually do its duty and ... would advance [his] Article 35.04 sick leave credit denial health issue ...but never did." The Applicant also takes issue with a letter dated December 12, 2016, from the Commission enclosing the certified tribunal record, which states that "documents obtained as part of the gathering of facts and evidence in the complaint process were not presented to the Commission." The Applicant questions the veracity of this statement in view of the fact that he sent a letter to the Commission on September 6, 2016, which, among other things, enclosed reports from his doctor and his pharmacist.

[18] The Respondent maintains that the Commission's factual findings were reasonable as was its decision not to deal with the complaint under paragraph 41(1)(e) of the *Act*. The Respondent says the Commission made two main factual findings. First, the Applicant's complaint was based on acts which occurred more than one year before it was filed and the Applicant did not file his complaint until 2016, four years after the alleged discriminatory acts. Second, the Commission reasonably found that the Applicant had not provided a reasonable explanation for the delay. According to the Respondent, the Commission's other findings that the Applicant was represented by a union, that he could have continued on with his grievance, that

PSPC was unaware of the Applicant's intentions to file a complaint, and that the lack of prejudice against PSPC's ability to defend the complaint was not determinative, were all reasonable. In light of these findings, the Respondent says the Commission reasonably adopted the Section 40/41 Report's recommendation to not deal with the complaint.

[19] The Applicant has not, in my view, demonstrated how the Commission's decision to accept the Section 40/41 Report's recommendation and not deal with the complaint, pursuant to paragraph 41(1)(e) of the *Act*, was unreasonable. The Commission reasonably found that the Applicant had filed his complaint three years after the one-year statutory time limit had expired. The Commission reviewed the Applicant's explanation for that delay, and it was reasonable for the Commission not to accept his explanation since the evidence revealed that he had been functioning in his personal life, attending meetings with management, and even attempting a gradual return to work during this time. It cannot be said, in this case, that the Commission failed to consider the Applicant's explanation for the delay. On the contrary, the Commission here, by essentially adopting the Officer's Section 40/41 report, thoroughly considered the Applicant's submissions and evidence, and it reasonably concluded that the evidence did not substantiate the Applicant's claim that he was incapable of filing a complaint until four years after the alleged acts occurred. The Commission's factual findings are afforded deference and should not be disturbed by the Court.

[20] The Commission recognized its discretion to hear complaints filed after the one-year time limit and reviewed several factors to determine whether it was warranted in this case: notably, the type of human rights issues raised by the complaint; whether the public interest was affected

by the issues raised in the complaint; the length of delay in filing the complaint; the reasons for the delay in filing the complaint; whether the Applicant was represented at the time the alleged discrimination happened or during the year after; whether PSPC knew that the Applicant intended to file a complaint; and whether PSPC would be seriously prejudiced if the complaint were to proceed. In my view, the Commission thoroughly reviewed the factors presented in this case in a fair and impartial manner. The Commission's decision to accept the Section 40/41 Report's recommendation fell within a range of possible and acceptable outcomes in light of the relevant facts and law.

V. Conclusion

[21] For the reasons stated above, the Applicant's application for judicial review is dismissed.

[22] The Respondent has requested its costs in its memorandum of fact and law. In view of the application having been dismissed, the Respondent is entitled to its costs from the Applicant in such amount as may be agreed to by them. If they are unable to agree as to the amount of such costs within 20 days of the date of this judgment, either the Applicant or the Respondent shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules*, SOR/98-106.

JUDGMENT in T-2045-16

THIS COURT'S JUDGMENT is that: the Applicant's application for judicial review is dismissed with costs to be paid by the Applicant to the Respondent; and that the Respondent is entitled to costs in such amount as may be agreed to by the Applicant and the Respondent, provided that if they are unable to agree as to the amount of such costs within 20 days of the date of this judgment, either the Applicant or the Respondent shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules*, SOR/98-106.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2045-16

STYLE OF CAUSE: ANDRÉ GAUTHIER v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JUNE 26, 2017

JUDGMENT AND REASONS: BOSWELL J.

DATED: JULY 18, 2017

APPEARANCES:

André Gauthier

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Diya Bouchédid

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin
Deputy Attorney General of
Canada
Ottawa, Ontario

FOR THE RESPONDENT