Federal Court Cour fédérale

Date: 20201112

Docket: T-1609-19

Citation: 2020 FC 1054

Ottawa, Ontario, November 12, 2020

PRESENT: Madam Justice Walker

BETWEEN:

DOUG DIXON

Applicant

and

TD BANK GROUP and TD CANADA TRUST MS. JACQUELINE ROVER

Respondents

ORDER AND REASONS

[1] This Order addresses Mr. Dixon's Motion for a subpoena of documents, records, and attendance of representatives of the Respondents (known and unknown), in connection with the underlying application for judicial review. Mr. Dixon submits that he requires the documents and the opportunity to question the witnesses to support his application.

[2] Mr. Dixon's application to the Court challenges a decision of the Canadian Human Rights Commission (the Commission) dated September 6, 2019 (Decision). The Commission informed Mr. Dixon in the Decision that it had decided not to deal with his complaint of discriminatory treatment by the Respondents (Complaint) because the Complaint was frivolous within the meaning of paragraph 4l(1)(d) of the *Canadian Human Rights Act* (*CHRA*).

[3] Mr. Dixon raises two issues in his Motion. First, he argues that the Respondents abandoned their right to participate in the application for judicial review of the Decision because they failed to file their Notice of Appearance within the time limit set out in Rule 305 of the *Federal Courts Rules* (Rules). Second, and in the alternative, he argues that the Court must order the issuance of the subpoena as the evidence in question is necessary to the application and is relevant to the issues of why the Bank did not respond to his Complaint and why the Commission declined to deal with the Complaint.

[4] Mr. Dixon and the Respondents' counsel argued this Motion before me, via Zoom videoconference, on October 28, 2020. I have carefully considered both parties' written and oral submissions in making this Order. For the reasons that follow, I will dismiss the Motion. Briefly, I find that the Respondents have not abandoned this application. They have complied with the Rules as modified by the Court's directions to address issues regarding service and filing of documents from the outset of the application. I also find that Mr. Dixon has not satisfied the rigorous test to be met for the issuance of a subpoena in an application for judicial review.

I. **Background**

[5] On March 29, 2019, Mr. Dixon filed the Complaint with the Commission alleging that the Respondent, the Toronto-Dominion Bank, had discriminated against him on the basis of his race, national or ethnic origin, colour, religion, age and disability. The Complaint was precipitated by Mr. Dixon's visit to one of the Bank's branches in Toronto in February 2019 during which he states that another customer was served before him despite the fact Mr. Dixon was first in the queue. Mr. Dixon also states that the second customer was verbally abusive when Mr. Dixon pointed out that he was first in line. One of the three tellers on duty moved to serve Mr. Dixon and apologized for the customer's abuse. In the meantime, two other tellers continued to serve the second customer with the result that he was, in fact, served before Mr. Dixon.

[6] Mr. Dixon complained about his treatment through the Bank's process. He was subject to a cross-complaint that resulted in the Bank's discontinuation of Mr. Dixon's financial services.

[7] The Commission reviewed the Complaint and a Commission officer (Officer) prepared a report dated June 26, 2019 (Report). The Report summarized Mr. Dixon's allegations as follows:

> More specifically, [Mr. Dixon] alleges that the [Bank] treated him in an adverse differential manner when it
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> a) failed to intervene on his behalf when another of its customers verbally abused him;
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> b) served his alleged abuser before him; and,
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> c) discontinued its services to him, alleging, among other things, that he had made racist remarks to one of its staff members.

[8] The Officer referred to the test for whether a complaint is frivolous within the meaning of paragraph 41(1)(d) of the *CHRA* and stated that there is a burden on each complainant to put forward sufficient information or evidence to persuade the Commission of a link between the alleged facts and a prohibited ground of discrimination. The Officer accepted Mr. Dixon's allegations as true but concluded that they amounted to bald assertions unsupported by the facts set out in the Complaint. The Officer stated that Mr. Dixon had not offered any information or facts to support his allegations that the Bank had treated him differently based on his age, colour, disability, national or ethnic origin, and race.

[9] The Report was sent to both parties for comment. Mr. Dixon provided his comments to the Commission by way of letter dated July 13, 2019. The Bank did not provide comments on the Report.

[10] In the Decision, the Commission informed Mr. Dixon that it had reviewed the Report and his reply comments. As stated above, the Commission decided not to deal with the Complaint because it was frivolous.

II. **The Motion for subpoena**

[11] In this Motion, Mr. Dixon seeks access to the Bank's records concerning his February 2019 visit to the branch, including footage from the closed-circuit television recordings of his interactions. He relies on the decision of the Federal Court of Appeal (FCA) in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 (*Tsleil-Waututh*) to argue that the evidence in question is necessary and under the control of the Respondents. Mr. Dixon states that the

Commission should have requested evidence from the Respondents prior to making the Decision but failed to do so. He also questions why the Bank did not respond to his Complaint or to the Report. Mr. Dixon submits that he is not engaged in a fishing expedition and has raised a credible ground for review.

[12] The Respondents submit that Mr. Dixon has failed to meet the high threshold established by the FCA for granting a motion for a subpoena of documents and witnesses in the context of an application for judicial review. They argue that the evidence in question is not necessary to adjudicate Mr. Dixon's application as the role of this Court is to assess the Decision based on the evidentiary record before the Commission.

III. **Preliminary matter – Respondents' standing**

Procedural History

[13] Mr. Dixon's arguments before me centred on his submission that the Respondents do not have standing in this application because they failed to file a Notice of Appearance in accordance with Rule 305. He argues that the Respondents have abandoned the proceeding, that they must be assumed to agree with his position regarding the Decision, and that the application for judicial review must be allowed. Mr. Dixon has raised the argument of abandonment a number of times in other procedural steps in his underlying application.

[14] Mr. Dixon stated that he should not be required to give submissions on the substance of his request for a subpoena. He argued that he does not want to give the Respondents' continued participation in the proceeding any credibility and that the Court should hear no further

submissions regarding the Motion. I indicated to Mr. Dixon that I understand his position but requested his submissions in support of the Motion to ensure his application moves forward. I also indicated that I would include in this Order my ruling regarding his claim of abandonment.

[15] The Respondents submit that the issue of standing is not properly before the Court because it was not raised in Mr. Dixon's Notice of Motion. Should the Court decide to address the issue, the Respondents argue that their Notice of Appearance was not served late and was properly accepted by the Court for filing. They state that Mr. Dixon's position regarding abandonment reflects his disagreement with the Court's duly issued directions regarding service.

[16] Although the issue of standing was not formally raised in the Notice of Motion, I will address the issue in order to bring some finality to what is an important outstanding concern for Mr. Dixon.

[17] My review of the Court's records regarding Mr. Dixon's application for judicial review indicates that there were initial delays on the part of both parties in, first, Mr. Dixon's service and filing of his Notice of Application, and, second, the Respondents' attempts to deliver their Notice of Appearance to Mr. Dixon's address for service.

[18] The first Court record indicates that the Notice of Application was filed on October 2, 2019. On October 8, 2019, Mr. Dixon's affidavit of service confirming service of the Notice of Application on the Respondent, TD Bank Group, was filed with the Court. On October 9, 2019,

the Court received Mr. Dixon's affidavit of service confirming his attempted service of the Notice of Application on the Respondent, TD Canada Trust-Ms. Rover, on October 8, 2019.

[19] The Respondents became aware of the Notice of Application on October 8, 2019. Mr. Dixon had not served the Notice of Application on Ms. Rover in accordance with the Rules but Respondent's counsel wrote to Mr. Dixon by fax accepting service on behalf of Ms. Rover effective October 8, 2019. The Respondents discovered that Mr. Dixon's fax number in the Notice of Application was invalid and sent a copy of their letter dated October 8, 2019 to him by email. Respondent's counsel has been corresponding with Mr. Dixon via email since that time.

[20] The Respondents' evidence, which is uncontradicted, demonstrates that they attempted to personally serve their Notice of Appearance at Mr. Dixon's address for service, his residence, on each of October 11, 12 and 15, 2019 but that Mr. Dixon did not answer his door. The process server on each occasion knocked on the door and made various attempts to ascertain whether someone was at home. On the second occasion, the process server left a service notification on the door handle and noted that it remained in place on the third occasion.

[21] On October 15, 2019, Respondents' counsel contacted Mr. Dixon by email to make an appointment for service of the Notice of Appearance. Counsel sent a number of follow-up emails through October. Mr. Dixon acknowledged counsel's emails but stated that he does not open his emails every day. He confirmed his address for service and stated that he had no knowledge of any prior attempt to deliver papers to his house. Mr. Dixon did not suggest a date and time when he would be available to accept service.

[22] On October 21, 2019, the Respondents sent a copy of the Notice of Appearance to Mr. Dixon via registered mail. The letter was returned by Canada Post “unclaimed”.

[23] In late October 2019, at Mr. Dixon’s request and by direction of the Court, Mr. Dixon was granted an extension of time to serve and file his proof of service of the Notice of Application on the Commission and the Attorney General of Canada. Mr. Dixon complied with the Court’s direction.

[24] On November 4, 2019, the Court received a letter from Mr. Dixon making an informal request for an extension of time to file his Rule 306 affidavit. On November 13, 2019, the Court directed that Mr. Dixon’s request be held in abeyance and that he was to serve the Respondents with his Notice of Application within 20 days. On November 20, 2019, Respondent’s counsel wrote to Mr. Dixon to advise him that they had authority to accept service of the Notice of Application on behalf of the Respondents.

[25] Mr. Dixon did not comply with the Court’s direction. Rather, he served his supporting Affidavit on Respondent’s counsel on December 3, 2019, and attempted to file his affidavit of service with the Court on December 4th. A copy of the Notice of Application was attached to the Affidavit. Respondents’ counsel informed the Court on December 6, 2019 that they would accept service of the Affidavit as service of the Notice of Application.

[26] Prothonotary Furlanetto issued a direction on December 11, 2019 that Mr. Dixon’s service of the Notice of Application was effective as of December 3, 2019 and the abeyance was

lifted. Mr. Dixon was permitted to file his proof of service of his Affidavit pursuant to Rule 306. Subsequent timelines were to be calculated from his filing of the proof of service.

[27] The Respondent's Notice of Appearance was filed on December 11, 2019.

Analysis

[28] I find that the Respondents' Notice of Appearance was filed in accordance with the Rules (Rules 3 and 305) and the Court's directions. In the alternative, I find that the Respondents have acted in good faith and would grant relief against any non-compliance with the Rules on their part in serving their Notice of Appearance. Mr. Dixon's argument that the Respondents have abandoned this matter is not persuasive.

[29] From the outset, the Respondents have been fully engaged in responding and attempting to respond to Mr. Dixon's application for judicial review. They first attempted to effect service of their Notice of Appearance on October 11, 2019, at the address provided by Mr. Dixon, within the initial 10-day period contemplated by Rule 305. The Respondents continued their attempts to serve the Notice of Appearance during October 2019. At no point through October, November and December 2019 did the Respondents or their counsel indicate that they would not contest this proceeding. To the contrary, they made repeated attempts to timely serve and file their Notice of Appearance, relying on information provided by Mr. Dixon.

[30] Mr. Dixon initiated this application for judicial review and, in my view, must make reasonable efforts to accept proof of service of required documents from the Respondents.

Mr. Dixon failed to answer his door for the process server or, if he was not at home, failed to respond to the notification left at his residence; failed to open his emails; and failed to respond to the Respondents' requests for an appointment for personal service. The fact that Mr. Dixon has objected to the process server's methods or that he asserts there are other ways for the Respondents to effect service do not establish his position. Mr. Dixon's own inaction does not permit him to claim abandonment or failure to comply with the Rules by the Respondents.

[31] The record shows that the Respondents have acted in good faith in their attempts to file their Notice of Appearance. Mr. Dixon was well aware of the Respondents' participation in the preceding from early October 2019 and has not suffered prejudice in pursuing his application due to any action or inaction of the Respondents.

[32] Mr. Dixon has taken issue with the directions issued by the Court's Prothonotaries in this matter, stating there is no reason why the Respondents should have been permitted to file their Notice of Appearance in December 2019. However, I find that the Prothonotaries have made repeated attempts, to the benefit of both parties, to resolve initial skirmishes and to ensure proper service on both parties of each required document. They have accommodated Mr. Dixon as a self-represented litigant. I acknowledge that the Court's Rules and processes are difficult to follow for anyone who is not required to interact with the Court on a regular basis but the fact that initial directions and rulings have been required to date is not unusual, particularly in matters of service of documents and brief time delays.

IV. **Mr. Dixon's Motion for a subpoena**

[33] The starting point for my analysis of Mr. Dixon's Motion is the general principle that the evidentiary record on an application for judicial review is restricted to the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 (*Access Copyright*)). The rule reflects the different roles Parliament has conferred on the decision maker (the Commission) and the Court. The decision maker decides the case on its merits based on the evidence before them. The reviewing court reviews the overall legality of the decision in light of that evidence and does not engage in a new trial of the questions before the decision maker (*Access Copyright* at paras 17-19). Only in exceptional circumstances will new evidence be admitted by the reviewing court (*Tsleil-Waututh* at para 97).

[34] Often, the general rule against the admission of new evidence in support of an application for judicial review arises when an applicant seeks to introduce new evidence that they have in their possession. In the present Motion, Mr. Dixon is seeking to first obtain the new evidence from the Bank and to then use it to support his challenge to the Commission's decision.

[35] In *Tsleil-Waututh* (at para 103), the FCA established the test for issuing a subpoena in the course of an application for judicial review:

> [103] In some cases, witnesses may be less than forthcoming. In rare cases, witnesses may be subpoenaed to produce a document or other material on an application for judicial review: Rule 41(1) and Rule 41(4)(*c*).The subpoena power in Rule 41 applies to "proceedings" and Rule 300 shows that applications are "proceedings." This is allowed with leave of the Court where:
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> - the evidence is necessary;

- there is no other way of obtaining the evidence;
- it is clear that an applicant is not engaged in a fishing expedition but, instead, has raised a credible ground for review beyond the applicant's say-so; and
- a witness is likely to have relevant evidence on the matter.

[36] The first question I must address is whether the evidence sought by Mr. Dixon is necessary to the Court's review of the Commission's Decision. This question requires me to consider the basis on which the Commission makes a paragraph 41(1)(d) decision.

[37] Paragraph 41(1)(d) of the *CHRA* provides as follows:

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	**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 :
[. . .]	[. . .]
(d) the complaint is trivial, frivolous, vexatious or made in bad faith;	d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
[. . .]	[. . .]

[38] A decision taken by the Commission under paragraph 41(1)(d) is a screening decision. The paragraph permits the Commission to exercise its discretion to dismiss a complaint without further inquiry if the facts and evidence set out in the complaint, if true, do not show a link between the acts complained of and a prohibited ground of discrimination (*Hartjes v Canada (Attorney*

General), 2008 FC 830 at paras 12-15); *Hérold v Canada (Revenue Agency)*, 2011 FC 544 at para 33 (*Hérold*)).

[39] Where, as in this case, the Commission reviews the report of one of its officers and provides very brief reasons for its decision, the Court treats the report as the Commission's reasoning (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37; *Guerrier v Canadian Imperial Bank of Commerce (CIBC)*, 2013 FC 937 at para 10 (*Guerrier*)). Therefore, my consideration of the Decision includes both the letter dated September 6, 2019 and the Report.

[40] The parameters and outcome of the Commission's screening assessment of Mr. Dixon's Complaint were:

1. Mr. Dixon was required to include in the Complaint the material facts and evidence in support of his allegations that linked the alleged discriminatory acts to a prohibited ground of discrimination in the *CHRA* (*Stukanov v Canada (Attorney General)*, 2018 FC 854 at para 18);

2. The Commission was required to base its determination on the evidence presented by Mr. Dixon and assume that the facts alleged were true;

3. The Commission then applied the legal test for determining if the Complaint was frivolous within the meaning of paragraph 41(1)(d) of the *CHRA*: whether, based on the evidence in the Complaint, it appeared to be plain and obvious that the

Complaint cannot succeed (*Konesavarathan v University of Guelph Radio*, 2018 FC 1217 at para 33; *Hérold* at para 35);

4. The Commission was not required to undertake an investigation at this stage and did not do so;

5. The Commission concluded that the Complaint did not present sufficient facts to establish a link between the treatment alleged by Mr. Dixon and a prohibited ground of discrimination. Therefore, it was plain and obvious that the Complaint could not succeed.

[41] The nature of the Commission's Decision is central to my consideration of this Motion because it determines the scope of the evidence the Court will consider in its eventual review of the Decision. In a paragraph 41(1)(d) screening inquiry, the Commission proceeds solely on the complaint and any comments provided by the complainant and/or responding party to the Report. On review, the Court will be required to determine whether the Decision was reasonable based only on the information before the Commission.

[42] It follows that no new evidence will be necessary or relevant to the Court's review of the Decision and I find that Mr. Dixon has not satisfied the first requirement of the *Tsleil-Waututh* test. The introduction of new evidence would obscure the Court's focus on the Commission's assessment of the Complaint. If the Court were to admit new evidence, it would improperly place itself in the role of decider of the merits of Mr. Dixon's Complaint.

[43] The *Tsleil-Waututh* test is conjunctive, meaning an applicant must satisfy each of the four requirements. As Mr. Dixon has not satisfied the first requirement of the test, his Motion will be dismissed.

[44] I note that Mr. Dixon submits that the Commission had an obligation to seek evidence from the Respondents before making the Decision. I do not agree. As stated above, Mr. Dixon bore the onus of describing in the Complaint sufficient facts and evidence to establish a link between the behaviour alleged and a prohibited ground of discrimination. None of the cases he cites address a screening decision by the Commission under paragraph 41(1)(d). *Lubaki v Bank of Montreal Financial Group*, 2014 FC 865, and *Guerrier* involved allegations of a flawed investigation undertaken by the Commission and, in any event, the applicant in those cases did not attempt to introduce new evidence before the Court. The application proceeded on the record before the Commission. The other cases cited involve proceedings before the Canadian Human Rights Tribunal and not the Commission.

[45] Mr. Dixon also submits that the Respondents should have unilaterally provided evidence in response to the Complaint and the Report. However, any response, either to the Complaint in the first instance or to the Report, was solely in the Respondents' discretion. They were under no obligation to provide comments or additional evidence upon receipt of the Report. The cover letter from the Commission to the Respondents dated June 28, 2019 stated that, if they agreed with the Report, they could contact the officer assigned to the file to waive their right to respond. If they disagreed, the Respondents were permitted but not required to respond.

V. **Conclusion**

[46] Mr. Dixon may not seek further evidence through this Motion to bolster his Complaint. As Justice Stratas stated in *Tsleil-Waututh*, the issuance of a subpoena in the course of an application for judicial review is rare. Mr. Dixon has not established unusual or rare circumstances that would persuade the Court to permit him to engage in further fact finding in support of his Complaint. In so stating, I do not characterize Mr. Dixon's request as a fishing expedition. It is clear from his submissions that he genuinely believes the evidence he seeks is relevant to the Court's role in this application. However, the Motion does attempt to enable Mr. Dixon to place additional, substantive evidence before the Court to challenge the reasonableness of the Commission's Decision.

[47] The Motion will be dismissed. I find that Mr. Dixon has not satisfied the test for the issuance of a subpoena to permit him to obtain additional documents and records, and to interview witnesses, in support of his application for judicial review.

[48] I also find that the Respondents at no time abandoned their role in this application and continue to have standing as respondents.

[49] The Respondents have not requested costs in this Motion and no costs will be awarded.

ORDER IN T-1609-19

THIS COURT ORDERS that:

1. The Applicant's Motion for a subpoena of documents, records, and attendance of representatives of the Respondents (known and unknown) is dismissed.

2. No costs are awarded.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1609-19
STYLE OF CAUSE:	DOUG DIXON v TD BANK GROUP and TD CANADA TRUST MS. JACQUELINE ROVER
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE BETWEEN TORONTO, ONTARIO AND OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 28, 2020
ORDER AND REASONS:	WALKER J.
DATED:	NOVEMBER 12, 2020

APPEARANCES:

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Bonny Mak Justin P'ng	FOR THE RESPONDENTS

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