Federal Court Cour fédérale

Date: 20210422

Docket: T-1370-19

Citation: 2021 FC 353

Ottawa, Ontario, April 22, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

TIMOTHY JOHN BREEN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Breen filed a complaint on January 4, 2019 [the 2019 Complaint], with the Canadian Human Rights Commission [the Commission], alleging that his former employer, Human Resources and Skills Development Canada, discriminated against him in his employment between October 2003 and June 2005 on the basis of disability.

[2] Mr. Breen has "various learning and comprehension disabilities" including dyslexia, attention deficit disorder, attention deficit hyperactivity disorder, learning disability, and anxiety

and panic disorder. He asserts that his disabilities make it impossible for him to self-advocate, and to fully and quickly comprehend events.

[3] The Commission decided not to deal with the 2019 Complaint for two reasons. First, pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*], it is vexatious, and second, pursuant to paragraph 41(1)(e), it is based on acts which occurred more than one year before it was filed and the Commission found that the respondent may be seriously prejudiced by the investigation and adjudication of the 2019 Complaint. It is that decision which Mr. Breen asks the Court to review.

[4] Mr. Breen's 2019 Complaint reads as follows:

> Between October 2003 and June 2005, Human Resources and Skills Development Canada (HRSDC), a department of the Federal Government of Canada; engaged in discriminatory employment practices against Mr. Breen. HRSDC violated Mr. Breen's fundamental human rights, denied Mr. Breen an accommodation under the protected ground of "Disability" and treated Mr. Breen differently because of his learning disabilities. Following being diagnosed with multiple learning disabilities, HRSDC refused to renew Mr. Breen's term contract. These are all severe breaches of Sections 3, 5(a) & (b), 7(a) & (b), 10(a) & (b), 14(l) and 15(2) of the *Canadian Human Rights Act*, (the "*Act*").
>
> - HRSDC discriminated against Mr. Breen on the prohibited ground of Disability - a breach of Section 3(1) of the *Act*.
>
> - During the entire course of Mr. Breen's employment with HRSD [*sic*], Mr. Breen was continuously threatened with termination *"unless he proved that he was "capable of performing the duties of his position"*. This is a serious breach of sections 7(a) & (b) of the *Act* which requires employers to implement accommodations to enable employees with a confirmed disabilities to maintain their employment and participate in the workplace.

- Mr. Breen was treated differently from his peers due to his disability. In so doing, HRSDC engaged in a discriminatory employment practice against Mr. Breen on the prohibited ground of "disability", a breach of Section 5(a) & (b) of the *Act*.

- HRSDC deprived Mr. Breen of employment opportunities while awaiting the learning assessment results- a breach of Section 10 of the *Act*.

- HRSDC actions against Mr. Breen meet the definition of retaliation, as described in Section 14(l) of the *Act*.

- HRSDC, the federal department whose very mandate is to educate and encourage employers to remove barriers and promote greater accessibility for employees with disabilities - incredulously refused to accommodate Mr. Breen's learning disabilities. In so doing. HRSDC failed in their duty and obligation to accommodate an employee with a disability. This is a direct violation of Section 15(2) of the Act, which obligates employers to comply with their "duty to accommodate" to the point of undue hardship (in terms of health, safety or cost).

[5] In the 2019 Complaint, Mr. Breen outlines several events that occurred during his employment that form the basis of the allegations of discrimination. In addition, he references the fact that in November 17, 2004, his union filed a human rights complaint on his behalf against HRSDC, and requested mediation [the 2004 Complaint]. Mediation took place in June 2005 with a Commission mediator. HRSDC had the benefit of legal counsel at the mediation; however, the union informed Mr. Breen that it did not require legal counsel. Mr. Breen in his 2019 Complaint states the following regarding the mediation process:

> Following the mediation, Mr. Breen was informed that the matter was “settled”. However, it was settled without the employer accommodating Mr. Breen.
>
> Immediately following the mediation before the tribunal, Mr. Breen requested his legal, constitutional right to a hearing before

> the tribunal and the right to be heard by an impartial judge. However, the union informed him that it would be a waste of time because HRSDC would not, under any circumstances:
>
> - Permit him to stay in the Service Delivery Representative (SDR) Level 5 position, under any capacity
>
> - Permit him to work part-time as a SDR
>
> - Permit him to apply for a CR 4 or CR 3 (more junior positions).

[6] Mr. Breen says in his 2019 Complaint that due to his disabilities, the settlement was illegal and void:

> It should be noted that Mr. Breen, an employee with multiple learning disabilities, disabilities in terms of reading, visual learning disabilities and dyslexia and in the presence and stress of imminent job loss, was pressured to agree to a termination/severance agreement without legal counsel. It was impossible for Mr. Breen to think clearly. Mr. Breen was not advised nor given time to have the offer reviewed by independent legal counsel. This makes that termination agreement, whether verbal or written, illegal and void.

[7] A Human Rights Officer with the Commission [the Officer] reviewed the 2019 Complaint. She concluded that the 2019 Complaint raises the same allegations as those raised in the 2004 Complaint:

> The allegations in both complaints start in October 2003 when the complainant began his employment with the respondent. They both raise the same allegations of adverse differential treatment and failure to accommodate the complainant's disability up to the termination of his employment.

[8] The Officer noted that the allegations in the 2004 Complaint ended when his employment was terminated in November 2004; whereas, the 2019 Complaint continues beyond that date and ends in June 2005 after the mediation referenced above.

[9] She concludes that the matter has already been the subject of a Commission decision because the Minutes of Settlement reached by the parties was approved by the Commission pursuant to subsection 48(1) of the *CHRA*, and “as such, the complaint has had a final decision by an independent third party with authority to decide on human rights issues.”

[10] She also recommended that the 2019 Complaint not be dealt with as the events raised occurred almost 14 years ago and “there is little doubt that such a long delay would cause serious prejudice to the respondent in its ability to defend the complaint.”

[11] Both parties were provided with an opportunity to respond to the report. The Commission adopted the recommendation in the report and decided that it would not entertain the 2019 Complaint as it was frivolous, in the sense that the matters raised had previously been dealt with, and because of the unreasonable delay in bringing the 2019 Complaint.

[12] Mr. Breen took issue then and does now with certain aspects of the Officer’s report.

[13] He argues that the Officer incorrectly stated that he was given a termination notice in November 2004, because he began to receive threats of termination after October 2003 and received termination letters beginning in June 2004 until the end of December 2004. I am not persuaded that the Officer’s statement is inaccurate. Notwithstanding the typo in the date (written “2014” instead of “2004”), Mr. Breen appears to have conflated the finding of a termination notice that he received in November 2004 with the various notices he received

regarding termination over several prior months. The mention of the November 2004 termination notice does not preclude the receipt of other notices in prior months.

[14] He further says that the Officer incorrectly found his 2019 Complaint to lack the proper format when the report noted that, "A complaint is only filed when it is received in a form acceptable to the Commission." To the contrary, the Officer did not find the 2019 Complaint to lack the proper format. Mr. Breen appears to have made an erroneous inference from the report.

[15] Lastly, he takes issue with the summary where it noted that in the 2004 Complaint he raised "the same allegations as those raised in the present complaint." He submits that the 2004 Complaint was a grievance of "a violation of rights under Article 19" and to be "treated with respect and equity under the provisions of the workplace duty to accommodate", while the 2019 Complaint listed other sections, namely sections 3, 5(a), 5(b), 7(a), 7(b), 10(a), 10(b), 14(1), and 15(2) of the *CHRA*. He says that the 2019 Complaint presented "new and different" breaches of the *CHRA*, but that the Officer unreasonably "lumped" them as "adverse treatment."

[16] While Mr. Breen may have pointed to other sections of the *CHRA* in the 2019 Complaint, it is fair to say that the factual allegations raised in the 2019 Complaint are the same as those raised in the 2004 Complaint, and this is the matter being addressed by the Officer when she writes:

> The allegations in both complaints start in October 2003 when the complainant began his employment with the respondent. They both raise the same allegations of adverse differential treatment and failure to accommodate the complainant's disability up to the termination of his employment.

[17] The real issue raised by Mr. Breen in this application is whether the decision of the Commission not to deal with the 2019 Complaint is reasonable. Notwithstanding Mr. Breen's capable delivery of his submissions, both in writing and orally, I find that the decision under review is reasonable.

[18] Justice Rowe of the Supreme Court of Canada in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paragraphs 31 – 33, explains what is required for a reasonable decision as enunciated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and what is required of a reviewing court when using the reasonableness standard of review:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*,

> at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

[19] I agree with the Attorney General of Canada that in order to succeed in this application, Mr. Breen must convince the Court on the balance of probabilities that the decision was unreasonable on both grounds cited by the Commission: vexatiousness under paragraph 41(1)(d) of the *CHRA*, and timeliness under paragraph 41(1)(e) of the *CHRA*.

[20] Mr. Breen's characterization of "vexatious" as being akin to having "malicious intent" to "annoy, embarrass or harass the respondent" is not accurate in this context. The definition of "vexatious" within the meaning of paragraph 41(1)(d) of the *CHRA* has been described by the Federal Court of Appeal in *Exeter v Canada (Attorney General)*, 2012 FCA 119 at paragraph 34 as the "relitigation of issues previously resolved or settled." Such relitigation can constitute an abuse of process which the Federal Court of Appeal noted "would permit the relitigation to be characterized as vexatious."

[21] In response to the Officer's report, Mr. Breen submitted that the 2019 Complaint was not frivolous. However, he appears to accept that the issues raised in the 2019 Complaint were those raised in the 2004 Complaint. He wrote the following in his response to the report:

> The Complainant did not fully understand the purpose of the mediation on June 29, 2005. <u>Even though the facts and issues of his complaint were previously raised</u>, and the Commission approved the settlement, the process failed the complainant because of his numerous learning and comprehension disabilities combined with his mental disorders were a barrier to his full and informed participation. The complainant was not an equal party to the proceedings. [emphasis added]

[22] Indeed, while Mr. Breen now asserts that the settlement is invalid due to his condition at the time, the substance of the complaint, as focused on discrimination under the *CHRA*, appears to be exactly that addressed in the 2004 Complaint. His allegations regarding his inability to appreciate the settlement go only to his submission that the settlement is invalid – they do not go to the allegation of discrimination.

[23] For this reason, I find the Commission's decision that the 2019 Complaint is vexatious to be reasonable.

[24] The Commission's finding that the 2019 Complaint is not timely is also reasonable. The Commission may entertain a complaint filed more than one year after the facts giving rise to it, as was the case in *Canada (Attorney General) v Galipeau*, 2012 FC 1399, cited by Mr. Breen, where there was a delay of some 31 months. However, each situation is very much dependant on the facts and reasons advanced for the delay. While the Court appreciates that Mr. Breen may not have been aware until recently that he might have an argument that the settlement was invalid due to his condition at the time, no authority has been provided where a complaint filed some 14 years after the events giving rise to it has been accepted by any human rights commission, let alone when the issues raised have previously been adjudicated by the very commission receiving the complaint.

[25] As the Attorney General notes, Mr. Breen had available judicial review remedies to challenge the settlement reached in 2005. Regrettably, those are now also well beyond the short time permitted for filing. As regrettable as this may be for Mr. Breen, there are excellent policy

and practical reasons to justify why human rights complaints are to be dealt with quickly after the events giving rise to them. Justice delayed is justice denied for the victims of discrimination. In the same vein, justice delayed also adversely impacts the ability of the alleged discriminator to defend itself against such claims.

[26] For these reasons, this application must be dismissed. The Attorney General sought nominal costs if successful; however, in the exercise of my discretion, no costs will be awarded.

JUDGMENT IN T-1370-19

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

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1370-19
STYLE OF CAUSE:	TIMOTHY JOHN BREEN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND TORONTO, ONTARIO
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JUDGMENT AND REASONS:	ZINN J.
DATED:	APRIL 22, 2021

APPEARANCES:

Timothy Breen	APPLICANT (ON HIS OWN BEHALF)
Benjamin Wong	FOR THE RESPONDENT

SOLICITORS OF RECORD:

- Nil -	SELF-REPRESENTED APPLICANT
Attorney General of Canada Department of Justice Canada Toronto, Ontario	FOR THE RESPONDENT