

Federal Court



Cour fédérale

Date: 20211021

Docket: T-1509-20

Citation: 2021 FC 1122

Ottawa, Ontario, October 21, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

THE BANK OF NOVA SCOTIA

Applicant

and

MARCUS WILLIAMS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Bank of Nova Scotia [Scotiabank] seeks judicial review of a decision by the Canadian Human Rights Commission [Commission] to refer a human rights complaint to the Canadian Human Rights Tribunal [Tribunal] for inquiry. The complaint was made by Marcus Williams, who alleges that Scotiabank discriminated against him in the course of his

employment on the grounds of colour, national or ethnic origin, race, sex or age, contrary to s 7 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

[2] Scotiabank provided unsatisfactory explanations to the Commission's investigator of its reasons for terminating Mr. Williams' employment, particularly given its hiring practices at the relevant times. The Commission's determination that it was not plain and obvious Mr. Williams' complaint was frivolous was therefore reasonable.

[3] The labour adjudicator who decided Mr. Williams' complaint of unjust dismissal did not consider the human rights issues advanced in his complaint to the Commission. The Commission's determination that Mr. Williams' complaint was not vexatious was therefore reasonable.

[4] The Commission did not sufficiently explain its rejection of Scotiabank's submissions respecting prejudice, or its departure from the recommendation of its investigator that it deal with only those aspects of the complaint that were timely. This aspect of the Commission's decision was therefore unreasonable.

[5] The application for judicial review is allowed in part.

II. Background

[6] Mr. Williams was a casual employee of Scotiabank from February 9, 2015 to October 26, 2017. He worked as a Level 04 Credit Risk Administration Officer [CARDS Officer]. His primary responsibility was data entry.

[7] Mr. Williams was hired to help Scotiabank clear a temporary system backlog. While he worked at Scotiabank, Mr. Williams applied for 15 contract and non-casual positions as a CARDS Officer at his level or one level higher. He also submitted applications for approximately 200 internal job postings. None of his applications were successful.

[8] The terms of Mr. Williams' casual employment permitted either party to terminate the employment relationship with two weeks' notice. Scotiabank terminated Mr. Williams' employment on October 26, 2017 due to "discontinuance of work" and/or "lack of function".

[9] Mr. Williams submitted a human rights complaint to the Commission on November 17, 2017. However, the Commission did not immediately accept his complaint form because Mr. Williams had not identified a nexus between his alleged mistreatment and a prohibited ground of discrimination. Mr. Williams submitted a revised complaint form that was acceptable to the Commission on April 10, 2018.

[10] Mr. Williams also filed an unjust dismissal complaint pursuant to Part III of the *Canada Labour Code*, RSC 1985, c L-2. The complaint was referred to a labour arbitrator on August 7,

2018. The labour adjudicator accepted Scotiabank's explanation that it had dismissed Mr. Williams due to discontinuance of work or lack of function, and rejected the complaint. Mr. Williams did not seek judicial review of the labour arbitrator's decision.

[11] On March 13, 2019, a Human Rights Officer with the Commission delivered an initial screening report [Screening Report], and recommended that Mr. Williams' complaint be dismissed as frivolous. The Commission rejected this recommendation, and decided to deal with the complaint in a decision dated June 12, 2019.

[12] Scotiabank sought judicial review of the Commission's decision to deal with the complaint, but the application was dismissed by Justice Nicholas McHaffie on the ground that it was premature (*Bank of Nova Scotia v Williams*, 2020 FC 1127). Justice McHaffie specified that his judgment was without prejudice to Scotiabank's right to raise the same arguments in a subsequent application for judicial review in respect of Mr. Williams' complaint (at para 35).

[13] A second Human Rights Officer [Officer] completed an investigation report on September 11, 2020 [Investigation Report]. The Officer determined that it was not plain and obvious the labour adjudicator had dealt with the human rights aspects of Mr. Williams' complaint, and the complaint was therefore not vexatious. The Officer also found that some instances of discrimination alleged by Mr. Williams' were not timely, because they occurred more than one year before he submitted his complaint form to the Commission. The Officer recommended that only the timely aspects of the complaint be referred to the Tribunal for inquiry, and that the remainder be severed.

[14] On November 4, 2020, the Commission referred Mr. Williams' complaint to the Tribunal in its entirety. The Commission adopted the conclusion of the Investigation Report that Mr. Williams' complaint was not vexatious, and also found the entire complaint to be timely because the alleged acts appeared to constitute a continuous pattern of discrimination.

III. Issue

[15] The sole issue raised by this application for judicial review is whether the decision of the Commission to refer Mr. Williams' complaint to the Tribunal for inquiry was reasonable.

IV. Analysis

[16] The Commission's decision is subject to review by this Court against the standard of reasonableness (*Ennis v Canada (Attorney General)*, 2020 FC 43 at para 18). The Court will intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[17] Scotiabank challenges the Commission's findings that Mr. Williams' complaint was (a) not frivolous; (b) not vexatious; and (c) timely in its entirety.

(a) *Frivolousness*

[18] The Screening Report concluded that Mr. Williams had failed to demonstrate any nexus between his alleged differential treatment and a prohibited ground of discrimination such as race, colour, national or ethnic origin, sex, or age. According to the Screening Report, "it appears the complainant's employment was terminated because of his casual status".

[19] In its decision to proceed with the complaint, the Commission rejected the recommendation contained in the Screening Report for the following reasons:

The complainant had satisfactory performance evaluations. During this period of employment, the complainant submitted applications for 15 posted contract term or non-casual positions, all of which were at, or one level above, the level of the position in which he was employed. He was not offered an interview in respect of any of these applications. Several other positions at, or one level above, the level of the position in which the complainant was employed were filled without a posted competition during the same period. The complainant's employment was terminated by the respondent for reasons which the respondent is alleged to have variously described as "lack of work" and "discontinuance of a function," shortly after the complainant had requested a pay increase. These reasons for termination are difficult to reconcile with the hiring activity of the respondent, as noted above. Discrimination is rarely overt, and often manifests itself in subtle ways. It is the Commission's view that it is not plain and obvious that the complainant's allegations are mere bald assertions.

[20] The Officer who completed the Investigation Report reviewed documents pertaining to Mr. Williams' employment and interviewed two of his managers: Mandrake Khan and Juli Chan. According to the Investigation Report (at para 83):

Throughout the *Canada Labour Code* adjudication hearing, and throughout the Commission complaint process, the respondent has maintained that the complainant "was dismissed exclusively as a result of lack of work or discontinuance of a function." And yet, based on [Mr. Khan's] email it suggests that the complainant's performance may have been a factor in the termination of employment. This was also confirmed by Ms. Chan's evidence [...].

[21] The Officer acknowledged that Scotiabank's management team may have had legitimate concerns about Mr. Williams' performance. However, the Officer found it troubling that Scotiabank maintained the reason Mr. Williams was selected for termination was because of his casual employment status; yet based on the evidence this may not have been the sole reason. The Officer noted that a shifting explanation for a respondent's conduct may support an inference of discrimination, citing *Peel Law Association v Pieters*, 2013 ONCA 396 at paragraph 105.

[22] The Officer echoed the Commission's earlier observation that discrimination is rarely overt, and often manifests itself in subtle ways. The Officer cited Justice Susan Elliott's decision in *Banda v Canada (Attorney General)*, 2019 FC 791 for the proposition that proving racial discrimination is difficult, and "often discrimination can only be proven by inference" (at paras 44-45, 77).

[23] Scotiabank relies on *Halifax Employers Association v Farmer*, 2021 FC 145 [HEA], where Justice Richard Southcott found a referral decision of the Commission to be unreasonable

because it failed to engage meaningfully with the evidence cited in the investigator's report or the related analysis (at para 51). Justice Southcott observed that *Vavilov* has heightened the duty of the Commission to explain a departure from the investigator's report (*HEA* at para 37).

[24] In this case, the Commission departed from the findings and recommendations of the Screening Report, but accepted most of the findings and recommendations of the Investigation Report. The analysis in the Investigation Report was supported by documentary evidence and witness testimony.

[25] The test for determining whether or not a complaint is frivolous within the meaning of s 41(1)(d) of the CHRA is whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed (*Hérolde v Canada (Revenue Agency)*, 2011 FC 544 at para 35). This is a low threshold.

[26] Scotiabank provided unsatisfactory explanations to the Commission's investigator of its reasons for terminating Mr. Williams' employment, particularly given its hiring practices at the relevant times. Bearing in mind that racial discrimination may be difficult to prove, and must often be established by inference, the Commission's determination that it was not plain and obvious Mr. Williams' human rights complaint could not succeed was reasonable.

(b) *Vexatiousness*

[27] Scotiabank argues that the labour adjudicator's decision to reject Mr. Williams' claim of wrongful dismissal is final. The labour adjudicator accepted Scotiabank's explanation that Mr. Williams was dismissed due to discontinuance of work or lack of function, and Scotiabank says that this conclusion cannot be revisited in Mr. Williams' human rights complaint.

[28] Mr. Williams responds that the labour adjudicator did not consider his allegations of racial or other discrimination. He therefore maintains that his human rights complaint is distinct, and is made in the correct forum.

[29] The Screening Report found it was unclear whether the labour arbitrator had examined the human rights issues raised in Mr. Williams' complaint to the Commission. The Officer who prepared the Investigation reached a similar conclusion.

[30] In *MacFarlane v Day & Ross Inc*, 2010 FC 556, Justice Robert Mainville confirmed that an adjudicator appointed under Part III of the *Canada Labour Code* has residual jurisdiction to ascertain whether an employee was dismissed for discriminatory reasons (at para 76). Scotiabank therefore maintains that the labour arbitrator's conclusion that Mr. Williams was dismissed for lack of work or discontinuance of a function necessarily means he could not have been dismissed for discriminatory reasons.

[31] In *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 [*Figliola*], the Supreme Court of Canada considered a provision of the British Columbia *Human Rights Code*, RSBC 1996, c 210 that is comparable to s 41(1)(d) of the CHRA. The Supreme Court held that the provision did not codify the actual doctrines of issue estoppel, collateral attack and abuse of process; nevertheless, it embraced their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay (*Figliola* at para 36):

That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

[32] If the precise doctrines of issue estoppel, collateral attack and abuse of process were codified by s 41(1)(d) of the CHRA, then it would be open to Scotiabank to argue that Mr. Williams is estopped from raising the same issues that were raised before the labour arbitrator, as well as all other issues that could reasonably have been raised. This would include the human rights concerns he advanced in his complaint to the Commission. However, pursuant to *Figliola*, the Commission is not bound by “precise doctrinal catechisms”, and should instead focus on fairness and avoiding relitigation of issues that have already been decided by a decision maker with the authority to resolve them.

[33] Mr. Williams was not represented by counsel in the proceeding before the labour adjudicator. It is clear from the labour adjudicator's decision that the human rights concerns Mr. Williams advanced in his complaint to the Commission were not addressed in that proceeding:

44. My decision might have been different if there had been evidence before me that the Bank took advantage of "other business reasons" to terminate Mr. Williams, and that the lack of work or discontinuance of his functions was not the actual operative reason for his termination. In other words, did the Bank use the "lack of work" explanation as a false one in order rid itself of Mr. Williams and thereby avoid the onerous restrictions on unjust dismissal set out in the *Canada Labour Code*. However, even Mr. Williams in his testimony and his final argument did not suggest what those "other business reasons" or false motives of the Bank might have been.

[34] While it may have been preferable for Mr. Williams to raise his human rights concerns before the labour arbitrator, it is apparent from the arbitrator's decision that he did not. The Commission's determination that Mr. Williams' human rights complaint was not vexatious was therefore reasonable.

(c) *Timeliness*

[35] The Officer who prepared the Investigation Report calculated the one year time period for submitting complaints from the date on which Mr. Williams initially submitted his complaint form in November 2017, rather than the date on which the complaint was accepted by the Commission in April 2018. The Officer made the following recommendation:

It is recommended that the Commission not deal with, and should sever from the complaint, the allegations occurring prior to November

15, 2016, as they are based on acts which occurred more than one year before the complaint was filed and which are separate and independent of the remaining allegations. Although the complainant was fearful of reprisals, he could have come to the Commission earlier to file a complaint on the earlier allegations.

[36] In its response to the Investigation Report, Scotiabank asserted that the one year limitation period ought to be measured from the date on which Mr. Williams submitted his complaint in a form acceptable to the Commission: April 10, 2018. Scotiabank agreed with the Officer's conclusion that a continuous chain of violations did not exist between the disparate allegations of discrimination, and that Mr. Williams' allegations were separate and independent.

[37] The Commission found that "in many instances the allegations appear, on their face, to encompass a continuous pattern of discrimination". The Commission therefore referred Mr. Williams' complaint to the Tribunal in its entirety.

[38] I am not satisfied that the Commission complied with the heightened duty imposed by *Vavilov* to explain its departure from the recommendation contained in the Investigation Report (*HEA* at para 37). The Commission described the events that fell outside the one year limitation period as "virtually identical" to those that fell within it. However, different recruiters and managers were involved in the consideration of Mr. Williams' various job applications. Scotiabank says that each of the job postings was unique, and required different qualifications. The circumstances surrounding Mr. Williams' lack of success also varied: sometimes the posting had already been filled; sometimes he lacked the minimum qualifications; and sometimes another candidate had superior qualifications.

[39] Furthermore, the Commission did not consider the prejudice to Scotiabank if events that occurred more than one year prior to the complaint were referred to the Tribunal for inquiry. Scotiabank explained in its written submissions to the Commission that it was unable to determine the hiring manager in almost half of the staffing actions encompassed by Mr. Williams' full complaint, and one of Mr. Williams' direct managers during the relevant time was no longer employed by the bank. In many instances, neither the original job posting nor e-mail correspondence pertaining to the process had been retained. Given the significant delay, Scotiabank was understandably concerned that identifying potential witnesses would be difficult, and the ability of those witnesses to remember the alleged events would be impaired by the passage of time.

[40] The Commission must weigh any unfairness or prejudice caused by delay before proceeding with a complaint (*Bredin v Canada (Attorney General)*, 2007 FC 1361 at para 29). Here, there was no mention in the Commission's analysis of Scotiabank's legitimate concerns about extending the scope of the complaint beyond one year prior to the date on which it was received in an acceptable form.

[41] The Commission has not sufficiently explained its rejection of Scotiabank's submissions respecting prejudice, or its departure from the recommendation of the Investigation Report to deal with only those elements of the complaint that were timely. This aspect of the Commission's decision is therefore unreasonable.

V. Conclusion

[42] The application for judicial review is allowed in part. The Commission's decision to refer Mr. Williams' human rights complaint to the Tribunal in its entirety, including those aspects that its investigator considered to be untimely, is remitted to the Commission for reconsideration.

[43] In all other respects, the application for judicial review is dismissed.

[44] As success is divided, there is no award of costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed in part. The decision of the Canadian Human Rights Commission [Commission] to refer the human rights complaint of Marcus Williams to the Canadian Human Rights Tribunal in its entirety, including those aspects that its investigator considered to be untimely, is remitted to the Commission for reconsideration.
2. In all other respects, the application for judicial review is dismissed.
3. No costs are awarded.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1509-20

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