

Federal Court



Cour fédérale

Date: 20231121

Docket: T-1974-22

Citation: 2023 FC 1537

Ottawa, Ontario, November 21, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

CHRISTOPHER PRIEST

Applicant

and

CANADA REVENUE AGENCY

Respondent

JUDGMENT AND REASONS

[1] Christopher Priest [Mr. Priest] is retired from the Canada Revenue Agency [CRA].

While employed with the CRA, he was unsuccessful in applications for internal job opportunities as he does not hold “a bachelor’s degree in computer science.” Mr. Priest takes the position that this education requirement is discriminatory as “computer science” degrees were not available at the time he completed his post-secondary education. He filed a complaint with the Canadian Human Rights Commission [CHRC or Commission] alleging that the educational requirement was discriminatory on the basis of age.

[2] Mr. Priest seeks judicial review of the decision of the Commission not to allow his human rights complaint against the CRA to move forward. The Commission determined, on a preliminary review, that his claim could not proceed on two grounds. First, it determined that a number of the events he complained of were beyond the one year time limit for bringing a complaint. Second, for the claims that were not time barred, the Commission determined that other procedures had addressed the discrimination allegations.

[3] I am granting this application for judicial review as I have found that the Commission did not provide Mr. Priest a fair process and the decision is unreasonable.

I. Background

[4] Mr. Priest started his employment with the CRA in 2005. He holds a Bachelor of Science degree from McMaster University as well as numerous training courses on computer science.

[5] In 2008, he applied for the Research and Technology Manager (CO-03) position in the Scientific Research and Experimental Development [SRED] department. He was not selected for the job because he did not meet the educational requirement. He was offered, and accepted the role of Advisor (CO-02) in the same department.

[6] In August 2015, Mr. Priest applied for another CO-02 position and was rejected based on the educational requirement.

A postgraduate degree from a recognized university with specialization in a field of science or engineering relevant to the SR&ED program.

Candidates possessing a bachelor's degree in engineering or computer science with an acceptable combination of education, training and/or experience will be considered as meeting the education requirements.

[7] In September 2016, he applied for a Manager position with SRED (CO-03) and was rejected for failing to satisfy the minimum educational requirements.

[8] In August 2018, Mr. Priest asked the Commission about filing a human rights complaint but was advised to exhaust the internal CRA grievance processes under the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2, before filing a complaint.

[9] In total, Mr. Priest filed four grievances in relation to the education requirement for the CO-03 position. Three addressed the specific instances of age discrimination in the job applications. The fourth concerned the inclusion of discriminatory language in the educational requirements for CO positions which Mr. Priest claimed was evidence of systemic discrimination.

[10] On October 27, 2020, the CRA issued the Final Level Grievance Decision denying Mr. Priest's three grievances related to age discrimination in the job applications.

[11] In December 2020, Mr. Priest filed a complaint with the Commission based on age discrimination under sections 7 and 10 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [CHRA]. The core of his argument is that computer science degrees were not available when he completed his post-secondary studies.

II. The Decision under review

[12] The CHRC determination took place in two stages. The first report being the Report for Decision dated March 4, 2022, and the second being the Record of Decision dated August 25, 2022.

A. *Report for Decision*

[13] The Report for Decision prepared by the Human Rights Officer focussed on paragraphs 41(1)(d) and (e) of the CHRA, which state:

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| <p>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</p> <p>...</p> <p>(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or</p> <p>(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.</p> | <p>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 :</p> <p>...</p> <p>d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;</p> <p>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.</p> |
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[14] With respect to paragraph (e) above, the Officer considered the chronology of events and considered the prospect of severing the claims by only dealing with those falling within the one year limitation period. The Officer noted a significant gap between the allegations arising from

the 2008-2009 period and those arising from 2015-onward. The Officer noted that Mr. Priest had not filed a complaint in 2008-2009 and had accepted another job “as accommodation.” On this basis, the Officer determined that it was appropriate to sever the 2008-2009 allegations from the others.

[15] On the balance of the allegations, the Officer noted that none of the claims occurred after July 2018. Mr. Priest originally filed a complaint in 2018 but was advised to continue with the CRA’s internal grievance process. Regarding the 2015-2016 allegations, the Officer noted that the policy and education requirements about which Mr. Priest complained had not changed. The Officer also noted that the Respondent did not consider it prejudicial to deal with those complaints. The Officer was therefore convinced that the 2015-2016 allegations were not severable by reason of time.

[16] With respect to paragraph 41(1)(d) considerations, the Officer defined vexatious as seeking to re-litigate issues that have already been resolved. However, the Officer noted that the Commission needed to be satisfied that the other decisions had addressed the human rights issues.

[17] The Officer considered the CRA internal grievance process, and compared the procedures.

- (a) First, she noted that the decision-maker was not lacking impartiality by reason of Mr. Priest’s employment.

- (b) Next, she noted that, although Mr. Priest did not have an opportunity to respond to the CRA decision before receiving the final grievance report, he admitted to being able to raise all relevant human rights issues.
- (c) The Officer further found that the reasons given in the grievance decision were brief, but sufficient.
- (d) Finally, she noted the guidance that paragraph 41(1)(d) be interpreted broadly in order to prevent a multiplicity of proceedings and the misuse of resources in re-litigating issues.

[18] The Officer concluded that since the CRA grievance procedure had already addressed the human rights-based grievances brought by Mr. Priest, the CHRC need not deal with them.

B. *The Record of Decision*

[19] In the CHRC Record of Decision dated August 25, 2022, the Commissioner determined that Mr. Priest's grievances were vexatious under paragraph 41(1)(d) of CHRA. It also agreed with the recommendation in the Officer's Report to sever the 2008-2009 grievances.

[20] Regarding the three allegations of age discrimination based on being ineligible for job postings, the Commissioner noted that they were denied at the final grievance level. As for the fourth allegation—that of discriminatory language in the educational requirements for CO positions—the CRA informed the Commissioner that it had referred the matter to its Discrimination and Harassment Centre of Expertise, which had not yet considered the matter.

[21] The Commissioner pointed to the lack of proof for Mr. Priest's claims of systemic discrimination, stating that he only raised his own circumstances and no broader public interest regarding the human rights issues.

[22] Mr. Priest's procedural fairness argument, that he did not have the opportunity to review the CRA reply before the Officer's Report was completed, was dismissed. The Commissioner pointed out that the CRA Reply was incorporated into the Report, and Mr. Priest had the opportunity to reply.

III. Issues and standard of review

[23] On this judicial review application, Mr. Priest argues that he was denied procedural fairness and that the CHRC decision is not reasonable.

[24] Questions of procedural fairness attract a correctness-like standard of review (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [CPRC]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 para 77).

[25] The Court must determine "whether the procedure was fair having regard to all of the circumstances" (CPRC at para 54). The Federal Court of Appeal reminds us that "deference is owed to the decision maker's choice of procedure in determining the content of the duty of fairness but none is owed in determining whether the decision-maker fulfilled that duty" (CPRC at para 45).

[26] In assessing the reasonableness of the CHRC decision, the 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).

[27] A reasonableness review is concerned with the decision as a whole (*Vavilov* at paras 15, 85, 99, and 116). A reviewing court must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic. The Court must be satisfied that there is a line of analysis contained in the reasons that could reasonably lead the decision maker from the evidence before it to the conclusion reached (*Vavilov* para 102)

IV. Analysis

A. *General principles*

[28] As a starting point, it is useful to outline the applicable legal principles. The CHRC performs a screening function to determine whether the complaint will be referred to the Canadian Human Rights Tribunal. If a matter is referred to the Tribunal, that would involve a more in-depth inquiry as to whether there was discrimination (*Beaulieu v Canada (Attorney General)*, 2022 FC 1671 at para 55).

[29] Subsection 41(1) of the CHRA provides as follows:

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| Commission to deal with complaint | Irrecevabilité |
| 41 (1) Subject to section 40, the Commission shall deal | 41 (1) Sous réserve de l’article 40, la Commission statue sur toute plainte dont elle est |

with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(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.

saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

c) la plainte n'est pas de sa compétence;

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

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.

[30] For the purpose of judicial review, where the Commission decision adopts the recommendations in an Officer's Report (as here), the underlying report is treated as part of the Commission's reasons (*Berberi v Canada (Attorney General)*, 2013 FC 99 at para 18).

B. *Procedural fairness*

[31] Mr. Priest argues that the Decision was procedurally unfair. He raises a number of issues including the imposition of page limits, not being given the opportunity to respond before the final report was issued, and the failure to consider his evidence.

[32] In my view, the only procedural fairness ground that has merit is whether there was a failure by the Commission to consider Mr. Priest's evidence. This arises here as Mr. Priest was invited by the Commission to make further submissions on the paragraph 41(1)(e) issue.

[33] As noted above, Mr. Priest filed his human rights complaint on December 5, 2020. On January 29, 2021 Mr. Priest received an email from Andrew McArthur, Manager Initial Review Unit CHRC, stating:

As discussed yesterday, I was able to follow-up with the manager of the team in who will be doing the section 41 analysis of your file and she has confirmed that you may resubmit your position on the s41(1)(e) issue if you wish to do so. Be sure that your submission addresses why the events of 2008 and 2009 should not be considered as separate and independent from the remaining allegations. Your file is currently awaiting an assignment to an Officer. When it is assigned, the Officer will consider your and the respondent's positions and draft a report with a recommendation – you will have a chance to review the report and provide comments for the consideration of the decision-maker. [Emphasis added]

[34] In response to this email, on February 25, 2021, Mr. Priest forwarded his “new section 41 response” which is a document comprised of 5 type-written pages. In this document, Mr. Priest explains in detail the connection between the events in 2008 and 2009 to the event in 2018 and why they should be considered together by the Commission. This submission clarifies the

chronological information that Mr. Priest complained of was cut off from his initial three-page complaint form.

[35] The invitation by the Commission to allow Mr. Priest to resubmit his submissions on this issue was to address what Mr. Priest perceived as an unfair restriction (three pages) to make his initial complaint.

[36] On this judicial review, Mr. Priest's submissions of February 25, 2021 are attached to his Affidavit filed in support of his application. These submissions however do not appear in the Certified Tribunal Record [CTR] prepared and filed by the CHRC. Also not included in the CTR is the January 29, 2021 email from Andrew McArthur permitting Mr. Priest to make further submissions.

[37] In the Rule 318(1)(a) Certificate prepared by the CHRC, Mr. Priest's submissions of February 25, 2021 are not listed as part of the "material that was before the CHRC when it made its decision on August 25, 2022..."

[38] In the cover letter attaching the CTR, legal counsel to the CHRC explains the basis for the documents included in the CTR. Relevant to this issue is the following statement:

Pursuant to Rule 318(1), we enclose certified copies of the documents that were before the Commission when it rendered its decision with respect to the human rights complaint filed by Christopher Priest, against the Canada Revenue Agency. We also enclose copies of the letters that communicated the decision of the Commission to the parties.

Please note that the documents presented to the Commission for decision were the complaint form, the Report for Decision, and subsequent submissions by the parties. Other documents obtained

or generated as part of the gathering of information and evidence in the complaint process were not presented to the decision maker.

[39] In addition to not appearing in the CTR, the February 25, 2021 submissions are also not referenced in the Report for Decision or the Record of Decision.

[40] The absence of Mr. Priest's submissions of February 25, 2021 from the CTR and the absence of any reference to them in the Commission's decisions raise doubt as to whether the submissions were, in fact, considered.

[41] By granting Mr. Priest the right to make further submissions, the Commission created a legitimate expectation for Mr. Priest that his further submissions on the 41(1)(e) issue would be considered.

[42] Having granted Mr. Priest the right to provide further submissions, and having assured him that those submissions would be considered, the absence of those submissions from the materials considered by the Commission (as documented in the CTR) was a breach of Mr. Priest's legitimate expectation that his submissions would be taken into consideration.

[43] The concept of legitimate expectations is explained in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 94-96:

[94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently

adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

[95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:

The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis in original.]

(D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)

[96] In *Mavi*, Binnie J. recently explained what is meant by “clear, unambiguous and unqualified” representations by drawing an analogy with the law of contract (at para. 69):

Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

[44] The January 29, 2021 email from the Commission contained a “clear, unambiguous and unqualified” assurance to Mr. Priest that he could file further submissions and that they would be considered. However, the absence of these submissions from the CTR and the fact they are not referenced in the Report for Decision or the Record of Decision, leaves this Court with no other conclusion but that his submissions were not considered as part of the decision making process.

[45] Having afforded Mr. Priest the opportunity to make full submissions, the Commission created a legitimate expectation that the submissions would be considered. Not having done so is a breach of procedural fairness.

[46] Thus, the decision of the Commission on paragraph 41(1)(e) was reached in a procedurally unfair manner.

C. *Did the Commission reasonably consider the CRA grievance process?*

[47] Mr. Priest argues that the Commission finding that the CRA grievance process addressed Mr. Priest’s allegation of discrimination and therefore was an equivalent process is unreasonable. Mr. Priest argues that CRA’s grievance process did not address his allegations of adverse impact discrimination.

[48] Here, the Officer concluded that the CRA grievance procedure addressed the human rights-based grievances brought by Mr. Priest, therefore the Commission need not deal with them based upon paragraph 41(1)(d). In making this assessment, the Commission needed to be

satisfied that the CRA process addressed Mr. Priest's specific adverse impact discrimination claim.

[49] The Officer's Report lists the following factors among its relevant considerations in assessing if the allegations of discrimination have been addressed through another process:

- b) Were the issues raised during the other process essentially the same as the issues in this complaint?
 - i) What human rights issues were raised?
 - ii) Were all the human rights issues addressed? If not, which ones were not addressed? In what way were these issues not addressed? Why were they not addressed?
 - iii) Was the substance (or essence) of the complaint considered even if all the issues were not dealt with?

[Emphasis added]

[50] The Officer's Report, however, does not provide any analysis as to how it reached the conclusion that the CRA process addressed the human rights issues raised by Mr. Priest. Nor does the Officer undertake any analysis of Mr. Priest's claim that the CRA policy directly draws a distinction based on education credentials, and that such a distinction amounts to adverse impact discrimination based on age. The Officer appears to rely upon the statements in the CRA final grievance decision. Although the CRA final grievance was dismissed for lack of jurisdiction, the relevant part of the final grievance to this issue only addressed direct discrimination stating: "the education requirement does not differentiate between candidates based on their age, but rather on their possession of the necessary education credentials." The

adverse impact discrimination issue raised by Mr. Priest is not addressed in the CRA final grievance.

[51] Here, the Commission does not appear to have turned its mind to the adverse impact discrimination allegations made by Mr. Priest. Rather, the Commission endorsed the CRA grievance decision which itself does not consider Mr. Priest's adverse discrimination claim.

[52] Adverse impact discrimination is a distinct human right which is not addressed as such in the CRA final grievance. Accordingly, to the extent that the Commission relies upon the CRA final grievance procedure as having addressed all the human rights issues raised by Mr. Priest, such a conclusion is not justifiable.

[53] The CHRC's dismissal of Mr. Priest's complaint under paragraph 41(1)(d) is unreasonable.

[54] Finally, I note the decision of Mr. Justice Pentney in *Priest v Canada (Attorney General)*, 2022 FC 1598. The Commission did not have the benefit of this decision, as it was issued after the Commission's decision. However, in this decision, Justice Pentney finds that the CRA "...decision does not address the core elements of Mr. Priest's complaint of adverse effect discrimination based on age..." (at para 4).

V. Conclusion

[55] For the reasons outlined above, this judicial review application is granted. The decision of the Commission regarding the application of paragraph 41(1)(e) of the CHRA was reached in

a procedurally unfair manner. Further, the decision of the Commission regarding paragraph 41(1)(d) of the CHRA is unreasonable.

[56] No costs were sought by Mr. Priest.

JUDGMENT IN T-1974-22

THIS COURT'S JUDGMENT is that:

1. This judicial review application is granted.
2. The August 25, 2022 decision of the Canadian Human Rights Commission is set aside and the matter is to be re-determined by a different decision maker.
3. No costs are awarded.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1974-22

STYLE OF CAUSE: CHRISTOPHER PRIEST V CANADA REVENUE
AGENCY

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 7, 2023

JUDGMENT AND REASONS : MCDONALD J.

DATED: NOVEMBER 21, 2023

APPEARANCES:

Christopher Priest (ON HIS OWN BEHALF)

Monisha Ambwani FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A FOR THE APPLICANT

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario