Federal Court Cour fédérale

Date: 20240925

Docket: T-1566-23

Citation: 2024 FC 1509

Toronto, Ontario, September 25, 2024

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

CHRISTOPHER CHOLEWA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the Canadian Human Rights Commission's [Commission] decision not to deal with the Applicant's complaint against his former employer, the Canadian Armed Forces [CAF]. The Applicant, who is self-represented, seeks a declaration that his complaint is linked to a prohibited ground of discrimination and requests that the Commission offer mediation and/or conciliation of his complaint.

[2] For the reasons that follow, this application is dismissed.

II. Background

[3] The Applicant was released from his position in the CAF in March 2022 for failing to comply with the CAF COVID-19 Vaccination Policy [Policy].

[4] The Policy required all CAF members to be fully vaccinated unless they obtained an exemption due to a certified medical contraindication, religious ground or any other prohibited ground as defined in the *Canadian Human Rights Act*, RSC, 1985, c H-6 [CHRA]. The Applicant requested a religious exemption under the Policy, which the CAF denied.

[5] The Applicant filed a complaint with the Commission, alleging that the CAF discriminated against him due to his religion by refusing to grant him a religious exemption, despite granting the same exemption to other CAF members.

[6] The Applicant claimed that his beliefs are not of a particular religion, but are more spiritual in nature. He described his beliefs to be that humans should be able to make conscious decisions regarding their lives as long as they are lawful and do not interfere with others' rights, that the human is a unique creation with sophisticated features, that everyone should have the right to decide what is put in their body, and that an individual's body and mind are the most personal of spaces and should not be violated. Furthermore, the practice of using his conscience or "gut-feeling" is strongly tied to his beliefs.

[7] To determine whether the Applicant's beliefs constitute a religion protected by s. 3 of the CHRA, the Commission applied the following definition of "religion" from the decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 39 [*Amselem*]:

> Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

[8] The Commission determined that the Applicant's beliefs were not of a religious or spiritual nature. It found that the Applicant failed to demonstrate that the practice of his beliefs allows him to foster a connection with the divine or with a subject or object of his spiritual faith, that his beliefs address questions of human existence, or that they contemplate life, death, purpose or a different order of existence.

[9] The Commission therefore decided it would not deal with the Applicant's complaint pursuant to paragraph 41(1)(d) of the CHRA because it did not establish a link between the acts complained of and a prohibited ground of discrimination.

III. Issue

[10] The parties submit, and I agree, that the applicable standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 33. The

main issue to be determined is whether the Commission's decision refusing to deal with the Applicant's complaint is unreasonable.

IV. Analysis

A. *Preliminary Issues*

[11] The Respondent submits that there are facts asserted in the Applicant's affidavit and his Memorandum of Fact and Law, as well as documents included in the Applicant's Record, that were not before the Commission when it made its decision and are not admissible in this proceeding.

[12] It is trite law that only evidence that was actually before the administrative decision-maker is admissible on judicial review, other than in a few recognized exceptions: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20. The Applicant acknowledged at the hearing that the facts and documents identified by the Respondent were not part of the evidentiary record that was before the Commission and do not fall under a recognized exception for new evidence. It follows that the evidence in question is inadmissible.

[13] The Applicant also conceded at the hearing that paragraphs 18 to 21 and 23 to 31 of his affidavit filed in support of the application are argumentative. This is contrary to Rule 81 of the *Federal Courts Rules*, SOR/98-106, which requires that affidavits be confined to facts without arguments.

[14] Consequently, in determining this matter, I have disregarded the inadmissible evidence and argumentative portions of the Applicant's affidavit.

B. *Was the Commission's Decision Unreasonable?*

[15] The Applicant submits that it was unreasonable for the Commission to conclude that his complaint was not linked to a prohibited ground of discrimination. I disagree.

[16] Paragraph 41(1)(d) of the CHRA provides the Commission with the discretion to not deal with complaints in circumstances where a complaint is trivial, frivolous, vexatious, or made in bad faith. This provision was interpreted by the Federal Court of Appeal as imposing a "screening function" for the Commission to examine, on a *prima facie* basis, whether the grounds set out in subsection 41(1) are present and if so, to exercise its discretion in deciding whether the deal with the complaint nonetheless: *Canada Post Corp v Barrette*, 2000 CanLII 17127 (FCA), [2000] 4 FC 145 (CA) at paras 23-25.

[17] Although the threshold is low, a complainant bears the burden of putting sufficient information or evidence forward to persuade the Commission that there is a link between the acts complained of and a prohibited ground of discrimination.

[18] The Applicant submitted in his complaint form that the CAF granted exemptions to other individuals but not to him as a result of his beliefs. He further stated that he was being discriminated against because of his religion, and his sincerity and adherence to his spiritual belief.

[19] Freedom of religion is one of the core pillars of liberal democracies. The Supreme Court of Canada has articulated an expansive definition of freedom of conscience and religion, which "revolves around the notion of personal choice and individual autonomy": *Amselem* at para 40. In *Amselem*, the Supreme Court went on to define freedom of religion in the following terms at para 46:

> Freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

[20] In the present case, the Commission had to assess whether a *prima facie* case of religious discrimination was established, taking into account the particular nature of the prohibited ground at issue. The Applicant's case was determined through a relatively new process that gave the parties the opportunity to make submissions directly to a Commission member. In this process, the parties received a notice providing them with information about the issues the Commissioner intended to determine and requesting their submissions.

[21] The Applicant submits that the *Amselem* test was inappropriately applied when deciding the outcome of the complaint. However, based on the record before me, I am satisfied that the Commission fully appreciated the factual allegations concerning the Applicant's beliefs and correctly applied the *Amselem* definition of religion to the Applicant's beliefs.

[22] In his complaint form to the Commission, the Applicant indicated that his beliefs regarding vaccination against COVID-19 are not of a particular organized or recognized religion

and that they are spiritual in nature. Despite being given an opportunity to provide additional submissions, the Applicant provided no information which would link his beliefs to either the divine (for example a god, a supreme being or a superhuman figure) or to a subject or object of his spiritual faith.

[23] The Commission was not required to make further inquiries into the nature of the Applicant's beliefs. The Applicant had an opportunity to describe his beliefs in the complaint form as well as a preliminary issues information sheet, which the Commission reviewed before it rendered its decision. The Applicant was required to put his best foot forward in those submissions: *White v Canada Post Corporation*, 2024 FC 198 at para 15.

[24] In the circumstances, I see no error in the Commission's finding, on the record before it, that while the Applicant may have sincere beliefs, he failed to demonstrate that the practice of his beliefs allows him to foster a connection with the divine or with a subject or object of his spiritual faith.

[25] The decision not to deal with a complaint under subsection 41(1) is highly discretionary and reviewing courts must give "deference and… latitude to the Commission in making factually-infused and policy-based screening decisions that involve expertise": *Alliance for Equality of Blind Canadians v Canada (Attorney General)*, 2021 FC 860 at para 35, as affirmed in *Alliance for Equality of Blind Canadians v Canada (Attorney General)*, 2023 FCA 31.

[26] The Applicant has not demonstrated that the Commission failed to respect the factual constraints in the complaint or that the Commission erred in deciding not to deal with his complaint pursuant to paragraph 41(1)(d) of the CHRA.

[27] I should add that there is no indication that the Commission erred by failing to consider whether the CAF treated the Applicant differently than other members who were granted religious exemptions. There was simply no evidence before the Commission about the nature or circumstances of the exemptions granted to other CAF members. In any event, the Commission was only required to consider whether the Applicant himself was denied an exemption based on a prohibited ground of discrimination.

[28] Finally, the Applicant's argument based on the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 will not be addressed because it was not raised before the Commission: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22 to 26, or even in the Notice of Application.

V. Conclusion

[29] For the above reasons, I find that the Commission's decision is transparent, logical and intelligible. It is defensible on the law and the facts. There is, therefore, no basis to intervene.

[30] The application is dismissed.

[31] Finally, counsel for the Respondent did not press the issue of costs. As a result, I do not consider this to be a case for costs against the Applicant.

JUDGMENT IN T-1566-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No costs are awarded.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1566-23
STYLE OF CAUSE:	CHRISTOPHER CHOLEWA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	JUNE 4, 2024
JUDGMENT AND REASONS:	LAFRENIÈRE J.
DATED:	SEPTEMBER 25, 2024

APPEARANCES:

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