

Date: 20080604

Docket: T-1631-06

Citation: 2008 FC 704

Toronto, Ontario, June 4, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

STEPHEN LEUNG

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application made by Stephen Leung, the Applicant, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c.F-7, for judicial review of the decision by the Canadian Human Rights Commission (the “Commission”) to dismiss that Applicant’s complaint that the Canada Revenue Agency (the “CRA”) failed to promote him in retaliation for his filing a human rights complaint.

BACKGROUND

[2] The Applicant is a person of Chinese origin. He has been employed with the Respondent, CRA, for over twenty-five years.

[3] In 1989, Mr. Leung assumed the position of Assistant Director at the FI03 level. He was responsible for financial and administration activities in the Toronto region. In 1994, following a reorganization, Mr. Leung became the Assistant Director in Finance and Administration at the AS06 level. In this position he was responsible for finance, administration and human resources in two tax service offices in Toronto. In 1997, following a second reorganization, Mr. Leung's AS06 position became redundant. At that time Steve Hertzberg was Director, Finance and Administration for the Southern Ontario region. Mr. Leung reported to Mr. Hertzberg.

[4] Mr. Leung requested appointment to a new FI03 or a new AS06 position but his request was not accepted. As a result Mr. Leung filed a human rights complaint alleging discrimination on the basis of race, national or ethnic origin.

[5] In April 2001, the CRA placed Mr. Leung into the FI03 position. He was now responsible for resource management and financial services supervising finance officers and financial clerks. Shortly thereafter, after a third reorganization all positions became redundant including Mr. Leung's FI03 position. All of the redundant positions were to be reviewed by Classification Review Committees to determine whether they would be upgraded to higher positions. As a result of a national job review process, a new FI04 Regional Comptroller position, subsequently renamed

Assistant Director Finance, came into effect on July 1, 2001. Mr. Leung was appointed to the FI04 position on an acting basis for one year.

[6] By mid-September 2001, a Classification Review Committee had reviewed redundant positions and determined that thirty of thirty-three positions should be upgraded including Mr. Leung's FI03 position. In June 2002, Mr. Leung's acting F104 Assistant Director Finance appointment was extended.

[7] On June 17, 2002, the Commission recommended that Mr. Leung's initial human rights complaint be dismissed.

[8] On August 21, 2002, Mr. Hertzberg advised Mr. Leung that the FI04 position in which he was Acting Assistant Director Finance would be staffed by competition. This was because the CRA had classified the FI04 position as a new position with no significant link to Mr. Leung's FI03 position and because staffing directives dictated that new positions be filled via a competition. On September 17, 2002, the Agency initiated a competition to staff the FI04 position. Mr. Leung did not participate in the competition as he believed it was in retaliation for his filing the human rights complaint.

[9] On October 19, 2002, Mr. Leung filed a retaliation complaint with the Commission. The CRA took the position that the Commission ought not to deal with the retaliation complaint on the basis that Mr. Leung should first exhaust internal CRA grievance procedures.

[10] On September 30, 2004, the Commission investigator released the contents of the investigation report on the retaliation complaint to Mr. Leung and the CRA. The investigator recommended that, pursuant to s. 41(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the “*Act*”), although the retaliation complaint was not trivial, frivolous or made in bad faith, the Commission should not deal with the complaint as Mr. Leung ought to exhaust internal grievance or similar procedures otherwise reasonably available. On December 14, 2005, after a further submission by Mr. Leung, the Commission accepted the investigator’s recommendation and decided not to deal with Mr. Leung’s complaint at that time.

[11] On June 24, 2005 the Commission assigned a second investigator to conduct an investigation as to whether other redress procedures had addressed the matters set out in Mr. Leung’s retaliation complaint. On October 5, 2005, the investigator recommended that Mr. Leung’s retaliation complaint be dealt with because the investigator was not satisfied that internal CRA procedures were available to address Mr. Leung’s complaint. The Commission re-opened Mr. Leung’s file on November 30, 2005 and began a third investigation.

[12] On December 13, 2005 the Commission began the investigation that underlies this application for judicial review. A third investigator was assigned to the file and her report was completed on March 24, 2006. The report was disclosed to Mr. Leung and the CRA for comment and submission. The response submission by Mr. Leung was provided by the Commission to the

CRA on June 6, 2006. The CRA did not comment or respond to the disclosed investigator's report but it did respond to Mr. Leung's submission to the Commission.

[13] On August 11, 2006 the Commission decided to dismiss Mr. Leung's retaliation complaint because, as it stated in its letter to him:

- the evidence does not support the complainant's allegation that he was retaliated against for filing a human rights complaint;
- the complaint form does not establish a link between the alleged incidents and grounds of discrimination based on race and national/ethnic origin, pursuant to section 7 of the *Act*;
- the complaint form does not raise any policy issues pursuant to section 10 of the *Act*. (Tab 50, p. 239, Application Record Volume II)

DECISION UNDER REVIEW

[14] As the Commission did not give reasons in deciding to dismiss Mr. Leung's retaliation complaint, it is deemed to adopt the investigator's report as its reasons. The pertinent issue before the investigator was whether the CRA Director, Mr. Hertzberg, retaliated against Mr. Leung by denying him a promotion without competition and also by interfering with his authority as a result of the Applicant filing a human rights complaint. The investigator concluded that Mr. Leung was not promoted without competition into the FI04 Assistant Director Finance position as a result of a national job review process and not because of retaliation by his Director.

ISSUES

[15] In my view the four issues that need to be considered in this application for judicial review are as set out below.

- Did the Commission breach its duty of procedural fairness when it relied on an investigation report that investigated the Applicant's Director rather than the CRA for retaliation?
- Was the investigator partial towards the CRA as exhibited by the manner in which the investigation was undertaken?
- Did the investigator fail to investigate the CRA's decision not to link the Applicant's old FI03 position to the new FI04 Assistant Director Finance position which would have resulted in the Applicant's promotion without competition?
- Did the Commission err when it relied on an investigation report that applied the wrong legal test for retaliation?

STANDARD OF REVIEW

[16] This Court has held that when a tribunal accepts the recommendation of an investigator with little or no reasons, then the investigator's report is considered the Commission's reasons. The Commission, in dismissing the Applicant's complaint, adopts the reasons of the investigator as contained in her report. It then follows that if the report is flawed, so to is the Commission's decision to dismiss the Applicant's complaint (*Gainer v. Export Development Canada*, 2006 FC 814 at para.11).

[17] Procedural fairness concerns the manner in which the investigation was conducted. The Court's task is to determine whether the process followed by the investigator, and by extension, the Commission, satisfied the level of fairness required in all of the circumstances. If the Commission

breached its duty of fairness, the decision under review should be set aside (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at paras. 52-54).

ANALYSIS

Did the Commission breach its duty of procedural fairness when it relied on an investigation report that investigated the Applicant's Director rather than the CRA for retaliation?

[18] The Applicant submits that the investigator's failure to conduct a thorough investigation is indicated by the fact that she investigated the wrong respondent. The Applicant argues that although his complaint of retaliation was made against the CRA and not his Director, the investigator's report states that the only issue in the complaint is "whether the [Applicant's] director retaliated against him for filing a complaint with the [Commission] by denying him a promotion without competition" (Investigator's Report at para. 1). The Respondent replies that for all intents and purposes, the retaliation complaint made by the Applicant was directed at his Director.

[19] The actions complained of by the Applicant in his complaint submitted to the Commission were directed against his Director. The Applicant has not established that other CRA managers involved in the classification process had involvement or knowledge of the Applicant's human rights complaint. Retaliation can only be committed if one has knowledge of the Applicant's human rights complaint.

[20] I find that the investigator did not err by focussing her investigation on the question of retaliation by the Applicant's Director as opposed to retaliation by the CRA as an organization.

Was the investigator partial towards the CRA as exhibited by the manner in which the investigation was undertaken?

[21] The Applicant argues that the investigator lacked neutrality in her investigation. After the Commission decided to proceed with the investigation, the investigator invited the CRA to respond to the retaliation complaint. The CRA filed its submission on December 29, 2005 in response to the Applicant's retaliation complaint. The investigator requested further information which was provided on February 2, 2006. The Applicant was not provided with the CRA submission.

[22] When the investigator completed her report on the retaliation complaint on March 24, 2006, she invited the Applicant and the CRA to respond to the report. The Applicant responded in May 2006. The CRA did not. The Applicant's response submission was provided to the CRA. The CRA responded on June 23, 2006 with comment on the Applicant's response submission. This CRA response was not provided to the Applicant.

[23] The Applicant submits that, as a result of the investigator not disclosing the CRA's submissions, he was unable to point out material inconsistencies.

[24] The Respondent submits that the duty of procedural fairness in the context of an investigation under the *Act* only requires that an applicant be fully apprised of the substance of the case and be given a fair opportunity to respond (*Mercier v. Canada (Human Rights Commission)*, [1994] F.C.J. No. 361 at paras. 17-18 (F.C.A); *Bradley v. Canada (Attorney General)*, [1997] F.C.J.

No. 1031 at paras. 52-58). Cross-disclosure of submissions in response to an investigation report is not required if the material in the submissions were either mentioned or alluded to in the investigation report or is not material to the case (*Garvey v. Meyers Transport Ltd.*, [2005] F.C.J. No. 1684 (F.C.A.)).

[25] In *Miller v. Canada (Canadian Human Rights Commission) (re Goldberg)*, [1996] F.C.J. No. 735 at paras. 9-10, this Court held that an investigation undertaken by an investigator must satisfy at least two conditions, namely neutrality and thoroughness. Upon reading the investigator's reasons, I am satisfied that these two conditions have been met. There is no indication that the investigator was partial to the CRA.

Did the investigator fail to investigate the CRA's decision not to link the applicant's old FI03 position to the new FI04 position which would have resulted in the applicant's promotion without competition?

[26] The investigator inquired into the process by which the new FI04 position was created. She found that:

- at one point in time within the context of the regional reorganization, it was proposed by management that the substantive position of the complainant, Manager Finance (FI03), position be reclassified and replaced by the position of Assistant Director, Finance at the FI04 level;
- in July 2001, the final proposed changes submitted to senior management for approval did not include the proposal. It recommended the creation of a new FI04 position, along with two new FI03 positions. It was suggested that, should the new structure be approved, the complainant's substantive position be reviewed against the proposed new position descriptions;
- in the fall of 2001, as a result of a national job description review, a Classification Review Committee determined the position Assistant Director, Finance (FI04) was a new generic national job without any significant link to any former regional FI positions;

- in February 2002, a competitive process was held in the Pacific Region to staff the new national position of Assistant Director, Finance (FI04);
 - in July 2002, both the FI03 and FI04 positions were reassessed by an independent party to determine whether the establishment of a significant link between them was justified. It was determined that there was no significant link;
 - in September 2002, Mr. Hertzberg held a selection process to staff the new national FI04 position in Southern Ontario Region;
 - the complainant had opportunity to apply for the position. He chose not to; and
 - staffing of a new position through a selection process is the Respondents generally accepted best practice.
- (Investigator's Report at para. 34)

[27] The investigator concluded that decision of the Applicant's director to staff the position of FI04 Assistant Director Finance through a selection process was justified noting that the classification decision was made by the Classification Review Committee and that the Applicant's Director was not a member of the Committee.

[28] I am satisfied the investigator did not fail to investigate the CRA's decision not to link the Applicant's old FI03 position to the new FI04 Assistant Director finance position. The investigator did investigate and give reasons for her conclusion.

Did the Commission err when it relied on an investigation report which applied the wrong legal test for retaliation?

[29] The Applicant submits that under section 14.1 of the *Act*, there are two ways to establish his retaliation claim. The first is where there is evidence the CRA intended the act to serve as retaliation; and the second is where the Applicant reasonably perceives the act to be retaliation for the human rights complaint (*Wong v. Royal Bank of Canada*, [2001] C.H.R.D. No. 11 at para. 219).

[30] The Applicant argues that, in the case at bar, the investigator failed to undertake any assessment as to whether the Applicant had a reasonable perception of retaliation when the decision to staff the FI04 Assistant Director Finance position through competition was made after the Commission released its report recommending a dismissal of the first complaint.

[31] Further, the Applicant alleges that the investigator's examination of the retaliation complaint focussed on the link between the Applicant's race and national/ethnic origin, whereas retaliation is founded on the filing of a complaint, not on a particular ground of discrimination. As a result, the Applicant argues that the investigator failed to apply the correct legal test.

[32] The Respondent acknowledges that the intent to retaliate need not be established for retaliation complaint to be well-founded. A retaliation complaint may be well-founded if the complainant reasonably perceived that the act in question was in retaliation for the human rights complaint. Relying on *Wong*, above, at para. 219, the Respondent argues that the reasonableness of the perception must be measured as respondents ought not to be held accountable for unreasonable anxiety or undue reaction on the part of the complainant.

[33] The Respondent argues that the Applicant's perception cannot be considered in a vacuum. The perception of the Applicant's reasonableness must be considered in light of the CRA's explanation as to why the FI04 position was staffed via competition.

[34] The question of the perception of retaliation and the standard to be used when evaluating the complainant was discussed by the Ontario Board of Inquiry in *Entrop v. Imperial Oil Ltd. (No. 7)* (1995), 23 C.H.R.R. D/213. The Board of Inquiry set out the standard as follows:

The proper standard under s. 8 is the "reasonable human rights complainant." In assessing the reasonableness of the complainant's fears and perceptions, boards of inquiry must be sensitive to the particular difficulties that confront complainants, many of whom experience great fear and anxiety surrounding the lodging and pursuit of a human rights complaint. This is exacerbated where the complainant continues in an ongoing relationship with the respondent, especially where that relationship is complicated by a differential in power, such as is undeniably the case in the employer-employee setting.

Although this discussion took place under the framework of section 8 of the *Ontario Human Rights Act*, R.S.O. 1990, c. H.19, the reprisal section, the wording and intent of the section is similar to section 14.1 of the *Act*, the retaliation section of the *Act* (*Bresette c. Kettle and Stony Point First Nation Band Council*), 2004 CHRT 40 at para. 49).

[35] Upon review, I find there is no evidence on the record to demonstrate that the investigator was not sensitive to the Applicant's fears or that she conducted her analysis of the allegation of the retaliation by erroneously linking the CRA's alleged retaliation with the Applicant's race and ethnic/national origin. While the reasons do not explicitly state whether the investigator considered if the Applicant reasonably perceived that the actions of the Director amounted to retaliation, the investigator does discuss the reasonableness of the CRA's decision and provides rationale for her decision.

[36] The investigator found, at paragraphs 36-37 of her reasons, that the decision to staff the F104 Assistant Director Finance position through a selection process was justified. The position

had not been deemed by the Classification Review Committee to be a reclassification upwards of the Mr. Leung's substantive position. She also found that the Applicant's Director was not a member of the Classification Review Committee and therefore had no influence over whether the Applicant would be promoted with or without a competition.

[37] I agree with the Respondent that *Wong*, above, at para. 219, set out the proposition that the reasonableness of a complainant's perception of retaliation must be measured. The Applicant has not shown that the investigator improperly failed to conclude that the Applicant had a reasonable perception of retaliation. Given the findings and conclusion of the investigator, I find the Applicant has not demonstrated that his perception of retaliation was reasonable.

CONCLUSION

[38] I conclude that the Commission investigator conducted a thorough investigation of the Applicant's retaliation complaint and did not breach the duty of procedural fairness to the Applicant as would be required of an investigative process.

[39] The application is to be dismissed with costs to the Respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed.
2. Costs are awarded to the Respondent.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1631-06

STYLE OF CAUSE: STEPHEN LEUNG
v.
CANADA REVENUE AGENCY

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 4, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** Mandamin J.

DATED: June 4, 2008

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