

Date: 20080828

Docket: T-154-08

2008 FC 969

Ottawa, Ontario, August 28, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JOSEPH G. HERBERT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application to set aside the decision of the Canadian Human Rights Commission dismissing the Applicant's complaint. The Applicant submits that the report on which the Commission based its decision was the result of an investigation that was not performed thoroughly. Where, as in this case, the Commission adopts the investigator's report, the sins of the investigator are visited on the Commission. In my view, the investigation and resulting report were flawed to an extent that the Applicant was denied procedural fairness by the Commission and thus the decision of the Commission must be set aside.

Background

[2] Mr. Herbert is a former member of the Royal Canadian Mounted Police. He was hired as a Constable on March 22, 1991, and was initially posted to the Coquitlam Detachment in British Columbia. In December 1995, he was transferred to the Vancouver Drug Section, where he was later assigned undercover work as a part of the Street Crew of the Vancouver Drug Section, in February 1997. He was the only Black member of the force while in Coquitlam and the only non-white member assigned to the Street Crew during his tenure.

[3] On July 16, 1999, Mr. Herbert filed an internal complaint with the RCMP alleging racial harassment. This was apparently followed by a formal complaint to the Canadian Human Rights Commission. As a result of an agreement reached by the parties concerning this complaint, he was subsequently transferred to “O” Division in Ontario towards the end of 2000, where he states that he believed that he would have a “new start”. Instead, he alleges, he was subjected to further discrimination and harassment.

[4] On November 17, 2004, he filed a complaint with the Canadian Human Rights Commission alleging that he had been discriminated against on the basis of race, colour and national or ethnic origin in contravention of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. Mr. Herbert was dismissed by the RCMP on January 5, 2005, and then amended his complaint to include an allegation that his dismissal was also discriminatory and added disability as a ground of the complaint.

[5] A brief summary of some of the allegations of discrimination asserted by Mr. Herbert is warranted in order to appreciate his allegation that his complaint was not thoroughly investigated.

[6] He asserts that prior to his transfer from Vancouver to Ontario he met with his new supervisors who informed him that they had a need for experienced undercover agents and that he would be used for such operations in Ontario. However, when he reported to work in January 2001, he was told that he would not be doing any undercover work and was not given any explanation for the change in plan. Instead, he was posted to the Executive Diplomatic Protection Service, which he describes as one of the most undesirable positions within the RCMP. Mr. Herbert alleges that his race and his previous complaint were factors in the decision to deny him undercover work and to post him to EDPS.

[7] In February of 2001, after having written the Corporal's exam and scored in the top 11% to 20% of the candidates, he was appointed to the new Canadian Air Carrier Protection Program, where he completed 260 hours in an Acting Corporal's position. He says that he received written commendation for his excellent work and leadership in that position. He asserts that despite this commendation and the fact that he had logged more hours in the CACPP than any other officer, he was not selected in July 2001 to staff one of two Acting Corporal positions, each of which was given to less senior, white Constables, with much less experience. When he inquired as to the reason why he was not considered for one of the positions he was told that it was a "discretionary decision". Mr. Herbert is of the view that his colour or race and his previous complaint played a part in this decision.

[8] He alleges that the work environment continued to deteriorate and that he was denied basic requests for days off and for approval of overtime. He alleges that such requests were routinely granted to other officers.

[9] He learned through an access to information request that he was being monitored by supervisors and colleagues and that his immediate supervisor was monitoring his security pass to scrutinize his comings and goings. As a result of this alleged harassment, his physician placed him on medical leave on August 27, 2003.

[10] In September 2003, he met with his section head to discuss his complaints. Despite assurances of good faith and promises of changes, he alleges that he continued to be disciplined without cause. He viewed this as a part of the ongoing harassment and again, his doctor placed him on medical leave.

[11] In December 2003, he was told to return all of his equipment to the RCMP, and while in their offices to do so, he says he was followed the whole time, and even watched while he used the urinal. He describes this as "an extremely humiliating experience".

[12] In early 2004, Mr. Herbert took educational upgrade courses in Nova Scotia that were approved by the RCMP, so that he would be able to apply to attend law school. He was accepted into law school in Nova Scotia and he applied for educational leave on September 1, 2004. On

September 16, 2004, the RCMP attended his home and later communicated with his lawyer asking that he attend a health assessment in Toronto. Less than 24 hours notice was provided although the document given to him indicated that if he did not give three business days notice to cancel the appointment, he would be charged \$1,000. On October 7, 2004, the RCMP provided Mr. Herbert's lawyer with documents denying the request for an educational leave, threatening discharge proceedings, and ordering that he undergo a health assessment. Despite having informed the RCMP on a number of occasions that communication to Mr. Herbert was to go through his lawyer, the RCMP contacted Mr. Herbert's family and, on one occasion, his professor. Eventually two RCMP members came to Mr. Herbert's school and interrupted one of his classes to serve him with documents.

[13] Mr. Herbert's complaint was investigated and the investigator made a recommendation to the Commission that, pursuant to section 44(3)(b) of the Act, the Commission dismiss the complaint because "the evidence does not support the allegations that the complainant was denied opportunities, harassed and that he had his employment terminated on the ground of his race, colour, national or ethnic origin and disability". As is its usual procedure, the Commission asked both parties for submissions on the investigator's report. While the Respondent indicated that it had no comment to make on the report other than to concur with the recommendation, Mr. Herbert provided a full 9 pages of legal-sized paper, containing some 69 comments in reply to the report.

[14] The Commission dismissed Mr. Herbert's complaints without referring them to an inquiry by the Canadian Human Rights Tribunal. It is this decision that Mr. Herbert seeks to set aside.

Issues

[15] Mr. Herbert initially represented himself, but retained counsel just prior to the scheduled hearing of this application for judicial review of the Commission's decision. Accordingly, the parties were permitted to file amended materials and additional issues were advanced in challenge to the Commission's decision. Essentially, Mr. Herbert submits that the application raises two issues:

- a. Whether the Commission breached its duty of fairness on the basis that the investigation was not thorough; and
- b. Whether the Commission erred in interpreting the evidence and applying the appropriate legal tests in determining whether Mr. Herbert had been subject to discrimination.

The Obligations of the Commission in Investigating and Screening Complaints

[16] Typically, in more complex complaints such as Mr. Herbert's, the Commission designates an investigator pursuant to section 43 of the Act to investigate the complaint and submit a report to the Commission of the findings of the investigation. The investigator also typically sends the report to the parties in order that they may respond to it. The responses of the parties and the report are then placed before the Commission which must determine whether the complaint is to be dismissed or whether an inquiry is warranted. This screening function has been aptly characterized by the Supreme Court of Canada in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at paragraph 53, as being akin to that which a judge fulfills at a preliminary inquiry.

The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. Justice Sopinka emphasized this point in *Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 899:

The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) [now s. 44(3)(b)] that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39 [now s. 49]. It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.

[17] Unlike a preliminary inquiry where it is the role of the Crown to present the evidence and the judge to perform the screening exercise, in human rights matters the Commission performs both roles – the evidence is presented through the investigator's report and the screening through the Commission's members. As a consequence, it is my view that the Commission, when undertaking its screening role, must be vigilant in ensuring that the report does indeed adduce all of the relevant evidence. The screening out of a complaint has very significant consequences for a complainant, who will most often have no other remedy for the alleged discrimination.

[18] In performing its screening function, the Commission is given a very broad discretion to determine "having regard to all of the circumstances" whether an inquiry is warranted: *Mercier v.*

Canada (Human Rights Commission), [1994] 3 F.C. 3 (C.A.). However, the process it follows in exercising that discretion must be fair. In *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056, 2005 FCA 404, the Federal Court of Appeal affirmed at paragraph 112 that where the investigation is procedurally flawed, then the decision of the Commission, if it is made in reliance on that report, is equally flawed:

It is clear that a duty of procedural fairness applies to the Commission's investigations of individual complaints, in that the question of "whether there is a reasonable basis in the evidence for proceeding to the next stage" (SEPQA, supra at para. 27) cannot be fairly considered if the investigation was fundamentally flawed. As the Supreme Court of Canada noted in SEPQA, supra, "[i]n general, complainants look to the Commission to lead evidence before a tribunal appointed under s. 39 [now s. 49], and therefore investigation of the complaint is essential if the Commission is to carry out this role" (para. 24). This same consideration -- the indispensable nature of the investigation in the Commission's handling of each individual complaint -- applies equally to an investigation undertaken prior to dismissal of a complaint under section 44(3)(b). Where a proper inquiry into the substance of the complaint has not been undertaken, the Commission's decision based on that improper investigation cannot be relied upon, since a defect exists in the evidentiary foundation upon which the conclusion rests (Singh, supra at para. 7).

The duty of the investigator is to be neutral and thorough in the investigation. Where that duty has not been met, procedural unfairness may result. It has been recognized in many decisions, *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574; affirmed (1996), 205 N.R. 383 (F.C.A.) being one, that the requirement for thoroughness must be considered within the administrative and financial realities of the Commission's work. Accordingly, it has been held that minor omissions in the investigation may be overcome by providing the parties with a right to make submissions on the report -- a process followed in this instance. However, it has also been recognized in many cases

that the right to make submissions cannot compensate for a defect in procedural fairness in the investigation where evidence has been disregarded or ignored: see, as examples, *Slattery, supra*; *Sanderson v. Canada (Attorney General)*, 2006 FC 447; *Powell v. TD Canada Trust*, 2007 FC 1227; and *Egan v. Canada (Attorney General)*, 2008 FC 649.

Was this Investigation Thorough?

[19] Mr. Herbert submits that the investigation and the report were not thorough because they failed to consider fundamental aspects of his complaint, namely disability as a ground of discrimination and his allegation of systemic discrimination.

[20] The Respondent submits that it is open to an investigator to conclude in the course of an investigation that there is little or no evidence or basis for a particular ground of complaint. I agree. This is particularly so where, as here, the allegations relating to a ground of discrimination are sparse. There is no mention whatever in the initial complaint filed by Mr. Herbert in 2004 that disability is a ground of complaint. When Mr. Herbert amended the complaint in 2007 he added the following statement: “I allege that on or about January 5, 2005 the RCMP terminated my employment on the grounds of my race, colour, national or ethnic origin and disability”. That is the sole reference to disability in his complaint. In my view, more than a bald assertion of discrimination is required before the requirement to investigate the complaint is triggered. At a minimum a complainant must set out some basis for the allegation being made before any investigation is warranted. Here there was none. Notwithstanding the paucity of factual assertions the report does indicate that the investigator gave some consideration to this ground of complaint

and, in the circumstances, I agree with the Respondent's submissions that Mr. Herbert was accorded procedural fairness with respect to his allegation of discrimination on the basis of disability.

[21] Mr. Herbert also alleges that the investigator failed completely to investigate the allegation of systemic discrimination. Mr. Herbert was somewhat more fulsome with respect to his allegations in this regard. He writes in his complaint:

I believe that the differential treatment I have received in the RCMP is indicative of systemic discrimination regarding the treatment of Black and racialized members of the RCMP. I understand that Black officers have filed two similar complaints with the Canadian Human Rights Commission and that one is currently before the Canadian Human Rights Tribunal.

[22] The investigator appears to have given short shrift to this allegation. He dismissed this complaint in the report in the following manner:

The complainant alleges that the treatment he received from the respondent is indicative of systemic discrimination regarding the treatment of Black members of the RCMP. He says that two other Black constables filed similar complaints with the Commission against the RCMP. This information does not itself constitute reasonable ground to believe that systemic discrimination on the ground of colour exists in the RCMP. For this reason, the allegation will not be explored in this report.

[23] While it is possible that after an investigation of the evidence offered by Mr. Herbert, an investigator may have concluded that there was insufficient evidence to support the claim of systemic discrimination, the allegation, in my view, required more than the cursory dismissal the investigator gave it. In particular, the investigator fails to reference in the report that one of these complaints has been scheduled for a Tribunal inquiry, which suggests that the Commission was of

the view that there may be some merit to it. All of the information regarding these complaints was readily available to the Commission and its investigator in its own files. The Applicant submits that these two individuals ought to have been interviewed by the investigator. That may be so if a review of the complainants' files indicated that such was warranted. However, without even examining those complaints, the investigator came to the view that further inquiry was not warranted. In my view the failure of the investigator to even review those two complaints and their status results in an investigation that was less than thorough. This is particularly egregious as it appears that Mr. Herbert is claiming that these two Black members of the RCMP have also alleged systemic discrimination on the part of the RCMP against Black members. The investigation being less than thorough in this regard, it follows that the Commission did not have all of the relevant information when it made its decision to dismiss Mr. Hebert's complaint.

[24] It is also very troubling that the investigator appears to have made some significant errors in some of the facts recited in the report. The Respondent argues that the submissions made by Mr. Herbert in response to the report are largely a repetition of the facts as he sees them and do little more than indicate his disagreement with the facts as found by the investigator. In its written submission, the Respondent writes:

This Court should not reweigh the evidence which was before the Commission. It was open to the Commission to accept the facts as found by the investigator, and its conclusions were reasonable in light of that evidence. While Mr. Herbert may not agree with the outcome of Commission's weighing of the evidence in his case, its conclusion was reasonable and this Court should not interfere.

[25] There is no question that it is not the role of this Court on an application for judicial review to reweigh the evidence before the Commission. It is certainly open to the Commission to accept or reject the facts as found in the investigation report. As has previously been noted, where, as here, the Commission's decision is brief and accords with the investigator's report, the report becomes its reasons for the conclusion. The Respondent submits that the reasons for the Commission's decision are not just the investigator's report. It was pointed out that the Commission in its letter to Mr. Herbert says that "before rendering their decision, the members of the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report". Accordingly, the Respondent submits that "when this court is asked to infer that the Commission's reasons are identical to those of the Investigator, it should take account of the whole of the material that was before the Commission in rendering its decision". I agree that this Court must take into account all of the material that was before the Commission when it reached its decision, not in determining whether the reasons of the report are the reasons of the Commission, but in assessing the reasonableness of the Commission's decision.

[26] The jurisprudence is clear that where the Commission provides the complainant what is essentially a form letter dismissing the complaint for the same reasons set out in the investigator's report, then the report does constitute the reasons of the Commission as to why the complaint was dismissed. If the Commission chooses to dismiss on some other basis than that advanced by the investigator, it must state those reasons in its decision. Where the parties' submissions on the report take no issue with the material facts as found by the investigator but merely argue for a different conclusion, it is not inappropriate for the Commission to provide the short form letter-type response.

However, where these submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all. Such was the situation in *Egan v. Canada (Attorney General)*, [2008] F.C.J. 816; 2008 FC 649.

[27] In *Egan* the complainant filed a rebuttal submission of some ten pages that began with the statement: “I have read the report in total disbelief as to how a less than 10-minute telephone conversation with me and my union reps can amount to an “investigation”. My colleague, Mr.

Justice Hughes, noted:

The Commission's letter does not specifically address any of the concerns as to the investigation and Report raised in the Applicant's rebuttal and refers to the rebuttal in such a neutral way -- "*any submission(s) filed in response*" -- that one is left to wonder to what extent, if at all, the Applicant's concerns were even noted let alone considered.

Justice Hughes concluded, in allowing the review:

I am satisfied that, in the present case the issues raised by the Applicant in rebuttal were of such a fundamental character that they should have been clearly considered by the Commission and a further or better investigation ordered or clear reasons set out by the Commission in its decision as to why it did not do so. To simply say that the Report is the Commission's reasons would be to ignore the rebuttal entirely.

[28] Much the same observation is appropriate on the facts of this case. While Mr. Herbert in his rebuttal submissions claims that the Respondent has either lied or misrepresented the facts, he also

states that he is countering the findings made with reference to written documents which support his position. He writes:

I will now fully qualify my above noted statements [regarding lies and misrepresentations] by going through this report and again fully substantiating my HRC complaint by clarifying misstated facts and referring you to documented materials that have already been submitted to various HRC investigators during the course of this complaint, but have apparently been overlooked at this stage of the investigation.

[29] In my view, the following are four of the material and fundamental “misstated facts” Mr. Herbert raises in his rebuttal that would have cried out for consideration by the Commission.

- The report states that because Mr. Herbert’s complaint of harassment in 2000 was an internal complaint and not a complaint under the Act, it cannot form the basis of an allegation of reprisal under the Act and “therefore the allegation of retaliation will not be examined”. Mr. Herbert’s rebuttal points out that while he first made an internal complaint in July 1999, having received no satisfaction, he filed a formal complaint with the Commission in February 2000. Thus, the foundation for a claim of retaliation is made out.
- The report contains a recitation of the evidence of the Respondent as to why “normally” Constables in Ontario do not do undercover work and accepts this as the reason why Mr. Herbert was not assigned undercover work. The rebuttal establishes that the assignment to Ontario was not “normal” - it was part of a mediated settlement of Mr. Herbert’s complaints in Vancouver. Further, he says that he was specifically told by an officer, who was not questioned by the investigator, that he would be assigned undercover work. Without interviewing that officer how can the investigator discount Mr. Herbert’s evidence?

- The report recites the evidence of the Respondent that the two non-Black candidates who were given the Acting Constable assignments were “good solid members with good files” but fails to note that Mr. Herbert also fell in this category as he had letters of commendation and supervisory experience in the RCMP, which neither of the successful candidates had. As was pointed out in the rebuttal, the investigator fails to analyze why the officer’s exercise of discretion in these circumstances had nothing to do with race or the previous human rights complaint.
- With respect to the denial of leave without pay to attend law school, the report recites the position of the Respondent that such leaves have not been approved in Ontario for a decade. Mr. Herbert points out that such leaves with pay have been approved and that he can name five white RCMP members who have attended Canadian law schools in the previous ten years on full pay and benefits. No investigation was made of these claims or why, when Mr. Herbert was on disability leave, he could not be released at no cost to the RCMP to attend law school when a number of white members were granted leave with pay to do so.

[30] In my view, each of these issues, among others raised by Mr. Herbert in his rebuttal, was so significant that the Commission ought to have referred the matter back to the investigator for further investigation and the preparation of a new report. If the Commission chose to make a determination based on all of the evidence before it, including the rebuttal, to dismiss the complaint, then procedural fairness required that the Commission specifically deal with each of the issues raised in the rebuttal that were of a fundamental character. Having failed to do so, the decision of the Commission cannot stand.

[31] Accordingly, this application is allowed because the investigator failed to conduct a thorough investigation and because the Commission failed to address those omissions and inaccuracies. This might have been accomplished either by directing a further and proper investigation, or alternately, by stating why, in the face of the material issues raised by Mr. Herbert in rebuttal, no further investigation was necessary, if that were indeed the case.

[32] Mr. Herbert advised the Court that he was not seeking his costs in this application, primarily because of the Respondent's co-operation when, just before the scheduled hearing date, he chose to have counsel represent him and an adjournment and leave to file amended materials was required. In the circumstances the Court will not award costs against the Respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application is allowed;
2. The decision of the Canadian Human Rights Commission dated December 21, 2007 is set aside and the matter is remitted to the Commission for investigation by a different investigator and subsequent redetermination by the Commission; and
3. Each party shall bear its own costs.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-154-08

STYLE OF CAUSE: JOSEPH G. HERBERT v.
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Halifax, Nova Scotia

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**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN, J.

DATED: August 28, 2008

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