

Date: 20081029

Docket: T-2225-07

Citation: 2008 FC 1211

Ottawa, Ontario, October 29, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

PAULINE BUSCH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, Ms. Busch, was employed on a term basis, from 2000 to 2003, by the Department of Justice (DOJ) as National Coordinator of the Aboriginal Justice Learning Network (AJLN). On February 3, 2003, Ms. Busch was informed that her employment was terminated, effective May 9, 2003, because the AJLN was to be dissolved and her position was to be eliminated.

[2] On February 3, 2004, Ms. Busch filed a complaint with the Canada Human Rights Commission (CHRC or the Commission), in which she alleged discrimination on the ground of race and national or ethnic origin in the course of her employment and subsequent termination by the DOJ, contrary to sections 7 and 10 of the *Canadian Human Rights Act*, R.S., 1985, c. H-6 (CHRA).

The basis of the claim was that the Director General of AJLN and the Applicant's immediate supervisor, Daniel Watson, denied training and career opportunities, refused to address discriminatory treatment and a poisoned work environment, and declined to continue her employment because she is a Traditional Aboriginal woman.

[3] In a letter dated November 20, 2007, Ms. Busch was advised that the Commission had decided, pursuant to s. 44(3)(b)(i) of the CHRA, to dismiss the complaint because, having regard to all the circumstances, an inquiry by a Tribunal was not warranted.

[4] Ms. Busch seeks judicial review of this decision.

II. Issues

[5] As presented during oral submissions, the outstanding issues in this application may be described as follows:

1. Did the Commission breach the principles of procedural fairness in that it did not conduct a thorough and neutral investigation and analysis of Ms. Busch's allegations of discrimination by:
 - (a) Failing to interview members of the AJLN's advisory committee and other persons identified by Ms. Busch as having information related to her allegations?

- (b) Failing to consider evidence provided to it after the completion of the investigation?

III. Process leading to the decision

[6] I will begin by spending some time setting out the process leading to the Commission's decision. This is because the alleged errors can readily be seen in a description of the process in this particular case.

[7] Ms. Busch's complaint was referred to an investigator. Her complaint was forwarded to the employer, DOJ, who made lengthy representations in response. In summary form, the response, which was written by Mr. Watson, made the key claim that the decision not to renew Ms. Busch's term employment was that "she failed to deliver a strategic planning document that was key to the successful operation of the unit for which she was responsible". Mr. Watson also disputed Ms. Busch's claim that the AJLN program did not end as she had been advised. On November 8, 2006, Ms. Busch, through her representative, provided her reply comments. Of note, Ms. Busch provided a list of 12 possible witnesses; for each, she described the type of evidence that could be obtained from an interview. Some were employees who, Ms. Busch asserted, could provide evidence regarding the working environment. Ms. Busch also identified former AJLN Elders who were present at a meeting where Mr. Watson made comments regarding Ms. Busch's dismissal that were allegedly inconsistent with the stated reasons for her termination.

[8] The report of the investigator assigned to this claim (the Investigator's Report) is dated April 5, 2007. Information for the Report was obtained from a number of interviews and documents. However, of the 12 witnesses identified by Ms. Busch, it appears that only one was interviewed; that person was questioned on the very narrow point of whether that witness had been offered the position of National Coordinator of the AJLN. In her Report, the Investigator stated that she interviewed a number of current and former employees of DOJ, none of whom were suggested by Ms. Busch (or by DOJ). Significantly for this judicial review, the Investigator appears not to have interviewed any of the Elders identified on Ms. Busch's list. Throughout the Report are references to the conflicts between Mr. Watson and Ms. Busch. At one point, with respect to availability of training, the Investigator acknowledged conflicting evidence and the fact that "evaluating credibility of the parties was something that the investigation is unable to do". A portion of the Report related to the question of whether Ms. Busch had been replaced as National Coordinator. On this point, the Investigator found that no one was offered the position of National Coordinator to replace the Ms. Busch.

[9] The Investigator's Report concluded with a recommendation that the Commission dismiss the complaint.

[10] Ms. Busch and the DOJ were provided with an opportunity to respond prior to the Commission making a final decision. Only Ms. Busch provided comments. Of particular importance, Ms. Busch's representative forwarded copies of a series of e-mails, that had recently come to light, that appear to suggest that the AJLN National Coordinator position was filled by secondment and that the work that Ms. Busch was doing continued to exist.

[11] In a letter dated November 20, 2007, the decision of the Commission to dismiss the complaint was communicated to Ms. Busch. There was no specific reference to the matters raised in the response of Ms. Busch. There was merely a “boilerplate” statement that the members of the Commission reviewed the Investigator’s Report and “any submission(s) filed in response to the report”.

IV. Analysis

[12] There is no material disagreement between the parties as to key legal principles applicable to this decision. In brief:

1. The question of whether the Commission’s investigation is thorough is an issue of procedural fairness. As such, it is reviewed on a standard of correctness.
2. The Court is entitled to consider the Investigator’s Report as constituting the reasons of the Commission (see *Sketchley v. Canada (Attorney-General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at para. 37).
3. Investigations conducted to determine whether a tribunal should be appointed pursuant to s.44(3)(a) of the CHRA must be neutral and thorough in order to satisfy the duty of procedural fairness (*Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (T.D.) at para. 49, *aff’d* (1996) 205 N.R. 383 (F.C.A.), [1996] F.C.J. No. 385 (C.A.) (QL), *Public Service Alliance of Canada v. Canada (Treasury*

Board), 2005 FC 1297, [2006] 3 F.C.R. 283 at para. 24, *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113, (2005) 332 N.R. 60 at para. 8).

[13] For a thorough discussion of the obligations of the Commission in investigating and screening complaints, the reader is referred to the recent decision of my colleague, Justice Zinn, in *Herbert v. Canada (Attorney General)* 2008 FC 969, [2008] F.C.J. No. 1209 (F.C.) (QL), at paras. 16-18, which analysis I adopt.

[14] Where the parties disagree is whether the Commission's investigation was thorough and neutral and whether the decision was made without regard to certain of Ms. Busch's submissions. Having reviewed the record, I am of the view that the Commission erred in two material aspects.

[15] First, in declining to interview 11 of 12 of the witnesses suggested by Ms. Busch, the Investigator arguably failed to conduct a thorough investigation. This is so, in particular, with respect to the Elders on the list who may have heard comments of Mr. Watson that are contradictory – at least to some extent – to the reasons he gave in his report to the Investigator. The Investigator gave no reason why the Elders (or other persons on Ms. Busch's list) were not interviewed. I accept that not all persons on a complainant's list of possible witnesses must be interviewed; an investigator has considerable discretion in deciding how to conduct an investigation (see, for example, *Bateman v. Canada*, 2008 FC 393, [2008] F.C.J. No. 510 (F.C.) (QL) at para. 30, *Slattery*, above, at para. 69). However, where a witness may have information that could address a significant finding of the Investigator and where no one else is interviewed that could resolve a controversial and important fact, it seems to me that failure to interview that person may result in an investigation

that is not complete (see *Egan v. Canada (Attorney General)* 2008 FC 649, [2008] F.C.J. No. 816 for a similar situation). In this case, the reasons for Ms. Busch's dismissal were in question.

According to Ms. Busch, Mr. Watson gave different reasons to the AJLN Advisory Committee for the termination than were provided to Ms. Busch. In my view, this failure to interview any members of that advisory body resulted in a Report that was not thorough.

[16] I am not as concerned about the failure to interview the former employees suggested by Ms. Busch. The Investigator did interview a number of former employees who could give the same evidence as to the work environment as those on Ms. Busch's list. Further, as employees suggested by neither party, these witnesses were likely to give an impartial view. There was no breach of fairness in not interviewing the former employees suggested by Ms. Busch.

[17] The second error involves the e-mail exchange forwarded to the Commission by Ms. Busch's representative and referred to in her reply to the Investigator's Report. The e-mail describes a secondment of a person to the position of National Coordinator. The Commission, in its final decision makes no reference to this new evidence. The subject matter of the e-mails directly affects one of the Investigator's findings that Ms. Busch was not replaced. It may be that the e-mails can be explained and that one can dismiss them as being unreliable, ambiguous or unclear. Nonetheless, this is evidence that goes to an important finding of the Investigator. A failure to address important issues raised by a complainant in rebuttal has been held to be a reviewable error (see, for example, *Egan*, above, at para. 16; *Public Service Alliance of Canada*, above, at para. 50). With the silence of the Commission's decision on any of the reply, I am left wondering if the

evidence was considered. Given its close relationship to the points in issue, the Commission erred by failing to address this evidence.

V. Conclusion

[18] For these reasons, the application for judicial review will be allowed, with costs to the Applicant.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed;

2. The decision of the Commission dated November 20, 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. The Applicant is entitled to costs to be taxed at the middle of Column III of Tariff B.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Mr. Andrew Raven FOR THE APPLICANT
Mr. Bijon Roy

Mr. Alexander Gay FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. FOR THE APPLICANT
Barristers and Solicitors
Ottawa, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada