Date: 20090106

Docket: T-1649-07

Citation: 2009 FC 9

Ottawa, Ontario, January 6, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

JOCELYN GREAVES

Applicant

and

AIR TRANSAT INC.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of the Canadian Human Rights Commission ("the Commission") decision dated August 10, 2007, in which the Applicant's complaint was dismissed.

[2] The Applicant makes an application for her complaint to be referred to the Canadian Human Rights Tribunal for further inquiry or, in the alternative, the Commission's August 10, 2007 decision be set aside as invalid and the matter be sent back to the Commission for reconsideration.

[3] It is the Applicant's position that Air Transat's staff failed to address her needs, as an elderly disabled woman, to have use of a washroom accessible to her.

[4] The Applicant is a 62 year-old black woman who uses a cane to assist her when walking. She also suffers from a spinal cord tumour which has resulted in the loss of normal bowel and bladder control. On October 11, 2005, she was a passenger on board an Air Transat flight from Toronto, Canada to London, England. She was seated in Row 5, seat D, an aisle seat in the "economy" cabin.

[5] During the flight the Applicant states that, due to her disability, she could not access the washroom provided in her area of the plane and was directed by a flight attendant to use the facilities in the "first class" cabin. She states that she was denied access to the first class facility by the flight attendants, was spoken to in a rude and discriminatory manner that resulted in her losing bladder and bowel control, was not provided any assistance after the incident even when requested, and that this was based on her age, skin colour, gender, and disability. It is her position that the Air Transat staff failed to address her needs, as an elderly disabled woman, to have use of a washroom accessible to her.

[6] The Applicant wrote to Air Tansat regarding the incident on January 13, 2006. Air Transat sent her a letter of apology and a gift certificate for use on Air Transat flights. The Applicant was not satisfied with this response. She sent another letter demanding $25,000, that Air Transat launch

an inquiry into the incident, develop a policy to deal with disabled passengers in three months time, and cover her legal fees. Air Transat refused.

[7] The Applicant initiated a complaint before the Commission on September 11, 2006. Ms. B. Rittersporn investigated the matter on behalf of the Commission and wrote an Investigation Report. The report was made available to all the parties. Each party provided a formal response for consideration by the Commission. In her response the Applicant provided further evidence regarding her disability, including a letter from her doctor, Dr. Tucker.

[8] Subsequently, the Commission dismissed the complaint against Air Transat for the following reasons:

- The evidence did not support the complainant's allegations that she was treated in an adverse differential manner compared to others in the provision of a service, or that the treatment she received was, in whole or in part, based on one or more prohibited grounds of discrimination; and

- There was no evidence to support that the complainant was not accommodated either in whole or in part, because of a disability or any other prohibited ground of discrimination.

[9] In its reasons the Commission confirmed that it considered both the Investigation Report and the responding submissions of both parties before rendering its decision.

[10] During her investigation Ms. Rittersporn considered a to-scale seating plan for the airbus 310, the aircraft involved; written submissions from two flight attendants and an oral interview with another; and oral interviews with three passengers, two from first class where the rude incident allegedly occurred and one who sat parallel to the Applicant. She also interviewed the Applicant in the presence of her lawyer.

[11] The Investigator stated that as the Applicant and Respondent's version of events were divergent, she interviewed the passengers as independent witnesses. She did not find that the evidence supported the Applicant's claims.

[12] There are several points of contention between the Applicant, the Respondent and the findings of the Investigator:

- **Location of the nearest accessible lavatory**: Using the to-scale airplane model, the Investigator determined that the lavatory in the first class compartment was actually further away than a lavatory available to the Applicant in her cabin and that it was accessible to her with her disability. It is the Applicants position that she could not access this lavatory due to her inability to move sideways.

- **Actions of the Applicant**: The Applicant states that she only got out of her seat to use the facilities. The evidence of the passengers and staff was that the Applicant came into the first class cabin to stretch, stand, and asked the first class cabin crew to assist her with drinks etc.

- **The flight attendants being rude and disrespectful**: The Investigator did not find that there was a loud, disruptive incident between the Applicant and staff, as stated by the Applicant. On the contrary, the evidence from the passengers was that the staff had been polite to the Applicant.

- **The fact that the Applicant had an "accident" due to the incident**: The Applicant claims that she lost bladder control due to the conflict with the Flight Attendants over use of the first class washroom. She then had to remain in these clothes for the duration of the flight as no one answered her request for assistance in changing. She states that she attempted to mask the embarrassing smell by using a blanket. The passenger sitting parallel to the Applicant stated she did not notice any particular smell or anything else out of the ordinary.

[13] The standard of judicial review on issues of procedural fairness is correctness (*Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 at para. 151; *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056 at para. 53 (C.A.)).

[14] In determining the more specific content of procedural fairness required of a given investigation, the Federal Court confirmed that the Commission's determination as to whether further investigation is appropriate in the circumstances should enjoy considerable deference (*Slattery v. Canada (Human Rights Commission*), [1994] F.C.J. No. 181 at para. 56, aff'd [1996] F.C.J. No. 385 (C.A.)). In *Slattery v. Canada*, Nadon J. also stated that the Commission and its investigators should be afforded considerable latitude in their choice of procedures and their investigations generally (see para. 69).

[15] As set out by the Supreme Court in *Komo Construction Inc. v. Québec (Commission des Relations de Travail)*, [1968] S.C.R. 172 (as quoted in *Miller v. Canada (Canadian Human Rights Commission)*, [1996] F.C.J. No.735 at para. 12 (T.D.)), the Governor in Council has not provided the Commission with guiding regulations or standard procedures for its investigations and therefore the Court should refrain from imposing a code of procedure upon an entity which the law has sought to make master of its own procedure.

[16] The Courts need to balance the interests of procedural fairness with the maintenance of an administratively workable system (*Slattery v. Canada*, supra).

[17] The duty of procedural fairness requires the Commission to give the complainant the Investigator's report, provide them with the opportunity to respond and to consider that response before it decides, *Murray v. Canada (Canadian Human Rights Commission)*, [2002] F.C.J. No. 1002 at para. 24:

> 24 The principles of natural justice and the duty of procedural fairness with respect to an investigation and consequent decision of the Commission, are to give the complainant the investigator's report and provide the complainant with a full opportunity to respond, and to consider that response before the Commission decides. The investigator is not obliged to interview each and every witness that the applicant would have liked, nor is the investigator obliged to address each and every alleged incident of discrimination which the applicant would have liked. In this case, the applicant had the opportunity to respond to the investigator's report and to address any gaps left by the investigator or bring any important missing witness to the intention of the investigator. However, the investigator and the Commission must control the investigation and this Court will only set aside on judicial review an investigation and decision where the

> investigation and decision are clearly deficient. See Slattery, supra. per Nadon J. (as he then was) and at the Federal Court of Appeal per Hugessen J.A. (as he then was).

[18] In the present case, the Commission provided the Applicant with a copy of the Investigator's report and the Applicant filed a comprehensive response, including extra information she deemed necessary. The Commission stated in its reasons that it considered the Applicant's response.

[19] To satisfy the requirement of procedural fairness the Commission's investigation must be thorough and neutral, providing it with an adequate and fair basis to make a decision (*Slattery v. Canada, supra*). The threshold for thoroughness is high and it was held in *Slattery*, supra, that judicial review of an allegedly deficient investigation should only be warranted where the investigation is clearly deficient (*Slattery v. Canada*, para. 69; supra; *Aziz v. Telestat Canada*, [1995] F.C.J. No. 1475 at para. 60 (T.D.)).

[20] In *Skechley*, supra, para. 120, Linden J.A. reviewed two circumstances where further submissions of an Applicant to the decision-maker cannot compensate for an investigator's omissions: (1) where the omission is of such a fundamental nature that merely drawing the decision-makers' attention to it cannot compensate for it or (2) where fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it.

[21] I am satisfied that the investigation in this case was thorough and extensive. The investigator went to great lengths to contact and interview three independent witnesses, two in the area where the incident was alleged to have occurred, and one seated next across the aisle to the Applicant. The Investigator also interviewed the Applicant in the presence of her lawyer, a flight attendant, obtained written statements from two additional flight attendants, and reviewed a to-scale diagram of the aircraft cabin.

[22] The Applicant takes issue with two specific areas of the Investigation Report: that the investigator relied on written statements from two of the flight attendants and the nature of the investigation into the Applicant's disability.

[23] The Investigator interviewed one flight attendant and accepted written statements from two others, Richard and DeSousa. Richard and DeSousa, according to the Applicant, were the two attendees who were primarily involved in the allegedly discriminatory actions.

[24] The Applicant relies on *Grover v. Canada (National Research Council)*, [2001] FCT 687, for the submission that direct interviews of Richard and DeSousa were required. In *Grover*, the failure to interview a key witness, Mr. Grover's boss Dr. Vanier, lead to the inference of pre-judgment by the instigator and was found to be a breach of procedural fairness by the investigator.

[25] As noted by the Respondent, the facts of *Grover* are not parallel with the facts of this case:

- Grover was in the employment context and entailed discrimination over several years;
- The principle antagonist in Grover, Dr. Vanier, was not interviewed, where as Richard and DeSousa provided written submissions; and
- Dr. Vanier, as the employer/decision maker, was in a unique evidentiary position. In this case, the incident occurred in front of many potential independent witnesses, three of whom were interviewed.

[26] The Respondent submits that the facts of this case are more aligned with *Lindo v. Royal Bank of Canada*, [2000] F.C.J. No. 1101 (T.D.) and *Coward v. Canada (Attorney General)*, [1997] F.C.J. No. 1101 (T.D.) where the Court upheld decisions of the Commission to dismiss complaints despite the fact that the investigator did not interview witnesses the complainants regarded as "critical" to their case. In both cases, the Federal Court stated that the Applicants' concerns were before the Commission in their responses to the investigations and therefore were considered.

[27] At paragraph 17 of *Lindo*, supra, Gibson J. wrote:

> 17 On the facts of this matter, based upon the Commission record that consists primarily of the investigative report, and written comments thereon on behalf of the applicant and the respondent, I am satisfied that the duty of fairness was met. While the applicant is concerned that the investigation did not extend to an interview of one witness whose evidence the applicant regarded as critical, the applicant's concern in this regard was before the Commission when it reviewed the investigation report and I must conclude that the

> Commission took that concern into consideration and dismissed it. I am satisfied that such action was reasonably open to the Commission, given its broad discretion in arriving at the decision under review.

[28] At paragraph 46 of *Coward*, supra, MacKay J. wrote:

> 46 In my view, based on the jurisprudence, there has been no breach of procedural fairness in the present circumstances. The applicant was aware of the substance of the case on the basis of the evidence provided by both parties to the Commission. He was provided with a summary of the CAF's internal investigation, as well as a copy of the CHRC Investigation Report containing the results of the investigator's findings, and was therefore fully apprised of the substance of the evidence before the CHRC. He was given an opportunity to respond to both these documents, and he did so by making detailed written submissions, which were among the documents before the Commission when it made its decision. I do not accept the arguments advanced by the applicant that the CHRC breached the duty of procedural fairness (i) by failing to provide a complete summary of the evidence before it, (ii) by failing to give careful consideration to the role of his race, colour and disability in the incident complained of, and (iii) by relying solely on the evidence adduced by the CAF. While certain dissatisfactions for the applicant arose in the course of the investigation conducted by Commission staff, ultimately the investigation as completed by Ms. Choquette did review all of the evidence adduced by both parties. In my view, there is no evidence to suggest that investigation by the Commission staff of the applicant's complaint was conducted in anything other than a fair and thorough manner.

[29] At paragraph 69 of *Slatterly*, supra, Nadon J. stated:

> 69 The fact that the investigator did not interview each and every witness that the applicant would have liked her to and the fact that the conclusion reached by the investigator did not address each and every alleged incident of discrimination are not in and of themselves fatal as well. This is particularly the case where the applicant has the opportunity to fill in gaps left by the investigator in subsequent submissions of her own.

[30] The Applicant claims that the Investigator made credibility findings as she accepted the evidence of the flight attendants. In her report the Investigator states that as the evidence of the Applicant and the flight attendants was in conflict, she relied on the evidence of the independent witnesses.

[31] In my opinion, the written statements of Richard and DeSousa were sufficient and did not result in the report being clearly deficient. The key witnesses, as determined by the Investigator, were the independent passengers.

[32] The Applicant claims that the Investigator made an "able bodied" assessment of her ability to gain access to another washroom and states that she attempted to explain her inability to move side-to-side to the Investigator during the interview. It is the Applicant's position, relying on *Sketchley*, supra, that the Investigator's failure to look into the details of the Applicant's disability constitutes an egregious gap in the investigation and this was a violation of procedural fairness as the evidence was so crucial that the Applicant could not compensate for its absence in her responding submissions. The Applicant also submits that the Investigator failed to complete a

thorough investigation as she did not make inquires as to the extent of the complainant's physical disability.

[33] The Respondent submits that the Applicant was given an opportunity to provide all relevant information in her initial complaint or during the interview, attended by her counsel, with the Investigator. Therefore, any missing information regarding her disability, which they deny, is entirely the fault of the Applicant. In addition, Dr. Tucker's report describing the Applicant's disability was before the Commission. This fact was enough to cure any possible deficiency in the Investigation Report.

[34] In my opinion, any possible oversight of the Investigator, which I do not think happened, regarding the Applicant's disability was cured by the fact that her doctor's letter detailing her disability was before the Commission.

[35] When the Commission has not provided detailed written reasons, Investigative reports are to be read as the Commissions reasons. In order for a fair basis to exist for the Commission to evaluate whether a tribunal should be appointed, the investigation conducted prior to the decision must satisfy the conditions of neutrality and thoroughness (*Sketchley*, *supra*, at 12).

[36] The Applicant submits that the Commission's adoption of the Investigators flawed report resulted in a reviewable error and a breach of her procedural fairness.

[37] The Federal Court of Appeal established the "closed-minded" test for finding an investigator and/or Commission biased in *Northwest Territories v. Public Service Alliance of Canada*, [1997] F.C.J. No. 143 (FCA). This test was set out in *Canadian Broadcasting Corp. (CBC) v. Canada (Canadian Human Rights Commission)*, [1993] F.C.J. No. 1334 at para. 47 (T.D.) as:

> The test, therefore is not whether bias can reasonably be apprehended, but whether, as a matter of fact, the standard of open-mindedness has been lost to the point where it can reasonably be said that the issue before the investigative body has been predetermined.

[38] This test must be established on an objective, rational and informed basis. A mere suspicion of bias is not sufficient - there must be some factual basis to sustain the allegation (*Northwest Territories v. Public Service Alliance of Canada*, *supra*).

[39] I am satisfied that the extent of the investigation highlights the Investigator's lack of bias. She went to great lengths to interview independent witness, based on the fact that the evidence of the Applicant and the flight attendants was contradictory. Regarding the evidence of the Applicant's disability, this material was before the Commission and it was within the power of the Applicant to provide it to the Investigator during her interview. Therefore, it was not a matter of "close-mindedness" on the part of the Investigator if it was not included in the report, but any deficiency was cured as it was before the Commission.

[40] As I have stated, the investigation was objective in every manner. The Investigator interviewed and obtained written statements of everyone in a position to state the relevant facts.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the judicial review application is denied with costs.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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