Federal Court  Cour fédérale

Date: 20091217

Docket: T-1886-07

Citation: 2009 FC 1289

Ottawa, Ontario, December 17, 2009

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

LADISLAV KONECNY

Applicant

and

ONTARIO POWER GENERATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The self-represented Applicant, Ladislav Konecny, seeks Judicial Review of a decision of the Canadian Human Rights Commission (CHRC) dated September 28, 2007 (the Decision). The Applicant had complained that Ontario Power Generation (OPG) discriminated against him on grounds of disability when it investigated his conduct at the office and terminated his employment

(the Complaint). However, the CHRC decided, pursuant to paragraphs 41(1)(d) and (e) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act), not to conduct an investigation of his Complaint because it was out of time, made in bad faith and frivolous.

[2] For the reasons that follow, I have concluded that the Complaint was neither out of time nor made in bad faith. However, I have found that it was frivolous in the sense that it was plain and obvious that it could not succeed. Accordingly, this application for Judicial Review has been dismissed.

THE FACTS

[3] The Applicant is a civil engineer living in Toronto. He worked for OPG and its predecessor, Ontario Hydro, from 1987 until his termination on July 26, 2002.

[4] In August 1999, the Applicant was diagnosed with Multiple Sclerosis. He was prescribed treatments which had negative side effects including flu-like symptoms. OPG therefore allowed him to work a 4-day week. The Applicant acknowledged that this schedule accommodated his disability.

[5] OPG treated the Applicant's accommodated day off as sick leave. The Applicant's supervisor, Mr. Sean Russell, worried that the resulting accumulated sick days could prejudice his department's chance to win a car in OPG's anti-absenteeism contest. Mr. Russell was therefore anxious to have the Applicant return to a 5-day week.

[6] Mr. Russell was also concerned about the quantity and quality of the Applicant's work, and raised these concerns at the Applicant's performance review on November 18, 2001. Then, three days later, Mr. Russell provided a harsher assessment of the Applicant's work. In a conversation with a member of OPG's health service, he said that the Applicant was "functioning at below the level of a student or trainee."

[7] On March 21, 2002, a supervisor who worked next door to the Applicant, sent Mr. Russell an e-mail (the Supervisor's Complaint) which stated, in part:

> I haven't been keeping records, but [the Applicant] certainly seems to spend a LOT of time talking on the phone (today at least, impression is that other days are not so different). Since it is a foreign language, I assume it is not work related.

[8] Mr. Russell forwarded the Supervisor's Complaint to the office of the Vice President - Nuclear Waste (the Vice President). An employee in that office informed OPG's Corporate Security department that the Applicant had been making non-business related telephone calls with such frequency that it was "distracting to others in the work group." This allegation was made even though the Supervisor's Complaint had not suggested that anyone had been distracted.

[9] On March 25, 2002, Mr. Russell was informed that the Applicant would be transferred to a different department at OPG, where he would work under the direction of a different supervisor. The transfer took effect on May 2, 2002.

[10] On April 10, 2002, the Vice President authorized OPG's Corporate Security department to investigate the Applicant's telephone records for one month (the Preliminary OPG Investigation). The outcome led to a broader investigation of the Applicant's telephone, e-mail and Internet use over a period of approximately one year (the Final OPG Investigation). These investigations will be referred as the OPG Investigations.

[11] The OPG Investigations revealed that the Applicant was engaged in personal commercial activities during working hours. Between April 2001 and April 2002, the Applicant made or received 1072 telephone calls and made several internet searches regarding his business of importing exotic dancers from Europe. The Applicant also sent or received 155 e-mails related to that business and sent 212 e-mails concerning his hobby of buying and selling dinky toys on e-Bay. A further 175 telephone calls were made or received dealing with the operation of a health store.

[12] The Applicant was interviewed about this conduct on his return from vacation on July 22, 2002. He was terminated on July 26, 2002.

[13] The Applicant's union, the Society of Energy Professionals (SEP), grieved his termination and a SEP lawyer represented the Applicant during a 28-day hearing before an Arbitrator. The grievance was dismissed in a 33-page award dated May 24, 2005 (the Award).

[14] The Applicant filed his Complaint with the CHRC on May 23, 2006.

[15] On June 4, 2007, the CHRC issued an Investigation Report which recommended that the Complaint not be investigated. After receiving submissions from counsel for both parties in response to the Investigation Report, the Commission declined to investigate the Complaint on September 28, 2007. It is that decision that is now under review.

THE COMPLAINT

[16] The basis of the Complaint is that OPG was improperly motivated in that it investigated and terminated the Applicant because it wanted to rid itself of someone who only worked a 4-day week. This conduct, the Applicant says, amounted to discrimination due to his disability.

[17] The Applicant submits that the CHRC should have investigated the Complaint because the Award did not deal with his human rights issues "at all." He said in oral submissions that the Complaint identifies four matters which indicate improper motivation by OPG and that those matters were not mentioned in the Award. They will be described collectively as the Issues**.** The Issues are as follows:

a. Mr. Russell made harsh and insulting statements about the Applicant's performance behind his back, 3 days after giving him a somewhat negative performance review (the Performance Review Issue);

b. The Applicant was not spoken to and warned about his conduct or afforded progressive discipline before he was investigated and terminated (the Warning Issue);

c. The Vice President's office falsely advised Corporate Security that the Applicant was "distracting" others (the Distraction Issue);

d. OPG kept a "travelling file" on the Applicant (the Travelling File Issue).

THE ARBITRATOR'S AWARD

[18] In my opinion, in deciding to dismiss the Applicant's grievance, the Arbitrator did consider whether OPG had been improperly motivated when it investigated and terminated the Applicant. However, she dealt with the subject in general terms and did not specifically refer to three of the Issues. She stated, at page 29 of her Award:

> I have carefully reviewed the evidence of Mr. King, Mr. Giersjewski [sic] and Mr. Russell in the context of the union's argument that the employer was inappropriately motivated in pursuing an investigation and in reaching the decision to terminate the grievor's employment. It relied on the impact of the grievor's accommodation on the work group, Mr. Russell's desire to have the grievor return to a five-day work week, and the lack of a progressive disciplinary response in the context of conducting a surreptitious investigation.

[19] The Arbitrator also said:

> The grievor may well have felt pressure to return to work full time. In a meeting between Mr. Russell, Mr. Dinner (another supervisor), and Mr. Lo on January 9, 2001 those members of management reviewed the grievor's expertise, his then medical restrictions, and discussed speaking to Human Resources regarding the use of sick time versus long term disability. They learned that an application for part-time LTD would prevent the grievor from accumulating sick leave so it was not pursued. Notes from that meeting (Ex.242) reflect that they concluded that they needed to go slow, keep the grievor challenged, and bring him into the group and get him involved. Mr. Russell did check with Dr. House every six months to get an update regarding the grievor's accommodation. He accepted the information he received. The employer was monitoring performance and was

> keeping its accommodation information current; both of which an employer is readily entitled to do.

[20] The Award did specifically deal with some aspects of the Warning Issue. On page 30, the Arbitrator noted that the supervisor in the neighbouring office made the Supervisor's Complaint, rather than speaking to the Applicant, because he was not the Applicant's supervisor. She also stated, on page 31, that it was proper for OPG not to speak to the Applicant after the start of the Preliminary OPG Investigation. She described the actions of Mr. Frank King, who was Mr. Russell's supervisor, in that regard and said:

> The union queried why the employer had simply not gone to the grievor and dealt with the matter directly, asserting that the employer was more interested in building a case than having the activity cease. Had the results of [the Preliminary OPG Investigation] disclosed different information one cannot now predict how the employer may have responded. As it turned out, it appeared to Mr. King that the grievor was engaged in a number of private commercial activities using employer time and assets. Mr. King was aware of the performance concerns identified to the grievor and of the employer's efforts to find him a more suitable assignment. In light of that knowledge and given the clear prohibition in the Code [OPG's Code of Business Conduct], there was nothing inappropriate about the employer's decision to gather more information about the nature and scope of the grievor's activities.

[21] As well, at page 26, the Arbitrator discussed the union's argument that OPG should have afforded progressive discipline to the Applicant instead of terminating him. The Arbitrator then said as follows at page 29:

> The conduct is extremely serious. It goes beyond the kind of activity referred to in the caselaw cited by the union. It is a breach of the most fundamental employment obligation. Any employer is entitled to expect that an employee understands that when you're at work, being paid by the employer, you are to perform work for that employer. One would normally assume that a Code of Conduct would not be required in order for an employee to appreciate this

> obligation. The time spent on personal matters goes well beyond any standard of reasonable use. In addition the exotic dancer business was engaged in without regard to the employer's reputation.

[22] On page 33, the Arbitrator concluded as follows:

> Having regard to all of the circumstances, I decline to exercise my discretion. I am not persuaded that there is an appropriate basis on which to set aside the employer's decision to terminate the grievor's employment and substitute a lesser penalty.

[23] However, the Award did not address why Mr. Russell did not warn the Applicant before he forwarded the Supervisor's Complaint to the office of the Vice President.

[24] Further, the Award did not mention the Performance Review Issue, the Distraction Issue or the Travelling File Issue even though evidence on those issues was before the Arbitrator.

DISCUSSION

[25] As noted above, the CHRC declined to investigate the Complaint because it was out of time, made in bad faith, and frivolous. I will address each of these findings in turn and will evaluate them using reasonableness as the standard of review. See *Khanna v. Canada (Attorney General)*, 2008 FC 576, 167 A.C.W.S. (3d) 761.

Was the Complaint Made Out of Time?

[26] Paragraph 41(1)(e) of the Act gives the CHRC discretion to refuse to deal with a complaint that is based on acts or omissions which occur more than one year before the complaint was received.

[27] The CHRC acknowledged that the Applicant was not aware of the Issues until evidence was adduced during the arbitration hearing. The CHRC held, however, that the Applicant should have filed the Complaint within a year of November 24, 2004, which was the last day of the hearing.

[28] In my opinion, that conclusion was unreasonable. The Applicant could not have been expected to know whether the matters which he alleged showed improper motivation had been considered by the Arbitrator until he read her Award. Since the Award was released on May 24, 2005 and the Complaint was filed within one year of that date, it was filed in time.

Was the Complaint Made in Bad Faith?

[29] In my view, it was not reasonable to conclude that the Complaint was made in bad faith. The Applicant may have slightly overstated his case when he told the CHRC that his human rights issues had not been dealt with “at all” by the Arbitrator. However, as discussed above, the Award did not specifically mention three of the four matters the Applicant says showed OPG’s improper motivation. As well, the Award did not fully consider the Warning Issue. In these circumstances, it

was reasonable for the Applicant to advise the CHRC that these matters had not been dealt with. This conduct did not amount to a bad faith attempt to re-litigate matters that had already been decided.

Was the Complaint Frivolous?

[30] The CHRC concluded that the Complaint was frivolous because "based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed." I agree with this conclusion. In my view, none of the Issues illustrate improper motivation. Accordingly, they are not capable of supporting a successful human rights complaint.

[31] I have the following comments on the Issues.

[32] Regarding the Performance Review Issue, there is no question that Mr. Russell was aggravated that an employee who was underperforming and missing deadlines was only working four days a week. His harsh remarks to OPG's health service support this conclusion. However, the evidence also shows that Mr. Russell did not control the OPG Investigations or OPG's decision to terminate the Applicant. As the Arbitrator found, after forwarding the Supervisor's Complaint to the Vice President's office and taking up the matter with his own supervisor, Mr. Russell "had no further involvement in the investigation."

[33] It is also significant that by March 25, 2002, two weeks before the Preliminary OPG Investigation was authorized, a decision had already been made to transfer the Applicant to a different department where he would work under a different supervisor. As well, it is noteworthy that the Supervisor's Complaint, which led to the OPG Investigations, was not made by Mr. Russell.

[34] For all these reasons, I see no basis for concluding that Mr. Russell's criticism of the Applicant behind his back suggests that OPG was motivated to fire the Applicant rather than to accommodate his disability.

[35] Regarding the Warning Issue, in light of the volume of telephone calls and e-mails that the Applicant made on non-OPG business, OPG had good cause to terminate him. The Arbitrator found that, in the egregious circumstances of this case, no progressive discipline was required.

[36] However, the Applicant says that Mr. Russell displayed improper motivation when, having received the Supervisor's Complaint, he sent it to the Vice President without first giving him a warning. In my view, this submission cannot succeed because the evidence shows that Mr. Russell was unsure of how to deal with the Supervisor's Complaint and that he sent it to the Vice President seeking procedural advice. This conduct does not suggest improper motivation. It is reasonable to conclude that Mr. Russell would be unsure about the procedure for dealing with a complaint about "a LOT" of personal calls.

[37] Regarding the Distraction Issue, the Supervisor's Complaint demonstrates that the OPG Investigations were launched because the Applicant had been overheard making "a LOT" of non-OPG-related telephone calls. This observation provided OPG with ample justification to begin the OPG Investigations. Against this background, the fact that someone in the Vice President's office incorrectly described the Supervisor's Complaint as having been about distracting behaviour as well as personal calls is not material.

[38] Finally, regarding the Travelling File issue, there is no evidence about when or why this file was created, who created it, what it contained, or how it may have been used. Given the lack of any evidence suggesting an improper motive, it was reasonable for the CHRC to conclude that in all the circumstances the mere existence of the travelling file did not justify an investigation.

CONCLUSION

[39] The CHRC erred in concluding that the Complaint was out of time and made in bad faith. However, it did not err in finding that the Complaint was frivolous. Accordingly, this application for Judicial Review will be dismissed.

[40] In view of the divided success, there will be no order as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that, for the reasons given above, this application for judicial review is hereby dismissed.

Sandra J. Simpson
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1886-07
STYLE OF CAUSE:	LADISLAV KONECNY v. ONTARIO POWER GENERATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 16, 2009
REASONS FOR JUDGMENT:	SIMPSON J.
DATED:	DECEMBER 17, 2009

APPEARANCES:

Ladislav Konecny	FOR THE APPLICANT
Helen C. Daniel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ladislav Konecny Toronto, ON	FOR THE APPLICANT
Helen C. Daniel Ontario Power Generation Inc. Toronto, ON	FOR THE RESPONDENT