

Federal Court



Cour fédérale

Date: 20100830

Docket: T-1955-08

Citation: 2010 FC 860

Ottawa, Ontario, August 30, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

PUI CHIU TSUI

Applicant

and

CANADA POST CORPORATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of a decision of the Canadian Human Rights Commission (the Commission), dated November 14, 2008, dismissing the applicant's human rights complaint against the respondent pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act). Paragraph 44(3)(b) of the Act requires dismissal where, having regard to all of the circumstances of the complaint, the Commission is satisfied that an inquiry into the complaint is not warranted.

[2] The applicant requests an order setting aside the Commission's decision and remitting the matter back to the Commission for a hearing, with the direction that the applicant and the Canada Post employee witnesses be interviewed.

Background

[3] The applicant, Pui Chiu Tsui, is employed as a letter carrier. He has been employed with the respondent, Canada Post, since 1988 and has occupied his current position since 2001. He self-identifies as a Canadian citizen of Chinese origin.

[4] On or about March 20, 2006, the applicant filed a complaint with the Commission alleging discrimination and harassment on the basis of race, national or ethnic origin and colour, contrary to the Act, in respect of alleged acts that occurred between the summer of 2004 and March of 2006 (the complaint). In the complaint, the applicant summarized the following allegations against his immediate supervisors at Canada Post:

- he was denied leave on September 13, 2004 to visit his mother who was very ill;
- he hurt his back while working and was not given any assistance by his two managers who he alleged were stalking him on his route;
- he was wrongly accused of creating overtime on his route on April 11, 2005 and was subsequently disciplined (the complaint also alleged that Canada Post's policy and practice of scrutinizing and monitoring overtime was applied more severely to letter carriers who were members of visible minorities);

- his sort table was moved away from his fellow employees on or about March 2005;
- eight hours pay was deducted in April of 2005 without notice;
- his supervisor had discussions about him with a co-worker and a union representative in his absence;
- he was wrongly accused of leaving 99 pieces of mail behind in August of 2005.
- he was treated differently than other employees in the conduct of an investigation into a complaint of harassment against him by another employee in October of 2005;
- he was treated differently insofar as his start time of his route was changed and when additional points of call were added on or about April 2005.

[5] The Commission initially declined to deal with the complaint pursuant to paragraph 41(1)(a) of the Act and directed the applicant to first exhaust the grievance and internal review procedures available to him.

[6] The applicant filed two internal human rights complaints, an internal privacy complaint and two letters of complaint to the President's Office and his union filed five grievances on his behalf, all of which were related to the same allegations as those set out in the complaint. The applicant was not satisfied with the outcome of any of these processes and in March of 2007, formally requested that the Commission deal with his complaint. Canada Post argued that the Commission should not deal with the complaint.

[7] After collecting information from the parties on the internal processes conducted thus far, the Commission agreed to deal with the complaint and appointed an investigator in December of 2007. In February 2008, the investigator requested Canada Post's position with respect to the complaint and additional information. In addition to reviewing corporate records and other documents, the investigator interviewed eleven Canada Post employees including the supervisors named in the complaint and a number of the applicant's co-workers. The applicant was not interviewed during the process.

[8] In August of 2008, the Commission provided Canada Post and the applicant with its investigation report. The investigation report recommended that the Commission dismiss the complaint because the evidence gathered did not support the applicant's allegations of discrimination or harassment on the basis of race, national or ethnic origin nor did it support that Canada Post engaged in a discriminatory policy or practice on the grounds of race, national or ethnic origin.

[9] The letter accompanying the investigation report outlined the next steps in the procedure. It indicated that the Commission could accept or reject the recommendations and the parties were given the opportunity to make submissions in response by September 4, 2008. After that date, the complaint, the investigation report and any submissions from the parties would be submitted to the Commission for a decision on the disposition of the case.

[10] In a letter dated November 14, 2008 and a corrected version dated January 20, 2009, the Commission advised the parties that, based on the investigation report and the submissions, it had decided to dismiss the complaint pursuant to paragraph 44(3)(b) of the Act because (i) the evidence gathered did not support the applicant's allegation of discrimination; and (ii) the evidence gathered did not support the allegation that Canada Post had engaged in a discriminatory policy or practice based on the grounds of race, national or ethnic origin (the decision). The result of the decision is that the complaint did not proceed to the Canadian Human Rights Tribunal (the tribunal).

Issues

[11] The issue in this case is as follows:

Did the Commission breach its duty of fairness to the applicant by failing to afford the applicant an oral hearing and thus not having full regard to all the circumstances of the complaint?

[12] There is no dispute regarding the standard of review. Matters of procedural fairness fall to be reviewed against the standard of correctness (see *Boldy v. Royal Bank of Canada*, 2008 FC 99, 77 Admin. L.R. (4th) 43, [2008] F.C.J. No. 135 (QL) at paragraph 11). Nor is there any dispute that decisions of the Commission under subsection 44(3) are discretionary and that those decisions are to be afforded deference (see *Bateman v. Canada (Attorney General)*, 2008 FC 393, [2008] F.C.J. No. 510 (QL) at paragraph 20, *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392, 263 D.L.R. (4th) 113 at paragraph 47, *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574, [1994] F.C.J. No. 181 (QL) (T.D.) (aff'd [1996] F.C.J. No. 385 (QL) (C.A.)).

Applicant's Written Submissions

[13] The applicant submits that the duty of fairness required the Commission to interview him personally during its investigation, allow him an opportunity to cross-examine Canada Post's witnesses and allow him to present his case in full. The applicant submits that had he been interviewed, he would have been able to lead specific evidence regarding the claim of discrimination. The Commission, in fulfilling its duty to screen complaints, must have regard to all of the circumstances of the complaint, including all of the facts and allegations placed before it. The failure to interview him meant that the facts and circumstances that could have been gleaned directly from the applicant were not considered by the Commission in making its decision. This failure was aggravated by not giving the applicant an opportunity to cross-examine Canada Post's witnesses. Simply allowing the applicant to make written submissions in reply to the investigation report was insufficient.

[14] The full impact of the treatment of the applicant was not properly assessed. The Commission is fully equipped to conduct oral interviews and given the complexity of the facts in the present case, should have done so.

Respondent's Written Submissions

[15] The respondent submits that at the screening stage, there is no requirement for the Commission to hold a formal hearing. Fairness at this stage does require that the Commission

inform the parties of the substance of the evidence obtained by the investigator and give the parties the opportunity to respond to the evidence and make any relevant submissions. This was done.

[16] The investigation must satisfy the conditions of neutrality and thoroughness, but deference must be given to assess the probative value of the evidence and decide whether further investigation is necessary. Here, there was no crucial evidence that the investigator failed to obtain.

[17] There was no obligation to interview the applicant. The investigator interviewed a number of witnesses as part of her investigation into each of the allegations in the complaint, many of them co-workers with no allegiance to Canada Post's position. Nor was there a duty to permit cross-examination during the investigation process. In any event, the evidence of each witness was summarized in the investigation report which the applicant reviewed and commented on. There is simply no basis for the applicant's assertion that he was not provided the opportunity to present his case in full.

Analysis and Decision

[18] The Commission acts as an administrative and screening body, deciding whether a complaint should be referred to the tribunal under sections 44 and 49 of the Act. The Commission does not decide a complaint on its merits at this stage, but determines whether having regard to all the circumstances, it is satisfied that an inquiry into the complaint is warranted. As such, its decisions are administrative in nature and therefore discretionary (see *Niaki v. Canada (Attorney*

General), 2006 FC 1104, [2006] F.C.J. No. 1393 (QL) at paragraph 29, (also see *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879, [1989] S.C.J. No. 103 (QL) (*SEPQA*) and *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115 (QL) at paragraph 53).

[19] In the present case, the Commission made an initial decision to proceed with its own inquiry. This decision tasked the Commission with investigating the applicant's complaint of discrimination and harassment on account of his race, national or ethnic origin and determining whether it warranted further inquiry. In doing so, the Commission had to consider whether there was a reasonable basis in the evidence to support a breach of the Act.

[20] Among the Commission's duties in exercising its discretion under subsection 44(3), its ability to weigh the evidence presented to it by the investigation process is entitled to the highest degree of deference: (see *Naiki* above, at paragraph 39).

[21] The Commission has been conferred a significant degree of deference in choosing its own processes and procedures, especially in fulfilling its administrative and screening functions under the Act. This Court and the Federal Court of Appeal have repeatedly stated that the investigation process is not intended to provide the full range of natural justice to a complainant and that there is no right to quasi-judicial procedures such as an oral hearing or cross-examination of witnesses (see *McConnell v. Canada (Canadian Human Rights Commission)*, 2004 FC 817, [2004] F.C.J. No. 1005 (QL) at paragraph 90, *aff'd* 2005 FCA 389).

[22] In *Syndicat des employés de production du Québec et de l'Acadie (SEPQA)* above, Mr. Justice Sopinka held that procedural fairness requires that the Commission inform the parties of the substance of the evidence obtained by the investigator, which will be put before it, and give the parties the opportunity to respond to the evidence and make all relevant representations in relation thereto (at paragraph 30).

[23] That this is the extent of the requirements of procedural fairness on the Commission has been confirmed time and again (see *Canadian Broadcasting Corp. v. Paul*, 2001 FCA 93, 198 D.L.R. (4th) 633 at paragraph 43 and *Naiki* above, at paragraph 46).

[24] However, if the Commission merely adopts the recommendations of the investigation report, there are two significant effects on a subsequent judicial review of the decision. First, the reviewing court may treat the report as constituting the Commission's reasoning (see *SEPQA* above, at paragraph 35, *Naiki* above, at paragraph 19, *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113, (C.A.) at paragraph 30, [1998] F.C.J. No. 1609 (QL)). Second, the creation of the investigation report itself becomes part of the decision-making process which must conform to the duty of fairness: (see *Slattery* above).

[25] Mr. Justice Nadon, in *Slattery* above, at paragraph 48, considered the requirements facing the Commission under subsection 44(3) and noted:

...underlying these requirements is the assumption that another aspect of procedural fairness-that the CHRC had an adequate and fair basis on which to evaluate whether there was sufficient evidence to warrant appointment of a tribunal-existed.

[26] The substance of Mr. Justice Nadon's concern was that the investigation itself be of sufficient quality so as to present the facts of the complaint in a fair manner. He continued:

49 In order for a fair basis to exist for the CHRC to evaluate whether a tribunal should be appointed pursuant to paragraph 44(3)(a) of the Act, I believe that the investigation conducted prior to this decision must satisfy at least two conditions: neutrality and thoroughness.

[27] The requirements of neutrality and thoroughness appear to arise only from the jurisprudence, as section 43 of the Act, while setting out that some of the broad investigative powers of the Commission does not contain any restrictions on the Commission's ability to conduct as minimal, an investigation as it sees fit.

[28] I would adopt the above comments from *Slattery* above, and agree that when the report of an investigator proves to be highly influential to the Commission, the Commission's decision-making process cannot be considered fair unless the report itself is neutral and is reasonably thorough.

[29] This brings us to the applicant's allegations of procedural unfairness, because after all, he does not challenge the procedures of the Commission *per se*, but the investigation report which the Commission adopted. As noted in those situations, the duty of fairness only requires that the investigation and report be neutral and thorough and does not require any quasi-judicial procedures. Thus, the applicant's specific allegations regarding the content of the duty of fairness (i.e. the lack of a personal interview by the investigator and the lack of an opportunity to cross-examine

witnesses) will only be a breach of procedural fairness if shown that those omissions resulted in a lack of neutrality or thoroughness.

[30] An applicant's ability to challenge the fairness of a Commission decision under subsection 44(3) on the basis that the report adopted lacked thoroughness was affirmed by Mr. Justice de Montigny in *Naiki* above, at paragraph 26.

[31] The requirement of neutrality stems from the notion that administrative processes must be free of bias and free of the appearance of any bias in order to be fair. Neutrality is offended when an investigator makes conclusions in a way which may be characterized as biased and when the Commission subsequently adopts those conclusions without giving reasons (see *Slattery* above, at paragraph 50).

[32] The requirement of thoroughness stems from the essential role that investigators play in determining the merits of each complaint (see *Slattery* above, at paragraph 53, *SEPQA* above, at page 898). However, the desire for thoroughness must be balanced against the Commission's limited resources and its need to allocate them between competing needs. Thus, judicial review for a lack of thoroughness in the investigation is only warranted where an investigator misses obviously crucial evidence and when such an omission cannot be addressed adequately with subsequent submissions directly to the Commission (see *Slattery* above, at paragraph 56).

[33] Support for this position is found in the recent decision of Mr. Justice de Montingny in *Naiki* above, at paragraph 40, where he noted that if the Commission affords an applicant the opportunity to bring such omissions to its attention in the form of submissions, an applicant must explain how this ability does not compensate for the omission.

[34] Mr. Justice Nadon in *Slattery* above, considered two instances where this may occur:

57 Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission 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.

[35] The law thus requires an applicant to bring to the court's attention the substance of what was missed or omitted and not simply state the investigative steps the investigator failed to take. After all, if an omitted investigative step does not result in the missing of any evidence in the resulting report, the omission cannot have resulted in procedural unfairness.

[36] In *Naiki* above, although the thoroughness of an investigation report was not overly analyzed by the Court, the applicant's ability to bring forth new evidence when making such a challenge was affirmed as a necessary exception to the general rule barring evidence not before the tribunal whose decision is the subject of review (at paragraph 26).

[37] The requirement that an applicant point out or bring forth the substance of the omission, is similar to the requirement in other cases where a breach of procedural fairness is claimed, that the applicant show some prejudice as a result of the breach (see *Naiki* above, at paragraph 43).

[38] The failure of the applicant in *Slattery* above, to point to any such evidence, was fatal to her allegation of a breach of procedural fairness. Indeed, Mr. Justice Nadon stated:

64 ... Most importantly, the applicant has failed to demonstrate to me what aspect, if any, of this inaccessible evidence that was not obtained by the investigator (and was therefore not before the CHRC when it dismissed the applicant's complaints) is fundamental to the outcome of her case.

[39] In the present case, the absence of direct challenges by the applicant to the findings of facts within the investigation report is telling. If the facts he claims were missed by the investigator in failing to interview him were crucial enough to have satisfied the test in *Slattery* and *Naiki* above, one would expect that the substance of those facts would have been brought to the attention of the Commission when it gave the applicant the opportunity to make submissions and would be alleged again here on judicial review. Yet, the applicant does not make any such allegations or divulge such facts.

[40] The Court in *Slattery* above, believed that applicants must divulge the substance of the alleged omissions before the reviewing court may hold that, as a matter of fairness, the investigator ought to have discovered it.

[41] If the evidence which could have been gathered for the investigation report by interviewing the applicant is impossible to bring before the Court now, the applicant must at least explain why this is so. This also applies to evidence which would have been gathered from cross-examinations. He offers no such explanation. Without any evidence of crucial evidence missed by the investigation report, there is no basis upon which to consider that the report was not sufficiently thorough.

[42] For similar reasons, I find no merit in the applicant's allegation that he was prevented from presenting his case in full to the Commission. Without a specific complaint about what was missing or how a procedural omission impeded his case, it is an empty allegation.

[43] A review of the investigation report shows that each incident complained of by the applicant was addressed and that the investigator's findings were clearly set out. There is no evidence that the investigator was denied access to any information he sought. The evidence of some witnesses interviewed by the investigator appeared sympathetic to some of the applicant's allegations, but could not corroborate them. The evidence of other witnesses seriously impugned the credibility of the applicant's allegations. The investigator, on the evidence before me, appears to have been both neutral and thorough.

[44] The evidence of each witness was summarized in the investigation report, which the applicant reviewed and commented on. His submissions on the investigation report were before the

Commission when it rendered its decision. Accordingly, there is no basis on which it can be found that the applicant was denied procedural fairness.

[45] The application for judicial review is therefore dismissed.

JUDGMENT

[46] **IT IS ORDERED that** the application for judicial review is dismissed.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

Canadian Human Rights Act, R.S.C. 1985, c. H-6

43.(1) The Commission may designate a person, in this Part referred to as an “investigator”, to investigate a complaint.

(2) An investigator shall investigate a complaint in a manner authorized by regulations made pursuant to subsection (4).

(2.1) Subject to such limitations as the Governor in Council may prescribe in the interests of national defence or security, an investigator with a warrant issued under subsection (2.2) may, at any reasonable time, enter and search any premises in order to carry out such inquiries as are reasonably necessary for the investigation of a complaint.

(2.2) Where on ex parte application a judge of the Federal Court is satisfied by information on oath that there are reasonable grounds to believe that there is in any premises any evidence relevant to the investigation of a complaint, the judge may issue a warrant under the judge’s hand authorizing the investigator named therein to enter and search those premises

43.(1) La Commission peut charger une personne, appelée, dans la présente loi, « l’enquêteur », d’enquêter sur une plainte.

(2) L’enquêteur doit respecter la procédure d’enquête prévue aux règlements pris en vertu du paragraphe (4).

(2.1) Sous réserve des restrictions que le gouverneur en conseil peut imposer dans l’intérêt de la défense nationale ou de la sécurité, l’enquêteur muni du mandat visé au paragraphe (2.2) peut, à toute heure convenable, pénétrer dans tous locaux et y perquisitionner, pour y procéder aux investigations justifiées par l’enquête.

(2.2) Sur demande ex parte, un juge de la Cour fédérale peut, s’il est convaincu, sur la foi d’une dénonciation sous serment, qu’il y a des motifs raisonnables de croire à la présence dans des locaux d’éléments de preuve utiles à l’enquête, signer un mandat autorisant, sous réserve des conditions éventuellement fixées, l’enquêteur qui y est nommé à perquisitionner dans

for any such evidence subject to such conditions as may be specified in the warrant.	ces locaux.
(2.3) In executing a warrant issued under subsection (2.2), the investigator named therein shall not use force unless the investigator is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.	(2.3) L'enquêteur ne peut recourir à la force dans l'exécution du mandat que si celui-ci en autorise expressément l'usage et que si lui-même est accompagné d'un agent de la paix.
(2.4) An investigator may require any individual found in any premises entered pursuant to this section to produce for inspection or for the purpose of obtaining copies thereof or extracts therefrom any books or other documents containing any matter relevant to the investigation being conducted by the investigator.	(2.4) L'enquêteur peut obliger toute personne se trouvant sur les lieux visés au présent article à communiquer, pour examen, ou reproduction totale ou partielle, les livres et documents qui contiennent des renseignements utiles à l'enquête.
(3) No person shall obstruct an investigator in the investigation of a complaint.	(3) Il est interdit d'entraver l'action de l'enquêteur.
(4) The Governor in Council may make regulations	(4) Le gouverneur en conseil peut fixer, par règlement :
(a) prescribing procedures to be followed by investigators;	a) la procédure à suivre par les enquêteurs;
(b) authorizing the manner in which complaints are to be investigated pursuant to this Part; and	b) les modalités d'enquête sur les plaintes dont ils sont saisis au titre de la présente partie;
(c) prescribing limitations for the purpose of subsection (2.1).	c) les restrictions nécessaires à l'application du paragraphe (2.1).

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| 44.(1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation. | 44.(1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête. |
| (2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied | (2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas : |
| (a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or | a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts; |
| (b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act, it shall refer the complainant to the appropriate authority. | b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale. |
| (3) On receipt of a report referred to in subsection (1), the Commission | (3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission : |
| (a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied | a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue : |
| (i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and | (i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié, |

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| (ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or | (ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e); |
| (b) shall dismiss the complaint to which the report relates if it is satisfied | b) rejette la plainte, si elle est convaincue : |
| (i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or | (i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié, |
| (ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e). | (ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e). |
| (4) After receipt of a report referred to in subsection (1), the Commission | (4) Après réception du rapport, la Commission : |
| (a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and | a) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des paragraphes (2) ou (3); |
| (b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3). | b) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3). |
| 49.(1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to | 49.(1) La Commission peut, à toute étape postérieure au dépôt de la plainte, demander au président du Tribunal de désigner un membre pour instruire la plainte, si elle est convaincue, compte tenu des |

all the circumstances of the complaint, an inquiry is warranted.

circonstances relatives à celle-ci, que l'instruction est justifiée.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1955-08

STYLE OF CAUSE: PUI CHIU TSUI
- and -
CANADA POST CORPORATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 2, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: August 30, 2010

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