

Federal Court



Cour fédérale

Date: 20100917

Docket: T-290-09

Citation: 2010 FC 935

Ottawa, Ontario, September 17, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JAIME H. ORTIZ

Applicant

and

**THE ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR ORDER AND ORDER

[1] For many years Mr. Ortiz provided Spanish-English translation services to the Immigration and Refugee Board (IRB). He worked in Greater Toronto, primarily at two detention centres. He signed a series of one-year contracts, the last for the calendar year 2006. However, he was not provided with any work that year. This led him to eventually complain to the Canadian Human Rights Commission that he was a victim of age discrimination. The Commission appointed an

investigator who reported that in her opinion the evidence did not support his contention. Rather than appoint a conciliator or refer the matter to the Canadian Human Rights Tribunal for a full hearing, the Commission endorsed that report and dismissed the complaint. Mr. Ortiz has sought a judicial review of that decision.

[2] The investigator took jurisdiction on the grounds that whether Mr. Ortiz was an employee as he asserted, or an independent contractor as the IRB asserted, his services had been employed and so the issue of discrimination could be examined.

[3] There are two grounds on which Mr. Ortiz seeks judicial review. The first is that the manner in which the investigator went about her business was procedurally unfair. The second is that the decision of the Commission to dismiss his complaint was unreasonable.

[4] Mr. Ortiz, who was self-represented, did not have a clear idea of the remedies available to him on judicial review. He asked for costs including the monies he would have earned from January 2006 through to the date he signed his memorandum of fact and law, which was in June of this year. I explained to him that if I granted his application the remedy would be to refer the matter back to the Commission for a fresh investigation. Costs in this Court do not extend to income allegedly lost.

[5] The basis of the procedurally unfair submissions is that the investigator interviewed seven witnesses proposed by the IRB, and only one of the four Mr. Ortiz proposed. Mr. Ortiz was interviewed by telephone. He submits he should have been interviewed face to face. In addition, he

was not given a fair opportunity to respond to the position taken by the IRB. Had there been a more fulsome examination, the investigation should have concluded that he had been the victim of adverse discrimination.

[6] The short answer is that even if the investigation was procedurally unfair, and I specifically find that it was not, the outcome of another investigation could only be the same. It is an undeniable fact that Mr. Ortiz, who was in his mid-50s, was one year younger than the average age of interpreters used by the IRB at the time (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 163 N.R. 27). Whatever discrimination there may have been could not have been based on age.

[7] Mr. Ortiz's real complaint is that he has been victimized by Ms. Rita Prashad, the Head of the Interpreters and Recordings Unit of the Central Region of the IRB, who did not like him personally, and because he attempted to act as a union organizer. It was she who directed that he be given no more work. Even if such be true, such remedies as may be available to Mr. Ortiz do not include intervention by the Commission. The bases of the Commission's jurisdiction are grounds of discrimination which are prohibited under the *Canadian Human Rights Act*, i.e. "race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted" (section 3).

[8] Matters came to a head in December 2005 when, according to the IRB, Mr. Ortiz did not show up at a detention hearing. He claims that he was led to understand that as a result his

employment was terminated. The coordinator is said to have informed him that Ms. Prashad had instructed him not to call him for future work assignments. Mr. Ortiz called Ms. Prashad, and this is his recollection of the conversation:

Ms. Prashad stated to me that "The suspension was going to be a lengthy one" and when I asked her again the reason Ms. Prashad said, **"You're always late, maybe if you were younger things would be different"**.

[Mr. Ortiz's emphasis.]

Ms. Prashad denies making any comment with respect to age. Although he was given no work for a while, he was offered and signed a new contract for 2006. The IRB say they called him for work, but he never responded. He denies being called but on the other hand concedes that he never called the IRB for work in 2006.

[9] The investigator concluded that Mr. Ortiz's lack of employment opportunities during the year 2006 resulted from his consistent breaches of contract in arriving for work late, or not showing up at all, and his failure to advise as to his availability to work. The investigator's conclusions rested in large measure on credibility findings and there is nothing in the record to suggest her conclusions were not thought out and reasonable. Mr. Ortiz simply wants the Court to reweigh the evidence.

[10] The IRB's position is that commencing in 2003 and 2004, as a result of complaints of interpreters showing up late, ten interpreters, including Mr. Ortiz, were cautioned. He was cautioned in September 2004. While Mr. Ortiz recalls a meeting at that time, he said that a caution was not on the agenda.

[11] From then until 20 December 2005, he was late 41 times and did not show up twice. The culminating event was the failure to show at a detention centre on 20 December 2005. He says that he did but that the centre was subject to a lock-down and he called the IRB to report same. The person he says he called does not recall one way or another. The IRB's records indicate that he was supposed to be at another centre and that the only required interpretation at the detention centre he said he presented himself at was Polish-English and that it proceeded, *i.e.* there was no lock-down.

[12] While Mr. Ortiz admits that he may have been late on a few occasions, he said that the sign in records that show him late some 40 times were falsified. In particular he says it was a requirement that he personally sign the sign-in sheets. The sheets in question were not signed. However, a witness whose name he submitted supported the IRB's position that interpreters sometimes sign in, and sometimes were signed in. Although Mr. Ortiz had an opportunity to contest the accuracy of the records, he did not produce his own diary for the days in questions.

[13] As to the lack of work in 2006, the IRB contends that it would call interpreters and vice versa. Mr. Ortiz claims that the policy was "don't call us we'll call you". However, the witness whose name he proposed confirmed the IRB's position.

[14] As to the three other potential witnesses identified by Mr. Ortiz, as indicated by the investigator in her report, they were either reluctant to talk or set out impossible conditions. Even if Mr. Ortiz is correct that they were afraid of reprisals on the basis that there were too many

interpreters and not enough work, and that favouritism played a role, again the *Human Rights Act* is not engaged.

[15] The investigator enjoys considerable latitude in the manner in which she went about her work. The authorities were recently reviewed by Mr. Justice Zinn in *McFadyen v. Canada (Attorney General)*, 2009 FC 78, 340 F.T.R. 221 and *Tinney v. Canada (Attorney General)*, 2010 FC 605, [2010] F.C.J. No. 744 (QL). I cannot improve upon what Mr. Justice Zinn said at para. 45 of *McFadyen*:

Fifth, the applicant alleges that the investigation was not thorough as the investigator failed to interview “a number of vitally connected decision makers” at CRA. This cannot be sustained. First, I find that the investigator did question those at CRA who had been the most critical decision-makers, namely Ms. McGetchie and Ms. McKenny and, in addition, had an interview with Ms. Erskine who was a senior Rulings Officer at CRA. Justice Nadon of the Federal Court – Trial Division, as he then was, in *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574, at para.69, has observed that the fact that an investigator has not interviewed every witness that an applicant would have liked to be interviewed is not necessarily fatal to the validity of the report. The investigator is the master of his or her own process. The investigators are experienced and knowledgeable in this area and ought to be accorded wide latitude in how they conduct their investigations. When, as here, the key witnesses are interviewed, the Court should exercise restraint in finding that the investigation was flawed because others were not investigated, unless there is clear and cogent evidence that those not interviewed had critical evidence to offer. There is no such evidence here, and I find that the decision of the investigator as to whom she would interview was reasonable.

[16] As is the practice of the Commission, the investigator’s report and the comments of the IRB had been circulated and Mr. Ortiz was given a full opportunity to respond.

[17] To summarize, the investigator went about her work in a fair and reasonable way. Her report and the conclusions therein were well thought out and reasoned, as was the decision of the Commission to dismiss the complaint rather than entertain it further or to refer it to the Tribunal.

[18] With respect to costs, during the hearing I pointed out to both parties that the Court much prefers to award lump sum costs and worked out figures should the judicial review be granted or dismissed.

[19] Mr. Ortiz took the position that if it were dismissed that he had been penalized enough. Even if there were merit to this position, he certainly was not penalized by the Commission. I award the respondent lump sum costs of \$1,500, which are quite modest in that a full taxation would undoubtedly result in a higher award.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that this application for judicial review is dismissed with costs in the favour of the respondent in the lump sum of \$1,500.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-290-09

STYLE OF CAUSE: Jaime H. Ortiz v. AGC

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 15, 2010

**REASONS FOR ORDER
AND ORDER:** HARRINGTON J.

DATED: September 17, 2010

APPEARANCES:

Jaime H. Ortiz	FOR THE APPLICANT (ON HIS OWN BEHALF)
Gillian Patterson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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