

CANADA / JUDGMENT

Lee v. Bank of Nova Scotia

2002 FCT 753

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Federal Court

DECIDED

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Lee v. Bank of Nova Scotia

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Decision Content

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BETWEEN:

DOUGLAS M. LEE,

Applicant,

- and -

THE BANK OF NOVA SCOTIA,

Respondent.

REASONS FOR ORDER

LAYDEN-STEVENSON J.

- [1] This is an application for judicial review of the decision of the Canadian Human Rights Commission (CHRC) dated March 22, 2000, dismissing a complaint filed by the applicant, Douglas M. Lee. Mr. Lee had alleged that his former employer, the Bank of Nova Scotia, had discriminated against him on the prohibited grounds of age and race. He seeks an order granting the application for judicial review and an appropriate remedy binding on the CHRC. Mr. Lee alleges that the CHRC breached its duty of procedural fairness when dealing with his complaint.
- [2] Mr. Lee began working for the Bank of Nova Scotia in 1967, and with the exception of two years in the 1970s, worked continuously for the respondent in various roles until his termination in January 1999. In 1998, the applicant was employed as an Operations Officer in the Group Retirement Services (GRS) unit. In June of that year, the bank decided to relocate the GRS unit to Stratford, Ontario and announced that those GRS employees who did not wish to move to Stratford would have to find new positions at the bank. These employees were offered salary protection for a period of two years, meaning that if their new positions with the bank were at a lower level than their current positions, they were guaranteed salary and benefits commensurate with their former positions for the next two years.
- [3] At some point following its announcement of the move, the bank came to be under the impression that the applicant was refusing to relocate and began advising him with respect to other vacancies. The bank claimed that Mr. Lee was referred to and offered a number of positions, the first of which was a position as an Investment Adjustment Officer in the Investment Products Support Unit. This position, the bank said, was offered to the applicant in September 1998 and was subsequently declined by Mr. Lee as it was at a lower level than his position with the GRS unit.
- [4] The applicant acknowledged at least one of the bank's alleged offers. He claimed that on October 1, 1998, he was suddenly told to report to the Scotia Mutual Funds (SMF) department the following day for a lower-level job. He refused to do so and claimed that the bank's attempts to force him to take a job below his current level of employment amounted to constructive dismissal. As of October 2, 1998, the applicant ceased reporting to work.
- [5] On October 15, 1998, the applicant sent a letter to the bank complaining of unfair treatment. On the same day, he informally sought the CHRC's advice on how to proceed with complaints. As a result of the applicant's complaint to the bank, he was invited to a meeting with the Senior Vice-President, Human Resources on October 22, 1998. The meeting was also attended by two other managers.

- [6] The bank claimed that, at this meeting, the applicant was offered a position as a Taxation and Estates Officer, which, while at a lower level, included training and the salary protection package. Some negotiation ensued, but the applicant ultimately did not report to work and thus presumably declined the offer as of, at the latest, December 21, 1998. The evidence indicated that the applicant did not feel that he was qualified for the position and felt that the training proposed by the bank was insufficient.
- [7] On November 3, 1998, the bank's Senior Vice-President, Human Resources, wrote to the applicant noting his continued absence and indicating that, unless an explanation of his absence was provided by November 12, 1998, his salary would be discontinued. The letter went on to indicate that if the applicant were to return to work, he would be assigned to the Customer Support Unit, "carrying out duties as assigned, including duties associated with the Group Retirement Reconciliation process" and that this assignment would last until January 29, 1999. The letter concluded by stating that the bank could not protect the applicant's employment if he continued to turn down offers and that if he failed to find a job, his employment protection would cease as of February 1, 1999 and he would be terminated.
- [8] On November 13, 1998, a second letter was sent by the bank to the applicant indicating that the bank did not wish to terminate the applicant but that, if he continued to be absent and failed to provide "a legitimate explanation of his absence" by November 23rd, the bank would consider that he had abandoned his employment.
- [9] The bank wrote to the applicant a third time on December 19, 1998 advising him that, if he did not report to work by December 21st, he would be deemed to have resigned his position.
- [10] The applicant's employment was terminated by letter dated January 6, 1999.
- [11] The applicant filed two complaints regarding the termination of his employment. On January 11, 1999, he complained to Human Resources Development Canada (HRDC) regarding the "labour" issues related to his dismissal. On January 28, 1999, the applicant filed his complaint with the CHRC, alleging that his dismissal was discriminatory on the basis of age and race. Specifically, the applicant noted that, when his department was relocated, his younger Caucasian colleagues were provided with equivalent or better jobs, while he and a manager, the older members of the department, were offered demotions. It is the CHRC's disposition of the latter complaint that is the subject of this judicial review proceeding. In particular, the Court is called upon to examine the fairness of the process followed by the CHRC's investigator.
- [12] On April 28, 1999, the CHRC assigned an investigator to the applicant's file. Having been provided with the applicant's complaint, the bank submitted a response to the investigator on June 22nd. On July 7th, the investigator forwarded a summary of the bank's submissions to the applicant for rebuttal, giving him a deadline of August 17, 1999. The applicant sent a 197 page rebuttal on August 19th.

- [13] By December 8, 1999, the investigator had completed his report, recommending that the Commission dismiss the applicant's complaint. This report was sent to the parties for review and commentary prior to its submission to the Commission. The report was sent first to the applicant and then to the respondent bank.
- [14] In his covering letter to the applicant, which contained the invitation for comment on the report, the investigator set a 10 page limit and a deadline date of December 27, 1999. The applicant submitted his comments, on 8 ½ pages, on December 15th. The investigator then sent a copy of his report as well as the applicant's responsive comments to the bank and informed it that it was "entitled to comment on new material facts", set a 10 page limit and a deadline date of January 10, 2000. On January 27th, the bank submitted a 24 page commentary responding to the applicant's December 15th submission on a point-by-point basis, and included approximately 40 pages of appendices, including its entire June 22, 1999 submission.
- [15] The Commission's Record filed with the Court indicates that the Commission had the following documents before it at the time of its decision: (i) the complaint form; (ii) the investigator's report; (iii) the applicant's December 15, 1999 comments on the report; and (iv) the respondent's January 27, 2000 comments on the report, which included the rebuttal to the applicant's December 15th comments and the 40 pages of appendices.
- [16] In letters dated March 22, 2000, the Commission communicated its decision to both parties. The Commission specified that it had read the investigator's report and the parties' responses, and had decided to dismiss the complaint on the following grounds:
- 1) The evidence did not support the allegation that the respondent had discriminated against the applicant based on his race or age;
 - 2) The evidence did show that the respondent had offered the applicant two positions, but these offers were rejected; and
 - 3) The evidence supports the respondent's position that the applicant's employment was terminated only after he failed to report to work.

It is of this decision that the applicant seeks judicial review.

- [17] As the issue arose at the hearing, and for ease of reference and clarification, the procedure of the CHRC in its investigation of a complaint will be briefly summarized.
- [18] Once the CHRC appoints an investigator to a complaint, it is the role of the investigator to create a record for the Commission, based on which the Commission will decide either to dismiss the complaint or appoint a tribunal to resolve the matter. Section 44 of the Canadian Human Rights Act, R.S.C. 1985, c. H-6 (the Act) governs this stage of the proceedings, the relevant passage of which reads:

44.(3) On receipt of a report referred to in subsection (1), the 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
- (i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and
- (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
- (b) shall dismiss the complaint to which the report relates if it is satisfied
- (i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or
- (ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

44.(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission_:

- 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) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,
- (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) rejette la plainte, si elle est convaincue_:
- (i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
- (ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

In this case, the Commission dismissed the complaint under s. 44(3)(b)(i).

[19] In its role under s. 44, the Commission performs a screening function that is discretionary in nature and which is therefore entitled to great deference. In the recent case of *Gee v. The Minister of National Revenue*, 2002 FCA 4, [2002] F.C.J. No. 12, the Federal Court of Appeal considered the standard of review for decisions of the Commission and, at paragraph 13, reviewed the relevant caselaw:

This Court has on various occasions noted the deference which should be shown to the Commission in respect of its decisions, after receipt of an Investigation Report, as to whether to dismiss the complaint or refer it to a tribunal. For example, it was stated in *Bell Canada v. Communications, Energy and Paperworkers Union of Canada* ([1999] 1 F.C. 113 (C.A.)):

Exercise of discretion

[38] The Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report. Subsections 40(2) and 40(4) and sections 42 and 44 are replete with expressions such as "is satisfied", "ought to", "reasonably available", "could more appropriately be dealt with", "all the circumstances", "considers appropriate in the circumstances" which leave no doubt as to the intent of Parliament. The grounds set out for referral to another authority (subsection 44(2)), for referral to the President of the Human Rights Tribunal Panel (paragraph 44(3)(a)) or for an outright dismissal (paragraph 44(3)(b)) involve in varying degrees questions of fact, law and opinion (see *Latif v. Canadian Human Rights Commission*, [1980] 1 F.C. 687 (C.A.), at page 698, *Le Dain J.A.*), but it may safely be said as a general rule that Parliament did not want the courts at this stage to intervene lightly in the decisions of the Commission.

More recently this Court in *Zundel v. Attorney General of Canada et al* ((2000), 267 N.R. 92 at para. 5) endorsed a Trial Division decision ([1999] 4 F.C. 289, at paras. 46-49) that the standard of judicial review of a decision of the Commission under section 44, to refer a matter after investigation to a tribunal, should be that of a determination as to whether there was a rational basis for the decision. In *Bradley v. Attorney General of Canada* ((1999), 238 N.R. 76) this Court held that the standard of review of a decision taken by the Commission under subsection 44(3) of the Act to dismiss a complaint instead of appointing a conciliator was that of reasonableness. I respectfully concur with my colleagues in this respect and accept that the standard of review for the exercise of the discretion provided in subparagraph 44(3)(b)(i) to dismiss a complaint is that of reasonableness. This is the standard to be applied in the present case. ...

[20] As the Commission has delegated investigation and seeks at this stage simply to determine whether a complaint warrants the appointment of a tribunal to conduct an inquiry, it makes sense that the investigator would parse through the submissions, summarize them, and submit to the Commission a record limited to his or her report and any responses thereto. This appears to be consistent with the practice of the CHRC to have the investigator submit only the original complaint, the investigator's report and the parties' responses to the report in his submission to the Commission under s. 44(1) of the Act.

[21] Therefore, although in this case the parties made additional submissions to the investigator, namely the bank's response to the applicant's complaint dated June 22, 1999 and the applicant's subsequent rebuttal dated August 19, 1999, these were received with the apparent intention that they be considered only by the investigator in the process of compiling his report to the Commission.

[22] One other aspect of the Commission's process requires comment and clarification. It appears to be the common practice of the CHRC at the investigation stage to prepare summaries of a respondent's position, and provide the summaries to the complainant for rebuttal. However, the respondent apparently receives complete, unedited versions of the applicant's submissions for comment.

[23] The central question in this judicial review proceeding is whether these elements of the CHRC's procedure are fair, and if so, whether they were fairly applied to the parties in the circumstances of this case.

[24] While a number of grounds were raised in the submissions of the parties, oral argument at the hearing was focussed on considerations of procedural fairness. Basically, there are two issues that arise in this application:

- (1) Did the disclosure to the bank of unexpurgated copies of Mr. Lee's submissions, while he received only summaries of the bank's submissions, violate the applicant's right to procedural fairness?
- (2) Did the imbalance in the quantity of material from the parties before the Commission lead the Commission to decide to dismiss Mr. Lee's complaint on an unfair basis?

It is the applicant's broad contention that these procedural problems amount to a denial of fairness and thus the decision of the Commission was not made on a proper basis.

[25] The applicant is concerned that he only received summaries of the respondent's submissions while the respondent received copies of the applicant's documents. The applicant contends that this constitutes inadequate disclosure, or at least, unequal treatment.

[26] On this issue, the respondent cites *Miller v. Canada* (Canadian Human Rights Commission) (1996), 112 F.T.R. 195, in which, at 203, Dubé J. discussed the disclosure rule:

The rule of procedural fairness requires that a complainant know the substance of the case against him or her. The complainant is not entitled to every detail but he should be informed of the broad grounds of the case [*Jennings v. Canada* (Minister of Health), [1995] F.C.J. No. 906, at p. 8 and *Mercier v. Commission canadienne des droits de la personne* (1994), 167 N.R. 241, at p. 254]. The complainant is not entitled to the investigator's notes of interviews or the statements obtained from persons interviewed. He must be informed of the substance of the case and he has every right to expect that the investigator's report fully and fairly summarize the evidence obtained in the course of his investigation [*Labelle v. Canada* (Treasury Board) (1987), 25 Admin L.R. 10, at p. 19 (F.C.A.) and *Radulesco v. Human Rights Commission* [1984] 2 S.C.R. 407, at p. 410). He must be given the opportunity to respond. He is also entitled to the disclosure of an opposing party's comments when those comments contain facts which differ from those set out in the investigative report [*Mercier v. Commission canadienne des droits de la personne*, supra, at p. 254]. In order to constitute a reviewable error, the complainant must demonstrate that the information was wrongly withheld and that such information is fundamental to the outcome of the case [*Slattery v. Canada*, [1994] 2 F.C. 574, at p. 603].

The respondent notes that the applicant was made aware of the substance of its case and that he was therefore afforded all of the procedural fairness appropriate in the circumstances.

- [27] The applicant is also particularly concerned that his most voluminous submission to the investigator, his 197 page rebuttal dated August 19, 1999, was not before the Commission when it made its decision to dismiss his complaint. This question arises because, while only 5% of the applicant's submissions were before the Commission, all of the respondent's submissions made their way into the investigator's package for the Commission.
- [28] As mentioned earlier, the investigator invited both parties to make comments on his report and both parties availed themselves of this opportunity. He set timelines for both parties and a 10 page limit for each party's submission. The applicant submitted his comments within the parameters set by the investigator, on 8 ½ pages, 12 days before the deadline date. The investigator then sent the applicant's submission to the respondent so that it could respond to any new points that had been raised. The respondent went considerably further than that, submitting a 24 page document 17 days after the deadline date set by the investigator and including not only a point-by-point response to the applicant's submission, but also approximately 40 pages of appendices, including its entire June 22, 1999 submission.
- [29] This, the applicant contends, left him at a considerable disadvantage when it came to the Record before the Commission. This imbalance is what Mr. Lee referred to as "the crux of the matter" in his submissions before this Court. He sees it as unfair and incompatible with the CHRC's purposes in that it leaves him with the impression that justice was not done by a board that exists to ensure that people are treated fairly and without discrimination.
- [30] The bank argues that all of the applicant's submissions were considered by the investigator, and where relevant, summarized in his report to the Commission. Therefore, the substance of these submissions was, in fact, before the CHRC at the time of its decision. In addition, the respondent submits that the applicant was given a full opportunity to respond to the investigator's report. With regard to the time deadline and page limit, the respondent notes that these were imposed by the investigator.
- [31] Additionally, the bulk of the bank's response to the report consisted of documents that had previously been submitted to the investigator, raised no new issues or defences, and thus the applicant had ample opportunity to respond to these submissions in the course of the investigation. In short, there was nothing new in the respondent's response, no matter how voluminous.
- [32] While a great deal of deference is owed to the Commission in making such decisions, it is settled law that it must nevertheless adhere to the principles of procedural fairness. The investigator, in conducting the investigation, does so as an extension of the Commission: *Syndicat des employés de production du Québec et de l'Acadie v. Canada* (Human Rights Commission), [1989] 2 S.C.R. 879 (SEPQA). Hence, the same standard that applies to the Commission would apply to the investigator in his dealings with the parties.

[33] The question then becomes, what is the content of the duty of fairness in these circumstances? In *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (T.D.), affirmed (1996) 205 N.R. 383 (F.C.A.), Nadon, J. (as he then was) held, at page 598, that:

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.

[34] The meaning of these terms was defined by Dubé J. in *Miller*, supra, at 201:

... The investigations conducted by the investigator prior to the decision must satisfy at least two conditions: neutrality and thoroughness. In other words, the investigation must be conducted in a manner which cannot be characterized as biased or unfair and the investigation must be thorough in the sense that it must be mindful of the various interests of the parties involved. ...

[35] In *Slattery*, the issue was whether the report prepared by the investigator was prepared in a neutral and thorough manner. The rationale for the requirements of neutrality and thoroughness are succinctly expressed by Nadon J., when he quotes from the decision of Noël J. (as he then was) in *Canadian Broadcasting Corp. (CBC) v. Canada (Human Rights Commission)* (1993), 71 F.T.R. 214 at 226: "[i]f the report which [the CHRC] adopted in making its decision is flawed, it must follow that the decision itself is equally flawed."

[36] In this case, I do not propose to evaluate the investigator's report, but rather the contents of the Record before the CHRC. The same basic principle applies. Since the decision is flawed when the report is flawed, it follows that if the Record is flawed, the decision itself is equally flawed.

[37] The case law establishes that the content of fairness requires that the parties be afforded an "opportunity" to respond to the investigator's report: *SEPQA*, supra; *Slattery*, supra; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 (C.A.). It is Mr. Lee's opportunity to respond that was compromised in this case.

[38] I agree with Mr. Lee that it is the second issue, pertaining to the Record before the Commission, that is the "crux of the matter". In my view, the Commission made a number of significant errors in accepting the bank's final submission.

[39] The bank's submission was improper in that it ignored its purpose, stated by the investigator to be (i) to respond to the investigator's report, and (ii) to respond to any "new material facts" raised by Mr. Lee's response to the report. After a single sentence agreeing with "the entirety of [the report's] findings", the bank's response continues, for 23 pages, to rebut Mr. Lee's final submission, which contained no new facts, on a line-by-line basis. The bank also appended its June 22, 1999 submission to the investigator as a means of emphasizing its argument.

[40] The bank's response was also improper in that it was filed outside the page and time limits set for the submission. I do not propose to pass judgment on whether an investigator may, in his or her wisdom, set page and time limits on parties' submissions and I am willing to

assume for the purpose of this case that it is permissible. However, fairness requires that any such limits be applied in an even-handed manner. If the investigator was willing to waive the rules that he had set, which may in some circumstances be the wisest course, he should have done so with notice to Mr. Lee, who may then have requested that he also be given additional time and space for his submissions.

- [41] The CHRC did not disclose the bank's final submission to Mr. Lee and thus Mr. Lee was not afforded either an opportunity to object to it or to reply to it. It seems to me that an improper submission should be subject to being rejected or ignored by the Commission or be subject to reply by the applicant. While I can appreciate that the Commission would not want to entertain reply after reply, in order to stem this tide it need only be vigilant about the submissions that it accepts. The CHRC cannot simply act as a repository for documents, no matter their quality or relevance.
- [42] Where a complainant cannot correct the misapprehension or error in the investigative report by pointing out the error or providing the missing information, then the problem is so fundamental as to warrant judicial review. Otherwise, an injustice, or at least procedural unfairness, would result because the Commission would be basing its decision on a flawed and improper evidentiary basis: *Singh v. Canada (Attorney General)*, 2002 FCA 247, [2002] F.C.J. No. 885. The same reasoning is applicable to a flawed Record. Here, having received an improper submission and having chosen to accept it as a valid response, whether through the investigator or through the Commission, the CHRC had before it, when it rendered its decision, an improper or flawed Record. The Commission would, therefore, be "basing its decision on a flawed and improper evidentiary basis". The complainant had no opportunity to object as he did not know of its existence. Mr. Lee was entitled to assume that the same rules and procedures had been applied to both parties. The error could have been corrected if the submission had been disclosed to the applicant and he was provided an opportunity to respond. That was not done.
- [43] It bears noting that I have, in the course of these deliberations, been mindful of the fact that Mr. Lee is an unrepresented complainant. In a situation such as this, where one party is unrepresented and the other party is so ably represented, decision-makers must be vigilant that the playing field nonetheless remains level. It is essential that the rules and procedures are explained to the lay litigant to ensure that he or she can engage fully in the process. It is equally essential that the established rules and procedures are adhered to and followed in a manner that is fair to both sides. The evidence indicates that Mr. Lee was unaware of the fact that his most voluminous submission to the investigator, his 197 page rebuttal dated August 19, 1999, would not be before the Commission at the time it made its decision. I am confident that, given the opportunity, he would have liked to append this submission to his final response as the bank had done with its June 22, 1999 document.
- [44] In the result, I conclude that, in the circumstances that exist here, there was a breach of procedural fairness that taints the decision of the CHRC.

- [45] Having decided to allow this application for judicial review on the second ground, I need not determine whether the investigator's disclosure to the applicant was adequate in these circumstances.
- [46] For the reasons given, the application for judicial review is allowed. The decision of the Canadian Human Rights Commission is quashed and the applicant's complaint is remitted back to the Commission for determination in accordance with the provisions of the Canadian Human Rights Act, R.S.C. 1985, c. H-6, provided that any person designated pursuant to subsection 43(1) be a person other than the person involved in the report underlying the quashed decision.

Judge

Ottawa, Ontario

July 9, 2002

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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THE HONOURABLE MADAM JUSTICE LAYDEN-STEVENSON

DATED: July 9, 2002

APPEARANCES:

Douglas M. Lee ON HIS OWN BEHALF

Peigi R. Ross FOR RESPONDENT

SOLICITORS OF RECORD:

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