Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 24
Date: August 4, 2021
File No.: T2566/12320

Between:

Marcus Williams

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

The Bank of Nova Scotia

Respondent

Ruling

Member: Edward P. Lustig

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I. BACKGROUND

[1] This is a ruling on a request made by the Respondent that the Tribunal hold the proceedings in this matter in abeyance pending a determination by the Federal Court of an application for judicial review.

[2] On or about April 9, 2018, the Complainant filed a human rights complaint (the "complaint") with the Commission in which he alleges discrimination in his employment by the Respondent on the basis of race, national or ethnic origin, colour, age and sex, within the meaning of the *Canadian Human Rights Act* (the "CHRA"). The Complainant was an employee of the Respondent from February 9, 2015, until he was terminated on October 26, 2017.

[3] Prior to filing the complaint, on or about November 6, 2017, the Complainant had also initiated an unjust dismissal complaint (the "Code complaint") under section 240 of the *Canada Labour Code* (the "Code"), which was rejected by an arbitrator's decision dated August 7, 2018.

[4] The complaint was reviewed by an investigator at the Commission ("the first investigator") who issued a report on March 13, 2019, recommending that the Commission decline to deal with the complaint on account of it being frivolous.

[5] On June 12, 2019, the Commission decided to deal with the complaint, notwithstanding the first investigator's recommendation.

[6] The Respondent filed an application for judicial review (the "first JR application") seeking to quash the Commission's decision to deal with the complaint arguing that the Commission had reached unreasonable conclusions on whether Mr. Williams' complaint was frivolous or vexatious, and failed to address the Bank's arguments that aspects of the complaint were out of time.

[7] This application was dismissed by the Federal Court on December 7, 2020, for being premature (*The Bank of Nova Scotia v. Marcus Williams*, 2020 FC 1127).

[8] The matter was reviewed by a second investigator (the "second investigator") at the Commission, who issued the second investigation report on September 11, 2020, and recommended that the majority of the allegations be dismissed for delay.

[9] On November 17, 2020, the Commission requested the Chairperson of the Canadian Human Rights Tribunal (the "Tribunal") to institute an inquiry into all of the allegations of the complaint, as encompassing a continuous pattern of alleged discrimination (the "referral decision").

[10] On December 16, 2020, the Respondent filed a second application for judicial review (the "second JR application"), this time of the referral decision arguing that it was "unreasonable for the reasons of frivolousness, delay and vexatiousness."

[11] The Respondent requested in correspondence dated May 4, 2021, that the Tribunal hold proceedings in this matter in abeyance pending the determination of the second JR application challenging the referral decision. Both the Complainant and the Commission opposed the request, with the Commission suggesting a compromise.

[12] The parties were invited by the Tribunal to discuss with each other whether a solution to this issue could be reached. On May 13, 2021, the Respondent advised the Tribunal that the issue was unresolved, and on May 27, 2021, the Tribunal directed the parties to file written submissions on this issue.

[13] On July 8, 2021, after having received all parties' submissions on this request, the Tribunal was advised by the Respondent that the second judicial review application would be heard on September 13, 2021. The hearing is due to last one day. Despite a date for the hearing having been set, the Complainant's and the Commission's positions opposing the request have not changed.

II. SUMMARY OF PARTIES' POSITIONS

[14] In their submissions, the parties use in turn the terms "abeyance", "adjournment" and "stay". I would like to point out that these terms are not interchangeable: each one refers to

a distinct notion. In this ruling, I am going to use the terms “stay” and “stay of proceedings”, as I believe they more aptly describe the relief sought in this request.

A. THE RESPONDENT’S POSITION

[15] The Respondent, citing *Duverger v. 2553-4330 Québec inc. (Aéropro)*, 2018 CHRT 5 [*Duverger*], argues that the test for granting an adjournment of the Tribunal’s proceedings pending the outcome of a judicial review matter is the “interest of justice test”, which the Federal Court applies in motions to adjourn its own proceedings.

[16] It submits that the interest of justice test warrants a stay of the Tribunal’s proceedings in this case pending the determination of the second JR application for the following reasons:

a. *The adjournment will result in minimal delay in the Tribunal’s processes*

   The Respondent initially suggested the matter would likely be heard by the Federal Court in the summer or fall 2021, with the hearing lasting one day and a decision issued thereafter. As mentioned above, a date has since been set for the hearing, that is September 13, 2021.

b. *The second JR application poses serious questions to be determined by the Federal Court*

   These serious questions include:

   i. the absence of nexus between the Complainant’s employment circumstances and a prohibited ground under the Act;

   ii. the failure to consider that, except for the termination of the Complainant’s employment, all the allegations made in the Complaint were out of time; and

   iii. the failure to explain why the one part of the complaint that was not out of time, relating to the termination, ought to proceed before the Commission when an unjust dismissal adjudicator under the Code determined that the Complainant had not been unjustly dismissed.

c. *The Respondent would suffer irreparable harm without an adjournment*

   The Respondent argues that irrecoverable expenditure of financial resources (given that the Tribunal does not award costs), participation in an unnecessary hearing and the preparation of irrelevant evidence (multiple days of hearing and evidence would be avoided if the Application was successful to any degree) and the risk of

inconsistent finding (the Federal Court will be considering whether matters are appropriately before the Tribunal and whether they should be entertained in any respect), are the sort of irreparable harm within the meaning of the interest of justice test that justify staying the proceedings in this matter.

d. *The "balance of inconvenience" favours an adjournment*

The Respondent submits that any stress and anxiety that the Complainant may experience as a result of a few months' delay in the Tribunal's proceedings should no more than equal the stress and anxiety that the Respondent would experience without an adjournment. The Complainant would in fact likely benefit from the direction of the Federal Court. At worse, if the second JR application is denied, this matter would resume in a few months. On the other hand, the time and energy the Respondent would incur if the Tribunal refuses a stay "eclipses" the time and energy the Complainant would incur if the stay is allowed.

e. *The public interest favours efficiency and the avoidance of inconsistent decisions*

The Respondent argues that while the public has a vested interest in ensuring that human rights complaints are dealt with expeditiously, the delay resulting from a stay of the proceedings in this matter has a neutral impact at worst, considering the Federal Court will likely issue a decision on the second JR application within a few months' time. Further, the Tribunal must not overlook the public interest in having consistent findings that do not contradict one another.

f. *The efficiencies associated with staying the proceedings in this matter make for a more expeditious process whereby "short term delay can achieve long term gain, and a better final result"*

The Respondent notes that while the common law favours expeditiousness in all human rights proceedings, expediency means far more than a short time for a Tribunal hearing. Indeed, efficiency must be accounted for. He contends that "[h]olding this matter in abeyance until the Federal Court renders its decision provides judicial clarity that will likely lead to a more efficient resolution of the complaint than denying the adjournment. The Federal Court will determine what, if anything, the Tribunal must ultimately decide". The Respondent further submits that the "hearing of the [second JR application] may entirely dispose of this Tribunal matter or it may significantly narrow and sever the issues, including the scope of inquiry and production."

[17] For the above reasons, the Respondent requests that the Tribunal hold the proceedings in this matter in abeyance until a decision in respect of the Application is provided by the Federal Court. Alternatively, it requests the Tribunal use its discretion to suspend timelines and reconvene the parties for a Case Management Conference call in six months.

B. THE COMPLAINANT'S POSITION

[18] The Complainant argues that the request for a stay of proceedings by the Respondent is an abuse of process and an attempt to delay the Tribunal hearing, that it is not supported by evidence of inconvenience that would outweigh the public interest, and that it fails the interest of justice test.

[19] Though the Complainant submits a certain number of arguments on the appropriateness and the timeliness of a judicial review, and stresses the fact that the Respondent has seemingly refused mediation at various stages, at the center of his arguments is the issue of delay, that is, the alleged repeated attempts by the Respondent to delay proceedings.

[20] Further, according to the Complainant, the delay resulting from the second JR application cannot be considered as temporary, as the Complainant would be the one suffering irreparable harm if the request for a stay of proceedings was not dismissed. For the same reason, the balance of convenience could not favor the Respondent.

[21] Finally, the Complainant further argues that the Respondent suffers no prejudice from the Tribunal hearing the matter without interruption. He submits that since the Respondent failed to observe the principle of administrative fairness in proceedings between the parties and has not proved it will be denied procedural fairness or natural justice, the request for a stay of proceedings ought to be dismissed.

C. THE COMMISSION'S POSITION

[22] The Commission, also citing *Duverger*, opposes the request on the basis that the Respondent has failed to demonstrate that a stay would be in the interest of justice.

[23] The Commission counters the Respondent's arguments as follows:

a. *The irreparable harm argument*

    i. The Respondent bases its claim on the speculative assumption that its application for judicial review will be successful; and

ii. Costs and inconvenience of litigation do not automatically result in irreparable harm.

b. *The "balance of inconvenience" argument*

i. Inconveniences in terms of stress, anxiety, costs, time, and energy, are experienced by all parties in litigation; and

ii. Delays have considerable impact on complainants, as issues raised in a human rights complaint are sensitive and relate to human dignity.

c. *The public interest argument*

i. The Tribunal process would not be more efficient should the application for judicial review be dismissed; and

ii. It is in the public interest to proceed without unnecessary delay given the extended period the Complainant has waited to have his complaint heard.

[24] For the reasons set out above, the Commission asks the Tribunal to dismiss the Respondent's motion to stay and order new dates for the filing of the parties' statements of particulars and disclosure.

D. THE RESPONDENT'S REPLY

[25] In its reply to both the Complainant's and the Commission's submissions, the Respondent repeats and reiterates its earlier submissions.

[26] The Respondent points out that both the Complainant and the Commission cited *Duverger* in their responses to its request, and therefore focuses its reply arguments on that decision.

[27] The Respondent's reply arguments, grouped under three headings, can be summarized as follows:

a. *Application of the Act, Not Interpretation of the Act*

i. In *Duverger*, the employer was asking the Federal Court to revisit the interpretation of section 14(1)(c) of the CHRA, and it was determined that the Tribunal was best placed to decide questions of law and questions of fact in the matters before it, including the scope of the legislation; and

ii. In the instant case, the Federal Court will review whether the CHRA applies and whether the Tribunal has jurisdiction. Having the matter go forward would carry the risk of inconsistent findings from the Tribunal and the Court on the issue of the Tribunal's jurisdiction.

b. *Efficiency*

i. In *Duverger*, the Federal Court was not called upon to narrow the issues and assist the parties if the matter went forward before the Tribunal, but to answer a discrete question (on the interpretation of the words "related to employment");

ii. In the instant case, the Federal Court may dispose of the proceedings in their entirety and narrow the issues significantly. This narrowing of the issues is in the interests of all parties;

iii. Expediency is to be considered, not the time it takes parties to get to a hearing;

iv. The second JR application is not intended to cause further delay. The first JR application was determined to be premature without prejudice to the Respondent's right to raise the same arguments in a subsequent judicial review. The Respondent had merely attempted to act expeditiously; and

v. Moving forward efficiently with a minimal delay is also in the public interest. Efficiency and a better result will be achieved with the short-term delay sought.

c. *No Prejudice*

i. In *Duverger*, it was pleaded and decided that the complainant was likely to suffer prejudice with respect to the preservation of evidence, including the memories and recollections of witnesses;

ii. In the instant case, no party argued that they will be prejudiced by a stay of the proceedings, in relation to the preservation of evidence or otherwise. The failure to assert any specific prejudice militates in favour of granting a stay; and

iii. The parties can keep the Tribunal apprised of the status of the review and may request the scheduling of a case management conference call after the release of the Federal Court's decision to determine the status of the complaint.

[28] For the above reasons, the Respondent reiterates its request to stay the proceedings in this matter, as being consistent with the interest of justice test.

III. ISSUE

[29] Should the Tribunal exercise its discretion to stay the proceedings in this matter pending completion of the second JR application?

IV. LEGAL FRAMEWORK

Jurisdiction – Preliminary Remark

[30] The Tribunal's jurisdiction to hear and determine the Respondent's request is not at issue, as the parties agree that the Tribunal is the master of its own procedure and that it may grant a stay of its own proceedings (par. 1(6) of the *Rules of procedure under the CHRA (03-05-04)* (the "Rules").

[31] In exercising this jurisdiction, the Tribunal has a general obligation to act informally and expeditiously, in accordance with the principles of natural justice, procedural fairness, and the scheme of the CHRA (par. 48.9(1) of the CHRA and par. 1(1) of the Rules).

[32] It is also understood that the Tribunal does not have jurisdiction to review the Commission's referral decision. The mandates of the Commission and the Tribunal are different. The Commission decides whether to refer the complaint to the Tribunal for inquiry and the scope of the referral. Once the referral is made, the Tribunal decides the complaint on its merits (see *Banda v. Correctional Service Canada*, 2021 CHRT 19 at paras 20-22).

[33] However, the Tribunal, in proceeding with its inquiry into the complaint, may be called upon to hear evidence that was examined by the Commission in its investigation and to determine issues that arise therefrom, within the scope of the case referred to it.

Stay of Proceedings – Applicable Test

[34] A stay of proceedings should only be granted in exceptional circumstances (*Bailie et al. v. Air Canada and Air Canada Pilots Association*, 2012 CHRT 6 at para 22; *Hughes v. Transport Canada*, 2020 CHRT 21 at para 20 [*Hughes*], citing *Canadian Association of Elizabeth Fry Societies and Acoby v. Correctional Service of Canada*, 2019 CHRT 30 at para 14).

[35] In deciding whether the Tribunal should stay its proceedings pending judicial review, the Tribunal's ruling in *Duverger* is the leading and most comprehensive authority to follow. It has indeed been relied upon by all of the parties to this case.

[36] In *Duverger*, where a motion for a stay pending a judicial review was denied, the Tribunal adopted the interest of justice test used in the context of requests for adjournment, and expanded on it:

> [58] In my opinion, the interest of justice allows for a broader assessment of factors relevant to a motion to stay proceedings, which would **include** the principles of natural justice, procedural fairness and expeditiousness provided under subsection 48.9(1) of the *Act*. Moreover, as articulated by the Federal Court of Appeal at paragraph 26 of *Clayton*, the Tribunal may also consider certain factors developed in *RJR-MacDonald* (a serious issue of fact and/or law to be tried, irreparable harm and a balance of convenience).
>
> [59] It goes without saying that the interest of justice includes the interest of all the parties. It also includes the public interest. It is important to recall that complaints filed before the Tribunal concern individuals who believe that their human rights have been violated. These allegations are serious and require the Tribunal to act expeditiously. Every time allegations of discrimination are made under the *CHRA* the public interest is obviously involved (see *Federation of Women Teachers' Associations of Ontario v. Ontario (Human Rights Commission)* (Ont. Div. Ct.), 1988 CanLII 4794 (ON SC)). There is no question that public interest notably demands that complaints related to discrimination be dealt with expeditiously (see *Bell Canada v. Communication, Energy and Paperworkers Union of Canada* (1997), 127 F.T.R. 44, 1997 CanLII 4851 (FC), [*Bell Canada*], see also subsection 48.9(1) of the *CHRA*).
>
> (*Duverger*, supra, at paras 58-59)
>
> *[Emphasis in original.]*

[37] In answering the question of whether the interests of justice support the proceedings being delayed, the Tribunal must consider the legislative scheme, which envisions a balancing of the principles of natural justice and expeditiousness in subsection 48.9(1) of the CHRA.

[38] Furthermore, as the Tribunal recently stated:

> The “interest of justice” approach relies on a “reasonable and flexible assessment of factors relevant to stay requests including but not limited to principles of procedural fairness, irreparable harm, the balance of convenience between the parties, and the public interest in dealing with human rights complaints expeditiously.” The factors and interests to be taken into consideration by the Tribunal may vary depending on the circumstances of each case.
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> (*Hughes* at para 21)
>
> [Footnote omitted.]

V. DECISION

[39] For the reasons that follow, I have determined, in assessing the various factors related to the issue in this motion, based upon the facts and the applicable law, as referred to above, that **on balance**, the interest of justice is best served by refusing the request by the Respondent for a stay of the proceedings in this case, pending completion of the second JR application.

VI. ANALYSIS

[40] I agree that the "interest of justice" approach or test referred to in paragraphs 36, 37 and 38 above is the correct approach to follow in determining this motion. It involves assessing, in a reasonable and flexible manner, the factors referred to in the cases cited above, that are relevant to the Respondent's request for a stay of the proceedings in this case pending the completion of the second JR application.

[41] I do not feel that the Respondent's request is an abuse of process or made with the intention of delaying matters. It is certainly open to the Respondent to challenge the referral decision in the Courts and to request a stay of the proceedings before me in this case. Further, there is merit to many of the arguments that have been made by all parties in their submissions including the facts and law cited. As such, I need to assess the factors relevant to the parties' submissions, using the interest of justice approach or test, to determine, whether on balance, it is in the interest of justice to allow the Respondent's request.

[42] The Respondent has the onus of establishing that its request for a stay is, on balance, in the interest of justice and should be allowed. Its submissions in support of its request, based upon its view of the factors referred to in the cases cited above that are relevant in this case, are summarized in paragraphs 16 and 27 above. In the paragraphs that follow to the end of this part of the ruling, I will assess the factors presented in the submissions.

[43] The recent establishment by the Federal Court of a date for the hearing of the second JR application, referred to in paragraph 16 *a* above, does not, in my opinion, establish definitively that there will be a "minimal delay" to the proceedings by virtue of the Respondent's request for a stay. There are still many uncertainties, and the potential delay may not be minimal as suggested by the Respondent. There may be adjournments of the Federal Court date. The success of the application is unpredictable and speculative, as is the date of the release of a decision by the Federal Court after the application is heard. Appeals of a decision of the Federal Court are possible and could further delay the ultimate determination of the application for an unknown period.

[44] At the same time, as noted in paragraph 33 above, despite the referral decision, the Tribunal has the jurisdiction to hear and consider evidence that was considered by the Commission in the investigation reports and by the Labour Board in the Code complaint. While, as noted, the Tribunal does not have jurisdiction to set aside the referral decision, the Tribunal's assessment of the evidence, in its determination of liability in the hearing of the merits of the complaint before the Tribunal under the CHRA, might conform with the views of the evidence by the Commission's investigators and the Labour Board. Further, without a stay, the Tribunal's assessment of this evidence and its decision may occur earlier than a final determination of the second JR application by the courts, who are normally very deferential to bodies like the Tribunal in making decisions within the realm of their specialty.

[45] Motivated to do so, the parties and the Tribunal could work collaboratively to hasten the conclusion of proceedings in the inquiry of the complaint before the Tribunal. Accordingly, in the Order below, I am including provisions to hasten matters in the proceedings before me, including early completion of prehearing matters, so that a hearing can take place soon and not delay the fair adjudication of allegations of human rights

violations by the Complainant against the Respondent by the Tribunal which is vested with the adjudicative function of the allegations by virtue of the CHRA.

[46] That said, it is acknowledged that IF the Courts were to allow the application before a hearing by the Tribunal, it might reduce the time of the hearing or even eliminate the need for a hearing. On balance, however, in assessing the delay factor in this case, in my opinion, the interest of justice is better served by expediting proceedings before the Tribunal rather than delaying them until the courts finally rule on the application.

[47] To the Respondent, the matters it refers to in paragraph 16 *b* above are "serious questions to be determined" by the Federal Court in this case. However, for the reasons explained in paragraph 44 above, the Tribunal could also adjudicate the questions and is specialized in doing so. On balance, therefore, in assessing this factor, in my opinion, the interest of justice is better served in expediting proceedings before the Tribunal, so that these questions might be ruled on earlier by the Tribunal proceeding expeditiously, rather than delaying them until the courts finally rule on the application.

[48] According to their submissions, all parties will suffer harm from the delay of the conclusion of the complaint. That is why the CHRA and case law favor expediency as well as fairness in case proceedings, in the interest of justice. It is hard to see, however, even if it is accurate to use possible waste of money and time in this case as the means of assessing the "irreparable harm" factor referred to in paragraph 16 *c* above, how the Respondent's loss, in relation to its wealth and resources, could be greater than the Complainant's loss because of possibly unnecessary proceedings.

[49] It is equally hard to see, in assessing the "balance of convenience" factor referred to in paragraph 16 *d* above, how the Respondent's inconvenience as a corporation, in terms of stress and anxiety, would be greater than the Complainant's inconvenience as an individual, in this regard. On balance, therefore, in assessing the factor related to potential irreparable harm or inconvenience to the parties in this case, in my opinion, the interest of justice is better served in expediting proceedings before the Tribunal, so that potential harm, in terms of wasted money and time, and inconvenience, in terms of stress and anxiety for everyone, is avoided or reduced by an earlier determination of the case by the Tribunal,

rather than by delaying proceedings until the courts finally rule on the application concerning the referral decision.

[50] The Respondent is generally correct in saying that "the public interest favors efficiency and the avoidance of inconsistent decisions", as referred to in paragraph 16 *e* above, and that "short term delay can achieve long term gain, and a better result", as referred to in paragraph 16 *f* above. However, for the reasons set out above, its suggestion that in this case a decision by the Federal Court (or a higher Court if there is an appeal) will occur "within a few months' time" and will avoid "inconsistent findings" and will provide "judicial clarity" is speculative. I am unconvinced, in this case, that granting the Respondent's request for a stay of the Tribunal proceedings in favor of its Court challenge of the Commission's referral decision is likely to avoid inconsistent decisions, provide judicial clarity, or hasten justice. On balance, therefore, in assessing the factors related to efficiency and the avoidance of inconsistent decisions, in my opinion, the interest of justice is better served in expediting the proceedings before the Tribunal than delaying those proceedings until the courts finally rule on the second JR application.

[51] The factors raised by the Respondent in its reply, as referred to in paragraph 27 *a* and *b* above, are essentially the same as the ones raised in its submissions except that they are responsive to the other parties' submissions and are intended to distinguish this case from the facts in *Duverger* where the Tribunal refused to grant a stay. These factors include the serious questions to be determined by the Federal Court and the potential for greater efficiency with the Federal Court providing judicial clarity. As both of these factors have been dealt with in previous paragraphs of this part of the ruling, nothing further needs to be said about them.

[52] The factor raised by the Respondent in its reply, as referred to in paragraph 27 *c* above, is also intended to distinguish *Duverger* from this case respecting the absence of any party in this case raising prejudice in relation to the preservation of evidence if the request for a stay was granted. Respectfully, this factor does not convince me to allow the request for a stay when balanced against everything else mentioned above in my assessment of the other factors in this case.

VII. ORDER

[53] For the foregoing reasons I am dismissing the motion of the Respondent requesting a stay of these proceedings under the CHRA until the second JR application is decided by the Federal Court. Also, I am directing the parties to be available for a Case Management Meeting within two weeks of the release of this decision to establish early timelines for prehearing matters to be completed so that a hearing by the Tribunal of the complaint under the CHRA can take place as expeditiously as possible, in the interest of justice.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
August 4, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2566/12320

Style of Cause: Marcus Williams v. Bank of Nova Scotia

Ruling of the Tribunal Dated: August 4, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Marcus Williams, for the Complainant

Heather Unger and Giacomo Vigna, for the Canadian Human Rights Commission

Paul Macchione, for the Respondent