CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

RAYMOND GAGNÉ

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
CANADA POST CORPORATION

Respondent

RULING

MEMBER: Athanasios D. Hadjis 2007 CHRT 18
2007/05/10

[1] The Respondent, Canada Post Corporation (CPC), has made a motion requesting that the Tribunal exercise its discretion to refuse to hear the present complaint on the basis that the "inordinate" delay in filing the complaint constitutes an abuse of process.

Factual Background

[2] The Complainant, Raymond Gagné, worked for CPC as a postal clerk in Toronto from November 1974 until October 1988, when he obtained a senior postal clerk position at the post office in Ladysmith, British Columbia. He alleges in his complaint that shortly after transferring into the new position, he was harassed on the basis of his ethnic origin (French Canadian) and his place of origin (which was not specified in the complaint). He refers to a number of specific incidents of verbal and physical abuse that took place between October 1988 and April 1989.

[3] The next occurrences of discrimination mentioned in the complaint relate to specific incidents of alleged harassment that took place in September of 1995. He states that in December 1995, he was diagnosed with a mental illness, which he claims was to some extent caused by the harassment. When his illness worsened and required that he take

medical leave from work from January to May 1996, Mr. Gagné alleges that CPC did not assist him properly in his attempt to obtain worker's compensation benefits. Upon his return to work, he claims that CPC management harassed him by excessively monitoring him due to his disability.

[4] He also alleges that his co-workers were permitted to harass him by spreading false rumours about his illness and making other efforts to worsen his state of health. Mr. Gagné contends that the level of harassment so affected his mental health that he needed to be hospitalized. His illness prevented him from attending work, as a result of which CPC dismissed him from his employment in August 2000.

[5] Mr. Gagné did not file his human rights complaint with the Canadian Human Rights Commission, however, until May 5, 2004. The Commission referred the complaint to the Tribunal on November 27, 2006.

[6] Thus, CPC alleges that the length of time from the dates of the alleged discriminatory practices (1988 to 2000) to the present time (2007) is inordinate and constitutes an abuse of process, which warrants the exercise by the Tribunal of its discretion to refuse to hear the complaint.

Analysis

[7] The Commission decided, pursuant to s. 41(1)(*e*) of the *Canadian Human Rights Act*, to deal with Mr. Gagné's complaint even though the last alleged discriminatory act took place over one year prior to the filing of his complaint (in fact, about 45 months prior thereto). The Tribunal does not have the jurisdiction to review this Commission decision. This power rests with the Federal Court (see *I.L.W.U. (Marine Section) Local 400 v. Oster*, [2002] 2 F.C. 430 (T.D.) at paras. 25-31).

[8] However, if the entire pre-hearing delay, from the earliest alleged discriminatory acts until the hearing, is so long that the respondent's right to a fair hearing is compromised, the Tribunal has the authority to remedy the situation (see *Desormeaux v. Ottawa Carleton Regional Transit Commission* (2002 July 19) T701/0602 (C.H.R.T.) at para. 13; *Cremasco v. Canada Post Corporation* (2002 September 30) T702/0702 (C.H.R.T.) at para. 71, aff'd on other grounds *Canada (Human Rights Commission) v. Canada Post Corporation*, [2004] 2 F.C.R. 581 (F.C.)). As the Tribunal in *Cremasco* noted at paragraph 74, this is in keeping with common sense: a board or tribunal must have some capacity to protect itself from litigants who use its process improperly.

[9] The leading Supreme Court decision in relation to delay in the context of human rights cases is *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44. The Court noted, at para. 101, that "delay, without more, will not warrant a stay of proceedings as an abuse of process at common law", adding that "in the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay". The Court went on to state, at para. 102, that where delay impairs a party's ability to answer the complaint against him or her, because, for example memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy.

[10] In the present case, only a relatively small portion of the period can be attributed to any "administrative delay" in the Commission's handling of the complaint. The complaint was filed in May 2004 and the matter was referred to the Tribunal in November 2006, a period of 30 months. In its submissions on the motion, CPC did not "take issue" with the

length of time that has passed since the complaint was filed. It is the pre-filing delay with which CPC takes issue. That being said, the principles articulated by the Supreme Court that I have cited above, remain, in my view, applicable. To warrant remedial action from the Tribunal, there must be proof of significant prejudice resulting from the unacceptable delay, which impairs the respondent's ability to answer the complaint.

[11] Mr. Gagné worked with a number of CPC employees who could address his allegations. CPC does not affirm in its submissions that any of them have since died. At least seven of them have resigned or retired from CPC. Interestingly, Mr. Gagné points out that of those seven, five had already left CPC when he was dismissed. Thus, even if he had filed his complaint immediately after his dismissal, any issues regarding a party's ability to track down these individuals for the purposes of this case would have already arisen to some extent. In any event, I am not of the view that merely because potential witnesses have retired and perhaps moved away from their original place of employment, they will inevitably be untraceable and therefore, unavailable for a hearing. While trying to find these witnesses may pose a challenge, it is not necessarily an impossible task, and it is in my view not sufficient cause to conclude at this early stage that a respondent's ability to answer the complaint is so impaired as to justify the Tribunal's refusing to conduct a hearing into the complaint.

[12] Nor is there any indication at this stage that the witnesses' memories have necessarily "faded" in this case. It should be noted that the bulk of the incidents alleged in the complaint occurred between 1996 and 2000, i.e. between eleven and seven years ago. This would not be the first case before the Tribunal to have received testimony regarding incidents that date back a similar length of time (see e.g. *Uzoaba v. Canada (Correctional Service)*, (1994), 26 C.H.R.R. D/361 (C.H.R.T.); *Sugimoto v. Royal Bank of Canada*, 2007 CHRT 5). I cannot therefore presume *a priori*, as CPC suggests, that its ability to provide evidence in answer to the allegations of the complaint has been compromised. As the Tribunal noted in *Bozek v. M.C.L. Ryder Transport Inc.*, 2002 CanLII 45937 (C.H.R.T.), at paras. 21-2, evidentiary prejudice must be proven.

[13] In setting out some of the difficulties it faces in preparing its answer to the complaint, CPC raises the absence of sufficient particulars in the complaint, which prevents it and its witnesses from being able to recall these allegedly discriminatory incidents that occurred between 18.5 and seven years ago. This strikes me as a matter that can be addressed through the Tribunal's disclosure process. If CPC believes Mr. Gagné's Statement of Particulars, which includes witness will-say statements, is insufficient and that further disclosure is required pursuant to the Tribunal's Rules of Procedure, CPC may make a motion to that effect. This is not a ground to justify a refusal by the Tribunal to hear the complaint.

[14] Thus, just as in the lower court's finding that the Supreme Court adopted in *Blencoe* at para. 104, I find in the present case that the delay is not such that it would necessarily result in a hearing that lacks the essential elements of fairness. Proof of prejudice in the evidentiary sense has not been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing.

[15] The Court in *Blencoe*, however, recognized that there may be cases of abuse of process for other than evidentiary reasons brought about by delay (at para. 115). The delay must be clearly unacceptable and have directly caused a significant prejudice to

amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute.

[16] In the present case, while the delay is very long, particularly when taking into account the date of the first alleged discriminatory acts of October 1988, I am not convinced that it was "unacceptable to the point of being so oppressive as to taint the proceedings" (*Blencoe* at para. 121). The Court points out, in *Blencoe* at para. 122, that the determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to or waived the delay, and other circumstances of the case.

[17] Based on the allegations in the complaint form, Mr. Gagné appears to be claiming that he was harassed at the workplace, which contributed to the development of his disability, and was in turn a factor in the decision to dismiss him. Cases of discrimination are different from typical civil cases, such as the one relating to contract law to which CPC alluded in its submissions (*Woodheath Developments Ltd. v. Goldman* (2001), 56 O.R. (3d) 668 (S.C.J.)). In cases of discrimination, it is not uncommon for the discriminatory practice to be of an ongoing nature, particularly where harassment has been alleged. Tribunals have recognized that victims of discrimination will not always immediately perceive a respondent's acts as being discriminatory.

[18] Moreover, depending on the circumstances, individual acts may not necessarily amount to harassment, within the meaning of the *Act*, unless they are repeated over time (see *Canada (Human Rights Commission) v. Canada (Armed Forces)* ("*Franke*"), [1999] 3 F.C. 653 (T.D.)). In harassment cases, the employer's efforts to prevent harassment or its response to acts of harassment will also frequently be in issue (see s. 65(2) of the *Act*). In determining whether an employer has acted promptly and properly in all of the circumstances of a given case, the previous knowledge of an employer as to the vulnerability of a particular employee may well be germane (*Uzoaba*, *supra*, at para. 17). Thus, evidence that may stretch over a fairly extensive period of time may be relevant.

[19] Part of the delay in the present case is attributable to the forty-five months that Mr. Gagné took before filing his complaint. Mr. Gagné claims that his medical condition was a factor in his failing to file the complaint sooner, and he has produced a letter from a physician in support of this contention. CPC disputes this claim and has submitted a letter from a psychiatrist contradicting some of the findings of Mr. Gagné's physician. CPC argues that Mr. Gagné's health did not prevent him from filing his complaint within the one year period contemplated in s. 41(1)(*e*) of the *Act*.

[20] As I have already stated, the Tribunal has no jurisdiction to review Commission decisions to deal with complaints beyond the one-year period. If a party disagrees with the Commission's decision in the present case and wants it reviewed, the Federal Court would be the appropriate forum. Moreover, to the extent that this matter is being raised before the Tribunal as a matter of abuse of process, it is, in my view, inappropriate for the Tribunal to make any findings with respect to expert evidence and other factual issues in dispute without the benefit of a full evidentiary record. The Tribunal should not be drawing any conclusions that could result in the dismissal of a human rights complaint on the basis of a couple of letters written by medical professionals whose expertise has not even been established before the Tribunal and whose evidence has not been heard and tested through cross-examination.

[21] Furthermore, it would appear, based on some of the documents filed by the parties regarding the present motion, that Mr. Gagné did in fact take action against his employer in response to his dismissal. On October 10, 2002, he filed a grievance through his union, alleging that he had been discharged without just, reasonable or sufficient cause. He asked for his reinstatement. Apparently, the union did not deal with the matter to Mr. Gagné's satisfaction, and on May 28, 2003, he filed a complaint with the Canada Industrial Relations Board alleging that his union was in breach of its duty of fair representation, pursuant to s. 37 of the *Canada Labour Code*. This is not therefore a case of a complainant who simply did nothing in response to the last alleged discriminatory act (the dismissal), before filing his human rights complaint.

[22] In conclusion, given the context and circumstances of this case, I am not convinced that the delay is "inordinate". This is not to say that all of the evidence to be introduced regarding the 1988-89 incidents or any of the subsequent events must necessarily be taken into consideration by the Tribunal in adjudicating the complaint on its merits. It may become evident at the hearing that the recollections of the witnesses are hazy or perhaps non-existent, given the passage of time and the nature of the events in relation to which they testified. Key documents may no longer be available. CPC could therefore argue that the Tribunal should not allow any evidence relating to these events to form part of its decision. This was in effect what the Tribunal in *Uzoaba*, *supra*, at D/368-9, decided with respect to evidence led at the hearing of incidents that had occurred as many as 19 years prior to the hearing.

[23] CPC's motion is therefore dismissed, without prejudice to CPC's right to later argue that the Tribunal should not take into account evidence relating to one or more given incidents that have been alleged in the complaint.

"*Signed by*"

Athanasios D. Hadjis

OTTAWA, Ontario

May 10, 2007

PARTIES OF RECORD

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APPEARANCES:	
Michael R. Scherr	For the Complainant
No one appearing	For the Canadian Human Rights Commission
Norman K. Trerise	For the Respondent