Origin: Appeal from a decision of the Master of the Court of Queen's Bench, dated June 5, 2013

Date: 20131213
Docket: CI 13-01-81367
(Winnipeg Centre)
Indexed as: Jewish Community Campus of Winnipeg Inc. v. Metaser et al.
Cited as: 2013 MBQB 303

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: ***The Human Rights Code*** (C.C.S.M. c. H175)

AND IN THE MATTER OF: A complaint of discrimination under ***The Human Rights Code*** (C.C.S.M. c. H175) filed By Etabezahu Metaser

BETWEEN:

JEWISH COMMUNITY CAMPUS OF WINNIPEG INC.,	)	Counsel:
applicant,	)	KAREN R. POETKER for the applicant
-and-	)	
ETABEZAHU METASER and HUMAN RIGHTS COMMISSION,	)	ISHA KHAN for the respondents
respondents.	)	JUDGMENT DELIVERED: DECEMBER 13, 2013

SUCHE J.

INTRODUCTION

[1] Jewish Community Campus of Winnipeg Inc. ("JCC") has filed an application seeking judicial review of two decisions of the Manitoba Human

Rights Commission (the "Commission") concerning a complaint by Etabezahu Metaser. This includes a decision of the Board of the Commissioners ("the Board") on May 30, 2012 that the evidence in support of the complaint was sufficient to substantiate Metaser's claim that she had been sexually harassed in the course of her employment; and a finding by the Board on December 17, 2012 that an offer made by JCC during mediation was not reasonable, with the result that an adjudicator was appointed to hear the complaint (herein, collectively, the "Decisions").

[2] JCC argues that in making the Decisions the Commission breached its duty of natural justice, procedural fairness, and committed errors of law and fact. It claims the Commission's investigation was neither neutral nor thorough as it failed to investigate crucial evidence, adduce all relevant evidence, and failed to disclose evidence to JCC during the process.

[3] After commencing this application, JCC brought a motion before the master for an order requiring the Commission to produce all documents in its possession concerning the complaint, including the contents of its investigator's file. The master granted the order.

[4] The Commission's appeal from that order is now before me.

STANDARD OF REVIEW

[5] While presented as an appeal from the master, this request should have been brought as a motion of first instance. This proceeding is by way of an application. The procedures governing applications are found in Court of

Queen's Bench Rule 38, and provide no right to documentary discovery. This is different from proceedings commenced by action, which provide for documentary discovery as outlined in Rule 30.

[6] The law is well settled, however, that a judge can order production of documents as part of the court's inherent jurisdiction to control and regulate its own procedure. In ***McPherson v. Inst. of Chaltered Accountants of B.C.*** (1987), 15 B.C.L.R. (2d) 44, (rev'd on other grounds (1988), 32 B.C.L.R. (2d) 328), Macdonald **J.** explained (pp. 49-50):

> ... R. 26 applies only to actions; a proceeding such as McPherson's commenced by petition is not an action.
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> However, a judge of this court has an inherent jurisdiction to order the production of relevant documents in any proceeding before it. Where the existence of relevant documents is known, the court will not deprive itself of access thereto if there is no other bar to their production. While an order for production based on the inherent jurisdiction of the court would normally be much less broad than an order for discovery of documents under R. 26, it is simply a means of ensuring that the court is able to control and regulate its own procedure: see *Re Jones* (1959), 27 W.W.R. 631 (B.C.); and *Surrey Credit Union v. Tillmanns,* [1984] B.C.D. Civ. 2768-05 (S.C.).

[7] This passage was cited with approval by Schulman J. in ***Stein et al. v. Thames Bend Hybrids Inc. et al.*** (1998), 133 Man.R. (2d) 152; aff'd (1999), 138 Man.R. (2d) 296 (C.A.):

> [7] As counsel correctly pointed out Manitoba rule 30.10 empowers this court to make an order for production for inspection of a "relevant document". Rule 39.01(1)(c) states that for the purpose of this rule, "a relevant document is one which relates to any matter in issue in an action". Rule 1.03 defines an "action" as a "civil proceeding other than an application". It follows that, for a litigant to obtain the benefit of an order for production from a third party under rule 30.10, he or she must initiate the court proceeding by statement of claim, and the rule does not apply to a proceeding which has been commenced by notice of

> application. Such an interpretation is consistent with the obvious intention of the draftspersons that, generally speaking, there should not be a right of discovery in proceedings commenced by notice of application.

[8] JCC asserts that even if the power to order production arises from the inherent jurisdiction of the court, the master has been delegated authority to make such an order. It says s. 11.15(1) of ***The Court of Queen's Bench Act,*** C.C.S.M. c. C280 (the ***"Act"),*** which states that "[a] master has jurisdiction as provided by statutes, regulations made under statutes or the rule" combined with Rule 37.02(2) which allows a master to hear any motion in a proceeding save for certain exceptions not applicable here, give the master this authority.

[9] I disagree. The master is a creature of statute, whose authority must be founded in a specific legislative direction. This is what 11.15(1) says. Neither the ***Act*** nor the rules provide for documentary disclosure in proceedings commenced by way of application. Thus, there is no motion concerning this subject for the master to hear. Rule 37.02(2) concerns the procedure on motions arising from the rules or other legislation; it does not confer additional jurisdiction on the master. Simply put, the inherent jurisdiction of a superior court rests with the judges of the court.

[10] Thus, whether a party to an application should be ordered to disclose a document is a matter of discretion of the judge who hears the application. Properly, then, this motion ought to have been brought as a preliminary motion before the judge assigned to hear the application. While preliminary motions in proceedings commenced by application are not generally encouraged, they are

both appropriate and necessary in some circumstances. (See, for example, ***Board of Education of Winnipeg School Division No. 1 v. Winnipeg Teachers' Association of the Manitoba Teachers' Society,*** 2007 MBQB 23, 211 Man.R. (2d) 138.)

FACTS

[11] Ms. Metaser was employed by JCC as a housekeeper. On April 16, 2010 she filed a complaint alleging she had been sexually harassed by her supervisor during the course of her employment.

[12] JCC filed a response denying the allegations. The complaint was investigated pursuant to s. 26 of ***The Human Rights Code,*** C.C.S.M. c. H175 (the ***"Code")***. The investigator issued a 33-page Investigation Assessment Report ("IAR[11]") on March 21, 2012 concluding Metaser's manager was responsible for an activity or undertaking to which the ***Code*** applies; Metaser was harassed during her employment; and JCC knowingly permitted or failed to take reasonable steps to terminate the harassment. The IAR recommended that mediation should be attempted between Metaser and JCC, to try to resolve the complaint.

[13] On May 17, 2012, JCC provided a 10-page written response to the IAR, taking issue with the findings. It also pointed out that it had not been provided with documents it had asked for, that the investigator had failed to interview witnesses JCC deemed important, and asserted the investigation had not been neutral or sufficiently thorough. It claimed that Metaser was not credible.

[14] On May 30, 2012, the Board considered the IAR, JCC's May 17, 2012 response, and Metaser's response to the IAR. The Board concluded sufficient evidence existed to support the complaint and referred the complaint to mediation.

[15] As part of the mediation process an offer of settlement was made by the JCC, which was rejected by Metaser. On December 17, 2012 the Board considered JCC's offer and decided it was not reasonable. Pursuant to s. 24.1(4) of the ***Code,*** it referred the complaint to adjudication.

[16] In response to JCC's application for judicial review, the Commission filed an affidavit of Stacey Lea Belding, attaching the material that was before the Board when it made the Decisions, all correspondence communicating the Decisions to the parties, and relevant excerpts of the minutes of the Board meetings. JCC does not dispute that this material comprises the complete record of the proceeding.

[17] JCC thereafter brought this motion seeking disclosure of all materials created, received or considered by the Commission relating to the complaint, including the investigator's notes.

ANALYSIS AND DECISION

[18] The starting point is consideration of the procedure on judicial review. The Commission is an independent and highly specialized tribunal, expert in its processes, procedures, and the substantive law in the area of its decision making. The ***Code*** contains a strong privative clause. It has long been

accepted that courts apply a very high standard of curial deference to the decisions of such specialized tribunals.

[19] On a judicial review, the record of the proceeding before the tribunal is generally the basis on which its decision is judged. Evidence extrinsic to the record may be introduced only in very limited situations; otherwise the case before the court will not be that which was before the tribunal. In ***AOV Adults Only Video Ltd. v. Labour Board (Man.) et al.,*** 2003 MBCA 81, 177 Man.R. (2d) 56, the Manitoba Court of Appeal held that extrinsic evidence will be admitted only where necessary to prove error going to jurisdiction which cannot be proved on the record. Similarly, ***Zeliony v. Red River College,*** 2007 MBQB 308, 222 Man.R. (2d) 156, concluded that where allegations of procedural unfairness have been raised, affidavit evidence may only be permitted where the procedural unfairness cannot be established because of the inadequacy of the record.

[20] Thus, it is not just the grounds for the review, but the inability of the court to decide whether the allegations are well founded that justifies admission of extrinsic evidence.

[21] It seems self-evident, then, that absent any right to documentary disclosure a court should only order a tribunal whose decision is under review to produce documents that are admissible (or potentially admissible) as extrinsic evidence.

[22] Counsel referred me to several Federal Court decisions involving the Canadian Human Rights Commission, which describe the test for documentary production in judicial review proceedings before it as "[a] document ... [that] may affect the decision that the Court will make on the application". (See ***Canada (Human Rights Commission) v. Pathak,*** [1995] 2 F.C. 455 (C.A.), at p. 460). Depending on the circumstances, this may or may not be essentially the same test as I described above. However, care must be taken when considering Federal Court decisions, as its rules specifically provide for documentary disclosure in judicial review proceedings. For this reason, I conclude that three decisions relied on by JCC in support of its contention that it is entitled to the investigator's file, namely, ***Cooke v. Canada (Correctional Services),*** 2005 FC 712, [2005] F.C.J. No. 886 (QL), ***Kamel v. Canada (Attorney General),*** 2006 FC 676, [2006] F.C.J. No. 876 (QL), and ***Tremblay v. Canada (Attorney General),*** 2005 FC 339, [2005] F.C.J. No. 421 (QL), are of no assistance here.

[23] It is also important to keep in mind that the Decisions are part of what is essentially a screening process by the Commission, not a determination on the merits. The merits of the complaint will be decided by an adjudicator, who also has the power to order documentary disclosure before the hearing.

[24] The nature of this screening function, typically used by human rights commissions, has been the subject of much judicial consideration. In ***Tekano v.***

Canada (Attorney General}, 2010 FC 818, [2010] F.C.J. No. 1132 (QL),

Gauthier J. reviewed the jurisprudence in this area, including the following:

> 28 To properly characterize the questions before the Court, it is useful to say a few words about the role of the Commission and the threshold it must apply to determine whether a complaint should be referred to the Tribunal or not.
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> 29 The Supreme Court of Canada addressed these issues on a number of occasions (for example, *Syndicat des employés de production du Québec et de I'Acadie v. Canada (Human Rights Commission),* [1989] 2 S.C.R. 879 (paras. 23-27) (hereinafter *SEPQA); Bell v. Canada (Canadian Human Rights Commission; Cooper v. Canada (Canadian Human Rights Commission),* [1996] 3 S.C.R. 854 (paras. 48-58) (hereinafter *Bell).* The Federal Court of Appeal also had the opportunity to review them more recently in *Sketchley v. Canada {Attorney General},* 2005 FCA 404, [2006] 3 F.C.R. 392 (F.C.A.).
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> 30 It is clear that the Commission's role under subsection 44(3) of the *Act* is a screening function. Still, it constitutes an important threshold in accessing "the remedial powers of the Tribunal under section 54: a decision at this stage by the Commission not to deal with a complaint is a decision which effectively denies the complainant the possibility of obtaining relief under the *Act' (Sketchley,* para. 75). The investigator is essentially engaged in a fact-finding mission, but the Commission itself, when it takes action on the basis of the investigator's report, is nevertheless applying the facts in the context of the legal requirements of the *Canadian Human Rights Act* The resulting decision will, in general, be one of mixed fact and law, calling "for more deference if the question is fact-intensive, and less deference if it is law-intensive" *(Sketchley,* para. 77, quoting *Dr. Q. v. College of Physicians and Surgeons of British Columbia,* 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 34).[9] It is clear from *SEPQA* that the decision to either dismiss a case or send it to the Tribunal for consideration is intimately linked to the Commission's perception of the merits of the case. As noted in *Slattery v. Canada (Human Right Commission),* [1994] 2 F.C. 574 (T.D.) at paras 72-78, this reasoning continues to apply to the new version of the legislation under subsection 44(3) of the *Act.*
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> 31 In *Bell* at paragraph 53, Justice La Forest viewed the role of the Commission in performing a screening analysis as somewhat analogous to that of a judge at a preliminary inquiry and held that it was not the function of the Commission to determine if the complaint is made out. Rather, its duty is to determine if an inquiry is warranted, considering all the facts and to assess the sufficiency of the evidence.

> 33 It is also clear that the Commission must look and consider the sufficiency of the evidence as a whole. However, the threshold it must apply to determine whether considering all the circumstances a referral is warranted has repeatedly been described as low, see for example *Bell Canada v. Communications, Energy and paperworks Union of Canada,* [1999] 1F.C. 113 (F.C.A.) (hereinafter *Bell Canada)* at para. 35. Justice Sopinka in *SEPQA* describes it at paragraph 27 as whether or not there is a reasonable basis on the evidence for proceeding to the next stage. As the respondent puts it at paragraph 35 of his Memorandum, it can also be translated as: "whether the evidence is sufficient to suggest a possibility that some discrimination had occurred".

[25] JCC's allegations are wide ranging: bias, breach of natural justice, including lack of procedural fairness, and errors of law amounting to loss of jurisdiction. In essence, though, it says that the investigation was flawed, it takes issue with the Board's conclusions that there was sufficient evidence to refer the complaint to adjudication, and that JCC's offer of settlement was reasonable.

[26] With respect to the investigation, JCC says it was incomplete and biased. JCC asked the investigator to give it copies of his file but he refused; he failed to interview witnesses JCC identified who, it says, were critical because they would have corroborated JCC's version of events. The IAR summarized Metaser's testimony at a hearing before the Employment Insurance Board of Referees, which the investigator created by listening to the audio tape of the hearing. He did not give the tape to the Board or to JCC. JCC asserts that Metaser gave false evidence regarding her dismissal from her employment at that hearing, which is crucial to her credibility. Finally, JCC says the investigator was not neutral in that

he preferred the evidence of Metaser, which it describes as unreliable and, in some respects, outrageous.

[27] All of these objections are in JCC's May 17, 2012 response to the IAR which was before the Board when it made the Decisions now under review.

[28] JCC argues that it is not just what was before the Board, but what ought to have been before the Board that is at issue in this case. Well, that is one of the objections in its May 17th response to the IAR. The judge who hears this application can decide whether the investigator's refusal to provide documents, interview the witnesses JCC suggested, or to believe any of what Metaser said given JCC's assertion that her testimony before the Board of Referees was false amount to bias, inadequate or unfair investigation or otherwise rendered the investigation invalid.

[29] Fundamentally, however, JCC does not know of the existence of any documents it wishes to present as extrinsic evidence, and it has no basis to suggest that any documents (other than the Board of Referees' tape) exist. With respect to the tape, it is important to note that JCC asserts that the investigator's summary in the IAR reveals that Metaser gave false testimony. It does not claim that the investigator's description of Metaser's testimony is inaccurate.

[30] The result, then, is that JCC has not demonstrated that there are any documents which would likely, or at least arguably, be admissible at the hearing of this application. In substance it seeks documentary disclosure, which is not available in this proceeding.

[31] Accordingly, the appeal is allowed. The Commission is entitled to costs in this court and below. If counsel are unable to agree on the amount, they may speak to the matter.