CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

**MICHELINE MONTREUIL**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**CANADIAN FORCES**

**Respondent**

**RULING**

MEMBER: Karen A. Jensen 2008 CHRT 32
2008/07/22

[1] This is a ruling about the process that will be followed to complete the inquiry into the complaint of Micheline Anne Montreuil against the Canadian Forces (CF).

[2] Ms. Montreuil considers herself to be a transgendered person. She was born a man and went by the name of Pierre Montreuil until the mid to late 1990's when she began the medical process to become a woman. She did not complete this process.

[3] From April of 1997 to August of 1999, the Complainant served with the CF as a male member of the First Reserve of the Régiment des Voltigeurs de Québec. In 1999, the Complainant was granted a voluntary discharge from the CF. In that same year, the Complainant applied, as a female, for re-enrollment in the Canadian Forces. Her request for re-enrollment and employment with the CF was denied in 2002.

[4] Ms. Montreuil filed a complaint with the Canadian Human Rights Commission on October 23, 2002 alleging that her request for re-enrollment and employment was denied on the basis of her gender and/or a perception that she was disabled. The CF's response was that Ms. Montreuil did not meet the medical requirements for re-enrollment, and she did not establish that the circumstances had changed since her discharge in 1999 such that she should be re-enrolled in the CF.

[5] Tribunal Member Pierre Deschamps commenced the hearing into this matter on October 23, 2006 and completed it on December 21, 2007. On February 9, 2008 Mr. Deschamps' appointment to the Canadian Human Rights Tribunal ended. He was not re-appointed. The Tribunal Chairperson decided not to exercise his discretion under s. 48.2(2) of the *Act* to permit Mr. Deschamps to conclude the inquiry into the present case. The Chairperson assigned the case to the Vice-Chairperson of the Tribunal for case management.

[6] On May 13, 2008, the Vice-Chairperson invited the parties to consider the possibility of a case settlement conference to discuss options for resolving the dispute. The Respondent declined

the invitation. The Vice-Chairperson then requested submissions from the parties on the procedure to be followed to conclude the inquiry into this matter.

[7] The Complainant and the Canadian Human Rights Commission ("the Commission") propose that the case be reheard by another member on the basis of the transcripts, documentary evidence and digital voice recordings of the evidence. If necessary, some of the witnesses can be re-called to testify as the Member sees fit.

[8] In contrast, the Respondent is of the view that the principles of natural justice, and specifically the rule that "he or she who hears must decide" require that the case, in its entirety, be reheard *de novo*. The Respondent does not consent to a rehearing on the basis of the documentary evidence, transcripts and digital voice recordings of the hearing before Member Deschamps.

[9] The principle "he or she who hears must decide" requires that anyone who takes part in a decision must have heard the evidence and the representations of the parties in the manner in which the law requires that they be heard (*Doyle v. Canada (Restrictive Trade Practices Commission),* [1985] 1 F.C. 362 (F.C.A.). This principle is a significant component of the *audi alteram partem* rule of natural justice (relating to the tribunal's fairness duty), and no one disputes its application in the present case (*International Woodworkers of America, Local 2-69 v. Consolidated- Bathurst Packaging Ltd.,* [1990] 1 S.C.R. 282).

[10] Does the principle "he or she who hears must decide" require a new hearing or may the matter be reheard on the basis of the previous record? The weight of judicial and tribunal authority favours a *de novo* hearing where one or more of the parties do not consent to a rehearing on the basis of all or part of the record of the previous hearing.

[11] For example, in *Beauregard c. Québec (Commission de la function publique),* 1987 CanLII 786 (Q.C. C.A.), the Quebec Court of Appeal held that it was a breach of natural justice for the Commission de la fonction publique to appoint a new commissioner to hear a wrongful dismissal complaint half way through the proceedings even though a transcript of the evidence was available.

[12] In *Moyer v. New Brunswick (Workplace Health, Safety and Compensation Commission)* 2008 NBCA 41, the New Brunswick Court of Appeal reviewed a decision of the New Brunswick Appeals Tribunal. The Appeals Tribunal heard argument on the admission of new evidence and then adjourned. When it reconvened, two of the members of the original panel had been replaced by two new members. The Court of Appeal held that it was a breach of procedural fairness for a newly composed panel to decide Mr. Moyer's case without having first alerted him to the change of composition of the panel, and then afforded him the opportunity to commence the hearing anew.

[13] The Federal Court quashed a decision of a seven member National Parole Board in *O'Brien v. Canada (National Parole Board)* [1984] 2 F.C. 314, because four of the members of the Parole Board were not present at the interview. The four members based their decision exclusively on the written record. This was found to be a violation of the rule that "he or she who hears must decide".

[14] Human rights tribunals have applied this jurisprudence to decide whether they have an obligation to rehear a case *de novo* in the absence of consent to rehear it on the basis of the previous record. For example, in *Salvadori v. British Columbia (Ministry of Health)* [1996] B.C.C.H.R.D. No. 33 (Q.L.) the British Columbia Council of Human Rights decided that a hearing into the complaint of a number of doctors had to be recommenced when the member who started hearing the case was unable to continue. The evidence was recorded and transcripts of the hearing were available. However, not all of the parties were willing to proceed on the basis of the transcripts. After carefully reviewing the submissions and authorities, Member Patch concluded that proceeding with the inquiry on the basis of the transcripts of the evidence without the consent of all parties would be a violation of the rules of natural justice.

[15] In *Davis v. City of Toronto* 2008 HRTO 15, the Ontario Human Rights Tribunal decided that the principle of *audi alteram partem* required that a new hearing be held when the member who had started the hearing was unable to finish the hearing. The only written record of the proceedings was the handwritten notes of Commission counsel and the previous member who had heard the first part of the case. The parties did not agree that the notes could be used by the new member instead of commencing the hearing *de novo*.

[16] The new member stated that the case raised serious issues concerning the complainant's right to be hired as a firefighter by the City. It involved the application of human rights legislation, which has been recognized as quasi-constitutional in nature. Facts in relation to the hiring process as well as the complainant's medical condition were disputed, and the credibility of the complainant would be an issue. The new member stated that this is the type of case that is consistently dealt with by the Tribunal through an oral hearing, presided over from beginning to end by the same panel. On that basis she decided that it would be inappropriate to rely upon the hand-written notes as a record of the proceedings. She was not convinced that her resumption of the hearing partway through the evidence would be consistent with the principles of procedural fairness.

[17] I find the *Davis* and *Salvadori* cases instructive. Like the Ontario and British Columbia Tribunals, this Tribunal has a legislative mandate to make final determinations on complaints involving quasi-constitutional rights. The Tribunal's decisions as well as its decision-making process are similar in nature to a judicial proceeding.

[18] The Commission and the Complainant argue that given the resemblance of the Tribunal's decision-making process to that of a judicial proceeding, the Tribunal is justified in adopting the approach used by the courts and other quasi-judicial tribunals when they are in similar situations to the present.

[19] For example, the *Federal Court Rules* permit the Chief Justice to replace a judge in a case with another judge and to order that the case be reheard on such terms as he or she considers appropriate (Rule 39 of the *Federal Court Rules*). However, to date there appears to be no case law interpreting this Rule.

[20] Moreover, the *Federal Court Rules* do not provide clear legislative authority to indicate that the Tribunal, as opposed to the Federal Court, has the authority to abrogate the rules of procedural fairness. Similarly, the British Columbia *Rules of Court*, which were relied upon in *Garbutt v. Burbank* 2000 BCSC 14, and the Quebec *Code of Civil Procedure*, which was cited in

*Commission de reconnaissance des associations d'artistes et des associations des producteurs* (January 13, 2006, Dossier: 2000-0193 (AD) (unreported)), do not provide the Tribunal with the authority to abrogate or modify the rules of natural justice or procedural fairness without the consent of the parties.

[21] These two cases were cited by the Commission as support for their assertion that the Tribunal could proceed with the inquiry on the basis of the transcripts without full consent of the parties. However, the case law is clear that the rules of natural justice may only be abrogated by clear legislative authority (*Kane v. Board of Governors of University of British Columbia* (1980), 18 B.C.L.R. 124 (S.C.C.) at 135). The rules applicable to courts in other jurisdictions do not provide the Tribunal with clear legislative authority to abrogate the rules of natural justice.

[22] The question remains however, as to whether the Tribunal may rehear the case on the basis of some or all of the previous record provided the parties consent to this? Citing *Doyle, supra*, the Respondent asserts that the Tribunal is not permitted to do so. The *Doyle* case involved the judicial review of a report prepared by a Commission established under the *Canada Corporations Act* regarding allegations of fraud committed by Mr. Doyle. Mr. Doyle was not present at the hearings, but was represented by counsel for some of the proceedings. Mr. Doyle's counsel absented himself from the last part of the proceedings in protest over the manner in which the proceedings were being conducted. Mr. Doyle applied for judicial review of the report alleging that there were numerous problems with the proceedings. Among those problems was the fact two of the three persons who signed the report did not attend all the hearings. The Federal Court of Appeal found that this defect in procedural fairness to be sufficient to invalidate the report. It constituted a violation of the rule that he or she who hears must decide.

[23] The Court of Appeal stated that the rule "he or she who hears must decide" affects the decision maker's jurisdiction. For that reason its violation may be invoked even by a litigant who waived his right to be heard by the court which passed judgment on him. Thus, a defendant who voluntarily declines to attend the hearing thereby waives the right to be heard; he or she does not, however, waive the right to be judged by a judge who has heard the evidence.

[24] In the text *Practice and Procedure Before Administrative Tribunals*, authors Robert Macaulay and James Sprague offer the opinion that *Doyle* does not stand for the proposition that the principles of natural justice do not allow for a voluntary and informed choice to waive a full rehearing of the case. Rather, the case stands for the proposition that waiving the right to be heard in a matter does not constitute a waiver of the necessity that the decision-maker must have him or herself reviewed all of the evidence and argument before him or her, even though a party has elected not to put any such evidence in him or herself (at pages 22-22 - 22-24). It stands also for the proposition that waivers of aspects of the "he or she who hears" rule must be explicit.

[25] Macaulay and Sprague argue that like other aspects of the *audi alteram partem* principles such as bias, the "he or she who hears" rule should be capable of waiver. They state:

Fair play is a function of the circumstances in which it is found and a breach of the "he who hears" rule can hardly be seen to be unfair to a party who has waived its application. I fail to see any social policy objection to an applicant voluntarily and knowingly electing to have his case judged by someone who has not personally heard all of the evidence. **One might agree, for**

**example, to have the decision-maker review transcripts of past proceedings. This latter course may be socially laudable where the delays and expenses inherent in rehearings can be avoided in cases where they serve no practical purpose**. (Sprague and Macaulay, at page 22-23) (emphasis added)

[26] I agree with the statement above. In my view, there is nothing to stop the parties from agreeing that certain portions of the transcripts may be entered as evidence. Indeed, s. 50(3)(*c*) of the *CHRA* authorizes the Tribunal to receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information would be admissible in a court of law.

[27] In the *Davis* and *Salvadori* cases, the Ontario Human Rights Tribunal and the British Columbia Council of Human Rights emphasized that their ruling that the case must be reheard *de novo* did not mean that oral evidence on every aspect of the case was required if the parties agreed otherwise. The members encouraged the parties to work towards an agreement on the manner that evidence would be put before the Tribunal. In *Davis*, the Ontario Human Rights Tribunal stated that among the options the parties could explore were the use of the previous members' notes as the basis of a jointly produced statement of facts or evidence, or as the basis of affidavits of evidence in chief, in either case subject to the leading of evidence and cross examination on areas not agreed to. In *Salvadori*, Member Patch suggested that non-contentious documents and testimony from the prior hearing could be adduced through the written record of that hearing.

[28] In the present case, it is clearly in the interests of all parties to have this matter resolved expeditiously and fairly. The hearing into this case took ninety-seven days to complete. There is no question in my mind that this case can be reheard in much less time than it took in the first hearing. It is likely that much of the testimony and many of the documents are not contentious. It may even be that the parties can agree to put the examination-in-chief testimony of the non-expert witnesses in on the basis of the transcripts and then cross-examine the witnesses *viva voce*. What is required is good faith effort on the part of all to come to an agreement upon the testimony and documentary evidence that is not contentious and does not need to be adduced in the same manner as previously.

[29] The case manager will meet with the parties and assist them to attempt to reach an agreement on what parts of the evidence from the previous hearing may be adduced in the new hearing without the need for further *viva voce* testimony on those matters.

Karen A. Jensen

OTTAWA, Ontario
July 22, 2008

PARTIES OF RECORD

| | |
|---|---|
| TRIBUNAL FILE: | T1047/2805 |
| STYLE OF CAUSE: | Micheline Montreuil v. Canadian Forces |

| | |
|---|---|
| RULING OF THE TRIBUNAL DATED: | July 22, 2008 |
| APPEARANCES: | |
| Micheline Montreuil | For herself |
| Ikram Warsame | For the Canadian Human Rights Commission |
| Guy Lamb / Claude Morissette | For the Respondent |