Federal Court  Cour fédérale

Date: 20130130

Docket: T-91-12

Citation: 2013 FC 99

Ottawa, Ontario, January 30, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

DETRA BERBERI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Detra Berberi [the applicant] seeks judicial review of a decision made by the Canadian Human Rights Commission [the Commission, or CHRC], delivered by correspondence dated March 25, 2011. In that decision, pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act], the Commission decided not to deal with the applicant's complaint against her employer, Human Resources and Skills Development Canada [HRSDC].

I. Background

[2] The applicant has been an employee of HRSDC, represented here by the Attorney General of Canada [the respondent], since 1986. On November 22, 2005 she filed a complaint with the Commission, alleging discrimination at her workplace on the basis of her disability. In her complaint form, she claimed her manager had harassed her by calling her at home on a Friday evening and directing her to report to a new work location effective the following Monday. She also alleged that her employer failed to accommodate her disability, which was the result of two separate car accidents in 1998 and 1999, by directing her to report to the new location, which added 2 ½ to 3 hours to her daily commute.

[3] In addition to her complaint under the Act, the applicant filed grievances through her union pertaining to various work related matters, including the subject matter of her complaint under the Act.

[4] In April 2006, pursuant to section 41(1)(a) of the Act, the Commission decided not to deal with the applicant's complaint, as her complaint could be dealt with through the grievance procedure available to her.

[5] In December 2009, the applicant's union withdrew her grievances from the Public Service Labour Relations Board [the PSLRB, or the Board] on the basis that it was non-adjudicable.

[6] The applicant returned to the Commission on April 26, 2010 and asked that her complaint be re-activated. The Commission decided it would not deal with the complaint. This decision,

delivered by correspondence dated March 25, 2011, is the subject of the present application for judicial review.

[7] The Commission advised the applicant that it had decided not to deal with her complaint pursuant to section 41(1)(d) of the Act. The only reason the Commission provided was that "[t]he allegations of discrimination in the complaint were addressed through a review procedure otherwise reasonably available to the applicant."

[8] By letter dated July 25, 2011, the Commission advised the applicant that her request for reconsideration of this decision was denied.

II. Issues

[9] The only issue raised by this application for judicial review is whether the Commission's decision was reasonable.

III. Standard of review

[10] The standard of review applicable to the Commission's decision to dismiss the complaint is reasonableness (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at paras 54-55 [*Dunsmuir*]; *Chan v Canada (Attorney General of Canada)*, 2010 FC 1232 at para 15).

IV. Analysis

[11] The applicant submits there was insufficient evidence before the Commission to support its decision, as contrary to the Commission's assessment, the alleged discrimination and failure to

accommodate the applicant's disability were not addressed through the grievance procedure or elsewhere.

[12] The applicant asserts the Commission should have conducted an investigation and/or assessment of the merits of her complaint rather than simply adopting the respondent's position that it had remedied the matter. Moreover, the Commission does not provide reasons or an explanation to justify why it preferred the respondent's position over the applicant's, or any indication that the Commission even considered the applicant's submissions that the allegations in her complaint had not been addressed by the grievance procedure.

[13] The applicant maintains that the Commission's failure to test the competing positions advanced by herself and HRSDC in relation to the issue of whether her discrimination claim was addressed by the grievance procedure renders the decision unjustifiable.

[14] The respondent submits that where the Commission provides only brief reasons for its decision, the Commission's investigator's report is treated as constituting the Commission's reasoning for the purpose of reviewing its decision (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 37 and 38 [*Sketchley*]; *Exeter*, above, at para 21). Accordingly, the decision under review in this case includes the Section 40/41 Report prepared by the investigator and considered by the Commission.

[15] The respondent asserts the Commission's decision was reasonable and emphasizes the following findings made by the investigator after she considered the parties' positions:

- The investigator found that a "final decision" was made on the grievances when they were denied at the third level because the union had withdrawn the applicant's grievances before they were considered by the PSLRB;
- The investigator also determined that the summary of the final decisions on the grievances indicated that all of the applicant's human rights allegations were addressed by the grievance procedure, and although the applicant alleged bias on the part of those investigating her grievances, she had provided no additional facts to substantiate this allegation;
- The investigator therefore concluded that the Commission should not deal with the complaint under paragraph 41(1)(d) of the Act because the applicant's complaint of alleged discrimination was addressed through a review procedure otherwise reasonably available to her.

[16] The respondent submits that the Commission's finding that the applicant's complaint had been dealt with through the grievance procedure, notwithstanding that it was never adjudicated before the PSLRB, is consistent with *Chan*, above, at paras 32 and 46.

[17] In *Hérold v Canada (Revenue Agency)*, 2011 FC 544 at paragraphs 33 to 36, Justice Donald J. Rennie set out the following four threshold points for any analysis of the discretion vested in the Commission by paragraph 41(1)(d) of the Act:

> 33 First, the Commission has a broad discretion to dismiss complaints where it is satisfied that further inquiry is not warranted. In *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113 (CA) at para 38, the Federal Court of Appeal held that "the Act grants the Commission a remarkable degree of latitude when it is performing its screening

> function on receipt of an investigation report". In consequence Parliament did not intend the Court to intervene lightly in the decisions of the Commission.
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> 34 Second, the Commission is not an adjudicative body and does not draw any legal conclusions. It simply assesses the sufficiency of the evidence before it and determines whether a full Tribunal hearing is warranted. In *Slattery v Canada (Canadian Human Rights Commission)*, [1994] 2 FC 574 at para 56, Justice Nadon held that deference was owed to decision makers assessing such evidence and judicial review is warranted only when unreasonable omissions are made, such when an investigator failed to investigate crucial evidence.
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> 35 Third, the test for determining whether or not a complaint is frivolous within the meaning of section 41(1)(d) of the Act is whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed.
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> 36 Finally, the standard of review with respect to the Commission's decision to dismiss a complaint, rather than refer it to the Tribunal, is reasonableness: *Wu v Royal Bank of Canada*, 2010 FC 307 as it is for a decision to find a complaint trivial, frivolous, vexatious or made in bad faith: *Morin v Canada (Attorney General)*, 2007 FC 1355 at para 33.

[18] I agree with the respondent that in the case at bar, as the Commission provided only brief reasons for its decision, the Commission's investigator's report should be treated as constituting the Commission's reasoning for the purpose of reviewing its decision. As found by the Federal Court of Appeal in *Sketchley*, above, at para 37:

> …The investigator's Report is prepared for the Commission, and hence for the purposes of the investigation, the investigator is considered to be an extension of the Commission (SEPQA, supra at para 25). When the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons, the Courts have rightly treated the investigator's Report as constituting the Commission's reasoning for the purpose of the screening decision under section 44(3) of the Act (SEPQA, supra at para 35; Bell Canada v Communications, Energy and Paperworkers Union of Canada (1999) 167 DLR (4th) 432, [1999] 1 FC 113 at para 30 (CA)

> [Bell Canada]; Canadian Broadcasting Corp v Paul (2001), 274 NR 47, 2001 FCA 93 at para 43 (CA)).

[19] Moreover, reasons need not be exhaustive, or include all the details I may have preferred, as the reviewing judge, as noncomprehensive reasons do not impugn the validity of the decision's reasons or its result (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 [*Newfoundland*]).

[20] Respondent's counsel admitted the Commission's decision is "thin", but still within the acceptable level of reasonable outcomes to sustain the Commission's decision.

[21] Notwithstanding the clear path of deference to be given to the Commission's decision, such deference is not unfettered, and the Commission must be prudent in determining whether a complaint warrants an inquiry by the Tribunal (*Canada (Attorney General) v Mohawks of the Bay of Quinte*, 2012 FC 105 [*Mohawks*], *Conroy v Professional Institute of the Public Service of Canada*, 2012 FC 887).

[22] As stated by Justice Marie-Josée Bédard in *Mohawks*, above, at paragraphs 39 and 42:

> **39** As stated above, the first decision that the Commission must make upon receiving a complaint is whether it will deal with it and investigate the allegations. Section 41 of the Act obliges the Commission to deal with all complaints that are filed unless it appears to it that the complaint falls within the exceptions set forth in section 41; one of those exceptions being that the complaint is beyond its jurisdiction. The approach that the Commission should adopt when deciding whether to deal with a complaint, and the approach that the reviewing court should keep in mind, was enunciated by Justice Rothstein in *Canada Post Corp v Canada (Canadian Human Rights Commission)* (1997), 130 FTR 241, 71 ACWS (3d) 935 (TD); aff'd (1999), 169 FTR 138, 245 NR 397

(FCA) [*Canada Post*], wherein he held that the Commission should decline to deal with a complaint only where it is plain and obvious that the matter is beyond its jurisdiction:

> 3 A decision by the Commission under section 41 is normally made at an early stage before any investigation is carried out. Because a decision not to deal with the complaint will summarily end a matter before the complaint is investigated, the Commission should only decide not to deal with a complaint at this stage in plain and obvious cases. The timely processing of complaints also supports such an approach. A lengthy analysis of a complaint at this stage is, at least to some extent, duplicative of the investigation yet to be carried out. A time consuming analysis will, where the Commission decides to deal with the complaint, delay the processing of the complaint. If it is not plain and obvious to the Commission that the complaint falls under one of the grounds for not dealing with it under section 41, the Commission should, with dispatch, proceed to deal with it.
>
> [Emphasis added]

…

42 As the respondents suggest, the "plain and obvious" test proposed by Justice Rothstein is very similar to the test for striking out a court pleading on the basis that it discloses no reasonable cause of action. The approach proposed in the context of such a motion by the Supreme Court of Canada in *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at para 33, 74 DLR (4th) 321, may be of assistance to the Commission when it determines whether a complaint should be summarily dismissed without any investigation:

> Thus, the test in Canada ... is ... assuming that the facts as stated can be proved, is it "plain and obvious" that the plaintiff's statements of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential

> for the defendant to present strong defence should prevent the plaintiff from proceeding with his or her cause. ...
>
> [Emphasis added]

[23] Thus, while the Supreme Court of Canada in the *Newfoundland* case, above, clearly decided that reasons given for a tribunal's decision need not be comprehensive, it does not translate into not giving meaningful reasons or reasons supported by some evidence before the Tribunal. I am mindful that the Supreme Court also stated in *Newfoundland* that in order for the *Dunsmuir* criteria for reasonableness to be met, a reviewing court must be able to understand why a tribunal made its decision and determine whether a tribunal's conclusion is within the range of acceptable outcomes given the evidence that was before it (*Newfoundland* at paras 16 and 18).

[24] Here, there is very little in the section 40/41 Report of the Commission to support any reasonable finding that the Commission turned its mind to any of the underlying reasons for the complaint, or that the grievance process did in fact even deal with the applicant's complaints. The following facts demonstrate the deficiencies and errors made by the Commission on this front:

a) With respect to the grievance process initiated and undertaken by the PSLRB, it was withdrawn at the third level due to the union acting on behalf of the applicant deciding the grievances were "not adjudicable, for technical reasons, but not based on the merits of her grievances". Therefore, the union withdrew the grievances and the applicant could not obtain adjudication on the merits;

b) The Commission found a "final decision" was made in respect of the grievances at the third level, but did not provide any analysis or reasons for this finding, nor comment on the merits of the grievances;

c) The Commission found that "the grievances were all denied. All the allegations were found to be unfounded". This is not the case. The grievances were withdrawn, not concluded with any final decision on the merits of the grievances or the veracity of the applicant's allegations;

d) The Commission admitted that "[n]o copies of the decisions with respect to the grievances were provided" (paragraph 25 of the investigator's report); and

e) While the Commission in its report did state "the Respondent provided a summary of the final decisions on the grievances, which indicate that all the human rights allegations were addressed by the grievance procedure", no reasons or analysis were given in respect of that summary report. In fact in the February 11, 2011 letter from the respondent to the Commission's Resolution Services Division, the respondent states:

> With respect to disclosure of the final report: While it is true that the parties to the harassment complaint were informed that the final report would not be released to the parties, this in no way reflected an impingement of the Complainant's procedural rights. The Respondent firmly states that the investigator arrived at the conclusion that the complaint was unfounded and management had no doubt as to that conclusion. Rather, management was concerned with respect to the quality of the investigation report and with respect to the fact that the investigator expressed personal opinions that were inappropriate in such a report. Consequently, management advised the parties that the report was being rejected and would therefore not be disclosed to the parties.

[25] I find that the Court's intervention in the present case is warranted, as the reasons provided by the Commission through its investigator were not justified, transparent or intelligible. While the Commission is certainly entitled to consider the grievance process and a decision made by a third party, it cannot abdicate its responsibility to independently consider any decision that resulted from that process and the reasons for it.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1.) The decision of the CHRC not to deal with the applicant's complaints dated March 25, 2011 is set aside;

2.) This matter is referred back to the Human Rights Commission to conduct an investigation of the applicant's complaint against HRSDC and render a decision based on the full record concerning the applicant's grievances and its own consideration of the merits of those grievances;

3.) Costs to the applicant.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Gavin Leeb	FOR THE APPLICANT
Michael Sims	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gavin J. Leeb Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT