

Federal Court



Cour fédérale

**Date: 20131104**

**Docket: T-230-13**

**Citation: 2013 FC 1120**

**Vancouver, British Columbia, November 4, 2013**

**PRESENT: The Honourable Mr. Justice Hughes**

**Docket: T-230-13**

**BETWEEN:**

**LYNETTE SUZANNE DERKSEN**

**Applicant**

**and**

**CORRECTIONAL SERVICE OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission dated December 20, 2012, wherein the Commission decided under paragraph 41(1(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6, not to deal with the Applicant's complaint. For the reasons that follow, I am dismissing this application.

[2] The Applicant Lynette Suzanne Derksen commenced employment with the Respondent Correctional Service of Canada in November 2001. In 2006, she was diagnosed with a disability in

respect of which she underwent surgery in 2007. She returned to work in March 2008, but continued to experience limitations in the performance of her duties. In January 2011, she undertook an engagement as Chief of Administrative Services at one of the Respondent's institutions. Later in 2011, she was advised by her doctor to cease working pending further surgery. A series of events occurred in May 2011 between the Applicant, her supervisor and others at the Institution concerning the Applicant's attendance at work, the training of a replacement and related issues. As a result, the applicant filed a harassment complaint against her supervisor with the Respondent on May 24, 2011.

[3] On September 1, 2011, the Applicant was advised that her harassment complaint would be investigated and, in the meantime, the Applicant would be temporarily reassigned to other duties. A Mr. Larocque was named as the investigator to conduct the investigation into the harassment complaint. Around the same time, the Applicant contacted the Canadian Human Rights Commission about the filing of a complaint of discrimination due to her disability. As a result of her discussions with a representative of the Commission, the Applicant was under the impression that the harassment complaint and proposed discrimination complaint, while related, would be treated as separate issues.

[4] The Applicant was provided with a preliminary report respecting the harassment complaint in early December 2011. She made submissions as to this preliminary report in late December and endeavoured to file further evidence which evidence the investigator would not accept as it was filed too late and of marginal significance. On February 6, 2012, a final report was issued dismissing the harassment complaint as vexatious with a disciplinary review of the Applicant's

actions to follow. I am advised by both counsel that a judicial review of this decision was filed by the Applicant in this Court, but it was dismissed as being filed too late.

[5] In the meantime, on January 20, 2012, some two weeks before the release of the decision in the harassment complaint, the applicant filed a discrimination complaint with the Canadian Human Rights Commission. This is the complaint that ultimately led to the decision under review here.

[6] In respect of the discrimination complaint, the Applicant was advised by the Commission by letter dated March 21, 2012, that it would be considering the matter under the provisions of subsection 41(1)(d) of the *Canadian Human Rights Act* and provided a preliminary report. On October 10, 2012, the Applicant provided her position statement in respect of the preliminary report to the Commission.

[7] The Respondent provided its submissions to the Commission on November 8, 2012.

[8] On December 5, 2012, the Commission issued its decision adopting the conclusion set out in the report that the discrimination complaint was unfounded, that the Applicant had the opportunity to address her human rights issues through another process, namely, the harassment complaint.

### ISSUES

[9] The Applicant has raised the following issues:

1. What is the standard of review applicable to the decision at issue?
2. Was the Applicant afforded procedural fairness?

3. Should the decision to dismiss be set aside and sent back for a new decision?

### STANDARD OF REVIEW

[10] Each of the parties agree that the standard of review is reasonableness within the range of possible outcomes as stated by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at paragraphs 46-47.

[11] However, the matter goes further in cases where the Court is considering a decision by the Canadian Human Rights Commission under section 41(1)(d) of the *Canadian Human Rights Act*. As discussed by Justice Kane in her decision in *O'Grady v Bell Canada*, 2012 FC 1448, the Commission in acting under subsection 41(1)(d) of the Act provides a screening role, the function of the Court in reviewing such a decision is not to explore the merits of the case, the Court's role is to determine if the screening decision was reasonable. She wrote at paragraph 37:

*The Commission plays a "screening" role; it investigates complaints to determine whether the complaint should be considered by the Canadian Human Rights Tribunal. The Tribunal's role is to examine the complaint on its merits; to determine whether the complaint has been established and the appropriate remedy. The Commission does not perform this function. In reviewing a decision of the Commission to refuse to deal with a complaint, the Court cannot go beyond the Commission's role and explore the merits of the complaint. The Court can only consider whether the Commission's "screening" decision was reasonable.*

### PROCEDURAL FAIRNESS

[12] I find that the Applicant was provided procedural fairness. The Applicant was provided with a draft report and made substantial comments as to that report before a final report was issued.

[13] In its Memorandum filed with the Court and in oral argument, the Applicant took issue with some of the procedures taken in the harassment proceedings. This is not a judicial review of those proceedings and this proceeding should not be used as a collateral attack on those proceedings or the decision made there.

#### WAS THE DECISION TO DISMISS REASONABLE?

[14] I find that the report made in the discrimination proceedings is to be considered as the reasons for which the Commission made its decision to dismiss.

[15] That report was thorough and clearly had in mind the issues and determinations made in the harassment proceedings. I particularly have in mind the analysis portion of the report at paragraphs 25 through 40 of the report leading to the conclusion and recommendations at paragraphs 41 and 42 of the report. I will not repeat any of those paragraphs here. I find that the analysis is thorough, that the conclusion is reasonable as is the recommendation.

[16] I find no basis upon which to set aside the decision of the Commission in reliance upon the report.

#### COSTS

[17] The Respondent submitted that costs in the sum of \$500 would be appropriate. The Applicant submitted that no costs should be awarded in the event that it was unsuccessful.

[18] The sum of \$500 is very reasonable. Any applicant in a case such as this should be aware that there are cost consequences in losing the case. I will award costs in favour of the Respondent in the sum of \$500.

**JUDGMENT**

**FOR THE ABOVE REASONS,**

**THE COURT ORDERS AND ADJUDGES that:**

1. The application is dismissed;
2. The Respondent is entitled to costs in the sum of \$500 to be paid by the Applicant.

“Roger T. Hughes”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-230-13

**STYLE OF CAUSE:** LYNETTE SUZANNE DERKSEN  
v CORRECTIONAL SERVICE OF CANADA

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** NOVEMBER 4, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** HUGHES J.

**DATED:** NOVEMBER 4, 2013

**APPEARANCES:**

Stephanie B. Gorner FOR THE APPLICANT

Graham Stark FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Baker Newby LLP FOR THE APPLICANT  
Barrister & Solicitor  
Chilliwack, BC

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Vancouver, BC