Federal Court of Appeal  Cour d'appel fédérale

Date: 20161104

Docket: A-514-15

Citation: 2016 FCA 268

CORAM: **PELLETIER J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

TANIA ZULKOSKEY

Appellant

and

CANADA (MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT)

Respondent

Heard at Toronto, Ontario, on September 15, 2016.

Judgment delivered at Ottawa, Ontario, on November 4, 2016.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: PELLETIER J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Introduction

[1] The appellant, Tania Zulkoskey, appeals from the October 29, 2015 decision of the Federal Court (2015 FC 1196) in which the application judge dismissed her application for judicial review of the Canadian Human Rights Commission (the Commission)'s decision to not

deal with her human rights complaint because it was vexatious within the meaning of paragraph 41(1)(d) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the CHRA).

II. Background

[2] The appellant and her spouse have paid Employment Insurance (EI) premiums for many years. The appellant gave birth to twins on July 10, 2009. Due to the work required to care for the twins, the appellant and her spouse each requested 35 weeks of EI parental benefits. The spouse's request was approved. The EI Commission denied the appellant's request on the basis that the appellant's spouse had already received the maximum parental benefits under the *Employment Insurance Act*, S.C. 1996, c. 23 (the EI Act). The EI Act allows for one set of parental benefits per pregnancy.

[3] The appellant appealed the EI Commission's decision to the Board of Referees and then to the Umpire. The issue on appeal was whether the appellant was entitled to EI parental benefits. On consent, the appellant's appeal to the Umpire was stayed pending the outcome in *Martin v. Canada (Attorney General)*, 2013 FCA 15, [2014] 3 F.C.R. 117 [*Martin*] , where a father of twins had appealed the denial of his request for a second set of EI parental benefits, additional to those received by his spouse. The appellant had initially proposed that the outcome in *Martin* be binding on her appeal but, ultimately, the stay was granted without conditions.

[4] In *Martin*, this Court found that the EI Act provides 35 weeks of parental benefits per single pregnancy or adoption, not 35 weeks per child. This Court also found that the EI parental benefits scheme is not discriminatory on the basis of family/parental status and, therefore, does

not violate subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The Supreme Court of Canada denied leave to appeal *Martin* on June 27, 2013 (*Martin v. Canada (Attorney General)*, [2013] S.C.C.A. No. 122).

[5] All of the appeals before the Umpire that were stayed pending the outcome in *Martin* were transferred to the Social Security Tribunal, Appeal Division (SST-AD). The SST-AD subsequently dismissed all of the appeals, including the appellant's appeal. The SST-AD stated that *Martin* settled all aspects of the issue of parental benefits and multiple-child pregnancies, including the constitutional challenge to the EI Act (AB, Tab 6(g), pp. 283-84, paras.7-8). The appellant did not seek judicial review of the SST-AD's decision.

[6] The appellant filed a complaint with the Commission, alleging that the "per pregnancy" restriction under the EI parental benefits scheme discriminated against her on the ground of family status.

[7] The Commission requested that the appellant provide a position letter on whether the Commission should not deal with her complaint, pursuant to paragraph 41(1)(d) of the CHRA. The Commission stated that "the issue is whether or not [the appellant's] complaint may be vexatious" because the human rights allegations "may have already been dealt with through another process" (AB, Tab 5(a), pp. 46-49).

[8] A Section 40/41 Report was prepared to address whether the appellant's complaint was vexatious within the meaning of paragraph 41(1)(d) and to make a recommendation to the

Commission on this basis (AB, Tab 6(l), pp. 296-298, 304, paras. 4, 8-16, 66). The Report identified the factors relating to vexatiousness, summarized the parties' position letters, summarized the *Martin* case, and compared the legal tests under the CHRA and the *Charter*. The Report recommended that the Commission not deal with the appellant's complaint because the appellant's other process had "addressed the allegations of discrimination overall" (AB, Tab 6(l), p. 309, para. 98). Each party responded to the Report and availed themselves of the opportunity to respond to each other's submissions to the Report.

[9] The Commission ultimately decided not to deal with the appellant's complaint, pursuant to paragraph 41(1)(d) of the CHRA. The Commission adopted the Section 40/41 Report's conclusion. The Commission accepted that the SST-AD relied on *Martin* in dismissing the appellant's EI Act appeal and that the appellant's allegations of discrimination were essentially the same as those decided upon by this Court in *Martin*, even though *Martin* alleged discrimination under section 15 of the *Charter* (AB, Tab 4, pp. 38-39).

[10] The appellant sought judicial review of the Commission's decision to not deal with her human rights complaint on the grounds that the decision was unreasonable and that the Commission breached procedural fairness.

III. Federal Court Decision

[11] The application judge reviewed the Commission's decision to not deal with the appellant's complaint on a reasonableness standard. The application judge determined that the Commission was entitled to "higher deference" and should be afforded "great latitude" because

it was making a discretionary decision based on factual and policy considerations (reasons at paras. 26-27). The application judge found that the Section 40-41 Report erroneously concluded that the SST-AD finally determined the appellant's allegations of discrimination. He found that the appellant did not raise human rights issues until she filed her CHRA complaint and that the SST-AD proceedings only dealt with the interpretation of the relevant provisions in the EI Act (reasons at para. 56). The application judge concluded, however, that the Commission's reliance on *Martin*, alone, justified its decision not to deal with the appellant's complaint. The application judge stated that even though *Martin* involved a different complainant, the decision determined the appellant's underlying facts and arguments such that it "negates any prospect for success in her case" (reasons at para. 65).

[12] The application judge determined that the standard of review for determining procedural fairness is correctness. Based on the *Baker* factors, the appellant was owed a lesser degree of procedural fairness (reasons at para. 42). The application judge found that the Commission informed the appellant of what it would consider in deciding whether to deal with her complaint and gave her ample opportunity to provide submissions. The application judge found that the Section 40/41 Report, upon which the Commission based its decision, was neutral and sufficiently thorough, accurately summarized the parties' submissions, and comprehensively examined the factors to determine whether a claim is vexatious (reasons at paras. 43-45).

IV. Issues

[13] I would characterize the issues on appeal as follows:

1. What is the correct standard of review to be applied to the Commission's decision to not deal with the appellant's complaint?

2. Was the Commission's decision to not deal with the appellant's complaint reasonable?

3. Was the Commission's decision to not deal with the appellant's complaint procedurally fair?

V. Analysis

A. *Standard of Review*

[14] On an appeal of an application for judicial review, this Court must determine whether the application judge chose the correct standard of review and applied it properly. In doing so, this Court "step[s] into the shoes" of the Federal Court judge (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559).

[15] The parties agreed that the Commission's decision not to deal with the appellant's complaint is to be reviewed on a reasonableness standard. While their agreement does not bind me, I find that the parties have settled on the appropriate standard of review (*Bergeron v. Canada (Attorney General)*, 2015 FCA 160 at para. 40, 255 A.C.W.S. (3d) 955 [*Bergeron*]). The parties spent considerable effort in making arguments that would either decrease, on the part of the appellant, or increase on the part of the respondent, the "margin of appreciation" to be afforded the Commission in reaching its decision. In my view, analyzing reasonableness in an attempt to

assign some greater or lesser amount of deference to the Commission is of no assistance here. In this matter, the question to be answered is, given the overall context, was the Commission's decision not to deal with the appellant's complaint based upon the vexatious ground set out in paragraph 41(1)(d) reasonable. Nothing more and nothing less (see *Wilson v. Atomic Energy of Canada Ltd*., 2016 SCC 29 at paras. 18, 73, 399 D.L.R (4th) 193).

B. *Reasonableness of the Commission's Decision*

[16] This Court should consider the Section 40/41 Report as part of the Commission's reasons for its decision to not deal with the appellant's complaint (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at para. 37, [2006] 3 F.C.R. 392; *Bergeron* at para. 60). The Commission's decision consists of a verbatim copy of the conclusion contained in the Section 40/41 Report.

[17] The Commission informed the appellant that it was considering whether or not to deal with her complaint as it may be "vexatious" under paragraph 41(1)(d). The Commission considers a complaint vexatious where "the human rights issues in [the] complaint may have already been dealt with through another process" (AB, Tab 5(a), pp. 46-49; Tab 6(l), p. 296, p. 304, paras. 4, 9, 66).

[18] In *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422 [*Figliola*], the Supreme Court considered a provision of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210, para. 27(1)(f), that is similar to paragraph 41(1)(d) in the CHRA. A complaint could be dismissed where "the substance of the complaint or that part of the

complaint has been appropriately dealt with in another proceeding". Justice Abella found that the provision reflected the principles of the doctrines of finality – issue estoppel, collateral attack and abuse of process (*Figliola* at paras. 24-25). In *Bergeron*, this Court summarized the *Figliola* factors used to assess whether a human rights complaint has already been dealt with in a prior proceeding (at para. 50):

1. Was there concurrent jurisdiction to decide human rights issues?

2. Was the legal issue in the alternate forum essentially the same as the legal issue in the human rights complaint?

3. Did the complainant have the opportunity to know the case to meet and have a chance to meet it?

Figliola and *Bergeron* addressed circumstances where the same complainant received a final decision on allegations of discrimination in a prior proceeding then raised discrimination again in a human rights proceeding.

[19] The Commission's stated approach to vexatiousness reflects the *Figliola* factors. As shown in the Commission's correspondence with the appellant and the Section 40/41 Report, the Commission considers the following factors when deciding whether or not a complaint is vexatious (AB, Tab 5(a), pp. 48-49; Tab 65(l), pp. 297-98, para. 16):

- Has a final decision been made in another process?

- Did the decision-maker in the other process have the authority to decide human rights issues?

- Were the issues raised during the other process essentially the same as the issues in this complaint?

- Were all the human rights issues addressed?

- Did the complainant have a chance to raise all relevant human rights issues?

- Is there a significant difference between the other process and the Commission process?

[20] The Section 40/41 Report identifies the appellant's other process as her EI Act appeal before the SST-AD (AB, Tab 6(l), pp. 304, 309, paras. 67, 96). The Report emphasizes that the SST-AD relied on this Court's decision in *Martin* to dismiss the appellant's appeal (AB, Tab 6(l), pp. 304-309, paras. 67, 73, 75, 96). The Commission's reasons state that both the SST-AD and this Court had jurisdiction to decide human rights issues (AB, Tab 6(l), pp. 305, 309, paras. 71, 96). The reasons also state that the allegations of discrimination in the appellant's CHRA complaint are essentially the same as those raised and finally decided on by the SST-AD in the appellant's EI Act appeal and by this Court in *Martin* under section 15 of the *Charter* (AB, Tab 6(l), pp. 305-306, 308, paras. 75-77, 96). The investigator acknowledges that the appellant did

not raise the CHRA before the SST-AD. However, the Commission concludes that *Martin*'s *Charter* analysis, on which the SST-AD relied, sufficiently examined the appellant's allegations of discrimination and would be similar to an analysis under the CHRA (AB, Tab 6(l), pp. 305, 308-309, paras. 76, 92, 96-97).

[21] In my view, the Commission unreasonably applied paragraph 41(1)(d) to the appellant's complaint. Counsel for the respondent conceded that the appellant did not raise human rights issues prior to filing her CHRA complaint and that the SST-AD's decision was limited to the statutory interpretation of the relevant EI Act provisions. The SST-AD only applied Martin to find that, under the EI Act, the appellant was entitled to a single set of benefits per pregnancy, not per child. The appellant did not raise any allegations of discrimination, under the Charter or the CHRA, to which the SST-AD could have applied Martin. The appellant did not receive a final decision regarding human rights issues at the SST-AD. As the appellant is not attempting to re-litigate an issue on which she has already received a final decision, vexatiousness and the Figliola factors do not apply to the appellant's CHRA complaint.

[22] The respondent argues that the Commission could reasonably dismiss the appellant's complaint based on *Martin* alone. It may be that the Commission could properly dismiss the appellant's complaint if, having accepted her allegations, it finds that the complaint has no reasonable prospect of success. However, such a complaint would be considered frivolous within the meaning of paragraph 41(1)(d) (*Love v. Canada(Privacy Commissioner)*, 2015 FCA 198 at para. 23, 259 A.C.W.S. (3d) 130). Although frivolous is included alongside vexatious in paragraph 41(1)(d), the Commission clearly limited its analysis to the factors relating to

vexatiousness and the appellant's other process. The Commission asked the parties to provide submissions on vexatiousness only and to not include evidence related to the allegations of discrimination (AB, Tab 5(a), pp. 47-49; Tab 5(c), p. 150).

[23] I recognize that the vexatious ground in paragraph 41(1)(d) is intended to be interpreted flexibly to prevent multiplicity of proceedings and waste of resources on re-litigation (*Figliola* at para. 36). This Court adjudicated Mr. Martin's allegations of discrimination under the *Charter*. The allegations of discrimination in *Martin* may be essentially the same as those raised in the appellant's CHRA complaint. On this basis, the appellant's complaint may inevitably fail. However, the Commission based its decision to not deal with the appellant's complaint solely on vexatiousness which raises particular legal principles, specifically that the appellant must have received a final decision on her allegations of discrimination. The adjudication of Mr. Martin's allegations of discrimination cannot be used as a substitute. As a result, the Commission's decision does not fall within a range of acceptable and defensible outcomes that could be reached under the ground of vexatious in paragraph 41(1)(d).

[24] The Commission misconceived the basis of the SST-AD's dismissal of the appellant's appeal from the decision of the EI Commission. This led the Commission to ask itself whether the appellant's CHRA complaint was vexatious. Had the Commission properly understood the basis of the SST-AD's dismissal and, had it thought that this Court's decision in *Martin* was conclusive on the issue raised in the appellant's complaint, it could have properly raised this with the appellant. After hearing the appellant's submissions on this point, the Commission could have decided whether the complaint was frivolous, in the narrow legal sense of having no

prospect of success. In my view, this approach is still open to the Commission when it reconsiders the matter. The Commission must manage scarce resources; it is open to the Commission to not proceed with a complaint that, in its view, has no prospect of success. I wish to make it clear that I do not believe that the appellant's complaint is frivolous in the colloquial sense of the term. I appreciate that this matter is very important to the appellant and to those in similar circumstances.

C. *Procedural Fairness*

[25] Given my conclusion above, it is not necessary to determine whether the Commission breached procedural fairness in coming to its decision to not deal with the appellant's complaint. However, in my view, the appellant's submissions on this issue are without merit. The Commission did not make a clear, unambiguous, and unqualified promise that it would consider the appellant's original position letter when making its decision on whether to deal with her complaint. The initial correspondence to the appellant stated that the Commission would use "the parties' submissions to the report" (AB, Tab 5(a), p. 46). Correspondence seeking the appellant's submissions to the Section 40/41 Report stated (AB, Tab 5(c), p. 150):

> The Commission will decide based on the [Report], the complaint form, and any submissions (comments) it has received from the parties. For this reason, if you disagree with information in the report, it is important that you take this opportunity to make a submission.

The Commission clearly communicated that it would consider the parties' submissions that were made in response to the Section 40/41 Report. The Commission followed this stated procedure in coming to its decision.

[26] The appellant was provided a full opportunity to present her position on why the Commission should deal with her complaint. The arguments made in her original position letter were repeated in the Section 40/41 Report, including: the limited scope of the SST-AD proceeding; the inapplicability of *Martin*; and the heavy burden on the Commission to only dismiss complaints in plain and obvious cases. In addition to the Section 40/41 Report, the Commission specifically reviewed the appellant's submissions to the Report and the appellant's response to the respondent's submissions to the Report.

D. *Conclusion*

[27] I would allow the appeal, with costs, and refer the matter back to the Commission for reconsideration.

"David G. Near"
J.A.

"I agree.
J.D. Denis Pelletier"

"I agree.
Wyman W. Webb"

APPENDIX

Canadian Human Rights Act, R.S.C., 1985, c. H-6	*Loi canadienne sur les droits de la personne* , L.R.C., 1985, c. H-6
Commission to deal with complaint	Irrecevabilité
41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41 (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	(a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	(b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
(c) the complaint is beyond the jurisdiction of the Commission;	(c) la plainte n'est pas de sa compétence;
(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or	(d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.	(e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.
[…]	[…]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE MANSON DATED OCTOBER 29, 2015, IN T-2627-14.

DOCKET:	A-514-15
STYLE OF CAUSE:	TANIA ZULKOSKEY v. CANADA (MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT)
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 15, 2016
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	PELLETIER J.A. WEBB J.A.
DATED:	NOVEMBER 4, 2016

APPEARANCES:

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