

Federal Court of Appeal



Cour d'appel fédérale

Date: 20221215

Docket: A-197-18

Citation: 2022 FCA 218

**CORAM: WEBB J.A.
LEBLANC J.A.
GOYETTE J.A.**

BETWEEN:

TRACY ANNE DREW

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on December 1, 2022.

Judgment delivered at Ottawa, Ontario on December 15, 2022.

REASONS FOR JUDGMENT BY:

GOYETTE J.A.

CONCURRED IN BY:

**WEBB J.A.
LEBLANC J.A.**

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REASONS FOR JUDGMENT

GOYETTE J.A.

[1] Ms. Drew (the appellant) appeals from a judgment of the Federal Court (*per* Manson J.) 2018 FC 553 dismissing her application for judicial review of a decision of the Canadian Human Rights Commission (the Commission). In its decision, the Commission dismissed the appellant's complaint against Correctional Service Canada (the CSC) pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the Act) because it found that having regard to all the circumstances of the complaint, further inquiry was not warranted.

[2] The appellant and her spouse were both employed as Corrections Officers with the CSC. In 2011, they worked in the same unit at the Pacific Institution, the Complex Needs Program (the CNP unit), but on a different shift schedule. During that year, a request was made for the appellant and her spouse to work on the same shift schedule to accommodate their family routine and their 9-year-old daughter. The CSC responded to this request by transferring the appellant on the same shift schedule as her spouse, but into a different unit at the Pacific Institution, the Delta unit.

[3] In December 2014, the appellant submitted a complaint to the Commission, alleging that she was the subject of ongoing discrimination on the grounds of marital and family status in that she had been removed from the CNP unit on the basis that her spouse was working in that unit.

[4] On May 5, 2017, a Commission investigator (the Investigator) completed a report in relation to the appellant's complaint. In her report, the Investigator concluded that there did not appear to be a link between the CSC's decision to transfer the appellant to the Delta unit and her marital or family status.

[5] By letter to the Commission dated May 31, 2017, the appellant responded to the Investigator's report. In her letter, the appellant disputed several statements and factual findings of the report. The appellant enclosed with her letter two supporting documents: the first and second level management decisions in respect of her grievances related to her removal from the CNP unit (the Grievance Decisions).

[6] By letter dated August 8, 2017, the Commission informed the appellant that after having reviewed the Investigator's report and "any submission(s) filed in response to the report", it had decided to dismiss her complaint pursuant to subparagraph 44(3)(b)(i) of the *Act*.

[7] On September 12, 2017, the appellant applied for judicial review of the Commission's decision before the Federal Court, arguing that she had not been afforded procedural fairness due to the Commission's investigation not being thorough. The appellant also argued that the Commission's decision was unreasonable because of errors contained in the Investigator's report.

[8] In support of her application for judicial review, the appellant sought to rely on documents that were not before the Commission when it made its decision. Applying the rule according to which the evidentiary record before a court is the evidence that was before the decision-maker (*Association of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297 at paras. 19-20), and determining that the appellant's situation did not fit into the exceptions to this rule, the Federal Court held that it could not consider these documents.

[9] With respect to procedural fairness, the Federal Court concluded that the Commission's investigation was sufficiently thorough. In this connection, the Federal Court noted that court intervention is warranted only in the presence of fundamental investigative flaws that cannot be remedied by responding submissions (*Eadie v MTS Inc.*, 2015 FCA 173 at para. 79; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras. 120-121). The Federal Court found no such

flaws in the case before it. It also found that in light of the evidence she had obtained, the Investigator had not committed an error by not interviewing a witness that the appellant argued should have been interviewed. Accordingly, the Federal Court concluded that the appellant had been afforded procedural fairness.

[10] Turning to the reasonableness of the Commission's decision, the Federal Court noted that the key evidence submitted by the appellant in support of her allegations, the Grievance Decisions, were of limited value as they did not provide a full factual account. By contrast, the Investigator had interviewed all parties involved and reviewed the relevant evidence. The Federal Court therefore concluded that the Commission was entitled to make its decision having regard to the findings of the Investigator as well as the appellant's response to these findings and that said decision was reasonable.

[11] The appellant has appealed the Federal Court's decision before this Court.

[12] On appeal from a decision of the Federal Court sitting in judicial review, this Court must determine whether the Federal Court chose the appropriate standard of review and, if so, whether it properly applied it in reviewing the impugned decision. This requires this Court to "step into the shoes" of the Federal Court and effectively focus on the administrative decision under review (*Agraira v. Canada (Public Safety and Emergency Preparedness*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47).

[13] The applicable standards of review when assessing the Commission's decision to refer or decline to refer human rights complaints to the Canadian Human Rights Tribunal for further inquiry pursuant to subsection 43(3) of the Act are no deference, sometimes called correctness review, for review of procedural fairness issues, and reasonableness for review of the merits of the Commission's decision (*Canada (Attorney General) v. Ennis*, 2021 FCA 95, paras. 43 to 46).

[14] Before this Court, the appellant filed a motion seeking leave to introduce fresh evidence, which she submitted would dispute some of the Investigator's findings. By order dated November 22, 2018, this Court denied the appellant's motion for essentially the same reasons as those of the Federal Court for refusing to consider additional evidence.

[15] At the hearing, the appellant reiterated her request for this Court to rule on the merits and reasonableness of the Commission's decision on the basis of evidence that was not before the Commission when it made its decision. Unfortunately for the appellant, this Court cannot acquiesce to her request.

[16] As indicated above, both the Federal Court and this Court have ruled that the circumstances of this case do not warrant the admission of evidence that was not before the Commission. Detailed explanations were provided in support of these rulings.

[17] Besides the arguments made in her memorandum of fact and law, I have considered the Appellant's supplementary submissions made orally at the hearing to ensure a proper comprehension of her position. Based on the material the Court has before it and for the reasons

expressed by the Federal Court, I am satisfied that there is no basis to interfere with the Commission's decision.

[18] In light of the foregoing, I would dismiss the appeal.

[19] The appellant questioned why she, a taxpayer, should have to pay costs to the Crown. The general rule, however, is that costs are awarded to the successful party, which will include the Crown (*Stubicar v. The Queen*, 2020 FCA 66). The respondent is seeking a fixed amount of \$1,500. Although I am of the view that the respondent is entitled to costs, I would reduce the amount to the all-inclusive amount of \$750.

“Nathalie Goyette”

J.A.

“I agree.

Wyman W. Webb J.A.”

“I agree.

René LeBlanc J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-197-18

**APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE MANSON OF THE
FEDERAL COURT, DATED MAY 29, 2018, DOCKET NO. T-1381-17**

STYLE OF CAUSE: TRACY ANNE DREW v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: VANCOUVER,
BRITISH COLUMBIA

DATE OF HEARING: DECEMBER 1, 2022

REASONS FOR JUDGMENT BY: GOYETTE J.A.

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

DATED: DECEMBER 15, 2022

APPEARANCES:

Tracy Anne Drew ON HER OWN BEHALF

Courteney Landsiedel FOR THE RESPONDENT

SOLICITORS OF RECORD:

A. François Daigle FOR THE RESPONDENT
Deputy Attorney General of Canada