

Federal Court



Cour fédérale

Date: 20151208

Docket: T-910-15

Citation: 2015 FC 1355

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, December 8, 2015

PRESENT: Madame Justice St-Louis

BETWEEN:

LYNE BRASSARD

Applicant

and

**ATTORNEY GENERAL OF CANADA,
JIRKA DANEK AND YVON PARIZEAU**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] Lyne Brassard, the applicant, is seeking judicial review of a decision rendered May 12, 2015, based on paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act], reproduced in the Appendix, in which the Canadian Human Rights Commission [CHRC] refused

to deal with three complaints she had filed. Ms. Brassard asks the court to allow and approve the judicial review and to order the CHRC to review her complaints.

[2] For the reasons set out below, the Court allows, in part, this application for judicial review.

II. Relevant facts

[3] On August 23, Ms. Brassard was appointed as administrative assistant (AS-02) at the Information Technology Services Directorate at Public Works and Government Services Canada [PWGSC] and reported to Jirka Danek, one of the co-respondents, and Yvon Parizeau, another co-respondent. Ms. Brassard was subject to a one-year probation period, ending August 23, 2011.

[4] In October and December 2010, and in January and April 2011, Ms. Brassard met with her management team about her performance; in short, a performance evaluation was given to her and an action plan was developed.

[5] On May 16, 2011, Ms. Brassard filed an internal harassment complaint against Messrs. Danek and Parizeau regarding her working conditions and micromanagement; later, she added allegations of gender-based harassment to this complaint.

[6] This complaint was filed with the manager of the Prevention of Harassment in the Workplace team at PWGSC's Labour Relations Division, Alexandre Picard, who was replaced

shortly thereafter by Laura Milsom. Ms. Milsom met with Ms. Brassard many times between June 7 and 13, 2011, and obtained additional information. In July 2011, John Rath-Wilson, Chief Operating Officer at the Information Technology Services Branch of PWGSC, began a [TRANSLATION] "internal fact-finding process" that he led himself with the support of the labour relations group. Mr. Rath-Wilson conducted an investigation that concluded in September 2011. The information from Mr. Rath-Wilson is limited to two emails he sent on September 9, 2011, one to Mr. Danek and one to Mr. Parizeau, to confirm with each that he had met with them and the matter was concluded.

[7] The Court notes that it has no information about the above-noted internal fact-finding process, Mr. Rath-Wilson's mandate, the nature of the related investigation, which the parties confirmed was conducted, the manner in which the investigation was conducted, the witnesses who were met, or even the conclusions Mr. Rath-Wilson reached. Moreover, the parties confirmed that Ms. Brassard was not informed of this investigation, was not met by Mr. Rath-Wilson and was not informed of his findings.

[8] On June 28, 2011, before the end of her probation period, Ms. Brassard was dismissed because, according to the employer, she did not meet the requirements of the position.

[9] On July 5, 2011, Ms. Brassard, assisted by her union, filed a grievance challenging her dismissal. In it, she did not mention being subject to harassment or discrimination, but made such allegations at the hearing.

[10] On December 20, 2011, the Senior Assistant Deputy Minister, Projects and Client Services, dismissed Ms. Brassard's grievance at the final level of the grievance process. He concluded that Ms. Brassard's dismissal took place during her probation period and was the result of management's dissatisfaction with her work, which was related to her reliability, her incompatibility with coworkers and her manager, and her inability to meet the requirements of the position. He made note of the corrective measures Ms. Brassard and her union representative requested at the hearing, including providing a harassment-free workplace or finding that the impugned acts constituted a violation of the Act.

[11] Ms. Brassard's union did not support sending the grievance to adjudication, but in October 2012, eight months later, Ms. Brassard took the initiative to send it to the Public Service Labour Relations Board [PSLRB]. On September 9, 2013, the PSLRB dismissed the request for referral on the ground that it was past the deadline and Ms. Brassard did not provide a clear, logical and convincing reason to justify the delay.

[12] In January 2012, Ms. Brassard requested the re-activation of her three distinct harassment and discrimination complaints before the CHRC. One targets PWGSC, another Jirka Danek and the last, Yvon Parizeau.

[13] The first complaint was filed January 27, 2012, and bears the file number 20110861. Ms. Brassard alleges that PWGSC committed gender-based employment discrimination by failing in its duty to provide her with a harassment-free workplace and by dismissing her, contrary to sections 7 and 14 of the Act.

[14] The second complaint was filed January 23, 2012, and bears number 20110864.

Ms. Brassard alleges that Mr. Danek harassed her because of her sex, contrary to section 14 of the Act.

[15] The third complaint was also filed on January 23, 2012, and bears number 20110865.

Ms. Brassard alleges that Mr. Parizeau harassed her because of her sex, contrary to section 14 of the Act.

[16] On May 12, 2015, the CHRC wrote to Ms. Brassard informing her of its decision to not deal with her complaints under paragraph 41(1)(d) of the Act. It stated that it reviewed the reports previously disclosed to Ms. Brassard and all the related observations transmitted at a later date.

[17] With its transmission letter, the CHRC enclosed three papers supporting the decision in each of the above-noted complaints. In essence, the three decisions confirm the documents that were reviewed at the time the decision was made and the reasons for the decision.

[18] Each decision confirms that the CHRC reviewed the complaint form, the section 40/41 report dated December 30, 2014, the complainant's and the respondent's written submissions and the complainant's and respondent's written submissions from cross-disclosure.

[19] Each of the decisions adopts findings as stated in each of the reports on sections 40/41 that, essentially, Ms. Brassard's allegations are vexatious since they have already been addressed

through the grievance process or through the internal harassment process. The CHRC therefore decided to not deal with the complaints pursuant to article 41(1)(d) of the Act.

[20] Ms. Brassard is applying for judicial review of the CHRC decision to refuse to deal with her complaints.

III. Issues

[21] The Court must first determine the appropriate standard of review and then determine whether the CHRC committed a reviewable error by refusing to deal with Ms. Brassard's complaints.

IV. Parties' positions

A. *Ms. Brassard's arguments*

[22] Essentially, Ms. Brassard argues that the CHRC erred by referring to paragraph 41(1)(d) of the Act and qualifying her allegations as vexatious because this term, in her opinion, implies (1) bad faith or a malicious intent, which she did not have, and (2) a lack of seriousness, which is not the case.

[23] She also argues that the CHRC violated the principle of procedural fairness in its decision-making process and in particular, she challenges the internal investigation process because she was not informed of it and nobody met with her.

[24] Ms. Brassard argues that there is dysfunction and complacency in the CHRC hierarchy, which explains why her complaint was not handled properly, and that the CHRC review mechanism is not sufficiently independent to assess a harassment situation.

B. *Respondents' arguments*

(1) Preliminary issue

[25] First, the respondents submit that the Attorney General of Canada should be named as a respondent and not his departments or agencies, in accordance with subsection 303(1) of the *Federal Courts Rules*, [the Rules] SOR/98-106. The designation of PWGSC should therefore be replaced by the Attorney General of Canada. The Court agrees.

(2) Standard of review

[26] According to the respondents, the decisions rendered by the CHRC pursuant to paragraph 41(1)(d) of the Act must be reviewed on a standard of reasonableness (*Morin v Canada (Attorney General)*, 2007 FC 1355 at paras 22-25).

(3) Decision is reasonable

[27] The respondents submit that Ms. Brassard filed an internal harassment complaint and a grievance against her dismissal during her probation period and that these two processes reviewed her allegations regarding human rights; these allegations were presented again in her

complaint before the CHRC. The complaint is vexatious because Ms. Brassard is asking the CHRC to consider issues already considered by competent organizations.

[28] The respondents submit that it was reasonable for the CHRC to refuse to deal with the complaints and the fact that issues that have already been decided are being raised again could constitute an abuse of process (*Exeter v Canada (Attorney General)*, 2011 FC 86 at para 22).

[29] The respondents submit that the doctrine of issue estoppel, supported in particular by the Supreme Court in *Penner v Niagara (Regional Police Services Board)*, [2013] 2 SCR 125, cited at para 27 in the report on articles 40/41 of file 20110861, at para 13 of file 20110864 and para 25 of file 20110865, applies to the CHRC decision because Ms. Brassard's complaints had already been received a final decision, and because the parties to the previous decision are the same.

[30] According to the respondents, to determine whether there is issue estoppel, the CHRC must decide (i) the nature of the issue raised, (ii) the finality of the decision, (iii) the parties involved in the various cases and (iv) the circumstances of the case presented to the CHRC, which it did.

(a) *Estoppel of grievance process*

(i) Nature of the issue raised

[31] As to the nature of the issue raised in the CHRC decision, the respondents submit that the CHRC considered the following:

- The grievance was filed after Ms. Brassard was dismissed;
- During the hearing of the grievance, Ms. Brassard and her union representative alleged that Ms. Brassard had been subject to discrimination and harassment;
- During the hearing, Ms. Brassard and her union representative requested many corrective measures including the right to claim financial compensation on the grounds that that the impugned acts constituted a violation of the Act;
- The decision-maker was a senior assistant deputy minister with the jurisdiction to decide human rights issues;
- The decision-maker determined that reason for Ms. Brassard's dismissal was her inability to meet the requirements of the position, her lack of reliability and her incompatibility with her coworkers.

(ii) The finality of the decision

[32] As to the finality of the decision, the respondents submit that the CHRC considered the following:

- Ms. Brassard could have requested adjudication of her grievance before the PSLRB but her union chose not to send the grievance to adjudication;
- Ms. Brassard filed the grievance to adjudication herself, but the PSLRB chose not to consider it, because of the time frame;
- The senior assistant deputy minister's decision was therefore the final decision.

(iii) The parties involved

[33] As to the parties involved, Ms. Brassard's grievance was directed against PWGSC; Mr. Danek and Mr. Parizeau were the subject of an internal complaint process.

(b) Estoppel of internal complaint process

[34] Moreover, the respondents submit that to determine the application of estoppel to the internal complaint process, the CHRC considered the following, among others:

- They were harassment complaints against Messrs. Danek and Parizeau;
- Ms. Brassard's complaints were reviewed in an internal fact-finding process that addressed all the allegations;
- The internal process was led and conducted by Mr. Rath-Wilson, with the support of labour relations, who has the jurisdiction to decide human rights issues;
- Mr. Rath-Wilson led an investigation regarding the allegations, which concluded in September 2011;
- Mr. Rath-Wilson had a frank discussion with Mr. Danek and Mr. Parizeau about the allegations and discussed expectations regarding appropriate behaviour in the workplace, including appropriate language, and labour relations concluded the matter after this process;
- There is no indication that Ms. Brassard was informed of the conclusion of the process and Mr. Rath-Wilson acknowledged that it was a regrettable error.

[35] The respondents submit that it was therefore reasonable for the CHRC to find that Ms. Brassard's allegations had already been addressed in the grievance process and the internal complaint process.

(c) Circumstances of the case presented to the CHRC

[36] As for the circumstances of the case, the respondents submit that the CHRC must establish whether the decision made was procedurally fair and whether it would be unfair to end the new proceeding, using the results of the previous process.

[37] To determine whether it would be unfair to not reconsider the complaint, the CHRC considered the following:

- For both processes, there was no indication or motive to believe that the decision-maker was not objective;
- For both processes, the parties were advised of the issues to be decided and they had the opportunity to address them;
- There is no significant difference between the grievance process and the CHRC complaint process;
- There are negligible differences between the internal harassment process and the CHRC complaint process.

[38] The CHRC reasonably determined that it was not unfair to consider that the allegations regarding human rights arguments had already been addressed in the grievance process and the

internal complaint process. It was therefore reasonable to not deal with the complaint before the CHRC.

V. Standard of review

[39] The Court agrees with the respondents' position and shall review the CHRC decision on a standard of reasonableness (*Khaper v Air Canada*, 2015 FCA 99 at para 16).

[40] The decision is reasonable if it falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). On this, the Court is aware of the need to defer to the decision-maker, the CHRC, considering its expertise and experience interpreting and applying the statute and considering it exercises a discretionary power (*O'Grady v Bell Canada*, 2012 FC 1448 at paras 27 and 36).

VI. Analysis

[41] The Court is satisfied that the CHRC decision regarding complaint no. 20110861, related to Ms. Brassard's grievance, is reasonable. The Court subscribes to the respondents' position on this, being satisfied that (1) the grievance process addressed the allegations of discrimination, human rights and harassment in Ms. Brassard's workplace, (2) the grievance process is fair and (3) the decision rendered is final. The Court is satisfied that for this complaint, the allegations have been determined and it is not unfair to not reconsider this complaint.

[42] However, the Court cannot come to the same conclusion regarding the internal complaints against Messrs. Danek and Parizeau. The internal fact-finding process Mr. Rath-Wilson conducted does not meet the so-called estoppel criteria because the process does not seem fair.

[43] As noted by the Court above, the record contains no information on Mr. Rath-Wilson's mandate, the nature of the related investigation, which the parties confirmed was conducted, the manner in which the investigation was conducted, the identity of the witnesses who were met, or even the conclusions Mr. Rath-Wilson reached. Additionally, the parties confirmed that Ms. Brassard was not informed that this investigation occurred, was not met by M. Rath-Wilson and was not informed of his findings.

[44] The Court is aware that the level of procedural fairness varies depending on many factors, including, among others, the nature of the decision being made, the importance of the decision to the individual affected and the legitimate expectations of the person challenging the decision (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23-27).

[45] In the present case, the internal fact-finding process and related investigation did not provide an adequate level of procedural fairness to Ms. Brassard. It would be unfair to not reconsider these complaints and the CHRC's decision to not deal with complaints 20110864 and 20110865 under paragraph 41(1)(d) of the Act is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The name of the Minister of Public Works and Government Services Canada is replaced by the name of the Attorney General of Canada as respondent;
2. The application for judicial review of the Canadian Human Rights Commission decision regarding complaint number 20110861 is dismissed;
3. The application for judicial review of the Canadian Human Rights Commission decision regarding complaint numbers 20110864 and 20110865 is allowed;
4. The decision of the Canadian Human Rights Commission regarding complaint numbers 20110864 and 20110865 is quashed and the matter is returned to the Canadian Human Rights Commission for reassessment taking into account these reasons;
5. As the parties were each partially successful, no costs shall be awarded.

"Martine St-Louis"

Judge

APPENDIX

Canadian Human Rights Act,
RSC 1985, c H-6, section
41(1)d):

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:

(d) the complaint is trivial,
frivolous, vexatious or made in
bad faith; or

...

*Loi canadienne sur les droits
de la personne, LRC 1985,*
c H-6, article 41(1)d) :

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 :

d) la plainte est frivole,
vexatoire ou entachée de
mauvaise foi;

[...]

FEDERAL COURT
SOLICITORS OF RECORD

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