Federal Court  Cour fédérale

Date: 20161206

Docket: T-690-15

Citation: 2016 FC 1346

Toronto, Ontario, December 6, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

YVONNE SOULLIÈRE

Applicant

and

CANADIAN BLOOD SERVICES
HEALTH CANADA

Respondents

and

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

ORDER AND REASONS

I. Introduction

[1] The Applicant brings this motion pursuant to Rules 8, 59, and 369 of the *Federal Courts Rules*, asking for the following relief:

i. An order striking: paragraphs 3 to 6 and 8 of the Canadian Blood Services [CBS or the Respondent] Notice of Appearance; paragraphs 4, 5 and 80 to 116 of the CBS Memorandum of Fact and Law [CBS Factum]; paragraphs 3, 5 to 15, and 30 of the CBS Response to the Memorandum of Fact and Law of the Intervener, the Canadian Human Rights Commission ("Commission") [CBS Response].

ii. In the alternative, a direction from the Court on how to object and if necessary reply to the additional grounds raised by CBS in the paragraphs outlined in (i).

[2] I rendered a decision from the Bench denying the relief requested in (i), but providing a direction requested in (ii), with the consent of the Respondent, to provide a factum of no longer than 12 pages by February 28, 2017. In doing so, I promised brief reasons that would follow, and those are contained below.

II. Background

[3] Yvonne Soullière [the Applicant] brought her disabled daughter, Yanhong Dewan, to donate blood on February 2, 2012. The blood clinic which she attended in La Salle, Ontario was operated by CBS.

[4] The Applicant requested accommodation for her daughter's disability in the form of translating the Donor Health Questionnaire [DHAQ] into language familiar to her daughter. CBS declined to allow Ms. Soullière or anyone else to translate the DHAQ into accessible language for Ms. Dewan.

[5] Ms. Soullière filed the underlying complaint with the Commission against CBS [the complaint] on December 7, 2012 (Commission File No 20120986), as well as against Health Canada on the same date (Commission File No 20121051), on the basis of discrimination pursuant to the *Canadian Human Rights Act*, RSC, 1985, c H-6 [the Act].

[6] On February 8, 2013, CBS objected to the investigation of the complaint pursuant to sections 40/41 of the Act. On December 18, 2013 the Commission decided to deal with the complaint finding that CBS provides a service when screening potential blood donors. It referred the complaint to an Investigation Officer. On December 29, 2014, Investigation Reports were completed with respect to both the CBS and Health Canada complaints and delivered to the respective parties. Submissions in response to the Investigation Reports were made. The Respondent CBS continued to advocate that donating blood is not a "service" within the meaning of section 5 of the Act.

[7] The Commission dismissed the allegations of discrimination against CBS in a letter dated March 26, 2015. It decided, pursuant to subparagraph 44(3)(b)(i) of the Act, to dismiss the complaint because "having regard to all the circumstances of the complaint, further inquiry is not warranted". In short, despite accepting that blood screening is a service, the officer found no basis for a further investigation of discrimination.

[8] Since the Commission provided no reasons, the parties agree that the report of the investigative officer constitutes the Commission's reasons: *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 37-38. The complainant (now the Applicant) filed two judicial

reviews, which are set to be heard consecutively in Toronto on May 15-16, 2017. (The motion which forms the subject of this decision only concerns the Respondent CBS.)

[9] As noted above, the investigative officer accepted that the blood screening process constitutes a "service" as defined under the Act. This had been a major issue between the parties throughout the course of the investigation. Before this Court, the Respondent continues to argue that the complaint should be dismissed not only on the basis of subparagraph 44(3)(b)(i), as the Commission decided – but also on the basis of subparagraph 44(3)(b)(ii) and paragraph 41(1)(c). In other words, the Commission could – and should – have also justified its decision to dismiss the complaint on the basis that the blood donor screening process does not constitute a service.

III. Issues and Analysis

[10] The Applicant asks that the Court strike out all arguments made by CBS alleging that blood screening is not a service. In her written submissions, the Applicant argued that the Commission made three distinct decisions: (1) whether there was support for the allegations of discrimination in the provision of a service; (2) whether the policy, practice, rule or standard was *bona fide* justified; and (3) whether there was a failure to accommodate.

[11] The Applicant therefore characterizes the Respondent as being "partially successful", in that the Respondent only succeeded on the issue of non-discrimination under subparagraph 44(3)(b)(i) of the Act, but was unsuccessful with respect to its arguments pursuant to paragraph 41(1)(c), regarding the "service" issue. The Respondent, according to the Applicant, had an obligation to bring its own judicial review to challenge that unsuccessful component of the case.

The Applicant relies on several cases in support of its position, including *Systèmes Equinox Inc v Canada (Public Works and Government Services)*, 2012 FCA 51; *Larsson v Canada*, [1997] FCJ No 1044 (Fed CA); and *Go v Canada (Attorney General)*, 2004 FC 471.

[12] The Applicant has not disputed that a party may not judicially review a decision in its favour. However, the Applicant seeks to avoid this issue by characterizing the decision under review as actually being a number of separate decisions. According to the Applicant, CBS should have separately judicially reviewed the unfavourable decision regarding the "service" issue, and cannot do so in this proceeding. Therefore, this motion turns on whether the below decision was in fact a single determination in which the Respondent was wholly successful.

[13] As indicated to the parties, the Court agrees with the Respondent's position: ultimately, the Commission made only one decision – there should be no further inquiry under the Act. The investigative officer's determinations formed the reasons for that decision. In turn, the officer's various reasons were ultimately components of the Commission's reasons not to proceed with a full inquiry. The "services" question goes only to one of the potential justifications for those reasons. It is not an additional decision in and of itself.

[14] Furthermore, the Notice of Application filed by the Applicant refers to "the Decision" of the Commission, not "the Decisions".

[15] I also disagree with the Applicant's argument that the Respondent was only "partially successful". The Respondent was wholly successful in the decision it advocated for. It was

partially successful only in the legal reasoning on which the Commission's said disposition was founded, in that while the Commission found no basis for further investigation into alleged discrimination, it nonetheless accepted that screening donors constituted a service under the Act. While not all of the Respondent's alternative arguments for dismissing the complaint were accepted, one was, and that was sufficient to achieve a favourable determination to the Respondent.

[16] Given my findings on the nature of the decision, the cases raised by the Applicant differ in their facts, as they all involved at least two decisions, where the rulings were favourable and unfavourable in part to each of the litigants.

[17] Contrary to the position of the Applicant, I disagree that the Respondent should have brought forward its own judicial review in this case. The case law is clear that successful parties have the choice of awaiting a decision at the section 44 stage before challenging the Commission: see *Canada Post Corporation v Barrette*, [2000] 4 FC 145 at para 24; *Mohawks of the Bay of Quinte v Canada (Attorney General)*, 2014 FC 527 at para 5; *Canada (Attorney General) v Hotte*, 2005 FC 246 at paras 9-10, 15, 39.

[18] Here, the Respondent had every right to await the outcome of the section 44 decision, which was ultimately decided in its favour. Having received that decision, the Respondent could not challenge it, given the disposition in its favour. However, once challenged by the Applicant through this judicial review, the Respondent had every right to challenge the underlying reasons

with which it took issue. As held by the Federal Court of Appeal in *Canada (Attorney General) v Dussault*, 2003 FCA 5 at para 5:

> A party that wins but does not necessarily endorse the reasons given certainly has no interest in attacking the judgment, whether by an appeal or by an application for judicial review. Technically, it is the disposition that is attacked, not the reasons leading up to it. It is equally certain, however, that if the adverse party attacks the judgment, the party that won has the right, in its memorandum if it is an appeal or in its record if it is an application for judicial review, to go after the reasons for judgment that are under attack in order to improve them, if appropriate, or, as in this case, to demonstrate their lack of merit and even to have the appeal or application dismissed on grounds other than those adopted by the trial judge..

IV. Costs

[19] Having considered the submissions on costs from both sides, no costs will be ordered, for all the reasons put forward by the Applicant, including the Applicant's financial position, her public interest motivation and redress sought, along with the nature of her counsel as a not-for-profit supporting the public interest, and the underlying legal issues raised.

V. Direction on Reply Memorandum

[20] The Applicant's request for an opportunity to respond on the issue of service (the alternate relief sought) is granted. The Reply memorandum, due by February 28, 2017, upon the consent of the other parties to the litigation, shall not exceed 12 pages in length.

ORDER

THIS COURT ORDERS that:

1. The primary relief request, namely striking paragraphs from the pleadings relating to the "service", as outlined in section (i) above, is rejected.

2. The alternate relief, namely a direction to permit the Applicant to file a Reply memorandum, is granted. That memorandum shall only address the "service" issue and shall be a maximum of 12 pages in length and submitted by February 28, 2017.

3. No costs will issue.

"Alan S. Diner"

Judge

FEDERAL COURT

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STYLE OF CAUSE:	YVONNE SOULLIERE v CANADIAN BLOOD SERVICES AND HEALTH CANADA
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