Federal Court  Cour fédérale

Date: 20170504

Docket: T-1093-15

Citation: 2017 FC 446

Ottawa, Ontario, May 4, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

OURANIA GEORGOULAS

Applicant

and

ATTORNEY GENERAL OF CANADA (AGC)
CANADIAN ASSOCIATION OF
PROFESSIONAL EMPLOYEES (CAPE)

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Ourania Georgoulas [the Applicant] asks this Court to judicially review a Canadian Human Rights Commission [CHRC] decision dated May 20, 2015, which screened out her complaint. The CHRC decided that file #20140564 should not proceed because the Applicant did not use the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [PSLRA] for her labour

complaint and it was plain and obvious that the claim would not succeed (ss. 41(b) and (d), *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act]).

II. Background

[2] The Applicant has her civil and common law degrees and was at all times and still is a member in good standing with the Barreau du Québec and the Law Society of Upper Canada. She chose to represent herself in this matter.

[3] The Applicant has a number of matters before the CHRC, the Federal Court, and the Federal Court of Appeal, making it very difficult for the Applicant and the Respondents to move on. In this file the Attorney General did not participate in the hearing or file any materials. Understandably, the Applicant's life revolves around these matters and their conclusion would enable the Applicant to engage in something other than litigation.

[4] I am granting this application solely on the basis of a breach of procedural fairness and not for the myriad of other issues that go to the merits and reasonableness of the decision. For that reason, I will only briefly address issues other than procedural fairness.

[5] The Applicant was employed as a Policy Analyst with Transport Canada [the employer or TC], Aviation Security Directorate, beginning November 2007 until 2016. She was on long term disability from December 2011 until September of 2014 after which she returned to work for 18 months. The Canadian Association of Professional Employees [CAPE] was at all material times the Applicant's certified bargaining agent.

[6] Throughout 2013 and much of 2014, the Applicant, Transport Canada and CAPE had numerous discussions about how to accommodate her gradual return to work. TC requested she complete a Health Canada assessment to identify her functional limitations in order to accommodate her return to work. The Applicant objected to this assessment as she had already submitted her own doctor's medical report and accommodation plan. CAPE advised the Applicant to complete the Health Canada assessment.

[7] The Applicant's complaint against both TC and CAPE began with the CHRC as file #20140234. The CHRC later separated that complaint into two files, one remaining #20140234 (against TC), and the other given file #20140564 (against CAPE). The file ending in 234 is being judicially reviewed in T-1094-15, and a previous complaint file (#20111316) against TC is also the subject of a judicial review. The file ending in 564 against CAPE is the subject of this judicial review.

[8] On February 21, 2014, the Applicant approached the CHRC with complaints against TC and CAPE. An Early Resolution Analyst at the CHRC informed the Applicant that she could not file against CAPE. The analyst suggested that the Applicant file a complaint with the provincial authorities. Instead after an extension of time to file was granted, the Applicant included her complaint against CAPE in the complaint kit against her employer- TC on April 11, 2014.

[9] The Applicant was dissatisfied with filing one complaint against both her employer and CAPE as she felt she had two human rights complaints against two different parties with different incidents that supported the two separate claims. Her dissatisfaction was compounded

since one complaint kit contains a maximum three page limit to describe the incidents against both parties. According to the Applicant, having only three pages for two parties prevented her from properly filing her complaint. She further alleges that two separate complaint kits with three pages of space each would have adequately allowed her to describe the incidents ascribed to each party.

[10] At some point after filing, the CHRC unilaterally separated the Applicant's complaint into two files, one against TC, and the other against CAPE. The letter to CAPE from CHRC dated June 12, 2014, has the file number 20140564 on it. Attached to the letter is the copied complaint form with the last three numbers crossed out and 564 hand-written in. However, with the creation of two files, the Applicant was still restricted to the three page submission in her original complaint kit. The Applicant's request to amend her complaint to reflect her claim against each party was not granted.

[11] On July 4, 2014, the CHRC informed the parties that it would be preparing a section 40/41 report to determine whether the Applicant's complaint should be addressed. In a July 14, 2014 letter, the CHRC requested submissions on the applicability of section 41 of the Act. The Applicant filed a position statement in response on September 19, 2014.

[12] On January 30, 2015, the section 40/41 report was completed. It concluded that since the limitation period under the PSLRA had passed, the CHRC should address her complaint. However, it also concluded that it was "plain and obvious that the complaint cannot succeed." It

found the Applicant's complaint was frivolous within the meaning of paragraph 41(1)(d) of the Act and recommended that the CHRC dismiss it.

[13] On March 26 and April 23, 2015, the Applicant made further submissions to the CHRC regarding the section 40/41 report and submissions from CAPE. In a letter dated May 20, 2015, the CHRC dismissed the Applicant's complaint against CAPE.

[14] In its decision, the CHRC refused to deal with the Applicant's complaint under paragraphs 41(1)(b) and (d) of the Act. The CHRC adopted the reasons from the section 40/41 report stating that the allegations were frivolous within the meaning of the Act. However, it disagreed with the report regarding adequate alternative remedy preferring submissions made by CAPE. The CHRC agreed that the Public Service Labour Relations Board [PSLRB] was the appropriate forum for the Applicant's complaint. CHRC found contrary to the report that the expiry of the limitation period for her complaint under that Act did not alter its appropriateness.

III. Issues

[15] The Applicant raised the following issues in this application:

A. Did the CHRC err in dismissing her complaint?

B. Did the CHRC err by lacking neutrality/impartiality?

C. Did the CHRC err by refusing to exercise its jurisdiction regarding s. 41(1)(d) of the Act?

D. Did the CHRC err in refusing to amend the Applicant's complaint to include retaliation pursuant to s. 14.1 of the Act?

[16] The issues are better stated as follows:

A. Was the Applicant deprived of a fair opportunity to present her case to the CHRC; and

B. Was the CHRC decision reasonable?

IV. Standard of Review

[17] The appropriate standard of review is reasonableness for an error of fact or error of fact and law (*Kwon v Federal Express Canada Ltd*, 2014 FC 268 at para 12; *Ayangma v Canada (Attorney General)*, 2012 FCA 213 at para 56). A decision by the CHRC not to deal with a complaint under subsection 41(1) of the Act is discretionary and entitled to deference (*Zulkoskey v Canada (Employment and Social Development)*, 2015 FC 1196 at paras 24-27 [*Zulkoskey*]). The screening role of the CHRC to not hear the merits of a complaint should be accorded deference (*O'Grady v Bell Canada*, 2012 FC 1448 at para 37 [*O'Grady*]).

[18] Questions of procedural fairness will be reviewed on the correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 [*Dunsmuir*]).

V. Analysis

A. *Affidavit Evidence*

[19] The Respondent CAPE asked that the Applicant's affidavits sworn June 30, August 5 (the Applicant uses the 4th), 2015, as well as March 31, 2016 be struck, as they contain legal argument and opinion. In addition, the Respondent alleges that the affidavits contain "new

information" that was not before the decision maker including events that occurred after the decision.

[20] The Applicant indicated that the affidavits demonstrate a breach of procedural fairness through interactions she had with CHRC staff which fit within the exceptions to Rule 81 of the *Federal Courts Rules*, SOR/98-106. The Applicant does not agree that the affidavits contain argument, opinion or legal conclusions, saying instead that they "contain information submitted to the commission throughout the process." The Respondents counters that the interactions with staff were administrative in nature and did not involve the decision maker.

[21] At the start of the hearing, I confirmed that I would be making my decision based on the material that was before the decision maker and that I am only judicially reviewing the decision dated May 20, 2015. Specific affidavit material that may breach procedural fairness will be consider on an ad hoc basis (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 16-17).

[22] Any opinion or argument contained in the affidavits noted above is given little weight pursuant to Rule 81. The matter will proceed without any affidavits being struck.

B. *The Law*

[23] CAPE points out that where the CHRC adopts the conclusions in a section 40/41 report, that report constitutes part of their reasons (*Carroll v Canada (Attorney General)*, 2015 FC 287 at para 28). The test for determining whether a complaint is frivolous within the meaning of the

Act is "whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed" (*Hérold v Canada (Revenue Agency)*, 2011 FC 544 at para 35). Although this threshold is low, "there is a burden on a complainant to put sufficient information or evidence forward to persuade the Commission that there is a link between complained-of acts and a prohibited ground" (*Hartjes v Canada (Attorney General)*, 2008 FC 830 at para 23).

C. *Procedural Fairness*

[24] The question I must answer is whether the Applicant was deprived of a fair opportunity to present her complaint to the CHRC?

[25] The Applicant argues that limiting her submissions against both parties to three pages deprived her of the ability to set out the facts surrounding each complaint. At the hearing she said this prevented her from discussing the reality of her claim since she could only devote eight paragraphs towards CAPE. Despite having more information to include in her complaint, she did her best to provide as much as possible to the CHRC. She went on to say that her rights were infringed by not being allowed to present all of the facts and arguments in each file.

[26] There is no doubt that the CHRC is master of their own procedure and that a limit of three pages for a complaint is reasonable. There is a degree of tension implicit when the fairness of an agency's procedure is reviewed by the courts on a standard of correctness and yet the decision maker has discretion over their own procedure (*Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 39 [*Re:Sound*]).

[27] In their screening role, the CHRC acts as a gatekeeper of whether matters should proceed. For this reason they do not hear a complaint in its entirety as it would otherwise be redundant. In their screening capacity they have determined that three pages is the maximum allowable submission. This is the same for every complainant, seemingly without exception.

[28] There is nothing procedurally unfair or unreasonable with how the CHRC requires complaint kits to be completed including page limits and other formatting requirements. The procedural fairness owed by the CHRC was canvased recently by Mr. Justice Manson in *Zulkoskey*, above, where he applied the factors from *Baker v Canada (Citizenship and Immigration)*, [1992] 2 SCR 817. Mr. Justice Manson noted at paragraph 41 that the Governor in Council had not passed regulations for a process to follow in the screening process and that "procedural choices at this stage should therefore be afforded deference, so long as they comply with the duty of fairness." In the end, he concluded that the procedural fairness owed under paragraph 41(1)(d) is at the lower end of the spectrum. However, as will be seen, being entitled to fairness at the low end of the spectrum does not sanction a decision that, when considered in its factual context, is not essentially fair.

[29] The general principles regarding the content of the duty of fairness are set out by the Federal Court of Appeal in *Re:Sound*, above, at paragraph 54:

> The ultimate question for a reviewing court in every case is whether, in all the circumstances (including respect for administrative procedural choices), the tribunal's decision-making procedure was essentially fair. This involves a contextual and fact-specific inquiry.

[30] In my view, the CHRC breached procedural fairness in this case. The Applicant wanted to file two separate complaints and requested two kits and was only allowed one kit to file against both CAPE and TC. In some cases that would not be unreasonable especially if the allegations against the parties were the same. But on these facts the Applicant's claims were not identical and she could not express her claims against her employer and her union in the one complaint kit. The CHRC ultimately agreed with the Applicant, separating her complaints, but did not allow her to complete a complaint kit for each Respondent.

[31] The Applicant argues that her complaint against CAPE was dismissed precisely on the grounds she was unable to put before the CHRC. To support this position she presented evidence to this Court that she says would have been presented in a complaint kit had she been given a fair opportunity to do so. I am not commenting on whether this information would make a difference to the Commission's decision. It is only raised to address the issue that the Applicant was prevented from fairly presenting her complaint solely against CAPE.

[32] I considered whether on an objective basis a person could express their complaints against two parties in the three pages allocated. Certainly it could be done and again there is nothing wrong with the CHRC restricting submissions to three pages. However in this case, subjectively, this individual needed three pages for each complaint in order to present her complaint.

[33] It is a fundamental rule that justice must not only be done, but it must be seen to be done (*R v Sheppard*, 2002 SCC 26 at para 15; *Société des Acadiens v Association of Parents*, [1986] 1

SCR 549 at para 153). The Applicant had already identified she needed accommodation and she asked for a separate complaint kit from the outset and was told she could not bring separate complaints. Given this unique circumstance, once the CHRC unilaterally split her complaint into separate files, it should have provided her with the opportunity to make adequate submissions on each and by not doing so breached procedural fairness.

D. *Administrative Interactions - Email*

[34] The Applicant raises further procedural fairness concerns regarding her administrative interactions with CHRC staff. However, none of these interactions were with the decision maker involved with her complaint. As addressed above, the procedural fairness to be afforded in this circumstance falls on the lower end of the spectrum. It requires that a section 40/41 report be neutral and thorough, that the Applicant be provided with a copy of it, and that she be given ample opportunity to make submissions (*Zulkoskey*, at paras 42-45). All of these occurred in this case including multiple time extensions for the Applicant to make submissions.

[35] I do not condone any of the alleged rude behaviour between the Applicant and members of the CHRC staff. I do not see on the paper record before me that CHRC staffs were discourteous towards the Applicant but I do acknowledge that I do not have transcripts of the interactions. Despite the Applicant's allegations of mistreatment, CHRC granted her numerous extensions of time and continued to be professional and cooperative in all the written materials in the record. Some of the interactions between the parties may have caused confusion and some misunderstandings. However, I find the actions taken by both parties were meant to facilitate this matter moving forward.

[36] I would strongly caution both parties to keep civility in mind as this matter is re-determined by a different decision maker.

E. *Reasonableness*

[37] Though I am granting the application due to a breach of procedural fairness I note that the decision was reasonable given the material that was before the decision maker. The Applicant submits a litany of arguments that the decision is not reasonable. Those arguments are found in the Applicant's Memorandum of Fact and Law starting at page 12 and continuing to page 29. In summary:

a) The Applicant argues that the CHRC and CAPE harassed, discriminated, and retaliated against her in the context of their duty to accommodate a disabled employee returning to work. In particular, by condoning her employer's behaviour, CAPE participated in it. Despite her many requests, the CHRC refused to process her complaint against CAPE contrary to the Act and their internal procedures manual.

b) The Applicant submits that she provided sufficient information to establish discrimination yet the CHRC failed to conduct a proper analysis. CAPE's responsibilities, as per *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 [*Renaud*], do not stop when accommodation is initiated or provided but must include ongoing monitoring which it failed to do.

c) The Applicant argues that CAPE's objections to her complaint changed from paragraphs 41(1)(a), (c), and (d) to 41(1)(b) and (d) without her notification.

d) When the Applicant asked the CHRC to add the grounds of retaliation to her complaint it was a request that the CHRC properly conduct its analysis and not merely an amendment.

The Applicant argues that a broad interpretation of section 14.1 of the Act is appropriate and that CAPE's approach is too restrictive. Furthermore, the CHRC erred because it refused to consider her complaint on the ground of retaliation. She feared that more harm would come to her but TC and CAPE did not stop.

e) A CHRC employee left a discriminatory, threatening, and retaliatory voice message for the Applicant on February 18, 2015 forbidding her from contacting the CHRC via e-mail. The CHRC has subsequently become an interested party in these proceedings and therefore breached their neutrality/impartiality.

f) The Applicant submitted that the CHRC rejected CAPE's argument that this matter falls under the jurisdiction of the PSLRB. CAPE did not change her union representative despite her requests to do so and never advised her of processes available under the PSLRB. The CHRC's analysis that it had jurisdiction under paragraph 41(1)(b) should have been kept as it never accepted that this was a matter that falls under the PLSRA. To date CAPE has refused to file or exercise any remedy on her behalf. The CHRC adopted CAPE's submissions in their decision contrary to their duty of fair representation and which is discriminatory. CAPE never provided the Applicant with the right information regarding remedies, filings or information. According to CAPE's Protocol 1 Redress, Representation, it does not provide representation in human rights cases like this one which is not in conformity with their obligations under section 16 of the Collective Agreement on discrimination.

[38] In response CAPE submitted that the duty to accommodate is a three-party process, requiring the employer, employee and union to work together. Although the Applicant disagrees

with her union's representation, it does not constitute discrimination and the CHRC's decision to dismiss was reasonable. CAPE goes on to suggest that the Applicant's true issue is that she feels they represented her in a manner that is arbitrary, discriminatory or in bad faith. This falls under section 187 of the PSLRA, which includes dissatisfaction and disagreement with advice and representation provided by the union. Despite the 90 day limitation period, the PSLRA is the appropriate procedure.

[39] The CHRC did not follow the section 40/41 report which recommended allowing the complaint because it had exceeded the limitation period under the PSLRA. It concluded that paragraph 41(1)(b) of the Act does not have a temporal aspect.

[40] On this point Justice Stratas noted in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, at paragraph 45 that "the Commission gets 'great latitude' when courts review decisions such as this." Justice Stratas went on to say at paragraph 47 that "[t]he concept of adequacy is highly judgmental and fact-based, informed in part by the policy that the Commission should not devote scarce resources to matters that have been in substance, addressed elsewhere or that could have been addressed elsewhere. On this last-mentioned point, a failure to pursue adequate redress elsewhere or to pursue that adequate redress to its full extent can be invoked under paragraph 41(1)(d)."

[41] I find that it was open to the CHRC to adopt or reject portions of the section 40/41 report as it saw fit. Furthermore, since the Applicant's position statement was considered in the section 40/41 report, it need not have been considered by the CHRC separately. The position statement

spoke to the merits of the complaint and was not relevant to whether an alternative process was available. Even if it is found that it was unreasonable for the CHRC to not consider the position statement with respect to the frivolous nature of her claim, the decision can still stand on the basis of adequate alternative.

[42] Furthermore, the CHRC correctly adopted the appropriate analysis as presented in *Renaud*, above, that a "union may be liable for failure to accommodate…if the union impedes the reasonable efforts of an employer to accommodate." Contrary to impeding accommodation efforts, the CHRC concluded that CAPE was "cooperating with the employer in its efforts to provide the complainant with reasonable accommodation upon her return to work."

[43] The CHRC's gatekeeper role is an important one conferred by Parliament. I agree with CAPE that in its screening role the decision was reasonable given that it is not to decide the merits of the complaint (*O'Grady*, above).

[44] In some circumstances it would be possible to dismiss the application as the breach of procedural fairness would not have affected the decision. Respectfully, this is not such a case. The Applicant is a self-represented individual (though legally trained) and presented as being either: not concise or having a lot of information to convey. In any event, the breach of procedural fairness did not allow the Applicant to present the case she had to the CHRC and as a result I will grant the application. The matter is to be re-determined by a different decision maker after allowing the Applicant to submit a three page submission as directed in the complaint kit.

F. *Costs*

[45] The Applicant sought costs as did the Respondents. I will not grant costs in this application. Though the Applicant was successful she represented herself and was only successful on a very narrow point that was clearly not within CAPE's control.

JUDGMENT in T-1093-15

THIS COURT'S JUDGMENT is that:

1. The application is granted and the Applicant will be allowed to file a complaint kit for file # 20140564 but must follow all of the procedures outlined in the complaint kit.
2. The matter will be re-determined by a different decision maker.
3. No costs are awarded and each party will bear their own costs.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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