Federal Court  Cour fédérale

Date: 20170717

Docket: T-691-15

Citation: 2017 FC 686

Ottawa, Ontario, July 17, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

YVONNE SOULLIÈRE

Applicant

And

HEALTH CANADA
AND
CANADIAN BLOOD SERVICES

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision ("Decision") of the Canadian Human Rights Commission ("Commission") which dismissed Ms. Soullière's complaint against Health Canada ("HC") pursuant to section 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act]. This judicial review was heard concurrently with a companion case, Court

File No. T-690-15, which challenged a related decision of the Commission that the Applicant had simultaneously filed against Canadian Blood Services ("CBS").

[2] The two decisions under review emanated from two complaints brought by Ms. Yvonne Soullière on behalf of her daughter, Yanhong Dewan, on December 5, 2012, alleging that Ms. Dewan was rejected as a blood donor and deemed indefinitely ineligible on the basis of her inability to understand and complete the blood donor screening questionnaire due to her intellectual disability. The complaints were thus filed on the basis that both organizations (CBS and HC) discriminated against Ms. Dewan, by failing to accommodate her, such that she could not complete the screening process required to be able to donate blood.

[3] The Commission refused both the HC and CBS complaints on March 26, 2015, in separate decisions. I have already found that there was no reviewable error in the companion case T-690-15 ("CBS Decision"), an outcome which accepts that CBS did not discriminate on the alleged grounds against Ms. Dewan. Absent a finding of discrimination by CBS, in my view this concurrent judicial review application against HC becomes moot, since, therefore, there can be no basis upon which to find any discrimination by HC through its regulatory oversight.

[4] In any event, I would find the Commission's decision to dismiss the HC complaint to be reasonable.

[5] Before providing my reasons for these conclusions, a review of the background to the complaint against HC follows. Please note that a full background of the underlying complaints

may be found in the CBS Decision. The background that follows is focused on facts particularly relevant to the HC complaint.

II. Background

[6] CBS collects blood from volunteer donors, processes them into blood products, and distributes these products to hospitals across the country. Canada considers blood products to be biological products. CBS is therefore considered a biological drug manufacturer subject to the *Food and Drugs Act*, RSC, 1985 c F-27 [FDA]. As part of CBS' blood donation screening process, potential donors are asked to complete the "Donor Health Assessment Questionnaire" ("DHAQ"). The DHAQ asks a series of questions to assess the potential donor's health, potential for giving blood, and potential risk to the blood system. HC, as the regulator for biological products in Canada, has regulatory oversight over CBS.

[7] The Commission made its initial section 41 screening decision in December 2013, rejecting HC's arguments that (i) CBS, rather than HC, was the proper respondent, as the author of the questionnaire (DHAQ), manual (Donor Selection Criteria Manual "DSCM"), and the impugned actions at issue; and (ii) blood donation does not constitute a "service" within the meaning of the Act. In proceeding with the complaint, the Commission noted first that HC had approved the documents in question, and second, it was not plain and obvious that blood donation screening is not a service.

[8] The subsequent March 2015 Commission decisions, made following section 44 investigations, did not go as favourably for Ms. Soullière and her daughter Ms. Dewan. In these

two decisions, the Commission dismissed both complaints pursuant to section 44(3)(b)(i) of the Act. The Commission dismissed the complaint against HC on the basis that HC "is not the party responsible for the alleged discriminatory act".

[9] Given that no other reasons were provided for dismissal, the Commission's reasons are deemed to be those in the Investigation Report ("Report"): *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 119 [*Sketchley*]. The Report, written by an investigator ("Investigator") concluded that (a) the service at issue was the screening of potential blood donors; (b) CBS was the party that denied the service to Ms. Dewan; and, most relevant to this application, (c) HC does not appear to be a party to the denial of service.

[10] These conclusions were based on the following findings (Report at paras 58-59):

- HC has neither a direct role in the donor screening process generally, nor a role in Ms. Dewan's specific situation;
- CBS develops its policies and procedures independently and at arm's length from HC;
- HC plays no role in drafting or administering the DHAQ form, nor does it require that blood operators have a DHAQ; and
- HC had stated that it would not ask CBS to modify its donor screening criteria for any reason except in the event of an emerging health issue (such as occurred, for instance, with SARS and the West Nile Virus), and Ms. Dewan's case did not fit into the ambit of an emerging health issue.

[11] With respect to the argument that any order by a Tribunal would be meaningless without a concurrent order against HC, the Investigator found that it could not assume that CBS would be a roadblock to any remedial measures.

III. Issues

[12] Ms. Soullière asserts that the Commission made errors of procedural unfairness because it did not have the entirety of the Ms. Soullière's Responses to the Report before it. Ms. Soullière also asserts the Commission made unreasonable findings (i) about HC's non-involvement with screening blood donors and in drafting/administering the DHAQ; (ii) that HC could not be a party to the denial of service since it had no direct dealings with Ms. Soullière or Ms. Dewan; and (iii) in failing to conclude that an effective remedy requires an order against HC.

[13] It should be noted that whereas both parties addressed the issue of whether blood donation constituted a "service" within the Act in the companion case T-690-15 proceedings, the service issue did not form part of this proceeding. In any case, as in the CBS Decision, I find that this HC application should be dismissed on other grounds, as outlined below, and therefore find it unnecessary to review the service issue.

IV. Analysis

A. *Mootness*

[14] As stated above, it is my view that this application is rendered moot by the outcome of the companion application in Court File No. T-690-15, because without any finding of

discrimination against CBS, there can be no finding of discriminatory action by the Respondent HC who, in this case, is alleged to have indirectly contributed to the discrimination by virtue of its regulatory control over CBS.

[15] In the companion case, I have accepted the finding that CBS did not discriminate. Therefore, HC cannot have discriminated by extension. Stated another way, HC cannot be said to have discriminated by virtue of having some control over what CBS did, if what CBS did was not discriminatory. Therefore, as this application can have no effect, and thereby has been deprived of practical significance, I find it to be moot (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353).

[16] At the hearing, I asked both parties about the effect a dismissal of the T-690-15 judicial review would have on this application. Counsel for HC stated that no complaint could proceed against HC if the complaint against CBS was dismissed. When the question was put to Ms. Soullière's lead counsel, she declined to provide a response. Therefore, while I believe the answer is clear that this judicial review is now moot, in the event that I am wrong, I will address all substantive points raised before the Court in this judicial review, namely under the rubrics of procedural fairness and reasonableness.

[17] Questions of procedural fairness are to be reviewed on the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79*; Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 92 at para 6), while the discretion of the Commission to dismiss complaints is to be reviewed on a standard of reasonableness (*Halifax (Regional Municipality) v*

Nova Scotia (Human Rights Commission), 2012 SCC 10 at para 17; *Keith v Canada (Correctional Services)*, 2012 FCA 117 at paras 43-48 [*Keith*]).

B. *No Reviewable Error*

(1) Was the Commission's Decision procedurally fair?

[18] In my view, the Commission made no procedural error in coming to its decision. Ms. Soullière raised similar issues in the companion proceeding. In the CBS Decision, I agreed with CBS' position that the Commission appropriately severed certain submissions relating specifically to the complaint against the other respondent (HC in the CBS complaint, and vice versa here), because the two complaints proceeded separately before the Commission, as its process requires. I would note that Ms. Soullière has not suggested that this requirement is itself unfair.

[19] As a result, the Commission properly considered the complaints separately. Indeed, contrary to Ms. Soullière's contention, if anything, it would have been procedurally unfair to the respective respondents had the Commission conflated the two files and considered matters related to the companion investigation in making each decision. Materials specific to the CBS complaint were properly excised from the materials put before the Commission when reviewing the HC complaint (and vice versa).

[20] That is the crux of the Applicant's contention of procedural unfairness, which I find to be without merit. Again, I would have found the opposite – it would have been unfair to the Respondent not to have excised the submissions related to the other complaint where possible.

[21] Further, after a review of the record, I find the investigation to have been thorough and neutral, and to have satisfied the procedural fairness requirements of the process: *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 (Fed TD) at paras 49-50 and 55-57, aff'd (1996), 205 NR 383 (FCA); *Hughes v Canada (Attorney General)*, 2010 FC 837 at paras 32-33 [*Hughes*].

[22] In this case, that process included the production of detailed responses and replies to the Report and to one another's submissions, meaning that the parties were each given ample opportunity to comment on the complaint they were facing, consistent with procedural fairness safeguards (*Canada (Attorney General) v Davis*, 2009 FC 1104 at para 21, aff'd 2010 FCA 134). The sheer volume of the evidence submitted speaks to this point.

[23] Ultimately, I do not agree that there was any interference with Ms. Soullière's right to be heard, as alleged.

(2) Was the Commission's Decision Reasonable?

[24] I find none of Ms. Soullière's three issues raised under the rubric of 'unreasonableness' to be persuasive in light of the four factual conclusions arrived at by the Commission. For ease of reference, these are that HC had (a) no direct role in screening donors, including Ms. Dewan; (b)

an arms-length oversight of CBS' policies and procedures; (c) no role drafting or administering the DHAQ; and (d) only proactively required modified screening for emerging health issues.

(a) *HC's involvement in the alleged discrimination*

[25] The evidence simply does not support Ms. Soullière's argument that HC has direct input and control over the design and implementation of the blood donor screening process and policies. Rather, the evidence showed that when HC approved the impugned CBS policies, it did so solely on the basis of the safety of Canada's blood system, consistent with its legislative mandate. Its "control" of CBS was and is limited to that particular oversight function.

[26] Specifically, Ms. Soullière correctly points out that HC broadly approves and comments on CBS' procedures, such as its policy manuals (e.g. the DSCM), questionnaires (e.g. the DHAQ), and any exemptions (e.g. exemptions to the policy against 3rd parties in the screening process for foreign language and American Sign Language interpretation: see CBS Decision for further details on those exceptions). HC can also require changes in response to emerging health issues (e.g. West Nile Virus, SARS).

[27] However, the evidence also shows that HC does not get involved in individual cases – and indeed did not get involved in Ms. Dewan's case. Rather, the Report clearly sets out the importance of HC's oversight of the Canadian blood system, a direct result of the Krever inquiry. In this regard, HC does not control the individual donor screening process beyond general policy approval. The Commission's conclusions regarding HC's involvement in the case of Ms. Dewan are therefore reasonable.

[28] Nor do I accept Ms. Soullière's contention that since CBS policies and procedures are essentially mandatory once approved, and may affect HC approval for future license eligibility, HC is necessarily a party to the discrimination, even without any direct dealings with Ms. Dewan. For this proposition, Ms. Soullière relies on a section of the decision in *Canadian Blood Services v Freeman*, 2010 ONSC 4885 at paras 325-336 [*Freeman*].

[29] In my view, however, *Freeman* arises from a different context, namely from a section 15 *Canadian Charter of Rights and Freedoms* argument in response to a claim of negligent misrepresentation, not a complaint under human rights legislation. Further, although I am mindful of this different context, *Freeman* itself establishes that there is limited government control of CBS (at paras 351 and 356):

> From a control perspective, CBS is not subject to government control in terms of policy development or day-to-day operations.
>
> …
>
> Where the federal government plays a role is under the *FDA* and the *FDR* [*Food and Drug Regulations*] in the regulation of blood operators, such as CBS. It is primarily as a result of the intensive regulatory framework in which CBS must operate that Mr. Freeman argues CBS is controlled by government to such an extent that it must be considered a government entity. In no other respect, aside from regulation under the *FDA* and *FDR*, does the federal government exert any control or influence over decision-making functions at CBS.

[30] While Ms. Soullière is correct in asserting that the Act must be interpreted in a broad, liberal, and purposive manner (*Canadian National Railway v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1134-1138), in my view this does not require that all regulatory oversight bodies must be included as respondents to human rights complaints against

individuals or entities under their purview. I also do not agree with Ms. Soullière's interpretation of the case law concerning regulators as requiring such an outcome.

[31] Specifically, Ms. Soullière relies on *Canada (Attorney General) v Jodhan*, 2012 FCA 161 at para 185 [*Jodhan*], observing that the Federal Court of Appeal found the Treasury Board responsible for monitoring compliance with the standards it established and imposed on federal departments and agencies. Ms. Soullière also relies on *Panacci v Canada (Attorney General)*, 2010 FC 114 at para 51 [*Panacci*], where after the Commission declined to deal with the application against the Treasury Board (finding it was not the responsible party), this Court subsequently found this to be unreasonable because it failed to consider the policy monitoring obligations of Treasury Board (at para 70).

[32] However, the *Jodhan* and *Panacci* cases are both distinguishable, in that the 'regulator' – in both cases Treasury Board – was enforcing its own policies, and as such, was the source of the impugned conduct, unlike in this case. Here, CBS created the policy – not HC. It was CBS that was responsible for creating and administering the blood screening system, and for creating and administering the policies under which blood donations are accepted or rejected. HC simply oversaw the system as regulator for blood safety.

[33] Therefore, I find no merit to the argument that the law requires that HC, as regulator, to be a party in this instance, nor do I find anything unreasonable about the Commission's decision in this respect.

[34] Finally, it must be recalled that the Commission itself, which performs a screening function, has broad discretion to dismiss complaints under the Act; a discretion to which deference is owed (*Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999], 167 D.L.R. (4th) 432, 1 FC 113 (FCA) at para 38, leave to appeal to SCC denied, [1999] SCCA No 1; *Keith*, above at paras 48-49).

[35] I see no reason to interfere with the Commission's discretionary decision in this case. Here, even given the Commission's "modest" screening role (*Dupuis v Canada (Attorney General)*, 2010 FC 511 at para 12), I find its Decision to be intelligible, justifiable and transparent. It falls well within the range of possible outcomes.

(b) *Whether an effective remedy requires an order against HC*

[36] Ms. Soullière also submits that the Commission's Decision is unreasonable because an effective remedy requires an order against HC, when the Commission instead found that it could not assume HC would be a roadblock to remedies.

[37] In support of this argument, Ms. Soullière asserts that only HC has both the necessary expertise and authority to determine whether a change to the DHAQ or '3rd party rule' would pose a risk to the safety of the blood supply. Any change would have to go through HC, as the Commission found, because CBS cannot make such changes unilaterally. Therefore, Ms. Soullière argues, if HC is not a party to the judicial review, it could refuse to approve the change, frustrating the human rights process and/or potentially jeopardizing CBS' establishment license. An order against CBS would, according to the Applicant, be meaningless without a concurrent

order against HC. In this regard, Ms. Soullière relies on *Woodwork v Canadian Blood Services*, 2012 HRTO 2219 at para 52 [*Woodwork*], and *Canadian Blood Services v The Manitoba Human Rights Commission*, 2011 MBQB 312 at para 56 [*Zoldy*].

[38] I find nothing unreasonable with the Commission's conclusion that there is no basis to assume HC would not comply with a potential order of the Commission. The mere possibility that HC could frustrate a potential remedy does not render unreasonable the Commission's decision that HC is not the party responsible for the alleged discrimination. The Report extensively canvassed Ms. Soullière's arguments and found that the concerns regarding implementing any order are hypothetical at best. The Commission simply decided that it could not assume that HC "would" be a roadblock.

[39] Furthermore, as explained above, this is now a moot point, given that the underlying complaint against CBS has been dismissed.

[40] As for *Zoldy* and *Woodwork*, the two cases relied upon by Ms. Soullière, both found provincial Tribunals lacked jurisdiction for complaints against CBS, which fell exclusively under federal jurisdiction. *Zoldy* and *Woodwork* were both decided on the basis of federal paramountcy in the area of human rights legislation relating to the blood screening process, whereby the provincial human rights codes under which they were brought were not the appropriate legislation. In other words, both cases are clearly not relevant to the issues at hand.

[41] Finally, HC was not a party to the litigation in either *Zoldy* or *Woodwork*. The fact that HC (a federal department) would not be bound by any remedial orders from a provincial Tribunal was simply used in those cases as an example to illustrate the jurisdictional issue (*Zoldy* at para 56; *Woodwork* at para 52, citing *Zoldy*).

[42] In short, Ms. Soullière has not demonstrated that it is unreasonable for the Commission to determine that HC was not a proper respondent in this case simply because there is a possibility that HC could frustrate some potential remedial action in the future. This would appear to be the case for many regulators, and I would be hesitant to determine that the mere potential for non-compliance, particularly absent compelling evidence of same, compels the Commission to refer complaints against such regulators to the Tribunal. This is especially so where there is no direct involvement in the impugned conduct by the regulator.

V. Conclusion

[43] This Court has dismissed the judicial review in the companion matter T-690-15 on the basis of that decision of the Commission being reasonable and procedurally fair. That alone is determinative of this application, because Ms. Soullière's complaint against HC depends on its complaint against CBS, because it claims that HC was party to the discrimination by virtue of its regulatory control over the CBS policies under which CBS decided to 'indefinitely defer' a blood donation from Ms. Dewan. Since no discrimination was found in the CBS Decision, there can be no finding that HC also discriminated by extension. This matter has been rendered moot.

[44] For the sake of completeness, my alternative conclusion (in the event I am wrong on my first conclusion) is that the Commission also made no reviewable error in its Decision. First, there is no evidence of procedural unfairness. Second, the factual findings regarding the limited nature of HC's 'control' are reasonable. Finally, there was nothing unreasonable about the Decision overall and in particular dismissing the complaint despite acknowledging that HC could be a roadblock to a remedial order against CBS.

[45] This application for judicial review is accordingly dismissed.

JUDGMENT in T-691-15

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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