

Federal Court



Cour fédérale

Date: 20180115

Docket: T-596-17

Citation: 2018 FC 33

Ottawa, Ontario, January 15, 2018

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission [Commission] in respect of a complaint against the Treasury Board for systemic discrimination [the Treasury Board Complaint] in respect of government employees with disabilities.

[2] In May 2010, the Applicant, the bargaining agent for numerous federal public workers – in this case, those at Employment and Social Development Canada [ESDC] and Treasury Board – filed two complaints alleging the same systemic discrimination against public service employees on the basis of disability.

[3] The Treasury Board Complaint, File No 20100891, was against the Treasury Board specifically, whereas Complaint File No 20199890 [the ESDC Complaint] named Employment and Social Development Canada as the offending party.

[4] The essential subject matter of this judicial review is that, without reasons explaining the different conclusions reached by the Commission, the Commission dismissed the Treasury Board complaint but referred the ESDC complaint to the Canadian Human Rights Tribunal for an inquiry.

It is argued that the decision to dismiss was unreasonable and unfair.

[5] The pertinent legislative provisions of the *Canadian Human Rights Act*, RSC 1985, c H-6 are as follows:

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

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise

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 :

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement

reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

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

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

...

44 (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

ouverts;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

c) la plainte n'est pas de sa compétence;

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

e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[...]

44 (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

ouverts;

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

it shall refer the complainant to the appropriate authority.

(3) On receipt of a report referred to in subsection (1), the Commission

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

(b) shall dismiss the complaint to which the report relates if it is satisfied

b) rejette la plainte, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

II. Background

[6] ESDC is a federal department and exercises operational control over the work of persons employed in the Applicant's bargaining unit.

[7] The Applicant represents the non-managerial employees at ESDC in the Program and Administrative Services category.

[8] In the Treasury Board Complaint, the Applicant alleges that workplace wide policies and practices cumulatively deny employment opportunities to employees with disabilities including:

- failure to accommodate employees with disabilities in a timely way;
- denial of certain types of accommodation including telework, alternate hours of work, equipment, and tools;
- arbitrarily stopping accommodation arrangements already in place;
- delay in providing necessary information to Sunlife (ESDC's disability insurer) and/or to workers' compensation;
- expressing and/or displaying negative, stereotypical and discriminatory attitudes including dismissive and skeptical attitudes from managers regarding accommodation requests, treatment of employees with disabilities as workplace

“liabilities”, refusal to accommodate term employees, and being less comfortable, and/or less able to manage and accommodate employees with mental health issues; and

- unnecessarily referring employees for Health Canada medical assessments.

[9] Specifically, the effect of these policies and practices is alleged to result in the denial of opportunities to have access to continued employment, access to flexible working arrangements, and access to full-time work. This results in employees with disabilities possibly being forced to work without appropriate accommodation, take less desirable jobs, take medical retirement, or go on leave without pay.

[10] The ESDC Complaint and the Treasury Board Complaint addressed the same concerns regarding systemic discrimination in the accommodation of disabled federal public service employees working at ESDC.

[11] The Applicant had alleged in the complaints that ESDC and Treasury Board had overlapping and joint responsibility to address accommodation at ESDC – the Treasury Board as the “employer” had a policy and monitoring role while ESDC had operational control over employees’ work.

[12] In the ESDC Complaint, it was alleged that ESDC contravened s 10 of the *Canadian Human Rights Act* by discriminating through six policies and practices that deprived disabled employees of employment opportunities.

[13] In the Treasury Board Complaint, it was alleged that Treasury Board established or pursued policies contrary to s 10 which had the same discriminatory effect. The same allegations of the ESDC Complaint were alleged against Treasury Board with the specific allegation that as the employer Treasury Board had failed its duty to accommodate and failed to enforce and monitor its “Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service”.

[14] The two complaints were referred to the same investigator who treated the complaints as “separate, but related”.

On October 12, 2016, the investigator released reports for both matters and recommended that the two complaints be dismissed.

[15] As concluded by the investigator, the reason for dismissing the ESDC Complaint was that there was insufficient information to support the allegations in that complaint. With respect to the Treasury Board Complaint, which also raised the legal issue of responsibility for enforcement and monitoring, it was recommended that the Commission not deal with this legal issue given the insufficiency of the ESDC Complaint.

Paragraphs 109-110 best encapsulate the reasoning:

109. While complaint # 20100890 considered whether the complainant’s allegations that ESDC systemically discriminates against employees with disabilities, this complaint raises the legal question of the extent to which the respondent is responsible under the CHRA for monitoring and enforcing its policies and whether a failure to do so can give rise to liability in individual instances of non-accommodation.
110. As outlined above, the complainant has not provided the Commission with sufficient information to support its

allegations in complaint # 20100890. The two complaints are related and without sufficient factual evidence of a breach of the CHRA that warrants further inquiry in the other complaint, the Commission should not exercise its discretion to refer the legal question raised in the present complaint to the Canadian Human Rights Tribunal.

[16] In response to the recommendations for each complaint, the Applicant filed further evidence focused particularly on the ESDC Complaint.

[17] Thereafter the Commission decided to request an inquiry into the ESDC Complaint, despite the investigator's recommendation. The Commission concluded that sufficient evidence was presented in the responding submissions that an inquiry was warranted.

The record shows that in reaching its conclusion, the Commission considered only the ESDC Complaint, the report thereon, and the parties' submissions on the report.

[18] On March 23, 2017, the Commission decided to dismiss the Treasury Board Complaint.

Having cited the investigator's report and the submissions in response, the Commission, without citing any reasons, concluded that in "all the circumstances of the complaint, further inquiry is not warranted."

As with the ESDC Complaint, the record shows that in reaching this decision, the Commission only considered the Treasury Board Complaint, the report thereon, and the parties' submissions on the report.

[19] The issues in this judicial review are as follows:

1. Is the Commission's decision reasonable?

2. Did the Commission breach its duty of procedural fairness by not considering the two complaints together as promised?

There is a subsidiary issue of whether there should be a remedy of a “directed decision”.

III. Analysis

A. *Standard of Review*

[20] There is no debate on the standard of review but there is debate on how it applies. The parties agree, and the Court concurs, that on the decision to dismiss the Treasury Board Complaint, it is reviewable on a “reasonableness standard”.

As to the alleged breach of procedural fairness, it is reviewable on a correctness standard.

[21] Much of the argument as to “reasonableness” centred on the absence of specific reasons for dismissing the ESDC Complaint. The Respondent relies heavily on the broad discretion possessed by the Commission. The Respondent especially relies on the principle, first touched on in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 48, [2008] 1 SCR 190, and more clearly pronounced in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paras 37-38, [2016] 2 SCR 293, that a “reviewing court may consider the reasons ‘which could be offered’ in support of the decision”.

[22] The Respondent was unable to point the Court to anything which would allow the Court to conclude what those reasons could have been. It is fair to say that the Court is unable to find any.

[23] The range of acceptable outcomes is necessarily narrowed by the reasons of a decision and the relevant context. In *Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75, 444 NR 120, the Federal Court of Appeal stated as follows in the context of a decision of the Tribunal at paras 13-15:

[13] As the Attorney General accepted in argument before us, one must remember that the range of acceptability and defensibility “takes its colour from the context,” widening or narrowing depending on the nature of the question and other circumstances: [. . .]

[15] The Supreme Court’s decision in *Mowat, supra* – also involving a review of the Tribunal’s interpretation of the Act – illustrates this well. There, the Supreme Court reviewed the Tribunal on the basis of the deferential standard of reasonableness. However, acting under that standard, the Supreme Court engaged in an exacting review of the Tribunal’s decision, a review more exacting than that of the Federal Court in this case. Some might describe what the Supreme Court did in *Mowat* as disguised correctness review. I disagree. *Mowat* is reasonableness review, still deferential, conducted in recognition that, as far as the Supreme Court was concerned, the Tribunal had only a narrow range of acceptability and defensibility open to it, given the constrained nature of the matter before it. Within that range, the Tribunal was entitled to deference.

B. *Reasonableness Review*

[24] It is obvious and clearly accepted by the Federal Court of Appeal that a court must be able to understand the basis on which a decision was made to determine whether it falls within the range of reasonable outcomes. In *Lloyd v Canada (Attorney General)*, 2016 FCA 115 at para 24, 265 ACWS (3d) 1036, the Federal Court of Appeal noted that a decision cannot be justified on judicial review through speculation and rationalization and quoted as follows from *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, 16 Imm LR (4th) 267:

[11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[25] Under this aspect of reasonableness, the Court must engage in reasoned contemplation of what the decision maker was thinking. It would be a triumph of form over substance to quash a decision if it was crystal clear, by intelligent observation, as to what the decision maker was thinking but which was not clearly or adequately expressed.

[26] “Connecting the dots” requires dots which are clear and which lead inexorably to one conclusion. In the present case, I see no dots and if they are there, they are too opaque.

[27] Reading the decision in context, it is evident that the preliminary conclusion of the investigator was that the ESDC Complaint was insufficiently supported. The investigator recognized that the Treasury Board Complaint contained a distinct issue of employer liability. However, the Treasury Board Complaint failed because of the insufficiency of information in the ESDC Complaint.

[28] The Commission, on the other hand, concluded after receiving further submissions that the ESDC Complaint was sufficient to warrant an inquiry. Conversely, the Commission dismissed the Treasury Board Complaint without explanation.

[29] Therefore, without explanation and in the face of an ESDC complaint which was sufficient, the Commission dismissed the complaint.

[30] The Court is unable to see how if the ESDC Complaint was insufficient to proceed, and the Treasury Board Complaint was unable to proceed on the same basis, the curing of that insufficiency would not likewise clear the Treasury Board Complaint of any deficiencies.

[31] Both complaints relied on the same evidentiary record; therefore it is inconsistent, contradictory, and not clearly intelligible that the evidence which could be sufficient to warrant a referral to an inquiry in one case is not sufficient in the other.

[32] There may be an explanation but it is not provided nor even suggested by “connecting the dots”.

[33] On this ground alone, this decision must be quashed.

C. *Procedural Fairness*

[34] Given my conclusion above, it is unnecessary to reach a conclusion on this point. It has been argued that the promise of the complaints being dealt with “together” was imprecise. In

court proceedings, this type of language encompasses the matters being intertwined but also covers matters being heard one after the other.

[35] The procedure to be followed was within the discretion of the Commission. It is hard to see, given the interrelationship between the two complaints, how or on what basis they could exist as separate silos but that is for the Commission at another time.

[36] This issue also does not affect the Court's remedy. The remedy would be the same in any event.

D. *Remedy*

[37] The Applicant asks the Court to direct the Commission to refer the Treasury Board Complaint to an inquiry. This remedy has the attractiveness of being efficient and possibly fair, but the Commission's failure was one of an inarticulated rationale. It is not for the Court to substitute its rationale in a matter over which the Commission has significant expertise and may have some reason for its conclusions.

IV. Conclusion

[38] Therefore, the Court will quash the decision of the Commission in respect of the Treasury Board Complaint and orders it to be considered afresh and in light of its conclusion to refer the ESDC Complaint to an inquiry.

[39] The Commission is strongly encouraged to give coherent reasons for whatever its conclusion may ultimately be.

[40] The Applicant shall have its costs.

JUDGMENT in T-596-17

THIS COURT'S JUDGMENT is that the decision of the Canadian Human Rights Commission in respect to the Treasury Board Complaint is quashed. The Court orders that the decision is to be considered afresh and in light of its conclusion to refer the Employment and Social Development Canada Complaint to an inquiry. The Applicant is to have its costs.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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