Federal Court  Cour fédérale

Date: 20191212

Docket: T-1838-18

Citation: 2019 FC 994

Ottawa, Ontario, December 12, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

COLETTE GREAVES

Applicant

and

ROYAL BANK OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicant, Collette Greaves, applies for judicial review of a September 18, 2018 decision of a Canadian Human Rights Commission [Commission] which refused to consider her discrimination complaint under the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

[2] The Applicant, Ms. Collette Greaves, filed a complaint alleging that the Respondent, the Royal Bank of Canada, discriminated against her in the course of her employment based on

national or ethnic origin, colour, age, and sex. A Human Rights Officer [Officer] drafted a report concluding that the Applicant's complaint was vexatious because the Applicant had previously filed and withdrawn a complaint for unjust dismissal under the *Canada Labour Code*, RSC 1985, c L-2 [CLC]. The Officer recommended that the Commission dismiss the complaint. The Commission approved the report and decided not to consider the complaint under paragraph 41(1)(d) of the CHRA.

[3] The application for judicial review is allowed for the reasons that follow.

II. Background and Procedural History

[4] The Applicant states in her complaint to the Commission that she had been employed by the Respondent for 27 years and 11 months. The Respondent states that the Applicant had been employed since 1998. For the purpose of the Report, the Officer determined the Applicant had been employed with the Respondent for at least 19 years. Nothing turns on this discrepancy.

[5] On June 21, 2016, the Respondent informed the Applicant that she would be terminated in the coming months. At that time, she was employed as a Project Coordinator with the Respondent's Global Technology Infrastructure Project Management Office. The Applicant was formally terminated on September 20, 2016.

[6] In December 2016, the Applicant filed an unjust dismissal complaint under section 240 of the CLC with the assistance of counsel. In April 2017, the parties attended a CLC mediation session, which was unsuccessful. The Applicant thereafter requested that the matter be referred

to an adjudicator under section 242 of the CLC. The Respondent was advised in May 2017 that the Applicant had retained new legal counsel.

[7] On June 27, 2017, the Applicant filed a complaint with the Commission, with the assistance of different counsel, in which she alleged that the Respondent discriminated against her on prohibited grounds under section 7 of the CHRA from early 2013 until her formal termination in 2016, namely for the following reasons:

A. she was transferred to a different team and was assigned to work on a "troubled project that had been stagnant for over a year and a half" and was assigned to perform strictly clerical work instead of project management work;

B. she was treated in a hostile manner because she was older and less "tech savvy" than her colleagues: one of her managers would "downplay and belittle" her work and would hint that she was not as technologically inclined as her younger colleagues;

C. one of her managers would email job postings to her to "passively aggressively" suggest that she look for another position within RBC;

D. This same manager made a false complaint to human resources regarding the Applicant's performance;

E. another manager purposefully withheld information from her to hinder her work;

F. a manager asked how old she is and insinuated that it is time for her to retire;

G. other black employees have not advanced and are removed after they "voic[e] their ideas", which "seems to be systemic".

[8] According to the report, the Applicant requested reinstatement with the same salary, bonus, and benefits until her retirement, in addition to a number of other remedies including: emotional and health compensation, the maximum general damages provided in the CHRA ($20,000), a positive reference letter, and legal fees. The Applicant also requested organizational remedies such as age sensitivity courses and the creation of an internal review board.

[9] In August 2017, the parties were notified that a CLC adjudicator had been appointed to address the Applicant's unjust dismissal complaint. However, the Applicant withdrew her unjust dismissal complaint and her file was formally closed on September 8, 2017. The parties dispute whether the Respondent was aware of the closure of the CLC complaint.

[10] In October 2017, the parties attended a mediation session with the Commission, which was also unsuccessful. During that session, the Applicant states that she informed the mediator of her CLC process and that the mediator advised her to exhaust that process before proceeding with her complaint to the Commission.

[11] On December 18, 2017, the Respondent filed a preliminary objection under paragraph 41(1)(b) of the CHRA and submitted that the complaint could be more appropriately dealt with, initially or completely, using the CLC unjust dismissal procedure.

[12] On April 19, 2018, the Applicant informed the Commission in writing that she had withdrawn her unjust dismissal complaint. In her correspondence with the Commission, the Applicant stated that the CLC complaint would not provide her "with the correct access to

Justice" as the focus was on "contractual damages to be awarded" and that the CLC procedure would not address all of the human rights considerations at issue.

[13] On July 3, 2018, the Officer drafted a Report in which she recommended that the Commission dismiss the complaint because it is vexatious under paragraph 41(1)(d) of the CHRA, as the Applicant was required to exhaust the CLC process before bringing a complaint to the Commission. The Officer invited the parties to provide submissions regarding her conclusion.

[14] In a letter dated September 18, 2018, the Commission informed the parties of its formal decision to endorse the Officer's recommendation not to deal with the complaint because of its vexatious nature.

[15] In her notice of application for judicial review of the Commission's decision, the Applicant requested that the Commission send a certified copy of the material in the Commission's possession, namely the entire contents of the Officer's file. However, in a letter dated November 13, 2018, the Commission objected to this request under subsection 318(2) of the *Federal Courts Rules*, SOR/98-106. Essentially, the Commission stated that documents before Commission staff but not before the Commission itself when it rendered its decision are not typically relevant in an application for judicial review of the Commission's decision and the Applicant did not provide particulars about documents that would be relevant to the application. The Commission stated that it remained open to reconsidering its position if further particulars

were provided. Ultimately, the Applicant did not request further particulars and did not raise any issues with respect to the documents before this Court.

III. Officer's Report and the Parties Submissions in Response

[16] The Officer first remarked that the report's purpose was to respond to the Respondent's preliminary objection. The Officer acknowledged that recourse under paragraph 41(1)(b) of the CHRA is no longer applicable given that the Applicant withdrew her CLC complaint. The Officer stated that the Commission can refuse to deal with the complaint if another complaint or grievance process already has, or could have addressed the allegations of discrimination. The Commission views such complaints to be vexatious under paragraph 41(1)(d) of the CHRA.

[17] The Officer noted that an adjudicator treating an unjust dismissal complaint would have had the authority to entertain human rights issues (citing *MacFarlane v Day & Ross Inc.*, 2010 FC 556). Of particular importance in this matter, the Officer noted as follows (at para 38):

> While the [Applicant] raises several allegations that would not appear to directly fall with the [CLC's] mandate, including the allegation of adverse differential treatment, the human rights allegation of termination of employment on the grounds of sex, national or ethnic origin, age and colour raised in the present complaint could have been dealt with by an adjudicator appointed under the [CLC]. The arbitrator could have reviewed the circumstances which led to the termination of employment, including the allegations of adverse differential treatment. As such, the essence of the complaint could have been addressed through the [CLC] process.

[18] In this regard, the Officer pointed to paragraph 242(4)(c) of the CLC which allows the adjudicator to "do any other like thing that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal" and which also grants the adjudicator a

broad equitable discretion, including the power to award moral damages. The Officer then stated that if the allegations of discrimination could have been addressed through another process the Commission may refuse to deal with it (citing *Khapar v Air Canada*, 2014 FC 138 at paras 4, 41 [*Khapar*]; *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 47 [*Bergeron*]).

[19] The Officer then held that by withdrawing the CLC complaint, the Applicant did not allow that process to reach a conclusion and therefore frustrated it. The Officer acknowledged that if the Commission decides not to deal with the complaint the Applicant will be left without recourse to any process; however, it remarked that this is a direct result of her actions. The Officer further remarked that the Applicant was represented by counsel at all material times, and they should have been aware of the remedies available under each process. The Officer further stated that the Applicant's reasons for withdrawing the CLC complaint to proceed before the Commission suggests that she is "forum shopping".

[20] The Officer ultimately concluded that the Applicant had the opportunity to address her complaints under the CLC application but chose not to use that forum and frustrated a process that was actively proceeding and was further advanced than the Commission process. The Commission further noted that the Applicant was informed that she should exhaust the CLC process during the mediation, and did not inform the Commission of her ongoing CLC in a timely manner. While the Applicant may have believed that the Commission is the more appropriate forum, the officer viewed it as plain and obvious that, by frustrating the CLC process, her conduct is vexatious as per paragraph 41(1)(d) of the CHRA.

[21] The Officer's Report was subsequently approved by a manager of investigations.

[22] On August 1, 2018, the Respondent provided submissions in which it endorsed the Officer's recommendation and notably stated that it was not aware of the Applicant's decision to withdraw the unjust dismissal complaint until it received the Report. On August 20, 2018, the Applicant filed a reply in which she submitted that the Commission should refer the complaint to the Canadian Human Rights Tribunal and stated that the Respondent was informed that she withdrew her CLC complaint. In addition, she made further submissions about the merits of her complaint. The Respondent filed further submissions on August 24, 2018, in which it denied that it was aware of the Applicant's decision to withdraw her CLC complaint before receiving the Officer's Report.

[23] On September 18, 2018, the Commission stated that it reviewed the Report and the parties' submissions filed in response to the Report. It decided not to deal with the complaint because it was vexatious under paragraph 41(1)(d) of the CHRA.

IV. Issues and standard of review

[24] In this matter, the Applicant's submissions require the Court to address the following two issues:

A. Did the Commission fail to consider the Applicant's submissions on the Report and thereby breach her right to procedural fairness?

B. Did the Commission fetter its discretion or otherwise commit reviewable errors by deciding not to deal with the complaint?

[25] Whether the Commission's process was fair raises issues of procedural fairness, which are reviewable on a correctness standard (*Harvey v VIA Rail Canada Inc.*, 2019 FC 569 at para 20; *Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 92 at para 6).

[26] The assessment of whether or not the Commission fettered its discretion is to be assessed on a reasonableness standard (*Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at paras 20-25; *Perez Fernandez v Canada (Citizenship and Immigration)*, 2019 FC 628 at para 14). The Commission's decision not to deal with the complaint because it is vexatious is also reviewable on a reasonableness standard as this is a determination involving fact-based discretion (*Fannon v Canada (Revenue Agency)*, 2017 FC 58 at para 24; *Bergeron* at para 41).

[27] The following provisions of the CHRA and the CLC are relevant:

***Canadian Human Rights Act*, RSC 1985, c H-6**	***Loi canadienne sur les droits de la personne*, LR. (1985), ch H-6**
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	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 :
[…]	[…]
(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; [or]	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;

[…]

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

***Canada Labour Code*, RSC 1985, c L-2**

240 (1) Subject to subsections (2) and 242(3.1), any person (a) who has completed twelve consecutive months of continuous employment by an employer, and (b) who is not a member of a group of employees subject to a collective agreement, may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

242 (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

[…]

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

[…]

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

***Code canadien du travail*, LRC (1985), ch L-2**

240 (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si : a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur; b) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.

242 (1) Sur réception du rapport visé au paragraphe 241(3), le ministre peut désigner en qualité d'arbitre la personne qu'il juge qualifiée pour entendre et trancher l'affaire et lui transmettre la plainte ainsi que l'éventuelle déclaration de l'employeur sur les motifs du congédiement.

[…]

(4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur:

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;	a) de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;
(b) reinstate the person in his employ; and	b) de réintégrer le plaignant dans son emploi;
(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.	c) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.

V. Analysis

A. *Procedural fairness of the Commission's decision*

[28] The Applicant essentially submits that the Commission breached her right to procedural fairness because it did not consider her submissions filed in response to the report.

[29] The Respondent submits that the Commission was not required to address the Applicant's submissions filed in response to the report. The Applicant's response submissions addressed the merits of the underlying complaint and did not materially address the issue as to whether the complaint was vexatious under paragraph 41(1)(d) of the CHRA or point to material omissions of the report. The Respondent argues that the Applicant largely restated the position that she previously raised before the Officer regarding her preference for the Commission's procedure over the CLC complaint.

[30] The Commission is required only to explicitly address response submissions that "seriously challenge" the findings of a report and is not otherwise required to "reference everything" filed before it in response to the report (*Carroll v Canada (Attorney General)*, 2015 FC 287 at para 71; *Bergeron* at para 76). In this matter, the Applicant's submissions of August 20, 2018 did not seriously challenge the report.

[31] The Court is persuaded by the Respondent's argument that the Applicant's reply submissions largely referred to the merits of her complaint and other irrelevant matters and therefore did not seriously challenge the report. In this regard, since screening is the purpose of the section 40/41 stage, and the Commission is not to look behind the facts to determine if the complaint itself is made out (*Wisdom v Air Canada*, 2017 FC 440 at paras 27-28).

[32] The Applicant's submissions contained limited comments regarding the report's recommendation that the complaint is vexatious. Apart from submitting that the Respondent was aware of the withdrawal of her CLC complaint and her opinion that the Commission is the more suitable and efficient forum, the remainder of her allegations were devoted to the merits of her complaint to the Commission which were not relevant at this stage. The Commission was therefore not required to explicitly refer to these submissions in considering whether the complaint is vexatious under paragraph 41(1)(d) of the CHRA. Rather, the Commission properly restricted its inquiry to determining whether or not the CLC process could have dealt with the allegations before the Commission. Accordingly, the Court finds that no breach of procedural fairness occurred.

B. *Reasonableness of the Commission's Decision*

[33] The Applicant argues that the Commission committed a reviewable error by "rubber stamping" the Officer's recommendation not to deal with her complaint due to the withdrawn CLC complaint, without providing additional reasons for its decision. In other words, the Commission fettered its discretion by dismissing the complaint for the sole reason that it had been addressed in another forum (citing *Carroll v Canada (Attorney General)*, 2015 FC 287 at paras 120-127).

[34] The Applicant further submits that the reasons set forth in the report are unreasonable. In the Applicant's view, the Officer failed to consider the impact on the Applicant of deciding not to deal with the complaint. The Applicant further submits that the Officer committed a reviewable error by dismissing her complaint on the basis that she was "forum shopping". In the Applicant's view, she was entitled to exhaust her remedies to the maximum extent allowed by law, and her motives for doing so are not relevant. The Applicant argues that it is not improper to withdraw a labour complaint to proceed before a human rights body. It is only where the possibility for duplicative decisions on the same matter arises that the issue of "forum shopping" should be raised. The Applicant argues that the Commission's decision not to deal with the complaint is unreasonable because the CLC complaint was withdrawn with finality and there was no other forum left from which a conflicting decision could be rendered.

[35] The Respondent submits that the Commission did not abdicate its responsibility or otherwise fetter its discretion. Given that the report forms part of the Commission's reasons, the Commission was not required to provide separate reasons for deciding not to deal with the complaint.

[36] The Respondent submits that the Commission's decision is reasonable. The Respondent notes that the Officer acknowledged that the Commission cannot refuse to address a complaint on the sole basis that it has already been dealt with or could have been dealt with by another process, and that the Commission must conduct an independent assessment based on the facts and evidence before it. The Respondent submits that the Commission considered the three criteria set forth in the jurisprudence before determining that the complaint is vexatious and that the decision's outcome is reasonable (*Bergeron*; *British Columbia (Workers' Compensation Board) v Figliola*, [2011] 3 SCR 422 [*Figliola*]). Essentially, the Respondent argues that the CLC adjudicator would have had the jurisdiction to address allegations of adverse differential treatment on a prohibited ground of discrimination in the course of employment (encompassing events leading to and including termination), that both the CLC complaint allegation raised essentially the same allegations based on the same facts, and that the Commission reasonably considered if the Applicant had the opportunity to know the case to meet and had a chance to meet it.

[37] The Respondent submits that in this case, the Applicant could have adequately addressed her human rights complaint through the CLC process and she voluntarily chose to withdraw the CLC complaint; given these circumstances, it was reasonable for the Commission to conclude that the complaint was vexatious and refuse to deal with it.

[38] Both the reasons contained in the report and the Commission's decision form the decision under review before this Court. When the Commission's reasons for adopting an Investigator's report are brief, Courts have treated the Report as constituting the Commission's

reasoning for the screening decision (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 36-39; *Sabourin v Canada (Attorney General)*, 2019 FC 294). For this reason, the Court finds that the Commission was not required to provide separate reasons for dismissing the complaint or that its decision not to do so amounts to a fettering of its discretion or otherwise amounts to a reviewable error. The Commission stated that it considered the conclusions of the Report and the submissions filed by the parties in response. As the Applicant's submissions did not raise any material oversight in the report, there is no basis to conclude that the Commission refused to exercise its statutory duty or that it improperly "rubber stamped" the report.

[39] With respect to the reasonableness of the Commission's decision not to deal with the complaint, I find that the Commission's decision not to consider the Applicant's complaint does not fall within a range of reasonable outcomes and must therefore be set aside (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[40] The Officer properly acknowledged that the submission of a CLC unjust dismissal complaint does not automatically require the Commission to dismiss her human rights complaint. With that said, the Commission may rely on paragraph 41(1)(d) of the CHRA to dismiss a complaint where it either was addressed elsewhere or could have been addressed elsewhere. In other words, "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) of the Act" (*Bergeron* at para 47). The Commission addressed the factors set forth in the jurisprudence to be considered when assessing if a human rights complaint could have been appropriately dealt with in an alternative process (*Bergeron* at para 50; *Figliola*):

A. Did the CLC adjudicator and the Commission have concurrent jurisdiction to decide human rights issues?

B. Was the legal issue before the CLC adjudicator essentially the same as the legal issue in the human rights complaint?

C. Did the Applicant have the opportunity to know the case to meet and have a chance to meet it?

[41] I find that the Commission erred in addressing the first two factors, which requires this Court to intervene and set the Commission's decision aside. The Commission essentially relied on this Court's decision in *MacFarlane v Day & Ross Inc.*, 2010 FC 556 [*MacFarlane* 1] for the proposition that an adjudicator appointed to consider an unjust dismissal under the CLC also has the jurisdiction to address human rights allegations. The Commission also remarked that paragraph 242(2)(c) of the CLC provides that "where an adjudicator decides…that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to…do any other like thing that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal" [Emphasis added.].

[42] The problem with this reasoning however, remains that the adjudicator's jurisdiction is limited to addressing the "human rights complaint to the extent that it relates to the dismissal" (*MacFarlane* 1; *MacFarlane v Day & Ross Inc.*, 2013 FC 464 at para 29; aff'd: *MacFarlane v Day & Ross Inc.*, 2014 FCA 199; *MacFarlane v Day & Ross Inc.*, 2011 FC 377 at para 11). In other words, *MacFarlane* 1 stands for the proposition that an adjudicator has the jurisdiction to

address human rights complaints, to the extent that they relate to the circumstances of a dismissal.

[43] Moreover, the Court recognizes that an adjudicator would have the jurisdiction to award moral damages, or aggravated damages, in the context of an unjust dismissal complaint under paragraph 242(4)(c) of the CLC. That said, such damages are intended to compensate the employee for "damages flowing from the manner in which employment is terminated" (*Tl'azt'en First Nation v Joseph*, 2013 FC 767 at paras 30-41; *Wallace v United Grain Growers Ltd.*, [1997] 3 SCR 701 at para 103; *Spruce Hollow Heavy Haul Ltd. v Madil*, 2015 FC 1182 at paras 79-82).

[44] However – and without commenting on the potential merits of the Applicant's allegations – her complaint to the Commission set forth a number of allegations of discrimination on prohibited grounds, which she stated took place from early 2013 up to and including her formal dismissal in September 2016. Many of these allegations arose from differential treatment on prohibited grounds unrelated to the circumstances of her dismissal and could not have been addressed by the adjudicator or compensated under its equitable jurisdiction. Moreover, the Applicant's complaint raised allegations of systemic discrimination and included requests for organizational remedies.

[45] In light of these considerations, the Court finds it was unreasonable for the Commission to conclude that an adjudicator determining an unjust dismissal complaint under the CLC had the

jurisdiction to address all of the human rights issues raised in the Applicant's human rights complaint, or that these complaints raised the same legal issues.

[46] This matter differs from *Khapar*, relied on by the Commission, in which the Court upheld the Commission's decision to dismiss a complaint as vexatious under paragraph 41(1)(d) of the CHRA for the following reason: "To allow the complainant to raise new grounds of discrimination before the Commission when he could have had all of his human rights issues dealt with at arbitration would be tantamount to an abuse of process and as such should be considered vexatious" (*Khapar* at paras 41, 119). Moreover, in *Figliola* at page 37, the Supreme Court stated that the principle of finality weighs against permitting a human rights tribunal from addressing a complaint when the Applicant's allegations before an arbitrator were "essentially the same as what is being complained of to the Tribunal".

[47] In this matter, the Applicant could not have had all of the human rights issues raised (before the Commission) dealt with in the CLC proceeding before she withdrew that CLC complaint. Rather, that CLC proceeding would have dealt uniquely with the circumstances of her dismissal and human rights issues related to the dismissal.

[48] In light of the foregoing, the Court finds that the Commission committed a reviewable error when it held that the Applicant's human rights complaint was vexatious because it could have been dealt with through the CLC unjust dismissal process.

[49] The Applicant has requested that this Court direct the Commission to refer this matter to the Tribunal under subsection 49(1) of the CHRA. This is not an appropriate remedy in these circumstances. The Applicant's allegations have yet to be investigated or subject to a report dealing with the factual issues that have been raised. The Court will therefore order this matter to be remitted to a different investigator for continued processing, without prejudice to the respondent's right to raise any objections under the CHRA.

VI. Conclusion

[50] The application for judicial review is allowed and the matter is remitted to a new investigator for the continued processing of the Applicant's human rights complaint.

JUDGMENT in T-1838-18

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The matter is returned to the Commission in order for a new Investigator to be appointed to conduct an investigation into the merits of the complaint. The Applicant is entitled to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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