Federal Court  Cour fédérale

Date: 20210426

Docket: 20-T-36

Citation: 2021 FC 365

Holyrood, Newfoundland and Labrador, April 26, 2021

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ANGELENA LIU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. INTRODUCTION

[1] By a Notice of Motion dated August 27, 2020, Ms. Angelina Liu (the "Applicant") seeks an Order, pursuant to subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for an extension of time to commence an Application for Judicial Review of a decision of the Canadian Human Rights Commission (the "Commission"). In that decision, dated September 15, 2016, the Commission dismissed the Applicant's complaint about a failure of the Canada Border Services

Agency (the "CBSA"), her employer, to accommodate on the basis of family status. The Applicant made her complaint pursuant to section 7 and 10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act").

[2] Pursuant to Rule 303(2) of the *Federal Courts Rules*, S.O.R./98-106 (the "Rules"), the Attorney General of Canada is the Respondent (the "Respondent") to this Motion.

II. BACKGROUND

[3] The following details are taken from the affidavits filed by the parties, including the exhibits attached to and forming part of those affidavits.

[4] The Applicant filed her affidavit, affirmed on August 24, 2020. She also filed the affidavit of Mr. James Carpick, affirmed on August 25, 2020.

[5] In her affidavit, the Applicant outlines the history of her employment with the CBSA, and her attempts to find accommodation on the basis of family status. The Applicant attached several exhibits to her affidavit relative to her accommodation requests, including a letter dated June 3, 2014, written by the Applicant's husband, Mr. Mike Liu, "in conjunction with and on behalf of" the Applicant.

[6] In this letter, Mr. Liu sets out details of the Applicant's personal circumstances in Vancouver.

[7] Mr. Liu deposed that he is a serving member of the Royal Canadian Mounted Police and that the Applicant is the daughter of a former member of the Vancouver police force. He also deposed that he and the Applicant own a private company in Vancouver "that is specifically based in the Vancouver area and cannot be relocated."

[8] Mr. Carpick is a lawyer and an uncle of the Applicant. He deposed that he represented the Applicant on a pro bono basis in connection with her requests for accommodation by the CBSA. He refers to exhibits which are attached to his affidavit, including decisions of the Commission, his submissions to the Commission on behalf of the Applicant, and some correspondence containing advice to the Applicant.

[9] Mr. Carpick also deposed about his understanding of the law about the content of the Commission's decision, that is, that it was a brief decision without reasons. He deposed that he did not understand that the Investigation report would be considered the "reasons" of the Commission. He deposed that he informed the Applicant about the Commission's decision and further advised as follows: "If you want to go further, you'd have to sue in Federal Court, and soon. Otherwise, you will have to focus on your grievance."

[10] For his part, the Respondent filed the affidavits of Ms. Denise Morrison, affirmed on October 8, 2020 and of Ms. Linda Ott, affirmed on October 8, 2020.

[11] Ms. Morrison is a Senior Labour Relations Advisor in the Labour Relations and HR Redress Division of the CBSA. In that capacity, she deposed to her knowledge of the Applicant's

knowledge and understanding of the requirement that she accept a posting anywhere in Canada as a condition of acceptance into the Officer Induction Training Program and her agreement to accept a posting anywhere in Canada if an employment offer were made to her. Copies of executed documents to that effect are attached as exhibits to Ms. Morrison's affidavit.

[12] Ms. Morrison also deposed to the fact that on June 26, 2020, the CBSA made written submissions to the Federal Public Sector Labour and Relations Board, raising objections to the Applicant's further pursuit of her grievance. A copy of those submissions is attached as an exhibit to the Morrison affidavit.

[13] Ms. Ott is a Legal Assistant with the Department of Justice, Counsel for the Respondent. As the exhibit to her affidavit, she attached a copy of the webpage belonging to Mr. Carpick in his law firm, that is Owen Bird Professional Corporation in Vancouver.

[14] The Applicant is a wife and mother of two children, who were aged 4 and 6 in 2014. She lives in Vancouver. She applied for employment with the Canada Border Services Agency (the "CBSA") as an officer and underwent training in Rigaud, Quebec from February to June 2014.

[15] During her training, the Applicant requested a posting to Vancouver, to accommodate her family status as the mother of young children. She made a request in a meeting on May 14, 2014 with representatives of the CBSA. She repeated her request in a letter dated June 3 directed to the CBSA's National Recruitment and Development Division; that letter was signed as well by her husband, a serving member of the Royal Canadian Mounted Police.

[16] The Applicant accepted an offer of employment on June 9, 2014. Prior to signing the offer, she was advised that acceptance of the offer required her agreement to accept a posting anywhere in Canada, as a term and condition of employment.

[17] The CBSA directed the Applicant to report to Regina, the posting that she had selected based on the available options. She reported for duty in Regina on July 7, 2014 and on July 28, 2014, made another request for accommodation, on the grounds that her husband was in the first year of a three year posting in the Vancouver area and was unable to relocate to Regina. She also referred to the traumatic effect of the family separation upon her children.

[18] By a letter dated August 28, 2014, Mr. Michael Shoobert, Director, Prairie Region denied the Applicant's request for accommodation. On behalf of the CBSA, he advised that parenting in person was a personal preference, not a legal obligation, and that the Applicant was fully aware of the mobility requirement when she accepted employment with the CBSA.

[19] On September 11, 2014, the Applicant filed two complaints with the Commission, alleging discrimination in reference to employment. The first complaint relates to the time when she was in training in Rigaud, that is from December 3, 2013 until July 7, 2014, the second relates to the period after she reported for duty in Regina on July 7, 2014.

[20] On September 8, 2014, the Applicant submitted a grievance alleging that the denial of her request for accommodation, on the basis of family status, violated her Collective Agreement.

[21] On October 27, 2014, the Applicant requested an extended leave without pay, beginning on December 1, 2014, to allow her to return to Vancouver to be with her family.

[22] The Commission appointed an Investigator. The Investigator reviewed the submissions of the parties, together with the documentary evidence submitted. The Investigator also interviewed the Applicant by telephone.

[23] The Investigator issued a Report on September 15, 2016, recommending that the Applicant's complaint be dismissed, as follows:

> 33. It is recommended, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, that the Commission dismiss the complaint because:
>
> - Having regard to all the circumstances of the complaint, further inquiry is not warranted.

[24] By letter dated September 15, 2016, the Commission decided to dismiss the Applicant's complaints.

[25] The letter from the Commission contained the following notice:

> For your information, either party to a complaint can ask the Federal Court to review a Commission's decision under subsection 18.1(1) of the *Federal Courts Act*. The application to the Court must normally be filed within 30 days of receipt of the Commission's decision. …

[26] The Applicant continued to pursue her grievance. According to her affidavit filed in support of this Motion, the grievance was scheduled for adjudication before the Federal Public

Sector Labour Relations and Employment Board (the "Board") in March 2020. As a consequence of the COVID-19 pandemic, the hearing was rescheduled until September 2020.

[27] By letter dated June 26, 2020, the CBSA advised the Board that it would seek dismissal of the Applicant's grievance on the basis that its subject matter had been decided by the Commission. A copy of that letter is attached to the affidavit of Denise Morrison, as exhibit E.

[28] According to the Applicant's affidavit, the CBSA submitted written arguments to the Board on June 26, 2020, formally setting out its objection to the adjudication of the Applicant's grievance, on the grounds that the matter is now *res judicata* and issue estoppel applies.

[29] The Applicant deposed, in her affidavit, that on July 13, 2020, her Counsel asked the Board to hold her grievance in abeyance in order to allow her to apply to this Court for an extension of time within which to file an Application for Judicial Review of the Commission's decision made on September 15, 2016.

[30] The sole issue arising in this Motion is whether an extension of time should be granted to the Applicant to commence an application for judicial review.

III. SUBMISSIONS OF THE PARTIES

A. *Applicant's Submissions*

[31] In *Canada (Attorney General) v. Larkman* (2012), 433 N.R. 184 (F.C.A.), the Federal Court of Appeal said that in deciding whether to grant an extension of time, the Court should consider whether the moving party had a continuing intention to pursue the application; whether there is some potential merit to the application; whether there is prejudice to the opposing party arising from the delay; and whether the moving party has a reasonable explanation for the delay. It is not necessary for the moving party to establish all four elements, and the overriding consideration is that the interests of justice be served.

[32] In the present Motion, the Applicant argues that she has met all four elements.

[33] The Applicant submits that pursuit of her grievance shows a continuing intention to protect her rights; that the potential merit in an application for judicial review arises from an error by the Commission in purporting to make a decision on the merits of her complaint relating only to her posting in Regina; that there is no prejudice to the CBSA since the evidence upon an application for judicial review is the same evidence that would be presented to the Board.

[34] As for a reasonable explanation for the delay, the Applicant argues that neither she nor her Counsel, Mr. Carpick, understood that the brief decision of the Commission made on September 15, 2016 would preclude her from “pursuing her human rights claim through the grievance process.”

B. *Respondent's Submissions*

[35] For his part, the Respondent argues that the Applicant did not have a continuing intention to seek judicial review of the Commission's decision. He submits that there is no evidence of any intention to commence an application for judicial review, let alone a continuing intention.

[36] The Respondent contends that there is no merit to any application for judicial review since the decision in issue is one that relates to sufficiency of the evidence and is reviewable on the standard of reasonableness.

[37] The Respondent submits that the Commission did not purport to make a final decision about discrimination on the basis of family status and the Investigator's reference to the decision in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 was only to provide the legal context for a fact-based inquiry into the Applicant's complaints.

[38] The Respondent submits that the Applicant did not provide a reasonable explanation for the lengthy delay in seeking judicial review of the Commission's decision. He argues that the Applicant relied on the advice of her lawyer and if that advice was wrong, she bears the consequences.

[39] In this respect the Respondent relies on the decisions in *Williams v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 258 (QL) (Fed. T.D.); *Mutti v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 97; *Canada (Attorney General) v. Larouche*,

[1994] F.C.J. No. 1720 (QL) (Fed. C.A.); and *Washagamis First Nation of Keewatin, Ontario v. Ledoux,* 2006 FC 1300.

[40] Finally, the Respondent submits that granting an extension of time will cause prejudice**,** that is to its litigation strategy in the proceedings before the Board.

[41] Further to the hearing of the Motion on October 26, 2021, the parties were given the opportunity to address a recent decision upon a similar motion, that is the Order and Reasons in *Cyr v. Batchewana First Nations of Ojibways, Batchewana First Nation Housing Authority*, 2020 FC 1001. The Applicant filed her submissions on November 5, 2020 and the Respondent filed his on November 12, 2020.

IV. DISCUSSION AND DISPOSITION

[42] Upon consideration of the evidence submitted by the Applicant and the oral and written submissions of both parties, I am not persuaded that the Applicant has met the test for an extension of time.

[43] The evidence does not show a continuing intention to pursue an application for judicial review of the decision of the Commission. I agree with the arguments of the Respondent that the evidence demonstrates an intention to pursue her grievance. I refer to paragraphs 18, 19 and 20 of the Applicant's affidavit which provide as follows:

> 18. Accordingly, I did not seek to judicially review the decision at the time. Had I understood that the Commission's decision could prevent me from pursuing my accommodation request under the

> grievance process, I would have judicially reviewed the decision immediately.
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> 19. From 2014 to present, I have continually pursued my right to accommodation, including an ongoing manner through the grievance process, which I understood to be an appropriate forum to pursue this claim. This has included communicating with and providing instructions to the grievance and adjudication officer assigned by my union, and later to external counsel. I have also provided documents as part of the disclosure process, participated in discussions regarding procedural matters that have arisen, reviewed documents provided by the employer in its disclosure materials, and participated in preparations for the hearing. At no point have I neglected to perform any step in the grievance process that was necessary to pursue my claims.
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> 20. I was informed by my current counsel and I believe that on June 19, 2020, the employer informed the Board that it would be seeking to have my grievance dismissed on the basis that the subject matter of the grievance had been dealt with through the Commission process. Prior to June 2020, I was not aware that my ability to pursue my grievance may have required me to judicially review the Commission's decision.

[44] I am not satisfied that there is much merit in a proposed application for judicial review. The role of the Commission, at the investigation stage, is to gather facts. The content of the Report is reviewable on the standard of reasonableness. The recommendation of the Investigator can be adopted by the Commission and the contents of the Report adopted as the reasons of the Commission; see the decision in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404.

[45] The Applicant argues that because the evidence upon an application for judicial review would be the same evidence that would be submitted to the Board, upon adjudication of her grievance, there would be no prejudice to the Respondent.

[46] I disagree with the proposition that granting an extension of time, to commence an application for judicial review, will not cause prejudice to the Respondent.

[47] I acknowledge that the question of prejudice is not clear-cut. However, the Respondent, like any other party to litigation in the Federal Court, is entitled to rely on the finality of a decision. I refer to the Order of Justice Gauthier in *Curtis v. Bank of Nova Scotia*, 19-A-18 (unreported), where she said "the need for finality of court decisions is an important concept; time limits are not whimsical."

[48] The decision of the Commission was made on September 15, 2016. According to the email dated September 22, 2016, Counsel for the Applicant, Mr. Carpick, advised her on that date that the Commission had dismissed the complaints. He sent to the Applicant the decision of the Commission. He pointed out to the Applicant that if she wanted to pursue the matter of the complaints under the Act, she would need to proceed in the Federal Court "and soon."

[49] Neither am I satisfied that the Applicant has offered a reasonable explanation for the length of the delay in this case.

[50] In support of her Motion for an extension of time, the Applicant filed the affidavit of Mr. Carpick. Mr. Carpick said the following in paragraphs 11, 12, and 13 of his affidavit:

> 11. When I received the Commission's decision, I understood that this was the final decision by the Commission on this matter. However, I did not understand that this decision could preclude Ms. Liu from pursuing her claim through the grievance process. As my email at the time to Ms. Liu stated: "I attach the CHRC's decision letter. They have denied your complaints. If you want to

> go further, you'd have to sue in Federal Court, and soon. Otherwise, you will have to focus on your grievance. Please call me to discuss."
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> 12. I understood this to be the case based on the summary process employed by the Commission in dismissing her complaint. Although we were entitled to make written representations, and Ms. Liu was interviewed by the investigator, we were not entitled to cross-examine respondent witnesses or to seek document disclosure as part of the process. We were provided with only a summary of the respondent's submissions, but not a copy of the submissions themselves.
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> 13. Further, the Commission's decision in this matter was a short, one-page letter. On its face, it only stated that, "having regard to all the circumstances of the complaints, further inquiry is not warranted". In light of the fact that the Commission's decision itself provided no explanation or reasons for dismissing the complaint that were specific to Ms. Liu, it was my understanding that, while the Commission had decided not to proceed with her complaints, this did not jeopardize her ability to advance her grievance and the underlying human rights issues before the ongoing process with the Board. I did not advise her that was a risk if she did not judicially review the Commission's decision.

[51] The Applicant chose to be represented by Mr. Carpick. I agree with the submissions of the Respondent, as supported by the jurisprudence, that she is bound by the decisions made by her Counsel, on her behalf.

[52] In any event, the decision to pursue an application for judicial review of the Commission's decision was the choice of the Applicant. She was clearly on notice that such remedy was available to her, upon receipt of the decision of September 15, 2016 and upon receipt of the email, dated September 22, 2016, from Mr. Carpick.

[53] The delay is lengthy, nearly four years. In *Curtis*, *supra*, the Federal Court of Appeal dismissed an application for an extension of time filed two years after dismissal of an application for judicial review.

[54] As noted above, the overriding consideration upon a motion for an extension of time is that the interests of justice be served. However, that does not mean an arbitrary adoption of the interests of one party over another. That principle requires consideration of the evidence presented and its assessment against the relevant factors, as addressed in *Larkman*, *supra*, and other decisions.

[55] In the present case, I am not satisfied that the Applicant has shown that positive exercise of discretion is warranted, to grant an extension of time and the motion will be dismissed.

ORDER in 20-T-36

THIS COURT'S ORDER is that the motion is dismissed, with costs to the Respondent.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	20-T-36
STYLE OF CAUSE:	ANGELENA LIU v. ATTORNEY GENERAL OF CANADA

HEARING HELD BY VIDEOCONFERENCE ON OCTOBER 26, 2020 FROM ST. JOHN'S, NEWFOUNDLAND AND LABRADOR (COURT) AND OTTAWA, ONTARIO (PARTIES). FURTHER SUBMISSIONS RECEIVED FROM THE APPLICANT ON NOVEMBER 5, 2020. FURTHER SUBMISSIONS RECEIVED FROM THE RESPONDENT ON NOVEMBER 12, 2020.

ORDER AND REASONS:	HENEGHAN J.
DATED:	APRIL 26, 2021

APPEARANCES BY:

Andrew Astritis	FOR THE APPLICANT
David Aaron	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT