Federal Court  Cour fédérale

Date: 20121207

Docket: T-1784-11

Citation: 2012 FC 1448

Ottawa, Ontario, December 7, 2012

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

KATHLEEN O'GRADY

Applicant

and

BELL CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision made by the Canadian Human Rights Commission (the "Commission" or "CHRC") dated September 14, 2011. The Commission decided that it would not deal with the applicant's complaint pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA* or the "Act"], and therefore would not refer it to the Canadian Human Rights Tribunal (the "Tribunal").

The Background

[2] Ms. O'Grady was employed by Bell Canada since 1990. She was a dedicated and proud employee and noted several times in her submissions that Bell had been a good employer with good benefits and that her work with Bell had been "her life". In 2006 she began a period of short term disability leave due to mental health issues, followed by long term disability leave (LTD) which she received until 2009. Ms. O'Grady followed her counsellors' recommendations to prepare to return to work. A gradual reintegration was planned and proposed for early May 2009. On April 20, 2009 Ms. O'Grady was called to a meeting with Bell, which she anticipated was for the purpose of discussing her gradual return to work. At that meeting, she was advised that her position had already been eliminated (in August 2008) as part of a large scale reorganisation and downsizing plan affecting hundreds of employees. Bell offered Ms. O'Grady a severance package.

[3] Ms. O'Grady retained counsel to assess her options and to negotiate an improved severance package, which was eventually finalised in February 2010. During the negotiations, on several occasions, she asserted that because she was terminated while on long term disability, Bell should provide some accommodation to her and that its conduct in eliminating her position and terminating her employment was discriminatory and a violation of her human rights. She indicated that she could and would pursue a complaint to the CHRC if the settlement was not satisfactory.

[4] Given the high regard Ms. O'Grady had for Bell Canada, in particular the initiatives that Bell was promoting to raise awareness about mental health, Ms. O'Grady was dissatisfied and disappointed by the outcome of her negotiations with Bell Canada, which she noted had an adverse impact on her recovery.

[5] Although Ms. O'Grady seeks a range of relief, particularly to reinstate her long-term disability benefits and other compensation, it is important to note – as was underlined by the Court during the hearing – that the only issue before the Court is the reasonableness of the Commission's decision not to refer her complaint to the Tribunal.

[6] It is not the role of this Court to address the other allegations made by Ms. O'Grady, including whether the settlement negotiations with Bell Canada were conducted in bad faith, or whether an incorrect return to work date was relied upon with an impact on the settlement and her long-term disability status at the time of termination. In summary, the merits of Ms O'Grady's claim that she was discriminated against by Bell Canada cannot be addressed in this judicial review.

The Severance Agreement

[7] The severance agreement signed by Ms. O'Grady on February 11, 2010 included details of the compensation and an Acknowledgment, Release and Discharge ("the Acknowledgment") indicating:

> In consideration of the terms and benefits of the said severance package, I hereby grant to Bell Canada…a full and final release and discharge with respect to any right, action, claim, cause of action or complaint, damage, or debt that I have, had or may claim against [Bell]...

[8] Ms. O'Grady had provided her lawyer with two versions of this Acknowledgment: an original version which was witnessed and another version which contained her handwritten 'addendum' ("the addendum version") which stated:

> I, Kathleen, O'Grady, have signed above to honour this legal contract. However, in no way do I agree with termination while I was on LTD prior to return to work date of May 4, 2009. I believe that Bell Canada allegedly acted unethically, under false pretenses, denied my human rights and discriminated against my disability.

[9] Ms. O'Grady submits that her lawyer had recommended that two versions be prepared with the intention that her lawyer would attempt to have the addendum version used. If Bell refused the addendum version, the original version without the addendum would be provided. However, the record suggests that Ms. O'Grady's lawyer only provided Bell with the original version. Bell never received the addendum version and was not aware of its existence until being notified at the time of the CHRC investigator's report, over a year later.

[10] Bell honoured its settlement and Ms. O'Grady received the amounts agreed upon.

The Complaint to the CHRC

[11] Ms. O'Grady filed a complaint to the Commission on October 26, 2010, in which she alleged that she was discriminated against by Bell on the basis of her mental health disability. With respect to the settlement and the Acknowledgment, she stated:

> I was forced to sign-off the Termination Package under mental duress. I instructed my lawyer to do what she thought was best because I was incapable of deciding anything. I also instructed her to send Bell my sign-off that included an Addendum 'A' advising that I did so under mental duress.

The CHRC decision

[12] The decision of the Commission includes brief reasons which must be read together with the investigative report (the Section 40/41 Report): see *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 at para 37.

[13] The Commission's decision was made pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, which permits the Commission to not deal with a complaint if it appears to be trivial, frivolous, vexatious or made in bad faith:

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 :
[…]	[…]
(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith;	*d*) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

[14] Section 40 addresses who can make complaints and provides some limitations on the Commission's authority to deal with certain types of complaints.

[15] In its reasons, the Commission noted that the complainant was represented by a lawyer and negotiated the settlement with the respondent. The complainant signed an acknowledgement which relieved the respondent of any liability relating to her termination. The complainant's signature on the acknowledgement was witnessed and sent to the respondent by the complainant's lawyer. The Commission noted that the only version of the acknowledgement with the complainant's addendum

or notation that it had been signed despite the respondent's denial of her human rights and discriminatory actions was on the complainant's own copy of the acknowledgement. The respondent had received the original signed and witnessed version without the addendum.

[16] The report makes it clear that the only issue the Commission addressed was whether it should refuse to deal with the complaint under paragraph 41(1)(d) of the *CHRA*.

[17] The investigator considered the specific factors applicable to each aspect of paragraph 41(1)(d) to assess whether the complaint was "trivial, frivolous, vexatious or made in bad faith". He summarized each party's position and analyzed the factors as they applied to the circumstances of this case. The investigator determined that "it is not clear and obvious that the matter is not trivial as the allegations relate [to] the termination of employment based on a disability", that "it is not obvious that the matter is frivolous", and that "it is not obvious that the matter is vexatious". While the use of double negatives is confusing, it is apparent that the investigator concluded that the complaint was not trivial, frivolous or vexatious.

[18] With respect to assessing whether the complaint was in bad faith, the investigator noted that he had considered the following factors or questions:

a) Has the complainant engaged in improper conduct amounting to fraud, deception, intentional misrepresentation, or some other design to mislead the respondent or the Commission?

b) Is the complaint filed in a deliberate attempt to avoid some contractual or other legal obligation?

c) Have the issues in the complaint been the subject of another body's decision?

If so:

i) What is the nature of the alternate redress mechanism that was used, including was there a hearing on the issues, was the complainant permitted to present his or her case, was the decision-maker independent?

ii) What did the decision-maker decide?

iii) Did the decision address all of the human rights issues raised in the complaint?

iv) If the complainant was successful (or partly successful) under the alternate redress procedure, what remedies were awarded?

[19] The investigator concluded that the complaint "may be in bad faith". He noted that the complainant did "not appear to have engaged in a fraudulent or deceptive way" and that she had been forthcoming about the acknowledgement that she signed, although she insisted that it was signed under duress. However, the acknowledgement arose out of a negotiated severance package and a release of the employer from liability relating to the termination of employment. The investigator also observed that the complainant was represented by counsel during this process and at the time the severance package was executed. The investigator indicated that pursuing the human rights complaint may be perceived as an attempt to circumvent the Acknowledgement. He concluded that Ms. O'Grady's allegation that she was terminated due to her disability was not supported by the evidence.

[20] The investigator, therefore, recommended that the Commission not deal with the complaint because it is "trivial, frivolous, vexatious or in bad faith" pursuant to paragraph 41(1)(d) of the *CHRA*.

[21] The Commission's decision notes that it reviewed the complaint submitted by the complainant, the Section 40/41 Report (of the investigator) dated July 28, 2011, submissions from the complainant dated July 30 and August 17, 2011 and a submission from the respondent dated July 26, 2011.

[22] Although Ms. O'Grady submitted other documents to the Court with her application for judicial review, only the information that the Commission relied upon can be considered.

The Issues

[23] In this application, the applicant seeks the following remedies:

a. an order in the nature of certiorari quashing the decision of the CHRC;

b. an order for status quo ante to receive the reinstatement remedy;

c. Tariff A $50 cost of application, $50 hearing request, and if necessary any Tariff B costs;

d. such further and other relief as this Honourable Federal Court may deem just;

e. an order for Final Release to be void *ab initio* since procedural fairness in the manner of termination was denied;

f. an order for compensatory damages;

g. an order establishing this a *prima facie* case of discrimination;

h. an order for long-term income protection to age 65;

i. an order for amended Record of Employment, if reinstated; and

j. an order for Bell to present a letter of apology for wrongful termination, signed by CEO.

[24] The applicant raised 22 issues, most of which relate to the termination process with Bell.

[25] As noted above, at the outset of the hearing and during the hearing, the applicant was advised that the jurisdiction of this Court on the judicial review application is limited to the Commission's decision to decline to deal with the complaint. While the applicant made submissions on the majority of the issues raised, there are only three issues for this Court to address;

1. What is the applicable standard of review?
2. Was the Commission's decision not to deal with Ms. O'Grady's complaint reasonable?
3. Are the remedies sought by the applicant available?

Standard of Review

[26] The applicant submits that the decision should be reviewed on the standard of correctness and that no deference should be given to the Commission and that this Court should substitute its own decision to make the orders requested. In effect, the applicant asked the court to "do the right thing" for her. While it is understandable that litigants have high expectations for the Courts to resolve all related issues, the Court must act within its statutory jurisdiction and in accordance with the relevant case law with respect to the standard of review.

[27] The respondent correctly submits that the standard of review is reasonableness and that a high level of deference is to be given to the Commission in interpreting and applying its home statute, the *CHRA*, particularly given the wide discretion provided in section 41, which is the basis for the decision under review. The respondent also submits that it is important to consider the role of the Commission as a screening body, as distinguished from the role of the Canadian Human Rights Tribunal as an adjudicative body.

[28] There is a great deal of jurisprudence governing the standard of review applicable to decisions of the Commission and about its role. The principles relevant to this review have been considered and some of the key cases are referred to below.

[29] In *Exeter v Canada (Attorney General)*, 2011 FC 86, 383 FTR 106, Justice Heneghan dismissed judicial review of a decision by the Commission to refuse a complaint pursuant to paragraph 41(1)(d) of the *CHRA*. She held, at para 16:

> [16] In *Dunsmiur v. New Brunswick*, [2008] 1 S.C.R.190, the Supreme Court of Canada said that there are only two standards of review by which decisions of statutory decision-makers can be reviewed, that is correctness for questions of law and procedural fairness and reasonableness for findings of fact and questions of mixed fact and law. At paragraph 53, the Court in *Dunsmuir* held that:
>
> > Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[30] And at paras 19 and 20:

> [19] In *Morin v. Canada (Attorney General)* (2007), 332 F.T.R. 136, the Federal Court found that reasonableness is the appropriate standard when reviewing a decision of the Commission not to deal with a complaint pursuant to subsection 41(1) of the Act. The substance of the Commission's decision is reviewable on the standard of reasonableness.
>
> [20] The standard of reasonableness applies to both the decision-making process and the result; see *Dunsmuir*, paragraph 47, which reads as follows:
>
> > A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[31] Justice Heneghan's analysis of the applicable standard of review was confirmed by the Federal Court of Appeal in *Exeter v Canada (Attorney General)*, 2012 FCA 119, 433 NR 286 at para 6.

[32] The role of the Court in judicial review where the standard of reasonableness applies is not to substitute any decision it would have made but, rather, to determine whether the Commission's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 47.

[33] In *Lusina v Bell Canada*, 2005 FC 134, 268 FTR 227 at paras 29, 36 [*Lusina*], the Court dealt with a dismissal of a complaint due to bad faith. Justice Layden-Stevenson noted:

> 29 The Court's task is not to re-examine the evidence and come to its own conclusion. The standard of review of a decision of the CHRC to dismiss a complaint requires a very high level of deference by the Court unless there be a breach of the principles of natural justice or other procedural unfairness or unless the decision is not supportable on the evidence before the CHRC.
> …
> 36 The question of bad faith is one of mixed law and fact. The decision as to whether it exists, in the circumstances of the case, is one for the CHRC to make… Thus, it appears that in only the rarest of cases would such a determination, by the CHRC, warrant the intervention of the Court.
>
> [emphasis added, references omitted]

[34] The wording of subsection 41(1) provides the Commission with discretion to decline to deal with a complaint. It states that "the Commission shall deal with any complaint filed with it unless in respect of that complaint *it appears to the Commission that…*(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith" [emphasis added].

[35] Similar wording is found in other sections of the Act, including section 44, which addresses the Commission's role upon receipt of an investigator's report and whether a complaint will be referred to the tribunal or dismissed. In *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113, [1998] FCJ No 1609 at para 38, the Federal Court of Appeal noted: "The Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report."

[36] Where the standard of reasonableness applies, deference is owed to the decision-maker, given their expertise and experience interpreting and applying the relevant statute. The issue for the Court is whether this is one of the rare cases warranting the Court's intervention.

Role of the Canadian Human Rights Commission

[37] The Commission plays a "screening" role; it investigates complaints to determine whether the complaint should be considered by the Canadian Human Rights Tribunal. The Tribunal's role is to examine the complaint on its merits; to determine whether the complaint has been established and the appropriate remedy. The Commission does not perform this function. In reviewing a decision of the Commission to refuse to deal with a complaint, the Court cannot go beyond the Commission's role and explore the merits of the complaint. The Court can only consider whether the Commission's "screening" decision was reasonable.

[38] In *Morin v Canada (Attorney General)*, 2008 FCA 269, [2008] FCJ No 1310, the Federal Court of Appeal upheld the Federal Court's decision in *Morin v Canada (Attorney General)*, 2007 FC 1355, [2007] FCJ No 1741 which, among other things, summarised the role of the Commission at para 27 as follows:

> In sum, that role involves:
>
> (1) performing administrative and screening functions with no appreciable adjudicative role;
>
> (2) accepting, managing and processing complaints of discriminatory practices;
>
> (3) if a complainant must be referred to a human rights tribunal, the Commission performs a screening function similar to that of a judge in a preliminary inquiry.

[39] In *Cooper v Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854, 140 DLR (4th) 193, the Supreme Court of Canada examined the operation of the *CHRA* and the role of the Commission, noting at para 53:

> The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it.

[40] Similarly, in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364 at para 23, the Supreme Court of Canada commented on the role of the Nova Scotia Human Rights Commission, which parallels that of the CHRC, and noted that in deciding to refer a complaint to a board of inquiry, the Commission's function is one of screening and administration, not of adjudication. The Court emphasised that the screening role is not a determination of the merits of the complaint.

The Reasonableness of the Decision

[41] The issue in this judicial review is whether the Commission's decision that the complaint "may be in bad faith" was reasonable.

Applicant's Submissions

[42] The applicant's written and oral submissions address the substance of her allegations of discrimination against Bell Canada and to a lesser extent, the reasonableness of the decision of the

Commission. When considered together, the applicant submits that the decision to dismiss her complaint, given the information provided in her complaint and the two submissions she made to the investigator, was not reasonable.

[43] As a preliminary issue, Ms. O'Grady asserted that the decision to dismiss her complaint was unfair and unreasonable, because the Commission's Early Resolution Team Leader referred to her complaint as being trivial, frivolous, vexatious or made in bad faith before even seeing the settlement documents and the Acknowledgment between Ms. O'Grady and Bell.

[44] This allegation appears to be based on a misinterpretation of the letter sent in February 2011, which informed her that the Commission would decide whether it should refuse to deal with her complaint pursuant to paragraph 41(1)(d) of the *CHRA*. This letter in fact advised her that the Commission's assessment of her complaint would be limited to determining whether the complaint was trivial, frivolous, vexatious or made in bad faith, not that any such conclusions had been reached.

[45] With respect to the investigator's conclusion that her complaint "may be in bad faith", Ms. O'Grady submits that she had repeatedly indicated that she might pursue a human rights complaint, beginning with her demand letter of June 26, 2009. She noted that she was not threatening Bell, but rather giving Bell an opportunity to improve the settlement offer (given the circumstances and Bell's public mental health commitments) and to avoid a human rights complaint. She noted in several passages of her submissions to the investigator and in her submissions to the Court that her

conduct was not intended to be in bad faith but that she was in a state of desperation, which is a symptom of mental illness, and that her mental state was known to all parties.

[46] With respect to economic duress, the applicant submits that she had no other source of income and it was imperative that she secure her LTD benefits, which she argues she was entitled to in her severance.

[47] She submits that her mental health had deteriorated following her termination and that Bell was aware of this due to the exchange of communications with her counsel. Therefore, Bell should have insisted on establishing that she was "of sound mind" before signing the agreement.

[48] Ms. O'Grady also submits that the Commission's decision to dismiss her complaint on the basis of the Acknowledgment she signed fails to take into account the Commission's own policy with respect to paragraph 41(1)(d).

[49] That policy, titled The Effect of Final Releases on Human Rights Complaints, states:

> Section 41(1)(d) of the *Canadian Human Rights Act* allows the Canadian Human Rights Commission to exercise its discretion not to deal with a complaint where the issues raised in the complaint have been dealt with through another process. This includes complaints which have been settled and where releases have been signed.
>
> The Commission may choose to deal with complaints despite the fact that the parties have signed a final release if it appears that the human rights issues raised in the complaint have not been addressed in the settlement.

> *In its determination of the impact of a final release on a complaint the Commission will consider several factors including the following:*
>
> *1 Did the parties contemplate the human rights claim at the time the release was signed?*
>
> *2 Was the complainant represented or did the complainant have a reasonable opportunity to seek independent advice? If not, is there evidence that the complainant understood the effect of the release?*
>
> *3 Was reasonable consideration received in exchange for the complainant's promise not to proceed with the human rights claim?*
>
> *4 Was the complainant free of duress?*

[50] With respect to these factors, Ms. O'Grady submits that Bell did not contemplate the human rights claim when the Acknowledgement was signed because Bell had denied all the allegations of discrimination. She also submits that she did not understand the full effect of the release because she thought it had included her addendum, as per her instructions to her lawyer. She further submits that she was under mental and economic duress when she signed the acknowledgement. Therefore, the Commission should not have refused to deal with her complaint.

[51] Ms. O'Grady made other submissions relating to her allegations that Bell had discriminated against her, including by terminating her position while she was on LTD and by failing to accommodate her, which compounded the discrimination given that she would be competing with many other former employees, who were healthy, in seeking possible employment opportunities with Bell's sister companies.

Respondent's Submissions

[52] The respondent submits that the Commission's decision not to deal with Ms. O'Grady's complaint was reasonable and reflects the requirements set out in *Dunsmuir*: justification, transparency and intelligibility, and that the decision falls within the range of possible, acceptable outcomes.

[53] The Commission relied, to a large extent, on the Section 40/41 Report, prepared by the investigator on the basis of the documentary evidence set out in the complaint and in the submissions regarding Ms. O'Grady's termination, the negotiations and the Acknowledgment.

[54] The respondent submits that the Report contained a detailed analysis of the relevant considerations for determining whether a complaint is vexatious, frivolous, trivial, or made in bad faith. The conclusions on each of these issues flow logically and are reasonably supportable on the facts. The Commission reasonably exercised its discretion not to deal with the complaint on the grounds that it was made in bad faith, since the applicant had negotiated a settlement, was represented by counsel throughout the negotiations, signed the release and acknowledgement, and Bell was not aware of the addendum version.

[55] The respondent also noted that in any event, the reservations expressed in the addendum would not be grounds for considering that the Acknowledgement was not binding on the parties. The respondent states that compromise of legal claims is understood in any settlement and that each party modified their original positions as a result of the negotiations. Bell had improved the

settlement from the original offer based on the negotiations and Ms. O'Grady had agreed not to pursue other claims, including the human rights claim.

[56] The respondent agreed that Ms. O'Grady had raised her human rights and discrimination concerns early on in the negotiations. The respondent submitted that this was "on the table" and that the settlement offer agreed upon in February was a better package than the original offer. In the respondent's view, the settlement agreed upon reflects the compromises reached by both parties and, particularly, the applicant's release of Bell's liability regarding her other claims, including the possible complaint to the CHRC.

[57] With respect to the applicant's assertions that she was not "of sound mind" when she executed the agreement and signed the Acknowledgment, the respondent notes that Ms. O'Grady was represented by a lawyer at all times and that neither Ms. O'Grady nor her lawyer raised her lack of capacity. On other occasions, counsel had alerted the respondent to delays in the negotiations due to Ms. O'Grady's health. Bell was not aware of any concerns about her capacity to sign the agreement. Moreover, Ms. O'Grady had personally contacted the respondent's counsel after the Acknowledgment was signed to confirm the payment arrangements and did not indicate any lack of capacity at the time of executing the agreement or receiving the payment.

[58] With respect to the assertions that Ms. O'Grady signed under duress, the respondent noted that there was no suggestion that the applicant was not ably represented by her lawyer, who would not have permitted her to sign under duress.

Analysis

[59] As noted by Justice Rennie in *Hérold v Canada (Revenue Agency)*, 2011 FC 544, [2011] FCJ No 683 at para 32, "[a]ny analysis of the discretion vested in the Commission by section 41(1)(d) is framed by four threshold points."

[60] Justice Rennie referred to many of the cases noted above and identified the threshold points (at paras 33-36), which I would summarize as follows:

- The Commission has a broad discretion to dismiss complaints where it is satisfied that further inquiry is not warranted, which the Court should not lightly interfere with.

- The Commission is not an adjudicative body and does not draw any legal conclusions. It simply assesses the sufficiency of the evidence before it and determines whether a full Tribunal hearing is warranted.

- The test for determining whether or not a complaint is *frivolous* within the meaning of paragraph 41(1)(d) of the *Act* is whether, based upon the evidence, it appears to be plain and obvious that the complaint cannot succeed.

- The standard of review with respect to the Commission's decision to dismiss a complaint, rather than refer it to the Tribunal, is reasonableness.

[61] The same "threshold points" apply to the analysis in this case, the only difference is that the third point will address the test for determining whether the complaint was made in bad faith, rather than whether it was frivolous.

[62] In *Lusina*, above, which also dealt with a CHRC decision not to deal with a complaint pursuant to paragraph 41(1)(d) of the *CHRA*, the Court adopted the following definition of "bad faith":

> …the term "bad faith" was described as one that normally "connotes moral blameworthiness on the part of the person accused, encompassing conduct designed to mislead or pursued for an improper purpose".
>
> *Lusina*, above, at para 35 (citing *Pritchard v Ontario (Human Rights Commission)* (1999), 45 OR (3d) 97, 122 OAC 302 (Ont Div Ct) [*Pritchard*]) [emphasis added].

[63] In the present case, the Section 40/41 Report acknowledges that Ms. O'Grady does not appear to have engaged in fraudulent or deceptive conduct, but suggests that she acted in bad faith by attempting to "circumvent" her legal obligations after signing the Acknowledgment. The report referred to the factors the investigator considered to determine bad faith and applied the first two factors, while the third factor was not applicable to the circumstances (as noted above at paragraph 18).

[64] The Report did not specifically refer to the Commission's policy, *The Effect of Final Releases on Human Rights Complaints*. However, some of those factors appear to have been considered by the investigator: while Ms. O'Grady may have contemplated a human rights claim at the time the release was signed, Bell did not, in light of the Acknowledgement and release signed; the complainant had independent legal advice; and, reasonable consideration (the severance payment) was received by the complainant in exchange for the promise not to pursue a complaint.

[65] However, the applicant's allegation that she signed under mental and/or economic duress was merely acknowledged by the investigator but was not assessed in the determination of bad faith.

[66] As noted above, the Commission's policy with respect to releases includes factors that the Commission should consider. The Commission's policy also specifically refers to the Ontario Human Rights Commission's 2006 *Guide to Releases with Respect to Human Rights Complaints* (the "Guide"), suggesting an endorsement of the Guide and an awareness of it by the Commission's investigators.

[67] The Commission's Policy as posted on its website includes the following statement:

> *The Ontario Human Rights Commission has prepared a useful document entitled, Guide to Releases With Respect to Human Rights Complaints, which provides helpful information to both employers and employees in understanding and structuring termination agreements and final releases that reflect appropriate human rights principles. The Guide also provides a sample proposed text for a final release of a human rights complaint. Further, its Appendix includes tips for employers and employees in negotiating and concluding a final release of a human rights complaint.*

[68] The Ontario Guide provides helpful advice about what constitutes bad faith in pursuing a complaint in the face of a signed release. At page 2 of the Guide:

> *The mere existence of the signed release is not, without more information, sufficient to conclude that the human rights complaint was brought in bad faith. Rather, the Commission is required to look into the circumstances surrounding the signing of the release. In legal terms, the Commission must satisfy itself that the complainant should be estopped (i.e.prohibited) from proceeding with the complaint. To meet the test of 'bad faith' the Commission must find that the evidence reveals, not an honest or negligent mistake on the complainant's part, but an intention to mislead- the*

> *conscious doing of a wrong because of 'dishonest purpose' or 'ill will'.*
> [emphasis in original]

[69] The Guide also elaborates on the four factors established by the Ontario Divisional Court in *Pritchard*, above to determine if a release actually reflects a settlement of a human rights complaint.

[70] These factors are:

1. Did the complainant understand the significance of the release? This will usually turn on whether or not they were given sufficient time, and a sufficient opportunity to obtain advice.

2. Did the complainant receive compensation for the alleged breach of the human rights issue? If for example, the complainant only received an amount akin to what they would have been entitled to under statute…then it may be implied that they did not also receive compensation for the human rights violation.

3. Was the complainant subject to such significant economic pressure that his or her consent was negated due to duress?

4. Was the complainant subject to such significant psychological or emotional pressure that his or her consent was negated due to duress?

[71] In assessing whether a complainant misunderstood the significance of the release, the Guide notes that special consideration should be given to complainants who are experiencing a mental disability, such as depression or bi-polar disorder, that may impair their ability to understand the significance of the document.

[72] With respect to psychological or emotional duress, the Guide notes that even where the employer did not behave inappropriately, the mere act of termination can create psychological stress amounting to duress. It further notes that where an employee is experiencing psychological problems at the time of termination, such as depression or mental illness, this can impact on his or her ability to consent.

[73] The Guide suggests that where an employer has a reasonable basis to believe that an employee is experiencing a mental disability that could impair his or her judgment, the employer should request that the employee obtain medical clearance before signing the release.

[74] In *Pritchard*, above, the Court noted that the mere fact that a complaint is brought after signing a release will not always amount to bad faith. At para 17, the Court stated:

> *To take the approach that there is bad faith whenever a human rights complaint is brought after signing a release risks ignoring the context within which a particular complainant has signed the release and denying access to the investigative procedure under the Human Rights Code without assessing the complainant's individual moral blameworthiness in pursuing the complaint.*

[75] In this case, Ms. O'Grady stated in her complaint and in her submissions to the Commission that she signed the Acknowledgement under mental and/or economic duress. She indicated that she did not have the intent to avoid the legal obligations and consequences of the acknowledgement or renege on the agreement. The following statement was included in several parts of her submissions responding to the investigator's report before the report was finalized:

> "It is unethical and uncompassionate for respondent to accuse complainant of bad faith acts of "threats", "demanding" and

> "reneging" when she acted in a desperate way which is a strong behavioural symptom of her mental illness disability."

[76] Note that Bell did not make such accusations; Bell simply indicated its agreement with the investigator's initial Section 40/41 Report.

[77] The Commission was aware that Ms. O'Grady had executed two versions of the Acknowledgement and her submissions to the Commission indicated that she thought the addendum version, in which she expressed reservations despite signing the release and reiterated her position that Bell had discriminated against her, had been provided to Bell. However, it is clear that Bell never received the version with the addendum and had no knowledge of it until the time of the complaint.

[78] Her complaint to the CHRC, while contrary to the terms of the agreement she signed, was consistent with this statement and with her position throughout the negotiations that she was considering filing a human rights complaint.

[79] The Commission's finding that the complaint "may be in bad faith" – in other words, that Ms. O'Grady's conduct was morally blameworthy – did not take into account her particular circumstances, including the need to consider the issue of mental duress as that concept is understood in the human rights context. The Commission ignored or misapprehended the evidence of the applicant's mental health and her assertions that she signed the release under mental duress.

[80] It should be emphasized that it is not the role of the Court to address whether Ms. O'Grady was in fact under some form of duress when she signed the Acknowledgment. There is no suggestion by the Court that Bell acted in bad faith during the severance negotiations. Rather, the point is that the Commission's failure to address the issue and to consider her circumstances as a person suffering from a mental illness renders the decision unreasonable. This is especially so in light of the fact that moral blameworthiness is an essential component of bad faith in the present context.

Request for damages

[81] The applicant sought several orders in her application, including a request for compensatory damages.

[82] As noted above, the Court has no jurisdiction to order damages. The role of the Court on judicial review is to determine if the decision under review should stand or be re-determined by the Commission or Board or applicable decision-maker in accordance with the applicable standard of review.

[83] As described more fully above, the CHRC performs a screening and investigative role and, therefore, even it could not have awarded damages, reinstatement, or the other relief sought.

[84] The Court can only address the reasonableness of the Commission's decision.

[85] As confirmed by the Supreme Court in *Canada (Attorney General) v Telezone*, 2010 SCC 62, [2010] 3 SCR 585 at para 26 [*Telezone*]:

> The focus of judicial review is to quash invalid government decisions - or require government to act or prohibit it from acting - by a speedy process. A bookstore, for example, will have a greater interest in getting its foreign books through Canada Customs - despite ill-founded allegations of obscenity - than in collecting compensation for the trifling profit lost on each book denied entry (*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38). Thus s. 18.1 of the *Federal Courts Act* establishes a summary procedure with a 30-day time limit. There is no pre-hearing discovery, apart from what can be learned through affidavits and cross-examination. The applications judge hears no *viva voce* evidence. Damages are not available. Judicial review suits the litigant who wishes to strike quickly and directly at the action (or inaction) it complains about. A damages claimant, on the other hand, will often be unaware of the nature or extent of its losses in a 30-day time frame, and may need pre-trial discovery to either make its case or find out it has none.

Conclusion

[86] It bears repeating that the only issue on this judicial review is whether the Commision's decision not to deal with the complaint pursuant to paragraph 41(1) of the Act because it appears to be trivial, frivolous, vexatious or made in bad faith is reasonable. The merits of the various claims made which underlie the complaint cannot be addressed in this application.

[87] The complaint was contrary to the agreed-upon terms of the agreement and had in fact been negotiated away, and the applicant was represented by counsel throughout the process and did receive her settlement. However, the applicant's conduct in pursuing the complaint despite her signed release must be considered in light of her particular circumstances. The guidance provided by the Ontario Human Rights Commission, which the CHRC refers to, supports the need to

consider whether there has been bad faith – an intent to mislead, or morally blameworthy conduct – in the overall circumstances of the complainant.

[88] The reasons of the Commission and the record before it do not support a finding of bad faith when the context is considered. The Commission, more specifically the investigator's report, did not assess the mental or emotional duress that the applicant alleged, or the fact that the mental health issues of the applicant pre-dated the negotiations and were known to the employer and to the Commission.

[89] The judicial review is allowed and the decision of the Canadian Human Rights Commission is quashed. The complaint is remitted to the Commission to be re-determined.

[90] For the reasons noted above, no damages are awarded.

[91] No costs are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed and the decision of the Canadian Human Rights Commission is quashed. The complaint is remitted to the Commission to be re-determined;

2. No damages are awarded; and

3. No costs are awarded.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Toronto, Ontario
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APPEARANCES:

Kathleen O'Grady	FOR THE APPLICANT (ON HER OWN BEHALF)
Maryse Tremblay	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kathleen O'Grady Toronto, Ontario	FOR THE APPLICANT (ON HER OWN BEHALF)
Heenan Blaikie LLP Montreal, Quebec	FOR THE RESPONDENT