Federal Court  Cour fédérale

Date: 20130830

Docket: T-409-12

Citation: 2013 FC 921

Ottawa, Ontario, August 30, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CANADIAN HUMAN RIGHTS COMMISSION

Respondent

and

DETRA BERBERI

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a judicial review of a decision of the Canadian Human Rights Tribunal (the Tribunal) dated December 29, 2011, determining that it had jurisdiction to convene a hearing regarding the implementation of a remedial offer referred to in an earlier decision.

[2] The applicant seeks an order quashing the decision and requests costs. The respondent opposes the application and seeks costs. The Canadian Human Rights Commission (the Commission) also opposes the application but seeks no costs and requests that no costs be awarded against it.

Background

[3] The respondent, a federal public servant, filed a complaint with the Commission on August 7, 2006, alleging that the Royal Canadian Mounted Police (RCMP) had discriminated against her contrary to section 7 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the Act) in its consideration of her application for deployment. The Commission convened a hearing to inquire into this complaint.

[4] The RCMP conceded liability and the hearing proceeded on June 1 and 2, 2009, solely on the basis of remedy. In a decision dated July 27, 2009, the Commission ordered the RCMP to pay $4,000 to the respondent for pain and suffering and $5,814 in legal expenses. In its reasons, cited as 2009 CHRT 21 (the remedy decision), the Commission described at paragraphs 32 and 33, a job offer that was made by the RCMP to the respondent in the course of the proceeding:

> At the hearing, the RCMP offered Ms. Berberi an indeterminate CR-04 finance/administrative position at the RCMP detachment in Milton, which is one of her preferred locations. The only condition was that Ms. Berberi obtain a top secret security clearance. The RCMP also offered to conduct a functional ability assessment and provide the necessary accommodations to ensure that she succeeds in this position.

> Ms. Berberi accepted this offer and agreed that this satisfied her remedy request for a permanent position with the RCMP. The parties agreed that no order from the Commission was necessary.

[5] Detra Berberi brought an application in this Court for judicial review of the remedy decision. Madam Justice Elizabeth Heneghan dismissed the application in *Berberi v Canada (Canadian Human Rights Tribunal)*, 2011 FC 485, [2011] FCJ No 750 (QL) (the judicial review) on April 21, 2011. One of the respondent's arguments was that the Tribunal erred by assuming the RCMP would honour the job offer in good faith. Justice Heneghan commented at paragraphs 64 and 65:

> 64 The Applicant was represented by counsel at the hearing before the Tribunal. She had the option of requesting an order. She did not do so.
>
> 65 The responsibilities of the Tribunal were discharged once the issues of remedy, including compensation for pain and suffering and a contribution towards legal fees, were adjudicated. The Applicant is at liberty to seek an order from the Tribunal with respect to implementation of the remedy. She has failed to show that the Tribunal made any assumptions on the basis of any error, and this argument is dismissed.

[6] The respondent pursued an appeal of that decision (Court of Appeal file A-195-11) but it was dismissed for delay in late February 2012.

[7] On July 15, 2011, the respondent, Detra Berberi, requested that the Tribunal convene a hearing in relation to the remedial offer from the June 2009 hearing. The Tribunal wrote to the parties and the Commission requesting submissions on the proposed continuation. The Tribunal offered mediation to the parties but it was declined.

The Decision

[8] On December 29, 2011, the Tribunal found that it had jurisdiction to return to the matter to address questions related to the implementation of the remedial offer. The reasons are cited as 2011 CHRT 23 (the jurisdiction decision).

[9] The Tribunal summarized the background of the case and laid out the positions of the parties. Ms. Berberi's position was that the Tribunal possesses the jurisdiction to superintend over the conduct of the parties in relation to remedial proposals made and accepted during the course of the proceedings before it. Her alternative position was that the complaint had not been properly or fully adjudicated.

[10] The applicant took the position that the Tribunal was *functus officio*. It had issued a final decision and therefore its jurisdiction was exhausted. Both the applicant and the Commission agreed that the job offer formed part of the Tribunal's decision.

[11] The Tribunal canvassed the law of *functus officio* as it applies to administrative tribunals, beginning with the Supreme Court's decision in *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848. It also considered this Court's decisions in *Grover v Canada (National Research Council-NRC)*, [1994] FCJ No 1000 (QL), 80 FTR 256 and *Canada (Attorney General) v Moore*, [1998] 4 FC 585, [1998] FCJ No 1128 (QL), which both dealt with judicial reviews of the tribunal. It also considered this Court's judicial reviews of the Commission in *Kleysen Transport Ltd v*

Hunter, 2004 FC 1413, [2004] FCJ No 1723 (QL) and *Merham v Royal Bank of Canada*, 2009 FC 1127, [2009] FCJ No 1410 (QL).

[12] At paragraph 17 of its decision, the Tribunal summarized the issue before it as: "considering the *Act* and the circumstances of the case, should the Tribunal return to the matter in order to discharge the function committed to it by the *Canadian Human Rights Act*?"

[13] The Tribunal noted that the primary purpose of the Act is to identify and eliminate discrimination, and it referred to its broad remedial discretion in subsection 53(2) of the Act. The Act does not provide a right of appeal and judicial review is not the appropriate forum to seek out the implementation of a tribunal decision. The Tribunal quoted the passage from the judicial review decision indicating the respondent was at liberty to seek an order from the Tribunal. The Tribunal noted that its orders could be made orders of this Court under section 57 of the Act, but that it would frustrate the mandate of the Act to require a complainant to file a new complaint in order to obtain the full remedy awarded by the Tribunal.

[14] The Tribunal noted that the finality, validity and correctness of the remedy decision were not being challenged and the respondent was not asking the Tribunal to change the remedies. Rather, she had asked for the opportunity to argue for the effective implementation of part of the remedy decision.

[15] In coming to the remedy decision, the Tribunal had the power under subsection 53(2) of the Act to make an order, but the parties had agreed it was not necessary. The Tribunal queried whether

it would be overly formalistic to deny a victim of discrimination the opportunity to seek effective implementation of a remedy for the sole reason that the remedy had not been turned into an order, given that the Tribunal had clearly expected the job offer would be forthcoming.

[16] The Tribunal concluded that the absence of an order left the respondent without an enforcement mechanism and that it would defeat the remedial purpose of the Act to deny the victim of discrimination an opportunity to return to the matter. Therefore, in the circumstances of the case, the Tribunal concluded it had jurisdiction to return to the matter to address questions related to the implementation of the offer.

Further Proceedings

[17] On June 19, 2012, Prothonotary Kevin Aalto granted a motion on consent of both parties staying the Tribunal proceedings in this matter pending the final determination of this application for judicial review.

Issues

[18] The applicant's memorandum raises the following issue:

1. Did the Tribunal err in law by finding that it was not *functus officio* in this matter?

[19] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Tribunal err in deciding to return to the matter?

Applicant's Written Submissions

[20] The applicant argues the question of whether the Tribunal was *functus officio* or not is a true question of jurisdiction which attracts a standard of review of correctness, relying on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. If the Tribunal failed in its task to interpret its grant of authority under the Act correctly, its action was *ultra vires*.

[21] The applicant argues that the doctrine of *functus officio* protects the principle finality in judicial and administrative decision making. The applicant describes four exceptions to the doctrine:

1. There was a slip in drawing up the final decision.

2. There was an error in expressing the manifest intention of the court or the tribunal.

3. If there is an indication in the enabling statute that the tribunal can reopen a decision to discharge its statutory functions.

4. The tribunal has failed to dispose of an issue that was fairly raised during the proceedings.

[22] The applicant argues that a tribunal may not reopen proceedings merely to select a different remedy than it originally chose. The applicant submits that none of these four exceptions apply. The applicant concedes that the tribunal has the power to retain jurisdiction over a matter by explicitly doing so, but argues there is nothing in the Act that allows the tribunal to reopen matters after a final order if jurisdiction was not explicitly reserved.

[23] The applicant relies on this Court's decision in *Grover* above, where it was determined that the Tribunal's remedial power under subsection 53(2) includes the power to reserve jurisdiction and that the overarching test for applying the *functus officio* doctrine to the Tribunal is whether it could be said to have fully determined the complaint. The remedy decision in this case finally disposed of the issues raised at the hearing.

[24] The applicant characterizes the jurisdiction decision as an unwarranted departure from the current state of the law. The applicant argues the case law relied upon by the Tribunal is inapplicable, as those cases dealt with either a failure to address submissions or the powers of the Commission, which are distinct from the Tribunal's.

[25] The applicant argues the Tribunal failed to identify any jurisdictional basis for reopening the matter. Section 57 of the Act shows that Parliament turned its mind to enforcement procedures and chose not to give such powers to the Tribunal. It was open to the respondent to seek an order of *mandamus* in her previous judicial review in this Court to require the RCMP to comply with the job offer. The failure to properly argue her application for judicial review does not confer jurisdiction on the Tribunal.

Respondent's Written Submissions

[26] The respondent argues that the question before the Tribunal is of mixed fact and law and therefore attracts a reasonableness standard.

[27] The respondent's position is that the Tribunal was not *functus officio* because the Tribunal's remedy decision did not adjudicate or otherwise dispose of the issue of the respondent's entire remedial entitlement. Rather, the Tribunal simply recorded the fact that the respondent had accepted the RCMP's job offer and determined the monetary claims. Accordingly, there was no finding or award in relation to the obligation to provide a job. The doctrine of *functcus officio* is therefore inapplicable.

[28] The respondent's alternative position is that if the doctrine applies, then the jurisdiction decision fell within the manifest intention exception. The remedy decision clearly expected that the job offer would be forthcoming, so the Tribunal's intention was that the job offer be made.

[29] The respondent disputes the applicant's argument that it was open to her to bring enforcement proceedings under section 57 of the Act, given the lack of an order from the Tribunal. The respondent also argues that *mandamus* was not available since the existence of a tribunal order is a necessary precondition. The Tribunal was therefore correct that the respondent was left without an enforcement mechanism regarding the job offer.

[30] The respondent further argues the doctrine of necessary implication grants tribunals all the powers needed to accomplish their statutory mandates.

Commission's Written Submissions

[31] The Commission argues that the standard of review is reasonableness. The decision involves an interpretation of the Tribunal's enabling legislation and is within the Tribunal's expertise. The Act does not contain a privative clause, but the purpose of the Act is set to provide an expert regime for the expeditious and informal resolution of human rights disputes. The Commission emphasizes the principle that human rights legislation must be given full recognition and effect.

[32] The Commission argues that a tribunal's authority to reopen decisions is not limited to situations where it has retained jurisdiction. Rather, this Court has found that the Commission has the authority to reconsider its decisions despite the absence of express provision in the Act. The Commission agrees with the Tribunal's conclusion that the respondent would be left without any enforcement mechanism absent an order from the Tribunal.

[33] The Commission submits that while the Tribunal does not have jurisdiction to reconsider the findings in its original decision, it has the authority to complete its original decision, especially if something that should have been considered was overlooked. The remedy decision contained a partial decision on remedy since the parties reached an agreement. Therefore, the Tribunal has jurisdiction to complete its original decision and deal with the alleged noncompliance.

[34] The Commission agrees with the respondent that enforcement under section 57 of the Act is not available. This Court held in the judicial review decision that the respondent could seek an order from the Tribunal. The Commission points out filing a new complaint would not be effective

redress as it would give complainants little incentive to settle disputes prior to or during adjudication, given the unenforceability of such promises. The Tribunal's decision was reasonable.

Analysis and Decision

[35] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir* above at paragraph 57).

[36] The respondent characterizes the issue before the Tribunal as a true question of jurisdiction. The Supreme Court, however, has recently cautioned against the use of this rationale for correctness review (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at paragraphs 32 to 34. The Supreme Court also reviewed this very Tribunal's interpretation of its home statute on a reasonableness standard in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 at paragraphs 24 to 27. The Tribunal's determination of whether it can reopen a matter is no more "jurisdictional" than the Tribunal's determination of whether it may afford costs. On the latter question, the Supreme Court held that deference was appropriate. Therefore, reasonableness is also appropriate for reviewing the Tribunal's decision in this case.

[37] In reviewing the Tribunal's decision on the standard of reasonableness, the Court should not intervene unless the Tribunal came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47). As the Supreme Court held in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[38] **Issue 2**

Did the Tribunal err in deciding to return to the matter?

I agree with the Tribunal's finding in the jurisdiction decision that the remedy decision clearly signals that the Tribunal expected that the job offer would be made to the respondent. Why neither the Tribunal nor the respondent's counsel thought it would be useful to formalize that expectation in the form of an order is unclear.

[39] What is the effect of the expectation, absent an order? It would appear from reading section 57 of the Act that the job offer cannot be made an order of the Federal Court for the purpose of enforcement.

[40] The applicant submits that the doctrine of *functus officio* applies and that the Tribunal does not have jurisdiction to deal with the job offer. In *Chandler* above, Mr. Justice Sopinka stated at page 862:

> 21 To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> 22 Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas, supra*.

[41] In *Kleysen Transport* above, Mr. Justice James O'Reilly of this Court applied similar reasoning to conclude that the Canadian Human Rights Commission had power to reconsider its decision in certain circumstances.

[42] In *Canada (Attorney General) v Amos*, 2011 FCA 38, [2011] FCJ No 159 (QL), the question before the Federal Court of Appeal was as stated in paragraph 1:

> This case is about the scope of an adjudicator's jurisdiction under the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (*PSLRA* or Act or new Act). Does an adjudicator maintain jurisdiction over disputes relating to settlement agreements entered into by parties in respect of matters that can be referred to adjudication or, as put by the Adjudicator in this case, where does a party go for redress when he or she has settled a grievance referred to adjudication and subsequently alleges that the other party has failed to honour the settlement agreement (Adjudicator's reasons at paragraph 46)?

This Court in that case went on to conclude that the adjudicator could deal with the settlement agreement and expressed its rationale in paragraphs 62 to 68 of its reasons.

[43] The situation in this case, where the Tribunal's reasons clearly anticipate an agreed course of action between the parties and that course of action is subsequently disputed, does not fall into the defined exceptions of *functus officio* laid out in the case law above. Yet to stop there would clearly contradict the Supreme Court's instruction in *Chandler* above, that that doctrine should be applied flexibly in the context of administrative tribunals. As well, this Court's decision in *Moore* above, at paragraph 49, holds that there will be certain circumstances where it is appropriate for the Tribunal to return to a matter. The other case law referred to above leads to the same conclusion.

[44] The unique situation, which one would hope is infrequently repeated, where a tribunal's decision is clearly premised upon an agreed transaction between the parties, but the tribunal fails to make that transaction enforceable, is a scenario where a decision to return to the matter is reasonable. The Tribunal is not convening a hearing for the purpose of relitigating the entire complaint. The applicant's concern for finality is tempered by the fact that returning to the matter of the job offer raises no prospect of any new obligation, rather, such a proceeding would only be concerned with holding the applicant to its original promise. It does not lie in the applicant's mouth to complain of being held to its own offer.

[45] I would therefore dismiss the application for judicial review, with costs to the respondent, Detra Berberi.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs to the respondent, Detra Berberi.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Canadian Human Rights Act*, RSC 1985, c H-6**

53. (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:	53. (2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :
(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including	a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :
(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or	(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),
(ii) making an application for approval and implementing a plan under section 17;	(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;
(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;	b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;
(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;	c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;
(d) that the person compensate the victim for any or all additional costs of obtaining	d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires

alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

(4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

57. An order under section 53 or 54 may, for the purpose of enforcement, be made an order of the Federal Court by following the usual practice and procedure or by the Commission filing in the Registry of the Court a copy of the order certified to be a true copy.

57. Aux fins de leur exécution, les ordonnances rendues en vertu des articles 53 et 54 peuvent, selon la procédure habituelle ou dès que la Commission en dépose au greffe de la Cour fédérale une copie certifiée conforme, être assimilées aux ordonnances rendues par celle-ci.

FEDERAL COURT

SOLICITORS OF RECORD

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