Federal Court  Cour fédérale

Date: 20151224

Docket: T-125-13

Citation: 2015 FC 1420

Toronto, Ontario, December 24, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

E. W.

Applicant

and

THE PRIVACY COMMISSIONER OF CANADA

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] This is a judicial review of the December 12, 2012 report of findings [Report] by the Privacy Commissioner of Canada [the Commissioner]. The Report was issued in response to the Applicant's privacy complaint against what is now the Department of Human Resources and Skills Development Canada [HRSDC, the Department], for collecting personal information contrary to section 5 of the *Privacy Act*, RSC 1985, c P-21 [the Act].

[2] The Applicant argues that the Report contains several errors, including that the Commissioner:

i. did not conduct a thorough investigation;

ii. did not provide the Applicant with the opportunity to make submissions; and

iii. was biased in the investigation of the Applicant's allegations.

[3] The bulk of the errors raised by the Applicant concern the manner in which the investigation was carried out, along with factual items raised in the Report.

[4] The parties have agreed to change the style of cause as reflected above, for confidentiality purposes.

[5] I conclude that that the judicial review application should be dismissed, for two reasons. First, this Court is limited to the extent it can engage in judicial review in the circumstances raised by this case. Second, to the extent that a judicial review is possible, the Report raises no reviewable error.

II. BACKGROUND

[6] On February 2, 2011, the Office of the Privacy Commissioner of Canada [the OPC] received a complaint [Complaint] from the Applicant against HRSDC (then known as Human Resources Development Canada [HRDC]), alleging that it improperly collected her personal

information from her employer, McMaster University [McMaster], in connection with the HRDC-sponsored Targeted Wage Subsidy Program [TWSP].

[7] More specifically, the Applicant contends that the private information was collected by the Quality and Continuous Improvement Centre [QCIC], acting on behalf of the Department, when McMaster applied to TWSP for funding for a custodial position that McMaster had offered her in 1999. The Applicant maintains that the data was collected and provided without her consent, thereby breaching her rights under the Act.

[8] The information collected was on a QCIC Work Experience Plan form (Application Record [AR], page 167), which was likely the source of the information HRSDC collected, and contained the Applicant's name, address, telephone number and social insurance number.

[9] After receiving the privacy complaint, the OPC commenced a formal investigation, advising the Applicant and HRSDC of the investigation via letters dated October 4, 2011.

[10] The Applicant was also advised of her right to submit additional information or comments to the OPC investigator [the Investigator] assigned to the case, which the Applicant did, including engaging in various telephone calls with the Investigator and submitting over 1,500 pages of further documentation.

[11] During the course of the investigation, the Investigator also contacted HRSDC, including sending numerous emails following up on the Department's progress in gathering information

relating to the Complaint (namely locating any relevant files relating to the Applicant). Ultimately, on September 21, 2012, HRSDC provided submissions, including the fact that it was unsuccessful in finding any QCIC files pertaining to the Applicant or her employment and that the file retention period had elapsed.

[12] The Investigator followed up with HRSDC and McMaster for materials relating to the TWSP. All that ultimately surfaced on the specific issue under investigation was the contract between the Department and McMaster but nothing regarding contracts between HRDC and QCIC and/or with the Applicant specifically. Furthermore, the individuals that the Investigator interviewed at both McMaster and HRSDC had no recollection of the events.

[13] The Investigator considered all submissions and documents, including the agreement between the Department and McMaster regarding the wage subsidy pertaining to the Applicant. On December 12, 2012, the OPC advised the Applicant of its findings by issuing the Report.

III. THE REPORT

[14] The OPC's Report first confirmed that that the Applicant's name, telephone number, address, and social insurance number were all collected by QCIC on behalf of the Department and meet the definition of personal information under section 3 of the Act.

[15] Having identified the information as personal, the OPC considered whether QCIC's collection contravened section 4 of the Act, which requires that any collection of personal information by the government must relate to the operation of the institution. In this case, the

Department had collected the information for the purposes of administering the TWSP program, which was part of its proper mandate.

[16] The OPC then turned to section 5 of the Act, which states that personal information about an individual should not be collected without the consent of that individual. On the evidence available, the OPC found that it could not reach a finding with respect to whether the Applicant's personal information had been collected without her consent, because 12 years had passed since the alleged improper collection of the Applicant's personal information and the TWSP no longer existed.

IV. ISSUES RAISED

[17] The issues raised by the Applicant in this judicial review are whether the OPC:

i. erred in fact and/or law; or

ii. violated the requirements of procedural fairness.

[18] Before examining these issues, I will begin my analysis by looking at the ability this Court to intervene in the outcome of this investigation by the OPC, and to review its conclusions.

V. ANALYSIS

[19] The Respondent is an independent officer of Parliament who ranks as and has all the powers of a deputy head of a department. She investigates complaints from individuals who allege that personal information held by a government institution has been collected, used or

disclosed improperly (see sections 29 and 54 of the Act). When investigating, the Commissioner must be impartial, independent and non-partisan (*HJ Heinz Co of Canada Ltd v Canada (Attorney General),* 2006 SCC 13, paras 33-36).

[20] The Respondent has broad discretion in carrying out investigations: in other words, the Commissioner is a master of her own proceedings (see sections 32-34 of the Act).

[21] At the conclusion of an investigation, the Respondent's investigator prepares an investigation report. After considering that report and the evidence in the file, the Respondent (or the Assistant Privacy Commissioner, as her delegate), issues a final report. Its findings and/or recommendations are not legally binding. Furthermore, the Act does not provide the Commissioner with any order-making powers (section 35 of the Act).

[22] The Respondent's role is thus to resolve disputes in an informal manner, effectively serving as an ombudsman and creating an alternate, non-judicial avenue to address privacy concerns.

[23] Section 41 of the Act allows any individual who has been refused access to personal information requested under subsection 12(1), if a complaint has been made to the Privacy Commissioner in respect of the refusal, to apply to this Court for a judicial review within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to the complainant. A section 41 application under the Act, however, is not a judicial review of the Privacy Commissioner's report of findings: rather, it serves to

challenge a refusal by a government institution to provide an individual with access to his or her personal information that is held by that government institution (see *Keita v Canada (Minister of Citizenship and Immigration)*, 2004 FC 626 at paras 20-22).

[24] In other words, the respondent in a section 41 application should be the department that allegedly lost (or improperly used) the information, *not* the Commissioner. As described by Justice Russell in *Love v Office of the Privacy Commissioner of Canada*, 2014 FC 643, aff'd 2015 FCA 198, at para 82 [*Love*], "[i]t is simply a mechanism for a de novo review by the Court of a refusal to provide access to personal information. It is brought as an application naming the refusing party and not the OPC as the respondent, and can only be pursued once the OPC has reported its recommendations".

[25] As the Respondent pointed out, to the extent the Applicant's grievance lies with the Department, which the OPC found to have collected the Applicant's TWSP-related personal information, but for which evidence of consent for said collection could not be found, this application for judicial review is misdirected.

[26] An additional challenge for the Applicant in this case is that for this Court to engage in a judicial review of the facts and conclusions laid out in the Report, it must be a "decision or order" pursuant to paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7. That paragraph states that "[t]he Federal Court may grant relief … if it is satisfied that the federal board, commission or other tribunal… based its decision or order on an erroneous finding of fact

that it made in a perverse or capricious manner or without regard for the material before it" (emphasis added).

[27] However, the OPC can only make non-binding findings or recommendations (see *Murdoch v Canada (Royal Canadian Mounted Police)*, 2005 FC 420 at para 19; *Morneault v Canada (Attorney General)*, [2001] 1 FCR 30 at para 41), and non-binding findings and recommendations that do not affect the substantive rights of parties are generally not considered "decisions or orders" for the purposes of judicial review under section 18.1 (see *Democracy Watch v Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 at paras 9-10, 12; *Pieters v Canada (Attorney General)*, 2007 FC 556 at para 68; *Rothmans, Benson & Hedges Inc v Canada (Minister of National Revenue)*, [1998] FCJ No 79 (FC) at paras 28-29). In light of this, it is worth asking what scrutiny this Court can actually apply.

[28] Direction comes in *Oleinik v Canada (Privacy Commissioner)*, 2011 FC 1266 [*Oleinik*], where the Court was similarly asked to review a report by the OPC. There, Justice Rennie distinguished "the investigation process", which the Court can review, from the "recommendations" of the OPC's report, which the Court cannot. He concluded that "[i]f the report had material omissions, reached unreasonable conclusions, contained unsustainable inferences, misconstrued the factual and legal context or evinced a bias or pre-disposition on the part of the investigator, the Court could intervene" (*Oleinik* at para 11). In *Love* at para 82, Justice Russell held that "this Court's remedial powers on judicial review under s. 18.1 of the Federal Courts Act are sufficiently broad to provide remedies if the OPC were to unlawfully refuse to

investigate or report its findings on a complaint, or were to conduct its investigation in an unfair manner".

[29] This application for judicial review, then, can only focus on those narrow grounds discussed by Justice Rennie in *Oleinik* and Justice Russell in *Love*.

[30] While the Applicant made several arguments as to alleged errors in the Report, her claims fall into two categories, namely errors of (i) procedural fairness and bias, and (ii) of fact-finding. I will address each of these in turn.

A. *Allegations of Procedural Unfairness and Bias*

[31] The Respondent should have broad latitude in determining how to run its own investigation, for various reasons, including, as mentioned above, the fact that the OPC operates as an ombudsman, issues non-binding reports, and, according to the Act, is master of its own procedures. This reality militates against highly formal proceedings and against a highly intrusive review by this Court of the OPC's investigative procedure.

[32] Despite the Applicant's submissions to the contrary, I find that the OPC provided her with ample opportunity to make submissions, an opportunity of which she availed herself readily, submitting hundreds of pages of documentary evidence and entering into numerous exchanges (telephone and otherwise) with both the Investigator and other OPC staff. There is no evidence that the Applicant was thwarted in any of her efforts to present her case. Similarly, there is no indication of bias, or even a reasonable apprehension of bias, from anything on the

record before me, based on the high threshold that must be met to prove this serious allegation (*Committee for Justice and Liberty v Canada (National Energy Board),* [1978] 1 SCR 369 at p 394; *R v S (RD),* [1997] 3 SCR 484; *Arthur v Canada (Attorney General),* 2001 FCA 223 at para 8).

B. *Allegations of Fact-Finding Errors*

[33] As described in *Oleinik*, this Court may review the Report to determine whether it "had material omissions, reached unreasonable conclusions, contained unsustainable inferences, [or] misconstrued the factual and legal context" (para 11). However, "deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly", and judicial review will only be warranted "where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence" (see *Slattery v Canada (Human Rights Commission),* [1994] 2 FCR 574, aff'd (1996) 205 NR 383 (FCA); *Lafond v Canada (Attorney General),* 2015 FC 735 at para 19).

[34] Investigations and reasons provided, in other words, need not be perfect, but rather must be reasonable (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at paras 16 and 18; *Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47; *Tahmourpour v Canada (Solicitor General),* 2005 FCA 113 at para 39).

[35] The Applicant's contention here is that the Respondent unreasonably overlooked various key documents, including a wage subsidy agreement and McMaster's collective agreement of the

time with a local union. However, it is clear from the Report that the OPC considered the wage subsidy agreement and did not find that it showed any privacy breach (AR, p 95). As for the collective agreement, the Department was not a party to it nor is it in any way related to the TWSP. These suggested gaps would not prove that the Department obtained the Applicant's consent to obtain the personal information from McMaster. This is no proof that the Investigator failed to investigate relevant evidence.

[36] Based on the Investigators' findings and numerous unsuccessful efforts to obtain evidence from HRSDC, the Report's conclusions fall well within the possible range of outcomes, defensible in respect of the facts and law. I further find the reasons to be justified, transparent and intelligible.

VI. CONCLUSION

[37] Despite being sympathetic to the Applicant and her best efforts to represent herself in difficult circumstances, I find no reason to interfere with the Report or its findings.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.
2. The style of cause is hereby amended to E. W. and The Privacy Commissioner of Canada.
3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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