Federal Court Cour fédérale

Date: 20161028

Docket: T-520-16

Citation: 2016 FC 1201

Ottawa, Ontario, October 28, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

KELLI WINDSOR-BROWN

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission [Commission], dated February 10, 2016. The Commission exercised its discretion to deal with the complaint filed by the Respondent, Ms. Kelli Windsor-Brown, against the Royal Canadian Mounted Police [RCMP], pursuant to subsection 41(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

[2] For the reasons that follow, the application for judicial review is dismissed.

I. Background

[3] On June 25, 2014, Ms. Windsor-Brown, a member of the RCMP since 1992, filed a complaint with the Commission, alleging that the RCMP discriminated against her in employment on the grounds of sex and family status, in violation of sections 7, 10 and 14 of the CHRA.

[4] The following month, she filed twelve (12) internal harassment complaints pursuant to the RCMP's *Policy on the Prevention and Resolution of Harassment in the Workplace*.

[5] In February 2015, the Commission declined to deal with the complaint pursuant to paragraph 41(1)(*a*) of the CHRA, on the basis that Ms. Windsor-Brown had recourse to another complaint or grievance process. Ms. Windsor-Brown was advised that she could come back to the Commission at the end of that process and ask to have her complaint reactivated.

[6] Accordingly, Ms. Windsor-Brown engaged in the procedure provided in the RCMP's harassment policy. The RCMP screened out nine (9) of her harassment complaints for being out of time. Decisions were issued in the remaining three (3) complaints on March 19, 2015, April 8, 2015 and April 19, 2015. It was determined that the allegations contained in the three (3) complaints were not established.

[7] On April 28, 2015, Ms. Windsor-Brown wrote to the Commission asking that her complaint be reactivated. The Commission wrote to the RCMP and to Ms. Windsor-Brown on

July 20, 2015 informing them that paragraph 41(1)(*d*) of the CHRA might apply, given that the human rights issues in the complaint may have already been dealt with through the previous process. If so, the complaint could be "vexatious" within the meaning of paragraph 41(1)(*d*) of the CHRA. The parties were invited to submit their positions on the issue.

[8] The RCMP raised new objections under paragraphs 41(1)(*a*) and 41(1)(*e*) of the CHRA. Regarding paragraph 41(1)(*a*), the RCMP argued that the Commission should decline to deal with the complaint on the basis that Ms. Windsor-Brown had not grieved the internal harassment complaint decisions, that she was now out of time to do so and that the failure to exhaust the grievance process was solely attributable to her, as provided in subsection 42(2) of the CHRA. As for the objection raised pursuant to paragraph 41(1)(*e*), the RCMP argued that the complaint contained allegations that occurred more than a year before it was filed with the Commission.

[9] Despite the objections raised by the RCMP, the Commission reactivated the complaint. A Human Rights Officer in the Commission's Resolution Services Division prepared a Section 40/41 Report. She recommended, pursuant to paragraph 41(1)(*d*) of the CHRA, that the Commission not deal with Ms. Windsor-Brown's complaint on the basis that the RCMP's procedures had addressed all of Ms. Windsor-Brown's human rights allegations in a manner that was procedurally fair and similar to the Commission's process. She clarified that only those allegations which began after March 2013 would be reviewed. She rejected the RCMP's argument regarding the application of paragraph 41(1)(*a*) and subsection 42(2) of the CHRA, finding that these provisions no longer applied as she considered the decisions in the harassment complaints to be final.

[10] The parties were given the opportunity to provide written submissions in response to the Section 40/41 Report. On December 17, 2015, Ms. Windsor-Brown disputed the report's findings arguing, among other things, that the harassment complaint process was deficient in addressing her human rights issues and that the decision-maker lacked independence. Further to a request made by the Human Rights Officer in the Section 40/41 Report, Ms. Windsor-Brown also elaborated on a statement she had made regarding her lack of opportunity to appeal the decisions regarding her harassment complaints, indicating that she was not advised of her right to further review or appeal the RCMP's decisions.

[11] The RCMP subsequently responded to the Section 40/41 Report, stating that it concurred with the recommendation that the Commission not deal with the complaint pursuant to paragraph 41(1)(*d*) of the CHRA. It then disputed the submissions made by Ms. Windsor-Brown, arguing that the human rights issues she raised had been addressed by the RCMP's harassment complaint process. The RCMP also argued that Ms. Windsor-Brown had not provided any evidence to corroborate her assertions of bias in the RCMP's harassment complaint process and that the process was procedurally fair. Furthermore, she had the benefit of legal representation and advice throughout the process, as well as specific training and could thus not claim to have been unaware of her appeal and review rights. Lastly, the RCMP did not have the incentive to discriminate against its employees. The RCMP finished by stating that it was in agreement with the conclusion in the report that it would be unfair and prejudicial for the RCMP to have to answer to the very same allegations as it had in the RCMP's harassment complaint process. The RCMP requested that the Commission not deal with the complaint pursuant to paragraph 41(1)(*d*) of the CHRA.

[12] The Commission subsequently rendered its decision on February 10, 2016 and decided that it would deal with the complaint. At the outset of its decision, the Commission confirmed that it had considered the Section 40/41 Report, the complaint and the submissions of both parties. It also acknowledged the Section 40/41 Report's recommendation that the Commission not deal with the complaint. However, it then stated that it was persuaded by Ms. Windsor-Brown's submissions and adopted three (3) paragraphs from those submissions as part of its reasons.

II. Issues

[13] In its memorandum of fact and law, the Attorney General of Canada [AGC] raised the following three (3) issues:

a) What is the appropriate standard of review?

b) Did the Commission fail to provide adequate reasons, thereby violating the principles of procedural fairness and natural justice?

c) Is the Commission's decision unreasonable?

[14] Upon review of the AGC's submissions, I consider that the second and third issue can be merged into one. The AGC's argument on the third issue focuses entirely on the Commission's failure to provide an explanation for departing from the recommendation contained in the Section 40/41 Report, which relates essentially to the adequacy of the Commission's reasons.

[15] Accordingly, I consider the determinative issue in this case to be whether the Commission provided adequate reasons for deciding to deal with the complaint of Ms. Windsor-Brown.

III. Analysis

A. *Standard of review*

[16] The applicable standard of review regarding the Commission's determination under section 41 of the CHRA is that of reasonableness (*Canadian Museum of Civilization v Public Service Alliance of Canada*, 2014 FC 247 at paras 32, 39 [*Canadian Museum of Civilization*]; *Cameco Corporation v Maxwell*, 2007 FC 260 at page 9 [*Cameco*]). The same standard of review applies to the determination of the adequacy of the Commission's reasons (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board*), 2011 SCC 62 at para 22 [*Newfoundland Nurses*]; *Air Canada Pilots Association v MacLellan*, 2012 FC 591 at para 20).

[17] When reviewing a decision on the standard of reasonableness, the Court is concerned with "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the 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 at para 47 [*Dunsmuir*]).

B. *Were the Commission's reasons adequate?*

[18] In its memorandum of fact and law, the AGC submits that the Commission's reasons are deficient. Other than a statement that it was persuaded by Ms. Windsor-Brown's submissions of December 17, 2015, the Commission offered no reasons why it departed from the recommendation contained in the Section 40/41 Report not to deal with the complaint. The AGC contends that the Commission disregarded both the conclusions in the Section 40/41 Report and the RCMP's submissions which raised credibility concerns with respect to Ms. Windsor-Brown's allegation that she was unaware of her right to grieve or appeal the three (3) harassment decisions. The AGC argues that the Commission had an obligation to reconcile the credibility concerns it raised and the material differences in the parties' submissions in response to the Section 40/41 Report.

[19] Ms. Windsor-Brown contends that the Commission did not have an obligation to issue reasons for its decision and, in any event, if required to do so, the reasons issued were sufficient to satisfy the parties' rights to reasons.

[20] I am not persuaded that the Commission's reasons are deficient for the following reasons.

[21] As this Court has done in the past, it is important to situate the Commission's decision within the context of the discrimination complaint process set out under the CHRA. Subsection 41(1) of the CHRA provides that once a complaint is filed, the Commission must first decide whether to deal with the complaint. This initial preliminary screening stage involves the

Commission identifying those complaints requiring further investigation and screening out those which, in its opinion, fall into one of the five (5) exceptions set out in subsection 41(1) of the CHRA (*Canadian Museum of Civilization* at para 38; *Canada (Attorney General) v Mohawks of the Bay of Quinte First Nation*, 2012 FC 105 at paras 38, 39 [*Maracle*]; *Cape Breton Development Corp v Hynes* [1999] FCJ No 340 at para 16 [*Cape Breton*]). The Commission's discretion to screen out complaints at this point should be limited to those cases where it is "plain and obvious" that the complaint should not be dealt with (*Canada Post Corp v Canada (Canadian Human Rights Commission*) (1997), 130 FTR 241 (TD), aff'd (1999) 245 NR 397 (FCA) at para 3 [*Canada Post Corp*]; *Canadian Museum of Civilization* at para 68). In exercising its discretion, the Commission is, however, under no duty to investigate the merits of the complaint (*Cape Breton* at para 16).

[22] If the Commission determines that it will deal with the complaint, the complaint enters the second screening stage. Pursuant to section 43 of the CHRA, the Commission may designate an investigator to investigate the complaint. As in the initial stage, the investigator will send a report of the findings of the investigation to the parties so that they may respond to it. The report and the submissions of the parties will then be placed before the Commission so that it may determine whether the complaint is to be dismissed or whether it should request for the Chairperson of the Canadian Human Rights Tribunal to institute an inquiry, as per subsection 44(3) of the CHRA.

[23] The wording of section 41 of the CHRA clearly suggests that the Commission enjoys a certain level of discretion in the exercise of its screening function. The Commission is entitled to

deference and this Court has held that it shall not interfere lightly with the Commission's exercise of discretion (*Public Service Alliance of Canada v Canada (Attorney General)*, 2015 FCA 174 at para 34; *Bell Canada v CEP (Communications, Energy and Paperworkers Union of Canada)*, [1998] FCJ No 1609 at para 51; *Canadian Museum of Civilization* at para 59; *Maracle* at para 40; *Cape Breton* at para 15). Similarly, such deference should also be afforded to the Commission's reasons when this Court is called upon to determine whether they are sufficiently detailed in the context of a decision made pursuant to subsection 41(1) of the CHRA at the initial screening stage of the Commission's complaint process.

[24] In *Cameco*, the applicant sought judicial review of a decision of the Commission whereby it decided to deal with the complaint, notwithstanding the recommendation of the Commission's screening officer that it decline to do so, as a grievance process was available to the respondent. The applicant had argued that the Commission ought not to have decided to deal with the matter as the grievance process had not yet been completed. The Commission decided nonetheless to deal with the complaint and stated (*Cameco* at page 8):

> The submissions from the Respondent [Cameco] and the Complainant [Maxwell] have led the Commission to conclude that the grievance procedure will not address the issue of discrimination on the grounds of age and disability.

[25] Despite the brevity of the Commission's reasons in *Cameco*, in determining that the Commission's decision to deal with the complaint was reasonable, Madam Justice Layden-Stevenson reaffirmed that the decision under section 41 of the CHRA is made at a very early stage in the Commission's complaint process. She noted the following comments by Mr. Justice Rothstein in *Canada Post Corp* at paragraph 3 of his decision:

> A decision by the Commission under section 41 is normally made at an early stage before any investigation is carried out. A lengthy analysis of the complaint at this stage is, at least to some extent, duplicative of the investigation yet to be carried out. A time consuming analysis will, where the Commission decides to deal with the complaint, delay the processing of the complaint. If it is not plain and obvious that the complaint falls under one of the grounds for not dealing with it under section 41, the Commission should, with dispatch, proceed to deal with it.
>
> [My emphasis.]

[26] I agree with this rationale. The sufficiency of the Commission's reasons should be assessed keeping in mind at which stage of the Commission's process the decision was made.

[27] In the present case, the Commission stated in its decision that it considered the Section 40/41 Report, the complaint and the submissions of the parties. It also acknowledged that the Section 40/41 Report recommended that the Commission not deal with the complaint. In the end however, the Commission was persuaded by Ms. Windsor-Brown's submissions that it should deal with the complaint. The Commission stated that it accepted the arguments advanced by Ms. Windsor-Brown in paragraphs 4, 5 and 19 of her submissions and reproduced them verbatim in the decision:

> The Commission should not be satisfied that the human rights issues raised in the complaint were addressed by the [RCMP's] process. While it is true that the [RCMP's] decision maker discussed the complainant's allegations, it cannot be said that he truly addressed them in any meaningful sense of the word. As discussed at paragraph 37 of the report, the [RCMP] found as a fact that allegations of sexual harassment were founded, but dismissed them out of hand as having been dealt with by 'operational guidance', which is, put simply, a "talking to". Operational guidance does nothing to address the damage done to the complainant's dignity and sense of self-worth, or the resultant toxic work environment to which she could not return, and was

> (inappropriately) the mildest available form of action despite the seriousness of the violations.
>
> Furthermore, the [RCMP], via its decision-maker, exonerated itself by concluding that the majority of the complainant's allegations were not established. As will be discussed in greater detail below, the [RCMP] was motivated to dismiss the complainant's complaint in order to rid itself of its own direct and vicarious responsibility, and did not adequately consider all of the relevant issues. In this sense, it cannot be said that all of the complainant's human rights issues were addressed in the process, and to the extent that they were addressed at all, the response was not appropriate or reasonable.
>
> The author of the Report concluded that it would be "unfair for the [RCMP] to have to answer the same allegations in different processes." The complainant cannot accept that this conclusion is reasonable. The [RCMP] has hardly had to "answer" allegations, because it was not answering to anyone but itself, and offers no remedy to the complainant. It is hardly unfair to have the [RCMP] answer to the complainant's allegations before an independent and impartial decision maker; in fact, it is only by that occurrence that fairness can be realized at all. Real unfairness will result if the complainant is denied access to the Commission's process, and that is the unfairness with which the Commission should be concerned. Every employer that is made aware of a complaint of harassment in the workplace has an obligation to investigate the complaint. That is all the RCMP has done in this case. To suggest that this ends the matter would render the Human Rights Act meaningless.

[28] While a significant portion of the Commission's decision was taken directly from the submissions of Ms. Windsor-Brown, it cannot be said the Commission has failed to provide the rationale for its decision to deal with the complaint. In my view, the Commission decided to deal with the complaint because it was persuaded by Ms. Windsor-Brown's argument that she lacked any meaningful remedy within the RCMP's harassment complaint process. The crux of Ms. Windsor-Brown's argument is that, contrary to the conclusions contained in the Section 40/41 Report, the RCMP's harassment complaint process did not address all of her human rights

issues in any significant way. To support her argument, she referred to the RCMP's decision-maker's conclusion regarding one of her allegations. The decision-maker noted that the individual in question had acknowledged the improper comment and that the conduct had been corrected through "operational guidance". In responding to the Section 40/41 Report, Ms. Windsor-Brown indicated that the expression "operational guidance" only meant a "talking to" and did nothing to address the damage done to her dignity or the toxic work environment to which she would have to return. The Commission was also persuaded by her argument that the RCMP had a vested interest in dismissing her allegations, thus raising issues of fairness and independence. These arguments, in my view, led the Commission to decide that it was not "plain and obvious" that it should not deal with the complaint.

[29] In *Newfoundland Nurses*, the Supreme Court of Canada found that a lack of "adequate reasons" is not a stand-alone basis for setting aside a decision. It found that reasons are to be read as a whole, in conjunction with the record (*Newfoundland Nurses* at para 14). Reasons will be found sufficient if they allow a reviewing court to understand why the tribunal made its decision and permit the reviewing court to determine if the decision falls within the range of acceptable outcomes. Reasons need not include all the details the reviewing judge would have preferred nor is the tribunal required to make an explicit finding on each constituent element leading to its final conclusion (*Newfoundland Nurses* at para 16).

[30] While it might have been preferable for the Commission to restate in its own words the reason why it decided to deal with the complaint, the AGC has not persuaded me that it was

inappropriate for the Commission to incorporate portions of Ms. Windsor-Brown's submissions into its decision, nor that the Commission's decision is unintelligible or irrational.

[31] The AGC relied on the decision of this Court in *Herbert v Canada (Attorney General)*, 2008 FC 969 [*Herbert*] to support the argument that when the Commission chooses to dismiss the investigator's report, it must state its reasons and even more so, in those cases where the submissions of the parties allege substantial and material omissions in the investigation (*Herbert* at para 26). The AGC also relied in oral argument on the decision of this Court in *D'Angelo v Canada (Attorney General)*, 2014 FC 1120 [*D'Angelo*] where the application for judicial review was granted on the basis that the Commission had provided no reasons, only a conclusion that the applicant should await the outcome of his various grievances [*D'Angelo* at para 22]. However, both cases are distinguishable because they arise from decisions of the Commission not to deal with a complaint.

[32] In assessing the sufficiency of reasons required, it is equally important to consider the scope of the Commission's statutory obligations with respect to the provision of reasons. Pursuant to subsection 42(1) of the CHRA, when the Commission decides not to deal with a complaint, it is required to send a written notice of its decision to the complainant, setting out the reasons for its decision. When the Commission decides not to deal with a complaint, it is in fact putting an end to a complainant's legal recourse, which adds to the seriousness of the decision (*Sketchley v Canada (Attorney General)*, 2004 FC 1151 at para 51). The CHRA does not provide a corresponding obligation for when the Commission decides that it will deal with a complaint pursuant to subsection 41(1) of the CHRA. While I hesitate to find that the common law rules of

procedural fairness would impose such an obligation on the Commission at this stage of its process when Parliament did not do so, I consider that if reasons are required, the requirement for reasons cannot be greater than in those cases where the Commission decides not to deal with a complaint.

[33] In the present case, the Commission decided that it would deal with Ms. Windsor-Brown's complaint and provided reasons for doing so. The decision to deal with the complaint is a discretionary administrative decision which should attract a high level of deference. When read as a whole and with regard to the record, the reasons show why the Commission decided to deal with the complaint. As such, the reasons are justified, transparent and intelligible and meet the reasonableness standard set out in paragraph 47 of *Dunsmuir*.

[34] For the foregoing reasons, I see no basis to interfere with the Commission's discretionary decision. This application for judicial review will be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The Respondent shall be entitled to costs in the amount of $2,100.00.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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