Federal Court Cour fédérale

Date: 20161031

Docket: T-121-16

Citation: 2016 FC 1206

Ottawa, Ontario, October 31, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

BEVERLY KLECKNER

Applicant

And

ATTORNEY GENERAL OF CANADA
(CANADIAN ARMED FORCES)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Beverly Kleckner, is a Captain in the Canadian Armed Forces [CAF] and has served as a Health Care Administrator in the Health Services Group Headquarters since June 2008.

[2] In November 2012, the CAF directed Captain Kleckner to undergo a psychosocial assessment, as part of the Periodic Health Assessment, to ensure her capability for deployment. She refused to undergo the assessment on the basis that the CAF would not provide her with the parameters that a CAF mental health provider would use to consider a member unfit. She also requested the ability to consult the physician of her choice. Because of her refusal to undergo the assessment, the CAF downgraded Captain Kleckner's medical category to "unfit to serve".

[3] In February 2013, Captain Kleckner brought an urgent motion seeking injunctive relief before the Ontario Superior Court of Justice [ONSC]. In her motion, Captain Kleckner sought a declaration that the referral by the CAF directing her to attend the psychosocial assessment was of no force and effect. She also sought a further declaration that she had the right to choose her own health care provider for the purpose of any medical treatment or assessment that she might be required to undergo by the CAF, including the psychosocial assessment. Captain Kleckner's motion was heard on an interim basis by Justice Ratushny, who ordered that the assessment be cancelled and that, pending the hearing of the motion, the CAF not take any action whatsoever in respect of the November 2012 referral which might affect her medical category. Justice McKinnon subsequently heard the motion over the course of four (4) days, ending in November 2013. On January 15, 2014, he dismissed the injunctive motion and stayed the underlying action pending Captain Kleckner exhausting her rights in accordance with the *National Defence Act*, RSC 1985, c N-5 [NDA] (*Kleckner v Canada (Attorney General)*, 2014 ONSC 322) [*Kleckner*].

[4] In June 2014, Captain Kleckner submitted a complaint to the Canadian Human Rights Commission [Commission] in which she alleged that, by downgrading her medical category to

"unfit to serve", the CAF discriminated against her in employment, based on the ground of perceived disability, contrary to sections 7 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

[5] Upon receipt of the complaint, the Commission advised the parties that paragraph 41(1)(*a*) of the CHRA might apply to the complaint because another grievance or review procedure might be available. The Commission's Resolution Services Division subsequently prepared a Section 40/41 Report based upon Captain Kleckner's allegations and the CAF's response, confirming that the Commission would not deal with the complaint because the complainant had failed to exhaust grievance or review procedures that were otherwise reasonably available to her. The Commission then gave both parties the opportunity to respond to the report.

[6] In a decision dated December 23, 2015, the Commission decided not to deal with Captain Kleckner's complaint pursuant to paragraph 41(1)(*a*) of the CHRA. The Commission based its decision on the determination that Captain Kleckner had failed to exhaust the CAF's grievance procedures that were otherwise reasonably available to her. The Commission's decision being quite short, the Section 40/41 Report constituted the Commission's reasoning for the decision (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37).

[7] Captain Kleckner now seeks judicial review of the Commission's decision. She argues that the Commission erred in finding that the CAF's grievance procedure was "reasonably available" as per paragraph 41(1)(*a*) of the CHRA.

[8] For the reasons set out below, the application for judicial review is dismissed.

II. Issue

[9] Although Captain Kleckner raised a number of issues in her written submissions, the sole determinative issue in this case is whether the Commission's decision not to deal with her complaint is reasonable.

III. Standard of review

[10] The standard of review with respect to decisions by the Commission not to deal with complaints pursuant to subsection 41(1) of the CHRA is reasonableness (*Mun v Canada (Attorney General)*, 2016 FC 94 at para 14 [*Mun*]; *Andrews v Canada (Attorney General)*, 2015 FC 780 at para 20 [*Andrews*]; *English-Baker v Canada (Attorney General)*, 2009 FC 1253 at para 22). This standard of review applies to both the decision-making process and the result (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[11] 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* at para 47; *Andrews* at para 21).

IV. Analysis

[12] Captain Kleckner submits that the Commission's decision not to deal with her complaint is unreasonable because it failed to consider that, in certain cases, such as hers, the CAF's grievance process does not provide an adequate alternative remedy. In particular, she argues that the CAF's grievance process is unfair in that it lacks independence and impartiality. In support of her argument, she asserts that the Military Grievances External Review Committee [Grievance Committee], which advises the Chief of Defence Staff [CDS], as the Final Authority in the grievance process, is comprised of serving or former members, with the exception of the Chair and Vice-Chair. In addition, the individuals who required her to undergo a psychosocial assessment will ultimately be involved in advising the Grievance Committee. Captain Kleckner further alleges that she will be required to share her medical information with her Commanding Officer and supervisors, as the CAF's grievance process requires that all grievances pass through the Commanding Officer, and at times, through the various chains of command prior to getting to the Grievance Committee or the Final Authority. She also fears that she will be unable to defend her grievance since there is no mechanism for her to obtain an order requiring the CAF to disclose her medical records. She argues that she requires communication of her entire medical record in order to demonstrate that her fitness for duty has never been an issue.

[13] Captain Kleckner further submits that the CAF's grievance process does not constitute an adequate remedy since the CDS, as the Final Authority in the CAF's grievance process, does not have the authority, through *ex gratia* payments, to grant monetary compensation for damages.

[14] Captain Kleckner also maintains that the NDA does not limit the Applicant to the CAF's grievance process as the only means of redress, basing herself on the language of subsection 29(1) of the NDA. In other words, the CAF's grievance process is not mandatory and is but one of the options for redress contemplated by the NDA.

[15] Finally, Captain Kleckner asserts that the Commission committed a number of errors and failed to consider her submissions in addition to improperly assigning a "Protected B" security designation to its decision.

[16] Paragraph 41(1)(*a*) of the CHRA provides that the Commission may decline to deal with a complaint if it appears to the Commission that the complainant ought to exhaust grievance or review procedures otherwise reasonably available. This Court has indicated that the Commission's decision not to deal with a complaint should be only exercised in "plain and obvious cases" (*Mun* at para 16; *Hicks v Canada (Attorney General)*, 2008 FC 1059 at para 22; *Canada Post Corp v Canada (Canadian Human Rights Commission) (re Canadian Postmasters and Assistants Assn)* (1997), 130 FTR 241 (FTD) at para 3 [*Canada Post Corp*]).

[17] In deciding whether a complaint falls within the scope of paragraph 41(1)(*a*) of the CHRA, the Commission must decide:

a) whether the grievance or review procedure was "reasonably available"; and

b) whether the complainant "ought" to exhaust the procedure before filing a complaint under the CHRA;

(*Mun* at para 17; *Canada Post Corp* at para 6).

[18] The determination of whether a complainant ought to have exhausted an alternative procedure is subjective and involves the exercise of discretion. The scope of judicial review is thus narrow (*Mun* at para 17; *Bergeron v Canada (Attorney General)*, 2013 FC 301 at para 39 [*Bergeron*]; *Canada Post Corp* at paras 4 and 6).

[19] Moreover, in deciding not to deal with a complaint, the Commission must be satisfied, pursuant to the terms of subsection 42(2) of the CHRA, that the failure to exhaust the alternative process is attributable to the complainant and not to another (*Mun* at para 18).

[20] Bearing in mind these principles and in particular, the discretionary nature of the Commission's decision, I find the Commission's decision to be reasonable.

[21] The Commission reviewed and addressed all of the arguments raised by Captain Kleckner, which for the most part, were identical to those raised before this Court and the ONSC.

[22] Regarding the alleged lack of independence and impartiality of the CAF's grievance procedure, the Commission recognized that the Final Authority was not an independent third party as the CDS (or when applicable, his designated delegate) is in the employment of the CAF. Nonetheless, the Commission found that the Final Authority would have been considerably removed from Captain Kleckner and could have objectively examined the issues raised by her situation. The Commission also observed that this Court has found that the "alleged lack of independence in the grievance process" was not sufficient to overturn the Commission's decision

to dismiss the complaint. In making this observation, the Commission relied on the decision of this Court in *Bergeron* at paragraph 43.

[23] The Commission's finding on this point is supported by the decision of this Court in *Mun* at paragraph 31, which likewise found that the CDS or his delegate was considerably removed from the griever's case to ensure the independence and impartiality of the grievance process. Moreover, the finding is consistent with the jurisprudence of this Court which has repeatedly held that the CAF's grievance process constitutes an adequate remedy that must be exhausted before an individual can turn to the courts for redress (*Mun* at paras 31 and 32; *Moodie v Canada*, 2008 FC 1233 at para 28; *Sandiford v Canada*, 2007 FC 225 at para 28; *Pilon v Canada*, 1996 FCJ No 1200 at paras 8 and 9).

[24] As for Captain Kleckner's fears that the people responsible for requiring her to undergo the psychosocial assessment would be involved in the grievance process, I find that Captain Kleckner's concerns are both premature and speculative. Article 8.19 of the Defence Administrative Order and Directive (DAOD) 2017-1 – Military Grievance Process specifically provides that a grievor has the right to a fair hearing by an impartial redress authority and that this right will be undermined if the redress authority is, or appears to be, predisposed regarding the outcome of the grievance. Furthermore, subsection 7.14(2) of the *Queen's Regulations and Orders for the Canadian Armed Forces* explicitly prohibits an officer from acting as the Initial Authority in the grievance process if the grievance relates to his or her decision, act or omission. Consequently, one has to assume that if Captain Kleckner had initiated a grievance, it would have been conducted in a fair, impartial and independent manner. If, after commencing the

grievance process, Captain Kleckner was of the view that this was not the case, it would have been open to her to raise these concerns with the appropriate authorities in the CAF and afterwards, if necessary, on judicial review. Moreover, if Captain Kleckner considered that all of her human rights issues had not been addressed through the CAF's grievance process, she could then have gone back to the Commission and asked that her complaint be reactivated.

[25] Captain Kleckner also raised the argument before the Commission that there is a power imbalance within the CAF's grievance procedure because she is unable to obtain the release of information she needs and cannot afford the help of a medical expert or legal representative. On this point, the Commission noted that where an applicant is self-represented, similar power imbalances exist within the court proceedings and in proceedings before administrative bodies, such as the Commission. The Commission indicated that Captain Kleckner, who is self-represented, would likely encounter similar issues obtaining information and expert medical testimony in all these proceedings. It also noted that even if the Commission had accepted to deal with the complaint, the CAF would still have a disproportionate amount of resources in comparison to those of Captain Kleckner.

[26] I see no error in the reasoning of the Commission. Although in certain limited circumstances, there may be a constitutional right to legal representation, there is no general right to representation by a lawyer. As stated by Justice Russell of this Court in *893134 Ontario Inc (Mega Distributors) v Canada (National Revenue)*, 2008 FC 715 at paragraphs 29 and 30: "the rule of law does not require the assistance of, or the representation by, legal counsel even where rights and obligations are at stake". Representing oneself does not amount to unfairness or even a

breach of procedural fairness, even if afterwards the self-represented litigant thinks that legal representation might have assisted him or her in making a better case. To hold otherwise would mean that every decision involving a self-represented litigant would have to be construed as procedurally unfair, except in those cases where the ruling was in his or her favor (*Balasingam v Canada (Citizenship and Immigration)*, 2012 FC 1368 at para 51). If parties may proceed before courts of law without legal representation, the absence of counsel in the context of a grievance process is even more acceptable given that the grievance process is intended to be more informal and accessible.

[27] As for her inability to obtain her entire medical file to demonstrate that her medical fitness for duty has never been an issue, the Grievance Committee has, pursuant to section 29.21 of the NDA, the power to summon and enforce the attendance of witnesses and the power to compel the production of documents. Thus, Captain Kleckner could have requested that the Grievance Committee require the production of her medical file.

[28] I note that Captain Kleckner alleges that the CAF withheld part of her medical record. In January 2016, a Senior Privacy Investigator of the federal Office of the Privacy Commissioner confirmed that Captain Kleckner had not received all the information she was entitled to, in response to a complaint she had submitted. However, this is an entirely separate issue. The procedure under the *Privacy Act*, RSC 1985, c P-21 is a distinct process, with a very different purpose and it is governed by a different legislative framework.

[29] The Commission also rejected Captain Kleckner's assertion that the CDS cannot award monetary compensation for harm done through *ex gratia* payments. It relied on the decision issued by Justice McKinnon who addressed this issue and concluded that recent legislative changes gave the CDS the discretionary power to award *ex gratia* payments in certain cases. The Commission thus found that Captain Kleckner's human rights complaint could be addressed through the CAF's grievance process.

[30] Although not bound by the decision of Justice McKinnon, I find it nonetheless persuasive. In examining whether the CAF's grievance process constituted an effective alternative remedy to address Captain Kleckner's claims for damages for various breaches of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], Justice McKinnon found that the CDS had the requisite authority and jurisdiction to compensate individuals whose *Charter* rights might have been infringed (*Kleckner* at para 47). I also note that this Court has also recently confirmed that the CDS may resort to *ex gratia* payments to award compensation (*Lafrenière c Canada (Autorité des griefs des Forces canadiennes*), 2016 CF 767 at para 67; *Chua v Canada (Attorney General)*, 2014 FC 285 at para 13). Captain Kleckner has not persuaded me that the CDS could not have exercised his discretion to award her an *ex gratia* payment in recognition of her alleged pain and suffering, had she lodged a grievance.

[31] Captain Kleckner also argued before the Commission that if she had recourse to the grievance process, her right to an appeal would be negated. In my view, the Commission properly found that while a decision by the Final Authority in the grievance process is final and

binding, judicial review before the Federal Court is available pursuant to section 29.15 of the NDA. Captain Kleckner's situation is not unlike that of many other individuals who find themselves involved in other administrative law procedures where there is no right of appeal. Given the deference afforded to administrative tribunals and their respective areas of expertise, judicial review is often the only relief available against decisions made by administrative decision-makers or tribunals.

[32] The Commission also addressed Captain Kleckner's argument that the grievance procedure was not mandatory. This Court responded to this very argument in paragraph 23 of *Mun,* finding that "regardless of whether the process is mandatory or voluntary, the Commission was nevertheless entitled to decide if the grievance process was a more appropriate forum to deal with the Applicant's complaint before being brought to the Commission".

[33] The Commission also found, pursuant to subsection 42(2) of the CHRA, that Captain Kleckner was solely responsible for not exhausting the CAF's grievance procedure. The Commission noted that: 1) Captain Kleckner had ample opportunity to file a grievance as she had been given a time extension up to and including November 28, 2014; 2) the decision of the ONSC informed Captain Kleckner that she should file a grievance before proceeding with legal action in that venue; and 3) the Commission had also informed Captain Kleckner of paragraph 41(1)(*a*) and subsection 42(2) of the CHRA and asked her to use the grievance process which was reasonably available to her. The Commission's conclusion was reasonable given that the record supports the facts upon which it relied.

[34] As for the other issues raised by Captain Kleckner, I find that Captain Kleckner has not demonstrated a breach of procedural fairness by the Commission. The Commission afforded both parties the opportunity to make representations on the Section 40/41 Report. While Captain Kleckner alleges that the Commission did not consider all of her evidence and would have preferred the Commission's decision to be more exhaustive, it is trite law that a decision-maker is presumed to have reviewed all the evidence (*Anderson v Canada (Attorney General),* 2013 FC 1040 at para 55). Moreover, the Supreme Court of Canada found in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at paragraphs 12, 14, 16 and 22, that a decision-maker is not required to make explicit findings on every element leading to its conclusion. It also found that the adequacy or sufficiency of reasons does not fall under procedural fairness and the corresponding correctness standard of review, but rather is an issue commanding a reasonableness analysis. This principle is equally applicable to decisions made in the context of the Commission's determination of whether or not it should deal with a complaint (*Berberi v Canada (Attorney General*), 2013 FC 99 at paras 18 and 19).

[35] Finally, Captain Kleckner submitted before this Court that the Commission erred in assigning a "Protected B" security designation to its decision. She is of the view that the Commission was attempting to prevent it from being released to the public. There is no merit to this argument. The purpose of the designation is to indicate that the decision contains personal information. In any event, this argument is now moot as the decision is now part of the public record.

[36] In conclusion, the Commission enjoys a certain level of discretion in deciding whether or not to deal with a complaint on the basis that a complainant ought to exhaust grievance or review procedures otherwise reasonably available (*Bell Canada v CEP (Communications, Energy and Paperworkers Union of Canada)*, [1998] FCJ No 1609 at para 51). I understand that the effect of this judgment will be that Captain Kleckner will be left without recourse, as the deadline of November 28, 2014 to submit her grievance has long passed. The CAF may perhaps waive this delay. In any event, I consider that Captain Kleckner had ample opportunities and sufficient notice to initiate the grievance process. Captain Kleckner not only knew that the CAF's grievance process was available, she also had the benefit of the decision of the ONSC, which informed her that she needed to exhaust her rights in accordance with the NDA. I agree with the ONSC that there are no exceptional circumstances that would justify departing from the normal grievance process (*Kleckner* at para 66).

[37] As a result, the Commission's decision not to deal with her complaint is reasonable and falls within the range of possible, acceptable outcomes which are defensible both in facts and in law (*Dunsmuir* at para 47). For all these reasons, the application for judicial review shall be dismissed with costs in the amount of $3,100.00.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs to the Respondent in the amount of $3,100.00.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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