Federal Court  Cour fédérale

Date: 20170327

Docket: T-211-16

Citation: 2017 FC 312

Ottawa, Ontario, March 27, 2017

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

CECILIA CARROLL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Cecilia Carroll [Ms. Carroll] seeks judicial review of a December 24, 2015 decision by the Canadian Human Rights Commission [the Commission] not to refer her complaint to the Canadian Human Rights Tribunal for inquiry, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [Act].

[2] For the reasons herein, I would dismiss this application for judicial review.

II. Background

[1] Ms. Carroll began her employment with Employment and Social Development Canada [ESDC] in 1986. On February 3, 1993, she commenced sick leave without pay due to back pain. Ms. Carroll has not returned to work since, and has been receiving disability benefits from Sun Life of Canada since 1993.

[2] In 2007, ESDC contacted Ms. Carroll regarding her sick leave. It provided her with three options: (i) return to work; (ii) retire on medical grounds; or (iii) be dismissed due to medical incapacity. These directions were based upon the Treasury Board Secretariat's *Directive on Leave and Special Working Arrangements* [the Directive]. I note here that while on sick leave without pay, Ms. Carroll continued to accumulate pension entitlement and the employer was required to contribute to the pension plan. Since this time, she has been unable to provide any date by which she might be able to return to work. Ms. Carroll did not wish to choose any of these options, preferring instead to continue to receive long term disability benefits and remain on sick leave without pay. After having contacted her in 2007 and due to issues unrelated to this judicial review application, the ESDC did not take any concrete action until 2011; seventeen years after Ms. Carroll began her sick leave. Ms. Carroll eventually agreed, "under duress", to apply for retirement on medical grounds, which was approved effective December 29, 2011.

[3] In February 2012, Ms. Carroll filed a human rights complaint before the Commission, in which she contended the application of the Directive discriminated against persons suffering

from a disability. On March 5, 2012, the Commission advised Ms. Carroll that her complaint would not be considered until she had pursued all remedies available to her, including the grievance process. Accordingly, Ms. Carroll filed a grievance with ESDC which was rejected at all three internal levels. Her union refused to refer the matter to grievance arbitration before the Public Service Labour Relations Board. The response at the final level of the grievance process stated that Ms. Carroll had not provided "information concerning a possible return to work or any necessary accommodations that could make a return to work successful".

[4] On September 11, 2013, Ms. Carroll applied to re-open her complaint before the Commission. After reviewing the complaint, the Commission concluded it was "vexatious" within the meaning of paragraph 41(d) of the Act in that her allegations had already been dealt with by an alternative decision-maker, with the authority to decide upon the issues (the grievance process). Ms. Carroll challenged this decision by way of an application for judicial review before this Court. In *Carroll v Canada (Attorney General)*, 2015 FC 287, [2015] FCJ no 250 [*Carroll 2015*], Mosley, J. granted the application for judicial review, quashed the Commission's decision and referred it back for re-determination, with directions to render a decision based on "the full record concerning the applicant's grievances and its own consideration of the merits of those grievances". The Court went on to say that "[f]or greater certainty, the Commission shall not dismiss the complaint pursuant to subparagraph 44(3)(b)(ii) of the [Act]". Importantly, I would note here that Ms. Carroll interprets Mosley, J.'s direction as requiring the Commission to consider the full record of the grievance she filed pursuant to the collective agreement. With respect, I do not share that view. I interpret Mosley, J.'s direction as referring to Ms. Carroll's

grievances in general; that is, her complaints or grievances regarding violations of her right to be free from discrimination.

[5] Shortly thereafter, on April 17, 2015, the Commission informed Ms. Carroll that it had referred her complaint to an investigator. In her oral submissions, Ms. Carroll contended that the ESDC indicated to the investigator a willingness to mediate, but she was not made aware of this. The Investigative Report [Report], dated September 23, 2015, found that the "practice of applying the Directive (former Policy) is reasonably necessary to achieve the legitimate work-related purpose and further inquiry is not warranted". The investigator readily concluded that, *prima facie*, the Directive's requirement that employees on sick leave make one of the three choices outlined above was discriminatory toward people with disabilities. She (the investigator) therefore went on to consider the three-part test outlined in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*], which can be stated as follows:

> 1) Was the policy, rule, practice or standard adopted for a purpose that is rationally connected to the performance of the job?
>
> 2) Is the policy, rule, practice or standard based on an honest and good faith belief that it is necessary to the fulfillment of that legitimate work-related purpose?
>
> 3) Is the policy, rule, practice or standard reasonably necessary to achieve the legitimate work-related purpose?

[6] The investigator concluded that the three-part *Meiorin* test was met and recommended the Commission dismiss the complaint. Both parties were invited to make, and did make, submissions regarding the Report. Ms. Carroll filed a "cross-disclosure submission" [Reply] to

ESDC's response on November 19, 2015. The Commission then reviewed the Report and the parties' submissions, including Ms. Carroll's Reply, following which it dismissed her complaint pursuant to subparagraph 44(3)(b)(i) of the Act. The Commission concluded that an inquiry was not warranted. It is that decision of the Commission which is now being challenged by Ms. Carroll.

[7] I note that in an e-mail message to Ms. Carroll dated January 25, 2016, an officer of the Commission set out the material it considered. This included the summary of the complaint, an amended summary, the Report by investigator Erin Sweeney, both parties' response to the Report, and Ms. Carroll's Reply.

III. Issues

[8] Ms. Carroll does not seriously question the findings of fact, nor does she challenge the Commission's interpretation of the law. She does, however, appear to take exception to the application of the facts to the law in several respects. For example, she contends the Commission failed to deal with the substance of her complaint of discrimination, provided insufficient reasons, and erred in its analysis with respect to the employer's duty to accommodate up to the point of undue hardship. She further contends that the Commission violated her right to procedural fairness or natural justice in that (i) the investigator did not inform her that ESDC was willing to submit the complaint to mediation; (ii) the submissions at the grievance stage were not before the Commission; and (iii) approximately 96 pages of her materials (Tab H of Ms. Carroll's materials) were not placed before the Commission.

IV. Analysis

A. *Standard of Review*

[9] First, I would note that sufficiency of the reasons is not a stand-alone ground of review: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 12, [2011] 3 SCR 708 [*Newfoundland Nurses*]. The reasons must be viewed in their entirety, and in light of all of the evidence, in order to determine whether they are reasonable. In addition, the reasons must allow a reviewing court to understand how the tribunal arrived at its ultimate conclusion (*Taman v Canada (Attorney General)*, 2017 FCA 1 at paras 37-38, [2017] FCJ no 7 [*Taman*]). It is trite law that in order to meet the reasonableness requirement, the reasons must demonstrate justification, transparency and intelligibility and fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCR 190 [*Dunsmuir*]. The Commission's findings of fact are, of course, to be shown deference: see, *Keith v Canada (Correctional Service)*, 2012 FCA 117 at paras 47-48, [2012] FCJ no 505. In reaching the conclusion that the standard of review on the first three issues is that of reasonableness, I am mindful of the broad discretion conferred upon the Commission pursuant to subparagraph 44(3)(b)(i) of the Act as to whether or not to institute an inquiry.

[10] Issues of procedural fairness and natural justice must be measured against the standard of correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] SCJ no 24; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] SCJ no 12.

B. *Reasonableness of the Commission's Decision*

(1) Substance of the Commission's decision

[11] At the outset of her written submissions, Ms. Carroll submits that the Report failed to respond to the substance of her complaint dated October 17, 2013. In the first paragraph of her complaint, Ms. Carroll clearly stated:

> I am a person with a disability and feel that I was discriminated against due to my disability. I believe that Service Canada's use of Treasury Board's Directive on Leave and Special Working Arrangements is discriminatory against people with Disabilities.

[12] To support her contention, she refers this Court to numerous passages in the Report which indicate that the scope of the investigation was to "focus on how the respondent applied the TSB Directive (formally Policy) and whether it did so in a discriminatory matter". Ms. Carroll says that she is not interested in knowing whether the *application* of the Directive was discriminatory; rather, she is focused on the discriminatory nature of the Directive itself. To support her position, she relies on *Carroll 2015*, where Mosley J. addressed the importance of dealing with the substance of a complaint:

> The case law clearly establishes that an investigation which does not deal with the substance of a complaint, fails to investigate a relevant question, or fails to consider crucial evidence is unfair because it is not thorough. That unfairness carries over to any eventual dismissal decision rendered by the Commission.

[13] With respect, Ms. Carroll's assertion fails to grasp the foundational premise of the Report. While the Report does not quote verbatim from Ms. Carroll's complaint, the investigator clearly addressed the issue raised by her. As previously mentioned, she (the investigator)

acknowledged that, *prima facie*, the Directive was discriminatory against a person, or a class of persons, with disabilities. Ms. Carroll explicitly acknowledged and agreed with this finding in her response to the Report. As such, I am of the view that the investigator fulsomely addressed whether or not the Directive was discriminatory against Ms. Carroll. The Report reasonably dealt with the substance of her complaint.

(2) Sufficiency of Reasons

[14] As already noted, Ms. Carroll contends the Commission provided insufficient reasons. The Commission's decision states, in part, the following:

> Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, to dismiss the complaint because:
>
> - in all of the circumstances of the complaint, further inquiry is not warranted.

[15] While the decision is admittedly very brief, the Commission stated that it arrived at this conclusion after assessing the Report and the parties' submissions in response to the Report, including Ms. Carroll's Reply. When the Commission provides no reasons of its own, the investigative report constitutes the reasons for the decision: *Sketchley v Canada (AG)*, 2005 FCA 404 at para 37, [2005] FCJ no 2056 [*Sketchley*]. The Court provided the following explanation:

> While it is true that the investigator and Commission do have "mostly separate identities", (*Canada (Human Rights Commission) v. Pathak*, , [1995] 2 F.C. 455 (C.A.), at paragraph 21, per MacGuigan J.A., (Décary J.A. concurring)), it is also well established that, for the purpose of a screening decision by the Commission pursuant to subsection 44(3) [as am. by R.S.C., 1985 (1st Supp.), c. 31, s. 64; 1998, c. 9, s. 24] of the Act, the

> investigator cannot be regarded as a mere independent witness before the Commission (*Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, , [1989] 2 S.C.R. 879, at page 898 (SEPQA)). The investigator's report is prepared for the Commission, and hence for the purposes of the investigation, the investigator is considered to be an extension of the Commission (SEPQA, at page 898). When the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons, the courts have rightly treated the investigator's report as constituting the Commission's reasoning for the purpose of the screening decision under subsection 44(3) of the Act (SEPQA, at pages 902-903; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, , [1999] 1 F.C. 113 (C.A.), at paragraph 30 (*Bell Canada*); *Canadian Broadcasting Corp. v. Paul* (2001), , 198 D.L.R. (4th) 633 (F.C.A.), at paragraph 43).
>
> [Emphasis in original]

[16] In her Report, the investigator explains that she intends to apply a two-step analysis: first, an examination of whether the Directive is *prima facie* discriminatory; second, an assessment of whether the Directive meets the three-part test articulated in *Meiorin*.

[17] As previously mentioned, the investigator first found that the application of the Directive was *prima facie* discriminatory against a person or class of persons with disabilities, since it deprives them of an opportunity to (i) remain an employee on leave without pay; and (ii) continue to contribute to a pension. The investigator then applied the *Meiorin* test and concluded the Directive is *bona fide* justified: it allows ESDC to fulfill its purpose of ensuring its workforce remains productive, and allows management to effectively resolve leave without pay situations. In my view, the Report's reasons allow this Court to understand its recommendation that further inquiry by the Canadian Human Rights Tribunal is not warranted. In her report, the investigator states she took into consideration: all the documentary evidence submitted during the section 41

process, Mosley, J.'s March 6, 2015 decision, the parties' positions, and all documentary evidence submitted during the course of the investigation. The analysis of the *Meiorin* test by the investigator is exhaustive, and allows the Court to understand how she came to her ultimate conclusion. As a result, I am of the view the Commission's decision was reasonable in the circumstances: see, *Dunsmuir*, above, at para 47; *Newfoundland Nurses*, above, at para 26; *Taman*, above, at para 38; *Sketchley*, above, at para 37.

(3) Accommodation to the Point of Undue Hardship

[18] Ms. Carroll submits that by remaining on sick leave without pay until the age of 65 she would not cause ESDC any undue hardship. She contends that in order for ESDC to fulfill its purpose of remaining productive, it simply needs to hire new employees. In addition, during oral submissions, Ms. Carroll contended that since her employer allowed her to remain on sick leave without pay for fourteen years, it must not have endured any undue hardship.

[19] With respect, the jurisprudence does not support Ms. Carroll's position. In *Hydro Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 SCR 56, an employee's record of absences indicated that she had missed 960 days of work between January 1994 and July 2001. In addition, at the time of her dismissal, she had been absent from work for five months and would no longer be able to work on a regular basis without continuing absenteeism. The Court held at para 19 that "[t]he employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future".

[20] The evidence is unequivocal that Ms. Carroll will not be able to return to work in the foreseeable future. There is therefore no useful purpose to be served by assessing ESDC's duty to accommodate to the point of undue hardship. Ms. Carroll is simply no longer able to fulfil the obligations associated with her employment relationship. It is important to note that Ms. Carroll proposed no steps to ESDC that it could take, or should have taken, to re-integrate her into the workplace. The finding regarding undue hardship is reasonable in the circumstances.

V. Procedural Fairness and Natural Justice

[21] I will briefly address Ms. Carroll's contention that she was denied procedural fairness or that natural justice was not respected in the circumstances. Ms. Carroll received a letter from the Commission on April 20, 2015 which indicated that, if interested in mediation, she should contact the investigator as soon as possible. Ms. Carroll did not respond to that invitation to mediate. ESDC received a similar letter to which it responded positively. Ms. Carroll contends that, had she been made aware of ESDC's willingness to mediate, she would have pursued that avenue. Since the investigator failed to inform her of ESDC's willingness to mediate, Ms. Carroll contends she was denied procedural fairness. With respect, her argument fails based upon the fact that she was offered the opportunity to mediate the dispute and did not indicate any willingness to do so. In my view, her failure to respond positively to the opportunity to mediate forecloses any complaint she might have about not being informed of ESDC's position. Furthermore, I would note efforts or offers to mediate are made "without prejudice" to the issues confronting the Commission (*Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35 at para 31, [2014] SCJ no 35). For that reason, I question whether such information should have even been raised by Ms. Carroll in the circumstances.

[22] Second, Ms. Carroll contends that her submissions during the grievance process were not before the Commission. I note here that neither were those of the ESDC. Just as the mediation process is separate and distinct from the Commission's process, the same can be said about the grievance process. The parties are entitled to expand, reduce, or adopt entirely different arguments before the Commission as compared to the arguments advanced during the grievance process contemplated by the collective agreement. Ms. Carroll contends that in *Carroll 2015* Mosley, J. directed that evidence from the grievances was to be considered on the re-determination. I have already indicated in my opening observations why I believe Ms. Carroll is misinterpreting Mosley, J's. directions. He was, with respect, referring to her grievances in a general way, namely, her complaint that she was the victim of discrimination. The material reviewed by the investigator is, in my view, sufficient to respond to the claim of a breach of procedural fairness or a failure to respect the principles of natural justice (*Slattery v Canada (Human Rights Commission) (TD)*, [1994] 2 FCR 574, [1994] F.C.J. No. 181 at para 56).

[23] Finally, Ms. Carroll contends that 96 pages of her Application Record were not before the Commission; those constitute pages 71 to 166. Upon a review of the investigator's Report and the Commission's decision, I am unable to determine with any certainty whether all of that material was before either the investigator or the Commission. I would note, however, that a breach of procedural fairness will only result in the quashing of a decision in the event the breach would have had an effect on the outcome (*Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 81, [2015] 2 FCR 170; *Canadian Cable Television Association v American College Sports Collective of Canada, Inc*, [1991] 3 FCR 626, [1991] FCJ no 502). I have

carefully reviewed all of the material Ms. Carroll contends was not considered and am satisfied that none of it would have had an effect upon the outcome.

[24] I am satisfied no grounds exit upon which to quash the Commission's decision based upon the procedural fairness and natural justice issues raised by Ms. Carroll.

VI. Conclusion

[25] Based upon all of the foregoing, I am satisfied the Commission's decision is reasonable in the circumstances and that there was no violation of procedural fairness or the principles of natural justice. In the event procedural fairness or natural justice were breached in the circumstances, I am of the view such breach(es) had no effect upon the decision the Commission was called upon to make. As a result, I would dismiss the application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"B. Richard Bell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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