Federal Court Cour fédérale

Date: 20180409

Docket: T-309-16

Citation: 2018 FC 376

Ottawa, Ontario, April 9, 2018

PRESENT: The Honourable Mr. Justice Grammond

BETWEEN:

ELENA MAXIMOVA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Ms. Elena Maximova, seeks judicial review of a decision made by the Canadian Human Rights Commission [the Commission] pursuant to paragraph 41(1)(b) of the *Canadian Human Rights Act,* RSC 1985, c H-6 [the Act], not to deal with her complaint. For the reasons that follow, I am dismissing her application.

I. Introduction

[2] Ms. Maximova believes that she suffered an injustice. She turned to the law to obtain redress. Unfortunately, what unfolded afterwards is a story of misunderstanding. It is useful to clarify why this took place.

[3] Lawyers see the world through abstract concepts. These concepts are used to define and classify the kinds of injustice that the law addresses. Lawyers use abstract concepts to simplify reality, which facilitates the application of objective rules. Lawyers have also created a wide range of legal institutions and procedures to address different kinds of injustice. As a result, we speak of many "areas of the law," which tend to have their own concepts and their separate institutions.

[4] People do not live their lives according to legal concepts or categories. People's lived experiences, in all their complexity and diversity, do not always fit easily into the categories of the legal system or in a single "area of the law." Thus, when they seek the assistance of the law, people are required to use concepts and categories that are difficult to understand and that are sometimes different from those they use in their everyday lives.

[5] One of the roles of lawyers is to act as translators, so to speak, between legal concepts and categories and the real world. One of the skills that lawyers must develop is the ability to explain the law in terms that may be understood by persons who have no legal training. Ms. Maximova has not been represented by a lawyer in these proceedings. I do not know what efforts

have been made to help her understand the law. However, it is apparent that in constructing her argument, she uses certain concepts in a way that is different from how they are understood by lawyers.

II. Ms. Maximova's Story

[6] Ms. Maximova separated from her husband in 2004 and subsequently divorced. She says that he left the country and disappeared. She then raised her daughter alone.

[7] In 2005, she reported to the Canada Revenue Agency [CRA] that she was separated. On that basis, she claimed certain benefits, in particular the Canadian Child Tax Benefit, the Energy Costs Benefit and the GST/HST credit, that are calculated on the basis of family net income, which includes income earned by a co-habiting spouse.

[8] Legal or governmental institutions, such as the CRA, do not know the details of people's personal lives. This is why they often require documents to confirm what people are telling them. Lawyers call these documents "evidence."

[9] Thus, in 2006 the CRA told Ms. Maximova that it did not accept that she was separated, because she had not provided enough evidence that she resided at a different address than her spouse. The CRA believed that her ex-husband was still living at the same address, since he had not provided a new address. As a result, the CRA determined that she was no longer entitled to the benefits. It also claimed reimbursement for the benefits already paid.

[10] Ms. Maximova alleges that from 2006 to 2013, she and the CRA engaged in an "endless game" of correspondence. This was a stressful time for her: she was a single mother; her ex-husband had abandoned her, left the country and was not providing support; she suffered from health problems; she had to collect welfare; and at one point she was forced to live in homeless shelters. The tax benefits and credits she was denied during this time would have had a significant positive impact on her life.

[11] Eventually, Ms. Maximova was able to provide evidence that she was no longer married. In October 2013, the CRA retroactively changed her status from "married" to "separated" for the years 2004 to 2013; however, she claims she has still not received the full amount of benefits she was entitled to.

[12] On April 3, 2014, Ms. Maximova filed a complaint with the Commission, in which she alleged discrimination and harassment by the CRA on the basis of her marital status.

[13] On September 2, 2015, a representative from the Resolution Services Division of the Commission [the Investigator] prepared a report recommending that the Commission not deal with the complaint, pursuant to paragraph 41(1)(b) of the Act. The Investigator noted that the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*Income Tax Act*] sets forth an internal process for challenging decisions made by the CRA with respect to the availability of certain benefits. If a person is not satisfied of the results of that process, he or she may bring the case before the Tax Court of Canada. The Investigator also questioned whether there "are human rights issues

present in the complaint," because Ms. Maximova "has not provided any information which links the alleged acts to her marital status."

[14] On January 4, 2016, the Commission sent a letter to Ms. Maximova stating that it would not deal with her complaint. The Commission explained that it had considered the Investigator's report, as well as Ms. Maximova's submissions in response to the report, and decided that the complaint could more appropriately be dealt with according to a procedure provided for under another Act of Parliament. The decision was based on paragraph 41(1)(b) of the Act.

[15] On February 19, 2016, Ms. Maximova applied for judicial review of the Commission's decision.

III. <u>Analysis</u>

[16] In reviewing a decision of the Commission made under section 41 of the Act, a standard of correctness applies to questions of procedural fairness whereas a standard of reasonableness applies to the substance of the Commission's decision (*Exeter v Canada (Attorney General)*, 2012 FCA 119 [*Exeter*] at para 6; *Ayangma v Canada (Attorney General)*, 2012 FCA 213 at para 56).

A. *Was the Commission's decision reasonable?*

[17] Ms. Maximova submits that this is a plain and obvious discrimination matter that the Commission should deal with.

[18] Unfortunately for Ms. Maximova, this is not the case, for two basic reasons that I will explain below: (1) she did not direct her complaint to the proper legal institution; (2) what she complains about is not discrimination.

(1) The Proper Legal Institution

[19] What the Commission is trying to explain in its decision is that we have different legal institutions to deal with different legal problems. To go back to what I said earlier, each "area of the law" has its own procedures and dispute resolution mechanisms. And what people might see as a single injustice may actually be more complex when seen by lawyers. It may relate to several "areas of the law."

[20] Different areas of the law may be called to task to address the injustices suffered by Ms. Maximova. The relationship with her husband is handled through family law. The availability of the Canadian Child Tax and Energy Costs Benefits and the GST/HST credit, however, is governed by tax law. This may sound counter-intuitive. Ms. Maximova says that the benefits have nothing to do with income tax. But when Parliament created the Canadian Child Tax and Energy Costs Benefits as well as the GST/HST credit, it decided to offer them through the machinery of tax law (see section 122.6 of the *Income Tax Act*, as well as the *Energy Costs Assistance Measures Act*, SC 2005 c 49).

[21] Tax law has its own legislation and governing agency (the CRA). It also has its own dispute resolution mechanisms, which culminate in the Tax Court of Canada. The Office of the Taxpayers' Ombudsman may also investigate service-related complaints concerning the CRA.

When the Commission said that Ms. Maximova's complaint could be dealt with under the *Income Tax Act*, what it meant is that Ms. Maximova raises an issue that belongs to the area of tax law and that it should be resolved through the mechanisms of that area of the law. In doing so, it did not distort the nature of Ms. Maximova's complaint.

[22] But could Ms. Maximova's complaint also raise an issue of human rights law? In other words, can two areas of the law be relevant to her situation? That possibility was contemplated by Parliament when it adopted the Act. Section 41(1)(b) of the Act says that when a situation may be dealt with both as a human rights issue and as an issue governed by another area of the law, that other area prevails. So when a situation can be viewed as a tax law issue and a human rights issue, it must be addressed through the dispute resolution mechanisms of tax law. The Commission's decision is thus reasonable.

(2) No Discrimination

[23] This brings me to an argument that Ms. Maximova makes with great conviction: that hers is an obvious case of discrimination the Commission should have accepted.

[24] I have no doubt that Ms. Maximova feels that she has been the victim of a serious injustice. The challenge, as I have explained earlier, is to decide whether that injustice fits one particular legal concept, that of discrimination.

[25] Lawyers have argued among themselves about the meaning of discrimination. One way to resolve those disagreements is for the courts to try to coin a definition – often called a "test."

Thus, in a case called *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360, Justice Rosalie Abella of the Supreme Court of Canada said that "to demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact." This is often simplified by saying that under the Act or similar provincial legislation, discrimination is (a) an adverse treatment (b) based on a prohibited ground.

[26] Ms. Maximova is aware of that definition or "two-part test". She says that the adverse treatment is the fact that the CRA denied her benefits. She then says that the benefits were denied to her because of her marital status, namely, because the CRA thought that she was married. (Marital status is one of the prohibited grounds of distinction mentioned in the Act.)

[27] While it may be useful to express legal concepts in short and concise formulas, this may sometimes be misleading and fail to capture important nuances. While proof of discrimination requires an adverse treatment and a prohibited ground, there must also be a relevant link between the two. The nature of that link is difficult to describe and may give rise to different perspectives.

[28] Thus, from Ms. Maximova's perspective, there is a link because the CRA denied her benefits because it thought she was still married and living with her husband.

[29] But this is not the perspective adopted by the courts. Requiring information concerning one's marital status does not constitute discrimination when this is the condition on which certain social benefits are granted.

[30] Indeed, eligibility for many social benefits is based on factors such as age or marital status, which are also prohibited grounds of discrimination under the Act or, for that matter, under section 15 of the *Canadian Charter of Rights and Freedoms* [Charter]. In several cases, the Supreme Court of Canada decided that laws that conferred social benefits on the basis of factors such as age or marital status are not discriminatory (see, e.g., *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497; *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 SCR 357). Moreover, section 15(2) of the Charter states that programs aimed at bettering the conditions of disadvantaged groups are not discriminatory. In this case, Ms. Maximova does not challenge the way the benefits are calculated, including the fact that the calculation depends in part on one's marital status – the calculation is based on family income. Obviously, whose income is taken into account depends on one's marital status.

[31] Once the validity of the regime itself is accepted, requiring persons to prove their eligibility does not amount to discrimination. To take a simple example, the *Old Age Security Act*, RSC 1985, c O-9, provides that, under certain conditions, persons who have reached 65 years of age are entitled to a pension. It is not discrimination to require persons to prove their age before granting them a pension. Likewise, it was not discrimination to require Ms. Maximova to

prove her marital status, namely, that she was separated, before granting her certain benefits, where the amount of those benefits depended on her marital status.

[32] Thus, it was reasonable for the Commission to rely on the Investigator's report, who said that Ms. Maximova's situation raised "no human rights issue." In other words, it did not constitute discrimination. I note that, in expressing this conclusion, the Investigator used expressions such as "more than speculation is needed," "bald assertion" or "the complainant has not provided any information." These expressions should not be taken as a form of disrespect to Ms. Maximova or as a conclusion that she never suffered harm of any kind. They are used routinely by lawyers to say that the test for the application of a legal rule has not been met.

B. *Procedural fairness*

[33] Ms. Maximova also complains that the process followed by the Commission was unfair. Fairness is another concept that may have different meanings in everyday language and in legal language.

[34] For example, Ms. Maximova may consider that she was treated unfairly if the Commission staff was not sufficiently helpful in assisting her in the preparation of her complaint, advised her to change the manner in which she presented her complaint or, perhaps, in that process, advised her that her claim would likely fail.

[35] However, from a legal perspective, procedural fairness has a more precise meaning. It refers to those basic features of the decision-making process that ensure that each party may

present its case and respond to the other party's case. The actual scope of procedural fairness depends on the kind of decision under consideration. The Supreme Court of Canada, in a decision rendered almost thirty years ago, defined as follows the scope of the duty of procedural fairness when the Commission makes a decision under section 41:

> […] the Commission had a duty to inform the parties of the substance of the evidence obtained by the investigator and which was put before the Commission. Furthermore, it was incumbent on the Commission to give the parties the opportunity to respond to this evidence and make all relevant representations in relation thereto.
>
> (*Syndicat des employés de production du Québec et de l'Acadie v Canada (Human Rights Commission)*, [1989] 2 SCR 879 at 902)

[36] In a subsequent case, the Federal Court of Appeal clarified that the Commission is not required to disclose communications between the investigator and the respondent to the complaint (here, the CRA). It is only in exceptional circumstances, such as where the Commission makes a decision that is different from the recommendation of the investigator, that more complete disclosure is necessary (*Mercier v Canada (Human Rights Commission),* [1994] 3 FC 3 (FCA)).

[37] Ms. Maximova's main complaint with respect to procedural fairness is that she was not given a copy of a letter written by the CRA to the Investigator. I have reviewed that letter and I am of the opinion that the Investigator's report adequately summarizes it. Accordingly, procedural fairness did not require the Commission to disclose that letter to Ms. Maximova before making its decision.

[38] Ms. Maximova also submits that the Commission's two-year delay in issuing a decision was unacceptable.

[39] However, the Supreme Court of Canada has set a very high threshold with respect to delays in administrative law (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*]). There are two situations in which a delay becomes unacceptable. First, the delay may affect the fairness of the hearing itself (*Blencoe* at para 102). For example, an important witness may have died or evidence may have been lost. Second, a delay may in and of itself constitute a breach of the duty of fairness. However, this happens only when the delay is "unacceptable to the point of being so oppressive as to taint the proceedings" (*Blencoe* at para 121).

[40] In this case, the delay did not have any impact on the fairness of the proceedings before the Commission. Neither is it "oppressive" in and of itself. The complaint is dated April 3, 2014. The investigator's report is dated September 2, 2015. Ms. Maximova replied on October 1, 2015. The Commission rendered its decision on December 23, 2015 and mailed it to the parties on January 4, 2016. This amounts to 21 months. I would simply observe that in *Blencoe*, the Supreme Court of Canada decided that a longer delay was not unreasonable (*Blencoe* at paras 129-132). *Blencoe* dealt precisely with a human rights complaint.

[41] Ms. Maximova also says that the Commission created "perjured evidence." What she means is not entirely clear to me. At the hearing, her argument in this regard pointed to her disagreement with how the Commission viewed her complaint. It seems that this allegation

regarding "perjured evidence" is simply a restatement of her arguments on the merits in a different manner. There is simply no "perjured evidence" in this case.

[42] Despite her submissions, I conclude that Ms. Maximova was afforded procedural fairness.

IV. Costs

[43] In this Court, the usual rule is that costs follow the issue (*Federation of Canadian Municipalities v AT & T Canada Corp*, 2002 FCA 500, [2003] 3 FC 379). In other words, the losing party must usually pay a part of the winning party's legal fees. Nevertheless, under rule 400 of the *Federal Court Rules*, SOR/98-106, the Court retains full discretion as to the amount and allocation of costs.

[44] It is apparent that Ms. Maximova brought her complaint to the Commission and her application for judicial review before this Court on the basis of a misapprehension of the concept of discrimination. Ms. Maximova is self-represented. Had she obtained legal advice, she would have been in a better position to bridge the gap between her perception of her situation and the way the law sees it. She might have understood earlier that the proper recourse, if any, was with the institutions of tax law. However, it is well-known that it may be difficult for low-income litigants to obtain legal advice. I do not wish to punish Ms. Maximova through a costs award for her misunderstanding of the law.

[45] Given the history of this case and Ms. Maximova's circumstances, I exercise my discretion not to award costs in this case.

[46] Nevertheless, I hope that this judgment will put a definitive end to Ms. Maximova's attempts to portray her situation as being "discrimination" and will dissuade her from taking any further steps in the hopeless pursuit of her complaint.

JUDGMENT

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

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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