

Federal Court



Cour fédérale

Date: 20190325

Docket: T-362-18

Citation: 2019 FC 366

Ottawa, Ontario, March 25, 2019

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

GARY HAGERTY

Applicant

and

CANADA POST CORPORATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Gary Hagerty (the “Applicant”) seeks judicial review of a decision of the Canadian Human Rights Commission (the “Commission”), made pursuant to paragraph 41(1)(a) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the “Act”). In its decision, dated January 31, 2018, the Commission decided not to deal with the complaint on the basis that the grievance process under the Applicant’s collective agreement was reasonably available to him.

II. FACTS

[2] The following facts are taken from the Certified Tribunal Record (the “CTR”) and the affidavits filed by the parties. The Applicant filed an affidavit sworn on March 2, 2018. The Respondent filed an affidavit affirmed by Jamie Riddle, the Operations Manager of Canada Post Corporation in St. John’s, on May 31, 2018. The exhibits attached to these affidavits are also part of the evidence.

[3] Further materials that were submitted by the parties November 26, 2018, January 28, 2019 and February 2019 were addressed by way of a Direction issued on March 22, 2019. These materials were not considered in the disposition of the within application for judicial review.

[4] The Applicant has been employed as a letter carrier by Canada Post Corporation (the “Respondent”) since 1987. He has not worked since July 2, 2014.

[5] The Applicant inquired in 2015 about filing a complaint with the Commission. According to the Investigation Report (the “Report”) prepared pursuant to sections 40 and 41 of the Act, both the Applicant and the Respondent were advised by the Commission on March 30, 2015, that the Commission may decide not to deal with a complaint, pursuant to paragraph 41(1)(a) of the Act, if an alternative grievance or resolution process were available.

[6] The Applicant filed his complaint dated March 6, 2015, on February 21, 2017.

[7] In his complaint, the Applicant alleged that the employer had discriminated against him in employment on the grounds of disability by treating him in an adverse differential manner. Specifically, he alleged that the Respondent refused to allow him to return to work or accommodate a return to work because he has a disability.

[8] The Applicant is a member of the Canadian Union of Postal Workers (the “CUPW” or the “Union”). The Union filed four grievances on his behalf.

[9] The first grievance was submitted July 23, 2014, alleging that the Applicant was disciplined without just, reasonable or sufficient cause, contrary to Article 10 of the collective agreement. According to the Applicant, this discipline was communicated to him by letter dated July 2, 2014.

[10] Two more grievances were filed on April 22, 2015. In the first grievance, dated April 22, 2015, the Applicant alleged that the Respondent failed in its obligation to provide him with a work environment free of violation, harassment and discrimination, contrary to Articles 5 and 33 of the collective agreement.

[11] The second grievance dated April 22, 2015 alleged a failure by the Respondent to provide a modified duty program, contrary to Articles 20, 24, 33, 54 and 56 of the collective agreement.

[12] The Union filed another grievance on the Applicant's behalf April 5, 2017.

[13] Two of these grievances have been referred to arbitration.

[14] In attempting to schedule his grievances for arbitration, the Applicant filed three complaints with the Canada Industrial Relations Board (the "CIRB"). According to the Applicant's complaint, the CIRB issued decisions August 26, 2015 and November 23, 2015, to encourage the parties to proceed to arbitration as soon as possible.

[15] On February 21, 2017, the Applicant requested the Commission to "re-activate" his complaint.

[16] On March 28, 2017, the Commission advised the Applicant that paragraph 41(1)(a) of the Act may apply. Paragraph 41(1)(a) of the Act provides as follows:

Commission to deal with complaint

41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

Irrecevabilité

41 (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

[17] In the Report dated November 7, 2017, a Human Rights Officer noted that the grievances had not yet been scheduled for arbitration and it was unclear when they might be scheduled. The Human Rights Officer recommended that the Commission deal with the Applicant's complaint because the grievance process under the collective agreement may no longer be "reasonably available" to the Applicant.

[18] The Applicant and the Respondent were given the opportunity to respond to this Report.

[19] The Applicant responded by letter dated November 30, 2017. In his letter, the Applicant commented upon provisions of the collective agreement that addressed lack of reprisals for the Respondent.

[20] In its submissions responding to the Report, dated December 6, 2017, the Respondent argued that the labour arbitrator properly has jurisdiction over the complaint pursuant to Article 9.33 of the collective agreement, that the grievance process remains "reasonably available" to the Applicant, and that it should be exhausted prior to resorting to the process available under the Act.

[21] The Applicant, by letter dated January 10, 2018 commented on the letter from the Respondent. He claimed that the Respondent was responsible for the delay by not availing itself of other mechanisms to resolve grievances outside of arbitration, noting Article 9.50 of the collective agreement provides an accelerated mechanism to facilitate speedy settlement of grievances.

[22] On January 31, 2018, the Commission decided, pursuant to paragraph 41(1)(a) of the Act, not to deal with the Applicant's complaint. After considering the complaint form, the Report, and the submissions of the parties, the Commission found that despite the delay, the grievance process remains reasonably available to the Applicant. The decision of the Commission was communicated to the parties under cover of a letter dated February 16, 2018.

III. SUBMISSIONS

A. *Applicant's Submissions*

[23] The Applicant submits that the Commission's conclusion that the grievance process remains reasonably available to him was unreasonable. He argues that the Commission disregarded the delay in scheduling arbitration and failed to consider evidence that the grievance procedure is unreasonable.

[24] The Applicant alleges errors on the part of the Commission for urging the parties to arbitrate the grievance as soon as possible and for informing him that he may ask the Commission to re-activate his complaint if the grievances were not arbitrated within a reasonable time, without defining what constitutes a reasonable time. He also argues that the Commission acted illogically.

B. *Respondent's Submissions*

[25] The Respondent first addresses the standard of review at issue in this proceeding. It submits that the decision of the Commission is reviewable on the standard of reasonableness, relying on the decision in *Bagnato v. Canada Post* (2016), 482 N.R. 325 (F.C.A.).

[26] The Respondent submits that the Commission's decision not to deal with the Applicant's complaint pursuant to paragraph 41(1)(a) is reasonable. It argues that the Act provides that the Commission may decline to deal with a complaint where alternate procedures to resolve the dispute are reasonably available.

[27] The Respondent submits that the Commission reasonably determined that it was plain and obvious that the complaint fell under one of the grounds in section 41.

[28] The Respondent also argues that the Commission reasonably determined that the Applicant should follow the grievance process in this matter. It submits that the question whether a complainant should exhaust such alternate procedure is a question of opinion or discretion, relying on the decision in *Latif v. Canada (Canadian Human Rights Commission)* (1979), [1980] 1 F.C. 687 (F.C.A.).

[29] The Respondent argues that, in this case, the Commission acknowledged the delay and said that "despite the delay" the grievance process remains available and urged the parties to

proceed by way of arbitration. The Respondent submits that, in these circumstances, the Commission properly exercised its discretion.

[30] Finally, the Respondent argues that a decision made by the Commission pursuant to paragraph 41(1)(a) of the Act is subjective and that the scope for judicial review of such a decision is narrow, relying on the decision in *Canada Post Corporation v. Canadian Human Rights Commission* (1997), 130 F.T.R. 241 (F.C.).

IV. DISCUSSION AND DISPOSITION

[31] The first issue to be addressed is the applicable standard of review.

[32] I agree with the submissions of the Respondent that the decision of the Commission is reviewable upon the standard of reasonableness.

[33] According to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the standard of reasonableness requires that a decision be transparent, justifiable and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[34] The Federal Court of Appeal applied the standard of reasonableness in *Bagnato, supra* at paragraph 4, as follows:

It is well-settled law that decisions of this type are reviewed on the standard of reasonableness. Therefore, the judge was required to examine whether the decision was justifiable, intelligible, and

transparent, and also whether it fell within a range of reasonable outcomes. If so, he was required to deny the application, regardless of whether he would have reached a different conclusion than that reached by the Commission.

[35] I adopt the submissions of the Respondent about the role of the Commission in acting under paragraph 41(1)(a) of the Act, that is, when making a decision pursuant to paragraph 41(1)(a), the Commission first determines if an alternate process was “reasonably available” and if so, whether a complainant “ought” to exhaust that process before filing a complaint.

[36] I agree that here, the Commission reasonably concluded that the grievance process is “reasonably available” to the Applicant.

[37] The Applicant complains that the decision of the Commission, insofar as it contributes to delay in the adjudication of his grievances, is affecting his ability to pay into his pension.

[38] The issue of the Applicant’s pension is beyond the jurisdiction of this Court in addressing the within application for judicial review.

[39] The Commission, pursuant to paragraph 41(1)(a) of the Act, decided not to deal with the Applicant’s complaint at this time because “the grievance process remains reasonably available to the Complainant [Applicant] at this time”.

[40] This decision lay within the authority of the Commission to make. There is no evidence that the Commission acted improperly or unfairly in making its decision or that it considered irrelevant or immaterial factors.

[41] The Applicant has failed to show that the decision fails to meet the legal test of “reasonableness” or that the Commission otherwise committed a reviewable error. There is no basis for the Court to intervene.

[42] In the result, the application for judicial review is dismissed.

[43] The Respondent seeks its costs upon this application if it is successful.

[44] Pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”), Rule 400(1), costs lie within the full discretion of the Court. In the exercise of my discretion, I award costs to the Respondent in the amount of \$500.00, inclusive of HST, together with disbursements.

JUDGMENT in T-362-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, costs in the amount of \$500.00, inclusive of HST, together with disbursements, are awarded to the Respondent.

“E. Heneghan”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-362-18

STYLE OF CAUSE: GARY HAGERTY v CANADA POST CORPORATION

PLACE OF HEARING: ST. JOHN'S, NEWFOUNDLAND

DATE OF HEARING: SEPTEMBER 26, 2018

JUDGMENT AND REASONS: HENEGHAN J.

DATED: MARCH 25, 2019

APPEARANCES:

Mr. Gary Hagerty

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Ms. Michelle Willette

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cox and Palmer
St. John's, Newfoundland and
Labrador

FOR THE RESPONDENT