

Federal Court



Cour fédérale

Date: 20201127

Docket: T-551-19

Citation: 2020 FC 1090

Ottawa, Ontario, November 27, 2020

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MICHÈLE BERGERON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision of the Canadian Human Rights Commission [CHRC] dated January 30, 2019, in which the Applicant's complaint alleging retaliation contrary to s. 14.1 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], was dismissed pursuant to section 41(1)(d) of the CHRA.

[2] The application was heard by videoconference on November 3, 2020.

[3] For the reasons that follow, the application is dismissed.

II. **Facts**

[4] The Applicant was employed as counsel for the Department of Justice [the Department] in 1999. She worked for two years before taking a leave for a chronic illness in May 2001. In 2005, the Applicant attempted to return to work. However, the Applicant and the Department were unable to reach agreement on a suitable return to work plan. In May 2008, the Department informed the Applicant of its intention to vacate her position. The Department staffed her position in June 2008. This led the Applicant to file a series of grievances and complaints against the Department, some of which have led to litigation in this Court and the Federal Court of Appeal.

[5] The first grievance was filed by the Applicant in July 2008 [First Grievance] and alleged a failure to accommodate on the part of her employer. In September 2008, the Applicant filed a complaint with the CHRC on the same grounds as the First Grievance [Vacating Complaint].

[6] On March 3, 2009, the Applicant filed a second grievance with her employer, this time alleging retaliation by her employer because she had filed a complaint with the CHRC [Second Grievance]. On April 27, 2009, the Applicant filed another complaint with the CHRC on the same grounds as the Second Grievance [Retaliation Complaint].

[7] On December 21, 2011, the CHRC, in two separate decisions, refused to deal with the Applicant's Vacating and Retaliation Complaints. The Applicant sought judicial review of both decisions. The Applicant's challenge of the CHRC's decision relating to the Retaliation Complaint was successful on judicial review. The Court found that the CHRC breached procedural fairness when it failed to consider the appropriate Section 40/41 Report and sent the Retaliation Complaint back for redetermination: *Bergeron v Canada (Attorney General)*, 2013 FC 301. Justice Zinn dismissed the judicial review of the Vacating Complaint and the decision was upheld by the Federal Court of Appeal: *Bergeron v Canada (Attorney General)*, 2015 FCA 160. Leave to the Supreme Court of Canada was denied.

[8] On August 13, 2014, the CHRC rendered its reconsideration decision in relation to the Retaliation Complaint. The Applicant sought judicial review of the decision on the basis that the CHRC had failed to consider her 2011 submissions on the Section 40/41 Report. On January 19, 2017, this Court determined that the CHRC breached procedural fairness by failing to consider the Applicant's 2011 submissions on the Section 40/41 Report and failed to consider the Applicant and Respondent's 2014 submissions in response to the Supplementary Section 40/41 Report. Justice Brown sent the Retaliation Complaint back to the CHRC for redetermination: *Bergeron v Canada (Attorney General)*, 2017 FC 57.

[9] On January 30, 2019, the CHRC rendered its second reconsideration decision in which, for a third time, it decided not to deal with the Applicant's Retaliation Complaint because it had already been dealt with through the grievance process, pursuant to s 41(1)(d) of the *CHRA*.

[10] The Applicant now seeks judicial review of the CHRC's January 30, 2019 decision, this time on the basis that the decision is unreasonable, not on procedural grounds.

III. **Issue**

[11] The sole issue to be determined is whether the decision of the CHRC not to deal with the Applicant's Retaliation Complaint was reasonable or not.

IV. **Relevant Legislation**

[12] The following legislative provision of the *Federal Courts Act*, RSC 1985, c F-7 is relevant:

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

[...]

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

- (a)** order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[...]

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

- a)** ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

[...]

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[...]

[13] The following legislative provisions of the *Canadian Human Rights Act*, RSC 1985, c H-6 are relevant:

Retaliation

14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

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

[...]

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

[...]

Représailles

14.1 Constitue un acte discriminatoire le fait, pour la personne visée par une plainte déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée.

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 :

[...]

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

[...]

Report

44 (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

[...]

Idem

(3) On receipt of a report referred to in subsection (1), the Commission

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e);
or

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry

Rapport

44 (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

[...]

Idem

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

b) rejette la plainte, si elle est convaincue :

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

[14] The following legislative provisions of the *Federal Public Service Labour Relations Act*, SC 2003, c 22, s 2 [*PSLRA*] are relevant:

Right of employee

208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award; or

(b) as a result of any occurrence or matter affecting

Droit du fonctionnaire

208 (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :

a) par l'interprétation ou l'application à son égard :

(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,

(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

his or her terms and conditions of employment.

Limitation

(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*.

Limitation

(3) Despite subsection (2), an employee may not present an individual grievance in respect of the right to equal pay for work of equal value.

Limitation

(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

Limitation

(5) An employee who, in respect of any matter, avails himself or herself of a complaint procedure established by a policy of the employer may not present an individual grievance in respect of that matter if the policy expressly provides that an employee who avails himself or herself of the

Réserve

(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la *Loi canadienne sur les droits de la personne*.

Réserve

(3) Par dérogation au paragraphe (2), le fonctionnaire ne peut présenter de grief individuel relativement au droit à la parité salariale pour l'exécution de fonctions équivalentes.

Réserve

(4) Le fonctionnaire ne peut présenter de grief individuel portant sur l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

Réserve

(5) Le fonctionnaire qui choisit, pour une question donnée, de se prévaloir de la procédure de plainte instituée par une ligne directrice de l'employeur ne peut présenter de grief individuel à l'égard de cette question sous le régime de la présente loi si la

complaint procedure is precluded from presenting an individual grievance under this Act.

Limitation

(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Order to be conclusive proof

(7) For the purposes of subsection (6), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, a direction or a regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Reference to adjudication

209 (1) An employee who is not a member as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act* may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

ligne directrice prévoit expressément cette impossibilité.

Réserve

(6) Le fonctionnaire ne peut présenter de grief individuel portant sur une mesure prise en vertu d'une instruction, d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Force probante absolue du décret

(7) Pour l'application du paragraphe (6), tout décret du gouverneur en conseil constitue une preuve concluante de ce qui y est énoncé au sujet des instructions, directives ou règlements établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Renvoi d'un grief à l'arbitrage

209 (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un membre, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du Canada*, peut renvoyer à l'arbitrage tout grief individuel portant sur :

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(c) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(d) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(ii) deployment under the *Public Service Employment Act* without the employee's consent where consent is required; or

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la *Loi sur la gestion des finances publiques* pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) la mutation sous le régime de la *Loi sur l'emploi dans la fonction publique* sans son consentement alors que celui-ci était nécessaire;

d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

Application of paragraph (1)(a)

(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

Designation

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).

Application de l'alinéa (1)a)

(2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)a), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.

Désignation

(3) Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)d), tout organisme distinct.

V. **Analysis**

A. *Standard of Review*

[15] There is no controversy that the decision not to deal with the Applicant's Retaliation Complaint should be reviewed on the standard of reasonableness. It was confirmed in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30, that reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions. None of the exceptions to the presumption arise in this case.

[16] As held in *Bergeron FCA*, the margin of appreciation afforded to the Commission is quite broad owing to the factual and policy-based task of the Commission: *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at paras 90-99. The Commission gets "great latitude" when courts review decisions such as this: *Sketchley v Canada*

(*Attorney General*), 2005 FCA 404 at para 38 (screening decisions under section 41 are to be “reviewed with a high degree of deference”).

B. *Is the Commission’s decision not to deal with the Applicant’s complaint reasonable?*

[17] The Applicant’s position is that it was unreasonable for the CHRC to determine that the Associate Deputy Minister [ADM] had already dealt with all the human rights complaints in the two grievance decisions she issued. The Applicant submits that this is patently false because the first grievance decision did not relate to the retaliatory acts. In the second grievance decision, the ADM held that the allegations of retaliation were unfounded, without specifically addressing all of the Applicant’s allegations. These alleged a refusal to provide the Applicant with employment related information, a refusal to accept the Applicant’s payments for extended medical benefits and an alleged threat to place the Applicant on a priority staffing list.

[18] The Applicant further submits that it was unreasonable for the CHRC to conclude that the Retaliation Complaint was frivolous, vexatious or in bad faith because a complaint that has not received a final decision cannot reasonably be found to be vexatious. Nor was the internal grievance process an adequate alternate redress. A bare assertion from an employer accused of retaliation that the allegations against them are unfounded should not be accepted as an adequate alternate redress. The principle articulated in *British Columbia (Workers’ Compensation Board) v Figliola*, 2011 SCC 52 [*Figliola*] should not be used to permit a respondent to exonerate itself of a retaliation complaint.

[19] In this context, the role of the CHRC is that of assessing the sufficiency of the evidence before it, in order to determine whether an inquiry is warranted, having regard to all the facts: *Kirkpatrick v Canada (Attorney General)*, 2019 FC 196 at para 24 [*Kirkpatrick*]. The CHRC does not need to weigh the evidence carefully as if deciding on the merits; rather, the CHRC must be satisfied that an inquiry into the complaint is warranted: *Kirkpatrick* at para 28. The Commission's task under paragraph 41(1)(d) and 44(3) of the *CHRA* is to screen out complaints where adequate redress elsewhere has been had. The concept of adequacy is highly judgmental and fact-based, informed in part by the policy that the Commission should not devote scarce resources to matters that have been, in substance, addressed elsewhere or that could have been addressed elsewhere. On this last-mentioned point, a failure to pursue adequate redress elsewhere or to pursue that adequate redress to its full extent can be invoked under paragraph 41(1)(d).

[20] In *Figliola*, above, the Supreme Court addressed the question of how a human rights tribunal should exercise its discretion to refuse to hear a complaint when another tribunal with concurrent human rights jurisdiction has disposed of the complaint. The Supreme Court set out three factors for assessing whether a human rights complaint has been appropriately dealt with in an alternative process: (1) was there concurrent jurisdiction to decide human rights issues; (2) was the legal issue in the alternative forum essentially the same as the legal issue in the human rights complaint; and (3) did the complainant have an opportunity to know the case to meet and have a chance to meet it?

[21] The Applicant argues that *Figliola* is distinguishable to the case at hand because it did not address the circumstance in which the decision-maker in the alternative proceeding was also the

respondent to the human rights complaint. To the contrary, the Applicant contends that the Court's reasons in *Figliola* assume that the decision-maker is distinct and independent from the parties. She relies on *Vaughan v Canada*, 2005 SCC 11 for the proposition that there is an exception to exclusive jurisdiction of the grievance procedure in cases that raise an obvious conflict of interest for the employer. And relying on *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, the Applicant argues that the CHRC's decision not to deal with the complaint effectively permits the employer to become the judge of its own case and exonerate itself from liability for retaliation under the *CHRA*.

[22] In *Vaughan*, the Supreme Court cited the example of whistle-blowing cases, where courts have been reluctant to hold that in such cases employees' only recourse was to grieve in a procedure internal to the very department they blew the whistle on. However, the Court clearly stated that a process is not deficient solely because the decision-maker is a departmental official: *Vaughan* at para 37.

[23] In *Penner*, the Court identified a potential unfairness if the outcome of the disciplinary proceeding could foreclose the complainant's chance to pursue a personal remedy in a civil action. Neither of those circumstances apply here. This matter does not involve a whistle-blowing complaint and the Applicant was not denied access to independent adjudication.

[24] Here, the ADM had jurisdiction to decide human rights issues under subsection 208(2) of the *PSLRA* and the ability to grant relief. There is no basis for a finding that the ADM was biased against the Applicant or did not decide the grievance impartially. The issues addressed in the

grievance process were essentially the same as those raised in the Retaliation Complaint. The Applicant had the opportunity to know the case she had to meet and multiple opportunities to meet it, although she chose not to take advantage of several invitations to discuss her grievance. Thus, in my view, the principles expressed in *Figliola* are applicable.

[25] Under subsection 209(1) of the *PSLRA*, an employee can refer an individual grievance against disciplinary action to adjudication. The Applicant chose not to do that apparently because the employer indicated that it would raise a jurisdictional objection. It was open to the employer to do so but such an objection would not have been determinative unlike the situation, which caused the Supreme Court concern in *Penner*. Nothing precluded the Applicant from presenting counter arguments.

[26] This Court must afford the Commission a good margin of appreciation over its factual assessments, balancing and weighings. Here, the grievance officer had jurisdiction to assess human rights complaints pursuant to section 208(2) of the *PSLRA*, which she did. She had the ability to grant adequate relief. The issues in the grievance were essentially the same as those raised in the complaint and the Applicant had an opportunity to know the case to meet and the chance to meet it. In light of this, the Commission reasonably assessed the complaint against the standard set out in *Figliola*.

[27] While the grievance officer did not explicitly address three of the Applicant's complaints, she concluded that the allegations of discrimination, disciplinary and retaliatory acts by the employer were unfounded. It is well established that the reasons of an administrative decision-

maker do not need to address every matters raised: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; *Bergeron FCA*, para 58.

[28] Given the comprehensive investigation report prepared for the Commission that documented the history of the grievance process and forms part of its reasons, it was reasonable for the Commission to find that it need not deal with the complaint.

VI. Conclusion

[29] I am satisfied that the CHRC's decision not to deal with the Applicant's complaint is reasonable and supported by the record. The substance of the Applicant's complaint was addressed in the grievance process where she had the opportunity to have the issues considered and to obtain relief. She was not barred from seeking adjudicative relief as an alternative but chose not to pursue that avenue. In essence, not satisfied with the outcome of the grievance, she sought another forum to seek a remedy. It was reasonable for the Commission to decline to deal with the complaint.

[30] While the Respondent has sought costs, I will exercise my discretion not to award them given the circumstances of this matter.

JUDGMENT IN T-551-19

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

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-551-19

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