Federal Court Cour fédérale

Date: 20250102

Docket: T-2423-23

Citation: 2025 FC 1

Ottawa, Ontario, January 2, 2025

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KIMBERLEY GILLESPIE

Applicant

and

CANADA REVENUE AGENCY

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Kimberley Gillespie, seeks judicial review of a decision of the Canadian Human Rights Commission (the "Commission") dated October 10, 2023, dismissing the Applicant's complaint against her employer, the Canada Revenue Agency ("CRA"), pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 (the "Act").

[2] The Applicant submits that the Commission's decision is unreasonable for erring in its application of paragraph 41(1)(d) of the Act and failing to provide a coherent and rational chain of analysis for dismissing her complaint.

[3] I agree. For the reasons that follow, this application for judicial review is granted.

II. **Background**

A. *Statutory Framework*

[4] The Commission is the screening body for the Canadian Human Rights Tribunal. The Commission's purpose is to "decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts" (*Cooper v Canada (Human Rights Commission)*, 1996 CanLII 152 at para 53 (SCC)).

[5] To assess whether a human rights complaint should be dismissed, the Commission may designate an investigator to produce a report of a complainant's allegations and provide a recommendation on next steps (Act, ss 43, 44(1)).

[6] The Commission may dismiss a complaint if it is satisfied that "the complaint is trivial, frivolous, vexatious, or made in bad faith" (Act, s 41(1)(d)).

[7] The Commission considers a proceeding to be vexatious if it has previously been addressed in another process (*Mulligan v Canadian National Railway Company*, 2015 FC 532 at

para 26 (“*Mulligan*”); *Zulkoskey v Canada (Employment and Social Development)*, 2016 FCA 268 at para 17 (“*Zulkoskey*”)).

B. *Facts*

[8] The Applicant is an employee of the CRA.

[9] Since June 2017, the Applicant has required accommodations for anxiety and post-traumatic stress disorder. Her accommodations stipulate that the Applicant’s supervisor “will be mindful of situations which may cause [the Applicant] stress.” Similarly, the CRA was recommended to “minimize confrontational/emotional situations.”

[10] Between June 2017 and February 2018, the Applicant experienced several incidents in which she felt belittled and attacked by her supervisors at the CRA. These incidents include an account review meeting in which the Applicant’s supervisors questioned whether the Applicant had completed her assigned tasks on a specific date; a meeting where the Applicant reports to have been “yelled at” by a supervisor; a discussion about accommodations which left the Applicant “with a sinking feeling that there was no help” and “regret[ting] reaching out to get help for her disability”; and an incident where a supervisor forcefully closed the Applicant’s cabinet drawer and asked about the Applicant’s accommodations in front of her co-workers.

[11] Around this time, the Applicant initiated a series of grievances and internal processes.

[12] Between March 2018 and February 2020, the Applicant submitted three grievances pursuant to the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 ("*FPSLRA*"): a workplace violence grievance, which was denied due to insufficient evidence; a harassment grievance, which was also denied due to insufficient evidence; and a grievance alleging that the CRA had violated her individual accommodation plan. Only the workplace violence grievance and harassment grievance are relevant to this matter.

[13] Aside from the *FPSLRA* framework, the Applicant initiated two processes internal to the CRA: a workplace violence process, which was dismissed following a review by an external investigator; and a process involving the CRA's Discrimination and Harassment Centre of Expertise ("DHCE"), which was dismissed following a screening review by the DHCE.

[14] By March 2022, the Applicant's relevant grievances and internal processes had been dismissed.

[15] In August 2022, the Applicant submitted a complaint form to the Commission, alleging that the CRA discriminated against her on the basis of disability (Act, s 7).

[16] In August 2023, a report was prepared pursuant to subsection 44(1) of the Act (the "Report"). The Report recommended that the Applicant's complaint be dismissed as other procedures "ha[d] addressed the allegation of discrimination overall."

[17] In October 2023, the Commission dismissed the Applicant's complaint, finding that "it is not plain and obvious that there was unfairness to the Complainant in the internal-grievance

processes. It is also plain and obvious that the essence of this complaint was addressed in these internal-grievance processes" (the "Dismissal Decision"). This is the decision under review.

III. **Issues and Standard of Review**

[18] I frame the issues in this application as follows:

A. Is the Dismissal Decision unreasonable?

B. Did the Commission breach their duty of procedural fairness?

[19] The parties submit that the applicable standard of review for the substance of the Dismissal Decision is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 25, 86-87 ("*Vavilov*")). I agree.

[20] The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General*), 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). I find that this conclusion accords with the Supreme Court of Canada's decision in *Vavilov* (at paras 16-17).

[21] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible, and justified (*Vavilov* at para 15). A

reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[22] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100).

[23] Correctness, by contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 (at paras 21-28; see also *Canadian Pacific Railway Company* at para 54).

IV. **Analysis**

A. *The Internal Processes were Not Capable of Addressing the Applicant's Human Rights Allegations*

[24] The Applicant submits that the Dismissal Decision is unreasonable. According to the Applicant, the Commission erred in determining that her allegations of human rights contraventions had been addressed pursuant to paragraph 41(1)(d) of the Act, as the internal processes were not capable of addressing human rights issues and the Applicant's union unilaterally elected not to pursue her grievances to arbitration. The Applicant further asserts that the Commission misapplied the "plain and obvious" test under paragraph 41(1)(d) of the Act. Lastly, the Applicant submits that the Dismissal Decision is internally incoherent, as the Commission failed to assess the grievances independently of the internal processes and found no deficiencies in either procedure despite clear evidence to the contrary.

[25] The Respondent submits that the Dismissal Decision is reasonable. According to the Respondent, the Commission reasonably found that the Applicant's human rights complaint had been addressed in the internal processes and grievance process. The Respondent submits that the CRA appropriately applied the "plain and obvious" test, duly considered the evidentiary record, and provided a rational chain of analysis for dismissing the Applicant's complaint.

[26] In my view, the Applicant's complaint could not have been addressed through the internal processes, as procedural deficiencies rendered both the workplace violence process and the DHCE process incapable of "deal[ing] with the substance of the" Applicant's human rights allegations (*Bharadwaj v Peel District School Board*, 2017 HRTO 587 at para 8). The investigator of the workplace violence process was retained by the CRA. Similarly, the harassment process was assessed by the DHCE, a body internal to the CRA. During the DHCE process, the Applicant was not interviewed. At the close of the workplace violence process, the investigator explicitly stated that "[i]ncidents involving…discriminatory treatment would

generally not be considered Workplace Violence" and "[c]omplaints involving" this issue "are generally more appropriately addressed by other legislation or grievance provisions under a collective agreement." Consequently, I find that the DHCE process deprived the Applicant of a meaningful opportunity to present her case, the workplace violence process explicitly did not consider the issue of discrimination, and both internal processes lacked an independent decision-maker. The Commission's determination that "[t]here is no information that the internal processes did not have formal guarantees of procedural fairness, impartiality or independence" is unintelligible in light of these facts.

[27] The deficiency of the internal processes in this case accords with the general principle that internal workplace mechanisms cannot adequately address human rights issues, as they are instituted and controlled by employers. Although the Canadian Human Rights Tribunal has not explicitly stated that internal processes are incapable of rendering a complaint "trivial, frivolous, or vexatious" pursuant to paragraph 41(1)(d) of the Act, the Human Rights Tribunal of Ontario ("HRTO") and the British Columbia Human Rights Tribunal ("BCHRT") have determined that internal mechanisms do not constitute valid alternatives to the human rights adjudication process (*Armstrong v Ontario (Revenue)*, 2012 HRTO 1527 para 9 ("*Armstrong*"); *Pihl v Westwinn Group and another*, 2012 BCHRT 427 at para 24 ("*Pihl*")). In my view, the reasoning of the HRTO and BCHRT applies to the present proceeding. As in *Armstrong* and *Pihl*, the Applicant in this case participated in internal processes controlled by her employer, the party accused of infringing her human rights. The Commission cannot now rely on these internal processes to find that the Applicant's human rights complaint was meaningfully assessed in the manner and to the standard required under the Act.

[28] The non-judicial nature of the internal processes is not a relevant factor in this assessment. Highlighting the court cases cited by the Respondent in the Dismissal Decision, including *Ontario v Lipsitz*, 2011 ONCA 466, *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, *Aba-Alkhail v University of Ottawa*, 2013 ONCA 633, and *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, the Applicant submits that the Dismissal Decision is not truly rooted in paragraph 41(1)(d) of the Act but "[i]nstead …in the common law doctrines of issue estoppel and abuse of process." To the Applicant, as these doctrines are only concerned with prior judicial proceedings and the internal processes were non-judicial in nature, the Commission erred by considering the internal processes in the Dismissal Decision.

[29] I am not persuaded by this argument. Although the Commission refers to court cases about issue estoppel and abuse of process in the Dismissal Decision, the Commission also cites jurisprudence and statutory provisions concerning its discretion to screen out complaints that are "vexatious" within the meaning of paragraph 41(1)(d) of the Act (*Verhelle v Canada Post Corporation*, 2010 FC 416 at para 11 ("*Verhelle*"); *Snook v Canada Post Corporation*, 2014 FC 351 at para 19 ("*Snook*")). In my view, the Dismissal Decision is rooted in this exercise of discretion. The Dismissal Decision resembles an issue estoppel or abuse of process proceeding not because it turns on these issues, but because issue estoppel and abuse of process bear a superficial resemblance to the particular meaning of "vexatious" in the Act, namely, a proceeding that has been previously addressed in another process (*Zulkoskey* at para 16; *Mulligan* at paras 26, 33, 35).

[30] Consequently, the legal question that was before the Commission was whether the Applicant's complaint should be dismissed pursuant to paragraph 41(1)(d) of the Act. Both judicial and non-judicial processes are relevant to this inquiry. The Commission erred in this case not by applying the doctrines of issue estoppel and abuse of process, but by finding that the internal processes at issue were capable of addressing the Applicant's allegations of human rights contraventions.

B. *The Grievances Unilaterally Withdrawn by the Applicant's Union Did Not Address the Applicant's Human Rights Complaint*

[31] With respect to the grievance process, I agree with the Applicant that the Dismissal Decision is unreasonable given the unilateral decision of the Applicant's union to not pursue her grievances to adjudication. The circumstances in which "an employee…may refer to adjudication an individual grievance…that has not been dealt with to the employee's satisfaction" are listed in subsection 209(1) of the *FPSLRA*. The Applicant's situation is not captured by these provisions. As a result, the Applicant was barred from advancing her grievances once the union elected not to do so.

[32] The Commission's determination that the grievance process had addressed the Applicant's human rights complaint within the meaning of paragraph 41(1)(d) of the Act therefore constitutes a reviewable error. Unions regularly withdraw grievances for reasons other than the merits of an employee's claims. Reasonable justifications for a union to withdraw a grievance have included "broader labour relations concerns," "the costs incurred" by arbitration, and even the unwillingness of "an employee…to continue to work for the employer" (*Chris*

Bennett v Millwright Regional Council of Ontario, 2023 CanLII 97006 at para 22 (ON LRB); *Re v Children's and Women's Health Centre of British Columbia*, 2004 CanLII 48825 at para 22 (BC LRB); *Stewart v United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, Local 675*, 2003 CanLII 9592 at para 5 (ON LRB)). In evaluating these factors, unions are not even "require[d]…to be correct in [their] assessment of [a] grievance" for a withdrawal decision to be valid at law (*Blakely v Canadian Marine Officers' Union*, 2003 CIRB 241 at para 37).

[33] What is required for a union to discharge its duty of fair representation evidently differs from what is required for a human rights complaint to be "addressed" pursuant to human rights legislation (*Paterno v Salvation Army, Centre of Hope*, 2010 HRTO 10 at para 10; *McCue v University of British Columbia (No 2)*, 2014 BCHRT 57 at para 36; *List v Parmalat Canada Inc*, 2019 HRTO 529 at para 12). Although it was within the Commission's ambit to determine that the Applicant's human rights complaint had been meaningfully addressed through the grievance process in this case, the Commission was required to provide at least some justification for this finding.

[34] But no substantive justification was provided. The Report and Dismissal Decision merely state that the Applicant's allegations "were investigated by an external investigator," screened by the DHCE, and found to be unsupported by the evidence. These factors pertain to the internal processes, rather than the grievance process. Even if they were relevant to the grievance process, they would be insufficient to overcome the issue of the union's unilateral decision to not pursue the Applicant's grievances to arbitration.

[35] I agree with the Applicant that the jurisprudence cited by the Commission on this issue is distinguishable from the present case. Citing *Verhelle* and *Snook*, the Commission found that it "may refuse to deal with [a] complaint" if "the essence of a complaint has been addressed through another redress process." However, *Verhelle* and *Snook* concerned grievances that had proceeded to arbitration (*Verhelle* at para 5; *Snook* at para 8). The grievances in this case did not pass through a "redress process" with similar procedural safeguards or the capacity to meaningfully address human rights allegations. Similarly, the Report states that paragraph 41(1)(d) of the Act "may apply in situations where a union has decided not to pursue a grievance to arbitration" and "does not require that a grievance be decided by an arbitrator for the Commission to screen out a complaint," as noted by this Court in *Mulligan* and *Bergeron v Canada (Attorney General)*, 2013 FC 301 ("*Bergeron*"). However, the applicant in *Mulligan* "refused, for no reason that is established, to engage in [the] grievance process" (at para 37). The applicant in *Bergeron* was able to refer one of her grievances to arbitration independently of her union (at para 13). *Verhelle*, *Snook*, *Mulligan*, and *Bergeron* are clearly distinguishable from this case, where the union unilaterally withdrew the Applicant's grievances despite her persistent efforts to have her complaint "addressed" within the meaning of paragraph 41(1)(d) of the Act.

C. *The Commission Misconstrued the Plain and Obvious Standard*

[36] In addition to erring in its assessment of the previous processes, I agree with the Applicant that the Commission mischaracterized the legal test applicable under paragraph 41(1)(d) of the Act.

[37] As stated by this Court in *Stukanov v Canada (Attorney General)*, 2021 FC 49, "[t]he test to be applied…is whether it is 'plain and obvious' the complaint cannot succeed, assuming the facts alleged in the complaint are true" (at para 40 [citations omitted]). In other words, the Commission was required to determine "whether it was 'plain and obvious' that there was no *prima facie* discrimination" (*Hicks v Canada (Attorney General)*, 2008 FC 1059 at para 22).

[38] However, the standard applied by the Commission in this case was whether it was "plain and obvious" that "the internal and grievance processes were incapable of addressing the [Applicant]'s allegations," that "the [Applicant] was not heard or that there was a lack of impartiality or independence," or that "there was unfairness to the [Applicant]." The Commission also considered whether it was "plain and obvious that the essence of this complaint was addressed" in previous proceedings. Although these questions may be relevant to the paragraph 41(1)(d) analysis, they do not displace the primary issue of whether the Applicant failed to establish a *prima facie* case of discrimination.

[39] Reading the Dismissal Decision generously, it is possible to find that the Commission turned its mind to the issue of *prima facie* discrimination. However, the Commission's assessment of this issue was inadequate and unintelligible in light of the record. In the Dismissal Decision, the Commission stated that the Applicant's allegations of workplace violence and harassment were not substantiated. At no point did the Commission consider whether these findings met the "plain and obvious" standard.

D. *The Dismissal Decision is Incoherent*

[40] Overall, I agree with the Applicant that the Dismissal Decision lacks a coherent and rational chain of analysis and is not justified with respect to the facts and law (*Vavilov* at para 85). The Commission erred in its assessment of the previous proceedings. The Commission applied the wrong legal test. Furthermore, the Commission conflated the grievance and internal processes, finding that the flaws in one mechanism were masked by the strengths of the other. For instance, the Commission found:

> Although the Complainant states that she was not interviewed as part of the DHCE review, that review considered her version of events and she was heard during the grievance process, which also dealt with allegations of adverse differential treatment and harassment. The final level grievance decision considered the DHCE's letter and the report of the independent investigator. It is therefore not plain and obvious that the Complainant was not heard or that there was a lack of impartiality or independence in the internal or grievance processes.

[41] The Applicant rightly notes that this constitutes circular and illogical reasoning. That the Applicant was heard in the grievance process does not resolve the fact that she was not interviewed by the DHCE. Furthermore, reliance on a deficient process perpetuates, rather than remediates, a decision's flaws. The union's reliance on the findings of the DHCE and workplace violence investigator weighs against the reasonableness of its decision to withdraw the Applicant's grievances, as these findings were produced through internal processes controlled by the CRA.

[42] Consequently, I agree with the Applicant that the Dismissal Decision is unreasonable. Since this finding is determinative of this application, there is no need to address the secondary issue of procedural fairness.

V. **Costs**

[43] The parties agree to costs in the amount of $2,500. I find this figure to be reasonable. As this application for judicial review is granted, costs in the amount of $2,500 are awarded to the Applicant.

VI. **Conclusion**

[44] For these reasons, I find that the Dismissal Decision is unreasonable. The Commission's reasons contain several reviewable errors, including the mischaracterization of the legal test pursuant to paragraph 41(1)(d) of the Act and the absence of a coherent and rational chain of analysis for the Commission's findings (*Vavilov* at paras 85, 112). I therefore grant this application for judicial review, quash the Commission's decision, and remit the matter for re-determination.

JUDGMENT in T-2423-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The decision under review is quashed and the matter is remitted for re-determination.

3. Costs are awarded to the Applicant in the amount of $2,500.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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