Date: 20080131

Docket: T-623-07

Citation: 2008 FC 114

Ottawa, Ontario, January 31, 2008

Present: The Honourable Mr. Justice Shore

BETWEEN:

CHRISTINE PICHÉ

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

INTRODUCTION

[1] All of this is based on a procedural rather than substantive element, because this third grievance filed by the applicant is the subject of judicial review on an issue of an expired time limit and all of the elements to which the applicant ascribes her distress and anguish are tied to a situation which is not procedural but rather substantive, regarding which she did not file a grievance. The applicant is bound by the procedural limits where there is no mention of the reason for her sick or other leave. The issue of the alleged discrimination was not addressed because it was never submitted.

JUDICIAL PROCEDURE

[2] This is an application for judicial review of the decision by the Human Rights Commission (Commission), dated March 15, 2007. This application was originally a harassment and discrimination complaint to the Commission, filed on August 11, 2005, by the applicant, against her employer, Correctional Service Canada (CSC).

FACTS

[3] The applicant, Christine Piché, and her partner are work colleagues at the La Macaza Institution which is managed by CSC.

[4] On October 18, 2003, Ms. Piché discovered that her partner was having an affair with a work colleague.

[5] On October 23, 2003, Ms. Piché sent the colleague with whom her husband had the affair a note advising her to not interfere with her relationship. The local management was informed of this note by Ms. Piché's partner and work colleague. Following this incident, the employer took measures to limit Ms. Piché's access to the workplace. Ms. Piché was not however made aware of this restrictive measure. Further, management advised all CSC officers of Ms. Piché's marital situation and conferred them a power to intercept her in the event that she were to show up at work (applicant's record (AR), volume 1, summary of the complaint, page 29, paragraph 4.)

[6] Ms. Piché alleges that on October 24, 2003, a Sûreté du Québec officer came to get her at her home and escorted her to the hospital for a psychiatric assessment following complaints received from penitentiary employees. The applicant was committed for three days for a psychiatric assessment.

[7] On September 22, 2003, Ms. Piché began a prolonged sick leave, according to the Court record.

[8] On January 29, 2004, Ms. Piché submitted a certificate from her family doctor recommending that she return to work on February 1, 2004.

[9] On January 30, 2004, the employer refused to allow Ms. Piché's return to work on February 1, and sought the expert opinion of Health Canada. Ms. Piché did not file a grievance regarding the employer's refusal.

[10] After four months, Health Canada determined that Ms. Piché [TRANSLATION] "is able to work without restriction", however, Health Canada recommended a gradual return to work beginning on May 17, 2004. (AR, volume I, summary of the complaint, pages 29-30 and section 41 report, dated October 19, 2006, page 26, paragraph 12.)

[11] On November 16, 2004, Ms. Piché filed a grievance (second grievance #04-27554-352) seeking to recover the loss of salary and benefits resulting from her absence from work from

February 1 to May 16, 2004, and resulting from the gradual return to work from May 17 to August 31, 2004. The applicant withdrew this grievance before the hearing at the first level.

[12] A few days later, Ms. Piché applied for leave for the period from February 1 to August 31, 2004. This leave was refused on January 18, 2005; the employer refused this leave because this type of leave must be requested and approved before this leave begins.

[13] On February 1, 2005, Ms. Piché filed a new grievance (third grievance # 05-2188-352) contesting her employer's refusal of her leave request for the medical contestation period. The validity of grievance # 05-2188-352 was not recognized at the three levels because it was considered out of time.

[14] The union recommended to the complainant that she not bring the third grievance #05-2188-352 before a grievance adjudicator because this new grievance essentially addressed the same matter as the second grievance #04-27554-352 that she had withdrawn earlier. The union believed that the grievance regarding the leave request would fail.

[15] On August 11, 2005, Ms. Piché filed a complaint with the Commission alleging that CSC subjected her to differential treatment based on her martial status, her family status and her disability (perceived mental disorder).

[16] In January 2006, the Commission informed the parties that it would decide the complaint filed on August 11, 2005, despite the fact that it was filed out of time. The Commission informed the parties, however, that it would not decide the complaint at that time because Ms. Piché had first to exhaust the other grievance recourse available to her.

[17] Ms. Piché provided the Commission with a copy of the letter in which her union had explained the refusal to bring the grievance to adjudication. She asked the Commission to decide her complaint.

[18] On October 19, the Commission's investigator issued his report pursuant to section 41. After analyzing Ms. Piché's complaint and the facts surrounding the three grievances that she filed, the investigator recommended that the Commission not decide the complaint pursuant to paragraph 41(1)(*d*) of the *Canadian Human Rights Act*, R.S. 1985, c. H-6 (CHRA).

[19] On December 3, 2006, Ms. Piché filed written submissions in response to the investigator's report.

[20] On March 5, 2007, the Commission, however, decided not to decide Ms. Piché's complaint, pursuant to paragraph 41(1)(*d*) of the CHRA, because [TRANSLATION] "it was possible to decide the allegations of discrimination through the other remedy, grievances under the collective agreement" (AR, volume I, Canadian Human Rights Commission decision, page 5.)

[21] On April 16, 2007, Ms. Piché filed this application for judicial review (AR, volume I, notice of application, page 1).

RELEVANT LEGISLATION

[22] The CHRA provisions relevant in this case are the following:

Harassment	**Harcèlement**
14. (1) It is a discriminatory practice,	**14.** (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu:
. . .	[. . .]
(*c*) in matters related to employment,	*c*) en matière d'emploi.
to harass an individual on a prohibited ground of discrimination.	

[23] Despite the fact that the result would have been the same, the Commission should have based its finding on paragraph 41(1)(*a*) and not 41(1)(*d*) because, as the respondent himself noted [TRANSLATION] "the Commission may determine . . . that the grievance settlement procedure must first be exhausted" (respondent's record, memorandum of fact and law, page 10, paragraph 33):

Commission to deal with complaint	**Irrecevabilité**
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	**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

Commission that	suivants:
(*a*) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	*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;
. . .	[. . .]
(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith; or	*d*) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
. . .	[. . .]

[24] Quebec's *Charter of human rights and freedoms*, R.S.Q. C-12, defines discrimination:

Discrimination forbidden	**Discrimination interdite**
10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.	**10.** Toute personne a droit à la reconnaissance et à l'exercice, en pleine égalité, des droits et libertés de la personne, sans distinction, exclusion ou préférence fondée sur la race, la couleur, le sexe, la grossesse, l'orientation sexuelle, l'état civil, l'âge sauf dans la mesure prévue par la loi, la religion, les convictions politiques, la langue, l'origine ethnique ou nationale, la condition sociale, le handicap ou l'utilisation d'un moyen pour pallier ce handicap.
Discrimination defined	**Motif de discrimination**

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.	Il y a discrimination lorsqu'une telle distinction, exclusion ou préférence a pour effet de détruire ou de compromettre ce droit.
Harassment	**Harcèlement interdit**
10.1. No one may harass a person on the basis of any ground mentioned in section 10.	**10.1.** Nul ne doit harceler une personne en raison de l'un des motifs visés dans l'article 10.

ARGUMENTS

The crux of this application for judicial review

[25] Ms. Piché argues that the Commission erred in law when it accepted the investigator's recommendation to not decide the complaint because the grievances could be used to decide the allegations of discrimination.

[26] She contends that the only grievance related to the allegations raised in the complaint and decided by the employer had been dismissed because the grievance was out of time; therefore, according to Ms. Piché, contrary to what the Commission stated in its decision, her grievances could not be used to decide the allegations of discrimination.

[27] Ms. Piché also argues that the questions were not decided on the merits by any decision-maker and the Commission did not proceed with an analysis – not even a screening – of her allegations.

[28] Ms. Piché also submits that the Commission refused to exercise its jurisdiction and decide the complaint, since the complaint did not meet the ineligibility criteria of paragraph 41(1)(*d*).

ISSUE

[29] Did the Commission make a reasonable decision in determining that it would not decide the applicant's complaint?

ANALYSIS

Standard of judicial review

[30] Mr. Justice W. Andrew MacKay, in *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] F.C.J. No. 1017 (QL), points out the standard that the reviewing court must use on judicial review:

> [37] In deference to the expertise of the CHRC in relation to issues relating to the application of its enabling statute to the facts of complaints, it is my view that the Court should intervene in relation to issues concerning jurisdiction of the Commission only where it is persuaded the Commission has erred, that its decision is incorrect. That recognizes the appropriate standard in the context of deference to the decisions of the CHRC made in the course of administering its enabling statute, and in the context of the normal burden of argument in an application for judicial review pursuant to s. 18.1 of the *Federal Court Act*.

[31] Accordingly, "[d]epending upon the nature of the error alleged, intervention is warranted when the Commission acted unreasonably (the reasonableness standard) or where it erred in law (the correctness standard)" (*Brine v. Canada Ports Corporation*, [1999] F.C.J. No. 1439 (QL), paragraph 57.)

[32] Mr. Justice Allen M. Linden decides on the appropriate standard of review for Canadian Human Rights Commission decisions. He notes:

> [59] . . . the particular question at issue in respect of the TB decision must be identified. I have already noted that the Applications Judge analysed the Commission's decision concerning the TB complaint as hinging on a question of law, namely whether the TB complaint established a prima facie case of discrimination. In my view, the Applications Judge correctly identified this question of law as the question at issue for review purposes in respect of the TB complaint as one of law. The determination as to whether prima facie discrimination has been established in a particular complaint will in some cases be a question of mixed fact and law, and in others a question of law. The distinction between these categories of questions is perhaps inherently elusive (*Pushpanathan*, *supra* at para. 37; *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 S.C.R. 748 at para. 35), yet at the same time proper identification of the type of question at issue is an important step in determining the appropriate standard of review..

(*Sketchley v. Canada (Attorney General)*, 2005 CAF 404, [2005] F.C.J. No. 2056 (QL).)

Pragmatic and functional analysis

The existence or absence of a privative clause or a statutory right to appeal

[33] The CHRA does not offer any directive for appealing or reviewing this type of decision. *Dr Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at paragraph 27: "... silence is neutral, and 'does not imply a high standard of scrutiny'", referring to *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paragraph 30.

[34] Mr. Justice Michel Bastarache of the Supreme Court of Canada noted in *Pushpanathan, supra*, at paragraph 31: "In essence, a partial or equivocal privative clause is one which fits into the overall process of evaluation of factors to determine the legislator's intended level of deference, and does not have the preclusive effect of a full privative clause."

[35] If we consider, accordingly, the CHRA as a whole, it clearly appears that the Commission's role is to receive complaints and to conduct screenings so that they are treated in accordance with the provisions of this legislation.

Relative expertise

[36] This analysis involves a three-dimensional assessment: first, the Court must qualify the expertise of the tribunal in question, it must then examine its own expertise comparative to the tribunal in question and, finally, it must identify the nature of the specific question that was before the administrative tribunal with regard to this expertise (*Pushpanathan*, *supra*, paragraph 22, referred to in *Dr Q*, *supra*, paragraph 28).

[37] Mr. Justice Bastarache notes: "If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded" (*Pushpanathan*, *supra*, paragraph 32).

[38] The Commission has a certain degree of expertise in dealing with human rights complaints. This factor militates in favour of judicial deference. The CHRA enables persons who believe they have been discriminated against to file a complaint with the Commission; however, section 41 of the CHRA provides that the Commission may refuse to hear a complaint if it finds that the complaint cannot be dealt with.

Objective of the Act in general and the provision in particular

[39] The objective of the CHRA is found in section 2. Linden J.A. of the Federal Court of Appeal describes this objective, noting:

> [74] . . . [it] is essentially to prevent discriminatory practices based on a series of enumerated grounds. The protection of human and individual rights is a fundamental value in Canada and any institution, organization or person given the mandate by law to delve into human rights issues should be subjected to some control by judicial authorities.

(CHRA, *supra*, section 2; *Sketchley*, *supra*.)

[40] However, he adds:

> [75] . . . the decision taken by the Commission pursuant to section 44 constitutes an important threshold in accessing the remedial powers of the Tribunal under section 54 [as am. *idem*, s. 28]: a decision at this stage by the Commission not to deal with a complaint is a decision which effectively denies the complainant the possibility of obtaining relief under the Act. The Commission's activities with respect to the investigation of individual complaints and their selective referral to a Tribunal directly engages the individual rights and entitlements of the parties to a particular complaint. This aspect suggests a less deferential standard.
>
> [76] At the same time, it is common knowledge that the number of complaints received far exceeds the number that the Commission may be able, due to practical and monetary considerations, to refer to a tribunal for further inquiries. As Décary, J.A. observed in *Bell Canada*, at paragraph 38:
>
> > The Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report. . . . The grounds set out for referral to another authority (subsection 44(2)), for referral to the President of the Human Rights Tribunal Panel (paragraph 44(3)(*a*)) or for an outright dismissal (paragraph 44(3)(*b*)) involve in varying degrees questions of fact, law and opinion (see *Latif v. Canadian Human Rights Commission*, [1980] 1 F.C. 687 (C.A.), at page 698, Le Dain J.A.), but it may safely be said as a general rule that Parliament did not want the courts at this stage to intervene lightly in the decisions of the Commission. [Emphasis mine.]
>
> > In general, at least in the assessment of practical and monetary matters, the Commission is in a better position than the Federal Court to assess whether any

> given complaint should go further. This consideration thus leans in favour of greater deference.

(*Sketchley*, *supra*.)

[41] Accordingly, despite the Commission's expertise in the analysis of what is and what is not discriminatory and the degree of latitude to be given to it, the Commission had to determine whether or not the application for leave reimbursement had been filed out of time, a determination which militates in favour of less judicial deference by the reviewing Court.

Nature of the problem

[42] The investigator in this case had to determine whether Ms. Piché had been treated differently based on her personal circumstances when her employer, CSC, chose not to compensate her financially for the period of the medical contestation.

[43] The investigator determined: [TRANSLATION] "the employer was entitled to request the opinion of Health Canada" and, accordingly [TRANSLATION] "there is nothing remaining that could concern the Commission." On this basis, the investigator determined that Ms. Piché had not been discriminated against when her grievance was being decided. The Commission, relying on this report and analyzing Ms. Piché's situation, arrived at the same conclusion (AR, volume I, section 41 report, *supra*, paragraphs 17 and 19, page 27.)

[44] Linden J.A. observes:

> [77] . . . The investigator is essentially engaged in a fact-finding mission but the Commission itself, when it takes action on the basis of the investigator's report, is nevertheless applying the facts in the context of the legal requirements of the *Canadian Human Rights Act*. The resulting decision will in general be one of mixed fact and law, calling "for more deference if the question is fact-intensive, and less deference if it is law-intensive" (*Dr. Q*, at paragraph 34).

(*Sketchley*, *supra*.)

[45] Based on this:

> [80] . . . when the Commission decides to dismiss a complaint, its conclusion is "in a real sense determinative of rights" (*Latif v. Canadian Human Rights Commission*, [1980] 1 F.C. 687 (C.A.) at page 697 (*Latif*)). Any legal assumptions made by the Commission in the course of a dismissal decision will be final with respect to its impact on the parties. Therefore, to the extent that the Commission decides to dismiss a complaint on the basis of its conclusion concerning a fundamental question of law, its decision should be subject to a less deferential standard of review

(*Sketchley*, *supra*.)

[46] In this case, the analysis performed by the Commission regarding Ms. Piché's complaint was based on the answer to the question as to whether there was *prima facie* evidence of discrimination. The examination of this question was based not only on the analysis of the policy on time limits for filing grievances, but also according to the applicant's particular circumstances; this is a question of mixed fact and law militating in favour of less deference.

[47] According to the pragmatic and functional analysis and the case law referred to above, the standard of review is that of reasonableness *simpliciter*.

<u>The application of the principles in this case</u>

[48] The Supreme Court of Canada, per Madam Justice Bertha Wilson, describes discrimination in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143:

> [37] . . . discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[49] In this case, Ms. Piché argued that her employer discriminated against her. She explains her circumstances in her written submissions which she submitted to the investigator on December 3, 2006. She notes: [TRANSLATION] “the complaint explains the exploitation of my status as a separated person and a twisted portrayal of my state of health to justify barring me from entering the workplace without pay. The intervention of my partner and his relatives (all colleagues) are the connections between the discriminatory practices and the grounds raised.” (AR, volume I, written submissions, *supra*, page 31.)

[50] The grounds of discrimination and harassment raised by Ms. Piché are: the failure to communicate legitimate information, medicalizing a conflict, using power and professional relationships and violating privacy. (written submissions, *supra*.)

[51] However, the three grievances filed by Ms. Piché do not specifically address the scope of the grounds she sets out in her written submissions to the Commission’s investigator.

a. The first in regard to the theft of computer hardware in 2003, accordingly unrelated to the subject of the complaint.

b. The second grievance bears on the fact that the applicant considers that her return to work was excessively slow, that her employer had not taken any steps to facilitate her return and that it had unduly delayed her by requiring an assessment from Health Canada. This second grievance contemplates the recovery of salary lost by the applicant over certain dates between February 1 and August 31, 2004, i.e. between the date her physician stated that she was able to return to work and the return-to-work date that was authorized by Health Canada. This was however withdrawn by the applicant before the first level hearing.

c. In the third grievance, the subject of this application for judicial review, the applicant contests her employer's refusal to allow her to take paid leave for other reasons for the period between February 1 and August 31, 2004. This third grievance was nevertheless rejected at the three levels and the union refused to bring the grievance before the grievance adjudicators. The grievance was dismissed on the grounds that the applications for paid leave were made out of time and that the employer was entitled to request a medical opinion from Health Canada.

(AR, volume I, section 41 report, *supra*, pages 24-27.)

[52] The investigator recommended that the Commission not decide the complaint because [TRANSLATION] "there is nothing left that concerns the Commission." He based his analysis on the following:

[TRANSLATION]

16. The three grievances filed by the complainant contemplate the allegations of differential treatment of the complaint in regard to a disciplinary measure that was imposed, the delay in her return to work and the refusal to give her paid leave for other reasons. The union's position is quite clear that these grievances would not be brought before an adjudicator. The complainant therefore then applied to the Commission to decide her complaint.

17. Following approximately four months of sick leave, the complainant's physician stated that she was able to return to work. She received disability insurance benefits until her physician stated that she was able to return to work. Her return to work was delayed for about three months, i.e. until Health Canada issued its opinion. The complainant attempted, through a grievance, to blame the mis en cause for having required a medical report and attempted to recover the salary that she did not receive over those three months. She decided to withdraw the grievance, only to then file *a posteriori* applications for paid leave for other reasons to cover these three months. As the union explained to her, the employer was entitled to request Health Canada's opinion and it was also entitled to refuse the requested paid leave after the fact.

18. In support of her application to have the Commission decide her complaint, the complainant submitted a letter that she received from her union. Nothing in this correspondence suggests that the measures taken by the mis en cause were based on marital status, family status or disability. The complainant did not provide any additional information.

(AR, volume I, section 41 report, page 27, paragraphs 16 to 19.)

[53] Unsatisfied with the decision on the third last grievance, Ms. Piché asked the Commission to deal with her complaint.

[54] The Commission therefore had to analyze Ms. Piché's submissions as well as the investigation report which had determined that the allegations contained in the complaint form had were addressed in the grievance. In his report, the investigator recommended that the Commission not decide the complaint since there was nothing left to decide: the grievance made it possible to

determine that the applications for paid leave were not granted because they were out of time; the refusal was therefore not connected to discriminatory grounds. The grievance also made it possible to determine that the employer was entitled to request a medical opinion from Health Canada, which the applicant, however, admitted in her complaint (respondent's record, memorandum of fact and law, page 12, paragraph 43).

[55] The applicant points out, however, that the Commission cannot simply refuse to decide a complaint because the allegation was already decided in another proceeding. She refers to Madam Justice Danièle Tremblay-Lamer who determined, in *Boudreault v. Canada (Attorney General)*, [1995] F.C.J. No. 1055 (QL), at paragraph 17, that the Commission had not reasonably exercised its power since it had not based its decision on its assessment of the record, but rather on the fact that an adjudicator had already disposed of the issue.

[56] However, Tremblay-Lamer J. also noted in this matter:

> [10] Under the *Canadian Human Rights Act,* the Commission is not required to hear all complaints filed with it. Section 41 provides as follows:
>
> > 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;
> >
> > (b) the complaint is one that could more appropriately be dealt with, initially or completely,

according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

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

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint. 1976-77, c. 33, s. 33

[57] Tremblay-Lamer J. continues her analysis, pointing out:

> [11] In the case at bar, the Commission decided not to deal with the complaint because no further proceedings were warranted following the appeal board's decision.
>
> [12] The applicant argues that the Commission simply adopted the appeal board's decision rather than exercising its own discretion.
>
> [13] The respondent claims that on the contrary the Commission considered the facts and examined the applicant's complaints before reaching its own conclusion that no further proceedings were warranted.
>
> [14] In *Burke et al. v. CHRC* and *Pitawanakwat v. CHRC*, the Court of Appeal held that the Commission may refuse to consider a complaint if the internal remedies provided for by Parliament have not been exhausted when the complaint is filed. If the applicant has taken advantage of the available internal remedies, the Commission may not refuse to exercise its jurisdiction on the ground that the matter has already been decided.
>
> [15] In my opinion, the situation is the same in the case at bar. Although the Commission based its decision on section 41(*d*), the underlying reason for its decision that the complaint was frivolous was that the appeal board had already ruled on it. While the wording of the letter of May 30, 1994 that the Commission sent to Mr. Boudreault is ambiguous, in my opinion the conclusion in the Commission's report leaves no room for doubt. [TRANSLATION] . . . that under section 41(*d*) of the *Canadian Human Rights Act*, the complaint filed on August 30, 1989 by Jean

> Boudreault of Ottawa, Ontario against the Public Service Commission of Canada, which alleged employment discrimination based on a disability, will not be dealt with because it has already been dealt with by the appeal procedure under the *Public Service Employment Act*.

[58] The respondent stated that allowing the applicant to make the same allegations again before the Commission would have constituted a frivolous or vexatious proceeding. The concept of frivolous or vexatious proceeding is intimately connected to the doctrine of abuse of procedure recognized at common law; in essence it is intended to preserve the integrity of the judicial role. In *Toronto (City) v. Canadian Union of Public Employees*, [2003] 3 S.C.R. 77, the Supreme Court of Canada noted that this doctrine applies as much to court decisions as it does to administrative tribunal decisions:

> [44] The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:
>
>> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.
>
> . . .
>
> [51] Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the

> conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[59] The applicant argues, however, that the Commission erred in law when it accepted the investigator's recommendation to not decide the complaint because the allegations of discrimination could be addressed through the grievances. She is of the opinion that the only grievance related to the allegations raised in the complaint and addressed by the employer was dismissed because it was out of time.

[60] The Commission has a statutory obligation to "to consider an investigator's report once received as well as the obligation, based on procedural fairness, to obtain comments from the parties on such a report before deciding it" (*Brine*, *supra*, paragraph 65).

[61] In this case, all is based on a procedural rather than substantive element, because this third grievance filed by the applicant is the subject of judicial review on an issue of an expired time limit and all of the elements to which the applicant ascribes her distress and anguish are tied to a situation which is not procedural but rather substantive, regarding which she did not file a grievance. The applicant is bound by the procedural limits where there is no mention of the reason for her sick or other leave. The issue of the alleged discrimination was not addressed because it was never submitted.

[62] As specified by the Commission, the applicant in the past had other recourse that she either abandoned or withdrew pursuant to the collective agreement, but because applicant desisted, these recourses were withdrawn and therefore in terms of the Commission's perception, this could be considered as extraneous to the recourse available for the complaint.

[63] In this case, the Commission had before it a complaint in regard to a grievance which had been considered out of time. The Commission therefore had to decide this aspect, exclusively. In deciding "not to deal with a complaint pursuant to paragraph 41(1)(*d*) on grounds that the complaint is trivial, frivolous, vexatious or made in bad faith . . . the footing of the Commission must be legally and factually very solid and its reasons must be consistent with the purpose of the Act and its role as a screening body" (*Brine*, *supra*, paragraph 69).

[64] The applicant had already exhausted the grievance settlement procedure that was reasonably available, but she was not satisfied with the results that she got, because her grievance had been dismissed. She also believed that the issue of forced sick leave, based on the assessment of Health Canada that the employer had required of her before her return to work, should be compensated, and that all of the other issues that her complaint had raised had not been fully addressed, as they would have been for an investigation conducted pursuant to the CHRA. For example, there was no mention regarding the employer's behaviour after the deterioration of the applicant's relationship and no grievance addressed the issue of whether there were alternatives to those proposed by Health Canada.

[65] However, in deciding not to deal with the complaint, under the third grievance (the only grievance before the Commission involving discrimination), the Commission fulfilled its obligation to ensure that the applicant's complaint warranted being dealt with. It considered the investigator's report as well as the applicant's submissions and decided, pursuant to paragraph 41(1)(*d*) of the CHRA, not to deal with the complaint because the allegation of discrimination on the basis that it had been decided out of time was addressed in the grievance and that the applicant had withdrawn the second grievance involving the same complaint (*Canada Post Corporation v. Barrette*, [2000] F.C.J. No. 539 (QL), paragraphs 22-26; AR, volume I, Commission's decision dated February 23, 2007, page 5.)

[66] Even though the Commission found that the complaint had been decided by relying on paragraph 41(1)(*d*) of the CHRA, the reason underlying its decision that the complaint was frivolous, was that the assistant commissioner of human resources had already decided the complaint, refusing to recognize the validity of the grievance because it was considered out of time.

[67] Accordingly, being limited to the judicial review of the third grievance and specifically the Commission's decision regarding this grievance, considering that "nothing in this correspondence suggests that the measures taken by the mis en cause could have been based on marital status, family status or disability. The complainant did not provide any additional information."

[68] The Commission "fully complied with its duty of fairness to the complainant when it gave her the investigator's report, provided her with full opportunity to respond to it, and considered that

response before reaching its decision" (*Slattery v. Canada (Canadian Human Rights Commission)*, [1996] F.C.J. No. 385 (QL)).

[69] The Commission reasonably determined that the applicant "ought to exhaust grievance or review procedures otherwise reasonably available;" because this other recourse was more appropriate for resolving her issue. Further, by refusing to decide this question, the Commission also determined that the applicant was not the victim of the discrimination in her claim for compensation for her sick leave (CHRA, *supra*, paragraph 41(1)(*a*)).

[70] Accordingly, in light of the foregoing, this Court dismissed the application for judicial review (this Court could, accordingly, have arrived at the same finding had the appropriate standard been that of correctness).

JUDGMENT

THE COURT orders that the application for judicial review be dismissed.

Obiter

In this case, the application for relief under the contestation procedure was addressed in a grievance procedure granted under the collective agreement. The Commission determined that the applicant had, accordingly, other recourse that she had chosen to abandon or withdraw, which would have in fact have been appropriate personal recourse, available to the applicant, which was not exhausted.

The Federal Court can only address a matter which is before it; therefore, the matter to consider, from the point of view of an application for judicial review, cannot exceed the evidence from an earlier proceeding. All of the material would have had to have been addressed in the previous proceeding for it to be heard by the Federal Court for the purposes of examining an application for judicial review.

". . . The point of departure in any proceeding [is knowing] which door to approach in order to be heard." (*Bakayoko v. Bell Nexxia*, 2004 FC 1408, [2004] F.C.J. No. 1705 (QL).)

"Michel M.J. Shore"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-623-07
STYLE OF CAUSE:	CHRISTINE PICHÉ V. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 9, 2008
REASONS FOR JUDGMENT:	SHORE J.
DATE OF REASONS:	January 31, 2008

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