Date: 20080703

Docket: T-1441-07

Citation: 2008 FC 830

Ottawa, Ontario, July 3, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

TINA JOY HARTJES

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Tina Joy Hartjes, is an Aboriginal woman who was incarcerated at the Grand Valley Institution for Women (GVI), a federal correctional facility for women operated by Correctional Service of Canada (CSC), in 2005-2006. During her incarceration, Ms. Hartjes was hospitalized on two separate occasions. She characterizes the medical care that she received as "grossly inadequate".

[2] On January 25, 2007, Ms. Hartjes filed a complaint with the Canadian Human Rights Commission (the Commission) alleging that she was discriminated against by the CSC on the basis of race, colour, national or ethnic origin and disability with respect to the medical care she had

received. In a letter dated June 29, 2007, the Commission advised Ms. Hartjes that it had decided, pursuant to s. 41(1)(c) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA), that it would not deal with Ms. Hartjes's complaint because "the allegations are not based on a prohibited ground of discrimination". Ms. Hartjes seeks judicial review of this decision.

I. Issues

[3] This application raises the following issues:

a. What is the appropriate standard of review of the decision of the Commission?

b. Did the Commission err in finding that Ms. Hartjes's complaint was not based on a prohibited ground of discrimination?

II. Background

[4] Ms. Hartjes's complaint was made in the form required by the Commission and was confined to three pages. Ms. Hartjes set out that the basis of her complaint; specifically, she disclosed that she was an incarcerated Aboriginal woman who had received "inadequate medical care". She outlined the history of a serious medical condition and submitted that the "inadequate medical care provided by GVI was a result of discrimination in the provision of services on the basis of race, national or ethnic origin and colour because the complainant is an Aboriginal woman".

[5] In a letter dated April 12, 2007, sent to both Ms. Hartjes and to the Commissioner of CSC, the Deputy Secretary General of the Commission (the Commission Officer) wrote to Ms. Hartjes to advise her that there were two bases upon which a negative recommendation would be made to the Commission. The first ground was the question of jurisdiction. After stating, in part, that a complainant must "demonstrate that a correlation exists between the discriminatory act and a prohibited ground of discrimination", the Commission Officer wrote as follows:

> Section 41(1)(c) of the *CHRA* states that the Commission may refuse to deal with a complaint where the complaint is beyond the jurisdiction of the Commission. A complaint that is not based on a prohibited ground of discrimination in the *Act*, or does not provide a clear link to a ground, is beyond the jurisdiction of the Commission.

[6] The Commission Officer also expressed his concern that Ms. Hartjes had available to her a grievance process, which had not been followed.

[7] Both Ms. Hartjes and CSC were invited to make further submissions of no more than 10 pages in length, including attachments. CSC made no submissions. On May 3, 2007, Ms. Hartjes made further submissions, consisting of seven pages of submission and three pages of appendix.

IV. The Decision

[8] The documents referred to above, including the Commission Officer's letter outlining the complaint and his initial recommendation to reject the complaint, were before the Commission when it made its decision. The Commission did not reject the complaint on the basis that Ms. Hartjes ought to have pursued her grievance. However, it is apparent that the Commission agreed with the Commission Officer's recommendation, even after the supplementary submissions,

that Ms. Hartjes had not shown any link between her complaint and a prohibited ground. As a result, the Commission dismissed Ms. Hartjes' complaint on the basis that, pursuant to s. 41(1)(c) of the CRHA, "the allegations are not based on a prohibited ground of discrimination".

[9] It is accepted that in judicial review of Commission decisions the investigator's or, as in this case, the Commission Officer's report forms part of the reasons (see *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission),* [1989] 2 S.C.R. 879 at 902; *Sketchley v. Canada (Attorney General)* 2005 FCA 404 at paras. 36-37).

V. Analysis

A. *Nature of the Decision*

[10] Before proceeding to a discussion of the appropriate standard of review and thereafter to the merits, it is important to understand the nature of the Commission's decision.

[11] The Commission has a statutory mandate to receive and deal with complaints of discrimination on the basis of, *inter alia*, race, national or ethnic origin, colour, or disability. The role of the Commission is to deal with the intake of complaints and to screen them for proper disposition (*Cooper v. Canada (Human Rights Commission),* [1996] 3 S.C.R. 854 at para. 52). As noted by the Supreme Court in *Cooper*, above at para. 53:

> It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central

> component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it.

[12] As I read s. 41(1)(c), "jurisdiction" could refer to two different categories of matters. For example, a complaint by an inmate of a provincial institution could likely be dismissed under s. 41(1)(c); this would be a question of "true jurisdiction . . . where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59). In a broader context, a complainant may complain of certain acts that are, on their own, not allegations that fall within the mandate of the Commission but allege that these acts took place because of race, ethnic origin, disability or another prohibited ground. In such a case, unless the complainant can disclose sufficient information or facts to show a link to a prohibited ground of discrimination, the acts complained of are not within the statutory mandate of the Commission. In this second example, the pre-screening exercise involves an assessment of the sufficiency of the evidence.

[13] In the application before me, it is evident that the Commission was not questioning whether it had the jurisdiction to inquire into complaints arising in a federal institution or whether discrimination on the basis of being Aboriginal or having a disability was a prohibited ground. However, it is also obvious that the Commission has no mandate to consider whether, absent a link to a prohibited ground, Ms. Hartjes received adequate medical care. Thus, the Commission was required to assess whether there was sufficient evidence put forward by the complainant to show any link between the complained-of acts and the two prohibited grounds.

[14] Finally, I observe that s. 41(1)(c) of the CHRA provides the Commission with considerable discretion. Specifically, s. 41(1)(c) provides that "the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that . . . the complaint is beyond the jurisdiction of the Commission" [emphasis added]. The use of the words "it appears to the Commission" infers the exercise of discretion.

[15] In sum, the question that was before the Commission was: did the submissions put forward by Ms. Hartjes disclose a link between the treatment that she received in GVI and discrimination on the grounds of racism or disability? Responding to this question required the Commission to assess the sufficiency of evidence and to exercise its discretion in doing so.

B. *Standard of Review*

[16] The law of standard of review recently changed with the Supreme Court's decision in *Dunsmuir*, above. *Dunsmuir* teaches, at paragraphs 57 and 62, that a court should first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question.

[17] In *Comstock v. Public Service Alliance of Canada*, 2007 FC 335, aff'd 2008 FCA 197, Justice Gibson was faced with a judicial review of a decision of the Commission, taken under s. 41(1)(c) of the Act. As in the case before me, the Applicant's complaints to the Commission had been dismissed on the ground that ". . . the complaints are beyond the jurisdiction of the Commission as no link to a prohibited ground of discrimination was established". In his decision,

Justice Gibson carried out a careful analysis of the standard of review. Although this case was pre-*Dunsmuir*, I note that Justice Gibson undertook a pragmatic and functional analysis which is, in substance, no different than the second step identified by the majority in *Dunsmuir*. Justice Gibson concluded that that the decision was reviewable on a standard of reasonableness. On the basis of this jurisprudence, I am satisfied that the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a decision of the Commission under s. 41(1)(c) of the Act; that standard of review is reasonableness. I pause to note that Justice Gibson's decision was affirmed by the Court of Appeal in *Comstock v. Public Service Alliance of Canada*, 2008 FCA 197, with no comment on the standard of review adopted by Justice Gibson.

[18] The Applicant raises two cases that, in her view, establish a standard of review of correctness - *Gee v. Canada (Minister of National Revenue - M.N.R.*), [2001] F.C.J. No. 48 at para. 33 (T.D.) (QL), rev'd 2002 FCA 4; *Donovan v. Canada*, 2008 FC 524 at paras. 10-11. Neither of these cases dealt with the same category of question as is before me. These cases do not assist in determining the appropriate standard of review.

[19] In addition, a review of the four factors relevant to the standard of review analysis leads to the same conclusion. First, I observe that there is no privative clause in the CHRA; nor is there any statutory right of appeal. Second, a decision whether the allegations of a claimant are linked to or based on a prohibited ground of discrimination has a significant factual component to it, and involves the exercise of discretion. Third, while the purpose of the legislation is to give effect to the fundamental Canadian value of equality, the CHRA grants the Commission a remarkable degree of latitude when it is performing its screening functions. Finally, the Commission has considerable

expertise in human rights matters and in balancing the competing interests of the parties to a complaint.

[20] Taking the relevant factors into account, I am satisfied that the Commission's determination as to whether allegations of a complainant are linked to or based on a prohibited ground of discrimination is reviewable under the reasonableness standard.

[21] In reviewing the decision against the reasonableness standard, the Court will consider whether the decision under review falls within a range of possible acceptable outcomes which are defensible in light of the facts and law (see *Dunsmuir* at para. 47).

C. *Analysis of the merits*

[22] Having determined that the decision of the Commission is reviewable on a standard of reasonableness, I next turn to the specifics of Ms. Hartjes' complaint.

[23] Although the threshold may be low, there is a burden on a complainant to put sufficient information or evidence forward to persuade the Commission that there is a link between complained-of acts and a prohibited ground.

[24] Ms. Hartjes identifies herself, in her complaint, as an Aboriginal person. She alleges that she received "grossly inadequate medical care and experienced discrimination in the provision of medical services on the basis of race, colour, national or ethnic origin, and disability". The

complaint set out a description of two incidents as the "basis of the complaint". Ms. Hartjes then describes the history of her medical treatment and her interactions with various medical and non-medical personnel. Having read the submission carefully and assuming that her medical care was inadequate (which, of course, I am not deciding), I can see nothing that would lead me to link her alleged mistreatment to her alleged discrimination. Nowhere in her complaint does Ms. Hartjes provide any evidence to suggest that non-Aboriginal persons receive better or different medical care.

[25] As noted above, Ms. Hartjes was advised of the shortcomings of her complaint in the letter from the Commission Officer dated April 12, 2007.

[26] Almost the entirety of Ms. Hartjes's further ten-page submission in reply dealt with the inadequacy of the grievance procedure. The following summarizes all of her submissions on the link between the complained-of acts and the prohibited grounds:

- In paragraph 2, Ms. Hartjes states that her grievances are "directly linked to the prohibited grounds of race, colour, national or ethnic origin and disability . . . and as such are within the jurisdiction of the Commission";

- In paragraphs 15-17, Ms. Hartjes draws the attention of the Commission to findings and opinions of the Supreme Court of Canada, two Royal Commissions and a Canadian Bar Association Report on, *inter alia*, the overrepresentation of Aboriginal

> women in the penal system and, more generally, the racism faced by Aboriginal persons and systemic discrimination in the criminal justice system.

- In paragraph 18, Ms. Hartjes submits that:

  > the lack of proper response to her serious medical conditions are premised on systemic discrimination within the institution against her on the grounds of both race and disability as Ms. Hartjes is an Aboriginal woman with physical and mental disabilities. And, as such, her credibility and worthiness of equal access to medical services afforded non-Aboriginal persons were denied.

[27] Absent a link, the allegations of Ms Hartjes are based solely on a claim that she received "grossly inadequate" medical care. Such a claim is not one that is based on a prohibited ground and is thus beyond the statutory authority of the Commission.

[28] Ms. Hartjes argues, in essence, that the link can readily be inferred from the facts that: (a) she allegedly encountered difficulties in accessing proper medical care; (b) she is Aboriginal; and (c) past Royal Commissions and jurisprudence have concluded that Aboriginal persons are discriminated against in penal institutions.

[29] Even if I assume that it would have been reasonable for the Commission to accept the submissions and draw the inferences now argued, this would not mean that it was unreasonable for the Commission to decide otherwise. A characteristic of the reasonableness standard of review is that there may be a range of possible acceptable outcomes which are defensible in light of the facts and law. The fact that another possible outcome may be preferred by the Court or an applicant does not necessarily make a tribunal's decision unreasonable.

[30] In the case before the Commission, Ms. Hartjes provided no submissions that identified how her treatment was linked to the alleged discrimination. Her initial and response submissions could reasonably be characterized as bald assertions of discrimination. The question to be assessed by the Commission was not whether discrimination against Aboriginal women or persons with medical disabilities in prisons exists. Rather the Commission was deciding, at this pre-screening stage, whether it appeared to the Commission that Ms. Hartjes had put forward sufficient information to show – even at a *prima facie* level – a link between her individual treatment problems and a prohibited ground. The Commission decided that she had not done so.

[31] Given the record that was before the Commission, I am satisfied that the Commission's decision is defensible in light of the facts and law before it. There is no reviewable error.

VI. Conclusion

[32] For these reasons, this application for judicial review is dismissed. The Respondent did not seek costs; no costs will be awarded.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed, without costs.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1441-07
STYLE OF CAUSE:	Tina Joy Hartjes v. Attorney General of Canada
PLACE OF HEARING:	Toronto
DATE OF HEARING:	June 11, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	SNIDER J.
DATED:	July 3, 2008

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