Federal Court  Cour fédérale

Date: 20091210

Docket: T-1495-08

Citation: 2009 FC 1253

Ottawa, Ontario, December 10, 2009

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

JULIET ENGLISH-BAKER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of a decision of the Canadian Human Rights Commission (the Commission) dated August 29, 2008, where the Commission dismissed the Applicant's human rights complaint (File Number: 20041816) against the Department of Citizenship and Immigration.

[2] The Applicant alleges that Citizenship and Immigration Canada (CIC or the Employer) discriminated against her by failing to accommodate her and treated her in an adverse and

differential manner contrary to sections 7, 10, and 14 of the *Canadian Human Rights Act*, R.S. 1985, c. H-6 (the *Canadian Human Rights Act* or the *Act*).

[3] For the reasons set out below the appeal is dismissed.

I. Background

[4] The Applicant was hired by CIC in 1987 as a Quality Assurance Clerk at the CR-03 group and level. She remained away from work from December 1999 to June 2002 on various forms of sick leave and long-term disability. In June 2003, following a Fitness to Work Evaluation (FTWE) by Health Canada, the Applicant was found fit to work and returned to her substantive duties at CIC. Prior to her return, the Applicant provided medical notes from her physician stating that she was fit to work.

[5] On October 9, 2003, after some friction in the office, the Applicant was given a written reprimand and told to remain away from CIC until another FTWE was conducted. On December 8, 2003, after the FTWE, Health Canada informed CIC that the Applicant was unfit to work due to a chronic medical condition. The Applicant was informed that if she chose to retire on medical grounds, her application would be reviewed favourably. The Applicant did not apply for retirement on medical grounds and after several warnings was terminated for reasons of medical incapacity under the *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 11.

[6] The Applicant grieved her termination to the Public Service Labour Relations Board (PSLRB) and filed a complaint with the Commission alleging differential treatment, refusal to accommodate, and termination of employment based on disability. The Commission informed the Applicant that it would not deal with the complaint until the PSLRB had completed its process, pursuant to subsection 41(1)(a) of the *Canadian Human Rights Act*.

[7] At the PSLRB, the Applicant's grievance went to adjudication and she attended a three day hearing of the matter in February 2008, represented by her union. The Applicant's representative met with her in the week leading up to the hearing, discussed the case with her, and submitted evidence to the adjudicator. At the hearing, the Applicant's representative did not call any witnesses and did not cross-examine CIC's witnesses. The Applicant did not voice any concerns or objections with regard to her representative at that time.

[8] The PSLRB adjudicator assumed jurisdiction to make a determination on whether the employer breached its duty to accommodate the Applicant during her reintegration to the workplace and whether her termination was discriminatory. The adjudicator found that the employer had breached article 19, the "No Discrimination" clause of the Applicant's collective agreement, when it disciplined the Applicant by way of a written reprimand for behaviour that was non-culpable. Nonetheless, the adjudicator upheld the termination for medical incapacity, finding that the employer had met its duty to accommodate to the point of undue hardship. The adjudicator dismissed the Applicant's allegations of harassment and discrimination at the workplace, including

the Employer's failure to accommodate her disability and upheld the Applicant's ultimate termination for medical incapacity.

[9] The Applicant did not seek judicial review of the adjudicator's decision but requested that the Commission re-open her file.

A. *The Commission's Decision*

[10] In May 2008, the Commission re-opened the file and sent the parties a Section 40/41 Report, inviting them to make submissions concerning whether it should refuse to deal with the complaint under subsection 41(1)(d) of the *Act*. The Applicant provided a ten-page submission in which her counsel acknowledged that the adjudicator had considered all of the human rights elements of the grievance. The Applicant took the position that at the PSLRB hearing she had not been provided with the opportunity to respond to the Employer's evidence as neither herself nor her physicians were called upon as witnesses. Therefore, she argued, the adjudicator did not have all the evidence before him at the time of his decision.

[11] The Employer's submissions stated that the PSLRB had addressed all of the Applicant's complaints to the Commission in his final decision and therefore the Commission should not deal with the complaint.

[12] The Commission ruled that it would not deal with the complaint under subsection 41(1)(d) of the *Canadian Human Rights Act* because the complaint was trivial, frivolous, vexatious or made in bad faith, words that reflect the language of the *Act*. The Commission's reasons where in the form of a checked box stating that "the human rights issues in the complaint have been addressed by another body".

II. Standard of Review

[13] The appropriate standard of review of the Commission's decision not to deal with a complaint under subsection 41(1)(d) is reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, *Morin v. Canada (Attorney General)*, 2007 FC 1355, 332 F.T.R. 136). Issues related to procedural fairness must be correct.

III. Issue

[14] The issue to be considered can be set out as such: did the Commission err and/or breach procedural fairness or natural justice in declining to deal with the complaint?

[15] It is the Applicant's position that she was not given the opportunity to provide evidence in support of her grievance or with the chance to be heard. Therefore, she argues, it was the Commission's responsibility to at least conduct an investigation into the matter prior to rendering a decision.

A. *Subsection 41(1) of the Canadian Human Rights Act*

[16] Under subsection 41(1) of the *Act*, the Commission has the discretion not to deal with complaints in certain circumstances.

[17] Subsection 41(1) is set out thus:

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 Commission that	41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
(a) 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;
(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;	b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
(c) the complaint is beyond the jurisdiction of the Commission;	c) la plainte n'est pas de sa compétence;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or	d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
(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.	e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[18] In *Canada Post Corporation v. Barette*, [2000] 4 FC 145, 27 Admin. L.R. (3d) 268 (C.A.), the Federal Court of Appeal interpreted subsection 41(1) as imposing a "screening function" onto the Commission to ensure that a complaint is worthy of being dealt with. As stated in *Barette*, above, the Commission is not under a duty to investigate every complaint at this stage. They are to examine, on a *prima facie* basis, whether the grounds set out in subsection 41(1) are present, and if so, to decide whether to deal with the complain nevertheless. Justice Décary, for the Court, wrote that in performing this function, the Commission must do its work diligently but should not be subject to stringent procedural standards nor should the courts closely scrutinize decisions under this section.

[19] The Applicant provided four references with regard to the "test" the Commission should apply in assessing whether a complaint warrants further inquiry (specifically *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R.

879, [1989] S.C.J. No. 103; *Bell v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115; *Ontario (Human Rights Commission) v. Simpson Sears Ltd*., [1985] 2 S.C.R. 536, [1985] S.C.J. No. 74; *Basi v. Canadian National Railway Company*, 1988 CanLII 108 (C.H.R.T.), 9 C.H.R.R. D/5029 (C.H.R.T.)). These cases are not directly applicable as they relate either to an investigator's report, the *Ontario Human Rights Code*, R.S.O. 1980, c. 340, or to the role of evidence and the burden of proof at a Canadian Human Rights Tribunal hearing.

[20] In *Morin*, above, Deputy Judge Orville Frenette considered the concept of frivolous or vexatious proceedings and the rule of abuse of process which applies to both judicial and administrative tribunals. I agree that these principles are designed to avoid wasting judicial and institutional resources and imposing unnecessary expenditure on the parties involved. Parliament has given the Commission the discretion to eliminate frivolous, unwarranted or pointless proceedings, and unless that discretion is exercised arbitrarily without reasonable grounds, the courts may not intervene.

[21] The factual circumstances of this case differ from cases such as *Boudreault v. Canada (Attorney General)*, 99 F.T.R. 293, [1995] F.C.J. 1055 (T.D.), *Burke v. Canada (Canadian Human Rights Commission)*, 125 N.R. 239, [1987] F.C.J. No. 440 (F.C.A.), and *Barette*, above. In these cases, the Court determined that the Commission could not refuse to exercise its jurisdiction on the ground that the matter was *res judicata* if the applicant had first made use of internal remedies or that the Commission's decision had not complied with its duty to ascertain whether the grounds alleged were valid before deciding to hold an inquiry.

[22] In this case, the Commission's actions and determination was reasonable. The Commission initially decided, after considering a number of factors such as the nature of the dispute, remedies available, process involved, access and the appropriateness of the forum, that the Applicant should exhaust all her alternative redress mechanisms. In this case, that was a grievance and adjudication before the PSLRB.

[23] The Commission retained jurisdiction over the matter after the adjudication. The Applicant asked the Commission to re-open her complaint. In response, the Commission sent the Applicant and Respondent a Section 40/41 Report. The stated purpose of the Report was to give notice that a decision would be made by the Commission under subsection 41(1) of the *Act* and to identify the factors that were important to the decision. The Report set out subsection 41(1) and the factors relevant to the decision. The parties were then invited to make submissions to the Commission addressing the factors listed. They were advised that, based on their submissions, the Commission would decide either to deal with or not deal with the complaint under subsection 41(1)(d). The Applicant and Respondent both filed submissions.

[24] The Commission did not find that the Applicant's argument, namely that the Commission should independently investigate the complaint based on the alleged deficiency of her representation at her grievance, overcame subsection 41(1)(d) or that it should be heard nevertheless. The Commission based its decision on its assessment of the case and it complied with its duty to ascertain whether the grounds alleged were valid before deciding to hold an inquiry as outlined in

the written submissions of both parties. It is clear that the grievance adjudicator, exercising concurrent jurisdiction over the human rights issues, considered the matters based on the information before him. Indeed, he did not find that her complaint was without substance as he retracted the letter of discipline. The Applicant failed to raise any valid grounds to convince the Commission that another inquiry into her human rights allegations was warranted. The Commission determined that there was insufficient evidence to warrant an inquiry into the complaint. This was reasonable.

B. *Adequacy of Representation at the PSLRB Hearing*

[25] The Applicant argues that she was inadequately represented at the adjudication. She did not raise the issue of representation to the adjudicator nor did she appeal the adjudicator's decision based on procedural fairness grounds. I do not address the issue of the adequacy of her representation in this decision. However, any alleged failure on the part of the Applicant's chosen representative, especially when the alleged failure is not clear on its face to the tribunal, cannot be in some way identified as a failure on the part of the tribunal to ensure natural justice or fairness (see *Gholam-Nejad v. Canada (Minister of Employment and Immigration)* (1994), 77 F.T.R. 44, [1994] F.C.J. No. 476 (T.D.)).

C. *The Reasons*

[26] The Applicant takes issue with the reasons provided by the Commission.

[27] The law is clear that the decision maker must set out its findings of fact and the principle evidence upon which those findings were based, address the major points in issue, and set out the reasoning process. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed (see *Via Rail Canada Inc. v. National Transportation Agency et al.*, [2001] 2 FC 25, [2000] F.C.J. No. 1685 (C.A.)).

[28] Therefore, while the reasons provided were not detailed, when considered in conjunction with the Section 40/41 Report and the parties' submissions, the Commission's reasons were adequate and the Applicant could have understood how the Commission came to its conclusion. In the Section 40/41 Report, the Commission set out the facts and principle evidence the parties were to address and that would form the basis of the decision.

D. *The Evidence*

[29] The Applicant argues that the Commission never examined the evidence but relied on the fact that the matter had been previously heard in a separate adjudication process and ignored the fact that the Applicant had not been afforded the opportunity to provide evidence to the employer.

I disagree. In their letter dated August 29, 2008, the Commission stated that they reviewed and examined the information provided by the parties and the Section 40/41 Report. The Commission considered the evidence as submitted by the Applicant and Respondent. They have the discretion to dismiss under section 41 and they did so based on the parties' submissions.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is dismissed with costs to the Respondent.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-1495-08**
STYLE OF CAUSE:	**ENGLISH-BAKER** **v.** **THE ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	**OTTAWA**
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