Federal Court  Cour fédérale

**Date: 20110125**

**Docket: T-1803-09**

**Citation: 2011 FC 86**

**Toronto, Ontario, January 25, 2011**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**RACHEL EXETER**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR ORDER AND ORDER

[1] Ms. Rachel Exeter (the "Applicant") seeks judicial review of a decision made by the Canadian Human Rights Commission (the "Commission" or "CHRC") dated October 1, 2009. In that decision, made pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act"), the Commission denied the Applicant's request to reactivate her complaint and refer it to the Canadian Human Rights Tribunal.

[2] The Applicant had been employed with Statistics Canada, here represented by the Attorney General of Canada (the "Respondent") for a number of years. She had filed a complaint, number 20060542, alleging discrimination in the workplace on the basis of race, colour and disability. She alleged failure to accommodate for various physical ailments. She alleged harassment, interference, intimidation, retaliation and restrictions concerning her Workers' Compensation claim. The timeframe addressed in her complaint is April 2003 to April 2007. Her complaint makes note of various grievances submitted in connection with workplace activities, alleging racism on the part of her supervisors. She stated that, as of the time of filing the complaint before the Commission, she had exhausted the internal grievance process and characterized her treatment by the employer as "psychological, mental, physical and emotional harassment".

[3] On February 11, 2009, the Applicant signed a Memorandum of Agreement with her employer, Statistics Canada. It was signed as a confidential agreement and remained confidential when submitted to the Commission. However, once the Applicant brought this application for judicial review and put into issue the matters in front of the Commission, that confidentiality was waived.

[4] The Commission's Record was filed as part of this application. A Section 40/41 Report is part of the Commission's Record. That Report referred to the agreement, and attached the agreement as Appendix "A". The parties did not make a request to keep the Commission's record confidential.

[5] The Memorandum of Agreement purported to settle all grievances and complaints filed by the Applicant concerning her employer, including grievances before the Public Service Labour Relations Board and complaints before the Commission and the Public Service Staffing Tribunal. The Memorandum of Agreement also pertained, in paragraph 3, to "any other grievances, complaints or claims the grievor has which, known or unknown to the Parties, shall be identified collectively herein as the 'grievances'".

[6] The Memorandum of Agreement provided that subject to fulfillment of the terms of the agreement, all the grievances and complaints of the Applicant "are hereby withdrawn". A letter of termination dated September 4, 2007, on the Applicant's file was to be replaced with a resignation letter signed by the Applicant. The employer undertook to provide a neutral letter of reference to the grievor and to remove all letters of reprimand, suspension, and performance appraisals from 2003 forward from the Applicant's personnel file. The agreement also provided that the employer would pay to the Applicant the sum of $128,971 calculated as follows:

i. 27 days of suspension, for a total amount of $6,135.00
ii. 1.5 days of leave without pay, for a total amount of $335.00
iii. A lump sum payment equivalent to 15 months of salary, for a total amount of $72,500.00
iv. a one time compassionate nature payment of $20,000.00
v. a one time training allowance of a total amount of $10,000.00
vi. payment of reasonable legal fees upon appropriate receipt, for a maximum amount of $20,000.00.

[7] Clauses 16, 19 and 21 address the finality of the agreement insofar as it resolves all outstanding disputes between the Applicant and her former employer, Statistics Canada. These clauses provide as follows:

> The Grievor forever releases and discharges the Employer from all proceedings of whatever kind or nature arising from; or in any way

> related to the allegations and grievances referred to in paragraphs 1 and 2, or her employment relationship with the Employer, including those facts or events not known or anticipated at the time of signing this agreement.
> …
> The Grievor agrees not to commence any further administrative or judicial procedure in any Court or any administrative tribunal of any jurisdiction in Canada in relation to any matter connected to or related to in any way to her employment with the Employer with the exception of a Worker's Compensation Complaint as contemplated under the Worker's Compensation Legislation, subject to paragraphs 16, 17 and 18. This includes but is not limited to, any form of grievance or complaint before the Public Service Staffing Tribunal, The Public Service Labour Relations Board and the Canadian Human Rights Commission.
> …
> The above terms and conditions constitute a full, complete and final settlement of the grievances.

[8] Clause 20 is an acknowledgment that the Applicant had been represented by legal counsel throughout the process leading to the signing of the agreement. Clause 20 provides as follows:

> The Grievor understands the irrevocability of this agreement and her resignation and has had legal representation throughout the settlement process leading to the signing of this Agreement.

[9] A Section 40/41 Report was prepared dated July 29, 2009. This Report relates to complaint number 20060542. The Report states the issue as follows:

> The issue for the Commission to decide is whether it should refuse to deal with the Complaint under section 41(1)(d) of the Act.

[10] The Section 40/41 Report was made available to both the Applicant and the employer. Each were given the opportunity to comment and did so. Both parties were then given an opportunity to respond to one another's submissions, and both did so.

[11] Paragraphs 31 to 39 of the Section 40/41 Report are entitled “Conclusions”; however, in my opinion, these are more appropriately recognized as being in the nature of recommendations. The Report did not contain any firm recommendations to the Commission. Paragraph 39, the concluding paragraph, sets out the options available to the Commission, as follows:

> The Commission can decide either:
>
> a) to deal with the complaint under section 41(1) of the *Canadian Human Rights Act*, or
> b) not to deal with the complaint under section 41(1)(d) of the *Canadian Human Rights Act*, as the allegations of discrimination in the complaint were addressed through a review procedure otherwise reasonably available to the complainant, resulting in a full and final settlement.

[12] In its decision, the Commission decided not to reactivate the complaint. The Record of Decision shows that the Commission made its decision on the basis of paragraph 41(1)(d) of the Act, “because the complaint is trivial, frivolous, vexatious or made in bad faith”. However, there is a cross-reference from this initial paragraph to further reasons set out at pages 2 and 3 of the Record of Decision. Having regard to pages 2 and 3, it appears that the Commission decided not to reactivate the complaint on the basis that the Applicant had entered into a Memorandum of Agreement that dealt with this complaint and other matters.

[13] The Commission addressed the Applicant’s arguments that she had signed the memorandum under duress and found that there was no evidence in support of this argument. The Commission made particular note of the fact that the Applicant had been represented by legal counsel through the negotiations leading up to the signing of the agreement and at the time the agreement was signed, and further that the Applicant herself had signed the Memorandum of Agreement.

[14] In dealing with the Applicant's allegations that the terms of the Memorandum of Agreement had not been totally fulfilled, the Commission adopted the reasoning set out in the investigation report as follows:

> The fulfillment of a "Memorandum of Settlement" is not, however, a human rights issue. It is an enforcement issue, and one in which the proper recourse would be through the Federal Court.

[15] Three issues are raised in this application for judicial review:

a. What is the applicable standard of review?

b. Did the Commission commit a reviewable error by refusing to reactivate the Applicant's complaint?

c. Did the Commission breach procedural fairness by failing to interview two individuals, as suggested by the Applicant?

[16] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R.190, the Supreme Court of Canada said that there are only two standards of review by which decisions of statutory decision-makers can be reviewed, that is correctness for questions of law and procedural fairness and reasonableness for findings of fact and questions of mixed fact and law. At paragraph 53, the Court in *Dunsmuir* held that:

> Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[17] The Supreme Court of Canada held in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at paragraph 43, that:

> Judicial intervention is also authorized where a federal board, commission or other tribunal
>
> > (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> No standard of review is specified. On the other hand, *Dunsmuir* says that procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review.

[18] As well, the Supreme Court in *Dunsmuir* at paragraph 57 noted that when the jurisprudence has already determined the standard of review for a particular decision-maker, an exhaustive analysis will not be required to establish the appropriate standard of review:

> An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp*. (Re), 2004 SCC 26 (CanLII), [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

[19] In *Morin v. Canada (Attorney General)* (2007), 332 F.T.R. 136, the Federal Court found that reasonableness is the appropriate standard when reviewing a decision of the Commission not to deal with a complaint pursuant to subsection 41(1) of the Act. The substance of the Commission's decision is reviewable on the standard of reasonableness.

[20] The standard of reasonableness applies to both the decision-making process and the result; see *Dunsmuir*, paragraph 47, which reads as follows:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of

> justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[21] The Commission's reasons are relatively brief, and adopt the analysis of the Section 40/41 Report. In these circumstances, it is appropriate to consider the Section 40/41 Report as part of the Commission's reasons; see *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 at para. 37.

[22] Having regard to the contents of the Section 40/41 Report, the investigator reviewed the history of the Applicant's various complaints and grievances before stating her conclusions. In her conclusions, the investigator referred to paragraph 41(1)(d) of the Act that grants the Commission a discretion not to deal with a complaint where the issues raised in that complaint have been otherwise dealt with, through another process, including settlements and compromises. At the same time, the investigator noted that the Commission retained a discretion to deal with a complaint in spite of the fact that a final release has been signed "if it appears that the human rights issues raised in the complaint have not been addressed in the settlement".

[23] The investigator's report shows the investigator was alive to the relevant jurisprudence, that is the decisions in *Boudreault v. Canada (Attorney General)* (1995), 99 F.T.R. 293 and *Canada Post Corporation v. Barrette*, [2000] 4 F.C. 145 (F.C.A.).

[24] In *Boudreault*, the Federal Court decided that the Commission cannot refuse to deal with a complaint merely on the ground that it has been already dealt with by another process. The Court says that the Commission must review the evidence itself and make its own decision whether or not to proceed. At the same, however, the Commission can use the evidence gathered through the other process including documents and the evidence of witnesses.

[25] In *Barrette*, the Federal Court of Appeal ruled that a decision from another forum does not create an estoppel. At para. 28, the Court said the following:

> …
>
> the Commission must turn its mind to the decision of the [other forum's decision maker], not to determine whether it is binding on the Commission, but to examine whether, in light of that decision and of the findings of fact and credibility made by the arbitrator, the complaint may not [sic] be such as to attract the application of para. 41(1)(d).

[26] The Commission had before it material indicating that the Applicant had made related grievances to the Public Service Labour Relations Board and that these grievances had been dismissed. It had before it material indicating that a fact-finding exercise was undertaken which concluded that the Applicant's complaints were not substantiated.

[27] The Section 40/41 Report included a copy of the Memorandum of Agreement as Appendix A. This document was before the Commission. The document provided financial compensation to the Applicant. The agreement also included the Applicant's undertaking to refrain from pursuing her human rights complaint. It appears from the review of the circumstances of all of the Applicant's complaints that there was a human rights dimension to some of her grievances, for

example her complaints relating to a failure to accommodate her disability, her complaint concerning differential treatment and her allegations concerning her disability arising from her disability of allergies.

[28] The Memorandum of Agreement provided substantial financial compensation to the Applicant, including a "one time compassionate nature payment of $20,000".

[29] The Section 40/41 Report gives a thorough account of these considerations. While the Applicant attempted to attack the credibility and fairness of the fact-finding exercise and the agreement, she provided no evidence in her submissions before the Commission to support these claims. On the other hand, the Respondent provided considered explanations for each of the Applicant's concerns about the conduct of the fact-finding exercise.

[30] It was open to the Commission to find that the Applicant's submissions lacked credible evidence in support. In these circumstances, I am satisfied that the Commission's decision that the Applicant's claim fell within the criteria of paragraph 41(1)(d) of the Act, was reasonable and there is no basis for judicial intervention.

[31] The Applicant also challenges the thoroughness of the underlying investigation. She submits that the Commission failed to seek information from material witnesses whom she identified. She also argues that the Commission should have notified her that there may be an issue as to the credibility of her claims and failing to do so also constituted a breach of procedural fairness.

[32] It is trite law to say that the Commission is the master of its own procedure. In *Busch v. Canada (Attorney General)* (2008), 71 C.C.E.L. (3d) 178 the Court said the following at para.15:

> … not all persons on a complainant's list of possible witnesses must be interviewed; an investigator has considerable discretion in deciding how to conduct an investigation. However, where a witness may have information that could address a significant finding of the Investigator and where no one else is interviewed that could resolve a controversial and important fact, it seems to me that failure to interview that person may result in an investigation that is not complete [citations omitted].

[33] It must be kept in mind that the Section 40/41 Report in this case is a report that was prepared following the execution of the Memorandum of Agreement by the Applicant and her former employer, Statistics Canada. At the initial investigation level, the Commission was focused on whether to reactivate the Applicant's complaint, in light of the surrounding circumstances, including the execution of this Memorandum of Agreement. In *Tinney v. Canada (Attorney General)*, 2010 FC 605, the Court summarized the standard of procedural fairness relative to interviewing proposed witnesses at para. 28 as follows:

> The jurisprudence is clear: There is no requirement that a human rights investigator interview every witness proposed or identified by the parties. However, it is equally clear that an interview is required where a reasonable person would expect evidence useful to the investigator in his determination would be gained as a result of the interview or where there is a witness that may have information that could address a significant fact and where no one else has been interviewed that could resolve that important and controversial fact [citations omitted].

[34] Having regard to this standard, I find that a reasonable person would not expect the Applicant's purported witnesses to be useful sources to substantiate her claim of duress or that they could have information that would help resolve this issue. I am satisfied that no breach of procedural fairness occurred in this regard.

[35] The Applicant is now alleging duress at the time she signed the Memorandum of Agreement. She has led no independent evidence in that regard. She is virtually disowning the role of her legal counsel who assisted during the negotiations and at the signing of the agreement.

[36] With respect to the Applicant's submissions that the Commission ought to have made her aware that it may not accept her submissions concerning the integrity of the fact-finding exercise or duress in signing the agreement, the exchange of submissions and cross-disclosure submissions makes it clear that these matters were in dispute. The Applicant had the opportunity to address these issues in her submissions.

[37] In conclusion, I am satisfied that the Commission reached a reasonable decision and that no breach of procedural fairness occurred. The application for judicial review is dismissed with costs to the Respondent.

**ORDER**

**THIS COURT ORDERS that** the application is dismissed with costs to the Respondent. If the parties cannot agree on costs then brief submissions not exceeding five (5) pages may be made, the Respondent to serve and file his submissions on or before February 7, 2011 and the Applicant to serve and file her submissions on or before February 21, 2011.

"E. Heneghan"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1803-09 |
| **STYLE OF CAUSE:** | RACHEL EXETER v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Ottawa, Ontario |
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| **DATED:** | January 25, 2011 |

**APPEARANCES:**

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| Paul Battin | FOR THE RESPONDENT |

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