Date: 20081119

Docket: A-93-08

Citation: 2008 FCA 356

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

CHRISTINE PICHÉ

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Ottawa, Ontario, on November 19, 2008.

Judgment delivered from the bench at Ottawa, Ontario, on November 19, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Ottawa, Ontario, on November 19, 2008)

LÉTOURNEAU J.A.

[1] This is an appeal from a decision of the Federal Court dismissing an application for judicial review of a decision of the Canadian Human Rights Commission (Commission) made under paragraph 41(1)(*d*) of the *Canadian Human Rights Act*, R.S.C. [1985], c. H-6 (Act). Essentially, this paragraph authorizes the Commission to decline to deal with a complaint filed with it if it appears to the Commission that the complaint is trivial, frivolous, vexatious or made in bad faith.

[2] The appellant submits that the Commission improperly refused to exercise its jurisdiction to rule on her complaint and that this refusal is an error of law. She asks the Court to set aside the decision of the Federal Court and that of the Commission. She requests that the matter be referred back to the Commission for reconsideration in accordance with the reasons for judgment of this Court. She also seeks costs of the appeal.

[3] It is not necessary to go into the details of the events that led to this case, except to state the following.

[4] The appellant was employed by the Correctional Service of Canada (the employer). She filed three grievances against the employer, the first of which was in regard to disciplinary measures imposed against her for use of the employer's computer equipment at home for personal purposes. This grievance was dismissed.

[5] The second grievance relates to her return to work following a prolonged sick leave. She submitted that the employer unduly delayed her return to work by requiring that she undergo a medical assessment by Health Canada.

[6] This second grievance, for reasons we will state later, was withdrawn by the appellant before the first-level hearing.

[7] Finally, through a third grievance, the appellant challenged her employer's decision to refuse a requested paid leave after the fact. Under the collective agreement, such leave requests had to be approved before the start of the leave. Since the grievance was bound to fail, the appellant withdrew it before the first-level hearing.

[8] Thus, the appellant subsequently filed a complaint with the Commission, claiming that she had been the [TRANSLATION] "victim of harassment and discrimination based on [her] marital status, family status and temporary sick leave, or the perception of this temporary sick leave" (see Appeal Book, at page 56, appellant's complaint).

[9] The appellant's complaint was analyzed by an investigator of the Commission, and the investigator rightly noted that, by the union's own admission, these grievances clearly could not be arbitrated since they were without merit: the employer was entitled to request Health Canada's opinion and to refuse the requested paid leave after the fact (see the investigator's report, Appeal Book, page 39, paragraphs 16 and 17).

[10] Regarding the actual matter of discrimination with respect to the three incidents that were the subject of the grievances and the complaint before the Commission, the investigator writes the following at paragraph 18 of his report:

> In support of her request to have the Commission rule on her complaint, the complainant submitted a letter she received from the union. Nothing in this letter points to the fact that the respondent could have based the measures taken on the complainant's marital status or disability. The complainant submitted no additional information.

Consequently, the investigator made the following recommendation at paragraph 19:

> It is recommended, under paragraph 41(1)(*d*) of the *Canadian Human Rights Act*, that the Commission not rule on the complaint as it contains nothing else that concerns the Commission.
>
> [Emphasis added]

[11] There is no doubt that the investigator's report finds that there was no discrimination or evidence of discrimination by the employer in relation to the facts alleged against the employer by the appellant.

[12] The Commission reviewed the file and, in a letter to the appellant, informed her that it had decided, under paragraph 41(1)(*d*) of the Act, not to rule on the complaint because [TRANSLATION] "it was possible to decide the allegations of discrimination through the other remedy, grievances under the collective agreement" (see Appeal Book, page 33, decision of the Commission).

[13] The terminology used by the Commission to express its conclusion is unfortunate because, taken literally, it suggests that the issue of discrimination was resolved by adjudication on the merits of the grievances by the appropriate authority. However, aside from the first grievance, which was dismissed, the other two were withdrawn. It is therefore not surprising that the appellant challenges this conclusion on the basis that the grievances did not resolve the issue of discrimination.

[14] With respect, the Commission's conclusion must not be read literally or abstractly or taken out of context. Rather, it should be read and analyzed in the context of the investigator's report, the actual allegations of the appellant, the incidents themselves, the union's opinions on the issues and the evidence presented in support of the allegations of discrimination.

[15] All of the evidence shows that the measures taken by the employer, measures that were cited by the appellant as being discriminatory, were justified and that there is no evidence of a ground of discrimination. The grievances revealed the legitimacy of the employer's actions and the absence of any underlying discrimination. It is in this sense that we are of the opinion that the Commission's conclusion that [TRANSLATION] "it was possible to decide the allegations of discrimination through the other remedy, grievances under the collective agreement" should be read and understood.

[16] For these reasons, we are of the opinion that the Federal Court, though not without equivocation, came to the right conclusion and that the appeal should be dismissed with costs.

"Gilles Létourneau"

J.A.

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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DELIVERED FROM THE BENCH BY:	LÉTOURNEAU J.A.

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