Federal Court  Cour fédérale

Date: 20150203

Docket: T-1922-13

Citation: 2015 FC 133

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 3, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

LINE LEBEAU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is a judgment concerning an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of the decision rendered on October 24, 2013, by Adjudicator Michael Bendel under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, whereby the Adjudicator dismissed the grievance of Line Lebeau (the applicant) on the grounds

that she was not entitled to any compensation for the pain and suffering she alleges to have suffered as a result of a discriminatory policy of her employer.

[2] For the reasons that follow, I am of the opinion that this application for judicial review should be dismissed.

II. Facts

[3] The applicant has been an employee at Statistics Canada since 2001. She works in Ottawa, at Tunney's Pasture, a complex of several buildings with several parking areas.

[4] The applicant suffers from Raynaud's disease, a circulatory disorder. Because of this condition, her extremities (ears, fingers, etc.) become white, cold, insensitive and numb when she is exposed to the cold. The applicant may also feel sharp pain when she is exposed to the cold.

[5] In 2005, after she was diagnosed with this disease, the applicant acquired a car for getting to work. Statistics Canada's parking policy at the time provided for three categories of parking permits: (i) parking for executives, (ii) general parking, and (iii) medical/accessible parking. On the basis of that policy and a supporting medical certificate, the applicant was able to get a parking spot from her employer that was close to her work, for $100 per month, the same rate as for general parking.

[6] In 2010, further to an amendment of Statistics Canada's parking policy, the applicant was informed that she would no longer qualify for the special rate, and that the monthly fee that she would have to pay to keep her parking spot would increase from $100 to $200. This policy provides that people with a slight disability who do not have a provincial accessible parking permit, as is the case with the applicant, can no longer qualify for the $100 monthly rate, which will continue to be available to people with an accessible parking permit.

[7] Even though the additional cost represents a significant amount for the applicant because of her tight financial situation, she decided to keep her parking spot because she could not get to her work in the cold.

[8] On November 9, 2010, the applicant filed a grievance to contest her employer's decision to demand an additional amount to keep her parking spot despite her medical condition.

[9] The applicant's grievance was denied at the third level of the grievance process on January 4, 2011. In its response at the third level of the grievance process, the applicant's employer indicated, through the Assistant Chief Statistician, as follows:

> [TRANSLATION]
>
> You asked Statistics Canada to pay these costs for you. At this time, the organization is facing an operating budget freeze, strategic program reviews and the need to absorb recent pay increases (and others that will be coming in the next fiscal year). Paying the administrative costs of every employee in your situation would cost Statistics Canada $650,000 annually. This sum cannot be covered without taking money away from surveys or existing programs.

[10] On January 28, 2011, the Canadian Association of Professional Employees filed a notice of reference to adjudication of an individual grievance on behalf of the applicant.

[11] In November 2012, Statistics Canada finally decided to offer the applicant and the other employees in the same category a reserved parking spot at the same rate as for general parking, effective December 1, 2012. Further to this change in policy, Statistics Canada reimbursed the applicant the additional amount she had to pay for parking, $2,406.

[12] The grievance was heard by the Adjudicator on May 13 and 14, 2013. The applicant testified before him that her employer's decision gave her the impression that it did not consider her to be as valuable as the other employees. The applicant maintained that she felt humiliated, that her self-esteem was affected, and that she suffered from insomnia, depression and irritable bowel syndrome as a result of her employer's new policy.

[13] The applicant also maintained before the Adjudicator that her employer's response at the third level of the grievance process was insensitive and incomprehensible, as her employer tried to make her bear the guilt for program cutbacks and lost positions. Before the Adjudicator, the Assistant Chief Statistician who signed the response at the third level of the applicant's grievance process did not remember the basis for the $650,000 amount mentioned in that response.

[14] As mentioned above, the Adjudicator rendered his decision on October 24, 2013.

III. Decision

[15] In his decision, the Adjudicator chose to express "doubts" about the discriminatory nature of Statistics Canada's parking policy "rather than officially decide these matters" because the parties hardly raised these issues in their arguments. However, the Adjudicator set aside his doubts about the discriminatory nature of this policy and pursued his analysis of the non-pecuniary damages accordingly.

[16] The Adjudicator expressed doubts as to the discriminatory nature of this policy because, according to him: (i) Statistics Canada was entitled to apply the same principles as those adopted by the provinces by creating a distinction based on obtaining an accessible parking permit, (ii) Statistics Canada's decision was merely designed to prompt people with disabilities to obtain a permit attesting to their disability, which the applicant did not indicate in her testimony that she had done, and (iii) asking employees to fill out a form to obtain a provincial permit to avoid a monthly increase of $100 is not a discriminatory practice. Having completed this analysis, the Adjudicator then stated, "I will set those doubts aside".

[17] The Adjudicator also concluded that even if Statistics Canada had violated the *Canadian Human Rights Act*, R.S.C. 1985, c H-6 (CHRA), and the Agreement between the Treasury Board and the Canadian Association of Professional Employees (the Agreement), it was impossible to conclude that the applicant was entitled to moral damages. Based on the analysis of Justice Zinn in paragraph 60 of *Canada (Attorney General) v Tipple*, 2011 FC 762 (*Tipple*), the Adjudicator ruled that because the applicant did not provide any medical evidence in support of her testimony and did not mention that she was continuing to experience pain and suffering, she did not prove that she had experienced pain and suffering that would justify compensation.

[18] As for the compensation under subsection 53(3) of the CHRA, the Adjudicator concluded that it could not be paid because Statistics Canada's decision to base its parking policies on provincial plans did not amount to engaging in a discriminatory practice "wilfully or recklessly".

IV. Issues

[19] There are three issues:

1. Did the Adjudicator rule on the discriminatory aspect of the employer's policies, and did the Adjudicator err in deciding on whether or not to rule on this issue?
2. Did the Adjudicator err in failing to award the applicant compensation under paragraph 53(2)*(e)* of the CHRA?
3. Did the Adjudicator err in failing to award the applicant compensation under subsection 53(3) of the CHRA?

V. Relevant provisions (in effect on the date of the decision)

Canadian Human Rights Act, R.S.C., 1985, c. H-6	***Loi canadienne sur les droits de la personne, L.R.C. (1985), ch. H-6***
53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.	53. (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.
Complaint substantiated	**Plainte jugée fondée**
(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:	(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire:
(*a*) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including	a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment:
(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or	(i) d'adopter un programme, un plan ou un arrangement visé au paragraphe 16(1),
(ii) making an application for approval and implementing a plan under section 17;	(ii) de présenter une demande d'approbation et de mettre en œuvre un programme prévu à l'article 17;
(*b*) that the person make available to the victim of the discriminatory practice, on the	b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances

first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(*c*) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(*d*) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

ou avantages dont l'acte l'a privée;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

Special compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

Indemnité spéciale

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

Interest

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a

Intérêts

(4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la

period that the member or panel considers appropriate.	période qu'il estime justifiés.

VI. Analysis

[20] I note that the applicant raised certain errors of fact in the Adjudicator's decision, such as the fact that the applicant had not taken steps to obtain an accessible parking permit. While I note these observations, I believe that these issues are incidental to this case.

A. *The appropriate standard of review*

[21] In *Dunsmuir v New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question".

[22] In this case, the parties rightly submit that the standard of reasonableness applies to all the issues in dispute in this case: *Stringer v Canada (Attorney General)*, 2013 FC 735, at paragraphs 61 to 67 (*Stringer*).

B. *Analysis regarding the discriminatory nature of the employer's policy*

[23] The reasons for an administrative authority's decision must be reviewed organically, and "a decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland and Labrador Nurses'*

Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62, at paragraphs 14 and 16). As Justice Sharlow mentioned in *Tipple v. Canada (Attorney General)*, 2012 FCA 158, at paragraph 13, "[t]he adjudicator's reasons must be read in their entirety, in light of the evidence before him and the jurisprudence to which he was referred". Recently, the Federal Court of Appeal, in *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245, at paragraphs 63 and 67, reiterated that it is important to defer to an adjudicator's decision not to analyze one of the issues raised by the parties in order to rule on the overall dispute.

[24] In this case, the employer admitted before the Adjudicator that *prima facie* evidence of discrimination had been presented by the applicant. The Adjudicator mentions in his reasons that the parties chose not to fully address the discriminatory nature of the employer's policy in their arguments.

[25] In his decision, the Adjudicator mentions in paragraphs 33 and 38:

> I have doubts about the discriminatory nature of Statistics Canada's parking policy for two reasons. I have raised doubts rather than officially decide these matters because the parties hardly addressed them in their arguments.
>
> . . .
>
> Even if Statistics Canada violated the collective agreement and the CHRA by imposing an additional premium on the grievor as a condition for keeping her reserved spot (which I doubt), it is impossible to conclude that she would be entitled to moral damages.

[26] Based on my reading of the Adjudicator's decision, I find that he chose not to determine whether Statistics Canada's policy is discriminatory. However, in light of the Adjudicator's

conclusions, I am of the opinion that he chose to assume that the applicant was a victim of discrimination for the purpose of the analysis of the entitlement to moral damages. This appears to me to be a reasonable choice, given the facts in this case, and insofar as the Adjudicator's analysis of the entitlement to any ensuing compensation under paragraph 53(2)*(e)* and subsection 53(3) of the CHRA is reasonable. The outcome of the Adjudicator's analysis would have been the same, regardless of his conclusion on the issue of discrimination. Moreover, courts and tribunals commonly choose not to rule on an issue when this issue would not have an impact on the overall findings in the case.

[27] I am therefore of the opinion that the Adjudicator's decision not to make a definitive ruling on whether Statistics Canada's policy was discriminatory falls within a range of possible, acceptable outcomes, and is reasonable in respect of the facts and law.

C. *The reasonableness of the lack of compensation under paragraph 53(2)*(e) *of the CHRA*

[28] The applicant submits that, according to the case law of the Public Service Labour Relations Board (PSLRB) and the Canadian Human Rights Commission, the testimony of a person who alleges that he or she was a victim of pain and suffering may suffice as evidence of pain and suffering under paragraph 53(2)*(e)* of the CHRA. I agree with the applicant on this point. However, this does not mean that it was unreasonable for the Adjudicator to point out and consider the absence of medical evidence corroborating the applicant's allegations.

[29] On the one hand, the Adjudicator's analysis does not contradict the case law, as he did not consider that the applicant was required to provide medical evidence in support of her

allegations. In fact, the Adjudicator's position instead indicates that the applicant had to prove the pain and suffering, "preferably" through evidence from a health care professional. The applicant maintained before the PSLRB that she had suffered from stress, humiliation, loss of self-esteem, irritable bowel syndrome, insomnia and depression. Given the nature and severity of the pain and suffering alleged by the applicant, the Adjudicator notes that the applicant did not submit any medical evidence to support her allegations, and that she "did not state that she had to consult a health professional" about the pain and suffering that she allegedly endured. In my opinion, it was not unreasonable for the Adjudicator to draw a negative inference in the absence of medical evidence or evidence corroborating the alleged harm. In other words, I find that the Adjudicator considered that, in all likelihood, the harm suffered by the applicant was not serious enough to seek help from a health care professional and that the extent of the harm was not sufficiently great to justify awarding compensation under paragraph 53(2)*(e)* of the CHRA.

[30] Moreover, although I consider that *Tipple*, on which the Adjudicator relied, must be considered with caution (because this decision does not involve a human rights violation under the CHRA, and some of the Federal Court's conclusions in *Tipple*, other than those pertaining to the awarding of compensation for pain and suffering, were subsequently overturned by the Federal Court of Appeal), I am not inclined to ignore the analysis by Justice Zinn at trial in that matter, which concerns, among other things, an assessment of the awarding of damages and interest for psychological harm.

[31] In my opinion, the reasoning of Justice Zinn regarding the absence of evidence of medical treatment and the extent and duration of the harm can be applied to this case, as was

done by the Adjudicator. The purpose of subsection 53(2) of the CHRA is not to penalize the person who committed the discriminatory practice, but to eliminate as much as possible the impact of the discrimination on the complainant (*Robichaud v. Canada (Treasury Board),* [1987] 2 SCR 84, at paragraph 13; *Tremblay v. Canada (Attorney General),* 2006 FC 219, at paragraphs 49 and 50; *Canada (Human Rights Commission) v. Warman,* 2012 FC 1162, at paragraphs 18 and 19; *Hicks v. Canada (Human Resources and Skills Development),* 2013 CHRT 20, at paragraph 75). Thus, an adjudicator must be able to determine the extent and seriousness of the alleged harm in order to assess the compensation that should be awarded. Thus, it was reasonable for the Adjudicator to follow the reasoning of Justice Zinn and to turn to the absence of medical evidence in drawing his conclusions about the compensation to which the applicant is entitled.

[32] In this regard, it is also important to note that the employer's policy that was claimed to be discriminatory was voluntarily corrected by the employer, and that all additional costs incurred by the applicant during the period in which the policy was in effect were reimbursed.

D. *The reasonableness of the absence of compensation under subsection 53(3) of the CHRA*

[33] The applicant did not submit any evidence demonstrating that special compensation should be awarded pursuant to subsection 53(3) of the CHRA. As was pointed out by the respondent, in *Canada (Attorney General) v. Collins*, 2011 FC 1168, at paragraph 33, Justice Near states:

> The Tribunal found that any discrimination that may have occurred was not intentional and I do not agree with the findings of the Tribunal that wilful or reckless discrimination can be found without some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour (see for example the definition of reckless as "disregarding the consequences or dangers" and "lacking caution" in the *Canadian Oxford Dictionary*, 2d ed. (Toronto: Oxford University Press Canada, 2005)). I find no evidence of such behaviour on the part of CSC in this case. As such, I find that there was no basis for an award of special compensation pursuant to subsection 53(3) of the CHRA and would strike that award.

[34] The Adjudicator's decision not to award any compensation under subsection 53(3) of the CHRA falls within a range of possible, acceptable outcomes, and is therefore reasonable in respect of the facts and law.

VII. Conclusions

[35] This application for judicial review must be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUGES that this application for judicial review is dismissed, with costs.

"George R. Locke"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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