Federal Court Cour fédérale

Date: 20151005

Docket: T-21-15

Citation: 2015 FC 1135

Ottawa, Ontario, October 5, 2015

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

KATHLEEN O'GRADY

Applicant

and

BELL CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission (the Commission) dated December 10, 2014 (the Decision). The Commission dismissed the applicant's complaint pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act* (the Act) because, "having regard to all the circumstances of the complaint, an inquiry by a Tribunal is not warranted."

[2] For the reasons which follow, the application is allowed.

I. BACKGROUND

[3] This is the second application for judicial review in this matter. The background facts to the issues between the parties are fully set out in the decision of Justice Kane dated December 7, 2012, reported at 2012 FC 1448, and need not be repeated here other than as necessary to explain these reasons.

[4] Justice Kane quashed the Commission's decision not to deal with the complaint under subparagraph 41(1)(d) of the Act and remitted the matter to the Commission to be re-determined on the basis that the Applicant had negotiated a Settlement and signed an Acknowledgement relieving the Respondent of any liability relating to her termination.

The Applicant's Disability

[5] The Applicant, who has been self-represented throughout, suffers from mental illness and was totally disabled at the time of the events underlying her complaint. She was receiving Long Term Disability (LTD) benefits and hoping to return to work via a rehabilitation program as part of her LTD benefits.

[6] After the events under consideration in the complaint the Applicant suffered a major relapse of her illness. At the time of the prior application and this application the Applicant was still disabled. She is receiving benefits under the *Ontario Disability Support Program*.

The Complaint

[7] The heart of the Applicant's complaint involves her dismissal from her position with Bell Canada while she was receiving LTD benefits. Her job was eliminated as part of a corporate

restructuring. She was called in to a meeting on April 20, 2009, ostensibly to discuss plans for her return to work, but instead she was advised her last day of employment would be October 27, 2009 if she could not find a new position before then. She was immediately removed from LTD, placed on salary continuance as an active employee for six months, and paid a lump sum of approximately eight month's salary.

[8] The Applicant's complaint to the Commission was filed October 27, 2010. It alleged she was discriminated against on the grounds of disability by way of adverse differential treatment and termination of employment. Within the complaint the Applicant provided several specific examples ranging from lack of support by the Respondent to not being advised her position had been eliminated until approximately one year after the fact, when other jobs for which she might have applied had been taken by others whose jobs were eliminated.

[9] At the April 20, 2009 meeting the Applicant lost her LTD benefits. The relief she has been seeking includes reinstatement of those benefits retroactive to her last official day of employment on October 27, 2009.

[10] It is the Applicant's belief that had she been treated more fairly, instead of being unexpectedly terminated at the April 20, 2009 meeting, she would eventually have been able to return to work as that had been her goal throughout. Following her termination, the Applicant's doctor found that she had a major relapse of her condition causing her difficulty in functioning. She was found to be unable to work for the Respondent or any other employer.

The Reconsideration

[11] On July 17, 2013, the Commission reconsidered the complaint and decided to deal with it finding that "it does not appear the complainant was 'morally blameworthy' when she filed the complaint" and "the complaint was not made in bad faith".

The New Investigation

[12] On July 23, 2013, the Commission referred the Applicant's complaint for a fresh investigation. It is the Commission's decision arising from that investigation and subsequent conciliation attempt which is the subject matter of this application.

[13] The investigator noted that the Applicant alleged adverse differential treatment by the Respondent in terminating her employment while she was on disability leave. The Applicant's allegations were investigated and were categorized by the investigator into four distinct issues. The investigator considered in detail each of the allegations. She reviewed the history of the complaint, considered the chronology of events, and interviewed the Applicant as well as three of the Respondent's current or former employees.

[14] When the investigation was finished, the original conclusion drawn by the investigator was that the matter should be referred to the Tribunal. After discussion with the director and review by the legal team at the Commission the recommendation in the report to the Commission was not a referral to the Tribunal but rather to pursue conciliation. The Applicant's evidence is that the investigator told her the report was changed because of the February 2010 settlement.

[15] In an email to the Applicant on April 1, 2014 the investigator wrote:

> As I tried to explain on the phone yesterday, I was mistaken when I thought there was agreement with my initial report recommending Tribunal. I sincerely apologize for the frustration, anxiety and upset this is caused you. After further discussions, it was felt that a recommendation of conciliation was more appropriate. You may, after receiving and reviewing the report, include any of your concerns in your submissions. The Commission will review the parties' submissions before making a decision about your complaint.

[16] On April 11, 2014 the Applicant received the investigation report which did recommend conciliation "to attempt to bring about a settlement of the complaint". Following delivery of the report, both parties were provided with the opportunity to present submissions which they both did. Both parties were also provided with the opportunity to make submissions with respect to each other's submissions. The Respondent made no further submissions.

The Conciliation Process and Report

[17] The Commission referred the matter to conciliation in June 2014.

[18] On September 22, 2014, the conciliator reported to the Commission that the matter was not resolved and, as set out in the Act, the Commission could either request the appointment of a Tribunal or dismiss the complaint because having regard to all the circumstances of the complaint, an inquiry by a Tribunal was not warranted.

[19] The conciliator's report indicated she explained the process and possible findings to the parties and what the steps would be if the matter was not resolved. The parties entered into negotiations and explored options for settlement during which the conciliator discussed with the parties the merits of the complaint and provided additional information on the remedies they

could reasonably expect if the Tribunal substantiated the complaint. Offers were exchanged between the parties but they were unable to reach a settlement.

[20] The parties were invited to make submissions with respect to the report and, subsequently, with respect to each other's submissions. The Applicant made submissions on October 19, 2014. The Respondent's submissions were sent October 20, 2014. The Applicant also made lengthy submissions on November 10, 2014 addressing the Respondent's submissions.

[21] The Respondent agreed to disclose the offer it made during conciliation to the Commission for information and it was attached to the conciliation report.

The Commission's Decision

[22] The Commission rendered the Decision at issue on December 10, 2014. The opening paragraph confirms, without specifying by date or detail, that the Commission reviewed:

- the conciliation report,
- the submissions made by the parties on the conciliation report,
- the investigation report,
- the submissions made by the parties on the investigation report and
- the complaint form.

[23] The Commission then dismissed the complaint because, "having regard to all the circumstances of the complaint an inquiry by a Tribunal is not warranted pursuant to subparagraph 44(3)(b)(i) of the Act."

[24] The Commission's explanatory text for the dismissal consisted of reproducing verbatim, with attribution, the financial terms of the Respondent's settlement offer and the brief submissions made by the Respondent justifying it, including their position that it was a reasonable offer.

[25] There were only two sentences in the Decision which were not written by the Respondent. One was the actual finding that "in all the circumstances reference to a tribunal was not warranted" and the other was the opening recitation of what documents were reviewed. (In that respect as already observed not all the submissions made to the investigator were actually before the Commission as the Applicant's May 26, 2014 reply submissions were omitted.)

[26] The Decision does not refer to any aspect of the investigator's report other than the two paragraphs from it selected by the Respondent to justify its offer both of which were rebutted in detail by the missing reply submissions from the Applicant.

II. ISSUES

[27] In this application the issues are:

(a) What is the appropriate standard of review of the Decision?

(b) Was the Commission's decision to dismiss the complaint reasonable?

(c) If not, what is the appropriate remedy?

III. THE STANDARD OF REVIEW

[28] There is no dispute that the standard of review of a decision of the Commission is reasonableness. However, in a decision where the Commission dismisses a complaint under subparagraph 43(3)(b) of the Act, it has been said that a more probing review should be carried out, see *Keith v. Canada (Correctional Service)*, 2012 FCA 117 at para 45.

[29] In applying the standard I am required to consider the "justification, transparency and intelligibility" of the Commission's reasoning and whether the decision "falls within a range of

possible, acceptable outcomes which are defensible in respect of the facts and law". *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47.

IV. WAS THE COMMISSION'S DECISION REASONABLE?

[30] The Applicant has submitted that the Decision did not provide sufficient reasons in that it just quoted from the respondent's settlement offer and conciliation submission verbatim without responding to the Applicant's submissions. She submits this is a breach of procedural fairness and gives an appearance of bias. However, as held by the Supreme Court in *Newfoundland and Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 [hereinafter *Newfoundland Nurses*] at paras 16 and 22, and recently re-iterated by the Federal Court of Appeal in *Cycles Lambert Inc. v. Canada (Border Services Agency)*, 2015 FCA 45 at para 19, "where there are reasons, there is no issue of a breach of the duty of procedural fairness. . . . the issue is whether the reasons allow the reviewing court to understand why the tribunal made its decision . . .".

[31] On that basis, I take the Applicant's submission to mean simply that the decision is not reasonable in that it does not permit her to understand *why* the Commission reached the decision it did and therefore it suffers from a lack of justification, transparency and intelligibility.

Analysis

[32] It is not uncommon for decision-makers to copy into their decisions large parts of the briefs received from parties. Chief Justice McLachlin in *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 commented extensively about judicial copying of submissions. In *Cojocaru* the decision being reviewed contained 368 paragraphs of which only

47 were predominately in the judge's own words and those were largely a recitation of facts. In rejecting the copying argument as a criticism of the reasons the court put the review test this way at paragraph 70:

> the evidence did not show the judge failed to put his mind to the critical issues . . . [T]he reasons, read as a whole, show that the trial judge considered the issues and the arguments of both sides, and came to a conclusion on each of the main issues. (my emphasis)

[33] The nature of the case is also one of the important circumstances to review. Here, it is one with serious personal consequences to the Applicant. This Court has previously determined in *Gravelle v. Canada (Attorney General)*, 2006 FC 251 at para 39 that "decisions dismissing complaints should be more closely scrutinized than decisions referring complaints to the Tribunal" because, as put by Evans J. in *Larsh v. Canada* [1999] F.C.J. No. 508 (FC), at para 36:

> A dismissal is, after all, a final decision that precludes the complainant from any statutory remedy and, by its nature, cannot advance the overall purpose of the *Act*, namely protection of individuals from discrimination, but may, if wrong, frustrate it.

[34] Deference to the decision maker includes an acknowledgement that not every document or argument need be addressed in reasons, there is a presumption that what was before them was considered and they are "not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion . . ." and, if there are omissions the first step is not to substitute the Court's own reasons but rather "look to the record for the purpose of assessing the reasonableness of the outcome," see *Newfoundland Nurses* at para 15.

[35] However, when what is being considered is not a subordinate issue but rather one of central importance to the outcome, the decision maker must address it in their reasons. Here notably absent from the decision of the Commission is any reference at all to, or analysis of, the

Applicant's lengthy reply submissions in which she rebutted each of the Respondent's submissions to the conciliator with a variety of additional facts, corrections to the record as stated by the Respondent, mathematical calculations as to why the offer made to her was not reasonable for her, caselaw in support of her position and extracts from human rights articles dealing with ending the employment relationship.

[36] On May 26, 2014, the Applicant provided detailed additional submissions to the Investigator's Report. However it appears from the rule 318 (1) (a) certificate that these responding submissions were not before the Commission when it made the decision to refer the complaint to conciliation. This raises a question of whether that material was before the Commission when they considered the matter.

[37] There is always a question of how far a reviewing court can "wade into" the record to look for reasons that were not stated, à la *Newfoundland Nurses*, but must have been present in arriving at the decision. Mr. Justice Rennie, as he then was, analyzed the process in *Pathmanathan v. Canada (Citizenship and Immigration)*, 2013 FC 353 at para 28 this way:

> *Newfoundland Nurses* does not authorize a court to rewrite the decision which was based on erroneous reasoning. The reviewing court may look to the record in assessing whether a decision is reasonable and a reviewing court may fill in gaps or inferences reasonably arising and supported by the record. *Newfoundland Nurses* is a case about the standard of review. It is not an invitation to the supervising court to re-cast the reasons given, to change the factual foundation on which it is based, or to speculate as to what the outcome would have been had the decision maker properly assessed the evidence.

[38] Unlike *Cojocaru*, the reasons here do not show the Commission considered the issues and the arguments of both sides and then came to a conclusion. The Decision only shows the Commission considered the submissions of the Respondent. It fails to deal with the Applicant's

submissions at all. By not addressing those submissions the Commission has left an analytical gap which the Court cannot fill.

Does the Analysis in the Investigator's Report Add to the Reasons?

[39] Normally when reasons are scant the investigator's report can be taken as reasons of the Commission. But, in this case, the Decision is based solely upon the offer of settlement made at the conciliation stage *after* the investigation report had already been delivered.

[40] The investigator's report initially concluded this complaint should be sent to a Tribunal. She was then persuaded or directed (the evidence being unclear) to recommend conciliation because of the February 2010 settlement. That is the settlement which Justice Kane had found did not appropriately take into account the Applicant's mental health issues at the time she executed a Release in favour of the Respondent.

[41] The justification presented by the Respondent for making the offer to settle did reference two paragraphs of the investigator's report but, as with the conciliator's report, the Applicant filed reply submissions which dissected the Respondent's submissions and disagreed with the investigator. As those submissions were not before the Commission, the Decision may be flawed in that not all the argument was before the Commission.

Conclusion

[42] In a recent decision of this court dealing with failure to consider submissions, Justice Fothergill found in *Brosnan v. Bank of Montreal*, 2015 FC 925 at para 11, that "[w]here the Commission fails to address submissions that go to the heart of the complaint under adjudication,

this implicates the procedural fairness of the investigation and the resulting decision." (my emphasis).

[43] Although *Brosnan* dealt with a deficient investigation, the reasoning applies equally on the facts of this particular case to the conciliation report and the submissions made with respect to the settlement offer made during conciliation because the Commission made that offer to settle the determinative issue. The Respondent's offer, attached to the conciliation report and reproduced in the Decision, effectively took the place of the investigation report.

[44] In all the circumstances of this case, including the importance of the outcome to the Applicant, which precludes her from any statutory remedy for her complaint, and the lack of transparency or justification in the reasons set out in the Decision, I find the Decision cannot stand.

V. REMEDY

[45] I do not think this is a case which requires another fresh investigation or conciliation. It simply requires a fresh look. Therefore the Decision at issue of the Commission is quashed. The complaint is remitted to the Canadian Human Rights Commission for a re-determination of the complaint using the same materials with the addition of the Applicant's additional reply submissions with respect to the investigation report and taking into account these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and decision of the Commission is quashed.
2. The matter is remitted for re-determination considering the same materials plus the reply submissions made by the Applicant to the investigator and taking into account these reasons.
3. No costs are awarded.

"E. Susan Elliott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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