

Federal Court



Cour fédérale

Date: 20160706

**Dockets: T-1003-15
T-1005-15**

Citation: 2016 FC 758

Ottawa, Ontario, July 6, 2016

PRESENT: The Honourable Mr. Justice Fothergill

Docket: T-1003-15

BETWEEN:

CONNIE LIDDIARD

Applicant

and

CANADA POST

Respondent

Docket: T-1005-15

AND BETWEEN:

CONNIE LIDDIARD

Applicant

and

CANADA POST

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Connie Liddiard has brought two applications for judicial review [Court File No. T-1003-15 and Court File No. T-1005-15] of refusals by the Canadian Human Rights Commission [the Commission] to investigate her complaints of discrimination against Canada Post Corporation [CPC]. The Commission found that the first complaint had been previously addressed by a labour arbitrator with authority to consider human rights issues, and was therefore vexatious pursuant to s 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act]. The Commission found that the second complaint was the subject of ongoing grievances and, pursuant to s 41(1)(a) of the Act, Ms. Liddiard should exhaust the grievance procedure before filing a human rights complaint with the Commission.

[2] For the following reasons, I find that the Commission reasonably concluded that the substance of Ms. Liddiard's first complaint had been dealt with by another decision-maker with the authority to rule on human rights issues under the Act. The Commission reasonably concluded that Ms. Liddiard's second human rights complaint attracted s 41(1)(a) of the Act due to the ongoing grievance procedure. If the arbitration of Ms. Liddiard's remaining grievances does not address all of the human rights issues raised in her second complaint, then she may ask the Commission to reactivate her complaint after the arbitration process has been exhausted. The applications for judicial review are therefore dismissed.

II. Background

[3] Ms. Liddiard began working at CPC in August 1997. In April 2000, she suffered a back injury that resulted in a permanent, partial disability. She was away from work for approximately two years, and was accommodated as a part-time postal clerk when she returned to CPC in 2002.

Court File No. T-1003-15

[4] In October 2006, Ms. Liddiard submitted a written internal complaint to CPC alleging that she had endured discrimination and harassment because of her disability. The complaint was investigated by Ms. Kelly Edmunds, Officer, Human Rights and Legislated Programs, CPC. In a report dated March 23, 2007, Ms. Edmunds found that there was no evidence to support Ms. Liddiard's allegations that she was subject to discrimination and harassment.

[5] In April 2007, the Canadian Union of Postal Workers [CUPW], as the sole and exclusive bargaining agent for the majority of CPC's employees, filed a grievance on Ms. Liddiard's behalf. CUPW and CPC are parties to a collective agreement which provides for a grievance and arbitration process to resolve complaints. CUPW alleged discrimination and harassment contrary to articles 5 and 56 of the collective agreement. CUPW also claimed that Ms. Edmunds had not fully investigated Ms. Liddiard's internal complaint.

[6] On April 13, 2007, Ms. Liddiard filed a human rights complaint against CPC with the Commission in which she alleged discrimination on the basis of her disability. In August 2007, the Commission declined to investigate the complaint, citing s 41(1)(a) of the Act. This provision

grants the Commission discretion not to deal with a complaint if it appears that review or grievance procedures that are otherwise reasonably available have not yet been exhausted. Following the Commission's decision, Ms. Liddiard agreed to pursue the grievance process.

[7] In March 2008, Ms. Liddiard sought to reactivate her human rights complaint with the Commission on the ground that the grievance process was not reasonably available to her. In August 2008, the Commission again refused to deal with her complaint pursuant to s 41(1)(a) of the Act.

[8] Ms. Liddiard continued to pursue the grievance process. Her grievances, together with a further 13 grievances, were referred to arbitration. The grievances were heard by Arbitrator F.R. Von Veh [the Arbitrator] between January 25, 2012 and October 28, 2014.

[9] In May 2012, Ms. Liddiard again asked the Commission to reactivate her human rights complaint. The Commission declined to investigate the complaint because the grievance process was still ongoing.

[10] In January 2014, Ms. Liddiard again asked the Commission to reactivate her human rights complaint. The Commission invited the parties' submissions on the application of s 41(1)(a) of the Act.

[11] On November 5, 2014, the Arbitrator dismissed all of Ms. Liddiard's grievances against CPC. The Arbitrator found that Ms. Edmunds' internal investigation had been conducted in a

competent and professional manner, and affirmed her conclusion that there was no evidence to support Ms. Liddiard's allegations that CPC had treated her in an unfair or discriminatory manner.

[12] Following the Arbitrator's Award, the Commission advised the parties that an investigator from the Commission would prepare a "section 40/41 report". The Commission invited the parties to state their positions on whether Ms. Liddiard's human rights complaint was vexatious within the meaning of s 41(1)(d) of the Act. This provision affords the Commission discretion to dismiss a complaint if it appears to be "trivial, frivolous, vexatious or made in bad faith".

[13] On February 25, 2015, the Commission issued its section 40/41 report. The report summarized Ms. Liddiard's first human rights complaint to the Commission, the jurisprudence governing the application of s 40(1)(d) of the Act, the factors that must be considered when determining whether a complaint is vexatious, the Arbitrator's Award, and the parties' submissions. The report dealt with Ms. Liddiard's criticisms of the Arbitrator's Award as follows:

The complainant feels that the arbitrator was not impartial, that he worked in concert with the employer and union and did not consider all the evidence before him, and that he was biased. She has not presented any information to the Commission to support these assertions. The Commission is not an appeal process for complainants who are dissatisfied with the outcome of arbitration. In this case, it appears that the arbitration process was fair.

[14] The report concluded that the "arbitration procedure had addressed the allegation of discrimination overall":

In the present case, a labour arbitrator with the authority to decide human rights issues dealt with the complainant's allegations of adverse differential treatment and harassment based on her disability. The arbitrator heard testimony over fourteen (14) days from several witnesses, including extensive testimony from the complainant. He dismissed the complainant's grievances. Given that another decision-maker with the authority to apply the Act has dealt with the allegations of discrimination raised in this complaint, the complaint is vexatious within the meaning of section 41(1)(d) of the Act and the Commission should not deal with it.

[15] Ms. Liddiard and CPC provided their respective responses to the section 40/41 report in March and April 2015.

Court File No. T-1005-15

[16] On June 10, 2014, Ms. Liddiard filed a second human rights complaint with the Commission. She alleged that she had endured discrimination and harassment because of her disability and national origin. She said that CPC had placed unfavourable reports in her personnel file, improperly suspended her, and retaliated against her for filing the first human rights complaint.

[17] On July 11, 2014, CUPW filed a grievance on Ms. Liddiard's behalf alleging that CPC had improperly suspended Ms. Liddiard on May 20, 2014, and had inappropriately placed unfavourable reports in her personnel file. The grievance also alleged that CPC had violated numerous articles of the collective agreement, including articles 5, 54 and 56 relating to discrimination and harassment in the workplace, and CPC's "Work Reintegration Program".

[18] On August 13, 2014, Ms. Liddiard's grievances were referred to arbitration pursuant to the collective agreement. A hearing was scheduled for January 27, 2015. However, the arbitrator assigned to hear the grievances was F.R. Von Veh, who had recently rendered the adverse decision regarding Ms. Liddiard's previous grievances. CUPW requested an adjournment of the hearing. It appears that the arbitration has yet to take place.

[19] CUPW then filed another grievance on Ms. Liddiard's behalf. This grievance alleged that CPC had improperly placed unfavourable reports in Ms. Liddiard's personnel file, contrary to articles 5, 54 and 56 of the collective agreement. The grievance was referred to arbitration on September 26, 2014. It appears that the arbitration has yet to take place.

[20] On September 26, 2014, CPC requested that the Commission decline to deal with Ms. Liddiard's second human rights complaint pursuant to s 41(1)(a) of the Act. CPC argued that Ms. Liddiard had access to CPC's internal grievance procedure pursuant to the collective agreement, and that she should exhaust this avenue of redress before proceeding with a human rights complaint to the Commission. CPC noted that CUPW had filed grievances concerning some of the issues raised in the human rights complaint that were still unresolved.

[21] Following an investigation, the Commission issued a section 40/41 report dated March 9, 2015. The report concluded that the Commission should not deal with the second human rights complaint until Ms. Liddiard had exhausted the grievance process as required by s 41(1)(a) of the Act.

[22] On March 23, 2015, Ms. Liddiard submitted a response to the report, and stated that the grievance process was not available to her because she was no longer employed by CPC and no longer a member of CUPW.

[23] On May 5, 2015, CPC informed the Commission of its position that the grievance process remained available to Ms. Liddiard, even though she had retired. CPC noted that CUPW continued to represent her in the grievances filed on her behalf, and that an arbitrator had been selected to hear the grievances.

III. Decisions under Review

Court File No. T-1003-15

[24] By letter dated May 20, 2015, the Commission advised the parties that it had decided not to deal with Ms. Liddiard's first human rights complaint pursuant to s 41(1)(d) of the Act. The Commission adopted the following conclusion of the section 40/41 report:

The Supreme Court has held that the Commission must respect the finality of decisions made by other administrative decision-makers with concurrent jurisdiction to apply human rights legislation where the previously decided issue was essentially the same as the complaint before the Commission. In the present case, a labour arbitrator with the authority to decide human rights issue dealt with the complainant's allegations of adverse differential treatment and harassment based on her disability. The arbitrator heard testimony over fourteen (14) days from several witnesses, including extensive testimony from the complainant. He dismissed the complainant's grievances. Given that another decision-maker with the authority to apply the Act has dealt with the allegations of discrimination raised in this complaint, the complaint is vexatious within the meaning of section 41(1)(d) of the Act, and the Commission should not deal with it.

[25] On June 17, 2015, Ms. Liddiard brought an application for judicial review of the Commission's decision not to deal with her first human rights complaint.

Court File No. T-1005-15

[26] By letter dated May 27, 2015, the Commission advised the parties that it had decided not to deal with Ms. Liddiard's second human rights complaint pursuant to s 41(1)(a) of the Act. The Commission adopted the following conclusion of the section 40/41 report:

The union has referred to arbitration two grievances filed on behalf of the complainant that relate to alleged events described in the present complaint. These grievances are still in progress. It appears that the complainant has full access to the grievance and arbitration process, and that that process will be able to deal with at least some of the human rights issues raised in this complaint. The complainant ought to exhaust the other redress procedure that is reasonably available to her. At the end of the grievance and arbitration process, if the complainant believes that her human rights concerns have not been fully addressed, she could request that the Commission reactivate her complaint.

[27] On June 17, 2015, Ms. Liddiard brought an application for judicial review of the Commission's decision not to deal with her second human rights complaint.

IV. Issue

[28] The sole issue raised by these applications for judicial review is whether the Commission's decisions were reasonable.

V. Analysis

[29] A decision by the Commission not to deal with a human rights complaint is discretionary and is subject to review by this Court against the standard of reasonableness (*Kwon v Federal Express Canada Ltd*, 2014 FC 268 at para 12 [*Kwon*], citing *English-Baker v Canada (Attorney General)*, 2009 FC 1253 at para 13). The Commission's decision is entitled to deference, and this Court will intervene only if it falls outside of the range of possible, acceptable outcomes that are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[30] With respect to the Commission's first decision (Court File No. T-1003-15), Ms. Liddiard argues that the grievance process is not reasonably available to her, and the Arbitrator's Award should be disregarded. She says that the process is biased and fraudulent. She alleges that Ms. Edmunds, who conducted the internal investigation that was upheld by the Arbitrator, was incompetent and the Arbitrator should not have accepted her evidence. She accuses CUPW of failing to represent her, and of colluding with CPC. She says that she was prevented from calling witnesses and presenting documents at the hearing. She claims that the Arbitrator was not independent because his salary was paid by CPC, the process took an unreasonable amount of time to complete, and the remedies available through the grievance process are inadequate.

[31] With respect to the Commission's second decision (Court File No. T-1005-15), Ms. Liddiard says that the grievance process is not reasonably available to her for substantially the same reasons advanced in relation to Court File No. T-1003-15. In addition, she maintains

that she is no longer a member of CUPW, she no longer pays union dues, and the union is no longer pursuing any grievances on her behalf.

[32] Ms. Liddiard has offered little in the way of evidence to substantiate her allegations. Following a lengthy hearing, the Arbitrator found that Ms. Edmunds had conducted a competent and professional investigation into Ms. Liddiard's internal complaint. Ms. Liddiard's challenge to Ms. Edmunds' competence is based on Directions to the Employer issued under s 145(1) of the *Canada Labour Code*, RSC 1985 c L-2 [Directions] in unrelated matters. These Directions prohibited Ms. Edmunds from assuming responsibility for the prevention of workplace violence within her own geographical area, on the ground that she may not be perceived as impartial. This was not a finding of incompetence in the ordinary sense, but in the technical sense envisaged by the Directions. In any event, Ms. Liddiard brought the Directions to the attention of the Arbitrator.

[33] Contrary to Ms. Liddiard's assertion, the Arbitrator's fees were paid jointly by CPC and CUPW. When asked which witnesses she was prevented from calling due to CUPW's alleged failure to properly represent her interests, she named Dean Roosevelt and her shop steward. Paradoxically, both of these individuals were representatives of the very union she said had provided her with inadequate representation.

[34] The evidence demonstrates that Ms. Liddiard was responsible for much of the delay in bringing her grievances to arbitration. CUPW requested an adjournment of the second arbitration to prevent the grievances from being heard by Mr. Von Veh. I accept CPC's assertion that

CUPW continues to represent Ms. Liddiard's interests and to pursue the grievances it filed on her behalf, notwithstanding that she is no longer employed by CPC. The evidence confirms that delays are common in the grievance process.

[35] Paragraph 41(1)(d) of the Act provides that the Commission shall deal with a complaint unless it appears to the Commissioner that the complaint is trivial, frivolous, vexatious or made in bad faith. Paragraph 41(1)(a) of the Act provides that the Commission shall deal with a complaint unless it appears to the Commissioner that the alleged victim of the discriminatory practice ought to exhaust grievance or review procedures that are otherwise reasonably available.

[36] In declining to deal with Ms. Liddiard's complaints, the Commission adopted the conclusions of the investigators who prepared the section 40/41 reports. Those reports therefore constitute the Commission's reasons (*Carroll v Canada (Attorney General)*, 2015 FC 287 at para 28).

[37] With respect to the first human rights complaint (Court File No. T-1003-15), the Commission found that there had been a final decision in another process, namely the grievance and arbitration process. The Commission noted that the Arbitrator had the authority to interpret and apply the Act and was an independent third party. The Commission also observed that there is no significant difference between the labour arbitration process and the Commission's complaint process. Both deal with human rights allegations, can lead to a decision by an independent decision-maker, and can result in similar remedies. The Commission held that there was no evidence to suggest that the Arbitrator was in any way biased.

[38] With respect to the second human rights complaint (Court File No. T-1005-15), the Commission found that CUPW had filed numerous grievances on Ms. Liddiard's behalf and that she had full access to the grievance process, with which she was well acquainted. The Commission noted that two grievances dealing with the same events alleged in the complaint were currently in arbitration. The Commission once again rejected Ms. Liddiard's submission that the arbitration process was procedurally unfair or biased. Furthermore, the Commission observed that the labour arbitrator had jurisdiction to interpret and apply the Act; would be able to deal with some or all of the human rights issues raised in Ms. Liddiard's second human rights complaint to the Commission; and could award similar kinds of remedies to those available under the Act.

[39] A grievance arbitrator has the power and responsibility to enforce the substantive rights and obligations of human rights statutes if those rights and obligations were part of a collective agreement (*Parry Sound (District) Welfare Administration Board v O.P.S.E.U., Local 324*, 2003 SCC 42). In this case, the Arbitrator's Award addressed 15 grievances that were filed by CUPW on Ms. Liddiard's behalf. There were 14 days of hearings, and Ms. Liddiard testified in support of the grievances. The reasons provided by the Arbitrator were lengthy and examined all of the evidence, including conflicting evidence. The Commission concluded that "a full and careful review of the Award shows that the arbitrator dealt with all of the allegations in the present complaint, and he dismissed them as having no merit".

[40] I am satisfied that the Commission properly considered the Arbitrator's decision and his findings of fact before determining that Ms. Liddiard's first human rights complaint attracted the

application of s 41(1)(d) of the Act (*Canada Post Corp v Barrette*, [2000] 4 FC 145 at para 28, [2000] FCJ No 539 (Fed CA)). The Commission reasonably concluded that the substance of Ms. Liddiard's complaint had already been dealt with by another decision-maker with the authority to rule on human rights issues under the Act.

[41] I am also satisfied that the Commission reasonably concluded that Ms. Liddiard's second human rights complaint attracted s 41(1)(a) of the Act due to the ongoing grievance procedure. If the arbitration of Ms. Liddiard's remaining grievances does not address all of the human rights issues raised in her second complaint to the Commission, the Commission has stated that she may return to the Commission after the arbitration process has been exhausted. Furthermore, counsel for CPC acknowledged that Ms. Liddiard may ask the Commission to reactivate her second human rights complaint at any time, on the ground that the grievance process is no longer available to her (assuming that she is able to adduce evidence in support of this assertion). This should alleviate any risk that the grievance procedure may be inadequate or untimely in addressing Ms. Liddiard's concerns (*Bagnato v Canada Post Corp.*, 2016 FCA 40 at para 7).

VI. Conclusion

[42] The Commission's reasons for declining to deal with both of Ms. Liddiard's human rights complaints are intelligible, transparent and justified, and both decisions fall within the range of possible, acceptable outcomes that are defensible in respect of the facts and law. Both applications for judicial review are therefore dismissed.

VII. Costs

[43] CPC seeks costs, but did not submit a draft Bill of Costs or make substantive submissions regarding the quantum of costs, as contemplated by this Court's Notice to the Parties and Profession dated April 30, 2010. Ms. Liddiard is no longer employed by CPC, and she appears to have limited means. Nevertheless, CPC has been wholly successful in these applications for judicial review, and is therefore entitled to costs. Having regard to all of the circumstances, I exercise my discretion to make a single award of costs in the fixed amount of \$750.00, inclusive of disbursements, for both applications together.

JUDGMENT

THIS COURT'S JUDGMENT is that both applications for judicial review are dismissed with a single award of costs in the fixed amount of \$750.00, inclusive of disbursements.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1003-15

STYLE OF CAUSE: CONNIELIDDIARD v CANADA POST

AND DOCKET: T-1005-15

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