Federal Court  Cour fédérale

Date: 20170529

Docket: T-1482-15

Citation: 2017 FC 528

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 29, 2017

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MARCELLE LUSSIER

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Attorney General of Canada [AGC] is seeking a judicial review of a decision rendered by an independent reviewer on July 30, 2015, as part of a request for an Independent Third-Party Review [ITPR]. Governed by a Canada Revenue Agency [CRA] internal directive entitled *Canada Revenue Agency (CRA) Independent Third-Party Review (ITPR) Processing*

Directive [Directive], this review process allowed CRA employees, until May 2015, to challenge, among other things, decisions at the final level of the grievance procedure relating to demotions for non-disciplinary reasons.

II. Background

[2] Ms. Lussier has been employed with the CRA since 1988. In August 1999, she was promoted to the position of tax auditor at the AU-01 group and level for an indeterminate period.

[3] Since 2002, Ms. Lussier has experienced productivity issues due to a medical condition. At the CRA's request, she met with various health professionals to assess her functional limitations at work, as well as accommodation measures to improve her performance. She was assigned to lower groups and levels, while receiving salary protection at the AU-01 auditor group and level. In 2007, she returned to her position as an auditor at the AU-01 group and level; then in 2008, for a period of nine (9) months, was appointed on an acting basis to an auditor position at the AU-02 group and level.

[4] In 2010, after CRA management observed deficiencies in her work performance as an auditor at the AU-01 group and level, the CRA decided to assign Ms. Lussier to a compliance program officer position at the lower SP-04 group and level, while keeping her salary at the AU-01 group and level.

[5] After a trial period of nine (9) months, the CRA notified Ms. Lussier on July 18, 2012, that a decision had been made to demote her to a general office clerk position at the SP-02 group

and level. She was told that because of her functional limitations, she was not meeting the performance expectations of the compliance officer position at the SP-04 group and level.

[6] On August 10, 2012, Ms. Lussier filed an individual grievance challenging her demotion. She claimed that the CRA failed to implement reasonable accommodation measures based on her medical condition.

[7] Ms. Lussier's grievance was dismissed on August 13, 2013. While acknowledging that Ms. Lussier's performance issues were related to her medical condition, the CRA considered that Ms. Lussier was unable to meet the requirements of her position despite the accommodation measures put in place to help her meet her targets.

[8] Since her demotion was unrelated to breaches of discipline or misconduct and her grievance could not be referred to adjudication before the Public Service Labour Relations and Employment Board under section 209 of the *Public Service Labour Relations Act*, SC 2003, c 22, part 2 [PSLRA], Ms. Lussier requested an ITPR on September 10, 2013.

[9] The CRA initially refused to refer the grievance to the ITPR process on the basis that the request had been submitted nine (9) days late. That decision was challenged before this Court, and on January 6, 2015, Justice Michel M.J. Shore allowed the application for judicial review. He held that the ITPR application should be reconsidered in accordance with his reasons (*Lussier v Canada (Revenue Agency)*, 2015 FC 10 [*Lussier*]).

[10] Before the independent reviewer, Ms. Lussier claimed, in particular, that the accommodation measures taken by the CRA to help her meet her performance targets were lacking and inconsistent with the recommendations made by the health professionals she had consulted since 2002. She claimed to have established that she was able to meet the requirements of her position when the conditions were favourable. She therefore asked the independent reviewer to order her reinstatement to a position at the AU-01 group and level.

[11] In response, the CRA argued that the independent reviewer lacked the jurisdiction to consider Ms. Lussier's arguments regarding its accommodation of her medical condition. It submitted that the issues relating to the duty to accommodate in the workplace fall under the application and interpretation of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA]. Furthermore, the Directive states that independent reviewers may not rule on issues relating to the interpretation or application of the CHRA.

[12] Alternatively, the CRA argued that Ms. Lussier's demotion was warranted because the CRA implemented all the accommodation measures recommended by health professionals to help Ms. Lussier meet her performance targets at work and perform the tasks and duties associated with her tax auditor position at the AU-01 group and level and as compliance program officer at the SP-04 group and level.

[13] On July 30, 2015, the independent reviewer allowed the ITPR request and ordered that Ms. Lussier be reinstated to her auditor position at the AU-01 group and level.

[14] On the issue of his jurisdiction, the independent reviewer acknowledged that he did not have the jurisdiction within the ITPR process to hear ITPR requests under the CHRA based on grounds of discrimination. He considered, however, that Ms. Lussier's request was not based on [TRANSLATION] "discrimination on any designated grounds under the CHRA", but rather, on Ms. Lussier's demotion. Of the view that workplace accommodation is a fundamental legal duty of the employer and that the duty to accommodate an employee for health reasons is not exclusive to human rights, the independent reviewer confirmed that he had the jurisdiction to hear Ms. Lussier's challenge and determine whether the demotion was warranted.

[15] On the merits of the case, the independent reviewer found that Ms. Lussier would be able to provide her services with reasonable accommodation by the CRA, despite her medical condition. He also found that the CRA failed to demonstrate that its implementation of these measures was excessive. In this regard, he emphasized that when an action plan was put in place to accommodate Ms. Lussier and the plan was carefully followed by the manager in question, Ms. Lussier was able to perform her work and was even appointed as an auditor at the AU-02 group and level on an acting basis.

III. Issues

[16] This application raises the following two (2) issues:

a) What is the applicable standard of review?

b) Did the independent reviewer make a reviewable error by finding that he had jurisdiction to rule on Ms. Lussier's request for review?

[17] Only the question of jurisdiction is at issue. The independent reviewer's finding on the merits of the demotion is not the subject of this application.

IV. Analysis

A. *Standard of review*

[18] The AGC argues that the standard of review applicable to the issue of the independent reviewer's jurisdiction is correctness. It claims that the issue of accommodation related to Ms. Lussier's medical condition concerns the interpretation or application of the CHRA, which is neither the independent reviewer's enabling statute nor legislation closely connected to his mandate. It adds that there is no indication that the independent reviewer has any expertise in the application or interpretation of issues that may relate to the CHRA.

[19] Alternatively, the AGC submits that if reasonableness is the applicable standard of review, the independent reviewer's interpretation of his jurisdiction is not intelligible and is not 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 paragraph 47 [*Dunsmuir*]).

[20] For her part, Ms. Lussier argues that the issue of the independent reviewer's jurisdiction arises not from the interpretation or application of the CHRA, but rather, the interpretation of the Directive. She is of the opinion that the applicable standard is that of reasonableness.

[21] The first step in determining the applicable standard of review is to ascertain whether the case law has already satisfactorily established the degree of deference corresponding to a specific category of issues. If case law has not, the Court must conduct an analysis to determine the applicable standard of review (*Dunsmuir* at paragraphs 57, 62, 64).

[22] In the case at hand, the parties argue that the case law has not yet established the applicable standard of review. The standard of review analysis applicable to a decision made by an independent reviewer in the context of an ITPR request was previously conducted by this Court in *Canada (Customs and Revenue Agency) v Kapadia*, 2005 FC 1568 [*Kapadia*]. In that case, the respondent sought the quashing of the independent reviewer's decision ordering that a selection process be re-run on the grounds that the respondent's candidacy had been arbitrarily excluded. The Court found that the standard of review was reasonableness *simpliciter* (*Kapadia* at paragraphs 8–15).

[23] Since this decision precedes *Dunsmuir* and the Directive in the case at hand is subsequent to the one in *Kapadia*, the Court intends to conduct a standard of review analysis.

[24] According to the case law, it should be assumed that the reasonableness standard applies to a decision by an administrative body that is interpreting its home statute or statutes closely connected to its function and with which it will have particular familiarity (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paragraph 23 [*Edmonton East*]; *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at paragraph 46; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paragraph 21; *Alberta (Information*

and Privacy Commissioner) v Alberta Teachers' Association), 2011 SCC 61 at paragraphs 30, 34, 39 [*Alberta Teachers' Association*]). The same applies to questions of fact, discretion or policy, and questions where the legal issues cannot be easily separated from the factual issues (*Dunsmuir* at paragraph 51).

[25] However, this presumption is rebutted in the presence of the four (4) categories of issues identified in *Dunsmuir* which call for correctness, namely constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or *vires*", and issues "regarding the jurisdictional lines between two or more competing specialized tribunals" (*Edmonton East* at paragraph 24; *Dunsmuir* at paragraphs 58–61).

[26] In the case at hand, the issue of the independent reviewer's jurisdiction involves the independent reviewer's interpretation of the Directive governing the ITPR process.

[27] The ITPR process was established in accordance with section 54(1) of the *Canada Revenue Agency Act*, SC 1999, c 17, which enables the CRA, as a "separate agency" for the purposes of the PSLRA, to develop a staffing program governing, in particular, appointments and remedies available to employees.

[28] Under paragraph 51(1)(*g*) of this same act, the CRA may provide, for reasons other than breaches of discipline or misconduct, for the demotion to a position at a lower maximum rate of

pay, establish the circumstances and manner in which, and the authority by which those measures may be applied, varied, or rescinded.

[29] The Directive came into force on May 1, 2005. It applies to disputes that involve either (1) staffing, as per the CRA's staffing policy, or (2) staff relations, in certain specific circumstances, including lay-off or demotion of an employee for any reason other than lack of discipline or misconduct.

[30] According to sections 2C and 2F of the Directive, when an employee requests an ITPR, the CRA's Office of Dispute Management [ODM] examines the request to determine whether it is eligible and, if so, assigns the case to an independent reviewer. As soon as he or she agrees to manage a case, the independent reviewer contacts both parties to inform them of his or her mandate and to confirm his or her jurisdiction to review the case. He or she clarifies the nature of the case and the issues to be reviewed and describes the review process and timelines (section 3F, paragraph 2 of the Directive). Throughout the process, the independent reviewer gives expression to the principles of procedural fairness, including the right to be heard, to question the opposing party's arguments and to access documents introduced by the opposing party (section 3F, paragraph 16 of the Directive). The reviewer is also authorized to make decisions on jurisdiction and on processing matters (section 3F, paragraph 6 of the Directive). Once the review process is complete, the reviewer makes a final and binding decision in a final report (section 3F, paragraph 25 of the Directive).

[31] According to paragraph 28 of section 3F of the Directive, in cases of demotion, the reviewer can apply the following corrective measures: (1) order employee's reintegration or return to the previous classification group and level, but not rule on issues relating to the interpretation or application of the CHRA; (2) order payment of lost pay and benefits.

[32] In this context, the Court is of the view that the independent reviewer is interpreting his home statute, i.e., the Directive, to establish whether he has the jurisdiction to rule on Ms. Lussier's request to be reinstated. Furthermore, and until proven otherwise, he shall be considered as having particular familiarity with employment-related issues. Deference to his findings is therefore appropriate, thus favouring application of the reasonableness standard. (*Dunsmuir* at paragraph 54; *Alberta Teachers' Association* at paragraph 30).

[33] Furthermore, the Court considers that the independent reviewer's jurisdiction raises a question of mixed fact and law as to whether the decision to demote Ms. Lussier was justified given the CRA's duty to accommodate her medical condition. This factor also supports curial deference.

[34] Finally, the Court is of the opinion that the issue of whether the independent reviewer has the jurisdiction to adjudicate Ms. Lussier's request does not fall within one of the categories of questions that require the application of the correctness standard of review.

[35] Consequently, the Court intends to address the independent reviewer's decision regarding his jurisdiction to rule on Ms. Lussier's request for review on the basis of reasonableness. Under

this standard, the Court will intervene only if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at paragraph 47).

B. *Independent reviewer's jurisdiction*

[36] The AGC submits that it was not open to the independent reviewer to decide whether he had the jurisdiction to consider and rule on the issue of accommodation measures relating to Ms. Lussier's disability and any undue hardship. According to the AGC, this issue raises an allegation of discrimination based on Ms. Lussier's disability and falls within the area of human rights, including sections 3, 7(b), and 15 of the CHRA. As such, according to the Directive, the independent reviewer cannot rule on matters relating to the interpretation or application of the CHRA.

[37] For her part, Ms. Lussier claims that the independent reviewer's decision is consistent with the wording of the Directive. The Directive cannot be interpreted as removing the independent reviewer's jurisdiction regarding accommodation.

[38] For the reasons that follow, the Court is of the opinion that the independent reviewer's decision regarding his jurisdiction to rule on the request is reasonable, even though his reasons are flawed in some respects (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 12).

[39] The passage on which the AGC relies appears at paragraph 28 in section 3F of the Directive. This paragraph deals specifically with the corrective measures the independent reviewer can apply. There is a table containing the corrective measures that apply for each of the three (3) types of cases specified by the Directive: (1) staffing; (2) lay-off or demotion for any reason other than lack of discipline or misconduct; and (3) grievances relating to some Agency grievances under the Procedure for Dealing with Grievances Presented on CRA Policies. The Directive specifies that in the case of lay-off or demotion, the independent reviewer can order the employee's reintegration or return to the previous classification group and level, but may not rule on issues relating to the interpretation or application of the CHRA. The independent reviewer may also order payment of lost pay and benefits.

[40] Given the location of the limitation and the fact that this is the only place where it is found in the Directive, it is reasonable to conclude that this limitation is restricted to corrective measures. The Court finds convincing Ms. Lussier's argument that the purpose of such a restriction is to prevent the independent reviewer from applying corrective measures that fall within the jurisdiction of the Canadian Human Rights Tribunal, as provided for in section 53 of the CHRA. Those measures are more varied than the ones set out in the Directive and may include, among other things, the authority to order the adoption of a special program, payment of damages for a discriminatory practice, payment of special compensation in the case of a wilful or reckless discriminatory practice, as well as the payment of interest.

[41] Contrary to the AGC's claims, the Court is of the opinion that the limitation provided for in paragraph 28 of section 3F does not have the effect of preventing the independent reviewer from applying all human rights legislation.

[42] This interpretation is consistent with case law that recognizes that grievance adjudicators have the authority and jurisdiction to enforce substantive rights and obligations conferred by human rights legislation and other employment legislation on the basis that granting such power encourages the prompt, final, and binding resolution of workplace disputes (*Parry Sound (District), Social Services Administrative Board v O.P.S.E.U, Local 324*, 2003 SCR 42 at paragraphs 40, 41, 50, 52 [*Parry Sound*]; *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14 at paragraph 39 [*Tranchemontagne*]; *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at paragraphs 21, 45, 53 [*Figliola*]).

[43] It is also recognized that, due to its quasi-constitutional status, human rights legislation must be given expansive meaning and offer accessible application (*Tranchemontagne* at paragraphs 33 and 52; *Figliola* at paragraph 53). In *Tranchemontagne*, the Supreme Court of Canada noted the following at paragraph 26 of its decision:

> 26 The presumption that a tribunal can go beyond its enabling statute—unlike the presumption that a tribunal can pronounce on constitutional validity—exists because it is undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law. The law is not so easily compartmentalized that all relevant sources on a given issue can be found in the provisions of a tribunal's enabling statute. Accordingly, to limit the tribunal's ability to consider the whole law is to increase the probability that a tribunal will come to a misinformed conclusion. In turn, misinformed conclusions lead to inefficient appeals or, more unfortunately, the denial of justice.

[44] The CHRA itself recognizes that the resolution of human rights issues does not fall under the exclusive jurisdiction of the Canadian Human Rights Commission [CHRC] and the Canadian Human Rights Tribunal. According to paragraph 41(1)(*b*) of the CHRA, when a human rights complaint is filed with the CHRC, it may declare the complaint inadmissible if it finds that the complaint is one that could more appropriately be dealt with, initially, according to a procedure provided for under a different Act of Parliament. Parliament has therefore considered the possibility that other administrative bodies may rule on these issues. Counsel for Ms. Lussier also informed the Court at the hearing that on August 20, 2013, the CHRC declined to review the complaint filed by Ms. Lussier on July 23, 2013, under paragraph 41(1)(*a*) of the CHRA on the grounds that Ms. Lussier had to first file a grievance under the PSLRA.

[45] In *Parry Sound*, the Supreme Court of Canada considered the relationship between the jurisdiction of the Ontario Human Rights Commission and that of a grievance arbitrator. It stated that the fact that the Ontario Human Rights Commission has greater expertise than grievance arbitrators in respect of human rights violations is an insufficient basis on which to conclude that a grievance arbitrator ought not to have the power to enforce the rights and obligations of Ontario's *Human Rights Code* and other employment related statutes. The Court also noted the advantages of arbitration, such as accessibility and expertise, and that "the availability of an accessible and inexpensive forum for the resolution of human rights disputes will increase the ability of aggrieved employees to assert their right to equal treatment without discrimination, and that this, in turn, will encourage compliance with the *Human Rights Code*". Finally, the Court noted that it was "of great importance that such disputes are resolved quickly and in a manner that allows for a continuing relationship between the parties" (*Parry Sound* at paragraphs 52–53).

[46] In the case at hand, the objective of the Directive is to provide a fair, expeditious, and cost-effective dispute resolution mechanism for employees who wish to dispute the rejection of a grievance and who do not have access to arbitration provided by the PSLRA (*Lussier* at paragraph 22).

[47] The independent reviewer has the same role as a labour relations arbitrator. The Directive also refers to the independent reviewer as an external arbitrator in the Introduction, which provides an overview of the ITPR process. The Directive explicitly states that the ODM "assigns cases to an external arbitrator who is mandated to conduct a review and to make a decision that is final [and] binding…".

[48] Moreover, it is logical to expect that a regime that seeks to address situations involving demotions, for reasons other than lack of discipline or misconduct, deals with situations where it is alleged that the employer has breached its duty to accommodate. If we accept the interpretation proposed by the AGC, employees wishing to challenge their lay-off or demotion on the basis of reasons either unrelated or related to human rights would be forced to split their recourse and proceed using different forums. Employees could therefore be left without recourse. At the very least, it could not be argued that such a course of action would be "effective" and "expeditious".

[49] Given the purpose and wording of the Directive, as well as the case law that encourages accessible, prompt, and effective application of human rights legislation, it is therefore

reasonable to interpret the Directive as granting the independent reviewer jurisdiction to rule on questions relating to the CRA's duty to accommodate.

V. Conclusion

[50] In light of the foregoing, the Court is of the opinion that the independent reviewer's decision regarding his jurisdiction to rule on Ms. Lussier's request is reasonable since it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at paragraph 47). The Court's intervention is therefore not warranted.

[51] For all these reasons, the application for judicial review is dismissed with costs in the amount of $2,500 in favour of Ms. Lussier.

JUDGMENT in T-1482-15

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. Costs in the amount of $2,500 are awarded to the respondent.

"Sylvie E. Roussel"
Judge

Certified true translation
This 4th day of December 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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