Federal Court  Cour fédérale

Date: 20170131

Docket: T-1419-16

Citation: 2017 FC 122

[UNREVISED CERTIFIED ENGLISH TRANSLATION].

Ottawa, Ontario, January 31, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

EVEDA NOSISTEL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] Ms. Nosistel, the applicant, filed an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, on August 25, 2016. The application is

ostensibly related to a "decision" that was reportedly made by one of the respondents, Don Head. He is the Commissioner of the Correctional Service of Canada.

[2] It is not clear from simply reading the applicant's notice which decision by Mr. Head is being referenced. Ms. Nosistel, who is representing herself, is seeking a series of remedies, ranging from obtaining the acknowledgement of deficiencies in the management of the access to information request and of a harassment complaint to the full re-establishment of her integrity, dignity and reputation and the assurance of fair restitution. The respondents allege that many of the remedies sought are not available on judicial review.

[3] For a reason that remains unclear, the respondents chose to file a motion under rule 369 of the *Federal Courts Rules*, SOR/98-106, to obtain the dismissal of the application for judicial review rather than debate its merits. That motion is the only issue in this case.

[4] Three allegations are made in the motion:

a) The decision for which judicial review is being sought was reportedly not made by a federal tribunal;

b) The application for judicial review was apparently filed outside the time limit set out in subsection 18.1(2) of the *Federal Courts Act*;

c) If the motion is dismissed, the respondents ask that the style of cause for the application for judicial review be changed to substitute the named respondents with the Attorney General of Canada.

[5] I must admit that I do not fully understand the respondents' initiative. It seems to me that it would have been easier to move the case forward by deciding it on the merits. Instead, it is

being alleged that the letter from the Commissioner of the Correctional Service of Canada received on July 27, 2016, does not constitute a reviewable decision.

[6] The respondents argue that this type of letter is simply [TRANSLATION] "polite" or courteous in nature and does not constitute a decision that may give rise to judicial review. There lies the crux of the matter. What is the true nature of the exchange between Ms. Nosistel and the Commissioner?

[7] I will avoid becoming entangled in the details, but it is necessary to present some of them to provide a basic understanding of the case:

a) On July 19, 2013, the applicant filed a complaint for harassment directed at her by employees of the Correctional Service of Canada [CSC];

b) That complaint was declared admissible on August 19, 2013;

c) An investigation was ordered and begun by an external consultant to CSC in October 2013;

d) Since that investigation involved four persons against whom the applicant filed the complaint, four reports were prepared. The reports were completed on August 6, 2015, but they had to be redacted. The redaction was completed on September 30, 2015;

e) The decision to accept the conclusions of the investigation reports, all of which find that the applicant's complaints are unfounded, was made on September 2, 2015, but Ms. Nosistel was not informed until October 2015;

f) On November 18, 2015, the applicant filed a grievance regarding those final reports. She is challenging the conclusion that her complaints are unfounded. The grievance contains a series of allegations regarding the investigation, as well as some allegations that seem to be based solely on the format of the reports.

g) The Assistant Commissioner, Human Resource Management, responded to the grievance application on January 28, 2016. The letter is unclear. The letter explains that, pursuant to the *Federal Public Sector Labour Relations Act*, a grievance cannot be filed by a former public servant (the applicant allegedly resigned in June 2015)

unless he or she was suspended or dismissed under the *Financial Administration Act*. The investigation reports do not address these issues. However, the Assistant Commissioner adds the following:

> [TRANSLATION] "In light of the above, and even if I am wrong, I would remind you that the objectives of the Treasury Board Secretariat's Policy on Harassment Prevention and Resolution are to promote conditions that are conducive to a safe and respectful work environment and to restore harmonious labour relations . . . This policy does not apply to a former civil servant."
>
> (Emphasis added)

Not only is it unclear how the Treasury Board Secretariat's policy relates to a grievance concerning final investigation reports, but the Assistant Commissioner does not appear to be convinced of the reason she provides for seemingly dismissing the grievance.

h) Thus, it comes as no surprise that the applicant wrote to the Commissioner of CSC on March 3, 2016, presenting him with three copies of the grievances:

i. One, dated February 15, 2015, concerning the way the applicant alleges to have been treated during the investigation, but long before the final reports were submitted. The status of this grievance is not clear. It could be encompassed within the grievance dated November 18, 2015. What is clear is that it does not appear to have been processed;

ii. Another grievance, dated March 4, 2016, concerning what the applicant refers to as her [TRANSLATION] "dismissal in disguise";

iii. The grievance dated November 18, 2015, which was allegedly the subject of the decision made by the Assistant Commissioner on January 28, 2016.

[8] The Commissioner's response to the letter dated March 3 is not very articulate. On March 29, 2016, he acknowledged receiving the letter dated March 3, though he makes no reference to its content. Seemingly without any urgency, he indicated that he had been made aware of an investigation led by the Canadian Human Rights Commission, with which he assured her that CSC would cooperate.

[9] The applicant once again wrote to the Commissioner on June 14, 2016. She reiterated that her understanding was that the grievances had not been [TRANSLATION] "addressed by management" and wished to [TRANSLATION] "enquire about your position and your intentions regarding the next steps, if applicable." Once again, the Commissioner's response was terse. He acknowledged receiving the letter on July 16, adding that [TRANSLATION] "the procedure followed to respond to your grievances was consistent with the policies." The letter was allegedly received on July 27, the date on which the 30-day time limit for applying for judicial review began to elapse.

[10] The applicant filed her application for judicial review with the Federal Court. The Court's stamp bears the date of August 25, while the procedure itself is dated August 19.

[11] As noted above, in their motion for dismissal dated November 10, 2016, the respondents submit that no decisions were made by the Commissioner on March 29 and July 16, 2016. In my view, that is far from evident upon simply reading the Court record. The respondents would like the Assistant Commissioner's letter dated January 28, 2016, to be the final decision on the grievance dated November 18, 2015. But what about the other two grievances? In reality, the applicant seems to have filed three grievances: one in February 2015, before she resigned from her job; one on November 18, 2015; and a new grievance on March 4, 2016, regarding what she refers to as her dismissal in disguise. Regardless of whether these grievances are valid, which I will not address, they should receive a response. The letter from the Assistant Commissioner dated January 28, 2016, was intended to respond to the grievance dated November 18, 2015, but

it cannot address the grievance dated March 4, 2016. As for the grievance dated February 2015, it seems to have been met with dead silence.

[12] Therefore, it is clear that—at best—the letter dated January 28, 2016, could be a response to the grievance dated November 18, 2015. The other grievances do not appear to have been addressed. The letters exchanged between the Commissioner and the applicant could be a refusal to address the grievances or a dismissal of them.

[13] Thus, two different questions are raised. First, were the grievances filed in February 2015 and March 2016 addressed? The grievances dated February 2015 and March 2016 do not seem to have received a decision, including from the Commissioner, given the lack of responses to the applicant's letters. Second, was the Commissioner right to respond to the grievance dated November 2015 by ignoring it, which could represent a decision?

[14] I can easily concede that the application for judicial review is confusing, and determining its scope is no easy task. Two of the applicant's grievances were submitted after she resigned, and she seems to have included elements in her argument that are irrelevant, overly general or that warrant caution. Thus, in her voluminous reply record to the respondents' motion (November 28, 2016), she submits at paragraph 196 of her memorandum that she had not [TRANSLATION] "had the opportunity to exercise her right to be heard, a fair chance to present her case, and enough time and details to respond." Other than this general assertion, the facts supporting the argument are lacking, especially since Ms. Nosistel's reply record also refers to a letter dated November 27, 2014, from the Assistant Commissioner (a different person than the

signatory to the letter dated January 28, 2016), which sets out a long list of summaries of interviews sent to the applicant in the preceding months and to which she did not make the required comments. The letter notes that the investigation sought by the applicant had been initiated in October 2013.

[15] At paragraphs 157 and 158 of her memorandum, the applicant comments on the first letter from the Commissioner, dated March 29, 2016, and states that the Commissioner concluded his acknowledgment of receipt by stating [TRANSLATION] "I can assure you that we will cooperate . . ." The applicant argues that [TRANSLATION] "this letter suggested that her concerns (that is, the grievances) would be addressed and created a legitimate expectation that she would receive a response." Such a comment is surprising because, on its face, the Commissioner's letter unequivocally does not deal with the grievances, but rather another remedy that Ms. Nosistel had allegedly initiated. Had the applicant cited the entire sentence instead of cutting it off at the word "cooperate," its true meaning would have quickly been understood: [TRANSLATION] "I can assure you that we will cooperate and provide the [Canadian Human Rights] Commission with all the information and documents necessary for its investigation."

[16] The issue in this case is not to determine whether the applicant is right. It is rather to determine whether the application for judicial review is flawed in the manner the respondents allege, namely, whether the Commissioner made a decision on July 16, 2016. It has not been demonstrated that no decision was made. The record submitted does not indicate why the letter dated July 16 does not constitute a decision. The respondents submit that Ms. Nosistel

[TRANSLATION] “is actually asking this Court to examine the procedure followed to address her harassment complaints leading to the decision on September 2, 2015, in which it was determined that the complaints were unfounded, as well as to the decision made on her grievance on January 28, 2016” (respondents’ memorandum, paragraph 26). This sentence is unclear, and I do not think that this is the actual objective of the application for judicial review. The decision made on September 2, 2015, is not the one subject to judicial review, and it is important to make that distinction clear. A clarification can be made to the memorandum dated December 2, in which it is indicated that the Assistant Commissioner is responsible for the harassment complaint resolution procedure. It is argued that the applicant was seeking to have the Commissioner intervene solely to have the Assistant Commissioner’s decisions changed.

[17] I fear the genres were confused. The applicant is complaining that her grievances were not addressed by the Commissioner. Two of those grievances pertain to the investigation conducted at her request. The applicant is seemingly trying to use the grievance procedure to attack the final investigation reports and the way she was reportedly treated during the investigation (the grievance dated February 2015). The responses issued, if any, by CSC are not clear, and the motion to have the application for judicial review dismissed is hardly more so. No response was given to two of the grievances. In addition, it appears that the applicant is alleging that the Commissioner represents a stage in the grievance procedure. If that is the case, which has not been established, it would apply to only one of the three grievances regardless, that of November 2015.

[18] It would have been much more efficient and effective to handle the case transparently. If the respondents have an argument to make about the procedure for handling grievances, they should do so clearly. This could be a part of their representations on the merits. The same applies to the suggestion that the remedies sought, or some of them, exceed what is allowed in a judicial review. At issue here are the three grievances that the Commissioner, rightly or wrongly, did not address. There lies, in my opinion, the subject of this application for judicial review.

[19] Though they do not blatantly say so, we can read between the lines that the respondents would like to argue that the Assistant Commissioner acts at the final stage of the grievance procedure. If that is the case, this would have to be openly stated and proven. I found no indication of who would be responsible for the preceding stages of the grievance resolution procedure. Nor did I find any indication of what the nature of the decisions made might have been. Rather, it seems as if no decisions were made concerning two of the three grievances. In fact, if the Assistant Commissioner made a decision on the grievance dated November 18 at the final level, and that grievance is related to the final investigation reports, then she is also the person who—on September 2, 2015—accepted the conclusions of the four investigation reports that gave rise to the grievance.

[20] What adds to the confusion is that Ms. Nosistel is applying for an extension of time, if indeed it is the decision made by the Assistant Commissioner on January 28, 2016, that should have been the subject of the judicial review, as the respondents allege (memorandum dated November 10, 2016). At best, the letter dated January 28 addresses the grievance dated November 18, 2015. I would not hesitate to grant an extension of time to contest the decision

made on January 28, 2016, if it were necessary. The test to be applied is set out in *Canada (Attorney General) v. Hennelly*, (1999) 244 NR 399 (FCA) and consists of four criteria:

1. a continuing intention to pursue his or her application;
2. that the application has some merit;
3. that no prejudice to the respondent arises from the delay; and
4. that a reasonable explanation for the delay exists.

[21] As for the two other grievances, it would be the letter dated July 16 and received on July 27, 2016, that addresses them. The application for judicial review dated August 25 would therefore not be filed out of time.

[22] This case is steeped in confusion. There lies the explanation for the time extension. The way the grievances were handled is confused, the grievances themselves are confused, and the decisions on the grievances—if any were made—are also confused. If the applicant was wrong to contest the Commissioner's decision because he allegedly did not make one—despite the unequivocal letter from the applicant on June 14, 2016, in which she requests that it be addressed—this error is the result of all this confusion.

[23] The applicant is not an exceptionally diligent person. Nevertheless, she demonstrated a certain amount of diligence in pursuing her remedies, as demonstrated by the various letters in 2016. I see no prejudice for the respondents, especially since they are responsible for much of the confusion.

[24] As for the chances of success, the application merely has to have some merit. I do not find it to be without merit such that the applicant must be prevented from applying to the Court. In fact, the way the grievances were handled remains cloudy: transparency is lacking. Given the confusion, it is preferable that a decision be made on the merits once the parties have presented their arguments and clarified the confusion surrounding the three grievances and the decisions that might or might not have been made.

[25] The Commissioner was made aware of the existence of three grievances. The one dated November 18, 2015, might have been the subject of a decision in January 2016. But could it have been validly decided at the final level? As for the two other grievances, the record does not reveal how they were handled. These are issues in the application for judicial review.

[26] In this respect, the parties would benefit from clarifying their positions. The applicant must explain precisely what she is seeking with her application. As for the respondents, they would benefit from explaining the way the grievances were handled in this case. The lack of transparency adversely affected the examination of their motion under rule 369; clear arguments are required. Greater clarity in the evidence would also be desirable. This case needs to be brought back on course.

[27] Lastly, I would allow the request made by the respondents, who should not be specified as respondents. CSC is not a legal entity and should not be designated as a party. As for the two other respondents, since they could represent a federal tribunal whose decisions are contested,

they cannot be designated as respondents pursuant to paragraph 303(1)(a) of the *Federal Courts Rules*:

Respondents	**Défendeurs**
303 (1) Subject to subsection (2), an applicant shall name as a respondent every person	**303 (1)** Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or	**a)** toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;

[28] I will add that Liette Dumas-Sluyter could be disqualified because she is not concerned by the order sought.

[29] Costs will not be awarded in this case. Awarding costs is a discretionary exercise. In my opinion, the applicant contributed to the confusion, to the extent that the outcome of the case cannot be attributed to her. This case is not complex so much as it is confused. I find that this is a case where it is appropriate to apply subsection 400(6) of the Rules.

ORDER

THIS COURT ORDERS that:

1. The motion to dismiss the application for judicial review is dismissed;

2. The application for judicial review in question was not filed out of time and, if it were, the time limits are extended;

3. The respondents Correctional Service of Canada, Don Head and Liette Dumas-Sluyter are replaced with the Attorney General of Canada, including in the style of cause of this order and reasons;

4. No costs are awarded;

5. The time limits set out in the *Federal Courts Rules* will begin to elapse from the date this order is issued.

"Justice Roy"
Judge

Certified true translation
This 7th day of October 2019

Lionbridge