

Federal Court



Cour fédérale

Date: 20180529

Docket: T-1381-17

Citation: 2018 FC 553

Ottawa, Ontario, May 29, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

TRACY ANNE DREW

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision by the Canadian Human Rights Commission (the “Commission”), to dismiss the Applicant’s complaint because further inquiry was not warranted, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act].

II. Background

[2] The Applicant has been employed as a Corrections Officer with the Correctional Service of Canada (“CSC”) since 2006. She is in a spousal relationship with another female and they have a 9-year old daughter.

[3] The Applicant’s spouse is also a Corrections Officer with CSC. In 2011, she was transferred to the same unit as the Applicant – the Complex Needs Program (“CNP”) at the Pacific Institution - in order to accommodate a disability. Although they worked in the same unit, the Applicant and her spouse worked on a different shift schedule (“line”) and therefore had few days off together.

[4] The Applicant requested to be assigned on the same line as her spouse. CSC responded to this request by transferring her onto that line but into a different unit – the Delta unit at the Pacific Institution. The Applicant objected to this transfer. Emails were exchanged and a meeting took place between the Applicant and CSC staff, but the decision to transfer the Applicant was upheld.

[5] On December 4, 2014, the Applicant submitted a complaint to the Commission, alleging that she was subject to discrimination on the basis of family and marital status. Essentially, she complained that:

- she had been transferred out of the CNP unit because her spouse was working in that unit;
- and

- the transfer was punitive because she had recently raised concerns about safety in the unit.

[6] On May 5, 2017, a Commission investigator (the “Investigator”) completed a report in relation to the Applicant’s complaint. The Investigator stated the issue as whether CSC had treated the Applicant in an adverse differential manner in employment, based on her family or marital status, when it transferred her. The Applicant agreed that the issue was not whether CSC had discriminated against her for being in a same-sex relationship.

[7] The Investigator reviewed all of the evidence and interviewed the Applicant and two CSC staff members. She found that at the time the request was made, there were no vacancies in the CNP unit that would have allowed the Applicant and her spouse to be on the same line. Although one employee had expressed interest in being transferred, which would have opened a position for the Applicant, that employee eventually decided against it.

[8] As well, the Investigator found that there had been discussion about the Applicant’s marital and family status, and while for safety reasons there may have been a practice of generally not having spouses work on the same shift in the same unit, there was no policy that people in a familial relationship cannot work together and it did not appear that there was a link between CSC’s decision to transfer her and her marital or family status.

[9] The Investigator concluded that the Applicant’s marital or family status was not a factor in the decision to transfer her when she requested to be assigned to the same line as her spouse. The reason was because there was no vacancy at the time. The Investigator recommended to the

Commission that the complaint be dismissed because further inquiry was not warranted, pursuant to subparagraph 44(3)(b)(i) of the *Act*.

[10] On August 8, 2017, the Commission sent a letter to the Applicant advising her that, after reviewing the Investigator's report, it had decided to dismiss the complaint pursuant to subparagraph 44(3)(b)(i) of the *Act*.

[11] On September 12, 2017, the Applicant applied for judicial review of the Commission's decision.

A. *Preliminary Issues*

[12] "Correctional Service of Canada" should be replaced with "Attorney General of Canada" in the style of cause. Government departments are not legal entities and cannot be named as parties. As well, a tribunal in respect of which an application is brought should not be named as a respondent (Rule 303(1) of the *Federal Court Rules*, SOR/98-106 [*Rules*]). Where there are no persons that can be named under Rule 303(1), the Attorney General of Canada shall be named as a respondent (Rule 303(2) of the *Rules*).

[13] The documents contained in the Applicant's affidavit, as well as in the "Supplementary Certificate pursuant to Rule 318(1)(a)" filed by the Commission on October 18, 2017, were not before the Commission when it made its decision. The Respondent submits that the Court should not consider these materials. I agree.

[14] As a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the decision-maker. Exceptions to that rule include: (1) when the evidence contains general background information that may help the Court to understand the issues relevant to the judicial review; (2) when the information serves to demonstrate procedural defects that cannot be found in the record before the decision-maker; and (3) when the evidence reveals the complete absence of evidence available to the decision-maker when it made a finding (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20).

[15] Furthermore, this Court has recently held that documents that were before an investigator but were not before the Commission when it made its decision, are not properly before this Court on judicial review unless it is shown that they fit one of these exceptions (*ES v Canada (Attorney General)*, 2017 FC 1127 at paras 24-45).

[16] The Applicant has raised an issue of procedural fairness with respect to the thoroughness of the investigation. Having reviewed the documents in question to determine whether they contain information that “serves to demonstrate procedural defects that cannot be found in the record that was before the decision-maker”, I find that there is nothing in her affidavit that fits this exception. It merely contains information on the CNP unit, internal CSC discussions regarding safety issues she had raised, statements from colleagues praising her work, emails with CSC staff regarding her request and subsequent transfer, and her grievance documents.

[17] Nor do the Supplementary Certificate documents from the Commission fit this exception. Those documents include: an intake form; correspondence between the Commission and the CSC regarding the complaint; a section 40/41 report related to her complaint, her response to that report and the Commission's subsequent decision to deal with the complaint; briefing notes; and the Investigator's interview notes.

[18] The Applicant submits that there are several factual errors in the Supplementary Certificate documents. Some of those alleged errors are minor and contained in documents that were produced by staff at the Commission. The other alleged errors are found in documents produced by CSC staff and consist of statements that the Applicant disputes. None of these documents were submitted to the Commission when it made its decision.

[19] The Investigator reviewed all of this information and prepared a report for the Commission, which the Applicant had the opportunity to review and respond to before the Commission made its decision. The Applicant has not identified any error or omission in the Investigator's report that was so fundamental that it could not be remedied by her responding submissions, nor is there any evidence necessary in the Supplementary Certificate to help me better understand the issues in this judicial review.

[20] These documents are not properly before the Court on judicial review, and will not be considered.

III. Issues

[21] The issues are:

- A. Was the Applicant afforded procedural fairness?
- B. Was the Commission's decision reasonable?

IV. Standard of Review

[22] The standard of review for a decision under subparagraph 44(3)(b)(i) of the *Act* is correctness for issues of procedural fairness and reasonableness with respect to the Commission's substantive determination (*Ritchie v Canada (Attorney General)*, 2017 FCA 114 at para 16).

V. Analysis

A. *Was the Applicant afforded procedural fairness?*

[23] The Applicant submits that she was not afforded procedural fairness because the investigation was not thorough: the Investigator did not interview an important witness and omitted relevant information.

[24] In exercising the Commission's screening function, the Commission is entrusted with broad discretionary powers which have been described as providing it with "a remarkable degree of latitude" (*Walsh v Canada (Attorney General)*, 2015 FC 230 at para 19).

[25] In order for a fair basis to exist for the Commission to determine whether further inquiry is warranted, the investigation conducted prior to that decision must be neutral and thorough (*Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 (TD) [*Slattery*] at para 50).

[26] With respect to thoroughness, in the context of an investigation and subsequent decision under sections 43 and 44 of the *Act*, the parties have the opportunity to make submissions in response to an investigator's report and bring omissions to the attention of the Commission. Therefore, this Court should only intervene if it concludes that the investigative flaws are fundamental and could not be remedied by responding submissions (*Eadie v MTS Inc.*, 2015 FCA 173 at para 79; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at 120-121).

[27] As part of her investigation, the Investigator interviewed the Applicant, Carole Chen and Terry Hackett. Ms. Chen was the Assistant Warden of Operations at the CSC Pacific Institution at the relevant time, and Mr. Hackett was the Acting Warden at the CSC Pacific Institution at the relevant time.

[28] According to the Investigator's report, Ms. Chen explained that the Applicant was transferred to the Delta unit because she requested to be on the same line as her spouse, but there were no vacancies in the CNP unit that could accommodate that request whereas there was such a vacancy in the Delta unit. Ms. Chen then provided the Investigator with records indicating that there were no vacancies in the CNP unit on the Applicant's line or her spouse's line.

[29] Ms. Chen also explained that it was only when the Applicant learned of the transfer that she requested to remain in the CNP unit. At that point, the issue of spouses working together in the CNP unit was discussed. The Investigator's report states on page 11 at paragraphs 19 and 20:

[They] asked her if working in the same unit in that particular unit was the best choice. The CNP has very challenging inmates with mental health issues and inmates could use that against spouses. She and [the Corrections Manager] talked to the [Applicant] to find out why she was so focused on staying in CNP. They explored if that was really the best practice. While marital relationship was discussed, Ms. Chen states that this was a side bar only.

According to Ms. Chen, there is no rule or policy that people in a familial relationship cannot work together although it is uncommon for them to do so. This was the first request that she was aware of. [CSC] has spouses who work at the same institution but not in the same unit on the same line. Many are in managerial positions that have a different schedule than [Corrections Officers]. While she and the [Corrections Manager] were talking to the [Applicant] about her marital and family status, this was not the reason nor a factor in the decision not to place the [Applicant] with her spouse on the same line in CNP. The reason was because there was no vacancy.

[30] As well, the report states on page 11 at paragraph 23 that Mr. Hackett told the Investigator:

[T]here was a practice about spouses not working on the same line in the same unit because normally spouses did not want to work the same line in the same unit. He said that the complainant's request was the first time the issue had come up for him. He did not recall employees asking to work on the same line in the same unit before this. [CSC] has a lot of spouses working in the same institution on the same line but generally not the same unit. He had a case once where one spouse was asking for this and the other spouse quietly asked for it not to happen.

[31] The Applicant submits that the Investigator should have also interviewed Alana Patterson. Ms. Patterson was a Corrections Officer in the CNP who offered to transfer to the

Delta unit to open a position at the CNP unit for the Applicant, but changed her mind. The Applicant alleges that Ms. Patterson was manipulated by management to stay in the CNP unit.

[32] This issue was also addressed in the Investigator's report, which states on page 10 at paragraphs 17 and 18:

[The Applicant] told [CSC] that Alana Patterson, a CX2 on her line in CNP (line 2), was prepared to move to Delta. Ms. Chen received an email from Ms. Patterson on September 8, 2011 referring to the [Applicant's] transfer and inquiring about her moving to CNP. Ms. Chen said she then considered the possibility of Ms. Patterson moving to Delta which would create a vacancy on line 2 in CNP and then the complainant and her spouse could be on the same line in the same unit. According to Ms. Chen, she met with Ms. Patterson on September 15, 2011 with her union steward. Ms. Patterson told her she changed her mind and did not want to transfer to Delta. Ms. Chen sent Ms. Patterson an email that day confirming Ms. Patterson's position about the transfer. Ms. Chen provided the investigator with an email from the union steward dated September 23, 2011, wherein he confirms that Ms. Patterson "does not wish to pursue a move out of the CNP at this time."

The [Applicant] states that the reason Ms. Patterson decided not to pursue a transfer out of CNP in September 2011 was because management was putting pressure on her to stay in CNP. The [Applicant] states that she has an email to that effect from Ms. Patterson about this but has been unable to locate it. The complainant agrees that if Ms. Patterson did not transfer out of CNP, there was no vacancy for her in CNP on the same line as her spouse. The [Applicant] told the investigator that in the two weeks leading up to her transfer to Delta, she and Ms. Patterson continued to work together and Ms. Patterson kept changing her mind about wanting to transfer. Once Ms. Patterson told her that she would no longer pursue a transfer out of CNP in September 2011, the [Applicant] stopped asking [CSC] to transfer Ms. Patterson to the Delta unit and the [Applicant] to the CNP unit.

[33] The Investigator turned her mind to the allegation that Ms. Patterson had been pressured to remain in the CNP unit. She asked Ms. Chen about Ms. Patterson and was told about the

meeting between Ms. Chen, Ms. Patterson and the union steward. She was also provided with an email from the union steward confirming Ms. Patterson's desire to remain in the CNP unit.

[34] The decision to not interview Ms. Patterson was not a fundamental error. No evidence was submitted to suggest she was pressured to stay at the CNP unit for the purpose of keeping the Applicant and her spouse on separate lines. Moreover, the union steward was present at the meeting with Ms. Chen and there is no evidence to suggest that he raised any concerns about discrimination against the Applicant or undue pressure on Ms. Patterson. The Applicant's allegation is unsupported on the evidence in the record.

[35] The Investigator did not err by failing to interview Ms. Patterson. She was required to conduct a thorough investigation but absolute perfection is not the standard (*Ritchie* at para 31). As this Court stated in *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113 at paragraph 39:

Any judicial review of the Commission's procedure must recognize that the agency is master of its own process and must be afforded considerable latitude in the way that it conducts its investigations. An investigation into a human rights complaint cannot be held to a standard of perfection; it is not required to turn every stone. The Commission's resources are limited and its case load is heavy. It must therefore balance the interests of complainants in the fullest possible investigation and the demands of administrative efficacy: see, for example, *Slattery v Canada (Human Rights Commission)* at para 55; Canadian Human Rights Commission, *Annual Report for 2001* (Ottawa: Minister of Public Works and Government Services, 2002), p 33.

[Emphasis added]

[36] Lastly, the Applicant submits that the Investigator omitted two pieces of critical information: written responses to her grievance that refer to “spouses working together” as the reason for the transfer; and a Facebook messenger conversation suggesting that Ms. Patterson was manipulated by management to stay in the CNP unit. These omissions could have been remedied by the Applicant’s responding submissions. Indeed, she submitted a copy of the grievance response in her reply to the Investigator’s report. I find this submission is without merit.

[37] The Applicant was afforded procedural fairness.

B. *Was the Commission’s decision reasonable?*

[38] In her written submissions to this Court, the Applicant only takes issue with the conduct of the investigation and the report that was submitted to the Commission. Those are issues of procedural fairness, which are addressed above. However, the Applicant is also concerned with the merits of the Commission’s decision and the reasonableness of that decision.

[39] The Applicant submitted a response to the Investigator’s report prior to the Commission making a decision, in which she disputed several aspects of the Investigator’s report. Most of her submissions do not affect the resulting decision, such as the allegation that her and her spouse had originally been assigned to the same line before that arrangement was reneged, her comment on when she first requested to remain in the CNP unit, or her personal attacks on the character of Ms. Chen.

[40] More significantly, the Applicant disputed the Investigator's finding that the inability to assign the Applicant and her spouse to the same line in the CNP unit was primarily a matter of vacancy. She also disputed the comments made by Ms. Chen that her marital status was only a "side bar" and that there is no rule or policy against spouses working together, as well as the comment by Mr. Hackett that this was the first time he was confronted with the issue of spouses working together.

[41] The key evidence submitted by the Applicant in support of her allegations was two documents entitled "Management Decision on Grievance". These are two documents that were prepared by CSC representatives in response to grievances submitted by the Applicant, in which she grieved her removal from the CNP unit and the ensuing discussions with CSC staff, including Ms. Chen and Mr. Hackett.

[42] The first document contains the following statement:

I have reviewed your grievance where you state; that you had a meeting with AWO Carole Chen where you discussed the reasons why you removed from CNP. The conversation primarily focused on your common law marital status with another employee in the CNP. AWO Chen told you that you should not be in the CNP under those circumstances. You make a note that other employees and Officers in similar relationships work together.

You also make reference to another meeting this time with Warden Hackett and the DW Noonward, where the same topic was discussed. You were once again told that you should not be working in the CNP under those circumstances. You make reference to other officers in similar relationships working together.

[43] The second document contains the following statement:

In your discussion with AWO Carole Chen and A/Warden Terry Hackett it was explained to you that the practice at the site was not to place spouses or partners on the same line in the same unit. Partners can work on the same line, however they should not be scheduled on a regular basis to work in the same unit.

[44] Both grievances were dismissed because they were filed outside the mandatory time frame.

[45] The statements in these documents appear to at least qualify the Investigator's finding that the decision to transfer the Applicant, or not have her and her spouse on the same line in the CNP unit, was primarily a matter of vacancy. They also suggest an informal policy or decision against such a practice as a consideration for the decision.

[46] However, the Commission was entitled to make its decision having regard to the findings of the Investigator. The grievance decisions do not provide a full account of what occurred during the Applicant's meetings with CSC staff. It was the Investigator that interviewed all parties involved and reviewed the relevant evidence. The Investigator noted in her report that "concerns were raised about spouses working together in the CNP unit" and concluded that "[w]hile there was a discussion about the [Applicant's] marital and family status and while there may be a practice of not having spouses work on the same line in the same unit, it does not appear that there is a link between [CSC's] decision to transfer the [Applicant] to the Delta unit and her marital or family status."

[47] Moreover, the Investigator referred to documentation provided by Ms. Chen showing that at the time the request was made, there was no vacancy in the CNP unit that would allow the Applicant and her spouse to be on the same line. The Investigator also referred to the Applicant's insistence that other officers in similar relationships were allowed to work together, as well as her suggestion that the decision was a form of retaliation for raising safety concerns, both of which undermine the allegation of a policy against spouses working together.

[48] It is not the role of the Court to reweigh the evidence before the Commission.

[49] I find that it was reasonable for the Commission to find that no further inquiry into the Applicant's complaint was warranted.

[50] While the Respondent is successful in the result, I am sympathetic to the Applicant's concerns and the delay in having her complaint dealt with. I find that no costs should be awarded.

JUDGMENT IN T-1381-17

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended to replace "Correctional Service of Canada" as a Respondent with "Attorney General of Canada";
2. The Application is dismissed;
3. No costs are awarded.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1381-17

STYLE OF CAUSE: TRACY ANNE DREW v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MAY 23, 2018

JUDGMENT AND REASONS: MANSON J.

DATED: MAY 29, 2018

APPEARANCES:

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ON HER OWN BEHALF

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