Federal Court  Cour fédérale

Date: 20201026

Docket: T-1685-16

Citation: 2020 FC 1005

Ottawa, Ontario, October 26, 2020

PRESENT: Madam Justice McDonald

BETWEEN:

JANET MERLO AND
LINDA GILLIS DAVIDSON

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] The settlement of this class action was approved by Order of this Court on May 30, 2017, (*Merlo v Canada* 2017 FC 533). The approval gave effect to the terms of the Settlement Agreement intended to address gender and sexual orientation harassment claims for female RCMP members and employees. Pursuant to terms of the Settlement Agreement and the Order approving the settlement, the Court retains continuing jurisdiction over the settlement and its implementation.

[2] This is a Motion by a member of the class, identified as Claimant 19407 (Claimant), who seeks an order for the reassessment of her claim. The Claimant also seeks a confidentiality order to protect her identity and to seal the confidential information she filed in support of this Motion. I note that only the Claimant, her legal counsel and the Court had access to the Confidential Motion materials. The Defendant and the Assessor were provided with redacted Motion materials.

[3] Despite the objections of the Claimant's legal counsel, the Court granted leave to the Assessor's Office to file written submissions in response to the Claimant's Motion.

[4] This Motion proceeded as a Motion in writing pursuant to Rule 369(1) of the *Federal Court Rules*.

Relevant Provisions of the Settlement Agreement

[5] The following are the relevant provisions of the Settlement Agreement that bear on this Motion:

> Article 6.05 The Assessor will render a Decision in respect of a Claim to a Claimant promptly after the decision is made in accordance with paragraph 33 of Schedule B to this Agreement. A Decision of the Assessor in respect of a Claim will, subject to the limited right of a Claimant assessed at Level 2 to request a reconsideration as set out in the Claims Process in Schedule B of this Agreement, be final and binding upon the Claimant. For further clarity, there is no right of appeal or judicial review from any Decision of the Assessor.
>
> Article 7.01 The objective of the Claims Process is to provide just compensation for meritorious Claims in a process that is both sensitive to and supportive of Primary Class Members in bringing

> issues forward and at the same time ensures that Claims are properly, fairly, and expeditiously assessed on the basis of adequate and sufficient validation which is proportionate to the severity of the injuries alleged.

[6] The claims process is detailed in Schedule B of the Settlement Agreement as follows:

> 21. The Assessor will determine for each Claim whether it falls within levels 1, 2 or within levels 3 to 6 by adopting the factors of culpable conduct and effect on victim categorization in Levels 1 to 6 of "Compensation Levels" in Appendix 6 to this Schedule.
>
> 22. For a Level 1 or 2 Claim, the Assessor will conduct a paper review of the Claim Package and determine:
>
> > (a) whether, on a balance of probabilities, the alleged events occurred and, if so, in or in relation to the workplace, and during the Class Period;
> >
> > (b) whether the events found to have occurred constitute Harassment within the definition set out in the Agreement;
> >
> > (c) the nature and severity of harm suffered by the Claimant that was caused or contributed to by the Harassment that is found to have occurred; and
> >
> > (d) the level of compensation to be awarded in accordance with Appendix 7 of this Schedule.
>
> 23. Within 30 days of a Claimant being sent the Assessor's Decision of a Level 2 Claim, the Claimant may, by submitting a Request for Reconsideration of a Level 2 Claim Form in Appendix 8 to this Schedule, request that the Assessor reconsider his or her decision where:
>
> > (a) the Claimant provides reasonable grounds to show that the Claim should be determined in accordance with the process applicable to Levels 3, 4, 5 and 6 Claims; and
> >
> > (b) the Claimant has additional documentation or information that was not reasonably available to the Claimant prior to receipt of the Decision.
>
> […]

> 33. The Assessor shall render a Decision in respect of a Claim and provide it to the Claimant promptly after the Decision is made, setting out the Compensation Level determined and the amount of compensation to be paid. A Decision of the Assessor in respect of a Claim will, subject to the limited right of a Claimant assessed at Level 2 to request a reconsideration as set out in paragraph 23 of this Schedule, be final and binding upon the Claimant. For further clarity, there is no right of appeal or judicial review from any Decision of the Assessor.

Relevant Background

[7] As noted in the above provisions, the Settlement Agreement outlines the claim process in detail. As part of the negotiated settlement culminating in the Settlement Agreement, the parties agreed to the appointment of an Independent Assessor with a mandate "to administer the settlement and determine which claimants are eligible for compensation pursuant to the terms of the Settlement Agreement." The Honourable Michel Bastarache, C.C., Q.C., was appointed as the Independent Assessor at the time of the Court approval of the settlement. Afterwards, two additional Assessors were appointed to assist with processing claims. To date, 3,086 claims have been assessed under the Settlement Agreement.

[8] In May 2018, the Claimant, through legal counsel, submitted a claim with supporting documentation to the Assessor for assessment outlining incidents alleged to have occurred during her employment as a civilian member of the RCMP. In February 2020 she provided updated information to the Assessor.

[9] On April 17, 2020, the Assessor issued a decision denying the Claimant's claim for compensation. The Assessor's letter states, in part, as follows:

> My mandate is to assess claims for compensation in accordance with the terms of the Settlement Agreement reached by the parties to the Merlo Davidson class action as approved by the Federal Court of Canada. The Claims process set out in Schedule B of the Settlement Agreement requires me to determine:
>
> (a) whether, on a balance of probabilities, the alleged events occurred and, if so, if they occurred in, or in relation to, the workplace, between September 16, 1974 and May 30, 2017;
>
> (b) whether the events found to have occurred constitute harassment within the definition set out in article 1.01 of the settlement agreement;
>
> (c) the nature and severity of harm suffered by the claimant that was caused or contributed to by the harassment that is found to have occurred; and
>
> (d) the level of compensation to be awarded in accordance with appendix 7 of schedule B of the settlement agreement.
>
> The claims process also provides that: "the assessor may deny any claim as unproven or on the basis that the events do not constitute harassment."
>
> If a claim does not meet the settlement agreements requirements, I have no authority to award compensation to the claimant, even if that person has had a negative experience in the RCMP.
>
> I have carefully reviewed and considered your claim form and the other documents you submitted in support of your claim. I have concluded that your claim does not meet the requirements for compensation as set out in the terms of the Settlement Agreement.
>
> Accordingly, based on my review of the information and evidence that you submitted to me, I am unable to award you compensation under the Settlement Agreement.

[10] On May 19, 2020, legal counsel for the Claimant wrote to the Assessor requesting that the Assessor confirm that the denial of the Claimant's claim was a clerical error and requesting that the claim be re-assigned for evaluation.

[11] On June 3, 2020, the Office of the Assessor responded in writing stating: “I confirm that following a review of the claim form and the supporting information in file 19407, the Independent Assessor assessed the claim as being not compensable. There has not been any administrative error.”

Relief Sought on this Motion

[12] On this Motion, the Claimant seeks the following relief:

(a) Claimant 19407’s Claim form and supporting documents be remitted to the Office of the Assessor for a reassessment of her claim;

(b) The reassessment of Claimant 19407’s claim be conducted by a practicing lawyer and Assessor other than Maxine Vincellette and Mr. Bastarache (the Assessor);

(c) The contents of Claimant 19407’s Claim Form and supporting documents submitted under the Settlement Agreement be deemed confidential and filed in a sealed form with access restricted to the Court; and

(d) Any identifying information of Claimant 19407 in any order or other document released by the Federal Court of Canada be replaced by the pseudonym, “Claimant 19407.”

[13] The Defendant argues that the issues raised on the Motion relate to the finality of the Assessor’s decisions and whether the Claimant has met the high threshold to demonstrate that the Court should intervene and direct a reconsideration of the Assessor’s final decision.

[14] I would frame the issues as follows:

A. Is a confidentiality order appropriate?

B. Does the Court have jurisdiction to order a reassessment of a denied claim?

Analysis

A. *Is a confidentiality order appropriate?*

[15] The Claimant requests that her information be protected from disclosure by a confidentiality order. The Defendant did not make any submissions on the request for a confidentiality order.

[16] Rule 151 of the *Federal Courts Rules* states as follows:

151 (1) On motion, the Court may order that material to be filed shall be treated as confidential.	151 (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.
(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.	(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

[17] In the Order approving the settlement (2017 FC 533) at paragraph 11, I noted the importance of the confidentiality of the claims process, quoting paragraph 24 of the Settlement Agreement, as follows:

> The Settlement incorporates numerous safeguards to protect the privacy of claimants and to maintain confidentiality in the claims process. Confidentiality was a significant concern for class members, many of whom had experienced retaliation while working within the RCMP after making complaints that they experienced harassment and/or discrimination. The Settlement incorporates multiple measures to protect the identity of the claimants, thereby encouraging class members to feel safe when making claims under the Settlement.

[18] Ensuring a confidential process to allow class members to come forward has been an overriding feature of the claims process. The filing of a claim for compensation under the Settlement Agreement takes place via a confidential process designed to protect the identity of claimants and their information. In my view, the risk of harm to the Claimant by disclosing the information she provided in support of her claim, outweighs the public interest in open and accessible court proceedings.

[19] The considerations outlined in *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 are met here, and protecting the Claimant's privacy is not incompatible with the open court principle (*A.B. v Canada (Citizenship and Immigration),* 2018 FC 237 at para 41).

[20] Pursuant to the terms of the settlement of this class action, I am satisfied that it is appropriate to issue the confidentiality order sought.

B. *Does the Court have jurisdiction to order a reassessment of a denied claim?*

[21] The Claimant submits that the Assessor "summarily denied" her claim and that the denial of her claim is a "complete failure to apply the terms of the Settlement Agreement and contradicts the intentions of the parties in negotiating its terms."

[22] In support, the Claimant relies upon the decisions in *Fontaine v Duboff Edwards Haight & Schacter*, 2012 ONCA 471 and *Brown v Canada (Attorney General)*, 2019 BCCA 245 to argue that the Court may intervene where the decision reflects a failure to comply with the terms of the Settlement Agreement or if there is a "gap" in the agreement.

[23] The Supreme Court in *J.W. v Canada (Attorney General)*, 2019 SCC 20 (*J.W.)* addressed the jurisdiction of courts supervising class action settlement agreements. Although a split decision, in *J.W.*, Justice Côté held at paragraph 134, "to open IAP decisions to intervention by the courts would be contrary to the objective of efficient and timely resolution of disputes with finality." Further, the majority of the Court, adopting Côté J.'s Reasons from paragraphs 142-143 held that courts could intervene only if a relevant term was not considered, or there was a gap in the agreement.

[24] Here the Claimant argues that the decision letter from the Assessor is not evidence that he implemented or adhered to the provisions of the Settlement Agreement. This argument implies that the Assessor has an obligation to provide reasons for denying a claim. However, such a requirement is not identified in the language of the Settlement Agreement. Further, the Assessor did confirm that the claim was assessed and there was no administrative error in the denial of the

claim. Accordingly, in my view, the denial of the claim by the Assessor cannot be said to be a failure to comply with the Settlement Agreement and it does not establish that there is a gap in the Settlement Agreement.

[25] The Settlement Agreement is intended to be a complete code detailing the terms, conditions and limitations on claims coming within its ambit. Class members, like the Claimant, have relinquished their right to have their claim resolved by the courts in favour of a non-adversarial, efficient and final claims process. Article 6.05 of the Settlement Agreement states: "For further clarity, there is no right of appeal or judicial review from any Decision of the Assessor."

[26] Notwithstanding that the parties disagree on the applicable test that emerges from *J.W.*, in my view, the Court in *J.W.* was clear that judicial intervention in a Settlement Agreement is restricted to very limited circumstances.

[27] I am not satisfied that the facts here fall within the "limited circumstances" category which would justify the intervention of the Court in the claims process. Accordingly, I conclude that the Court does not have jurisdiction to order the reassessment of a claim that has been denied by the Assessor.

ORDER in T-1685-16

THIS COURT ORDERS that:

1. The content of Claimant 19407's Claim Form and supporting documentation as submitted under the Settlement Agreement are confidential and shall remain sealed in the Court File;

2. The Claimant shall be identified as "Claimant 19407";

3. The request for a reassessment of Claimant 19407's claim is denied; and

4. No costs are awarded.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1685-16
STYLE OF CAUSE:	JANET MERLO AND LINDA GILLIS DAVIDSON v HER MAJESTY THE QUEEN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF THE PARTIES

ORDER AND REASONS:	MCDONALD J.
DATED:	OCTOBER 26, 2020

WRITTEN REPRESENTATIONS BY:

Won J. Kim Megan B. McPhee	FOR THE PLAINTIFF LINDA DAVIDSON AND CLAIMANT 19407
Charmaine De Los Reyes Susanne Pereira	FOR THE DEFENDANT
Richard G. Dearden David P. Taylor	FOR THE ASSESSOR UNDER THE MERLO DAVIDSON SETTLEMENT AGREEMENT, THE HON. MICHEL BASTARACHE, C.C., Q.C.

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