

Federal Court



Cour fédérale

Date: 20230222

Docket: T-12-22

Citation: 2023 FC 257

Ottawa, Ontario, February 22, 2023

PRESENT: Madam Justice Pallotta

BETWEEN:

KAREN TYLER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] On this application for judicial review, Ms. Karen Tyler seeks to set aside the Canadian Human Rights Commission's (Commission) December 1, 2021 decision (2021 Decision) not to deal with a complaint alleging that her former employer, the Canada Revenue Agency (CRA), had discriminated against her.

[2] The Commission decided not to deal with Ms. Tyler's complaint for two reasons. First, pursuant to paragraph 41(1)(e) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*], the Commission found Ms. Tyler's complaint was untimely, that she had not reasonably explained a delay in providing necessary documents, and the delay may have seriously prejudiced CRA's ability to respond. Second, pursuant to paragraph 41(1)(d) of the *CHRA*, the Commission found Ms. Tyler's complaint was vexatious in that substantially all of her human rights allegations of discrimination had been addressed in another procedure.

[3] Ms. Tyler submits the Commission's decision was unreasonable. Ms. Tyler contends the Commission had no basis for refusing to deal with her complaint as untimely when it was filed within the time limitation prescribed by paragraph 41(1)(e) of the *CHRA*. She states the Commission's reliance on delay in providing materials and prejudice to CRA was both unreasonable and procedurally unfair, including because the Commission did not set a deadline to provide materials and it ignored the effect of its own delay on CRA's ability to respond. Ms. Tyler contends the Commission's refusal to deal with her complaint as vexatious was also unreasonable, because the Commission did not grapple with her arguments and evidence that the other procedure did not substantially address all of her allegations of discrimination. CRA had set the investigator's mandate, and deliberately excluded key allegations of discrimination that she had raised from the scope of the investigation.

[4] For the reasons that follow, this application is granted. I find Ms. Tyler has established that the Commission's decision not to deal with her complaint was unreasonable, and should be set aside.

II. **Background**

[5] Ms. Tyler was a contract employee at CRA's Winnipeg Tax Centre. According to Ms. Tyler, the events that gave rise to her human rights complaint began in late 2014 when she was working as a Taxpayer Relief Screener on a fixed term contract effective until June 26, 2015. In this position, Ms. Tyler worked under the direction of a team leader, who in turn reported to a manager responsible for their unit.

[6] Ms. Tyler states she was on sick leave without pay from April 22, 2015 until July 31, 2015. She alleges that, as she was preparing to return to work on July 31, 2015, CRA informed her of its decision not to rehire her and told her that her contract had ended on June 26, 2015.

[7] In September 2015, Ms. Tyler filed a complaint of discrimination with the Commission. The Commission notified Ms. Tyler by letter dated August 8, 2017 (2017 Decision) that it decided not to deal with her complaint pursuant to paragraph 41(1)(a) of the *CHRA*, because she should first exhaust other available procedures. The 2017 Decision states Ms. Tyler could return to the Commission within 30 days following completion of the other process, if she believed the human rights issues were not adequately addressed and wanted the Commission to reactivate her complaint. The Commission would then verify whether the other process had adequately dealt with the human rights issues, and decide whether or not to deal with her complaint.

[8] In November 2015, Ms. Tyler made a complaint of harassment to CRA regarding the team leader and the unit manager, alleging a series of actions against her that culminated in CRA's refusal to extend her employment or rehire her. CRA retained an external investigator

who dismissed the complaint after completing an investigation, and issued a final report in October 2017 (Investigator's Report).

[9] On November 1, 2017, Ms. Tyler wrote to the Commission, requesting that it proceed with hearing her complaint. She followed up on November 26, 2017. A Commission analyst (Analyst) sent emails on January 18, 2018 and February 8, 2018, asking Ms. Tyler to send a copy of the Investigator's Report. Ms. Tyler responded that she had been unable to obtain an electronic copy of the report and could not scan it herself. She stated she would have the report sent to the Analyst in 24-48 hours. Ms. Tyler believes she asked her spouse to send the Investigator's Report to the Commission, but she has no record confirming its delivery.

[10] Ms. Tyler next contacted the Commission over a year later, in March 2019. She spoke with a representative who told her the Commission had not received the Investigator's Report. Ms. Tyler attempted to send the report by email. The representative told her the file was too large to send by email, and Ms. Tyler should send it by fax or mail. Ms. Tyler faxed the report in April 2019.

[11] Ms. Tyler followed up with the Commission in June 2019. After an exchange of correspondence, the Analyst wrote in July 2019 stating that the complaint would be reactivated, and would move forward to the next step in the process.

[12] There was no further action for over a year. When Ms. Tyler followed up she was told her file was "in the queue" waiting to be assigned to an officer for assessment, and this could take several months.

[13] In November 2020, the Commission sent Ms. Tyler a copy of CRA's written position and invited Ms. Tyler to respond. CRA had provided its position to the Commission months earlier, in January 2020. Ms. Tyler submitted her response to CRA's position in December 2020.

[14] On September 1, 2021 an officer (Officer) issued a report recommending that the Commission not deal with Ms. Tyler's complaint, based on paragraphs 41(1)(d) and 41(1)(e) of the *CHRA* (Section 40/41 Report). The Section 40/41 Report stated that its purpose was to help Commissioners make a decision about what should happen next in the complaint. It stated that the Commissioners may accept or reject the recommendations in the Section 40/41 Report, and they would make their own decision based on the information in the report and information provided by the parties in response to the report. Both parties filed responding submissions.

[15] On December 7, 2021 the Commission notified Ms. Tyler of its decision not to deal with her complaint.

[16] The 2021 Decision is brief. It states:

Before rendering its decision, the Commission reviewed the Complaint Form, the Report for Decision, and the submissions of the parties filed in response to the Report for Decision. After examining this information, the Commission decides, pursuant to paragraph 41(1)(e) of the *Canadian Human Rights Act*, not to deal with the complaint because:

- it is untimely;
- the Complainant has not provided a reasonable explanation for the delay in providing the necessary documents; and
- the Respondent may be seriously prejudiced in its ability to respond to the complaint by the delay.

The Commission further decides, pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, not to deal with the complaint because the other procedure has addressed substantially all of the allegations of discrimination in the complaint and it is vexatious. The decision maker in that procedure had the authority to address human rights issues and the Complainant had the opportunity to raise all of her human rights allegations in that other procedure.

III. Issues and Standard of Review

[17] The issues on this application are whether the 2021 Decision was unreasonable, and whether the Commission acted contrary to procedural fairness principles.

[18] The reasonableness of the 2021 Decision is reviewed according to the Supreme Court of Canada's guidance in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 77 [*Vavilov*]. The reasonableness standard of review is a deferential but robust standard of review: *Vavilov* at paras 12-13, 75 and 85. In applying the reasonableness standard, the reviewing court determines whether a decision bears the hallmarks of reasonableness—justification, transparency, and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

[19] Ms. Tyler's allegation that she was denied procedural fairness is reviewed on a standard that is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is "eminently variable", inherently flexible, and context-specific: *Vavilov* at para 77, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 22-23 [*Baker*],

among other cases. The central question is whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54.

IV. **Analysis**

A. *Did the Commission err in deciding not to deal with Ms. Tyler's complaint based on paragraph 41(1)(e)?*

[20] Ms. Tyler submits the Commission's reliance on paragraph 41(1)(e) of the *CHRA* is incoherent. That paragraph requires the Commission to deal with a complaint unless it is "based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint". Ms. Tyler states she filed her complaint within that time.

[21] Ms. Tyler submits the 2021 Decision does not identify a time limit that she missed. The 2017 Decision had indicated that she could request reactivation within 30 days of the Investigator's Report, and she requested reactivation within that period. Ms. Tyler submits the Commission's decision to dismiss her complaint due to delay in providing the Investigator's Report was unreasonable as paragraph 41(1)(e) of the *CHRA* does not authorize the Commission to dismiss a complaint based on delay in providing a document. Furthermore, the Commission breached principles of procedural fairness because it did not communicate a deadline to provide the Investigator's Report, or warn that a delay in providing it could result in a refusal to deal with her complaint.

[22] Ms. Tyler also states the Commission erred by relying on the Officer's erroneous findings that she had not provided a reasonable explanation for the delay in providing necessary

documents, and that the delay may seriously prejudice CRA's ability to respond. The Officer made these findings in assessing whether to exercise discretion to "extend the time limitation set by the Commission"; however, Ms. Tyler states she did not miss any time limitation set by the Commission, and the Officer had no basis to consider whether to extend a time limitation that did not exist. Furthermore, the Officer overlooked crucial facts. The Officer found that Ms. Tyler had provided no reasonable explanation for the delay in sending the Investigator's Report without considering the fact that she believed she had sent it when the Analyst asked for it. Also, the Officer found that Ms. Tyler's delay may seriously prejudice CRA's ability to respond without considering the delay that was attributable to the Commission, including: nine months to inform CRA of Ms. Tyler's November 1, 2017 letter requesting reactivation of her complaint; fifteen months to contact Ms. Tyler after receiving a copy of the Investigator's Report, to ask for her response to CRA's submission that the Commission had received ten months earlier; nine months to provide the Section 40/41 Report after receiving the parties' submissions.

[23] The respondent submits the Commission is entitled to a high level of deference in the performance of its screening function, and exercised its discretion in a reasonable manner by declining to deal with the complaint pursuant to paragraph 41(1)(e) of the *CHRA*. While Ms. Tyler's complaint was filed within the one-year limitation period, it was reasonable for the Commission to consider her delay in providing information that was necessary in order to verify whether another process had adequately dealt with her allegations of discrimination. The respondent submits the Commission also reasonably considered the adverse impact of the delay on CRA, noting that some of the rationales for the time limitation of paragraph 41(1)(e) relate to safeguarding the ability to gather credible evidence, providing fairness for defendants, and ensuring that plaintiffs exercise due diligence. The respondent states that CRA's ability to

present a full defence was impaired because four witnesses, including the team leader and unit manager, were no longer CRA employees.

[24] I agree with Ms. Tyler that the Commission unreasonably concluded that her complaint was untimely. The Section 40/41 Report acknowledges that Ms. Tyler filed her complaint within one year of the last alleged act of discrimination, and provides no basis that would justify dismissing Ms. Tyler's complaint pursuant to paragraph 41(1)(e) of the *CHRA*. This is a sufficiently serious shortcoming that renders the Commission's paragraph 41(1)(e) determination unreasonable.

[25] In addition, I agree with Ms. Tyler that the Commission unreasonably relied on the Officer's findings about the delay in providing the Investigator's Report, and its effect on CRA. The Officer's statement that "the issue for the Commission to decide is whether it should exercise its discretion in extending the time limitation set by the Commission" is not coherent: *Vavilov* at paras 102-104.

[26] In the Section 40/41 Report, the Officer states that Ms. Tyler knew on February 12, 2018 that she had to provide a copy of Investigator's Report, but the next time she contacted the Commission was more than a year later. The Officer states that Ms. Tyler "provided no reasonable explanation" about what prevented her from sending the Investigator's Report or contacting the Commission about her complaint for more than a year. The Officer does not indicate that the Commission had set a one-year deadline, or any other time limit for Ms. Tyler to provide a copy of the Investigator's Report.

[27] According to the Officer's summary of the parties' submissions, CRA's position was that Ms. Tyler's complaint was untimely because CRA was notified she had reactivated her complaint in August 2019, "well outside of the 30-day window" provided in the 2017 Decision. CRA argued that allowing such delay would be prejudicial, as the absence of key witnesses would impact its ability to respond. However, the Section 40/41 Report acknowledges that Ms. Tyler contacted the Commission to request reactivation of her complaint within the 30-day window. If this was "the time limitation set by the Commission", then Ms. Tyler did not miss it, and the delay that CRA complained of was in fact the Commission's delay in notifying CRA.

[28] The Section 40/41 Report and the 2021 Decision do not provide a basis for finding that the time limitation of paragraph 41(1)(e) or a time limitation set by the Commission was missed, or for requiring the Commission to consider whether to exercise discretion to extend a missed time limitation. Ms. Tyler has established that the Commission's refusal to deal with her complaint based on paragraph 41(1)(e) was unreasonable. In view of this finding, it is not necessary to address Ms. Tyler's procedural fairness arguments.

B. *Did the Commission err in deciding not to deal with Ms. Tyler's complaint based on paragraph 41(1)(d)?*

[29] Ms. Tyler submits the Commission's determination that her complaint had been adequately addressed in an alternate procedure was not justified or rational in light of the facts and the law that were before it. She argues that section 41 decisions are made at a very early stage in the process, the Commission should only decline to deal with a complaint in plain and obvious cases, and the allegations of fact in her complaint should have been taken as true:

Conroy v Professional Institute of the Public Service of Canada, 2012 FC 887 at paras 30-33 [Conroy].

[30] Ms. Tyler states it was not plain and obvious that her complaint should be brought to an early end as being vexatious under paragraph 41(1)(d), based on the adequacy of the CRA investigatory process. She had explained why the CRA process was inadequate, including because it did not address her allegation that CRA's refusal to rehire her was discriminatory. According to Ms. Tyler, it was significant that this allegation was excluded from the CRA investigator's mandate, because the refusal to rehire her deprived her of over 5 years of continuous service and accrued benefits.

[31] Ms. Tyler states the Commission relied on the Section 40/41 Report without addressing her arguments and evidence about its inaccuracies. While it is common for the Commission to give no reasons or short reasons independent of an officer's section 40/41 report, Ms. Tyler submits that a "rubber stamping" of the Section 40/41 Report was not reasonable in the circumstances of her case. Her arguments and evidence regarding the flaws in the Section 40/41 Report were, to use this Court's words at paragraph 40 of *Conroy*, "serious enough to warrant further assessment, or at least a mention". Ms. Tyler states the Commission's failure to grapple with her arguments renders its decision unreasonable.

[32] For example, regarding CRA's refusal to rehire, Ms. Tyler states the Officer found it was "unclear why [Ms. Tyler] did not raise this issue" in the alternative process when she did raise it. CRA was responsible for setting the investigator's mandate, and deliberately excluded the allegations relating to the decision not to rehire from its scope. She had also pointed out that

CRA's investigator did not assess credibility, or make findings of fact. Ms. Tyler submits the Commission's failure to address her key submissions was contrary to the principle of responsive reasons discussed in *Vavilov*, and calls into question whether the Commission was alert and sensitive to her submissions.

[33] Ms. Tyler relies on this Court's jurisprudence in section 44 cases (that is, the Commission's second gatekeeper step, when the Commission decides whether to refer a complaint to the Canadian Human Rights Tribunal after an investigation) that it is inappropriate for the Commission to provide a short form response when a complainant has raised significant factual errors in the section 44 report. In such a case, the Commission must either refer the matter back for further investigation or provide clear reasons why further investigation is unnecessary: *Egan v Canada (Attorney General)*, 2008 FC 649 at paras 13-15 and *Dupuis v Canada (Attorney General)*, 2010 FC 511 at paras 16 and 22; *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 26 [*Herbert*]. Ms. Tyler points to the following passage from *Herbert*, at paragraph 26:

[...] Where the parties' submissions on the report take no issue with the material facts as found by the investigator but merely argue for a different conclusion, it is not inappropriate for the Commission to provide the short form letter-type response. However, where these submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all. [...]

[34] Ms. Tyler states this Court has recognized that similar principles apply in the context of the preliminary screening process and section 40/41 reports: *Conroy* at paras 38, 39-41; *Hicks v Canada (Attorney General)*, 2008 FC 1059 at para 24.

[35] The respondent submits the Officer thoroughly analyzed whether the central issues of Ms. Tyler's complaint had been adequately addressed in an alternative procedure, according to the factors identified in *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, namely: (i) was there concurrent jurisdiction to decide human rights issues; (ii) was the legal issue in the alternative forum essentially the same as the legal issue in the human rights complaint; and (iii) did the complainant have an opportunity to know the case to meet and have a chance to meet it? The Officer found that Ms. Tyler's attempt to re-litigate the various issues of discrimination was vexatious, noting that CRA's investigator had the authority to address human rights allegations, dealt with the majority of allegations Ms. Tyler was attempting to raise before the Commission, and followed a fair process similar to the process under the *CHRA*. With respect to CRA's decision not to rehire Ms. Tyler, the respondent submits the Officer found these allegations to be interconnected with other allegations about Ms. Tyler's work performance assessment that were considered in the CRA investigation.

[36] The respondent submits the Commission's reasons were adequate and complete. A decision maker is not required to make an explicit finding on every matter before it; if the reasons allow the reviewing court to understand why the decision maker made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the decision is reasonable: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16. The respondent submits the Section

40/41 Report addressed the central points, and the record amply supports the Commission's 2021 Decision.

[37] I find Ms. Tyler has established that the refusal to deal with her complaint based on paragraph 41(1)(d) of the *CHRA* was unreasonable. Ms. Tyler had raised substantial and material issues with the findings and recommendations in the Section 40/41 Report. Apart from an assertion that the Commission reviewed the parties' submissions about the Section 40/41 Report, the 2021 Decision did not grapple with Ms. Tyler's central arguments and was not responsive to them: *Vavilov* at paras 127-128; *Conroy* at paras 38-40.

[38] In the Section 40/41 Report, the Officer acknowledged that Ms. Tyler's allegation that CRA refused to rehire her or to extend her employment contract based on prohibited grounds of discrimination "was not raised" in CRA's investigation, but found it was "unclear why the complainant did not raise this issue" and "the complainant had an obligation to ensure that all human rights issues were raised". I agree with Ms. Tyler that it was unreasonable for the Commission to rely on these findings without addressing her submissions that the Officer was wrong. She had argued, in essence, that she did raise the issue, and she should not be blamed for a choice by CRA—the body she says discriminated against her—to exclude an issue that she had raised from the scope of an investigative mandate that it controlled.

[39] The Officer went on to state that the allegations about CRA's refusal to rehire were "related to" a series of allegations of harassment and discriminatory remarks about Ms. Tyler's work performance, and in this way, the alleged failure to rehire was the ultimate consequence of Ms. Tyler's other allegations. Therefore, the Officer found that the substantive human rights

issue about whether CRA “treated the complainant adversely based on one or more discriminatory grounds in the Act” was addressed in the other process. The respondent submits that the Officer’s findings in this regard constituted an independent basis that supported the recommendation not to deal with the complaint under paragraph 41(1)(d).

[40] I am not persuaded by the respondent’s argument. While it is unclear why the Officer believed that issues that were excluded from the CRA investigatory process were nevertheless addressed by that process, I agree with Ms. Tyler that when the findings are read in context, it does not seem that the Officer was presenting alternative bases to support a refusal based on paragraph 41(1)(d).

[41] I would add that the 2021 Decision does not state or suggest that the Commission believed the Officer was providing independent bases for recommending that the complaint be dismissed pursuant to paragraph 41(1)(d). In any event, the 2021 Decision does not state that the Commission disagreed with any of the Officer’s findings or relied on only some of them to support its determination—to the contrary, the Commission’s reasons for dismissing the complaint pursuant to paragraph 41(1)(d) seem to be aligned with the Officer’s reasons in the Section 40/41 Report. There is no indication that the Commission’s reasons differ from those of the Officer as a result of Ms. Tyler’s submissions challenging the Officer’s recommendation.

[42] In summary, Ms. Tyler has established that the Commission unreasonably refused to deal with her complaint based on paragraph 41(1)(d). The Commission adopted the recommendation in the Section 40/41 Report without addressing Ms. Tyler’s arguments and evidence that challenged the Officer’s analysis and recommendation. The Commission’s failure to address

these submissions, which were substantial, supported by evidence, and central to Ms. Tyler's complaint, rendered the Commission's refusal to deal with Ms. Tyler's complaint based on paragraph 41(1)(d) unreasonable.

V. **Conclusion**

[43] Ms. Tyler has established that the 2021 Decision not to deal with her complaint based on paragraphs 41(1)(d) and (e) of the *CHRA* was unreasonable.

[44] Ms. Tyler asks that the matter be referred back to the Commission with directions that it accept her complaint as having been filed within the time limits the Commission prescribed. It is not apparent to me that this outcome is inevitable: *Vavilov* at paras 141-142. The matter will be remitted to the Commission for redetermination, without directing a particular outcome.

[45] The parties reached an agreement on costs of this application. Accordingly, the Court is not required to make a ruling on costs.

JUDGMENT in T-12-22

THIS COURT'S JUDGMENT is that:

1. The application is allowed.
2. The Commission's 2021 Decision is set aside.
3. The matter is sent back to the Commission for redetermination.
4. In view of the parties' agreement, there is no ruling on costs.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-12-22

STYLE OF CAUSE: KAREN TYLER v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE

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DATED: FEBRUARY 22, 2023

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