Federal Court  Cour fédérale

Date: 20240809

Docket: T-1572-23

Citation: 2024 FC 1245

Toronto, Ontario, August 9, 2024

PRESENT: Madam Justice Go

BETWEEN:

KATHRYN BROWN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Kathryn Brown [Applicant] seeks to judicially review a decision of the Canadian Human Rights Commission [CHRC] dismissing her human rights complaint against her former employer, the Canada Revenue Agency [CRA] [Decision].

[2] The Applicant began working for the CRA in 2002. The Applicant alleges that in or around June 2011, while working at the CRA's Hamilton office, she began experiencing harassment due to her race, colour and ethnic origin. The Applicant further alleges that beginning in 2019, her employer denied her requests for accommodations – a request made in August 2019 to work from home due to her mental health disabilities and, later, a request made in June 2020 to work remotely from British Columbia to care for her elderly mother during the pandemic.

[3] Between June 2019 and March 2021, the Applicant's union filed three internal grievances on her behalf to deal with some of her workplace issues. On October 5, 2022, the Applicant submitted her complaint to the CHRC. By that point two of the internal grievances were closed while one remained outstanding. The Applicant quit her position with the CRA in November 2022.

[4] On February 17, 2023, a Human Rights Officer [Officer] recommended that the CHRC not deal with the Applicant's complaint at this time, finding that the Applicant should exhaust grievance or review procedures otherwise reasonably available.

[5] On June 28, 2023, the CHRC decided to not deal with the complaint, other than the ongoing grievance which the CHRC decided not to deal with at this time. The CHRC found that the Applicant failed to pursue a grievance procedure reasonably available to her and that the Applicant was solely responsible for the failure to exhaust the grievance procedure pursuant to paragraph 41(1)(a) and subsection 42(2) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [*CHRA*].

[6] I find the CHRC unreasonably found that the Applicant was solely responsible for the failure to exhaust the available grievance procedure. I therefore grant the application.

II. Issues and Standard of Review

[7] The Applicant raises the following issues to challenge the reasonableness of the Decision:

a. Did the CHRC wrongly apply subsection 42(2)?

b. Did the CHRC err in finding that the Applicant was solely responsible for the failure to exhaust the available grievance procedure?

c. Was the CHRC's departure from the Officer's report reasonable?

[8] The parties agree the standard of review for the decision is reasonableness, as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65 [*Vavilov*]. Under the *Vavilov* framework, the Court should assess whether the decision bears the requisite hallmarks of justification, transparency and intelligibility: *Vavilov* at para 99. The Applicant carries the onus of demonstrating that the Decision was unreasonable: *Vavilov* at para 100.

III. Analysis

A. *Legislative Framework*

[9] Upon receiving a complaint, the CHRC must initially assess whether it necessitates further investigation or whether it falls under one of the five exceptions outlined in subsection 41(1) of the *CHRA*, which may result in the complaint's dismissal:

Commission to deal with complaint	**Irrecevabilité**
41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	**41 (1)** Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	**a)** la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	**b)** la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
(c) the complaint is beyond the jurisdiction of the Commission;	**c)** la plainte n'est pas de sa compétence;
(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or	**d)** la plainte est frivole, vexatoire ou entachée de mauvaise foi;
e) the complaint 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.	**e)** la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[10] If the CHRC decides to dismiss a complaint pursuant to paragraph 41(1)(a), subsection 42(2) of the *CHRA* imposes an additional requirement on the CHRC to satisfy itself that the failure to exhaust the available grievance or review procedure was attributable to the complainant.

[11] Subsection 42(2) reads that:

Attributing fault or delay	**Imputabilité du défaut**
(2) Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(a) has not been exhausted, the Commission shall satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to another.	**(2)** Avant de décider qu'une plainte est irrecevable pour le motif que les recours ou procédures mentionnés à l'alinéa 41a) n'ont pas été épuisés, la Commission s'assure que le défaut est exclusivement imputable au plaignant.

[12] The combined effect of paragraph 41(1)(a) and subsection 42(2) is that the CHRC may dismiss a complaint if it finds that the complainant did not seek a grievance or review procedure reasonably available to them and that the failure is attributable to the complainant, and not to others: *Alcock v Canada (Armed Forces)*, 2022 FC 708 [*Alcock*] at para 27. With that, however, discretion still rests with the CHRC to hear the matter: *D'Angelo v Canada (Attorney General)*, 2014 FC 1120 [*D'Angelo*] at para 31.

B. *Was the Decision reasonable?*

[13] As noted above, the Applicant submitted three grievances through her union over the course of her employment with the CRA that are described in brief as follows:

A. In July 2019, the Applicant submitted a grievance concerning workplace harassment;

B. In February 2021, the Applicant submitted a grievance when her leave without pay request was denied; and

C. In March 2021, the Applicant filed a grievance because she was required to work according to Eastern Standard Time while teleworking from British Columbia.

[14] According to the Officer's "Summary Information about this Complaint" [Officer's Report], the Officer emailed the Applicant's union representative to inquire about the status of

the grievances filed. The Applicant's union representative confirmed they filed three grievances on her behalf. Two grievances, the ones filed in July 2019 and March 2021 respectively, were closed. The union further confirmed that the one grievance filed on February 23, 2021 remains active and relates to the Applicant's denial of leave from October 2020 to January 6, 2021.

[15] Also according to the Officer's Report, the Officer reviewed the Applicant's Complaint Form, which provided details regarding the two closed grievances. The Officer's Report indicates that the Applicant withdrew the July 2019 grievance because she feared retaliation and her employers were punishing her by making it difficult for her to work from home. With regard to the other closed grievance filed in March 2021, the Officer's Report notes: "It is unclear why this grievance was closed."

[16] The Officer recommended the CHRC not deal with the complaint at this time under paragraph 41(1)(a) of the *CHRA*, because there is an active grievance dealing with some of the issues in the Applicant's complaint and the union has provided no information suggesting that it has withdrawn support for this grievance. The Officer further recommended that at the termination of these procedures, or if they prove not to be reasonably available, the CHRC may exercise its discretion to deal with the complaint at the Applicant's request.

[17] Instead of adopting the Officer's recommendation for the entire complaint, the CHRC decided only to put the ongoing grievance in abeyance until the grievance process is complete. The CHRC decided not to deal with the two closed grievances and the rest of the allegations in the complaint after finding the Applicant solely responsible for the failure to exhaust the

grievance procedure pursuant to subsection 42(2) of the *CHRA*. The effect of the CHRC's decision is to foreclose the possibility for the Applicant to pursue her complaint against her former employer other than the one issue that is still subject to the ongoing grievance procedure.

[18] In so doing, I find the Decision unreasonable for the following reasons.

i *The CHRC's reasons for finding the Applicant "solely responsible" were incomprehensible*

[19] First, I agree with the Applicant that the CHRC's reasons for finding the Applicant solely responsible for the failure to exhaust the available grievance procedure were simply incomprehensible. However, I come to this position for reasons slightly different from those put forth by the Applicant. I do not share the Applicant's view that the CHRC considered subsection 42(2) without considering paragraph 41(1)(a). I find, in fact, the contrary is true. The CHRC only provided reasons for its paragraph 41(1)(a) finding and neglected to explain why it found the Applicant solely responsible under subsection 42(2).

[20] After setting out a summary of the three grievances the union filed on the Applicant's behalf, as well as a summary of the Officer's Report, the CHRC listed the following reasons or factors for finding the Applicant solely responsible under subsection 42(2):

1. Although the Applicant indicated having serious mental health challenges, she was able to file three grievances and maintain her employment;

2. The Applicant was therefore familiar with the grievance process and it was reasonably available to her;

3. While she feared retaliation after filing her first grievance and felt her union would not be able to resolve the issues, there is no information about any retaliation and its impact on her ability to proceed with the grievance;

4. The Applicant was allowed to work remotely most days of the week and relocate to British Columbia to care for her parent; and

5. Despite her mental health challenges and allegations against her union, she has not provided sufficient information that she was not solely responsible for failing to exhaust the grievance process for all the allegations included in the complaint and the two grievances that are closed.

[21] The CHRC then concluded: "For these reasons, it is plain and obvious that the [Applicant] is solely responsible for failing to exhaust the grievance process with regards to the two closed grievances and the allegations in this complaint."

[22] Even reading the Decision as a whole, I am unable to determine what "reasons" the CHRC was referring to when it found the Applicant solely responsible for failing to exhaust the grievance process. The first two reasons the CHRC cited – the Applicant's ability to file grievances and the Applicant's familiarity with the grievance process – were factors relating to the determination of whether the Applicant ought to "exhaust grievance or review procedures otherwise reasonably available" under paragraph 41(1)(a) of the *CHRA*.

[23] The fourth factor, i.e., the Applicant being allowed to work remotely while in British Columbia, had more to do with the merits of the Applicant's complaint, and less to do with the issues under either paragraph 41(1)(a) or subsection 42(2).

[24] While the third factor, namely, the lack of information about retaliation, could raise a question of why the Applicant chose to close the first grievance, it still did not explain why the CHRC held the Applicant ***solely*** responsible for not exhausting the grievance process, particularly for the third grievance, which was closed for reasons unknown.

[25] Taken as a whole, I find the only reason that the CHRC provided to hold the Applicant solely responsible for failing to exhaust the grievance process was because "she has not provided sufficient information that she was not solely responsible." Put in another way, the CHRC found that the Applicant was solely responsible because the CHRC was not convinced she was not. With respect, this was circular reasoning.

[26] *Vavilov* instructs that a decision will be unreasonable if the reasons read in conjunction with the record do not make it possible to understand the decision-maker's reasoning on a critical point: *Vavilov* at para 103. The CHRC's finding that the Applicant was solely responsible under subsection 42(2) formed the basis of its decision to dismiss the bulk of the Applicant's complaint. The Decision's lack of transparency, intelligibility and justification on this core issue warrants the Court's interference.

[27] I pause to add that the CHRC also mistakenly found the Applicant no longer has access to the grievance process because she left her position with the CRA. The parties agree that the CHRC's understanding of the public sector's grievance process was incorrect. At the hearing, however, the Respondent pointed to the Applicant having left her job as a new fact that the CHRC took into account to justify why it diverged from the Officer's recommendation to hold

the entire complaint in abeyance. I fail to see the logic in that argument. Indeed, if the CHRC believed, although incorrectly, that the Applicant could no longer avail the grievance process due to the change in her employment status, then it would be even less reasonable to hold the Applicant solely responsible for failing to exhaust the grievance procedure. In any event, I note the CHRC did not rely on this fact as the basis for its determination under subsection 42(2).

[28] Finally, even if I were to accept the Respondent's submission that the CHRC considered the Applicant's explanation that she withdrew the first closed complaint due to retaliation and found there was no evidence of retaliation, the CHRC still did not explain why it decided to dismiss both closed complaints, when it was unclear why the March 2021 complaint was closed, and why it would then lead to a conclusion that the Applicant was solely responsible under subsection 42(2).

[29] In sum, the failure of the CHRC to articulate their reasons for finding the Applicant solely responsible under subsection 42(2) rendered its decision to dismiss the bulk of the complaint under paragraph 41(1)(a) unreasonable.

ii *The CHRC failed to properly apply paragraph 41(1)(a) and subsection 42(2) of the* CHRA

[30] The Applicant further submits that in coming to its conclusion, the CHRC failed to properly apply paragraph 41(1)(a) and subsection 42(2) of the *CHRA*.

[31] The Applicant contends that the language of subsection 41(1) imposes an obligation on the CHRC to consider a complaint unless one of the enumerated exceptions are met. The Applicant asserts that the CHRC is to determine whether the complaint warrants further investigation or whether to screen it out under subsection 41(1) on a "plain and obvious" basis, which is a high threshold: *McIlvenna v Bank of Nova Scotia (Scotiabank)*, 2014 FCA 203 [*McIlvenna FCA*] at para 13; *Canada (Attorney General) v Windsor-Brown*, 2016 FC 1201 at para 21; *Canada Post Corporation v Canadian Human Rights Commission*, 1997 CanLII 16378, 130 FTR 241.

[32] Further, at this screening stage, the CHRC is to take the allegations raised in the complaint form as true. In support, the Applicant cites *Canada (Attorney General) v Mohawks of the Bay of Quinte First Nation*, 2012 FC 105 [*Mohawks*] at para 43 and *Michon-Hamelin v Canada (Attorney General)*, 2007 FC 1258 at para 23.

[33] While the case law does not specifically address whether the "plain and obvious" threshold applies to subsection 42(2), the Applicant argues it does. I agree.

[34] I also find the requirement that the CHRC takes the allegations raised in the complaint form as true apply equally to any information about a complaint's decision to, or not to, access any reasonably available grievance procedure.

[35] I reject the Respondent's argument that the "plain and obvious" threshold applies only to paragraph 41(1), and not to subsection 42(2), citing for instance *Mohawks* and *McIlvenna FCA*.

However, the cases the Respondent cites do not stand for that proposition. Indeed, as the Applicant points out, none of the case law the parties cite deal specifically with the threshold question for subsection 42(2).

[36] Nor do I agree with the Respondent that the wording in subsection 42(2) stating that the CHRC "shall satisfy itself" that a complainant is not solely responsible for failing to exhaust procedures suggests the standard is something more than "plain and obvious." The Respondent does not point to any case law in support. I find that the phrase "shall satisfy itself" does not, by itself, denote a threshold. Rather, it imposes an additional obligation on the CHRC as the case law confirmed: *D'Angelo* at para 31.

[37] I am also not persuaded that by adding that the CHRC "shall satisfy itself" under subsection 42(2), Parliament had intended to impose some additional evidentiary burden on a complainant to prove that they are not solely contributing to the failure to exhaust other processes. Specifically, I do not find the Respondent's proposed interpretation to be consistent with the principle of statutory interpretation laid down by the Supreme Court of Canada [SCC] in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 [*Rizzo*] at para 21, requiring that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Nor is the Respondent's interpretation compatible with the teaching of SCC in *Rizzo* at para 22 that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." This is particularly important in this case given the scheme of the *CHRA* is to provide a

mechanism for individuals with human rights complaints: *Cooper v Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 SCR 854 [*Cooper*] at para 48.

[38] Reading the words in subsection 42(2) in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *CHRA* leads me to conclude that the section must be read harmoniously with subsection 41(1) by ensuring the same threshold applies when the CHRC decides whether to dismiss a complaint. Reading subsection 42(2) in this manner also leads me to find that this provision does not impose an additional evidentiary requirement on a complainant to prove they are not solely responsible for the failure to exhaust grievance procedures. Rather, a complainant's information about their involvement in the grievance procedures, like the allegations of their complaint in the context of subsection 41(1), should be accepted as true.

[39] I find support for my findings in *D'Angelo* where the Court confirmed that paragraph 41(1)(a) must be read "in conjunction with" subsection 42(2) to require the CHRC to hear a matter *unless* it "appears to the Commission that the complainant *ought* to seek other remedies and where the failure to seek those remedies is the fault of the complainant:" *D'Angelo* at para 31. The requirement that the two sections are to be read in conjunction lends support to the Applicant's argument that these provisions should be subject to the same threshold.

[40] As well, the power of the CHRC not to hear a matter is found in paragraph 41(1)(a), not in subsection 42(2). Thus, while subsection 42(2) adds an additional requirement for the CHRC to "satisfy itself" that a complainant is not solely responsible for the failure to exhaust grievance

procedures, the CHRC must ultimately render its decision under subsection 41(1), which is subject to the "plain and obvious" threshold. I see no reason why a different – and notably lower – threshold should apply whether to dismiss a complaint on the basis of subsection 42(2). Doing so would lead to an incongruous situation whereby the CHRC can only dismiss a complaint on any other ground under subsection 41(1) on a "plain and obvious" basis, but when it comes to paragraph 41(1)(a), where the CHRC is subject to an additional requirement under subsection 42(2), that the CHRC could apply a lower threshold to dismiss a complaint.

[41] I further find that just as subsection 42(2) acts as a safeguard so that the CHRC is not forced into hearing a matter, as the Respondent submits, relying on *Guydos v Canada Post Corporation*, 2012 FC 1001, the same provision also acts a safeguard to ensure human rights complainants are not unreasonably and prematurely denied access to processes available to them to redress their discrimination claims: *D'Angelo* at para 32.

[42] Finding that the same "plain and obvious" threshold applies to subsection 42(2) does not diminish the deference that the CHRC enjoys, as it does when it exercises its screening function in all subsection 41(1) cases: *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at paras 45-48; *Ritchie v Canada (Attorney General)*, 2017 FCA 114 at para 38; *Canada (Attorney General) v Ennis*, 2021 FCA 95 at para 56; and *Mun v Canada (Attorney General)*, 2016 FC 94 at para 18. The CHRC continues to retain its discretion to dismiss a complaint, if, having regard to all the circumstances and evidence, it is satisfied that no further inquiry into the complaint is warranted: *Alcock* at para 25; *McIlvenna v Bank of Nova Scotia (Scotiabank)*, 2019 FC 1610 at

paras 15-16; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 21; and *Cooper* at paras 52-53.

[43] I also note that, even after it decides to initiate an investigation, the CHRC will have yet another opportunity to refer the complaint to the appropriate authority if it is satisfied that the complainant ought to exhaust grievance or review procedures otherwise reasonably available: *CHRA*, subsection 44(2).

[44] I note that in the Decision, the CHRC referred to the "plain and obvious" threshold to find that the Applicant was solely responsible for failing to exhaust grievance procedures under subsection 42(2). It would appear that the position of the CHRC differs from that of the Respondent.

[45] However, while acknowledging the "plain and obvious" threshold applied, the CHRC then failed to apply it properly when it found the Applicant "has not provided sufficient information that she was not solely responsible for failing to exhaust the grievance process." In making this finding, I agree with the Applicant the CHRC was weighing the evidence as opposed to accepting the Applicant's allegations against her union and the statements of her mental challenges as true.

[46] Both in her complaint and in her reply to the Officer's Report, the Applicant provided submissions on her experiences trying to enlist the union for help in dealing with her discrimination and harassment complaints but was rebuffed by the union. The Applicant also

described her mental health challenges, including the experiences of suicidal ideation, sense of hopelessness and an inability to cope. The Decision did not explain, if these statements were accepted as true, why it was "plain and obvious" that the Applicant was "solely responsible" for the failure to exhaust the grievance procedure. The CHRC provided no analysis of these other contributing causes before concluding that the Applicant was solely responsible under subsections 42(2) of the *CHRA* and which thereby made the Decision unintelligible.

[47] As I find the Decision unreasonable for the reasons set out above, I need not address the Applicant's remaining arguments.

IV. Conclusion

[48] The application for judicial review is granted.

[49] The parties agree that the cost should be set at $3,000.00.

JUDGMENT in T-1572-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The Applicant's complaint is remitted back to the CHRC for reconsideration by a different member of the CHRC.
3. The Respondent shall pay costs to the Applicant in the amount of $3,000.00 inclusive of taxes and disbursements.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
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