Date: 20071019

Docket: T-1915-06

Citation: 2007 FC 1078

Ottawa, Ontario, October 19, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

TOINI JARVINEN

Applicant

and

CITY OF OTTAWA (OC TRANSPO)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review of a decision by the Canadian Human Rights Commission (the Commission) dated September 25, 2006 within which the Commission decided, pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act) to take no further proceedings in the complaint filed by the applicant against the respondent.

[2] The applicant requests:

1. an order declaring that the decision of the Commission to deny the applicant's request for relief under the Act was invalid and unlawful;

2. an order declaring that the respondent acted without jurisdiction, or beyond jurisdiction, in denying the applicant's request for relief under the Act;

3. an order setting aside the decision contained in the Commission's letter dated September 25, 2006 confirming that the applicant did not qualify for compensation;

4. an order declaring that the respondent is estopped from denying the applicant's request for relief under the Act;

5. an order prohibiting the respondent from taking any actions to assess or prosecute the applicant; and

6. costs.

Background

[3] The applicant, Toini Jarvinen, was employed as a bus operator by OC Transpo from 1985 until 2005. During her employment, the applicant was a member of Amalgamated Transit Union, Local 279 (the Union).

[4] In 1994, the applicant underwent surgery on her neck and was absent from work for a period of six months. During this time, she was provided with long-term disability benefits in accordance with the collective agreement between her employer and the Union.

[5] Between 1999 and 2001, the applicant suffered from a chronic back injury and was unable to perform her duties as a bus operator. The applicant once again applied for and received long-term disability benefits.

[6] In February 2002, the applicant, who was still unable to perform her duties as a bus operator, was terminated from her employment. On February 14, 2002, the applicant (through the Union) grieved the respondent's decision to terminate her employment. She alleged that the respondent had discriminated against her by failing to accommodate her chronic back pain.

[7] On July 8, 2002, the respondent attempted to accommodate the applicant's injury by reinstating her in a temporary assignment as a Park and Ride Attendant. On September 10, 2002, the applicant was granted retroactive payment of wages for the period when the respondent had terminated her employment. The applicant's temporary position as a Park and Ride Attendant ended on October 30, 2002.

[8] From November 2002 to March 2005, the applicant completed a few more temporary assignments with the respondent which usually lasted a couple of months in length, but was unemployed between these assignments. The applicant voluntarily retired in March 2005 upon reaching the age of sixty-five.

[9] On July 3, 2003, the applicant filed a complaint with the Commission against the respondent. The applicant's complaint alleged that the respondent had discriminated against her in

employment by failing to accommodate her disability. On April 13, 2004, the Commission decided pursuant to paragraph 41(1)(a) of the Act, that it would not deal with the complaint at that time as the applicant had not exhausted the grievance procedures readily available to her.

[10] Meanwhile, the applicant's grievance (filed through her union in February 2002) was proceeding to binding third party arbitration as per the collective agreement between her employer and the Union. The arbitration lasted from October 21, 2003 to December 8, 2005. The applicant's grievance was heard simultaneously with that of another employee because of related issues. Throughout the arbitration proceedings, the applicant was represented by the Union.

[11] The arbitration panel first heard evidence regarding the respondent's accommodation process. The arbitration panel then heard evidence regarding the other employee's grievance. Lastly, the panel heard evidence on possible jobs for the applicant that would accommodate her disability. The Union cited two positions it felt would best accommodate the applicant. The applicant was directly involved in the selection of these positions. The respondent submitted that the applicant was not suitable for either position and provided reasons. At this point, the Union felt that the best outcome for the applicant was a settlement that guaranteed her some compensation for the past discrimination it felt she had experienced.

[12] The grievance was resolved by an agreement reached between the Union and the respondent on December 8, 2005. The minutes of settlement were signed by the Union and the respondent. The applicant refused to sign them. The Union and respondent intended that the settlement would

resolve "all outstanding matters related to the [complainant's] employment and her retirement from employment, including but not limited to her claim of discrimination pursuant to the *Canadian Human Rights Act*." As the applicant had since retired, there was no need for employment accommodation. The only issue was that of compensation. The agreement provided that the respondent pay the applicant $12,000 as a retiring allowance, and $5,000 (without deduction) as damages for the alleged claims of discrimination. The applicant cashed the $5,000 cheque despite not signing the minutes of settlement.

[13] On January 25, 2006, the applicant returned to the Commission. She requested that the Commission now deal with her complaint as she was not satisfied with the outcome at arbitration. An investigation was ordered and both the applicant and respondent made written submissions. The investigator issued the investigation report on June 22, 2006 and recommended that pursuant to paragraph 44(3)(b) of the Act, the Commission take no further proceedings in the complaint. In response to the recommendation, the applicant made written submissions to the Commission dated July 20, 2006. By way of a letter dated September 25, 2006, the Commission informed the parties that pursuant to paragraph 44(3)(b), it had decided not to continue with the investigation. This is the judicial review of the Commission's decision.

Board's Reasons for Decision

[14] In a letter to the parties dated September 25, 2006, the Commission decided pursuant to paragraph 44(3)(b) of the Act, to take no further proceedings in the complaint because:

1. the parties had reached a settlement; and

2. the evidence did not indicate that there was a public interest in conducting further investigation into this complaint.

[15] In *Sketchley* v. *Canada (Attorney General)*, [2005] F.C.J. No. 2056, 2005 FCA 404 at paragraph 37, the Court held that given the cursory nature of Commission decisions under section 44 of the Act, investigation reports must be read as the Commission's reasons. As such, I have outlined the reasons provided in the investigation report.

[16] As expected, the investigator's reasons provide more insight into the recommendation made to the Commission. The investigator made the following findings regarding the grievance and arbitration procedure:

- the grievance and arbitration procedure dealt with the same issues as raised in the complaint, this included the same human rights issues and thus, the same information and evidence;
- the applicant had legal representation from the union throughout the arbitration, however, this also meant that the applicant did not have the opportunity to speak on her own behalf during the proceedings;
- the parties reviewed the alleged failure to accommodate during the arbitration;
- as the applicant had retired, there were no ongoing accommodation issues;
- the Board of Arbitration never made a ruling on whether the alleged discrimination had occurred; and

- despite the applicant's dissatisfaction with the results, the arbitration proceedings were now closed and could not be reopened.

[17] The investigator made the following findings regarding the settlement:

- the Union and the respondent reached a settlement;
- the Union and the respondent intended the settlement to resolve all outstanding issues related to the grievance and human rights complaint;
- the reasons for the settlement were explained to the applicant;
- the applicant refused to sign the settlement; and
- the applicant had cashed the settlement cheque for $5,000.

[18] The investigator made the following findings regarding the positions of the parties:

- the applicant is not satisfied with the result of arbitration, and feels the Commission should investigate her complaint.
- the respondent (and the Union) feel that the arbitration proceedings, and the resulting settlement, have fully resolved the applicant's human rights concerns.

Issues

[19] The applicant submitted the following issue for consideration:

1. Did the Commission satisfy the requirements of procedural fairness in its dealings with the applicant?

[20] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Commission err in deciding pursuant to paragraph 44(3)(b) of the Act, not to take any further proceedings in the complaint?

Applicant's Submissions

[21] The applicant submitted that the appropriate standard of review in this case is reasonableness (see *Lanno* v. *Canada Customs and Revenue Agency*, [2005] F.C.J. No. 714). The applicant argued that the Commission erred in deciding not to take further action regarding her complaint. The applicant submitted that the information and evidence before the Commission proved that the arbitration process had not settled the applicant's accommodation issue, nor had the arbitration given the applicant the opportunity to have her complaint heard. With this evidence before it, the Commission made an unreasonable decision.

[22] The applicant also argued that the Commission made erroneous findings of fact. Specifically, the applicant noted that in the Commission's decision, it found that the parties had reached a settlement. The applicant submitted that this was an erroneous finding of fact because the applicant never signed the minutes of settlement.

[23] The applicant also submitted that the Commission breached the duty of procedural fairness by failing to consider all the evidence before it.

Respondent's Submissions

[24] The respondent submitted that given the appropriate standard of review, the Commission decision should not be interfered with by this Court.

[25] The respondent submitted that the Act grants the Commission a remarkable degree of latitude when performing its screening function pursuant to paragraph 44(3)(b). The respondent also submitted that as a general rule Parliament did not want the courts at this stage to intervene lightly in the decisions of the Commission (see *Bell Canada v. Communications, Energy and Paperworkers Union of Canada,* [1991] 1 F.C. 113 at 38 (QL)). The respondent submitted that *Cozma v. Canada (Attorney General),* [2006] F.C.J. No. 1881 at 18 (QL), held that the appropriate standard of review for a decision under paragraph 44(3)(b) of the Act is patently unreasonableness. A decision is only found to be patently unreasonable if it is so flawed that no amount of curial deference can justify letting it stand (see *Ryan* v. *Law Society (New Brunswick),* [2003] 1 S.C.R. 247).

[26] The respondent submitted that the Commission, through the investigator, engaged in an extensive review of the evidence and arguments of both parties. The evidence disclosed that the

applicant's claim had been settled through arbitration and consequently, it was open to the Commission to render the decision it did.

[27] The respondent also submitted that the evidence supported the finding that there was no public interest in taking further proceedings on the complaint. The complaint was highly fact specific and as such, any decision would have little precedential value. Lastly, the respondent submitted that the determination of what is public interest is wholly within the jurisdiction of the Commission.

Analysis and Decision

[28] **Issue 1**

What is the appropriate standard of review?

As instructed by the Federal Court of Appeal in *Sketchley* v. *Canada (Attorney General),* [2005] F.C.J. No. 2056, 2005 FCA 404, a reviewing judge must refrain from adopting the standard of review used by other judges reviewing decisions of the Commission under the same legislative provision. As such, I will begin my analysis by engaging in my own assessment of the pragmatic and functional analysis in order to determine the level of deference owed to the Commission in this case.

Privative Clause

[29] There is no privative clause in the *Canadian Human Rights Act*, nor is there any statutory right of appeal. The absence of a privative clause is understood to be a neutral factor (see *Dr. Q* v. *College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19).

Nature of the Question

[30] The applicant has raised two separate questions. Firstly, the applicant submitted that the Commission erred in dismissing the applicant's complaint. This involves a discretionary decision, and as such, a high-level of deference is warranted. The second issued raised by the applicant is whether the Commission made an error in finding that the parties had reached a settlement. This is a question of mixed law and fact and attracts a mid-level of deference.

Relative Expertise

[31] The applicant submitted that the Commission erred in dismissing the applicant's complaint. The issue of whether or not a complaint should proceed in the process described under the Act is within the expertise of the Commission. In *Cooper* v. *Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, the Supreme Court of Canada held that the Commission's determination that in light of all the evidence and circumstances, further proceedings are not warranted is a discretionary decision. The Commission is in a better place than this Court to decide this issue and as such, a more deferential standard applies.

[32] The second issue raised by the applicant is whether the Commission made an error in finding that the parties had reached a settlement. As noted in *Loyer* v. *Air Canada*, [2006] F.C.J. No. 1473 at paragraph 47, 2006 FC 1172, the mandate of the Commission "requires that it deal, on a daily basis, with the examination and resolution of human rights complaints." Resolution and settlement of claims is within the expertise of the Commission. Courts are also experts in the area of determining whether settlements have been reached. This consideration indicates that a mid-level of deference is owed.

Purpose of the Legislation and Provision

[33] Section 2 of CHRA provides that the purpose of the Act is to ensure equality by preventing discriminatory practices based on a series of enumerated grounds. The purpose of subsection 44(3) was considered in *Loyer* above. In that case, this Court said that the decision to dismiss a complaint under this subsection effectively extinguishes a complainant's ability to proceed further with their complaint under the Act and consequently, a less deferential standard is warranted.

Conclusion

[34] Having applied the pragmatic and functional test, I am of the opinion that the appropriate standard of review for both questions is reasonableness.

[35] **Issue 2**

Did the Commission err in deciding pursuant to paragraph 44(3)(b) of the Act, not to take any further proceedings in the complaint?

There was a preliminary issue as to whether the respondent's hearing materials had been properly served on the applicant. After hearing the parties' submissions, I am satisfied that the materials were provided to the applicant with sufficient time for her to prepare for the hearing.

[36] In my opinion, the Commission's decision to dismiss the applicant's complaint was reasonable. In making this finding, I turn to the investigation report as it constitutes the entirety of the information before the Commission when it rendered its decision. I find nothing in the investigation report that requires this Court's intervention.

[37] The investigator found that the same human rights and accommodation issues in the complaint had already been reviewed by the arbitration panel. Furthermore, the investigator noted that the applicant had been represented by her Union throughout the arbitration, the terms of the settlement had been explained to the applicant, and she had cashed the settlement cheque provided by the respondent. The investigator noted that the applicant did not speak directly to the arbitration panel, nor was she satisfied with the settlement reached between the respondent and the Union, but despite these findings, the investigator recommended that the complaint be dismissed. The investigator was satisfied that a settlement of the issues had been reached and that there was no public interest in conducting further investigation into the complaint.

[38] The applicant also submitted that she never had an arbitration hearing as the hearing was concerning the other grievor. I do not agree. The applicant's hearing continued the Union settled the matter as it was entitled to do as her representative.

[39] As to the allegations that the applicant did not receive priority placement and that the respondent's witness, Troy Charter, was biased, these are matters that should have been dealt with in the arbitration process. In any event, with respect to the bias argument, I see no evidence in the file that would support this allegation.

[40] The investigator considered a number of factors both for and against the pursuing the complaint, but in the end, concluded that further investigation was not warranted. Accordingly, I find the Commission's decision to dismiss the applicant's complaint reasonable. There is no reviewable error on this ground.

[41] The application for judicial review is therefore dismissed.

JUDGMENT

[42] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

Canadian Human Rights Act, R.S.C. 1985, c. H-6:

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.	2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.
44.(1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.	44.(1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.
. . .	. . .

(3) On receipt of a report referred to in subsection (1), the Commission

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission:

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue:

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

(b) shall dismiss the complaint to which the report relates if it is satisfied

b) rejette la plainte, si elle est convaincue:

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Toini Jarvinen	SELF-REPRESENTED FOR THE APPLICANT
David G. White	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Toini Jarvinen Kinburn, Ontario	SELF-REPRESENTED FOR THE APPLICANT
City of Ottawa Legal Department Ottawa, Ontario	FOR THE RESPONDENT