Date: 20090107

Docket: T-558-08

Citation: 2009 FC 22

BETWEEN:

ATTORNEY GENERAL OF CANADA
(CANADIAN FORCES)

Applicant

and

MICHELINE ANNE MONTREUIL

CANADIAN HUMAN
RIGHTS COMMISSION

Respondents

and

J. GRANT SINCLAIR, Q.C., IN HIS CAPACITY
AS CHAIRPERSON OF THE CANADIAN
HUMAN RIGHTS TRIBUNAL

CANADIAN HUMAN
RIGHTS TRIBUNAL

Third Party

REASONS FOR JUDGMENT

JUSTICE HANSEN

[1] This is an application for judicial review of the decision dated March 26, 2008, in which the Chairperson of the Canadian Human Rights Tribunal (the Chairperson) refused to authorize

the Tribunal member seized of inquiry T1047/2805, *Micheline Anne Montreuil v. Canadian Forces*, to complete it and render a decision, despite the expiration of his appointment.

[2] In June 1999, Ms. Montreuil submitted an application to the Canadian Armed Forces for a legal officer position in the Office of the Judge Advocate General. The application was refused.

[3] In October 2002, Ms. Montreuil filed a complaint with the Canadian Human Rights Commission (the Commission) alleging, *inter alia*, that she had been refused the position because she is transgendered and therefore discriminated against on the ground of sex. The Commission referred the case to the Tribunal for a hearing, which began on October 23, 2006.

[4] On December 21, 2007, at the end of a 97-day hearing during which the Tribunal heard four expert witnesses and fifteen factual witnesses, Member Pierre Deschamps reserved his decision. At that time, he was seized of three other cases.

[5] On February 8, 2008, the Chairperson of the Tribunal informed Mr. Deschamps that, under subsection 48.2(2) of the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6 (the Act), his appointment that was due to expire on February 9, 2008, had been extended so that he could complete the three other inquiries mentioned above.

[6] On March 7, 2008, the parties were informed that the member's appointment had expired on February 9 and that the case would be given to the Vice-Chairperson of the Tribunal. On

March 10, 2008, the applicant asked the Chairperson to exercise his discretion under subsection 48.2(2) of the Act to permit the member to complete the Montreuil case.

[7] On March 26, 2008, the Registrar of the Tribunal informed the parties that the Chairperson had denied the request for an extension on the following grounds:

> [TRANSLATION]
>
> After considering subsection 48.2(2) of the Act, the Chairperson has decided to not approve this request. In reaching this decision, the Chairperson took the following factors into account:
>
> - the Chairperson has supervision over and direction of the Tribunal's work, including the allocation of work among the members (subsection 48.4(2));
> - the duty of the Tribunal to conduct proceedings as expeditiously as the requirements of natural justice allow (subsection 48.9(1));
> - the time and resources already dedicated to this inquiry;
> - Mr. Deschamps' jurisdictional work load from other pending cases before the Tribunal;
> - the limited length of an extension granted to a member to allow him or her to complete an inquiry; this implicit time limit is a necessary inference from subsection 48.2(2), since the authority to appoint members and to grant new mandates falls exclusively within the mandate of the Governor in Council.
>
> The Chairperson is of the view that some of these factors require more detailed explanations.
>
> On the last day of his mandate, Mr. Deschamps was seized of four inquiries:
> - *M. Montreuil v. Canadian Forces* (T1047/2805)
> - *M. Dawson v. Canada Post* (T1053/3405)
> - *R. Warman v. M. Guille* (T1090/7105)
> - *S. Chopra v. Health Canada* (T901/2104)
>
> The Chairperson exercised his discretion to permit Mr. Deschamps to conclude the *Dawson*, *Warman* and *Chopra* inquiries by September 12, 2008. (*Dawson* – 17 days; *Warman* – 14 days; *Chopra* – 39 days).
>
> The hearing in the *Dawson* inquiry ended on March 22, 2007. The final written submissions were filed on October 23, 2007. The hearing in the *Warman* inquiry ended on December 14, 2007. The final written submissions were filed on

> February 6, 2008. The hearing in the *Chopra* inquiry ended on October 4, 2007. The final written submissions were filed on November 9, 2007.
>
> The *Dawson* and *Warman* complaints were referred to the Tribunal in 2005, and the *Chopra* complaint in 2004.
>
> The hearing in the *Montreuil* inquiry, which lasted 97 days, significantly exceeded the length of time originally anticipated by the parties. The Chairperson is of the opinion that a decision in the *Montreuil* inquiry cannot be rendered within a reasonable time in the sense that Parliament intended in subsection 48.2(2). Consequently, the Chairperson has determined that giving his approval in these circumstances would be tantamount to granting a new mandate to the member, which would exceed the power set out in subsection 48.2(2).
>
> Based on his experience and considering the history of these four cases – as well as his legal obligation to the Tribunal's proceedings as a whole – the Chairperson has determined that he will not exercise his discretion under subsection 48.2(2) in the *Montreuil* inquiry. Vice-Chairperson Hadjis has been designated to manage this proceeding.

[8] On August 1, 2008, the applicant served his record on the application for judicial review of the Chairperson's decision. The Chairperson and the Tribunal were named as parties to the proceeding. On August 8, 2008, the respondent, Ms. Montreuil, served a letter on the parties requesting the Chairperson to reconsider the decision, although she had originally supported it. In a letter dated August 13, 2008, the Commission consented to the order sought by the Attorney General of Canada.

[9] The Chairperson of the Tribunal filed a motion under section 109 of the *Federal Courts Rules* for leave to intervene in the application for judicial review. On October 23, 2008, Prothonotary Morneau granted the motion and gave leave to the Chairperson to [TRANSLATION] "to file and serve an affidavit [and] a memorandum, and to present oral arguments" dealing with the following issues:

> [TRANSLATION]
>
> -any legal or factual argument relating to the context of the decision . . . and the impact of the findings of the application for judicial review on the allocation of work among Tribunal members . . . and the management of its internal affairs, and
>
> -whether it has a duty to comply with the rules of natural justice and procedural fairness [including] whether it has a duty to hear the parties when exercising the [discretion] conferred on it by subsection 48.2(2) of the Act.

Subsequently, the Chairperson filed the affidavit of the Registrar and a memorandum.

[10] The following provisions of the Act are relevant in this case:

48.1 (1) There is hereby established a tribunal to be known as the Canadian Human Rights Tribunal consisting, subject to subsection (6), of a maximum of fifteen members, including a Chairperson and a Vice-chairperson, as may be appointed by the Governor in Council.

48.1 (1) Est constitué the Tribunal canadien des droits de la personne composé, sous réserve du paragraphe (6), d'au plus quinze membres, dont the Chairperson et le vice-président, nommés par le gouverneur en conseil.

(2) Persons appointed as members of the Tribunal must have experience, expertise and interest in, and sensitivity to, human rights.

(2) Les membres doivent avoir une expérience et des compétences dans le domaine des droits de la personne, y être sensibilisés et avoir un intérêt marqué pour ce domaine.

48.2 (1) The Chairperson and Vice-chairperson are to be appointed to hold office during good behaviour for terms of not more than seven years, and the other members are to be appointed to hold office during good behaviour for terms of not more than five years….

48.2 (1) The Chairperson et le vice-président du Tribunal sont nommés à titre inamovible pour un mandat maximal de sept ans et les autres membres le sont pour un mandat maximal de cinq ans [….]

(2) A member whose appointment expires may, with the approval of the Chairperson, conclude any inquiry that the member has begun, and a person performing duties under this subsection is deemed to be a part-time member for the purposes of sections 48.3, 48.6, 50 and 52 to 58.

(2) Le membre dont le mandat est échu peut, avec l'agrément du président, terminer les affaires dont il est saisi. Il est alors réputé être un membre à temps partiel pour l'application des articles 48.3, 48.6, 50 et 52 à 58.

(3) The Chairperson, Vice-chairperson or any other member whose term has expired is eligible for reappointment in the same or any other capacity.	(3) The Chairperson, le vice-président ou tout autre membre peut recevoir un nouveau mandat, aux fonctions identiques ou non.
. . .	[…]
48.4 (1) The Chairperson and Vice-chairperson are to be appointed as full-time members of the Tribunal, and the other members are to be appointed as either full-time or part-time members.	**48.4** (1) The Chairperson et le vice-président sont nommés à temps plein et les autres membres le sont à temps plein ou à temps partiel.
(2) The Chairperson is the chief executive officer of the Tribunal and has supervision over and direction of its work, including the allocation of work among the members and the management of the Tribunal's internal affairs.	(2) The Chairperson est le premier dirigeant du Tribunal; à ce titre, il en assure la direction et en contrôle les activités, notamment en ce qui a trait à la répartition des tâches entre les membres et à la gestion de ses affaires internes.
. . .	[…]
48.9 (1) Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.	**48.9** (1) L'instruction des plaintes se fait sans formalisme et de façon expéditive dans le respect des principes de justice naturelle et des règles de pratique.
. . .	[…]

[11] The applicant raised two preliminary objections. First, the applicant contends that the affidavit filed by the intervenor does not comply with the Prothonotary's order and that the deponent of the affidavit is the Registrar and not the Chairperson, as provided in the order. Second, the applicant submits that the content of a number of paragraphs in the affidavit goes

beyond the parameters established for the intervention of the decision-making body whose decision is being challenged.

[12] In my view, the Prothonotary's order did not limit the affidavit evidence to the affidavit of the Chairperson himself. Accordingly, the first objection is rejected. As to the second objection, at the judicial review hearing, I advised the parties that I would not have regard to those portions of the affidavit that went beyond what the order permitted.

[13] In addition, during the submissions of counsel for the intervenor, I advised her that, to the extent that they attempted to defend or justify the decision, I would not take them into consideration in reaching my decision.

[14] The applicant raises the following issues in this case:

1. Does the Chairperson's decision contain errors of law in the interpretation of subsection 42.2(2) of the Act and the jurisdiction conferred by this provision?
2. Did the Chairperson exercise the discretion provided in subsection 48.2(2) of the Act unreasonably?
3. Did the Chairperson breach the rules of natural justice and procedural equity by refusing to hear these representations before rendering the March 26, 2008, decision?

[15] On the question of the appropriate standard of review, the applicant and the intervenor are in agreement, and I concur, that the application of the statutory provision to the facts should be reviewed against a standard of reasonableness. However, the parties disagree on the appropriate standard of review for the Chairperson's interpretation of subsection 48.2(2) of the Act. While the applicant submits that, as a question of law, it should be reviewed against a standard of correctness, the intervenor maintains that it should be reviewed against a reasonableness standard.

[16] In *Dunsmuir c. Nouveau-Brunswick*, [2008] 1 R.C.S. 190, at paragraph 51, the Supreme Court of Canada stated that while many legal issues attract a standard of correctness, some attract the standard of reasonableness. The Supreme Court noted that guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the case law. The Court observed at paragraph 54 that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function…" (citations omitted). In this case, neither the applicant nor the intervenor cited any jurisprudence regarding the appropriate standard of review for the interpretation of subsection 48.2(2) by the Chairperson or a Tribunal member.

[17] The Supreme Court also stated that where it is not possible to ascertain the appropriate standard of review from prior jurisprudence, a contextual analysis must be undertaken in which a number of relevant factors will be taken into account, in particular, the presence or absence of a privative clause, the purpose of the administrative tribunal as found in its enabling statute, the nature of the question, and the expertise of the tribunal.

[18] In this case, the absence of a privative clause in the Act favours a less deferential standard. Although the Act creates a discrete and special administrative regime to deal with complaints of discrimination and establishes the Tribunal as a body having expertise in the area of human rights (subsection 48.1(2)), the interpretation of subsection 48.2(2) does not engage that expertise. However, the interpretation of the provision is related to the responsibilities of the Chairperson as chief executive officer of the Tribunal to supervise and direct its work, and the interpretation is also linked to his knowledge of the workings of the Tribunal. Lastly, as the question of law at issue in this case concerns the internal administration of the Tribunal it is not of "central importance to the legal system": *Dunsmuir*, at paragraph 55. These latter two considerations point to a deferential standard. Based on this analysis, I conclude that the Chairperson's interpretation of subsection 48.2(2) should be reviewed against a standard of reasonableness.

[19] In his interpretation of subsection 48.2(2), the Chairperson found that the discretion to extend the mandate of a member is circumscribed by an implicit time limit in the provision. He reasoned that such an interpretation was necessary since the power to appoint and reappoint Tribunal members rests exclusively with the Governor in Council. Having regard to the language and the purpose of the provision and given that the discretion to extend the mandate of a member whose appointment expires may only be exercised to permit the member to conclude inquiries that he is seized of, not to permit a member to undertake new work, I am unable to find any reason to justify the need to infer an implicit time limit to give effect to the provision. In my view, the Chairperson erred in so finding.

[20] The Chairperson's interpretation, in turn, led him to erroneously conclude that, since a decision in the Montreuil matter would not likely be rendered within the time limit contemplated by subsection 48.2(2), extending the member's mandate would be tantamount to reappointing the member, which was beyond his authority under the subsection in question. In my opinion, the erroneous interpretation and the conclusion based on that interpretation renders the decision unreasonable.

[21] The decision is unreasonable in another respect. In reaching his decision, the Chairperson took into account a number of relevant factors, including the requirement that proceedings be conducted as expeditiously as the requirements of natural justice and the rules of procedure allow, the time and resources already dedicated to this inquiry by the Tribunal, and the other inquiries that the member was still seized of.

[22] It is well established that it is the decision maker's responsibility to weigh the relevant factors, and that it is not the role of the Court to re-examine the weight that the decision-maker has assigned to the various factors. However, the Court will intervene where a relevant factor has not been taken into account.

[23] In this case, although the Chairperson considered a number of relevant factors, he neglected one, namely, the interests of the parties to the proceeding. In particular, the Chairperson did not have regard to the interests of the parties, in particular, the commitment of both financial and non-financial resources in having to relitigate a lengthy, complex matter.

[24] At the hearing, counsel for the intervenor argued that the reference in the Chairperson's reasons to having taken into account the time and resources that had already been dedicated to the matter included the interests of the parties. It is clear from the affidavit evidence submitted by the intervenor that this consideration was limited to the time and resources of the Tribunal and did not include the interests of the parties.

[25] At the hearing of the judicial review on December 18, 2008, I was advised that the rehearing of the complaint was scheduled to begin on January 5, 2009. Given the importance to the parties of having a decision on the judicial review prior to that date, I issued an order on December 23, 2008, allowing the judicial review application and ordering the parties to bear their own costs. Accordingly, no order will issue with these reasons.

"Dolores M. Hansen"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-558-08
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA (CANADIAN FORCES) and MICHELINE ANNE MONTREUIL CANADIAN HUMAN RIGHTS COMMISSION and J. GRANT SINCLAIR, Q.C., IN HIS CAPACITY AS CHAIRPERSON OF THE CANADIAN HUMAN RIGHTS TRIBUNAL THE CANADIAN HUMAN RIGHTS TRIBUNAL
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 8, 2008
REASONS FOR JUDGMENT BY:	JUSTICE HANSEN
DATED:	January 7, 2009

APPEARANCES:

Guy Blouin	FOR THE APPLICANT
Marie Cossette	FOR THE INTERVENOR
Micheline Anne Montreuil Ikram Warsame	FOR THE RESPONDENT