Federal Court  Cour fédérale

Date: 20120713

Docket: T-1471-11

Citation: 2012 FC 887

Ottawa, Ontario, July 13, 2012

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

DR. PATRICIA CONROY

Applicant

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] At all material times, Ms. Patricia Conroy (the applicant) was employed by the Correctional Service of Canada (CSC) as a unionized psychologist and, as such, was a member of the Professional Institute of the Public Service of Canada (the respondent). As of 1995, the applicant encountered various problems in the advancement of her career within the CSC. For example, she was screened out of a competition for a permanent PS-04 position in 2001 and she was removed from an acting PS-04 position in 2005. In 2005 she took medical leave, followed by a one-year

leave without pay. She alleges that she requested a further extension of her leave in 2007 but never received a response to that request. In 2009, she was contacted by the CSC and pressured to return to her substantive position. She tried to negotiate an accommodation that would allow her to return to a different position than the one she held in 2005, but to no avail.

[2] Throughout her dealings with her employer, the applicant sought the assistance and support of her union, the respondent. The applicant claims that on all occasions, in 2001, 2005 and 2010, she received differential representation from the respondent, based on her gender. In 2010, she filed a complaint with the Canadian Human Rights Commission (the Commission) against the respondent alleging that it discriminated against her because of her gender, contrary to sections 9 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the *Act*]. In particular, the applicant alleged that, from 2001 to 2010, the respondent failed to offer her adequate representation and offered much more meaningful representation to similarly situated male members.

[3] On July 20, 2011, the Commission decided, pursuant to section 41 of the *Act*, that it would not deal with the applicant's complaint. This application for judicial review concerns that decision. For the following reasons, the application is allowed.

I. History of the proceedings and decision under review

[4] The Commission's decision was preceded by what is usually called a Section 40/41 Report whereby an agent of the Commission preliminarily assesses the complaint and the parties' respective positions. The Section 40/41 Report makes recommendations on whether the

Commission should or should not deal with a complaint and launch an investigation. In this case, Ms. Jennifer Bouchard prepared the Section 40/41 Report.

[5] Section 40 of the *Act* provides than an individual may file a complaint with the Commission if he or she has reasonable grounds to believe that a person is engaging in a discriminatory practice. Section 41 of the *Act* prescribes that the Commission must deal with a complaint unless it appears that the complaint falls within the following exceptions:

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	*e*) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur

> year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.
>
> lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[6] The respondent raised two preliminary objections to the applicant's complaint. First, the respondent claimed that the complaint referred to two separate and distinct sets of allegations. The first set of allegations referred to events that occurred between 2001 and 2005, more than one year before the applicant filed her complaint. The respondent alleged that the Commission should, as a consequence, refuse to deal with those allegations because the respondent was prejudiced by the delay in filing and no longer had any evidence to adequately defend itself. Second, the respondent alleged that the allegations regarding the 2010 event fell beyond the Commission's jurisdiction. More specifically, the respondent alleged that even if the allegation regarding its failure to offer representation to the applicant in 2010 was taken as true, its actions do not breach the *Act* since it refused to represent the applicant based on her failure to pay union dues since 2006 and not because of a prohibited ground of discrimination.

[7] In her report, Ms. Bouchard summarized the applicant's allegations as follows:

> 2. The complainant alleges that she was denied adequate representation by the respondent because of her sex. Her allegations of adverse differential treatment are related to a series of events through application processes with her employer, removal from an acting position, and the lack of assistance to receive accommodation in her attempts to return to work.
>
> 3. In 2005, the complainant took a five-year leave from the respondent, which separates her allegations of discrimination into two periods, before her leave and her attemps to return to work after her leave. […] The two sets of allegations are as follows:

a) From January 2002 to December 2005, the complainant alleges that the respondent did not provide her adequate representation based on her sex, while she was attempting to acquire and stay in a PS 04 Institutional Psychologist position.

b) In March 2010, the complainant alleges that based on her sex, the respondent did not provide her adequate representation in her attempt to return to work.

[8] Ms. Bouchard summarized the respondent's position and indicated that the applicant would be given an opportunity to respond to the Section 40/41 Report. She agreed with the position taken by the respondent and concluded that it was plain and obvious that, in 2010, the respondent had not refused to represent or assist the applicant based on discriminatory reasons, but because she was not a member of the respondent at that time. It is important to keep in mind that the applicant's reply to this position was brought to the Commission's attention only after it prepared the Section 40/41 Report.

[9] The relevant excerpts of the Section 40/41 Report in that regard read as follows:

> 3 . . . As of May 2006, the complainant began working for the Department of National Defence (DND). Also as of 2006, the complainant was no longer paying union dues, and therefore was no longer considered a member of the Institute. . . .
>
> . . .
>
> 24. In this case it is plain and obvious that the complainant stopped paying union dues in 2006 and is no longer a member of the Institute. Therefore, as of her leave in 2006 and then her employment with DND she was no longer a member or represented by the respondent. Section 9(1)(c) is applicable "*where the individual is a member of the organization pursuant to a collective agreement relate to the individual.*" As the complainant was not a member of the Institute in

> March 2010 they could not be a respondent to an allegation of discrimination under section 9 of the Act. This reasoning is extending into the application of section 10, which in this context states that it is an [*sic*] discriminatory practice for an employee organization to pursue a practice "*that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination*." As the complainant was not a member of the union in March 2010, it is plain and obvious that she was not subject to any policies or practices of the respondent, or to discrimination under section 10 of the Act.
>
> 25. It is plain and obvious that the complainant does not have reasonable grounds to believe that the respondent failed to represent her because of her sex. Although the complainant may have had reasonable grounds for her first set of allegations, in the second set of allegations, it is cleat that the respondent did not represent or assist her because she was not a member of the institute, not because of her sex as the complainant alleges.

[10] With respect to the objection relating to the limitation period, Ms. Bouchard was of the view that although the two sets of allegations were similar, they did not pertain to the same allegations and raised two different issues. Based on her view that the allegation regarding the 2010 events fell beyond the Commission's jurisdiction, she only assessed the first set of allegations. She found that the first set of allegations occurred over four years prior to the filing of the complaint. Pursuant to paragraph 41(1)(*e*) of the *Act*, she opined that it was not appropriate for the Commission to extend the limitation period. Ms. Bouchard expressed that the applicant failed to act with due diligence in seeking redress and that the respondent would be seriously prejudiced in its ability to defend itself and respond to the allegations because of the delay in filing.

[11] In its decision, the Commission did not take a position on the issue of whether the allegations should be viewed as two different sets of allegations or as a single pattern of discrimination occurring over time. Its reasons are brief and read as follows:

> The respondent did not act for the complainant at the time of the 2010 allegations because the complainant was not a member at the time and not because of a reason related to a prohibited ground. Based on that, and given that the complainant was not a member of the respondent union since 2006 due to her failure to pay union dues, it would be reasonable to conclude that no allegations from 2006 onward would be subject to a complaint. Therefore, the remaining allegations occurred more than one year before receipt of the complaint by the Commission and it is not appropriate to deal with them because the respondent has demonstrated that the delay in signing the complaint has seriously prejudiced its ability to respond to the complaint.

[12] For these reasons, the Commission decided not to deal with the applicant's complaint.

II. Issues

[13] The only issue raised in this judicial review is whether the Commission erred in deciding not to deal with the applicant's complaint. However, the issue can be separated into two sub-issues:

- Did the Commission err in deciding that the applicant's complaint fell outside of its jurisdiction, with respect to the 2010 events?
- Did the Commission err in deciding that it was not appropriate to deal with the allegations that occurred over four years prior to the filing of the complaint?

III. Standard of review

[14] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62, 1 SCR 190 [*Dunsmuir*], the Supreme Court held that the first step in conducting a standard of review analysis is to "ascertain

whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular group of questions. . .”

[15] I am of the view that the jurisprudence satisfactorily established that a decision by the Commission to refuse to deal with a complaint on the basis that it did not disclose a link with a prohibited ground of discrimination is reviewable under the reasonableness standard (*Best v Canada (Attorney General)*, 2011 FCA 351 at para 2, 427 NR 381; *Hartjes v Canada (Attorney General)*, 2008 FC 830 at paras 16-21 and 30, 334 FTR 277 [*Hartjes*]; *Tomar v Toronto Dominion Bank*, 2009 FC 595 at para 25, 345 FTR 262; see also the principles in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 17, 27, 343 DLR (4th) 385 [*Halifax Regional Municipality*]; *Canada (Attorney General) v Maracle*, 2012 FC 105 at paras 17-21, [2012] 2 CNLR 37 [*Maracle*]).

[16] The issue related to the timeliness of the complaint and to whether the Commission should extend the limitation period, is also reviewable under the reasonableness standard. This type of decision involves an exercise of discretion and the Court should show deference (*Halifax Regional Municipality*, above at para 17; *Richard v Canada (Attorney General)*, 2010 FCA 292 at paras 9, 15, 327 DLR (4th) 292; *Bredin v Canada (Attorney General)*, 2008 FCA 360 at para 16, 383 NR 192).

[17] The Court’s role when reviewing a decision against the standard of reasonableness is defined in *Dunsmuir*, above, at para 47:

> . . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the

> process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

IV. The parties' arguments

A) *The applicant's arguments*

(1) Did the Commission err in deciding that the applicant's complaint fell outside of its jurisdiction, with respect to the 2010 events?

[18] The applicant argues that the Commission's decision based on paragraph 41(1)(*c*) of the *Act* was flawed. First, she contends that it was unreasonable for the Commission to conclude that she was not a member of the respondent's union. Second, she argues that the Commission failed to deal with the arguments that she raised in her response to the Section 40/41 Report.

[19] The applicant submits that in finding that she was not a member of the respondent when she sought assistance in March 2010, the Commission adopted a far too narrow interpretation of paragraph 41(1)(*c*) of the *Act* and of the concept of union membership. Rather, this provision must be interpreted broadly to protect constitutional rights. In particular, the Commission interpreted the term "member" in a way that fails to recognize that the applicant is required to belong to a union pursuant to a collective agreement and is thereby subject to all the policies and procedures of that union.

[20] The applicant also submits that she was, indeed, a member at the time the respondent refused to represent her. She was simply not a member in good standing. Paragraph 14.2.4.1 of the respondent's By-Laws states that "[a] member who is more than ninety (90) days in arrears in the payment of fees shall be considered to be "not in good standing." Once considered "not in good standing" a member may reinstate good standing status by paying the amount owed." The use of the term "member" in the text of this By-Law demonstrates that she was still a member and her employment is fully covered by the collective agreement. The applicant argues that to exclude a member, (even a member not in good standing), from seeking redress for human rights violations is unreasonable.

[21] The applicant also argues that the Commission failed to consider why she did not pay her unions dues. First, she contends that she ceased paying union dues when she began her leave without pay and received no salary from which to draw the dues. Second, this situation happens each and every time someone takes a leave without pay and it had happened to her on a prior occasion. Normally, the person resumes paying the dues when she or he returns to work. In this case, the respondent did not offer her any arrangements for reimbursement. She would have been willing to resume paying union dues and reimburse her arrears were it not for the conversations that she had with the respondent's representative when she sought assistance in March 2010. She admits having been told that the respondent would not represent her if she did not reimburse her union dues, however she also understood from her conversations with the respondent's representative that she would not receive any meaningful representation even if she reinstated her status as a member in good standing. In her view, this was in line with the pattern of discrimination that she had encountered with the respondent since 2001. The applicant argues that the Commission failed to

consider that the reason the union dues had not been paid was because of the discrimination that formed the basis of the complaint.

[22] The applicant submits that the Commission never dealt with her arguments in the short decision that it rendered.

[23] The applicant further contends that there was an error in the Section 40/41 Report. Ms. Bouchard stated that in 2006 she left the CSC and went to work with the Department of National Defence. However, the applicant argues that in 2006 she went on leave without pay but remained an employee of the CSC. She took on independent contractual work with other departments during her leave.

B) *The respondent's arguments*

[24] The respondent submits that there is only one reason why it denied legal representation to the applicant in 2010 and that is because of her failure to repay arrears after being notified of the requirement. The Section 40/41 Report made this determination based on the evidence before it. Notably, the respondent explained to the Commission that its By-Law 7 makes it clear that all of the rights of membership are subject to being a member in good standing. The respondent insists that the Commission has considerable discretion under paragraph 40(1)(*c*) of the *Act* in assessing whether to deal with a complaint and its decision was entirely reasonable.

[25] The respondent submits that the applicant's contention that she was offered less than adequate representation is not consistent with the facts. In fact, she was offered no representation at all. Further, the respondent argues that the fact that the applicant believed she would not receive

adequate representation is speculative. In addition, the applicant makes bald assertions about discrimination without enough evidence to support the allegations. The respondent contends that the preliminary advice that it gave to the applicant was sound and reasonable considering her circumstances.

[26] The respondent submits that paragraph 41(1)(*c*) of the *Act* permits the Commission to refuse to deal with a complaint if it is beyond its jurisdiction or if it is plain and obvious that there is no *prima facie* case of discrimination. The facts plainly demonstrate that the respondent denied the applicant representation because of the non-payment of her union dues. On this basis, the Commission's decision that it was plain and obvious that the complaint was beyond its jurisdiction is reasonable.

[27] The respondent acknowledges that the Commission's decision is brief but argues that the Section 40/41 Report is more complete and forms part of the Commission's reasons.

V. Analysis

[28] The Commission acts as a gate-keeper to the Canadian Human Rights Tribunal. The Commission's mandate was enunciated by Justice Laforest in *Cooper v Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854 at para 53, 140 DLR (4th)193:

> 53 The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of

> the Commission's role, then, is that of assessing the sufficiency of the evidence before it. . . .

[29] This role was recently reiterated by the Supreme Court in *Halifax Regional Municipality*, above at para 50.

[30] Once a complaint is filed, the Commission must make a preliminary decision about whether or not it will deal with the complaint by launching an investigation. Although the Commission's decision and decision-making process should be afforded deference (*Halifax Regional Municipality*, above at para 51), the jurisprudence establishes that the Commission should be prudent in dismissing a complaint at the pre-investigation stage. I recently had the opportunity to discuss the need for prudence at that early stage of the process in *Maracle*, above at para 40:

> This approach has been endorsed by this Court in several judgments (Comstock, above, at paras 39-40, 43; *Hartjes*, above, at para 30, *Hicks*, above, at para 22; *Michon-Hamelin v Canada (Attorney General)*, 2007 FC 1258 at para 16 (available on CanLII) [*Michon-Hamelin*]) and I also endorse it. This approach is consistent with the Commission's primary role under the Act as a gate-keeper responsible for assessing the allegations of a complaint and determining whether they warrant an inquiry by the Tribunal. In deciding whether to deal with a complaint, the Commission is vested with a certain level of discretion but it must be wary of summarily dismissing a complaint since the decision is made at a very early stage and before any investigation. The question of whether a complaint falls within the Commission's jurisdiction may, in itself, require some investigation before it can be properly answered. It is worth noting that, at the end of the investigation process, the Commission can again, pursuant to subparagraph 44(3)(1)(b)(ii) of the Act, dismiss a complaint for lack of jurisdiction.

[31] In *Maracle*, above at para 39, I also referenced the approach proposed by Justice Rothstein in *Canada Post Corp v Canada (Canadian Human Rights Commission)* (1997), 130 FTR 241, 71 ACWS (3d) 935 (TD); aff'd (1999), 169 FTR 138, 245 NR 397 (FCA). In this view, the

Commission should only decline to deal with a complaint where it is plain and obvious that the matter is beyond its jurisdiction:

> 39 As stated above, the first decision that the Commission must make upon receiving a complaint is whether it will deal with it and investigate the allegations. Section 41 of the Act obliges the Commission to deal with all complaints that are filed unless it appears to it that the complaint falls within the exceptions set forth in section 41; one of those exceptions being that the complaint is beyond its jurisdiction. The approach that the Commission should adopt when deciding whether to deal with a complaint, and the approach that the reviewing court should keep in mind, was enunciated by Justice Rothstein in *Canada Post Corp v Canada (Canadian Human Rights Commission)* (1997), 130 FTR 241, 71 ACWS (3d) 935 (TD); aff'd (1999), 169 FTR 138, 245 NR 397 (FCA) [*Canada Post*], wherein he held that the Commission should decline to deal with a complaint only where it is plain and obvious that the matter is beyond its jurisdiction:
>
> > **3** A decision by the Commission under section 41 is normally made at an early stage before any investigation is carried out. Because a decision not to deal with the complaint will summarily end a matter before the complaint is investigated, the Commission should only decide not to deal with a complaint at this stage in plain and obvious cases. The timely processing of complaints also supports such an approach. A lengthy analysis of a complaint at this stage is, at least to some extent, duplicative of the investigation yet to be carried out. A time consuming analysis will, where the Commission decides to deal with the complaint, delay the processing of the complaint. If it is not plain and obvious to the Commission that the complaint falls under one of the grounds for not dealing with it under section 41, the Commission should, with dispatch, proceed to deal with it.
> >
> > [Emphasis added]

[32] That approach has been endorsed on several other occasions by this Court (*Comstock v Public Service Alliance of Canada*, 2007 FC 335 at paras 39-40, 43, 310 FTR 277; *Hartjes*, above at para 30; *Hicks v Canada (Attorney General)*, 2008 FC 1059 at para 22, 334 FTR 260; *Michon-Hamelin v Canada (Attorney General)*, 2007 FC 1258 at para 16 (available on CanLII)).

[33] This Court has also stated that as the "plain and obvious" test is very similar to the test for striking out a court pleading on the basis that it does not disclose a reasonable cause of action, the test should be applied by taking the alleged facts as true. In *Maracle*, above at para 42-43, I adopted this approach as follows:

> 42 As the respondents suggest, the "plain and obvious" test proposed by Justice Rothstein is very similar to the test for striking out a court pleading on the basis that it discloses no reasonable cause of action. The approach proposed in the context of such a motion by the Supreme Court of Canada in *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at para 33, 74 DLR (4th) 321, may be of assistance to the Commission when it determines whether a complaint should be summarily dismissed without any investigation:
>
> > Thus, the test in Canada . . . is . . . assuming that the facts as stated can be proved, is it "plain and obvious" that the plaintiff's statements of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present strong defence should prevent the plaintiff from proceeding with his or her cause. ...
> > [Emphasis added]
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> 43 This Court has endorsed a similar approach in *Michon-Hamelin*, above, at para 23, where Justice Mactavish held that at the pre-investigation stage, the factual allegations contained in the complaint should be taken as true. In my view, this is an appropriate approach. The decision of the Commission is of a preliminary nature and is based on arguments presented by the parties without any examination of evidence. A thorough analysis of the complainant's allegations and of the arguments of the opposing party, at the pre-investigation stage would be "to some extent, duplicative of the investigation yet to be carried" (*Canada Post*, above, at para 3). Furthermore, where a party alleging a lack of jurisdiction from the Commission raises arguments that involve both factual and legal arguments, it is, in my view, an indication that some investigation is required in order for the Commission to

> determine whether the allegations disclose a sufficient link to a prohibited ground.

[34] In *Hartjes*, above at para 23, the Court held that the complainant bears the burden of including sufficient information to persuade the Commission that there is a link "between complained-of-facts and a prohibited ground", but that this threshold is low.

[35] In this case, the issue is whether it is plain and obvious that the complaint did not disclose any link between the allegation that the respondent refused to represent and/or assist the applicant and a prohibited ground of discrimination. The applicant claims that the respondent was not willing to offer her meaningful representation even if she agreed to reimburse her union dues. In doing so, it was perpetuating its differential treatment based on her gender.

[36] With all due respect, I find that the Commission's decision to refuse to deal with the complaint is unreasonable.

[37] It is clear from the Commission's decision that it espoused the respondent's position that it refused to represent the applicant because she was not a member of the respondent at the relevant time, due to her failure to repay the arrears of her union fees. However, the applicant raised several arguments to counter that allegation in response to the Section 40/41 Report. Those arguments were the same ones that she raised before this Court. More specifically, she alleged that the discussions that she had with the respondent's representative convinced her that she would not get meaningful representation even if she repaid her union dues and that this is why she did not do so. The applicant further argued that despite the fact that she was not a member in good standing because of her union dues arrears, she was still a "member" of the respondent and that the attitude of the respondent

towards her was a manifestation of its discriminatory practices. The applicant made those allegations and raised arguments in favour of the Commission's jurisdiction in her lengthy response to the Section 40/41 Report. It is clear from the Section 40/41 Report, that Ms. Bouchard did not consider the applicant's position as the report only references the respondent's position and indicates that the applicant would have an opportunity to state her position in her response to the Report.

[38] In reading the very brief decision of the Commission, I am unable to determine whether the Commission turned its mind to the applicant's allegations and arguments in response to the Section 40/41 Report and grappled with them.

[39] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16, [2011] 3 SCR 708, the Supreme court enunciated that the reasons given by administrative tribunals need not be comprehensive:

> 16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.

[40] However, I do not interpret the Supreme Court's decision to mean that an administrative tribunal is absolved from giving meaningful reasons. In reading the Commission's decision, I

understand that the Commission adopted the position presented by the respondent that the applicant was not a member of the respondent in March 2010 and that it was for this reason that it refused to represent her. However, the decision is silent with respect to the arguments raised by the applicant to counter this claim. These allegations and arguments were not "subordinate", they were central to the applicant's position. In my view, they were serious enough to warrant either a further assessment or at least a mention in the Commission's decision. It is worth noting that the Commission was acting at the pre-investigation stage, where it was to take the applicant's factual allegations as true, and that the decision had the effect of dismissing the applicant's complaint without further investigation.

[41] One must also bear in mind that rejecting a complaint at the pre-investigation stage is an exception. In my view, the Commission must explain why it considers that a complaint falls outside of its jurisdiction pursuant to section 41 of the *Act*. This obligation to explain its decision must be adapted to the context of each complaint. Although the Commission may not need to provide comprehensive reasons, it must at least leave the complainant with the impression that it considered his or her allegations before rejecting them. This is even more important when certain arguments were not considered in the preparation of the Section 40/41 Report and were only raised in response to the Report. I consider that in these specific circumstances, the applicant, and the Court, should have the assurance that the main arguments raised by the applicant were considered by the Commission before it concluded that it was plain and obvious that the complaint fell outside of its jurisdiction. Having no assurance that the Commission turned its mind to these arguments, and considering that it is not the Court's role to determine whether a complaint warrants an

investigation, I am of the view that the Court is not in a position to determine whether the Commission's decision falls within the range of acceptable possible outcomes.

[42] The situation in this case is somewhat similar to the situation that prevailed in *Hicks*, above at paras 24-25, where Justice Snider expressed the following:

> 24 The main problem that I have with the Commission's decision is that it does not address any of the arguments made by Mr. Hicks in his reply of September 4, 2007. In his reply, Mr. Hicks made extensive submissions on the topic of jurisdiction, with reference to case law that seems to apply a less narrow view of family status and disability than was apparently taken by the Commission. I do not know if the Commission had regard to the issues raised in the reply or, if it did, why the Commission found these arguments to be without merit.
>
> 25 The situation before me is very similar to that in Johnstone. I acknowledge the arguments made by the Commission before me that the human rights protected by the CHRA do not extend as far as posited by Mr. Hicks. The Commission may be right. However, on the record before me, I am not able to say with confidence that the arguments of Mr. Hicks were heard and considered. In other words, I am not persuaded that it is plain and obvious that there is no discrimination. Thus, whether viewed on a standard of reasonableness or of correctness, I find that the decision cannot stand.

[43] The same principles apply in this case and, accordingly, the Court's intervention is warranted.

[44] The Commission's decision to dismiss the allegations relating to the 2010 events had an impact on its decision regarding the timeliness of the complaint. It did not take a position as to whether the events that unfolded from 2001 to 2006 formed part of one lengthy and continuous

incidence of discrimination or formed two sets of separate allegations. Therefore, it is not useful for the Court to consider the second sub-issue raised in this application for judicial review.

[45] The matter should be remitted to the Commission. It should reassess the applicant's complaint and turn its mind to all of the relevant circumstances, including the arguments raised by the applicant in favour of the Commission's jurisdiction to deal with the complaint. In light of its conclusions, the Commission may or may not need to deal with the issue of timeliness in application of paragraph 41(1)(*e*) of the *Act*.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed.
2. The Commission's decision is overturned.
3. The matter is sent back to the Commission for a redetermination.
4. Costs are awarded in favour of the applicant.

"Marie-Josée Bédard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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