

Federal Court



Cour fédérale

Date: 20121130

Docket: T-780-12

Citation: 2012 FC 1399

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 30, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MAXIME GALIPEAU

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Attorney General of Canada (Attorney General) is filing this application for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, of a decision dated March 7, 2012, by the Canadian Human Rights Commission [CHRC] to deal with the

complaint filed by the respondent, Maxime Galipeau [Mr. Galipeau], against the Canadian Forces [CF].

[2] In its decision, the CHRC rejects the Attorney General's argument that Mr. Galipeau's complaint is ineligible pursuant to paragraphs 41(1)(d) and 41(1)(e) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act].

[3] For the following reasons, the Court dismisses this application for judicial review.

II. The facts

[4] Mr. Galipeau enrolled in the CF on September 12, 2001.

[5] A few years later, Mr. Galipeau was diagnosed as HIV positive.

[6] Mr. Galipeau submits that a CF senior medical officer informed him that he would have to be released from the CF on medical grounds because he had an incurable disease and that his colleagues were at risk of contamination.

[7] Mr. Galipeau receives antiviral treatments. Given the state of his health, the CF is of the view that he has permanent employment limitations and that he violates the CF's universality of service principle. Accordingly, his file was sent to the Director Military Careers Administration [DMCA] in June 2007.

[8] The DMCA convened a career review board (the Board), which recommended M. Galipeau's release on the basis of reason 3(b) of Chapter 15 of the *Queen's Regulations and Orders for the Canadian Forces* [QR&O]. The CF's DAOD 5019-2 provides for the possibility of challenging the Board's recommendation before it becomes final by filing representations.

[9] Mr. Galipeau admits that he received the disclosure package explaining his right to challenge the Board's recommendation. He even signed an acknowledgment of receipt of this package on October 11, 2007.

[10] The same day, Mr. Galipeau signed another document confirming his agreement with the Board's final recommendation to release him from the CF and stating that he had nothing to add.

[11] On May 25, 2008, Mr. Galipeau was released from the CF on the basis of reason 3(b) of Chapter 15 of the QR&O, namely, on "medical grounds".

[12] Mr. Galipeau did not submit a grievance against his release from the CF pursuant to subsection 29(1) of the *National Defence Act*, RSC 1985, c N-5 [NDA].

[13] Mr. Galipeau claims that he expressed his desire to remain in the CF during discussions with the CF physician and with his superiors. He also claims to have taken steps to inquire into the possibility of remaining in the employ of the CF, but these efforts were always met with the

same answer, namely, that it would be impossible for him to work for the CF because he was HIV positive.

[14] After his release from the CF, Mr. Galipeau received Long Term Disability Insurance (LTD) benefits until May 2010. The LTD program is part of the Service Income Security Insurance Plan (SISIP).

[15] Mr. Galipeau also took advantage of the CF's Vocational Rehabilitation Program, which enabled him to complete a Diploma of Collegial Studies [DCS] in carpentry-joinery in January 2010.

[16] In February 2010, Mr. Galipeau consulted infectious disease specialists at the Centre hospitalier universitaire de Sherbrooke [CHUS]. They informed him that he did not present a contamination risk for his CF colleagues and that he could have continued his career there. Mr. Galipeau maintains that this new medical opinion contradicts the information that he had received from the CF.

[17] Mr. Galipeau contacted an organization that advocates on behalf of individuals who are HIV positive. He claims that this was the first time he realized that he had likely been a victim of discrimination.

[18] On September 10, 2010, Mr. Galipeau telephoned the CHRC.

[19] On December 9, 2010, Mr. Galipeau filed a complaint. He submitted that he had been subjected to discrimination by the CF.

[20] On February 18 and April 14, 2011, the CF argued that the complaint to the CHRC was ineligible, citing paragraphs 41(1)(d) and 41(1)(e) of the Act.

[21] On October 3, 2011, Jonathan Bujreau of the CHRC's Resolution Services Division drafted his preliminary report.

[22] The two parties then made representations with respect to Mr. Bujreau's report. The CF sent their comments on November 4, 2011, and Mr. Galipeau sent his on November 22, 2011.

[23] On December 21, 2011, the CF responded to Mr. Galipeau's representations.

[24] On March 7, 2012, the CHRC decided to deal with Mr. Galipeau's complaint on the basis of subsection 41(1) of the Act. The CHRC concluded that Mr. Galipeau was not acting in bad faith and that the CF had not established that the filing of this complaint after more than one year would hinder their ability to respond effectively.

III. Legislation

[25] The applicable provisions of the *Canadian Human Rights Act*, RSC 1985, c H-6, the *National Defence Act*, RSC 1985, c N-5, and the *Queen's Regulations & Orders for the Canadian Forces* are appended to this decision.

IV. Issue and Standard of Review

A. Issue

- *Is the CHRC's decision to deal with Mr. Galipeau's complaint pursuant to subsection 41(1) of the Act reasonable?*

B. Standard of review

[26] The case law of this Court is clear. The standard of review applicable to decisions of the CHRC relating to the eligibility of a complaint under paragraphs 41(1)(d) and (e) of the Act is reasonableness (see *Lawrence v Canada Post Corporation*, 2012 FC 692, at paragraph 18; *Chan v Canada (Attorney General)*, 2010 FC 1232, at paragraph 15; *English-Baker v Canada (Attorney General)*, 2009 FC 1253, at paragraph 13; *Morin v Canada (Attorney General)*, 2007 FC 1355, at paragraph 25; and for decisions relating to the application of paragraph 41(1)(e), see *168886 Canada Inc c Reducka*, 2012 FC 537, at paragraph 15; *Donoghue v Canada (National*

Defence), 2010 FC 404, at paragraph 25 [*Donoghue*]; *Canada (Revenue Agency) v McConnell*, 2009 FC 851, at paragraph 39).

[27] Accordingly, this Court will not intervene in this case unless the CHRC's decision does not fall within "the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paragraph 47 [*Dunsmuir*]).

V. The parties' positions

A. Position of the Attorney General

[28] The Attorney General submits that the CHRC erred in its conclusion that Mr. Galipeau's complaint was not made in bad faith and in its interpretation of paragraph 41(1)(e) of the Act. According to the Attorney General, the CHRC should have required Mr. Galipeau to justify the late filing of his complaint, more than 31 months after his release from the CF.

[29] The Attorney General claims that Mr. Galipeau's complaint is ineligible under paragraph 41(1)(d) of the Act because it was made in bad faith. He voluntarily signed a document on October 11, 2007, indicating his agreement with the Board's recommendation that he be released on medical grounds pursuant to Reason 3(b) of Chapter 15 of the QR&O, without filing representations or objections. Moreover, according to the Attorney General, Mr. Galipeau took advantage of the Vocational Rehabilitation Program to obtain a DCS in carpentry-joinery

and received Long Term Disability benefits for two years. Finally, he argues that Mr. Galipeau failed to justify the lapse of time between his release from the CF and the filing of his complaint.

[30] The Attorney General submits that the facts demonstrate bad faith and an intention to abuse the recourse available under the Act. For this reason, he is of the view that the CHRC erred in finding that Mr. Galipeau was not acting in bad faith.

[31] Moreover, the Attorney General alleges that Mr. Galipeau has not met his burden of justifying the late filing of his complaint, beyond the one-year time limit set out in paragraph 41(1)(e) of the Act. He relies on paragraph 35 of *Donoghue*, above, in support of the proposition that “[j]ust as prejudice to the respondent is a legitimate reason to refuse to deal with a complaint, so is an insufficient explanation for the delay”.

[32] According to the Attorney General, Mr. Galipeau provided no explanation to the CHRC to justify his delay, and the CHRC failed to require one. For this reason, he concludes that this Court must declare the complaint ineligible pursuant to paragraph 41(1)(e) of the Act, on the grounds that the lack of a justification makes the decision to deal with the complaint unreasonable.

B. Mr. Galipeau’s position

[33] Mr. Galipeau alleges that the CHRC’s decision to deal with his complaint is reasonable because it is based on the evidence in the file.

[34] Contrary to the Attorney General's claim, Mr. Galipeau submits that he did explain his delay in filing his complaint with the CHRC. It was his meeting with the infectious disease specialists at the CHUS in February 2010 that allowed him to determine that he had been a victim of discrimination. According to Mr. Galipeau, he had no reason to question the CF's decision before receiving the opinion of the infectious disease specialists at the CHUS.

[35] Mr. Galipeau also points out that this is mentioned in Mr. Bujau's report and that he did not act in bad faith, having diligently filed his complaint once he had been properly advised.

[36] Mr. Galipeau also relies on *Canada Post Corporation v Canada (Canadian Human Rights Commission)* (1997), 130 FTR 241, at paragraph 3, in support of the proposition that the CHRC should only refuse to deal with a complaint when it is plain and obvious that it should not be dealt with:

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.

[37] Mr. Galipeau argues that the CHRC's decision is reasonable because it has not been established that he acted in bad faith or that the delay would hinder the Attorney General in responding to the complaint.

[38] Mr. Galipeau also points to the Supreme Court of Canada's decision in *Halifax (Regional Municipality) v New Brunswick (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364 [Halifax], which states that it is not the role of the reviewing court to assess the evidence at a preliminary stage of the administrative process.

[39] Finally, Mr. Galipeau argues that the CHRC took into account the purpose of the Act and the consequences of a dismissal of his complaint. This approach is consistent with *Larsh v Canada (Attorney General)* (1999), 166 FTR 101, [1999] FCJ no 508 at paragraph 36:

... dismissal is, after all, a final decision that precludes the complainant from any statutory remedy and, by its nature, cannot advance the overall purpose of the Act, namely protection of individuals from discrimination, but may, if wrong, frustrate it.

VI. Analysis

[40] This Court must determine whether the CHRC's decision to deal with Mr. Galipeau's complaint is reasonable.

[41] The Court finds that the CHRC's decision to deal with Mr. Galipeau's complaint is reasonable for the following reasons. First, the evidence in the file reveals that Mr. Galipeau did provide explanations to the CHRC justifying the lapse of 31 months between his release from the

CF and the filing of his complaint. The file indicates that it was his meeting with the infectious disease specialists at the CHUS in February 2010 that opened his eyes, as it was then that he learned that he could have continued his career in the CF, as he did not present a risk for his colleagues, contrary to what he had been told by the CF physician.

[42] As indicated in the report by Mr. Bujeau of the CHRC, to determine whether a complaint is made in bad faith, one must ask whether the complaint constitutes [TRANSLATION] “a deliberate attempt to avoid a contractual, legal or other type of obligation” (Applicant’s Record, Exhibit 10, page 121). The fact that a complainant signs a renunciation in favour of a respondent does not automatically mean that a subsequent complaint is made in bad faith. This is simply one factor to consider among others. The circumstances and the party’s knowledge must be considered in context. In *Pritchard v Ontario (Human Rights Commission)*, 45 OR (3d) 97, [1999] OJ no 2061, at paragraphs 16 and 17, the Ontario Divisional Court stated the following:

16 In deciding that the filing of a human rights complaint shows bad faith after the complainant has signed a release, absent evidence of duress that is defined to exclude economic duress, the Commission improperly fettered its discretion. The term “bad faith” normally connotes moral blameworthiness on the part of the person accused, encompassing conduct designed to mislead or pursued for an improper motive. Its use in s. 34(1)(b) suggests that this is the intended meaning in the Code, for a complainant can be denied access to the investigative procedure only if the complaint is vexatious, trivial or brought in bad faith. The terms “bad faith” and “vexatiousness” both indicate that the complainant has acted improperly in pursuing the complaint.

17 Undoubtedly, in some cases, an employee who has accepted a sum of money in exchange for a release of claims against a former employer, including human rights claims, would be acting in bad faith in subsequently turning around and filing a human rights complaint. However, in other cases, the facts may show that the employee misunderstood the significance of the release, or received little or no consideration for it beyond statutory

entitlements under employment standards legislation, or was in such serious financial need that she or he felt there was no choice but to accept the package offered. To take the approach that there is bad faith whenever a human rights complaint is brought after signing a release risks ignoring the context within which a particular complainant has signed the release and denying access to the investigative procedure under the Human Rights Code without assessing the complainant's individual moral blameworthiness in pursuing the complaint.

[43] The Court also wishes to reiterate that the document signed by Mr. Galipeau does not constitute a renunciation of the right to challenge his release, as the Attorney General claims. Mr. Galipeau's signature on the document indicates his agreement with the recommendation that he be released on medical grounds. His consent was based on the opinion that Mr. Galipeau had received from the CF physician. It was not a discharge or release of liability in favour of the CF in exchange for a payment of money. Mr. Galipeau did not receive LTD benefits in consideration of his acquiescence to the Board's recommendation, but rather as a result of the CF's contractual obligations arising from the employment relationship.

[44] The Attorney General argues that Mr. Galipeau had a duty to seek a second opinion from non-CF physicians before signing the consent form that released him from the CF in 2008. The Court cannot accept such an argument, since Mr. Galipeau had no reason at the time to question the opinion he had received.

[45] In this case, the CHRC has accepted Mr. Galipeau's explanations for the delay in filing his complaint. When Mr. Galipeau decided to leave the CF voluntarily, he was relying on the opinion of the CF physicians that because he was HIV positive, he did not and could no longer meet the standard of universality of service and presented a risk of contamination for his

colleagues. Since he did not believe himself to be a victim of discrimination, he did not challenge the Board's recommendation or file a grievance pursuant to subsection 29(1) of the NDA after his release.

[46] The CHRC concluded that Mr. Galipeau's complaint was not motivated by an improper purpose. It accepted his plausible explanation that the delay in filing his complaint was due to the time that passed before he received the opinion from the infectious disease specialists at the CHUS. This Court finds that the CHRC's decision falls within "the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47).

[47] In rendering its decision dated March 7, 2012, the CHRC reviewed the following documents:

- complaint form(s) dated December 9, 2010
- section 40/41 report dated October 3, 2011
- complainant's representations received on November 22, 2011
- respondent's [CF's] representations dated November 4 and December 21, 2011

(Applicant's Record, Exhibit 14)

[48] The Attorney General relies on *Donoghue*, above. In that case, the CHRC asked the complainant to provide in his representations an explanation of why he had waited nearly ten years before filing a complaint. He did not do so. Justice O'Keefe noted at paragraph 35 of *Donoghue*, above, that "[j]ust as prejudice to the respondent is a legitimate reason to refuse to

deal with a complaint, so is an insufficient explanation for the delay”. The facts in this case are distinguishable from those in *Donoghue* because Mr. Galipeau did provide the CHRC with a plausible explanation.

[49] In light of its finding that Mr. Galipeau had acted in good faith, the CHRC had no further reasons to reject his explanation for the late filing of his complaint. Good faith must be presumed in the absence of evidence to the contrary.

[50] This Court also accepts Mr. Galipeau’s argument, based on the Supreme Court of Canada’s recent decision in *Halifax*, above, that it is not the role of the reviewing court to assess the evidence at a preliminary stage of the administrative process, and that it must therefore show deference in such circumstances.

[51] As we are reminded by the Supreme Court, our role as a reviewing court is not to substitute our assessment of the evidence for that of the administrative tribunal, in this case the CHRC, but rather to inquire into the qualities that make a decision reasonable. This Court finds that, in this case, the CHRC reasonably exercised its discretion to deal with Mr. Galipeau’s complaint, despite the 31-month delay in filing. This decision by the CHRC falls within the range of possible outcomes in the circumstances.

VII. Conclusion

[52] This application for judicial review is dismissed. The CHRC came to a reasonable conclusion in deciding to deal with Mr. Galipeau's complaint. There is no reason for this Court to intervene.

JUDGMENT

THE COURT dismisses the Attorney General's application for judicial review, with costs.

“André F.J. Scott”

Judge

Certified true translation
Francie Gow, BCL, LLB

ANNEX

**Canadian Human Rights Act, RSC
1985, c H-6**

Commission to deal with complaint

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

...

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(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.

...

National Defence Act, RSC 1985, c N-5

Right to grieve

29. (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.

**Loi canadienne sur les droits de la
personne, LRC 1985, ch H-6**

Irrecevabilité

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 :

[...]

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

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.

[...]

**Loi sur la défense nationale, LRC 1985,
ch N-5**

Droit de déposer des griefs

29. (1) Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.

***Queen's Regulations and Orders
(QR&Os)***

Volume I - Chapter 15

Release

15.01 - RELEASE OF OFFICERS AND
NON-COMMISSIONED MEMBERS

TABLE TO ARTICLE 15.01

Reasons for Release

Item 3(b) On medical grounds, being disabled and unfit to perform his duties in his present trade or employment, and not otherwise advantageously employable under existing service policy.

***Ordonnances et règlements royaux
applicables aux Forces canadiennes
[ORFC]***

Volume I - Chapitre 15

Libération

15.01 - LIBÉRATION DES OFFICIERS
ET MILITAIRES DU RANG

TABLEAU AJOUTÉ À L'ARTICLE
15.01

Motifs de libération

Numéro 3 b) Lorsque du point de vue médical le sujet est invalide et inapte à remplir les fonctions de sa présente spécialité ou de son présent emploi, et qu'il ne peut pas être employé à profit de quelque façon que ce soit en vertu des présentes politiques des forces armées.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-780-12

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA
v
MAXIME GALIPEAU

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: November 20, 2012

REASONS FOR JUDGMENT: SCOTT J.

DATED: November 30, 2012

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