Federal Court  Cour fédérale

**Date: 20140924**

**Docket: T-743-13**

**Citation: 2014 FC 914**

**Ottawa, Ontario, September 24, 2014**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**CAROLYN BAGNATO**

**Applicant**

**and**

**CANADA POST CORPORATION and**
**CANADIAN UNION OF POSTAL WORKERS**

**Respondents**

## JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for judicial review of a decision [Decision] by the Canadian Human Rights Commission [Commission] pursuant to s 41(1)*(a)* of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act], not to deal with the Applicant's complaint pending the Applicant having exhausted other remedies, particularly the grievance procedure provided for in the Collective Agreement.

[2] The governing provision of the Act, s 41(1), reads:

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

(Court underlining)

## II. Background

[3] The Applicant is an employee of the Canada Post Corporation [CPC] and a member of the Canadian Union of Postal Workers [Union]. The Union is the sole and exclusive bargaining agent for CPC employees.

The collective agreement between CPC and the Union contains a grievance and arbitration procedure to resolve complaints.

[4] Between June 2012 and September 2012, the Union filed a number of grievance complaints, on the Applicant's behalf, all flowing from CPC's treatment of her and a workplace injury which she suffered. These complaints ranged from a failure to accommodate the Applicant to harassment and threatening actions by management.

[5] The human rights complaint [Complaint] at issue was filed September 7, 2012, alleging that CPC had engaged in adverse differential treatment, failed to provide a harassment-free environment and had discriminatory policies or practices.

[6] In response to the Complaint, CPC wrote to the Commission requesting that pursuant to s 41(1)*(a)* of the Act, the Commission should not deal with the Complaint because the Applicant had commenced an internal grievance procedure, which should first be exhausted.

[7] The matter was investigated and a section 40/41 report [Report] was produced stating that the issue to decide is whether the Commission should refuse to deal with the Complaint pursuant

to s 41(1)*(a)* of the Act. The Report contained a recommendation that the Complaint should not be dealt with by the Commission.

[8] The Applicant took the position that she had exhausted the grievance procedure and was not satisfied with the result. Her accusations were far ranging and in particular, she alleged that she had been harassed and humiliated by management and her own union president. In responding to the Report, the Applicant described another incident that she desired to add to the Complaint. She alleged that, in a public notice of implementation of a grievance decision, the union president had deliberately misspelled her name "BagnaHo" – the allegation is that there was a sexual connotation (or intended humiliation) in the misspelling. This allegation was the subject of a separate grievance and complaint to the Canadian Industrial Relations Board [CIRB].

[9] On April 3, 2013, the Commission issued its Decision. The ultimate conclusion was:

> The Commission decided, … , not to deal with the complaint at this time under paragraph 41(1)(a) of the *Canadian Human Rights Act*, as the complainant ought to exhaust grievance or review procedures otherwise reasonably available. At the end of the grievance or review procedures, the complainant may ask the Commission to reactivate the complaint.

[10] In the Report, which formed the factual basis for the Decision, it was noted that five grievances had been filed that dealt with the issues in the Complaint. At the time of the Report, all these grievances had been scheduled or were awaiting scheduling to be heard by an arbitrator.

By the time this judicial review was argued, some of the grievances had been settled or withdrawn. The Applicant took grave exception to the reference in the Report regarding the pending grievances and the fact that some had been withdrawn or settled.

[11] In deciding not to proceed with the Complaint, the Commission considered a number of factors; the principal ones being:

- the decision maker on any grievance would be a neutral and independent labour arbitrator;
- while noting the Applicant's objections to the grievance process, the Commission's task was to assess the accessibility of alternate redress mechanisms; not to assess the merits of her objections;
- the Applicant did not indicate that she is vulnerable or that pursuing the grievance procedure would cause her harm;
- a labour arbitrator has jurisdiction to interpret and apply the Act; and
- a labour arbitrator can award much the same kind of remedies as those available under the Act.

[12] There is only one issue: was the Commission's Decision reasonable?

## III. Analysis

[13] The situation and governing legal principles in this case are much the same as in *Shiferaw v Canada Post Corp*, 2011 FC 1046, 207 ACWS (3d) 131. For much the same reasons, this judicial review will be dismissed.

[14] The Applicant's position was to essentially reargue the Complaint. It would appear that the core of her argument was the bias of the grievance officer at CPC. However, there was no linkage between this allegation of bias (an inapplicable concept in these circumstances) and the Commission's Decision. There was no suggestion of bias directed at the Commission or its investigator.

[15] The Applicant also raised concerns that she is still being harassed, threatened with phone calls and e-mails from her Union and her employer and is otherwise distressed by the whole process.

[16] These matters are not the matter before this Court. The Applicant has failed to show how the Decision not to take up the Complaint now and leaving open the Applicant's ability to return to the Commission, when the grievance procedures are complete, is somehow unreasonable.

[17] The Decision is reasonable in accordance with the principles laid down in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 – that a decision is reasonable when it falls within a range of acceptable, defensible outcomes based on the facts and the law.

[18] The Commission considered all the relevant factors (see paragraph 11 of these Reasons) as well as the timeliness of the grievance process.

[19] The fact that the Applicant has the ability to come back to the Commission should relieve her concerns about the grievance process. Such a "safety net" is not strictly necessary; the

reasonableness of the Decision would stand without it but its inclusion eliminates any legitimate subjective or objective concerns.

## IV. Conclusion

[20] Therefore, this judicial review will be dismissed with costs.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed with costs.

"Michael L. Phelan"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-743-13 |
| **STYLE OF CAUSE:** | CAROLYN BAGNATO v CANADA POST CORPORATION and CANADIAN UNION OF POSTAL WORKERS |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | SEPTEMBER 4, 2014 |
| **JUDGMENT AND REASONS:** | PHELAN J. |
| **DATED:** | SEPTEMBER 24, 2014 |

**APPEARANCES:**

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| Shaffin A. Datoo | FOR THE RESPONDENT, CANADA POST CORPORATION |

**SOLICITORS OF RECORD:**

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