Federal Court  Cour fédérale

Date: 20141124

Docket: T-871-14

Citation: 2014 FC 1120

Ottawa, Ontario, November 24, 2014

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

SERGEANT ANTONIO D'ANGELO

Applicant

and

ATTORNEY GENERAL OF CANADA AND ROYAL CANADIAN MOUNTED POLICE

Respondents

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of the Acting Chief Commissioner of the Canadian Human Rights Commission dated March 5, 2014, wherein it was determined that the Applicant's grievance would not be heard until the Applicant's other grievances had been completed, whereupon, it was said that the Applicant may reactivate the grievance at issue. For the reasons that follow, I have determined that this application will be allowed and the matter sent back for redetermination having regard to these Reasons.

[2] The Applicant is a twenty-nine year career officer with the Royal Canadian Mounted Police. He had achieved the rank of Sergeant and may well have achieved the rank of Staff Sergeant were it not for the events at issue.

[3] In 2007, the Applicant suffered a spinal injury while engaged in sports activities with his colleagues. The injury appears to have healed remarkably, but has left him with some disabilities, limiting running and the like. In December 2009, he was stationed as a Liaison Officer in Rome, Italy. While stationed in Rome, the Applicant appears to have stumbled on some cobblestones. On February 13, 2013, the Applicant was informed by his superior officer that his posting was being permanently terminated, and that he was being repatriated to Canada due to his disability and medical profile.

[4] In February 2012, the Applicant filed a grievance under the RCMP procedure requesting that his repatriation be suspended pending the outcome of his grievance. Notwithstanding, the Applicant was ordered back to Canada in March, 2012. Further, the Applicant was removed from the promotion process, whereby he hoped to be promoted to Staff Sergeant. The Applicant sought restoration of financial losses, losses for pain and suffering, and losses arising out of failure to receive expected promotion. In the period of May and June 2012, the Applicant filed six grievances in all.

[5] Matters did not seem to move very quickly in the RCMP grievance process. On March 13, 2013, the Applicant filed a complaint with the Canadian Human Rights Commission alleging discrimination based on medical disability and seeking reinstatement of his position as a Liaison

Officer in Rome, as well as financial compensation for a number of specified losses, including for the strain on his life.

[6] The Commission responded by a letter dated April 4, 2013, that it would look into the matter and prepare what is called a section 40/41 report. The Commission indicated that it could decide not to deal with the matter, particularly if there was another complaint or review process that could deal with the complaint. This response listed a number of factors that may be considered by the Commission, including:

> (a) *Is there another complaint or review process available to the complainant? Does the complainant have full access to the process?*
>
> (b) *If another complaint or review process is available, has it resulted in a final decision? If a final decision has not been made, has the complainant caused the delay?*
>
> (c) *Should the complainant be asked to go through another complaint or review process? Specifically:*
>
> (i) *What other complaint or review process is available (internal dispute resolution process, grievance process)? Is the decision-maker a neutral third party? If not, are there guidelines in place to ensure fairness for everyone involved?*
>
> (ii) *Is the other process an acceptable option for everyone?*
>
> (iii) *Does the complainant's current situation make him or her vulnerable? Could the other process harm anyone involved?*
>
> (iv) *Does the other complaint or review process have ways to prevent and/or protect people from retaliation?*
>
> (v) *Will the parties be able to deal with all of the human rights issues through the other process? If not, what human rights issues cannot be dealt with through the other process?*
>
> (vi) *What remedies are available through the other process? Would these remedies resolve the human rights dispute?*

(vii) *Have any steps been taken to use the other process? If not steps have been taken to use the other process, why not?*

(viii) *If the parties have started the other process, what is the status of the complaint?*

(ix) *What are the timelines of the other process? How long is it likely to take before a final decision is made?*

[7] On May 17, 2013, the Applicant, through his legal Counsel, gave a fulsome written submission replying to the Commission's request for information, including addressing the above factors.

[8] The Commission then set about conducting its own inquiries. A section 40/41 Report dated November 22, 2013 was issued by an Early Dispute Resolution officer. That eight-page Report reviewed many of the details of the Applicant's complaint, including the following:

. . .

31. The complainant has filed six (6) grievances regarding the issues in this complaint. It appears that the complainant has full access to the grievance process.

32. There has been no final decision regarding the complainant's grievance. The complainant submits that a number of delays were brought forth by the respondent.

33. While the respondent argues that the internal redress procedure is available and is currently dealing with this matter, the complainant argues that requiring him to exhaust the grievance process is unfair given that the delays which are inherent to the RCMP grievance system make it ineffective; there is no independent third party adjudication; and the grievance system cannot award the type of remedy the complainant is seeking.

34. Although the complainant has not indicated that he is vulnerable, he argues that pursuing the grievance procedure is "tantamount to denying Sgt. D'Angelo with any opportunity for justice or meaningful redress" because of the reasons cited earlier.

. . .

38. The complainant has raised significant concerns regarding the timelines of the internal grievance process. He notes that it has taken 15 months for his first grievance to arrive at Phase II of the grievance process. He believes it will take several more years before the remaining grievances reach Phase II and are eventually submitted for Adjudication. He argues that based on his 27 years of service, it is possible that he would retire at 35 years of service, prior to any decision being made on this matter.

. . .

41. The complainant alleges that the remedies he is seeking would not be available through the internal grievance process. He indicates that although a Level I Adjudicator might rule that the complaint should not have been removed from his post or from the promotion system, he/she would never award a reinstatement and/or promotion (deferring to Staffing and Personnel), nor would monetary damages (for "loss of a promotion, discrimination and humiliation", "hurt feelings and the loss of dignity") be awarded. The respondent representative confirmed that, while an Adjudicator would be able to request some monetary damages, he/she cannot order damages for pain and suffering that the complainant is seeking. With regards to reinstatement and/or promotion, they indicated that while it was not impossible for the adjudicator to order the complainant to be reinstated, it was not probable that this would occur. They acknowledged that reinstatement via the RCMP internal grievance process is not enforceable to the same extent as a tribunal remedy. It is true that the tribunal can order the remedies the complainant is seeking if discrimination is proven (reinstatement, promotion and compensation).

[9] The 40/41 Report concluded that the various grievances could not provide the remedies which the Applicant is seeking, reinstatement and/or promotion or monetary damages:

> *Conclusion*
>
> *42. The complainant has fled six (6) grievances that deals with issues raised in this complaint. It appears that the complainant has full access to the grievance process provided for under the RCMP Act. Although the grievance process will be able to deal with the human rights issues raised in this complaint, it does not appear that it can provide the remedies which the complainant is seeking: reinstatement and/or promotion or monetary damages.*

[10] The 40/41 Report recommended that the Commission deal with the complaint because it was not satisfied that the other procedures will address the allegation of discrimination:

> *Recommendation*
>
> *43. It is recommended, pursuant to subsection 41(1) of the Canadian Human Rights Act, that the Commission deal with the complaint because:*
>
> - *it is not satisfied that the other procedure will address the allegation of discrimination.*

[11] This Report was provided to Counsel for the RCMP and the Applicant for comment. The RCMP wrote a letter dated January 3, 2014, taking issue with the recommendation. Applicant's Counsel wrote a letter dated February 4, 2014 supporting the recommendation and taking issue with the matters raised in the RCMP's letter, including the lack of availability of a remedy, unreasonable delays, and whether reactivation of a complaint was problematic.

[12] On March 5, 2014, the Acting Chief Commissioner of the Canadian Human Rights Commission made a decision which I reproduce in full:

Decision under section 41(1)

The Commission decided, for the reasons identified below, 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 procedures, the complainant may ask the Commission to reactivate the complaint.

Material considered when decision made

The following documents were reviewed:

- *Complaint form dated March 13, 2013*
- *Section 40/41 report dated November 22, 2013*
- *Submission from respondent dated January 3, 2014*
- *Submission from the complainant dated February 4, 2014*

[13] Whereupon the Applicant filed for judicial review.

I. ISSUES

[14] The Applicant has raised the following issues:

A What is the Appropriate Standard of Review?

B Did the Commission fail to provide adequate reasons, thereby violating the principles of procedural fairness and natural justice?

C Did the Commission err in its application of section 42(2) of the Canadian Human Rights Act?

D Is the Commission's decision unreasonable?

A. *What is the Appropriate Standard of Review?*

[15] Counsel for the parties each agree that the standard of review is reasonableness. The Federal Court of Appeal has said as much in *Royal Canadian Mounted Police v Tahmoupour*, 2010 FCA 192, where Sharlow JA, writing for the Court, said at paragraph 8:

> *Most elements of a decision of the Tribunal are reviewed on the standard of reasonableness, including questions of law involving the Tribunal's interpretation of its own statute or questions of general law with respect to which the Tribunal has developed a particular expertise.*

B. *Did the Commission fail to Provide Adequate Reasons, thereby Violating the Principles of Procedural Fairness and Natural Justice?*

[16] The Reasons provided by the Commission are extremely brief. I repeat them:

> ***Reasons for decision***
>
> *The complainant has filed 6 grievances that deal with the issues raised in the complaint. The Commission is of the view that those grievances ought to be completed and, upon completion, the complainant may ask the Commission to reactivate the complaint.*

[17] The Supreme Court of Canada has set the guidelines with respect to sufficiency of reasons. In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, Abella J wrote that in considering both the process of articulating the reasons and the outcome, there must be shown the existence of justification, transparency and intelligibility:

> *47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of*

> *appreciation within the range of acceptable and rational solutions. 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.*

[18] In *Newfoundland and Labrador Nurses Union v Newfoundland and Labrador Treasury Board*, 2011 SCC 62, Abella J, for the Court, began her review with *Dunsmuir*, supra, stating at paragraph 14 that lack of "adequate" reasons is not a stand-alone basis for quashing a decision and stating at paragraph 16 that reasons are sufficient if they allow a reviewing Court to understand why the Tribunal made its decision, and permit the Court to determine if it is within the range of acceptable outcomes:

> *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.*

[19] At paragraph 22 of *Newfoundland Nurses*, Abella J stated that where there are reasons, then a challenge to the decision should be made within the reasonableness analysis:

> *22 It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there are reasons, there is no such breach. Any challenge to the*

> *reasoning/result of the decision should therefore be made within the reasonableness analysis.*

[20] Justice Rennie, of this Court, recently wrote in *Komolafe v Canada* (MCI), 2013 FC 431, that *Newfoundland Nurses* is not an open invitation for the Court or, I add, Counsel in argument, to review the record and guess what there may be in there that gives support to the decision. In order to connect the dots, the reasons must supply the dots. He wrote at paragraph 11:

> *11 Newfoundland Nurses is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that Newfoundland Nurses, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. Newfoundland Nurses allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.*

[21] Justice Noel, of this Court, in *7687567 Canada Inc v Canada (Foreign Affairs and International Trade)*, 2013 FC 1191, wrote in a similar vein that a reviewing Court is not intended to scour the record and infer what the basis for the reasons are. He wrote at paragraph 63:

> *63 Newfoundland Nurses thus allows gaps in the reasons to be filled or supplemented to an extent, in light of the decision maker's record. However, the Supreme Court of Canada certainly did not intend to allow decision makers to render decisions that are devoid of any justification and, moreover, "unfortunately" drafted, nor did the Court intend to allow these same decision makers to defend the essence of their decisions by requiring a reviewing court to rely on the decision maker's record and infer all the reasons from it, all the while accepting an affidavit that adds, after the fact, reasons that did not appear in the decision dated February 20, 2013.*

[22] In the present case, there really are no reasons, only a conclusion that the Applicant should await the outcome of his various grievances. No basis for that conclusion has been provided. The Reasons are inadequate.

[23] I will, therefore, proceed to the last issue raised by the Applicant, namely, was the decision reasonable?

C. *Was the Commissioner's Decision Reasonable?*

[24] In cases of this kind, the Court is often required to determine if a Commissioner's decision was reasonable. If the Commissioner has decided to adopt the recommendation made in a section 40/41 report, then the Court usually considers that the report constitutes the reasons of the Commissioner and reviews the matter on that basis. However, if the Commissioner decides to dismiss a complaint for reasons other than as set out in the report, the Commissioner should set out in the reasons why that was done. Justice Zinn, of this Court, wrote in *Herbert v Canada (Attorney General)*, 2008 FC 969, at paragraph 26:

> *26 The jurisprudence is clear that where the Commission provides the complainant what is essentially a form letter dismissing the complaint for the same reasons set out in the investigator's report, then the report does constitute the reasons of the Commission as to why the complaint was dismissed. If the Commission chooses to dismiss on some other basis than that advanced by the investigator, it must state those reasons in its decision. Where the parties' submissions on the report take no issue with the material facts as found by the investigator but merely argue for a different conclusion, it is not inappropriate for the Commission to provide the short form letter-type response. However, where these submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or*

> *are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all. Such was the situation in Egan v. Canada (Attorney General), [2008] F.C.J. 816; 2008 FC 649.*

[25] Justice Zinn's decision was written before the Supreme Court delivered its decision in *Newfoundland Nurses*, but must be considered to be strengthened by *Newfoundland Nurses.* Further, Justice Zinn was dealing with a circumstance where the Commissioner agreed with the section 40/41 Report, but on a different basis.

[26] The present case is even stronger than that before Justice Zinn. The Commissioner disagreed with the recommendation of the section 40/41 Report and never said why. It was simply wrong not to have said why.

[27] There were several bases upon which the section 40/41 Report recommended that the Commission deal with the matter. They included:

- the Applicant could only seek the remedies such as reinstatement, promotion, damages for financial loss, damages for stress, and so forth, in this proceeding, and none other;
- the grievances that the Applicant was pursuing within the RCMP system would take years to resolve; and
- whether the Applicant could reactivate his complaint was by no means certain.

[28] A reasonable decision would recognize that these matters demanded that the Commission deal with them. The resolution of the other grievances that the Applicant had pending would in no way deal with reinstatement, promotion, damages for financial loss, damages for stress, and the like. The decision not to hear, or to defer, was wholly unreasonable. To defer pending other grievances that in no way provide the remedies sought here and will, in any event, take an undue length of time to resolve, is wholly unreasonable.

D. *Did the Commission Err in its Application of Section 42(2) of the Canadian Human Rights Act?*

[29] Section 41(1) of the *Canadian Human Rights Act*, RSC 1985, c. H-6, provides that the Commission *shall* deal with a complaint *unless* it appears to the Commission that the alleged victim ought to exhaust other remedies. It states:

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;*

[30] Section 42(2) of that *Act* provides a caution respecting section 41(1)(a) such that the failure to exhaust other remedies shall not be attributable to the complainant:

42.(2) Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(a) has not been exhausted, the Commission shall satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to another.	*42.(2) Avant de décider qu'une plainte est irrecevable pour le motif que les recours ou procédures mentionnés à l'alinéa 41a) n'ont pas été épuisés, la Commission s'assure que le défaut est exclusivement imputable au plaignant.*

[31] Struggling through all the double negatives, section 41(1)(a) of this *Act*, when read in conjunction with section 42(2), means that the Commission *shall* hear a matter *unless* it appears to the Commission that the complainant *ought* to seek other remedies and where the failure to seek those remedies is the fault of the complainant. Even in such a case, it appears that the commission *may,* nonetheless, hear the matter.

[32] There is little jurisprudence dealing with section 42(2). In *Guydos v Canada Post Corp*, 2012 FC 1001, Justice Mandamin, of this Court, wrote at paragraph 54:

> *54 Section 42(2) requires the Commission, prior to determining that a complaint will not be dealt with pursuant to s. 41(1)(a), to satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to another. As stated in Bell Canada, the term "satisfy itself" indicates Parliament intended to grant significant deference to the Commission's decision that it was satisfied.*

[33] In the present circumstances, there has been a finding, as set out in paragraph 32 (previously reproduced) of the section40/41 Report, that the complainant has not caused any delay, but that the complainant submits that the RCMP was responsible for a number of delays.

[34] Among the many reasons advanced as to why the Commission should hear the matter is that of delays caused by the process within the RCMP.

[35] Section 42(2) of the *Act* is clearly a safeguard so that the Commission should not be forced into hearing a matter where the complainant, him or her self, is the causes of the delay. Section 42(2) should not be read so that the Commission may refuse to hear a matter where those who administer the alternative procedures are themselves the cause of delay. Quite the reverse. The Commission should hear the matter.

II. CONCLUSION

[36] The reasons were wholly inadequate. The decision was unreasonable. Section 42(2) of the *Canadian Human Rights Act* cannot be interpreted so as to preclude the Commission from hearing a matter where the alternate remedy is being delayed by those providing the alternate remedy.

[37] The parties have agreed as to the quantum of costs awarded to the prevailing party. It is $4,000.00.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT ORDERS AND ADJUDGES that:

1. The application is allowed;

2. The matter is returned for redetermination by a different person in accordance with these Reasons; and

3. The Applicant is entitled to costs fixed at $4,000.00.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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