Federal Court  Cour fédérale

Date: 20240716

Docket: T-1910-22

Citation: 2024 FC 1115

Ottawa, Ontario, July 16, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Shelley Whitelaw

Applicant

and

ATTORNEY GENERAL OF CANADA
and
ROYAL CANADIAN MOUNTED POLICE

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Applicant Shelley Whitelaw is a retired RCMP officer who brought a human rights complaint against the RCMP alleging retaliation stemming from events surrounding a traffic stop. She seeks judicial review of the Canadian Human Rights Commission's dismissal of her complaint.

[2] Ms. Whitelaw asserts that procedural fairness was breached because certain evidence on which the human rights officer relied to prepare the Report for Decision was not given to her in advance. In her view, the investigation was neither thorough nor impartial.

[3] She further asserts that the Commission's dismissal of her complaint was unreasonable in that it lacked sufficient reasons, ignored certain evidence, did not demonstrate a coherent and rational chain of analysis, and involved errors of fact and law.

[4] Having carefully considered the parties' and the Commission's records and heard the parties' oral submissions, I find, as explained below, that the Commission's decision was neither procedurally unfair nor unreasonable.

II. Background

A. *Events leading to the Retaliation Complaint*

[5] After she had retired from the RCMP, a traffic stop resulted in tickets for three traffic violations that Ms. Whitelaw disputed in provincial court. Upon questioning by Constable Hodges, the officer who stopped her, Ms. Whitelaw disclosed that she was a former RCMP officer and, at one point, provided Constable Hodges with her badge number. Constable Hodges disbelieved her. Ms. Whitelaw, however, in fact was a member of the RCMP between 1986 and 1987 and from 1996 to 2016 until she retired.

[6] Constable Hodges later prepared a Report to Crown Counsel [RCC] regarding a possible additional charge of personating a peace officer, a *Criminal Code*, RSC 1985, c C-46 offence (section 130). The RCC was prepared in 2017 before Ms. Whitelaw initially filed a complaint with the Civilian Review and Complaint Commission [CRCC] in the same year. She subsequently filed her first human rights complaint in 2018 alleging age and sex discrimination [Discrimination Complaint] about the traffic stop that the Commission referred to the CRCC. The CRCC, however, referred the Discrimination Complaint back to the Commission and it now has been referred to the Canadian Human Rights Tribunal for an inquiry.

[7] The detachment commander where Constable Hodges worked, Sergeant Fitzgerald (formerly Thain), determined that the personation charge would not be pursued because the threshold for the charge likely was not met. The RCC therefore was not forwarded initially to the Crown.

[8] The current human rights complaint alleging retaliation [Retaliation Complaint] relates to the eventual disclosure, however, of the RCC to the Crown during the trial of the disputed traffic violations, and it is based on section 14.1 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*]. See Annex "A" for relevant statutory provisions.

[9] The traffic tickets ultimately were withdrawn and no criminal charge for personation was laid.

B. *The Decision*

[10] Having reviewed the Retaliation Complaint, the Report for Decision prepared by the human rights officer [HRO] who investigated the matter, and the parties' post-Report submissions, the Commission dismissed the Retaliation Complaint pursuant to subparagraph 44(3)(b)(i) of the *CHRA*. The Record of Decision contains the Commission's reasons for doing so, along with the Report for Decision which the Commission adopted.

[11] Briefly, the Commission notes in the Record for Decision that Ms. Whitelaw alleges she was charged with personating a police officer as retaliation but that the Crown did not proceed with the charge. The Commission acknowledges Ms. Whitelaw's assertion that she was upset by the process and that it had a negative impact on her health.

[12] The Commission also notes Ms. Whitelaw's contention that the Report for Decision was biased because the HRO did not interview all the witnesses that she suggested nor did the HRO consider all the available documentary evidence. The Commission points out that the Report for Decision indicates Ms. Whitelaw informed the HRO that the witnesses had no direct personal knowledge of the allegations. The Commission concludes that it was not necessary to speak to the witnesses and the failure to do so does not reflect bias on the part of the HRO.

[13] Unless indicated otherwise, I will use the term "Decision" to mean collectively the Commission's dismissal of the Retaliation Complaint, the Record for Decision and the Report for Decision.

III. Analysis

A. *Was the Decision procedurally unfair?*

[14] Ms. Whitelaw's procedural unfairness assertion is rooted in part on the HRO's reliance on the RCMP's operational disclosure policy [Policy], referred to in the Report for Decision, which Policy was not provided to the Applicant before the Report for Decision was prepared. The Report discusses the Policy in connection with the RCMP's explanation for having forwarded the RCC to the Crown. She also asserts that the HRO was biased in several respects described below. I am not persuaded that the process was procedurally unfair, in the applicable circumstances.

[15] When confronted with procedural unfairness allegations, a reviewing court must ask whether a fair and just process was followed in all of the circumstances, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual"; in other words, did the applicant know the case to meet and have a full and fair chance to respond?: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56. As the Supreme Court of Canada observes, the duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 77.

[16] Dealing first with the issue of the Policy, I note that the Report for Decision describes at paragraph 64 in some detail that portion of the Policy the HRO found relevant for the purpose of assessing the RCMP's explanation for having disclosed the RCC to the Crown. Where a report

for decision discloses the substance of the evidence, as here, on which a human rights officer relies, and the parties have an opportunity to respond, as the parties here did before the Commission dismissed the Retaliation Complaint, no unfairness arises from the officer not having sent the underlying evidence itself to the parties: *Jean v Canadian Broadcasting Corporation*, 2015 FC 541 at para 26, citing *Canada (Minister of Environment Canada) v Hutchinson*, 2003 FCA 133 [*Hutchinson*] at paras 47-50, 53.

[17] Based on the above jurisprudence, I find that there was no procedural unfairness as a result of the HRO not providing Ms. Whitelaw with a copy of the Policy before preparing the Report for Decision. I note that, likewise, no procedural unfairness results from the HRO's failure to disclose the email exchange between the RCMP and the HRO during the investigation in which the HRO sought clarification on several points. As *Hutchinson* holds (at para 49), "[t]he right to know the case to be met and to respond to it arises in connection with material which will be put before the decision maker [i.e. the Report for Decision], not with respect to material which passes through an investigator's hands in the course of the investigation."

[18] Turning next to the issue of bias, I note that the allegation is multi-faceted. Ms. Whitelaw asserts a lack of thoroughness because the HRO interviewed only her and not her suggested witnesses. A lack of thoroughness also is shown, according to Ms. Whitelaw, by the mischaracterization of the Retaliation Complaint. In addition, she states the HRO was closed-minded in how the HRO interviewed her, appearing to have made a predetermination. Ms. Whitelaw also argues that the Report for Decision failed to consider whether the Policy was justified, having only considered whether the RCMP's explanation for making the disclosure was

reasonable. Further, in her view, the Commission's dismissal should have contained reasons for adopting the Report for Decision.

[19] The test for a reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude? Would [they] think it is more likely than not that the decision-maker whether consciously or unconsciously would not decide fairly?": *Sandhu v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 889 at para 61, citing *Yukon Francophone School Board, Education Area No 23 v Yukon Territory (Attorney General)*, 2015 SCC 25.

[20] There is a rebuttable presumption that a tribunal member will act fairly and impartially. Suspicion of bias alone, however, is not enough; a real likelihood or probability of bias must be demonstrated by the person alleging bias, and the threshold for a finding of real or perceived bias is high. I find that Ms. Whitelaw has not met her burden.

[21] That the HRO asked a question of Ms. Whitelaw (i.e. what the retaliation was, to which she answered "the disclosure") and moved on to the next question without asking a follow up question, or that the HRO did not interview all of the suggested witnesses (for both parties, for that matter), in themselves these events do not point to bias: *Tinney v Canada (Attorney General)*, 2010 FC 605 at para 28. Here, in particular, the HRO found it unnecessary to interview Ms. Whitelaw's proposed witnesses because, apart from Ms. Whitelaw herself, they did not have direct knowledge of the asserted retaliation.

[22] Rather, in my view, Ms. Whitelaw's assertions in this regard are speculative and do not involve any evidentiary support that meets the high threshold: *Canadian Broadcasting Corp v Canadian Human Rights Commission,* 1993 CanLII 16517 (FC) at para 43; *Jagadeesh v Canadian Imperial Bank of Commerce*, 2023 FC 1311 at para 31, citing *Hughes v Canada (Attorney General),* 2010 FC 837 at para 21.

[23] Further, although the Applicant may have preferred that the HRO ask different questions in the interview, investigators have a wide latitude regarding how they conduct their investigation; they are not required to turn over every stone nor can they be held to a standard of perfection: *Holm v Canada (Attorney General),* 2006 FC 1170 at paras 40-41. In other words, the Court generally will not order a new proceeding just because an applicant can think of a fairer or different process: *Oleinik v Canada (Privacy Commissioner),* 2011 FC 1266 at para 10.

[24] While the Record for Decision describes that Ms. Whitelaw alleges she was charged with Personating a Police Officer, I find that this mischaracterization is of no moment when considered in the context of the Retaliation Complaint and the Report for Decision, for at least three reasons.

[25] First, the Retaliation Complaint itself refers to "the RCMP officer's (malicious) attempt to criminally charge the complainant in his police report sent to Crown."

[26] Second, the Report for Decision notes specifically that the detachment commander Sergeant Fitzgerald determined the personating charge would not be pursued because the

threshold for the charge likely was not met. I find that, on the face of the Report, the HRO understood that the act of retaliation was the disclosure of the RCC to the Crown (twice) at a later time(s) in connection with the traffic tickets proceedings.

[27] Third, the Commission understood that the alleged retaliation on the part of the RCMP was as a result of Ms. Whitelaw's earlier Discrimination Complaint (i.e. the human rights complaint based on age and sex discrimination).

[28] Turning next to the issue of whether the Policy was justified, I find that Ms. Whitelaw has misapprehended the Commission's information sheet on preparing a defence to a complaint. The two defences of a reasonable explanation and *bona fide* justification (or, *bona fide* occupational requirement) are different and disjunctive. The RCMP did not need to establish both. In fact, the information sheet states that "it is important to pick the appropriate type of defence based on the evidence."

[29] Further, the information sheet describes that a "reasonable explanation is information that rebuts or refutes any presumption that there was discrimination." Once a respondent provides a reasonable explanation, the complainant has the opportunity to show that the explanation is a pretext for discrimination. Otherwise, the complaint is dismissed at this point.

[30] Here, the Report for Decision concludes (at para 47) that "there is a reasonable basis in the evidence to support that the Respondent could have treated the Complainant in an adverse differential manner when it sent Crown counsel a copy of the RCC." It was appropriate and not

unfair, in my view, for the HRO and the Commission to consider only whether there was a reasonable explanation for the treatment. They found that there was; accordingly, they did not need to consider *bona fide* justification.

[31] Concerning Ms. Whitelaw's argument that the Commission's dismissal should have contained reasons for adopting the Report for Decision, I find that it is without merit. It is inherent in the brief reasons provided and in the act of adopting the Report for Decision that the Commission agrees with the HRO's recommendations. Nothing further is required.

[32] Where a decision of the Commission adopts the recommendations in an investigator's or officer's report, and provides only brief reasons, the underlying report simply is treated as part of the Commission's reasons for the purpose of review. The rationale is that the person who prepared the report is considered an extension of the Commission: *Sketchley v Canada (Attorney General*), 2005 FCA 404 at para 37 (in the context of subsection 44(3) of the *CHRA*, as is the case here); *Berberi v Canada (Attorney General)*, 2013 FC 99 at para 18 (in the context of paragraph 41(1)(d) of the *CHRA*).

B. *Was the Decision unreasonable?*

[33] I am not persuaded that Ms. Whitelaw has met her onus of showing that the Decision is unreasonable: *Vavilov*, above at para 100.

[34] Ms. Whitelaw asserts that the disclosure of the RCC made by Sergeant Fitzgerald of the RCMP was not requested specifically by the Crown. Further, she describes that the manner in

which the disclosure occurred, i.e. by giving the false impression that there was an active criminal charge against her, is the crux of the asserted retaliation. Ms. Whitelaw states she felt threatened and intimidated by this action and it significantly and negatively impacted her mental, emotional and physical health. From her perspective, the HRO did not understand the layered complexity of the Retaliation Complaint.

[35] I do not doubt that this experience has taken a toll on Ms. Whitelaw. The Court's role in judicial review, however, is not to determine whether the Commission's dismissal of the Retaliation Complaint was correct. Judicial review is not an appeal.

[36] Rather, the Court is tasked with assessing whether the Commission's reasons are logical and reflect a rational chain of analysis in the context of the evidence before it; in other words, does the decision exhibit the hallmarks of justification, transparency and intelligibility, and is it justified in the context of the applicable factual and legal constraints?: *Vavilov*, above at paras 97, 99.

[37] Further, as the Supreme Court of Canada guides, an administrative decision is not to be assessed against a standard of perfection, nor is the assessment to be treated as a line-by-line treasure hunt for error: *Vavilov*, above at paras 91, 102. Administrative decision makers are not expected to respond to all arguments or lines of possible analysis, nor are they required to make explicit findings on each constituent element of the matters they consider in reaching their conclusions. They are expected, however, to contend with central or key arguments and issues: *Vavilov*, above at para 128.

[38] Bearing in mind the role of a reviewing court on reasonableness review, I find that, while Ms. Whitelaw strongly disagrees with the Decision, she has not demonstrated a reviewable error.

[39] The Commission has a wide degree of latitude when screening complaints after receiving an investigation report, and broad discretion to dismiss complaints pursuant to subparagraph 44(3)(b)(i) of the *CHRA* when it is satisfied that no further inquiry is warranted; the Court should not intervene lightly: *Walsh v Canada (Attorney General)*, 2015 FC 230 at para 19.

[40] Ms. Whitelaw disputes that the Crown requested the RCC at any time. She asserts that the Crown only requested the traffic ticket and notes and the RCMP sent the RCC without prompting. The HRO, she submits, thus ignored her statement to the effect that sending the RCC was indicative of the procedure for seeking charge approval, not the procedure for disclosure. I disagree. Paragraphs 57-59 and 67 of the Report for Decision acknowledge Ms. Whitelaw's specific submissions in this regard.

[41] Further, while Ms. Whitelaw disagrees with the HRO's statement that the Crown counsel forwarded the disclosure to her counsel, she has not pointed to any supporting evidence. Ms. Whitelaw also takes issue with the interpretation of the Crown's request for "traffic ticket and notes" as including the RCC, but I find she has not demonstrated a reviewable error. These arguments demand a level of perfection in the Report for Decision that is not warranted and are tantamount to rearguing the merits of the Decision. This is not appropriate on a reasonableness review.

[42] I add that on judicial review, this Court generally will "defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist" [underlining added]: *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 40; *Canada (Attorney General) v Heffel Gallery Limited*, 2019 FCA 82 at para 48; *Delios v Canada (Attorney General)*, 2015 FCA 117 at paras 27-28.

IV. Conclusion

[43] While I recognize that the outcome of this matter will be disappointing to Ms. Whitelaw, I am satisfied that, after careful review and consideration of the Decision, the Commission's records, the parties' records and their oral submissions, the Decision is logical and coherent and permits the Court to "connect the dots." In other words, the reasons add up and, hence, the Decision is not unreasonable. Further, the Decision does not demonstrate procedural unfairness. This judicial review application thus will be dismissed.

[44] The Respondent seeks minimal lump sum costs in the amount of $500. I determine that this is an appropriate figure in the circumstances and, thus, the Respondent will be awarded lump sum costs of $500, inclusive of disbursements, payable by Ms. Whitelaw.

JUDGMENT in T-1910-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed.

2. The Respondent is awarded lump sum costs of $500, payable by the Applicant, inclusive of disbursements.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Canadian Human Rights Act,* RSC 1985, c H-6.**
***Loi canadienne sur les droits de la personne,* LRC 1985, ch H-6.**

Retaliation **14.1** It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.	**Représailles** **14.1** Constitue un acte discriminatoire le fait, pour la personne visée par une plainte déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée.
Report **44 (1)** An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation. … **Idem** **(3)** On receipt of a report referred to in subsection (1), the Commission … **(b)** shall dismiss the complaint to which the report relates if it is satisfied **(i)** that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or **(ii)** that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).	**Rapport** **44 (1)** L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête. … **Idem** **(3)** Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission : … **b)** rejette la plainte, si elle est convaincue : **(i)** soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié, **(ii)** soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1910-22
STYLE OF CAUSE:	SHELLEY WHITELAW V ATTORNEY GENERAL OF CANADA AND ROYAL CANADIAN MOUNTED POLICE
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	JUNE 24, 2024
JUDGMENT AND REASONS:	FUHRER J.
DATED:	JULY 16, 2024

APPEARANCES:

Shelley Whitelaw	FOR THE APPLICANT (ON THEIR OWN BEHALF)
Ely-Anna Hidalgo-Simpson	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENTS