Date: 20080423

Docket: T-558-08

Citation: 2008 FC 530

Ottawa, Ontario, April 23, 2008

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ATTORNEY GENERAL OF CANADA
(CANADIAN FORCES)

Applicant/Moving Party

and

MICHELINE ANNE MONTREUIL
CANADIAN HUMAN RIGHTS COMMISSION

Respondents/Respondents

and

J. GRANT SINCLAIR, Q.C., IN HIS CAPACITY AS
CHAIRPERSON OF THE CANADIAN HUMAN RIGHTS TRIBUNAL

CANADIAN HUMAN RIGHTS TRIBUNAL

Third Party

REASONS FOR ORDER AND ORDER

[1] Parliament conferred on the Chairperson of the Canadian Human Rights Tribunal the power to permit Tribunal members whose appointment has expired to conclude cases that they have begun. Pierre Deschamps, a part-time member of the Tribunal, had been dealing with the complaint of

Micheline Anne Montreuil against the Canadian Armed Forces, and in December 2007, after presiding over the hearing, which lasted 97 days over a period of 14 months, he reserved his decision. In February 2008, while the decision was still pending, his appointment with the Tribunal expired. He was not reappointed by the Governor in Council.

[2] On behalf of the Canadian Armed Forces, the Attorney General asked the Chairperson of the Tribunal, Mr. J. Grant Sinclair, to permit Mr. Deschamps to conclude his inquiry and issue his decision. The Attorney General asked for the opportunity to make representations. Chairperson Sinclair denied this request.

[3] The Canadian Armed Forces filed an application for judicial review of that decision. The Court is required to determine whether the proceeding before the Tribunal should be stayed until a decision is made on the application for judicial review.

[4] As a superior court of record, the Federal Court has the inherent power to stay proceedings and, more specifically, to make interim orders, including a stay of proceedings of any matter before a federal board or tribunal until an application for judicial review is considered (section 18.2 of the *Federal Courts Act*). The circumstances under which a stay may be granted until other proceedings are determined are well known. As the Supreme Court stated in *R.J.R. - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17, there must be a serious question to be tried that is neither frivolous nor vexatious; the applicant will suffer irreparable harm if the

stay application is dismissed; and the assessment of the balance of convenience favours the applicant. The public interest must also be taken into account.

DECISION

[5] Section 48.2 (2) of the *Canadian Human Rights Act* states the following:

48.2 (2) A member whose appointment expires may, with the approval of the Chairperson, conclude any inquiry that the member has begun, and a person performing duties under this subsection is deemed to be a part-time member for the purposes of sections 48.3, 48.6, 50 and 52 to 58.	**48.2** (2) Le membre dont le mandat est échu peut, avec l'agrément du président, terminer les affaires dont il est saisi. Il est alors réputé être un membre à temps partiel pour l'application des articles 48.3, 48.6, 50 et 52 à 58.

[6] Although Chairperson Sinclair refused the Canadian Armed Forces' request to make representations, the Registrar of the Tribunal issued a letter setting out the reasons why he refused to allow Mr. Deschamps to complete the inquiry in this case. When Mr. Deschamps' appointment expired and was not renewed by the Governor in Council, he was dealing with four cases including this one. Chairperson Sinclair exercised his discretion to authorize Mr. Deschamps to conclude the other cases; those decisions had to be issued by September 12, 2008. In making that decision, Chairperson Sinclair took into account a number of considerations including his power to supervise and direct the work of the Tribunal subject to natural justice, in particular, his power to allocate work among the members, the duty to conduct proceedings expeditiously, the time and resources already devoted to this matter and Mr. Deschamps' jurisdictional workload from other cases. The Chairperson also had to consider the limited length of time granted to a member to allow him or her

to complete an inquiry. In the circumstances of this case, he concluded that the decision in Ms. Montreuil's case could not be issued within a reasonable period of time. He therefore appointed the Vice-Chairperson, Mr. Hadjis, to take over this inquiry.

[7] In short order, Mr. Hadjis asked the parties to indicate their availability to participate in a case management conference. The Attorney General responded on behalf of the Canadian Armed Forces indicating that an application for judicial review would be filed along with a motion to stay the Tribunal proceeding until the application for judicial review was determined and that, therefore, the Attorney General would not participate in the discussion.

SUBMISSIONS OF THE PARTIES

[8] Since the conditions under which a stay may be granted are known but not watertight, it is appropriate to set out each party's submissions before proceeding with my analysis. In this case, the Tribunal is dealing with a complaint in which the complainant, Micheline Montreuil, alleges that she was discriminated against by the respondent, the Canadian Armed Forces, on the ground of her sex and a perception of disability when the Forces refused to allow her to enlist in the Forces in 1999.

Position of the Canadian Armed Forces

[9] As of this date, the hearing of this inquiry is the second longest hearing in the history of the Canadian Human Rights Tribunal. At the hearing, a number of factual and expert witnesses

testified. It should also be noted that there are very few experts in the world, even fewer in Canada, on the transgender issues that are the very basis of Ms. Montreuil's complaint. This has resulted in an enormous cost for the Canadian Armed Forces and, ultimately, for Canadian taxpayers, not to mention the resultant constraints on the Forces' human resources department.

[10] For the Canadian Armed Forces, recommencing this process would be a needless loss. If it had had the opportunity to make representations on the Chairperson's power to authorize Mr. Deschamps to conclude the case, the Chairperson would have seen that Ms. Montreuil's credibility lies at the heart of this inquiry and that, therefore, a *de novo* hearing would be required.

[11] The Chairperson's refusal to give the Forces the opportunity to make representations is a breach of natural justice. To advance an argument linked to section 48.4(2) of the *Canadian Human Rights Act* that the Chairperson, as chief executive officer of the Tribunal, was merely exercising his power to supervise and manage its internal affairs including the power to allocate work among the members, the Attorney General referred to the Federal Court of Appeal decision in *Bell Canada v. Canada (Human Rights Commission) (C.A.),* 2001 FCA 161, [2001] 3 F.C. 481. In that case, the issue was the Chairperson's power to authorize a member to conclude an inquiry. At paragraph 45 of his decision, Mr. Justice Stone wrote the following:

> It is also to be noted that if the Chairperson were to abuse his power in extending or refusing to extend the appointment of a Tribunal member for reasons wholly extraneous to the proper administration of the Tribunal, his decision would be reviewable pursuant to section 18.1 of the *Federal Court Act*. I would add that, as a practical matter, the Chairperson would appear to have a strong disincentive for refusing to extend a Tribunal member's appointment in appropriate circumstances since to do so would require starting the case afresh.

> Given that many cases before the Tribunal take years to litigate, frustrating the process in this manner would inevitably tend to discredit the Tribunal and, by implication, the Chairperson himself.

[12] The Supreme Court dismissed the appeal from that decision, 2003 SCC 36, [2003] 1 S.C.R. 884, [2003] S.C.J. No. 36. Chief Justice McLachlin and Mr. Justice Bastarache stated the following at paragraph 52:

> There is an obvious need for flexibility in allowing members of the Tribunal to continue beyond the expiry of their tenure, in light of the potential length of hearings and the difficulty of enlisting a new member of a panel in the middle of a lengthy hearing . . .

[13] Pursuant to the above-noted remarks by Justice Stone, if the inquiry continues before a new member, it must be *de novo*. An abridged hearing, based on the transcript of what has already transpired, would be a breach of the principles of natural justice.

[14] The inquiry should continue with a new hearing because of the Canadian Armed Forces' position that the case involves Ms. Montreuil's credibility. Section 50(1) of the Act provides for a full and ample opportunity to appear and present evidence. Since it would be necessary to ascertain the availability of expert witnesses, the earliest the hearing could recommence would be September 2008. In light of the difficulties raised by Ms. Montreuil during the first inquiry, it is presumed that the hearing would last another 97 days over a period of 14 months. This means that the decision on the inquiry would not be reserved until the end of 2009. Chairperson Sinclair's decision only prolongs this ongoing matter.

[15] An abridged hearing, based on the transcript of what has already been addressed, would deprive the Canadian Armed Forces of a full and ample opportunity to present its case. The transcript does not reveal everything, particularly Ms. Montreuil's behaviour. In addition, there was a [TRANSLATION] "viewing" at Valcartier military base, over the objections of Ms. Montreuil. This visit clearly demonstrated Ms. Montreuil's unsuitability for becoming an employee of the Canadian Armed Forces. No notes were taken during that visit.

[16] If the Canadian Armed Forces succeeds on its application for judicial review, putting aside for the moment the possibility of an appeal, the case will be returned to the Chairperson or someone on his behalf for review. The review would be based on things being what they were at that time, and should therefore also take into account the status of the inquiry (*Myle v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1073, [2007] No. 1389 at paragraph 13 and following).

[17] Consequently, the right of the Canadian Armed Forces could be futile if the new member had moved the case forward to a certain extent.

[18] There is a risk of contradictory decisions or two members who are actually dealing with the same case at the same time. Such a situation should be avoided.

[19] The Canadian Armed Forces submits that Ms. Montreuil would not suffer any harm if the Tribunal inquiry were stayed while the application for judicial review proceeds since, if the application is allowed, her complaint is essentially based on a claim for lost income.

Ms. Montreuil's position

[20] Ms. Montreuil, who is a lawyer, represented herself before the Tribunal and now before the Court. Unlike the Canadian Armed Forces, she is not opposed to the Chairperson's decision to not allow Mr. Deschamps to conclude this file and to designate the Vice-Chairperson to take over. In her view, if Mr. Deschamps continued to deal with this case, since he had reserved decisions on other matters, and since Chairperson Sinclair ordered him to issue his decisions before the September 2008 deadline, it is reasonable to believe that the decision in this file would not be issued before mid-2009.

[21] She would be satisfied if Vice-Chairperson Hadjis proceeded on the basis of the transcript of what has transpired to date. If her credibility is at issue, she is prepared to testify again.

[22] Chairperson Sinclair's decision simply involves the management of a proceeding. There is no serious question. In addition, given that the Canadian Armed Forces boycotted Vice-Chairperson Hadjis' request for a preliminary case management conference, it is not their place to complain about the manner in which the case is advancing at the Tribunal. Comments relating to the progress and management of the inquiry should be addressed to the Tribunal itself, not to this Court. The position of the Canadian Armed Forces is completely premature and speculative. Who knows how Vice-Chairperson Hadjis will dispose of the inquiry?

[23] Ms. Montreuil claims that it is she who is suffering irreparable harm, not the Canadian Armed Forces. Dealing with this case has taken up so much time that she had no choice but to leave her employment. Everyone else involved in this inquiry, with the exception of herself, is remunerated through public monies. Ms. Montreuil believes that it is she who is being inconvenienced in this case.

Position of the Commission

[24] The Commission is of the opinion that if someone is going to suffer irreparable harm, it is Ms. Montreuil and that the balance of convenience lies in her favour. With respect to a serious question to be tried, the Commission even argues that the decision is not really justiciable. This matter is really only an interlocutory case management issue.

[25] If anyone has a basis for an application for judicial review, which Ms. Montreuil seriously doubts, it is not up to her or the Canadian Armed Forces to bring the application; it is up to Mr. Deschamps.

[26] In this case, it is the Commission that represents the public, not the Canadian Armed Forces. The latter is, in fact, an employer, although putative in this case, the same as any other employer. Section 51 of the Act provides that, in appearing at a hearing, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

[27] Since Vice-Chairperson Hadjis has not yet ruled on how this inquiry will unfold, the Commission agrees with Ms. Montreuil that the application by the Canadian Armed Forces is premature and speculative.

[28] However, counsel noted that hearsay evidence is admissible before the Tribunal and that the right to question witnesses is not unlimited. The decision of a tribunal to not allow a party against whom a complaint has been filed to call witnesses was recently confirmed by the Federal Court of Appeal in *Goodwin v. Birkett*, 2008 FCA 127, [2008] F.C.J. No. 537.

[29] Notwithstanding the foregoing, the Canadian Armed Forces' complaint is that the Governor in Council did not renew Mr. Deschamps' appointment. The Court is not seized of this issue here.

ANALYSIS

Serious question to be tried

[30] In *RJR - MacDonald Inc.*, above, the Supreme Court recognized the difficulties that trial judges face on these motions. A decision must be made quickly based on a limited review of a file. Although there were almost five hours of submissions and reference to more than a dozen decisions, the Attorney General would like to obtain a decision as soon as possible because the final date proposed by Vice-Chairperson Hadjis for a case management conference is April 25.

[31] It appears to this Court that the Canadian Armed Forces has met the rather low burden of establishing that there is a serious question to be tried. The points that it raises are neither frivolous nor vexatious. There is no case law regarding the circumstances that the Chairperson of the Tribunal must consider in determining whether a member whose appointment has expired must nonetheless conclude matters that he or she has begun. We can readily say that the state of the proceedings and the cost to the parties are relevant issues that must be addressed. Relying on the recent Supreme Court decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, it may well be that the discretionary decision must be reviewed against a standard of reasonableness *simpliciter*.

[32] The Attorney General has also raised the issue of natural justice, which must always be reviewed against a standard of correctness. The Attorney General should have had the opportunity, as requested, to make representations that would have been along the same line as those made to this Court.

[33] I will spend almost no time on the aspect of a serious question to be tried since I am convinced that it has been established, at least at this stage of these proceedings. I will now assess the issues of irreparable harm and the balance of convenience.

Irreparable harm

[34] It is both too speculative and too premature to assume anything about how this inquiry will unfold. The Attorney General should have cooperated with the Tribunal and participated in the case management meeting, of course, without prejudice to his application for judicial review and his stay motion.

[35] At this stage, there is no reason to assume that the Attorney General will be deprived of an impartial hearing as the case progresses. Perhaps a new hearing is necessary, as suggested by Mr. Justice Stone in *Bell Canada*, above.

[36] Similarly, if, as the Attorney General submits, there must be a new hearing and it cannot begin until September, this new hearing would not have progressed very far by the time the decision on the application for judicial review is made. In the same vein, I am going to grant the Attorney General's oral motion and order that this matter proceed as a specially managed case so that this application will be heard on the merits as quickly as possible.

BALANCE OF CONVENIENCE

[37] With respect to irreparable harm and the balance of convenience, these two aspects seem, at this stage of the proceedings, to favour Ms. Montreuil, not the Canadian Armed Forces. The expense and the time required to make a motion pending judicial review would have very little influence (see: *Fournier v. Attorney General of Canada*, 2003 FC 996, [2003] F.C.J. 1257). A stay of proceedings would cause a loss of precious time if the application for judicial review were dismissed, either by the applications judge or on appeal.

[38] I recognize that the Tribunal may issue its decision even before the decision on the judicial review is rendered, and that, even if the judicial review is granted, a new review would be at a more

advanced stage of the inquiry that is being conducted. The Canadian Armed Forces could take some comfort in its victory.

[39] However, these are not the facts before me, and, consequently, I am going to dismiss the motion for a stay of proceedings, without prejudice to the Attorney General's right to make a new motion if circumstances change.

[40] Costs will be in the cause.

ORDER

THE COURT ORDERS:

1. The motion is dismissed.

2. The case will proceed as a specially managed case and will be sent to the Chief Justice so that he can assign a case management judge in this proceeding.

3. Costs will be in the cause.

"Sean Harrington"
Judge

Certified true translation,
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-558-08
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA (CANADIAN ARMED FORCES) -and- MICHELINE ANNE MONTREUIL CANADIAN HUMAN RIGHTS COMMISSION -and- J. GRANT SINCLAIR, Q.C., IN HIS CAPACITY AS CHAIRPERSON OF THE CANADIAN HUMAN RIGHTS TRIBUNAL and the CANADIAN HUMAN RIGHTS TRIBUNAL
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	April 17, 2008
REASONS FOR ORDER AND ORDER BY:	Mr. Justice Sean J. Harrington
DATED:	April 23, 2008

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