

Federal Court



Cour fédérale

Date: 20120817

Docket: T-1360-11

Citation: 2012 FC 1001

Ottawa, Ontario, August 17, 2012

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

DEBORAH GUYDOS

Applicant

and

CANADA POST CORPORATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Deborah Guydos applies for judicial review of a decision of the Canadian Human Rights Commission (the “Commission”) not to deal with the Applicant’s March 18, 2010 complaint because the Applicant had not yet exhausted her recourse to other available processes for addressing her complaint.

[2] At the start of the hearing on June 18, 2012, Ms. Guydos advised that she had just been informed by the Commission that the Commission revived its consideration of her complaint because her union, the Canadian Union of Postal Workers (the “Union”), had withdrawn the

grievance before the Canadian Industrial Relations Board (the “CIRB”). Counsel for the Respondent, Canada Post Corporation, did not have any such notice from the Commission. Subsequently Ms. Guydos provided a copy of a July 24, 2012 letter advising the Commission would be reviewing the issues raised under section 41(1)(d). The Respondent did not have any further information but submits, based on the July 24, 2012 letter, that the application is moot and should be dismissed.

[3] Ms. Guydos had desired to proceed with her application because she contended the Commission erred in not considering her complaint relating to events that occurred prior to 2008.

[4] Paragraph 41(1)(d) provides the Commission shall deal with any complaint filed unless it appears to the Commission that the complaint is trivial, frivolous, vexatious or made in bad faith. As such, it is not clear whether the Commission has decided to reactivate Ms. Guydos’ complaint. Considering Ms. Guydos is unrepresented and made her submissions to the Court on June 18, 2012, I consider the better course of proceeding is to decide the issues as put before the Court on June 18, 2012.

[5] After consideration of the issues, I have decided Ms. Guydos has failed to demonstrate the Commission committed a reviewable error and I dismiss this application. My reasons follow.

Background

[6] The Applicant began working for Canada Post in 1994. Later that year she began co-habiting with a co-worker, Mr. Joseph Coscia. The Applicant claims that Mr. Coscia abused her and that he was charged in April 1995 with criminal harassment, uttering death threats and assaulting and threatening to sexually assault her two children. As a result, the Applicant says a restraining order was issued against Mr. Corsica who nevertheless continued to be a co-worker at Canada Post.

[7] The Applicant alleges that she informed her supervisors, including her station manager, about the restraining order and that she feared for her safety in the workplace. The Applicant alleges that between 1995 and 1999, she was assaulted and criminally harassed at her workplace approximately 30 or more times, presumably by her estranged partner. The Applicant alleges these incidents of assault and criminal harassment were reported to her supervisors but nothing was done to stop or prevent re-occurrences. In 1998, the Applicant refused to work at the same location as her former partner. She was subsequently transferred to another location. Her station manager became zone manager and continued to supervise her. The Applicant says she was informed that the abusive co-worker was scheduled to be transferred to the same location.

[8] The Applicant went on sick leave and claimed disability insurance in 1998. The Applicant alleges that when she tried to return to work in 1999, she was informed that her disability insurance claim was not going to be processed. The Applicant states she is still

awaiting her disability insurance as the Respondent refuses to disclose the documents required to process her disability claim with her insurance carrier.

[9] The Applicant also claims that the Union was fully aware of her situation but that grievances she filed disappeared.

[10] The Applicant alleges that in 2000, while she was on sick leave, the Respondent decided that she had abandoned her position. The Applicant claims she was terminated at that time, although she claims that she did not discover this until 2003, after which time she descended into a deep depression which required hospitalization.

[11] The Applicant reports that when she became well enough, she asked her Union if she could return to work. The Applicant was re-instated in 2006. The Applicant states that upon returning to work, she was placed to work under the same supervisor which led to her situation again worsening. The Applicant went back on sick leave and has not returned to work since.

[12] The Applicant claims that her Union and the Respondent withdrew all of her grievances. The Applicant stated that she had a complaint before the CIRB and was awaiting a decision concerning the Union's failure to properly represent her with respect to her complaints.

[13] The Applicant alleges that the Respondent required her to undergo an independent medical assessment notwithstanding already having the requisite medical documentation. The Applicant was sent for a medical assessment sometime in 2008 to a doctor of the Respondent's

choosing. The Applicant alleges that instead of an independent medical examination, this was in fact a risk assessment about her. The Applicant believes that the report completed was purposely distorted to minimize the level of the alleged abuse she received in the workplace. The Applicant contends that the Respondent was seeking to use this assessment to have her terminated.

[14] Finally, according to the Applicant, although she had always known that she had been assaulted, it was not until 2008 that she could remember the details. The Applicant describes having severe flashbacks of the assaults after receiving the assessment from her employer.

[15] The Applicant first contacted the Commission on October 27, 2008 but did not file an acceptable complaint form until March 18, 2010.

[16] The Applicant was terminated as an employee of Canada Post Corporation on April 2, 2010.

Decision Under Review

[17] On July 29, 2011, the Commission issued its decision. It considered the following material in making its determination:

- Complaint form(s) dated March 24, 2010
- Section 40/41 Report dated January 31, 2011

In addition, the Commission considered the following submissions of the parties:

- Submission from complainant dated March 11, 2011
- Submission from respondent dated March 11, 2011
- Submission from respondent on cross-disclosure dated April 8, 2011
- Submission from complainant on respondent's cross-disclosure dated May 4, 2011
- Submission from complainant on cross-disclosure dated June 3, 2011

[18] The Commission's decision essentially followed the recommendations at the conclusion of the Section 40/41 Report (the "Report"). Mr. Scott Whitelaw (the "Investigator") reviewed the facts alleged, summarized the positions of the parties and analyzed the Applicant's complaint as it related to section 41(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the "Act"), more specifically sections 41(1)(a), 41(1)(c) and 41(1)(e), concluding with his recommendations to the Commission.

[19] The Commission determined, pursuant to s. 41(1)(a), not to deal with the Applicant's complaint at this time because the Commission determined the Applicant ought to first exhaust grievance or review procedures otherwise reasonably available to her. The Commission stated that at the end of the grievance or review procedures, the Applicant may ask the Commission to reactivate the complaint.

[20] The Commission also decided, pursuant to s. 41(1), that it would address the allegations that occurred from 2008 onward. However, pursuant to s. 41(1)(e) of the *Act*, it decided not to deal with the allegations which occurred prior to 2008.

Relevant Legislation

[21] *The Canadian Human Rights Act*, RSC 1985, c H-6 provides:

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

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(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;

(c) the complaint is beyond the jurisdiction of the Commission;

(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.

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) 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) 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) la plainte n'est pas de sa compétence;

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.

Issues

[22] The Applicant is a self-represented litigant. In her written submissions, the Applicant raises a number of issues contending erroneous findings of fact, errors of law, inadequate reasons and issues of procedural unfairness. In her oral submissions, she asserted that the Commission provided inadequate reasons, failed to consider her allegations of pre-2008 workplace harassment by her employer and failed take into account her disability as an explanation for her delay in filing her human rights complaint.

[23] The Applicant says she had been harassed, firstly by her former partner who was a co-worker, and secondly by management in the workplace. As a result of the harassment, the Applicant says she suffers post traumatic stress syndrome (PTSD) which made it difficult to remember details about incidents and to speak out about them.

[24] The Respondent submits the issues arising in this case are the determination of the standard of review of the Commission's decision and whether, in light of the appropriate standard of review, the Commission's decision ought to be set aside.

[25] In my view, there are two issues in this proceeding:

- a. Did the Commission err in deciding that it would not consider the Applicant's pre-2008 discrimination complaint?

- b. Did the Commission err in deciding that it would not consider the Applicant's post-2008 complaint at this time because of the availability of alternate grievance or review procedures?

Standard of Review

[26] The Supreme Court of Canada held in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact: *Dunsmuir* at paras 50 and 53. The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated: *Dunsmuir* at para 62.

[27] The Federal Court of Appeal has held that deference is to be afforded to the Commission of a screening decision made pursuant to s. 41 of the *Act*. In *Bell Canada v C.E.P.*, [1999] 1 FC 113, [*Bell Canada*], the Court of Appeal stated the following at paragraph 38 regarding the Commission's exercise of discretion:

The Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report. Subsections 40(2) and 40(4) and sections 41 and 44 are replete with expressions such as "is satisfied", "ought to", "reasonably available", "could more appropriately be dealt with", "all the circumstances", "considers appropriate in the circumstances" which leave no doubt as to the intent of Parliament.

[28] Moreover, the Commission, in determining whether to consider the Applicant's complaint, has to decide questions of mixed fact and law. In doing so, the appropriate standard of review of the Commission's decision is reasonableness.

[29] Where an issue of procedural fairness or a question of law is brought to the Court's attention, the Commission is not to be afforded deference. The standard of review would be correctness on these issues: *Donoghue v Canada (Minister of National Defence)*, 2010 FC 404 at para 27.

Analysis

[30] I begin by noting the Commission accepted the Applicant's complaint under s. 41(1) of the *Act* with two qualifications. The first was that it would not consider the allegations of discrimination that occurred prior to 2008 because they were separate and occurred outside the one year time frame contemplated by s. 41(1)(e). The second was that the Commission decided not to proceed with the Applicant's post-2008 complaint because the Applicant had alternate grievance or redress measures available to her which she had underway.

[31] I turn now to the two limitations the Commission placed on the Applicant's complaint. In doing so, I not only consider the Commission's decision but also the Investigator's Report.

Did the Commission err in deciding that it would not consider the Applicant's pre-2008 discrimination complaints?

[32] The Applicant submits the Commission erred by deciding not to consider the Applicant's pre-2008 complaints because the incidents are separate. I disagree.

[33] The Applicant fails to demonstrate how the Commission erred in concluding that the pre-2008 incidents were separate from the post-2008 incidents; she provides no support for her contention.

[34] The Applicant asserts that the Commission failed to consider the pre-2008 complaints because they were criminal in nature. She states she should have had the opportunity to make submissions on whether the assaults fell under the *Act*. She also says she should have had the opportunity to provide written submissions with respect to the timeliness issue regarding the pre-2008 incidents.

[35] In her submissions to the Commission, the Applicant took the position that her complaint was very serious and raised issues of public importance. She described the situation as being a cover-up of facts by her employer and the Union, and ongoing harassment. She explained there have been delays due to her health, PTSD, court proceedings and manipulation of facts by the employer and the Union.

[36] The Applicant filed her completed complaint form on March 18, 2010.

[37] The Commission may consider complaints based on acts that occur more than one year before the complaint is made. Section 41(1)(e) provides:

- (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 [emphasis added].

[38] The Commission noted the first alleged incident was in 1995 while the last was said to have occurred in April 2010. It acknowledged the Applicant's first contact with the Commission concerning this complaint was on October 27, 2008. The Commission recognized the Applicant insisted the issues were of an ongoing nature and constituted a continuous pattern of discrimination.

[39] The Commission found it significant that even though the first alleged discriminatory incident dates back to 1995, the Applicant does not explain why she did not file a complaint at that time. The Commission noted the Applicant says she only recalled details of the alleged assaults in 2008 when she began having flashbacks after receiving the assessment from her employer.

[40] The Commission found the present complaint relates to the last alleged discriminatory act, the April 2010 dismissal. The Commission found this was clearly linked to the Respondent's requirement that the Applicant report to a new employment posting in September 2008. The Respondent took the failure to report, and the absence of an acceptable explanation for not reporting, as grounds for termination. The Commission found the dismissal was also related to the 2008 assessment which the Applicant alleges was the reason for her dismissal. The

Commission took the fact that the Applicant initially contacted the Commission on October 27, 2008 as confirmation of the importance of the 2008 dates.

[41] A review of the Report demonstrates that the Investigator was clearly aware of the Applicant's claims that the events dating pre-2008 were linked to the post-2008 incidents. Some of the relevant paragraphs of the Report are reproduced here:

78. Once again, it is to be noted that the first alleged discriminatory act dates to 1995. The complainant insists that this act, and those that followed, are linked to the last alleged act in that they show a continuous pattern of discrimination. The complainant does not, however, explain why no complaint was filed at the time of these alleged discriminatory acts. The complainant mentions, however, that she only recalled the alleged assaults in 2008, when she began having flashbacks after receiving the assessment from her employer.

...

80. The importance of these two events in 2008 seems to be supported by the date of initial contact between the complainant and the Commission on October 27, 2008. The alleged events that occurred prior to the year 2008 appear to be separate and independent of those leading to the complainant's dismissal.

81. Moreover, it would appear that the respondent's ability to defend the complaint may very well be seriously prejudiced by the fact that the first alleged discriminatory act dates back to 1995. Once again, it will be useful to receive details from the parties as to the issues that are being dealt with presently in the internal grievance process and before the CIRB, as these details may inform the Commission as to the relation between the various events dated back over the past two decades.

[42] The Applicant had not filed any previous complaint but did so once she was given notice in 2008 that she was facing dismissal. In addition, the Applicant had a long hiatus from the

workplace between the initial events occurring between 1995 and 1999 and the events leading to her dismissal in 2010 as she was away from the workplace from 2000 to 2006. I consider these two factors consistent with the Commission's conclusion that the pre-2008 events were separate and independent of the events related to Applicant's dismissal during the period 2008 – 2010.

[43] The Commission had an additional reason for not considering the events going back to 1995. The Commission concluded the Respondent's ability to defend against the complaint would be seriously prejudiced if it had to address the discriminatory incidents dating back over two decades.

[44] The Commission did accept the Applicant's complaint dating back to 2008 despite this date being outside the one year timeframe for complaints under the *Act*. The Commission accepted that the Applicant found the process overwhelming and recognized the Applicant began to have contact with the Commission in October 2008.

[45] The Commission considered the Applicant's submissions; it had regard to the substantive content of the March 18, 2010 complaint; it had regard for the prejudice that would adversely affect the Respondent concerning incidents dating back to 1995; and it took into account the Applicant's difficulty in completing her complaint after her initial contact with the Commission.

[46] With regards to the Applicant's submission that the Commission did not allow written submissions with respect to the timeliness issue regarding the pre-2008 issues, I disagree.

[47] I note the Applicant had full opportunity to review the content of the Report and make submissions to the Commission regarding the timeliness of her complaint. Her submissions did not add anything new to her previous submissions.

[48] On page 10 of the Report, the Investigator set out a number of factors relevant to a decision under s. 41(1)(e), i.e. whether the complaint is based on acts or omission the last of which occurred more than one year before receipt of the complaint. On the next page, the Report indicates that the Applicant made submissions on this general issue.

[49] Once the Report was completed, the Applicant was provided with a copy and given the opportunity to make further submissions. The Applicant took this opportunity to address the issues and conclusions found within the Report. For example, on March 11, 2011, the Applicant submitted 10 pages of submissions. The Applicant submitted another 2 pages of submissions with some accompanying documentation on April 8, 2011. Finally, the Applicant submitted another 3 pages of submissions with additional documentation on June 7, 2011.

[50] The record is clear that the Applicant was able to make submissions on the timeliness issue as well as all the other issues identified in the Report. As well, I note the Applicant states at paragraph 36 of her Affidavit that she did not read the entire Report before making her submissions to the Commission due to her post traumatic stress disorder. She claims it is only now that she realizes certain aspects of the Report. There is no basis for the Applicant's claim that the Commission did not allow written submissions on this issue.

[51] I find the Commission decision not to consider the pre-2008 aspect of the Applicant's complaint is reasonable.

Did the Commission err in deciding that it would not consider the Applicant's post-2008 complaint at this time because of the availability of alternate grievance or review procedures?

[52] The Applicant submits that the Commission erred by not considering sections 42(2), 48 and 59 of the *Act*. Of these provisions, only section 42(2) is relevant to this proceeding.

[53] Section 42 provides:

42. (1) Subject to subsection (2), when the Commission decides not to deal with a complaint, it shall send a written notice of its decision to the complainant setting out the reason for its decision.
(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. (1) Sous réserve du paragraphe (2), la Commission motive par écrit sa décision auprès du plaignant dans les cas où elle décide que la plainte est irrecevable.
(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.

[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.

[55] It is true that neither the Commission's decision nor the Report expressly state it considered s. 42(2). However, a review of the Report indicates that the essence of s. 42(2) was considered, namely whether the Applicant's failure to exhaust the procedure was attributable to the Applicant and not to another. An example can be found at paragraph 20 of the Report which states:

In a letter dated June 4, 2010, the Canadian Industrial Relations Board informed the complainant in her file # 28057-C that the CIRB had not received a number of documents that the complainant had undertaken to attach to her complaint, including: "termination letters; grievances; emails, other correspondence; court documents; medical documents; police reports; authorizations to represent; MOAS; Human Rights documents; workplace injury documents; employee records; etc." The complainant has not provided any further explanation as to the status of this complaint.

[56] This paragraph demonstrates that the Applicant has not taken all required actions to exhaust the procedures available to her. Although the Commission did not expressly mention s. 42(2), the Applicant's failure to provide the documentation required by the CIRB, one of the otherwise reasonably available grievance processes, provides a basis for concluding that the Commission met the requirements of s. 42(2).

[57] The Commission decided, pursuant to s. 41(1)(a), not to deal with the Applicant's complaint at this time because the Commission determined the Applicant ought to exhaust grievance or review procedures otherwise reasonably available to her. The Commission stated

that at the end of the grievance or review procedures, the Applicant may ask the Commission to reactivate the complaint.

[58] In any event, I conclude the Commission's decision to not consider the complaint at this time to be reasonable in light of the evidence before it. Section 41(a) provides that the Applicant ought to avail herself of grievance or review procedures reasonably available to her. Section 42(2) provides the Commission must satisfy itself that the failure or delay is attributable to the complaint herself. There is evidence before the Commission that the Applicant does have alternative procedures available to her and that any delay is attributable to the Applicant.

[59] I conclude the Commission's decision not to proceed with the complaint at the time it made the decision was reasonable.

Costs

[60] The Applicant is self represented. Moreover, the Commission did accept the Applicant's complaint for consideration albeit in part and not at this time.

[61] In light of these facts, I do not consider this a case for ordering costs.

Conclusion

[62] I conclude the Applicant has failed to demonstrate any reviewable error made by the Commission. The application for judicial review is dismissed.

[63] I make no order for costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no order for costs.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1360-11

STYLE OF CAUSE: DEBORAH GUYDOS v CANADA POST CORPORATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 18, 2012

REASONS FOR JUDGMENT AND JUDGMENT: MANDAMIN J.

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