Federal Court Cour fédérale

Date: 20130116

Docket: T-1884-11

Citation: 2013 FC 40

Ottawa, Ontario, January 16, 2013

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

FALLAN DAVIS and
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

REASONS FOR ORDER AND ORDER

[1] On November 18, 2005, Teiohontathe Fallan Davis presented herself at the Canadian border crossing at Cornwall, Ontario, seeking readmission to Canada. Ms. Davis' subsequent interaction with employees of the Canada Border Services Agency [CBSA] led to her filing a complaint with the Canadian Human Rights Commission.

[2] Ms. Davis' complaint alleges that CBSA officers infringed her rights under section 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [*CHRA*], by treating her in an adverse differential

fashion in the provision of services customarily available to the public because she was a young indigenous woman.

[3] Following an investigation into Ms. Davis' complaint, the Commission referred the complaint to the Canadian Human Rights Tribunal for a hearing. The CBSA ultimately brought a motion before the Tribunal seeking to have the complaint dismissed on the basis that it was not providing "services" for the purposes of section 5 of the *CHRA* when its employees performed their duties enforcing the provisions of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).

[4] The Tribunal dismissed the CBSA's motion, finding that in processing Ms. Davis and her vehicle through primary and secondary examinations, CBSA officers were indeed providing "services" within the meaning of section 5 of the *CHRA*. The CBSA now seeks judicial review of that decision.

[5] For the reasons that follow, I have concluded that the Tribunal's decision was reasonable. Consequently, the application for judicial review will be dismissed.

Background

[6] Ms. Davis is a resident of the Akwesasne Reserve near Cornwall, Ontario. Although she lives in Canada, Ms. Davis' community extends into the United States, with the result that she frequently crosses the border at the Cornwall Island port of entry [POE] to visit family, work, bring her daughter to school, and so on. Ms. Davis asserts that she sometimes has to cross the border as many as 10 times a day.

[7] On the day in question, Ms. Davis says that she was returning home to Canada when a CBSA officer at the Cornwall Island POE directed her to pull over for a further inspection. During this secondary inspection, Ms. Davis' vehicle was scanned using a Vehicle and Cargo Inspection System, which is used to detect hidden compartments. The vehicle was also physically searched by several CBSA officers, who discovered $250 worth of undeclared goods. After advising the CBSA officers that she was going to call the Mohawk Warrior Society for support, Ms. Davis was allowed to enter Canada without having to pay duty on these goods.

[8] Ms. Davis alleges in her complaint that in singling her out for further examination, CBSA officers engaged in racial profiling based upon her status as a young indigenous woman. She further alleges that she was treated with heightened suspicion and aggression by the CBSA officers, and that she was the subject of racist slurs by the officers. Finally, Ms. Davis alleges that this incident reflects a pattern of systemic discrimination by CBSA officers against members of her community.

[9] Ms. Davis' allegations have been denied by the CBSA.

The Legislative Provision in Issue

[10] Section 5 of the *CHRA* provides that:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au

	public :
(*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	*a*) d'en priver un individu;
(*b*) to differentiate adversely in relation to any individual,	*b*) de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	

[11] Section 3 of the *CHRA* identifies race, sex and age as prohibited grounds of discrimination.

Standard of Review

[12] Before turning to consider the merits of the application for judicial review, it is first necessary to identify the standard of review to be applied to the Tribunal's decision.

[13] In its memorandum of fact and law, the applicant asserts that the question of whether activities carried out by government officials in enforcing federal legislation constitute a "service" customarily available to the general public within the meaning of section 5 of the *CHRA* is reviewable on a standard of correctness.

[14] In support of this contention, the applicant relies upon the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Watkin*, 2008 FCA 170, [2008] F.C.J. No. 710 [*Watkin*]. There, the Court determined that the question of whether the actions complained of in that case were "services" within the meaning of section 5 of the *CHRA* was a true question of jurisdiction or *vires*, and was thus subject to review on the standard of correctness. The Court did, however also note that

in referring Mr. Watkin's complaint to the Tribunal for hearing, the Commission had not provided any reasons with respect to the question of "services" to which the Court could defer.

[15] This would ordinarily be the end of the matter, given that the standard of review applicable to the question at issue in this case has already been determined by an appellate court: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para. 57 [*Dunsmuir*].

[16] That said, counsel for the applicant noted that the Federal Court of Appeal's decision in *Watkin* was released just two months after the Supreme Court of Canada rendered its decision in *Dunsmuir*. He further acknowledged that there have been significant developments in the Supreme Court's jurisprudence since that time. Indeed, counsel quite candidly stated that in light of the more recent Supreme Court jurisprudence, he would be "hard-pressed" to say that correctness was in fact still the appropriate standard of review with respect to the question in issue. I agree.

[17] The question at issue in this proceeding is one of mixed fact and law. It was, moreover, decided by an expert tribunal - one that is statutorily empowered to decide questions of law: see sections 48.1(2) and 50(2) of the *CHRA*.

[18] To the extent that the Tribunal was required to interpret the provisions of the *CHRA* in determining whether the activities in issue in this case constituted "services" for the purposes of a section 5 complaint, it has now been well established that decisions involving the interpretation of a tribunal's own enabling legislation will presumptively attract the reasonableness standard of review and will only attract a correctness standard in very limited circumstances: see, for example, *Smith v.*

Alliance Pipeline Ltd., 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28 [*Smith*] and *Dunsmuir*, above at paras. 58-61.

[19] This proposition applies with equal force to decisions of the Canadian Human Rights Tribunal: see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 [*Mowat*].

[20] Moreover, our understanding of what constitutes a "true question of jurisdiction or *vires*" has also evolved significantly since *Watkin* was decided. Indeed, Supreme Court decisions since *Dunsmuir* have repeatedly emphasized the need for reviewing courts to shift their focus away from historically broad notions of 'jurisdiction' in favour of increased deference to specialized decision-makers interpreting their enabling legislation: see *Mowat*, above, at para. 24; *Smith*, above at para. 28. Indeed, in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2008] F.C.J. No. 710, at para. 34, the Supreme Court questions whether the category of "true questions of jurisdiction" even exists.

[21] I would further note that in *Canada (Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555, [2010] F.C.J. No. 657, this Court applied the reasonableness standard of review to a determination by the Tribunal as to what constituted a service customarily available to the public for the purposes of section 5 of the Act.

[22] Perhaps most importantly, in *Public Service Alliance of Canada v. Canada (Revenue Agency)*, 2012 FCA 7, [2012] F.C.J. No. 40, leave to appeal ref'd [2012] S.C.C.A. No. 102, the

Federal Court of Appeal itself recently held that this Court did not err in applying the reasonableness standard of review to a Tribunal determination that assessment actions by the Minister of National Revenue pursuant to the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) were not "services" for the purposes of section 5 of the *CHRA*: see para. 2.

[23] As a consequence, I am satisfied that the Tribunal's decision should be reviewed against the reasonableness standard. In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir*, above at para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

Was the Tribunal's Decision Reasonable?

[24] As a starting point in the analysis, it should be noted that the Supreme Court of Canada has repeatedly stated that human rights legislation is to be given a large, purposive and liberal interpretation in a manner consistent with its overarching objectives, so as to ensure that the remedial goals of the legislation are best achieved: see, for example, *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, [1993] S.C.J. No. 20, at 611-12; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, 3 C.H.R.R. D/1163; *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, [1985] S.C.J. No. 74; *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, [1987] S.C.J. No. 42.

[25] This interpretive approach does not, however, permit interpretations which are inconsistent with the wording of the legislation: *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc*., 2008 SCC 45, [2008] 2 S.C.R. 604, at para. 19.

[26] The applicant relies heavily on the Federal Court of Appeal's decision in *Watkin* in support of its contention that the actions of CBSA officers at issue in this proceeding do not constitute a "service" within the meaning of section 5 of the *CHRA*. According to the applicant, the Tribunal erred in failing to have regard to the teachings of *Watkin*, and in failing to follow the analytical approach identified by the Federal Court of Appeal in that case.

[27] In order to put the applicant's submissions into context, it is, therefore, first necessary to have regard to what the Federal Court of Appeal actually had to say in *Watkin* in relation to the proper interpretation of the term "services" as it is used in section 5 of the *CHRA*.

[28] The *Watkin* case arose out of a human rights complaint brought by a shareholder in a company that marketed and sold herbal products intended for human and animal consumption. It was alleged in the complaint that Health Canada gave preferential treatment to Asian and First Nations businesses by regulating their herbal remedies less rigorously than it regulated products sold by non-Asian or First Nations vendors.

[29] The specific activities at issue in *Watkin* included Health Canada's request that the complainant's company cease advertising and selling certain products, followed by its recall and subsequent seizure of the products in question.

[30] The Federal Court of Appeal expressly disavowed the view expressed in early human rights cases such as *Bailey et al v. Minister of National Revenue* (1980), 1 C.H.R.R. D/193 and *LeDeuff v. Canada Employment and Immigration Commission* (1987), 8 C.H.R.R. D/3690 at D/3693 (aff'd (1989), 9 C.H.R.R. D/4479), which held that all government actions carried out in the performance of a statutory function constitute "services" within the meaning of section 5 of the *CHRA* because they are undertaken by the Public Service for the public good: see *Watkin*, above, at para. 32.

[31] The Federal Court of Appeal held that in enforcing the *Food and Drugs Act*, R.S.C. 1985, c. F-27, in the manner complained of, Health Canada was not providing "services ... customarily available to the general public" within the meaning of section 5 of the *CHRA*. According to the Court, "[t]he actions in question are coercive measures intended to ensure compliance. The fact that these measures are undertaken in the public interest does not make them 'services'": *Watkin*, above, at para. 22.

[32] The Court went on to hold that "services", as the term is used in section 5 of the *CHRA*, contemplates "something of benefit being 'held out' as services and 'offered' to the public" and involves something that is "the result of a process which takes place 'in the context of a public relationship'": *Watkin*, above, at para. 31.

[33] According to the Federal Court of Appeal, enforcement actions are not held out or offered to the public in any sense and are not the result of a process which takes place in the context of a

public relationship. As a consequence, Health Canada's enforcement activities did not constitute "services" within the meaning of section 5 of the *CHRA*: *Watkin*, above, at para. 31.

[34] By analogy, the applicant submits that the CBSA officers who interacted with Ms. Davis on November 18, 2005, were carrying out their enforcement mandate under the *Customs Act*. None of the activities in issue in the present case involved benefits being held out to Ms. Davis. Rather, the actions of the CBSA officers were coercive measures meant to ensure her compliance with the provisions of the *Customs Act*.

[35] As a consequence, the applicant contends that the Tribunal erred in failing to follow *Watkin*, with the result that its finding that the CBSA's actions arose in the context of the provision of a service was unreasonable.

[36] In its reasons, the Tribunal reviewed the parties' submissions with respect to the significance of the *Watkin* decision at some length. The Tribunal explained that the Federal Court of Appeal's decision was distinguishable on its facts, and was thus not determinative of the issue in this case. Indeed, it is clear from the Tribunal's decision that it accepted the Commission's argument that "[t]he relationship between [Ms. Davis] and the CBSA is qualitatively different than that of the parties in *Watkin*": Tribunal decision at para. 18.

[37] This finding was entirely reasonable, as the factual context in which Ms. Davis' complaint arises was quite different to the circumstances that were before the Federal Court of Appeal in

Watkin. Indeed, this case involves different officers employed by a different agency carrying out different activities pursuant to an entirely different statutory scheme.

[38] The applicant's argument is based upon a very narrow view of the case. The actions of the CBSA officers in carrying out their enforcement mandate under the *Customs Act* cannot be divorced from the broader context in which those actions took place, and the other aspects of the CBSA's mandate that were engaged in the process.

[39] In this case, Ms. Davis presented herself at a Canadian POE. She was indeed seeking "something of benefit" to her: namely her re-admission to Canada. It was in this context that she came into contact with CBSA officers, and the events that ensued took place "in the context of a public relationship", as contemplated by *Watkin*.

[40] There is no suggestion in *Watkin* that Health Canada had any obligation to assist vendors in the sale of regulated products. In contrast, as was noted by the Tribunal, the facilitation of the flow of people across the border is an express part of the CBSA's statutory mandate. Subsection 5(1) of the *Canada Border Services Agency Act*, S.C., 2005, c. 38, provides that the CBSA "is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods … that meet all requirements under the program legislation…"

[41] It is also worth noting that the subsection cited above actually refers to the provision of "integrated border *services*" in describing this aspect of the CBSA's mandate.

[42] Moreover, the CBSA's own publications hold itself out as offering services to the public. For example, the CBSA website has a section entitled "Serving our Clients", and includes a commitment to "service excellence". The CBSA's clients are identified as including Canadian citizens, permanent residents and visitors to Canada.

[43] A document on the website entitled "Our Service Commitment" discusses the CBSA's goal of providing a "high standard of service". Moreover, the section of this document entitled "How you can help us assist you" makes it clear that the CBSA's "service commitment" is intended to apply specifically in the context of examinations at border crossings.

[44] Thus the requirement at paragraph 31 of *Watkin* that "something of benefit" be "'held out' as services" and "offered to the public" has clearly been satisfied on the record in this case.

[45] This is not to say that everything that the CBSA does will necessarily constitute a service customarily available to the general public within the meaning of section 5 of the *CHRA*. There may well be enforcement activities carried out by the Agency that would not meet the test for "services" established by the Federal Court of Appeal in *Watkin*. It is, however, neither necessary nor appropriate to try to identify those activities in this case. Each situation giving rise to a human rights complaint will have to be examined in light of its own particular circumstances in order to determine whether the specific activities in issue constitute "services" for the purposes of section 5 of the Act.

[46] Suffice it to say that, as explained above, the Tribunal's conclusion that the activities of the CBSA officers in issue *in this case* took place in the context of the provision of a service customarily available to the public was one that was reasonably open to it on the record before it. Moreover, the Tribunal's decision falls within the range of possible acceptable outcomes that are defensible in light of the facts and the law.

[47] The above finding is sufficient to dispose of this application. I would, however, note that the Tribunal provided additional reasons for concluding that the CBSA was providing services customarily available to the public in this case. These additional reasons bear comment.

[48] The Tribunal relied upon the *Customs and Excise Human Rights Investigation Regulations*, SOR/83-196 [*CEHRI Regulations*], which set out how human rights complaints relating to customs matters are to be investigated. According to the Tribunal, these regulations "establish a public right to file *CHRA* complaints relating to the manner in which CBSA officers deal with travelers in administering or enforcing federal customs and excise law".

[49] I agree with the applicant that the Tribunal's reliance on the *CEHRI Regulations* was not reasonable. As the Commission quite properly conceded, the right to file human rights complaints is established by the *CHRA* itself, and not by the *CEHRI Regulations*.

[50] Moreover, although there is a reference in section 3 of the *CEHRI Regulations* to complaints being received by the Commission in relation to actions of CBSA officers engaged in the enforcement of a law, a review of the Regulations discloses that they are procedural in nature. This

is reflected in the full title of the Regulations, which is "*Regulations respecting the manner in which human rights complaints relating to customs and excise will be investigated*". The Regulations do not purport to interpret the term "services" as it is used in section 5 of the *CHRA*, nor do they confer any substantive rights.

[51] The Tribunal's reliance on Memoranda of Understanding between the Commission and the CBSA was similarly misplaced. As noted by the applicant's affiant, the Memoranda of Understanding define "the procedures, roles, responsibilities and timelines intended to guide the review and processing of complaints made against the CBSA to the Commission …." The Memoranda also discuss measures that the two agencies would take to help prevent discrimination.

[52] Once again, however, these documents (both of which post-date the incident that forms the subject matter of Ms. Davis' human rights complaint) do not purport to interpret the term "services" as it is used in section 5 of the *CHRA*, nor do they confer any substantive rights on complainants in this regard. Moreover, it would not have been open to the parties to expand or circumscribe by agreement the meaning of a statutory term such as "services".

[53] However, these errors are not material to the result, in light of my conclusion as to the reasonableness of the Tribunal's finding based upon the test established by the Federal Court of Appeal in *Watkin*. For the same reason, it is not necessary to address the applicant's arguments with respect to the Tribunal's reliance on provincial tribunal and court decisions characterizing police enforcement activities as "services" for the purposes of human rights legislation.

Conclusion

[54] For these reasons, I have concluded that the Tribunal's finding that the CBSA was indeed providing a "service" customarily available to the general public when it interacted with Ms. Davis on November 18, 2005, was reasonable. Consequently, the application for judicial review is dismissed. In accordance with the agreement of counsel, there shall be no order as to costs.

ORDER

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1884-11
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. FALLAN DAVIS ET AL
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 9, 2013
REASONS FOR ORDER AND ORDER:	MACTAVISH J.
DATED:	January 16, 2013

APPEARANCES:

Sean Gaudet Laura Tausky	FOR THE APPLICANT
Brian Smith Sarah Pentney	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

WILIAM F. PENTNEY Deputy Attorney General of Canada	FOR THE APPLICANT
LITIGATION SERVICES DIVISION Canadian Human Rights Commission Ottawa, Ontario	FOR THE RESPONDENTS