

Federal Court of Appeal



Cour d'appel fédérale

Date: 20191205

Docket: A-346-18

Citation: 2019 FCA 302

**CORAM: NEAR J.A.
LASKIN J.A.
MACTAVISH J.A.**

BETWEEN:

ROSEMARY ANNE HOOD

Appellant

and

**ATTORNEY GENERAL OF CANADA,
CANADIAN FOOD INSPECTION AGENCY,
PUBLIC HEALTH AGENCY OF CANADA and
EMPLOYMENT AND SKILLS
DEVELOPMENT CANADA - LABOUR**

Respondents

Heard at Ottawa, Ontario, on November 28, 2019.

Judgment delivered at Ottawa, Ontario, on December 5, 2019.

REASONS FOR JUDGMENT BY:

MACTAVISH J.A.

CONCURRED IN BY:

NEAR J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] Doctor Rosemary Hood is a veterinarian who was formerly employed by the Canadian Food Inspection Agency. After her employment was terminated, Dr. Hood filed a complaint with the Canadian Human Rights Commission in which she asserted that she had been the victim of

discriminatory practices in the course of her former employment because of her sex, and her perceived disability. She further alleged that her employer had failed to properly accommodate her carpal tunnel syndrome.

[2] The Canadian Human Rights Commission decided not to deal with Dr. Hood's complaint on the basis that it had not been pursued in a timely manner, and that it was vexatious. The Commission further determined that some of Dr. Hood's allegations had already been dealt with through other processes, and that she ought to have pursued alternate avenues of redress that were available to her with respect to the remaining allegations.

[3] Dr. Hood's application for judicial review of this decision was dismissed by the Federal Court in a judgment reported at 2018 FC 958. While Dr. Hood submits that the Federal Court's decision should be set aside, the majority of her submissions were directed to the conduct of her former employer, the handling of her complaints and grievances by the Canadian Food Inspection Agency in the years leading up to the termination of her employment and the merits of her original discrimination complaint. Few submissions were directed to any reviewable errors that might have been committed by either the Canadian Human Rights Commission or the Federal Court in dealing with this matter.

[4] For the reasons that follow, I am not persuaded that the Federal Court erred in its identification of the standards of review to be applied to the Commission's decision to dismiss Dr. Hood's human rights complaint. Nor am I persuaded that the Federal Court erred in the way that it applied these standards in this case. Consequently, I would dismiss Dr. Hood's appeal.

I. Background

[5] Dr. Hood began working for the Canadian Food Inspection Agency (CFIA) in 2001. She remained with the CFIA until her employment was terminated for incapacity on September 16, 2010.

[6] Dr. Hood asserts that she faced harassment, discrimination and a hostile work environment over the course of her employment with the CFIA. This led to her filing a harassment complaint against her supervisor in March of 2008, in accordance with the CFIA's *Policy on the Prevention and Resolution of Harassment in the Workplace*. Following an investigation by an external investigator, the CFIA issued a final decision with respect to Dr. Hood's complaint, upholding just one of the numerous allegations of harassment that she had made.

[7] In the meantime, Dr. Hood contacted the Canadian Human Rights Commission on August 21, 2008 with the intention of filing a human rights complaint against the CFIA. However, she was advised by the Commission that she should utilize the employer's grievance system before pursuing remedies through the Commission process. This advice was subsequently confirmed by letter, and Dr. Hood was further advised that in the event that she still wanted to file a human rights complaint after exhausting the grievance process, she should contact the Commission within 30 days of being advised of a final decision with respect to her grievances.

[8] Between 2008 and 2010, Dr. Hood's behaviour in the workplace and the tone and content of her emails raised concerns on the part of her supervisors with respect to her health and safety. On January 8, 2010, the CFIA placed Dr. Hood on leave with pay until she completed a Fitness-to-Work Evaluation (FTWE). Three months later, the CFIA placed Dr. Hood on leave without pay because she refused to undergo a FTWE. The CFIA subsequently terminated Dr. Hood's employment, effective September 16, 2010, because of her ongoing refusal to consent to a FTWE.

[9] Dr. Hood grieved the decisions putting her on leave first with pay, and then without pay. She also grieved the decision terminating her employment. The first two grievances were referred for adjudication before the Public Sector Labour Relations Board (PSLRB) in accordance with paragraph 209(1)(b) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2. This allowed employees to refer grievances to adjudication where they related to disciplinary action that had been taken against them that resulted in a suspension, termination or financial penalty. For reasons that are not entirely clear, Dr. Hood's grievance with respect to the termination of her employment did not proceed to a hearing before the PSLRB, and it was deemed by the Board to have been abandoned.

[10] Before the PSLRB, Dr. Hood alleged that the two suspensions had been imposed on her in bad faith and without reasonable grounds, and that they amounted to "disguised discipline".

[11] In a decision dated May 6, 2013 (reported as 2013 PSLRB 49), the PSLRB dismissed both of Dr. Hood's leave grievances. After a detailed review of the evidence adduced by the

parties with respect to these matters, the Board concluded that the actions taken by the CFIA in suspending Dr. Hood—first with pay, and subsequently without pay—were not disciplinary in nature. They were instead the result of legitimate concerns on the part of the CFIA with respect to Dr. Hood’s mental health.

[12] Because of its finding that the actions giving rise to Dr. Hood’s grievances were not disciplinary in nature, the Board concluded that it did not have jurisdiction to deal with them and both grievances were thus dismissed. Dr. Hood explained at the hearing of her appeal that she did not seek judicial review of the Board’s decision as she decided to pursue a human rights complaint instead. That may well have been the case, but the result of Dr. Hood’s failure to seek judicial review of the PSLRB’s decision is that its decision is now final.

[13] On June 5, 2013, Dr. Hood faxed a completed complaint form to the Commission. On June 27, 2013, Dr. Hood was told by the Commission that her complaint was not in an acceptable form. Between June of 2013 and March of 2014, the Commission communicated with Dr. Hood on several occasions explaining what she needed to do to put her complaint into an acceptable form. The Commission finally received Dr. Hood’s complaint in an acceptable form on March 10, 2014.

[14] The Commission then appointed an investigator to examine Dr. Hood’s complaint. After receiving information from the parties, including the more than 300 pages of documents provided by Dr. Hood, the Commission investigator issued a “Section 40/41 Report”. This Report recommended that the Commission not deal with Dr. Hood’s complaint on the basis of

paragraphs 41(1)(a), (d) and (e) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA).

[15] These provisions (the full text of which is attached as an appendix to these reasons), allow the Commission to refuse to deal with human rights complaints in a variety of situations. Amongst other things, this includes cases where it appears to the Commission that the victim of the allegedly discriminatory practice ought to first exhaust grievance procedures otherwise reasonably available to her. The Commission may also decline to deal with a complaint if it appears that the complaint is vexatious, or that it was based on acts or omissions the last of which occurred more than one year prior to the filing of the complaint.

[16] In this case, the investigator found that Dr. Hood had not been diligent in filing her complaint, and that her complaint was vexatious in light of the remedies that she had already pursued in her workplace. The investigator was further satisfied that any of Dr. Hood's allegations that were still outstanding could have been dealt with through other redress mechanisms that had been available to her. The Commission accepted the investigator's recommendation and determined that it would not deal further with Dr. Hood's complaint.

II. The Federal Court's Decision

[17] While noting that Dr. Hood's grounds for review were "broad and complex", the Federal Court observed that the majority of her submissions were not addressed to the way that her complaint was dealt with by the Commission, but related instead to the handling of her complaints and grievances by the CFIA.

[18] The Court noted that the Commission's mandate required that it treat complainants fairly and reasonably, but did not require it to conduct the sort of wide-ranging inquiry into the operations of the CFIA that Dr. Hood was seeking. The Federal Court further noted that its own role was limited to determining whether the Commission had treated Dr. Hood's complaint fairly and reasonably.

[19] While noting that Dr. Hood had not made any specific allegations of procedural unfairness on the part of the Commission, the Federal Court nevertheless examined the process that it had followed in dealing with her complaint. The Court concluded that Dr. Hood had been treated fairly by the Commission as she had been given the opportunity to make submissions to both the investigator and the Commission. The Court further found that the investigator's report was thorough, and that it included a fair assessment of the evidence and the background to Dr. Hood's complaint.

[20] The Federal Court was also satisfied that the Commission's decision was reasonable. It noted that there were three distinct statutory bases for the decision not to proceed with Dr. Hood's complaint, each of which was supported by detailed evidence set out in the investigator's report and adopted by the Commission. The Court further observed that to succeed with her application for judicial review, Dr. Hood would have to demonstrate that all three of the grounds cited by the Commission were unintelligible, unjustified, or indefensible, but that she had not directly contested any of them.

[21] As the Federal Court understood Dr. Hood's submissions, she was challenging the Commission's decision on the basis that it foreclosed the kind of broad-ranging review that she was seeking with respect to the way her complaints and grievances had been addressed by the CFIA. The Court noted, however, that the Commission's sole responsibility was to review the complaint that Dr. Hood had filed in 2014, and to come to a reasonable decision as to whether to deal with it. The Court concluded that this is what the Commission had done, and that its decision was reasonable. Consequently, Dr. Hood's application for judicial review was dismissed.

III. The Role of this Court

[22] On an appeal such as this from a decision of the Federal Court, this Court's task is not to dive into the facts underlying Dr. Hood's human rights complaint, or to reweigh the evidence submitted by the parties. Nor is it the role of this Court to make the decision that it thinks the Commission should have made: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, [2009] 1 S.C.R. 339.

[23] This Court's role is, rather, to determine whether the Federal Court identified the appropriate standard of review to be applied to the Commission's decision, and whether it properly applied that standard: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559.

IV. Did the Federal Court Correctly Identify the Appropriate Standard of Review?

[24] Dr. Hood asserts that the Federal Court erred in according deference to the Commission's decision not to deal with her human rights complaint. Although she cites no authority to support her claim, Dr. Hood asserts that the Court should have instead reviewed the Commission's decision on the correctness standard.

[25] It is true that where it is alleged that an individual was treated unfairly in an administrative regime (such as the Commission's complaints process), the reviewing Court must examine the process that was followed in the case in question and determine for itself whether that process satisfied the level of fairness required in all of the circumstances. In other words, the reviewing Court must apply the correctness standard: *Khosa*, above at para. 43; *Mission Institution v. Khela*, 2014 SCC 24 at para. 79, [2014] 1 S.C.R. 502.

[26] However, I cannot accept Dr. Hood's contention that the Federal Court should have reviewed the substance of the Commission's decision on the correctness standard. This is because there is a significant body of case law that is binding on this Court that states that where an administrative decision involves the assessment of the facts of a given case, that decision should be accorded deference: see, for example, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at paras. 29-30, [2018] 2 S.C.R. 230.

[27] The Supreme Court has further held that discretionary decisions made by Human Rights Commissions are entitled to deference: *Halifax (Regional Municipality) v. Nova Scotia (Human*

Rights Commission), 2012 SCC 10 at para. 17, [2012] 1 S.C.R. 364. Moreover, this Court has specifically determined that decisions made by the Commission pursuant to section 41 of the CHRA are to be reviewed on the reasonableness standard: *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 at paras. 40-42, 474 N.R. 366, leave to appeal to SCC refused [2015] S.C.C.A. No. 438. This is because screening decisions made pursuant to section 41 of the CHRA involves the exercise of discretion based on the facts of the case, policy considerations and the Commission's expertise: *Bergeron*, above at paras. 41, 45. Consequently, the Federal Court did not err in applying the reasonableness standard in reviewing the substance of the Commission's decision with respect to Dr. Hood's complaint.

[28] The next question is whether the Commission properly applied the relevant standards of review in Dr. Hood's case.

V. Did the Federal Court Err in Finding that Dr. Hood had been Treated Fairly by the Commission?

[29] While noting that Dr. Hood had not made any specific allegations of procedural unfairness on the part of the Commission, the Federal Court nevertheless went on to consider whether there had been a breach of procedural fairness in her case.

[30] It is true that the Federal Court did not expressly identify the standard of review to be applied in assessing whether Dr. Hood had been treated fairly by the Commission. It is, however, evident from the Court's reasons that it examined the process that had been followed by the Commission in dealing with Dr. Hood's human rights complaint, and that it determined for itself

whether she had been accorded the appropriate level of procedural fairness. This is the correct approach, and no error has been shown in this regard.

[31] The Federal Court further found that Dr. Hood had been treated fairly in the Commission process. I agree with that conclusion.

[32] The Commission put Dr. Hood on notice that section 41 considerations were at play in her case. She was, moreover, able to provide submissions to the investigator, and to provide the investigator with whatever documents she thought were relevant to her case. The investigator's report was thorough, and it contained a fair assessment of the evidence that had been provided by the parties. Dr. Hood was subsequently provided with the investigator's report, and she was able to make additional submissions in response to that report, which submissions were then considered by the Commission in arriving at its decision. In these circumstances, I am satisfied that Dr. Hood was treated fairly by the Commission.

VI. Did the Federal Court Err in Finding that the Commission's Decision was Reasonable?

[33] As was the case in the Federal Court, the majority of Dr. Hood's submissions to this Court were not addressed to errors relating the way that her human rights complaint was dealt with by the Commission. Instead, they focussed primarily on the merits of her underlying complaint, and what she says were the errors that were made by the CFIA in the handling of her complaints and grievances, as well as alleged errors in provincial health records.

[34] The Federal Court did not err in finding that the Commission's decision not to deal with Dr. Hood's human rights complaint was reasonable. As noted earlier, it was not the Court's role to redo the investigation into the complaint. Nor was it the Court's job to reweigh the evidence that was before the Commission, and to come to its own decision as to whether the Commission should have dealt with Dr. Hood's complaint. It was, rather, to determine whether the Commission's decision was justified, transparent and intelligible, and whether it fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190.

[35] It is clear from the Commission's decision precisely why it decided not to deal with Dr. Hood's human rights complaint, and its decision was justified, transparent and intelligible. Moreover, as will be explained below, I am also satisfied that it fell within the range of possible, acceptable outcomes that are defensible in respect of the facts and law.

[36] Insofar as the timeliness of the complaint is concerned, the Commission found that the delay in filing her complaint between 2008 and June of 2013 was attributable to the fact that Dr. Hood was pursuing the grievance process. This accorded with the Commission's policy that required complainants to exhaust other redress mechanisms before pursuing human rights complaints, and the Commission did not fault Dr. Hood for this delay.

[37] However, the Commission found that there had been an eight-month delay between June of 2013, when Dr. Hood first attempted to reactivate her complaint, and March of 2014, when she finally provided the Commission with complaint documents in an acceptable form. The

Commission concluded that this delay was within Dr. Hood's control, and that it was the result of a lack of diligence on her part. This led the Commission to conclude that it should not deal with the complaint under paragraph 41(1)(e) of the Act as it was not timely.

[38] At the hearing of her appeal, Dr. Hood suggested that there may have been a delay on the part of the Commission in locating her file because her name had been spelled incorrectly in the Commission's records. She also stated that she required time to research issues relating to her alleged disability before finalizing her human rights complaint. However, these explanations were not provided to the Commission in Dr. Hood's response to the investigation report, nor has she pointed to any evidence in the record that would support her claims or otherwise undermine the reasonableness of the Commission's finding on the timeliness issue.

[39] Paragraph 41(1)(a) of the CHRA allows the Commission to decline to deal with a human rights complaint where it is of the view that the victim of the allegedly discriminatory practice ought to exhaust grievance or review procedures that were otherwise reasonably available to her.

[40] The investigator found that Dr. Hood had the opportunity to raise the additional concerns that she identified in her human rights complaint (such as alleged harassment by co-workers and the failure to accommodate her carpal tunnel syndrome) through procedures that were available to her at the CFIA. The finding that Dr. Hood's failure to exhaust these internal dispute resolution processes provided a legitimate basis for the Commission to decline to inquire further into her complaint, and its conclusion on this issue was one that was reasonably open to the Commission on the record before it.

[41] Finally, the Commission found that Dr. Hood's complaint was "vexatious" within the meaning of paragraph 41(1)(d) of the CHRA, as she had already sought remedies for much of the alleged misconduct that was at the root of her human rights complaint. Dr. Hood's harassment complaint had been thoroughly investigated by an external investigator retained by the CFIA, who had determined that just one of her many allegations of improper conduct on the part of her supervisor had been made out. In the Commission's view, the substance of Dr. Hood's harassment complaint was substantially similar to the allegations that were contained in her human rights complaint. Once again, it is evident from a review of the record that this finding was reasonably open to the Commission.

[42] Moreover, some of the discrimination issues raised in Dr. Hood's human rights complaint had been the subject of the grievances that she had filed against her employer with respect to her suspension and termination. Her termination grievance was found to have been abandoned, and the grievances with respect to her suspensions were dealt with by the PSLRB.

[43] It is true that the PSLRB did not end up dealing with Dr. Hood's suspension grievances on their merits because of its conclusion that the employer's actions were not disciplinary in nature. It did however make findings with respect to Dr. Hood's behaviour in the workplace and the CFIA's motives in requesting that she undergo a FTWE. These findings (which are now final) led it to conclude that the CFIA's actions were justified, and that they were motivated by a legitimate concern as to the state of Dr. Hood's health.

[44] Consequently, the Commission’s conclusion that Dr. Hood’s human rights complaint was vexatious in light of the remedies that she had already pursued, or could have pursued in her workplace was one that was reasonably open to it on the record before it.

VII. Conclusion

[45] The Commission had three different reasons for deciding not to deal with Dr. Hood’s human rights complaint, any one of which would have provided a sufficient basis for its decision. The Commission applied the appropriate test in each case, and it considered the submissions and evidence that had been adduced by Dr. Hood on each point. Its decision was justified, transparent and intelligible, and it clearly fell within the range of possible, acceptable outcomes that are defensible in respect of the facts and law. It was thus a reasonable decision and no basis has been shown for this Court to intervene.

VIII. Proposed Disposition

[46] For these reasons, I would dismiss Dr. Hood’s appeal, without costs.

“Anne L. Mactavish”

J.A.

“I agree.
D.G. Near J.A.”

“I agree.
J.B. Laskin J.A.”

Appendix

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;

[...]

(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;

[...]

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.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-346-18

STYLE OF CAUSE: ROSEMARY ANNE HOOD v.
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DEVELOPMENT CANADA -
LABOUR

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: NOVEMBER 28, 2019

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: NEAR J.A.
LASKIN J.A.

DATED: DECEMBER 5, 2019

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