Federal Court of Appeal | Cour d'appel fédérale

Date: 20221205

Docket: A-314-20

Citation: 2022 FCA 209

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

BETWEEN:

MICHÊLE BERGERON

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on November 9, 2022.

Judgment delivered at Ottawa, Ontario, on December 5, 2022.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

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

Federal Court of Appeal  Cour d'appel fédérale

Date: 20221205

Docket: A-314-20

Citation: 2022 FCA 209

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

BETWEEN:

MICHÊLE BERGERON

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] For more than a decade, the Canadian Human Rights Commission tried to deal with one of Michêle Bergeron's human rights complaints on a summary basis. Because of what her counsel calls a "tragi-comedy of errors" on the part of the Commission, the Federal Court set aside two decisions not to deal with Ms. Bergeron's complaint on procedural fairness grounds. However, a third decision to dismiss her complaint on the basis that the issues raised by the

complaint had already been addressed through the grievance process was upheld by the Federal Court: *Bergeron v. Canada (Attorney General)*, 2020 FC 1090. This is an appeal from that decision.

[2] It is indeed troubling that it has taken so long for the Commission to deal fairly with Ms. Bergeron's human rights complaint, especially considering that the complaint has never been the subject of a full investigation. However, as will be explained below, Ms. Bergeron has failed to persuade me that the Federal Court's decision upholding the Commission's latest decision not to deal with her human rights complaint was unreasonable. Consequently, I would dismiss her appeal.

I. Background

[3] In order to put the issues raised by Ms. Bergeron's appeal into context, it is necessary to have some understanding of the lengthy procedural history of her employment-related disputes.

[4] Ms. Bergeron worked as a lawyer with the Department of Justice until May of 2001, when she took a medical leave for a chronic illness. She attempted to return to work several years later, but Ms. Bergeron and the Department were unable to reach an agreement on a suitable return to work plan. In May of 2008, the Department advised Ms. Bergeron that it intended to vacate her position. This led Ms. Bergeron to file a series of grievances and human rights complaints against the Department.

[5] Ms. Bergeron's first grievance was filed in July of 2008 (the first grievance), alleging a failure to accommodate on the part of her employer. Two months later, she filed a human rights complaint alleging discrimination on the basis of disability resulting from the Department's failure to accommodate her disability, and its actions in staffing her position (the first human rights complaint).

[6] In March of 2009, Ms. Bergeron filed a second grievance against the Department (the retaliation grievance). In this grievance, Ms. Bergeron alleged that she had been subjected to retaliation by her employer for having filed her first grievance. A month later, Ms. Bergeron filed a second human rights complaint also alleging retaliation on the part of her employer (the retaliation complaint). In this complaint, Ms. Bergeron alleged that she experienced retaliatory conduct after filing her first human rights complaint. She again complained of the Department's decision to staff her former position, its refusal to grant extensions to her leave of absence, the processing of cheques for pension and health insurance purposes, and the Department's return to work offer.

[7] In decisions rendered by the Associate Deputy Minister (ADM) of the Department in May and September of 2009, the Department allowed both of Ms. Bergeron's grievances, in part. I will discuss the details of the ADM's decisions further on in these reasons when I compare the subject matter of Ms. Bergeron's retaliation complaint with that of her grievances. To the extent that the ADM dismissed portions of Ms. Bergeron's grievances, neither Ms. Bergeron nor her union referred the grievances to adjudication before what was then the Public Service Labour Relations Board.

[8] In 2010, the Department terminated Ms. Bergeron's employment for medical incapacity.

[9] In 2011, the Commission considered both of Ms. Bergeron's human rights complaints under subsection 41(1) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6. This provision allows the Commission to decline to deal with human rights complaints in a variety of circumstances, one of which is where it appears to the Commission that the complaint is trivial, frivolous, vexatious or made in bad faith. Vexatious complaints include cases where issues raised in a human rights complaint have been adequately addressed through another process. The full text of subsection 41(1) of the Act and other statutory provisions referred to in these reasons is attached as an appendix to this decision.

[10] In two separate decisions, the Commission decided not to deal with either of Ms. Bergeron's human rights complaints on the basis that her allegations of discrimination and retaliation had already been dealt with through the grievance process.

[11] Ms. Bergeron's application for judicial review of the Commission's decision with respect to her first human rights complaint was dismissed by the Federal Court, but her application for judicial review of the Commission's decision not to deal with her retaliation complaint was granted on procedural fairness grounds: *Bergeron v. Canada (Attorney General)*, 2013 FC 301.

[12] In granting this application, the Federal Court noted that the Commission's decision regarding Ms. Bergeron's retaliation complaint had relied on the investigation report that had been prepared with respect to her first human rights complaint as providing reasons for the

dismissal of the retaliation complaint. Because the issues raised by the two complaints were different, the Court found that the Commission's reasons for dismissing Ms. Bergeron's retaliation complaint were "irrelevant and unintelligible", and contained no relevant analysis. Consequently, the Federal Court remitted the retaliation complaint to the Commission for reconsideration.

[13] This Court subsequently upheld the Federal Court's decision with respect to the dismissal of Ms. Bergeron's first human rights complaint: *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 (*Bergeron FCA*), and leave to appeal the Supreme Court of Canada was denied: [2015] S.C.C.A. No. 438.

[14] The Commission rendered its second decision with respect to Ms. Bergeron's retaliation complaint in 2014, again declining to deal with the complaint on the basis that the issues raised by the complaint had already been addressed through the grievance process. Once again, Ms. Bergeron sought judicial review of the Commission's decision and, once again, the Federal Court granted her application on procedural fairness grounds: *Bergeron v. Canada (Attorney General)*, 2017 FC 57.

[15] This time, the Federal Court found that the Commission had the wrong set of submissions from Ms. Bergeron in front of it when it decided, for the second time, not to deal with her retaliation complaint. Although both Ms. Bergeron and the Department had drawn this error to the Commission's attention prior to it arriving at its decision, it was Ms. Bergeron's submissions with respect to her first human rights complaint that were provided to the Commission for

consideration in connection with her retaliation complaint, rather than the submissions that she had provided with respect to her retaliation complaint.

[16] The Federal Court found that the Commission had again failed to treat Ms. Bergeron fairly as it failed to consider the submissions that she had made as to why the Commission should deal with her retaliation complaint. Consequently, the Federal Court once again remitted Ms. Bergeron's retaliation complaint to the Commission for redetermination.

[17] The Commission rendered its third decision with respect to Ms. Bergeron's retaliation complaint in 2019. Once again, it accepted the recommendation of an investigator and decided not to deal with the complaint pursuant to subsection 41(1) of the Act, on the basis that the issues that it raised had already been adequately addressed through the grievance process.

[18] Ms. Bergeron sought judicial review of this decision on substantive grounds. Unlike her earlier applications for judicial review, she did not identify any procedural defects in the process followed by the Commission in coming to this decision. Rather, she asserted that the decision was unreasonable.

[19] The Federal Court subsequently found the Commission's decision to be reasonable and supported by the record, and, accordingly, it dismissed Ms. Bergeron's application for judicial review. Before us now is an appeal from that decision.

II. Issues

[20] Ms. Bergeron submits that there are four reasons why the Commission's 2019 decision with respect to her retaliation complaint was unreasonable. She asserts that:

i) The Commission failed to provide a decision based on a "rational chain of analysis";

ii) The Commission's decision failed to consider the implications of the internal grievance process not being independent;

iii) The Commission failed to consider the harsh consequences that dismissing her retaliation complaint under section 41 of the Act had for Ms. Bergeron; and

iv) The Commission's decision that it was not in the public interest to deal with Ms. Bergeron's retaliation complaint was unreasonable.

[21] This Court's role in an appeal such as this is to determine whether the Federal Court identified the correct standard of review – correctness or reasonableness – and whether it properly applied that standard: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10-12; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47. This has been described as requiring us to "step into the shoes" of the Federal Court judge, focusing on the administrative decision below.

[22] I agree with the parties that the Court correctly identified reasonableness as the standard of review that it should apply in reviewing the Commission's retaliation decision: *Canada*

(Canadian Human Rights Commission) v. Canada (Attorney General), 2018 SCC 31 at paras. 27-29. The question to be determined is thus whether the Court applied that standard correctly.

III. Did the Commission Provide a Rational Chain of Analysis in its Decision?

[23] Ms. Bergeron submits that the Commission's 2019 decision fails to meet the requirements of a rationally justified decision articulated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. While acknowledging at the hearing that there was "some overlap" between the subject matter of her retaliation grievance and her retaliation complaint, Ms. Bergeron contends that the two raised different legal issues, and that the issues raised by the retaliation complaint were never dealt with through the grievance process.

[24] In deciding not to deal with her retaliation complaint, Ms. Bergeron argues that the Commission erroneously relied on an investigation report that concluded that her allegations of retaliatory acts and omissions had been addressed in the internal grievance decisions. There was, she says, no evidence that the grievance decisions analysed or addressed the specific retaliatory acts that she had identified in her retaliation complaint, or that the ADM ever turned her mind to the question of retaliation. Consequently, Ms. Bergeron submits that it was unreasonable for the Commission to have concluded that the substance of her retaliation complaint had been addressed in the ADM's decisions.

[25] In support of this argument, Ms. Bergeron notes that the ADM's May 2009 decision related to her first grievance, which alleged that her employer had failed to accommodate her disability. As such, Ms. Bergeron says that it contains no analysis or findings with respect to her numerous and specific allegations of retaliatory conduct on the part of the Department. The ADM's September 2009 decision simply states that Ms. Bergeron's allegations of retaliation were "unfounded", without providing any analysis supporting this statement.

[26] Ms. Bergeron further submits that neither of the ADM's decisions addressed the refusal of the Department to provide her with any of her employment-related information or to explain why the Department had ceased paying her Law Society fees. Nor did either decision address the Department's refusal to accept Ms. Bergeron's payments for extended medical benefits or the threat to place her on a priority staffing list should she refuse the Department's offer to return to work on terms that she says were contrary to her physicians' advice and recommendations.

[27] Finally, Ms. Bergeron says that the ADM's grievance decisions failed to address her claim that she had been subject to a "communication blackout" that prevented her from contacting Departmental human resources personnel, leaving her unable to address her employer's retaliatory acts and omissions.

[28] Before addressing Ms. Bergeron's arguments, it is important to understand the function being carried out by the Commission in screening human rights complaints under subsection 41(1) of the Act. The open-ended language of this provision confers discretion on the Commission not to deal with human rights complaints where, amongst other things, it appears to

the Commission that the complaint is trivial, frivolous, vexatious or made in bad faith. As noted earlier, “vexatious” cases include those where another process has already adequately addressed the issues raised in the complaint.

[29] This Court observed in *Bergeron FCA* that the concept of “adequacy” is “highly judgmental and fact-based”. It is informed, in part, by the policy that “the Commission should not devote scarce resources to matters that have been, in substance, addressed elsewhere or that could have been addressed elsewhere”: at para. 47.

[30] As this Court further recognized in *Canada (Attorney General) v. Ennis*, 2021 FCA 95, this discretion “derives from judicial recognition of the Commission’s expertise in performing its important screening and gate-keeping role”: at para. 56. See also *Bergeron FCA* at para. 74. Consequently, the Commission is afforded great latitude when courts review decisions such as this: *Bergeron FCA*, above at para. 45; *Ennis*, above at para. 57; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at para. 38.

[31] With this in mind, the question to be decided is thus whether the Commission’s determination that the issues raised by Ms. Bergeron’s retaliation complaint had been adequately addressed through the grievance process was one that was reasonably open to the Commission to have made on the basis of the record before it.

[32] In answering this question, I must first consider the guidance provided by the Supreme Court in *British Columbia (Workers’ Compensation Board) v. Figliola*, 2011 SCC 52. There, the

Court identified three factors that should guide a human rights commission in deciding when to dismiss some or all of a complaint on the basis that it had been appropriately or adequately dealt with by another administrative decision-maker. These are:

- Whether there was concurrent jurisdiction to decide human rights issues;
- Whether the legal issue in the alternate forum was essentially the same as the legal issue in the human rights complaint; and
- Whether the complainant had the opportunity to know the case to meet and had a chance to meet it.

[33] As the Supreme Court observed in *Figliola*, the question at the end of the day is really whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute: above at para. 37.

[34] I do not understand there to be any real dispute with respect to the first and third of the *Figliola* factors. Ms. Bergeron acknowledges that the ADM had the jurisdiction to decide human rights issues, and she has not suggested that she did not know the case that she had to meet or that she did not have a chance to meet it. Indeed, in addition to providing Ms. Bergeron with the opportunity to provide written submissions with respect to each of her grievances, the ADM also offered to meet with her with respect to each grievance to clarify her concerns and facilitate a dialogue, but Ms. Bergeron declined to meet. The issue that divides the parties is thus whether the legal issues that Ms. Bergeron raised in her grievances were essentially the same as the legal issues raised by her retaliation complaint.

[35] The Commission decision before us and the Commission decision that was before this Court in *Bergeron FCA* were both based on the 2010 investigation report. As this Court observed in *Bergeron FCA*, the Commission considered a number of questions in deciding whether to deal with Ms. Bergeron's first human rights complaint. They included the following:

- The nature of the alternate redress mechanism that was used;
- Whether Ms. Bergeron was permitted to present her case;
- Whether the decision-maker was independent;
- What the decision-maker decided;
- Whether the other decision addressed all of the human rights issues raised in the complaint;
- The nature of the remedies requested in the grievance procedure; and
- Whether Ms. Bergeron was successful (or partially successful) under the alternate redress procedure, and, if so, the remedies that were awarded.

[36] As this Court further observed in *Bergeron FCA*, this list is entirely consistent with the factors set out by the Supreme Court in *Figliola*, and that this was something that supported the reasonableness of the Commission's decision: at para. 49.

[37] As was the case in *Bergeron FCA*, I do not understand Ms. Bergeron to challenge the reasonableness of the Commission's use of these factors in its assessment in this case. What she argues is, rather, that the Commission's finding that the decisions of the ADM addressed all of the human rights issues raised in her retaliation complaint was unreasonable.

[38] Ms. Bergeron submits that the issues in her grievance were different from those raised in her retaliation complaint. According to Ms. Bergeron, her first grievance decision did not relate to retaliatory acts. Moreover, the ADM stated in her decision regarding Ms. Bergeron's retaliation grievance that her allegations of retaliation were "unfounded", without ever addressing her allegations that the Department had refused to provide her with employment-related information or to accept her payments for extended medical benefits. Nor did the ADM ever address her claim that the Department had threatened to place her on a priority staffing list. According to Ms. Bergeron, a bald denial of responsibility cannot constitute an adequate response to her concerns.

[39] Dealing with this last issue first, Ms. Bergeron says that the ADM's reasons with respect to her retaliation allegations were conclusory and clearly inadequate, as all the ADM says is that her allegations were "unfounded".

[40] If read in isolation, the ADM's finding with respect to Ms. Bergeron's allegations of retaliation could be seen as conclusory and insufficient. However, we cannot read this one statement in the ADM's September, 2009 decision in isolation from her earlier decision and the record as a whole. Reasons of administrative decision-makers are to be "read holistically and contextually" in "light of the record and with due sensitivity to the administrative regime in which they were given": *Vavilov*, above at paras. 97 and 103. We are also not to assess reasons of an administrative body against a standard of perfection: *Vavilov*, above at para. 91.

[41] Reading the response to Ms. Bergeron's retaliation grievance in light of the ADM's earlier response to her first grievance provides considerable insight into the ADM's thinking. Not only does this demonstrate that the ADM's September decision was reasonable, it also reinforces the conclusion that the issues raised in Ms. Bergeron's retaliation complaint were largely the same as the issues that she raised in her original grievance.

[42] The record before us does not contain the grievance forms initiating Ms. Bergeron's grievances. We do, however, have the ADM's decisions relating to each of her grievances, which identify the issues raised by Ms. Bergeron in her grievances. While Ms. Bergeron contends that the ADM did not deal with all of the issues that she raised, I do not understand her to suggest that issues raised by her grievances are not accurately identified in the ADM's decisions.

[43] As noted earlier, the 2010 investigation report was before the Commission when it made the decision at issue in this appeal. Where the Commission adopts the recommendation of an investigation report and provides limited reasons for its decision, the investigation report may be viewed as supplementing the Commission's reasoning for the purpose of a decision under section 41(1) of the Act. While the Commission did provide some reasons for its decision not to deal with Ms. Bergeron's retaliation complaint, those reasons may be supplemented by reference to the investigation report: *Sketchley*, above at para. 37.

[44] The 2010 investigation report noted that Ms. Bergeron had identified nine allegedly retaliatory acts in her retaliation complaint. These included four incidents that were alleged to have occurred before the Department was advised of the filing of Ms. Bergeron's first human

rights complaint. Consequently, the investigator concluded that these actions could not have been taken in retaliation for Ms. Bergeron having filed a human rights complaint.

[45] The investigation report further states that the ADM had addressed the remaining five allegations of retaliatory conduct in her decision with respect to Ms. Bergeron's first grievance, and that the ADM had provided some relief to Ms. Bergeron in this regard. These allegations were addressed for a second time in the ADM's subsequent decision with respect to Ms. Bergeron's retaliation complaint, and further remedies were provided to her to address issues that were continuations of conduct described in her first grievance. Consequently, the investigation report concluded that all of the allegations raised by Ms. Bergeron in her retaliation complaint had been dealt with through the grievance process.

[46] Section 14.1 of the Act makes it a discriminatory practice for a person against whom a human rights complaint has been filed, or any person acting on their behalf, to retaliate or threaten retaliation against an individual who filed the complaint. Given this, it was entirely reasonable for the Commission to find that actions that occurred prior to the employer becoming aware that a human rights complaint had been filed could not meet the statutory definition of retaliation.

[47] Ms. Bergeron also alleged in her retaliation grievance that the Department had refused to extend her leave without pay, to allow her to buy back her pension deficiencies and premiums for her supplemental death benefit, or to allow her to make contributions to the benefit plans on a

"pay as you go" basis. Ms. Bergeron also alleged discriminatory, disciplinary and retaliatory acts creating an unbearable return to work situation amounting to constructive dismissal.

[48] It is apparent from a review of the ADM's responses to Ms. Bergeron's grievances that she raised essentially the same issues in her grievances as she did in her retaliation complaint.

[49] Insofar as Ms. Bergeron's claim that the Department had refused to extend her leave without pay was concerned, the Commission observed that the ADM had addressed that issue in her response to Ms. Bergeron's first grievance. There, the ADM agreed to extend her leave without pay from April 6, 2009 to September 4, 2009 in order to give her sufficient time to come to an agreement with the Department with respect to a return to work plan. When Ms. Bergeron continued to raise this as a concern in her retaliation grievance, the ADM responded by further extending Ms. Bergeron's leave without pay for another month to allow her to engage in discussions with the Department's representative with respect to her return to work.

[50] The ADM's first grievance decision also specifically referred to Ms. Bergeron's concerns with respect to her contributions to her pension and other benefit plans, the payment of her professional fees and other employment-related issues. The ADM identified an individual within the Department who had been designated to serve as a contact person with whom Ms. Bergeron could deal who could provide her with assistance with respect to her employment matters. Ms. Bergeron takes issue with the identity of the contact person on the basis that the individual did not have human resources experience. There is no evidence, however, that Ms. Bergeron ever

contacted the designated individual to try to resolve her concerns with respect to her employment benefits nor is there any indication that the contact person would have been unable to do so.

[51] The ADM addressed Ms. Bergeron's concerns with respect to her employment benefits for a second time in her response to Ms. Bergeron's retaliation grievance. After reviewing the history of the Department's dealings with Ms. Bergeron with respect to these issues, the ADM concluded her decision by stating that "[t]he Department will accept payment of your pension arrears and Supplementary Death Benefits on a monthly or quarterly basis until you return to work and/or a decision with respect to your employment relationship is made".

[52] Ms. Bergeron also asserts that the ADM's grievance decisions failed to address her claim that she had been subject to a "communication blackout" that prevented her from contacting Departmental human resources personnel, leaving her unable to address her employer's retaliatory acts and omissions. As noted above, this concern was addressed in the decision relating to Ms. Bergeron's first grievance, where the ADM designated a contact person for Ms. Bergeron to deal with in relation to her employment concerns. While Ms. Bergeron may not have been happy with the identity of the person so designated, that does not mean that her communication-related concern had not been addressed.

[53] Ms. Bergeron also argues that although the remedies granted to her through the grievance process may have addressed some of her concerns on a "going-forward" basis, they did not address the pain and suffering she had endured at the hands of the Department. Here once again, the fact that Ms. Bergeron may not have recovered everything to which she believed she was

entitled through the grievance process does not mean that her concerns were not addressed through that process.

[54] From this, it is clear that the Commission's finding that the substance of the issues raised by Ms. Bergeron in her retaliation complaint had been dealt with through the grievance process was one that was reasonably open to it on the record before it. In arriving at this conclusion, the Commission considered the submissions of the parties, the history of the grievances and complaints, as well as relevant cases and reports prepared during the investigation into Ms. Bergeron's retaliation complaint. It identified and then applied the analytical framework set out by the Supreme Court in *Figliola*, above, for declining to deal with a human rights complaint on the basis that it had been adequately dealt with through another process.

[55] The Commission's decision was internally coherent, it was justified in relation to the facts and law that constrained it, and it followed a rational chain of analysis. I am thus satisfied that the Commission provided a rational chain of analysis to support its decision not to proceed with Ms. Bergeron's retaliation complaint.

IV. Did the Commission Fail to Consider the Implications of the Internal Grievance Process not being Independent?

[56] Ms. Bergeron does not dispute that the grievance process can address human rights issues. However, she asserts that the ADM was potentially in a conflict of interest in this case, with an obligation to protect the human rights of Departmental employees on the one hand, and a

duty to promote or further the Department's agenda on the other. In such circumstances, Ms. Bergeron says that the ADM could not be said to be an independent decision-maker.

[57] According to Ms. Bergeron, the Commission should have explicitly turned its mind to the fairness implications of the Department exonerating itself through internal grievance decisions. Rather than squarely engaging with this issue, however, Ms. Bergeron says that the Commission endeavoured to incorporate portions of this Court's decision in *Bergeron FCA* into its analysis, notwithstanding the fact that the present case involved a different decision that raised different considerations than the decision that was at issue in that case.

[58] Ms. Bergeron submits that a complaint of retaliation contrary to section 14.1 of the Act is different than an ordinary complaint of discrimination. Because the complainant is seeking a remedy for bad faith conduct on the part of an employer (rather than inadvertent or routine administrative conduct), it is more analogous to a whistle-blower-type case than a regular human rights complaint. Consequently, Ms. Bergeron says that a higher level of independent adjudication was required to deal with her retaliation complaint.

[59] In support of this contention, Ms. Bergeron cites *Vaughan v. Canada*, 2005 SCC 11 for the proposition that there is an exception to the exclusive jurisdiction of the grievance procedure in cases that raise an obvious conflict of interest for the employer. Ms. Bergeron also cites *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, to say that the Commission's decision not to deal with her retaliation complaint effectively permits the

Department to become the judge of its own case, and to exonerate itself from liability for retaliation under the Act.

[60] I do not accept Ms. Bergeron's suggestion that a complaint of retaliation is somehow worse than one involving an "ordinary" case of discrimination, or that such complaints give rise to a heightened requirement insofar as the independence of the departmental decision-maker is concerned. An allegation that an employer has breached the *Canadian Human Rights Act* by violating the quasi-constitutional human rights of an employee is always a serious matter – particularly in cases of direct discrimination – and is one that has the potential to cause significant reputational harm to the employer and employees implicated in the discriminatory conduct: see, for example, *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44.

[61] This Court addressed the independence question in *Bergeron FCA*, noting that the only evidence that Ms. Bergeron had offered with respect to the ADM's alleged lack of independence was her status as an Associate Deputy Minister. However, the Supreme Court held in *Vaughan*, above, that decisions by departmental officials are not necessarily deficient merely because of their status as departmental officials: *Bergeron FCA*, above at para. 48; *Vaughan*, above at para. 37.

[62] This Court further observed in *Bergeron FCA* that there was no evidence before the Commission that the ADM was biased, or that she did not decide Ms. Bergeron's grievances impartially. The Commission specifically addressed Ms. Bergeron's independence argument in

this case, noting that, as was the case in *Bergeron FCA*, there was no evidence of bias on the part of the ADM in dealing with Ms. Bergeron's retaliation complaint.

[63] Indeed, the ADM allowed both of Ms. Bergeron's grievances, in part, and some relief was granted to her in relation to each of her grievances.

[64] This Court further observed in *Bergeron FCA* that, to the extent that she was concerned that the ADM lacked sufficient independence because she was a senior official in the Department, Ms. Bergeron could have had access to independent adjudication, but that she chose not to pursue that option: above at para. 48. Given her claim that the Department's actions against her amounted to disguised discipline, Ms. Bergeron could have also endeavoured to take her retaliation grievance to adjudication, notwithstanding the Department's claim that her grievance was not amenable to adjudication, but again, she chose not to do so.

[65] The alleged lack of independence of the ADM was, moreover, just one of several factors that the Commission had to assess, balance and weigh. In the absence of some unusual consideration, reviewing courts will generally afford deference to the factual assessments of administrative decision-makers: *Bergeron FCA*, above at para. 48.

[66] Again, as was the case in *Bergeron FCA*, the deficiencies in the decision-making process identified by Ms. Bergeron in this case are speculative, and are insufficient to render the Commission's decision unreasonable given that most, if not all of the other factors weighed in favour of dismissing the complaint.

V. The Commission's Failure to consider the Harsh Consequences for Ms. Bergeron in Deciding not to Deal with her Complaint under Section 41(1) of the Act

[67] Ms. Bergeron further contends that the decision not to deal with her retaliation complaint was unreasonable because of the Commission's failure to consider the harsh consequences that its decision had for her. She observes that in *Vavilov*, the Supreme Court held that where the impact of an administrative decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The Court further noted that "where a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention": above, at para. 133. Such cases include those where an individual's livelihood is threatened: *Vavilov*, above at para. 133.

[68] The Court went on in *Vavilov* to observe that concerns with respect to arbitrariness will be more acute in cases where the consequences of the decision for the affected individual are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable: above at para. 134. As a result, administrative decision-makers must ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law: above at para. 135.

[69] However, *Vavilov* does not require that every administrative decision must explicitly make reference to the implications of the decision for the affected individual. Indeed, as the Supreme Court observed in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the reasons of the administrative decision-maker do not have to address every matter raised before it.

[70] The reports relied on by the Commission in this case provided a lengthy description of the history of Ms. Bergeron's dealings with the Department, including references to her disability, her accommodation needs and the termination of her employment. The Commission was thus fully aware of the long and difficult history of this case, and of the impact that these events have had for Ms. Bergeron and her career. The fact that the Commission did not expressly address what Ms. Bergeron calls the "harsh consequences" of its decision for Ms. Bergeron does not, in my view, render its decision unreasonable.

VI. Was the Commission's Decision that it was not in the Public Interest to Deal with the Complaint Unreasonable?

[71] Ms. Bergeron's final argument is that the Commission's determination that it was not in the public interest to deal with her retaliation complaint was unreasonable. In particular, she says that the Commission failed to consider whether the grievance process was suited to deal with complaints of retaliation, which, as noted earlier, Ms. Bergeron submits are akin to complaints of whistle-blowing. Ms. Bergeron further asserts that it is inimical to the public interest to require that a complainant navigate the Federal Courts system of judicial review and appeal for more than a decade in order to force the Commission to perform its screening function properly.

[72] Ms. Bergeron further contends that the Commission failed to provide any explanation as to why it was not in the public interest to investigate her complaint fully, given that the grievance process lacked independence.

[73] As the Supreme Court noted in *Figliola*, the public interest considerations addressed by statutory provisions such as paragraph 41(1)(*d*) of the Act are the need to avoid relitigation, the need to conserve resources for cases that have not otherwise been dealt with and the importance of the finality of decisions.

[74] Ms. Bergeron's retaliation complaint is undoubtedly very important to her. However, the fact is that it is an individual complaint. There is no suggestion that the complaint has systemic implications, nor does it raise any matters of overarching public interest. The allegations contained in Ms. Bergeron's retaliation complaint are confined to the specific circumstances of her disability and her employment.

[75] Having determined that the issues raised in Ms. Bergeron's retaliation grievance had been adequately dealt with through the grievance process, the Commission's conclusion that it was not in the public interest to deal with her retaliation complaint was thus reasonable.

VII. Conclusion

[76] The Commission demonstrated a clear understanding of the lengthy history of these proceedings and it approached this matter carefully. It applied the *Figliola* analytical framework, and it considered the relevant factual and legal constraints, the submissions of the parties and the guidance provided by this Court and the Federal Court in connection with Ms. Bergeron's two human rights complaints and two grievances. The Commission provided clear and cogent

reasons for its decision not to deal with Ms. Bergeron's retaliation complaint, and, viewed as a whole, in the context of the record before it, its decision was reasonable.

[77] Consequently, I would dismiss the appeal. In accordance with the agreement of the parties, the respondent shall have his costs fixed in the amount of $3,500.00.

"Anne L. Mactavish"
J.A.

"I agree.
Mary J.L. Gleason J.A."

"I agree.
J.B. Laskin J.A."

APPENDIX

Canadian Human Rights Act	*Loi canadienne sur les droits de la personne*
R.S.C., 1985, c. H-6, s. 3	**L.R.C., 1985, ch. H-6**
…	**[…]**
Retaliation	**Représailles**
14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.	**14.1** Constitue un acte discriminatoire le fait, pour la personne visée par une plainte déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée.
…	**[…]**
Commission to deal with complaint	**Irrecevabilité**
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	**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*) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	*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*) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an	*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;

Act of Parliament other than this Act;

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

c) la plainte n’est pas de sa compétence;

(*d*) the complaint is trivial, frivolous, vexatious or made in bad faith; or

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

(*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.

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-314-20
STYLE OF CAUSE:	MICHÊLE BERGERON v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 9, 2022
REASONS FOR JUDGMENT BY:	MACTAVISH J.A.
CONCURRED IN BY:	GLEASON J.A. LASKIN J.A.
DATED:	DECEMBER 5, 2022

APPEARANCES:

Yavar Hameed	FOR THE APPELLANT
Helen Gray	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hameed Law Ottawa, Ontario	FOR THE APPELLANT
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT