Federal Court Cour fédérale

Date: 20240207

Docket: T-2366-22

Citation: 2024 FC 198

Ottawa, Ontario, February 7, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

LAURIE WHITE

Applicant

and

THE CANADA POST CORPORATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Laurie White, is a Canada Post Corporation [CPC] employee with disabilities, including multi-chemical sensitivity syndrome that requires a scent-free work environment. The Applicant asserts discrimination in the workplace that has not been addressed fairly by her employer and the union to which she belongs; hence, she brought a human rights complaint before the Canadian Human Rights Commission [CHRC].

[2] The CHRC decided not to deal with the complaint, as recommended in the Section 41 Report for Decision [Section 41 Report]. In the CHRC's view, the issues raised in the complaint were resolved in another process, namely, four grievance processes settled by way of memoranda of agreement. Pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*], the complaint thus was found to be "vexatious" or "made in bad faith" in the legal sense [Decision].

[3] Asserting a breach of procedural fairness or natural justice, the Applicant seeks judicial review of the Decision. Specifically, the Applicant asks the Court to send the matter back to the CHRC with a direction for further investigation.

[4] Generally, questions of procedural fairness in a judicial review attract a correctness-like standard of review: *Benchery v Canada (Citizenship and Immigration)*, 2020 FC 217 at paras 8-9; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 77. The focus of the reviewing court is whether the process before the administrative decision maker was fair in the circumstances: *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24.

[5] In this case, however, the Applicant asserts a breach in respect of the union's decision not to send the grievances to arbitration, with reference to the Supreme Court of Canada decision in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817. The Applicant also asserts that CPC failed to release a November 4, 2020 HRProactive

Report to the union until after the grievances settled. The HRProactive Report involved the results of a third party, independent investigation, and it concludes that CPC violated the *CHRA*.

[6] The Applicant's application has the appearance of appealing the Decision, without explaining how the Decision itself is unreasonable or procedurally unfair. The Court has no jurisdiction, though, to deal with the actions of the Applicant's union and CPC.

[7] That said, in looking holistically at the Applicant's judicial review application, in my view it raises the following issue for the Court's consideration: Did the CHRC reasonably find that the complaint was dealt with fairly in another process? Faced with this issue, I find that the presumptive review standard of reasonableness applies to the merits of the Decision, including the Section 41 Report, which comprises the CHRC's reasons: *Vavilov*, above at paras 10, 25; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 37-38.

[8] To avoid judicial intervention, a challenged decision must bear the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov*, above at para 99. A decision may be unreasonable if the decision maker misapprehended the evidence before it: *Vavilov*, above at paras 125-126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, above at para 100.

[9] I am satisfied that the Applicant, who represented herself in this matter including at the hearing before the Court, has met her onus. For the reasons that follow, the Applicant's judicial

review application therefore will be allowed, with the matter remitted to the CHRC for redetermination.

II. Analysis

A. *Preliminary Issue: Late filing of certified tribunal record*

[10] In her Notice of Application, the Applicant requested that the CHRC send the record of the complaint to the Applicant and the Court. The Applicant, however, appears not to have served the Notice of Application on the CHRC. As a result, a certified tribunal record [CTR] was not provided in this matter until the eve of the hearing before the Court. The Court notes that the CTR contains a copy of the complaint that is not contained in the Applicant's record; otherwise, her record contains all other material in the CTR.

[11] Although the CTR was filed eventually, I note in passing that in *Rainy River First Nations v Bombay*, 2022 FC 1434, Justice McVeigh heard a judicial review without a CTR, where both parties provided the record through affidavits (para 6). Justice McVeigh did not admit any evidence, however, that had not been before the decision maker (paras 60, 62). See also *Spence v Bear*, 2016 FC 1191 at para 3. This segues to the next preliminary issue.

B. *Preliminary Issue: Admissibility of Applicant's new evidence on judicial review*

[12] In my view, none of the Applicant's new evidence before the Court is admissible. Several of the exhibits in the Applicant's record are not contained in the CTR, including:

- The Applicant's grievance submissions;

- The HRProactive Report;
- The Concordia Rules of Natural Justice Handbook;
- The collective agreement; and
- An email from the Employment and Social Development Canada labour program.

[13] It is well established that evidence not before the administrative decision maker generally cannot be admitted by the reviewing court: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 [*Access Copyright*] at para 15. The reason is that it is not the role of the Court to engage in findings of fact or decide the merits that are within the purview of the decision maker.

[14] There are three exceptions to this general principle. The material can be admitted if it: (1) assists the court to understand the general background circumstances of the judicial review; (2) is relevant to an issue of procedural fairness or natural justice; or (3) highlights a complete absence of evidence before the decision maker: *Access Copyright*, above at para 20.

[15] Noting the Applicant's evidentiary burden to put her best foot forward before the CHRC, and the absence of any reasons why the material in issue was not submitted to the CHRC, I am not persuaded that the material falls within any of the recognized exceptions.

[16] The material does not represent an objective account of the evidence before the CHRC, and thus it is not proper background that the Court can consider: *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45. In my view, the material instead supports the Applicant's

effort to “appeal” the Decision. It is not the role of the reviewing Court, however, to step into the shoes of the CHRC and make determinations that the CHRC is empowered to make.

[17] Although procedural fairness is in issue on the judicial review, the material on its face relates to the possible unfairness of the applicable grievance process, as opposed to the proceeding before the CHRC.

[18] Further, it cannot be said that the new evidence underscores a complete lack of evidence relating to the fairness of the grievance process. That exception essentially applies to instances where the decision maker makes a finding on a lark, contrary to evidence submitted (i.e. the absence of evidence is considered in the context of the evidence actually submitted); it does not apply to situations where an applicant could have but did not submit evidence before the tribunal that the applicant later seeks to have admitted before the Court. This Court previously has held that new affidavit evidence is inadmissible where it is submitted to substantiate an applicant’s position, it was not before the decision maker, and goes to the merits of the decision under review: *Ramos v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 667 at para 20.

C. *Preliminary Issue: Consequence of the Respondent not filing record or written representations*

[19] I am not persuaded that the Applicant was not prejudiced by the Respondent’s tardy attempt to submit written representations and make oral submissions at the hearing. I declined therefore to permit the Respondent to do so.

[20] A respondent is not required to produce a responding affidavit under rule 307 of the *Federal Courts Rules*, SOR/98-106 [*Rules*]: *Merck Frosst v Canada* (1994), 55 CPR (3d) 302, 169 NR 342 (FCA) at para 24, leave to appeal to SCC refused (1995), 58 CPR (3d) vii.

[21] Subrule 310(1) of the *Rules*, however, requires a respondent to file a record. Generally, a party before the Court must limit its oral submissions to those advanced in its written submissions to ensure fairness and to permit each party to prepare effectively for the hearing: *Gemstone Travel Management Systems Inc v Andrews*, 2017 FC 463 [*Gemstone*] at para 4. The Court nonetheless has discretion to permit a party to make submissions in the absence of written representations if the opposing party is not prejudiced; the Court also may decline to do so: *Gemstone*, above at para 6.

[22] In light of the obvious prejudice to the Applicant, which the Respondent did not allay to the Court's satisfaction, I declined to permit the Respondent here to make oral representations.

D. *The Decision was unreasonable*

[23] In short, I am persuaded that the CHRC did not reasonably determine that the complaint was addressed fairly in the grievance processes.

[24] The CHRC can refuse to hear a complaint pursuant to section 41 of the *CHRA* only in plain and obvious cases, as acknowledged in the Section 41 Report: *Carrasqueiras v Sunwing Airlines Inc*, 2022 FC 1714 [*Carrasqueiras*] at para 27, citing *Keith v Canada (Correctional Service)*, 2012 FCA 117 at para 50.

[25] In *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 [*Figliola*] at para 37, the Supreme Court of Canada outlines three factors for assessing whether a human rights complaint has been dealt with appropriately in an alternative process:

1. Whether there was concurrent jurisdiction to decide human rights issues;
2. Whether the previously decided legal issue was essentially the same as the complaint in the later process; and
3. Whether the complainant had the opportunity to know and meet the case.

[26] After setting out these factors, the Supreme Court concludes in the same paragraph that, "[a]t the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute."

[27] That said, the Supreme Court also instructs that the objectives of finality and avoidance of duplicative proceedings must be balanced against possible injustice that may arise if the result of an earlier proceeding is used to preclude a subsequent proceeding that involves significant differences in purpose, process and stakes: *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 [*Penner*] at para 42.

[28] In *Penner*, the Supreme Court held that a decision maker must consider whether the initial proceeding was unfair (paras 40-41). Even if it was fair, the decision maker must then consider whether it would be unfair to use the results of the previous proceeding to bar the subsequent proceeding (para 42). The Section 41 Report here acknowledges these guiding principles, among others.

[29] In the case presently before the Court, there was no arbitration and no impartial decision maker with statutory jurisdiction to consider the *CHRA*: *Carrasqueiras*, above at para 32. The union resolved the grievances, but allegedly without the Applicant's involvement or approval, as acknowledged by the CHRC. As a result, she did not have an opportunity to make submissions or to know the case to be met. The Decision thus unreasonably does not address whether the third part of the *Figliola* test was met.

[30] Further, the Applicant raises allegations of procedural fairness based on CPC's treatment of the HRProactive Report, but the CHRC does not consider this issue. She seeks to have the recommendations in the HRProactive Report addressed before the CHRC, which did not happen in the grievance process because CPC did not disclose the report until after the grievances were resolved.

[31] According to *Figliola* and *Penner*, the CHRC is required—at a minimum—to grapple with the fairness of the previous proceeding and, even if the prior proceeding was fair, consider whether it would be unfair to use the prior results to dismiss the complaint: *Carroll v Canada (Attorney General)*, 2015 FC 287 [*Carroll*] at para 126. While the Section 41 Report refers to the issues raised by the Applicant, the human rights officer who authored the Report did not engage with the issue of whether the proceeding was fair. More pointedly, the Section 41 Report in my view does not demonstrate that the officer, and hence the CHRC, considered whether it would be unfair to permit the results of the previous process to bar the subsequent *CHRA* proceeding.

[32] Rather, the CHRC disregarded and dismissed the Applicant's allegations of procedural unfairness as "dissatisfaction with the representation she received from her union." The CHRC's finding that it "must" respect the finality of the grievance process, in my view, gives rise to the spectre of the CHRC having fettered its discretion: *Carroll*, above at para 127.

[33] In addition, I note the memoranda of agreement resolving the grievances state that, "[w]ithout prejudice or precedent to any position the parties may take in similar or identical matters, the parties agree to resolve the above noted grievances" (emphasis added). This is to be contrasted with a settlement agreement in which a party specifically agrees to withdraw a CHRC complaint but the party nonetheless seeks to pursue a complaint: *Exeter v Canada*, 2012 FCA 119 at para 2. In fact, the memoranda here seemingly permit the Applicant to raise "identical matters" elsewhere, suggesting that the resolution of the grievances was not binding.

III. Conclusion

[34] For the above reasons, I conclude that the Decision was unreasonable. The Applicant's judicial review application therefore is allowed. The Decision is set aside, including the Section 41 Report, with the matter remitted to the Commission for redetermination by a different decision maker.

[35] On the issue of costs, and exercising the Court's discretion under rule 400 of the *Rules*, I find that the Applicant is entitled to her out-of-pocket court fees, totalling $100, payable by the Respondent.

JUDGMENT in T-2366-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The decision of the Canadian Human Rights Commission dated October 5, 2022 is set aside, including the Report for Decision dated March 14, 2022, with the matter remitted to the Canadian Human Rights Commission for redetermination by a different decision maker.
3. The Applicant is entitled to $100 in costs, payable by the Respondent.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Canadian Human Rights Act*, RSC 1985, c H-6.**
***Loi canadienne sur les droits de la personne*, LRC 1985, ch H-6.**

Commission to deal with complaint **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.	**Irrecevabilité** **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.
Report **44 (1)** An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation. **Action on receipt of report** **(2)** If, on receipt of a report referred to in subsection (1), the Commission is satisfied	**Rapport** **44 (1)** L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête. **Suite à donner au rapport** **(2)** La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or **(b)** that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act, it shall refer the complainant to the appropriate authority.	**a)** que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts; **b)** que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.
Idem **(3)** On receipt of a report referred to in subsection (1), the Commission **(a)** may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied **(i)** that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and **(ii)** that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or **(b)** shall dismiss the complaint to which the report relates if it is satisfied **(i)** that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or **(ii)** that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).	**Idem** **(3)** Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission : **a)** peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue : **(i)** d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié, **(ii)** d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e); **b)** rejette la plainte, si elle est convaincue : **(i)** soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié, **(ii)** soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

***Federal Courts Rules*, SOR/98-106.**
***Règles des Cours fédérales*, DORS/98-106.**

Respondent's affidavits **307** Within 30 days after service of the applicant's affidavits, a respondent shall serve its supporting affidavits and documentary exhibits and shall file proof of service. The affidavits and exhibits are	**Affidavits du défendeur** **307** Dans les trente jours suivant la signification des affidavits du demandeur, le défendeur signifie les affidavits et pièces documentaires qu'il entend utiliser à l'appui de sa position et dépose la preuve de

deemed to be filed when the proof of service is filed in the Registry.	signification. Ces affidavits et pièces sont dès lors réputés avoir été déposés au greffe.
Respondent's record **310 (1)** A respondent to an application shall, within 20 days after service of the applicant's record, serve and file the respondent's record.	**Dossier du défendeur** **310 (1)** Le défendeur signifie et dépose son dossier dans les 20 jours après avoir reçu signification du dossier du demandeur.
Costs **Awarding of Costs Between Parties Discretionary powers of Court** **400 (1)** The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	**Dépens** **Adjudication des dépens entre parties Pouvoir discrétionnaire de la Cour** **400 (1)** La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2366-22
STYLE OF CAUSE:	LAURIE WHITE v THE CANADA POST CORPORATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 18, 2023
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DATED:	FEBRUARY 7, 2024

APPEARANCES:

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Hashim Syed	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canada Post Corporation Toronto, Ontario	FOR THE RESPONDENT