Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Detra Berberi

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

Ruling

Member: Shirish P. Chotalia, Q.C.
Date: December 29, 2011
Citation: 2011 CHRT 23

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I. Introduction

[1] In file T1311/4108, the Canadian Human Rights Tribunal (the Tribunal) held a hearing on June 1-2, 2009 and rendered a decision on July 27, 2009: *Detra Berberi v. Attorney General of Canada*, 2009 CHRT 21 [*Berberi*]. The Complainant now requests that the Tribunal convene a hearing in relation to a remedial offer which was made and accepted during the course of the June 2009 hearing. The Complainant claims that she has not received the benefit of that remedial offer.

II. Background

[2] In *Berberi*, the Complainant alleged that she was denied a CR-04 position with the RCMP because of her disability and past absenteeism, contrary to section 7 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*]. The RCMP admitted that its decision not to employ the Complainant was based in part on a perceived disability. The hearing into her complaint proceeded on the issue of remedy alone. At the hearing, the RCMP offered the Complainant a CR-04 position, which she accepted. The Tribunal noted this in its decision as follows:

[3] [32] At the hearing, the RCMP offered Ms. Berberi an indeterminate CR-04 finance/administrative position at the RCMP detachment in Milton, which is one of her preferred locations. The only condition was that Ms. Berberi obtain a top secret security clearance. The RCMP also offered to conduct a functional ability assessment and provide the necessary accommodations to ensure that she succeeds in this position.

[4] [33] Ms. Berberi accepted this offer and agreed that this satisfied her remedy request for a permanent position with the RCMP. The parties agreed that no order from the Tribunal was necessary.

[5] The Complainant was denied compensation for lost wages, willful or reckless conduct, and other expenses, but received compensation for pain and suffering and legal expenses.

[6] Ms. Berberi filed an application for judicial review with the Federal Court. Among other things, Ms. Berberi argued that the Tribunal had erred in assuming that the RCMP would act in good faith in honouring the job offer. In *Berberi v. Canadian Human Rights Tribunal and Attorney General of Canada (RCMP)*, 2011 FC 485, the Federal Court stated:

> [63] In my opinion, the answer to this issue lies in the Tribunal's acknowledgement at paragraph 33 of the decision that the "parties agreed that no order from the Tribunal was necessary" relative to the job offer that was made by the RCMP and accepted by the Applicant.
>
> [64] The Applicant was represented by counsel at the hearing before the Tribunal. She had the option of requesting an order. She did not do so.
>
> [65] The responsibilities of the Tribunal were discharged once the issues of remedy, including compensation for pain and suffering and a contribution towards legal fees, were adjudicated. The Applicant is at liberty to seek an order from the Tribunal with respect to implementation of the remedy. She has failed to show that the Tribunal made any assumptions on the basis of any error, and this argument is dismissed.

[7] Ultimately, Ms. Berberi's application for judicial review was denied and she has filed an appeal of that decision with the Federal Court of Appeal.

[8] On July 15, 2011, the Complainant made the present request to the Tribunal. The parties were given an opportunity to make submissions on the request and were offered mediation in an attempt to settle the dispute. However, mediation was declined.

III. Positions of the parties

[9] The Complainant argues that the remedial offer, when accepted, formed part of the Tribunal's decision. As a matter of natural justice and ensuring the adjudicative and institutional integrity of the Tribunal, the Complainant claims that it is necessary and consistent with the

purpose of the *Act* that the Tribunal posses the jurisdiction to superintend over the conduct of the parties in relation to remedial proposals made and accepted during the course of proceedings before it.

[10] In the alternative, the Complainant submits that the hearing into this complaint should be resumed as the complaint has not been properly or fully adjudicated. According to the Complainant, the Respondent's unwillingness to fulfill the terms of the remedial offer renders nugatory Ms. Berberi's agreement at the hearing not to pursue an order for a permanent position with the RCMP. In the further alternative, the Complainant submits that this request should be considered as a new application that alleges the continuation of the discriminatory conduct which the Respondent has already admitted to.

[11] Both the Respondent and the Canadian Human Rights Commission (the Commission) submit that the Tribunal is *functus officio* with respect to this matter. The Tribunal issued a final order/decision and, therefore, the jurisdiction of the Tribunal to deal with the matter was exhausted. However, both the Respondent and the Commission agree that the remedial offer formed part of the Tribunal's decision.

IV. Law

[12] Pursuant to the principle of *functus officio*, courts cannot, as a general rule, reopen their final decisions except where there has been a slip in drawing it up or there was an error in expressing the manifest intention of the court (see *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at para. 19 [*Chandler*]). In *Chandler*, the Supreme Court found that the *functus officio* principle applied to administrative tribunals as well, although "...its application must be more flexible and less formalistic..." (*Chandler* at para. 21). A decision of the Tribunal can be reopened if there are indications in the *Act* that the Tribunal may do so in order to discharge its functions (see *Chandler* at para. 22). In addition, the Tribunal can reopen a decision if it failed to dispose of an issue that was fairly raised by the proceedings and of which the Tribunal is empowered by the *Act* to dispose (see *Chandler* at para. 23). However, the Tribunal

cannot revisit a decision because it has changed its mind, made an error within its jurisdiction or because there has been a change of circumstance (see *Chandler* at para. 20). Furthermore, the fact that one remedy is selected over another alternative remedy does not entitle the Tribunal to reopen proceedings to make another selection (see *Chandler* at para. 23).

[13] In *Grover v. Canada (National Research Council)* (1994), 80 F.T.R. 256 (F.C.) [*Grover*], an application for judicial review of a Tribunal decision, the Federal Court had to decide whether the Tribunal had the power to reserve jurisdiction with regards to a remedial order. The Tribunal had ordered that the complainant be appointed to a specific job, but retained jurisdiction to hear further evidence with regards to the implementation of the order. The Federal Court held that although the *Act* does not contain an express provision that allows the Tribunal to reopen an inquiry, the wide remedial powers set out therein, coupled with the principle that human rights legislation should be interpreted liberally, in a manner that accords full recognition and effect to the rights protected under such legislation, enables the Tribunal to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants (see *Grover* at paras. 29-36). The Federal Court added:

[14] It is clear that the Act compels the award of effective remedies and therefore, in certain circumstances the Tribunal must be given the ability to ensure that their remedial orders are effectively implemented. Therefore, the remedial powers in subsection 53(2) should be interpreted as including the power to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the Tribunal are forthcoming to complainants. The denial of such a power would be overly formalistic and would defeat the remedial purpose of the legislation. In the context of a rather complex remedial order, it makes sense for the Tribunal to remain seized of jurisdiction with respect to remedial issues in order to facilitate the implementation of the remedy. This is consistent with the overall purpose of the legislation and with the flexible approach advocated by Sopinka J. in *Chandler*, *supra*. It would frustrate the mandate of the legislation to require the complainant to seek the enforcement of an unambiguous order in the

Federal Court or to file a new complaint in order to obtain the full remedy awarded by the Tribunal. (*Grover* at para. 33)

[15] Similarly, in *Canada (Attorney General) v. Moore*, [1998] 4 F.C. 585 [*Moore*], the Federal Court had to determine whether the Tribunal exceeded its jurisdiction by reconsidering and changing a cease and desist order. Having found the complaint to be substantiated, the Tribunal made a general direction in its order and gave the parties the opportunity to work out the details of the order while the Tribunal retained jurisdiction. After examining the reasoning in *Grover* and *Chandler*, the Federal Court stated:

[16] The reasoning in these cases supports the conclusion that the Tribunal has broad discretion to return to a matter and I find that it had discretion in the circumstances here. Whether that discretion is appropriately exercised by the Tribunal will depend on the circumstances of each case. That is consistent with the principle set out in *Chandler v. Alberta Association of Architects*, relied upon by the applicant, which dealt with the decision of a board other than the Canadian Human Rights Tribunal. (*Moore* at para. 49)

[17] The Federal Court determined that the Tribunal had reserved jurisdiction and there was no indication that the Tribunal viewed its decision as final and conclusive in a manner that would preclude it from returning to a matter included in the order. Therefore, on the authority of *Grover*, the Federal Court concluded that subsection 53(2) of the *Act* empowered the Tribunal to reopen the proceedings (see *Moore* at para. 50).

[18] The Tribunal jurisprudence that has considered the *functus officio* principle and interpreted *Grover* and *Moore*, has generally found that absent a reservation of jurisdiction from the Tribunal on an issue, the Tribunal's decision is final unless an exception to the *functus officio* principle can be established (see *Douglas v. SLH Transport Inc.*, 2010 CHRT 25; *Walden v. Canada (Social Development)*, 2010 CHRT 19; *Warman v. Beaumont*, 2009 CHRT 32; and, *Goyette v. Voyageur Colonial Ltée*, (November 16, 2001), TD 14/01 (CHRT)). However, recent

Federal Court jurisprudence, decided several years after *Grover* and *Moore* and which examined the authority of the Commission to reconsider its decisions, provides further guidance on the application of the *functus officio* principle to administrative tribunals and commissions.

[19] In *Kleysen Transport Ltd. v. Hunter*, 2004 FC 1413 [*Kleysen*], the Commission had investigated a complaint and the investigator recommended that the complaint be dismissed. However, the Commission failed to consider some of the complainant's submissions. The Commission then reconsidered the complaint and referred it to the Tribunal. The respondent sought judicial review of the Commission's actions. The Federal Court found that nothing in the *Act* gave the Commission the power to reconsider its decisions, however, "the Commission clearly possesses a very broad discretion to screen and process complaints" (see *Kleysen* at para. 8). The Federal Court also examined the British Columbia Court of Appeal decision in *Zutter v. British Columbia (Council of Human Rights)* (1995), 122 D.L.R. (4th) 665 (B.C.C.A.) [*Zutter*]. In *Zutter*, the British Columbia Council of Human Rights had also failed to consider a submission from a complainant and the British Columbia Court of Appeal found that the Council had the power to reconsider the complaint in that circumstance. The Court in *Zutter*, in addition to examining the Council's enabling statute, also looked at the overall context of the situation and found that the absence of any right of appeal of the Council's decision and the fact that the Council was trying to correct an unfairness were contextual factors supporting the power of the Council to reconsider its decision. The Court in *Zutter* also considered the broad purposes of human rights legislation and stated "it would be an unfortunate irony if the Council, whose very existence and remedial purpose is characterized by the fundamental values of fairness and justice, nonetheless lacked the jurisdiction to remedy that unfairness" (*Zutter* at para. 23). In consideration of *Zutter* and *Chandler*, the Federal Court in *Kleysen* found as follows:

> Here, the Commission decided to reconsider its initial decision when it realized that it had overlooked some of Mr. Hunter's materials. Had it not done so, Mr. Hunter might well have brought an application for judicial review, arguing that the Commission had treated him unfairly by failing to consider all of his submissions. In my view, the Commission rightly decided to consider whether its initial decision was well-founded in light of the new submissions rather than

> burden Mr. Hunter with the onus of bringing an application in this Court. (*Kleysen* at para. 12)

[20] In *Merham v. Royal Bank of Canada*, 2009 FC 1127 [*Merham*], the complainant sought judicial review of a Commission decision. The Commission decided not to reconsider its prior decision based on new information, as the information did not demonstrate a link to a prohibited ground of discrimination. In determining that the Commission's decision was reasonable, the Federal Court affirmed that the Commission has the power to reconsider its decisions. Specifically, after considering *Kleysen*, *Zutter* and *Chandler*, the Federal Court stated:

> Consequently, the above case law leads me to conclude that the Commission has the power to reconsider its decisions, but this is a discretionary power which must be used sparingly in exceptional and rare circumstances. (*Merham* at para. 25)

V. Analysis

[21] The application of the *functus officio* principle to administrative tribunals must be flexible and not overly formalistic (see *Chandler* at para. 21). In *Grover*, in determining whether the Tribunal could supervise the implementation of its remedial orders, the Federal Court recognized that the Tribunal has the power to retain jurisdiction over its remedial orders to ensure that they are effectively implemented. In *Moore*, in deciding whether the Tribunal could reconsider and change a remedial order, the Federal Court expanded on the reasoning in *Grover* and stated that "the Tribunal has broad discretion to return to a matter…" (*Moore* at para. 49). Consistent with the Supreme Court of Canada's decision in *Chandler*, the Federal Court added that "whether that discretion is appropriately exercised by the Tribunal will depend on the circumstances of each case" (*Moore* at para. 49). In *Grover* and *Moore*, while the retention of jurisdiction by the Tribunal was a factor considered by the Federal Court in determining whether the Tribunal appropriately exercised its discretion to return to a matter, ultimately, it was not the only factor considered by the Court. In addition to examining the context of each case, the Tribunal must also consider whether "there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling

legislation" (*Chandler* at para. 22). This method of analyzing the Tribunal's discretion to return to a matter is consistent with the Federal Court's reasoning in *Kleysen* and *Merham*. The question then becomes: considering the *Act* and the circumstances of the case, should the Tribunal return to the matter in order to discharge the function committed to it by the *Canadian Human Rights Act*?

[22] The primary focus of the *Act* is to "…identify and eliminate discrimination" (*Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 13). In this regard, subsection 53(2) of the *Act* grants the Tribunal broad remedial discretion to eliminate discrimination when a complaint of discrimination is substantiated (see *Grover* at para. 31). Therefore, as the Federal Court has stated, "subsection 53(2) should be interpreted in a manner which best facilitates the compensation of those subject to discrimination" (*Grover* at para. 32). The *Act* does not provide a right of appeal of Tribunal decisions, and judicial review is not the appropriate forum to seek out the implementation of a Tribunal decision. As the Federal Court indicated to the Complainant: "The Applicant is at liberty to seek an order from the Tribunal with respect to implementation of the remedy" (*Berberi v. Canadian Human Rights Tribunal and Attorney General of Canada (RCMP)*, 2011 FC 485 at para. 65). When the Tribunal makes a remedial order under subsection 53(2), that order can be made an order of the Federal Court for the purposes of enforcement under section 57 of the *Act*. Section 57 allows decisions of the Tribunal to "…be enforced on their own account through contempt proceedings because they, like decisions of the superior Courts, are considered by the legislator to be deserving of the respect which the contempt powers are intended to impose" (*Canada (Human Rights Commission) v. Warman*, 2011 FCA 297 at para. 44). However, as the Federal Court has stated: "It would frustrate the mandate of the legislation to require the complainant to seek the enforcement of an unambiguous order in the Federal Court or to file a new complaint in order to obtain the full remedy awarded by the Tribunal" (*Grover* at para. 33). With this legislative framework in mind, I turn to the specific circumstances under which the Complainant asks the Tribunal to return to her matter.

[23] In this case, the Complainant is not challenging the finality of the Tribunal's decision. The validity or correctness of the Tribunal's decision is not in issue, nor is the Complainant asking the Tribunal to change any of the remedies that are outlined in the Tribunal's decision. Rather, she is asking the Tribunal for an opportunity to argue for the effective implementation of a remedial offer, which all the parties agree, formed part of the Tribunal's decision in this matter. In this sense, the remedial offer was not in the nature of a private settlement between the parties. As the complaint was substantiated, the Tribunal had the power to make the remedial offer an order under section 53(2) of the *Act*, but the parties agreed that such an order was not necessary (see *Berberi* at para. 33). That being said, would it not be overly formalistic to deny a victim of discrimination the opportunity to seek the effective implementation of a remedy for the sole reason that the Tribunal did not make the remedy into an "order". Although the Tribunal left it to the parties to implement the remedy, it no doubt expected that the remedy would be forthcoming to the Complainant. Furthermore, the Tribunal addressed the remedy in its reasons and laid out the conditions thereof (see *Berberi* at para. 32). However, without an order from the Tribunal, the Complainant is left without an enforcement mechanism regarding the remedial offer. Given that the Tribunal's remedial powers should be interpreted in a manner "...which best facilitates the compensation of those subject to discrimination" (*Grover* at para. 32) and given that the *Act* "...compels the award of effective remedies…" (*Grover* at para. 33), it would defeat the remedial purposes of the *Act* to deny the victim of discrimination in this case the opportunity to return to her matter to argue for the effective implementation of the remedial offer. Similar to the reasoning of the Court in *Zutter*, it would be an unfortunate irony if the Tribunal, whose very existence and remedial purpose is characterized by the fundamental values of fairness and justice, nonetheless lacked the jurisdiction to remedy a potential unfairness (see *Zutter* at para. 23). Therefore, in the circumstances of this case, the Tribunal finds that it has the jurisdiction to return to the matter to address questions related to the implementation of the remedial offer. The Tribunal will convene a case conference call between the parties to determine how this matter will proceed.

Signed by

Shirish P. Chotalia, Q.C.
Tribunal Chairperson

Ottawa, Ontario
December 29, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1311/4108

Style of Cause: Detra Berberi v. Attorney General of Canada

Ruling of the Tribunal Dated: December 29, 2011

Appearances:

Gavin J. Leeb, for the Complainant

François Lumbu, for the Canadian Human Rights Commission

Shelley C. Quinn, for the Respondent