Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Marie Mache-Rameau

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian International Development Agency

Respondent

Ruling

File No.: T1148/3006
Member: Robert Malo
Date: August 26, 2014
Citation: 2014 CHRT 26

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I. Background

[1] In a motion dated January 16, 2013, to the Canadian Human Rights Tribunal (Tribunal), by way of a letter, the representative of the complainant, Marie Mache-Rameau, asked the Tribunal to convene the parties to determine a question of narrow interpretation on the application of the memorandum of understanding reached between the parties, that is, the complainant, Marie Mache-Rameau and the Canadian International Development Agency (CIDA), as well as the Canadian Human Rights Commission (Commission), in an agreement signed on November 29, 2006.

[2] The Tribunal held a hearing on the motion made by Marie Mache-Rameau's representative on August 8, 2014, to the Tribunal in Ottawa, but in the absence of the Commission, which informed the parties on June 10, 2014, that it would not make any submissions in relation to the complainant's motion.

II. Facts

[3] On August 1, 2003, the complainant, Marie Mache-Rameau, filed a complaint with the Commission, a complaint alleging discriminatory practice in an employment situation and workplace harassment within CIDA, contrary to section 7 of the *Canadian Human Rights Act* (Act).

[4] As stipulated in the Tribunal's internal procedures, the Tribunal then proposed, if agreed to by all parties, that the parties work towards a settlement through mediation.

[5] A first mediation session was therefore held between the parties on September 6, 2006, before a member of the Tribunal, and said mediation session was scheduled to resume on November 29, 2006.

[6] At that time, a settlement was reached in the mediation process and the proceedings in the case were adjourned indeterminately (see the letter dated December 8, 2006, by the Registry Operations Manager, Gwen Zappa).

[7] On January 16, 2007, a letter from the Commission addressed to the Tribunal registry officer was sent to the Tribunal stating that the memorandum of understanding pertaining to above-mentioned file [TRANSLATION] "had been approved by the Commission under subsection 48(1) of the *Canadian Human Rights Act.*"

[8] The Tribunal was then required to issue a notice of discontinuance in the case (see the Commission's letter dated January 16, 2007).

[9] On January 17, 2007, the Tribunal's Director of Registry Operations, Guy Grégoire, further to the letter from Ikram Warsame dated January 16, 2007, informed counsel for the Commission that he was stopping the proceedings and closing the file in the matter.

[10] On June 23, 2010, in a letter signed by François Lumbu, a lawyer with the Commission, the Commission made a request to the Tribunal for the services of a Tribunal member to chair a mediation session in this case.

[11] The request in question made reference to the fact that the parties did not agree on the interpretation of article 6 of the memorandum of understanding.

[12] Said letter also made reference to the fact that by article 16 of the memorandum, the parties were committed to return to mediation to renegotiate the issues (see the letter dated June 23, 2010, 3rd paragraph).

[13] As evidenced by said letter, the Commission was not requesting that the Tribunal file be reopened. Instead, the Commission was stating that they were prepared to discuss the terms in order to benefit from the Tribunal's services, complimentary or not, to proceed with mediation in the case.

[14] On September 24, 2010, the Tribunal's Director of Registry Operations responded that the Tribunal was not willing to offer the required service. More specifically, the Tribunal reported the following situation:

> [TRANSLATION]
>
> We find that the file was closed on January 17, 2007, that the Member (Member Hadjis) who attended the prior mediation in the file completed his

> term with the Tribunal and that the Commission approved a settlement in the matter under section 48 of the *Canadian Human Rights Act*. Consequently, we find that it would be inappropriate for the Tribunal to participate in the mediation considering the above-mentioned circumstances. (See the letter dated September 24, 2010.)

[15] Additionally, in a letter dated October 24, 2010, the respondent herein, that is, CIDA, stated that it was still in agreement with using a mediator to define the application of article 6 of the signed memorandum of understanding between the parties dated November 29, 2006.

[16] At the hearing of the motion, the parties admitted that additional mediation was held between the parties, but it was unsuccessful in respect of deciding the interpretation of the relevant article 6.

[17] On May 29, 2012, an order was issued by the Honourable Justice Yvon Pinard of the Federal Court, and it reads as follows:

> [TRANSLATION]
>
> The settlement between Marie Mache-Rameau and the Canadian International Development Agency approved by the Canadian Human Rights Commission dated November 29, 2006, is made an order of the Federal Court.

[18] On November 2, 2012, another decision of the Federal Court was rendered by the Honourable Justice Richard Boivin regarding a motion filed by the applicant, Marie Mache-Rameau, under section 466 of the *Federal Courts Rules* to make a show cause order against the President of CIDA on the basis that the President was allegedly in contempt of court.

[19] In that regard, it is helpful to reproduce paragraph 19 of said decision, which reads as follows:

> Having heard the parties, the Court must observe that a difference in interpretation was raised and that it is therefore not clear what the parties must do to comply. In a similar scenario, the Federal Court of Appeal stated that "[i]t must be clear on the face of the order what is required for

> compliance" (*Telecommunications Workers Union v Telus Mobility*, 2004 FCA 59 at paragraph 4, [2004] FCJ no 273 (QL)), which is not the case here. Moreover, Justice Hansen of this Court has noted that "the fact that the Order is ambiguous precludes a finding of contempt . . ." and that an alleged contemnor "is entitled to the most favourable interpretation" (*Sherman v Canada (Customs and Revenue Agency)*, 2006 FC 1121 at paragraphs 29 and 14, [2006] FCJ no 1413 (QL)).

[20] Consequently, the Honourable Justice Boivin found that the complainant did not discharge her burden of making a *prima facie* case, and the complainant's motion was therefore dismissed.

[21] Following that judgment, the complainant proceeded with the present motion, that is, a letter from her counsel dated January 16, 2013, for the Tribunal to reconsider this case to rule on an issue of interpretation that arose in the context of interpreting article 6 of the memorandum, which was not completed or approved by the Commission according to the complainant.

III. Applicant's position

[22] In her written arguments dated May 26, 2014, reproduced at the hearing on August 8, the complainant raised three main arguments that apparently define the Tribunal's jurisdiction to reconsider the interpretation of the memorandum of understanding based on three alleged reasons:

(1) There is a statutory presumption in the circumstances of this case that the Tribunal has jurisdiction to rule on the question in this case;

(2) The challenge to this Tribunal's jurisdiction by the respondent is unjust and inequitable and must fail;

(3) The memorandum of understanding and its approval by the Commission triggers public interest, which requires the intervention of the Tribunal and triggers the statutory prerequisites to the exercise of its jurisdiction (see para 1, written arguments of the applicant).

[23] At the hearing, the complainant's representative stated that the Tribunal is not *functus officio,* and then the complainant's representative asked the Tribunal to define its jurisdiction under the Act to decide the issue.

[24] The complainant's representative also reproduced parts of the Federal Court's decision in *Berberi* (*Attorney General of Canada and the Canadian Human Rights Commission and Detra Berberi*, 2013 FC 921), rendered by the Honourable Justice O'Keefe.

[25] That decision was an application for judicial review of a remedy decision, relating to an earlier decision of the Tribunal, in which it had been decided that the Tribunal had jurisdiction to convene a hearing regarding the implementation of a remedial offer referred to in an earlier decision.

[26] In that decision by the Tribunal, rendered on December 29, 2011, (*Attorney General of Canada and the Canadian Human Rights Commission and Detra Berberi*, (2011 CHRT 2) (*Berberi*)), by Tribunal Chairperson Shirish P. Chotalia, counsel drew the Tribunal's attention to paragraph 21 of said decision, which reads as follows:

> The application of the *functus officio* principle to administrative tribunals must be flexible and not overly formalistic (see *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at para 21).

[27] Thus, relying on that principle as stated in the Tribunal's decision, the complainant's representative stated that flexibility is necessary given that the Tribunal is an administrative tribunal.

[28] Also, in reference to the Federal Court's decision dated August 30, 2013, by the Honourable Justice O'Keefe, *Berberi*, counsel for the complainant reiterated the argument set out in paragraph 21 of that decision that the doctrine of *functus officio* protects the principle of finality in judicial and administrative decision making.

[29] Regarding the second point, that is, the Tribunal's jurisdiction under the Act to deal with this matter, counsel for the complainant stated that the parties attempted to resume mediation under article 16 of the agreement, which allowed for that process, but that mediation failed, and that thereafter, the respondent refused to continue said mediation.

[30] In his arguments, counsel for the complainant stated that the Tribunal has a residual power to intervene in this case and that the origin of that residual power can be found in part in the Tribunal's decision to which I referred above, that is, the decision dated

December 29, 2011, by Shirish P. Chotalia, the Tribunal Chairperson at the time (2011 CHRT 23).

[31] Finally, counsel for the complainant submitted that the interests of justice justify the intervention of the Tribunal given that should it fail to do so and if the Tribunal is the only avenue for settling the matter, the complainant would be without recourse, resulting in her having to start the whole process over again, which would be contrary to the overall scheme of the Act.

IV. Respondent's position

[32] In his arguments, counsel for the respondent told the Tribunal that the *functus officio* doctrine does not apply in this case.

[33] He also stated that the signed agreement between the parties dated November 29, 2006, does not allow the Tribunal to reconsider this case.

[34] In this regard, he referred to article 11 of the agreement, which states that the settlement between the parties was reached without prejudice to either party and without an admission of liability or misconduct on the part of the respondent with respect to the allegations made in the complaint of the complainant.

[35] Similarly, he stated that the Tribunal did not render a decision in this case and that in this regard, in reference to the *functus officio* doctrine, the absence of a decision by the Tribunal means that the *functus officio* doctrine cannot apply.

[36] Regarding the origin of the Tribunal's jurisdiction, counsel for the respondent reproduced paragraph 23 of *Bell Canada v. CTEA* [2003] 1 S.C.R. 884 (*Bell*), in which the Supreme Court of Canada stated the following:

> The main function of the Canadian Human Rights Tribunal is adjudicative. It conducts formal hearings into complaints that have been referred to it by the Commission.

[37] In addition, counsel for the respondent referred to a decision by the Tribunal dated July 29, 2009, in *Pawal Kowalski and Canadian Human Rights Commission* (*Kowalski*)

and Ryder Integrated Logistics (2009 CHRT 22), a decision by Member Athanasios D. Hadjis, where the following is stated in paragraph 7:

> 7. The Tribunal's jurisdiction to conduct inquiries into complaints is derived from s. 49 of the *Act*, pursuant to which the Tribunal Chairperson must institute an inquiry into a complaint upon receipt of a request from the Commission (s. 49(2)). The scope of Tribunal inquiries is thus limited to the matters arising from the complaints accompanying such requests.

[38] In his arguments, counsel for the respondent found that there is no such complaint before the Tribunal at this time, and that there is no remedy to reinterpret like there was in the Federal Court decision in *Berberi*, *supra*.

[39] Furthermore, counsel for the respondent reiterated the decision in *Powell v. United Parcel Service Canada Ltd*. (2008 CHRT 43), where the same member, that is, Member Athanasios D. Hadjis, dismissed a motion by respondent UPS to confirm an alleged settlement bringing the case before the Tribunal to a close.

[40] In that decision, given that the human rights complaint hearing had not yet commenced and given the absence of Commission approval of an alleged settlement, the complaint could not be said to have been settled.

[41] In this case, the parties confirmed the definitive nature of the signed agreement between them because it was approved by the Commission and also, the signed agreement between the parties dated November 29, 2006, in this case was also made an order of the Federal Court (see article 15 of the agreement).

[42] Consequently, counsel for the respondent is asking the Tribunal to decline jurisdiction over the motion filed by the complainant.

V. Decision

[43] The Tribunal has properly reviewed this file and has taken into account the written and verbal submissions of the parties and has come to the conclusion that it cannot allow the complainant’s motion for reconsideration of this case.

[44] Consequently, the Tribunal will dismiss the complainant's motion for the following reasons.

[45] For a better understanding of the Tribunal's decision, I will refer to the following provisions of the Act, the first being the following:

> Section 44. (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*).

[46] Similarly, I cite the provisions of section 48 of the Act regarding a settlement in a case:

> Section 48. (1) When, at any stage after the filing of a complaint and before the commencement of a hearing before a Human Rights Tribunal in respect thereof, a settlement is agreed on by the parties, the terms of the settlement shall be referred to the Commission for approval or rejection.
>
> (2) If the Commission approves or rejects the terms of a settlement referred to in subsection (1), it shall so certify and notify the parties.
>
> (3) A settlement approved under this section may, for the purpose of enforcement, be made an order of the Federal Court on application to that Court by the Commission or a party to the settlement.

[47] As well, it is helpful to reproduce section 49 of the Act with respect to inquiries into complaints:

> 49. (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.
>
> (2) On receipt of a request, the Chairperson shall institute an inquiry by assigning a member of the Tribunal to inquire into the complaint, but the Chairperson may assign a panel of three members if he or she considers that the complexity of the complaint requires the inquiry to be conducted by three members.

[48] With deference to the opinion expressed by counsel for the complainant, the Tribunal is effectively *functus officio* in this case.

[49] Thus, the Tribunal finds that no relevant decision was rendered on the merits of the complaint made by the complainant.

[50] More specifically, there was a settlement between the parties and said settlement was approved by the Commission on November 19, 2006, which the Commission then informed the Tribunal of. Subsequently, the Tribunal closed its file on January 17, 2007.

[51] Following the settlement in this case and the subsequent closing of the file by the Tribunal, the Commission did not request that such file be reopened before the Tribunal (see the letter dated June 23, 2010).

[52] As stated above in reference to the arguments by the respondent's representative at the hearing on August 8, the Tribunal's jurisdiction derives from complaints that are referred to it by the Commission (see *Bell Canada*, *supra*). Similarly, I also refer to the passage that I noted in *Kowalski*, also *supra*, which itself refers to inquiries into complaints as stated in section 49 of the Act.

[53] At the time when the complainant brought her motion as well as when the parties' arguments were heard on August 8, 2014, the Tribunal did not have any such complaint before it from the Commission.

[54] That argument alone seems to me to be fatal to the continuation of the complainant's motion for the Tribunal to reconsider the complainant's file pursuant to the motion that she filed on January 16, 2013.

[55] But there is more. The Tribunal notes that in the signed memorandum of understanding between the parties dated November 29, 2006, a memorandum of understanding subsequently approved by the Commission, no provision maintained the Tribunal's jurisdiction in this case in any manner.

[56] To the contrary, the reference to the fact that the parties agreed that the settlement be made an order of the Federal Court in accordance with subsection 48(3) of the Act clearly suggests to me that the Tribunal became *functus officio* and that any subsequent decision belongs to the Federal Court for the resolution of any disagreement concerning that agreement.

[57] Similarly, at article 16 of the memorandum of understanding, the same provisions are reiterated with regards to the possibility of a disagreement giving rise to the need to resume mediation to renegotiate the issues. Thus, that provision indicates that the parties agreed that any modification would be submitted for approval to the Commission in accordance with section 48 of the Act and would be binding in Federal Court according to the same terms of the initial settlement.

[58] I have no choice but to interpret that provision as definitively barring any jurisdiction of the Tribunal with respect to that memorandum of understanding, which identified the Federal Court as being the new applicable legal forum for resolving any disagreement regarding the signed memorandum of understanding between the parties.

[59] Consequently, the letter by the registry operations manager dated January 17, 2007, that confirmed the end of the proceedings and the closing of the Tribunal's file in this case, and also the signed memorandum of understanding between the parties dated November 29, 2006, which became an order of the Federal Court, does not allow for any possibility of the Tribunal retaining any jurisdiction over the resolution of any disagreement on the interpretation of the memorandum of understanding.

[60] Considering the relevant statutory provisions, and more specifically subsection 48(1) and section 49 of the Act, to which I referred above, the absence of a current complaint before the Tribunal, as well as the absence of relevant provisions in the memorandum of understanding enabling the Tribunal to retain its jurisdiction, I do not find that the Tribunal may intervene further to the request made by the complainant for the resolution of all differences pertaining to the agreement entered into by the parties on November 29, 2006.

[61] As stated above, the parties designated the Federal Court as the appropriate legal forum for resolving any disagreements that may arise from the memorandum of understanding by stating in that same memorandum of understanding that the settlement would be made an order of the Federal Court in accordance with subsection 48(3) of the Act.

[62] Regarding the argument that it is in public interest that the Tribunal intervene again, I find that counsel for the complainant did not provide any relevant authority to support that argument in the context of this case, where there is no complaint that could be brought before the Tribunal, contrary to all of the decisions that he referred to in his arguments.

[63] Furthermore, I find that the Commission, normally guarantor of public interest, did not intervene in the debates to make such argument.

[64] In my opinion, the above-stated legal provisions are sufficient to respond to that argument in the context of Parliament's intention to define the Tribunal's jurisdiction. Furthermore, I reiterate and adopt the passage from the Supreme Court of Canada's decision in *Bell*, which I cited in paragraph 36, above, as well as that from the Tribunal's decision in *Kowalski*, at paragraph 37 of this decision.

[65] Consequently, and in light of the foregoing, the Tribunal has no jurisdiction to reconsider the signed memorandum of understanding between the parties dated November 29, 2006.

VI. Conclusion

[66] For all of these reasons, the complainant's motion is therefore dismissed.

Signed by

Robert Malo
Tribunal Member

Ottawa, Ontario
August 26, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1148/3006

Style of Cause: Marie Mache-Rameau c. Agence canadienne de développement international

Ruling of the Tribunal Dated: August 26, 2014

Date and Place of Hearing: August 8, 2014

Ottawa (Ontario)

Appearances:

Yavar Hameed, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Benoît de Champlain, for the Respondent