Federal Court  Cour fédérale

Date: 20150223

Docket: T-1207-14

Citation: 2015 FC 230

Ottawa, Ontario, February 23, 2015

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JASYN EVERETT WALSH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This judicial review application arises from a decision of the Canadian Human Rights Commission (the Commission) to dismiss the applicant's complaint against Transport Canada (TC). The applicant alleged that TC had discriminated against him on the basis of disability by first refusing to provide him with a Marine Medical Certificate (Certificate), and thereafter providing him with a restricted Certificate. For the reasons that follow the application is granted.

II. Facts

A. *Background to the human rights complaint*

[2] The applicant is Jasyn Everett Walsh, a seafarer who sought to obtain a Marine Medical Certificate in or around June, 2010.

[3] Under the *Marine Personnel Regulations*, SOR/2007-115 (*Marine Personnel Regulations*), the Minister of Transport issues Certificates to seafarers. The Certificate confirms the holder's physical and mental fitness. It is essential to employment as a seafarer – no one can work without a Certificate and no one can employ a seafarer without a Certificate (see *Marine Personnel Regulations* subsection 269(1)). A Certificate may, however, be issued with restrictions. The *Marine Personnel Regulations* do not include a list of physical and/or mental disabilities that may prevent a seafarer from obtaining a Certificate; nor do they list any disabilities that would result in a seafarer obtaining a restricted Certificate.

[4] In order to assess whether the applicant was fit to hold a Certificate, he was examined by TC Marine Medical Examiner Dr. L.A. Leong. After the examination, Dr. Leong had concerns about the applicant's health. He contacted Dr. Peter Janna, a Senior Marine Medical Officer. Dr. Janna shared Dr. Leong's concerns regarding the applicant's fitness for seafaring duty. Consequently, on or around August 31, 2010, TC informed the applicant that he was unfit to hold a Certificate. The decision letter cited "Alcohol Dependence, Major Depression, and a Developmental Disorder among other things" as the reasons for the denial of the Certificate.

[5] The applicant appealed TC's decision to the Transportation Appeal Tribunal of Canada (TATC). On November 21, 2011, TATC confirmed the decision to refuse to issue a Certificate to the applicant as he had not demonstrated that he met the necessary medical requirements.

[6] Subsequent to the TATC decision, on December 3, 2011, the applicant emailed Dr. Janna to ask what requirements he would have to meet to be considered for a Certificate. Dr. Janna explained that the applicant's medical history was of concern and until the applicant's health issues were addressed and managed, the applicant would not be deemed fit to hold a Certificate. Dr. Janna also recommended that the applicant contact his family doctor and be referred to a specialist to address his issues. Dr. Janna concluded by stating that only after such steps were taken would the applicant be allowed to undergo another Marine Medical Examination, and only upon TC's satisfaction that the applicant's medical conditions no longer posed a safety risk would TC "consider the possibility of issuing" a Certificate.

[7] On December 9, 2011, the applicant again wrote to Dr. Janna to advise that his medical issues, specifically his alcoholism, were being addressed and that he hoped to be found fit to hold a Certificate in the very near future. The applicant reapplied for a Certificate, and on or around May 29, 2012, Dr. Leong again examined the applicant and found that he was fit with two limitations; no bridge watchkeeping; and the certification would be limited to three months. Consequently, on June 8, 2012, the applicant was issued a three-month provisional restricted Certificate with the restriction of "no watchkeeping duties."

[8] In October, 2012, TC issued an unrestricted Certificate to the applicant.

B. ***The applicant's human rights complaint***

[9] On June 4, 2012, the applicant filed a complaint against TC with the Commission alleging that the applicant had been discriminated against by TC on the basis of disability. The complaint was founded both on the initial refusal to issue a Certificate on August 31, 2010 (the Complaint) and the second provisional Certificate of May, 2012. In response to the applicant's complaint, the Commission sent letters to TC and the applicant asking both parties to provide position statements, and both parties provided a response to the Commission in June, 2012.

[10] On January 29, 2013, a Section 40/41 Report was issued by the Commission recommending that the Commission not deal with the Complaint as it was vexatious pursuant to section 41(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *Act*). Specifically, the Section 40/41 Report concluded that the issues raised in the Complaint had already been dealt with before the TATC and the applicant had since been issued an unrestricted Certificate. The Commission provided both the applicant and TC with the opportunity to submit written comments on the Section 40/41 Report. On February 14, 2013 the applicant wrote to the Commission explaining why he disagreed with the Section 40/41 Report's conclusions. In his response, the applicant also identified TC's May 2012 decision to issue the applicant a restricted "No Watchkeeping" Certificate as discriminatory. I note that it was not contested that this restriction had a significant impact on the applicant's employment opportunities.

[11] In response to the applicant's comments, the Commission issued a Supplementary Report on May 13, 2013. The Supplementary Report also recommended that the Commission not pursue the Complaint pursuant to section 41(1) of the *Act* on the basis that the Complaint was

vexatious. On June 3, 2013, the applicant once again submitted written comments to the Commission in response to the Supplementary Report. On June 14, 2013, the Commission wrote a letter to TC, again providing an opportunity for TC to comment on the applicant's submission.

[12] On July 24, 2013, the Commission rendered a decision stating it would deal with the Complaint under subsection 41(1) of the *Act*. The reasons for decision explained that the Commission was "persuaded by the submissions of the complainant, neither of which was responded to or challenged by the respondent, that the complaint appears to have merit and is not obviously groundless." On August 26, 2013, the Commission wrote to TC asking for TC's position on the applicant's allegations, and TC provided written comments on September 25, 2013. The applicant was then provided with a summary of TC's position, and provided his comments in response to this summary on December 3, 2013.

[13] The Commission issued its Investigation Report on January 20, 2014. The Investigation Report noted that TC had imposed requirements on the applicant's employment by requiring that in order to obtain a Certificate a seafarer must be physically and mentally fit. The Investigation Report noted that the fitness requirement did not take into account the applicant's past maritime services and his ability to do the work of a seafarer, including standing watch. However, the Investigation Report ultimately recommended that the Complaint be dismissed pursuant to subparagraph 44(3)(b)(i) of the *Act*. The reasons for this recommendation included: (1) TC treated the applicant in an adverse differential manner by failing to accommodate his disability; (2) the respondent has a *bona fide* justification (BFJ) based on safety for its rules covering

seafarers and alcohol dependence; and (3) the rules accommodated seafarers with a history of alcohol dependence.

C. *The Commission's decision*

[14] On April 15, 2014, the Commission informed the applicant and TC via letter of the Commission's decision pursuant to subparagraph 44(3)(b)(i) of the *Act* to dismiss the Complaint. The Commission's reasons for this decision were derivative of the Investigation Report, specifically stating:

> Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, to dismiss the complaint because:
>
> - the evidence does not support that the respondent treated the complainant in an adverse differential manner by failing to accommodate his disability;
> - the evidence supports that the respondent has a *bona fide* justification based on safety for its rules covering seafarers and alcohol dependence; and
> - the evidence supports that these rules do accommodate seafarers with a history of alcohol dependence.

III. Issues

[15] In his memorandum of fact and law, the applicant cites both procedural and substantive errors on the part of the Commission. The respondent identifies the two issues as whether the Commission breached its duty of procedural fairness, and whether the decision of the Commission was reasonable. However, in my view it is clear that this application turns on a

single issue: whether the Investigation Report failed to properly apply the duty to accommodate test as articulated by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 (*Meiorin*) and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 (*Grismer*).

IV. Relevant legislation

[16] The purpose of the *Act* as stated in section 2 is to ensure individuals are free from discriminatory practices based on a prohibited ground. The *Act*'s prohibited grounds of discrimination include "disability", which is defined at section 25 as including a "previous or existing dependence on alcohol" The *Act* specifically prohibits discrimination based on disability in regards to a service at section 5:

Discriminatory Practices	Actes Discriminatoires
5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual,	b) de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	

[17] Subsection 15(1)(g) of the *Act* explains that it is not a discriminatory practice if there is a BFJ for that denial or differentiation. However, subsection 15(2) clarifies that in order to have a BFJ, the service provider must accommodate the needs of the individual up to the point of undue hardship:

> (2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.
>
> (2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

V. Analysis

A. *Mootness*

[18] Mootness is not raised and is not in issue. The applicant contends that he was discriminated against for a specified period of time. While the fact that the alleged discriminatory practice was cured by the ultimate grant of an unrestricted certificate it does not extinguish the underlying factual allegation of discrimination. Put otherwise, the refusal of a bar to grant entry to a patron on the basis of colour is not moot simply because entry is granted on a subsequent occasion.

B. *The appropriate standard of review*

[19] Before commencing a standard of review analysis, I note that there is no doubt that the Commission has broad discretion, pursuant to subsection 44(3)(b)(i), to dismiss complaints where it is satisfied that further inquiry is not warranted. In *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113 (CA) at para 38, the Federal Court of Appeal observed that "the Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report." Parliament did not intend this Court to intervene lightly in the decisions of the Commission: *Hérold v Canada (Revenue Agency)*, 2011 FC 544 at para 33.

[20] Nevertheless, the standard of review is dependent on the nature of the question to be decided. In this case, the determinative issue is whether the Investigation Report, and therefore the Commission, applied the proper legal test. This issue is a question of law reviewable on the correctness standard. In adopting the correctness standard, the reviewing court "will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50.

[21] I note parenthetically that I am conscious of the decision in *Chopra v Canada (Attorney General)*, 2007 FCA 268, where the Federal Court of Appeal concluded that the standard of review of a human rights tribunal on questions of law will not always be correctness and will call for deference "on those questions of law with which it is most intimately familiar": *Chopra* at para 56; *Brown v Canada (National Capital Commission)*, 2009 FCA 274. Further, in *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 (TD); aff'd [1996] FCJ No 385 (FCA),

the Federal Court held that in the context of procedural fairness and Commission decisions "'[i]t should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted." More recently, in *Attaran v Canada*, 2015 FCA 37, the Court of Appeal stated that "the findings of fact made by the CHRC are to be reviewed on the standard of reasonableness. If such findings are reasonable, then the question will be whether the decision to dismiss the complaint was reasonable, bearing in mind that the decision resulted in a termination of the matter and therefore the range of possible, acceptable outcomes may be narrower."

[22] Accordingly, even if the appropriate standard of review is reasonableness, the failure to apply the controlling legal test is also unreasonable. That is, the failure to analyze accommodation up to the point of undue hardship was both incorrect and unreasonable.

C. *The Commission failed to apply the* **Meiorin** *test*

[23] The applicant alleges that TC discriminated against him by treating him in an adverse differential manner by failing to accommodate his disability to the point of undue hardship. In human rights complaints, the onus is first on the complainant to establish a *prima facie* case of discrimination: *Ontario (Human Rights Commission) v Simpson Sears Ltd.*, [1985] 2 SCR 536 at 558. After a *prima facie* case of discrimination is made out under section 5 of the *Act*, the burden then shifts to the respondent to establish on a balance of probabilities a BFJ for the discriminatory practice. The respondent must show that he or she has taken reasonable steps to accommodate the individual as are open to him or her without undue hardship, considering health, safety and cost.

[24] The Investigation Report found that the applicant had established a *prima facie* case of discrimination under section 5 of the *Act*. Specifically, the Investigation Report concluded that TC had imposed requirements or restrictions on the applicant's employment, because in order to obtain a Certificate a seafarer must be physically and mentally fit. This fitness requirement did not take into account the applicant's past maritime service, nor his ability to do the work of a seafarer, including standing watch. The Investigation Report also concluded that the fitness requirement also disadvantaged the applicant since he was not able to obtain the Certificate because of his alcohol use, and the adverse effects to the applicant were related to the ground of disability.

[25] With *prima facie* discrimination established, the Investigation Report considered whether there was a BFJ for the discriminatory practice. It is here where the Investigation Report proved deficient. The Investigation Report failed to fully assess whether TC had accommodated the applicant up to the point of undue hardship. That is, the Investigation Report failed to properly apply the third criteria of the analytical framework set out in *Meiorin* and *Grismer*. In order for a respondent to establish that a discriminatory practice has a BFJ, the respondent must prove on a balance of probabilities that its practice satisfies three criteria:

> (1) It adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> (2) It adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
>
> (3) The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship: *Grismer* at para 20.

[26] The Investigation Report properly considered criteria 1 and 2 of the *Meiorin/Grismer* test; however, the Investigation Report did not address whether TC satisfied its onus to establish criteria 3.

[27] First, the Investigation Report analyzed whether TC denied the applicant required accommodation, and found that TC did accommodate the applicant once it had evidence that his alcohol dependence was under control. The Investigation Report then outlined the unwritten and written rules and practices relied on by TC, including the written rule in the *Marine Personnel Regulations* that a seafarer must be physically and mentally fit to work in a safety critical occupation, and the unwritten practice that an alcohol dependent applicant, not in verifiable sobriety and treatment, is ineligible for a Certificate. There is also an unwritten practice that an alcohol dependent applicant, who can provide verifiable evidence of sobriety and treatment, may be eligible for a restricted Certificate.

[28] Further, the applicant argued that TC discriminates against alcohol dependent seafarers by imposing strict No Watchkeeping restrictions compared to seafarers with other disabilities. For example, seafarers with other medical limitations, such as a cerebral aneurysm, have fewer restrictions associated with them than alcohol dependence. The Investigation Report did not address the applicant's arguments in this regard.

[29] The Investigation Report then considered step 1 of the *Meiorin* test: whether these written and unwritten rules and practices were adopted for a purpose that was rationally connected to the service. The Investigation Report concluded that the rules and practices were adopted to ensure

marine safety, and specifically to ensure that those working in safety critical positions as seafarers with Watchkeeping are fit to perform their duties.

[30] Step 2 of the *Meiorin* test was then considered. At paragraph 42 of the Investigation Report, the Commission concluded that there is "no reason to doubt" that TC adopted the rules in a good faith belief that they contribute to marine safety.

[31] Finally, the Investigation Report went on to consider the first half of step 3 of the *Meiorin* test. The Investigation Report questioned whether TC had a "[BFJ] for its rules, considering health, safety and cost." However, the Investigation Report did not analyze, as was required, whether TC had accommodated persons with the characteristics of the applicant without incurring undue hardship. Specifically, under the controlling jurisprudence of the Supreme Court of Canada the Investigation Report was required to analyze undue hardship in terms of both the initial refusal by TC to issue a Certificate on August 31, 2010, as well as undue hardship in the context of the Certificate issued on June 8, 2012, with the restriction of No Watchkeeping.

[32] The lack of an undue hardship analysis in the context of the June 8, 2012 restricted Certificate is problematic, given that at the time the restricted Certificate was issued the applicant had commenced sobriety and treatment. The Investigation Report failed to consider ways in which TC may have accommodated the applicant, such as imposing a No Lone Watchkeeping restriction.

[33] In my view, the failure to analyze whether TC could accommodate persons with the characteristics of the applicant without incurring undue hardship was incorrect and determinative of this application.

D. *The remaining issues*

[34] In light of the above, it is not necessary to consider the applicant's procedural fairness arguments regarding document disclosure, adequacy of reasons, and the right to be heard.

VI. Conclusion

[35] Much of the Investigation Report is unassailable, and indeed, two of the three *Meiorin* steps were fully applied. The failure to consider and apply the third component of the test in its entirety, namely whether TC had accommodated the applicant up to the point of undue hardship, was incorrect and unreasonable. The matter is therefore remitted to the Commissioner for re-determination of the third step in the *Meiorin* test.

[36] In reaching this conclusion I am mindful of the obligation of a court to read the decision under review with a view to upholding it (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62), and to draw inferences or bridge gaps in the reasoning where appropriate. Here, however, each of the steps in the *Meiorin* test is critical, and the Investigation Report, even when given the most generous reading, does not demonstrate that the question of accommodation to the point of hardship was considered, explicitly or otherwise.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, with costs.

2. The matter is remitted to the Commission for reconsideration in accordance with these reasons.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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