Federal Court Cour fédérale

Date: 20190816

Docket: T-1196-18

Citation: 2019 FC 1079

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, August 16, 2019

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

SAID EGUEH-ROBLEH

Applicant

and

CANADIAN INSTITUTES OF HEALTH RESEARCH

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, Said Egueh-Robleh, is seeking judicial review of a decision rendered on May 23, 2018, by the Canadian Human Rights Commission [Commission], in which the Commission, under subparagraph 44(3)(*b*)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], dismissed the complaint that he had filed against his employer, the Canadian Institutes of Health Research [CIHR]. In his complaint, following CIHR's decision to terminate

his employment, Mr. Egueh-Robleh alleges that he was discriminated against on the basis of a disability, in violation of sections 7 and 15 of the CHRA.

[2] Mr. Egueh-Robleh claims that the Commission breached its duty of procedural fairness by refusing to question one of the witnesses he had proposed. He also argues that the Commission's decision is inconsistent with the evidence on the record and the principle of the duty to accommodate.

[3] For the following reasons, the application for judicial review is dismissed.

II. Context

A. *Employment at CIHR*

[4] In 2011, Mr. Egueh-Robleh was employed by CIHR as a data production specialist.

[5] Since Mr. Egueh-Robleh has severe glaucoma in both eyes and poor vision, he first had surgery in his right eye in 2012. After the surgery, he suffered from double vision.

[6] In August 2013, Mr. Egueh-Robleh took sick leave, during which he had surgery on his left eye to treat his glaucoma. It was not until June 2014 that he started a gradual return to work. Mr. Egueh-Robleh gave his employer a medical note in which his doctor recommended that he be bought a laptop computer with a larger screen. Upon receipt of this medical note, the employer conducted an ergonomic assessment of Mr. Egueh-Robleh's work station. Following this assessment, a monitor arm was installed as an alternative to the laptop computer. In

August 2014, Mr. Egueh-Robleh signed a form in which he stated that he was satisfied with the adjustments made.

[7] In December 2014, Mr. Egueh-Robleh was informed by his managers that a performance improvement plan [PIP] had been put in place for him. The PIP covered a period of six months, from December 2014 to June 2015.

[8] In April 2015, Mr. Egueh-Robleh's managers conducted a formal end-of-year performance assessment for which Mr. Egueh-Robleh received a performance rating of [TRANSLATION] "succeeded –". In summer 2015, he was informed that the PIP had been extended until December 2015.

[9] In September 2015, Mr. Egueh-Robleh had another operation on his right eye. He returned to work in October 2015, after three weeks of convalescence.

[10] On December 3, 2015, there was a meeting between members of the management team and the labour relations consultant, during which it was decided to terminate Mr. Egueh-Robleh's employment because he was not fulfilling the professional requirements for his position.

[11] On December 11, 2015, Mr. Egueh-Robleh saw a doctor, who referred him to a psychiatrist for assessment. In his consultation request, the doctor indicated that Mr. Egueh-Robleh was experiencing symptoms of progressive depression which had allegedly started in

2013 and had worsened in the previous four months. The doctor also described Mr. Egueh-Robleh's vision problems. Mr. Egueh-Robleh did not inform his management team of the consultation request.

[12] Noting that Mr. Egueh-Robleh appeared to be preoccupied by his eye disease, Mr. Egueh-Robleh's team leader suggested that he take some additional vacation so that at the end of this period, he would feel better. Mr. Egueh-Robleh did not inform him of his depression.

[13] Mr. Egueh-Robleh was officially dismissed from his position on January 7, 2016.

[14] Following his dismissal, Mr. Egueh-Robleh filed a grievance in February 2016. This grievance was rejected on April 22, 2016, at the final level.

B. *Complaint to the Commission*

[15] On June 10, 2016, Mr. Egueh-Robleh filed a complaint against CIHR with the Commission for discrimination on the basis of disability, in violation of sections 7 and 15 of the CHRA. He reproaches his employer for not inquiring about his medical condition—his depression—during his employment to determine whether it was affecting his job performance and for failing to reinstate him in his position when it learned of his disability.

[16] In an investigation report completed on January 24, 2018, the investigator recommended that the Commission dismiss Mr. Egueh-Robleh's complaint under subparagraph 44(3)(*b*)(i) of the CHRA. The investigator deemed that there was a lack of evidence linking the termination of

employment to Mr. Egueh-Robleh's disability. In his analysis, he confirmed that the evidence compiled demonstrated that the employer had terminated Mr. Egueh-Robleh's employment because he was not able to perform all the functions related to his position. The investigator also pointed out that when the employer terminated Mr. Egueh-Robleh's employment, the employer had no reason to believe that Mr. Egueh-Robleh was suffering from depression and that it was affecting his performance, given the lack of evidence describing his impairments with regard to his ability to perform his work properly. He indicated that even if one were to accept Mr. Egueh-Robleh's allegations that he had been suffering from undiagnosed and untreated depression since 2013, Mr. Egueh-Robleh did not report this condition to his employer for two years. In the circumstances, the employer's obligation to look into Mr. Egueh-Robleh's medical condition could not outweigh Mr. Egueh-Robleh's obligation to properly inform his employer about this condition. The investigator added that the employee is required to advise his employer of any impairments to trigger the duty to accommodate. The investigator therefore found the employer's explanation to be reasonable and determined that further investigation was not necessary.

[17] On completion of the investigation, the investigator sent his report to Mr. Egueh-Robleh and to CIHR for comments. Mr. Egueh-Robleh sent his comments to the investigator on February 16, 2018. The employer's comments were provided on March 12, 2018.

[18] In a letter dated May 23, 2018, the Commission dismissed the complaint. The Commission informed Mr. Egueh-Robleh that it had examined the investigator's report and the comments that had been submitted in response thereto and that it was of the opinion that, under subparagraph 44(3)(*b*)(i) of the CHRA, an inquiry into the complaint was not warranted.

[19] Mr. Egueh-Robleh is seeking judicial review of this decision. As stated at the beginning of these reasons, Mr. Egueh-Robleh submits that the Commission breached its duty of procedural fairness by refusing to question a witness that he had proposed and that the decision is unreasonable in that the evidence on the record reveals a link between the applicant's disability, his job performance problems and his dismissal, thereby establishing a *prima facie* case of discrimination. Mr. Egueh-Robleh also argues that failure to inform an employer of the existence and impact of a disability during the period of employment does not preclude the possibility of retroactively remedying the discriminatory effect of an employee's dismissal.

III. Analysis

A. *Standard of review*

[20] The parties agree that the Commission carries out preliminary administrative and screening functions in determining whether a complaint should be referred to the Canadian Human Rights Tribunal [the Tribunal] in accordance with subsection 44(3) of the CHRA. Its role consists of determining whether, under the provisions of the CHRA and having regard to all the facts, there is sufficient evidence to justify referring the complaint to the Tribunal. The Commission has broad discretionary power and enjoys a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report. It is not the job of the Commission to decide whether the complaint is made out, even in light of the fact that a decision to reject the complaint is a decision which precludes further consideration of the complaint (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 53; *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at p 899; *Wong v Canada (Public Works and Government*

Services), 2017 FC 633 at paras 27, 45; *Ritchie v Canada (Attorney General)*, 2017 FCA 114 at para 38 [*Ritchie* FCA]; *Keith v Canada (Correctional Service)*, 2012 FCA 117 at para 48 [*Keith*]; *Ritchie v Canada (Attorney General)*, 2016 FC 527 at paras 35–36 [*Ritchie* FC], citing *Alkoka v Canada (Attorney General)*, 2013 FC 1102 at para 40, which is citing *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at paras 60–61).

[21] It is well-established that the Commission's decision to reject a complaint under paragraph 44(3)(*b*) of the CHRA raises questions of mixed fact and law. The decision is therefore reviewable against a standard of reasonableness. This standard attracts a high level of deference and "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New-Brunswick*, 2008 SCC 9 at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14–18; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 17; *Wong v Canada (Public Works and Government Services)*, 2018 FCA 101 at paras 19, 24 [*Wong* FCA]; *Ritchie* FCA at para 16; *Miakanda-Batsika v Bell Canada*, 2016 FCA 278 at paras 14, 19; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 47 [*Sketchley*]; *Keith* at paras 47–48; *Ritchie FC* at paras 27-29; *Ouellet v Canada (Attorney General)*, 2006 FC 1541 at para 30 [*Ouellet*]).

[22] If the Commission accepts the investigator's recommendations and does not provide reasons, as in this case, the investigator's report can be considered to constitute the Commission's reasons (*Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 60; *Sketchley* at para 37; *Dubé v Canadian Broadcasting Corporation*, 2015 FC 78 at para 15 [*Dubé*]; *Dupuis v Canada (Attorney General)*, 2010 FC 511 at para 15; *Ouellet* at para 27).

[23] With respect to the alleged breach of procedural fairness, the Federal Court of Appeal has noted that a Commission investigation "may be set aside for being procedurally unfair only where unreasonable omissions are made, such as where the investigator failed to examine obviously crucial evidence" (*Wong* FCA at para 14, citing *Slattery v Canada (Canadian Human Rights Commission)*, [1994] 2 FC 574 (QL) [*Slattery*]).

B. *Alleged breaches of procedural fairness*

[24] Mr. Egueh-Robleh claims that the Commission breached procedural fairness by failing to question Linda Gagnon, his work colleague. Ms. Gagnon could allegedly have addressed (a) Mr. Egueh-Robleh's level of effort at the time; (b) the problems he had with his computer; (c) the vision problems he experienced at the time of the PIP; and (d) his complaints to his team leader regarding his vision problems. According to Mr. Egueh-Robleh, the Commission's failure in this regard amounts to the omission of crucial evidence.

[25] In *Wong* FCA, the Federal Court of Appeal held that "a failure to interview key witnesses who were 'obvious players' may amount to a failure to examine obviously crucial evidence, but that, in accordance with *Slattery*, an investigation will not be found to be lacking in thoroughness

merely because the investigator did not interview each witness put forward by a party" (*Wong* FCA at para 14, citing *Slattery* at para 69; *Sanderson v Canada (Attorney General)*, 2006 FC 447 at paras 49, 55–58; *Gravelle v Canada (Attorney General)*, 2006 FC 251 at paras 37, 40; see also *Dubé* at paras 26, 29; *Ouellet* at paras 32–34, 36).

[26] In this case, the investigator found that it was not necessary to question Ms. Gagnon because it was not the Commission's role to get involved in issues related to the management of employees' performance or to opine on the employer's preferred work methods.

[27] Mr. Egueh-Robleh argues that this explanation is inconsistent with the investigator's finding that the evidence demonstrated that his employment was terminated because of his unsatisfactory performance and his inability to perform all the functions related to his position.

[28] The Court shares this opinion. When the investigator reviewed the explanation provided by the employer, he necessarily had to look at the performance management issues concerning Mr. Egueh-Robleh.

[29] However, this inconsistency in the decision is not determinative. for the following reasons.

[30] First, it was not established that Ms. Gagnon was one of the "obvious players" in the events that led to Mr. Egueh-Robleh's complaint (*Wong* FCA at para 14). Mr. Egueh-Robleh and

his managers were the “key” witnesses who would have and who had a fundamental impact on the resolution of the complaint.

[31] Second, Ms. Gagnon could not testify about the discriminatory nature of the dismissal and, more specifically, the link between the termination of employment and Mr. Egueh-Robleh’s depression. Therefore, the failure to question Ms. Gagnon did not amount to a failure to review obviously crucial evidence (*Dubé* at para 26).

[32] Third, Ms. Gagnon was not qualified to testify about Mr. Egueh-Robleh’s job performance problems, since she was not a member of the management team that Mr. Egueh-Robleh reported to.

[33] Fourth, the employer did not dispute Mr. Egueh-Robleh’s eye problems.

[34] Fifth, Mr. Egueh-Robleh had an opportunity to comment on the investigator’s report. At that time, he could have sought to introduce a sworn statement by Ms. Gagnon as evidence to support his complaint.

[35] In short, the Court does not consider the failure to question Ms. Gagnon to be a determinative error. Mr. Egueh-Robleh did not establish that Ms. Gagnon’s testimony would have contributed to the issue to be decided by the Commission, namely, the existence of sufficient evidence to link the termination of employment to Mr. Egueh-Robleh’s depression and which could justify a referral of the complaint to the Tribunal.

[36] Therefore, the Court cannot conclude that the investigator failed to respect the criteria of neutrality and thoroughness by refusing to question Ms. Gagnon or that there was a violation of Mr. Egueh-Robleh's rights in terms of procedural fairness.

C. *Reasonableness of the decision*

[37] Mr. Egueh-Robleh submits that the investigator's conclusion, and by extension, that of the Commission, that there was no link between his depression and his job performance was unreasonable.

[38] To support his argument, Mr. Egueh-Robleh pointed out that he had received a satisfactory appraisal in April 2015, that the period relevant to his dismissal was April to December 2015 and that during that period, he had suffered a depressive episode. Concentration and attention to detail were important requirements in the context of his work, and several errors were made during this period, demonstrating that he did not understand or was not following management's instructions. According to Mr. Egueh-Robleh, these errors can be directly explained by his lack of concentration.

[39] Mr. Egueh-Robleh criticizes the investigator for failing to address the issue of whether his depression was the cause of his dismissal or had contributed thereto. According to him, the fact that he did not report his issues with depression to his employer does not preclude him from claiming redress. Although he acknowledges that the employer could not be held responsible for addressing a situation that it had not been aware of, Mr. Egueh-Robleh argues that when the employer learned of his disability, it had a legal obligation to retroactively assess whether

accommodation measures were possible and whether these measures constituted undue hardship. In this regard, he places great emphasis on the fact that mental illness is both difficult to discern from an external point of view and that is carries an extreme stigma. Indeed, Mr. Egueh-Robleh reproaches the investigator for failing to conduct this analysis.

[40] Having reviewed the file, the Court finds that the Commission's conclusion was reasonable.

[41] At this point, it is important to recall the Commission's role. In determining whether a complaint should be referred to the Tribunal in accordance with subsection 44(3) of the CHRA, its role consists of determining whether there is sufficient evidence of *prima facie* discrimination that would justify referring the complaint to the Tribunal.

[42] In this case, it was open to the Commission to follow the investigator's recommendation that a referral of the complaint to the Tribunal was not justified because the evidence did not show that Mr. Egueh-Robleh's depression was linked to his dismissal. This is one of three elements that a complainant is required to establish in order to demonstrate *prima facie* discrimination (*Moore v British Colombia (Education)*, 2012 SCC 61 at para 33).

[43] The investigator reasonably noted the lack of a report and/or a medical expert report describing Mr. Egueh-Robleh's impairments with respect to his ability to perform his duties properly. The only document on the record is the note dated December 11, 2015, which was only submitted to the employer as part of the grievance filed on February 5, 2016. However, this note

is brief and short on detail and is primarily intended to refer Mr. Egueh-Robleh to a psychiatrist in December 2015. The note does not address the extent of his depression in 2013 or the extent of his depression when the PIP started in December 2014. More significantly, it does not establish a link between Mr. Egueh-Robleh's depression and his performance issues or his inability to perform the functions of his position. The Court also notes the lack of evidence on the record with regard to the psychiatric consultation following the note dated December 11, 2015.

[44] The investigator also reasonably noted that Mr. Egueh-Robleh's arguments were inconsistent. On the one hand, Mr. Egueh-Robleh claims, in his complaint, that he performed well at work, that it is quite normal to make errors from time to time and that the employer had no reason to terminate his employment. On the other hand, he argues that his depression affected his job performance and that his employer should have taken his mental health problems into consideration.

[45] Mr. Egueh-Robleh also states in his complaint that he [TRANSLATION] "sank into depression" when he learned that he might lose his sight in his right eye. He was informed of this possibility in September 2015. In his complaint, he does not appear to allege that he suffered from depression in 2013. However, according to the request for a psychiatric consultation, Mr. Egueh-Robleh had suffered from this medical condition since 2013.

[46] Moreover, although this Court acknowledges that mental illness can be difficult to discern and that it can carry an extreme stigma, to the point that someone suffering from such an

illness may have reservations about sharing such information, it cannot subscribe to Mr. Egueh-Robleh's argument that his employer should have been aware of his depression. Members of the management team who met with the investigator confirmed that they did not know that Mr. Egueh-Robleh was suffering from depression. Mr. Egueh-Robleh's managers informed the investigator that they had repeatedly asked Mr. Egueh-Robleh about his general well-being after he received the news that he might lose the use of his right eye. Their discussions with him suggested that he was feeling fine. Mr. Egueh-Robleh had not added anything to the discussion despite the fact that he had been very forthright in sharing information about his eye disease. Even when there had been question of Mr. Egueh-Robleh taking additional vacation in December 2015 because his team leader sensed that he was concerned about his eyes, the matter of his depression did not arise. Mr. Egueh-Robleh's managers told the investigator that the only impairment they had been aware of was that related to his eye disease and that this could not be considered to be a factor explaining Mr. Egueh-Robleh's poor job performance because his difficulties had more to do with his understanding of client inquiries, requests from his managers and his ability to produce proper reports. According to his managers, these were not simply careless errors.

[47] In light of the foregoing, it is the Court's opinion that the Commission could reasonably conclude, in exercising its discretion, that the evidence to support a complaint of discrimination was not sufficient to justify further inquiry by the Tribunal, having regard to all the facts arising from the record and the evidence before it.

[48] Considering that Mr. Egueh-Robleh did not present sufficient evidence to establish the *prima facie* discriminatory effect of his dismissal, the investigator was not obliged to analyze the duty to accommodate or the undue hardship of these measures.

IV. Conclusion

[49] For all these reasons, the application for judicial review is dismissed. Mr. Egueh-Robleh did not demonstrate that the Commission failed to consider obviously crucial evidence so as to breach procedural fairness or that its decision was otherwise unreasonable.

JUDGMENT in Docket T-1196-18

THIS COURT ORDERS that:

1. The application for judicial review is dismissed with costs.

"Sylvie E. Roussel"
Judge

Certified true translation
This 15th day of October 2019

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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