Date: 20071204

Docket: T-703-07

Citation: 2007 FC 1290

BETWEEN:

DAN DURRER

Applicant

and

CANADIAN IMPERIAL BANK OF COMMERCE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Dan Durrer was an employee of the Respondent, Canadian Imperial Bank of Commerce. On October 19, 1999, after 28 years with the Bank, Durrer was notified that his position would no longer exist and that his employment was terminated. For two and a half years thereafter, Durrer remained with the Bank in three successive temporary positions until his engagement with the Bank was finally terminated on April 12, 2002. At that time, Durrer was 51 years old.

[2] On July 23, 2002, Durrer filed a complaint with the Canadian Human Rights Commission alleging that the Bank had discriminated against him on the basis of age. He relied on section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). The Commission reviewed the

complaint and recommended that the complaint be dismissed. Nonetheless, the Canadian Human Rights Tribunal instituted an inquiry. A hearing lasting for a period of several days took place before the Tribunal during November 2006. The Commission did not participate in that hearing. On March 30, 2007, the Tribunal rendered its decision giving written reasons in which it dismissed Durrer's complaint. Durrer now seeks judicial review of that decision.

[3] For the reasons that follow, I find that the Application is dismissed with costs to the Bank fixed in the sum of $10,000.00.

STANDARD OF REVIEW

[4] The standard of review in respect of decisions by the Canadian Human Rights Tribunal has been set out in decisions of this Court in *Oster v. International Longshore & Warehouse Union (Marine Section) Local 400,* 2001 FCT 1115 at paragraph 22 and *Goodwin v. Birkett*, 2007 FC 428 at paragraph 15. On questions of law, the standard is correctness, on questions of mixed fact and law it is reasonableness *simpliciter* and on questions of fact it is patent unreasonableness. Counsel for each of the parties agree that these standards are appropriate.

FACTS

[5] The basic facts are not in dispute. Durrer received a letter of termination of his employment with the Bank on October 19, 1999. At that time, he was 48 years old and, he had been with the Bank for 28 years, that is, all of his adult life. He came to the Bank with a high school education and worked his way through the ranks until, as of October 1999, he was engaged in a senior position

at Head Office which position, in the Bank's ranking scheme was assigned at 10, the highest ranking of its type.

[6] At the time of Durrer's termination, the Bank had a policy called Employment Continuity which stated that terminated employees would be given first consideration in filling positions with the Bank as they became available. In April 2001, this policy was replaced by a policy called Employee Transition Support Program (ETSP) which provided, among other things, that where skills, knowledge and fit of job candidates are equal, employees whose position has been eliminated would be given a greater opportunity for a job.

[7] Upon Durrer's termination in October 1999, advantage was taken first of the Employment Continuity policy and thereafter of the ETSP policy under which policies Durrer received a consecutive series of three temporary positions with the Bank lasting until April 17, 2002. From May 1, 2002 until February 21, 2003, Durrer was hired by the Bank on contract which provided for a salary but no benefits, in particular no benefits in respect of pension.

[8] As of the end of the last of Durrer's three temporary positions, he was 51 years of age and had been with the Bank for over 30 years. He had accrued certain pension benefits. Had Durrer reached the age of 55 and still been employed by the Bank in a position with pension benefits, he would have received an improved pension. Further, the Bank had a policy in place whereby if an employee such as Durrer reached the age of 53 in such circumstances, the employee would be "bridged" to be considered as being age 55 and receive much the same benefits accruing to a person

of that age. Durrer estimates that by being terminated at age 51, his loss of benefits had he remained until age 53 would over his expected lifetime, exceed one million dollars. I do not make any finding with respect to any monetary amount except to note that some evidence to that effect was put before the Tribunal.

[9] Durrer filed his complaint with the Human Rights Commission in the period after his final termination and during the period of his contract employment. Since termination of the contract Durrer has been working as a casual labourer in a low paying job.

ISSUES BEFORE THE TRIBUNAL

[10] The issues that Durrer, as Complainant, requested that the Tribunal consider were reviewed by the Tribunal at paragraphs 3 to 7 of its Reasons. It appears that the issues as presented in the Complaint Form were not entirely clear. They were particularized to some extent by a Statement of Particulars. At the hearing, the issues were further addressed when Durrer's counsel made it clear that no issue was to be made in respect of section 10 of the *Canadian Human Rights Act* but only in respect of section 7. The Tribunal's Reasons at the end of paragraph 5 and end of paragraph 6 state:

> *I find by the end of the hearing, CIBC had a reasonable expectation that I would be considering the evidence and argument from the perspective of a section 7 violation only. For me to consider a section 10 violation at this point would constitute a denial of fairness and natural justice. Accordingly, I will consider the evidence and argument only as they relate to a violation of subsections 7(a) and 7(b) of the CHRA.*
>
> …
>
> *In closing argument, counsel for the Complainant succinctly stated that the section 7 violation in this case was two-fold: first, when the*

> *termination decision was made by Mr. Young because age was a factor; and then, in March-April 2002 when Human Resources thwarted his attempt to get a fourth temporary job and his employment came to an end.*

[11] As a result, the Tribunal stated the issues as follows at paragraph 7 of its Reasons:

> *III. Issues*
>
> *[7] I deal with the following issues*
>
> *(1) Did CIBC eliminate Mr. Durrer's position in October 1999 on account of his age;*
>
> *(2) Did CIBC decide to not transfer Mr. Durrer to another position in the same department (Compliance) on account of his age; and*
>
> *(3) Did CIBC interfere with Mr. Durrer's attempts to seek redeployment within CIBC because of his age.*

[12] On the first issue, the Tribunal found at paragraphs 62 to 64 of its Reasons that the Bank did not eliminate Durrer's position in October 1999 because of his age. Applicant's counsel in argument before this Court did not contest that finding.

[13] On the second issue, the Tribunal found at paragraphs 65 to 67 of its Reasons that the Bank's decision not to offer Durrer a position in the Compliance Department was not made, in whole or in part, because of Durrer's age. At paragraph 67 the Tribunal said:

> *[67] To find otherwise and to hold that CIBC ought to have kept him employed in the new Compliance Department, because Mr. Durrer was 48 years old and notwithstanding that he lacked the qualifications sought, would have troubling consequences. It would mean that the mere "age" of an employee (and it could be any age) is more important than experience, education, "value-addedness", etc. In essence, "age" becomes the deciding or "primary" factor, not whether the employee is qualified.*

[14] The third issue was described by the Tribunal as the "crux" of Durrer's case. At paragraph 68 of its Reasons, the Tribunal said:

> *[68] This was the crux of Mr. Durrer's case: by not allowing him to take a fourth temporary assignment and crystallizing his date of termination, CIBC prevented Mr. Durrer from reaching the bridgeable age of 53, which stopped him from realizing his goal – an immediate, unreduced pension. Throughout his testimony and in pre-referral letters from Mr. Durrer to the Commission, this issue was the focal point of Mr. Durrer's concern about how CIBC treated him. In his testimony, he said, "Why couldn't they make an exception fro me? There was lots of work." He also said words to that effect in other parts of his testimony. He even testified that they had bridged other people who did not meet the EC/RSP and ETSP criteria for bridging: (i.e., the employee's job was being eliminated, and he or she was neither 55 years old nor 53-55 with enough severance to bridge them to 55). At the hearing, CIBC denied having done this. Mr. Durrer produced no probative evidence of CIBC having bridged other people falling outside the eligibility criteria.*

[15] The Tribunal found that none of the Bank's actions were taken on account of Durrer's age. At paragraph 72 of the Reasons it stated:

> *[72] Mr. Durrer had used the word "conspiracy" in his testimony and in a letter to the Commission described CIBC's action in preventing him from finding further work to reach the bridgeable age. His counsel showed more restraint. He said CIBC's actions did not constitute a conspiracy, nor were they done "deliberately or intentionally, but they showed a willful disregard, an act of utter neglect, shameful." I do not find that CIBC's actions constituted any of those things, nor were they on account of his age.*

[16] The Tribunal dismissed Durrer's complaint concluding at paragraph 78 of its Reasons:

> ***VII. CONCLUSION***
>
> *[78] There is no doubt that it was a sad and stressful time for Dan Durrer. His entire working life has been spent at CIBC. And by all accounts, he was a hard-working and successful employee. Hwoever, for the foregoing reasons, his age played no adverse part*

> *in his employment termination from CIBC. Accordingly, the Complaint is dismissed.*

ISSUES BEFORE THIS COURT

[17] Durrer's counsel in his factum stated the issues simply in paragraphs 71, 72 and 73:

> *71. Did the CHRT err in law in finding that Mr. Durrer's age played no adverse part in his termination from CIBC?*
>
> *72. Did the CHRT err in law in finding that Mr. Durrer's age was not a factor in denying him a continuing employment opportunity with CIBC?*
>
> *73. Did the CHRT err in law in failing to consider all of the evidence tendered by Mr. Durrer which reasonably supported his complaint, thereby failing to observe a basic principle of natural justice?*

[18] The issue as argued before the Court was somewhat different however. It finds its genesis in paragraph 83 of Durrer's counsel's factum.

> *83. The primary reason that the Decision does not mention Mr. Durrer's story is that [the Tribunal] did not consider the type of discrimination known as indirect discrimination, or adverse-effect discrimination. In this he erred in law. He considered only direct discrimination and found little evidence of it.*

[19] Durrer's motivations and beliefs as to the Bank's conduct are summarized in a statement repeated at paragraph 29 of his counsel's factum:

> *29. Mr. Durrer has reflected carefully as to why he was let go in the manner he was let go. He reasoned,*
>
> > *There was work, there is no doubt. I was available, there is no doubt. My performance was solid, there is no doubt about that. So I get down to why wouldn't CIBC keep me on and I can't for the love of me understand that can be any other reason that cost savings. I'm expensive. And I'm expensive because I'm older and I'm longer-tenured and I can't think in my own mind of any, any other independent reason why, other than my age and with the- my*

> *associated salary and benefits, pension plan – why CIBC would let me go.*

[20] The evidence as to the attitude of the Bank as relied upon by Durrer's counsel is typified by that repeated at paragraph 22 of his factum:

> *22. Both Eric Young and Cindy Size (nee Nicholls) gave evidence to the effect that they considered Mr. Durrer's age, but they also didn't consider it. Ms. Nicholls was asked whether she considered his age and she answered as follows:*
>
> *Mr. Morin: Did you ever give any thought to what this was going to do to Mr. Durrer's pension, his benefits, his family after thirty years of service?*
>
> *Ms. Size: Yes.*
>
> *Mr. Morin: You did think about that.*
>
> *Ms. Size: Yes, I did.*
>
> *Mr. Morin: And did you think about his age and his ability to get employment elsewhere if he lost out on this opportunity to find employment at the bank?*
>
> *Ms. Size: I didn't specifically think about that Dan's age. I thought about that Dan had been at the bank for a long period of time, that he was a long-term employee.*

[21] Durrer's argument as put by his counsel at the hearing before this Court is that the Tribunal failed to give appropriate consideration as to the application of section 7(b) of the CHRA. His counsel says that section 7(b) requires that before an employee is terminated consideration must be given to the age of the employee as well as other factors such as accrued benefits and an opportunity lost to secure further benefits. Failure to consider such matters, it is argued, constitutes "adverse discrimination" within the meaning of section 7(b) of the CHRA. The evidence, counsel argues, shows that "no consideration" was given by the Bank to Durrer's age at all or in the context of other

circumstances such as pension entitlement. Further, the Tribunal, it is argued, failed to give consideration to this argument in its Reasons.

[22] As a result, Durrer's counsel argues, the matter should be sent back to the same Tribunal for consideration on the record that already exists, of the section 7(b) argument as framed before this Court by Durrer's counsel.

[23] The Bank's counsel argues that the issue raised by Durrer's counsel is a new and different issue from any issue that was raised before the Tribunal or even an issue clearly stated in Durrer's counsel's factum filed with this Court. In any event, the Bank's counsel argues the issue is without merit.

ANALYSIS

[24] I agree with counsel for the Bank that the issue raised by Durrer's counsel in argument before me does not appear to be an issue that was presented to the Tribunal for determination. Nor is the issue squarely raised in Durrer's factum filed with this Court except by inference or combining disparate parts of the argument as presented in the factum. For that reason alone, I would dismiss this application. A party should not raise new argument on an issue not presented before the Tribunal except perhaps in exceptional circumstances. There are no such circumstances here.

[25] In any event, I find that the issue now raised fails on its merits.

[26] Sections 7(a), (b) and 10 of the *Canadian Human Rights Act* state:

> ***7.*** *It is a discriminatory practice, directly or indirectly,*
>
> *(a) to refuse to employ or continue to employ any individual, or*
>
> *(b) in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*
>
> ***10.*** *It is a discriminatory practice for an employer, employee organization or employer organization*
>
> *(a) to establish or pursue a policy or practice, or*
>
> *(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,*
>
> *that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.*

> ***7.*** *Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :*
>
> *a) de refuser d'employer ou de continuer d'employer un individu;*
>
> *b) de le défavoriser en cours d'emploi.*
>
> ***10.*** *Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :*
>
> *a) de fixer ou d'appliquer des lignes de conduite;*
>
> *b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.*

[27] As can be seen, section 7(a) deals with a situation where a person is refused employment or whose employment is terminated. Section 7(b) deals with adverse discrimination "in the course of employment". Section 10 deals with discriminatory practices or policies established or agreed to by an employer.

[28] Durrer's counsel stated in the hearing before the Tribunal and stated again in this Court that no reliance is placed upon section 10.

[29] Durrer's counsel does not rely on section 7(a) and agrees with the finding of the Tribunal that age (a prohibited ground) was not a factor in the Bank's refusal to continue to employ Durrer.

[30] Section 7(b) deals with adverse discrimination during the course of employment and not in respect of the decision to terminate (that is section 7(a)'s purpose) or after termination.

[31] Durrer's counsel argues that before deciding to terminate, hence "during the course of employment", an employer must weigh in respect of each individual employee to be terminated a number of factors, including those that are "prohibited" such as age, so as to prevent an "adverse" impact on any particular employee and if there is perceived to be such an impact, steps to ameliorate it must be undertaken. Hence it is argued, Durrer at age 51 with 28 years of service, nearing the age of 53 when enhanced benefits might accrue might be treated differently than a 25 year old employee with 2 years of service.

[32] Durrer's counsel's argument rests principally on a reading of the decision of McLachlin J. (as she then was) for the Supreme Court of Canada in "*Meiorin*": *British Columbia (Public Service Employee Relations Commission v. British Columbia Government and Service Employers' Union*, [1999] 3 SCR 3 in which, counsel argues, the Court found that conventional analysis of Acts such as the one at issue here, must be abandoned and that an obligation is placed upon employers to consider the individual needs of employees in regard to the prohibited matters, before termination.

[33] I do not find that the Supreme Court of Canada made such a determination in *Meiorin*.

[34] *Meiorin* was concerned with an issue as to whether a policy subscribed to by an employer, seemingly neutral in its provisions, nonetheless could be seen as indirect discrimination when applied to a particular individual or class. If a *prima facie* case of discrimination, or indirect discrimination is made out, then the Court addresses what an employer must demonstrate in order to justify the policy.

[35] At paragraphs 39 and 40, McLachlin J. began her analysis:

> ***39*** *It has also been argued that the distinction drawn by the conventional analysis between direct and adverse effect discrimination may, in practice, serve to legitimize systemic discrimination, or "discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination": Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 (hereinafter "Action Travail"), at p. 1139, per Dickson C.J. See generally I. B. McKenna, "Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be Resolved?" (1997-98), 29 Ottawa L. Rev. 153, and P. Phillips and E. Phillips, Women and Work: Inequality in the Canadian Labour Market (rev. ed. 1993), at pp. 45-95.*

> ***40*** *Under the conventional analysis, if a standard is classified as being "neutral" at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how "different" individuals can fit into the "mainstream", represented by the standard.*

[36] She critisized what she described as a “conventional analysis” at paragraph 41 as barring a proper assessment by the Courts:

> ***41*** *Although the practical result of the conventional analysis may be that individual claimants are accommodated and the particular discriminatory effect they experience may be alleviated, the larger import of the analysis cannot be ignored. It bars courts and tribunals from assessing the legitimacy of the standard itself. Referring to the distinction that the conventional analysis draws between the accepted neutral standard and the duty to accommodate those who are adversely affected by it, Day and Brodsky, supra, write at p. 462:*
>
> > *The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated".*
> >
> > *Accommodation, conceived this way, appears to be rooted in the formal model of equality. As a formula, different treatment for "different" people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those*

> *who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness.*
>
> *In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made, sometimes, to deal with unequal effects. Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make "different" people fit into existing systems.*
>
> *I agree with the thrust of these observations. Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination, as this Court acknowledged in Action Travail, supra.*

[37] As a result, she proposed at paragraphs 54 and 55 a three-step test for determining whether a standard was justified once a *prima facie* discriminatory standard has been established:

> ***54*** *Having considered the various alternatives, I propose the following three-step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:*
>
> *(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;*
>
> *(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and*
>
> *(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.*

> ***55*** *This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in Central Alberta Dairy Pool, supra, at p. 518, "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]". It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the prima facie case of discrimination stands.*

[38] McLachlin J. concluded at paragraph 68:

> ***68*** *Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible. A standard that allows for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.*

[39] Nothing in these paragraphs or elsewhere in the Reasons in *Meiorin* suggests that an employer has a duty of care upon it by provisions such as section 7(b) of the *Canadian Human Rights Act* to make an assessment, before terminating employment of an individual or class, as to

the circumstances of each and whether the impact upon one will be different from that upon others. *Meiorin* deals with standards or policies put in place by an employer during the course of employment: a matter addressed by section 10 of the *Canadian Human Rights Act* and a matter which Durrer's counsel has clearly stated, has not been raised here or before the Tribunal.

[40] The other cases cited by Durrer's counsel in his factum but referred to only in passing in argument, namely *O'Malley* (*Ontario Human Rights Commission v. Simpsons Sears Ltd.*, [1985] 2 SCR 536), *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 and *Huck* (*Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93 (Sask. C.A) do not assist in the determination of the issue now put to this Court by Durrer's counsel.

[41] I find, therefore, that not only was the issue now argued not raised before the Tribunal, and that the Application must fail on that that ground alone, but also, on its merits the issue does not succeed. The Application will be dismissed.

[42] As to costs, Counsel each proposed a fixed sum. Durrer's counsel suggested the sum of $10,000.00 on the basis that this was the sum fixed in earlier judicial proceedings brought by the Bank before this Court. The Bank's counsel proposed $20,000.00 citing increased complexity of these proceedings. I find that $10,000.00 is appropriate and will award costs to the Bank in that amount.

JUDGMENT

For the Reasons given:

THE COURT ADJUDGES that:

1. The Application is dismissed;

2. The Respondent (Bank) is awarded costs fixed in the sum of $10,000.00

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T—703-07
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