Date: 20090430

Docket: T-2190-07

Citation: 2009 FC 438

Ottawa, Ontario, April 30, 2009

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

Walter Kennedy

Applicant

and

Canadian National Railway Company

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] Walter Kennedy (the Applicant) seeks Judicial Review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of a decision made by the Canadian Human Rights Commission (the Commission) on November 20, 2007. The Commission dismissed the Applicant's

complaint against his employer, the Canadian National Railway Company (CN) under paragraph 44(3)(b) of the *Canadian Human Rights Act*, R.S. 1985, c. H-6 (the Act).

[2] The complaint, which was filed with the Commission on April 18, 2001, alleged that CN had failed to accommodate the Applicant by allowing him to return to work as a Clerk/Chauffeur with modified duties after a work-related injury (the Complaint). Following the procedural difficulties described below, a Commission investigator conducted a fresh investigation and prepared a report dated February 2, 2007 (the Report). It was before the Commission when it reached its decision on November 20, 2007.

THE EARLIER PROCEEDINGS

[3] In June of 2002, an investigator's report recommended that the Commission deal with the Complaint. However, in December of that year, the Commission decided not to do so because the Complaint was based on acts which had occurred more than one year before it was filed.

[4] In January of 2003, the Applicant applied for judicial review of the 2002 decision. During that judicial review, a document was discovered which had not previously been disclosed.

[5] This led to a supplementary investigator's report of May 12, 2003 which recommended that the Commission reopen the Applicant's file and consider the Complaint. In November of 2003, the Commission decided to deal with the Complaint.

[6] In September of 2004, a second investigator's report was completed. It recommended a dismissal of the Complaint. Thereafter, in December of 2004, the Commission followed the recommendation and dismissed the Complaint.

[7] In January of 2005, the Applicant filed an application for judicial review of the 2004 decision. On June 5, 2006, Justice Anne Mactavish set aside Commission's decision to dismiss the Complaint and ordered a fresh investigation because she found that "the investigation report upon which the Commission based its decision was fundamentally flawed": *Kennedy v. Canadian National Railway Co.*, 2006 FC 697 at para. 2. Justice Mactavish held that the investigator had wrongly concluded that the Applicant did not have seniority.

[8] In February of 2007, as noted above, the fresh investigation (the Investigation) led to the Report in which an investigator (the Investigator) recommended a dismissal of the Complaint. Both parties were provided an opportunity to comment on the Report and both provided written submissions. The Commission dismissed the Complaint on November 20, 2007 (the Decision).

THE FACTS

[9] On November 3, 1991, the Applicant slipped and injured his back while cleaning a caboose. As a result he was unable to work.

[10] In June of 1992, the Workers' Compensation Board (the WCB) informed the Applicant that, in its view, he was capable of returning to work. However, the Applicant and his family doctor (the Doctor) disagreed and the Applicant was referred to specialists and received spinal treatments. As late as May 1994, the Doctor opined that the Applicant could not work.

[11] In September 1994, the WCB again advised the Applicant that, in its opinion, he was fit for modified permanent employment (the Assessment). On November 21, 1994, the WCB terminated the Applicant's disability benefits. The next day, on November 22, 1994, his Doctor agreed with the Assessment and, according to the Applicant, provided him with a letter to that effect (the Medical Letter). The Applicant says that he then asked CN's Transportation Clerk, Tulio Ricci (the Clerk), to return him to work and provided him with the Medical Letter. The Applicant says that the Clerk later advised him that the Medical Letter had been given to Brent Short at CN but that there were no positions available with modified duties.

[12] The Applicant has never produced the Medical Letter and that the Doctor, who wrote a letter dated November 4, 1997 summarizing his interaction with the Applicant, made no reference to its existence. Further, on cross-examination on his affidavit of January 21, 2008, the Applicant stated that he had returned to the Doctor to ask for copies of the Medical Letter. Notwithstanding that fact, it was not produced in this proceeding and CN has no record of its receipt.

[13] The Clerk, who was interviewed during the Investigation, could not recall if he had been given the Medical Letter. The Clerk also said he would not have given the Applicant an opinion

about whether positions were available. Brent Short, when interviewed, had no recollection of the Applicant's circumstances. The Investigator concluded at paragraph 25 of her Report that, except for the Applicant's assertion that he did so, no evidence showed that he asked to return to work in November 1994.

[14] Following the WCB's denial of benefits on November 21, 1994, the Applicant appealed on the basis that he was not fit for work. He asked for full temporary disability benefits for the period from November 28, 1994 through January 1, 1995 and continued his appeal even after his Doctor gave him permission to resume modified duties on November 22, 1994.

[15] On April 25, 1995, the Applicant purchased a building and opened a convenience store. When faced with a settlement offer from CN he advised the Investigator that he failed to respond to the offer because he was unwilling to disclose the income from his store. He took this position because he knew that the store income would be deducted from the settlement amount pursuant to the terms of his collective agreement.

[16] On September 21, 1996, CN announced that ten employees in the Applicant's unit who had been recently laid off would be eligible for a permanent lay-off buyout. The Investigator noted at paragraph 8 of her Report that "[t]he Respondent states that the buy-out benefits only applied to current employees under active status".

[17] Shortly thereafter, in a letter dated September 26, 1996, the Applicant requested a return to work. CN says that this was the first such request.

THE ISSUES

[18] The Applicant says that the Commission erred in reaching the Decision because:

1. it relied on the conclusions in the Report without addressing the criticism of the Report in the Applicant's response;
2. the Report's conclusions involved an assessment of the Applicant's credibility and the Investigator should have held an oral hearing before making credibility findings;
3. the Report provided insufficient reasons;
4. the Report contained fundamental factual errors.

THE STANDARD OF REVIEW

[19] The law is clear that normally, decisions to dismiss complaints pursuant to subparagraph 44(3)(b)(i) of the Act are reviewed on a reasonableness standard see *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113, [2005] F.C.J. No. 543 (F.C.A.) paragraph 6. That standard would apply to issue 4. However, in this case, Issues 1 to 3 involve questions of procedural fairness which are outside the standard of review and decision-makers are not entitled to deference: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392, at paras. 52-54.

DISCUSSION AND CONCLUSIONS

Issue 1 The Applicant's Response

[20] The Applicant's response to the Report was dated February 22, 2007 (the Response). Therein, the Applicant alleged that the Investigator had made factual errors. The Applicant's concern is that the Decision made no reference to the alleged errors. The certified Tribunal record shows that the Response was before the Commission when it made the Decision and the Decision referred to the Response, at least in general terms, when it said "Before rendering their decision, the members of the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report."

[21] In these circumstances, I conclude that the Commission considered the Response in the course of reaching the Decision. Further, I can find no requirement on the Commission to give reasons which address concerns raised in comments on investigators' reports. In my view, to impose such a requirement would unduly complicate and prolong the Commission's "screening" role. In this regard, see *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 (C.A.), at paragraph 38.

Issue 2 Credibility

[22] The Applicant says that the Investigator disregarded the Applicant's assertion that he requested a return to work in November of 1994. However, this is not an accurate submission. The

Investigator acknowledged the Applicant's evidence when she reported that "save the complainant's assertion that he did no, no evidence exists to confirm that the complainant requested a return to work in November 1994."

[23] The Applicant also says that the Investigator reached conclusions and made findings about the Applicant's credibility. However, in my view, the Investigator made findings of fact. She did not assess credibility. The Investigator left it to the Commission to decide what weight it would give the Applicant's evidence when it considered all the circumstances of the case.

[24] Finally, the Applicant submits that before making credibility findings, the Investigator was required to hold a hearing. The Applicant relies on the decision in *Khan v. University of Ottawa*, [1997] 34 O.R. (3d) 535, to support this submission. That decision established the rules of procedural fairness applicable to the work of University Examinations Committees when they make credibility findings. However, the case is not applicable here as the Investigator made no such findings and because procedural fairness does not require an oral hearing given the Commission's "screening" role: *Slattery v. Canada (Human Rights Commission)*, [1994] F.C.J. No. 181, at para. 69, aff'd [1996] F.C.J. No. 385.

Issue 3 The Sufficiency of the Investigator's Reasons

[25] The Applicant complains that the Report in incomplete because, although it notes that he admitted that he proceeded with a false WCB appeal, it does not include his explanation. He

explained that he had to ensure that he had an income in late 1994 after CN refused his request to return to work (the Explanation).

[26] However, the Explanation does not alter the material fact which was that, having told CN he was fit for modified duties, the Applicant continued his WCB appeal on the basis of total disability. The Explanation merely seeks to justify the fraudulent appeal on economic grounds. It is not material in the sense that it could not have made the Commission view the Applicant in a more favourable light. For this reason, the Investigator did not err in failing to include the Explanation in the Report.

Issue 4 *Factual Errors in the Report*

[27] The Applicant submits that the Investigator made factual error when she concluded that the Applicant received an "appropriate" and "legitimate" offer to settle, dated March 26, 1999 (the Offer). The Applicant did not respond to the Offer in spite of CN's follow-up letter in September of 1999. However, in his Response to the Report, which was written by counsel for the Canadian Auto Workers union (CAW), the Applicant said that the Offer was deficient because it meant that he would have lost his seniority and would have been deprived of certain bridging benefits which would have entitled him to take early retirement with an improved pension.

[28] CAW's submissions appear to be premised on the notion that the Applicant requested a return to work in November of 1994 and CN refused to accommodate his request. Thus, according

to CAW, the Applicant's entitlements to pension and other benefits should be calculated as though the Applicant returned to active status in November of 1994. It is clear that the Investigator did not accept this underlying premise and was therefore not persuaded by CAW's arguments.

[29] It is also noteworthy that the Applicant raised none of these issues mentioned by CAW when he was interviewed by the Investigator. At paragraph 38 of her Report, the Investigator notes:

> The complainant states he refused the respondent's offer, because, says the complainant, the respondent would have deducted his convenience store earnings from the total amount in the offer. The complainant alleges that when he advised the respondent of his decision to reject the offer, the respondent deemed the complainant to have quit his job.

[30] The Investigator concluded that the Offer was legitimate or, put another way, *bona fide*. That is not in issue. However, she also concluded that it was "appropriate" because it was based in CN's acknowledgment that it had not recognized his seniority and called him to return to work for the 17 days the Investigator concluded he should have been recalled. In paragraphs 48 and 49 of her Report, the Investigator also noted that, if the Applicant had responded to the offer, a settlement "could" have addressed the Applicant's benefit and compensation issues.

[31] In my view, given the fact that the Applicant completely ignored the Offer, and given that the Applicant did not persuade the Investigator that he requested a return to work in November of 1994, the Investigator's reaction to CAW's submission and her conclusion that the Offer was appropriate was reasonable.

JUDGMENT

NOW THEREFORE THIS COURT ORDERS AND ADJUDGES that, for the reasons given above, that the application for judicial review is hereby dismissed with costs to the Respondent fixed, with the agreement of counsel for both parties, at $2000.00

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2190-07
STYLE OF CAUSE:	WALTER KENNEDY v. CANADIAN NATIONAL RAILWAY COMPANY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 19, 2008
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APPEARANCES:

Peter Shklanka	FOR THE APPLICANT
William G. McMurray	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CAW-Canada Legal Department Toronto, Ontario	FOR THE APPLICANT
William G. McMurray Canadian National Railway Company Montreal, Quebec	FOR THE RESPONDENT