Federal Court		Cour fédérale

Date: 20100511

Docket: T-816-09

Citation: 2010 FC 511

Montréal, Quebec, May 11, 2010

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

FRANÇOIS DUPUIS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is challenging the legality of a decision rendered by the Canadian Human Rights Commission (the Commission) on May 1, 2009. After an inquiry, the Commission, under paragraph 44(3)(*b*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act), dismissed the applicant's discrimination complaint against his former employer, the Department of Foreign Affairs and International Trade (the employer / the Department).

[2] For the following reasons, the application for judicial review is allowed.

General background

[3] The circumstances of the complaint involve the conduct of the applicant and the conduct of the employer in August 2006. The applicant was initially hired as a casual employee by the Department on April 1, 2003, having worked there as a consultant since May 6, 2002. His employment was technically supposed to end on December 31, 2006 (unless further renewed), but his contract ended prematurely on August 24, 2006.

[4] The applicant submits that, on that occasion, the employer failed to accommodate him and constructively dismissed him because of his disability, namely, major depression. The employer's view of the facts is very different: it contends that the applicant voluntarily left his employment because of a personality conflict with a manager, that he never notified his superiors of any disability, and that the employer therefore had no duty to accommodate.

[5] In order for the Commission to accept a complaint, the "discriminatory" treatment, which can include refusing to continue to employ an individual, or, in the course of employment, differentiating adversely in relation to an employee (section 7 of the Act), must be directly connected to at least one of the prohibited grounds of discrimination set out in the Act (section 3). These grounds include "disability", which can be physical or mental (section 25).

[6] If the applicant's allegations in this matter are proven, they constitute a prohibited discriminatory practice based on which the Canadian Human Rights Tribunal (the Tribunal) can

grant him relief. However, in order to be able to grant him relief, the Commission must find that an inquiry into the complaint is warranted having regard to the circumstances of the complaint (sections 44, 49 and 53 of the Act).

[7] The employer initially objected to the admissibility of the applicant's complaint, arguing that the applicant had to first exhaust the grievance procedure under the collective agreement. At the same time, the applicant was informed by his union (which did not file a grievance) that his only remedy against the employer was to file a discrimination complaint with the Commission.

[8] Having decided to deal with the applicant's complaint in June 2008, the Commission nonetheless dismissed it slightly less than a year later. In this case, the Commission adopted the recommendation in the investigation report prepared by the person it had designated to investigate the complaint (the investigator). The recommendation was that the complaint be dismissed under paragraph 44(3)(*b*) of the Act because [TRANSLATION] "the evidence does not support the allegations to the effect that the [Department] failed to accommodate [the applicant] and that it dismissed [him] because of his disability". In written representations that were apparently sent to the Commission, the applicant harshly criticized the investigation report in question.

The standard of review and the Commission's role

[9] Essentially, the question for determination is whether the Commission committed a reviewable error in deciding to dismiss the applicant's complaint under paragraph 44(3)(*b*) of the Act because [TRANSLATION] "the evidence does not support the allegations to the effect that the [Department] failed to accommodate [the applicant] and that it dismissed [him] because of his disability". The applicant also alleges that the Commission breached its duty of fairness and neutrality.

[10] Since *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the case law has confirmed that the appropriate standard of review for a question of mixed fact and law raised before the Commission is reasonableness. See *Bredin v. Canada (Attorney General)*, 2008 FCA 360 at paragraph 16, and *Davidson v. Canada Post Corporation*, 2009 FC 715 at paragraph 54.

[11] In view of the other relevant criteria and the case law, the legality of the impugned decision must be examined based on a standard of reasonableness, with the exception of any questions of jurisdiction or procedural fairness, which are reviewable against a standard of correctness. See *Lusina v. Bell Canada*, 2005 FC 134 at paragraph 29; *Bateman v. Canada (Attorney General)*, 2008 FC 393 at paragraph 20.

[12] The Commission's role is well known. Essentially, it is to assess the sufficiency of the evidence prior to referring a complaint to the Tribunal. The Commission's role is very modest: it is not to determine whether the complaint has merit, but, rather, whether an inquiry is warranted having regard to all the facts. Thus, the threshold is rather low, and questions related to the

credibility of witnesses are normally left to the Tribunal to assess. See *Canadian Broadcasting Corporation v. Paul*, 2001 FCA 93 at paragraphs 76 and 77 (*Paul*); *Bell Canada v. Communications, Energy and Paperworkers Union*, [1999] 1 F.C. 113 at paragraph 35 (C.A.) (*Bell Canada*); *Bell v. Canada (Canadian Human Rights Commission)*; *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854 at paragraphs 52 and 53; and *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879 at 898 and 899 (*SEPQA*).

[13] The dismissal of a complaint by the Commission is final and has far-reaching consequences for a person who claims to be the victim of a discriminatory practice. Consequently, a complainant is entitled to expect that the investigation conducted by the person designated by the Commission under subsection 43(1) of the Act to investigate the complaint (referred to by the Act as an "investigator") satisfies two fundamental conditions: neutrality and thoroughness. See *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 at paragraph 49 *et seq*. (T.D.) (*Slattery)*, affirmed (1996), 205 N.R. 383 (F.C.A.).

[14] In order to determine the requisite degree of thoroughness, one must consider not only the parties' interests, but also the Commission's interest in preserving a workable and administratively effective system (*Slattery*, at paragraph 55). That being said, an investigation can lack the legally requisite degree of thoroughness where, for example, the investigator has "failed to investigate obviously crucial evidence" (*Slattery*, at paragraph 56; *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113 at paragraph 8).

[15] In practice, the investigator's report is submitted to the parties for comments, so when the Commission chooses to follow the investigator's recommendations, the question of whether the decision is reasonable will depend mainly on the rationality of the reasoning and the conclusions in the investigation report, unless, of course, the Commission has provided supplementary reasons. See *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at paragraph 37; *SEPQA*, above, at paragraph 35; *Bell Canada*, above, at paragraph 30; and *Paul*, above, at paragraph 43.

[16] Lastly, as the Court noted in *Herbert v. Canada (Attorney General)*, 2008 FC 969 at paragraph 26 (*Herbert*), if the Commission chooses to dismiss the complaint for reasons other than those given by the investigator, it must state those reasons in its decision. Moreover, where a party's submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all. See *Herbert*, at paragraph 26 and *Egan v. Canada (Solicitor General*), 2008 FC 649 at paragraph 5.

The reviewability of the impugned decision

[17] The impugned decision was rendered under the supposed authority of paragraph 44(3)*(b)* of the Act, which prescribes the following:

...	...
(3) On receipt of a report referred to in subsection (1), the Commission	(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
…	...
(b) shall dismiss the complaint to which the report relates if it is satisfied	*b*) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41*(c)* to *(e)*.	(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41*c*) à *e*).

[18] The two options in subparagraphs (i) and (ii) of paragraph 44(3)(*b*) of the Act are mutually exclusive. Subparagraph 44(3)(*b*)(i) is clear. The provision echoes subparagraph 44(3)(*a)*(i) and subsection 49(1), which provide that the Commission may request that the Tribunal institute an inquiry into a complaint where, having regard to the circumstances, an inquiry is warranted. It should however be specified that paragraphs 41(*c*) through (*e*), to which subparagraph 44(3)(*b*)(ii) refers, apply to the specific case where the complaint is beyond the jurisdiction of the Commission, or where it is frivolous or made in bad faith, or was not timely made.

[19] However, at the hearing of this application for judicial review, counsel for the respondent, who represents the employer, acknowledged from the outset that the failure to indicate, in the letter

dismissing the complaint or in the investigation report, whether the complaint is being dismissed under subparagraph 44(3)(*b*)(i) of the Act or subparagraph 44(3)(*b*)(ii) of the Act, is sufficient to set aside the impugned decision and refer the matter back to the Commission in this case.

[20] However, beyond this admission, there are other reasons that warrant this Court's intervention in this case.

[21] It is clear that the applicant's discrimination complaint is within the Commission's jurisdiction. In addition, there is no suggestion that it is frivolous, vexatious or made in bad faith, or that it was not timely made. The Court is convinced that the Commission's decision is unreasonable and otherwise in breach of procedural fairness in finding, based on the conclusions contained in the investigation report, that [TRANSLATION] "the evidence does not support the allegations to the effect that the [employer] failed to accommodate . . . and that it dismissed [the applicant] because of his disability."

[22] Firstly, the main findings of fact in the investigation report dated December 30, 2008, are emphatically disputed by the applicant in his written representations to the Commission dated January 16, 2009. The fact that the Commission's refusal letter, dated May 1, 2009, provides no reasons for rejecting the applicant's substantive objections to the investigation process and to the investigator's findings indicates to this Court that the Commission simply disregarded them, or arbitrarily rejected them.

[23] Moreover, instead of asking whether there was a factual basis for the applicant's allegations of discrimination, the investigator appears to have appointed himself as a Human Rights Tribunal by deciding on the merits of the complaint, apparently preferring the employer's characterization without genuinely analyzing the basis of the applicant's allegations. Not only are the investigator's findings arbitrary and capricious, but it can also reasonably be asked whether the investigation process leading to the impugned decision was neutral and thorough.

[24] Furthermore, it can be asked whether the investigator and the Commission properly understood their role and considered the legal principles applicable to instances where an employee suffers from a major depression and suddenly announces to the employer that he is resigning. And the evidence in the record very clearly shows that this decision was irrational, and that the applicant then stopped working, and was even hospitalized for depression.

[25] It has already been stated that mental illness is a "disability" within the meaning of section 25 of the Act. Mental illness may take many forms, including mood disorders such as depression and bipolar disorder; schizophrenia; anxiety disorders such as obsessive-compulsive disorder and post-traumatic stress disorder; eating disorders; and addictions. The Act prohibits discrimination in the workplace on the basis of a perception or impression of a disability, and requires accommodation by the employer unless it constitutes undue hardship.

[26] An employee might well be unaware that he or she is suffering from a mental illness, so it is quite possible that he or she never consults a physician or notifies the employer. The absence of a

medical diagnosis of depression or another mental illness does not mean that an employee will do better at home or will perform his or her job satisfactorily. In view of the scope and diversity of psychiatric disorders, an employee can experience cognitive, emotional and social problems, both at home and at work. These behavioural difficulties can manifest as mood swings, among other things.

[27] If a manager can detect a change of behaviour that could be attributable to a mental disorder, it is his or her responsibility to determine whether accommodation is necessary. See the Canadian Human Rights Commission's *Policy and Procedures on the Accommodation of Mental Illness* (October 2008). It is also plausible to consider that erratic requests by an employee, and personality conflicts, can conceal a mental disorder. It is of course understood that the diagnosis of mental illness is not one for a manager or employee to make. Rather, it is the responsibility of a physician. However, a manager can raise the question with the employee in private and suggest that he or she consult a physician. In the meantime, by way of accommodation, the manager can grant the employee leave, which would be particularly urgent if the employee appears to be fatigued, on the verge of a burnout, or acting irrationally. Each case is unique and deserves to be assessed individually.

[28] However, it is settled law that an employee's decision to resign is exclusively his or hers to make. Thus, in order to be valid, the resignation must meet two requirements: the employee must genuinely intend to resign (subjective element) and this intention must be reflected in concrete action (objective element). Otherwise, a constructive dismissal could be involved. The subjective element might not be met if the decision to resign is made in anger or if the employee is in a major

state of depression. If the employer seeks unduly to take advantage of the situation, and rushes to accept the resignation, the employer can sometimes held liable for the termination of the employment relationship. See notably Donald J.M. Brown & David M. Beatty, *Canadian Labour Arbitration*, 4th ed. (Aurora, Ont: Canada Law Book, 2006) at 7:7100; *Re Nova Scotia Civil Service Commission and Nova Scotia Government Employees Union* (1986), 27 L.A.C. (3d) 120 (N.S.L.R.B.); and *Re Great Atlantic & Pacific Co. of Canada Ltd. and U.F.C.W., Locals 175 & 633* (1994), 42 L.A.C. (4th) 384 (O.L.R.B.).

[29] The documentary evidence that the applicant gave the investigator in this case clearly shows that the applicant was suffering from a major depression at the time that he announced to his employer that he intended to resign following his manager's refusal to authorize him to take time off in August 2006.

[30] The applicant alleges that there was a work overload in June 2006 and that he was in Romania on business from July 9 to July 21, 2006. In the week that he returned, which he was supposed to have off, the applicant, who was going through a difficult separation, was moving into his new house. The applicant says that his superiors were entirely aware of his personal problems. The applicant did what he could to convince his manager to grant him additional leave — since he had three weeks of leave banked — but he was unable to get his manager's consent.

[31] On August 9, 2006, during a brief discussion with his Director General, the applicant expressed the intention to leave his employment because he was [TRANSLATION] "tired and fed up

[with] the type of incident" that he had experienced with the manager in question. His director promptly asked him to confirm everything in writing, and the applicant did so that very day, stating that he would remain in his position for two weeks in order to ensure the transition.
On August 11, 2006, the employer accepted the applicant's resignation and notified him that his contract would end on August 24, 2006.

[32] Three days later, the applicant backtracked, and told his employer that he was exhausted and unwell and that his decision to resign was [TRANSLATION] "not thought out" and was more of a [TRANSLATION] "cry for help" than a [TRANSLATION] "rational decision" In an e-mail message to his superiors, dated August 14, 2006, the applicant notified the employer that [TRANSLATION] "following a discussion with my family, I will consult with my personal physician as soon as possible to find out whether my health had an impact on my conduct and decision-making."

[33] On August 15, 2006, the applicant, who was still working for the Department, notified the director that he had consulted a physician, who immediately directed him to stop working for medical reasons until August 29, 2006, in order not to aggravate his state of health.

[34] In addition to providing a medical certificate, the applicant wrote:

> [TRANSLATION] [My primary care physician] is of the opinion that the situation surrounding my conduct and my decision to resign were directly influenced by a health problem. This problem can be certified in writing at your convenience. Thus, I trust you understand that my offer of resignation is the result of a medical situation, and not the product of rational reflection.

[35] Consequently, by this time, the applicant was already inviting the employer to reconsider its decision to accept his resignation, and was stating that he expected the employer to rectify the situation.

[36] On August 23, 2006, the applicant's director replied that he was maintaining his decision to accept his "resignation", but was agreeing to the applicant remaining on sick leave until August 24, 2006, his last day of employment. At the time, the applicant had accumulated nearly 300 hours of sick leave, not to mention the three weeks of vacation to which he was also entitled.

[37] On August 24, 2006, the applicant hurriedly replied to the director by e-mail, stating that he was disappointed with the employer's decision and that [TRANSLATION] "you have taken advantage of my medical condition to assert other interests", adding: [TRANSLATION] "Don't worry, I am not in good enough health to commence court proceedings." The applicant's depths of despair are quite evident from this statement to the effect that he lacked the strength and health to bring proceedings against the employer.

[38] In view of the above facts, it must be concluded that the Commission's refusal to refer the complaint to the Tribunal is based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. Firstly, the investigator erroneously states, in his report, that the file contains no indication that the applicant was suffering from depression at the time that he resigned; this is contrary to the facts brought to the investigator's

attention and to the medical evidence in the file. Secondly, the investigator did not even make the effort to question the applicant or his primary care physician, and this happened in a context where the complaint's merits were predetermined: the investigator, and thus, the Commission, preferred to accept the employer's version of the facts and its interpretation, without providing a reasonable explanation.

[39] Thus, from the start, the applicant has maintained that the "personality conflict" attributed to him is based on hearsay, and was being used as a pretext for an unjust dismissal on the ground of his disability: the employer knew or should have known of the mental illness from which the applicant was suffering at the time. Consequently, how can the investigator have concluded in his report — without assessing the credibility of the applicant and of the employer's representatives — that the applicant was not constructively dismissed, but, rather, resigned voluntarily because of a personality conflict with the manager, who had the authority to grant him vacation and leave time?

[40] The applicant informed the investigator and the Commission that his decision to resign was not rational, and was the result of a major depression. According to the evidence in the file, upon the termination of employment on August 24, 2006, the applicant was the temporary employee with the longest uninterrupted period of service out of roughly 20 employees at the Department's Intergovernmental Affairs and Citizen Engagement Directorate. In this case, given the promises of permanent employment as of fall 2006, the receipt of a meritorious service award from the Deputy Minister and the purchase of a home into which he had just moved, one can reasonably inquire into the rationality of the applicant's early August 2006 announcement of an intention to resign. As for

the employer's obstinate insistence on maintaining its decision to accept this resignation, one can question the employer's true motives in a context where the employee had been directed to take leave from work for medical reasons. In fact, the applicant argued that he had asked his employer to contact his primary care physician, and that the failure to provide a written diagnosis of major depression was not required when he provided a medical leave of absence certificate on August 15, 2006. This Court has no idea why the investigator and the Commission disregarded the applicant's evidence and explanations.

[41] With respect to impartiality and neutrality, the applicable test was laid down by this Court in *Canadian Broadcasting Corporation v. Canada (Canadian Human Rights Commission)* (1993), 71 F.T.R. 214, [1993] F.C.J. No. 1334 (T.D.) (QL) at paragraph 47:

> [47] The test, therefore is not whether bias can reasonably be apprehended, but whether, as a matter of fact, the standard of open-mindedness has been lost to the point where it can reasonably be said that the issue before the investigative body has been predetermined.

[42] The above test has been met. There has been a flagrant violation of the standard of open-mindedness that can reasonably be expected in such a case. The Court finds that the investigation into the applicant's discrimination complaint was not neutral and thorough. Following the investigation, the Commission showed wilful blindness by not taking the trouble to seriously examine the criticism contained in the applicant's written representations, and, thus, the Court is not satisfied that the Commission took all the circumstances of the case into consideration.

[43] It bears repeating that the impugned decision is unreasonable because of the total absence of serious analysis, by the investigator and the Commission, of the questions at issue in this matter. The issue of reasonable accommodation under the Act was totally disregarded by the investigator and the Commission. The investigation report and letter of refusal in this case do not truly discuss the fact that there was a present or past disability, let alone whether the applicant's depression had an impact on his ability to resign and to seek accommodation while he was in a depressive state. Consequently, the Court finds that the rejection of the applicant's discrimination complaint, under paragraph 44(3)(*b*) of the Act, is not within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47).

[44] In closing, it should be understood that the Court is not deciding on the merits of the applicant's discrimination complaint. That is not its role, and it is not the Commission's role. What is clear, however, is that there is sufficient evidence in the file as currently constituted for the Commission to decide that an inquiry by the Tribunal into the complaint in question is warranted having regard to the circumstances of the complaint.

Conclusion

[45] For the above reasons, the application for judicial review is allowed. The decision dated May 1, 2009, is set aside, and the matter is referred back to the Commission for a redetermination of the applicant's discrimination complaint in light of these reasons and of the Court's findings.

[46] The applicant is self-represented. Consequently, the Court awards him the lump sum of $350 to cover his court costs and other disbursements in this matter.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be allowed. The decision dated May 1, 2009, is set aside, and the matter is referred back to the Commission for a redetermination of the applicant's discrimination complaint in light of this Court's reasons for judgment and its findings. A lump sum of $350 is awarded to the applicant on account of costs.

"Luc Martineau"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

François Dupuis (on his own behalf)	FOR THE APPLICANT
Talitha Nabbali	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT