Federal Court  Cour fédérale

Date: 20110209

Docket: T-1168-09

Citation: 2011 FC 148

Ottawa, Ontario, February 9, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

DONNA CASLER

Applicant

and

CANADIAN NATIONAL RAILWAY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Donna Casler challenging a decision by the Canadian Human Rights Commission (Commission) that summarily dismissed her complaint of discrimination against the Respondent Canadian National Railway (CN) under s 44 of the *Canadian Human Rights Act*, RS, 1985, c H-6 [Act].

Background

[2] Ms. Casler worked for CN for 25 years before being dismissed in September 2006 following a lengthy medically-related absence. On September 22, 2004, Ms. Casler initiated a human rights

complaint where she alleged that CN had failed to provide adequate accommodation for her medical limitations and had treated her less favourably than its disabled male employees.

[3] Ms. Casler's human rights complaint was preceded by a complaint to the Canada Industrial Relations Board (CIRB) alleging that her union had failed to meet its duty of fair representation in pursuing accommodation on her behalf with CN. This was followed on August 23, 2004 by a union-initiated grievance alleging that CN had failed to accommodate Ms. Casler. CN responded by asserting that the grievance was out of time and that there had been no prior notice of Ms. Casler's need for accommodation.

[4] On January 6, 2005 the Commission decided in accordance with ss 41(1) of the Act to deal only with those allegations which predated Ms. Casler's complaint by one year. It also postponed further involvement in the face of Ms. Casler's right to exercise her employment grievance. It was not until May 5, 2008 that Ms. Casler requested the reactivation of her human rights complaint and, by a decision dated August 20, 2008, the Commission agreed to consider the matter. In accordance with its usual practice, the claim was assigned to an investigator for a screening review under s 41 of the Act.

[5] On October 17, 2008, the Investigator wrote to CN to request a response to Ms. Casler's complaint. The Investigator confirmed that the investigation would be limited to matters arising between August 2000 and September 2004 (the reference period) and CN need not respond to Ms. Casler's allegations falling outside of those dates.

[6] CN responded by denying that it had subjected Ms. Casler to differential treatment and by stating that, during most of the reference period, Ms. Casler had not requested accommodation. CN went further to assert that Ms. Casler had failed to keep it apprised of her condition and only sought accommodation after August 23, 2004. Specifically CN advised the Investigator that Ms. Casler had provided it with no information between August 2000 and April 2003. It was only when CN contacted her that any information was forthcoming and even then Ms. Casler made no claim to accommodation. CN pointed out that in December 2003, Ms. Casler had initiated a complaint to the CIRB alleging that her union had failed to assist her in pursuing accommodation. A few months later the union initiated a policy grievance on her behalf which CN rejected as out of time. Despite the lack of timeliness, however, CN indicated at that point that it was willing to discuss accommodation measures with the union.

[7] CN also took the position that Ms. Casler had been substantially uncooperative in responding to its requests for medical information and for rules retraining and retesting. CN presented evidence of missed medical appointments in 2003 and 2004 and missed attendances for mentoring and rules testing.

[8] Ms. Casler was asked by the Investigator to respond to CN's position and she provided a 15-page reply. Most of Ms. Casler's reply concerned matters that arose either before August 2000 or after September 2004. During much of the period relevant to her complaint, Ms. Casler was unable to show any direct contact with CN. Notwithstanding the absence of any specific corroboration of contact with CN, she told the Investigator "I think I did keep the company appraised of my medical condition and the need for accommodation".

[9] Ms. Casler did not dispute most of CN's allegations about missed attendances but contended that, for the most part, she had reasonable excuses for her behaviour. This included an acknowledgement that she was so confused and anxious that she felt unable to write the required rules examination. She also continued to maintain that male employees with medical limitations were treated more favourably by CN and she offered a few examples in support.

The Investigator's Report

[10] The Investigator began by noting that Ms. Casler's complaint would be confined to the reference period. From August 2000 to March 2001, the Investigator found that Ms. Casler was unfit to work and receiving short-term disability benefits. The Investigator noted a psychiatric report dated April 11, 2003 which indicated that Ms. Casler was then "fit for light work with knowledgeable support". This was followed by a report from the same physician in August 2003 indicating that she was unfit for any employment.

[11] The Investigator concluded that Ms. Casler was suffering from fibromyalgia with permanent restrictions. Nevertheless the Investigator characterized the medical evidence as follows:

> 19. The medical evidence reviewed is contradictory with regard to the complainant's fitness to work, with or without accommodation. It also appears unclear, what accommodation was required.

[12] The Investigator found no documentary evidence that Ms. Casler or her union had sought accommodation from CN between August 2000 and March 2003. Ms. Casler's specific medical situation only became known to CN when there was an exchange of correspondence between CN

and Ms. Casler's lawyer in March of 2003. Her lawyer's letter is not contained in the record before me but the Investigator found that it was directed at securing income for Ms. Casler and failed to communicate a need for workplace accommodation.

[13] The Investigator also found that much of Ms. Casler's medical history had not been presented to CN until her union initiated a grievance on her behalf in 2004. From these facts, the Investigator found that CN had not been informed of Ms. Casler's need for accommodation before her grievance was filed in 2004. The Investigator's summary of the evidence stated:

> 59. The evidence indicates that the complainant did not communicate her need for accommodation to the respondent until August 2004.
>
> 60. The evidence indicates that the complainant did not cooperate with the respondent in the search for accommodation by refusing to return to work, by not providing medical information to support her request for further accommodation and by not completing rules requalification despite numerous opportunities to do so. It may be that the complainant would have best been accommodated in a sedentary position, rather than in a position involving moving trains. However, the complainant never provided the respondent with medical information to support the need for accommodation in a sedentary position, nor did the complainant ever request accommodation in the form of a sedentary position.
>
> 61. Considering all of the evidence, it appears that the complainant did not cooperate with the respondent thus never opening up the possibility of potential accommodation in a position other than a yard position. In the absence of cooperation, relevant medical information or a clear request, it does not appear that the respondent had a duty to accommodate the complainant in a sedentary position.
>
> 62. The evidence does not appear to support the complainant's allegation of adverse differential treatment based on sex.

[14] The Investigator considered Ms. Casler's complaint of differential treatment and found that some of the individuals who had been accommodated by CN were women. The Investigator also accessed a Labour Canada database which indicated that, on a relative percentage basis, CN employed more disabled women than men. From this evidence, the Investigator concluded that no case of systemic discrimination could be made out.

[15] Much of the remainder of the Investigator's review of Ms. Casler's and CN's conduct involved matters arising outside of the reference period.

[16] On the basis of the above findings, the Investigator recommended that Ms. Casler's complaint be dismissed and the Commission concurred on the following basis:

(a) CN appeared to have made reasonable efforts to accommodate Ms. Casler's disability;

(b) Ms. Casler did not appear to have cooperated fully with CN's search for accommodation; and

(c) the evidence does not appear to support an allegation of adverse differential treatment on the basis of sex.

[17] It is from the Commission's decision that this application for judicial review arises.

Issues

[18] Was the Commission investigation inadequate to the point of procedural unfairness?

[19] Did the Commission ignore material evidence?

Analysis

[20] The Commission's screening function under s 44 of the Act has been compared to the role of a judge presiding over a preliminary inquiry. The role was described by the Supreme Court of Canada in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 140 DLR (4th) 193 at para 53 as follows:

> 53 The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. Justice Sopinka emphasized this point in *Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 899:
>
> > The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.
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> [Emphasis added]

[21] In screening complaints, the Commission relies upon the work of an investigator who typically interviews witnesses and reviews the available documentary record. Where the

Commission renders a decision consistent with the recommendation of its investigator, the investigator's report has been held to form a part of the Commission's reasons: see *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 at para 37.

[22] As noted in the above authorities, the Commission's decision to dismiss or refer a complaint inevitably requires some weighing of the evidence to determine if it is sufficient to justify a hearing on the merits. It is this aspect of the process that has been said to require deference on judicial review. Deference is not required, however, in the context of a review of the fairness of the process including the thoroughness of the investigation. For such issues the standard of review is correctness (see: *Best v Canada (Attorney General)*, 2011 FC 71 at paras 16-19; *Ibrahim v Shaw Cablesystems G.P.*, 2010 FC 1220 at para 16).

[23] In considering the question of fairness, I am guided by the following statements from *Sketchley*, above:

> 112 It is clear that a duty of procedural fairness applies to the Commission's investigations of individual complaints, in that the question of "whether there is a reasonable basis in the evidence for proceeding to the next stage" (*SEPQA*, supra at para. 27) cannot be fairly considered if the investigation was fundamentally flawed. As the Supreme Court of Canada noted in *SEPQA*, supra, "[i]n general, complainants look to the Commission to lead evidence before a tribunal appointed under s. 39 [now s. 49], and therefore investigation of the complaint is essential if the Commission is to carry out this role" (para. 24). This same consideration -- the indispensable nature of the investigation in the Commission's handling of each individual complaint -- applies equally to an investigation undertaken prior to dismissal of a complaint under section 44(3)(b). Where a proper inquiry into the substance of the complaint has not been undertaken, the Commission's decision based on that improper investigation cannot be relied upon, since a defect exists in the evidentiary foundation upon which the conclusion rests (*Singh*, supra at para. 7).

[…]

120 In *Slattery*, supra, the Applications Judge considered the degree of thoroughness of investigation required to satisfy the rules of procedural fairness in this context. He noted the "essential role that investigators play in determining the merits of particular complaints" (para. 53), and also the competing interests of individual complainants and the administrative apparatus as a whole (para. 55). He concluded as follows:

> 56 Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted...
>
> 57 In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker. Therefore, it should be only where complainants are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it; or (2) where fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it.

121 Weighing the Baker factors, I agree that this is an appropriate description of the content of procedural fairness in this context.

Fairness

[24] Ms. Casler asserts that the Commission erred by failing to consider or to investigate evidence, most notably crucial medical evidence. She also complains that the "investigator never bothered to interview [her]" or other important witnesses to determine the extent of the communication with CN about the need for accommodation. These failings, she says, constitute a breach of the duty of procedural fairness.

[25] Ms. Casler's concern about not being interviewed by the Investigator is disingenuous. The Investigator requested an interview and it was declined through her counsel. This point is referenced in the following passage from the Investigator's report:

> […] At that time, the complainant indicated that by reason of the essence of her disability, she was not able to participate in an interview because she gets confused. She asked the investigator to go through her lawyer.
>
> 13. The investigator spoke to the complainant's lawyer on March 11, 2009 and asked if he had anything to add to the evidence already submitted and whether he could facilitate an interview with the complainant. At that time, he indicated that the complainant was not doing well and that she would have difficulty participating in a telephone interview. He further indicated that he would review his file with the complainant to see if he had any additional evidence to submit on her behalf. The investigator contacted the complainant's lawyer on March 24, 2009 to find out if there was any additional evidence forthcoming. As of March 27, 2009, no additional evidence had been received from the complainant or her legal representative.

Ms. Casler takes issue with this characterization of her availability and relies upon a letter from her lawyer dated May 1, 2009 where the possibility of a telephone interview was raised "to address any further questions you may have arising from this complaint".

[26] I can identify no inconsistency between the Investigator's observation and Ms. Casler's subsequent offer of a telephone interview. What is clear is that Ms. Casler declined the Investigator's initial request for an interview. It was only after she had seen the Investigator's report that she expressed a qualified interest in a telephone interview. It seems to me that Ms. Casler's present concerns about the weakness of the investigation must be considered in the context of her own unwillingness to cooperate fully with the process. Presumably, her apparent willingness to participate at the end of the investigation belies an argument that she lacked the capacity to assist in its initial stages. The Investigator cannot be faulted on fairness grounds for not taking up this late offer for a telephone interview limited as it was to "any further questions". It should also not come as too much of a surprise that the employer's side of the story was ultimately preferred by the Investigator where the request for an opening interview was declined by Ms. Casler.

[27] Ms. Casler's complaint about the Commission ignoring crucial evidence is also unfounded. Indeed, a significant part of the medical record upon which she now relies was created well outside of the reference period and was thus irrelevant to the Commission's decision. This was also true of much of Ms. Casler's reply to the Investigator's report in which she continued to complain about CN's conduct before August 2000 and after September 2004. She also advanced irrelevant complaints about the failure of her union to assist. Whatever complaints Ms. Casler may have had about her union, they were of no import to the complaint against CN.

[28] Although Ms. Casler did make the strenuous point in her reply to the Investigator that the medical evidence (particularly Dr. Morrison's report of April 16, 2004) supported her claim to accommodation, there is nothing in her reply to suggest that other witnesses needed to be

interviewed or that important medical or employment evidence had obviously been overlooked by the Investigator. In any event, the Commission and its investigators have a broad discretion to conduct an investigation as they consider necessary and appropriate. What is important is that they acquire sufficient information to understand the essential elements of a complaint and not its every detail (see: *Tutty v Canada (Attorney General)*, 2011 FC 57 at para 29; and *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 18).

[29] While I agree with Mr. Scher that much of the medical evidence indicated that Ms. Casler's condition limited her capacity for work through much of the reference period, I am unable to conclude that the Investigator's finding was unreasonable. The various medical reports do offer different opinions about Ms. Casler's precise limitations for work ranging from Dr. Flor-Henry's August 13, 2003 opinion that she was unfit for any work to Dr. Esmail's October 25, 2004 opinion that she could lift up to 75 pounds intermittently and not more than 40 pounds on a frequent basis. Similarly, although Dr. Morrison's very detailed report of April 16, 2004 identified no limiting mental restrictions, he later reported severe cognitive limitations such that Ms. Casler was incapable of sitting for a rules examination requested by CN. There is an evidentiary basis for the Investigator's finding that the medical evidence was not entirely consistent either with respect to Ms. Casler's condition or her employment limitations and it is not open to me on judicial review to reweigh that evidence or to substitute my views for those of the decision-maker.

[30] There is also a solid evidentiary foundation for the Investigator's finding that during a substantial part of the reference period significant elements of Ms. Casler's medical history were not disclosed to CN. Ms. Casler may well have given that material to her union with certain

expectations of disclosure but, as the Commission implicitly recognized, CN could not be faulted for failing to take into account information it did not have.

[31] Ms. Casler's employment record indicates that she was content to draw disability benefits when they were available and that she did very little, during the reference period at least, to keep CN apprised of her health status or to promote her employability. Indeed, between March 2001 when her short-term disability benefits ran out and August 2004 when her union filed a grievance on her behalf, she appears to have done almost nothing to advise CN that she was interested in returning to some form of accommodated employment. The duty to accommodate did not rest solely upon CN: see *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970, 95 DLR (4th) 577. Ms. Casler and her union had corresponding obligations to substantiate her limitations and to actively promote her return to some form of gainful employment. It was not unreasonable for the Investigator conclude on this record that Ms. Casler had failed to appropriately advance her own cause for accommodated employment.

[32] The record also indicates that CN had accommodated Ms. Casler's situation with a new temporary position as a flag-person: a job which she held until late August 2000. From September 3, 2000 until March 6, 2001, Ms. Casler was receiving long-term disability (LTD) benefits. It was only after her LTD claim ran out that she approached her union for assistance, and subsequently brought a complaint to the CIRB in 2003 claiming that her union had failed in its duty to assist her to obtain accommodation. According to the CIRB decision, Ms. Casler was unable to provide medical information between April 2001 and April 2003 and last communicated with her union in August 2001. The CIRB finding is consistent with the record before me which contains a

two-year gap in the medical record and nothing to establish contact with CN until an exchange of correspondence in March 2003. Despite this evidence, Ms. Casler asserted that she was under the impression that her claim to accommodation would be advanced by her union.

[33] Ms. Casler's complaint to the CIRB appears to have led to a union grievance in August 2004 (the end of the reference period). Notwithstanding CN's position that the grievance was long out of time CN indicated to the union that it was prepared to discuss the situation:

> In this case, the Company does not have any record of Ms. Casler communicating with the Company or requesting the Company provide her with accommodation, since she went off work on sick benefits in August 2000. As the Union has outlined, Ms. Casler's sick benefit ceased in March of 2001, therefore a timely grievance should have been submitted by June of 2001, and in any event not over 3 years later.
>
> Notwithstanding the foregoing, the Company is prepared to meet with the Union, outside of the grievance procedure, to discuss Ms. Casler's situation and any potential accommodation that may be viable, taking into consideration her restrictions. Please advise your availability.

This grievance was apparently subsequently abandoned. In 2008, the CIRB dismissed Ms. Casler's complaint against her union in part because it had been initiated some 26 months after her last contact with the union but also because her long absences had delayed the process.

[34] Against this history, the Commission's similar dismissal of Ms. Casler's complaint is hardly surprising. The record before me indicates that for whatever reason Ms. Casler was less than diligent during much of the reference period in making a case to CN for reasonable accommodation. To the extent that she may have had reason to complain about CN's behaviour after 2004, it was of

no relevance to the period of time that the Commission had undertaken to examine. Why the Investigator chose to examine some of that later history is unclear but it had the unfortunate result of unnecessarily complicating the evidentiary record and it triggered arguments that were irrelevant to the permitted scope of this judicial review.

[35] I would add in conclusion that there is no arguable case to challenge the Investigator's finding that Ms. Casler had not been treated in an adverse differential manner relative to similarly situate male employees. That finding was amply supported by the evidence in the record and it was not challenged in any meaningful way by Ms. Casler.

Conclusion

[36] For the foregoing reasons, this application for judicial review is dismissed. If CN is seeking costs from Ms. Casler, I will allow it 10 days to make its submission in writing not to exceed three pages in length. In that event, Ms. Casler will have an equivalent opportunity to respond.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed with the issue of costs to be reserved.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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