Federal Court Cour fédérale

Date: 20111017

Docket: T-72-11

Citation: 2011 FC 1168

Ottawa, Ontario, October 17, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

PETER M. COLLINS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision of the Canadian Human Rights Tribunal (the Tribunal), dated December 17, 2010. The Tribunal ordered the Applicant to pay compensation to a federal inmate at the Bath Institution for a failure of the Correctional Service of Canada (CSC) to accommodate his disability (2010 CHRT 33).

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

I. Background

[3] The Respondent, Peter M. Collins, is serving a life sentence for first degree murder. He is incarcerated at Bath Institution, a medium security prison located near Kingston, Ontario. He suffers from chronic back pain as a result of injuries sustained to his spine in previous motorcycle and automobile accidents. Since the 1980s, the CSC provided him with a variety of assistance devices to help him deal with his disability and pain.

[4] As a safety and security measure, offenders at federal institutions are required to "stand-to" count at least once every 24 hours under Commissioner's Directive 566-4 (CD-566-4). The stand-to count is a formal count where the offender stands in his cell facing the counting staff member to ensure that the offender is not only present but alive and uninjured.

[5] While there was initially no formal directive or policy adopted for exemption from this procedure, the CSC effectively accommodated the Respondent and did not require him to rise during the stand-to count.

[6] On November 30, 2005, this accommodation ceased when one CSC correctional officer ordered the Respondent to stand and be counted for the first time without any support. The Respondent informed the officer that he was medically incapable of standing at that time. She

advised him to seek an exemption from the Institution's warden or risk being charged with a disciplinary offence whenever he did not rise for the count.

[7] As a result, the Respondent sought an exemption from the procedure in November 2005. He consulted the doctor at the Bath Institution, Dr. Wyatt, at which time he informed her that the stand-to count required him to stand for 20-30 minutes. Based on this information, Dr. Wyatt wrote a recommendation to prison security staff stating "[t]here may be occasional times due to medical limitations when this inmate may need to lie, sit or stand supported for the stand up count."

[8] Acting Unit Manager in charge of health and safety for offenders and staff, Ian Chinnery, received this recommendation. He responded in a memo to Dr. Wyatt by explaining the institutional purpose and importance of the stand-to count. He suggested that providing the Respondent discretion to stand would be difficult for staff to administer in the medium security prison environment.

[9] Chief of Health Services at Bath Institution, Brian Blasko, also advised Dr. Wyatt that the stand-to count procedure required inmates to stand for only 1-2 minutes and not the 20-30 minutes suggested by the Respondent.

[10] This additional information led Dr. Wyatt to issue a revised recommendation stating "there may be times that Mr. Collins' back does make standing or even sitting difficult however I am aware that security must come first and therefore Mr. Collins is aware that at present he does need to stand in some fashion for count."

[11] In April 2006, the Respondent filed an internal grievance under the *Corrections and Conditional Release Act*, SC 1992, c 20. He claimed that Mr. Chinnery had wrongfully interfered with Dr. Wyatt's medical recommendation, was biased against him, and had acted in a retributive capacity to deliberately inflict pain and suffering on him. The Respondent's grievance proceeded to the third and final level but was repeatedly denied.

[12] In August 2006, the CD-566-4 was amended to include a formal exemption for the stand-to count related to medical conditions. It stated:

> Inmates with medical conditions or physical limitations, deemed by the Chief of Health Services (or equivalent) as unable to respond to, or perform a stand-to count request, are exempt from the requirement. In such cases, inmates must be awake and signal the staff member through an alternative means, normally a hand signal.

[13] Irrespective of this amendment, the Respondent was charged for failing to stand-to count as the CSC officer warned on May 28, 2007 and November 19, 2007.

[14] In December 2007, the Respondent filed a complaint with the Canadian Human Rights Commission. Prior to the hearing before the Tribunal, CSC conceded that the Respondent had a disability and was relieved from the stand-to count. The hearing before the Tribunal proceeded on the issue of remedy alone.

II. Tribunal Decision

[15] The Tribunal awarded the Respondent $7000 in compensation for pain and suffering experienced as a result of the discrimination under subsection 53(2)(e) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 (CHRA). It accepted Mr. Collins' evidence that the act of standing caused him additional pain. He also experienced some degree of anguish over the possibility that he would face charges or other retribution for failing to comply with the correctional officers' orders to stand-to count.

[16] In addition, the Respondent was awarded $2500 in special compensation under subsection 53(3). Special compensation can be provided if the discriminatory practice was engaged in wilfully or recklessly. The Tribunal found that CSC staff had not sufficiently considered the potential physical pain that could be caused to Mr Collins by endeavouring to reverse Dr. Wyatt's initial recommendations. The Tribunal stated that "CSC employees should have known that to act accordingly would constitute a discriminatory practice" and "it was reckless of them to have proceeded nonetheless."

[17] According to the Tribunal, Mr. Chinnery's foremost concern was applying the directive rather than accommodating the Respondent's disability. Dr. Wyatt did not have any personal knowledge of CD-566-4 and demonstrated a high-degree of deference to the information and advice provided by the CSC staff. Given the subsequent amendment to its directive, even the CSC ultimately recognized the form of accommodation Mr. Collins was seeking.

[18] Conversely, the Tribunal did not find that the discriminatory practice was intentional. Mr. Collins' allegation that Mr. Chinnery was motivated by a desire to personally decide when Mr. Collins would stand and cause him additional pain was considered unfounded. There was no reason to doubt Mr. Chinnery's testimony that his sole intention was to apply the CSC directive.

III. Relevant Provision

[19] Remedies are prescribed by the CHRA under section 53 as follows:

Complaint dismissed	Rejet de la plainte
53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.	53. (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.
Complaint substantiated	Plainte jugée fondée
(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:	(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :
(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general	a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des

purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the

mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des

discriminatory practice; and

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

dépenses entraînées par l'acte;

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

Special compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

Indemnité spéciale

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

Interest

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

Intérêts

(4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

IV. Issues

[20] This application raises two issues:

(a) Was it reasonable for the Tribunal to award relief to the Respondent for pain and suffering under subsection 53(2)(e) of the CHRA?

(b) Was it reasonable for the Tribunal to award additional relief to the Respondent under subsection 53(3)?

V. Standard of Review

[21] The reasonableness standard is required when the Tribunal is applying its enabling legislation to the facts (see *Brown v Canada (National Capital Commission)*, 2009 FCA 273, 2009 CarswellNat 2931 at para 5). Reasonableness also applies to questions of law involving the Tribunal's interpretation of its own statute or questions of general law with which the Tribunal has developed a particular expertise (see *Tahmourpour v Canada (Attorney General of Canada),* 2010 FCA 192, 2010 CarswellNat 2399 at para 8).

[22] As articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47, reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. Analysis

Issue A: *Was it Reasonable for the Tribunal to Award Relief to the Respondent for Pain and Suffering Under Subsection 53(2)(e) of the CHRA?*

[23] The Applicant submits that compensation was granted for pain and suffering without regard to the evidence. In particular, the Applicant claims that there was no oral evidence that standing during the stand-to count procedure had caused Mr. Collins additional pain sufficient to justify the finding of the Tribunal. It was suggested that the Respondent only described his pre-existing chronic back pain.

[24] In addition, the Applicant takes issue with the Tribunal's conclusion that "if the act of standing was of no consequence to him, Dr. Wyatt would not have made any entry in her chart or issued any of her recommendations." According to the Applicant, this ignored or misapprehended Dr. Wyatt's oral evidence that she had been misled by and relied on the representations of the Respondent as to the length of the stand-to count procedure. In support of its argument the Applicant relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, 1998 CarswellNat 1981 at para 17, claiming that the evidence of Dr. Wyatt was critical and should have been explicitly addressed by the Tribunal.

[25] The Respondent contends that it was reasonable for the Tribunal to infer he experienced additional pain and suffering. There was general acknowledgement of his medical limitations due to chronic back pain, including the claim that it got worse with age and at times left him bedridden. The Tribunal adopted the medical findings of Dr. Wyatt that there were times when standing or

sitting were difficult for Mr. Collins. Dr. Wyatt only indicated that she had not received all of the information regarding the administrative procedure of the stand-to count from the Respondent; it did not directly impact her overall characterization of his condition. Dr. Wyatt even suggested that the Respondent had represented accurately. The Respondent asserts that it was therefore reasonable for the Tribunal to conclude that a procedure requiring a person to stand who already experienced medical difficulties with this activity would face additional pain and suffering.

[26] As a secondary argument, the Respondent suggests that since the Applicant failed to cross-examine Mr. Collins as to his representation that the stand-to count procedure took 20-30 minutes, it cannot now attempt to impeach his credibility. A witness must be given notice before this action is taken (see for example *R v Paris*, (2000), 138 OAC 287, 150 CCC (3d) 162). I am not convinced that these secondary submissions related to the impeachment of credibility are appropriate in the judicial review context and outside the actual cross-examination of the witness.

[27] I agree with the Applicant that, in part, the recommendation made by Dr. Wyatt was based on inaccurate information provided by the Respondent. It is one thing to find that a person may have difficulty standing for 20 minutes and quite another scenario when a person may need to stand for only 1-2 minutes. Nor is there any evidence to suggest that the act of standing was the primary source of the Respondent's back pain. Indeed, the evidence seems to point to the fact that the primary source of the back pain was a pre-existing condition due to a motorcycle accident.

[28] Given recognition of the impact of the Respondent's medical condition, the conclusion that he experienced pain and suffering meriting compensation was within the range of possible,

acceptable outcomes. However, under the circumstances I would reduce the amount of compensation from $7000 to $500, given the inaccurate information provided to Dr. Wyatt by the Respondent.

Issue B: *Was it Reasonable for the Tribunal to Award Additional Relief to the Respondent Under Subsection 53(3)?*

[29] Special compensation under subsection 53(3) can be awarded where a discriminatory practice has been engaged in wilfully or recklessly. The Applicant claims that it was unreasonable to award compensation in this case because there was no factual basis for it and the Tribunal erroneously applied a negligence test in assessing whether the discrimination by CSC was wilful or reckless.

(i) Factual Basis

[30] The Applicant disputes the Tribunal's finding that CSC employees failed to consider the Respondent's disability and Dr. Wyatt's recommendation. The Applicant suggests that the Tribunal should have recognized the misrepresentation by the Respondent as to the length of the stand-to count procedure as prompting Dr. Wyatt's initial recommendation.

[31] However, the Applicant's claims related to the significance of the August 2006 amendment of CD-566-4 are not convincing. The Applicant suggests that CSC could not have been expected to contemplate accommodation without this amendment. As the Respondent points out, however, there is evidence that CSC staff were aware of his needs. Accommodations had been provided by

the CSC to the Respondent in various ways throughout his sentence. His condition was also accommodated during the stand-to count informally before November 2005. Prior to the Tribunal hearing, the CSC admitted its failure to accommodate and, by extension, knowledge of the discrimination that occurred as a result. The only reason given for failing to accommodate was that he was ambulatory and did not qualify for a medical exemption. The Tribunal was able to conclude that CSC staff members should have been aware, at least to some degree, of the Respondent's disability and need to accommodate him during the stand-to count procedure.

(ii) Test in Assessing Wilful or Reckless Discrimination

[32] The Applicant asserts that the Tribunal imported a negligence standard into its assessment of recklessness on the part of CSC. Although the Tribunal concluded that the discrimination was not intentional, it still found that CSC staff should have known their actions constituted a discriminatory practice. Relying on *R v Sansregret*, [1985] 1 SCR 570, 1985 SCJ No 23 at para 16, the Applicant insists that recklessness has a distinct subjective element from the objective negligence standard. The assessment should be of what an individual knew, not what they ought to have known.

[33] The definition of recklessness provided in *Sansregret* was designed for criminal law. As noted in *Brown* and *Tahmourpour*, above, the Tribunal is entitled to deference in interpreting its own statute. However, based on the evidence before me I do not agree that the actions of the CSC amount to wilful or reckless discrimination. The Tribunal found that any discrimination that may have occurred was not intentional and I do not agree with the findings of the Tribunal that wilful or reckless discrimination can be found without some measure of intent or behaviour so devoid of

caution or without regard to the consequences of that behaviour (see for example the definition of reckless as "disregarding the consequences or danger" and "lacking caution" in the *Canadian Oxford Dictionary*, 2d ed (Toronto: Oxford University Press Canada, 2005). I find no evidence of such behaviour on the part of CSC in this case. As such, I find that there was no basis for an award of special compensation pursuant to subsection 53(3) of the CHRA and would strike that award.

VII. Conclusion

[34] The Tribunal's decision to award compensation for pain and suffering under subsection 53(2)(e) for $7000 should be reduced to $500. It was unreasonable for the Tribunal to award special compensation for reckless or wilful discrimination on the part of CSC staff under subsection 53(3) of the CHRA.

[35] Accordingly, this application for judicial review is allowed. No costs are to be awarded in this matter.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Tribunal's decision to award compensation for pain and suffering under subsection 53(2)(e) of the CHRA is reduced from $7000 to $500.

2. This application for judicial review is allowed.

3. No costs are awarded in this matter.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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