

Federal Court



Cour fédérale

Date: 20130523

Docket: T-1318-12

Citation: 2013 FC 545

Vancouver, British Columbia, May 23, 2013

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

CHRIS BRAZEAU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Chris Brazeau (the Applicant) seeks judicial review of a decision of the Canadian Human Rights Commission (the Commission) dated June 5, 2012, made pursuant to s. 44(3) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the Act), wherein the Commission decided not to refer his complaint to the Canadian Human Rights Tribunal (the Decision). His complaint was made on two grounds: (i) failure to accommodate (or treat) his disability – Attention Deficit/Hyperactivity Disorder (ADHD), and (ii) failure to accommodate his religion. The claim based on religious grounds has been settled.

[2] The Applicant is a federal inmate whose incarceration began in 2003 at Stony Mountain Institution in Manitoba. On July 20, 2005, he was moved to the Kent Institution in British Columbia (Kent) and from there he was transferred to the Regional Treatment Centre (RTC) in Abbotsford. At the RTC, he was under the care of Dr. Martha Healey. She is a Psychiatrist and is also the Director of the RTC. On October 17, 2006, she prescribed Ritalin to treat the Applicant's ADHD. Ritalin is one of several brand names for medicine comprised of methylphenidate. It, together with Vyvanse, which is comprised of lisdexamfetamine, and Biphentin, another methylphenidate, treat ADHD by stimulating the central nervous system. I will refer to them as "Stimulants".

[3] The Applicant experienced positive results with Ritalin. However, on April 11, 2008, Dr. Healey cancelled his prescription because she was told that Correctional Services Canada believed that he had been providing his Ritalin to other inmates. The Applicant was promptly returned to Kent and received no treatment for his ADHD for five months. Four of those months were spent in segregation.

[4] Dr. Allan Moore is the general practitioner who supervised the Applicant's care after his return to Kent. Sometime in September 2008, he prescribed Strattera for the Applicant's ADHD. While recognized as a treatment for ADHD, Strattera is not a Stimulant and did not alleviate the Applicant's ADHD symptoms. The Applicant took this drug for approximately six weeks but discontinued its use due to side effects.

[5] Twelve months passed (again the Applicant spent a significant portion of this time in segregation) before he was offered any other medication for his ADHD. The offer came from

a psychiatrist called Dr. Siani who recommended against Stimulants and suggested Strattera which the Applicant had earlier rejected because of the side effects. Dr. Siani also suggested clonidine and venlafaxine. However, they do not treat ADHD. Accordingly, in my view, it was reasonable for the Applicant to refuse them.

[6] After two more months without treatment for his ADHD, the Applicant was seen by Dr. Preece on March 22, 2010. She is also a psychiatrist and she recommended Stimulants. This recommendation in favour of prescribing a Stimulant was supported by Nurse Dave Kereliuk after he met with the Applicant on May 26, 2011. He proposed treatment with Biphentin.

[7] In the meantime Dr. Moore prescribed two non-stimulants, Effexor for ADHD in September 2010, which the Applicant only took briefly due to side effects, and Zoloft, which is not used to treat ADHD. It was prescribed in January 2011 and it helped with the Applicant's anxiety.

[8] It was not until 15 months after Dr. Preece made her recommendation that Dr. Moore prescribed the stimulant Vyvanse.

I. The Complaint

[9] The Applicant's complaint was written on May 13, 2009 (the Complaint) and was received by the Respondent on May 25, 2009. However, because the Applicant was involved in grievance proceedings, the Complaint was not treated as active until February 16, 2011. Thereafter, the Complaint was investigated and the investigation report is dated February 28, 2012 (the Report).

[10] The Complaint alleges that the Applicant needs a Stimulant to treat his ADHD and that Ritalin was prescribed and then denied without justification. The Respondent's failure to provide effective treatment is said to be the cause, at least in part, of the long periods the Applicant spent in segregation at Kent.

[11] The Complaint also alleges that on May 13, 2009, Dr. Moore said that he refused to treat people with ADHD and the Applicant concluded that Dr. Moore was discriminating against him because of his disability.

[12] Contrary to the Respondent's repeated assertions, my reading of the Complaint reveals that the Applicant did not demand Ritalin. His Complaint says that he was prescribed a "methylphenidate-based medication". He goes on to state: "A popular name is Ritalin. This medication is not confined to this name brand or form of medicine." In my view, the Applicant was not insisting on Ritalin. Rather, he was asking for any drug that operated to stimulate his central nervous system since a drug of that type had proven effective at the RTC.

II. The Report

[13] I have concluded that the Report is inadequate and that its recommendation to the Commission to the effect that the Complaint not be referred to the Canadian Human Rights Tribunal is flawed for the reasons set out below. This finding means that the Decision must be set aside as it fails to meet the requirements of procedural fairness.

1. Dr. Moore was not interviewed. This means that the investigator was unaware of the answers to the following questions:

- Whether Dr. Moore knew that Dr. Healey had successfully treated the Applicant with a Stimulant at the RTC?
 - Whether Dr. Moore considered treating the Applicant with a Stimulant using a safe method of administration that would foreclose the possibility of the drug being diverted to other inmates?
 - Whether Dr. Moore refused to treat the Applicant with Stimulants and, if so, why?
 - Whether Dr. Moore was prepared to treat ADHD and, if not, why?
 - Why Dr. Moore waited five months to offer Strattera?
 - Why Dr. Moore waited 12 months to consult Dr. Siani after Strattera could not be tolerated by the Applicant?
 - What efforts did Dr. Moore make to identify and overcome the “risks” of giving Stimulants identified by Dr. Siani?
 - Why did Dr. Moore wait 15 months after Dr. Preece recommended a Stimulant in March of 2010 to prescribe one – Vyvanse in June 2011?
2. The investigator appeared to believe incorrectly that the Applicant would take nothing but Ritalin for ADHD. However, this view is contradicted by the Complaint, by the Respondent’s assertion that the Applicant was co-operative in the search for effective treatment, and by the fact that the Applicant in fact took Strattera and Effexor when neither is a Stimulant.
3. The investigator did not consider whether the withholding of Stimulants was reasonable given policies or practices which would have allowed medical staff at Kent to administer them without risk that they would be diverted to other inmates.

ORDER

THIS COURT ORDERS that:

Regarding Disability

The Decision as it relates to the Applicant's disability (ADHD) is set aside and a fresh investigation of the Applicant's disability claim in the Complaint dated May 13, 2009 is hereby directed in accordance with these reasons. Dr. Moore (who I am advised still works at Kent) is to be interviewed and asked the questions listed above, in addition to any further questions identified by the investigator.

The Respondent is liable for the Applicant's costs pursuant to Column III of Tariff B of the *Federal Courts Rules*. If a lump sum cannot be agreed, I will hear submissions about the quantum of the award.

Regarding Religion

The Decision on the Applicant's claim under this heading is set aside on consent and a fresh investigation is to be made of the Applicant's Complaint of May 13, 2009 on this topic. There is no order as to costs.

"Sandra J. Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1318-12

STYLE OF CAUSE: CHRIS BRAZEAU v AGC

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: May 16, 2013

**REASONS FOR ORDER
AND ORDER:** SIMPSON J.

DATED: May 23, 2013

APPEARANCES:

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FOR THE APPLICANT

Sarah-Dawn Norris

FOR THE RESPONDENT

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FOR THE RESPONDENT