Federal Court  Cour fédérale

Date: 20190531

Docket: T-1338-18

Citation: 2019 FC 767

Ottawa, Ontario, May 31, 2019

PRESENT: Madam Justice Roussel

BETWEEN:

SCOTT PEDDLE

Applicant

and

HALIFAX EMPLOYERS ASSOCIATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Mr. Scott Peddle, is seeking judicial review of a decision of the Canadian Human Rights Commission [Commission] dated June 15, 2018, dismissing his complaint against the Respondent, the Halifax Employers Association [HEA], pursuant to subparagraph 44(3)(*b*)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

A. *The Respondent's hiring process*

[3] The Respondent is a non-profit organization which represents employers of longshorepersons [HEA members]. The Respondent recruits and trains persons who will then perform work for the HEA members. As a federally regulated entity, it is subject to the *Employment Equity Act*, SC 1995, c 44.

[4] The Respondent's hiring process is governed by the HEA Hiring Rules. The first stage of the hiring process [Stage 1] requires passing four (4) steps: (i) the Lashing Test (a timed and physically demanding test which measures ability to lash, one of the tasks longshorepersons must perform); (ii) the Aptitude Test; (iii) the Test of Essential Workplace Skills [TOWES]; and (iv) the interview. If an applicant is unsuccessful at any of these four (4) steps, the applicant is removed from the hiring process.

[5] The HEA Hiring Rules also stipulate that if an applicant requires accommodation during the Aptitude and TOWES testing processes because of an existing disability, the applicant must provide the Respondent with a qualified doctor's report indicating how the disability could affect performance on the tests and suggesting the appropriate accommodation. They also indicate that if the applicant fails to provide this information prior to the commencement of Stage 1 or when

the applicant reports for the lashing strength and endurance test, no accommodation will be made except in unusual circumstances.

[6] On November 23, 2015, the Respondent initiated a hiring process by holding a job fair for potential applicants. Aspiring longshorepersons, including the Applicant, were provided an application package which included the HEA Hiring Rules.

[7] As per the requirements of the HEA HiringRules, the Applicant sought and obtained a letter from his medical doctor stating that he had long-standing issues with Attention Deficit Hyperactivity Disorder and that he required accommodation to complete the TOWES test. The letter also stated that the Applicant had issues with focus and concentration and any assistance in minimizing distractions would be to his benefit.

[8] On December 3, 2015, the Applicant submitted his application to become a longshoreperson and a member of the “Cardboard”. The Cardboard is a pool of qualified workers who receive training and whose work consists mainly of “lashing, driving yard tractors and operating forklifts”.

[9] The Applicant successfully completed the Lashing Test, as well as both the Aptitude and TOWES tests. By letter dated February 1, 2016, the Applicant was asked to attend an interview on February 24, 2016. As per the HEA Hiring Rules, the interview was conducted by a panel of three (3) persons who used standardized questions and scoring methods.

[10] By letter dated February 29, 2016, the Respondent advised the Applicant that he had not been successful in the interview.

B. *Complaint to the Commission*

[11] On May 5, 2016, the Applicant filed a complaint alleging that the Respondent had discriminated against him on the grounds of disability. The Applicant alleged that the Respondent had failed to accommodate his disability during the interview and that it adversely impacted his ability to compete for the employment opportunity in the hiring process. The Applicant also alleged that he "was also not sure if [he] was profiled because he was black" since he was the "last black person to be rejected by [the Respondent]".

[12] On September 16, 2016, the Respondent provided submissions in response to the complaint and again on November 21, 2017 in response to additional questions from the Commission.

[13] The Commission appointed an investigator who reviewed the parties' positions and interviewed the Applicant.

[14] On January 31, 2018, the investigator completed its investigation and issued its report on February 15, 2018. The investigator recommended, pursuant to subparagraph 44(3)(*b*)(i) of the CHRA, that the complaint be dismissed on the ground that, having regard to all the circumstances of the complaint, further inquiry was not warranted.

[15] The investigator first found that the Applicant had not demonstrated a reasonable basis to believe the Respondent's conduct was discriminatory on the basis of colour or race or that someone no better qualified or more eligible but lacking the Applicant's characteristic based upon colour and/or race had obtained the employment opportunity.

[16] The investigator then considered the Applicant's allegation of discrimination on the basis of disability and made the following observations:

(1) the Applicant did not ask for accommodation in the interview process at any time;

(2) the Applicant's argument that he did not have any information regarding the interview was unfounded given that the HEA Hiring Rules explicitly stated that the Applicant would be interviewed by a panel of at least three (3) persons using standardized questions and scoring;

(3) the Applicant did not identify what information was missing that would have made him aware of a need for accommodation in the interview process or even what measures he would have required;

(4) while the Respondent did not dispute knowing that the Applicant had a disability, this knowledge did not equate to knowing the Applicant required accommodation in the interview process and there was no other information demonstrating that the Respondent ought to have known the Applicant required accommodation during the interview;

(5) the Respondent had provided accommodation for the Aptitude Test despite the Applicant's accommodation request only specifying a need for the TOWES testing, thus demonstrating a willingness on the part of the Respondent to act on information relating to the Applicant's disability;

(6) the Applicant did not express how an accommodation would have impacted his performance; and

(7) accommodation is a shared responsibility between the employer and the employee or job applicant and, although it was the responsibility of the Applicant to make his accommodation needs known to the Respondent, he did not do so nor did he indicate that he was unable to do so or otherwise prevented from doing so.

[17] After making these observations, the investigator ultimately concluded that the Applicant failed to: 1) clearly identify what accommodation he required in the interview; (2) communicate to the Respondent a need for accommodation in the interview; and (3) demonstrate that the Respondent should have known of a need for accommodation in the interview.

[18] The parties were subsequently invited to make submissions in response to the investigator's report. The parties each did so on two (2) occasions.

[19] By letter dated June 15, 2018, the Commission informed the Applicant that it had decided, after review of the investigator's report and the submissions filed in response, to dismiss the complaint pursuant to subparagraph 44(3)(*b*)(i) of the CHRA on the basis that further inquiry was not warranted.

[20] The Applicant now seeks judicial review of the Commission's decision. He contends that the Commission failed to take into account that the HEA Hiring Rules excluded the opportunity for a job applicant to request accommodation for the interview and secondly, that the Commission failed to consider that he had made a request to provide additional information with respect to an accommodation that could have affected the interview process but was refused the opportunity to do so.

III. Analysis

A. *Preliminary matter*

[21] It is trite law that in a judicial review application, barring certain well-defined exceptions, the only material that should be considered is that which was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20 [*Association of Universities and Colleges of Canada*]. This Court has upheld this principle even in cases where neither party objected to the admissibility of the evidence (*Gadwa v Kehewin First Nation*, 2016 FC 597 at para 35).

[22] At the beginning of the hearing, I questioned counsel for both parties on the admissibility of some of the documentation included in their records that were not part of the Certified Tribunal Record [CTR]. Counsel for the Respondent conceded that pages 15 to 272 of the Respondent's Record were not part of the CTR. Similarly, pages 8 to 22, 58-72 and 110 of the Applicant's Record were not part of the CTR.

[23] With the exception of the HEA Hiring Rules and the letter from the Applicant's medical doctor, counsel did not submit any argument that the documents should be admitted under the recognized exceptions enunciated in *Association of Universities and Colleges of Canada.* As the documents are not properly before the Court, they will not be considered. As for the HEA Hiring Rules and the letter from the Applicant's medical doctor, I am satisfied that the documents can be considered under the general background exception as they will assist the Court to understand some of the issues relevant to the judicial review.

B. *Standard of review*

[24] When determining whether a complaint is to be referred to the Canadian Human Rights Tribunal [Tribunal], the Commission acts as an administrative and screening body. Its role is to determine whether, based on the provisions of the CHRA and all the facts, there is sufficient evidence to justify referring the complaint to the Tribunal. Although the Commission has discretion in this regard, it is not its job to determine if the complaint is made out (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 53; *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at 899; *2553-4330 Québec Inc v Duverger*, 2018 FC 377 at para 7 [*Duverger*]; *Ritchie v Canada (Attorney General)*, 2016 FC 527 at paras 35-36 [*Ritchie*], citing *Alkoka v Canada (Attorney General)*, 2013 FC 1102 at para 40, which cites *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at para 60).

[25] The decision to dismiss the Applicant's complaint under paragraph 44(3)(*b*) of the CHRA raises questions of mixed fact and law and is reviewable under the standard of reasonableness.

This standard includes a high degree of deference and "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 17, 27; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Ritchie* at paras 28, 38-39; *Duverger* at para 8).

[26] In cases where the Commission adopts the investigator's recommendations and provides no reasons or only brief reasons, the investigator's report is deemed to constitute the Commission's reasons (*Canada (Attorney General) v Sketchley)*, 2005 FCA 404 at para 37; *Gauthier v Canada (Attorney General)*, 2017 FC 697 at para 14).

C. *Issue I: The HEA Hiring Rules do not preclude accommodation requests for the interview process*

[27] The Applicant submits that the investigator ignored material evidence by failing to address the HEA's role in the Applicant's failure to request accommodation for the interview. Specifically, he contends that an ordinary, reasonable person interpreting the HEA Hiring Rules would understand that the Respondent provides accommodation for the Aptitude and TOWES test, but does not provide accommodation for the interview process. The Applicant relies on the fact that the HEA Hiring Rules explicitly state that accommodation is available for the Aptitude and TOWES tests, while they are silent with respect to the interview portion of the hiring process. The Applicant argues that the HEA Hiring Rules set the stage for an applicant not to

request accommodation for an interview. This, according to the Applicant, amounts to an implied restriction.

[28] I am not persuaded by the Applicant's argument.

[29] The investigator is presumed to have considered all the evidence before her and she was not required to mention every document in her report (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). As for the Commission, it considered the investigator's report and the parties' responses to the report.

[30] Moreover, while the Applicant's interpretation of the HEA Hiring Rules may be reasonable, the Applicant has not demonstrated that the investigator's interpretation, and by extension, that of the Commission, is unreasonable. There may be more than one reasonable interpretation. The HEA Hiring Rules' silence regarding the interview process does not mean that accommodation requests for interviews would not be accepted by the Respondent, even after the start of the Stage 1 hiring process.

D. *Issue 2: The Applicant did not request accommodation for the interview*

[31] The Applicant submits that the investigator and the Commission failed to take into account that he had requested and been refused the opportunity to provide additional information with respect to an accommodation.

[32] Again, I am not persuaded by the Applicant's argument.

[33] After considering the complaint of the Applicant, the parties' submissions and all of their documentary evidence and conducting an interview with the Applicant, the investigator ultimately concluded that the Applicant had failed to communicate a need for accommodation during the interview process to the Respondent. The parties were then invited to comment on the investigator's report and the Applicant did so on two (2) occasions. The Commission subsequently reviewed the investigator's report as well as both parties' responses to the report and concluded that further inquiry was not warranted. While the Applicant may disagree with the investigator's assessment of the evidence or the weight that the Commission gave to the material it considered, including the responses to the investigator's report, it is not my role to reweigh the evidence that was before the investigator or the material that was before the Commission.

[34] Moreover, upon review of the record, I am satisfied that it was reasonably open to the Commission to prefer the investigator's understanding of the evidence over that of the Applicant given the ambiguity of the statements found in the Applicant's responses to the investigator's report.

[35] For example, the Applicant states in his undated response that he "could not identify what accommodation he required in the interview because he was not allowed to apply for more accommodation" and he "could not convey [his] needs for the accommodation process". Again, in his submissions dated May 3, 2018, the Applicant concludes by stating that he "could not ask for any more accommodation…because it would not be accepted". The Applicant's counsel conceded at the hearing that these statements were ambiguous and created confusion.

[36] Furthermore, I cannot help but note the inherent contradiction between the Applicant's position on the two (2) issues raised in the context of this application for judicial review. The Applicant has argued, on the one hand, that he could not request accommodation for the interview because the HEA Hiring Rules excluded the possibility of accommodation for the interview process, and on the other hand, that he did request – and was denied – such an accommodation.

[37] Given the lack of clarity in the Applicant's submissions to the Commission, it was not unreasonable for the Commission to agree with the conclusions of the investigator that the Applicant did not seek an accommodation for the interview.

IV. Conclusion

[38] For these reasons, the application for judicial review is dismissed. The Applicant has not demonstrated that the Commission failed to consider relevant evidence or that its decision is otherwise unreasonable.

JUDGMENT in T-1338-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. Costs are payable by the Applicant to the Respondent in the amount of $1,000.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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