Federal Court  Cour fédérale

[ENGLISH TRANSLATION]

Date: 20050621

Docket: T-1150-04

Citation: 2005 FC 879

Ottawa, Ontario, June 21, 2005

PRESENT: THE HONOURABLE MR. JUSTICE GAUTHIER

BETWEEN:

PIERRE BERGERON

Applicant

and

TÉLÉBEC LIMITÉE

and

ALAIN RIVARD

Respondents

REASONS FOR ORDER AND ORDER

[1] Mr. Bergeron is asking the Court to set aside the decision made by the Canadian Human Rights Tribunal (the Tribunal) dismissing his complaints of harassment and discrimination on the basis of a disability (his depression) against his former employer, Télébec Limitée, and his former Technical Services Manager, Alain Rivard, personally.

FACTS[1]

[2] Mr. Bergeron worked for Télébec as an installer/repairman from 1988 to 1990 and then as a splicer from 1990 until December 6, 1995, the date on which he was laid off along with more than 100 other company employees.

[3] Because he was unable to obtain stable employment through bumping due to his lack of seniority,[2] his name was placed on a callback list for 24 months following his layoff.

[4] In May 1996, the applicant, who lives in La Sarre, Abitibi, applied for a transfer to an installer/repairman position in Val-d'Or.

[5] The technical requirements of this new position were different from the installer/repairman position as it existed in 1988–1990 (many technological changes and changes to the job description, which now included, for example, a customer/sales contact component, see paragraphs 222 to 224 of the Tribunal's decision).

[6] At first, his application was not accepted. Télébec had decided to fill one of the two available installer/repairman positions externally and offered the other to an employee it deemed more qualified. However, since that candidate withdrew after receiving the offer, Télébec decided to offer the position to Mr. Bergeron.

[7] On August 6, 1996, Mr. Bergeron began his probationary period (article 13.12 of the collective agreement). After a few days at work, he was diagnosed with major depression. He first took two weeks' vacation and then sick leave as of August 19, 1996.

[8] Mr. Bergeron alleges that he was harassed by his employer when his then-supervisor, Mr. Mayrand, came to see him at his home to apparently give him a form to be filled out by his physician. Mr. Mayrand allegedly continued to harass him by walking past his residence a number of times to check if he was indeed there.

[9] On November 25, 1996, his attending physician, Dr. Perrier, declared him fit to return to work as of December 2, 1996. Télébec's physician, Dr. Condé, confirmed that he could work without restrictions as of that date, but on a gradual basis.

[10] In December 1996, Mr. Rivard was his immediate supervisor and Mr. Mayrand continued to fulfil this role in Mr. Rivard's absence.

[11] Mr. Bergeron worked two non-consecutive days the week of December 2 and December 9, 1996,[3] and three non-consecutive days the week of December 16.

[12] On December 16, he asked if he could take vacation on December 20 and 23. This request was denied by Mr. Mayrand after verifying staff and needs for this period.

[13] On December 17, 1996, Mr. Bergeron again met with Dr. Condé, who confirmed that he no longer had symptoms of depression and that he would return to work full-time in January 1997.

[14] On December 20, he left early because he felt tired. He notified the secretary, but not his supervisor. He was absent from work on December 23 due to gastroenteritis (he had eaten or indulged too much). Télébec had to ask other employees to work overtime.

[15] He had asked the secretary to enter the absence on December 23 as a vacation day rather than sick leave. Upon learning of these absences, Mr. Mayrand wrote a memo to Mr. Rivard in that regard on December 23, 1996. However, no official letter of reprimand was placed on file, for which Mr. Mayrand and Mr. Rivard were rebuked when their own superior, Mr. Faubert, found out about the situation.

[16] The week of January 6, Mr. Bergeron worked five days. He met with Mr. Rivard and Mr. Mayrand, who informed him that they were unhappy with his [TRANSLATION] ”attitude” on December 20 and 23 and with the shortcomings in his work.

[17] After a meeting between Mr. Rivard, Mr. Mayrand and Mr. Faubert, the decision was made to let Mr. Bergeron go. On January 10, 1997, Mr. Mayrand gave him a letter, in the presence of a union representative, advising him that he would be laid off as of January 24 because he failed to demonstrate an ability to fulfil his new duties in keeping with the standards required for the installer/repairman position. He was also informed that, in accordance with the collective agreement, his name would be placed on a callback list for 24 months as of January 24, 1997.

[18] In his complaints and before the Tribunal, Mr. Bergeron argued that this layoff was based solely or primarily on his disability, that is, his depression. He also alleges that between December 2 and January 10, he was harassed by Télébec and Alain Rivard, who apparently had constantly given him a hard time and had filed phoney letters of reprimand in order to force him to leave his position.

[19] Mr. Bergeron was then called back to work temporarily as a splicer in February, August and October 1997. During this last callback, that is, on October 20, 1997, Mr. Bergeron was hired for a period of four to six weeks. However, according to him, his contract was extended indefinitely until the end of the project on which he was working in Chibougamau.

[20] The respondents submitted, through the testimony of Richard Leblanc, who was Mr. Bergeron’s immediate supervisor at the time, that this contract had been extended in late November 1997, but only until December 24, 1997. After that date, no Télébec employees worked in Chibougamau. The independent contractor that had submitted a fixed price at the beginning of the contract completed the project with its employee at its expense.

[21] In early December 1997, Mr. Bergeron had a consultation again because he was feeling depressed. He had had an allergic reaction to medication he was prescribed (Paxil). On December 9, he was hospitalized for a few days. He immediately notified Mr. Leblanc that he was in hospital, but did not say why.

[22] On December 10, 1997, Mr. Rivard, who was merely a messenger because he was just passing by, delivered a letter [TRANSLATION] "to his hospital bed" confirming his [TRANSLATION] "layoff" or the termination of his employment on December 24, 1997, and that he would again be placed on the callback list for two years. During this meeting, Mr. Bergeron explained his state to Mr. Rivard after the latter enquired about his health.

[23] According to Mr. Bergeron, this new "layoff" was based on his disability, that is, his depression (relapse).

[24] Mr. Bergeron was not called back until December 1999,[4] the date on which his employment relationship with Télébec ended.

[25] Between May 21, 1998, and September 10, 1998, he filed ten grievances. After an analysis, his union reached the conclusion that these grievances, with the exception of one seeking payment of a lump sum, were not justified. On October 2, 1998, Mr. Bergeron filed a complaint with the Canadian Industrial Relations Board against his union, Union des Routiers, claiming that the latter had failed in its duty of representation. The Board dismissed his application.

[26] On October 10, 2000, Mr. Bergeron filed two complaints with the Canadian Human Rights Commission, arguing that Télébec and Mr. Rivard had discriminated against him contrary to sections 7 and 14 of the *Canadian Human Rights Act*, R.S.C. (1985) c. H-6 (the Act).

[27] After referring the complaint to the Tribunal, the Commission announced at the hearing that, in its view, the facts underlying the complaints warranted review by the Tribunal and that its role at the hearing would be limited to an opening statement. Although Mr. Bergeron received advice from legal counsel up until the hearing, he represented himself during it.

[28] The Tribunal held the hearing over 15 days. The applicant testified at length and produced some 60 exhibits. He also cross-examined the seven witnesses called by Télébec.[5] When offered an opportunity to present rebuttal evidence, he said he had nothing to add.[6]

[29] On May 21, 2004, the Tribunal dismissed the complaints. It rendered a detailed 60-page decision, the last paragraph of which reads as follows:

VI. CONCLUSION

[271] I believe that the Complainant has failed to discharge his burden of establishing a *prima facie* case that:

. Télébec Limitée discriminated against him by treating him in an adversely differential manner in the course of his employment because of his disability, contrary to section 7 of the *Canadian Human Rights Act*.

. Télébec Limitée discriminated against him by refusing to provide him with a harassment-free workplace because of his disability, contrary to section 14 of the *Canadian Human Rights Act*.

. Alain Rivard discriminated against him by harassing him in the course of his employment because of his disability, contrary to section 14 of the *Canadian Human Rights Act*.

[30] Before reaching this conclusion, the Tribunal analyzed the evidence and ruled on a number of issues. For example, it said:

(a) Discriminatory practices in the course of employment

(i) Layoff on December 6, 1995

[217] . . . However, the Complainant did not submit any evidence demonstrating that he had any disability at all during his layoff starting December 6, 1995, except that he had experienced depression 11 years earlier.

[218] Without dismissing the Complainant's claim that the events he experienced caused his depression in August 1996, it remains that there is no evidence leading to a conclusion that the Complainant was laid off because of a disability.

(ii) Layoff on January 24, 1997

[243] When he returned to work on December 2, 1996, the Complainant already had previous experience as an installer/repairman. To help the Complainant become familiar with his new position, the Respondent assigned him some simple work installing a telephone system in the business sector. The work was not completed within the time frame normally allotted for that type of work. The Complainant was unable to do the programming and his customer interaction was weak. The Respondent assigned the Complainant some basic installer/repairman tasks, specifically cable pre-wiring, and the productivity standards were not met. Even though the work was simple, the Complainant's productivity did not improve.

[244] The Complainant's first obligation was to perform his work, even part time, to the satisfaction of the Respondent. I believe that, despite the fact that the Respondent gave him work involving basic tasks for an installer/repairman, the Complainant, who had applied for the position in order to have steady work and who, by his own admission, did not like that type of work, failed to demonstrate the ability to perform the duties of an installer/repairman. The Respondent was justified in terminating the Complainant's probationary period for the installer/repairman position and placing him on the callback list as a splicer.

[245] Moreover, I believe that the disability, namely the Complainant's depression, was not a determinant in the Respondent's decision-making. As such, I accept Dr.Condé's unchallenged testimony that the Complainant was fit to return to work gradually with no restrictions. In addition, when the Respondent decided to terminate the Complainant's probationary period for the installer/repairman position, he was not experiencing any depression symptoms and was completely recovered. I therefore conclude, based on the evidence on this aspect of the case, that the Complainant has failed to demonstrate that his layoff on January 24, 1997, was due to disability, namely depression.

(iii) Layoffs in 1997

[252] Based on the evidence submitted, I am not satisfied that the Complainant's layoffs and callbacks for temporary jobs by the Respondent was to encourage him to quit his job. On the contrary: the Respondent called the Complainant back to work in accordance with the provisions of the collective agreement with respect to calling back laid-off employees. If it had acted otherwise, it would have interfered with the Complainant's rights. Moreover, since the specific working conditions affected all employees on the callback list, he was not treated differently, because he was one of the employees on that callback list.

(iv) Layoff on December 24, 1997

[258] The evidence on this leads me to conclude that the Complainant's health condition was not a determinant in the Respondent's decision to end the Complainant's job on December 24, 1997. I accept the version from the Complainant's immediate supervisor, rather than the Complainant's version, that his layoff was effective December 24, 1997. Moreover, it is clear that, at the time that the Respondent notified the Complainant of his layoff, in other words December 10, 1997, it was unaware of the Complainant's depressed condition.

(b) Harassment in the course of employment

[265] I cannot accept the Complainant's position. In fact, any employee who expects to be absent from work due to illness for eight days or more must use a medical form, duly filled out by his/her attending physician, to inform the employer of the nature of his/her illness and how long he/she will be away from work. I do not believe that a reasonable victim would consider the action by the Respondent's representative as harassment.

[266] The Complainant suggested that the Respondent's representative's driving by his residence repeatedly between August 10, 1996, and December 2, 1996, to visit his father and sister constituted harassment. I do not believe that the Respondent's representative's actions, although repetitive, can be considered vexatious and demeaning and sufficient to cause a reasonable victim to conclude that he/she was harassed.

[267] Specifically regarding Alain Rivard, the Complainant maintained that the latter discriminated against him by writing phoney letters of reprimand and placing them in his file unbeknownst to him. The only document produced in support of that allegation was a memo from Claude Mayrand to Alain Rivard describing the circumstances of the Complainant's leaving work on December 20, 1996, and his absence on December 23, 1996. However, he admitted that he never officially received any written reprimands from the Respondents. I conclude from this that this allegation of harassment is completely groundless.

. . .

[269] The preponderance of evidence is also such that the meetings in question did not end with the Complainant crying, as he stated. If that had been the case, he would surely have brought it up during his appointments with Dr. Condé on December 17, 1996, and January 14, 1997. The opposite was true, however, because the Complainant stated to him on December 17, 1996, that his morale was excellent, he was not crying or sad, and during the January 14, 1997 visit, he told Dr. Condé that he accepted the notification of his layoff calmly and cried only a bit.

[270] I conclude from this that the words that Claude Mayrand and Alain Rivard exchanged with the Complainant from December 2, 1996, to January 24, 1997, do not constitute harassment of the Complainant because of a disability.

ISSUES

[31] The applicant submits that the Tribunal committed a number of reviewable errors, including the following:

(i) the Tribunal erred in its application of the notion of *prima facie* case of discrimination.

(ii) the Tribunal applied the test of the determinant of the decision rather than that of a basis for the decision.

(iii) the Tribunal did not consider the principle of adverse effect discrimination.

(iv) the Tribunal erred in finding that Télébec was justified in ending his probationary period not only by incorrectly interpreting clause 13.12 of the collective agreement, but also by finding that he was unable to meet the standards of the installer/repairman position.

(v) the Tribunal erred in concluding that Télébec was unaware of the applicant's health condition in December 1997.

RELEVANT PROVISIONS

Section 7 and paragraph 14(1)(c) of the *Canadian Human Rights Act*

7. It is a discriminatory practice, directly or indirectly,	7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(*a*) to refuse to employ or continue to employ any individual, or	a) de refuser d'employer ou de continuer d'employer un individu;
(*b*) in the course of employment, to differentiate adversely in relation to an employee,	b) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	14. (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu :
14. (1) It is a discriminatory practice,	[...]
[...]	*c*) en matière d'emploi.
(c) in matters related to employment,	
to harass an individual on a prohibited ground of discrimination.	

Article 13.12 of the Collective Agreement

[TRANSLATION] 13.12 If an employee does not demonstrate the ability to perform the new duties in accordance with company standards within 120 days following the promotion or transfer, the employee shall return to his/her prior position and location. The employee may also him/herself decide, within the first 90 days, to return to his/her prior position, but at his/her own expense.	13.12 Si un salarié n'a pas démontré sa capacité de remplir sa nouvelle tâche conformément aux normes de la Compagnie dans les cent vingt (120) jours qui suivent sa promotion ou sa mutation, il devra retourner à son poste et localité antérieurs. Dans les quatre-vingt dix (90) premiers jours, le salarié peut aussi décider, de lui-même, de retourner à son ancien poste mais à ses propres frais.

ANALYSIS

[32] In *Quigley v. Ocean Construction Supplies Ltd., Marine Division*, [2004] F.C.J. No. 786 (FCTD) (QL), Justice Gibson conducted a pragmatic and functional analysis (paragraphs 34 to 46) to determine the standard of review applicable to Tribunal decisions. He concluded that the standard of correctness applies to questions of law, the standard of reasonableness *simpliciter* applies to questions of mixed law and fact, and that fact-finding and adjudication in a human rights context are reviewed according to the standard of patent unreasonableness. These standards are the same as those he had applied in *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, [2002] 2 F.C. 430 (FCTD) at paragraph 22.

[33] I agree with my colleague's analysis in *Quigley*, *supra*, and will adopt the standards he identified for the questions submitted by the applicant in the case at hand.

Test of *prima facie* case of discrimination

[34] In *Lincoln v. Bay Ferries Ltd.*, [2004] F.C.J. No. 941 (F.C.A.) (QL), the Federal Court of Appeal was to decide on this very question. Had the Tribunal and the trial judge misunderstood the test? It applies the standard of correctness to this question of law.

[35] As stated by the Federal Court of Appeal in that case, this test was provided for by the Supreme Court of Canada in *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 and in *Ontario (Ontario Human Rights Commission and Theresa O'Halley) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (hereafter *O'Malley*). It is simply a

matter of the Tribunal assessing whether the complainant sufficiently proved, in the absence of evidence to the contrary, that there is discrimination. In this context, it is clear that the situation is evaluated without taking into account the employer's reply or evidence.

[36] Here, the Tribunal's conclusion regarding this question is contained in the last paragraph of the decision, thus after the analysis of both parties' evidence and after a number of conclusions based on the preponderance of the evidence submitted by them. It therefore appears that the Tribunal committed an error in drawing the conclusion it did in paragraph 271 of its decision.

[37] However, as the Federal Court of Appeal states in *Lincoln*, *supra*, this error is not necessarily fatal and the Court must ask itself whether the Tribunal's other general conclusions are substantiated by the evidence and whether they are sufficient to support the decision to dismiss the complaints.

[38] For the reasons that I will set out below, I am satisfied that each of the Tribunal's other conclusions on the allegations of harassment and discrimination are reasonable and supported by the evidence. In addition, they are sufficient to dismiss the complaints. Therefore, the erroneous approach taken by the Tribunal to conclude in paragraph 271 that the applicant failed to discharge his burden of establishing a *prima facie* case does not warrant overturning the decision by the Court.

[39] It should be noted that Mr. Bergeron presented no arguments to establish that the Tribunal had erred in its assessment of the evidence by concluding that no harassment had occurred in the course of employment due to his disability. This conclusion in paragraph 270 of the decision (reproduced in paragraph 28 above) is, in my view, after a rather thorough review of the record, well supported by the evidence and by the Tribunal's reasoning in paragraphs 259 to 269.

[40] Similarly, it is not disputed that Mr. Bergeron was not otherwise disadvantaged in the course of employment due to a disability prior to December 1996, that is, after he returned from sick leave. The Tribunal rightly notes in that respect that Mr. Bergeron did not submit any evidence demonstrating that he had any disability at all during his layoff on December 6, 1995, except that he had experienced depression 11 years earlier.

[41] As for the temporary callbacks and the layoffs that followed between January 24 and October 20, 1997, Mr. Bergeron did not raise doubts as to the Tribunal's conclusion in paragraph 252 of the decision to the effect that Mr. Bergeron simply failed to establish that the respondent had wanted to encourage him to quit his job or that he had been the victim of differential treatment compared to other employees on the callback list.

[42] In addition, as the Tribunal states elsewhere in the decision, there is no evidence that between January 24, 1997, and October 20, 1997, Mr. Bergeron had any disability. The applicant was also unable to refer the Court to any evidence showing that he would have been perceived as having such a disability by his employer during this period.

[43] Therefore, what remains to be examined are the Tribunal's conclusions as to the layoff on January 24, 1997, and that on December 24, 1997, as, with respect to these two events, Mr. Bergeron argues that the Tribunal's conclusions are flawed due to an error in fact-finding (knowledge of his disability during the layoff in December 1997) or an error of mixed fact and law (right to terminate his probationary period on January 24, 1997) or an error of law (burden of proof applicable to these two events).

Layoff on January 24, 1997

[44] The applicant contests the validity of the two conclusions, that is, the conclusion in paragraph 244 that Télébec was justified in terminating his probationary period and the one in paragraph 245 that a disability "was not a determinant in the Respondent's decision-making."

[45] The parties agree that even though the probationary period can be as long as 120 days, article 13.12 does not create an obligation for the employer to wait until the end of that period to lay off an employee. They also agree that the employer can terminate the probationary period if it reasonably and genuinely believes that the employee cannot meet the requirements and standards of the position.

[46] In Mr. Bergeron's opinion, Télébec should have acted in good faith and given him a real chance or a reasonable opportunity to demonstrate his abilities. According to him, a dozen days of work was simply not a sufficient amount of time and the Tribunal could not reasonably or rationally conclude that Télébec had evaluated him in good faith.

[47] Mr. Bergeron uses as a basis a Court of Appeal of Quebec decision in *Duffield v. Alubec Industries Inc.*, [2002] J.Q. 3121 (C.A.Q.). In that case, the applicant had been hired as the president of the respondent company and was laid off 11 days after starting in his position, even though he had been hired for a six-month probationary period. The Court had to determine whether, under the circumstances, the employer was entitled to terminate the employment contract without compensating the applicant.

[48] Of course, every case is unique. The type of employment, the effectively evaluated work performance and the evaluator's expertise are factors that must be considered.

[49] In the case at hand, the Tribunal said it was satisfied that the employer had established, on a balance of probabilities, that Mr. Bergeron did not like the work of an installer/repairman and that his ability to carry out the duties of this position was lacking (difficulty in programming, customer contact and productivity).

[50] As stated by the respondent, the evidence also showed that Mr. Rivard had considerable experience evaluating employees because of the many instances of bumping at Télébec since 1995. As such, he was used to assessing someone's abilities within a dozen days.

[51] Just because he had more time available to him in this case does not mean that he could not reasonably reach a conclusion in good faith within 10 or 12 days, especially when we consider that there is no indication in the evidence that Mr. Bergeron's attitude with respect to this type of work would have changed or that his ability to deal directly with customers, a crucial component of this position, would improve.

[52] After carefully reviewing the entire transcript and the numerous exhibits submitted by both parties, the Court is satisfied that the Tribunal's conclusion in this respect is reasonable and stems largely from its assessment of the evidence, including the credibility of the witnesses heard by the Tribunal.

[53] The respondent also argues that, at any rate, this conclusion is not the only relevant one to the Tribunal's more general conclusion that this layoff is not a discriminatory practice. Therefore, for the respondents, an error in the interpretation of the collective agreement in that regard would in no way change the decision.

[54] The Tribunal accepted the testimony given by Dr. Condé, a witness it says is very credible, that the complainant was fit to return to work gradually without restrictions as of December 2, 1996, that his depression was, for all intents and purposes, cured and that he had no disability between December 2 and January 10, 1997 (paragraphs 227, 245 and 268). It also accepted that Alain Rivard, during discussions with Mr. Bergeron, had told him that "there was nothing indicating to him that there were any restrictions on his ability to do the work required" (paragraph 231). This therefore means that the Tribunal was satisfied that the complainant had not established the existence of a disability during this period.[7]

[55] This finding of fact based on the assessment of the evidence by the Tribunal is supported by evidence in the record. It is not patently unreasonable. The Court's role during a judicial review, as I mentioned during the hearing, is not to substitute its own assessment of the evidence for that of the Tribunal.

[56] Before the Court, Mr. Bergeron argued that since he was still taking Paxil, this could have affected his productivity. He also says that he still had symptoms of depression because he cried during meetings with Mr. Simard and Mr. Mayrand. As concerns the effect of Paxil, there is no medical or other evidence to support such an allegation, which moreover was not pleaded before the Tribunal. This new argument put forward by counsel for Mr. Bergeron at the hearing is purely speculative. There is also no evidence that Télébec[8] or Mr. Rivard knew that he was taking Paxil or that they either rightly or wrongly believed that Mr. Bergeron's productivity was affected by this medication.[9]

[57] As for Mr. Bergeron crying, the Tribunal clearly favoured the testimony of Télébec representatives, that is, Mr. Mayrand and Mr. Rivard, which was corroborated by Dr. Condé's notes, to the effect that he had not once cried during these meetings.

[58] The Court referred to the perception of a disability by the employer because the applicant had argued during the hearing that the Tribunal should have considered not only his actual disability, but also any discriminatory practice stemming from a perception of disability by his employer, even an erroneous one. For example, it should have analyzed whether Télébec believed that Mr. Bergeron's depression, even though virtually cured, prevented him from being productive or otherwise meeting the requirements of the position (*Quebec (Commission des droits de la jeunesse) v. Boisbriand*), [2000] 1 S.C.R. 665).

[59] The applicant never argued before the Tribunal and certainly did not present evidence to support this. During the hearing, the Court specifically asked to be shown where the evidence that the Tribunal was to analyze on this specific question could be found, but Mr. Bergeron could not provide a single example. He referred vaguely to circumstantial evidence he had presented to establish that Télébec knew that he had a disability and that it was his physical ability not technical that was the reason for his layoff. I note that this circumstantial evidence aims to establish an actual disability and does not address a perceived disability.

[60] I am satisfied that the Tribunal did not commit a reviewable error by not expressly addressing this concept of perceived disability in its decision. I also note again that the Tribunal accepted Mr. Rivard's testimony as to his perception of Mr. Bergeron's condition, namely that, to him, Mr. Bergeron returned to work without restrictions.

[61] The same conclusion applies when we consider another argument made by Mr. Bergeron, that is, that the Tribunal did not deal with the question of adverse effect discrimination

[62] In *O'Malley*, *supra*, at paragraph 18, the Supreme Court of Canada makes a distinction between direct discrimination and adverse effect (or indirect) discrimination where, for example, an employer adopts a rule that on its face is neutral, but when applied to all employees has the effect of being discriminatory on a prohibited ground towards one or more employees in the sense that it imposes on them, because of some special characteristic specific to them, obligations or restrictive conditions not imposed on the others.

[63] As I mentioned, Mr. Bergeron specifically alleged being subject to direct discrimination. He never submitted to the Tribunal that there was adverse effect discrimination. He was unable to identify any evidence during the hearing or in his memorandum to support the existence of such discrimination. A review of the record does not reveal any that the Tribunal should have analyzed in its decision. The Tribunal therefore did not have to treat it separately and committed no reviewable error in that regard.

[64] Mr. Bergeron's final argument is that the Tribunal imposed too heavy of a burden on him, requiring him to establish that his disability was the determinant in his layoff. He submits that the Federal Court of Appeal set aside another Tribunal decision for this reason in *Holden v. Canadian National Railway Co.*, [1990] F.C.J. No. 419 (F.C.A.) (QL)[10] confirming that it is sufficient that the discrimination be but one basis for the employer's decision (emphasis by the Federal Court of Appeal).

[65] The respondents argue that the Court must read the conclusion at paragraph 245 in its entirety, taking into account the Tribunal's other comments. For them, it is clear that the Tribunal concluded that the discrimination was in no way a factor in or a basis for the decision.

[66] There is no doubt that the applicant was not required to prove that the discrimination was the determinant in his layoff to establish a contravention of section 7 of the Act. The Act considers a discriminatory practice to be any decision based wholly or partly on a prohibited ground of discrimination. Therefore, if Mr. Bergeron's disability was one of the factors upon which the decision was based or which served as a reason for the decision, it would have mattered little that Télébec also had other good reasons for laying off Mr. Bergeron.

[67] In the case at hand, I am not convinced that the Tribunal imposed a heavier burden on the applicant or that it dismissed the complaints because the discrimination was not the determining factor within the meaning suggested by the applicant and applied by the Tribunal, whose decision was reviewed by the Federal Court of Appeal in *Holden*, *supra*.

[68] It is clear that the Tribunal did not require that the discrimination be the only reason because it expressly refers to "a determinant."

[69] Admittedly, the language used[11] by the Tribunal is arguable, and that is unfortunate. But, as I already said, the Tribunal concluded that the applicant had not established the existence of a disability between December 2 and January 10, 1997. We therefore cannot interpret the sentence in paragraph 245 to mean that the existence of a disability would have been one of the reasons for the decision, but was not a determinant, and that the Tribunal dismissed the complaint for that reason.

Layoff on December 24, 1997

[70] Mr. Bergeron argues that the Tribunal erred in concluding that Télébec was unaware of his depression on December 10, 1997 (paragraph 258). As this is a finding of fact stemming from the Tribunal's assessment of the evidence, Mr. Bergeron was required to establish that this conclusion was patently unreasonable, that is to say, irrational and illogical, or that it was not supported by any evidence in the record.

[71] Mr. Bergeron acknowledges that his immediate supervisor, Richard Leblanc, did indeed testify that he was unaware of Mr. Bergeron's condition on or before December 10, 1997. He even asked him if he had been hospitalized as a result of an injury on duty. The applicant argues that this testimony could not rationally be accepted if the Tribunal had considered the circumstantial evidence he had submitted: the particular circumstances of his layoff in December 1997 (placement of the letter of termination of employment on his hospital bed), the bizarre circumstances surrounding the sent email filed as Exhibit I-12, which he believes makes it clear that Mr. Leblanc and Ms. Doroftei attempted to fabricate evidence to support their position, and his evidence that Télébec and Mr. Rivard were aware of his condition in December 1996 because he had informed them of it himself.

[72] My review of the evidence in the record satisfies me that there was sufficient evidence to support the Tribunal's conclusion. According to Dr. Condé, Mr. Bergeron's depression had been cured. His relapse was only diagnosed in early December 1997. Richard Leblanc had no reason to think that Mr. Bergeron was depressed before December 10, 1997, since he had not informed him of this relapse. All the medical reports dealing with this relapse provided to Télébec are dated after December 10, 1997. The decision contains no reviewable error in this regard.

[73] In this factual context, where the employer was unaware that Mr. Bergeron had a disability between November 1997 (the date on which the contract was extended only until December 24, 1997) and December 10 (the date on which the letter of termination of the contract was given to him), the Tribunal could with good reason conclude that the layoff was not based on a prohibited ground of discrimination.[12]

[74] As for Mr. Bergeron's argument that here again the Tribunal imposed too heavy of a burden on him by requiring that the discrimination be the determinant in the decision to terminate his employment (paragraph 258), for reasons I already explained (see paragraphs 64 to 69), I am convinced that such is not the case and that even if the Tribunal had the wrong test in mind, its conclusion as to the non-existence of a disability is sufficient to establish that such an error, if there was one, had no impact on the final decision.

[75] I conclude that the Tribunal's decision to dismiss the complaints is reasonable and that the Tribunal did not commit an error warranting the Court's intervention. The application for judicial review is therefore dismissed. The Court will decide the costs after it receives a draft bill of costs from the respondents on or before June 28, 2005, and Mr. Bergeron's comments, if there are any (see rule 400 of the *Federal Court Rules*), on or before July 4, 2005.

ORDER

THE COURT ORDERS that:

The application for judicial review is dismissed. The costs will be determined in a subsequent order.

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1150-04
STYLE OF CAUSE:	PIERRE BERGERON
	- and -
	TÉLÉBEC LIMITÉE and
	ALAIN RIVARD
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 16, 2005
REASONS FOR ORDER	
AND ORDER:	The Honourable Mr. Justice Gauthier
DATED:	June 21, 2005

APPEARANCES:

Jocelyn Dubé	FOR THE APPLICANT
Reno Vaillancourt	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Jocelyn Dubé	FOR THE APPLICANT

Montréal, Quebec

Legault & Associates FOR THE RESPONDENTS

Montréal, Quebec

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[1] The facts are detailed in the decision. This is therefore a summary of some of the relevant facts to provide context.

[2] Mr. Bergeron still argues that he should have obtained a job through bumping. Télébec submits that there was no position for him given his qualifications and his lack of seniority. However, this element is not part of the complaints before the Tribunal and nothing indicates that it is related to Mr. Bergeron's depression other than perhaps being a source of additional stress.

[3] Mr. Bergeron was originally supposed to work three days the week of December 9, but since he was tired after his first week of work, it was agreed with Dr. Condé's assistant (a nurse) that he would work only two non-consecutive days.

[4] The evidence shows that Télébec attempted to contact him once, but did not manage to reach him. It also appears that there were few callbacks during this period.

[5] In that respect, the Court notes that the Tribunal remarked on at least two occasions that Mr. Bergeron was very good in his cross-examinations.

[6] Page 2234 of transcripts, line 25, to page 2235, line 20, tab 15 of the Respondent's Record.

[7] I also note that Mr. Rivard himself had major depression a few years earlier.

[8] According to the evidence, it appears that an employee's medical record is considered and treated as a confidential document. The information it contains was not communicated internally to Mr. Bergeron's various supervisors. Mr. Rivard and Mr. Mayrand knew only what Mr. Bergeron had told them, and there is no indication that he told them about taking Paxil.

[9] Mr. Bergeron was taking Paxil until May 1997 and there is nothing to indicate that his productivity or his ability to work as a splicer during his callback on January 27, 1997, was affected in any way.

[10] The respondents referred to the decision of Madame Justice Michèle Rivet in *CDP v. Compagnie minière Québec Cartier, TDPQ* of July 14, 1994, but this decision was overturned on appeal by the Court of Appeal of Quebec ([1998] A.Q. 3657 (C.A.Q.)(QL)).

[11] The word "determinant" rather than "basis."

[12] The Court notes that in October 1997, Mr. Bergeron's work as splicer was evaluated by Télébec. Alain Rivard was the one who carried out this evaluation and concluded that his work was entirely satisfactory.