

Date: 20071019

Docket: T-1644-06

Citation: 2007 FC 1076

Ottawa, Ontario, October 19, 2007

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ALLAN BESNER

Applicant

and

**THE ATTORNEY GENERAL OF CANADA
(CORRECTIONAL SERVICE OF CANADA)**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission, dated August 8, 2006, wherein the Commission dismissed Mr. Besner's complaints that he had been discriminated against by his employer and that the employer had failed to provide reasonable accommodation for his disabilities. The central issue is whether the Commission conducted a thorough investigation of the complaint. For the reasons that follow, I have concluded that there are no grounds on which to interfere with the decision and the application will be dismissed.

BACKGROUND:

[2] The record in this matter discloses a protracted series of events leading up to Mr. Besner's retirement from the Correctional Service of Canada ("CSC") in 2002 on medical grounds and his subsequent complaint that this was induced by the employer's failure to accommodate his disabilities. While it is not the role of the Court to consider the merits of that complaint, a review of the factual background is necessary to determine whether the Commission's investigation was sufficiently thorough.

[3] Mr. Besner, a psychologist formerly employed with at the Matsqui Institution in British Columbia, has suffered for many years from obsessive-compulsive disorder and depression which made it difficult for him to perform certain of his assigned duties within the expected time frames. In particular, he was unable to prepare psychological assessments in a timely manner, a limitation he states he was able to deal with initially because his workload was varied and assessment writing could be offset against other duties which were less arduous for him.

[4] In 1994, while still employed at Matsqui, Mr. Besner was assigned to the Regional Reception and Assessment Centre (RRAC) at which his primary duty was to write psychological assessments. At the time he objected to the assignment for a number of reasons outlined in a memorandum to the Warden but did not disclose that his disability would cause any difficulties with the nature of the work. He was unable to meet the performance expectations of this assignment and took extended periods of stress related sick leave. It is apparent from the record that his inability to

complete timely assessments led to strains in his relationship with prison management as did his union activities which also required extended absences from the workplace.

[5] In July 1997, following several prolonged medical absences, Mr. Besner sought to return to work on the recommendation of his psychiatrist, a Dr. Pole, that he be allowed to work on a schedule of three days per week. Dr. Pole's letter providing this recommendation does not discuss the nature of the work that Mr. Besner could or could not perform nor did the psychiatrist address that question in a follow-up letter to Health Canada in December 1997. Mr. Besner submits that his supervisor was aware of his problem in completing assessments.

[6] By letter dated July 23, 1997 the acting chief of personnel at Matsqui requested an independent fitness for work assessment from Dr. I. Forbes of the Occupational Health Services Branch of Health Canada. The letter described Mr. Besner's duties as including providing psychological diagnostic assessment services for inmates; conducting individual and group therapy; providing consulting services to the case management and institutional management teams regarding inmates' treatment in programs; and, training for both staff and inmates. This is consistent with the statement of objectives for his position that was prepared by the Deputy Warden and signed by Mr. Besner on January 16, 1996.

[7] Attached to the letter was a checklist entitled *Occupational Health Services Job Analysis Guidelines* (the "Job Analysis"). The checklist included estimates of the frequency of job related physical, mental and environmental stress factors. For those marked as frequent or constant, brief descriptions of the tasks were added in handwriting. Only two factors were described as constant:

counselling/interviewing and psychological assessments/recommendations. "Constant", as submitted by the respondent in its reply to the Commission was defined as 67-100% of the work shift . Under the heading "Comments" the following remarks are found:

A psychologist employed in a Federal Prison provides psychological services and counselling to offenders, does risk assessments, makes recommendations respecting risk management, suitability for transfer, risk for self/other harms and assists in critical incident stress management within the institution.

[8] In response to the request for an independent evaluation, Dr. Forbes wrote that he supported a return to work based on Dr. Pole's recommendation, although he stated that he had not been able to conduct a full medical assessment as Mr. Besner would not grant consent to contact his physicians. Subsequent correspondence from Dr. Forbes on the record indicates that Mr. Besner continued to refuse consent for some time. Mr. Besner asserts in documents filed with the Commission that in dealing with Dr. Forbes he wished to preserve his privacy interests and limit the personal information which the employer might acquire. He believed that he had reached an understanding with Dr. Forbes about what information was relevant for the purposes of the assessment.

[9] The applicant returned to work on August 1, 1997 and was reassigned to the RRAC for three days per week at 50% workload. However, he continued to have difficulty in satisfying management's performance expectations. On January 27, 1998, a meeting was convened by Mr. Besner's supervisor with the applicant in which the acting head of personnel, an associate warden and a union representative also participated. This was described, by the supervisor in a letter of reprimand to Mr. Besner dated February 20, 1998, as a "disciplinary hearing", arising from Mr. Besner's failure to complete an inmate intake assessment report in a timely fashion.

[10] The only contemporaneous record of the January 1998 meeting is several pages of handwritten notes prepared by Mr. Besner's union representative. The notes indicate that it was stated at the meeting by the supervisor that the main reason he had been given the assessment work, considered a short term task, was to accommodate his frequent absences for medical reasons and his union duties. Mr. Besner could not be assigned to a living unit, as he preferred, if unavailable full-time. Mr. Besner is quoted as stating that he would have difficulty preparing risk assessments on time but was willing to give it a try.

[11] In a letter to Dr. Forbes dated February 26, 1998, Matsqui's acting chief of personnel again sought confirmation regarding Mr. Besner's fitness to work. The letter notes that Mr. Besner was reluctant to provide consent for a review of all of his medical records and wished to have the release of information restricted to his current situation to ensure the continued confidentiality of those records. The letter further states that Mr. Besner had discussed this with his physician and requested that the doctor contact Dr. Forbes to outline his situation. The letter concludes by asking Dr. Forbes to confirm if Mr. Besner had consented to the release of information sufficient to complete an assessment of his fitness for work and second, if that were the case, "do any restrictions apply or is Mr. Besner able to perform the duties of this position on a full-time basis?".

[12] On April 2, 1998 Dr. Forbes wrote to advise that the medical information regarding Mr. Besner had again been reviewed and that Mr. Besner had been interviewed at the health services offices. In his letter, Dr. Forbes states "after considerable effort, once again I've been unsuccessful in obtaining informed consent and have therefore been unable to conduct a full assessment." He then

proceeded to state that Mr. Besner met the medical requirements to perform all of his duties but, for medical reasons, should work only three days per week.

[13] Letters from Dr. Pole in January and March 1999 to Dr. Forbes certifying Mr. Besner's absences for medical reasons make no mention of any alternate work that he might perform but state simply that he was "under stress and strain at work". On May 7, 1999 Dr. Pole wrote to advise that Mr. Besner was medically disabled and would be unable to return to work indefinitely. Mr. Besner did not return to work, was placed on leave without pay and applied for long term disability insurance benefits which were approved in December 1999. An independent medical evaluation in October 1999, prepared for the insurer by a Dr. Kline, indicated that he was fully disabled but could possibly return to work if the employer were able to offer him alternate work in program development or therapy. It appears that this evaluation was not provided to the employer until these proceedings were initiated. In any event, no offer of alternate work was made.

[14] On July 12, 2001, further to Treasury Board policy respecting long term leave without pay, Mr. Besner was notified that his employment would be terminated if he did not return to work within two weeks. On the advice of his union and under what he considered to be duress, Mr. Besner sought retirement on medical grounds. In support of that application, Dr. Pole provided a detailed medical opinion dated March 5, 2002 in which he concluded that Mr. Besner "is completely disabled... [and] has been disabled for the last 4 years or so... which prevents him in [*sic*] engaging in any employment for which he is reasonably suited by virtue of education, training and experience..." In February 2003 Mr. Besner was advised that he would be retired on medical grounds effective May 2002.

[15] In his complaint to the Commission filed on August 27, 2004, Mr. Besner alleged that between June 7, 1994 and May 2002 he was discriminated against by his employer in being treated in an adverse differential manner because of his disability, that the employer had failed to accommodate his disability and that such actions culminated in the termination of his employment. The respondent objected to the matter proceeding as it was filed beyond the one year time period provided by the *Canadian Human Rights Act* (the Act). Further the respondent denied that it discriminated against the complainant by treating him in an adverse differential manner, by failing to accommodate his disability or by terminating his employment.

[16] On February 10, 2005 the Commission accepted the complaint and assigned an investigator. By letters dated November 15, 2005 and March 10, 2006, Mr. Besner's union representative provided the Investigator with extensive documentation supporting the complaint and a detailed rebuttal of the employer's response prepared by Mr. Besner with assistance. In the rebuttal Mr. Besner acknowledges that the nature of his disability made it extremely difficult for him to complete reports in a timely manner and that most available psychological work requires extensive report writing but asserts that he could have continued working productively for CSC had they accommodated his disability by allowing him to balance assessment preparation with program delivery and development work.

[17] The Investigator's report was completed on March 30, 2006 and recommended that the complaint be dismissed for these reasons:

- the evidence does not support the complainant's allegation that he was treated in an adverse differential matter because of his disability.

- the evidence indicates that the respondent provided medically supported accommodation to the complainant.
- the evidence indicates that the complainant was not capable of working at any occupation and that there was no reasonable prospect of him ever being capable of working in the future.

[18] In the analysis portion of the report, the key finding by the investigator reads as follows:

...the medical evidence does not support that the complainant was medically restricted from performing assessment work as both Dr. Pole and Dr. Forbes recommended only a decrease in his work schedule from five days per week to three days per week. While the complainant determined what his medical restrictions were and what form accommodation should be supplied, neither Dr. Forbes or [sic] Dr. Pole outlined any medical restrictions or indicated that the complainant was unable to perform specific types of work.

[19] The investigator's report was disclosed to Mr. Besner on April 10, 2006 and he was provided with an opportunity to respond to it, which was done on his behalf by a representative of his union on May 2, 2006. The response focused upon two aspects of the report; investigation of the employer's actions and use of the medical opinions. In particular, it was submitted, the report failed to recognize that CSC did not address the required accommodation, namely a change of work assignment away from completing psychological assessments.

[20] In correspondence with the Commission dated April 25, 2006, Dr. Pole stated that the employer's insistence that "his work be comprised solely of completing assessments led to a deterioration in his health and to his eventual disability" and further that Mr. Besner "could have functioned in the workplace if he had been assigned appropriate duties...before his health had deteriorated to the point where he was entirely and fully disabled."

[21] The Commission's decision, conveyed to Mr. Besner by letter dated August 8, 2006, indicated that the members had reviewed the investigator's report and the submissions filed in response. Their decision to dismiss the complaint was for the same reasons identified by the investigator. It is agreed by the parties that the investigator's report constitutes the Commission's reasons for the purpose of these proceedings.

Issues:

[22] The issues which I have identified from the parties' submissions are as follows:

1. whether the Commission conducted its investigation in accordance with the duty of procedural fairness; and
2. whether the Commission's decision was reasonable in finding that the evidence did not support Mr. Besner's allegation that he was treated in an adverse differential manner because of his disability.

Analysis:

Standard of Review;

[23] The Federal Court of Appeal applied a pragmatic and functional analysis to determine the appropriate standards of review of a decision of the Canadian Human Rights Commission to dismiss an analogous complaint in *Sketchley v. Canada (A.G.)*, 2005 FCA 404. The Court noted at paragraph 111, that this analytical approach does not apply to the question of whether an

investigation has been sufficiently thorough. That issue is one of procedural fairness, for which no curial deference is due. The failure to accord procedural fairness has long been seen to be a grave failure on the part of any tribunal, such that the courts should provide the legal answer to any such question: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 100.

[24] The issue of whether an employer must make specific and reasonable medical inquiries about an employee's alleged limitations is a question of law, which attracts a standard of correctness: *Sketchley*, above, at paras 63 to 70.

[25] Absent a breach of procedural fairness or an error of law, a reviewing court should only intervene where it is shown that the decision of the Commission is unreasonable: *Bell Canada v. Communications, Energy and Paperworkers Union of Canada (C.A.)*, [1999] 1 F.C. 113. Flaws in an investigator's Report will not vitiate a Commission's decision, so long as such flaws are not so fundamental that they cannot be remedied by the responding submissions of the parties. For the purposes of judicial review, when a Commission has not elaborated upon its reasons, as here, the Investigator's report may be considered to be the Commission's reasons for decision: *Sketchley* at para. 38.

Sufficiency of the Investigation;

[26] As noted in *Ruckpaul v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 149, [2004] F.C.J. No. 177 at paragraph 49: "the aim of the investigation of a human rights complaint ...

is to inquire into the facts of the complaint in order to provide the Commission with a fair evidentiary assessment for its decision what to do next.” In this context, the Commission performs a screening function based largely on that evidentiary assessment to determine whether the matter should be referred to a tribunal for inquiry.

[27] While Mr. Besner’s complaint covered the period from 1994 when he was assigned to prepare assessments at RRAC until his retirement, in my view the relevant time period for the purposes of this application begins with the meeting in January, 1998 when his job performance was discussed and Mr. Besner disclosed to the employer that his inability to complete assessments was due to medical causes. The parties agree that the need to accommodate Mr. Besner's condition was recognized from that meeting.

[28] Mr. Besner submits that his employer then failed to reasonably and accurately describe his actual job requirements when seeking medical advice as to his fitness to perform them. At the relevant time, his primary responsibility was to prepare psychological assessments, the very task that he found most difficult to perform because of his disabilities. He contends that the employer chose to rely upon a generic job description and the risk analysis to provide information to the medical assessor about the nature of the tasks he was expected to perform. That analysis covered the full range of functions performed by CSC psychologists and was inaccurate and misleading in so far as it was intended to describe his actual assignments. This resulted, the applicant submits, in the employer’s failure to appropriately accommodate his disability through the assignment of a varied range of duties. A reduced work week and work load did not constitute reasonable accommodation when it was precisely the nature of the assigned work that exacerbated his disabilities.

[29] The jurisprudence is clear that a human rights investigator has an obligation to complete a thorough investigation: *Slattery v. Canada (Human Rights Commission)*, (1994), 73 F.T.R. 161, [1994] 2 F.C. 574 (T.D.), affirmed (1996), 205 N.R. 383 (C.A.) [*Slattery*]. The applicant submits that in this instance the investigator's report was flawed by its reliance on the medical assessments compiled on the basis of CSC's provision of an inaccurate job description to the assessor. The investigator failed to engage in any analysis of whether this information was accurate and adequate. Such analysis was required for the investigation to have been truly thorough.

[30] The respondent counters that the Court should consider the parties' relative ability to cover alleged omissions in a report when making a decision about intervention: *Slattery*, at para. 60 – 61. In this case, the evidence shows that CSC did not conceal the nature of Mr. Besner's job from Health Canada when seeking an evaluation. The investigator did not ignore crucial evidence. The applicant had the opportunity to respond to the investigation, and the Commission referred in its decision to those submissions, which explicitly address the adequacy of the information provided to the medical evaluator.

[31] The question of the obligations of the parties in an investigation of reasonable accommodation in employment was recently considered by the Supreme Court in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] S.C.J. No. 4 (*McGill University Health Centre*). Madam Justice Deschamps there stated at paragraph 22 that:

[t]hroughout the employment relationship, the employer must make an effort to accommodate the employee. However, this does not mean that accommodation

is necessarily a one-way street. In *O'Malley* (at p. 555) and *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, the Court recognized that, when an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. **If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed.** (emphasis mine)

[32] In *Lowe v. Landmark Transport Inc.*, 2007 FC 217, [2007] F.C.J. No. 284 at paragraph 21, my colleague Justice Michael Phelan noted that:

[t]he allegation of failure to accommodate must also be considered against the background of the information available to either or both the employer and the Union.

[33] In the instant case, it appears that Mr. Besner had information available to him which was not provided to the employer or to the employer's medical assessor at the relevant times. The recommendations of Mr. Besner's own psychiatrist, Dr. Pole, and those of Dr. Forbes, relying upon Dr. Pole's advice, was for restricted hours of work rather than a change of duties. Based on those recommendations, Mr. Besner was offered an accommodation which he accepted. In hindsight, with knowledge of Dr. Kline's comments in relation to the insurance claim in October 1999 and those of Dr. Pole in his April 2006 opinion letter, it is apparent that due to the nature of Mr. Besner's disabilities, this was doomed to failure. But it is not apparent that this could have been foreseen by the employer based on the information CSC management had at the relevant time.

[34] Mr. Besner wished to limit the amount of information about his medical condition that was provided to his employer and to the medical assessor retained by the employer to assess his capacity to perform his work. He chose not to cooperate fully with Dr. Forbes when given several opportunities to provide information that Dr. Forbes believed was necessary for an adequate assessment. That was his right, but in choosing to exercise it, he failed to cooperate with the

employer in finding a reasonable accommodation for his disability. It is clear from the notes of the January 1998 meeting that CSC management was trying to find such an accommodation. What was offered, as was found by the investigator, was supported by the medical advice which they received.

[35] In *Guay v. Canada (Attorney General)*, 2004 FC 979, [2004] F.C.J. No. 1205, it was noted, at paragraph 36, that it is not for the Court "...to dissect the investigator's report on a microscopic level or to second-guess the investigator's approach to his task. The applicant can only succeed...if the alleged deficiencies she outlines render the investigator's report "clearly deficient"". In that case, the Court's intervention was warranted as the investigator had failed to address a number of the claims made by the complainant.

[36] Serious deficiencies were also found in *Ruckpaul* above, such as the failure to interview the applicant's witnesses or to disclose responses from the employer. There was no failure to disclose in this matter. Several witnesses who may have had personal knowledge of the events in question were not interviewed as they had retired or otherwise left CSC and their present locations were unknown to the employer. That does not, in my view, indicate a failure on the part of the investigator to conduct a thorough inquiry but reflects the passage of time since the events occurred.

[37] In *Singh v. Canada (Attorney General)*, 2001 FCT 198, [2001] F.C.J. No. 367, upheld 2002 FCA 247, [2002] F.C.J. No. 885, the Court found that an investigation into the substance of the complaint had never really taken place. That is not the situation in this case.

[38] From my review of the investigator's report and the supporting record, I am satisfied that the investigation properly focussed on the substance of the applicant's complaint and that his submissions were fully taken into consideration and put to the appropriate decision-makers.

[39] Mr. Besner argues that the investigator failed to address his contention that he was entitled to rely upon the assumption that the employer was providing complete and accurate information to the medical assessor with respect to the nature of his work duties. Counsel urges the Court to send the matter back for a fresh investigation of whether the failure to properly inform Dr. Forbes about the type of work Mr. Besner was doing is attributable to the employer or to him. I do not think that it was necessary for the investigator to address this in her analysis when, at the relevant time, there was no medical indication that Mr. Besner could not perform any part of the job description of a CSC psychologist, including assessments. That which was material to the investigation was that neither Dr. Forbes nor Dr. Pole recommended any specific work restrictions for Mr. Besner other than for the duration of his work week.

CONCLUSION:

[40] It is apparent from Mr. Besner's submissions to the Commission and from the other material on the record that he suffered considerably from his disabilities and from what he believes to have been the actions of management during his employment with CSC. It is not for the Court to determine the merits of those grievances but to review the adequacy of the investigation into his complaint of discrimination and the reasonableness of the Commission's decision.

[41] I must conclude, on the basis of the record before me, that the investigator did conduct a sufficiently thorough investigation and that the applicant was not denied procedural fairness in the preparation of the investigator's report. The investigator's analysis was not based on irrelevant factors, nor was it capricious or vexatious. The Commission was justified in relying upon the investigator's report, together with the final responding submissions of the applicant, in arriving at its decision. Accordingly, I find that the Commission's decision is reasonable and should not be set aside. The respondent has not requested its costs and none will be awarded.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. There is no award of costs.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1644-06

STYLE OF CAUSE: ALLAN BESNER

AND

THE ATTORNEY GENERAL OF CANADA
(CORRECTIONAL SERVICE OF CANADA)

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 4, 2007

REASONS FOR JUDGMENT: MOSLEY J.

DATED: October 19, 2007

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