Date: 20080125

Docket: T-433-07

Citation: 2008 FC 99

Ottawa, Ontario, this 25th day of January, 2008

PRESENT: The Honourable Barry Strayer, Deputy Judge

BETWEEN:

PETER BOLDY

Applicant

and

ROYAL BANK OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission set out in a letter dated February 9, 2007. In that decision the Canadian Human Rights Commission (CHRC) dismissed the Applicant's complaint pursuant to paragraph 44(3)(*b*) of the *Canadian Human Rights Act*, R.C.S. 1985, c. H-6. The complaint had been made by the Applicant against his former employer, Royal Bank of Canada, alleging discrimination on the basis of mental disability because the RBC had failed to make reasonable accommodation to enable the Applicant to return to work.

FACTS

[2] The Applicant commenced employment with the RBC in April, 1986 and worked there until October, 2002. His last position there was as Technical Systems Analyst.

[3] It is not in dispute (although this event did not form part of the formal complaint filed by the Applicant with the CHRC) that starting in about February, 2002, the Applicant had expressed concerns to his superiors about, according to RBC, "financial irregularities", and according to the Applicant, about "the over-configuration of RBC's mainframe computers". It is not in dispute that RBC after some consideration (RBC says there was an internal investigation and it is agreed the Applicant was interviewed in this connection) RBC found these complaints to be without foundation. On October 16, 2002, an Executive Vice-President, John D. Joyce, wrote to the Applicant. He advised that RBC had investigated his allegations and did not agree with them, and he expressed concerns about the Applicant's "well-being", advised him that he would be placed on leave of absence with salary "to seek independent professional medical counselling" and that an appointment had been arranged for him with a psychiatrist, a Dr. Murphy. Dr. Murphy diagnosed a major depressive episode, a probable paranoid personality disorder and some physical symptoms. He expressed the opinion that the Applicant was currently not able to perform at his worksite at more than 50% capacity. He recommended that the Applicant see a physician who would treat him for depression. He was subsequently put under the care of Dr. R. Rehaluk, a psychiatrist, and Dr. Nexhipi, a clinical psychologist.

[4] After the substance, but not the detail, of Dr. Murphy's opinion was reported to RBC the Applicant was required to go on disability leave in October, 2002. He was put on long-term disability benefits effective February 13, 2003. These benefits continued until February, 2006.

[5] On October 15, 2004, counsel for the Applicant wrote to RBC's counsel reporting that he had recently received reports from the Applicant's medical professionals (Drs. Rehaluk and Nexhipi). He summarized these reports as saying that the Applicant was "willing and capable of returning to work for the employer under certain conditions". Those conditions, summarized in the letter, will be set out more fully below in quotations from Dr. Rehaluk's letter. In reply of October 21, 2004, RBC's counsel advised that RBC had received no indication from Manulife (the agent managing disability benefits for RBC) that the Applicant was medically fit to return to work. She asked for medical documentation and particulars of some of the allegations. In reply, the Applicant's counsel sent to RBC's counsel a redacted version of the report of Dr. Rehaluk. It appears that Dr. Nexhipi had expressed the opinion that the Applicant could only return to work if there were a public investigation of the Applicant's original complaints of February, 2002 by an independent investigator, with RBC and the Applicant agreeing to accept the results. The major part of Dr. Rehaluk's letter is as follows (the areas left blank represent the redacted portions in the version sent to RBC):

> Since my first report to you on March 28th, 2003, I have had the opportunity to follow Mr. Boldy over time. I have also had the opportunity to have Dr. Nexhipi work with Peter. I am in agreement with Dr. Nexhipi's views regarding _____ dynamics involving the workplace and what is presented as the most fair and reasonable approach to initiating a return to work. I refer to Dr. Nexhipi's two reports dated February 16th, 2004 and June 30th,

2004. I have also reviewed Dr. Murphy's report dated November 14th, 2002 and understand his position.

Over time, my clinical opinion has changed _____ _____ _____. The process that led Peter to sick leave from the workplace was initiated by the employer and it appears that Peter had no other options at that time but to follow what was mandated for him.

I remain in agreement with Dr. Murphy and Dr. Nexhipi regarding a failure, in the event that Peter return to the workplace without something significant happening. Peter has maintained strong feelings of betrayal and mistrust based on reports of how his issues have been dealt with to date at many levels in the workplace. At present the workplace remains poisoned and he cannot return to his specific site with the same people or any possible site he could be transferred to by his current employer.

Over time, Peter has presented a very clear understanding of his position with details that merit being listened to and investigated by an independent assessor. It would be of benefit to Peter if the issue of "whistleblowing" were investigated. Peter presented his case in the workplace up the chain of command and did not find continuity. He feels shut down at many levels despite his good intentions to actually improve aspects in the workplace. The ability to recognize and identify any workplace retaliation would be possible thorough [*sic*] investigation. There are several documented cases available that support the similar experiences Peter describes and I would not simply leave this case open to offering Peter a workplace transfer. Mr. Boldy wants to return to the same workplace as soon as possible but will require that achieved sense of moral vindication prior to this.

Peter's position is such that he doesn't want what happened to himself in the workplace to happen again to anybody and that if guilt is found, those parties should be punished appropriately. He claims he was given a false staff review that ultimately was rejected by the VP that put the problem in motion, leading to Peter's sick leave. He would like the investigation to be public. _____ _____ _____. In the event that the investigation is in favour of Peter, he would want to be formally welcomed back to the company and be accepted for helping and coming forward with the problems that they tried to get him out of the workplace with. He

> would also like the data base project reinstated to him as he believes this was taken away from him due to the staff review he received.
>
> _____. He would be satisfied by an independent review of his issues regardless of the outcome, as long as the employer is kept bound by the outcome also, to show good faith with both parties. In the event that this could be expedited, it would cause less emotional stress as it would for anybody going through this process.

[6] In January-April, 2005, the Applicant and his counsel sought to have meetings with RBC representatives. These meetings did not occur because the Applicant would not agree to meet with certain representatives of RBC and because RBC took the position that it did not have up-to-date information on the Applicant's mental fitness to return to work. It did not regard the letter from Dr. Rehaluk, the only medical opinion it had at that point, as evidence of such fitness. It did not know what had been redacted but assumed it was critical elements of a medical diagnosis (as was the case). Requests by RBC of the complainant and of Manulife for access to his medical file were rejected by the Applicant.

[7] On August 12, 2005 the Applicant filed a complaint with the CHRC against RBC alleging discrimination in employment based on his mental disability, due to RBC's failure to accommodate his return to work up to the point of undue hardship. After an attempted mediation, an investigator was appointed. A summary of his findings are as follows:

> It does not appear as though the complainant's request for accommodation is rationally connected to his disability. The objective, relevant medical evidence indicates that the complainant could not return to work for the respondent. Consequently, as the respondent had no objective evidence that the complainant was fit to return to work, it had no duty to accommodate him, beyond continuing his disability benefits. While the complainant's

> psychiatrist may have raised a preference that the complainant requires an achieved sense of moral vindication prior to returning to work, it does not follow that his preference is rationally connected to the complainant's disability. The evidence indicates that the complainant's concerns were investigated by the respondent's Corporate Security Department, although not in the complainant's preferred method.

The report was provided to both RBC and the Applicant and they were able to make comments which were also put before the Commission along with the report.

[8] In a letter of February 9, 2007 to the Applicant, the Commission advised him that it had decided to dismiss the complaint because:

> Based on the investigator's findings, it appears as though the complainant's accommodation request was not rationally connected to his disability.

This decision was taken by the CHRC pursuant to paragraph 44(3)(*b*) of the *Canadian Human Rights Act* which provides that the Commission shall dismiss a complaint if "having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted … ."

ISSUES

[9] There appear to be two issues:

(1) What is the standard of review for this CHRC decision?

(2) Applying that standard, is the decision invalid?

ANALYSIS

Standard of Review

[10] The Applicant contends that the standard of review applicable to the determination that there was no rational connection between the accommodation and the disability is reasonableness; that the standard applicable to the issue of whether there is an onus on RBC to arrange accommodation is correctness; and the standard applicable to the duty of fairness in the conduct of the investigation and decision of the Commission is also that of correctness. RBC argues that the standard of review is that of patent unreasonableness or, in the alternative, reasonableness.

[11] Using the usual criteria for the pragmatic and functional approach, there is of course no privative clause and no appeal provision in respect of such decisions, facts which usually are neutral in assessing standard of review. The purpose of the legislation is obviously to provide remedies for human rights infringements by a simpler procedure administered by a Commission, whose general purposes include the promotion of human rights. This should suggest more deference. As for relative expertise, the Commission and its investigators have more direct experience with relevant fact situations than do the Courts and this should suggest more deference. An additional consideration in this case is that the decision here to dismiss the complaint without a tribunal hearing is determinative of the rights of the Applicant, and therefore somewhat less deference should be shown, particularly on questions of law: see *Sketchley v. Canada* 2006 3 F.C.R. 392 at paras. 79-80 (F.C.A.); *Clark v. Canada*, [2007] F.C.J. No. 20 at paras. 70-71 (F.C.). Looking at the nature of the question as a guide to the standard of review, it appears to me that a decision such as

the present one concerning a rational connection between the disability and the obligations of accommodation involves some legal determination of the scope of the accommodation duty and therefore it becomes a question of mixed law and fact. Taking all of these factors into account, the standard of review for that decision is reasonableness. With respect to the existence of an onus on the employer to find a means of accommodation, it appears to me that that is essentially a question of finding, and defining, a legal rule and becomes one of correctness. With respect to determinations of fairness, it is generally accepted that these are to be reviewed for correctness without regard to the pragmatic and functional approach.

Was the decision valid?

[12] Turning then to the decision of the Commission, perhaps the most important issue is as to whether CHRC correctly interpreted the scope of the onus on RBC to accommodate. It is true that in general an employer is considered to be in the best position to determine how the complainant can be accommodated without undue interference in the operation of the business. There is also a duty on the complainant to facilitate the search for an accommodation: see *Board of School Trustees, School District no. 23 (Central Okanagan) v. Renaud* (1992), 95 DLR 4th 577 at 593. Thus there is a considerable onus on the employer as a matter of law. I do not understand the reasons of the CHRC, as set out in the investigator's report which we must assume to have been adopted by the CHRC, to ignore this onus on the employer. Instead the investigator, as set out in the summary of his report quoted above, concluded that RBC had no duty to accommodate the Applicant in these particular circumstances because it had no clear evidence that the Applicant could return to work. The

information that had been given, mainly in the form of the redacted Rehaluk Report contained sentences such as the following:

> At present the workplace remains poisoned and he cannot return to his specific site with the same people or any possible site he could be transferred to by his current employer.

The letter goes on to say that Peter wants an investigation of his "whistleblowing" in 2002 by an independent assessor who would hold a public investigation, that "if guilt is found" parties should be punished appropriately, and that if the investigation is in favour of Peter he should be "formally welcomed back to the company". This was the only medical opinion on the Applicant's current medical condition which RBC had prior to these proceedings being started.

[13] It appears to me that the CHRC investigator correctly recognized the scope of the legal obligation on RBC to accommodate if possible. He observed that RBC had accommodated the Applicant by providing him with disability benefits which commenced after RBC was advised that he was unable to work. The Applicant contends that disability benefits cannot be reasonable accommodation in place of a renewal of employment, and he cites the case of *Tozer v. British Columbia* (2000), 36 CHRR D/393 (BC Human Rights Tribunal). That case is distinguishable because there the employee had provided the employer with medical opinions clearly indicating she was able to return to work. The Applicant also cites a railway arbitration which I do not consider particularly relevant. I believe the investigator was also correct in finding, in effect, that an employer does not have an onus of accommodating an employee so as to enable him to come back to work if the employer is not first satisfied that such employee can return to work.

[14] Given these legally correct interpretations of the onus of accommodation, I believe the investigator and the Commission reached a reasonable conclusion that the employer was not obliged to take a further step toward accommodation because the step requested by the Applicant was not rationally connected to his disability. His request was based on the hypothesis of his clinical psychologist as conveyed to his psychiatrist as conveyed by him to RBC in a letter from which unknown material had been deleted and in which a highly speculative scenario was presented. It would be obvious the doctors had no direct knowledge of the work situation other than what the Applicant had provided. It was reasonable for the investigator and the Commission to regard this letter as quite inadequate as a basis for accommodation by the RBC. Yet the letter made it clear that no other form of accommodation would be acceptable to the Applicant on medical grounds. It was therefore reasonable for the investigator and the Commission to conclude that (in the words of paragraph 44(3)(*b*) of the Act) "having regard to all the circumstances … an inquiry into the complaint is not warranted … ."

[15] The Applicant asserts that the investigator did not act fairly in the preparation of his report. This is not a matter for the pragmatic and functional analysis of the standard of review. However, the Court is obliged to determine as a matter of law whether the procedure followed was fair in the circumstances: see e.g. *C.U.P.E. v. Ontario*, [2003] 1 S.C.R. 539 at paras. 100, 102-103; *Sketchely*, *supra*, at paras. 52-55. It has been frequently said that the main requirements of fairness, in an investigation carried out under the *Canadian Human Rights Act*, is that the investigator demonstrate neutrality and thoroughness: see e.g. *Slattery v. Canada* 1994 2 F.C. 574, para. 49; *Miller v. Canadian Human Rights Commission* (1996), 112 FTR 195 at para. 13; *McNabb v. Canada Post*

Corporation 2006 F.C.J. No. 1424 at para. 74 (F.C.). The Applicant here complains in effect of a lack of thoroughness. I do not believe he has demonstrated this. He complains that the investigator treated the accommodation proposed on his behalf as being his request rather than the recommendation of his psychiatrist and psychologist. In the context, one can hardly see it as anything other than the request on behalf of the Applicant; his real complaint may be that the investigator did not treat the suggestions in Dr. Rehaluk's letter as being an expert opinion as to what was reasonable. He also feels that the investigator did not pay attention to what was being proposed for accommodation. It appears to me that the investigator gave due attention to the essential points made on the Rehaluk letter but found it inadequate to describe a viable form of accommodation. Essential information was lacking and the letter was emphatic that no other form of accommodation could possibly enable the Applicant to return to his employment. The Applicant also argued, as noted above, that the investigator was wrong to treat the disability benefits provided by RBC as a form of accommodation. For the reasons stated above, I disagree with this. When there is no reasonable possibility of a former employee returning to his employment, disability benefits can be seen as an accommodation. Up to the time of the Rehaluk letter there had been no indication to RBC that the Applicant could return to work and that letter – vague, contradictory, based on a mere hypothesis, and significantly redacted – was not a basis for RBC to conclude that he could return to work. During argument, the Applicant also complained that the investigator had never interviewed him although he had indicated an interest in doing so earlier. It has long been held that an investigator need not interview every possible witness and normally it is sufficient to meet the requirements of fairness that the parties be shown the investigator's report and have an opportunity to make submissions in respect to it for consideration by the Commission. In this way, if any

information that could have been obtained from the Applicant by the investigator was left out, the Applicant was able to include that information in his submission to the Commission. It may further be noted that although the investigator did not interview the Applicant before making his report, he was in communication with the Applicant's lawyer who presumably transmitted to him any information the Applicant wished him to have.

CONCLUSION

[16] I will therefore dismiss this application for judicial review. As the Respondent has specifically refrained from asking for costs, there will be no costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review of the decision of the Canadian Human Rights Commission of February 9, 2007, dismissing the Applicant's complaint, be dismissed, without costs.

"Barry L. Strayer"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-433-07
STYLE OF CAUSE:	**PETER BOLDY**
	and
	ROYAL BANK OF CANADA
PLACE OF HEARING:	Toronto
DATE OF HEARING:	December 19, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	STRAYER, J.
DATED:	January 25, 2008

APPEARANCES:

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Mr. Richard J. Charney Ms. Sarah C. Crossley	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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