Date: 20080509

Docket: T-1218-07

Citation: 2008 FC 591

Ottawa, Ontario, May 9, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

A.J.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Following an investigation, the Canadian Human Rights Commission dismissed the applicant's complaint against his former employer, the Department of Justice. The Commission found that the DOJ had, at all times, accommodated the applicant's disability, and further, that the applicant's employment contract was not extended because of his poor performance on the job.

[2] The applicant now seeks judicial review of that decision, alleging that the Commission erred in finding that the DOJ had fully accommodated his disability. The Commission further erred, the applicant says, in faulting him for having failed to disclose his disability to his employer at the outset of his employment. Finally, the applicant says that the Commission erred in failing to

properly consider whether the Department's job standards constituted a *bona fide* occupational requirement.

[3] For the reasons that follow, I find that the Commission did err in its analysis of the applicant's human rights complaint, and that its investigation was not sufficiently thorough. As a consequence, the application for judicial review will be allowed.

The Identification of the Applicant

[4] In order to protect the applicant's reputation within the legal community, the applicant sought and obtained an order from Justice Martineau stipulating that he was to be referred to throughout this proceeding as "A.J.".

[5] It should be noted that the use of the masculine personal pronoun in these reasons should not be interpreted as an indication that the applicant is male, as opposed to female.

Background

[6] In 1999, A.J. was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). He was prescribed medication, and there is nothing in the record to suggest that his ability to work successfully as a lawyer was compromised in any way by his disability prior to 2004.

[7] In the fall of 2002, A.J. was hired on a three-year contract by the Department of Justice to work in the Legal Services Unit of a government department. At the time that he was hired, A.J. did

not disclose to his employer that he had been diagnosed with ADHD, as he did not feel that it would affect his ability to do his job.

[8] A.J.'s primary job responsibilities were to prepare legal opinions, and to provide legal support to officials during negotiations. In both March of 2003 and March of 2004, he received "fully meets expectations" evaluations for his work performance.

[9] However, A.J.'s work performance then began to deteriorate. On December 21, 2004, and again on January 4, 2005, A.J.'s manager informed him that his work had not been up to standard. Realizing that his ADHD may have been contributing to his difficulties in completing a major legal opinion, in January of 2005, A.J. consulted with a doctor and obtained a prescription for a new medication.

[10] While it appears that this medication may initially have helped, it became less and less effective over time. A.J. had previously been reluctant to disclose to his employer that he was suffering a disability, fearing the stigma that would attach to him if his condition became known. However, as he felt that his disability had begun to negatively affect his job performance, on May 20, 2005, A.J. met with his manager, and, for the first time, advised her of his psychological disability, and his need for accommodation.

[11] A.J. says that his supervisor seemed supportive. The supervisor is also reported to have said that A.J. was an intelligent person, and that she had thought that "something didn't add up" when he

encountered difficulties on his file. A.J. and his supervisor also discussed his upcoming performance review, and the impending completion of his contract.

[12] As a result of the meeting, A.J. understood that his performance review, which had been scheduled for the following week, would be deferred until such time as his disability had been accommodated.

[13] Despite this understanding on A.J.'s part, his performance review took place, as scheduled, on May 27, 2005. At this time, A.J. was advised that he would receive a "does not meet expectations" rating, and that he would be advised the following week whether or not his contract would be extended.

[14] In this same meeting, A.J.'s supervisor advised him that she could not proceed with his request for accommodation without first being provided with a medical certificate identifying the nature of his disability, setting out the employment limitations imposed by that disability, and describing the most effective means of accommodation.

[15] On May 31, 2005, A.J. was advised that his employment contract would not be renewed.

[16] After consulting with a doctor, A.J. provided his employer with a letter dated June 10, 2005, in which he advised that he would be providing a formal medical report as soon as one was available. As a result of a verbal consultation with a doctor, A.J. also suggested possible

accommodative measures that would assist someone with his disability, including work that could be broken down into short-term tasks, and working with others on a team.

[17] A.J. also indicated that he would be willing to work anywhere in Legal Services, provided his disability was accommodated.

[18] A.J. ultimately obtained a medical certificate from Dr. François Dupont, which was provided to the employer on August 12, 2005. This certificate confirmed that A.J. suffered from ADHD. According to Dr. Dupont, A.J. was "still in need of treatment and accommodations to assist him in coping better at work". Dr. Dupont suggested the following accommodative measures be implemented:

1. Extra time to complete his work.
2. A quiet work environment (as much as possible).
3. Regular "coaching" or secretarial assistance to help A.J. become better organized.
4. The use of a timer or computerized organizer to remind A.J. of deadlines.
5. Avoidance of tasks that require reading large amounts of information at once.
6. Focus on tasks that can be broken into smaller parts.

[19] Dr. Dupont also recommended that A.J. receive medical treatment for his ADHD, and that he also receive therapy to deal with the distress associated with his condition.

[20] Upon A.J.'s return from a holiday on August 29, 2005, he met with an employer representative to discuss Dr. Dupont's report. A.J. asserts that the employer representative was

satisfied that the measures previously taken with respect to the conditions of A.J.'s employment were sufficient to meet the recommendations contained in the report. As a result, no further accommodative measures were implemented, and A.J.'s employment term ended on September 2, 2005.

The Commission Investigation

[21] The Commission's decision to dismiss A.J.'s human rights complaint is contained in a letter dated June 5, 2007. The letter states that the complaint was being dismissed because the evidence demonstrated that A.J.'s employer had, at all times, accommodated his disability, and that A.J.'s employment contract was not renewed because of his documented performance difficulties.

[22] Given the cursory nature of Commission decisions, investigation reports must be read as the Commission's reasons: see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at paragraph 37.

[23] The Commission investigator found that A.J. did have a disability that required accommodation. However, the investigator also found that once A.J. disclosed his disability to his employer, he was provided with all of the accommodative measures recommended by A.J.'s psychologist.

[24] Moreover, the investigator found that even before A.J. disclosed the existence of his disability, the respondent had, in fact, fully accommodated his needs.

[25] Despite A.J.'s contention that he was unaware of his disability's impact on his work performance prior to May of 2005, the investigator found that A.J. was aware of his disability and his need for accommodation. The investigator also found that A.J. was aware that his disability was negatively impacting his work performance well before then.

[26] In particular, the investigator noted that A.J. had sought an adjustment to his medication in January of 2005, after he became aware of his employer's dissatisfaction with his job performance. As a result, the investigator found that A.J. had failed to disclose the existence of his disability and his need for accommodation in a timely manner.

[27] The investigator also rejected A.J.'s argument that his employer should have been aware of his disability, and his need for accommodation.

[28] The investigator also observed that when he finally did disclose that he had a disability, A.J.'s disclosure was incomplete, because he failed to provide his employer with a complete account of the nature of his disability, and the accommodative measures that he required, making it difficult for his employer to take immediate action.

[29] A.J. asserted that he was unable to provide further details on the nature of his disability or the accommodation he required, as they were not readily known to him. Again, the investigator found this to be inconsistent with the information received by A.J. at the time of his diagnosis in 1999, and A.J.'s own research into his disability.

[30] The investigator observed that A.J.'s major job responsibilities involved the preparation of legal opinions, and legal support to officials during negotiations. A.J. had never sought to challenge his employment objectives, even though he was aware he was not meeting them, and had conceded that he only disclosed his disability once he realized it was affecting his work.

[31] Critical to the investigator's recommendation that the complaint be dismissed was the finding that even though the employer was not aware of A.J.'s disability, and his need for accommodation, A.J. had in fact been provided with the necessary accommodation even before he disclosed his disability.

[32] As was the case with all lawyers in Legal Services, A.J. had a closed office, regular access to senior practitioners for mentorship and guidance, an assistant to help him organize his work and a computer organizer to schedule activities and identify deadlines.

[33] Moreover, the investigator found that in October of 2004, A.J. had been provided with extra time to complete his work, and had been assigned files that could be broken down into smaller parts that did not involve large amounts of reading. These measures matched Dr. Dupont's six recommendations.

[34] At the same time, the investigator noted that the employer continued to insist that its lawyers must be able to read sometimes large volumes of information, quickly, sometimes all at once. The employer stated that this requirement was "probably a *bona fide* occupational requirement", and that

if this requirement was not met "it can result in costs to the respondent … to the point of undue hardship".

[35] The investigator also reviewed the steps that A.J.'s supervisor took once she was made aware of A.J.'s disability. The steps included relieving A.J. of responsibility for opinion work that required reading of voluminous documents, assigning him legal work involving short turnaround times, and seeking specific and suitable work with other managers in the Legal Services unit.

[36] The investigator therefore concluded that the Department of Justice had at all times accommodated A.J.'s disability. According to the investigator, A.J. only disclosed his disability when he became aware that his continued employment was in jeopardy. As a term employee, he had no right to an extension of his contract, and the contract was not extended because of A.J.'s poor performance on the job.

[37] As a result, the investigator recommended that A.J.'s complaint be dismissed. As was noted earlier, this recommendation was then accepted by the Canadian Human Rights Commission.

Standard of Review

[38] As a consequence, of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, there are now only two standards of review: reasonableness and correctness.

[39] Insofar as the application raises issues of fact or mixed fact and law, *Dunsmuir* teaches that a reviewing court must go through a two-stage analysis in order to ascertain which of these standards should apply in a given case.

[40] Firstly, the Court must determine whether the degree of deference to be accorded to the type of question in issue has already been identified by the jurisprudence. If this has been done, it is not necessary to carry out a complete standard of review analysis.

[41] In this case, this Court has already carried out a post-*Dunsmuir* standard of review analysis with respect to questions of mixed fact and law decided by the Canadian Human Rights Commission. That is, in *Bateman v. Canada (Attorney General)*, 2008 FC 393, Justice Martineau determined that the appropriate standard of review to be applied with respect to such questions was that of reasonableness. I adopt his analysis in this regard.

[42] I am further satisfied that, to the extent that this application involves findings of fact made by the Commission investigator, those findings are also reviewable on the reasonableness standard.

[43] In reviewing a decision against the reasonableness standard, a reviewing court must consider the justification, transparency and intelligibility of the decision-making process. The Court must also consider whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and law: see *Dunsmuir* at paragraph 47.

[44] The remaining issues raised by the applicant relate to the thoroughness of the investigation. This involves questions of procedural fairness. As the Federal Court of Appeal observed in *Sketchley*, previously cited, at paragraphs 52 and 53, the pragmatic and functional analysis (since replaced by the "standard of review analysis") does not apply where judicial review is sought based upon an alleged denial of procedural fairness in a Commission investigation. Rather, the task for the Court is to determine whether the process followed by the Commission satisfied the level of fairness required in all of the circumstances.

[45] I do not understand this to have changed as a consequence of the *Dunsmuir* decision: see Justice Binnie's concurring decision in *Dunsmuir* at paragraph 129, where he confirmed a reviewing court has the final say in relation to questions of procedural fairness. See also *Dunsmuir*, at paragraph 151, and *Halifax Employers' Association v. Tucker*, 2008 FC 516.

Analysis

[46] The Commission's decision was based upon two central findings: first, that the Department of Justice had, at all times, accommodated A.J.'s disability, and second, that A.J.'s employment contract was not extended because of his poor performance on the job.

[47] Both of these findings are flawed.

[48] I will deal first with the investigator's finding that the Department of Justice had fully accommodated A.J.'s disability, even before he disclosed the existence of that disability to his employer on May 20, 2005.

[49] On the one hand, the investigator finds at paragraph 42 of the investigation report that "in October, 2004, before the complainant had disclosed his disability, he was provided with extra time to complete his work and was assigned tasks which did not require copious reading and/or could be broken down into smaller parts".

[50] On the other hand, at paragraph 40(a) of the investigation report, the investigator finds as a fact that it was only *after* A.J.'s meeting with his supervisor on May 20, 2005 that "all opinion work that required reading voluminous documents was removed from his responsibility". This finding is inconsistent with the finding at paragraph 42, and flies in the face of the investigator's finding that all of the necessary measures required to accommodate A.J.'s disability had been put into place prior to May 20, 2005.

[51] It should be noted at this juncture that I am not suggesting that the Department of Justice should be faulted for failing to accommodate a disability of which it had no knowledge prior to May 20, 2005. The inconsistency in the investigator's analysis does, however, mean that the decision lacks the justification, transparency and intelligibility in the decision-making process mandated by *Dunsmuir*.

[52] The second problem with the investigator's analysis relates to the finding that A.J.'s employment contract was not extended because of his poor performance on the job, and the seeming failure of the investigator to appreciate the significance of this finding from a human rights perspective.

[53] Firstly, the investigator found at paragraph 69 of the investigation report that A.J. had no right to expect that his contract would be renewed or extended. While this is true from a contractual perspective, a discriminatory practice could still have been involved if A.J.'s disability was a factor in the employer's decision not to extend the contract: see *Holden v. Canadian National Railways Co.*, [1990] F.C.J. No. 419 (F.C.A.).

[54] Moreover, the investigation report contains the following important findings:

1. A.J. suffers from a disability which required workplace accommodation: [paragraph 12];
2. The Department of Justice did not renew A.J.'s employment contract because of his poor job performance [paragraph 67]; and
3. A.J.'s poor job performance was likely linked to his disability [paragraph 68].

[55] As a result, on the investigator's own analysis, A.J. suffered adverse consequences in relation to his employment opportunities as a result of his disability. This is sufficient to establish a *prima facie* case of discrimination: see *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Limited*, [1985], 2 S.C.R. 536 at 558, and *McGill University Health Centre*

(Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal, 2007 SCC 4, at paragraph 49.

[56] Indeed, counsel for the respondent conceded in argument that having found that A.J.'s performance difficulties resulted from his disability, and that the decision not to extend his contract was based upon his performance problems, the investigator's finding that A.J.'s disability was not a factor in the employer's decision is problematic. Counsel submits, however, that taken as a whole, the decision to dismiss the complaint was reasonable, and should not be set aside.

[57] I do not agree. As noted above, this is not the only error in the decision. Moreover, as will be explained below, I am also satisfied that the investigation was not sufficiently thorough, as the investigator failed to gather relevant evidence, and to carry out the necessary analysis.

[58] Once a *prima facie* case of discrimination has been established, the onus shifts to the respondent to satisfy all three elements of the test established by the Supreme Court of Canada in cases such as *British Columbia (Public Service Employee Relations Commission) v. BCGSEU ("Meiorin")* [1999] 3 S.C.R. 3 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*").

[59] That is, in order to establish that the job requirement in issue is a *bona fide* occupational requirement, an employer must demonstrate, on a balance of probabilities, that:

> i) it adopted the standard for a purpose that is rationally connected to the performance of the job;

> ii) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of that legitimate, work-related purpose; and
> iii) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate an employee sharing the characteristics of the complainant without imposing undue hardship on the employer.

[60] As the Supreme Court of Canada noted at paragraphs 41 and 42 of *Grismer*, to demonstrate that a job requirement is a *bona fide* occupational requirement, the adoption of the employer's standard has to be supported by convincing evidence. Impressionistic evidence will generally not suffice.

[61] Although the investigator's own findings in this case established the existence of a *prima facie* case of discrimination, the investigator did not carry out any kind of independent assessment as to whether the reading requirements of A.J.'s job amounted to a *bona fide* occupational requirement. Rather, it appears from paragraphs 45 and 63 that the investigator simply took the respondent's word that it "probably" was.

[62] Moreover, to establish the existence of a *bona fide* occupational requirement, an employer must also establish that it is impossible to accommodate a disabled employee any further, without incurring undue hardship, having regard to matters such as health, safety and cost. The only evidence referred to by the investigator in this regard is the statement at paragraph 45 of the investigation report which states that it is the employer's view that if an employee is unable to read

a large volume of material quickly "it can result in costs to the respondent, and others, to the point of undue hardship". With respect, that does not come close to meeting the evidentiary standard required by *Grismer*.

[63] The failure of the investigator to carry out the necessary analysis, and to investigate obviously crucial evidence, means that the report lacks the necessary degree of thoroughness required of Commission investigation: see *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (T.D.), aff'd [1996] F.C.J. No. 385 (F.C.A.).

[64] The third problem with the investigator's report relates to the investigator's criticism of A.J. for not disclosing his disability at the time that he was hired. In my view, this was unreasonable.

[65] It is true that the search for accommodation is a multi-party inquiry, and that there is a duty on complainants to assist in securing appropriate accommodation by bringing the facts relating to the alleged discrimination to the attention of his or her employer: see *Central Okanagan School District No. 23 v. Renaud*, at paragraph 44.

[66] That said, employees are also entitled to a measure of privacy with respect to their health, and there is no obligation on an employee to disclose a health condition that does not affect the employee's ability to do the job, particularly where, as here, the job in question is not a safety-sensitive position.

[67] In this case, in the first couple of years of his employment with the DOJ, A.J. believed that his disability was not affecting his work, and indeed, this is borne out by his first two performance reviews, which confirmed that he was fully meeting his employer's expectations. As a result, A.J. cannot be faulted for not having advised his employer that he had a disability at the time of hiring.

[68] The cumulative effect of the errors identified above is such that the Commission's decision cannot stand.

Conclusion

[69] For these reasons, the application for judicial review is allowed, with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, with costs. The June 5, 2007 decision of the Canadian Human Rights Commission is set aside, and the matter is remitted to the Commission for re-investigation and re-determination in accordance with these reasons.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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