

Date: 20090116

Docket: T-93-08

Citation: 2009 FC 36

Ottawa, Ontario, January 16, 2009

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

KENNETH BARTKUS

Applicant

and

CANADA POST CORPORATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Kenneth Bartkus worked at Canada Post Corporation for over 23 years. In 2004, Canada Post let him go. Mr. Bartkus alleges that Canada Post's decision was sparked by his request to be placed on sick leave. Canada Post maintains that the dismissal resulted from Mr. Bartkus's refusal to comply with a requirement to respond to a letter of offer within a particular deadline.

[2] Mr. Bartkus complained to the Canadian Human Rights Commission alleging discrimination on grounds of disability. In 2007, after an investigation, the Commission concluded that an inquiry into the complaint was not warranted and dismissed it.

[3] Mr. Bartkus argues that the Commission erred in failing to refer the complaint for a hearing before a tribunal. Essentially, he submits that the evidence clearly showed that he was dismissed just after Canada Post learned that he was dealing with health issues that prevented him from returning to work. In addition, Mr. Bartkus claims that the investigation into his complaint lacked thoroughness and impartiality. Finally, Mr. Bartkus alleges that the Commission treated him unfairly by failing to consider his full submissions and supporting evidence.

[4] Mr. Bartkus asks me to order the Commission to reconsider his complaint. However, I can find no basis for overturning the Commission's decision and must, therefore, dismiss this application for judicial review.

[5] There are two main questions before me: (1) Did the Commission treat Mr. Bartkus unfairly by relying on an inadequate investigation or by failing to consider Mr. Bartkus's evidence and submissions? (2) Was the Commission's decision unreasonable?

I. Factual Background

[6] Mr. Bartkus began working at Canada Post in 1981. In 1986, his position as Customer Service Analyst was downgraded and, in 1989, his position became surplus. He took various positions on a temporary basis while waiting for a permanent position to open up.

[7] From the fall of 2000 to the spring of 2004, Mr. Bartkus worked on the Business Transformation Project, a special project that required him to work long hours and endure significant stress. In 2003, Canada Post retroactively elevated Mr. Bartkus's classification from "A3" to "A4", although he remained on surplus status. When this project was finished, he took a 63-day leave of absence based on the overtime he had accumulated to that point.

[8] On May 12, 2004, just before he took his leave, Canada Post offered Mr. Bartkus a permanent position as Clerk Trace Mail at the A4 level commencing in August 2004. Under the collective agreement, Canada Post was obliged to keep the position open for 24 hours.

[9] On May 19, 2004, Mr. Bartkus acknowledged the offer, but was concerned that his acceptance would jeopardize an outstanding grievance relating to his classification. He was given until May 28, 2004 to decide whether to accept the offer. Mr. Bartkus resented being rushed, but indicated that he would be prepared to sign the offer "under protest". However, he did not do so. In a letter dated June 9, 2004, Canada Post gave Mr. Bartkus a further deadline of June 14, 2004. He was also informed that he could accept the position and continue to prosecute his outstanding grievance. However, if he failed to accept, he would be laid off.

[10] On June 10, 2004, Mr. Bartkus informed Canada Post by letter that he would "not be accepting any permanent positions until I have appropriately addressed certain unethical conduct concerning the evaluation of my PM1 position". He went on to say that he was "on 'Overtime Compensation Leave' but [had] encountered some unwelcome health issues that have rendered me

unfit for duty.” He asked to be put on sick leave and to have his overtime leave credited for the duration of his illness. This was the first time that Mr. Bartkus had mentioned any health issues in his correspondence with Canada Post.

[11] Canada Post says that it received Mr. Bartkus’s letter on June 16, 2004, two days after the extended deadline. Given his statement that he would not accept the offered position, Canada Post informed Mr. Barkus by way of a letter dated June 17, 2004 that his employment would be terminated as of the date he received the letter (June 21, 2004).

II. The Commission’s Decision

[12] On November 22, 2005, Mr. Bartkus complained to the Canadian Human Rights Commission alleging discrimination on the basis of disability. Included in the complaint were allegations of discrimination dating back to 1993. Mr. Bartkus had experienced a dependency on alcohol during the early 1990s and some documentation related to that issue remained in his file.

[13] In 2006, the Commission narrowed Mr. Bartkus’s complaint to the events that had transpired in the spring of 2004. It undertook to consider whether Canada Post had discriminated against Mr. Bartkus by terminating his employment “due to a disability of which the respondent was aware”.

[14] The portion of Mr. Bartkus's complaint relating to his termination in 2004 states that he believed that Canada Post's offer was a "permanent demotion" resulting from his disability, being alcohol dependency. He alleged that Canada Post had reached back into his past difficulties with alcohol to achieve a long-standing desire to demote him.

[15] The Commission assigned an investigator who prepared a report dated September 11, 2007.

The investigator framed the issue as follows:

"At issue in this complaint is whether the complainant's failure to comply with the respondent's administrative requirements (i.e. to return a signed letter of offer) and his subsequent termination of employment on 17 June 2004 was based on a disability (alcoholism)."

[16] He concluded that:

- Mr. Bartkus was given a total of 32 days to consider the offer of a permanent position, "far beyond the 24-hour period stipulated in the Collective Agreement";
- Canada Post had informed Mr. Bartkus of the consequences of failing to accept the offer;
- Canada Post was unaware of any disability prior to Mr. Bartkus's June 10, 2004 letter, which it received on June 16, 2004;
- There was no link between Mr. Bartkus's disability and the termination of his employment; and

- Canada Post terminated Mr. Bartkus's employment for his failure to accept the offer made to him within the deadlines imposed and this had nothing to do with Mr. Bartkus's prior dependency on alcohol.

[17] Mr. Bartkus responded to the investigator's report. He questioned whether the investigator had fully examined the issue whether Canada Post knew that Mr. Bartkus was a recovering alcoholic at the time of his dismissal. He also criticized the investigator's failure to consider whether Canada Post was aware of any other disability he was experiencing at the time. While the investigator had noted that Mr. Bartkus was tired and stressed after he finished the Business Transformation Project, he did not fully explore this as a possible "disability" of which Canada Post had been made aware by way of Mr. Bartkus's reference to "unwelcome health issues" in his June 10, 2004 letter. Finally, Mr. Bartkus questioned the investigator's conclusion that the evidence was insufficient to trigger a duty to accommodate him in the workplace. This duty, he alleged, arose from Canada Post's knowledge of the stress he had been dealing with and his express disclosure of "unwelcome health issues".

[18] In this response, Mr. Bartkus asserted that he was "completely unable to follow Canada Post's administrative requirements" due to his disability.

[19] The Commission reviewed the investigator's report and the parties' responses to it. It concluded that the information available to Canada Post at the time did not trigger a duty to accommodate Mr. Bartkus's disability. Further, the evidence did not support Mr. Bartkus's

suggestion that he had been terminated because of his disability (i.e., alcohol dependency).

Accordingly, the Commission decided that an inquiry into the complaint was not warranted.

III. The Standards of Review

[20] Mr. Bartkus argues that the issue before the Commission was a pure question of law – whether he had made out a *prima facie* case of discrimination. Accordingly, I should overturn the Commission’s decision if I find that it was incorrect.

[21] In my view, however, the case law does not support Mr. Bartkus’s position. Generally speaking, the Commission’s decision whether to submit a complaint to further inquiry involves an analysis of the supporting facts and the application of a legal standard. It deserves a certain degree of deference. I can overturn the Commission’s decision only if I find that it was unreasonable: *Sketchley v. Canada (Attorney General)* (2006), 263 D.L.R. (4th) 113 (F.C.A.); *Bastide v. Canada Post Corp.*, 2005 FC 1410, at para. 34-35; *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 51; *Bateman v. Canada (Attorney General)*, [2008] F.C.J. No. 510 (F.C.).

[22] I do agree, however, that the question of what is meant by a “*prima facie* case” is, indeed, a question of law. Mr. Bartkus maintains that the Commission applied the wrong definition. If it did, then I must overturn its decision.

[23] However, Mr. Bartkus also submits that the evidence clearly established a *prima facie* case of discrimination on the part of Canada Post. The fact that he was dismissed immediately after disclosing a disability amounted to direct discrimination, while the fact that that his employment was terminated during a period when he was incapable of responding to the letter of offer amounted to indirect discrimination. Given that these are questions of mixed fact and law, I can overturn the Commission's decision only if it was unreasonable.

[24] Finally, I can overturn the Commission's decision if it treated Mr. Bartkus unfairly in the process leading to the Commission's decision.

IV. A Prima Facie Case

[25] The question facing the Commission was whether there was a reasonable foundation in the evidence supporting Mr. Bartkus's case that would justify further inquiry: *Clark v. Canada (Attorney General)*, [2007] F.C.J. No. 20 (QL), at para. 76 (F.C.). Mr. Bartkus submits that a *prima facie* case is one which "covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer" (citing *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] S.C.J. No. 74, at para. 28) .

[26] Mr. Bartkus interprets this definition as meaning that, when deciding whether a complainant has made out a *prima facie* case, the Commission must take all of his or her allegations as being true

and must not take into account any evidence or submissions of the respondent. I do not read the definition that way.

[27] The passage in the *Simpsons Sears* case describes the threshold at which a respondent will be put to its case. It is a rule about the burden of proof at a hearing before a tribunal. It does not establish the test or the methodology to be applied by the Commission at the stage where it is deciding whether a complaint merits further inquiry. It is clear that in making that determination, the Commission must consider the overall merits of the complaint by weighing, albeit in a limited way, the evidence presented by the parties: *Clark*, above, at para. 76-81.

V. Did the Commission Treat Mr. Bartkus Unfairly?

[28] Mr. Bartkus raised a number of concerns about the process of the investigation and the Commission's screening of his complaint.

(a) A Narrow and Inadequate Investigation

[29] Mr. Bartkus submits that the investigator focussed exclusively on the part of his complaint relating to alcohol dependency and failed to analyze his allegation that he was incapable of responding to Canada Post's offer. He also argues that the investigator made factual errors in his report.

[30] As mentioned, the investigator did acknowledge Mr. Bartkus's stress and fatigue. However, he concluded that the information available to Canada Post was insufficient to trigger a duty to accommodate Mr. Bartkus. I interpret this conclusion as encompassing Mr. Bartkus's allegation that Canada Post was aware that he was tired and stressed, and had received confirmation of his circumstances in the June 10, 2004 letter. As I see it, the investigator did not fail to address this issue. He simply found that the evidence did not support Mr. Bartkus's allegation.

[31] As for factual errors, Mr. Bartkus points to the investigator's statement that Canada Post received Mr. Bartkus's letter on June 16, 2004 which was "two days after the termination of the complainant's employment". In reality, the termination did not take effect until, on June 21, 2004, Mr. Bartkus received the dismissal letter, which was dated June 17, 2004. The investigator was referring to the June 14, 2004 deadline for a response, not the actual termination date. He went on to state that the information available to Canada Post was insufficient to trigger a duty to accommodate Mr. Bartkus and that there was no link between his disability and the termination of employment.

[32] I do not regard this as a serious factual error. The investigator's conclusions were supportable in any case.

(b) A Limited Analysis of the Evidence and Submissions

[33] Mr. Bartkus maintains that the investigator did not insist that Canada Post answer the investigator's questions during the investigation. Further, the investigator failed to interview some

witnesses and to review Mr. Bartkus's personnel file. Finally, the Commission did not have before it all of the submissions filed by Mr. Bartkus, only those that had been filed in relation to the investigation.

[34] In February 2007, the investigator posed a number of questions to Canada Post about Mr. Bartkus's complaint. Canada Post responded with a lengthy written submission. True, the response did not track the investigator's request question-by-question. Still, it appears that Canada Post provided a substantive response that addressed the investigator's principal concerns.

[35] Generally speaking, investigators have wide latitude in deciding whom to interview or what material to review: *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574, at para. 69 (T.D.). The ultimate question is whether the investigation was impartial and sufficiently thorough.

[36] The Commission had before it the submissions made by the parties in response to the investigator's report. It did not have before it submissions that had been made by the parties in respect of the earlier proceedings before the Commission relating to the narrowing of Mr. Bartkus's complaint. I do not see any unfairness in this. The Commission considered the submissions that were most relevant to its decision. It had no duty to consider representations in respect of other issues at earlier points in time.

[37] I cannot find any unfairness in the manner in which Mr. Bartkus was treated by the investigator or the Commission.

VI. Was the Commission's Decision Unreasonable?

(a) Canada Post's Decision to Terminate Mr. Bartkus's Employment

[38] Mr. Bartkus submits that Canada Post clearly dismissed him because of the disability he disclosed in his letter of June 10, 2004. He notes that Canada Post would have been entitled to dismiss him on June 15, 2004 after he had missed the deadline of June 14, 2004. The fact that it waited until June 17, 2004 shows that the critical factor must have been his disclosure of a disability in his letter of June 10, 2004, which Canada Post received on June 16, 2004. He suggests that the Commission's failure to recognize this was unreasonable.

[39] In my view, the Commission's conclusion that there was insufficient evidence supporting Mr. Bartkus's claim of discrimination was reasonable. In all of the communications between Mr. Bartkus and Canada Post there was no reference to any health issues until Mr. Bartkus's June 10, 2004 letter in which he declined the offer. The fact that Canada Post would have been entitled to dismiss him sooner, and did not, merely shows that it was attempting to work with a person whom it presumably considered a valuable employee. It does not show that Canada Post's decision was based, even in part, on the reference to undefined health issues in the June 10, 2004 letter.

[40] Nor was there evidence that the persons involved in terminating his employment had any knowledge of Mr. Bartkus's issues with alcohol more than a decade earlier. I cannot find, therefore,

that the Commission's conclusion that there was insufficient evidence to justify further inquiry into this aspect of his complaint was unreasonable.

(b) Mr. Bartkus's Inability to Respond to the Letter of Offer

[41] This issue was not mentioned in Mr. Bartkus's original complaint, but was cited in later written submissions. Mr. Bartkus argues that the Commission erred by failing to analyze it expressly.

[42] In its decision, the Commission addressed the question whether the information available to Canada Post triggered a duty to accommodate Mr. Bartkus's disability. As I read it, this issue includes the allegation that Canada Post was aware that Mr. Bartkus was incapable of complying with the requirement to respond to its offer within the imposed deadlines. The investigator referred to the fact that Mr. Bartkus had been enduring stress and fatigue during the relevant time-frame. Mr. Bartkus's submissions to the investigator and to the Commission addressed very clearly this aspect of his complaint. In turn, the Commission dealt with it by way of its finding that "the evidence indicates that the information available to the respondent was not sufficient to trigger a duty to accommodate."

[43] Further, this conclusion was reasonable in light of the evidence. The only indication that Mr. Bartkus was experiencing poor health was set out in his June 10, 2004 letter in which he expressly turned down Canada Post's offer. As I see it, Mr. Bartkus was not incapable of responding to the

offer – he did respond, by rejecting it. Further, the reference to “unwelcome health issues” was too vague to give notice to Canada Post that Mr. Bartkus was experiencing a problem that interfered with his ability to consider the offer. Canada Post could not have known whether Mr. Bartkus had a minor, transient sickness (*e.g.*, the flu) or a more serious condition. In addition, looking at the June 10, 2004 letter, Mr. Bartkus’s apparent purpose in disclosing these health issues was to ensure that he would not lose compensatory leave while he was sick. It did not appear to be connected to the offer at all.

VII. Conclusion and Disposition

[44] I can find no basis for overturning the Commission’s decision not to refer Mr. Bartkus’s complaint for further inquiry. Both the investigator and the Commission treated Mr. Bartkus fairly and addressed the substance of his complaint. The Commission’s findings were reasonable in light of the evidence before it. Accordingly, I must dismiss this application for judicial review with costs.

JUDGMENT

THIS COURT'S JUDGMENT IS that

1. The application for judicial review is dismissed with costs.

“James W. O’Reilly”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-93-08

STYLE OF CAUSE: BARTKUS v. CANADA POST CORPORATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 9, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: January 16, 2009

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