

Federal Court



Cour fédérale

Date: 20110614

**Dockets: T-356-10
T-1326-10**

Citation: 2011 FC 690

Ottawa, Ontario, June 14, 2011

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ARTHUR KEITH

Applicant

and

CORRECTIONAL SERVICE OF CANADA

Respondent

AND BETWEEN:

Docket: T-1326-10

ARTHUR KEITH

Applicant

and

CANADIAN FORCES

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Dr. Arthur Keith has practiced psychiatry for many years. He studied medicine in the United States and became a board-certified specialist there before moving to Canada.

[2] In 2008, Dr. Keith applied for a position as Director of Psychiatry at the Regional Treatment Centre of the Correctional Service of Canada [CSC] in Kingston, Ontario. Among the qualifications for the position was a requirement that the candidate be a Fellow of the Royal College of Physicians and Surgeons of Canada [RCPSC]. To become a Fellow of the RCPSC a physician must successfully complete the required written and oral examinations.

[3] That same year, Dr. Keith also applied for positions with Calian Ltd, a contractor for health services in the Canadian Forces [CF]. Again, the job requirements included fellowship in the RCPSC.

[4] During the 1990s, Dr. Keith had tried on a number of occasions to pass the RCPSC examinations but was unsuccessful. Accordingly, he did not meet the job requirements for either the CSC or CF positions.

[5] Dr. Keith filed complaints of discrimination on the basis of national or ethnic origin with the Canadian Human Rights Commission [CHRC], arguing that the RCPSC certification process had a disproportionately negative impact on physicians who received their training outside of Canada. Further, he suggested that it also had a discriminatory effect on older physicians, since they have more difficulty passing the RCPSC's examinations. Since foreign-trained doctors are likely to be

older when they take the exams, the two grounds of alleged discrimination are connected. He argued that, given that the CSC and CF relied on the RCPSC's process to determine candidates' eligibility for hiring, they had discriminated against him. Dr. Keith submits that CSC and CF should have accepted his membership in the Ontario College of Physicians and Surgeons [OCPS] as a sufficient qualification for the vacant positions. The OCPS has recently altered its testing practices specifically to accommodate those who do less well on written examinations.

[6] The CHRC dismissed Dr. Keith's complaint against CSC under s 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (see Annex for statutory references) on the basis that it did not warrant further inquiry. The CHRC acted on the recommendations of an assessor. The assessor found that the essence of Dr. Keith's complaint was against the RCPSC, not CSC. Since the RCPSC is a provincially-regulated entity, it is beyond the CHRC's jurisdiction. Further, given that Canadian psychiatrists, whether trained in Canada or elsewhere, must also pass the RCPSC's examinations, there was no discrimination against foreign-trained doctors based on their national or ethnic origin. In addition, the assessor found that the requirement of fellowship in the RCPSC was a legitimate and justifiable requirement for the position for which Dr. Keith had applied. With respect to the complaint of age discrimination, the assessor found that there was little evidence to support Dr. Keith's assertion that success on the RCPSC's examinations was in any way tied to a candidate's age.

[7] Regarding Dr. Keith's complaint against CF, the CHRC relied on a finding by an investigator that the complaint was beyond its jurisdiction. The investigator also concluded that foreign-trained Canadian psychiatrists were subject to the same job requirements as Dr. Keith.

Therefore, there was no discrimination based on national or ethnic origin. Based on those findings, the CHRC found that the requirement of Fellowship in the RCPSC was neutral and non-discriminatory. It dismissed Dr. Keith's complaint on the basis that it was beyond its jurisdiction, relying on s 41(1)(c) of the Act.

[8] Dr. Keith argues that the CHRC erred in dismissing his complaints. He asks me to overturn the CHRC's decisions and order a reconsideration of his complaints. I cannot, however, find a basis for overturning the decisions. As the grounds advanced by Dr. Keith in respect of each of the CHRC's two decisions are somewhat different, I will deal with each of them separately.

II. Complaint against the CSC

[9] The issues are:

1. Was the CHRC's decision reasonable?
2. Was the investigation into Dr. Keith's complaint sufficiently thorough?

III. Issue One – Was the CHRC's decision reasonable?

[10] Dr. Keith argues that the CHRC's decision not to refer his complaint for a hearing was unreasonable. He points out that a low threshold applies to that decision and that the evidence supporting his claim was sufficient to justify a hearing on the merits. In particular, he presented evidence showing that the requirement of fellowship in the RCPSC has a disproportionate impact on older, foreign-trained doctors. The CHRC, he says, overlooked these intersecting grounds of

discrimination (*i.e.* age and national origin) and erred by considering them separately. Further, Dr. Keith contends that the CHRC erred in failing to consider whether the RCPSC certification process was discriminatory.

(1) The Basis for the CHRC's decision

[11] The Assessor conducted interviews with Dr. Keith, a representative of CSC, and two officials with the RCPSC. Based on her inquiries, the assessor found that she did not have jurisdiction look into whether the RCPSC examination process was discriminatory because it is a provincially-regulated entity (although created by an Act of Parliament).

[12] In any case, however, she went on to find that there was no discrimination based on national or ethnic origin given that all psychiatrists must pass the same tests, no matter whether they received their training outside or within Canada. Certification by the RCPSC is a well-recognized standard of competency in the practice of medicine. In addition, CSC was justified in requiring candidates to have achieved fellowship in the RCPSC since the Director's position involved educational, research and training components for which fellowship is usually required in Canada.

[13] Based on these considerations, the assessor recommended that Dr. Keith's complaint be dismissed because an inquiry was not warranted.

[14] In response to the assessor's recommendation, Dr. Keith filed further submissions adding age as a ground of discrimination. The assessor re-evaluated the complaint but, once again, found

that she was without jurisdiction to review the RCPSC's processes. Therefore, the only question before her was whether CSC's requirement of fellowship in the RCPSC was a *bona fide* occupational requirement. Once again, she found valid, non-discriminatory reasons for the requirement and recommended that the complaint be dismissed. The CHRC accepted that recommendation.

(2) The CHRC's Decision was not Unreasonable

[15] Dr. Keith maintains that once he presented a *prima facie* case of discrimination, the CHRC had a duty to refer the matter to a hearing. The CHRC erred, he says, when it found that a valid, non-discriminatory reason for the job requirement defeated his complaint. The CHRC should have looked at whether that facially neutral requirement had a differential adverse effect on persons in his circumstances. It should not have avoided looking into the impact of the requirement of RCPSC fellowship on older, foreign-trained physicians.

[16] In my view, the CHRC's conclusion was not unreasonable. In effect, Dr. Keith is arguing that a federal body, CSC, has imposed a discriminatory standard created by a provincial entity, the RCPSC. Because that standard is discriminatory, he says, CSC is itself discriminating. But one can only get to the substance of Dr. Keith's argument if another federal body, the CHRC, assumes the role of reviewing the provincial body's practices and procedures. The CHRC simply has no jurisdiction to carry out that analysis. Only a provincial commission could decide if the RCPSC discriminates against physicians writing its examinations.

[17] It would be different, of course, if the requirement that CSC wanted to impose was an obviously discriminatory standard created by a provincial body. In that case, a complainant might well persuade the CHRC to refer the matter to a hearing because it would not be necessary to review in substance the conduct of the provincial entity. CSC's use of a patently discriminatory standard would be clearly discriminatory on its face. There would be no need to conduct a substantive analysis of the provincial body's policies and practices. But here, the CHRC found that the requirement was not, on its face, discriminatory. Therefore, a substantive analysis of the question whether the CSC was imposing a discriminatory requirement would have drawn the CHRC into a review of an entity outside its jurisdiction.

[18] It is for that reason that, from Dr. Keith's perspective, the CHRC's reasoning appeared to be superficial and to ignore the many cases in which neutral requirements have been found to have discriminatory effects. For example, Dr. Keith relies heavily on *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3.

[19] But the cases relied on by Dr. Keith do not apply here. The CHRC was simply dealing with the question whether a hearing into Dr. Keith's complaint was warranted. It could not be warranted if the entity responsible for the allegedly discriminatory standard was beyond the CHRC's jurisdiction. In the absence of evidence that the standard was discriminatory on its face or that the CSC was imposing the standard for a discriminatory purpose, it was clear that Dr. Keith's complaint was really directed at the RCPSC, not CSC. Therefore, the CSC's conclusion that a hearing was not warranted was not unreasonable.

IV. Issue Two – Was the investigation into Dr. Keith’s complaint sufficiently thorough?

(1) The Assessor’s Findings

[20] Dr. Keith points out that the CHRC has a duty to carry out a neutral and thorough investigation of a complaint: *Slattery v Canada (HRC)*, [1994] 2 FC 574 at para 57. He argues that the CHRC did not discharge its obligation because it failed to consider evidence that supported his claim of discrimination based on age and national or ethnic origin. Further, it failed to probe the CSC’s explanations for imposing a requirement of fellowship in the RCPSC.

[21] In my view, in the circumstances of this case, the CHRC’s investigation was adequate. Given the jurisdictional question before it, the CHRC had to satisfy itself whether there was *prima facie* evidence that CSC had discriminated against Dr. Keith or whether the alleged discrimination was attributable to the RCPSC, a body beyond the CHRC’s reach.

[22] The assessor reviewed the circumstances and determined that the requirement of RCPSC fellowship was neither discriminatory on its face nor imposed for a discriminatory purpose. As such, the source of any discrimination was the RCPSC, not CSC. Having concluded that the CHRC’s endorsement of the assessor’s findings on the jurisdictional question was reasonable, it follows that its duty to investigate was met when it reviewed the evidence that was relevant to that question. It did not have a duty to go further.

(2) Conclusion

[23] In my view, the CHRC's decision in respect of Dr. Keith's complaint against CSC was not unreasonable and the investigation on which it relied in arriving at its decision was sufficiently thorough.

V. Complaint against the CF

[24] The issues are:

1. Did the CHRC err in finding a lack of jurisdiction?
2. Was the investigation into Dr. Keith's complaint sufficiently thorough?

VI. Issue One – Did the CHRC err in finding a lack of jurisdiction?

(1) The Basis for the CHRC's Decision

[25] The CHRC relied on the recommendation of an investigator assigned to Dr. Keith's complaint against CF. The investigator found that Dr. Keith's complaint was really directed against the RCPSC, not CF. Therefore, since the CHRC had no jurisdiction to review the practices and procedures of the RCPSC, Dr. Keith's complaint was not within its jurisdiction.

[26] The CHRC also noted that CF had valid and non-discriminatory reasons for requiring fellowship in the RCPSC, and that all candidates, whether trained in Canada or elsewhere, were subject to the same requirement.

[27] Based on these considerations, the CHRC concluded, relying on s 41(1)(c) of the Act, that Dr. Keith's complaint was beyond its jurisdiction.

(2) The CHRC did not have Jurisdiction

[28] I can overturn the CHRC's decision on a jurisdictional question if it was incorrect. Here, the CHRC's decision was a mixed one, based partly on a purely jurisdictional matter – whether it could review the conduct of a provincially-regulated body – and partly on a legal finding that there was no connection between Dr. Keith's disqualification and a prohibited ground of discrimination. As I discuss above, these questions are connected. If the RCPSC's standards had been plainly discriminatory or relied on by CF for a discriminatory purpose, then the CHRC might have had grounds to review the substance of Dr. Keith's complaint. Therefore, it was necessary for the CHRC to consider whether the gravamen of Dr. Keith's complaint was against the RCPSC or CF.

[29] I find that the CHRC's conclusion that Dr. Keith's complaint was beyond its jurisdiction was correct. There was simply no suggestion that CF had either discriminated against Dr. Keith directly or had imposed the requirement of RCPSC fellowship for any discriminatory purpose. Dr. Keith's quarrel is clearly with the RCPSC, not CF. That being the case, his complaint must be filed with a body vested with the power to analyze the RCPSC's operations and, if appropriate, order it to

change them. The CHRC does not have that authority.

1. Issue Two – Was the investigation into Dr. Keith’s complaint sufficiently thorough?

(1) The CHRC investigation

[30] Dr. Keith argues that the CHRC breached the duty of fairness because it failed to carry out a thorough investigation of his complaint. Again, he submits that the CHRC’s analysis of his circumstances was superficial and failed to respond to his assertion that CF’s facially neutral requirement had a discriminatory effect on him.

[31] As with Dr. Keith’s similar submission regarding his complaint against CSC, I find that the CHRC’s investigation into his complaint against CF was sufficiently thorough in the circumstances. The main question before the CHRC was whether the requirement of RCPSC fellowship was discriminatory on its face or imposed by CF for a discriminatory purpose. The investigator concluded that neither was the case based on the evidence. In the circumstances, given that it explored the evidence relevant to the main question before the CHRC, the investigation was sufficiently thorough.

(2) Conclusion

[32] In my view, the CHRC decided correctly that it did not have the power to determine whether the RCPSC’s examination procedures were discriminatory. Further, it acted fairly in

relying on an investigation into Dr. Keith's complaint that was, in the circumstances, sufficiently thorough.

VIII. Disposition

[33] The CHRC made no reviewable error in its decisions not to dismiss Dr. Keith's complaints against CSC and CF. Its analysis of the complaints was sufficiently thorough in the circumstances, and it treated Dr. Keith fairly. Accordingly, I must dismiss both of Dr. Keith's applications for judicial review, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are dismissed, with costs.
2. A copy of these reasons shall be placed in consolidated files T-356-10 and T-1326-10.

“James W. O’Reilly”

Judge

Annes

Canadian Human Rights Act, RSC 1985, c H-6

Loi canadienne sur les droits de la personne, LRC, 1985, ch H-6

Purpose

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Commission to deal with complaint

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

- (a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;
- (b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;
- (c) the complaint is beyond the jurisdiction of the Commission;
- (d) the complaint is trivial, frivolous, vexatious or made in bad faith; or
- (e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time

Objet

2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

Irrecevabilité

41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

- a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
- b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
- c) la plainte n'est pas de sa compétence;
- d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
- e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué

as the Commission considers appropriate in the circumstances, before receipt of the complaint.

dans les circonstances.

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

Action on receipt of report

Suite à donner au rapport

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

it shall refer the complainant to the appropriate authority.

Idem

Idem

(3) On receipt of a report referred to in subsection (1), the Commission

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41(c) à e);

(e); or

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

b) rejette la plainte, si elle est convaincue :

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-356-10 & T-1326-10

STYLE OF CAUSE: ARTHUR KEITH v CORRECTIONAL SERVICE OF CANADA and ARTHUR KEITH v CANADIAN FORCES

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