Federal Court Cour fédérale

Date: 20110707

Docket: T-275-10

Citation: 2011 FC 832

Ottawa, Ontario, July 7, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

SHELLY ANN GRAVEL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Shelley Ann Gravel (the applicant) was a federal public servant for many years. In January 2005, while on sick leave, she retired from the public service. In February 2006, she filed a complaint with the Canadian Human Rights Commission alleging that her former employer, the Public Service Commission of Canada, had discriminated against her on the basis of age and disability contrary to sections 7 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA]. In a decision dated February 3, 2010, the Canadian Human Rights Tribunal (the Tribunal) dismissed her complaint.

[2] The applicant filed an application for judicial review of that decision, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. She is self-represented. For the reasons that follow, her application for judicial review is dismissed. I wish to stress that I have reached my conclusion after having reviewed the entire transcript of the hearing before the Tribunal and the documentation filed by both parties.

I. Preliminary matter

[3] The application for judicial review was originally filed against three respondents: the Attorney General of Canada, the Canadian Human Rights Tribunal and the Public Service Commission of Canada.

[4] The respondent requests that the style of cause be amended to remove the Canadian Human Rights Tribunal and the Public Service Commission of Canada as respondents.

[5] Given that Rule 303(1)(a) of the *Federal Courts Rules*, SOR/98-106, indicates that an applicant shall name as a respondent every person "directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought" [emphasis added], and given that the Canadian Human Rights Tribunal is the tribunal in respect of which the current application is being brought, the Canadian Human Rights Tribunal is improperly named as a respondent and will be removed from the style of cause (see also *Akladyous v Canadian Judicial Council*, 2008 FC 50 at para 37, 325 FTR 240).

[6] Furthermore, government departments are not legal entities and cannot properly be named as parties (*Mahmood v Canada* (1998), 154 FTR 102 at para 14, 82 ACWS (3d) 898). Thus, the Public Service Commission of Canada is improperly named as a respondent and will be removed from the style of cause as well, leaving the Attorney General of Canada as the only respondent.

II. Background

[7] The applicant has been employed in various capacities throughout her career in public service. She spent several years working in the Department of Foreign Affairs and International Trade (DFAIT), providing mostly administrative assistance to senior government officials. In 2001, she was declared a surplus employee by that department. This led her to accept a permanent position in the International Programs Unit (IPU) of the Learning, Assessment and Executive Programs (LAEP) Branch of the Public Service Commission of Canada (PSC). Her position in the IPU was classified as group and level CR-05.

[8] In 2003, the PSC underwent a reorganization that was part of a larger restructuring and modernization of human resources in the public service. This reorganization led to the closing of the IPU where the applicant was working and eventually to the closing of the entire LAEP Branch. The employees of the IPU were informed that the reorganization was not a downsizing exercise and that they would receive assistance to find other positions, at their group and level, within the PSC.

[9] The parties have different versions of the events that unfolded following the reorganization of the PSC and the closing of the IPU.

A. *The applicant's version*

[10] The applicant's version can be summarized as follows. For a period of approximately one year, she was not offered a permanent position and was totally ignored by the PSC, whereas the remainder of her colleagues either retired or found new positions. The colleagues who were able to find new positions were all younger than her. In particular, when the LAEP Branch was closed and the Vice President was transferred to Industry Canada, he offered an executive assistant position to an employee who was significantly younger than the applicant. The applicant contends that she should have been given priority status under the Treasury Board's Workforce Adjustment Directive (the WFAD) and that if she had been given that status, she would have been able to secure a suitable permanent position. She further contends that she should have been informed that she was nevertheless given an informal priority status within the PSC; this would have helped her in her search to secure a new position.

[11] On January 19, 2004, the applicant left work on sick leave. She had been diagnosed with depression. Shortly after beginning her sick leave, she was contacted by Léo Daniels, Director of the PSC's Executive Resourcing Directorate, who offered her a permanent CR-05 level position as a Program Coordinator with the Directorate. The applicant was of the view that the position did not correspond to her skills and qualifications and that it would not respect certain functional limitations related to a prior medical condition. The applicant informed Mr. Daniels that she had previously

been diagnosed with fibromyalgia and that she could not perform long periods of work at a computer. She requested accommodation, but he refused. Instead, Mr. Daniels pressured the applicant into accepting the Program Coordinator position and told her that should she refuse the position, she could be declared a surplus employee and eventually be laid off.

[12] The applicant officially accepted the Program Coordinator position on January 21, 2004. She started work on March 8, 2004. On April 14, 2004, however, she once again left work on account of severe depression. In May 2004, the applicant applied for Long Term Disability Benefits (LTDBs). On October 15, 2004, she received a letter from her insurer informing her that her claim for LTDBs had been accepted for the period of July 28, 2004 until October 31, 2004. Benefits beyond October 31, 2004 had not been approved.

[13] On November 8, 2004, being without any further LTDBs and feeling somewhat better, the applicant contacted Mr. Daniels to request a gradual return to work. She suggested that she return to work as a receptionist in a position that was, at the time, occupied by a temporary employee. Mr. Daniels categorically refused her request. Having failed to secure a gradual return to work, the applicant decided next to request that her insurer review its decision to refuse her LTDBs beyond October 31, 2004. She provided her insurer with a medical report completed by Dr. Gillis, a psychiatrist, who confirmed that the applicant continued to be unwell.

[14] By January 2005, the applicant was having financial difficulties. She had yet to receive a response from her insurer regarding continued LTDBs. On January 10, 2005, she sent a letter to Mr. Daniels indicating that she wanted to retire effective January 13, 2005. She indicated that her

decision to retire was the result of her insurer's unwillingness to extend her LTDBs. The applicant's retirement became effective at the end of the business day on January 13, 2005.

B. *The respondent's version*

[15] The respondent's version differs from the applicant's. The respondent contends that the applicant was treated in the same manner as all the employees affected by the PSC reorganization. The Workforce Adjustment Directive referred to by the applicant was not engaged. It would only have come into play, the respondent submits, if the services of one or more indeterminate employees were no longer required beyond a specific date and only then if the affected employees were informed, in writing, to that effect. In such a case, the affected employee would become a surplus employee and would be afforded a formal priority of employment within the public service for a temporary period of time. In the current case, however, lay offs were not contemplated, therefore the Workforce Adjustment Directive was not applied and no employee was declared surplus.

[16] The applicant was nonetheless given an informal priority within the PSC for CR-05 positions. The applicant was not interested in securing a CR-05 position and, instead, wanted to obtain a position in the Administrative Services (AS) group, similar to the work she had previously performed with DFAIT. This type of a move would have constituted a promotion and, as such, the respondent decided to give the applicant some time to try and find an AS position. However, in January 2004, seeing that the applicant had not been successful in this regard, the PSC decided to accelerate the process of securing her a permanent position. It offered the applicant a permanent

CR-05 position in the Executive Resourcing Directorate in January 2004. Mr. Daniels informed the applicant that she could become surplus and eventually be laid off if she refused the offer. He felt it was his responsibility to inform her of the possible consequences of refusing an offer for a permanent position at her group and level. The applicant accepted the offer.

[17] The respondent denies that the applicant ever asked for accommodation in relation to her fibromyalgia when she was offered the Program Coordinator position. The respondent further denies that the applicant requested, and was refused, a gradual return to work in November 2004. In any event, the respondent contends that all the medical evidence shows that, in November 2004, the applicant was unfit to return to work, even on a part-time basis, and that she remained unfit until her retirement in January 2005.

III. The Applicant's Complaint

[18] On February 28, 2006 the applicant filed a complaint against the PSC with the Canadian Human Rights Commission (the Commission). The applicant's primary allegations were as follows:

- That the PSC differentiated adversely against her on the basis of her age, contrary to section 7 of the CHRA, by not finding her a permanent assignment when the IPU closed in June 2003 and when the LAEP Branch closed in October 2003.
- That the PSC differentiated adversely against her on the basis of her age, contrary to section 7 of the CHRA, by awarding an executive assistant position to one of the applicant's colleagues who was younger than her.

- That the PSC differentiated adversely against her on the basis of her disability (fibromyalgia), contrary to section 7 of the CHRA, and failed in its duty to accommodate her under section 15 of the CHRA, in the manner with which it offered her the Program Coordinator position and in the manner with which it required her to perform her duties while working in that position.
- That the PSC differentiated adversely against her on the basis of her disability (depression), contrary to section 7 of the CHRA, and failed in its duty to accommodate her under section 15 of the CHRA, by refusing her request to return to work on a gradual basis in November 2004.
- That the PSC's conduct deprived the applicant of employment opportunities contrary to section 10 of the CHRA.

[19] The Commission conducted an investigation and decided to refer the matter to the Tribunal. The Tribunal heard the matter over the course of five days from September 14 to September 18, 2009.

IV. The decision under review

[20] On February 3, 2010, the Tribunal rendered its decision dismissing the applicant's complaint.

[21] First, the Tribunal considered the applicant's allegation that the PSC had discriminated against her by failing to find her a permanent reassignment when the IPU and LAEP Branch closed. The Tribunal found that the applicant had established a *prima facie* case of discrimination in this

regard: she had adduced evidence indicating that her past work had been satisfactory, that her younger colleagues in the IPU and LAEP Branch had been reassigned, and that she believed that her younger colleagues were receiving preferential treatment.

[22] However, after considering the respondent's submissions, the Tribunal determined that the case for age-based discrimination had not been made out. The Tribunal accepted the explanation provided by the PSC's Director of Human Resources that because the applicant was not interested in continuing with clerical work at the CR-05 level, and was more interested in administrative-level work, she had been given additional time to try and find this type of a placement. The Tribunal noted that the applicant continued to be paid and continued to be assigned tasks throughout the period in question. While the Tribunal indicated that the PSC was not blameless – it faulted the PSC for not communicating effectively with the applicant and for allowing the applicant to work by herself for a six week period – it concluded that these mistakes were not deliberate and were not related to the applicant's age.

[23] Second, the Tribunal considered whether the PSC discriminated against the applicant based on her age when she was not offered the position of Executive Assistant for the Vice President of the LAEP Branch when he was transferred to Industry Canada. The Tribunal acknowledged that the individual who did receive the position was "very young to hold such a position". However, it also indicated that there was no evidence to suggest that the applicant applied for the position and that, in any event, she did not exercise her right to appeal the assignment decision. The Tribunal indicated that the applicant was not in a position to be given the assignment in a preferential manner because

it was at a higher level than her CR-05 classification, meaning it was technically a promotion. Ultimately, the Tribunal found that discrimination had not been made out in this regard.

[24] Third, the Tribunal considered whether the PSC had discriminated against the applicant by failing to accommodate her fibromyalgia when it offered her the Program Coordinator position and during the time that the applicant held that position. Once again, the Tribunal found that, based on the applicant's evidence alone, a *prima facie* case for discrimination had been made out. When it came to considering the respondent's evidence, the Tribunal noted that Mr. Daniels' version of events conflicted with the applicant's version. The Tribunal preferred Mr. Daniels' version, i.e. that the applicant had never mentioned fibromyalgia or requested accommodation, because the applicant's evidence contained inconsistencies. The applicant had testified that she spoke with Mr. Daniels about her fibromyalgia not only on the initial call in January 2004, but again on a call in February 2004 and that, in February, he had scared her so much that she decided to accept the offer. The Tribunal noted that the applicant had already accepted the job by this point as the letter of acceptance had been signed in January. The Tribunal also indicated that the applicant's notes regarding the February 2004 phone call involved reference to medical experts that were not consulted until a number of months later.

[25] Ultimately, the Tribunal reasoned that given the inconsistencies and given that Mr. Daniels would have had no reason to refuse a request for accommodation and no reason to lie, his version of events was more credible. The Tribunal concluded that the applicant had not told Mr. Daniels about her inability to perform the duties associated with the Program Coordinator position. As a result, the Tribunal found that there was no discrimination in this regard.

[26] Fourth, the Tribunal considered whether the PSC had discriminated against the applicant by refusing to accommodate her request to return to work on a gradual basis in November 2004. Once again, the Tribunal was confronted with contradictory evidence. The applicant established a *prima facie* case by testifying that she called Mr. Daniels on November 8, 2004 to request a gradual return to work and that he categorically refused her request. Mr. Daniels, on the other hand, testified that he had never received a call from the applicant and, instead, had been informed in September 2004 that her doctors believed she was not healthy enough to return to work.

[27] Given that the medical reports filed by various doctors showed that the applicant was not capable of returning to work during the period between May 2004 and March 2005, the Tribunal accepted Mr. Daniels's evidence that the applicant had not, in fact, requested a return to work in November 2004. The Tribunal rejected discrimination on this basis as well.

[28] Finally, with regards to the alleged discrimination under section 10 of the CHRA, the Tribunal found that the applicant had not demonstrated *prima facie* evidence that the PSC had exercised discriminatory policies or practices based on her age or disability.

V. Issues

[29] Two main issues arise for consideration on this application:

(1) Did the Tribunal breach the duty of procedural fairness owed to the applicant?

(2) Did the Tribunal err in finding that the PSC had not discriminated against the applicant on the ground of age or disability?

VI. Standard of review

[30] The Tribunal is not entitled to deference on matters of procedural fairness (*Canada (Attorney General) v Davis*, 2010 FCA 134 at para 3, 403 NR 355; *Murray v Canada (Attorney General)*, 2011 FC 542 at paras 11-12 (available on CanLII); *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53, [2006] 3 FCR 392). As such, the first issue for consideration – whether the Tribunal breached the duty of procedural fairness owed to the applicant – will be reviewed using the correctness standard of review.

[31] As a matter of substantive review, however, the Federal Court of Appeal in *Tahmourpour v Canada (Royal Canadian Mounted Police)*, 2010 FCA 192 at para 8, 405 NR 54, indicated that most elements of a decision of the Canadian Human Rights Tribunal are reviewed using the reasonableness standard, including questions of law involving the Tribunal's interpretation of its own statute. Since the question of whether or not the Tribunal erred in its analysis under sections 7 and 10 of the CHRA is a question of mixed fact and law, the appropriate standard of review to apply is the reasonableness standard. The Court will consider the existence of justification, transparency and intelligibility within the decision-making process, as well as the question of whether the Tribunal's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

VII. Analysis

(1) Did the Tribunal breach the duty of procedural fairness owed to the applicant?

[32] The applicant submits that the Tribunal breached her procedural rights in a number of ways. I will deal with each of the applicant's allegations in turn.

(a) *Restricted time to deliver opening statement*

[33] The applicant argues that the Tribunal treated her unfairly and breached her right to procedural fairness by restricting the time available for her to deliver her opening statement.

[34] The applicant opted to read her opening statement from a prepared document which she had entitled, "Victim Impact Statement"[1] . A review of both the applicant's "Victim Impact Statement" and the hearing transcript reveals that the applicant was, in fact, able to progress successfully through her entire statement during the time allotted by the Tribunal.

[35] While it is true that the applicant was interrupted at two points during her delivery, at no point was she prevented from continuing. During the first interruption, the Tribunal pointed out that the applicant was making a presentation and asked her how much longer her statement would last. The applicant indicated that she had timed her presentation and that it was only seven minutes in

length. She was allowed to continue.[2] The applicant continued to read, essentially verbatim, from her prepared "Victim Impact Statement".

[36] When the applicant was close to the end of her statement, counsel for the respondent interrupted her to point out that there was a distinction between opening statements and giving evidence:[3]

> MS. CROWLEY: I apologize for interrupting, Ms. Gravel, and I know this is unusual. I'm just wondering if the distinction if [*sic*] being made here between opening statement and giving evidence.
> THE CHAIRPERSON: I am also of the opinion that you might be a little bit out of what would normally be done. I accepted it because you told me it would be only seven minutes. I assume you have almost finished?
> THE COMPLAINANT: Yes. I only have half a page to go.
> THE CHAIRPERSON: Very good then. Thank you.

[37] A review of the transcript shows that although the applicant largely continued to read her "Victim Impact Statement" word-for-word, there were portions of text which she began to summarize.

[38] Although it would be understandable if the applicant felt as though she was being hurried along by the Tribunal, the distinction between providing an "opening statement" and giving evidence was a valid one to make. A review of the transcript reveals that the applicant did, substantively, address all of the points that she had set out to address. Ultimately, I cannot find that there was any violation of procedural fairness in this regard.

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[1] located at tab Y of the Applicant's Record
[2] located at page 599 of the Respondent's Record vol 3
[3] located at page 603 of the Respondent's Record vol 3

(b) *Attitude of the Tribunal*

[39] The applicant alleges that the attitude of the Tribunal's chairperson changed negatively over the course of the hearing. This allegation has no merit.

[40] A review of the full hearing transcript reveals that the Tribunal's chairperson remained respectful and patient towards the applicant throughout the duration of the hearing. It is true that the chairperson was required to intervene more often when the applicant was cross-examining the respondent's witnesses to remind her that she was not to give evidence during cross-examination or to explain to her the rules applicable to cross-examination, but these interventions did not demonstrate any disrespect towards the applicant. The applicant was not prevented from presenting her evidence, from asking the questions that she wished to ask, or from presenting her arguments. I conclude that the applicant was treated fairly and respectfully by the Tribunal and I wish to add that she was also treated fairly and respectfully by counsel for the respondent.

(c) *Refusal of adjournment*

[41] The applicant submits that the Tribunal breached her procedural rights by denying her request for an adjournment. After delivering her opening statement on September 14, 2009, the applicant requested an adjournment indicating that "all the lawyers that [she] had contacted" and "two key witnesses" were out of the country, in Europe, until the end of October. The Tribunal suspended the hearing to consider the applicant's request. When the hearing resumed, the Tribunal indicated that it was denying the applicant's request on account of the fact that the applicant had

already had the hearing adjourned once, "earlier in the summer", due to lack of legal representation and, since then, she had made no progress in obtaining legal counsel. The Tribunal indicated, "We must not forget that this case was opened more than six years ago. At one time we must come to an end". In the Tribunal's reasons, it explained at paragraph 16:

> 16 The Tribunal, pursuant to the stipulations of section 48.9 of the Act, which says that the proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirement of natural justice and rules of procedure allow, found that the additional 2.5 month extension gave the Complainant sufficient time to prepare and find new counsel and respected the principle of natural justice. It therefore ordered to proceed with the hearing without further delay.

[42] The hearing was initially scheduled for June 29-30 and July 2-3, 2009. The record shows that on June 3, 2009, the applicant sent an email to the Tribunal requesting an "urgent" adjournment, citing the fact that her legal counsel was, "no longer in a 'state of mind' to represent" her. During a case conference held on June 9, 2009, the applicant indicated that she would be retaining counsel within the next 48 hours, and the Tribunal agreed to entertain a request for adjournment from the applicant's new legal representative. However, on June 17, 2009, the applicant informed the Tribunal that she had been unsuccessful in obtaining legal counsel and she requested an indefinite adjournment. By email dated June 18, 2009, the Tribunal agreed to allow an adjournment of the hearing, but not an indefinite one. It offered the applicant three possible hearing periods and, on June 19, 2009, the applicant selected the September 14-18, 2009 option. On June 23, 2009, the applicant sent another email to the Tribunal indicating that she was having continuing difficulty finding legal representation:

> With regard to Legal Counsel, even though I have made contact with many, no one has agreed to represent me on "contingency". I had one junior lawyer who was willing but the senior partners in the Law Firm would not allow him to do it on "contingency". Others do not even bother returnig [*sic*] my my [*sic*] call.

[43] One can certainly sympathize with the plight of a complainant who wants, but for financial reasons is unable, to obtain legal counsel. However, at a certain point, the hearing must go forward. The applicant had been given a 2.5 month adjournment, which meant that she had over three months from the time when her initial legal counsel left the file to attempt to retain replacement representation. She was unsuccessful. While she did indicate at the hearing that there might be lawyers who were currently away in Europe who would be willing to take her case on a contingency basis, the applicant agreed with the Tribunal that there had been no firm commitment in this regard.[4]

[44] Given that the applicant had not demonstrated any real progress in obtaining legal counsel over the course of the approximately three months from June 3, 2009 to September 14, 2009, the Tribunal's concern that the applicant was "still at the same point" in September as she was at the beginning of June was valid. In these circumstances, I cannot find that the Tribunal breached the applicant's right to procedural fairness by denying her a further adjournment. The Tribunal made a point of indicating that it would take into account the fact that the applicant was without legal counsel, and I am satisfied - upon reviewing the transcript - that the Tribunal did indeed fulfill that commitment.

(d) *Absence of two key witnesses*

[45] The applicant's fourth submission is related to her third. At the hearing, the applicant indicated that because the Tribunal had denied her request for adjournment, she was being forced to present her case in the absence of "two key witnesses" who were both away in Europe until the end

of October. As a result of this, she requested the Tribunal's permission to obtain sworn affidavit evidence from these witnesses upon their return to the country in November 2009. The Tribunal denied this request. The applicant claims that this denial amounted to a breach of her right to procedural fairness.

[46] The Tribunal indicated that the receipt of affidavit evidence as late as November 2009 – a month and a half after the hearing - would be "much too late". In any event, it pointed out that any affidavit evidence submitted in this way would be of little weight because it would not be possible for the affiants to be cross-examined.

[47] By June 19, 2009 the applicant was fully aware that her hearing would be held approximately three months later; between September 14 and September 18, 2009. She was also aware of the importance of having all of her evidence ready for presentation during that time: on June 23, 2009, the applicant sent an email to the Tribunal, advising it that three of her four witnesses would be able to attend during the scheduled hearing period, but that one would be in Europe and, "therefore, [would] be providing an authenticated Affidavit".[5] No "authenticated affidavit" was ready for presentation during the hearing and no justification was provided as to why the necessary evidence had not been obtained. It should be pointed out, however, that at the hearing before the Court, the applicant did indicate that she had attempted, unsuccessfully, to obtain an affidavit from her absent witnesses prior to the Tribunal hearing.

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[4] see page 615 of Respondent's Record vol 3
[5] see page 104 of Respondent's Record vol 1

[48] The Tribunal concluded that the applicant's circumstances did not warrant invoking the requested "exceptional procedure" and I cannot find that it erred in this regard. This was not a case where the evidence in question was new or previously unavailable. It was the applicant's obligation – as she was clearly aware – to have her evidence ready for presentation by September 14, 2009. She failed in this regard, and cannot now rely on that failure to have the Tribunal's decision overturned.

(e) *Refusal to admit Investigation Report and Workforce Adjustment Directive*

[49] The applicant submits that the Tribunal treated her unfairly by refusing to admit two documents into evidence: the Commission's Investigation Report, and a document she refers to in her written submissions as "The Work Force Adjustment Directive – Section D".

[50] With regards to the Commission's Investigation Report, it should be noted that the Tribunal is an independent body established by statute to hold inquiries into complaints referred to it by the Commission. Once a complaint has been referred to it, the parties must adduce their own evidence and the Tribunal must arrive at a *de novo* determination of the matter referred, independent of the Commission's findings (*Canada (Canadian Human Rights Commission) v Canada Post Corp.*, 2004 FC 81 at para 14, [2004] 2 FCR 581; *Milazzo v Autocar Connaisseur Inc*, [2002] C.H.R.D. No. 26, at para 25 (available on CanLII)). As such, the Tribunal cannot be faulted for deciding not to admit the Commission's Investigation Report as evidence. The report was neither binding nor relevant - the Tribunal was required to decide the applicant's complaint *de novo*.

[51] As for the second document referred to by the applicant, the record shows that the Treasury Board's Work Force Adjustment Directive was successfully entered into evidence. As such, I cannot find that there was any breach of procedural fairness in this regard either.

(f) *Admission of medical evidence*

[52] The applicant further argues that the Tribunal erred by admitting into evidence sensitive medical reports that were unlawfully obtained.

[53] The three medical reports at issue – which pertained to the applicant's psychological health – were obtained by counsel for the respondent as part of the documentary disclosure package provided by the Commission. Paragraph 6(1)(d) of the *Canadian Human Rights Tribunal Rules of Procedure*, 03-05-04 [Tribunal Rules] requires each party – which includes the Commission – to serve and file a statement of particulars setting out "a list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case…". Subsection 6(4) of the Tribunal Rules requires that each document identified under paragraph 6(1)(d) be disclosed to all other parties. The medical reports were documents in the Commission's possession for which no privilege had been claimed. They related directly to one of the disabilities at issue in the applicant's claim and, as such, were properly disclosed by the Commission and were properly received by the respondent.

[54] The reports were also properly accepted as evidence by the Tribunal. As mentioned, the medical reports were directly relevant to one of the disabilities that the applicant was alleging she had been discriminated based on – her severe depression.

[55] While the three medical reports had presumably been submitted to the Commission by the applicant or by her former counsel, it is clear, after reviewing the hearing transcript, that the applicant was not initially aware that these medical reports were being placed in evidence before the Tribunal.[6] When the applicant realized that the documents were contained in the respondent's materials, she expressed concern. She indicated that the reports contained sensitive medical information regarding herself and her family and that she did not want them to become part of the public record.[7] The Tribunal proposed to have the reports sealed under order that they only be opened with prior express authorization. I find that this measure was reasonable in the circumstances and did not constitute a breach of procedural fairness.

(g) *Errors and omissions in the transcript*

[56] The applicant further contends that the transcript of the hearing before the Tribunal contained several errors and omissions. There is simply no evidence to support this allegation.

(2) <u>Did the Tribunal err in finding that the PSC had not discriminated against the applicant on the ground of age or disability?</u>

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[6] see page 1117 to 1118 of the Respondent's Record vol 4
[7] see pages 1119 and ss. of the Respondent's Record vol 4

[57] In terms of the substance of the Tribunal's decision, the applicant's primary submission boils down to a general allegation that the Tribunal erred in its assessment of the evidence.

[58] The applicant contends that the Tribunal should have preferred her evidence over Mr. Daniels' evidence and should have concluded that she had requested, and was denied, accommodation when she was offered the Program Coordinator position in January 2004, that she was refused a gradual return to work on March 8, 2004, and that as a result of both of these refusals to accommodate, she was ultimately forced to retire from the PSC earlier than she otherwise would have wished.

[59] With respect, I consider that the Tribunal's findings are reasonable and supported by the evidence.

[60] The Tribunal found that the applicant's version of events contained contradictions and that Mr. Daniels had no reason to lie. I agree with the Tribunal that the applicant's account of her conversation with Mr. Daniels, during which he allegedly pressured her into accepting the Program Coordinator position and refused to accommodate her, did contain contradictions. For example, in the particulars that she filed with the Commission in support of her complaint, the applicant contended that the conversation had taken place before she had accepted the position on January 21, 2004. At the hearing before the Tribunal, she testified that there were two conversations, and that one of them had taken place in February 2004, after she had accepted the position. She filed a note containing a summary of the second conversation which she said was written directly after it had taken place. The note indicates that the second conversation had taken place in February

2004. However, the applicant had already accepted the job at that time. The note also references medical reports prepared by doctors who were not involved with the fibromyalgia issue and who were, in fact, only consulted several months later. I consider that, in light of the evidence, it was reasonable for the Tribunal to note the following discrepancies:

> [194] How could she say in this same latter in February that the Director of Executive Resourcing scared her so much during the telephone conversation that she decided to return to work and sign a contract as she had already signed the “Response to the letter of appointment” on January 21?
>
> [195] How could she, in this same letter in February, mention the names of doctors, a psychologist and a psychiatrist, when we were discussing accommodations related to the Complainant’s fibromyalgia? These doctors were not involved until the summer of 2004 when the family doctor of the Complainant indicated that her patient was depressed.

[61] Furthermore, the applicant’s allegation that she felt well enough to return to work in November 2004 and, as a result, had requested a gradual return to work, is unsupported and is contradicted by the medical evidence which indicates that, in fact, she was unfit to return to work during the relevant time, even on a part-time basis. The report of the psychiatrist Dr. Gillis, which was dated November 10, 2004 (two days after the applicant had allegedly requested permission to return to work), was submitted by the applicant to her insurer to buttress her request for extended LTDBs. In fact, the insurer ultimately recognized, based in part on this evidence that the applicant was “disabled” at the time that she had allegedly indicated she was well enough to return to work. Therefore, the Tribunal’s decision to prefer the respondent’s version of the events over the applicant’s is supported by the evidence and its reasoning is justified, transparent and intelligible.

[62] The applicant also contends that she was pressured into retiring earlier than she would otherwise have liked. This pressure, she submits, came about as a result of the situation the respondent had placed her in by refusing her requests for accommodation. The applicant's own letter of resignation, however, indicated that she had decided to retire in January 2005 because of the financial difficulties she was experiencing as a result of her insurer's refusal to pay her LTDBs beyond October 31, 2004, and not because of any discriminatory actions taken by her employer. In the letter, she also expressed her appreciation to Mr. Daniels for his assistance and stated that she appreciated the short time that she had spent with his team. The applicant contends that the "diplomatic" tone of her letter was chosen in order to leave on positive terms. This explanation is somewhat surprising considering the applicant's allegations but, in any event, it does not diminish the weight of the evidence, taken as a whole, and does not render the Tribunal's decision unreasonable.

[63] Two weeks after her retirement, the applicant received a letter from her insurer informing her that it would pay her LTDBs until March 31, 2005. Had she received this letter before requesting retirement, I am sure she would not have retired when she did. The fact of this unfortunate timing, however, does not change the fact that the evidence does not support the applicant's allegation that she was forced into retirement as a result of discriminatory pressure from her employer.

[64] The applicant also argues that the Tribunal's decision contains contradictions. In particular, the applicant points to the fact that, on several occasions, the Tribunal concluded that the applicant had demonstrated a *prima facie* case that she had been discriminated against, and then contradicted

itself by concluding that ultimately the case for discrimination had not been made out. This shows, on the part of the applicant, an understandable misunderstanding of the legal test applicable to allegations of discrimination under the CHRA.

[65] In paragraphs 150 to 156 of its decision, the Tribunal explained the two-step approach to determining allegations of discrimination under the CHRA: first, the Tribunal must consider whether the applicant has established a *prima facie* case. At this stage, the Tribunal is interested only in the applicant's evidence. If the applicant's evidence, on its own, substantiates facts that could lead to a conclusion of discrimination, then a *prima facie* case has been made out. However, this is only the first step. Once a *prima facie* case of discrimination has been presented, a second step where the onus of proof is shifted and where the respondent's evidence is weighed, must be considered. When both parties have presented their respective evidence, the Tribunal must decide whether the evidence, overall, establishes discrimination. In this case, the Tribunal preferred the respondent's evidence where it conflicted with the applicant's evidence and concluded that the applicant was not treated differently on the basis of age or disability. The Tribunal's decision does not contain contradictions.

[66] The applicant further submits that the Tribunal erred by not taking into consideration the fact that the PSC had "ignored [her] for a period of one year" while it had found her younger colleagues permanent reassignments almost immediately following the closure of the IPU. The Tribunal considered the context in which the applicant was trying to secure a new position and concluded that the respondent was not without blame. The Tribunal referred mainly to the fact that the applicant had been left alone in the former LAEP Branch offices for a period of six weeks.

However, the Tribunal reasonably concluded that there was no evidence to support the applicant's allegation that these events were related to the applicant's age.

[67] The applicant also contends that the Tribunal erred by not recognizing that the PSC had failed to abide by the WFAD.

[68] The applicant claims that the closure of the IPU and LAEP Branch in 2003 had led to a "work force adjustment" situation and, thus, had triggered the PSC's obligations under the WFAD. The applicant submits that, among other things, the PSC should have immediately declared her to be of "surplus" status. The respondent, for its part, submits that no work force adjustment situation was ever triggered because the restructuring that took place in 2003 was not a down-sizing.

[69] While it is true that the Tribunal emphasized in its decision, at paragraph 88, that the restructuring which had taken place in the PSC was not a down-sizing exercise, the Tribunal did not directly address the applicant's submissions regarding the WFAD. I consider, however, that the Tribunal's silence in this regard does not render the Tribunal's decision unreasonable.

[70] The evidence shows that the WFAD was not applied to any of the employees of the IPU or LAEP Branch. The WFAD would only have been relevant if there were evidence to suggest that the PSC had applied the provisions of the WFAD on a differential basis; e.g. to her colleagues, but not to her. In the absence of evidence that the WFAD had been applied on a differential basis, the Tribunal was not required to consider whether or not it should have been applied to the applicant or whether or not the PSC had breached its obligations under the WFAD. Indeed, the WFAD expressly

sets out a grievance procedure to be followed in cases of alleged misinterpretation or misapplication of the directive. That procedure does not involve the Canadian Human Rights Tribunal. The only question before the Tribunal was whether or not the applicant had been discriminated against. As such, it was entirely appropriate for the Tribunal to focus on the main issue of differential treatment.

[71] I also consider that the Tribunal's conclusion that the complainant did not prove that she was discriminated against when she was not offered the Executive Assistant position at Industry Canada to be reasonable.

[72] Ultimately, the Court will only intervene with the Tribunal's assessment of the evidence where the Tribunal's conclusions are based on erroneous findings of fact made in a perverse or capricious manner or without regard to the evidence. Nothing leads me to conclude that the Tribunal assessed the evidence in a perverse or capricious manner and its findings are supported by the evidence and are reasonable. Furthermore, its reasoning is clear, its conclusions are well explained and they fall within the range of possible outcomes which are defensible in respect of facts and the law.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review is dismissed. Considering the particular circumstances of this case, no costs are awarded.

"Marie-Josée Bédard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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