

Date: 20091104

Docket: A-78-08

Citation: 2009 FCA 320

**CORAM: NADON J.A.
SEXTON J.A.
SHARLOW J.A.**

BETWEEN:

PETER BOLDY

Appellant

and

ROYAL BANK OF CANADA

Respondent

Heard at Toronto, Ontario on October 14, 2009.

Judgment delivered at Ottawa, Ontario, on November 4, 2009.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

**NADON J.A.
SEXTON J.A.**

Cour d'appel
fédérale



CANADA

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The appellant Mr. Boldy filed a complaint to the Canadian Human Rights Commission alleging that his employer, Royal Bank of Canada, discriminated against him by failing to accommodate his disability. By letter dated February 9, 2007, Mr. Boldy was informed that his complaint had been dismissed by the Commission because, based on the findings of the investigator, Mr. Boldy's accommodation request was not rationally connected to his disability. Mr. Boldy applied to the Federal Court for judicial review of the Commission's decision. That application was dismissed by Strayer D.J., for reasons reported as *Boldy v. Royal Bank of Canada*, 2008 FC 99. Mr. Boldy now appeals to this Court. The task of this Court is to determine whether the

Federal Court judge selected the appropriate standard of review and applied it correctly (*Telfer v. Canada (Revenue Agency)*, 2009 FCA 23 at paragraphs 18 and 19.).

[2] Mr. Boldy was first employed by the Royal Bank in 1986. In 2002, he occupied the position of Technical Systems Analyst. In or about February of that year, he complained to the Royal Bank's Corporate Investigation Services about certain financial irregularities and over-configuration of Royal Bank's mainframe computers. With respect to those complaints, Mr. Boldy considers himself a whistle-blower, attempting to expose corporate improprieties.

[3] By letter dated October 16, 2002, Mr. Boldy was informed by the Royal Bank that the complaints were investigated and found to be without foundation. Mr. Boldy disputes that there was a proper investigation. It is not possible to discern from the record whether there was any merit to Mr. Boldy's 2002 complaints or his subsequent allegations that they were not properly investigated by the Royal Bank.

[4] Also in 2002, Royal Bank expressed concern about Mr. Boldy's health and well-being, and referred him to an appointment with Dr. Murphy, a psychiatrist. Dr. Murphy expressed the opinion that Mr. Boldy suffered from a mental illness that made him unable to continue working. On the strength of that report, Mr. Boldy went on disability leave. He received short-term disability benefits beginning in October of 2002 and long term disability benefits beginning in February of 2003 and ending almost three years later. Mr. Boldy alleges that the Royal Bank's professed concern about

his health was in reality a form of retaliation against him for his complaints, and that he was coerced into applying for disability benefits.

[5] In October of 2004, counsel for Royal Bank received a letter from Mr. Boldy's then counsel suggesting that Mr. Boldy's physicians had opined that he could return to work subject to certain conditions, including an independent public investigation into what Mr. Boldy considered his whistle-blowing allegations. Mr. Boldy characterizes this attempt to obtain an independent investigation as a request for accommodation of his disability. The requested accommodation is stated in these terms by Mr. Boldy's then counsel, in a letter dated October 17, 2006 to the investigator appointed by the Commission to investigate Mr. Boldy's complaint (Appeal Book, page 81):

A type of quasi independent review and analysis of the circumstances whereby objective analysis could be performed and recommendations made relating to the concerns Mr. Boldy brought to the attention of [the Royal Bank].

[6] In support of Mr. Boldy's position, Royal Bank was provided with a copy of a report from Dr. Robert Rehaluk in which the idea of an independent review of Mr. Boldy's concerns was set out in some detail. The report was redacted so that Dr. Rehaluk's diagnosis of Mr. Boldy's condition was not disclosed to Royal Bank. The redaction appears to have been motivated by Mr. Boldy's concern about the stigma sometimes attached to persons with mental disabilities. Mr. Boldy had provided an unredacted copy of Dr. Rehaluk's report to Manulife, the administrator of Royal Bank's long term disability program, but did not consent to Manulife sharing that copy with Royal Bank without assurances that the diagnosis would not be disclosed to non-medical personnel.

[7] Royal Bank did not consider the report of Dr. Rehaluk to be evidence that Mr. Boldy was fit to return to work. Indeed, the report indicated that he was not fit to return to work and would not be fit unless the suggested investigation were to occur. The Royal Bank refused to initiate any such investigation because its position was that an investigation had already occurred and no basis was found for Mr. Boldy's allegations.

[8] Mr. Boldy's complaint to the Commission alleges a failure to accommodate his disability or perceived disability. Reasonable accommodation is a duty an employer owes in certain circumstances to an employee with a physical or mental disability. The investigator appointed by the Commission was required to consider, among other things, whether and how the requested accommodation could alleviate Mr. Boldy's disability (the existence of which was undisputed).

[9] The investigator conducted an investigation and made a report after receiving submissions from Mr. Boldy and Royal Bank. He recommended that the Commission dismiss the complaint on the basis that Mr. Boldy's accommodation request was not rationally connected to his disability. The Commission accepted that recommendation and dismissed the complaint.

[10] Mr. Boldy applied to the Federal Court for judicial review of the Commission's decision. Strayer D.J. dismissed the application on the basis that the Commission's decision was based on the correct legal principles and was reasonable on the facts.

[11] Mr. Boldy argues that Strayer D.J. was wrong to refer in his reasons to the diagnosis stated by Dr. Murphy in his 2002 report, because by 2004 a different diagnosis had been reached by Mr. Boldy's psychiatrist, Dr. R. Rehaluk, and his clinical psychologist, Dr. Nexhipi.

[12] I am not persuaded that Strayer D.J. erred in this respect. Assuming in Mr. Boldy's favour that the 2004 reports of Dr. Rehaluk and Dr. Nexhipi can be understood to state a new diagnosis (which in my view is not clear), the reasons of Strayer D.J. indicate that he was aware of those reports. He was not required to recount their contents in detail.

[13] Mr. Boldy also argues that Strayer D.J. should not have found the decision of the Commission to be reasonable when it was based on an investigator's report that did not state or disclose an understanding of the 2004 diagnosis. Mr. Boldy argues that it is not reasonable to find that there is no rational connection between the disability and the requested accommodation in the absence of an understanding of the disability. Given the particular facts of this case, I cannot accept that argument.

[14] The requested accommodation was an independent public investigation of what Mr. Boldy considered to be his whistle blowing complaints. Dr. Nexhipi and Dr. Rehaluk express the opinion in their 2004 reports that such an investigation, if conducted in a manner and resulting in a conclusion acceptable to Mr. Boldy, would alleviate his feelings of betrayal and mistrust which were either a cause or a manifestation of Mr. Boldy's disability. The reports set out the analysis underlying that opinion, but in my view the analysis falls short of establishing how or why the

investigation sought by Mr. Boldy would or could alleviate his disability. In my view, it was reasonably open to the investigator, and thus the Commission, to find that there was no rational connection between Mr. Boldy's disability and the accommodation he requested.

[15] Mr. Boldy argues that the decision of the investigator, the Commission and Strayer D.J. was the result of unconscious bias in favour of the Royal Bank and against Mr. Boldy. There is no factual foundation for this allegation and I would reject it.

[16] I conclude that there is no basis upon which the intervention of this Court can be justified. I would dismiss this appeal with costs.

“K. Sharlow”

J.A.

“I agree.
M. Nadon J.A.”

“I agree.
J. Edgar Sexton J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-78-08

**APPEAL FROM A REASONS FOR JUDGEMENT AND JUDGMENT OF THE
HONOURABLE STRAYER, DEPUTY JUDGE OF THE FEDERAL COURT DATED
JANUARY 25, 2008, ON COURT FILE NO. T-433-07**

STYLE OF CAUSE: Peter Boldy v.
Royal Bank of Canada

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 14, 2009

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: NADON J.A.
SEXTON J.A.

DATED: November 4, 2009

APPEARANCES:

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ON HIS OWN BEHALF

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