Federal Court  Cour fédérale

Date: 20140414

Docket: T-124-13

Citation: 2014 FC 360

Ottawa, Ontario, April 14, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MARK HALFACREE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant Mr Halfacree sought judicial review of a decision made by the Public Service Labour Relations Board [the PSLRB or the Board] on December 14, 2012, *Halfacree v Deputy Head (Department of Agriculture and Agri-Food*, 2012 PSLRB 130 (CanLII), in which

the Board dismissed two grievances and partially dismissed a third grievance, all three filed against the applicant's former employer, the Department of Agriculture and Agri-Food.

[2] The applicant was self-represented at the hearing but had the benefit of having counsel prepare his application and draft his memorandum of argument, which he followed closely.

[3] For the following reasons the application is denied.

II. Facts

[4] Mr Halfacree was hired by the Canadian Pari-Mutuel Agency [the Agency], an agency of the department of Agriculture and Agri-Food, as a part-time seasonal employee in 1989. He worked as a racetrack officer, inspecting racetracks to ensure that betting regulations were followed. He worked for the Manitoba Horse Racing Commission and then the Ontario Racing Commission between 1991 and 1996, then was hired as a part-time employee by the Agency again.

[5] In 2004 and 2005, Mr Halfacree was absent from work a number of times. His family physician provided occasional notes but his supervisor, Mr McReavy was not satisfied. On March 25, 2005, Mr Halfacree wrote to his supervisor authorizing him to contact the family physician, Dr Matsuo, directly. On August 10, 2005, Mr McReavy wrote to Mr Halfacree expressing concern at the amount of sick leave he was taking. He suggested a mediated or facilitated discussion once Mr Halfacree returned to work. At the discussion, which took place on September 22, 2005, the Treasury Board policy on sick leave was reviewed. This policy

provided that at most half a day (3.75 hours) could be granted for a medical appointment; to take more time off, an explanation needed to be provided.

[6] Mr Halfacree took all of October 25th off for two medical appointments. Mr McReavy was concerned by this. He telephoned on November 2nd to discuss, but Mr Halfacree hung up on him. The supervisor wrote to Mr Halfacree on November 14th, noting that hanging up was disrespectful and that future such incidents could be subject to discipline.

[7] Mr Halfacree took more sick leave in November and December 2005. On December 20th, Mr McReavy expressed his concern again, and tried to convoke him to a meeting on the 28th, but Mr Halfacree refused to meet with him to discuss the subject. Mr McReavy telephoned him on December 28th and he hung up. On January 4, 2006, Mr McReavy emailed him to say that there would be a discipline meeting. This was repeatedly rescheduled. Meanwhile, Mr Halfacree filed harassment complaints.

[8] In the course of the next three years, Mr Halfacree received first a disciplinary suspension of one day then a disciplinary suspension of five days and finally was terminated from his employment.

A. *One-day suspension*

[9] The meeting announced on January 4th eventually took place on February 22, 2006. Mr Halfacree was given a one-day suspension. On April 5, 2006, Mr Halfacree grieved this disciplinary measure.

[10] On March 24, 2006, Mr McReavy requested a Health Canada fitness-for-work assessment of Mr Halfacree, given that he had used 433 hours of sick leave in the previous fiscal year. From April 26 to May 4, Mr Halfacree was absent for an emergency dental problem. The Agency called the dentist's office for more information. The applicant learned of this on May 17, 2006 and objected, stating that he found this conduct to be harassing, offensive, and in violation of the *Privacy Act*. The Health Canada assessment took place on May 30, 2006 and based on the consultant's report submitted in June, Mr Halfacree was found physically fit to work.

[11] On September 13, 2006, Mr Halfacree called in sick and remained off work for a week. He then asked for advanced sick leave credits for October. He initially proposed to return to work in October, then in November.

[12] Mr Halfacree returned to work on November 22, 2006. Dr Matsuo provided a note stating : "Mark Halfacree may return to full duties without limitations Nov 22, 2016." The applicant then requested accommodation on the basis of family status (being a single parent of two teenaged children, the younger one of whom was alleged to have a mild learning disability) which would permit him to work closer to his house for part of his weekly hours. Ms Séguin met with him on December 7, 2006 and explained the requirements for documenting sick leave in firm terms. She emailed him on December 19th to explain that his request for accommodation could not be actioned until he provided more explanation.

B. *Five-day suspension*

[13] Mr Halfacree was scheduled to work on December 20th and 21st. He twice requested leave then cancelled it for those days and ended up missing work. As Ms Séguin could not get an explanation, she held a disciplinary meeting on February 21, 2007, which he did not attend. He was given a five-day suspension on March 20, 2007. He had continued to take extensive sick time during January, February, and March 2007. He grieved this disciplinary measure.

C. *Termination*

[14] On or about April 4, 2007, as the Board put it, "Mr. Halfacree's sick leave became – in retrospect – permanent." Mr Halfacree described himself as having gone on certified medical leave for stress and said that he had obtained a tractor-trailer driver's licence and driven a truck part-time in order to have some income while on unpaid sick leave.

[15] After many unsuccessful attempts to arrange meetings to obtain better medical information, the employer ran out of patience on April 28, 2009. Mr Halfacree was advised in writing that he was terminated. Mr Halfacree grieved his termination.

III. Contested decision

[16] An Adjudicator of the PSLRB examined Mr Halfacree's case over the course of November 2011 and June-July 2012 and issued a decision on December 12, 2013.

[17] The PSLRB noted that the applicant had filed three grievances against his employer, relating to the one-day suspension (566-02-577), the five-day suspension (566-02-3081), and the termination (566-02-3439). They had first been dealt with by mediation, but this had not succeeded. The Board then reviewed the lengthy history of Mr Halfacree's employment with the Agency.

[18] The Board found that it was clear on the evidence that Mr Halfacree had not established a duty to accommodate on the basis of family status. It found that there was no evidence of any illness or disease which created a limitation requiring accommodation. The medical certificates had never explained his condition, and given that he was operating a tractor-trailer while on sick leave, he did not seem physically limited. His bald statement that he was suffering from stress did not suffice.

A. *Grievance 566-02-577*

[19] Concerning the first grievance, the Board found that it was appropriate to issue a one-day suspension for failing to report as instructed on December 28, 2005, hanging up on his supervisor in the ensuing telephone conversation, and expressly refusing to meet with his manager a second time on January 11, 2006. Mr Halfacree had publicized the second refusal, which was not made in the heat of the moment, but was reasoned. It was a contemptuous act which warranted discipline and a one-day suspension was an appropriate penalty. The Board dismissed the grievance.

B. *Grievance 566-02-3081*

[20] Concerning the second grievance, the Board accepted some of Mr Halfacree's explanations. It therefore found that although discipline was warranted for missing work on December 20, 21, and 27, 2006, and for refusing to provide information or attend meetings to substantiate his excuses for his absences, a five-day suspension was too harsh. The Board allowed the grievance in part, substituting a three-day suspension for the five-day suspension.

C. *Grievance 566-02-3439*

[21] Concerning the termination, the Board analysed an employee's obligation to show up for work or explain the absence. It found that Mr Halfacree had been insubordinate in refusing to provide explanations to the satisfaction of the employer. He made no effort to contact his managers, left it to his union representative to organize meetings, and called in sick whenever a meeting was scheduled. This did not evince a *bona fide* intent to cooperate. There was no credible evidence that he was being harassed or discriminated against or that he was unable to attend meetings due to stress or high blood pressure.

[22] Mr Halfacree was a union steward and not easily intimidated; rather, he exhibited a strong sense of entitlement before the Board, which found that it was impossible to conclude that he was afraid to meet with his supervisor or management, particularly as the two supervisors with whom he had experienced conflict, Mr McReavy and Mr Pettigrew, had left the workplace in October and December 2007, respectively. The Board noted his assertions that he had authorized the employer to speak to his family doctor. No evidence substantiated this other than

one email of March 2005, and even if it was true, this did not relieve him of the onus to provide information.

[23] The Board concluded that termination was reasonable and fully justified in the circumstances of the case, given the repeated, deliberate insubordination by Mr Halfacree. The third grievance was dismissed.

IV. Issues

[24] The applicant raises as issues:

A. Did the Board apply the correct legal test in determining *prima facie* discrimination based on family status?

B. Did the Board err in its finding that the applicant did not establish a case of *prima facie* discrimination based on family status?

C. Did the Board err in its finding that the applicant did not establish a case of *prima facie* discrimination based on disability?

D. Did the Board err in finding that the applicant had been insubordinate?

E. Did the Board breach procedural fairness in not allowing a cross-examination of Mr McReavy as to the source of the information that the applicant had been working a second job since December 2003?

V. Standard of review

[25] The applicant does not make arguments on the standard of review. The respondent notes that the standard of review for questions of procedural fairness is correctness (*Canada*

(Citizenship and Immigration) v Khosa, 2009 SCC 12 at para 111), and submits that this Court previously determined the standard of review for cases involving termination of employment under the *Public Service Staff Relations Act*, RSC 1985, c P-35 to be reasonableness (*McCormick v Canada (Attorney General)*, [1998] FCJ No 1904 (QL) (TD) at para 16).

[26] I find that the standard of review is reasonableness for the first three contested issues and correctness for the last one.

VI. Analysis

A. *Did the Board apply the correct legal test in determining prima facie discrimination based on family status?*

[27] The respondent concedes that the Board erred on the first point. The Adjudicator cited the "serious inference" test set out in *Health Sciences Association of British Columbia v Campbell River and North Island Transition Society*, 2004 BCCA 260. However, Justice Mandamin of the Federal Court ruled in *Canada (Attorney General) v Johnstone*, 2013 FC 113 [*Johnstone*] at para 129 that "the serious inference test […] is not an appropriate test for discrimination on the ground of family status" and that the correct test is "whether the employment rule interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way". The respondent nonetheless argued that the Adjudicator's conclusion that the applicant was not discriminated against on the basis of family status should stand.

B. *Did the Board err in its finding that the applicant did not establish a case of prima facie discrimination based on family status?*

[28] The applicant argues that the employer never reimbursed him for travel and childcare expenses and never moved him to, or closer to, Toronto, despite what was agreed to in the 2002 settlement. This had a substantial negative impact on his ability to meet his parental obligations. As the Board noted in its decision, he declared that "he made "zero" after his travel and daycare expenses" (para 24 of the decision). While the applicant was, after substantial delay, finally placed in the Relocation Program, he discovered that he still could not move because the employer would not reimburse the travel and childcare expenses to date and because there were no suitable childcare and educational providers for his younger child in the destination locations in or near Toronto. Thus, his parental obligations kept him from relocating and forced him to continue incurring additional expenses. The applicant was further deprived of precious time with his children by having to work rotating shifts, rather than day shifts only, meaning that he habitually had to work at nights.

[29] This establishes that there were rules and conditions of employment (the schedule, location, and lack of financial support for travel and childcare) which interfered with the applicant's ability to meet a substantial parental obligation (see *Johnstone* at para 125).

[30] The Board stated that *prima facie* discrimination is not automatically established just because an employee is a single parent, but it failed to consider that being a single parent nevertheless results in obligations. It is the employer's adverse impact on those parental obligations which results in *prima facie* discrimination. The rules and conditions of employment in this case negatively impacted on the applicant's ability to meet his obligations.

[31] The respondent submitted that the Board had made two independent findings on this issue. The first was that the applicant failed to establish a duty to accommodate, while the second was that if such a duty existed, the applicant failed to establish any failure by the employer to comply due to the applicant's failure to communicate and cooperate.

[32] The Board noted that even had *prima facie* discrimination been established, the jurisprudence made it clear that the employee had a duty to explain the nature of the problem and to cooperate with the employer's attempts to accommodate. Mr Halfacree had consistently failed to do either. He repeatedly refused to provide additional information on why or how he should be accommodated, leaving his employer unable to take action. He submitted at the hearing that the employer, knowing that he was a single parent, had the duty to make further inquiries, but the Board rejected this (see also *Canada (Attorney General) v Cruden*, 2013 FC 520).

[33] I am in agreement with the respondent that although the Board used the wrong test for the establishment of *prima facie* discrimination, its conclusion that there was no breach of the duty to accommodate stands.

[34] Even had the applicant established a duty to accommodate due to his family status, he failed to establish any failure by the employer to comply. Instead he consistently failed to explain the nature of the problem and cooperate with attempts to accommodate it. It was not up to the employer to enforce accommodation upon him. I therefore find the Board's conclusion on the issue of discrimination due to family status to be a possible, acceptable outcome based on the facts and the law.

C. *Did the Board err in its finding that the applicant did not establish a case of prima facie discrimination based on disability?*

[35] The applicant argues that the Board dealt with this issue briefly and concluded that there was "no evidence of any illness or disease that created a limitation" (para 192 of the decision). However, the Board had before it several sick leave forms signed by the applicant's doctor and a letter from the doctor stating that there had not been any misuse of sick leave, and it was aware that he had taken substantial sick leave. It therefore cannot be said that there was no evidence of a disability or that the applicant was not experiencing undue stress at his workplace.

[36] The Board appears to have relied unreasonably on two adverse findings. The first was that at one point in time the applicant had been declared fit to work, and the second was that the applicant was apparently working a second job without problems. On the first point, since the applicant was suffering from severe workplace-induced stress, it was unreasonable not to consider that he might continue to experience symptoms due to the poisoned work environment despite being declared fit to work. On the second point, the applicant began working a second job in February 2007 to support himself while on sick leave without pay. Since the stress was specific to his workplace, it was logical to consider that he had a disability but that it did not prevent him from working altogether, merely in one particular environment.

[37] As argued by the respondent, decisions from labour arbitrators and human rights tribunals have consistently held that while stress may be disabling, it is not in and of itself a disability requiring accommodation. In order to obtain the protection of human rights legislation, an employee needs to provide a diagnosis with specificity and substance. Furthermore, a brief

doctor's note may be held to have no probative value where the doctor does not testify (*Gibson v Treasury Board (Department of Health)*, 2008 PSLRB 68 at para 31).

[38] I also find that although the applicant stated that he suffered from stress related to ongoing interpersonal conflict with his supervisor, he provided a number of medical certificates which provided no clarity and did not even specify whether he was suffering from an illness or an injury. He elected not to call the doctor as a witness.

[39] The Board had before it evidence that detracted from the applicant's claim of disabling stress; in June and November 2006, Health Canada and his family physician both declared him fit to work, and he acknowledged that while on leave, he was able to operate a tractor-trailer.

[40] I find that the Board's conclusion was reasonable. The evidence presented by the applicant did not explain what disability he might be suffering from, while medical evaluations both from his own physician and from Health Canada found him fit to work. He elected not to call the doctor as a witness, leaving the Board to rely on uninformative medical form notes which said very little and did not support a far-reaching inference of disability. Furthermore, the applicant did not deny that he was not prevented by any disability from working a second job and did not provide evidence that he was disabled specifically with respect to his job at the Agency and no other. As noted by the respondent, the arbitral jurisprudence establishes that while stress may be disabling, it is not in and of itself a disability requiring accommodation. In order to obtain the protection of human rights legislation, an employee needs to provide a diagnosis with specificity and substance.

D. *Did the Board err in finding that the applicant had been insubordinate?*

[41] The applicant submits that the Board erred in determining that he had been found insubordinate for failing to provide additional medical information which the employer had a right to request. He argues that he had no obligation to provide this information. Employers are not entitled to compel disclosure of personal medical details absent statutory authority or express consent. He argues that the Board erred in finding that the collective agreement required the applicant to provide the additional information, since the collective agreement only stipulated this for sick leave with pay. It is silent as to sick leave without pay. The applicant invoked in his support the case of *NAV Canada v Canadian Air Traffic Control Assn* (1998), 74 LAC (4th) 163 at para 64, in which the Board said that it was unable to envision circumstances in which insubordination could be justified by a refusal to provide information which had no statutory or collective agreement authorization.

[42] In addition, the applicant had authorized the employer by email in March 2005 to speak directly to his family physician. There was no evidence to support a finding that this was time limited. The fact that the applicant had complained on one occasion when the employer contacted his dentist directly had no bearing on the authorization to speak to his doctor. The Board erred, he argues, in contending that he did not accept an independent medical evaluation. This complaint about contacting the dentist did not affect the validity of the authorization to speak to the doctor, and the real motivation for the employer in wishing to conduct such an evaluation was that it disbelieved that he was under a disability.

[43] Finally, the applicant argues, it was unreasonable of the Board to conclude that he did not want to meet with management from 2007 to 2009. He met with the employer in September 2007 to discuss accommodation on the basis of his single parent status. Then in early 2009 he agreed to meet, but first it took a long time to organize dates due to missed correspondence, then his union representative was unavailable to be present during March, and then the point of contact at the Agency left her position in April. The Board unreasonably concludes from the fact that the meeting did not occur that Mr Halfacree did not want to meet.

[44] I find that the employer clearly was entitled to additional medical information. The applicant had been declared fit to work by both Health Canada and his family physician in June and November 2006. Despite this he was absent from work for most or all of September, October, and November 2006, February and March 2007, and April 2007 to April 2009. During this time he submitted 14 standard form notes from his physician which did not explain the reasons for the absences and were often incomplete given that the doctor did not certify that she had satisfactory knowledge of her patient's condition. The respondent wrote to the applicant on nine occasions requesting further information and advising him that until it was received, it would consider his absences to be unauthorized. It also warned him that excessive absenteeism might result in disciplinary action.

[45] Arbitral jurisprudence holds that the mere existence of a medical note may not be sufficient to justify a claim for sick leave (see for instance *Fontaine v Canadian Food Inspection Agency*, 2002 PSSRB 33 at para 29). Moreover, arbitrators have consistently found that an employer has the right to make reasonable requests for medical information when there is question as to whether the employee has given an adequate explanation for absence. What is

reasonable will depend on the circumstances of each case. Factors such as the expected duration of the absence, the inadequacy of documentation tendered by the employee, and the presence of conflicting information about the employee's health may prompt an employer to request more information (*Blackburn v Treasury Board (Correctional Service of Canada*, 2006 PSLRB 42 at paras 83-86).

[46] In the present case, the Board's conclusion that the employer was entitled to seek more information was clearly reasonable. The absence was of long duration and consistent with what was by then a well-established pattern of absences. Nothing more than incomplete form notes had been offered to substantiate it. There was contradictory information in the form of two recent medical evaluations pronouncing the employee fit to work.

[47] The employer advised the employee that it would not continue to accept the same standard form notes and yet that was all he continued to submit. It wrote to him at least six times to try to set up a meeting to discuss his ongoing absence, but he either ignored or refused the requests. As noted by the Board, one part of the employment relationship is an employee's obligation to show up for work or provide an explanation. It is not questioned that unauthorized absence from work may justify discipline up to termination. In this case, the employee refused to even meet the employer to discuss his ongoing absence, even though he knew the employer considered it to be unauthorized.

[48] I do not accept the applicant's explanations of being unaware of meetings; these are contradicted by the evidence.

[49] It is incumbent upon an employee to demonstrate his entitlement to leave to the satisfaction of the employer, failing which arbitrators have consistently held that the employee can be disciplined for absence from the workplace. There is no authority to support the applicant's argument that this did not apply to unpaid sick leave. Unpaid sick leave, similarly to paid sick leave, is an entitlement, to be administered on the same principles implied in the collective agreement.

[50] The applicant attempted the novel argument that his situation was not covered by the collective agreement article dealing with paid sick leave. However, he failed to show on what basis he was entitled to any leave at all if this was not covered by the collective agreement. It is a fundamental aspect of the employment relationship that an employee will come to work and is not entitled to whatever leave he wants just because it is unpaid.

[51] I agree with the applicant that an employer is not automatically entitled to demand any personal medical information it chooses from employees. However, this was far from the case. The applicant was missing long stretches of work even after being declared fit and he provided no reasonable explanation. The medical notes did not constitute such an explanation under the circumstances. It was not reasonable to expect the employer to do unsolicited independent research into his personal situation. The employer warned him repeatedly of the concern about his absenteeism and the potential consequences. Factors amply justifying requests for medical information – the frequency and duration of the absences, the inadequacy of the medical documentation, and the two medical assessments pronouncing the applicant fit to work - were present. The employer attempted repeatedly to meet with Mr Halfacree to discuss the situation, and yet he was consistently unavailable. It defies belief that the applicant was genuinely unable,

for good-faith reasons, to meet with his own employer even once between September 2007 and April 2009. He provided no evidence to show that he was entitled to unlimited days of unpaid sick leave. The Board's conclusion that the employer was entitled to seek more information was clearly reasonable.

E. *Did the Board breach procedural fairness in not allowing a cross-examination of Mr McReavy as to the source of the information that the applicant had been working a second job since December 2003?*

[52] The applicant argues that his right to know the case against him and be heard was breached when the Board refused to allow cross-examination as to the source of the information that he was working a second job since December 2003. The principles of natural justice require an arbitrator to admit all relevant evidence (*General Electric Canada v Communications, Energy and Paperworkers of Canada, Local 544*, 2007 CanLII 408).

[53] The Board did not rely on the allegations that the applicant was working a second job in determining that it was reasonable for the employer to request additional justification for sick leave. It relied on the length of the absences, the inadequacy of the medical notes, and the contradictory information from the two health assessments. Chief Justice Lamer, writing for the majority, stated in *Université du Québec à Trois-Rivières v Larocque*, [1993] 1 SCR 471 at para 46 that "[…] I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice." by a grievance arbitrator.

[54] I find that the Board decided correctly that it was under no obligation to admit this evidence. The disciplinary actions were taken as a consequence of insubordination in the form

of refusing to substantiate absenteeism, and it was irrelevant whether the employer was credible in saying that an informant existed and whether the applicant was truly disabled. Mr Halfacree could easily have prevented the disciplinary actions from ever being necessary simply by providing some further documentation of his medical situation which would have allowed the employer to understand and accommodate any problems. Instead he continued to be absent for excessive periods and uncooperative.

[55] In light of the above findings, the application is denied on all counts.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is denied

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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