Federal Court  Cour fédérale

Date: 20150519

Docket: T-1928-14

Citation: 2015 FC 644

Ottawa, Ontario, May 19, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

TOBY-LEE SAUNDERS

Applicant

and

ATTORNEY GENERAL OF CANADA and PUBLIC SERVICE COMMISSION

Respondents

JUDGMENT AND REASONS

[1] The applicant, Toby-Lee Saunders, seeks judicial review of a decision of the Public Service Staffing Tribunal (PSST) which dismissed her complaint in which she alleged that her selection for lay-off from employment with the Department of National Defence (DND) was tainted by discrimination.

[2] The applicant occupied a Dental Care Program Clerk position when DND decided that two such positions would be reduced to one. Accordingly, a process for the selection of employees for retention or lay-off (SERLO) was conducted in which the applicant and one other employee sought to be retained. The SERLO process involved the assessment, for each employee, of a cover letter, a resume, two references, and an interview.

[3] Following the SERLO process, the applicant was advised that she had been selected for lay-off. She complained to the PSST on a number of grounds, many of which are not challenged in the present application for judicial review. What remains relevant is the applicant's assertion that the SERLO process was tainted by consideration of certain negative comments in a reference provided by her supervisor, Master Warrant Officer Anna Aldrich (MWO Aldrich). The applicant argues that those comments were coloured by a strained relationship that existed between her and MWO Aldrich following the applicant's efforts to have her disabilities accommodated, and allegations by the applicant that MWO Aldrich had resisted the implementation of certain recommended accommodations, including the use of Voice Recognition Technology (VRT) to address the applicant's keyboarding limitations.

[4] The PSST addressed this aspect of the applicant's complaint in the following two paragraphs of its decision:

> 76. The complainant contends that MWO Aldrich's negative comments in her reference, such as the complainant being argumentative, could be due to the fact that she had complained several times about her VRT, mainly regarding the need to update it.
>
> 77. There is no evidence, however, that MWO Aldrich was disturbed or annoyed by the complainant's requests or complaints

> regarding her VRT, nor any other evidence that would in any way support the complainant's assertion.

[5] The applicant challenges the PSST's finding on this issue on the basis that the tribunal failed to conduct an initial analysis of whether the applicant had established a *prima facie* (first sight) case of discrimination (assuming that the evidence on point were believed), which analysis should have been followed (if a *prima facie* case had been found) by a shifted onus on the respondent to explain its actions: *Ont. Human Rights Comm. v Simpson-Sears*, [1985] 2 SCR 536 at para 28 (*Simpson-Sears*); *Lincoln v Bay Ferries Ltd.*, 2004 FCA 204 at para 17.

[6] The applicant also asserts that there was ample evidence of friction between her and MWO Aldrich that would establish a *prima facie* case of discrimination. The applicant argues that discrimination is often covert and it may be impractical for a party alleging discrimination to prove it through direct evidence: *Basi v Canadian National Railway Company*, [1988] CHRD No 2 at page 9. The applicant argues that a tribunal therefore errs when it looks only for such direct evidence. The applicant also argues that the discrimination in question need not be the sole influence on the impugned decision. It is sufficient that the discrimination be contributory to the decision: *Sinclair v London (City)*, 2008 HRTO 48 at para 53; *Besner v Canada (Deputy Minister of Human Resources and Skills Development)*, 2014 PSST 2 at para 17 (*Besner*).

[7] In support of her argument of discrimination, the applicant refers to her two references in the SERLO process (one from MWO Aldrich and the other from a previous supervisor), and notes the important differences between the two. Specifically, the applicant notes that the comments of the previous supervisor were almost uniformly positive, whereas each positive

comment by MWO Aldrich was countered by a negative comment. The applicant urges me to conclude that this is evidence of at least a *prima facie* case that MWO Aldrich's comments were the result of discrimination.

[8] The parties are agreed that the applicable standard of review is reasonableness. They appear to disagree only in the amount of deference that should be shown to the PSST's decision. In my view, it is not necessary that I decide on the amount of deference that should be shown to the PSST's decision. Even applying only a limited amount of deference, I am not inclined to interfere with the PSST's conclusion that there is no evidence that supports the allegation that MWO Aldrich's negative comments about the applicant were even partially the result of discrimination.

[9] The applicant focuses on the PSST's statement in paragraph 77 about the absence of evidence that "MWO Aldrich was disturbed or annoyed", and argues that this is the wrong test. However, that same paragraph goes on to note the absence of "any other evidence that would in any way support the complainant's assertion."

[10] It is important to bear in mind that the applicant's assertion in question is not that there had been friction between the applicant and MWO Aldrich, nor even that MWO Aldrich was disturbed or annoyed with the applicant, but rather that MWO Aldrich's negative comments about the applicant were the result, at least in part, of discrimination. The evidence cited by the applicant does not go to this point.

[11] I accept that the Court should be considerate of the fact that evidence of discrimination is not always direct. I also accept that it is not necessary to establish any intent to discriminate: *Simpson-Sears* at para 14. However, I do not accept that the evidence cited by the applicant in this case must necessarily lead a tribunal to conclude that a *prima facie* case of discrimination has been established. The PSST's conclusion that there was no evidence in support of the applicant's assertion was reasonable. Moreover, I conclude that the PSST implicitly concluded that a *prima facie* case of discrimination has not been established.

[12] In my view, the decision of the Federal Court of Appeal in *Turner v Canada (Attorney General)*, 2012 FCA 159, is distinguishable on this basis. There, the tribunal did not determine whether a *prima facie* case of discrimination was established. Instead, it simply assumed that a *prima facie* case was established, and continued its analysis accordingly. The Court criticized this approach because several factual findings on key issues were missing. In the present case, there was an implicit finding that no *prima facie* case of discrimination was established. Therefore, no further analysis was called for.

[13] The *Besner* decision, which also concerned allegations of discrimination in the context of a SERLO process, is distinguishable on its facts. There, the complainant was able to establish a *prima facie* case of discrimination by showing that her disabilities had given rise to the issues that were the subject of negative comments which then were relied on to decide that she would be laid off. The applicant in the present case has not succeeded in establishing that link. The negative comments made by MWO Aldrich are unrelated to the applicant's disabilities.

JUDGMENT

THIS COURT'S JUDGMENT is that the present application for judicial review is dismissed with costs.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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