Federal Court Cour fédérale

Date: 20190730

Docket: T-1376-17

Citation: 2019 FC 1022

Ottawa, Ontario, July 30th, 2019

PRESENT: THE CHIEF JUSTICE

BETWEEN:

VIOREL ROSIANU

Applicant

and

WESTERN LOGISTICS INC.

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mr. Rosianu is a truck driver who used to work for Western Logistics Inc. [**WL**].

[2] He was terminated by WL after allegedly driving in an unsafe manner with two flat tires, when road conditions included snow and ice. In its letter of termination, WL stated that it had previously cautioned Mr. Rosianu on several occasions about safety concerns, excessive speeds

and the need to adhere to its Operating and Safety Policies. The letter concluded by stating that WL could no longer tolerate such behaviour and that, “in the interests of public safety,” WL had to relieve him of his responsibilities with the company.

[3] However, Mr. Rosianu believes that the true reason for his termination by WL is that he had a disability that WL was not prepared to accommodate. In particular, he had two prior hernia operations that precluded him from lifting objects weighing in excess of approximately 23 kilograms.

[4] Accordingly, he filed a complaint with the Canadian Human Rights Commission [the **CHRC**]. Ultimately, the CHRC concluded that further inquiry was not warranted into the complaint, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act,* RSC 1985, c H-6 [the **Act**]. The text of that provision is provided in Appendix 1 to these reasons. Based on that conclusion, the CHRC decided not to refer the complaint to the Canadian Human Rights Tribunal [**CHRT**] for determination.

[5] In this Application, Mr. Rosianu seeks judicial review of the CHRC’s decision on two grounds. First, he alleges that his procedural fairness rights were violated by the CHRC. Second, he alleges that the CHRC’s decision was not reasonable. Consequently, he requests various types of relief, including that the CHRC’s decision be set aside.

[6] I disagree. For the reasons that follow, this Application will be dismissed.

II. **Background**

[7] Mr. Rosianu was hired by WL in January 2011.

[8] In October 2011, he had surgery to repair the second of his two hernias. Following that surgery, he submitted a medical form indicating that he could not do any heavy lifting for a particular period of time. During that additional period, he received short-term disability benefits.

[9] Approximately two years later, WL learned about the incident in which Mr. Rosianu was alleged to have driven unsafely in snow and ice conditions. A few days later, on November 25, 2013, he was given his letter of termination.

[10] In March 2014, an inspector with Employment and Social Development Canada [**ESDC**] concluded that WL had just cause to dismiss Mr. Rosianu under the *Canada Labour Code*, RSC 1985, c L-2 [***Canada Labour Code***]. That decision was subsequently confirmed by a Referee appointed by the Minister of Labour. Among other things, the Referee found that there was "sufficient evidence that the Appellant engaged in unsafe behaviour on November 20, 2013 that warranted immediate dismissal."

[11] On November 12, 2014, Mr. Rosianu filed his complaint under section 40 of the Act. In the complaint, Mr. Rosianu alleged that he had been abused, harassed and discriminated against by his former supervisor at WL, Mr. Ryan Decker, in various ways for a period of close to two years.

[12] With respect to the alleged discrimination, Mr. Rosianu stated that following his surgery in October 2011, he advised Mr. Decker that he was not fit to unload trailers. He alleged that despite that advice, Mr. Decker refused to accommodate his disability, continued to "force" him to do such work, and tried to force him to quit his employment at WL. He further alleged that he advised several other persons in senior positions at WL regarding his disability.

[13] With respect to the incident that triggered his termination, Mr. Rosianu explained that he had intended to fix the flat "tire" upon arriving at his destination.

III. <u>**The Decision Under Review**</u>

[14] The CRHC's decision letter simply informed Mr. Rosianu of its decision to "dismiss the complaint because having regard to all the circumstances of the complaint, further inquiry is not warranted."

[15] In the absence of stated reasons for the CHRC's decision, the report prepared by the CHRC investigator [the **Investigator**] who recommended dismissal of the complaint can be considered to constitute the CRHC's reasons [the **Decision**]: *Phipps v Canada Post Corporation*, 2016 FCA 117, at para 6; *Sketchley v Canada (Attorney General)*, 2005 FCA 404, at para 37.

[16] The Decision began by noting that the CHRC does not determine whether discrimination has actually occurred. That is a task performed by the CHRT. The CHRC simply determines whether a complaint requires further inquiry by the CHRT.

[17] After noting that Mr. Rosianu's allegations regarding abuse and harassment did not appear to be linked to his disability, the Investigator stated that those allegations would not be further investigated. It appears to be common ground between the parties that, in the absence of such a link, those allegations are not within the CRHC's jurisdiction. Accordingly, they will not be further addressed in these reasons for judgment.

[18] After reviewing the evidence, the Investigator noted that Mr. Rosianu had declined to be interviewed and therefore could not be questioned about his allegations. She added that no evidence had been provided either to support the claim that Mr. Rosianu had been terminated due to his disability, or to indicate that he had any ongoing accommodation needs related to the effects of his surgery or any disability, following his return to work in November 2011.

[19] Accordingly, the Investigator concluded that Mr. Rosianu had not been "treated in an adverse differential manner on the basis of a disability," and had not been terminated on that ground. In reaching that conclusion, the Investigator noted that an ESDC inspector had concluded that he had been dismissed for just cause under the *Canada Labour Code*.

IV. **Issues**

[20] The issues that Mr. Rosianu has raised in this application are appropriately restated as follows:

i. Were his procedural fairness rights violated by the manner in which the Decision was made?

ii. Was it unreasonable for the CHRC to conclude that Mr. Rosianu had not been treated adversely due to his disability and that he had not been terminated on that ground?

V. **Standard of Review**

[21] With respect to the first issue raised by Mr. Rosianu, the Supreme Court of Canada has observed that "procedural issues […] are to be determined by a court on the basis of a correctness standard of review": *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 43. More recently, the Federal Court of Appeal has characterized the meaning of the term "correctness" in the context of procedural fairness in terms of "whether the procedure was fair having regard to all of the circumstances": (*Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69, at paras 35 and 54).

[22] The second issue that Mr. Rosianu has raised, concerning the ultimate conclusions reached in the Decision, is reviewable on a standard of reasonableness: *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, at para 17 [***Halifax***].

[23] In assessing whether a decision is reasonable, the focus of the Court is generally upon whether the decision is appropriately intelligible, transparent and justified. In this regard, the Court's task will be to assess whether it is able to understand why the decision was made and to ascertain whether the decision falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir v New Brunswick,* 2008 SCC 9, at para 47 [***Dunsmuir***]; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador*

(Treasury Board), 2011 SCC 62, at para 16. A decision that is "rationally supported" will generally fall within this range: *Halifax,* above, at para 47.

[24] In the specific context of this case, the Court is required to bear in mind that the Decision resulted in a termination of Mr. Rosianu's complaint, and therefore the range of possible, acceptable outcomes may be narrower than might otherwise be the case: *Attaran v Canada (Attorney General)*, 2015 FCA 37, at para 14.

VI. **Preliminary Issues**

[25] In its written submissions, WL requested that Mr. Rosianu's affidavit, sworn on June 18, 2018, be struck on the ground that it contains arguments, rather than facts, contrary to Rule 81(1) of the *Federal Courts Rules*, SOR/98-106.

[26] WL further requested that affidavits filed by Libor Kovacs (sworn on June 16, 2018) and Norm Young (sworn on June 18, 2019) be struck on the ground that they contain arguments, opinion and hearsay, rather than facts.

[27] Rule 81(1) states as follows:

Content of affidavits	Contenu
81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it,	81 (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des

may be included.	déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

[28] In judicial review proceedings, the evidentiary record before this Court ordinarily must be restricted to the evidentiary record that was before the decision-maker whose decision is the subject of review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at para 19 [***AUCC***].

[29] There are a small number of recognized exceptions to this principle, one of which is relevant in the present context. The Court may receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: *AUCC*, above, at para 20.

[30] In addition to the foregoing, evidence sought to be adduced by way of affidavit must be relevant to an issue that is properly before this Court: *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88, at para 4.

[31] Applying the principles set forth above to the three affidavits that WL has challenged, I agree that most of their contents consist of either arguments, opinion or hearsay, contrary to Rule 81. However, there are some statements that contain background information that is relevant for the task that this Court has to perform. Statements falling into the latter category contain (i) facts about why Mr. Rosianu continued to drive in winter conditions with two flat tires on November 20, 2013, and (ii) the fact that his surgeon was not consulted by the CHRC, to obtain the surgeon's opinion regarding his disability.

[32] With respect to Mr. Rosianu's affidavit, the following paragraphs or parts of paragraphs should be struck for the reasons that I have indicated below:

i. The second sentence of paragraph 3, on the ground that it consists of argument.

ii. Paragraph 4, on the ground that it is incorrect – the Court does in fact have the reasons for the Decision.

iii. Paragraphs 5, 7, 8, 9 10, 11, on the ground that they contain argument or opinion evidence, rather than facts within Mr. Rosianu's personal knowledge.

iv. The last sentence in paragraph 6, on the ground that it is opinion evidence.

v. Paragraph 13, on the ground that it simply refers to the above-mentioned affidavit of Mr. Libor Kovacs, which I have decided to strike for the reasons set forth below.

vi. Paragraphs 15, 17 and 18, on the ground that they relate to harassment allegations that are not relevant to the issues before this Court.

vii. The second sentence in paragraph 16, on the ground that it contains argument, rather than facts within Mr. Rosianu's personal knowledge.

[33] With respect to the affidavit of Mr. Kovacs, the following paragraphs or parts of paragraphs should be struck for the reasons that I have indicated below:

i. Paragraphs 4, 5, 6, 7, 8, 9 (except for the second sentence), 10, 12, 13 and 14, on the ground that they are hearsay or opinion evidence.

[34] With respect to the affidavit of Mr. Young, it should be struck in its entirety, as it relates entirely to (i) Mr. Rosianu's part-time employment with a company at which Mr. Young was the Operation Manager, and (ii) the extent to which his employment with WL interfered with his part-time work. Those issues are not relevant to the issues before this Court. Neither Mr. Rosianu nor WL has suggested that his part-time job was a factor in his termination, or connected in any way with the discriminatory treatment that he has alleged.

[35] In addition to the foregoing, I would be remiss if I omitted to address certain documents filed by WL that were not before the CHRC. Those documents, consisting of WL's progressive discipline of Mr. Rosianu, appear at pages 19-25 of WL's Motion Record. WL was unable to explain why those documents were not provided to the CHRC. Accordingly, they will be struck from the record.

VII. **Assessment**

A. *Were Mr. Rosianu's procedural fairness rights violated by the manner in which the Decision was made?*

[36] Mr. Rosianu submits that his rights to procedural fairness were violated in the course of the CHRC's investigation. Specifically, Mr. Rosianu maintains that the CHRC:

i. improperly admitted hearsay evidence;

ii. failed to permit him to be interviewed in writing, as he had requested;

iii. failed to provide him with the opportunity to identify witnesses to support his complaint;

iv. only interviewed witnesses identified by WL; and

v. failed to investigate certain evidence submitted by WL.

[37] I disagree.

[38] With respect to hearsay evidence, Mr. Rosianu appears to object to the Investigator's reference to information provided to the Investigator by WL, to the effect that a motorist reported to WL that Mr. Rosianu had driven too fast for the road conditions that existed, and had driven with two flat tires.

[39] In my view, this objection cannot be sustained. The CHRC is an administrative and screening body, with no appreciable adjudicative role: *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, at para 58 [***Cooper***]. In this capacity, it is not subject to the

same rules of evidence that apply to a court, and cannot be said to have erred when it relies on information collected in the course of an investigation: *Cooper*, above, at para 60; *Big River First Nation v Dodwell*, 2012 FC 766, at para 95.

[40] Turning to Mr. Rosianu's allegation that he was not afforded an opportunity to be interviewed in writing, the Decision states that he "declined to be interviewed despite several written and verbal requests." During the hearing of this Application, Mr. Rosianu stated that this was untrue, and that he requested an opportunity to be interviewed in writing, and then never heard back from the Investigator. In response to counsel to WL's suggestion that he is difficult to reach, Mr. Rosianu acknowledged that he typically works outside the Vancouver area five days per week and sometimes is not in an area that has cellular telephone service. Unfortunately, there is no evidence in the certified tribunal record on this issue.

[41] Nevertheless, the fact remains that Mr. Rosianu did provide submissions to the CHRC before it made its decision. Those submissions, dated May 31, 2017, are included at pages 46-48 of his Application Record and were provided in response to the Investigator's report. Indeed, he also provided other, more extensive, submissions dated July 15, 2016. Accordingly, he did in fact have an opportunity to convey his written views to the CHRC, before it made its decision, both before and after the Investigator completed her report. Therefore, he was not denied procedural fairness: *Miakanda-Batsika v Bell Canada*, 2014 FC 840, at para 24, aff'd 2016 FCA 278 [***Bell Canada***].

[42] Regarding Mr. Rosianu's assertion that he was not afforded the opportunity to identify witnesses supportive of his complaint, once again, he did avail himself of that opportunity in his above-noted submissions dated May 31, 2017, where he identified eight individuals, two of whom (Ryan Decker and Marc Fernandes) were in fact interviewed. In her Report, the Investigator explained that two of the other persons on that list, including Ms. Mary Waring, the Chief Executive Officer [**CEO**] of WL, could not be reached. However, another senior manager within WL was interviewed in her place. In addition, the CEO provided a written response, dated June 25, 2016, to questions that had been posed by the CHRC. With this in mind, I am satisfied that Mr. Rosianu's procedural fairness rights were not in fact violated in the manner that he alleges: *Bell Canada*, above.

[43] I pause to acknowledge that in submissions dated May 31, 2017 that were provided to the CHRC with respect to the Investigator's report, Mr. Rosianu confirmed that Messrs. Decker and Fernandes were appropriate individuals to have been interviewed. However, he provided a further list of individuals for the Investigator to contact. These included individuals who he believed were in a position to provide information regarding his claim that he had to physically handle heavy freight in Kelowna on one or more occasions when he arrived there after business hours. However, there is no indication in the record that this was ever drawn to WL's attention or that it was a problem for Mr. Rosianu.

[44] With respect to Mr. Rosianu's submission that the Investigator only interviewed witnesses identified by WL, I have nothing to add to what I have stated in the immediately preceding paragraph above. Mr. Rosianu's procedural fairness rights were not violated by virtue

of the fact that all of the witnesses he identified were not interviewed: *Wong v Canada (Public Works and Government Services),* 2018 FCA 101, at paras 14 and 23. Two of the persons interviewed by the Investigator were "key" and "obvious" persons to interview, because they were "directly involved with" Mr. Rosianu's work and related experiences: *Harvey v VIA Rail Canada Inc*, 2019 FC 569, at para 39.

[45] Regarding Mr. Rosianu's position that the CHRC failed to investigate certain evidence that WL had submitted, this is simply a bald assertion. Mr. Rosianu did not provide any explanation of what particular evidence ought to have been investigated, and why the failure to investigate such evidence constituted a breach of his procedural fairness rights.

B. *Was it unreasonable for the CHRC to conclude that Mr. Rosianu had not been treated adversely due to his disability and that he had not been terminated on that ground?*

[46] Mr. Rosianu submits that the Decision was unreasonable because it did not deal with the substance of his complaint, was based primarily on irrelevant factors, and was arbitrary. In addition, Mr. Rosianu maintains that it was unreasonable for the Investigator to have failed to interview any medical experts and to provide him with an opportunity to provide a medical certificate to support his complaint.

[47] I disagree.

[48] With respect to the substance of his complaint, that document stated: "Despite my warnings [Mr. Decker] continued to force me to unload trailers and not to try to accommodate

my disability." In addition, Mr. Rosianu alleged that Mr. Decker bullied him in an attempt to force him to quit, and gave him fewer hours of work, in part because of his disability.

[49] In the Decision, the Investigator explicitly addressed these allegations. More specifically, she began by noting that five WL employees, including Mr. Decker (Mr. Rosianu's supervisor) stated in writing that Mr. Rosianu was not required to load or unload trucks as part of his regular duties during the course of his employment. She then noted that Mr. Rosianu did not provide any medical certificates to support his alleged disability, apart from the form dated November 23, 2011, which stated that he should not be required to do any "heavy lifting for 4 weeks postop" and that he was "unable to perform job activities until then." The Investigator also noted that in the Position Task Description form that Mr. Rosianu signed on April 26, 2012, he did not indicate that he required any accommodation.

[50] In addition to the foregoing, the Investigator noted that Mr. Rosianu had failed to provide any evidence to support the various allegations that he made in connection with his disability. She further noted that WL had maintained that Mr. Rosianu had only been asked to physically handle freight on three occasions during his three years of employment with the company, and that on each occasion he refused the request and did not suffer any adverse consequences as a result of those refusals.

[51] Based on the foregoing, the Investigator concluded that Mr. Rosianu had not been required to load or unload trucks in the performance of his duties and that therefore no further analysis of that allegation was warranted. She later reiterated that no evidence had been provided

to indicate that (i) he had any ongoing accommodation needs related to the effects of his operation or any disability, or (ii) he had been fired due to a disability. In my view, those conclusions are not unreasonable. On the contrary, they were appropriately intelligible, transparent and justified.

[52] With respect to his termination, the Investigator noted that WL had maintained that Mr. Rosianu "was fired due to repeated unsafe driving practices, and not because of a disability." In this regard, she noted that WL had explained that prior to his termination, it had provided him with progressive disciplinary letters with respect to speed and safety concerns, and that he had allegedly failed to follow dispatch instructions on several occasions. The Investigator then addressed the event that she characterized as having triggered his termination, namely, the complaint stating that Mr. Rosianu had been driving too fast for road conditions, and with two flat tires. For greater certainty, she reiterated that WL had maintained that "ongoing performance and safety issues led it to terminate [Mr. Rosianu's] employment, and that it has no knowledge of [Mr. Rosianu's] alleged disability, nor was the alleged disability a factor in its decision to end the employment relationship." This information was all corroborated in a response to a CHRC questionnaire that was submitted by WL's CEO.

[53] Having regard to all of the foregoing, the Decision was not based primarily on irrelevant factors and it was not arbitrary, as alleged by Mr. Rosianu. Given the evidence before the Investigator, the conclusions she reached with respect to Mr. Rosianu's alleged disability and his termination fell well "within a range of possible, acceptable outcomes which are defensible in

respect of the facts and the law" : *Dunsmuir*, above, at para 47. This is so even though the Decision effectively resulted in a termination of Mr. Rosianu's complaint under the Act.

[54] It was also not unreasonable for the Investigator to have failed to interview any medical experts. Mr. Rosianu bore the burden of providing relevant evidence to support his complaint under the Act, including medical evidence. He failed to do so. Although he now maintains that this was WL's burden, he has not provided any authority or other support for that position.

[55] In any event, as discussed above, it was not unreasonable for the Investigator to conclude that Mr. Rosianu was not in fact required to load or unload trucks in the performance of his duties, and that he was not terminated because of his disability. I will simply add in passing that the record before the Investigator included a written response to a CHRC questionnaire, in which WL's CEO stated that in light of Mr. Rosianu's refusals to engage in even minor handling of freight, he was given assignments that did not require him to physically handle any product.

VIII. **Conclusion**

[56] For the reasons set forth above, the application for judicial review will be dismissed.

[57] Given the foregoing, costs will be awarded in favour of WL. Having regard to the weakness of Mr. Rosianu's case, the fact that WL's submissions were relatively straightforward and brief, and some past cost awards that have been granted by this Court in broadly similar situations, I consider that an award of $3,500 would be fair and just in the circumstances.

JUDGMENT in T-1376-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The Applicant shall pay the Respondent costs in the amount of $3,500.00.

"Paul S. Crampton"

Chief Justice

APPENDIX 1 — Relevant Legislation

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

Discriminatory Practices and General Provisions	**Actes discriminatoires et dispositions générales**
Investigation	Enquête
Report	*Rapport*
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.
[…]	[…]
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 :
[…]	[…]
(b) shall dismiss the complaint to which the report relates if it is satisfied	b) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	(i) soit que, compte tenu des circonstances relatives à la plainte, l’examen de celle-ci n’est pas justifié,

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1376-17
STYLE OF CAUSE:	VIOREL ROSIANU v WESTERN LOGISTICS INC.
PLACE OF HEARING:	VANCOUVER, BRITISH-COLUMBIA
DATE OF HEARING:	JUNE 12, 2019
JUDGMENT AND REASONS:	CRAMPTON C.J.
DATED:	JULY 30, 2019

APPEARANCES:

Viorel Rosianu	SELF-REPRESENTED APPLICANT
Hartley E. Cramer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Viorel Rosianu	SELF-REPRESENTED APPLICANT
Harley E. Cramer Personal Law Corporation Vancouver, BC	FOR THE RESPONDENT