Federal Court Cour fédérale

Date: 20240705

Docket: T-947-23

Citation: 2024 FC 1057

Ottawa, Ontario, July 5, 2024

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

HARVEY ADAMS

Applicant

and

CANADA (MINISTER OF TRANSPORT) AND ATTORNEY GENERAL OF CANADA

Respondents

REASONS AND JUDGMENT

I. INTRODUCTION

[1] Captain Harvey Adams (the "Applicant") seeks judicial review, pursuant to section 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of the decision of an appeal panel of the Transportation Appeal Tribunal of Canada (the "TATC" or "Tribunal"), dismissing an appeal from the decision of a single member of the Tribunal.

[2] The Minister of Transport (the “Minister”) is responsible for the issuance of certificates, including certificates subject to the *Canada Shipping Act, 2001*, S.C. 2001, c. 26 (the “Act”).

[3] Pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106, the Attorney General of Canada is the Respondent (the “Respondent”) in this proceeding.

II. BACKGROUND

[4] The following facts and details are taken from the Certified Tribunal Record (the “CTR”) and the affidavits of Ms. S. Leanne Flett and Ms. Annette Hartlen. The exhibits attached to their affidavits are part of the evidence upon this application for judicial review.

[5] Ms. Flett is a solicitor. She attached to her first affidavit sworn on June 15, 2023, as an exhibit, a letter dated March 6, 2020, sent from an employee of the Canadian Human Rights Commission (the “CHRC”) to the Applicant.

[6] Ms. Flett also swore a second affidavit on July 13, 2023, to which she attached, as exhibits, documents that she deposes were part of the record before the Tribunal. Her affidavits were filed in support of the Applicant’s application.

[7] Ms. Hartlen is a legal assistant at the Atlantic Regional Office of the Department of Justice. She attached to her affidavit, as exhibits, the “review hearing record” and the “Record of Decision”. Her affidavit was filed by the Respondent.

[8] The Applicant is a Master Mariner, holding a Master Mariner's Certificate ("MMC" or "Certificate") issued by the Minister pursuant to the Act. He has held such a certificate since 1975.

[9] In 2019, the Applicant applied to renew his MMC.

[10] On September 16, 2019, the Applicant underwent a Marine Medical Examination by Dr. Peter MacAuly in order to renew his MMC. Dr. MacAuly requested a functional scan to complete his assessment.

[11] On September 23, 2019, Ms. Jaclyn MacLeod conducted the functional scan. Ms. MacLeod raised concerns regarding the Applicant's cognitive functions.

[12] On September 30, 2019, Dr. MacAuly withheld a provisional certificate due to concerns about the Applicant's cognitive functions.

[13] On October 7, 2019, Dr. MacAuly informed the Applicant that he was assessed as "Unfit. Temporarily?" and that he would likely require further assessment of his cognitive abilities to receive a MMC.

[14] By letter dated December 10, 2019, Transport Canada requested a list of the Applicant's current prescriptions and an evaluation of his cognitive functioning by a neuropsychologist in order to assess his fitness to hold a MMC.

[15] On January 14, 2020, the Applicant filed a complaint with the CHRC alleging he was subject to "old age discrimination" during his Marine Medical Examination.

[16] By letter mailed on February 28, 2020, Transport Canada informed the Applicant he would be declared unfit to hold a MMC unless he provided the requested neuropsychological assessment. As well, Transport Canada advised that the letter constituted a refusal by the Minister to issue a Canadian maritime document under paragraph 16(4)(a) of the Act.

[17] On May 21, 2020, the Applicant requested a review of the Minister's decision by a single member of the TATC (the "Member").

[18] On June 17, 2020, the CHCR decided not to deal with the Applicant's complaint pursuant to paragraph 41(1)(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 because it could be "more appropriately dealt with" by the TATC. The decision provided that the Applicant's file was closed, but that he could return to the CHCR at the conclusion of the TATC proceedings if he "believed" that his human rights complaint was not adequately addressed.

[19] The hearing before the Member began on February 24, 2021. The hearing was adjourned when the Applicant entered into evidence a neuropsychological report authored by Dr. Robert McInerney. Dr. McInerney concluded that "there is a high probability that [the Applicant] should be fit for duty as long as he functions within familiar/routine roles as described".

[20] By letter dated April 29, 2021, Transport Canada reaffirmed the Minister's refusal to issue a MMC to the Applicant based on a review of Dr. McInerney's report, citing the need for a Master Mariner to respond to emergency situations.

[21] On April 30, 2021, the hearing before the Member reconvened.

[22] By a decision dated November 19, 2021, the Member confirmed the Minister's decision to refuse to issue the Applicant a MMC.

[23] On December 9, 2021, the Applicant appealed the Member's decision to a three-member panel of the TATC (the "Panel").

[24] By a decision dated April 11, 2023, the Panel upheld the Member's decision.

[25] On May 3, 2023, the Applicant filed his notice of application for judicial review of the Panel's decision. In his application, he seeks the following relief:

> A. A declaration that the Tribunal erred in law when it failed to apply the *Canadian Human Rights Act* and consider the Minister of Transport's duty to accommodate to the point of undue hardship under subsection 15(2);

[26] An order that the Minister of Transport issue a Master Mariner's Certificate to the Applicant;

> B. In the alternative, an order setting aside the Tribunal's April 11, 2023 Decision and referring the matter back to the Tribunal for a determination in accordance with the directions of this Honourable Court;
>
> C. An order awarding costs to the Applicant for this application; and

D. Such further and other relief as may be requested by the Applicant and considered appropriate by this Honourable Court.

III. SUBMISSIONS

[27] The Applicant argues that the decision is unreasonable.

[28] For his part, the Respondent first submits that the Court should exercise its discretion not to hear this application, on the grounds that an adequate alternative remedy is available to the Applicant, that is pursuit of a complaint before the CHRC.

[29] Otherwise, the Respondent argues that the decision meets the applicable standard of review, that is of reasonableness. He submits that if the Member erred in refusing to consider the Applicant’s discrimination claim, that error had no material effect since the Applicant did not meet the medical standards to receive an MMC.

IV. DISCUSSION AND DISPOSITION

[30] I will first address the objection raised by the Respondent.

[31] I see no merit in this objection.

[32] The Applicant filed a complaint with the CHRC on January 14, 2020. By letter dated June 17, 2020, the Commission advised him that the TATC had jurisdiction to entertain that complaint, pursuant to paragraph 41(1)(b) of the *Canadian Human Rights Act*, *supra*.

[33] I turn now to the substance of this matter.

[34] Following the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653 (S.C.C.), the decision is reviewable on the standard of reasonableness.

[35] In considering reasonableness, the Court is to ask if the decision under review "bears the hallmarks of reasonableness-justification, transparency and intelligibility-and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision"; see *Vavilov*, *supra* at paragraph 99.

[36] Judicial precedents on similar issues "act as a constraint on what the decision maker can reasonably decide"; *Vavilov*, *supra* at paragraph 112.

[37] I agree with the arguments of the Applicant. The decision fails to take into account the relevant legal "constraints" that flow from the jurisprudence.

[38] The equality rights guaranteed under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "Charter") refer to age:

Equality before and under law and equal protection and benefit of law	**Égalité devant la loi, égalité de bénéfice et protection égale de la loi**
15 (1) Every individual is equal before and under the law and has the right to the	**15 (1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont

equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Paragraph 278(5)(c) of the *Marine Personnel Regulations*, SOR/2007-115 (the "Regulations") provides that issues of human rights are to be considered by the Minister:

(5) The Minister's decision with regard to any medical certificate shall be based on the following criteria:	**(5)** Le ministre fonde sa décision relative à tout certificat médical sur les critères suivants :
…	…
(c) any relevant consideration linked to human rights as set out in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*.	**c)** toute considération pertinente se rattachant aux droits de la personne, tels qu'ils sont énoncés dans la *Charte canadienne des droits et libertés* et dans la *Déclaration canadienne des droits.*

[39] The Regulations, cited above, specifically refer to the Charter. Several decisions, including *Walsh v. Canada (Attorney General)* (2015), 476 F.T.R. 142 (F.C.) have recognized the connection between the decision whether to issue a MMC and the provisions of the *Canadian Human Rights Act*, *supra*; see also *Houle v. Canada (Attorney General)*, 2020 FC 578 and *Walsh v. Canada (Attorney General)*, 2017 FC 451.

[40] The Applicant advanced a complaint of discrimination on the basis of age to the CHRC. Age is a prohibited ground of discrimination under the *Canadian Human Rights Act*, *supra*:

Prohibited grounds of discrimination	**Motifs de distinction illicite 3 (1)**
3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.

[41] It follows that the Applicant's allegation of discrimination on the basis of age was a mandatory consideration. The jurisprudence relating to such a claim is a "constraint" bearing on the decision.

[42] The Panel ignored the decision of the Federal Court in *Walsh*, *supra*.

[43] In that decision, Justice Rennie set out the framework for dealing with a claim of discrimination, following the guidance of the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (S.C.C.).

[44] In *Walsh*, *supra*, Justice Rennie said the following at paragraph 23:

> [23] […] In human rights complaints, the onus is first on the complainant to establish a *prima facie* case of discrimination: *Ontario (Human Rights Commission) v Simpson Sears Ltd.*, [1985] 2 SCR 536 at 558. After a *prima facie* case of discrimination is made out under section 5 of the Act, the burden then shifts to the

> respondent to establish on a balance of probabilities a BFJ for the discriminatory practice. The respondent must show that he or she has taken reasonable steps to accommodate the individual as are open to him or her without undue hardship, considering health, safety and cost.

[45] In the present case, the Applicant raised a discrimination complaint before the Member, but it was not addressed. I refer to paragraph 5 of the Member's decision, as follows:

> [5] During the hearing, the applicant's complaint to the CHRC was discussed in general terms, and it became evident that Mr. Adams felt that he had been subjected to discrimination based upon his age when he had undergone his marine medical examination. The CHRC had apparently reviewed his complaint but had referred him back to the Tribunal because, according to the CHRC, the refusal to issue the MMC in question could be more appropriately dealt with through the Tribunal review process. Mr. Adams did not pursue the issue at the hearing, and as such it was not directly addressed by the member, as TC refusal to issue the MMC was based upon the lack of provision of a neuropsychological report requested by TC.

[46] The Panel acknowledged the Applicant's discrimination complaint and said the following, in paragraphs 28 to 30, and 34:

> [28] At the hearing, the review member explained more than once that the issue to be determined by the Tribunal was whether or not TC s decision to declare Captain Adams unfit to hold an MMC should be maintained and that, the issue of age discrimination and human rights were not within the purview of the Tribunal. He clearly stated that he would not consider the alleged age discrimination.
>
> [29] It is apparent from the recording of the hearing that the claim of discrimination was considered by the review member to be outside of his jurisdiction. Whether the review member committed an error when he concluded that human rights issues are not within the Tribunal's mandate pertains to an issue of jurisdiction, which, as a question of law, requires the panel to apply the standard of correctness.

> [30] However, the panel determines that there is no need to make a finding on whether the review member was correct regarding the Tribunal's jurisdiction with respect to human rights and specifically age discrimination, since it would be immaterial to the determination rendered by the review member which the panel finds to be reasonable.
>
> […]
>
> [34] Therefore, even if the panel had concluded that it was an error for the review member not to address the complaint of discrimination, it would not have changed the outcome of the review determination. The review member's determination was reasonable in confirming the Minister's decision based on the medical evidence and the requirements for fitness (paras. 17, 18 and 19).

[47] The Panel perpetuated the error made by the Member. It did not make a finding as to whether the Applicant had established discrimination, on a prohibited ground, in this case, age. In my opinion, this was unreasonable.

[48] The Panel went on to find that a conclusion on that point was unnecessary on the basis that "it would be immaterial to the determination rendered by the review member which the panel finds to be reasonable".

[49] In my view, this conclusion of the Panel is unreasonable. It shows that the Panel, as well as the Member, failed to follow the test set out in *Walsh*, *supra*, among other decisions, for responding to an allegation of discrimination.

[50] Further, the Panel compounded its unreasonable analysis by concluding that the failure to address the discrimination complaint "would not have changed the outcome of the review determination".

[51] In my opinion, with this conclusion, the Panel focused on the merits of the decision refusing the issuance of a MMC to the Applicant without in any way acknowledging the imperatives of the Regulations, to address the human rights complaint.

[52] The focus of the present application is not about the Minister's denial of a MMC. It is about the failure of the Panel to deal with the discrimination complaint advanced by the Applicant.

[53] The Applicant bore the burden of showing a *prima facie* act of discrimination. He asserted such discrimination but neither the Member nor the Panel dealt with it. This failure may have impacted the decision about non-issuance of the MMC to the Applicant.

[54] Had the first part of the discrimination test been addressed, the burden would then have shifted to the Minister to show that the alleged disability, on the basis of age, could not be accommodated.

[55] The failure to fully assess the discrimination complaint makes the decision unreasonable.

V. REMEDY

[56] As noted above, the Applicant identified several forms of relief should he succeed upon his application for judicial review, that is a declaration that the Tribunal erred in law and an Order that the Minister issue him a MMC. In the alternative, he asked that the decision be set aside and the matter be remitted to the Tribunal for redetermination in accordance with the directions of this Court.

[57] I note that any remedy upon an application for judicial review lies within the discretion of the Court, pursuant to subsection 18.1(3) of the *Federal Courts Act*, *supra*.

[58] Declaratory relief, as a remedy, is available pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act*, *supra*. Such relief allows the Court to grant a declaratory judgment, that is a judicial statement confirming or denying a legal right.

[59] The Court does not have a general authority to direct the Minister to act in a certain way. There are exceptions, as illustrated by the decision in *Canada (Citizenship and Immigration) v. Tennant* (2019), 436 D.L.R. (4th) 155 (F.C.A.).

[60] In *Tennant*, *supra*, at paragraph 72, the Federal Court of Appeal described the limited circumstances where the Court can grant a substituted decision, as follows:

> [72] […] It is now well established that this form of relief, a combination of *certiorari* and *mandamus*, is available where on the facts and the law there is only one lawful response, or one reasonable conclusion, open to the administrative decision maker, so that no useful purpose would be served if the decision maker were to redetermine the matter. [citations omitted].

[61] The “usual” remedy upon an application for judicial review is to set aside the decision under review and remit it to a different decision maker, for redetermination. In the circumstances prevailing in this case, that is the appropriate remedy.

VI. CONCLUSION

[62] In the result, the application for judicial review will be granted, the decision set aside and the matter remitted to a different member for redetermination. The Applicant will have his costs.

JUDGMENT IN T-947-23

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision is set aside and the matter remitted to a different member for redetermination.

The Applicant shall have his costs.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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