

Date: 20070907

Docket: T-1687-06

Citation: 2007 FC 887

Ottawa, Ontario, September 7, 2007

PRESENT: THE HONOURABLE MADAM JUSTICE DAWSON

BETWEEN:

DUANE DAVID

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Duane David is a Muslim inmate who is incarcerated at the Joyceville Institution in Kingston, Ontario. He complained to the Canadian Human Rights Commission (Commission) that the Correctional Service of Canada (CSC) had implemented a policy that "resulted in the deprivation of my right to equal treatment based on my religion".

[2] The specifics of Mr. David's complaint were that on every Wednesday the Joyceville Institution provides a breakfast to inmates that consists of three pieces of bacon, two eggs, three

slices of toast, jam, ketchup, milk, coffee, juice and cereal. Muslim inmates who follow a halal diet receive all of these items, except the bacon. Mr. David had requested that he be provided with a substitute for the three pieces of bacon, but the request was refused by the institution.

[3] The refusal to provide a substitute or alternative to bacon was the subject of an internal grievance brought by Mr. David within the Joyceville Institution. The grievance was denied at all levels.

[4] Upon completion of the grievance procedure, the Commission proceeded to investigate Mr. David's complaint. An investigator prepared a report that, pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, recommended to the Commission that it take no further proceedings because "the allegations of discrimination have substantially been redressed by the other procedure". The Commission accepted that recommendation, as evidenced by a letter from the Commission's Secretary which repeated, verbatim, the recommendation of the investigator. Mr. David brings this application for judicial review of that decision.

THE INVESTIGATOR'S REPORT

[5] When the Commission adopts an investigator's recommendation but provides no reasons, the investigator's report constitutes the Commission's reasons. See: *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 at paragraph 37. I turn, therefore, to the investigator's report.

[6] In order to determine whether it was in the public interest to proceed with the complaint, the investigator considered the following:

- whether there were any human rights issues that were not dealt with through the grievance process;
- whether the remedy obtained through the grievance process was sufficient; and
- the positions of the parties as to why the investigation should or should not proceed.

[7] With respect to the first factor, the investigator noted that there was one outstanding human rights issue, namely whether any obligation to provide a substitute for bacon on Wednesday mornings existed. As to the second factor, the investigator correctly observed that no remedy was obtained through the grievance procedure because the grievance was denied. Finally, with respect to the positions of the parties, the investigator set out the position of the respondent CSC, as follows:

13. The respondent disagrees that there is any need to investigate this matter further. The respondent's position remains that measures for accommodating differing dietary needs, including the *halal* diet offered to inmates at Joyceville Institution, are based on guidelines developed by the Canadian Human Rights Commission. The respondent says the *halal* menu is comparable in variety and nutritional value to the regular menu, and in some instances more nutritious than the regular menu. The respondent says it provides a meat substitute on Wednesday mornings to Muslim inmates who adhere to a *halal* diet. The respondent agrees that not offering a substitute for meat to those who adhere to a *halal* diet would be discriminatory; the respondent asserts, however, that there is no requirement to provide an offender with a meat product as a specific replacement for bacon. The respondent asserts that menu planning in its institutions is based on *Canada's Food Guide to Healthy Eating*, and that there is no specific requirement to replace bacon in the regular meals on Wednesday mornings. The respondent maintains that the nutritional value of bacon is negligible, and that as the *halal* diet is comparable in variety and nutritional value to the regular diet, the respondent is fulfilling its duty to accommodate religious difference. The *halal* diet guidelines specify that on days where a meat product is served to inmates following the regular menu, those inmates following the *halal* diet will receive a *halal* meat product, except where the meat product on the regular menu is bacon. On those occasions, inmates who do not eat bacon are provided with two eggs, ketchup, milk, coffee, juice, cereal, three slices of toast and jam.

[8] Mr. David's position was set out in the following terms:

14. The complainant maintains that not being given his choice of meat product is unfair, inequitable and discriminatory.

[9] The investigator then provided the following analysis:

17. The issue in the present complaint is whether the provision of another alternative to a meat product that meets the nutritional standards accorded to all inmates, and which is consistent with the restrictions placed upon the complainant's

diet by his religious convictions, but which does not accord with the complainant's personal preference, constitutes a failure to accommodate the complainant's religious convictions. Given that there appears to be an alternative source of protein offered to Muslim inmates who do not eat bacon, and that the variety and value of meals offered to Muslim inmates appears comparable to that of the meals offered to non-Muslim inmates, the evidence does not support that the complainant's preference for *halal* sausage is the best way to accommodate his religious requirements. Furthermore, while the complainant later altered his request to include another substitute for a meat product, the choices he suggests as alternatives for bacon or his original request for *halal* sausage do not appear to be such as may be required by his religious convictions, but are again his personal preference. The evidence does not support that the substitutions offered by the respondent are inappropriate in all the circumstances.

THE ISSUES RAISED BY MR. DAVID

[10] Mr. David raises three issues. He says that the Commission:

1. erred by finding that his human rights complaint had been substantially redressed through the grievance process;
2. failed to give adequate reasons for its finding that his complaint was substantially redressed; and
3. failed to conduct a thorough and independent investigation.

STANDARD OF REVIEW

[11] In order to determine the appropriate standard of review, the Court must first identify the question or questions in dispute.

[12] The first issue is whether the Commission erred in finding that Mr. David's complaint had been substantially redressed. This issue is very similar to one considered by this Court in *Loyer v. Air Canada*, 2006 FC 1172. In that case, the question was whether human rights issues had been dealt with through an arbitration process. After conducting a pragmatic and functional analysis, my colleague Madam Justice Mactavish concluded that the standard of review to be applied was reasonableness. I agree with, and adopt, her analysis.

[13] No pragmatic and functional analysis is required in respect of the second and third issues. Both issues raise questions of procedural fairness, which are to be reviewed as questions of law.

DISCUSSION

(i) Did the Commission reasonably conclude that Mr. David's human rights complaint had been substantially redressed?

[14] Missing from the investigator's report was the following:

1. CSC had, on the basis of advice received from the Commission, established Religious Diets-General Guidelines that required that a “religious diet must compare

in quality and variety to meals served to the general population, and be served according to a meal plan that is balanced and nutritionally adequate [...]”.

2. The Project Officer, Human Rights Division, at CSC National Headquarters had advised in the course of the grievance process that:

[...] a meat substitute on Wednesday mornings should be provided to offenders who adhere to the halal diet. If the general population receives bacon on Wednesday mornings and offenders who adhere to the halal diet are not offered any meat substitutes, this is discrimination. Muslims at Joyceville who adhere to the Halal diet and do not receive a meat substitute on Wednesday mornings are being discriminated against because there [*sic*] diets must be comparable in quality and variety to meals served to the general population according to CHRC.

3. The Chief of Food Services at the Joyceville Institution had advised in the course of the grievance process that a bacon substitute was not provided on Wednesday mornings because it was not within his budget resources.

4. The Director of Food Services had provided advice in the grievance process that “I do agree with the fact that if from a human rights perspective, this is a discriminatory practice, then the practices within CSC will need to change and we will need to either offer an alternative to bacon for the Halal diet or withdraw the provision of bacon entirely for the general population”.

5. The Wednesday halal breakfast was nutritionally equivalent to that served to the general population. While, in the words of the Religious Diets-General Guidelines, that could well mean that the meals compare in terms of quality, the investigator did not explain how a meal that is a subset of another properly compares in terms of variety to the full meal.

[15] These are, in my view, significant omissions that, if not rectified, would likely have vitiated the decision. See: *Canadian Broadcasting Corporation v. Canada (Human Rights Commission)*, [1993] F.C.J. No. 1334 (T.D.). However, Mr. David was given the investigator's report and made a response to the Commission that substantially rectified the omissions. This Court has held that only where complainants are unable to rectify omissions in an investigator's report do such omissions warrant judicial review. See: *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 at paragraph 57 (T.D.).

[16] However, the inquiry does not end there. For the reasons of the Commission to withstand review on the standard of reasonableness, they must stand up to a somewhat probing examination. See: *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paragraph 56. The question to be asked is whether the reasons, when taken as a

whole, support the decision. See: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paragraph 47.

[17] The matters raised by Mr. David in response to the investigator's report were material to the Commission's conclusion that the allegations of discrimination had been substantially redressed by the grievance procedure. Indeed, they pointed to the opposite conclusion. In my view, in order for the Commission's reasons to withstand a somewhat probing examination, they would have had to address the material information that pointed to the conclusion that the allegations of discrimination had not been addressed. Given the Commission's failure to do so, I find that its reasons, when taken as a whole, do not withstand a somewhat probing examination. They do not provide a tenable explanation for the Commission's ultimate conclusion. The application for judicial review is therefore allowed, and it is not necessary to consider the other issues raised by Mr. David.

[18] There is no reason why costs should not follow the event. Counsel for Mr. David submitted that costs in the range of \$2,000.00 to \$2,500.00 would be reasonable. Counsel for the Attorney General submitted that reasonable costs would be in the range of \$1,500.00 to \$2,000.00. On the base of these submissions, costs are fixed in the amount of \$2,000.00 inclusive of disbursements and GST.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the decision of the Commission dated April 6, 2006 is hereby set aside.

2. The matter is remitted for redetermination by the Commission on the basis of an investigation to be conducted by a different investigator.

3. The respondent shall pay to the applicant costs fixed in the amount of \$2,000.00, inclusive of disbursements and GST.

“Eleanor R. Dawson”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1687-06

STYLE OF CAUSE: DUANE DAVID, Applicant and
THE ATTORNEY GENERAL OF CANADA,
Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 15, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** DAWSON, J.

DATED: SEPTEMBER 7, 2007

APPEARANCES:

KIKELOLA ROACH FOR THE APPLICANT

LORNE PTACK FOR THE RESPONDENT

SOLICITORS OF RECORD:

ROACH, SCHWARTZ & ASSOCIATES FOR THE APPLICANT
BARRISTERS & SOLICITORS
TORONTO, ONTARIO

JOHN H. SIMS, Q.C. FOR THE RESPONDENT
DEPUTY ATTORNEY GENERAL OF CANADA