Date: 20071123

Docket: T-467-07

Citation: 2007 FC 1230

Ottawa, Ontario, November 23, 2007

PRESENT: THE HONOURABLE MADAM JUSTICE DAWSON

BETWEEN:

HEATHER KERR

Applicant

and

BELL CANADA
MELANIE SINGH
BASIL ROWE
DOMINIQUE BENOIT

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Heather Kerr was a long-term employee of Bell Canada (Bell). While on short-term disability leave, Ms. Kerr's employment with Bell was terminated. Ms. Kerr then filed a complaint with the Canadian Human Rights Commission (Commission) that alleged that the termination of her employment constituted discrimination by Bell and a number of its employees on the basis of her disability and family status. The investigator appointed to investigate Ms. Kerr's complaint recommended that the complaint be dismissed because the evidence did not support Ms. Kerr's contention that her employment was terminated because of her disability or family status. The Commission subsequently dismissed the complaint on that basis.

[2] In this application for judicial review, Ms. Kerr alleges that the decision of the Commission was unreasonable and that it was based upon an inadequate investigation. The application is dismissed because Ms. Kerr has failed to establish that the Commission's decision was unreasonable, or that the investigator failed to investigate obviously crucial evidence.

Standard of review

[3] The parties do not dispute the applicable standard of review.

[4] Subparagraph 44(3)(*b*)(i) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (Act), gives to the Commission a broad discretion to decide whether a complaint should be dismissed. The jurisprudence establishes that, in the absence of an error of law or breach of the duty of fairness, the Commission's decision will only be interfered with if its conclusion is unreasonable. See: *Tahmourpour v. Canada (Solicitor General)* (2005), 332 N.R. 60 (F.C.A.) at paragraph 6.

[5] As to what review on the reasonableness standard entails, a decision is reasonable where the reasons in support of the decision withstand 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 reviewing Court is not to consider what the correct decision is. As the Supreme Court of Canada explained in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paragraphs 54 to 56:

> 54. How will a reviewing court know whether a decision is reasonable given that it may not first inquire into its correctness?

> The answer is that a reviewing court must look to the reasons given by the tribunal.
>
> 55. A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> 56. This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[6] An allegation of inadequate investigation on the part of the Commission raises an issue of procedural fairness. No deference is owed by the Court when determining the fairness of the Commission's process. It is for the Court to determine in every case what fairness requires. See: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 100.

[7] For the purpose of this review, the report of the investigator constitutes the Commission's reasons because the Commission simply adopted the investigator's recommendation. See: *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 at paragraph 37 (C.A.).

Was the Commission's decision unreasonable?

[8] Ms. Kerr says that the Commission's decision is unreasonable in two respects. First, she argues that, because she was terminated while on disability leave, the presumption must be that her disability was a factor in her termination and this establishes a *prima facie* case of discrimination. Second, she asserts that the decision was based upon the erroneous finding that a settlement agreement existed between her and Bell with respect to her termination.

[9] Turning to the investigator's reasons, he did not ignore the issue of whether there was a *prima facie* case of discrimination. At paragraph 2 of his report, he noted that Bell denied the *prima facie* case of discrimination, arguing that Ms. Kerr did not disclose to it any accommodation needs related to her disability or family status and that Ms. Kerr's employment was terminated at her request.

[10] As a matter of law, once a complainant establishes a *prima facie* case of discrimination under the Act, she ought to be entitled to relief in the absence of justification by the employer. See: *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at page 202. In *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 at page 558, the test for establishing a *prima facie* case of discrimination was described by the Court as follows:

> The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer. [Emphasis added]

[11] It is an error in law to consider the respondent's defence when determining whether a *prima facie* case of discrimination has been established. See: *Lincoln v. Bay Ferries Ltd.* (2004), 322 N.R. 50 (F.C.A.) at paragraph 22.

[12] In the present case, Ms. Kerr says that a *prima facie* case is raised because she was employed by Bell, she was on disability leave, and her employment was terminated while on disability leave.

[13] In his analysis, the investigator concluded that the evidence did not support Ms. Kerr's contention that her employment was terminated because of her disability or family status. To support his conclusion, the investigator pointed to the fact that, on the face of the complaint, it was Ms. Kerr who advised her counsel "to approach Bell regarding severing my working relationship" and Ms. Kerr who accepted the termination package proposed by Bell in two separate letters from her counsel.

[14] As for the evidence relevant to the officer's conclusion, Ms. Kerr, by her counsel's letter of October 1, 2003, initially inquired into the availability of a severance package. In that letter, counsel expressed her understanding that Bell was restructuring and would be significantly downsizing its workforce. When Bell responded by requesting medical confirmation that Ms. Kerr "is able to make an informed decision in relation to the severance package", Ms. Kerr's counsel replied that, while the request was a further manifestation of Bell's insensitivity, the medical information would be provided. Counsel for Ms. Kerr followed up her initial request by letter dated November 10, 2003.

[15] Bell then responded by letter dated November 28, 2003, written by Ms. Kerr's immediate supervisor Ms. Singh. The letter contained the terms of a severance package. While Ms. Kerr's counsel initially advised by letter dated December 9, 2003, that the offer contained in the letter was not acceptable, she later advised by letter dated January 8, 2004, that "Ms Kerr has instead decided, albeit somewhat reluctantly, to accept the offer contained" in the letter of November 28, 2003. Subsequently, by letter dated February 12, 2004, Ms. Kerr's counsel again advised that "my client will accept Bell Canada's most recent offer in settlement of the termination of her employment. My summary of the terms of the settlement follow".

[16] As to whether the evidence established a *prima facie* case of discrimination, this would require the inference to be drawn that, because Ms. Kerr was disabled when her employment was terminated, her disability was a factor in the decision to terminate her employment. As a matter of law an inference can be drawn “where matters may not be easily proved and the surrounding circumstances add an element of probability that the fact is true”. See: *R. v. Collins* (2005), 232 N.S.R. (2d) 92 (S.C.) at paragraph 26, aff’d (2006), 240 N.S.R. (2d) 308 (C.A.). In my view, the evidence in this case does not support the drawing of an inference that disability was a factor in Bell’s decision when, from a review of Ms. Kerr’s complaint, it was equally likely, or perhaps more likely, that Bell, in the midst of downsizing, would choose to end the employment of someone who had approached it seeking information as to the availability of a severance package.

[17] However, and in any event, whether or not a *prima facie* case of discrimination was established, the investigator was entitled to consider all of the information before him when making his report and recommendation to the Commission.

[18] Looking at the whole of the evidence, the termination of an employment relationship while an employee is on disability leave does not give rise to an irrebuttable presumption of discrimination on the ground of disability. In this case, the investigator found that the inference that disability was a factor in the termination of her employment was not warranted because it was Ms. Kerr who initially raised the issue of severance, and the parties appeared to have reached a mutually agreeable settlement package. This was a tenable explanation for the officer's conclusion that Ms. Kerr had not established that her employment was terminated because of her disability, particularly when Ms. Kerr's counsel stated that it was their understanding that Bell was downsizing its workforce.

[19] Applying a somewhat probing examination to the investigator's analysis, I find that the investigator's report and, in turn, the Commission's reasons, when taken as a whole, are tenable and grounded in the evidence.

[20] In oral argument, Ms. Kerr agreed that there was no "smoking gun" that established unlawful discrimination on the part of Bell. Rather, she argued that this is a conclusion to be drawn from circumstances that include the fact that Bell was aware that Ms. Kerr was on disability leave, Bell "rammed through" the settlement, the November 28, 2003 letter referenced a conversation that Ms. Kerr said never took place, Bell asked for proof of Ms. Kerr's capacity before providing a

severance package, Ms. Kerr's supervisor had asked her about her plans for more children, and Bell's conduct in finalizing the settlement. Even if those facts were capable of supporting an inference of discriminatory intent, they do not render untenable the officer's conclusion on the whole of the evidence that Ms. Kerr's employment was not terminated because of her disability or family status.

[21] Ms. Kerr also argues that the investigator erred by finding that a settlement had been reached between Ms. Kerr and Bell. Ms. Kerr relies on her lawyer's letters of October 1, 2003, December 9, 2003, and January 8, 2004, where her counsel advised that, until the parties signed a severance agreement, it was Ms. Kerr's position that she remained an employee of Bell who was in receipt of disability benefits.

[22] There are, in my respectful view, two answers to this concern. The first is that the investigator expressly recognized that no severance agreement was ever executed. He referred to the exchange of money and correspondence and to the return of settlement funds by Ms. Kerr, but noted that it did not appear to him that "the Commission is the appropriate avenue to redress the difficulties the parties experienced in attempting to execute the severance agreement that they had negotiated". The second answer is that the complaint was not dismissed because of the existence of a settlement agreement. Rather, the complaint was dismissed because the course of negotiations between the parties led the officer to conclude that Ms. Kerr's termination was not the result of discrimination.

[23] In addition to the two letters from Ms. Kerr's counsel confirming that an agreement had been reached, there was evidence that, on February 25, 2004, Ms. Kerr's counsel provided a signed direction to pay with respect to the settlement funds, and that Bell, by two letters dated March 19, 2004, forwarded cheques for the outstanding severance amount and legal fees and provided funds for deposit into Ms. Kerr's RRSP account. As of May 17, 2004, the only outstanding issue was said to be whether an achievement incentive payment had been paid by Bell. The fact that the settlement appears ultimately to have foundered does not, in my view, vitiate or render unreasonable the officer's reliance upon the parties' course of conduct in order to conclude that Ms. Kerr's employment was not terminated because of discrimination.

Was the Commission's decision based upon an inadequate investigation?

[24] Ms. Kerr complains that the investigator should have interviewed persons associated with her complaint, particularly Ms. Singh who, in the November 28, 2003 letter, referred to a conversation that Ms. Kerr says did not take place. In oral argument, Ms. Kerr's counsel also argued that the investigator should have obtained e-mails that Ms. Kerr referenced both in her complaint and in subsequent correspondence to the Commission.

[25] In *Murray v. Canada (Canadian Human Rights Commission)*, 2002 FCT 699, aff'd 2003 FCA 222, my colleague Mr. Justice Kelen considered what procedural fairness requires of an investigator. At paragraph 24, he wrote:

> The principles of natural justice and the duty of procedural fairness with respect to an investigation and consequent decision of the Commission, are to give the complainant the investigator's report and provide the complainant with a full opportunity to respond, and to consider that response before the Commission decides. The investigator is not obliged to interview each and every witness that the applicant would have liked, nor is the investigator obliged to address each and every alleged incident of discrimination which the applicant would have liked. In this case, the applicant had the opportunity to respond to the investigator's report and to address any gaps left by the investigator or bring any important missing witness to the intention of the investigator. However, the investigator and the Commission must control the investigation and this Court will only set aside on judicial review an investigation and decision where the investigation and decision are clearly deficient. See Slattery, supra. per Nadon J. (as he then was) and at the Federal Court of Appeal per Hugessen J.A. (as he then was). [Emphasis added]

[26] This is consistent with the Federal Court of Appeal's statement in *Tahmourpour*, cited above, that an investigation may lack the legally required degree of thoroughness if the investigator "failed to investigate obviously crucial evidence".

[27] In the present case, Ms. Kerr has not persuaded me that by failing to interview her co-workers and her supervisor, or by failing to access e-mails, the investigator ignored obviously crucial evidence.

[28] In this regard, review of the information Ms. Kerr provided to the Commission, particularly Ms. Kerr's comments to the response by Bell to her complaint, reflects that the investigator was requested by Ms. Kerr to interview persons who could speak to the strain under which all staff were functioning and who could confirm the "toxic work environment" that Ms. Kerr said existed throughout the department she worked in. Documents were referred to which would substantiate

the hours, travel responsibilities, and general working conditions of Ms. Kerr. Such information does not appear to be obviously crucial to the issue of alleged discrimination directed against Ms. Kerr.

[29] With respect to the failure to interview Ms. Singh, Ms. Kerr views this to be a significant omission because Ms. Singh, the author of the November 28, 2003 letter, referenced a telephone conversation on that day which Ms. Kerr says did not occur.

[30] With the benefit of hindsight, it would perhaps have been desirable for the investigator to interview Ms. Singh. However, in her comments made in response to Bell's correspondence, Ms. Kerr never identified Ms. Singh as a person to be interviewed. Given that, and the fact that the offer contained in Ms. Singh's impugned letter of November 28, 2003, was later accepted, I am not satisfied that the failure to interview Ms. Singh rendered the investigation so defective as to constitute a breach of the duty of fairness.

[31] Further, Ms. Kerr made extensive submissions in response to the investigator's report. Therefore, to the extent that information was within her knowledge, Ms. Kerr was able to compensate for any omissions in the report. Only where a complaint is unable to rectify omissions contained in an investigator's report is intervention on judicial review warranted. See: *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (T.D.) at paragraph 57, aff'd (1996), 205 N.R. 383 (F.C.A.).

[32] For these reasons, the application for judicial review is dismissed. In all of the circumstances, there will be no award of costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed without costs to any party.

"Eleanor R. Dawson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-467-07
STYLE OF CAUSE:	HEATHER KERR, Applicant and BELL CANADA ET AL., Respondents
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 29, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	DAWSON, J.
DATED:	NOVEMBER 23, 2007

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