Date: 20080109

Docket: T-37-07

Citation: 2008 FC 29

Ottawa, Ontario, January 9, 2008

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

DANA SPROULE

Applicant

and

CANADA POST CORPORATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] Dana Sproule (the Applicant) suffered repetitive strain injuries while employed by Canada Post Corporation (CPC). She was later terminated and then alleged in a complaint to the Canadian Human Rights Commission (the Commission) that the Respondent had failed to accommodate her disabilities. On December 4, 2006, the Commission dismissed her complaint (the Decision) pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act). These reasons deal with her application for judicial review of that Decision.

BACKGROUND

[2] On May 10, 2004, the Applicant began to work at CPC's mail processing plant at 969 Eastern Avenue in Toronto. Her position involved lifting bins of letters weighing approximately 25 lbs.

[3] Six weeks later on June 23, 2004, she started to experience problems with both forearms and wrists. As a result, her job was changed to one in which she did more letter sorting and much less lifting. However, in July she started to notice numbness and tingling in her fingers.

[4] On August 18, 2004, the Applicant stopped working for CPC and, as a result of the events described below, her employment was terminated on February 8, 2005 on the basis that she had failed to provide medical reports explaining her absence and had failed to report for work even though offers of accommodation had been made.

[5] As the following review will show, CPC provided the Applicant with Functional Ability Forms (FAFs) which were periodically completed by doctors following their examinations of the Applicant. The FAFs were four part forms which directed the doctor to mail the white copy to the Workplace Safety and Insurance Board (WSIB). The FAFs also showed that the yellow copy was for the employer but did not indicate how it was to be transmitted.

[6] Before the Applicant left CPC on August 18, 2004, it appears that her FAFs were either mailed to CPC or handed in by the Applicant.

[7] After the Applicant stopped working, her FAFs no longer reached her employer. The Applicant said that she signed an authorization permitting them to be mailed to CPC and assumed they were being received through the Fall of 2004 and early 2005. However, the Respondent submitted that as time passed and CPC continued to complain about the lack of medical information, the Applicant should have realized that her assumption was incorrect. Further, the Applicant did not include this explanation in her complaint to the Commission dated December 15, 2005 (the Complaint) or in her affidavit of February 19, 2007. There was, therefore, no evidence about how the FAFs were to be transmitted to CPC. It took the position that it was the Applicant's responsibility to ensure that it was apprised of her medical condition through FAFs. The CPC's correspondence asking her to supply medical updates supports its position.

THE FACTS

[8] A FAF dated June 23, 2004 completed by Dr. Sodhi, which CPC received, recommended no repetitive bending or twisting of wrists and a maximum of 2 kg of lifting. Light, slow sorting was permitted. This led to the Applicant's reassignment to the sorting job which involved much reduced lifting.

[9] A FAF from Dr. Sodhi dated July 15, 2004 which CPC also received included similar limitations and indicated that physiotherapy had begun.

[10] On August 13, 2004, the Applicant's supervisor sent her a letter which offered her modified employment which met the restrictions on her then current FAF. It read as follows:

> This is to summarize our discussion on Wednesday, Aug 11, 2004 and on Friday, August 13, 2004.
>
> Ms. Sproule, you have claimed "repetitive injury" to both of your wrists as a result of performing various functions in the SLB section for period of May 10/04 to June 23/04.
>
> Based on the restrictions outlined by your physician on FAF dated June 23, 2004 and July 15, 2004, "Limited bending, twisting and repetitive movements of wrists" you are temporarily accommodated at Orig. Rejects cases were [sic] you are required to sort S/L mail.
>
> On Wednesday Aug 11/04 you have reported to me that sorting S/L mail at the Reject Cases is giving you pain and you feel that is not helping you with the recovery of your wrists because you have to grip the mail. Then you requested to be accommodated at the Mail Repair Center but when I told you that functions performed at the Mail Repair Center require more gripping than sorting of S/L mail you said that you can type without a pain and could be working in VES. I advised you that VES is not available and the restrictions outlined on the most recent FAF do not refer to gripping. I also advised you that your accommodations are based on the documents from your doctor and if your condition is not improving or is changing you need to report it to your doctor and provide and updated medical. You said that Thursday, Aug 12/04 is your day off (RDO) and you will be seeing your doctor.
>
> **On Friday, August 13, 2004 you handed me an updated FAF. This time limitations listed on FAF referred only to R hand limitations of gripping and grasping however capability increased. There were no limitations listed for L hand**. I pointed this out to you and you stated that you disagree with your doctor's analysis and you wanted me to contact your doctor. I advised you that it is not my place to question your doctor and if you don't agree with this information it is up to you to take it back to your doctor.
>
> Again, based on the information provided today I offered you an accommodation at the Orig. Reject cases using an ergo arm (there is no restrictions to the L hand) or working at SLB pre-cull only. You have declined both of my offers and again insisted that you could be

> working in VES. Again, I advised you that your accommodations are temporary, you are not trained coder and VES is not available at this point. You have agreed to stay at Orig. Reject cases for the rest of your shift and you will be seeing your doctor. You were provided with another FAF to be completed by your doctor.
>
> Canada Post Corporation is obligated to provide work within the limitations that are provided by the medical communities, if you feel that you are not capable of working within the restrictions or limitations provided by your attending physician to the Corporation then you have the option to stay off work utilizing your sick time until such a time that you feel well enough to return to work and perform the functions within your limitation that have been provided to you.
>
> A copy of this letter will be forwarded to WSIB.
>
> [my emphasis]

[11] CPC subsequently received a FAF dated August 15, 2004 signed by Dr. Sodhi. It imposed restrictions on twisting, bending and repetitive movements of both wrists and prohibited all lifting. It also specified that thumbs and index fingers could not be used in opposition in a gripping motion.

[12] Thereafter, a CPC email dated August 24, 2004 shows that on August 24th CPC received a FAF dated August 18, 2004. It imposed the following restrictions:

> Limited bending or twisting of L & R wrist
> Limited repetitive movement of L & R thumb & index finger
> Limitations of exposure to vibration: high frequency and low frequency
> L & R wrist cannot perform repetitive movements with index finger & thumb ie. opposition/grip between index & thumb
> Lifting floor to waist: 0 kg
> Lifting waist to shoulder: 0 kg

[13] The email also indicated that at that time, the Applicant's supervisor could not identify a position for the Applicant in her department and therefore asked other supervisors if they had any suggestions for work for the Applicant elsewhere in CPC.

[14] The August 18th report was the last FAF that CPC says it received.

[15] However, there were additional FAFs. The record includes a FAF dated September 8, 2004 from Dr. Sodhi. It described a repetitive strain injury to both wrists with tendonitis, recommended no lifting, limited bending and twisting of both wrists and limited repetitive gripping with thumb and index finger.

[16] On September 22, 2004, Dr. Sodhi prepared a further FAF which proscribed repetitive gripping with the thumb and index fingers of both hands and bending and twisting of the wrists. It did however allow lifting of 0.5 kg.

[17] CPC initially denied receiving this FAF but counsel conceded that it may, in fact, have been received because the offer of November 1, 2004 described below in paragraph 23 below specifically referred to lifting 0.5 kg and this is the only FAF on the record which permitted such lifting.

[18] By letter to the Applicant dated September 23, 2004, CPC said that it had a position available which could be modified to meet her current limitations. The letter read:

> This is a follow up letter regarding your outstanding FAF. The FAF was given to you with instructions to have it completed by your

> family physician and returned within 48 hours. As of September 23, 2004 the second FAF has not been received by the corporation.
>
> Please take the necessary actions to make sure that the FAF form is completed and returned to us by Wednesday September 29, 2004 and we will provide you with the appropriate accommodations to suit your restrictions.
>
> As you are aware Canada Post Corporation has modify [sic] duty program available. Ms. Sproule, you are expected to report for duty on your next scheduled day, Friday October 1st, 2004 at 7 pm.
>
> Please find a copy of your rotation pattern enclosed.
> (Group B/International)
>
> A meeting will be scheduled at this time with Tania Eaglesham our Employee Reintegration Coordinator. You may contact your Union Representative, Donna Smith at (416) 462-5009.
>
> I look forward to your attendance and participation.

[19] The Applicant did not report for work on October 1 and so on October 7, 2004 she was sent a second letter in which she was again advised that CPC could accommodate her with modified duties within her medical restrictions. CPC asked her to explain her continued absence or report on her next scheduled date and told her that failure to report could lead to disciplinary action including termination. However, she did not report and sent no medical update.

[20] On October 15, CPC sent a similar letter. She was asked to report on October 21 for modified duties or explain her absence and she did neither.

[21] On November 1st, CPC again wrote the Applicant enclosing a copy of a work plan and for the fourth time offered her temporary modified employment which involved reduced hours and sorting

with a scissor grip. Her thumb and index finger were not to be used and her lifting was limited to no more than 0.5 kg. Limits to bending and repetitive movements of both her wrists were incorporated in the work plan. This job description met the requirements in the FAF of September 22, 2004. The Applicant was asked to report on November 8th and failed to do so and did not provide a medical update.

[22] On November 15th, the Applicant was asked, by letter, to respond on November 17 and again warned about termination. She did not appear for work and did not send a medical report.

[23] On November 17, 2004, the Applicant responded. She sent a note to CPC which said that her injuries prevented her from accepting the modified position and that she would not be coming to work. She asked CPC to contact a new doctor (Dr. Ballard) and asked CPC to send her a FAF. No doctor's report was submitted to substantiate her opinion that she could not sort with a scissor grip and lift 0.5 kg.

[24] The record includes a FAF from Dr. Sodhi dated November 24, 2004 which eliminated lifting 0.5 kg and returned to a recommendation against any lifting. However, CPC did not receive this form.

[25] As well, on November 24, 2004, CPC sent the Applicant a request for additional medical reports which were to be returned to it by December 8th. However, the Applicant says that this

request was not received and that may be so because, unlike CPC's other correspondence, it was not sent to the Applicant's home address.

[26] A letter from CPC to the Applicant of January 12, 2005 shows that she was to have reported for work on January 11 and did not appear or provide an explanation. She was again warned about a possible termination and was asked to report on January 16, 2005.

[27] On January 16, she failed to report for work and did not provide a doctor's report explaining her continued absence.

[28] On January 17, 2005, CPC wrote the Applicant in the following terms:

> This is a follow up to the letter sent to you on January 12, 2005, advising you to report for your next regular scheduled duty or to provide a credible and reasonable explanation for your unauthorized absence. You were also advised that upon your return modified duties would be available to you.
>
> You were also warned that a failure to contact the undersigned as instructed or failure to report for work as scheduled will leave the Corporation with no alternative but to conclude that you have no intentions of complying and may result in discipline up to and including discharge from Canada Post Corporation.
>
> As a result of your non-compliance to our request to date, your actions lead the corporation to believe that you have no intention to continue employment with Canada Post Corporation, and your continuing absence is considered as unauthorized and without pay.
>
> Failure to report by the start of your next regular scheduled shift on January 22, 2005 or provide a credible and reasonable explanation for your unauthorized absence will result in discipline up to and including discharge from Canada Post Corporation.

> A copy of this letter will be put on your personal file and your union will be contacted concerning your employment status.

[29] On January 18, 2005, the Applicant faxed CPC about her failure to return to work. She said:

> My injury is still affecting me the same way it was before. I promise you I will return to work whenever my doctor says it will be possible for me to do so.

[30] No medical report was provided. As well, on January 18, 2005, the WSIB denied her claim for loss of earning because it concluded that she had not returned to work in spite of numerous offers of modified work.

[31] On January 20, 2005, CPC wrote the Applicant to say that it had her note of January 18 and had also learned that on January 18, 2005 the WSIB had denied her claim (the First WSIB Decision). The letter then stated:

> …
>
> In this note you indicate that you are still affected by your injury and that you will return to work when allowed to do so by your doctor. I have to inform you that this does not meet your obligations under the collective agreement to provide a medical certificate for any absence that is longer than 5 days. I also note that to date, you have not provided such documentation in support of your absence.
>
> You are therefore advised that you are required to report for your regular shift on Saturday January 22, 2005 at 8 a.m. or to provide a medical certificate, acceptable to the Corporation, in support of your absence to date.
>
> If you fail to comply with these instructions, your conduct will be considered as insubordination and your absence will be deemed to be unauthorized. In addition, the Corporation may take disciplinary action, up to and including discharge, against you for insubordination and unauthorized.

[32] The Applicant did not send in medical reports or appear for work on January 22, 2005.

[33] Instead on January 28, 2005, the Applicant faxed CPC and her note read as follows:

> Have you not received the faxes I have sent you?!
>
> I told you, my condition has not changed! The job (modified) your colleagues have asked me to do is not suitable for my restrictions!
>
> I will come back to work whenever my doctor says it is possible for me to do so!!
>
> You do not have to send me the same letters every week!
>
> If I was able to work right now I would be working!!!

[34] The Applicant did not report on January 22 or send in a doctor's report. By letter from CPC dated January 25, 2005 she was instructed to provide medical documentation in support of her absence or report for work on January 29, 2005. She was advised that she would be discharged if she failed to follow the instructions. She did not comply.

[35] On February 8, 2005, the Applicant was discharged from her employment for failure to report for work and failure to provide medical documentation in support of her absence from work.

THE PROCESS BEFORE THE COMMISSION

[36] The Applicant filed her Complaint on December 15, 2005 alleging discrimination because she had been fired due to her disability.

[37] CPC filed a written response to the Complaint and provided copies of twelve letters it had written to the Applicant asking her to provide medical reports supporting her absence from work. CPC also provided the Commission with the WSIB's First Decision. The Applicant provided a written reply and seven supporting documents as well as an affidavit sworn by her mother which described the extent of her disability.

[38] In addition to receiving these written materials, the Commission held two teleconferences with the Applicant's representative and two with CPC's representative.

The Preliminary Report

[39] On August 8, 2006, the Commission's Assessor (the Assessor) issued a Preliminary Assessment Report (the Preliminary Report). The following statements describing the process appeared on the first page.

> The purpose of this report is to assist the investigator in developing the investigation report for the Commission members. **The final investigation report** will assist the Commission members to determine whether:
>
> a) a conciliator should be appointed to attempt to resolve the complaint and/or;
> b) further inquiry by a tribunal is warranted or;
> c) the complaint should be dismissed.
>
> [my emphasis]

[40] This report clearly suggested that a final report would be forthcoming and would be the document given to the Commission.

[41] The Preliminary Report concluded that the Applicant failed to provide a doctor's note indicating that the modified duties she was offered were unsuitable and that she was discharged, not because of her disabilities but for just cause because she had abandoned her duties. In his analysis, the Assessor noted that the WSIB had rejected the Applicant's disability claim on January 18, 2005 on the basis that there was a modified job available which accommodated her restrictions.

The Responses to the Preliminary Report

[42] In a letter dated August 10, 2006, the Applicant was given an opportunity to respond to the Preliminary Report but was told, for the first time, that the Commission would only consider a response of ten pages (the Limit). The letter said:

> …
>
> If you would like to submit comments on the report, you can do so by writing to me at the address below…Pages over the 10 page limit will not be placed before the Commission…
>
> …

[43] Notwithstanding the Limit, the Applicant sent in a detailed five page letter dated August 24, 2006 (the First Response Letter) with fifty-eight pages of attachments (the Attachments). The First Response Letter was forwarded to the Commission but the Attachments were withheld because of the Limit.

[44] The First Response Letter reviewed the facts and pointed out that the Applicant was studying in Australia as a disabled student with a voice-activated computer and that, on her return to Canada in July 2006, she had seen Dr. Tick who was a specialist in repetitive strain injuries. However, Dr. Tick's report was not included in the Attachments.

[45] CPC sent the Commission a one-page response dated August 28, 2006 in which it agreed with the Preliminary Report.

[46] In a second letter of response dated September 26, 2006 (the Second Response Letter), the Applicant advised the Commission that the WSIB decision referred to in the Preliminary Report had been reversed on appeal. The letter quoted material passages from the appeal decision. In particular the Commission was advised that the WSIB's Appeals Resolution Officer concluded that:

> The job that was subsequently offered to her was very repetitive with grabbing and it would be against her restrictions.
>
> …
>
> The Canada Post made countless offers to her but all for the same job. I am not persuaded by the employer's submissions they did everything possible to accommodate her.

[47] The Second Response Letter also enclosed a letter from Dr. Tick of July 26, 2006. It confirmed, based on Dr. Tick's review of the Applicant's FAFs from the summer and fall of 2004, that the Applicant could not have sorted using a scissor grip. The Second Response Letter and Dr. Tick's letter were placed before the Commission.

THE ISSUES

[48] The Applicant says:

1. That the Limit imposed in the Commission's letter of August 10, 2006 was unlawful and that its application in the circumstances of this case was unfair.
2. That the Assessor who prepared the Preliminary Report was biased.
3. That the Commission should have had the entire WSIB appeal decision before it and not just the excerpts provided in the Applicant's Second Response Letter.
4. That the Assessor was obliged to prepare a final report which indicated that the WSIB decision has been reversed on appeal and which corrected the errors the Applicant had identified in the Preliminary Report.

STANDARD OF REVIEW

[49] In my view, these issues all raise questions of procedural fairness on which no deference is owed. See: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 100.

DISCUSSION & CONCLUSIONS

Issue 1 The Limit

[50] The Commission acknowledges that the Limit on responses to Preliminary Reports is not authorized by statute or regulation but says that it is the master of its own procedure and is therefore entitled to impose the Limit. It also acknowledges that, in this case, the Limit meant that the Attachments were not placed before the Commission.

[51] An initial difficulty is that the First Response Letter with Attachments is not included in the Applicant's Application Record. Some of the Attachments may appear as individual exhibits to the Applicant's affidavit. However, since the descriptions of the Attachments in the First Response Letter are often general and undated, it is hard to be certain whether they are in the record.

[52] The First Response Letter does appear in the Respondent's Record but it does not include the Attachments.

[53] A second difficulty is that the Applicant did not allege that she had been prejudiced by the fact that the Commission did not see the Attachments. In my view, it was incumbent on the Applicant to demonstrate the relevance of the Attachments and the prejudice caused by the fact that they were not placed before the Commission. No submissions were made to indicate that the Attachments included any crucial evidence.

[54] Accordingly, on the record before me, I am unable to conclude that the imposition of the Limit denied the Applicant the opportunity to make a full response to the Preliminary Report.

[55] In reaching this conclusion, I am mindful of Justice Yves de Montigny's decision in *Nikai v. Canada (Attorney General)*, 2006 FC 1104, 297 F.T.R. 262. In that case, the Applicant alleged, among other things, that he had been unfairly treated because his response to the investigator's report was limited to ten pages. Justice de Montigny concluded that since no prejudice had been shown, the imposition of the Limit did not amount to a denial of procedural fairness.

Issue 2 Bias

[56] The question to be addressed when considering an allegation of bias is well settled: "…what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude…".This standard was formulated by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394 and was cited with approval in *Valente v. Queen*, [1985] 2 S.C.R. 673.

[57] The Applicant says that the Preliminary Report was biased because it:

- described her condition in paragraph 1 as tendonitis in both forearms without mentioning repetitive strain injuries. This says the Applicant minimized the harm she suffered;

- mentioned in paragraph 4 that she was studying in Australia at the time of the investigation without adding that she was being accommodated as a disabled student and that she left Canada only after she was terminated by CPC;
- mentioned at the end of paragraph 10 that she refused to come to work without adding that she feared further injury.

[58] With regard to the first submission, tendonitis was an accurate description of the ongoing condition the Applicant suffered. Tendonitis was referred to in the FAF of September 8, 2004 and in Dr. Tick's Letter of July 26, 2006. Having mentioned tendonitis, there was no need to describe the cause of the condition as well. Applying the test described above, it is my view that failure to say that a repetitive strain injury caused the tendonitis does not disclose actual bias or a reasonable apprehension of bias.

[59] Regarding the second submission, the Assessor was correct when he said that the Applicant studied in Australia. In my view, it was reasonable to include this fact to explain the absence of a personal interview. The fact that she was studying as a disabled student was not relevant to the investigator's mandate to determine whether she had been terminated because of her disability. The Assessor's failure to mention an irrelevant fact cannot suggest bias.

[60] Lastly, the Assessor's mention of her refusal to come to work was part of his description of CPC's position and as such was entirely accurate. He had earlier noted in paragraph 8 of the Preliminary Report that this was a disputed fact and that the Applicant had denied abandoning her

post. In this context, the Assessor's remarks did not disclose bias. As well, the Assessor's failure to mention the fact that the Applicant feared further harm if she returned to work did not disclose bias. Her views were not material, it was her doctor's views that would have been relevant but they were not available to CPC prior to her termination.

Issue 3 The WSIB Appeal Decision

[61] In paragraph 16 of his Preliminary Report, the Assessor noted that the WSIB had rejected the Applicant's claim on the basis that there was a modified job available to the Applicant at CPC which accommodated her medical restrictions.

[62] The Assessor treated the initial WSIB decision as an important component of his analysis. In paragraph 9 of his Preliminary Report he commented on an employer's duty to accommodate. He said:

> …It is also recognized that an employee has a corresponding obligation to cooperate with all reasonable attempts at accommodation. In view of the WSIB assessment of the complainant's situation, and the complainant's failure to work with the employer to achieve a suitable accommodation (or provide the employer with evidence that she was incapable of any modified duties whatsoever) it is not in the public interest to pursue this complaint further.

[63] However, the Applicant's Second Response Letter advised the Commission that the initial WSIB decision had been reversed on appeal and included excerpts from the decision showing that the WSIB found that CPC had not accommodated the Applicant's disability by offering her a job

within her restrictions. In my view, this material was sufficient to put the Commission on notice that it could not rely on Assessor's comments in the Preliminary Report about the first WSIB decision.

Issue 4 No Final Report

[64] The Applicant submits that the Preliminary Report promised a final investigation report and that the Commission acted unfairly because the Assessor failed to prepare a final report which incorporated the information included in the First and Second Response Letters. Instead, the Assessor simply forwarded to the Commission the Preliminary Report with the First Response Letter (without the Attachments) and the Second Response Letter with its enclosure.

[65] In my view, a preliminary report should not state that a final report will be prepared if that is not the Commission's practice. However, the focus must be on the information the Commission had before it and not on the form in which it was provided. What is critical is that the Commission received the Applicant's comments and corrections related to the Preliminary Report in the First and Second Response Letters. In these circumstances, the duty of fairness was met without the preparation of a final report.

JUDGMENT

UPON reviewing the material filed and hearing the submissions of counsel for both parties in Toronto on Tuesday, September 11, 2006.

THIS COURT ORDERS AND ADJUDGES that, for the reasons given above, this application for judicial review is hereby dismissed without costs.

"Sandra J. Simpson"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-37-07
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APPEARANCES:

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