

Date: 20080317

Docket: T-1645-06

Citation: 2008 FC 349

Ottawa, Ontario, March 17th, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

STEVEN COLWELL

Applicant

and

**ATTORNEY GENERAL OF CANADA
(FISHERIES AND OCEANS CANADA)**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Steven Colwell complained to the Canadian Human Rights Commission that he had been discriminated against on the basis of disability. An investigator looked into the complaint and recommended that the Commission dismiss it on the basis that Mr. Colwell had failed to cooperate fully with his employer, the Department of Fisheries and Oceans (DFO). The Commission reviewed the investigator's report, as well as the submissions the parties made in response to it, and decided to accept the investigator's recommendation.

[2] Mr. Colwell argues that he was treated unfairly because the investigation on which the Commission relied was inadequate. He asks me to overturn the Commission's decision and order it to reconsider his complaint. I can find no basis for overturning the decision and must, therefore, dismiss this application for judicial review.

I. Issue

[3] Was the investigation into Mr. Colwell's complaint sufficiently thorough?

II. Analysis

1. Factual Background

[4] Mr. Colwell was originally hired in May 2001 as the Senior Habitat Management Biologist in Port Hardy, British Columbia. After only a few days, a co-worker lodged a complaint against him for alleged sexual harassment. This complaint caused Mr. Colwell serious emotional distress. He took sick leave. His physician found that he could probably return to work soon, but he should not be asked to work alongside the woman who had made the complaint against him. Mr. Colwell's union representative noted that the two employees could be separated if Mr. Colwell were permitted to transfer to Campbell River.

[5] In August 2001, Mr. Colwell notified DFO that he could return to work on September 4, 2001 but not in Port Hardy. His supervisor advised Mr. Colwell that he should return to work in Port Hardy. He could be separated from the woman who had made the complaint by working at a separate office site. Mr. Colwell did not return to work.

[6] In June 2002, his supervisor informed Mr. Colwell that the woman who had accused him of sexual harassment had left her position. Mr. Colwell was invited to return to his position and to work at a site some distance from the place where the alleged sexual harassment had taken place. Discussions continued.

[7] In February 2003, Mr. Colwell was asked to submit to a Fitness to Work Evaluation (FTWE). Mr. Colwell refused, arguing that his own physician's assessment should be adequate. In due course, after Mr. Colwell had filed a grievance against the employer's insistence on an FTWE, his own physician's evaluation was accepted. Mr. Colwell was advised that he could return to work on June 9, 2003. He did not.

[8] Mr. Colwell was asked to report to work in Port Hardy by September 2, 2003 or steps would be taken to terminate his employment. Mr. Colwell did not return to work. However, he did agree to submit to the FTWE. In November 2003, a Health Canada doctor who conducted the FTWE agreed that Mr. Colwell should not return to work in Port Hardy. He also made additional stipulations regarding Mr. Colwell's need to have ready access to suitable health care, his inability to work overtime or travel frequently, and his need to adopt a healthy lifestyle and to avoid stress. The

doctor suggested that Mr. Colwell should be accommodated in another job if it was a requirement of his current position that he work in Port Hardy.

[9] After receiving the FTWE, DFO set about to find Mr. Colwell an alternative position. DFO contends that Mr. Colwell unreasonably declined to consider suitable alternatives and even refused to permit his resume to be distributed to potential employers. In addition, DFO alleges that Mr. Colwell frequently failed to respond to correspondence and telephone calls. Mr. Colwell submits that it was reasonable for him to refuse to consider positions that were at a lower classification or that were temporary. Further, he merely demanded that his resume be provided only in respect of genuine alternatives to his existing position. He is unaware of any failure to respond to communication from DFO.

[10] In any case, Mr. Colwell filed his complaint against DFO in September 2004 on the basis that DFO's conduct amounted to discrimination on the basis of disability and that DFO failed to take reasonable steps to accommodate him in the workplace. Efforts to place Mr. Colwell in a suitable position continued after he filed his complaint with the Commission. In 2005, DFO underwent a re-organization. It closed its Port Hardy headquarters and offered Mr. Colwell a position in Campbell River. Mr. Colwell accepted and started work in January 2006.

2. The Investigator's Report and the Commission's Decision

[11] The investigator prepared a ten-page report outlining in considerable detail the events summarized above. The investigator noted that an employee has a duty to facilitate the employer's reasonable efforts to accommodate him or her (citing *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970). The investigator concluded that Mr. Colwell had "failed to cooperate fully with the respondent in its attempts to secure him to return to work". Each party filed comments and submissions in respect of the investigator's findings and conclusion.

[12] On August 4, 2006, the Commission notified Mr. Colwell that it had reviewed the investigator's report and the parties' responses and had concluded that his complaint should be dismissed. The Commission relied on paragraph 44(3)(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, which requires the Commission to dismiss a complaint if "it is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted".

3. Was Mr. Colwell's Complaint Investigated Thoroughly?

[13] Mr. Colwell argues that DFO had a duty to accommodate him in the workplace to the point of undue hardship. In his view, transferring his position to Campbell River in 2001 would not have caused DFO undue hardship. Therefore, he was under no obligation to consider the alternative positions that DFO proposed, all of which, he suggests, were either temporary or classified lower. The investigator, in Mr. Colwell's view, failed to appreciate this fundamental aspect of his complaint and, therefore, failed to conduct a thorough analysis of it. In particular, Mr. Colwell

suggests that the investigator failed to evaluate the reasonableness of DFO's refusal to allow him to work in Campbell River (until the reorganization in 2005). He contends that his duty to cooperate arose only at the point when DFO presented reasonable offers to him, a point, he says, that was never reached.

[14] DFO points out that a complainant has a duty to facilitate the employer's reasonable efforts to accommodate him or her in the workplace. DFO proposed that Mr. Colwell work in a separate facility in Port Hardy as early as 2001 and, thereafter, presented a number of alternative positions for Mr. Colwell. True, some of those positions were in an acting capacity, but DFO undertook to preserve Mr. Colwell's indeterminate status. The acting positions might eventually have become indeterminate and, in any case, Mr. Colwell would have kept his salary and status. Further, some of the positions offered to Mr. Colwell were, in fact, indeterminate. In DFO's view, Mr. Colwell's desired accommodation, an equivalent position in Campbell River, was not appropriate for a number of reasons. When he was first hired, it was important, in his role as Senior Habitat Management Biologist, that he be present in DFO's headquarters in Port Hardy. Thereafter, it became clear that some other position be found for Mr. Colwell because of his medical circumstances and the inherent requirements of the position he occupied. That position required frequent overtime and travel, as well as considerable stress, all of which were factors that Mr. Colwell, according to his medical assessments, had to avoid. In DFO's submission, these circumstances were carefully reviewed and analyzed in the investigator's report and, therefore, Mr. Colwell's suggestion that the report was inadequate cannot be sustained.

[15] In my view, it is clear from the investigator's report that he considered the proposed accommodations offered by DFO to be reasonable and that Mr. Colwell's corresponding obligation to facilitate those proposals had been triggered. It is also clear that Mr. Colwell had failed to discharge that duty. The investigator addressed the essential issues and carefully reviewed the relevant facts and law in arriving at his recommendation. I am satisfied that the report was sufficiently thorough and that the Commission did not err in relying on it. Accordingly, I must dismiss this application for judicial review, with costs.

JUDGMENT

THIS COURT'S JUDGMENT IS that

1. The application for judicial review is dismissed.

“James W. O’Reilly”

Judge

Annex

Canadian Human Rights Act, R.S.C. 1985, c. H-6

Loi canadienne sur les droits de la personne, L.R., 1985, ch. H-6

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

(3) On receipt of a report referred to in subsection (1), the Commission

Idem

(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,

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1645-06

STYLE OF CAUSE: COLWELL v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 16, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: March 17, 2008

APPEARANCES:

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