Date: 20080522

Docket: T-462-07

Citation: 2008 FC 649

Ottawa, Ontario, May 22, 2008

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

PAMELA EGAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Pamela Egan, is an employee of the Canada Revenue Agency (CRA). She is legally blind and suffered a neck and back injury in 1998. She returned to work in 2001 and sought various forms of accommodation from her employer. The Applicant believed that her employer failed to make reasonable accommodation for her and, on May 21, 2003, filed a complaint with the Canadian Human Rights Commission.

[2] The Commission investigated the Applicant's complaint and, in a written decision dated February 9, 2007, determined that the CRA had accommodated the Applicant's disabilities in a reasonably timely manner. It is this decision which is the subject of this judicial review. For the

reasons set out, I find that the decision of the Commission is to be set aside and sent back for redetermination.

[3] The substantive issue is whether the Commission conducted a sufficiently thorough review. In determining such issue the Court must also consider what is the appropriate standard of review of that decision.

[4] As to the standard of review, since the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, there have been established two criteria, that of correctness in respect of legal issues and that of reasonableness in respect of factual and discretionary matters, with differing degrees of deference given in respect of reasonableness considering the expertise of the decision maker and other relevant matters. Where there has been a lack of procedural fairness, lack of natural justice or breach of the *Charter of Rights and Freedoms* such criteria are not the appropriate consideration for, if such a lack or breach has been demonstrated, the decision must be set aside.

[5] Here the substantive issue is that of the thoroughness of the investigation by the Commission of the Applicant's complaint. It is clear from the decision of the Federal Court of Appeal in *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 that failure by administrative decision makers to investigate obviously crucial evidence where an omission has been made that cannot be compensated for by making further submissions, there has been a lack of procedural fairness such that the decision must be set aside. To quote from paragraphs 120 and 121

of *Sketchley* which in turn quotes from *Slattery v. Canada (Human Rights Commission)* [1994] 2 FC 574 aff'd (1996), 205 NR 383 and *Baker v. Canada (MCI)* [1999] 2 S.C.R. 817:

> ***120*** *In Slattery, supra, the Applications Judge considered the degree of thoroughness of investigation required to satisfy the rules of procedural fairness in this context. He noted the "essential role that investigators play in determining the merits of particular complaints" (para. 53), and also the competing interests of individual complainants and the administrative apparatus as a whole (para. 55). He concluded as follows:*
>
> > *56 Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted...*
> >
> > *57 In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker. Therefore, it should be only where complainants are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it; or (2) where fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it.*
>
> ***121*** *Weighing the Baker factors, I agree that this is an appropriate description of the content of procedural fairness in this context.*

[6] Therefore, if I find that the investigation conducted by the Commission was insufficiently thorough and failed to investigate obviously crucial evidence the decision must be set aside.

[7] As stated by Justice Nadon in *Slattery*, *supra*, at paragraph 49 the investigation must satisfy at least two conditions: neutrality and thoroughness.

[8] The Applicant cites a number of deficiencies in the investigation conducted by the Investigator including:

1. Failure to interview the Applicant's treating physician or review an audio tape of a meeting between that physician and the Applicant's employer as to reasonable accommodation that could be made to effect her re-integration into the workforce.
2. Failure to interview the Applicant's Director who appeared to have become directly involved in the situation.
3. Failure to interview a number of other key individuals such as the Applicant's team leader and union steward.
4. Failure to investigate the Applicant's complaints as to discrimination respecting Income Averaging This particular issue has been resolved however Applicant's counsel maintains that the delay and procrastination in dealing with this issue is indicative of the treatment of all of the Applicant's issues.

[9] An investigation was conducted in respect of the Applicant's complaints and a Report dated September 20, 2006 was provided by the Investigator. As to the nature of the investigation made, the Report said at paragraph 9:

> *9. The investigation was conducted through a telephone interview with the complainant and her union representative e-mail and fax correspondence with the respondent, and through an examination of documents provided by the complainant and the respondent.*

[10] The Applicant was invited to make a rebuttal submission commenting on the Report and did so in a ten page detailed submission raising a number of points including the four enumerated above. The rebuttal begins:

> *"I have read the report in total disbelief as to how a less than 10-minute telephone conversation with me and my union reps can amount to an "investigation""*

[11] The Commission then issued a letter dated February 9, 2007 which is the decision under review. That letter appears to be a standard form letter and is very perfunctory. It states:

> *I am writing to inform you of the decision taken by the Canadian Human Rights Commission in your complaint (20021149) against Canada Customs and Revenue Agency.*
>
> *Before rendering its decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to subsection 41(1) of the Canadian Human Rights Act, to deal with the complaint because*
>
> - *the Commission is not satisfied that the grievance process adequately and fully addressed the allegation of discrimination.*
>
> *The Commission also decided, pursuant to paragraph 44(3)(b) of the Canadian Human Rights Act, to dismiss the complaint because*

- *the evidence shows that the respondent accommodated the complainant's disabilities in a reasonably timely manner.*

Accordingly, the file on this matter has now been closed.

[12] The Commission's letter does not specifically address any of the concerns as to the investigation and Report raised in the Applicant's rebuttal and refers to the rebuttal in such a neutral way – "*any submission(s) filed in response*" – that one is left to wonder to what extent, if at all, the Applicant's concerns were even noted let alone considered.

[13] I appreciate that the Court is entitled to consider the Investigator's Report as constituting the reasoning of the Commission. As stated by the Federal Court of Appeal in *Sketchly, supra* at paragraph 37:

> *"The investigator's report is prepared for the Commission, and hence for the purposes of the investigation the investigator is considered to be an extension of the Commission. When the Commission adopts an investigator's recommendations and provides only brief reasons, the Courts have rightly treated the investigators report as constituting the Commission's reasoning for the purpose of the screening decision…"*

[14] This, however, does not address the problem that arises when the rebuttal to the report raises serious issues as to what was said or not said in the report or how the investigation was conducted. This was the situation commented upon by Justice Mactavish of this Court in *Sanderson v. Canada (AG)*, 2006 FC 447 at paragraphs 77 and 78:

> *77 It may be that had the Commission looked into Ms. Sanderson's allegations, it might have determined that there is no substance to any of them. However, we have no way of knowing whether this was the case, as there is nothing in the record to*

> *suggest that any examination of Ms. Sanderson's allegations was ever carried out by the Commission prior to the decision being made to dismiss Ms. Sanderson's complaint.*
>
> ***78*** *The serious allegations made by Ms. Sanderson required consideration by the Commission. The failure of the Commission to address these concerns is a further reason why I am of the view that it would be unsafe to allow the decision of the Commission to stand.*

[15] Justice de Montigny of this Court faced a similar situation in *Public Service Alliance of Canada v. Canada (Treasury Board)*, 2005 FC 1297 where the investigator simply got the basic facts wrong, this was pointed out in the rebuttal but apparently ignored by the Commission who made a cryptic decision affirming the investigator's recommendations. At paragraph 50 of his Reasons Justice de Montigny said:

> ***50*** *I am of the view that this is a case where the omission was of such a fundamental character that the response filed by PSAC to the Investigator's Report could not rectify the problem. Not only was the Report extremely succinct on that issue, but it failed to provide sufficient information so that the rebuttal from PSAC could be meaningfully assessed. In any event, the Commission failed to address these issues and essentially ignored the position of PSAC.*

[16] I am satisfied that, in the present case the issues raised by the Applicant in rebuttal were of such a fundamental character that they should have been clearly considered by the Commission and a further or better investigation ordered or clear reasons set out by the Commission in its decision as to why it did not do so. To simply say that the Report is the Commission's reasons would be to ignore the rebuttal entirely.

[17] The first three issues deal with the failure by the investigator to interview certain witnesses which the Applicant says were crucial to the matters under investigation. Failure to interview witnesses who have important evidence in respect of the matters at issue constitutes a reviewable error (*Sanderson supra* at paras. 54 & 55, *Sketchley supra* at paras. 122-123).

[18] The Respondent argues that the Applicant should provide affidavits from those witnesses who were not interviewed and who are alleged to have important evidence, setting out what that evidence is so that the Court can make up its own mind as to how important the evidence might be. No authority was cited for this proposition. It appears that cases such as *Sketchly*, *Sanderson* and *Public Service Alliance supra* as well as others such as *Tahmourpour v. Canada (Solicitor General),* 2005 FCA 13 all dealt with such matters on the basis of the evidence in the record and not on the basis of new affidavit evidence filed with the Court.

[19] As has been stated in other cases such as immigration, the Court is to review the matter on the basis of the record before the decision making tribunal and not receive new evidence going to the issue decided by the tribunal; only in instances where lack of procedural fairness or natural justice is affidavit evidence received (see e.g. *Kante v. Canada (Minister of Public Safety and Emergency Preparedness)* 2007 FC 109 at paras. 9 & 10).

[20] In the present case, I could not receive evidence as to what the uninterviewed witnesses might say, my role is to examine whether the Commission or Investigator should have, on the basis of the evidence and submissions before them, conducted those interviews and whether failure to do so should result in the decision of the Commission being set aside.

[21] First as to Dr. Ennis, he was the physician treating the Applicant at the relevant time. He had a meeting on November 15, 2001 with the Applicant's employer at which time integration of the Applicant back into the workforce was discussed and Dr. Ennis made his views known. Apparently, this discussion was tape recorded but there is no indication that the Investigator asked for the tape or listened to it. The Applicant relied on this discussion to explain why she did not attend a medical assessment requested by her employer; she says it is because the matter has already been discussed at the meeting. The Applicant also asserts that her doctor at the meeting supported the suggestion that the Applicant be allowed to telework. The investigator apparently found the opposite.

[22] I find that failure to interview Dr. Ennis was a critical omission.

[23] Second, as to Ms. Charlton, the Applicant's Director, she supervised the Applicant's work and, according to the Applicant, made a number of statements critical of the failure of her employer to make meaningful and timely accommodations for her. For instance, it is said that Ms. Charlton made statements to the effect that nobody in management known their responsibilities, did not understand the duty to accommodate, did not appreciate the tardiness in addressing matters and so forth. Again, failure to interview this witness was a critical omission.

[24] Third, a number of other witnesses were also listed by the Applicant as important. It is acknowledged that an investigator has no duty to interview every witness named by a complainant if there is no relevant evidence to be gained or other good reason not to do so. However where a reasonable person would expect that useful evidence could possibly be gained by an interview there is some obligation to conduct the interview or say why not. In this category of witnesses who

possibly could offer useful evidence are Mr. Julian the Applicant's team leader and Ms. Corderro the Applicant's union steward.

[25] Other deficiencies in the Report were noted such as the failure to appreciate that it took almost three years to provide the Applicant with ergonomic apparatus whereas others had received similar apparatus in a few short months. Similar delays in coming to grips with matters such as the Income Averaging issue, now settled, were not well appreciated by the Investigator.

[26] As a result, there are two fundamental reasons for setting aside the Commission's decision. One is that the Investigator failed to conduct a thorough and proper investigation. The other is that the Commission failed to deal with these issues when raised by the Applicant in her rebuttal by not directing that there be a further and better investigation of, if not doing so, failing to state in its reasons, the letter of February 9, 2003, why it did not do so.

[27] Accordingly, the application is allowed with costs and the matter sent back for redetermination by different persons.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT ADJUDGES that:

1. The application is allowed;
2. The decision of the Commission dated February 9, 2007 is set aside and the matter is remitted to the Commission for investigation by a different investigator and subsequent redetermination by the Commission, and;
3. The Applicant is entitled to costs to be taxed at the middle of Column III.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-462-07
STYLE OF CAUSE:	**PAMELA EGAN v. ATTORNEY GENERAL OF CANADA**
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