

Date: 20080919

Docket: T-2050-07

Citation: 2008 FC 1059

Ottawa, Ontario, September 19, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

LESLIE HICKS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Leslie Hicks, the Applicant, worked in Sydney, Nova Scotia for a department within the federal public service. In 2002, the department offices in Sydney closed and Mr. Hicks was relocated to a position in the National Capital Region (NCR). At the time, Mr. Hicks's mother-in-law was residing in Sydney in an apartment designed for the elderly. Mr. Hicks sought financial assistance under the Treasury Board Temporary Dual Residence Assistance (TDRA) Directive to support the maintenance of a home in Sydney, to enable his wife to care for his

mother-in-law. His request was refused – and subsequent grievances dismissed – on the basis that the mother-in-law was not a dependent who lived in the same principal residence.

[2] Mr. Hicks then turned to the Canadian Human Rights Commission (the Commission), lodging a complaint as follows:

I am making a complaint under the Human Rights Act that [the denial of financial assistance] was discrimination against me due to my family/marriage situation and the age and disability of my family member. The employer's interpretation of the Relocation Directive discriminates against employees who have family members who are unable to live at home but, due to their disability, must live in accommodation suited to their condition.

[3] In a letter dated October 26, 2007, the Commission advised Mr. Hicks that it had decided, pursuant to s. 41(1)(c) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act or CHRA), that it would not deal with his complaint because “the allegations are not linked to a prohibited ground of discrimination identified in section 3 of the Act.”

[4] Mr. Hicks seeks judicial review of this decision. It should be clarified that Mr. Hicks does not ask that this Court make any finding on the merits of his case; he asks only that the complaint go forward for a full inquiry by the Commission.

II. Issues

[5] There is one overarching issue. Did the Commission err by concluding, at this preliminary stage, not to deal with Mr. Hicks's complaint?

III. Background

[6] Given that no investigation was carried out in relation to the substance of Mr. Hicks's complaint, the allegations contained in the complaint form must be taken as true (see *Michon-Hamelin v. Canada (Attorney-General)*, 2007 FC 1258; [2007] F.C.J. No. 1607 (Q.L.) at para 23). In this case the facts disclosed by the complaint are simple and not in dispute.

[7] As noted, Mr. Hicks relocated from Sydney to Ottawa to take up a position with the public service. The government has established policies to provide compensation for employees who are relocated. Mr. Hicks's move was covered by the Relocation Directive applicable to relocations begun before March 2003. As stated in the document:

It is the policy of the government that in any relocation, the aim shall be to relocate the employee in the most efficient fashion, that is, at the most reasonable cost to the public yet having a minimum detrimental effect on the transferred employee and family.

La politique du gouvernement est la suivante. Dans toute réinstallation, il faut viser à réinstaller l'employé de la façon la plus efficace, c.-à-d. au coût le plus raisonnable pour l'État tout en causant le moins d'ennuis possible à l'employé muté et à sa famille

[8] The Directive is deemed to be part of collective agreements (see "General" Section of the Directive).

[9] In certain circumstances where an employee continues to maintain a residence in the original location, an employee may receive financial assistance. Such assistance is referred

to as Temporary dual residence assistance (TDRA). The relevant portion of Clause 2.11 of the Directive provides as follows:

2.11.1 Financial assistance is intended to offset the cost of maintaining the second residence. The employee remains responsible for one set of household expenses.

2.11.1 L'aide financière accordée vise à compenser les frais rattachés à la deuxième résidence. L'employé continuera d'assumer les frais rattachés à une résidence.

2.11.2 Financial assistance towards living expenses can be obtained in situations when two residences are temporarily maintained during the initial stages of a relocation, i.e.:

2.11.2 L'employé peut obtenir une aide financière à l'égard des frais de subsistance lorsqu'il doit occuper temporairement deux résidences au début de la période de réinstallation, c.-à-d.:

(a) when one of the residences is occupied by dependant(s) (a term which includes a spouse):

a) si l'un des logements est occupé par une ou plusieurs personnes à sa charge, ce qui comprend le conjoint:

- for reasons of temporary illness, or
- in order for a dependant(s) (who has been living with the employee prior to relocation) to attend an educational institution in order to avoid disruption of the school term . . .

- à cause d'une maladie temporaire, ou
- pour permettre à toute personne à charge (qui vivait chez l'employé avant la réinstallation) de fréquenter un établissement d'enseignement donné afin de ne pas perturber son année scolaire,

[10] Dependant is defined, in the Directive, as:

. . . any person who lives with the employee or appointee and is either the employee's spouse, a person for whom the employee can claim a personal exemption under the *Income Tax Act*, or an employee's (or a spouse's) unmarried child, step-child, adopted child or legal ward who cannot be claimed as an income tax deduction but is in full-time attendance at school. A family member who is permanently residing with the employee, but who is precluded from qualifying as a dependant under the *Income Tax Act* because the family member receives a pension, shall also be considered as a dependant under this directive;

. . . toute personne qui habite avec l'employé ou la personne nommée et qui est, soit son conjoint soit la personne à l'égard de laquelle l'employé peut réclamer une exemption personnelle aux termes de la *Loi de l'impôt sur le revenu*, soit un enfant célibataire, un enfant né d'un mariage antérieur, un enfant adoptif ou sous la tutelle légale de l'employé (ou de son conjoint) qui ne fait pas l'objet d'une déduction d'impôt et qui fréquente une école à plein temps. Un membre de la famille qui réside en permanence avec l'employé mais auquel cette définition ne s'applique pas aux termes de la *Loi de l'impôt sur le revenu* parce qu'il reçoit une pension est aussi considéré comme une personne à charge en vertu de la présente directive

[11] Mr. Hicks requested 12 months of TDRA in respect of his mother-in-law and his son (the request for support for the son's situation is not in issue before me). His request was denied. In a subsequent grievance, the request was once again denied on the basis that the mother-in-law was not living with Mr. Hicks in the principal residence in Sydney and, as such, was not a "dependant" under the Directive. Mr. Hicks then took his request to an adjudicator of the Public Service Labour Relations Board (PSLRB), who dismissed the grievance. The principal ground for the dismissal was that Mr. Hicks's mother-in-law did not meet the definition of "dependant" in the Directive; any "temporary illness" must be that

of the dependant living in the principal residence. At the hearings before the adjudicator, Mr. Hicks argued that the employer's actions were discriminatory. The adjudicator stated that, "I have no jurisdiction to address any human rights aspects of this grievance".

IV. The CHRA Complaint and Statutory Provisions

[12] Mr. Hicks then brought his complaint to the Commission arguing that "the employer's interpretation of the Relocation Directive discriminates against employees who have family members who are unable to live at home but, due to their disability, must live in accommodations suited to their condition". In other words, Mr. Hicks claims that the Directive discriminates against him on two grounds – family status and disability – that are prohibited grounds of discrimination identified in s. 3(1) of the CHRA.

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience

[13] Mr. Hicks's complaint also rests on ss. 7 and 10 of the CHRA:

<p>7. It is a discriminatory practice, directly or indirectly, ...</p>	<p>7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects : ...</p>
<p>(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.</p>	<p>b) de le défavoriser en cours d'emploi.</p>
<p>10. It is a discriminatory practice for an employer, employee organization or employer organization</p>	<p>10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :</p>
<p>(a) to establish or pursue a policy or practice, or</p>	<p>d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :</p>
<p>(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,</p>	<p>a) de fixer ou d'appliquer des lignes de conduite;</p>
<p>that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination</p>	<p>b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.</p>

[14] Under s. 41 of the CHRA, the Commission is obliged to deal with a complaint, except in certain circumstances. The situation of interest to this application is s. 41(1)(c):

<p>41(1). Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that</p> <p style="text-align: center;">...</p> <p>(c) the complaint is beyond the jurisdiction of the Commission</p>	<p>41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :</p> <p style="text-align: center;">...</p> <p>c) la plainte n'est pas de sa compétence;</p>
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V. The Advisor's Report

[15] As is the practice of the Commission, and Early Resolution Advisor (the Advisor) prepared an Analysis Report. The Advisor recommended that the Commission not deal with the complaint, stating the following reasons:

The allegations in the complaint do not appear to raise a link to the grounds of marital status or age. The allegations as described do not suggest that the complainant's marital status or age of his mother-in-law were factors in the respondent's decision to deny his TDRA claim.

It appears that the denial of the complainant's application for TDRA was due to the fact that his situation did not meet the definition of "dependant" in that his mother-in-law did not reside with him at the time of his relocation. The definition of "dependant" in the TDRA Directive specifically contemplates family members, thus it is evident that the fact that the complainant's 'dependant' was his mother-in-law was not itself the reason that his TDRA claim was denied. The complainant appears to be challenging the residency criteria of the TDRA Directive, which he would like to see broadened to include circumstances such as his where a dependant family member does not reside in the family home. Given that the key issue in the complainant's situation is residency, and that the status of the complainant's relative as his mother-in-law was not the

obstacle for her being considered a “dependant” under the TDRA Directive, it does not appear that the complainant’s allegations demonstrate a link to the ground of family status.

The complainant has also alleged that he was discriminated against because of the disability of his mother-in-law. The circumstance alleged by the complainant does not support a link to the ground of disability as the disability in this case is a characteristic of the complainant’s mother-in-law and not of the complainant himself. Moreover, as stated above, it is evident that the complainant’s TDRA claim was denied due to the residency criteria that forms part of the definition of “dependant” in the TDRA Directive.

Since the complainant’s allegations do not demonstrate a link to a prohibited ground of discrimination under the CHRA, it is recommended that the Commission not deal with the complaint for lack of jurisdiction.

VI. Mr. Hicks’s Response

[16] Mr. Hicks was provided with an opportunity to respond to the recommendations of the Advisor. In a letter dated September 4, 2007, Mr. Hicks provided his response. The key points raised by Mr. Hicks can be summarized as follows:

- Mr. Hicks asserts that he was denied an employment benefit because of: (a) his family status, that of needing his wife to stay behind to care for her elderly and disabled mother; (b) marital status, that of being married to a woman with a mother who needs her care; and (c) age and disability, that of having an elderly family member who is disabled and frail and needs to live in a special home for the aged;
- The Advisor applied too narrow an interpretation to “family status”, which is inconsistent with recent jurisprudence (citing, *Health Sciences Assoc. of B.C. v.*

Campbell River and North Island Transitional Society, 2004 BCCA 260, [2004] 240 D.L.R. (4th) 479; *Hoyt v. Canadian National Railway*, [2006] C.H.R.D. No. 33; *Johnstone v. Canada (Attorney General)*, 2007 FC 36; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554);

- The fact that a complainant was adversely affected by an employer's policy is sufficient to establish a *prima facie* case of discrimination (*Hoyt*, above, at para.31);
- Mr. Hicks disagrees with the comment of the Advisor that the disability must be that of the employee and cannot be that of a family member (with no jurisprudence cited in support); and
- In sum, the employer failed to provide any form of accommodation to help lessen the burden faced by the Applicant

VII. The Commission's Decision

[17] The Commission's decision was brief. On the issue of jurisdiction, it consisted simply of a statement that the Commission had decided, pursuant to s. 41(1)(c) of the CHRA, that it would not deal with the complaint because "the allegations are not linked to a prohibited ground of discrimination identified in section 3 of the Act". While the actual letter decision provides no reasons for the Commission's conclusion, the Advisor's Report is

taken to form part of the reasons of the Commission (see, for example, *Michon-Hamelin*, above, at para. 17; *Sketchley v. Canada (Attorney-General)*, 2005 FCA 404 at para. 37).

VIII. Analysis

[18] The parties disagree on the appropriate standard of review. The Commission argues that the standard of review is reasonableness (see, for example, *Comstock v. Public Service Alliance of Canada*, 2007 FC 335, 310 F.T.R. 277, aff'd 2008 FCA 197). Mr. Hicks asserts that the standard should be correctness due to the fact that the question at issue was a legal one (see, for example, *Sketchley v. Canada (Attorney General)*, above).

[19] There is no question that the Commission should be afforded significant deference (*Canada Post Corp. v. Canada (Canadian Human Rights Commission)* (1997) 130 F.T.R. 241 (T.D.); aff'd [1999] F.C.J. No. 705 (F.C.A.) (Q.L.); *Comstock*, above) wherever there is a factual component to the Commission's decision. However, there also seems to be acknowledgement in the jurisprudence that a legal question should be reviewed on a standard of correctness (*Comstock*, above, at para. 34; *Johnstone*, above, at para. 18).

[20] What then is the nature of the question that was before the Commission? The question was not one of fact; Mr. Hicks and the Commission appear to have no disagreement on the facts of his

case. As I read the submissions of Mr. Hicks, particularly in reply to the Advisor's Report, he was asking the Commission to investigate the following:

- Does the TDRA impact negatively on Mr. Hicks's family duties and obligations, such that it is contrary to s. 3 of the CHRA?
- Does the TDRA, by refusing to provide a benefit in respect of Mr. Hicks's disabled mother-in-law or by not recognizing Mr. Hicks's family status, have a negative impact on his "employment opportunities", as prohibited under ss. 7 and 10 of the CHRA?

[21] Underlying these questions are serious legal issues related to the meaning of family status and employment opportunities. In my view, this particular s. 41(1)(c) determination attracts a higher level of judicial scrutiny – that is, a standard of correctness. However, if I am wrong in this conclusion and as discussed below, I am also satisfied that the decision would not stand on a reasonableness standard.

[22] The Commission, at this early screening stage, should only decide not to deal with a complaint in "plain and obvious" cases (see *Canada Post*, Trial Division, above, at para. 3; *Michon-Hamelin*, above, at para. 16). Thus, the Commission's duty was to identify whether it was "plain and obvious" that there was no *prima facie* discrimination. In rejecting Mr. Hicks's complaint, the Commission was, in effect, making a final determination that the

TDRA was not discriminatory – that it was “plain and obvious” that the TDRA was not contrary to ss. 3, 7 and 10 of the CHRA.

[23] On any standard of review, the Federal Court may grant relief if it is satisfied that a tribunal made its decision without regard for the material before it (*Federal Courts Act*, R.S.C. 1985, c F-7, s. 18.1(4)). As the Federal Court of Appeal concluded in *Johnstone v. Canada (Attorney General)* 2008 FCA 101 at para 2, the failure of the Commission, in that case, to clearly identify and consider what legal test it was applying was a valid basis for finding the decision of the Commission to be unreasonable.

The reasons given by the Commission for screening out the complaint indicate that the Commission adopted a legal test for *prima facie* discrimination that is apparently consistent with *Health Sciences Association of British Columbia v. Campbell River & North Island Transition Society*, [2004] B.C.J. No. 922, 2004 BCCA 260, but inconsistent with the subsequent decision of the Canadian Human Rights Tribunal in *Hoyt v. C.N.R.*, [2006] C.H.R.D. No. 33. We express no opinion on what the correct legal test is. We say only that the Commission's reasons raise a serious question as to what legal test the Commission actually applied in deciding as it did. In our view that is a valid basis for finding the decision of the Commission to be unreasonable, and justifies the order of Justice Barnes referring the matter back to the Commission for reconsideration. [Emphasis added]

[24] The main problem that I have with the Commission’s decision is that it does not address any of the arguments made by Mr. Hicks in his reply of September 4, 2007. In his reply, Mr. Hicks made extensive submissions on the topic of jurisdiction, with reference to case law that seems to apply a less narrow view of family status and disability than was apparently taken by the Commission. I do not know if the Commission had regard to the issues raised in the reply or, if it did, why the Commission found these arguments to be without merit.

[25] The situation before me is very similar to that in *Johnstone*. I acknowledge the arguments made by the Commission before me that the human rights protected by the CHRA do not extend as far as posited by Mr. Hicks. The Commission may be right. However, on the record before me, I am not able to say with confidence that the arguments of Mr. Hicks were heard and considered. In other words, I am not persuaded that it is plain and obvious that there is no discrimination. Thus, whether viewed on a standard of reasonableness or of correctness, I find that the decision cannot stand.

IX. Conclusion

[26] In conclusion, I find that the Commission's decision to dismiss Mr. Hicks's complaint should not stand. I will set aside that decision and remit the matter back to the Commission for a determination on the merits. Specifically, I am directing that the Commission accept that Mr. Hicks has provided sufficient argument to warrant an investigation into his complaint.

[27] I wish to make it clear that I express no opinion on whether Mr. Hicks's position on discrimination has merit. It may be that, after that investigation, the Commission concludes that the complaint is not linked to a prohibited ground or that it has no merit. That will be for the Commission to determine.

[28] The application for judicial review will be allowed, with costs to Mr. Hicks.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed, with the matter to be remitted to the Commission for a re-determination by a new decision-maker.
2. Costs are awarded to the Applicant.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2050-07

STYLE OF CAUSE: LESLIE HICKS
v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: SEPTEMBER 10, 2008

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

DATED: SEPTEMBER 19, 2008

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