Federal Court  Cour fédérale

Date: 20110120

Docket: T-149-10

Citation: 2011 FC 71

Montréal, Quebec, January 20, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

LORETTA BEST

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant challenges the legality of the decision of the Canadian Human Rights Commission (the Commission), dated December 23, 2009, to not deal with a complaint of discrimination on the basis of disability, sex and family status as per the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*), filed by the applicant, a former member of the Canadian Forces (CF).

[2] The applicant is a single mother of three. After taking a break from employment to have her children, she re-enlisted with the CF in 1998. At the time of her re-hiring, she was undergoing

counselling with a civilian psychiatrist as a result of her divorce. Although not noted in her file, the understanding was that counselling was a temporary measure due to the stress of the divorce. The applicant is also dyslexic, although this diagnosis was only made after her dismissal and so was not brought to the attention of her immediate supervisor during her employment with the CF.

[3] The applicant's counselling proved to be permanent. The net result was frequent absences from work which, because they were with a civilian psychiatrist, did not come within the CF's medical leave policy.

[4] The applicant had a recurring record of absenteeism because of her counselling, but also due to other reasons, such as her court appointments, her physiotherapy appointments, her children getting home from school and her children's illnesses. While the applicant's absences were initially accommodated, the CF was eventually forced to address the problem.

[5] First, as a result of the applicant's continued need for counselling, the CF sought a medical assessment of the applicant. The assessment confirmed the need for ongoing treatment. The assessment was reviewed and confirmed on several occasions.

[6] Second, attempts were also made to reduce the applicant's absenteeism: she was asked to make up the hours that were spent seeing to personal issues and her phone-in sick leave privileges were withdrawn. The applicant was unable to work after 3 p.m., as she had to get home to supervise her children, so she worked the extra hours on her lunch break. When the applicant surpassed her allotted sick leave, her direct supervisor required the applicant to take annual leave.

[7] Nonetheless, the efforts were unsuccessful and the CF notified the applicant of her pending release based on her need for ongoing specialist care in January 2004. The applicant went on sick leave from February 20, 2004 to March 4, 2004 and from March 23-31, 2004. During this period, the CF offered the applicant part time employment, which was refused. The applicant's medical release was approved by the CF's releasing authority on April 13, 2004 and became effective on October 14, 2004.

[8] In October 2005, the applicant filed a complaint with the Commission alleging discrimination under sections 7, 8, 9 10 and 12 of the *CHRA*. After an initial investigation, the investigator determined that only disability under section 7 of the CHRA was relevant, specifically the allegation that the CF terminated the applicant's employment on the basis of disability.

[9] In a Report dated April 1, 2008 (Report #1), the investigator found that the CF terminated the applicant's employment pursuant to the CF's policy of Universality of Service. This policy found at section 33 of the *National Defense Act*, R.S.C. 1985, c. N-5 states:

Liability in case of regular force	Obligation de la force régulière
33. (1) The regular force, all units and other elements thereof and all officers and non-commissioned members thereof are at all times liable to perform any lawful duty.	33. (1) La force régulière, ses unités et autres éléments, ainsi que tous ses officiers et militaires du rang, sont en permanence soumis à l'obligation de service légitime.
Liability in case of reserve force	*Obligation de la force de réserve*
(2) The reserve force, all units and other elements thereof and all officers and non-commissioned	*(2) La force de réserve, ses unités et autres éléments, ainsi que tous ses officiers et militaires du rang,*

members thereof	*peuvent être :*
(a) may be ordered to train for such periods as are prescribed in regulations made by the Governor in Council; and	*a) astreints à l'instruction pour les périodes fixées par règlement du gouverneur en conseil;*
(b) may be called out on service to perform any lawful duty other than training at such times and in such manner as by regulations or otherwise are prescribed by the Governor in Council.	*b) soumis à l'obligation de service légitime autre que l'instruction, aux époques et selon les modalités fixées par le gouverneur en conseil par règlement ou toute autre voie.*

[Emphasis added]

[10] The investigator concluded that the applicant's medical condition did not permit her to perform all military duties as required by the CF's Universality of Service policy. As such, the investigator recommended that the applicant's complaint be dismissed.

[11] The CF filed a response to Report #1. The applicant responded to Report #1, and sought to have the complaint amended to add the grounds of sex and family status. Following submissions on the request to amend from both parties, the Commission agreed to deal with the amended complaint. The Commission requested a further investigation and a supplementary investigator's report.

[12] Following further investigation, the investigator filed a Supplementary Investigator's Report on September 23, 2009 (Report #2). Report #2 concluded that the evidence did not establish that there were disadvantages or burdens imposed on the applicant, either directly or indirectly, due to her sex or family status.

[13] Both parties filed responses to Report #2. After consideration of all of the reports and submissions, the Commission concluded that the evidence supported that the applicant's medical condition did not permit her to perform all military duties and that her termination was pursuant to its Universality of Service policy. The Commission also concluded that the evidence did not support the assertion that the respondent discriminated against the applicant, directly or indirectly, due to her sex or family status. Consequently, the Commission exercised its discretion to dismiss the complaint on the basis that no further inquiry was warranted.

[14] The applicant now criticizes the Commission for having breached procedural fairness and for having made an unreasonable decision by refusing to deal with the complaint in question. The Attorney General of Canada (the respondent), submits that the decision was reasonable and that there was no breach of procedural fairness by the Commission.

[15] The applicable standard of review to a decision of the Commission dismissing a complaint is that of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Deschênes v Canada (Attorney General)*, 2009 FC 1126 at paragraph 9). In the context of judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above, at paragraph 47).

[16] Questions of procedural fairness are, however, reviewable on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43; *Bateman v Canada*

(Attorney General), 2008 FC 393 at paragraph 20). Procedural fairness dictates that parties be informed of the substance of the evidence obtained by the investigator which will be put before the Commission and that parties be given the chance to respond to the evidence (*Deschênes*, above, at paragraph 10).

[17] For the following reasons, the application for judicial review must fail.

[18] The applicant's claim that the Commission violated her right to procedural fairness must fail.

[19] The duty of fairness owed to the applicant by the Commission requires that the investigation be neutral and thorough (*Slattery v Canada (Human Rights Commission)*, [1994] 2 F.C. 574 at paragraph 49, affirmed (1996), 205 N.R. 383 (C.A.) and that the parties be informed of the substance of the evidence obtained by the investigator to be put before the Commission, as well as given the chance to respond to this evidence and make all relevant representations thereto (*Syndicat des employés de production du Québec et de l'Acadie v Canada (C.H.R.C.)*, [1989] 2 S.C.R. 879 at 902; *Deschênes v Canada (Attorney General)*, 2009 FC 1126 at paragraph 10).

[20] The applicant makes no allegation of impartiality against the investigator. Rather, she argues that the investigation was not thorough, as the investigator failed to interview both her and her proposed witness, her partner Warrant Officer Doug McQueen, also a member of the CF.

[21] The practical effect of the duty of thoroughness is canvassed by Justice Nadon in *Slattery*, above, at paras 56 and 57:

> 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.* Such an approach is consistent with the deference allotted to fact-finding activities of the Canadian Human Rights Tribunal by the Supreme Court in the case of *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.
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> *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.
>
> [Emphasis added]

[22] The investigator's duty of thoroughness clearly does not require the investigator to interview every person proposed by the applicant (*Miller v Canada (CHRC)*, [1996] F.C.J. No. 735 (QL), at paragraph 10). Rather, the investigator must simply ensure that all of the fundamental issues raised in the complaint were all dealt with in the report (*Bateman*, above, at paragraph 29).

[23] The applicant submitted her disability complaint and responded to Report #1. She thus had ample opportunity to both make her primary case and respond to the investigator's understanding of

her situation. No argument is made as to any specific information that she was unable to communicate to the investigator as a result of her not being interviewed. The investigator's decision to not interview the applicant thus does not reflect on the thoroughness of the investigation.

[24] The same reasoning applies to the investigator's decision to not interview Warrant Office McQueen. Warrant Officer McQueen was proposed as a witness primarily on the CF's rules and policies. These topics were addressed in Report #2, and thus the failure to interview him had no impact on the thoroughness of the investigation.

[25] Addressing now the reasonability of the Commission's decision to reject the applicant's complaint based on disability on the basis that no further inquiry was warranted, it is uncontested that the applicant suffers from a chronic medical condition requiring ongoing treatment. The evidence on record clearly shows that the applicant was not capable of being deployed to combat and therefore did not meet the CF's Universality of Service policy.

[26] Furthermore, notwithstanding the applicant's assertion that the Commission failed to review *bona fide* occupational requirements, as set out in *British Columbia (Public Service Employee Relations Commission) v B.C.G.E.U.* ("Meiorin"), [1999] 3 S.C.R. 3 at paras 71 and 72, subsection 15(9) of the *CHRA* provides that the Universality of Service policy is a *bona fide* occupational requirement and is thus an exception to the requirement under subsection 15(2) *CHRA* to establish that accommodation would result in undue hardship:

15. (9) Subsection (2) is subject to the principle of universality of service under which members of the Canadian Forces must at all times and under any circumstances	15. (9) Le paragraphe (2) s'applique sous réserve de l'obligation de service imposée aux membres des Forces canadiennes, c'est-à-dire celle

perform any functions that they may be required to perform.	d'accomplir en permanence et en toutes circonstances les fonctions auxquelles ils peuvent être tenus.

[27] The above provision means that the policy itself cannot be challenged as discriminatory. However, the application of the policy can be. To this end, the investigator confirmed that the policy was adopted for a purpose rationally connected to the performance of the job, that the policy is based on an honest and good faith belief that is necessary for fulfillment of that legitimate work-related purpose, and that the policy is necessary to achieve the legitimate work-related purpose.

[28] The investigator then analyzed what efforts were taken to accommodate the applicant and whether the evidence showed that it was impossible to accommodate the applicant without undue hardship. The investigator's review was extensive, and the numerous medical reports figured centrally in the analysis. The applicant was individually assessed on several occasions by CF doctors who consulted with the applicant's treating psychiatrist. The assessment that the applicant required continued treatment was supported by the applicant's doctor at the time and subsequently.

[29] In the case of a judicial review of an application of the Universality of Service policy, the Court is not entitled to reassess the medical reports and reach its own conclusions. The Court must simply determine that a fair assessment of all the available medical evidence was undertaken (*Irvine v Canada (Canadian Armed Forces)*, 2005 FCA 432 at paras 2 to 5). The applicant's medical reports demonstrate a clear consensus that she would require continued therapy and the Court finds no reason to conclude that the investigator did not undertake a fair assessment of all available medical evidence.

[30] Thus, given the concerted opinion of the medical experts that the applicant would continue to require therapy and the investigator's thorough analysis of the application of the policy, the Court concludes that Report #1's conclusion that there was no discrimination based on disability was justifiable and the Commission's decision to not proceed with the disability complaint reasonable.

[31] As for Report #2, the applicant's allegation that the Commission erred in law in concluding that the applicant did not make out a *prima facie* case of discrimination based on sex and family status is wholly unfounded. The investigator undertook a thorough analysis of all the evidence submitted, even interviewing the applicant and hearing witnesses from the CF. The investigator noted several factual discrepancies between the two parties and found the CF to be more credible. The applicant's allegations are general in nature and are not supported by any documentary evidence. In light thereof, the investigator's recommendation and the Commission's subsequent decision not to proceed with the sex and family status complaint is reasonable.

[32] Despite the suggestion made by the applicant that the complaint is without merit and that she should be allowed to proceed to the Tribunal of Human Rights, on the whole I am satisfied that the Commission's decision to dismiss the complaint on the basis that no further inquiry was warranted, constitutes an acceptable outcome which is defensible in respect of the facts and law.

[33] Consequently, while the applicant may not agree with the final decision reached by the Commission, the impugned decision is reasonable and there is no lack of procedural fairness in the process by which this decision was made.

[34] The application for judicial review is thus rejected. In view of the result, costs are awarded in favour of the respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed with costs in favour of the respondent.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-149-10
STYLE OF CAUSE:	LORETTA BEST v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
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APPEARANCES:

Chantal Beaupré	FOR THE APPLICANT
Michael Peirce	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lister & Associates Ottawa, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT