

Date: 20080527

Docket: A-505-07

Citation: 2008 FCA 191

**CORAM: DESJARDINS J.A.
BLAIS J.A.
EVANS J.A.**

BETWEEN:

ALLAN BESNER

Appellant

and

**THE ATTORNEY GENERAL OF CANADA
(CORRECTIONAL SERVICES OF CANADA)**

Respondent

Heard at Ottawa, Ontario, on May 27, 2008.

Judgment delivered from the Bench at Ottawa, Ontario, on May 27, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

EVANS J.A.

Date: 20080527

Docket: A-505-07

Citation: 2008 FCA 191

**CORAM: DESJARDINS J.A.
BLAIS J.A.
EVANS J.A.**

BETWEEN:

ALLAN BESNER

Appellant

and

**THE ATTORNEY GENERAL OF CANADA
(CORRECTIONAL SERVICES OF CANADA)**

Respondent

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on May 27, 2008)

EVANS J.A.

[1] This is an appeal by Allan Besner from a decision of the Federal Court in which Justice Mosley dismissed his application for judicial review of a decision by the Canadian Human Rights Commission under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, subparagraph 44(3)(b)(i), that in all the circumstances an inquiry was not warranted into Mr Besner's complaint against his employer of discrimination on the ground of disability. The decision of Justice Mosley is reported as *Besner v. Canada (Attorney General)*, 2007 FC 1076.

[2] Mr Besner was formerly employed in the federal public service as a psychologist with Correctional Services of Canada (“CSC”). He complained to the Commission that his employer had failed to accommodate his disability and that its discriminatory conduct culminated in his retirement on medical grounds in 2002.

[3] The basis of his application for judicial review of the dismissal of his complaint by the Commission is that it failed to conduct a sufficiently thorough investigation and, accordingly, its decision must be set aside as made in breach of the duty of fairness.

[4] In particular, he says, the Commission’s investigator omitted to consider his principal allegation, namely that the employer ought to have accommodated him by assigning a broader range of work to him. He asserts that his supervisor knew both that his medical condition (obsessive-compulsive disorder and depression) prevented him from completing on time the principal work assigned to him, namely the preparation of psychological assessments of prison inmates, and that the work was making his condition worse.

[5] The investigator’s report noted that the psychiatrists who had assessed Mr Besner (his own, Dr Pole, and a Health Canada doctor, Dr Forbes) found that he was not disabled from performing any of his employment duties, but recommended that his work schedule be reduced to three days a week. The employer adopted this recommendation and cut his work assignments by half.

[6] In submissions to the Commission in response to the investigator's report, Mr Besner's representative alleged, among other things, that the investigator had overlooked the aspect of his complaint that the medical assessment undertaken at the request of CSC was based on the employer's inaccurate description of his duties. It was said that the duties described those of a person employed by CSC as a psychologist, whereas, for the most part, Mr Besner performed only one of them, namely the preparation of psychological assessments and reports.

[7] In dismissing Mr Besner's complaint of lack of accommodation, the Commission stated that "the evidence indicates that [the employer] provided medically supported accommodation to the complainant", that is, the reduction in both the number of days to be spent at work and the amount of work to be done.

[8] We are not persuaded that, in rejecting the allegation that the Commission failed to investigate the complaint thoroughly, the Applications Judge committed any reversible error.

[9] First, the duty to investigate requires the Commission to deal with the essential or fundamental aspects of a complaint. However, the complaint form filed with the Commission by Mr Besner does not allege that the employer misled the Health Canada doctor by misdescribing his actual duties. Further, while this matter is mentioned in the 20 single-spaced pages of submissions made by Mr Besner to the investigator in response to those of the CSC, it is not given any particular prominence.

[10] Second, this omission from the investigator's report was brought to the attention of the Commission by Mr Besner, albeit as the third of three alleged deficiencies. However, these submissions obviously did not persuade the Commission to send the matter back for further investigation.

[11] Third, when it requested a medical assessment from Dr Forbes, CSC in fact indicated the extent of Mr Besner's responsibilities by noting that "counselling and interviewing" and "psychological assessments and recommendations" were the only duties performed by Mr Besner that constituted between 67%-100% of his work.

[12] Fourth, it was open to Mr Besner to inform the doctors who examined him that he was unable to perform the particular kind of work assigned to him because he was not also given any of the other duties of a CSC psychologist. Nonetheless, neither doctor concluded that his disability required that he be given a wider range of employment responsibilities.

[13] In short, on reading the record as a whole, we are not satisfied that Mr Besner's complaint was investigated inadequately so as to warrant our setting aside the Commission's decision as vitiated by procedural unfairness.

[14] For these reasons, the appeal will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-505-07

STYLE OF CAUSE: ALLAN BESNER
Appellant
v.
THE ATTORNEY GENERAL OF CANADA
(CORRECTIONAL SERVICE OF CANADA)
Respondent

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: May 27, 2008

REASONS FOR JUDGMENT OF THE COURT BY: Desjardins, Blais, Evans JJ.A.

DELIVERED FROM THE BENCH BY: Evans J.A.

APPEARANCES:

Steven Welchner

FOR THE APPELLANT

Lorne Ptack

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Welchner Law Office
Ottawa, Ontario

FOR THE APPELLANT

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE RESPONDENT