Date: 20081205

Docket: A-29-08

Citation: 2008 FCA 384

CORAM: **RICHARD C.J.**
EVANS J.A.
SHARLOW J.A.

BETWEEN:

DAN DURRER

Appellant
(Applicant)

and

CANADIAN IMPERIAL BANK OF COMMERCE

Respondent

Heard at Toronto, Ontario, on November 26, 2008.

Judgment delivered at Ottawa, Ontario, on December 5, 2008.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: RICHARD C.J.
SHARLOW J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This is an appeal by Dan Durrer from a decision of the Federal Court (2007 FC 1290) denying his application for judicial review of the Canadian Human Rights Tribunal's dismissal (2007 CHRT 6) of his complaint of discrimination on the ground of age, contrary to section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("CHRA").

[2] Mr Durrer alleged that his former employer, the Canadian Imperial Bank of Commerce ("CIBC"), discriminated against him on the ground of age when it eliminated his position, decided not to redeploy him, and terminated his employment when his subsequent temporary jobs ended.

[3] Mr Durrer argues in this appeal that the Tribunal committed two errors of law in dismissing his complaint. First, it failed to determine whether his dismissal was the result of indirect discrimination on the ground of age. Second, it failed to consider whether the Bank had differentiated adversely in respect of him in the course of employment by omitting to take into account the serious implications that termination had for him because of his age.

[4] In my view, the Tribunal committed no reviewable error in dismissing Mr Durrer's complaint. Consequently, I would dismiss the appeal.

B. FACTUAL BACKGROUND

[5] The background facts relevant to this appeal can be stated briefly. Mr Durrer joined CIBC in 1971 soon after leaving secondary school and had a successful career with the Bank in locations across Ontario. Nonetheless, in 1999 he was notified that his position in CIBC's compliance department had been eliminated as a result of corporate restructuring and downsizing, and that he would be terminated. He was then 48 years old.

[6] He was subsequently employed by the Bank for another two and a half years in three temporary positions. However, he was unable to find another position when the last of those jobs ended, and his termination took effect on April 12, 2002. He was then 50 and a half years of age. He was hired back later that year for eight months on a contract basis, but with no pension or other benefits.

[7] If Mr Durrer had remained a CIBC employee until he was 53 years old, he would have received an early pension, without any reduction for drawing it before he was 65 years old. As it was, he was entitled to a significantly reduced pension on his termination at 50 years of age. He suspected that CIBC decided to terminate him, and thwarted his attempts to find other employment with the Bank, in order to save the expense of paying both his relatively high salary and the full early pension to which he would be entitled if he remained an employee until the age of 53.

[8] Mr Durrer filed a complaint with the Canadian Human Rights Commission on July 23, 2002. In a report dated April 22, 2004, a Commission investigator concluded that the evidence did not establish that Mr Durrer had been terminated on the ground of age. However, the Commission did not accept the investigator's recommendation and, on January 30, 2006, referred the complaint to a Tribunal.

C. LEGISLATIVE FRAMEWORK

[9] The only provision of the CHRA relevant to this appeal is section 7.

> 7. It is a discriminatory practice, directly or indirectly,
>
> (*a*) to refuse to employ or continue to employ any individual, or
>
> (*b*) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.

> 7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
>
> *a*) de refuser d'employer ou de continuer d'employer un individu;
>
> *b*) de le défavoriser en cours d'emploi.

D. THE TRIBUNAL'S DECISION

[10] The Tribunal dismissed the complaint: 2007 CHRT 6. Adopting counsel's closing submissions, the Tribunal summarized (at para. 6) the bases of Mr Durrer's case under section 7 as follows:

> (i) the Bank unlawfully discriminated against him when it decided in 1999 to terminate him because age was a factor in the decision;
>
> (ii) the Bank unlawfully discriminated against him on the ground of age between March-April 2002 because Human Resources thwarted his attempt to obtain a fourth temporary position or permanent employment.

[11] I regard (i) as alleging a breach of paragraph 7(*a*), and (ii) a breach of paragraph 7(*b*).

(i) ***elimination of Mr Durrer's position***

[12] The Tribunal found that there was no evidence that CIBC's downsizing targeted older employees or that age was a factor in the elimination of positions. The Tribunal accepted (at para. 13) the expert evidence of an actuary, Mr Michael Banks of Mercer Human Resources Consulting, that the termination rate was 1% for Bank employees in the age range of 21-30, and 1.5% for those in the age range of 31-52. However, within that latter range, the termination rate, 1.5%, was uniform, and "there is no indication of selection by age in this range": see para. 13 of the Tribunal's reasons

[13] The Tribunal accepted the evidence of CIBC's Senior Vice-President for Compliance, Eric Young, who testified that the principal aim of the consolidation of the Bank's three compliance

departments into a single multi-disciplinary unit was to increase compliance effectiveness in a more complex business and regulatory environment. The reduction of costs was a subsidiary objective of the exercise.

[14] Mr Young also testified as to the process and the criteria he used to decide which positions to eliminate, and which employees would be retained and which let go. For example, he interviewed each employee whose position he was considering eliminating and obtained assessments of their effectiveness in compliance from other CIBC employees who dealt with them. In reviewing the information that he had gathered about each employee, Mr Young asked himself what compliance experience they had, how they understood the compliance function, and how adaptable they were.

[15] Mr Young also stated that he decided not to redeploy Mr Durrer in the restructured compliance department because he had limited experience in that area and lacked the skills that "brought value to compliance." Of the executives or managers in the compliance department whose positions were eliminated, two were older than Mr Durrer and three were younger. Of those retained, three were older than Mr Durrer and one was younger.

[16] On the basis of the above evidence, the Tribunal found that age was not a factor in the decision to eliminate Mr Durrer's position and to terminate his employment. Mr Durrer was not retained in the compliance department because, in comparison with other employees, he lacked the necessary skills, not because he was older.

(ii) ***subsequent events before termination***

[17] When notified of his termination, Mr Durrer was offered a termination package that included 12 weeks' notice, 24 months' salary, and other benefits, such as counselling and vocational rehabilitation. He was able to find three temporary work assignments in the Bank which lasted for more than two and a half years and thus, in effect, substantially extended his 12-week period of "working notice". This seems to have been regarded as contrary to the purpose of the Bank's programs of assistance for employees who, like Mr Durrer, had not been redeployed on a permanent basis following the abolition of their positions.

[18] However, because he was unable to find other temporary work to take him beyond the age of 50, Mr Durrrer could not take advantage of the Bank's policy entitling employees who reached the age of 53 to an unreduced pension by being "bridged" to age 55 with two years' severance. Indeed, Mr Durrer's central complaint in this entire proceeding has been that he should have been permitted to continue in temporary jobs for another two and a half years so that he would be eligible for an early unreduced pension at age 53.

[19] The Tribunal found no evidence to support the allegation, which it called (at para. 68) "the crux of Mr Durrer's case", that the Bank had prevented him from obtaining further temporary employment in order to avoid the expense of paying him an unreduced pension at age 53. Quite to the contrary. On the basis of the severance package provided by the Bank to Mr Durrer, the assistance given to him in obtaining employment, and the fact that he secured 28 months of

temporary work, the Tribunal concluded that none of the Bank's actions were because of his age (see para. 72) and said (at para. 70):

> Simply put, I find that CIBC had treated Mr Durrer well and with respect during what was no doubt a difficult time for him.

[20] The Tribunal found that there was no evidence that CIBC had terminated Mr Durrer in 2002, two and a half years before he was entitled to be "bridged" to an early pension without reduction, in order to avoid its pension liability to him.

E. THE FEDERAL COURT'S DECISION

[21] At the start of his reasons, the Applications Judge, Justice Hughes, stated that previous confusion about whether Mr Durrer's complaint included section 10 of the CHRA had been cleared up and it was agreed that only section 7 was relevant. Justice Hughes also understood (at para. 29) that Mr Durrer was no longer relying on paragraph 7(*a*) since he conceded that age was not a factor in CIBC's refusal to continue to employ him.

[22] Rather, Justice Hughes found, Mr Durrer's argument on his application for judicial review was based on "adverse effect" discrimination "in the course of employment" contrary to paragraph 7(*b*), a ground, counsel said, that the Tribunal had not considered, thereby committing an error of law. In particular, it was argued, the Tribunal had not decided whether, before terminating his employment, CIBC ought to have considered the adverse effects on Mr Durrer, especially his loss of the opportunity to obtain an unreduced pension when he was 53 years of age, and the difficulty that, as an older worker, he was likely to experience in obtaining other suitable employment.

[23] Although Justice Hughes was of the view that this argument had not been put to the Tribunal, and therefore should not have been raised for the first time on the application for judicial review, he nonetheless proceeded to consider it on its merits.

[24] After examining the reasons of Justice McLachlin (as she then was) in *British Columbia* (*Public Service Employee Relations Commission*) *v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 ("*Meiorin*"), Justice Hughes found no support in them for Mr Durrer's broad argument that, before terminating its employees, CIBC owed a duty to consider their individual circumstances, in order to determine whether they were likely to be more adversely affected than others because of their age and, if they were, to make reasonable accommodation.

[25] Accordingly, he dismissed the application for judicial review.

F. ISSUES AND ANALYSIS

Issue 1: Did CIBC discriminate indirectly against Mr Durrer contrary to paragraph 7(*a*) on the ground of age when it terminated his employment following the elimination of his position in 1999?

[26] Counsel stated that he agreed with the Tribunal's finding that CIBC did not terminate Mr Durrer's employment on the ground of age. However, he said, the Tribunal erred in law by failing to consider whether the decision to terminate him in 1999, and his subsequent inability to obtain a fourth temporary job, resulted from indirect age discrimination.

[27] His argument was that the Bank had decided to terminate employees who were expensive because of their high salaries and proximity to being entitled to an unreduced early pension. For long-term employees at least, counsel argued, there was a rational connection between their level of salary and eligibility for an unreduced early pension on the one hand, and their age on the other. Hence, since Mr Durrer was an "expensive" and a relatively old employee, the decision to terminate his employment was a discriminatory practice contrary to paragraph 7(*a*).

[28] I agree that the Tribunal did not expressly address this argument. However, in my view, this omission is not fatal. The argument that CIBC's downsizing targeted "expensive" employees, and that this indirectly discriminated against older employees, is mentioned obliquely and briefly in Mr Durrer's statement of particulars and is not mentioned in the Bank's responding notice of factual and legal issues. The Tribunal clearly did not understand that counsel's closing submissions (which were not part of the record before us) included this point: see para. 6 of its reasons. On the other hand, it appears from the memoranda of fact and law filed in the application for judicial review that the parties made submissions on indirect discrimination. However, because of the way that counsel for Mr Durrer presented the argument, it is not surprising that Justice Hughes overlooked it and thought that counsel was no longer relying on paragraph 7(*a*).

[29] In any event, the findings of fact made by the Tribunal, which Mr Durrer has not challenged, contradict the argument that employees were selected for termination because they were expensive and that, since these employees were likely to be older, this apparently neutral criterion in fact constituted discrimination of the ground of age.

[30] First, Mr Young stated that the restructuring of the compliance department was not primarily a cost-reduction exercise. Counsel pointed us to no evidence in the record indicating any relationship between employees' "expensiveness" and whether they were terminated or retained. Second, Mr Young testified that the reason that he decided not to redeploy Mr Durrer was because he lacked the necessary skills to work in the restructured compliance environment, not because of his age. Third, the evidence of Mr Banks was that older employees were not terminated by CIBC at a higher rate than younger employees in the age range 31-52. Fourth, the Tribunal found (at para. 76) no merit in Mr Durrer's allegation that the Bank terminated his employment in 2002, after his third temporary position came to an end, in order to avoid its liability to pay him the unreduced pension to which he would have been entitled if he had remained in employment until he was 53 years of age. In reaching this conclusion, it referred to the evidence of Mr Banks (at para. 77) to the effect that the impact on CIBC's pension liability of the termination of employees was not a material consideration in whether an employee was let go or retained.

[31] In short, there is no foundation in the record to support Mr Durrer's allegations that his employment was terminated because he was "expensive" and that he was therefore a victim of age discrimination because of a demonstrated connection between termination decisions on the one hand, and high salaries and age on the other. There is no reason to remit the matter to the Tribunal for a determination of the "indirect discrimination" argument, especially as it seems not to have been raised clearly at the hearing before the Tribunal.

Issue 2: Was CIBC in breach of paragraph 7(*b*) in terminating Mr Durrer's employment without considering the particularly adverse effect that termination would have on him as an older employee?

[32] Mr Durrer argues that, before it decided to terminate him, the CIBC did not discharge its duty to have regard to the fact that, as an older employee, he was likely to find it particularly difficult to be redeployed at the Bank and to find suitable employment elsewhere, and would lose the opportunity of receiving an unreduced pension at age 53. Consequently, by failing to have regard to these considerations, the Bank had, "in the course of employment … differentiate[d] adversely in relation to an employee" on the ground of age contrary to paragraph 7(*b*).

[33] Justice Hughes dismissed this argument because it had not been put to the Tribunal, but was raised for the first time before the Federal Court, and was, in any event, without merit. I agree.

[34] I see nothing in the *Meiorin* decision to support Mr Durrer's argument. In that case, a duty to accommodate was imposed on an employer only after a finding had been made of *prima facie* discrimination on the ground of sex because, for physiological reasons, it was more difficult for women than men to satisfy a particular physical fitness standard.

[35] In the present case, however, the evidence is that Mr Durrer was not retained after the elimination of his position in compliance because, relative to other employees, he lacked the necessary skills and experience, and was unable, though no fault of the Bank, to find additional temporary work assignments after March 2002. In order for his *Meiorin* argument to succeed, he

would have had to establish that his termination resulted from a *prima facie* discriminatory practice based on criteria that meant that older employees were more likely than their younger colleagues to be terminated. The evidence before the Tribunal did not warrant such a finding. In these circumstances, section 7 of the CHRA imposed no duty on CIBC, before terminating Mr Durrer's employment, to consider the degree of hardship that termination was likely to cause to him because of his age.

G. CONCLUSIONS

[36] For these reasons, and despite my sympathy for Mr Durrer's position, I would dismiss the appeal with costs fixed in the lump sum of $3,000.00 as agreed by counsel for the parties at the end of the hearing of the appeal.

"John M. Evans"
J.A.

"I agree
Richard C.J."

"I agree
Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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