Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2015 CHRT 5
Date: September 24, 2015
File No.: T2019/2014

Between:

Michael Moffat

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Davey Cartage Co. (1973) Ltd.

Respondent

Decision

Member: David L. Thomas

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I. Complaint

[1] This is a decision regarding a Complaint dated July 25, 2013 by Michael Moffat, as Complainant, against Davey Cartage Co. (1973) Ltd. ("Davey Cartage"), as Respondent, alleging it discriminated against him on the basis of his disability by terminating his employment. Mr. Moffat alleges that the impugned conduct occurred as a result of him becoming temporarily disabled and unable to perform his work as a "Dispatcher / Inside Sales Agent" for the Respondent following a motor vehicle accident outside of work. The accident occurred on or about February 16, 2013, in which Mr. Moffat suffered a concussion and was forced to remain off work for almost two months. When the Complainant returned to work on April 8, 2013, his employment was terminated by the Respondent that same day.

[2] On April 29, 2014, pursuant to s. 44(3)(a) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the "*CHRA*"), the Canadian Human Rights Commission (the "Commission") requested the Chairperson of the Canadian Human Rights Tribunal to institute an inquiry into the Complaint.

[3] Mr. Moffat appeared and gave evidence at the hearing. He was assisted occasionally by his friend, Ms. Lynne Dunstan. Mr. Moffat provided a helpful, written chronology of events and gave evidence that was clear and cogent. The Respondent's President, Mr. Michael (Mick) Thomas, and its Operations Manager, Mr. Keith Freeman, appeared on behalf of Davey Cartage and also gave helpful, detailed evidence at the hearing. The Respondent was represented by a lawyer, Mr. Joe Coutts, of Coutts Pulver LLP. The Commission did not appear at the hearing.

II. Decision

[4] For the reasons set out below, I have determined that the Complaint has not been substantiated and it is therefore dismissed.

III. Facts

[5] Davey Cartage is a trucking company based in Surrey, B.C. Its business has evolved over the years, but currently it owns and operates 11 truck tractors and approximately 100 trailers. It specializes in heavy hauling using flat-bed trucking solutions. Mr. Thomas gave evidence that 90% of the company's work is construction-related and that it specializes in moving large items such as bridge beams, structural steel and cranes. While 85-90% of its business is in British Columbia, it also does business in Alberta, Washington and Oregon. Its trucking employees are unionized. At the time of the hearing, the Respondent employed 15 people, including Mr. Thomas and Mr. Freeman. In the previous year, there had been as many as 25 employees.

[6] At the time that Mr. Moffat was hired, Davey Cartage did not do any business hauling containers to and from the various ports in Greater Vancouver. Mr. Moffat's previous employment as a dispatcher had been with a trucking company that did exclusively container hauling. Mr. Thomas gave evidence that Davey Cartage had been interested in hiring Mr. Moffat because it wanted to expand its business into container hauling and Mr. Thomas believed the Complainant could help the company do that. Mr. Moffat acknowledged that he discussed his ability to bring that type of new business to the company, but that he made no promises that he could.

[7] Nevertheless, the employment contract between Mr. Moffat and Davey Cartage indicated his job position to be "Dispatcher / Inside Sales Agent" and the latter part of the title implied there was some expectation that the Complainant would bring in new business. Mr. Moffat admitted that he had no experience in dispatching heavy haul trucks, the core business of the Respondent. The Respondent's witnesses also acknowledged this point, stating they believed that Mr. Moffat would learn the required specialized knowledge on the job.

[8] The employment contract contained a clause stating the terms upon which Davey Cartage could terminate Mr. Moffat's employment. Depending on the length of service, the company would be obliged to either give a certain period of notice of termination or pay in lieu thereof. The Respondent's evidence was that these amounts equalled or

surpassed the minimum requirements under the British Columbia *Employment Standards Act,* R.S.B.C. 1996, c. 113. The Respondent also submitted redacted copies of employment contracts with its other employees to demonstrate that this was a standard clause it used in all its employment contracts.

[9] Mr. Moffat commenced work with the Respondent on May 1, 2012. On or about July 26, 2012, the Respondent gave the Complainant an employment reference letter that was requested by Mr. Moffat in connection with the financing of his house. In addition to giving the particulars about his employment and wages, the letter stated, *inter alia*, that Mr. Moffat was "a reliable and competent employee."

[10] On August 1, 2012, after satisfactorily completing a three month probation period, Mr. Moffat was given a $400 per month raise. Mr. Thomas stated that if he was going to keep an employee beyond the initial three month probationary period, it was his practice to always give a pay increase to the employee at that time.

[11] On February 16, 2013, Mr. Moffat was involved in a very serious automobile accident. This occurred in his private motor vehicle and was not related to his employment. Several people were seriously injured in the accident, including Mr. Moffat. His injuries included a concussion, and he was unable to work for almost two months.

[12] The Respondent's employees were covered for short-term disability benefits by The Great West Life Assurance Company ("Great West Life"). The Complainant filed a Notice of Claim for such benefits on February 21, 2013 and did receive disability benefits while he was recovering from the accident and unable to work. The benefits were granted retroactively to the date of the accident.

[13] Mr. Freeman testified that before becoming the Operations Manager, he had considerable experience working as a dispatcher. When Mr. Moffat was unable to work, Mr. Freeman assumed the dispatcher responsibilities in February of 2013 and continued in this role for several months. It was during this time that Mr. Freeman had an opportunity to observe operational problems that he believed were attributable to Mr. Moffat.

[14] In particular, after he had assumed the dispatcher responsibilities, Mr. Freeman discovered that there were five company trailers that were essentially missing because there was no paperwork to account for them. According to Mr. Freeman, the trailers were not properly tracked by Mr. Moffat and the issue may never have come to light if Mr. Freeman had not taken over the dispatcher duties. Mr. Freeman had to drive around to various job sites of their customers to try to locate the 5 trailers. When he found them, he realized they had been unaccounted for, for 3 months, and as such, Davey Cartage was required to give its customer a substantial demurrage invoice for the three month period all at once. Although the demurrage charges were eventually recovered from the customer, the incident had a negative impact on the relationship between Davey Cartage and its customer.

[15] Further evidence was given about the loss of a major customer of Davey Cartage and the performance of Mr. Moffat that may have contributed to that loss. The customer had expressed some dissatisfaction with service before Mr. Moffat arrived at Davey Cartage. However, rather than alleviate concerns, Mr. Thomas testified that in his opinion, Mr. Moffat exacerbated the problems with the customer. This eventually led to the customer deciding to terminate its relationship with Davey Cartage shortly before Mr. Moffat had his accident. Mr. Moffat was asked to meet with his counterpart at the customer to see if he could salvage the relationship, but his accident occurred just a few days before the date of the meeting, and the meeting never happened. There was evidence that the loss of this customer led to a significant loss of monthly revenue for Davey Cartage.

[16] Both parties also gave detailed evidence about the failure of Davey Cartage to expand its business into port container hauling after Mr. Moffat was hired. There was evidence that some efforts had been made after the hiring of Mr. Moffat, such as the licensing of vehicles and personnel for port container hauling, but that a critical reservation system had not been set up. The Respondent claimed that it was the responsibility of Mr. Moffat to set up the reservation system, but that appeared to be in dispute. Mr. Moffat suggested other reasons for the failure. Whatever the cause, it was clear that Davey Cartage was not able to engage in the port container hauling business until after Mr.

Moffat's departure. It is not necessary for the Tribunal to find fault on this issue. It is sufficient for the Tribunal to observe that this was a legitimate business concern of the Respondent.

[17] Mr. Thomas gave evidence that internal monthly financial statements were prepared about 7-10 days after each month end. He testified that when he and Mr. Freeman reviewed the financial statements for February 2013, which would have been during the first or second week of March 2013, they made the decision to terminate Mr. Moffat's employment. The Respondent's revenues were decreasing, Mr. Moffat was a highly paid employee, and the company was having serious concerns about his performance. Mr. Thomas testified that the issue that really cemented his decision to let Mr. Moffat go was the discovery of the missing trailers. However, Davey Cartage's management decided not to communicate their decision to Mr. Moffat until he was able to return to work.

[18] The Complainant's medical condition was monitored by Dr. R. Demian who gave periodic reports to the insurance company, Great West Life. The doctor also kept Mr. Moffat apprised of his prognosis and advised him as to when he might be able to return to work.

[19] On March 7, 2013, Mr. Moffat sent an email to Mr. Freeman, stating: "Hi Keith, was at the doctor today and she said should be able to work on the Monday mar 18, if progress continue's. Will keep you posted....Mike." *(As written)*

[20] Mr. Freeman gave evidence that he spoke to Mr. Moffat on the telephone after receiving the March 7, 2013 email. Mr. Freeman stated he spoke to Mr. Moffat about his health in general and advised him to call again when he was ready to return to work.

[21] On March 14, 2013, Mr. Moffat sent another email to Mr. Freeman, which read: "Hi Keith, sorry but the doctor say's 2 to 3 more week's. I'll keep you posted,….Mike." *(As written)*

[22] Mr. Freeman testified that after the March 14, 2013 email, he spoke to Mr. Moffat and told him to take as much time to recover as he needed, as by then Great West Life

had accepted Mr. Moffat's claim and was paying him the short-term disability benefits. He also testified that he told Mr. Moffat not to return until he was fully recovered and able to resume his full responsibilities.

[23] Dr. Demian completed an updated report to Great West Life dated April 4, 2013. The salient content of the report is the doctor's reply to Question 5, which reads: "If your patient is able to return to work in the near future, does she have any restrictions and limitations that will need to be accommodated?" Dr. Demian's handwritten response appears to read: "April 8 / 13 – graduated RTW over 1 mo period."

[24] Dr. Demian was not called as a witness at the hearing. However, I understand the doctor meant that Mr. Moffat was ready to return to work as of April 8, 2013, but that there should be a graduated return to work (RTW) over a one month period. In their submissions at the hearing, the parties did not offer a different interpretation of the doctor's handwritten response to Question 5 of the report.

[25] On April 4, 2013, Mr. Moffat sent an email to Mr. Freeman, stating: "Hi Keith, I will be back on Monday the 8th ready to work, I will call you tomorrow (Friday) for detail's. hope everything is going well..Mike." *(As written)*

[26] Mr. Freeman testified that he spoke on the telephone with Mr. Moffat after the third email, on Friday, April 5, 2013. He recalled that Mr. Moffat was excited to come back to work and when he asked the Complainant if he was ready, Mr. Moffat replied that he was. Mr. Freeman testified that Mr. Moffat gave no indication during that phone call that he was not ready to fully resume his responsibilities. Mr. Moffat also testified that he did not raise the recommendation for a graduated return to work with Mr. Freeman during this telephone conversation.

[27] When Mr. Moffat returned to work on Monday, April 8, 2013, he was immediately handed a letter of termination and a cheque. The letter indicated that his employment was being terminated pursuant to the termination clause in his contract. The cheque represented the following amounts:

a) the 2 weeks' pay in lieu of notice as required under the employment contract;
b) 2 days' wages for February 18, 2013 and April 8, 2013;
c) 3 days' wages for 3 unused vacation days; and
d) a gratuitous payment equal to 5 days' wages described in the termination letter as "payment to assist you in your transition to new employment…"

[28] Mr. Thomas testified that the 5 days' wages were not paid out of any obligation, but because they wanted to help Mr. Moffat with a new transition and to avoid any "hard feelings" between the parties.

[29] There is some dispute about whether or not the Complainant, on April 8, 2013, was aware of Dr. Demian's report with the recommendation of a graduated return to work over a one month period. The report was from Dr. Demian to Great West Life. Mr. Moffat testified that he had the report in his possession when he returned to work on April 8, 2013. However, under cross-examination, he was unable to recall how he came to receive the report which had been signed just four days earlier. Mr. Moffat also acknowledged that he did not mention the report nor give a copy to the Respondent when he showed up for work on April 8, 2013. He also acknowledged that at no time did he mention he was under any restrictions for his return to work.

[30] Mr. Thomas testified that the first time the Respondent became aware of Dr. Demian's report dated April 4, 2013 was not until August of 2014, when it accompanied the Complainant's Statement of Particulars in this proceeding.

[31] Respondent counsel suggested in his argument that Mr. Moffat may not have recalled the facts accurately and that perhaps he did not have in his possession a copy of the doctor's report just four days after it was written. I have some doubt about whether Mr. Moffat had Dr. Demian's report when he showed up for work on April 8, 2013. He was unable to explain how he had come to possess the report so shortly after it was written,

and unable to explain why he never raised the contents of the report with his employer. Nevertheless, I am not convinced much turns on this point. I find on the evidence before me that on the date of termination, the employer was unaware there were any restrictions on Mr. Moffat's ability to return to work and, indeed, Mr. Moffat led the Respondent to believe there were none.

IV. Law

[32] The Complaint cites section 7 of the *CHRA* as the discriminatory practice that the Respondent engaged in, on the basis of Mr. Moffat's disability. This section reads as follows:

> **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.

[33] According to section 3 of the *CHRA*, disability is a prohibited ground of discrimination.

V. Jurisprudence

[34] A *prima facie* case is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer." (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears,* [1985] 2 S.C.R. 536, at p. 558). Once a complainant establishes a *prima facie* case of discrimination, he is entitled to relief in the absence of justification by the employer (*Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S .C.R. 202, at p. 208; *Lincoln v. Bay Ferries Ltd.,* 2004 FCA 204, at para. 18).

[35] In order to make out a *prima facie* case under s. 7(*a*) of the *CHRA*, a complainant must establish that:

> (i) the respondent refused to employ or continue to employ an individual; and
>
> (ii) there is a connection between—on the one hand—the refusal to employ or continue to employ that individual—and on the other—a prohibited ground of discrimination enumerated in s. 3 of the *CHRA* (See *Québec (C.D.P.D.J.) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39, at para. 52).

[36] In this last regard, it is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that the discrimination be a factor in the employer's actions or decisions (*Ibid*; *Holden v. Canadian National Railway Co.* (1990), 14 C.H.R.R. D/12 (F.C.A.)).

[37] Although the original Complaint to the Commission indicated discrimination under section 7 of the *CHRA*, Mr. Moffat did not lead evidence suggesting, nor did he present arguments alleging, discrimination under section 7(b) (adverse differentiation in the course of employment). Therefore, this decision is only examining allegations under section 7(a) of the *CHRA*.

[38] A respondent can either present evidence to refute the allegation of *prima facie* discrimination, put forward a defence justifying the discrimination, or do both (*Bombardier, supra,* para. 64). Where the respondent refutes the allegation, its explanation must be reasonable. It cannot be a pretext to conceal discrimination (*Khiamal v. Canada,* 2009 FC 495, at para. 58).

[39] The jurisprudence recognizes the difficulty in proving allegations of discrimination by way of direct evidence. As was noted in *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029, "[d]iscrimination is not a practice which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practised." Rather, one must consider all of the circumstances to determine if there exists what was described in the *Basi* case as the "subtle scent of discrimination" (*Khiamal, supra*, at para. 59). That said, "[e]vidence of

discrimination, even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct" (*Bombardier, supra*, at para. 88).

VI. Issues

[40] There are two issues to be determined:

1. To what extent does the Complainant's evidence support a *prima facie* case of discrimination, within the meaning of s. 7(*a*) of the *CHRA*?
2. Has the Respondent refuted the allegation of *prima facie* discrimination by providing a reasonable explanation for its conduct that is not a pretext for discrimination?

VII. Analysis

A. Issue #1 - To what extent does the Complainant's evidence support a *prima facie* case of discrimination?

[41] I have found that Mr. Moffat's evidence goes some distance towards a *prima facie* case. Without taking into account the Respondent's answer, the evidence appears to support the allegations in the Complaint: Mr. Moffat was indeed sidelined from his work by a disability at the time his employer decided to terminate his employment. At the time Mr. Moffat's termination letter was delivered to him, Dr. Demian had given the advice that he return to work gradually over a one month period. However, I must also consider whether the Respondent has refuted the *prima facie* allegation of discrimination.

B. Issue #2 - Has the Respondent refuted the allegation of *prima facie* discrimination?

[42] The question here is whether the Respondent has provided a reasonable, non-pretextual explanation for its conduct. Was the conduct of the Respondent, in its decision to terminate Mr. Moffat, influenced by his disability? In my view, it was not. The Respondent not only provided credible reasons for the termination that did not present characteristics of a pretext for discrimination, but moreover, the evidence as a whole

established that its decision to terminate Mr. Moffat's employment was in no way influenced by his disability.

[43] The Respondent's witnesses were very frank in their admission that they had decided to terminate Mr. Moffat's employment some weeks prior to his return to work. They gave several specific reasons for their decision that were not related to Mr. Moffat's disability.

[44] Throughout the hearing, Mr. Moffat defended his job performance and took exception to the blame that was attributed to him. In cross-examination, Mr. Moffat put into question the financial and management decisions of Mr. Thomas and Mr. Freeman. In essence, he was attempting to demonstrate the shortcomings of the business decisions of the Respondent.

[45] Unless there is evidence that a discriminatory ground was a factor, directly or indirectly, it is not the role of the Tribunal to second-guess the business decisions of company management which, with the benefit of hindsight, may be easy to criticize. The role of the Tribunal is to examine all of the considerations leading up to the impugned decision. In so doing, the Tribunal will ask itself whether the explanation proffered in support of the decision was reasonable in that context, but only so far as is necessary to determine whether the explanation given in support of the decision was not simply a pretext for discriminatory considerations (See *Morin v. Canada,* 2005 CHRT 41, at para. 219; *Durrer v. CIB,* 2007 CHRT 6, at para. 63, aff'd on other grounds in 2008 FCA 384).

[46] In its defense of its business decision to terminate Mr. Moffat, the Respondent also presented evidence to show that its gross revenues were greatly diminished in the early months of 2013. These statements were presented to demonstrate the impact of the loss of a major customer, for which Davey Cartage apportioned some blame to Mr. Moffat, and to show that continuing to employ him was becoming more unaffordable. In this regard, the Respondent also presented evidence to show that Mr. Moffat was the highest paid dispatcher the company had ever employed.

[47] The Tribunal's role in examining the reasons for, and circumstances surrounding, a termination of employment is to determine if there exists, as described in the *Basi* case, a

"subtle scent of discrimination." In the present case, I did not find any such scent. Whether in hindsight its business decisions were good ones or not, I am satisfied the Respondent made the decision to terminate Mr. Moffat's employment without having any regard to the disability that had sidelined him for the previous two months. The Respondent's decision was premised on the belief that he was fully recovered and able to resume his full work responsibilities. The performance problems that were considered and discovered during his absence were not in any way connected to his disability. I therefore find that the Respondent's decision to terminate Mr. Moffat's employment was not based on a prohibited ground of discrimination.

[48] Certainly one can empathize with Mr. Moffat for the shock he must have experienced after finally returning to work after his accident, only to find out he had lost his job. However, in all the circumstances of this case, the manner of his dismissal cannot support a finding of discrimination.

[49] In closing arguments, Mr. Moffat suggested there was a positive onus on his employer to make inquiries as to his medical fitness at the time he returned to work. He suggested that his employer should have asked for a medical report from his doctor or Great West Life. I am satisfied on the evidence that Davey Cartage did make such inquiry to Mr. Moffat directly, and that Mr. Moffat gave no indication that he was under any restrictions due to disability. In the circumstances of this case, and in light of Mr. Moffat's assurances that he was fully recovered and able to resume his full responsibilities, I do not find there was thereafter a positive duty on the Respondent to make inquiries to third parties.

[50] This Tribunal has previously determined there is no further duty for an employer to inform itself when the employer does not in good faith have any knowledge of the disability:

> "[42] However, in the present case, the Complainant, by his own admission, deliberately and successfully misled his supervising directors into sincerely believing that he was not an alcoholic. Although an employer has a duty to inform itself about an employee's disability and how the person can be accommodated, it seems only logical and fair that this duty should not be

> extended to situations where the employer does not in good faith have any knowledge whatsoever of the employee's disability."
>
> (*Benoit v. Bell Canada (Quebec,* 2004 CHRT 32, aff'd 2005 FC 926)

[51] Admittedly, the respondent-employer in the present case cannot claim to have had no knowledge whatsoever of Mr. Moffat's disability. Davey Cartage knew he had been injured; however, it believed Mr. Moffat's disability was temporary and no longer impacted his employment. Either Mr. Moffat himself was not aware of his own doctor's return to work recommendation at the time of the termination, or he simply chose not to disclose it to his employer. In any event, I am satisfied on the evidence that Mr. Moffat confirmed to his employer he was ready to return to work without restriction, and that Davey Cartage was not aware of the graduated return to work recommendation until more than a year later, when Dr. Demian's report was released to the Respondent as part of the disclosure process for this hearing.

VIII. Conclusion

[52] As noted above, one must consider all the circumstances to determine if there is a "subtle scent of discrimination." Based on the evidence, it is clear the Respondent decided to terminate the Complainant's employment for reasons entirely unrelated to his disability. Although some of the evidence suggested a *prima facie* case of discrimination insofar as the termination fell closely after Mr. Moffat's automobile accident, the Respondent has successfully refuted this suggestion by demonstrating that his disability was not a factor in its decision.

[53] I am satisfied on the evidence that the Respondent intended to wait until the Complainant had fully recovered from his injuries before terminating his employment. Davey Cartage's reasons for this termination were adequately explained and did not relate to his disability. In my view, these reasons provide a reasonable explanation for the termination and are not a pretext for discriminatory behaviour. I have found no evidence of any ulterior discriminatory considerations.

[54] It is settled law that the burden of proof in the human rights context is the same as in the civil context: he or she who alleges bears the burden of proving on a balance of probabilities (*Canada (Social Development) v. Canada (Human Rights Commission)*, 2011 FCA 202, at para. 16; *Bombardier*, *supra*, at para. 65). Where the respondent does not seek to rely on a statutory defence, the burden of proof remains with the complainant to demonstrate that the respondent's evidence is false or merely a pretext for discrimination (*Wilson v. CBSA*, 2015 CHRT 11, at para 22). The Complainant in the present case has not satisfied that onus.

[55] As I have found that it is not substantiated, the Tribunal dismisses the Complaint.

Signed by

David L. Thomas
Tribunal Chairperson

Ottawa, Ontario
September 24, 2015

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2019/2014

Style of Cause: Michael Moffat v. Davey Cartage Co. (1973) Ltd.

Decision of the Tribunal Dated: September 24, 2015

Date and Place of Hearing: March 2 and 3, 2015 in Tsawwassen, British Columbia

Appearances:

Michael Moffat, for himself

No one appearing, for the Canadian Human Rights Commission

Joe Coutts, counsel for the Respondent