

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Fred Smith

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

S & S Delivery Service Ltd.

Respondent

Decision

Member: Dr. Paul Groarke

Date: March 2, 2005

Citation: 2005 CHRT 13

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I. Introduction

[1] Fred Smith has filed a complaint against S & S. Delivery Service, his former employer. S & S is owned by Brian Slobodian. Mr. Smith worked for Mr. Slobodian from March 2001 to April of 2002. He worked five days a week, sometimes on Saturday. He was paid by mileage.

[2] The complaint states that S & S Delivery:

. . . has discriminated against me in violation of sections 7 and 10 of the *Canadian Human Rights Act* by requiring me to submit to a drug test prior to allowing me to return to work following an injury and by failing to return me to work because of a perceived disability (drug dependency).

It will become apparent that the situation is not so simple.

[3] The hearing in the case took less than a day. Mr. Smith and Mr. Slobodian were the only witnesses. They had no lawyers. Their submissions crossed into testimony and it was difficult to keep the inquiry within its proper legal bounds.

II. Facts

[4] Mr. Smith and Mr. Slobodian never liked each other. On April 23rd, 2002, the truck that Mr. Smith was driving hit a pothole. It must have been a terrible pothole. Mr. Smith's head hit the roof of the cab and his neck was badly injured. He was off work for six weeks and filed a claim with the Worker's Compensation Board. They provided him with six thousand dollars.

[5] Mr. Slobodian is convinced that Mr. Smith wasn't wearing a seat belt when his head hit the roof. He admitted that he doesn't wear a belt when he drives at home. Mr. Smith nevertheless insists that he was wearing a belt at the time of the accident. He adds that the real problem lies in the construction of the seat, which is mounted on springs. So in theory his head would have hit the roof, even if he were attached to it.

[6] On June 4, 2002, Mr. Smith was given a letter from his physiotherapist saying he was fit to go back to work. He took the letter to S & S Delivery. An hour and a half later, he received a call telling him that there was a letter from the company in the office. The letter was from Mr. Slobodian and indicated that there was a new drug policy. Mr. Smith would not be accepted back at work until he took a drug test.

[7] Mr. Slobodian states that he instituted the drug policy while Mr. Smith was on compensation. There is more to it, however. Mr. Slobodian candidly says that he was hoping that Mr. Smith would fail the drug test. He had seen him come into the yard with bloodshot eyes. Mr. Slobodian nevertheless states that other employees were asked for drug tests.

[8] Mr. Smith thinks there was no drug policy. He says no one else was tested. I do not know if there was a real policy; if there was, it was more *ad hoc* than it should have been. It was nevertheless apparent, even at the hearing, that Mr. Slobodian has a temper. Mr. Slobodian says that he and Mr. Smith constantly “buted heads”. I think Mr. Smith agrees.

[9] Mr. Slobodian had a problem with Mr. Smith’s attitude. He says that he heard from customers that Mr. Smith was saying things about his operations and his equipment. He mentioned a call from someone at Revelstoke. Mr. Slobodian had six weeks to think about it, while Mr. Smith was on Worker’s Compensation. He didn’t want Mr. Smith back.

[10] Mr. Smith refused to budge. He took the position that he was still an employee of S & S Delivery. He went to a doctor and requested a drug test. The results were given to Mr. Slobodian on June 11th. They were negative. Mr. Smith asked for work. Mr. Slobodian said he would call him. He never did.

[11] Mr. Smith phoned the office a number of times. At the end of June, he saw a newspaper ad in the StarPhoenix from S & S looking for a driver. So he knew there was work. Mr. Smith tried to contact Mr. Slobodian, without success. Communications ceased. There was another ad in August.

[12] The fight was not over. Mr. Smith went to Labour Standards at the end of June. Neil Klassen, the labour standards officer, said that he was entitled to two weeks pay in lieu of notice. Mr. Klassen discussed the matter with S & S and after legal threats from the Respondent, and an appeal, Mr. Smith received a cheque for two weeks pay. At the end of August, he filed a complaint with the Canadian Human Rights Commission.

[13] Mr. Smith now wants his wages for the period between June and September. Mr. Slobodian feels that this is piling on. Mr. Smith has already collected twelve thousand dollars from Worker's Compensation and something like 1500 dollars for salary in lieu of notice. Although he does not cite any law, Mr. Slobodian argues that Mr. Smith accepted that the job was over in June, when he went to Labour Standards in June and requested pay in lieu of notice.

[14] There may be something to this line of argument. Mr. Smith said that all Mr. Slobodian had to do was tell him, face to face, that he was terminated. He insisted on this, however. Mr. Slobodian conceded at the hearing that he should have been more forthright when Mr. Smith came to see him on June 5th. He should have told Mr. Smith that he was terminating his employment. He should have paid him the salary in lieu of notice. But he does not think it is fair to ask anything more of him.

III. Law and Analysis

[15] The complaint was laid under section 7 and section 10 of the *Canadian Human Rights Act*. Section 10 refers to an employment policy or practice. The argument is that the drug policy, if there was one, discriminated against those with a dependency on drugs.

[16] Mr. Smith had little if anything to say on this aspect of the case, and I cannot see any reason to discuss it. Both men agreed that drug testing is standard in the industry, at least for drivers who cross the border into the United States. In *Milazzo v. Canadian Human Rights Commission and Motor Coach Canada*, 2005 CHRT 5, the Tribunal recognized the legitimacy of such conditions in the transportation industry.

[17] The real issue lies under section 7(a) of the *Canadian Human Rights Act*. That provision states:

It is a discriminatory practice, directly or indirectly,

a) to refuse to employ or continue to employ any individual . . . on a prohibited ground of discrimination.

[18] The allegation is that S & S refused to continue Mr. Smith's employment on the basis that he might use drugs.

[19] The facts do not support this kind of assertion. The situation might be different if there was evidence that Mr. Slobodian had a prejudice against drivers who might have used drugs. As it stands, however, the evidence merely suggests that Mr. Slobodian didn't want Mr. Smith coming back to work. They had become enemies. The drug test was really beside the point. It was merely a ruse, a ploy to keep Mr. Smith out of the company.

[20] The problem goes deeper, however. I cannot see how Mr. Slobodian's conduct comes within the meaning of the term "discrimination". The *Merriam-Webster Online Dictionary* states that discrimination consists, in one sense, of treating someone differently "on a basis other than individual merit". It then gives two examples: to "*discriminate* in favor of your friends" and to "*discriminate* against a certain nationality".

[21] The *Compact Oxford Dictionary* provides a similar definition. It states that discrimination consists of making "an unjust distinction in the treatment of different categories of people, especially on the grounds of race, sex, or age." This reflects the contemporary legal use of the word. The idea is that a person is being treated differently because he is a member of a certain group.

[22] The complaint alleges that Mr. Slobodian refused to continue to employ Mr. Smith because he thought that he used drugs. I cannot see this. All of the evidence suggests that the

dispute between Mr. Smith and Mr. Slobodian was entirely personal. Mr. Slobodian never liked Mr. Smith. He thought that Mr. Smith lied when he filed his claim with Worker's Compensation. Mr. Slobodian may have been wrong in this; he admits that he has no proof, but the point is that his resentment was specific to Mr. Smith. It did not relate to his membership in a group.

[23] There might be an argument that Mr. Slobodian treated Mr. Smith differently because of the accident. This might be construed as discrimination on the basis of a disability. I suppose it is possible that Mr. Slobodian had it in for anyone who was unlucky enough to be injured on the job. Perhaps he saw this as a mark against his company. Or was concerned about the financial implications. This is mere speculation however.

[24] In the circumstances, I do not think that the case falls under section 7 of the *Canadian Human Rights Act*. This is a private dispute, between two men who dislike each other. Mr. Smith may or may not have grounds for a lawsuit. But that is another matter. The Complainant has not established that he was treated differently because he was a member of an identifiable group. There are none of the comparisons that the law of equality requires. This is essential.

[25] The Tribunal is not a court. There is a public interest component in the human rights process, which distinguishes it from private litigation. This is true, even when the issues are, for all practical purposes, exclusive to the parties. The point is fundamental. The human rights process engages larger interests, which concern everyone in society. It should not be used, for the purpose of trying a private claim in contracts or some other area of the law.

[26] I am not sure that I can say that much to appease either of the parties. I think that Mr. Smith and Mr. Slobodian probably need to move on to other things in their lives. The complaint is dismissed.

Signed by

Dr. Paul Groarke
Tribunal Member

Ottawa, Ontario
March 2, 2005

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T962/8204

Style of Cause: Fred Smith v. S & S Delivery Service Ltd.

Decision of the Tribunal Dated: March 2, 2005
(Written decision forwarded to the parties on March 4, 2005)

Date and Place of Hearing: February 28, 2005
March 2, 2005
Saskatoon, Saskatchewan

Appearances:

Fred Smith, for himself

No one appearing, for the Canadian Human Rights Commission

Brian Slobodian, for the Respondent