Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

John Francis Zieger

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Osborne Trucking Ltd.

Respondent

Decision

File No.: T1879/10912
Member: George E. Ulyatt
Date: August 29, 2014
Citation: 2014 CHRT 27

[1] The Complainant, John Francis Zieger, filed a complaint against the Respondent, Osborne Trucking Ltd., on January 12, 2012, alleging discrimination by the Respondent, his employer, under Section 7 of the *Canadian Human Rights Act ("the CHRA").*

[2] The Complainant was not represented by counsel throughout these proceedings, and specifically not represented at the hearing which took place in Regina, Saskatchewan on January 20, 2014 and January 21, 2014.

[3] The Respondent, who was initially self-represented, produced Wayne Osborne, the principal of the corporation, at the hearing. However, the Respondent thereafter retained the law firm of McDougall Gauley LLP as its lawyers, who in fact prepared the Statement of Particulars and attended at the hearing.

[4] At the outset of the hearing, the Complainant failed to produce the documentation that he had been advised was required to be filed with the Tribunal. The Tribunal adjourned the matter for a number of hours in order to allow the Complainant to attend at his residence to obtain the requisite documentation.

[5] At the commencement of the hearing, it became apparent that the Complainant was unfocused and having extreme difficulty in presenting his evidence. It was agreed that the Complainant's wife, Bobbie Zieger, who was initially scheduled to be a witness, would act as his advocate, would conduct direct examination of the Complainant and cross-examination of the Respondent's witness, and present closing arguments. The Tribunal was quite clear in its advice to the Complainant and Mrs. Zieger that, since Mrs. Zieger was playing such an active role, she could not then be a witness.

[6] The hearing adjourned briefly and, upon return, the Complainant and Mrs. Zieger agreed to proceed on the understanding that Mrs. Zieger would not give evidence.

[7] The Complainant alleged that he was discriminated against on the basis of a medical disability caused during the course of his employment with the Respondent. The disability complained of was a soft tissue injury of the lower back.

[8] The Respondent is a small trucking company located in White City, Saskatchewan. The Respondent employs approximately five other drivers and operates principally in Saskatchewan, although it does make periodic deliveries outside the Province.

[9] The Complainant had previously been employed by the Respondent in October and November of 2010. However, he had resigned his position and was rehired on February 20, 2011 as a Class 1A Truck Driver.

[10] The Respondent's principal contract is with Sysco Foods Ltd., which contracts with the Respondent for the delivery of food products to various locations in Regina and Saskatoon, as well as to other sites in Saskatchewan and, on occasion, outside the Province.

[11] The Complainant testified that on June 14, 2011, he "wrenched" his back while unloading pallets off the truck. His evidence was that he attended immediately to the hospital in Moose Jaw due to muscle spasms, at which time he received treatment. The Complainant sent text messages to the Respondent on June 14, 2011, one at 6:20:06 a.m., stating "Thanks Wayne, my back is fucked. I'm at the hospital".

[12] A number of texts were sent from the Respondent to the Complainant, none of which made inquiries as to the Complainant's condition. However, on June 14, 2011 at 7:48:50 a.m., the Complainant responded to a request as to his location by stating, "Still at the hospital. It takes forever".

[13] On June 14, 2011 at 7:34:29 p.m., the Complainant texted the Respondent the following message, "Sorry the Doc gave me a shot and I have been sleeping ever since. He said that I had a torn muscle, and laid me on my ass for five days".

[14] The next text produced was from the Respondent to the Complainant on June 20, 2011, 4:35:39 p.m. stating, “I need you to work tomorrow. To go to Saskatoon and drop trailer then back home.”

[15] The medical evidence, being the Physician’s Initial Report dated June 14, 2011 (Exhibit C-4), identifies the injury as muscle spasms and states:

> “Effects of the injury may affect activity for 5 days”.

[16] The evidence discloses that the Complainant’s return to employment with the Respondent in February 2011 was marred by disagreements between himself and Wayne Osborne. The Complainant felt he did not receive the support from his employer in a number of ways, including not being provided an assistant, always being assigned routes designed for one driver and the Respondent not providing modified duties.

[17] There was also evidence that, on one occasion, the Complainant hired his son as a helper and paid him out of his own pocket. The Respondent contradicted this allegation by showing that he had in fact paid the Complainant directly for his son’s wages.

[18] The Complainant also claims that Sysco, the Respondent’s principal client, had sabotaged his loads in an effort to discredit him and cause him further discomfort.

[19] The evidence is unclear as to when the Complainant returned to work. In his complaint, the Complainant states that the Respondent’s “…text message is telling me I need to work Thursday, June 16, 2011”. The text message in the evidence dated June 20, 2011, 4:35 p.m. reads, “I need you to work tomorrow to go to Saskatoon and drop”.

[20] The Complainant alleges that he was off work until June 24, 2011; the Respondent alleges he returned to work on June 17, 2011; and the medical report of Dr. Sanderson (Exhibit C-4) indicates that the Complainant advised that he had returned to work on June 23, 2011.

[21] Wayne Osborne maintained his own time log on a calendar, with the following entries relating to the Complainant:

Tuesday, June 14, 2011, “John drop said he hurt his back”;

Wednesday, June 15, 2011, “John off”;

Thursday, June 16, 2011, “John Off”;

Friday, June 17, 2011, “John ROC”;

Saturday, June 18, 2011, No entries re: John;

Sunday, June 19, 2011, No entries re: John;

Monday, June 20, 2011, “John no show off”;

Tuesday, June 21, 2011, “John SK00N”;

Wednesday, June 22, 2011, “John ROC”;

Thursday, June 23, 2011, “John ASS”;

Friday, June 24, 2011, “John off & quit”.

[22] Issues with the Complainant and the Respondent escalated on June 24, 2011 when the Respondent advised the Complainant that there was a delay of payment by its principal client, Sysco, and as a result the payroll for June 24, 2011 would be delayed until Monday, June 27, 2011.

[23] The Complainant had tried cashing his cheques twice, and a series of emails between the parties evidenced heightened tension. The Respondent had contacted the Complainant by text indicating that he should cash his cheque. On June 24, 2011, matters came to a head between the Complainant, the Respondent and the Complainant’s wife. The Complainant was of the opinion

that he was being picked on for having been injured and the Respondent had expressed a culmination of frustrations with the Complainant. The Complainant asserts that he was fired by the Respondent and the Respondent asserts that the Complainant quit.

[24] The Respondent has provided pay stubs for the pay period of June 18, 2011 to July 1, 2011, evidencing payment for three days. This would coincide with payment for June 21, 22, and 23 in the employer's log.

[25] On examination, dealing with the issue of the Respondent's knowledge of the Complainant's injury, Wayne Osborne testified, "I was not aware that he (John) was unable to work…He did all job duties."

[26] The Complainant argues that his position that he was terminated is substantiated by the decision of the HRSDC Labour Program that awarded him pay in lieu of Notice (Exhibit C-12). The Respondent dismisses same as he did not pay attention to the procedure.

[27] The Complainant throughout the hearing made it quite clear that he was not seeking any lost wages or reimbursement for expenses, but simply wanted an apology and that the Respondent be held responsible for his actions. The Complainant argued that he was "robbed of his life" and went from a "social butterfly" to a "disabled person".

[28] The Complainant is seeking damages under Section 53(2) of the *Act*.

[29] The Respondent's counsel submitted a brief on law dealing with the issues of voluntary resignation, repudiation of the employment agreement and a failure to mitigate.

[30] The Tribunal does not have to address the issue of failure to mitigate as the Complainant has not claimed lost wages. The Complainant did ultimately receive Workers' Compensation benefits.

[31] In the present circumstances, in view of the failure of the Respondent to pay the Complainant as required, and in light of the HRSDC Labour Program's Decision, the Tribunal would find that the Respondent had terminated the Complainant's employment.

[32] The principal issue in the present case is the issue of disability and the Respondent's knowledge of same.

[33] The issue of disability is a key criterion that the Complainant must satisfy. In order to be successful under Section 7(a) of the *CHRA*, the Complainant must establish a *prima facie* case of discrimination. In *Chaudhary v. Smoother Movers*, (2013) CHRT 15 (CanLII), the Tribunal at paragraph 33 stated as follows:

> (33) The Complainant in proceedings before the Tribunal must establish a *prima facie* case of discrimination. 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."
>
> (*Ontario Human Rights Commission v. Simpsons Sears*, (1985) CanLII 18 (SCC), (1985) 2 SCR 536 at para.28).
>
> (35) Paragraph 7(a) of the *Act* provides that it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual on a prohibited ground of discrimination. In complaints under subsection 7(a), the Complainant must establish a link between a prohibited ground of discrimination and the employer's decision to refuse to employ or continue to employ him or her. (see *Roopnarine v. Bank of Montreal*, (2010) CHRT 5 (CanLII), 2010 CHRT 5 at para.49). That said, discrimination does not need to be the only reason for the decision. It is sufficient that discrimination be one factor in the decision.(See *Holden v. Canadian National Railway Co.*, (1990) F.C.J. No. 419 (F.C.A.) (Q.L.); and *Khiamal v. Canada (Canadian Human Rights Commission)*, (2009) FC 495 (CanLII), 2009 FC 495 at para. 61).

[34] In the present case, the alleged prohibited ground is disability. The question of what constitutes a disability was canvassed by the Federal Court of Appeal in *Desormeaux v. Ottawa (City)*, (2005) FCA 311 at paragraph 15, wherein the Court stated:

> As the Supreme Court established in *Granovsky v. Canada,* (2000) SCC 29 (CanLII) (2000) 1 S.C.R. 703 at para.34 and in *City of Montreal* (supra) at para. 71, disability in a legal sense consists of physical or mental impairment which results in a functional limitation or is associated with a perception of impairment.

[35] To be successful, the Complainant must first establish on a *prima facie* basis:

(1) that he suffered from a disability; and

(2) that his disability played a role in the Respondent's decision to terminate his employment, contrary to Section 7(a) of the *CHRA*.

[36] In the present case, the Complainant has established that he suffered from a disability. However, he has failed to establish that the Respondent was aware of his disability and that it was based in part or played a role in his termination.

[37] The text message of June 14, 2011 from the Complainant to the Respondent indicated that he was to be off work for five days. This evidence was corroborated by the medical report, dated June 14, 2011, that the injury may affect activity for five days.

[38] The Respondent's time logs and pay stubs indicate that the Complainant was paid for three days in the pay period of June 18, 2011 to July 1, 2011. This in fact corresponds with the Respondent's time log. Furthermore, the medical report signed by Dr. Sanderson states "He took a few days off and then went back to work on 23/6."

[39] The Complainant's evidence before the Tribunal was inadequate. The Complainant failed to produce any evidence that the Respondent knew or ought to have known that he was disabled on June 24, 2011. In fact, the evidence was to the contrary.

[40] The Respondent's counsel demonstrated a willingness to allow Mrs. Zieger and the Complainant to go beyond what normally would be allowed at a hearing and in argument.

[41] In the present circumstances, the Complainant has failed to establish that his termination was based upon a discriminatory ground pursuant to Section 7 *CHRA*.

ORDER

[42] For the foregoing reasons, I hereby order that the complaint be dismissed.

Signed by

George E. Ulyatt
Tribunal Member

Ottawa, Ontario
August 29, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1879/10912

Style of Cause: John Francis Zieger v. Osborne Trucking Ltd.

Decision of the Tribunal Dated: August 29, 2014

Date and Place of Hearing: January 20 and 21, 2014

Regina, Saskatchewan

Appearances:

Bobbie Zieger, for the Complainant

No one appearing for the Canadian Human Rights Commission

Michael J. Phillips, for the Respondent