

Federal Court



Cour fédérale

Date: 20181127

Docket: T-1710-17

Citation: 2018 FC 1185

Ottawa, Ontario, November 27, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

JAMIE BOYCHYN

Applicant

and

ROYAL CANADIAN MOUNTED POLICE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a decision of the Canadian Human Rights Commission (the “Commission”) to dismiss Jamie Boychyn’s (the “Applicant”) complaint that the Royal Canadian Mounted Police (“RCMP” or the “Respondent”) discriminated against him on the basis of disability because he has Type 1 Diabetes. The Commission’s decision is based on an Investigator’s recommendation that his complaint did not merit an inquiry after it found that the different treatment resulted from a *bona fide* occupational requirement.

[2] For the reasons that follow, I am granting the application.

II. **Facts**

A. *The Applicant's Relationship with the RCMP*

[3] The Applicant wanted to become a police constable with the RCMP. On September 22, 2014, he was enrolled and began training in the RCMP's Training Academy Cadet Training Program (CTP) at "the Depot," in Regina, Saskatchewan. In late February, near the end of his training, he was hospitalized for several days. In early March, he was diagnosed with Type 1 Diabetes. He nevertheless completed his training and graduated from the CTP on March 16, 2015.

[4] Despite graduating from the CTP, the Applicant was not sworn in as a regular member and was not posted to his preferred detachment ("K" Division, in Alberta) to begin working as a constable. Instead, his commanding officer informed him that the Depot's Health Services Officer (HSO) instructed that he could not be sworn in, and that he would need to be re-assessed due to his health condition in three to six months. According to the Applicant, this did not occur.

[5] With the support of the RCMP, the Applicant was hired as a "Temporary Casual Employee" at a recruiting centre in Ontario. The contract lasted from April 1, 2015 until August 31, 2015, but could not be extended due to a hiring policy that limits casual positions to 90-day appointments. The Applicant contacted a number of human resources personnel within the RCMP in an attempt to develop a plan for his return to work. No such plan was established.

[6] In October 2015, the Health Services section of "K" Division contacted the Applicant for an assessment of his medical condition to determine whether he was employable as a constable.

At this time the Applicant advised that he was unsure if he was still interested in pursuing a position with the RCMP because he had settled in Ontario. The Respondent asserts that later in October and November 2015, “K” Division contacted the Applicant and left messages that were not returned. Conversely, the Applicant asserts that he continued to reach out to the RCMP to have them assess his medical condition, but that he was advised that he would have to wait until March 2016 to be re-assessed and that, in any event, there was no guarantee he would be sworn in following that assessment.

[7] In mid-December 2015, the Applicant provided the RCMP with updated medical reports, including a letter from his treating physician. On January 4, 2016, HSO Dr. Douglas Huber (“Dr. Huber”) determined that the Applicant’s condition was “NOT congruent with operational policing duties at this time” (emphasis in original). The same day, the RCMP notified the Applicant that the HSO was not currently satisfied that his diabetes was fully under control, but that the decision did not mean that he was excluded from becoming a constable. The Applicant responded, pointing to the results of his endocrinologist’s assessments and asserting his view that he met the requirements of the RCMP’s policy (which requires absence of “severe events”). He asked for the HSO to contact him so that the matter might be clarified.

[8] In February 2016, the Applicant was informed that Ontario’s “O” Division Health Services was trying to schedule a fitness assessment, to which the Applicant stated his interest but noted that he and his girlfriend had bought a house in Hamilton, Ontario, and therefore had no interest in leaving Ontario. When informed of the Applicant’s response, RCMP official Raj Gill instructed that they could “close our file here and conclude our involvement in this former cadet.”

[9] In July 2016 (well over a year since the Applicant's diagnosis) "O" Division's Career Development and Resourcing Office reviewed the Applicant's profile to determine if a position could be found for him in Ontario. It concluded that he did not have any specialized language, education or work experience that would permit a placement with "O" Division.

B. *The Commission Proceedings*

(1) Complaint and Investigation

[10] On January 18, 2016, the Applicant filed a complaint with the Commission. On February 16, 2016, the Commission informed the RCMP of the Applicant's complaint.

[11] On August 31, 2016, the Commission wrote to the Respondent, asking for its position on the Applicant's complaint. Specifically, the Commission asked 1) whether the RCMP refused to swear the Applicant in because of his diabetes, 2) to be provided with the RCMP policy and standards related to diabetes, and 3) a response to the Applicant's assertion that he could have been sworn in and placed on administrative duties until cleared to work as an officer.

[12] By way of a letter dated September 23, 2016, RCMP Human Rights Analyst Sargent Stéphane Gagné ("Sgt. Gagné") responded to the Commission's questions. With respect to the diabetes policy, the Respondent outlined a response provided by National Medical Advisor Dr. Josée Pilon ("Dr. Pilon"), who stated that the RCMP's current practice "consists of an individual occupational health assessment of fitness for duty for both the applicant as part of the recruitment process and the member as part of the Periodic Health Assessment." Dr. Pilon further states that these assessments are "conducted in accordance to RCMP policy using the

‘Diabetes Mellitus Medical Guidelines’” and summarizes the required medical information for the conduct of the medical assessment as follows:

One year of medical follow-up records or medical records, since onset of disease if diagnosis within the last year with yearly re-assessment for members

Confirmation from the treating physician that the applicant or member has received diabetic counselling and is knowledgeable in its management

Documentation on the presence/absence of severe hypoglycemia in past 12 months with description of symptoms and the management

Documentation of the treatment regimen

HbA1C obtained at 3 months interval

Results of blood glucose monitoring, at least 8 times per week or with measurement that covers the operational shift (prior to a shift and during), if applicable

Medical examination with details on relevant body system, yearly

Ophthalmologist report, yearly

Cardiac stress test – at recruitment and every three years or more frequently based on risk assessment

Other tests as clinically required

[13] Dr. Pilon then states that the applicant or member must demonstrate that he or she meets the “fitness for duty” criteria, which includes:

Stability of control of blood glucose demonstrated by HbA1C level or glucometer readings or modification in treatment regimen in the preceding months

No hypoglycemia unawareness or no severe hypoglycemia events within the past 6 months requiring corrective intervention by an outsider or producing loss of consciousness.

[14] Sgt. Gagné disagreed with respect to the allegation that the RCMP “could have sworn him in and provided him with an administrative position until he was cleared to work as a Police Officer.” Sgt. Gagné states that completion of the CTP does not equate to employment, that the Applicant’s failure to be sworn in resulted from the fact that he did not meet the minimum standards related to occupational health, and that the RCMP was not in a position to offer him employment. Sgt. Gagné also says that the RCMP’s “O” factor describes occupational capacity, and an “O2” minimum standard is applicable to recruits and entry level constables. To meet the “O2” criterion, the individual must “be able to participate fully in an operational call out and must not suffer from any condition that carries an increased risk of sudden incapacitation.” Sgt. Gagné argues that this requirement is rationally connected to job requirements of a constable, and that the RCMP adopts that standard in an honest and good faith belief that it is necessary in the policing context. Finally, Sgt Gagné expresses the view that the RCMP showed a good deal of flexibility and compassion in this case, demonstrating its intent to hire the Applicant if and when he met the medical requirements.

[15] Around the end of May or early June 2017, Commission Investigator Jennifer Murakami (the “Investigator”) contacted the Applicant and conducted a telephone interview.

(2) The Investigation Report

[16] On June 22, 2017, the Investigator completed her report (the “Report”) and communicated it to the parties. The Report states that its purpose is to determine whether the Commission should a) appoint a conciliator to attempt to resolve the complaint, b) recommend that the tribunal conduct further inquiry, or c) dismiss the complaint.

[17] The Report then sets out the two analytical steps that are followed when assessing adverse differentiation in employment. The first analytical step considers whether *prima facie* discrimination took place, and the second analytical step pertains to the existence of a *bona fide* occupational requirement. In applying this framework, the Investigator found that there is no dispute with respect to the first stage of the analysis – that is, discrimination on the basis of disability took place.

[18] With respect to the *bona fide* occupational requirement, the Report first identifies that the relevant policy at issue is the RCMP's medical requirements for general duty constables. The Investigator then finds that the policy is rationally connected to the performance of general duty constables, because the medical qualifications are tied to the tasks that a general duty constable typically performs. The Investigator further finds that there is no information to suggest that the RCMP adopted the standard in bad faith, but rather that the standard serves the goal of hiring individuals who can safely carry out policing duties.

[19] The Report then analyzes whether the RCMP's medical standard is reasonably necessary to achieve the intended purpose or goal of the policy. The Investigator begins by summarizing the Respondent's position that this question should be answered in the affirmative because the basic medical requirements are in place to ensure the health and safety of constables and the general public. The Report further summarizes the Respondent's position that it conducts an individualized occupational health assessment for fitness for duty as part of the recruitment process, and that this process makes use of applicable medical standards, occupational health guides, and clinical best practices. With respect to diabetes, the concern is hypoglycemia with sudden incapacitation and hyperglycemia with subtle incapacitation. For individuals with Type 1

Diabetes, the RCMP states that applicants must demonstrate that their condition is stable, well-controlled, would not interfere with safe performance of duties, and would not risk sudden incapacitation. The Report then sets out the applicable policy measures as described above.

[20] The Report also recounts the RCMP's position that it did not refuse to swear the Applicant in because of his diabetes, but rather because he did not meet its minimum standards related to occupational health, noting that the RCMP has hired individuals who have controlled their diabetes for the 12 month requirement. The RCMP further notes that it is clear that completion of the CTP does not automatically translate into an offer of employment, and that it nevertheless assisted the Applicant in obtaining a casual position in Ontario as a gesture of good will. Finally, the Respondent acknowledges that it erroneously indicated that the reassessment would take place in 6 months, when in fact its policy stipulates a 12 month timeframe.

[21] The Report then summarizes the Applicant's position. The Report notes that, during the telephone interview, the Investigator informed the Applicant that the correctness of the medical assessment would not be contemplated in these proceedings, and that she "would consider the medical information only insofar as to analyze the actions the [RCMP] took once learning of the complainant's diagnosis and to review whether the [RCMP] individually assessed him." The Report recounts the Applicant's assertion that he was not made aware of the specifics of the RCMP policy until receiving the Respondent's position on his complaint in November 2016, and notes a contradiction in the 12 month evaluation timeframe because the "K" Division was ready to evaluate him in December 2015 (well within the 12-month period following his diagnosis).

[22] The Applicant further notes that he never received clarification on what the RCMP considers to be "severe hypoglycemia," and noted that he retains a commercial driver's license

and a pilot's license without restrictions despite having provided information of his diabetes to the appropriate regulatory authorities. Further, the Applicant accepts that completing the CTP does not guarantee employment, but notes that an employment position is strongly implied throughout the recruitment process, and that his "O4" designation was only a temporary designation. Finally, the Applicant stipulates that he sought guidance and direction from the RCMP to no avail, that he was given no adequate explanation about why he did not meet the medical requirements, that the RCMP never contacted his endocrinologist, and that the RCMP did not have contact with him over a period of 5 months.

[23] The Investigator concludes that the medical requirements of the general duty constable position are reasonably necessary to achieve its goal of hiring those who can carry out the relevant duties safely, and that they are *bona fide* occupational requirements. She further determines that accommodating the complainant in his "preferred way" (i.e., by swearing him in as a member when he did not meet the medical requirements) would result in undue hardship based on safety. Finally, the Investigator determines that the Respondent's standard "does not exclude applicants with diabetes" but rather "requires applicants who have diabetes to show that their diabetes is stable, well-controlled, would not interfere with the performance of their duties, and would not carry sudden risk of incapacitation."

(3) Subsequent Submissions & Decision

[24] The Commission sought input from the parties on the Investigator's Report. The RCMP responded in a letter dated July 18, 2017, noting simply that it agreed with the Report and its conclusions.

[25] On July 28, 2017, the Applicant provided his submissions with respect to the Investigator's Report. The Applicant states that the matter should be referred for further inquiry because of the case's public importance and its importance to him as an individual beginning his career. The Applicant notes that when there is a neutral standard relating to disability, there is an obligation under *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*] to demonstrate that the established standard is necessary for the safe and efficient performance of a job, and that a less stringent standard would not achieve the stated goal. The Applicant further submits that the Investigator committed an error of law by failing to consider what alternative approaches were available to the RCMP, noting that two other government organizations – the Ontario Ministry of Transportation and Transport Canada – had adopted less stringent standards to that of the RCMP and yet these regulators did not restrict the Applicant's ability to drive or fly. The Applicant also challenges the RCMP policy itself, claiming that the 12-month requirement is unreasonable and that the policy is unclear as to what is meant by "stability" in relation to hypoglycemia. Finally, the Applicant asserts that the RCMP failed to accommodate his temporary "O4" status, contrary to the steps taken with other RCMP employees who were accommodated with an administrative role pending their approval as fit for duty.

[26] With respect to the Report itself, the Applicant argues that the Investigator failed to consider discrimination in hiring simply because he was not yet sworn in, which ignores the fact that the duty to accommodate also applies to hiring decisions (i.e. it is not exclusive to situations where an employment relationship already exists). The Applicant further asserts that the Investigator failed to consider the procedural component of the duty to accommodate, noting that the Respondent only provided him with detailed information about the applicable policies in

response to his complaint before the Commission, and failed to interact and communicate with him to explore accommodation options.

[27] By way of a letter dated August 4, 2017, the Investigator wrote to the RCMP, providing Sgt. Gagné with a copy of the Applicant's reply to the Report and seeking the Respondent's comments on those submissions. Sgt. Gagné responded in a letter dated August 23, 2017, explaining the Respondent's position that the medical requirements of other government agencies are irrelevant in an assessment of the RCMP's *bona fide* employment requirements. He further noted that the Cadet Training Agreement stipulates there is no automatic offer of employment upon completion of the CTP, and reiterated that the Applicant was an applicant for a position, not an employee of the RCMP.

[28] In a letter dated August 25, 2017, the Investigator provided the RCMP's submissions to the Applicant and informed him that he was now in receipt of all the information that would be placed before the Commission. She did not solicit further comment from the Applicant.

[29] By way of letters dated October 4, 2017, the Commission communicated its final decision to the parties, dismissing the Applicant's complaint without providing additional reasons.

III. Issues

[30] Three main issues arise in this application for judicial review:

- Did the Commission breach its duty of fairness by failing to conduct a thorough and neutral investigation?

- Did the Commission fail to apply the correct legal test when screening out the Applicant's complaint?
- Is the Commission's decision unreasonable given the law and facts before it?

IV. **Standard of Review**

[31] When the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons, the report constitutes the Commission's reasoning and forms part of the screening decision (*Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 37).

[32] Whether the investigation was thorough and neutral is an issue of procedural fairness reviewed for correctness (*Brosnan v Bank of Montreal*, 2015 FC 925 at para 19 [*Brosnan*]).

Whether the Commission applied the proper legal test is also reviewed for correctness (*Walsh v Canada (Attorney General)*, 2015 FC 230 at para 20 [*Walsh*]). The Commission's decision about whether the submissions warrant the Tribunal's inquiry is reviewed on the reasonableness standard (*Ritchie v Canada (Attorney General)*, 2017 FCA 114 at para 39).

V. **Analysis**

A. *Did the Commission breach its duty of fairness by failing to conduct a thorough and neutral investigation?*

[33] The Applicant argues that the Commission breached its duty of procedural fairness by failing to investigate crucial evidence, citing this Court's decision in *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574, aff'd (1996) 205 NR 383 (FCA) for the proposition that submissions cannot cure a defective investigation if the decision-maker explicitly disregards evidence or omits fundamental information. The Applicant argues that the Investigator failed to examine the assertion of undue hardship, did not interview a relevant witness, and did not inquire

as to whether or not the Applicant's medical information met the RCMP's policies. In particular, the Applicant argues that the Commission was required to analyze and assess whether there was sufficient evidence to support the Respondent's defence of undue hardship, and examine how the RCMP accommodates other employees with "O4" designations. The Applicant further argues that the Commission has a duty to consider and respond to his submissions, relying upon this Court's decision in *Brosnan* at para 22 which states:

Thoroughness also entails that the Commission must, as a matter of fairness, respond to any submissions which go to the heart of the investigator's findings.

[34] Finally, the Applicant points out that he was not given an opportunity to respond to the further submissions of the Respondent.

[35] The Respondent argues that the Report was thorough. For example, the Respondent states that the Investigator provided both parties with an opportunity to review and respond to the Report, and further argues that its response to the Applicant's submissions did not contain any new arguments and thus did not necessitate further submissions from the Applicant. The Respondent further notes that the Commission's decision explicitly states that it reviewed the Report and the parties' subsequent submissions, thus the requirements of procedural fairness were met. Moreover, the Respondent says that the Investigator does not have the expertise or the jurisdiction to assess the correctness of the RCMP's medical determination, and that the Investigator's decision not to interview a person put forward by the Applicant does not give rise to a breach of procedural fairness.

[36] An investigation must be conducted in a procedurally fair manner, which means it must be neutral and thorough. I find that this investigation was not thorough as the Investigator's

numerous failings have rendered it incomplete. For instance, the Investigator failed to consider: whether the Applicant's medical condition meets the RCMP requirement; whether the standard itself is a *bona fide* occupational requirement; and whether the RCMP standard is unclear. This last point is especially remarkable considering that Dr. Pilon (the RCMP's own National Medical Advisor) stated that the current "RCMP guidelines would benefit from clarity in the language used to incorporate current clinical practice" and cited the example of a "specific questionnaire that assesses the risk of hypoglycemia" as a potentially useful addition.

[37] I also agree that the Investigator failed to conduct any analysis about how the RCMP accommodates general duty constables living with diabetes. In my view, it was not necessary for the Investigator to interview another constable who had an "O4" profile (but who had been accommodated with an administrative role) precisely because the RCMP admits that other officers living with diabetes have been accommodated. In that sense, the Respondent's distinction, (a distinction somehow accepted by the Investigator), is an artificial divide between the Applicant as a candidate and other officers as employees. This distinction is absurd; the RCMP is effectively saying that the day after a candidate is sworn in, they will be accommodated with administrative roles if they fall below the standard, but because this Applicant happened to suffer a diabetic episode a matter of days before he was set to be sworn in, the RCMP owed him no duty of accommodation. That position is untenable. By automatically adopting the Respondent's artificial distinction between cadets and sworn members who subsequently become non-operational, the Investigator failed to conduct an adequate investigation.

[38] In sum, the Investigator failed to consider the core of the Applicant's claim. The Investigator cannot simply declare that she does not have the jurisdiction or expertise to assess the "correctness" of the RCMP's medical opinion and then merely adopt the RCMP's medical opinion despite conflicting evidence that the Applicant is stable. In any event, the Investigator's statement is logically incompatible with her conclusion: if she does not have jurisdiction or expertise to assess the correctness of the RCMP's determination, then she also does not have the capacity to deem it to be a *bona fide* occupational requirement.

[39] Accordingly, I find that the Investigator failed to thoroughly investigate the Applicant's complaint, and therefore breached the Applicant's right to procedural fairness. This alone is sufficient to remit this matter for redetermination.

B. *Did the Commission fail to apply the correct legal test when screening out the Applicant's complaint?*

[40] The Applicant submits that the Commission erred by failing to properly apply the undue hardship analysis as required under the *Meiorin* test. He argues that section 15(2) of the *Canadian Human Rights Act*, RSC 1985, c H-6, places a burden on the RCMP to demonstrate that it would face undue hardship if it were to accommodate the needs of the impacted person. Citing this Court's decision in *Air Canada Pilots Association v Kelly*, 2011 FC 120, the Applicant argues that *Meiorin* involves procedural and substantive obligations, and notes that one important consideration in satisfying those obligations is to investigate alternative approaches that do not have a discriminatory effect. The Applicant submits that the Investigator's analysis fails to apply the principles articulated in *Meiorin*, and instead adopts a framework that never contemplates whether the RCMP could have accommodated the Applicant to the point of undue hardship.

[41] The Respondent, on the other hand, argues that the Investigator spent a considerable portion of the Report on analyzing whether there is a *bona fide* occupational requirement to the RCMP's policy. It recalls the Investigator's finding that other RCMP employees were accommodated once they were able to show that their diabetes was stable, but that the Applicant was never able to demonstrate that his diabetes was, in fact, stable.

[42] I again agree with the Applicant. As he points out, the law as it exists under the *Meiorin* test is to determine whether the standard is reasonably necessary. A reasonably necessary standard means "it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer" (*Meiorin* at para 72). In this case, the Investigator concludes that the standard is rationally connected to policing duties, that it was adopted in an honest and good faith belief, and that it is reasonably necessary. Despite this conclusion, nowhere does the Report state or apply the test for establishing reasonable necessity as articulated by the Supreme Court of Canada in *Meiorin*. In this sense, the case at bar is virtually indistinguishable from this Court's decision in *Walsh*, wherein Justice Rennie found that the failure of an investigator to apply the undue hardship step of the *Meiorin* test is an error which requires rectification through redetermination. This case is similar in that the Investigator, and by extension the Commission, failed to both state and apply the correct legal test.

[43] Since the Court decides the above two issues in the affirmative, it is unnecessary to answer the third issue as the Commission's decision must be sent back for redetermination.

VI. **Costs**

[44] The parties came to an agreement that the successful party shall be awarded costs in the amount of \$6,000.00 inclusive of HST. I will award costs payable by the Respondent to the Applicant inclusive of HST in the lump sum amount of \$6,000.00 payable forthwith.

VII. **Conclusion**

[45] This application for judicial review is granted and the matter remitted for redetermination. The Investigator and, by extension, the Commission, breached the duty of fairness it owes the Applicant by failing to conduct a thorough investigation, and furthermore erred by failing to apply the correct law as it relates to the duty to accommodate.

JUDGMENT in T-1710-17

THIS COURT'S JUDGMENT is that:

1. The decision of the Commission dated October 4, 2017 is set aside, and the case shall be referred back to the Commission for a new investigation by another decision maker.
2. Costs in the amount of \$6,000.00 are awarded to the Applicant, payable forthwith.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1710-17

STYLE OF CAUSE: JAMIE BOYCHYN v ROYAL CANADIAN MOUNTED
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 20, 2018

JUDGMENT AND REASONS: AHMED J.

DATED: NOVEMBER 27, 2018

APPEARANCES:

Wade Poziomka
Jennifer Zdriluk
Saidan Campbell

FOR THE APPLICANT

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ross & McBride LLP
Law Firm
Hamilton, Ontario

FOR THE APPLICANT

Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT