

Federal Court



Cour fédérale

Date: 20190912

Docket: T-1711-17

Citation: 2019 FC 1169

Ottawa, Ontario, September 12, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

KARL NEPP

Applicant

and

KF AEROSPACE

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Karl Nepp was working for KF Aerospace as a Senior Aircraft Maintenance Engineer when his son passed away in March 2015. He had worked for the company for 20 years.

[2] KF Aerospace is a privately held aviation company based in Kelowna, British Columbia. Among other things, it provides aircraft maintenance and operates two fleets of cargo aircraft.

At the relevant time, it had over 800 employees at four locations in Canada – Kelowna, Portage la Prairie, Vancouver and Hamilton. Mr. Nepp worked at the Hamilton facility.

[3] Following his son's death, Mr. Nepp developed depression, anxiety and panic attacks. He had to take time off work to recover. From May 11, 2015, until July 31, 2015, he was on short-term disability leave. His insurer deemed him medically fit to return to work on August 1, 2015, but Mr. Nepp asked his employer if he could take more time off. As he put it in an email to Grant Stevens, the Director of Human Resources, he needed the time "to attend to several personal issues which can only be effectively dealt with if I can devote my full time efforts to resolving these issues." He asked to be off until January 2016.

[4] Mr. Nepp did not mention his son's death in this email but it must have been obvious to Mr. Stevens that this was what lay behind the request. In his email in response dated August 6, 2015, Mr. Stevens began by telling Mr. Nepp that he was "very sorry for your loss." Mr. Stevens then went on to tell Mr. Nepp that the company had decided to permit him to take vacation time from August 3 to August 27, 2015, and then to take an unpaid leave of absence from August 28 to October 31, 2015. Mr. Stevens added: "November is expected to be a very busy month, and we will need to get you back to work or replaced by then."

[5] Less than two weeks later, on August 17, 2015, Mr. Nepp and some 27 other employees in the Hamilton facility received layoff notices. The notices explained that the layoffs were the result of the loss of two major contracts earlier that year. (A number of other layoffs occurred elsewhere in the organization around the same time.) Among other things, the laid-off

employees were advised that the layoff could last for up to three months. In the event they were not recalled within three months, they would be terminated as required under the Canada Labour Code. However, an employee could request to have his or her layoff converted into a permanent layoff with no recall option, in which case they would be entitled to two weeks' pay in lieu of notice and severance.

[6] On August 22, 2015, Mr. Nepp chose the permanent layoff option.

[7] On November 24, 2015, Mr. Nepp filed a complaint against KF Aerospace with the Canadian Human Rights Commission [the Commission]. He alleged that KF Aerospace had discriminated against him on the basis of disability and family status when it selected him for layoff.

[8] After being advised of the complaint, KF Aerospace offered to reinstate Mr. Nepp but he declined this offer.

[9] The complaint proceeded to an investigation. On June 26, 2017, the investigator completed her report and recommended that further inquiry was not warranted.

[10] In a decision dated October 4, 2017, the Commission decided under subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c H-6, to dismiss the complaint "because having regard to all of the circumstances of the complaint, further inquiry is not warranted."

[11] Mr. Nepp now applies for judicial review of this decision under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. He contends that the investigation into his complaint was procedurally flawed and that the Commission's decision is unreasonable.

[12] For the reasons that follow, I agree that the decision is unreasonable. The application for judicial review will, therefore, be allowed and the matter remitted to the Commission for redetermination.

II. DECISION UNDER REVIEW

[13] In a one-page letter dated October 4, 2017, the Commission advised Mr. Nepp that it was dismissing his complaint against KF Aerospace.

[14] The letter explains that before rendering the decision, the Commission reviewed the investigative report and subsequent submissions from the parties in response to the report. The Commission does not explain its reasoning in dismissing the complaint beyond the comment that "having regard to all of the circumstances of the complaint, further inquiry is not warranted." However, consistent with well-established precedent, the parties agree that the report prepared by the investigator dated June 26, 2017, forms part of the reasons for the decision (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 37-38).

[15] After reviewing some preliminary matters pertaining to the procedures followed by the Commission after it receives a complaint, the substance of the investigative report begins with the observation that, based on a review of the information provided by the parties, Mr. Nepp was

not terminated from his employment but rather resigned. The report therefore focuses on alleged adverse differential treatment in employment rather than the termination of employment. No issue is taken with this determination.

[16] The report then provides a six-page narrative of the factual background and chronology of the complaint. The investigator notes that she interviewed Mr. Nepp and three representatives from KF Aerospace. She also reviewed the documentary evidence that was presented and the parties' written representations. The report sets a number of factual findings made on the basis of the investigation and the investigator's conclusions, including her recommendation that further inquiry was not warranted.

[17] The investigator drew the following conclusions:

- Mr. Nepp had been employed by the respondent longer than any of the other individuals identified for layoff at the same time as him but “this does not indicate that the reason for the layoff was related to his alleged disability;”
- Mr. Nepp contended that he would not have been selected for layoff were it not for his ongoing absence from work for health reasons but “it appears that the decision to undertake layoffs in Hamilton was the result of a lack of work in that facility after the loss of the Purolator and Canada Post contracts in March 2015;”
- Although when KF Aerospace issued the layoff notice to Mr. Nepp on August 17, 2015, he was still off work (having been off work since May 11, 2015), the evidence “does not

indicate that [KF Aerospace] ought to have known that this was linked to a disability, as the insurer indicated that [Mr. Nepp] was fit to return to work” and Mr. Nepp himself never linked his need for more time off to a disability but simply requested it for “personal reasons;”

- When Mr. Nepp was laid off, he was on leave until October 31, 2015, “which means that the decision to lay him off did not have an impact on him because he would have been on leave without pay at that time in any event;”
- Given the whole of the evidence, KF Aerospace’s decision to lay off Mr. Nepp on August 17, 2015 “does not appear to be linked to his disability. As such, the investigation will not proceed further.”

[18] In summary, the investigator concluded as follows:

Based on the evidence, [KF Aerospace’s] decision to layoff [Mr. Nepp] does not appear to be linked to the alleged ground. The evidence supports that [KF Aerospace’s] decision to lay off [Mr. Nepp] was due to a shortage of work at its Hamilton location.

III. STANDARD OF REVIEW

[19] The standards of review this Court should apply are well-established and not in dispute here. Issues of procedural fairness, including whether the Commission’s investigation was sufficiently thorough, are reviewable on the standard of correctness. Otherwise the Court’s task

is to determine whether the Commission's decision, viewed as a whole, is reasonable (*Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 92 at para 6).

[20] Reasonableness review “is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome” (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for “the existence of justification, transparency and intelligibility within the decision-making process” and determines “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). These criteria are met if “the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes” (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its opinion for that of the Commission (*Wong v Canada (Public Works and Government Services)*, 2018 FCA 101 at para 24 [*Wong*]).

[21] Thus, while no deference is owed to the Commission on issues of procedural fairness, the Commission's decision is entitled to substantial deference as it involves an exercise of discretion and is inherently fact-infused (*Wong* at para 24). If the Commission's findings of fact are reasonable, “then the question will be whether the decision to dismiss the complaint was reasonable, bearing in mind that the decision resulted in a termination of the matter and therefore the range of possible, acceptable outcomes may be narrower” (*Attaran v Canada (Attorney*

General), 2015 FCA 37 at para 14; *Keith v Canada (Correctional Service)*, 2012 FCA 117 at para 48).

IV. ISSUES

[22] As noted above, Mr. Nepp submits that the procedure followed by the Commission was flawed and that its decision is unreasonable.

[23] As I will now explain, I agree that the decision is unreasonable. As a result, it is not necessary to address the procedural flaws alleged by Mr. Nepp.

V. ANALYSIS

[24] The Commission performs an important screening function. It does not adjudicate a complaint under the *Human Rights Act*. Rather, its duty “is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts” (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 53; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 23-24) [*Halifax (Regional Municipality)*]. This is determined on a low threshold, “requiring only that the Commission determine whether there is a reasonable basis in the evidence for proceeding to the next stage” (*Southern Chiefs Organization Inc v Dumas*, 2016 FC 837 at para 27). While a limited assessment of the merits is inherent in the Commission’s role, the Commission “is not making any final determination about the complaint’s ultimate success or failure” (*Halifax (Regional Municipality)* at para 24).

[25] As set out above, findings of fact made by the Commission are entitled to deference from a reviewing court. That being said, the Commission must make the findings of fact that are necessary to dispose of the matter. A failure to do so can leave the decision lacking in justification, transparency and intelligibility (*Lloyd v Canada (Attorney General)*, 2016 FCA 115 at para 24; *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11).

[26] There was no dispute that changes in the business environment in which KF Aerospace was operating in 2015 required significant adjustments to its workforce, at the very least on a temporary basis, including at the Hamilton facility. The central question underlying Mr. Nepp's complaint to the Commission was whether he was discriminated against for reasons of disability or family status when he was selected to be included in the layoff. Unfortunately, the investigator's report fails to address the substance of the complaint.

[27] The investigator had asked the Director of Human Resources, Mr. Stevens, what criteria were used to select employees for layoff at the Hamilton facility (sometimes referred to in the record by its airport code letters YHM). Mr. Stevens answered as follows in an email:

The layoffs were developed based on:

- 1) anticipated staff levels required to support YHM (ie # of stores staff to cover shifts, # of Structures, # of Mechs etc) based on a guestimate of future workload.
- 2) We then retained the best performing staff by trade/dept – based on on-the-job performance, skills, qualifications, attitude, capabilities, and effort demonstrated. We do not take into account length of service, as legislation allows the employer to retain the best qualified staff to retain the strongest performing team.

[28] Mr. Stevens reiterated this explanation in response to a follow-up inquiry from the investigator asking him to explain how Mr. Nepp was selected for layoff. Mr. Stevens wrote: “We make our layoff decisions based on the employees [*sic*] skills, productivity, level of effort, attitude & aptitude.”

[29] The investigator had also asked Mr. Stevens whether Mr. Nepp’s request for a leave of absence affected the decision to lay him off. Mr. Stevens answered as follows in the email quoted in paragraph 27, above:

We did not consider his leave request when enacting layoffs. We considered his skills and abilities as outlined above. We had already approved his leave – so there was no cost to KF in maintaining his employment.

[30] It is apparent from the investigator’s conclusions set out in paragraphs 17 and 18, above, that she accepted KF Aerospace’s explanation for the layoffs at the Hamilton facility. It was certainly open to her to find that they were due to business needs because of a shortage of work and, in any event, this is not disputed. The material issue is why Mr. Nepp was selected to be among those who were laid off and whether this constituted discrimination on the basis of disability or family status. Unfortunately, the investigator cast this issue too narrowly by simply asking Mr. Stevens whether Mr. Nepp had been laid off because he had requested a leave of absence. Mr. Stevens answered in the negative. Again, it was open to the investigator to accept this answer. The problem is that the answer is incomplete. If Mr. Nepp was not laid off because of this, then what was the reason?

[31] In her report, the investigator simply concludes that the decision to lay off Mr. Nepp “was due to a shortage of work at its Hamilton location” and, therefore, did not appear to be linked to the alleged ground of discrimination. This, however, now casts the issue too broadly. That may be why there had to be layoffs at the Hamilton location. But it does not address why Mr. Nepp was selected for layoff.

[32] As it happened, Mr. Stevens did offer an answer to this precise question. He explained that the reason for laying off Mr. Nepp was that, given his “performance, skills, qualifications, attitude, capabilities, and effort demonstrated,” he did not have a place on the “strongest performing team” the company was trying to form. However, the investigator did not probe this rationale at all to see if it could be linked to a prohibited ground of discrimination. It is not mentioned anywhere in her conclusions.

[33] The critical question following from Mr. Stevens’ explanation, which the investigator never considers, is whether Mr. Nepp’s failing grade on the performance measures used to select him for layoff was due to the fact that he had not been at work for the last three months, the bulk of which time he was on medically-approved short-term disability leave because of the loss of his son. Mr. Nepp had raised the issue of a potential link between his disability and his job performance squarely in a response to an inquiry from the investigator about the nature of his disability, stating: “I suffered from depression, loss of concentration and felt I was unable to perform my duties as a Senior Aircraft Maintenance Engineer to the high aeronautical standards which were expected of me. This is why I requested a medical leave.” There may or may not be a link, as Mr. Nepp alleged. This was for the investigator to examine and to make a

recommendation based on that examination. However, by not addressing this potential link in any way, the investigator's report leaves unresolved whether the central issue underlying Mr. Nepp's complaint warrants further investigation or not.

[34] Why Mr. Nepp was selected for layoff may or may not have amounted to discrimination. It was not the investigator's function to make this ultimate determination. It was, however, her responsibility to determine whether this issue warranted further investigation. Her failure to examine why Mr. Nepp was selected for layoff beyond simply accepting that it was because of a shortage of work at the Hamilton location renders the Commission's decision unreasonable. The Commission's exercise of its screening function lacks justification, transparency and intelligibility.

VI. CONCLUSION

[35] For these reasons, the application for judicial review is allowed, the decision of the Canadian Human Rights Commission dated October 4, 2017, is set aside and the matter is remitted to the Commission for redetermination.

[36] Mr. Nepp is entitled to his costs. If the parties cannot agree on the amount, they may contact the Court to propose a schedule for the exchange of brief written submissions.

JUDGMENT IN T-1711-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed with costs.
2. The decision of the Canadian Human Rights Commission dated October 4, 2017, is set aside and the matter is remitted to the Commission for redetermination.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: KARL NEPP v KF AEROSPACE

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