Federal Court  Cour fédérale

Date: 20200309

Docket: T-1405-18

Citation: 2020 FC 344

Ottawa, Ontario, March 9, 2020

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

PAUL A. GUNN

Applicant

and

HALIFAX EMPLOYERS ASSOCIATION

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review challenges a decision by the Canadian Human Rights Commission (Commission) by which the complaint of Paul Gunn was dismissed under subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c H-6.

[2] Mr. Gunn's complaint was that the Respondent, the Halifax Employers Association (HEA), had failed to reasonably accommodate a disability that prevented him from performing

all of the duties of a longshore worker on the Halifax waterfront. The Commission dismissed the complaint after a lengthy investigation on the basis that the tasks Mr. Gunn was unable to perform are an essential aspect of the work of a longshore worker. In the result, the HEA was not required to relieve Mr. Gunn from successfully completing a strength and endurance test that formed part of the 2016 HEA hiring process and was used as a proxy by the HEA to establish a worker's fitness to perform high climb lashing (ie. the securing and unsecuring of shipboard cargo containers).

I. Analysis

[3] The standard of review to be applied on this application is that of reasonableness. In other words, the Court must consider the Commission's decision from a "posture of restraint": see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 49, [2019] SCJ No 65 (QL) [*Vavilov*].

[4] In *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at paras 60-63, [2013] FCJ No 230 (QL), Justice Anne Mactavish described the role of the Commission in performing its screening functions in the following way:

> [60] The role of the Canadian Human Rights Commission was considered by the Supreme Court of Canada in *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854. There the Court observed that the Commission is not an adjudicative body, and that the adjudication of human rights complaints is reserved to the Canadian Human Rights Tribunal.
>
> [61] Rather, the role of the Commission is to carry out an administrative and screening function. It is the duty of the Commission "to decide if, under the provisions of the Act, an

> inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it": *Cooper*, above, at para. 53; see also *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] S.C.J. No. 103, [1989] 2 S.C.R. 879 [*SEPQA*].
>
> [62] The Commission has a broad discretion to determine whether "having regard to all of the circumstances" further inquiry is warranted: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paras. 26 and 46; *Mercier v. Canada (Human Rights Commission)*, [1994] 3 F.C. 3, [1994] 3 F.C.J. No. 361 (F.C.A.).
>
> [63] Indeed, in *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113, [1998] F.C.J. No. 1609 [*Bell Canada*], the Federal Court of Appeal noted that "[t]he Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report": at para. 38.

Also see *Alkoka v Canada (Attorney General)*, 2013 FC 1102 at paras 41 and 47, 235 ACWS (3d) 457.

[5] In *Ritchie v Attorney General*, 2017 FCA 114, 279 ACWS (3d) 604, the Court observed that the role of the Commission's investigator in screening a complaint is to determine whether further inquiry is warranted and not strictly to decide whether a case of *prima facie* discrimination has been established. The degree of deference that must be applied by the Court to a screening decision of this type was described as follows:

> [38] In the early stages of a complaint, the investigative role of the CHRC is not to determine whether discrimination has occurred. Rather, its role upon assigning a complaint to an investigator is to determine if further inquiry by the Tribunal is called for. This is a highly fact-and policy-driven process. A broad margin of appreciation and a high degree of deference must be afforded to the CHRC when this kind of decision is reviewed (*Bergeron v. Canada (Attorney General)*, 2015 FCA 160, [2015] F.C.J. No 834

> (QL) at paragraph 45; *Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56, 455 N.R. 157 at paragraphs 90–99; *Sketchley*).
>
> [39] Deference must be afforded to the CHRC when it assesses whether the probative value of the evidence gathered by the investigator and whether the submissions of the parties warrant further inquiry before the Tribunal (*Colwell v. Canada (Attorney General)*, 2009 FCA 5, 387 N.R. 183 at paragraph 14 [*Colwell*]). In contradistinction to what happened in *Tahmourpour* at paragraph 40, a case cited by the appellant, the investigator did not fail to investigate "obviously crucial evidence". On the contrary, the investigator's findings reflect a thorough and detailed analysis. When considering the investigator's report as a whole, there is no justification for this Court to revisit the Judge's determinations, as the record supports the reasons and the outcome of the decision of the CHRC (*Colwell* at paragraph 15).

[6] The Court's assessment of the Commission's decision begins with its reasons: see *Vavilov*, above, at para 84. In Mr. Gunn's case, those reasons are contained in an investigation report dated February 20, 2018 recommending that his complaint be dismissed because further inquiry was not warranted. Where the findings and recommendation of an investigator are adopted by the Commission, the investigation report constitutes the Commission's reasons: see *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37, [2005] FCJ No 2056.

[7] The determinative issue for the Commission was whether the high climb lashing tasks routinely performed by longshore workers constituted a *bona fide* and essential requirement of the occupation. It was not disputed by Mr. Gunn that he could not, at the relevant time, perform high climb lashing. He maintained, however, that he could perform lighter duty work and had been appropriately accommodated in the past.

[8] The Commission turned its mind to the burden resting on the HEA to demonstrate that it would have caused undue hardship to exempt Mr. Gunn from high climb lashing and from performing the related strength and endurance testing required to qualify for employment in a labour pool known as the Cardboard.

[9] The HEA advised the Commission that 50% to 75% of the labour demands on the waterfront involved high climb lashing and that it was not feasible to permanently accommodate employees working out of the Cardboard by assigning lighter duties. It explained that it had in the past accommodated Mr. Gunn on a temporary basis as a casual employee in the expectation that he might recover. At the point of declaring Mr. Gunn ineligible for assignment to the Cardboard, he had been reinjured on the job and had been declared permanently unfit for high climb lashing. The HEA also told the Commission that it had never permanently exempted a worker from the Cardboard labour pool from high climb lashing.

[10] Mr. Gunn did not dispute that high climb lashing represented a significant percentage of the work of a longshore worker. However, he gave a lower volume estimate of 40% and described less demanding assignments involving cruise ships and unloading motor vehicles.

[11] The investigator concluded from the parties' submissions that the HEA was not obliged to accommodate Mr. Gunn to the extent he required. The investigator's analysis of the evidence was as follows:

> 67. The issue in this complaint is whether high climb lashing is a *bona fide* occupational requirement. The information demonstrates that high climb lashing is an essential duty for a member of the cardboard. The information in this

complaint demonstrates the complainant required exemption from the lashing test and requires permanent exemption from high climb lashing as a longshoreperson.

68. Employers are not obligated to accommodate job applicants with permanent exemption from an essential duty of the job for which they are applying, nor are employers obligated to search for other positions the applicant may be capable of performing.

69. The respondent provided information to demonstrate that while the accommodation received by the complainant intermittently from 2010 to 2015 in the labour pool was an error, it had little impact on the workplace due to a reduced workload and reduced reliance on members of the labour pool on the waterfront.

70. As a member of the labour pool (a subset of the bullpen), the complainant was not required to be available for high climb slashing on a daily basis. Since members of the labour pool are called upon to "fill gaps" in the waterfront, there was some leeway to assign the complainant different job duties. As a "regular" employee and member of the cardboard, the complainant must be available every day and the respondent has demonstrated that the duties associated with the position include a large proportion of high climb lashing. By the complainant's own estimate, the position consists of "approximately 40%" high climb lashing. Even this amount, while lower than the respondent estimates demonstrates high climb lashing is an essential duty of the position.

71. The investigator notes that the complainant's position is that the respondent can accommodate him by being placed "on the brow" in order to change the locks, and that he received this accommodation while working from the bullpen. However, the complainant is now permanently unable to perform the lashing portion of high climb lashing which is an essential duty of a longshoreperson. There is no evidence to suggest that there are reasonable steps the respondent could have taken to ensure the complainant could perform the essential duties of the position.

72. Based on all of the above, high climb lashing is an essential duty of the position, and it would cause the respondent undue hardship to exempt employees or job applicants from that task. As a result, the lashing test is reasonably

necessary to ensure new employees can perform the duty safely and efficiently.

Conclusion

73. It is not in dispute that the complainant required and requested accommodation in the form of exemption from the lashing test on the basis of his disability.

74. It is also not in dispute that the respondent denied the complainant's requested accommodation.

75. However, the lashing test is reasonably necessary to ensure applicants are capable of performing an essential duty (high climb lashing) of the job.

Overall conclusion – BFOR

76. The respondent has demonstrated that the lashing test is a *bona fide* occupational requirement.

[12] What is clear from the evidence before the Commission was that Mr. Gunn was seeking accommodation that would have exempted him from performing a significant amount of the duties of a longshore worker in the context of a constantly shifting demand for labour. As the investigator noted, the HEA's past accommodations had been made in a different context where Mr. Gunn was a member of a casual labour pool and available to fill workforce gaps. When he was removed from eligibility for admission to the Cardboard by the HEA, he was seeking to qualify for more regular employment where increased availability was required and where the allocation of work assignments was less flexible.

[13] On this record, it was not unreasonable for the Commission to conclude that Mr. Gunn's significant physical limitations could not be accommodated without undue hardship to the HEA. Although there were certainly lighter duties available from time to time that Mr. Gunn could

have completed, the nature of the work varied from day to day and from ship to ship. In the main, the job demanded an ability to perform high climb lashing – something Mr. Gunn could not do at the time.

[14] The Commission's decision turned on its evaluation of the evidence provided by the parties. It determined that the demands of the placement Mr. Gunn was seeking were beyond his performance capacity and that those demands formed an essential part of the work of a longshore worker employed out of the Cardboard. That was an evaluation the Commission was mandated to perform.

[15] In *Vavilov*, above, the Court discussed the constraints that apply to the judicial review of administrative decisions involving the assessment and evaluation of evidence. At para 125 it said:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[16] The above statement applies with equal force to the facts of Mr. Gunn's case. I can identify no reviewable errors in the Commission's analysis of the evidence before it and the

decision not to proceed with Mr. Gunn's complaint was, therefore, reasonable in light of the facts and the applicable law.

[17] For the foregoing reasons, this application is dismissed.

[18] The HEA has requested costs which I fix in the amount of $1,500.

JUDGMENT in T-1405-18

THIS COURT'S JUDGMENT is that:

1. This application is dismissed; and

2. Costs of $1,500 are payable by the Applicant to the Respondent.

"Robert L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1405-18
STYLE OF CAUSE:	PAUL A. GUNN v HALIFAX EMPLOYERS ASSOCIATION
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	FEBRUARY 27, 2020
JUDGMENT AND REASONS:	BARNES J.
DATED:	MARCH 9, 2020

APPEARANCES:

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Brian G. Johnson, Q.C. Michelle Black	FOR THE RESPONDENT

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