Date: 20061221

Docket: T-274-06

Citation: 2006 FC 1541

Ottawa, Ontario, the 21st day of December 2006

Present: The Honourable Mr. Justice de Montigny

BETWEEN:

PAUL OUELLET

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In a decision dated January 12, 2006, the Canadian Human Rights Commission (the Commission) dismissed a complaint made by Paul Ouellet against his employer, the Department of Human Resources and Social Development Canada. Mr. Ouellet alleged being a victim of discrimination because of his disability, contrary to section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act).

[2] The Commission ruled that the evidence uncovered in the course of its investigation did not support the applicant's allegations to the effect that the Department had acted in a discriminatory manner toward him in the course of his employment. In doing so, the Commission upheld the recommendation made by its investigator to dismiss the complaint pursuant to paragraph 44(3)(*b*) of the Act.

[3] In submitting this application for judicial review, Mr. Ouellet is asking that the Commission's decision be quashed on the ground that the investigation of his complaint was not thorough. More specifically, he alleges that the investigator did not question a key witness he identified and that she did not conduct any analysis of the employer's duty to accommodate. In addition, Mr. Ouellet is asking this Court to return his complaint to the Commission with an order that it be dealt with according to the reasons specified in the decision to be rendered.

[4] For the reasons that follow, I conclude that this application for judicial review must be dismissed. The applicant did not convince me that the Commission did not respect the requirements of procedural fairness in handling his complaint.

FACTS

[5] Mr. Ouellet has been employed by the federal government since September 13, 1971. He worked for the Department of Human Resources Development Canada until December 12, 2003, on which date his employment was transferred to the Department of Social Development Canada following the creation of this new administrative entity. He is employed on an indefinite (permanent) basis at the PM-01 group and level.

[6] The facts on which this application for judicial review is based are complex, and the versions differ somewhat. Considering that the allegations made by Mr. Ouellet concern the way in which the investigation was conducted, I will restrict the study of these facts to the ones most relevant for the purposes of this application for judicial review.

[7] Further to a grievance filed by Mr. Ouellet in August 1996 in which he claimed to have been sexually harassed, the parties reached a mediated agreement in 1998 under the terms of which Mr. Ouellet was assigned to a PM-01 position in the Human Resource Centre of Canada in Moncton. It was agreed that either of the parties could terminate the employment contract by giving notice beforehand. The employment contract was renewed twice.

[8] In February 2001, management of the Human Resource Centre of Canada decided not to renew Mr. Ouellet's assignment [TRANSLATION] "because the complainant was unable to function effectively in this position and was never able to do so in spite of the monitoring, repeated feedback, continuous training and direct coaching he was given" (Applicant's Record, page 13).

[9] Following the non-renewal of his assignment, Mr. Ouellet was assigned to new duties at the local shared services unit. Even though his duties were equivalent to those of a lower-level, CR-05 position, the applicant continued to be paid at the rate of his previous PM-01 classification. According to Mr. Ouellet, his new duties were quite ordinary and involved preparing information kits and packing them in boxes.

[10] On January 28, 2002, both of Mr. Ouellet's immediate supervisors met with him and advised him that he had to work faster and double his daily production of information kits. Mr. Ouellet felt intimidated and humiliated, and his physical health was affected. In fact, he had to stop working for one week on his doctor's recommendation.

[11] At a second meeting, held on February 21, 2002, Mr. Ouellet's union representative advised both managers who were present that Mr. Ouellet had to be accommodated and required adaptation measures because of the chronic post-traumatic stress disorder from which he suffered. Accordingly, a third meeting was held on April 18, 2002. In order to better understand the applicant's restrictions and special needs, the Department requested that he undergo a functional and vocational assessment. Mr. Ouellet and his union representative agreed to this request on condition that Mr. Ouellet receive psychotherapy before undergoing the assessment to improve his chances of succeeding. The Department did not object to this.

[12] Considering the difficulties Mr. Ouellet had at work, his employer asked him to remain at home until he could undergo the functional and vocational assessment. It should be noted that Mr. Ouellet has been on paid leave since then, that is, since February 21, 2002.

[13] The Department also agreed to pay the fees of the psychotherapist chosen by the applicant. The contract with Dr. Frigault was extended twice on his recommendation and at Mr. Ouellet's request. In addition, because the psychotherapist's office is a three-hour drive from the applicant's home, the Department agreed to pay his travel and accommodation expenses when he had to go for his treatments.

[14] The psychotherapy sessions were given by Dr. Frigault from October 2002 to September 2003 on a weekly basis, with each session lasting approximately four hours. Following a preliminary assessment, on November 1, 2002, Dr. Frigault recommended that Mr. Ouellet undergo fifteen to twenty sessions of psychotherapy. On February 19, 2003, Dr. Frigault advised the Department that Mr. Ouellet was fit to return to work but stressed the importance of continuing psychotherapy and developing a return-to-work plan carefully tailored to the applicant's situation. In a report dated May 27, 2003, Dr. Frigault outlined a six-step return-to-work plan.

[15] On August 27, 2003, Mr. Ouellet, his union representative, Dr. Frigault, and two employer representatives held a meeting to prepare the applicant's return-to-work plan. Disappointed with the turn the meeting was taking, Dr. Frigault decided to leave during a break. In a letter dated September 3, 2003, sent to the regional director of Human Resources Development Canada, he explained his conduct as follows:

> [TRANSLATION]
> . . . At this meeting, I was disappointed to see the paternalistic and maternal attitude your employees had towards Mr. Ouellet. I also noted the lack of adequate union representation at this meeting. I am not only disappointed with the attitudes but especially with . . . what they had my client endure after I left the meeting.
>
> According to the employee in question, for approximately two hours, they took turns subjecting my client to relentless affective therapy in an attempt at calming and reassuring him after having upset him with their interrogation.
>
> At this meeting, I repeated on several occasions that the approach used by your employees was inappropriate in a return-to-work situation, but unfortunately I sensed that it would be better if I left this meeting.

> First of all, I must underline the fact that Mr. Ouellet's return to work must be a dignified and fair one befitting an employee with more than 30 years of loyal service. He met all the Department's requirements and did not have any personality or cognitive dysfunctions that would warrant the approach used.
>
> They should simply give him back his position in Pensions, as was previously agreed with the mediator, and work should be done with the staff in this division so that they can take part in his return to work. All harassment or abuse must in order for Paul Ouellet to continue his career normally . . . .
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> Applicant's Record, pages 186-187.

[16] Of course, the employer's version differs considerably from that given by Dr. Frigault, as is shown in a note on record written by one of the Department's representatives who attended the meeting (Applicant's Record, page 328). However, there is no need for me to discuss these contradictory points of view for the purposes of this application for judicial review. In November 2003, the Department offered the applicant a position as a client payment officer at the CR-05 level. In answer, Mr. Ouellet explained in a letter dated November 26, 2003, [TRANSLATION] "that accepting this position would not in any way lead to a successful or healthy return to work" (Applicant's Record, page 226). Such would be the case, according to Mr. Ouellet, because he would have to work under the supervision of someone who had a biased and negative opinion of him.

[17] On August 24, 2004, Mr. Ouellet filed a complaint with the Commission alleging that Social Development Canada was discriminating against him in the course of employment by refusing to accommodate his disability. It appears from this complaint that Mr. Ouellet's main criticism of the Department is the refusal to let him return to work in spite of the recommendation made by Dr. Frigault. The allegation reads as follows:

> Human Resources Development Canada (HRDC), and/or its successor(s) HRSDC/SDC, contrary to section 7 of the **Canadian Human Rights Act**, have discriminated against me in an adverse differential manner by failing to accommodate my disability – perception of mental disability – by refusing to re-integrate me into the workforce contrary to the advice of the psychologist it hired.
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> Applicant's Record, page 20.

[18] On October 6, 2004, the Commission forwarded Mr. Ouellet's complaint to representatives of the Department to obtain their reply. On January 11, 2005, the reply was forwarded to the investigator appointed by the Commission. Meanwhile, in December 2004, the Commission appointed Sylvie McNicoll to investigate Mr. Ouellet's complaint. However, it was investigator Anick Hébert who took over in June 2005 and wrote the investigation report dated September 19, 2005, after completing the research and analysing the information.

THE IMPUGNED DECISION

[19] Since the Commission dismissed Mr. Ouellet's complaint without giving any reasons, I must consult the investigation report to understand the whys and wherefores of the decision. In this case, once the report was completed, it was forwarded to both parties so that they could submit to the Commission any observations they considered appropriate before proceeding with the analysis of the case.

[20] After having forwarded to Mr. Ouellet a summary of the Department's reply to his complaint and having received additional comments from Mr. Ouellet, the investigators questioned three Department representatives, as well as Mr. Ouellet's union representative. They also

considered six detailed reports by Dr. Frigault, which had been submitted by Mr. Ouellet. Finally, investigator Anick Hébert contacted the Department to obtain additional details about Mr. Ouellet's attempts to return to work, as evidenced by the letter dated June 22, 2005, to Serge Viens, a Department staff relations adviser (Applicant's Record, pages 263-264 and 273-351).

[21] After having studied at length the facts giving rise to the complaint and the arguments submitted by both parties, investigator Anick Hébert came to the following conclusions:

> [TRANSLATION]
> 40. The evidence shows that as soon as the respondent was advised of the complainant's disability, the complainant was asked to remain at home on a paid leave of absence until he could undergo a functional and vocational assessment to measure his fitness for work. An agreement was concluded between the complainant and the respondent to the effect that the complainant would undergo psychotherapy before the assessment. The respondent agreed to pay the fees for psychotherapy for the complainant, as well as his travel and accommodation expenses. Following a request made by the complainant's therapist, the respondent agreed to pay for additional psychotherapy sessions.
>
> 41. The evidence shows that following the treatments, the complainant's therapist declared him fit to return to work. Accordingly, the respondent prepared a return-to-work plan. Meetings were held with the complainant, and in August 2003 a position classified CR-04 was offered to the complainant. The respondent promised to pay the complainant at the PM-01 level. The complainant refused this position.
>
> 42. The evidence shows that in November 2003 the respondent offered the complainant a position at the CR-05 level, but he refused it. In 2004, the respondent made new attempts at having the complainant return to work, but it was to no avail, as the complainant refused to co-operate with the respondent.
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> 43. The evidence shows that the complainant has been off work since February 21, 2002, and has been paid at the PM-01 level since then.

On the basis of this analysis, the investigator recommended that the Commission dismiss the complaint because [TRANSLATION] "the evidence does not support the complainant's allegation to the effect that the respondent acted in a discriminatory manner in the course of employment by treating him differently and by refusing to accommodate him because of his disability". It should be noted that this investigation report was forwarded to the parties so that they could send in their written submissions to the Commission before it rendered a final decision.

[22] In his submissions to the Commission dated November 4, 2005, Mr. Ouellet noted several shortcomings in this report, particularly the lack of information about his medical condition and the lack of an analysis of reasonable accommodation measures to assist in his return to work. He also remarked that several potential witnesses he had identified had not been questioned by the investigator. Among these witnesses, he drew special attention to Dr. Frigault, who from his point of view was a key witness because he played a critical role in his assessment, therapy, and return-to-work program. Mr. Ouellet also noted that the investigator's analysis had shortcomings and completely endorsed the respondent's position (Applicant's Record, pages 21-30). Finally, Mr. Ouellet argued that a mistake was made during the investigation because his union representative at the time admitted having erroneously stated that a concrete job offer had been discussed on August 27, 2003.

[23] With regard to the Department's written submissions dated December 8, 2005, the Department's representatives stated that they agreed with the investigation report and reiterated that at no time did Human Resources Development Canada or Social Development Canada differentiate adversely in relation to the applicant on a prohibited ground of discrimination. Quite the contrary,

they were of the opinion that serious attempts at accommodating the applicant had been made on several occasions once the Department was aware of the diagnosis concerning Mr. Ouellet's state of health (Applicant's Record, pages 31-33). Thus, they rejected Mr. Ouellet's claims about the subject under discussion at the meeting on August 27, 2003, and reaffirmed that negotiations aimed at offering a position to the applicant did indeed take place. A position was offered to the applicant in November 2003.

[24] In its decision dated January 12, 2006, the Commission approved the investigation report and dismissed the applicant's complaint under paragraph 44(3)(*b*) of the Act.

ISSUES

[25] This application for judicial review essentially raises only one issue: Did the Commission respect the requirements of procedural fairness applicable to this case? More specifically, did the Commission err in not performing a detailed and complete investigation of the applicant's complaint in practice by failing to question a key witness and by failing to consider the Department's duty to accommodate?

ANALYSIS

[26] There is no real disagreement between the parties about the applicable legal principles. In this case, it is rather in the application they make of these principles that their views diverge. I will therefore briefly outline the case law in such matters before studying in more detail the arguments submitted by Mr. Ouellet and those of the Attorney General of Canada.

[27] First of all, it should be noted that the Commission is not bound by an investigator's recommendations. However, if it adopts these recommendations without giving any other details, the investigator's report will be presumed, under subsection 44(3) of the Act, to constitute the Commission's reasons for the decision. See for example: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at paragraph 37; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 at paragraph 35; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 at paragraph 30 (F.C.A.); and *Leila Paul v. Canadian Broadcasting Corporation*, 2001 FCA 93 at paragraph 93.

[28] Accordingly, if the investigation is found to be deficient in the way it was conducted or in its conclusions, the Commission's decision will also be considered to be deficient and cannot stand, because it is flawed: see the decisions in *Kollar v. Canadian Imperial Bank of Commerce*, 2002 FCT 848; *Singh v. Canada (Attorney General)*, 2002 FCA 247; and *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (F.C.), aff'd (1996), 205 N.R. 380.

[29] It is also settled law that the Commission must act fairly in handling the complaints it receives. In the context of investigations, this duty of procedural fairness dictates that two requirements be met: neutrality and thoroughness. These requirements were developed by Nadon J., as he then was, in *Slattery*, *supra*, and were subsequently confirmed on numerous occasions: see the recent example of *Gravelle v. Canada (Attorney General)*, 2006 FC 251, rendered by my colleague Mr. Justice Edmond Blanchard.

[30] While a certain degree of curial deference is required in the review of a decision not to defer a complaint to the Canadian Human Rights Tribunal under paragraph 44(3)(*b*) of the Act, thus applying in such situations the standard of reasonableness *simpliciter*, the same does not hold true when the decision is challenged on the ground of procedural fairness. As the Supreme Court of Canada noted at paragraph 100 in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, issues of procedural fairness are questions of law, and accordingly no deference is required when such an issue is raised: see also *Sketchley* at paragraph 53, *supra*; *Gravelle, supra*, and *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113.

[31] In this case, the applicant does not criticize the investigators for their lack of neutrality, that is to say, their partiality, but rather for their lack of thoroughness in conducting the investigation, which thus resulted in a superficial and incomplete report. On this point, in his memorandum, the applicant cites the following excerpt from the decision of Nadon J. in *Slattery* at pages 600 and 601:

> Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted
>
> . . .
>
> In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker. Therefore, it should be only where complainants are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it; or (2) where

> fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it
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> See also to the same effect *Sketchley* at paragraph 38, *supra*.

[32] Case law has many examples of situations in which investigations were considered deficient because of a lack of thoroughness. The failure to question one or several key witnesses who would have had a fundamental impact on the resolution of the initial complaint and the failure to deal with an important aspect of that complaint were considered by this Court and by the Federal Court of Appeal as being breaches of the duty of procedural fairness: *Kollar* at paragraph 39, *supra*; *Thamourpour* at paragraph. 40, *supra*; and *Grover v. Canada (National Research Council)*, 2001 FCT 687.

[33] What is the situation in this case? The applicant claims that the fact that Dr. Frigault was not questioned is a major omission that vitiates the results of the investigation and, consequently, the Commission's decision which is challenged herein. Not only did he conduct an assessment of Mr. Ouellet and give him psychotherapy, he also outlined a return-to-work plan and attended the meeting on August 27, 2003, the goal of which was to plan Mr. Ouellet's return to work. Accordingly, he was the person in the best position to explain how the employer's approach did not meet Mr. Ouellet's needs, if we accept his lawyer's submissions.

[34] With respect, I cannot accept this argument. When an investigation is conducted, all the relevant evidence must be considered. In the case at bar, I am of the opinion that the investigator complied with this requirement. She read all of Dr. Frigault's letters and restated their contents in her report, even citing extensive excerpts. Accordingly, the Commission was well aware of

Dr. Frigault's position and was therefore in a position to render an enlightened decision on this point.

[35] Moreover, Mr. Ouellet had the chance to respond to the investigator's report and explain his concerns in connection with the investigation. In fact, he took this opportunity and forwarded 10 pages of submissions to the Commission. In doing so, he repeated Dr. Frigault's findings and claimed that the recommendations he made to accommodate his disability and facilitate his return to work were not followed. Accordingly, the Commission had all the information it needed to make a fair and enlightened decision in the circumstances.

[36] Mr. Ouellet submitted that Dr. Frigault could have explained how the Department's approach did not meet his needs and could have shed light on the disagreement with his employer about the return-to-work measures. However, I cannot see what Dr. Frigault could have added to what was already mentioned in his reports. It is clear from his letter dated September 3, 2003, an extract of which I cited at paragraph 14 of these reasons, that pursuant to his return-to-work plan, he wished to continue to give psychotherapy to Mr. Ouellet and encouraged the Department to give the applicant another position at the PM-01 level. All this information was already included in the investigation report, which included the respective positions of the union representative and the Department.

[37] We must not lose sight of the fact that what the investigator and, ultimately, the Commission had to decide was not how Mr. Ouellet was to return to work and in what position, but whether the complaint should be referred to the Tribunal on the ground that the evidence supported the

allegation of discrimination and a refusal to accommodate. Considered from this point of view, the investigation report was detailed and complete and contained all the information required for the Commission to render a decision.

[38] The applicant also criticized the investigator for not having examined the main issue of his complaint, that is to say, the matter of whether the Department had properly accommodated the applicant by preparing a return-to-work plan that met his needs. In support of his argument, he submits that the investigation record did not contain any document showing the Department had prepared a return-to-work plan and that the investigator did not do a thorough job, having failed to question the employer's witnesses about their return-to-work plan. In addition, the applicant states that the investigation report did not contain any analysis of the employer's duty to accommodate or of the return-to-work plan proposed by the employer.

[39] Once again, I am not satisfied by this argument. The issue was not whether the Department's return-to-work plan was in compliance with Dr. Frigault's recommendations. Ultimately, it was up to the Department to determine the best way to have Mr. Ouellet return to work, relying on Dr. Frigault's recommendations for inspiration, of course. In this case, what the investigator had to consider, and what the Commission had to decide, was whether the employer had fulfilled its duty to accommodate.

[40] On this point, the investigator's report appears to me to be complete. She explained all the measures taken by the employer to facilitate Mr. Ouellet's return to work: a paid leave of absence; the payment of fees for assessment and psychotherapy, as well as Mr. Ouellet's travel expenses; the

extension of Dr. Frigault's contract, twice; and an offer of employment made to the applicant to ensure his return to work.

[41] It is interesting to note that, in his report filed with the Department in February 2003, Dr. Frigault mentioned being of the opinion that Mr. Ouellet was fit to return to work and added that he should continue receiving psychological treatments to ensure the success of his return. The employer seems to have taken this recommendation into consideration. It was only on the issue of the means that the employer disagreed with Dr. Frigault, insofar as the employer was of the view that the psychotherapy required by the applicant should be paid from now on under the Public Service Health Care Plan or the Employee Assistance Program.

[42] The investigator also noted the concerns mentioned by Mr. Ouellet and his psychologist about the return-to-work plan proposed by the respondent. The investigator even contacted the Department to obtain more information about the return-to-work plan and the reasons why it did not comply with Dr. Frigault's recommendations (letter from investigator Anick Hébert to Serge Viens, dated June 22, 2005, Applicant's Record, pages 263-264). Finally, she carefully dealt with the applicant's complaint without avoiding the fundamental issue of accommodation and mentioned all the relevant facts in her report.

[43] From the moment she concluded that the applicant refused to co-operate with the employer, she was not required to take her analysis any further. Her role was not to choose the best way of having Mr. Ouellet return to work, but rather to determine if the evidence established that the Department did not fulfil its duty to accommodate. Considered from this point of view, the

investigator's report was thorough and gave the Commission relevant information allowing it to rule on Mr. Ouellet's initial complaint while respecting the principles of procedural fairness as prescribed by the decisions rendered under paragraph 44(3)(*b*) of the Act. In endorsing an investigation report that was free of any procedural irregularities, the Commission rendered a decision that is not open to judicial review by this Court.

[44] For these reasons, the application for judicial review is dismissed with costs to the respondent according to the centre column of Tariff B of the *Federal Courts Rules*.

JUDGMENT

THE COURT DISMISSES the application for judicial review, with costs to the respondent according to the middle column of Tariff B of the *Federal Courts Rules.*

"Yves de Montigny"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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