Date: 20090211

Docket: T-1652-07

Citation: 2009 FC 136

Ottawa, Ontario, February 11, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

RAJDEEP KANDOLA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] An employee who requires accommodation for a disability must inform his employer of the fact of the disability, unless it is self-evident, and then co-operate in the accommodation process; if not, it is he who must bear the consequences. Admitting to a disability and seeking the employer's assistance is difficult for some. However, when disclosure and a request for accommodation have not been made, the employee cannot later ask that the employer's assessment of his performance, made in ignorance of the disability, be set aside, nor can it reasonably be asked that the employer

retrospectively assess what the employee's performance might have been if the disability was known and the employee accommodated in the workplace. It is in large part on this basis that this application to set aside the decision of the Canadian Human Rights Commission, dismissing the applicant's complaint, must be dismissed.

Background

[2] The factual background to this application is not in dispute. Mr. Kandola started work for the Canada Revenue Agency ("CRA") on February 18, 2002, at the PM-01 classification level. He was accommodated through various measures for his sleep apnea and obesity. From June to August of 2002, Mr. Kandola and his supervisor, Mr. Wood, worked together to develop a 60-day performance improvement plan which successfully addressed certain performance issues, apparently related in part to accommodation, which had arisen at the outset of Mr. Kandola's employment.

[3] On February 14, 2004, Mr. Kandola applied for a PM-02 Collections Officer position. The staffing process was conducted in three stages: (1) a screening stage, in which candidates who did not meet prerequisites were screened out; (2) an assessment stage to establish a pool of qualified candidates, comprising standardized competency assessments, an interview, and reference checks; and (3) a placement stage in which the hiring manager filled positions out of the pool of qualified candidates.

[4] Mr. Kandola self-identified as a person with disabilities on his application for the PM-02 position. Also at this time, Mr. Kandola advised Mr. Wood for the first time that he suffered from a learning disability. He was accommodated by the CRA at both the testing and the interview stages, through the provision of additional time to complete the competency test and text-to-speech technology during the written and oral assessments, among other measures. In the result, Mr. Kandola was successful at both the interview and the competency test.

[5] It was at the reference check stage that the applicant was screened out of the competition. At this stage, a member of the selection board contacted Mr. Wood, Mr. Kandola's supervisor, with four questions relating to on-the-job performance, with each question (except question 4, below) weighted at a possible 20 points. The questions put to the supervisor were: (1) Have you detected any problems regarding this employee's attendance; (2) to what degree does this person recognize what needs to be done and take responsibility for undertaking the appropriate action(s); (3) to what degree does this person rectify problems by initiating corrective action rather than placing blame; and (4) are you aware of any reason this candidate ought not to be appointed to the position of PM-02. A fifth question which had been anticipated was not applicable to Mr. Kandola and was therefore removed, with the weight of the others pro-rated accordingly.

[6] On the basis of Mr. Wood's answers to these questions, in which he noted frequent absences, overdrawn vacation and excessive sick leave, lengthy breaks, problems with a co-worker, a missed submission deadline, and the need to implement a performance improvement plan, Mr. Kandola was assigned "marginal" scores in relation to questions 1, 2, and 3, and was screened out

of the competition. He was informed of this by letter dated October 8, 2004. Alleging that the reference stage should have been approached taking account of his disabilities, Mr. Kandola filed a Request for Decision Review, following which his score on question 1 was augmented by three points, but this was still insufficient to place him back in the running for the PM-02 position, as noted in the selection board's letter of January 13, 2005. In its November 22, 2004 response to Mr. Kandola, the Review Board had noted:

> I realize that some information regarding your disabilities was disclosed to management in the early stages of your employment with CRA, and as a result, accommodations were arranged … However, your learning disability was not formally disclosed to the managers during the reference check period, therefore no accommodation was requested nor provided concerning this disability. As your previously disclosed disability(ies) were formally disclosed and accommodated, it was reasonable for the selection board to only consider your actual performance in the reference check.

[7] A grievance filed by Mr. Kandola in relation to the selection process was dismissed at the first level on February 24, 2005. Subsequently, he filed his complaint with the Commission, alleging *inter alia* that the reference check was discriminatory.

[8] The investigator assigned to investigate Mr. Kandola's complaint interviewed the complainant, Mr. Wood, and the CRA specialist who had assisted Mr. Kandola with his accommodation requests. In her report, she sets out Mr. Kandola's submissions that the selection board failed to consider how his disability impeded his work performance when it evaluated his reference, and that the accommodations he required should have given the selection board sufficient notice that his work performance had been impeded for disability-related reasons. She also sets out

the respondent's position that during the period to which the reference related, Mr. Kandola had been accommodated for his obesity and sleep apnea, but that CRA had not then been notified by Mr. Kandola of his learning disability and was thus not providing any accommodation relating thereto.

[9] On the evidence before her, the investigator came to the factual conclusions that after the fact, CRA could not guess as to what the complainant's performance could have been during the review period if he had disclosed his learning disability and received accommodation. She further noted that not all of the performance deficiencies described by the supervisor could be attributed to disability (e.g. tardiness, placing blame on others, and lack of experience). Accordingly, she recommended that the complaint be dismissed pursuant to s. 44(3)(b)(1) of the *Canadian Human Rights Act.*

[10] The investigation report was disclosed to both parties, who were invited to make submissions on it. PSAC legal counsel made submissions on Mr. Kandola's behalf, suggesting that the investigator had failed to recognize that Mr. Kandola's disability was a source of his performance issues as reflected in the supervisor's reference, and failed to apply the legal test outlined in *Watt v. Canada (Attorney General),* [2006] F.C.J. No. 791, 2006 FC 619, which asks whether the complainant has made out a case of *prima facie* discrimination, and if so, whether the employer has established any defences to that *prima facie* discrimination, e.g., that the discrimination corresponds to a bona fide occupational requirement. The CRA also made brief

submissions stating, among other things, that the deficiencies noted by Mr. Woods were not related to any disability.

[11] By letter dated August 10, 2007, the Commission informed Mr. Kandola that his complaint had been dismissed pursuant to s. 44(3)(b)(i) of the *Canadian Human Rights Act.* The Commission adopted the investigator's finding and stated that it is dismissing the complaint because:

> [T]he evidence shows the respondent was not aware of the complainant's learning disabilities prior to the staffing process initiated in February 2004, and therefore could not provide accommodation which would permit the complainant the opportunity to perform at his optimal level.

Issue

[12] The sole issue raised by the applicant is whether his right to procedural fairness was breached by the failure of the Commission and its investigator to conduct a thorough investigation of his complaint.

Analysis

[13] Both parties accept that matters of procedural fairness are to be reviewed against the standard of correctness: *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056, 2005 FCA 404.

[14] It is also accepted by both parties that where, as here, the Commission adopted the investigator's report, with no apparent independent analysis, the report is considered to be the

reasons of the Commission: *Herbert v. Canada (Attorney General)*, [2008] F.C.J. No. 1209, 2008 FC 969.

[15] The applicant, relying on *Sketchley*, submits that the duty to conduct a thorough investigation has at least two components. First, the investigator has a duty to investigate all elements of the complaint raised by the complainant and second, the investigator has a duty to assess all "crucial evidence", including interviewing those necessary to gather information for the Commission to render its decision. The applicant submits that the investigator erred in both respects.

[16] The applicant submits that the Commission effectively failed to investigate his complaint because it mischaracterized his complaint. The Commission, as has been noted, dismissed the complaint because it found that on the evidence, the employer was not aware of applicant's learning disabilities prior to the PM-O2 competition, and therefore could not have provided accommodation at any time before then, which would have afforded the applicant the opportunity to perform at his optimal level.

[17] The applicant submits that this wrongly characterizes his complaint as being directed at the employer's failure to accommodate him in the work he was doing as a PM-01. He describes the alleged mischaracterization at paragraphs 49 and 50 of his Memorandum of Fact and Law in this way:

> Mr. Kandola alleged discrimination during the staffing process itself. He complained that the CRA failed to take his disability into account

> during its assessment of his performance, not that he had not been adequately accommodated prior to the staffing process.
>
> However, the Commission focused its investigation on events which occurred long before the assessment stage of the staffing process, in particular, the period of time which formed the subject of Mr. Kandola's reference check. This was a fundamental misapprehension of the crux of the Applicant's complaint which was directed, rather, at the way the employer evaluated his reference check, in light of his disabilities. [references omitted]

[18] Notwithstanding counsel's able submissions, I find that the Commission did not mischaracterize the applicant's complaint. While the Commission's statement as quoted in paragraph 11 above, could have been differently worded, a reading of the investigator's report indicates that she did characterize the complaint properly. At paragraph 24 of her report she writes:

> The complainant states that both Mr. Woods and the selection committee failed to consider the impact of his disability on his performance thereby discriminating against him. He states he should have been provided with an individualized assessment unique to his needs which would take into account the affects of his disability on his performance. He states an individualized assessment incorporating a new standard in relation to his disabilities, such as evaluating his reference in a different non-discriminatory manner, was not considered.

[19] In short, the investigator understood that the applicant's complaint was that the performance assessment made by both Mr. Wood and the selection board ought to have taken into account that he had a learning disability and assessed his performance in light of that disability. The difficulty with that proposition, as noted by the investigator and the Commission, is two-fold. First, some of the performance issues were found by the investigator not to have any relationship to the disability being asserted. Second, to the extent that the performance issues were caused or exacerbated by the disability, it is impossible, with any reasonable accuracy, to make an assessment after the fact as to

what his performance would have been had he been accommodated. This point is aptly made by Mr. Wood who, in the words of the investigator, said that "he could not estimate what the complainant's performance would have been if the complainant had disclosed this disability earlier and the respondent had provided accommodation." It is my view that this is what the Commission was saying in the passage quoted in paragraph 11, above – without disclosure there was no accommodation and without accommodation his performance was not optimal but there was no way to retroactively make an assessment of performance premised on an assumption that there had been disclosure and accommodation.

[20] The applicant also submits that the investigation was not thorough as the investigator failed to interview key witnesses, namely members of the selection board. In my view, there was no evidence that they could have offered which would have been critical to the complaint. It was submitted that they had to be interviewed for the investigator to ascertain what assessment they made of the complainant's performance. While the applicant proposed that many "creative solutions" might have been adopted by the selection board in assessing his performance, the fact is that their assessment involved no more than taking the reference provided by Mr. Wood and assigning a numerical value to it. While it was submitted that the values assigned by the selection board members raise a suspicion of discrimination, there was no evidence placed before the investigator, the Commission, or this Court that the rating guide had been misapplied or applied in a discriminatory manner to Mr. Wood's assessment of the applicant.

[21] For these reasons the application for judicial review must be dismissed, with costs to the respondent.

ORDER

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and

2. The respondent is entitled to its costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1652-07
STYLE OF CAUSE:	RAJDEEP KANDOLA v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 17, 2008
REASONS FOR ORDER AND ORDER:	ZINN J.
DATED:	February 11, 2009

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