Federal Court of Appeal | Cour d'appel fédérale

Date: 20181010

Docket: A-200-17

Citation: 2018 FCA 183

CORAM: **DAWSON J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

JANE DOE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 20, 2018.

Judgment delivered at Ottawa, Ontario, on October 10, 2018.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NEAR J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The applicant was employed by the Canadian Border Services Agency (CBSA) as a Border Services Officer at the Douglas, British Columbia port of entry. As discussed in more detail below, the applicant filed two grievances against her employer, one of which asserted that the CBSA had failed to provide a harassment-free workplace. This grievance arose out of the following circumstances.

[2] In May 2008, the applicant began working with a male co-worker who repeatedly made crude and vulgar comments of a sexual nature to her.

[3] At the hearing into the grievances the applicant testified that the co-worker committed the conduct outlined in Exhibit 1 entitled “Conduct”. This conduct was not disputed by the CBSA. In addition to listing a number of comments made by the co-worker between May 2008 and August 28, 2009, Exhibit 1 stated that by July 2009, the co-worker was making sexually explicit and sexually violent comments to the applicant several times a day.

[4] The applicant spoke to her superintendent in the fall of 2008 about the co-worker’s behaviour. The supervisor then spoke to the co-worker who told the supervisor that he would not make further inappropriate comments. The applicant never filed a written complaint, and management did not follow up to ensure that the offending conduct had stopped.

[5] The behaviour continued and culminated on August 28, 2009, when the co-worker committed an act that the CBSA acknowledged constituted a sexual assault. The co-worker was immediately suspended and assigned to a different work location. The applicant went on leave and was later found by WorkSafeBC to have suffered a workplace injury as a result of the co-worker’s conduct.

[6] During the course of the grievance and adjudication process, the CBSA acknowledged that the applicant was sexually harassed and assaulted by her co-worker (see for example, the employer’s final level reply to the grievance (applicant’s record, volume 1, page 49)).

[7] In 2010, the applicant filed two grievances. The Public Service Labour Relations and Employment Board dismissed one grievance and partially upheld one grievance (2017 PSLREB 55). While the Board found that the employer had failed to provide a harassment-free workplace, the Board went on to find that no payment of compensation to the applicant was warranted (reasons, paragraphs 5-6, 152, 162-163).

[8] This is an application for judicial review of the Board's decision.

[9] Two issues are raised on this application. First, was it unreasonable for the Board to decline to award damages? Second, does the Board's decision give rise to a reasonable apprehension of bias?

[10] For the reasons that follow, I have concluded that the Board's decision was unreasonable. This conclusion makes it unnecessary to consider whether the applicant established a reasonable apprehension of bias.

Was it unreasonable for the Board to decline to award damages?

[11] Remedial orders of damages are discretionary; as such they are entitled to considerable deference on judicial review. This said, an award will be set aside if it is irrational or contrary to the principles accepted in the arbitral jurisprudence (*Bahniuk v. Canada (Attorney General)*, 2016 FCA 127, 484 N.R. 10).

[12] The Board began its consideration of the applicant's request for compensation by way of damages by reviewing the arbitral jurisprudence that had considered the factors to be considered when deciding the appropriateness of a remedial order. Citing *Stringer v. Treasury Board (Department of National Defence) and Deputy Head (Department of National Defence)*, 2011 PSLRB 110, the Board quoted the following passage:

> When analyzing the eight decisions referred to by the parties … it became apparent that most of them do not include a detailed analysis of the rational [*sic*] used by the Tribunal or the adjudicator to arrive at the specific amount ordered for pain and suffering and for special compensation, if applicable. However, it is clear that **the seriousness of the psychological impacts that discrimination or the failure to accommodate had on the complainants or the grievors** is the main factor that justified each decision. It is also clear that recklessness rather than wilfulness was the principal ground used to grant special compensation to the grievors ….
>
> [Emphasis added by the Board]

[13] The Board had previously concluded that, contrary to the position advanced by the CBSA, it did have jurisdiction to consider the applicant's claim for damages based on harm to her dignity interest (reasons, paragraph 92). This was a correct appreciation of the purposes of non-pecuniary damages in cases such as this, which purposes include vindicating the claimant's dignity and personal autonomy, and recognizing the humiliating and degrading nature of the wrongful acts.

[14] Relevant to the applicant's dignity interest were the Board's findings that the co-worker's actions were "reprehensible" (reasons, paragraph 99), and "a vulgar prank and undoubtedly humiliating in the moment" (reasons, paragraph 144), and that there was "no doubt" that the applicant "was angry and that she felt demeaned" (reasons, paragraph 146).

[15] Missing from the Board's analysis was any explanation as to why such findings did not ground an award for damages for pain and suffering to compensate for the applicant's loss of dignity.

[16] I am satisfied that when the Board's reasons are read fairly as a whole, the Board found that the co-worker's conduct was not the sole cause of the applicant's medical condition. It followed, in the Board's view, that the applicant was not entitled to damages. Thus, the Board wrote at paragraph 152 of the reasons that the applicant's "extreme reaction, which continued and worsened over the years, simply cannot, on the evidence, be attributed to the co-worker's act or to the employer's post-incident response."

[17] This is seen from the following summary of the Board's brief reasons:

- By all accounts, the applicant was a confident employee who handled the work easily and had aspirations of joining the management team. She was well-liked by the other Border Services Officers and engaged in friendly banter with them, including the co-worker. Sometimes that banter had sexual content. … (reasons, paragraph 142).
- There were steps that a confident employee such as the applicant could have taken to deal with the harassment (reasons, paragraph 143).
- It was "unlikely, to say the least" that the sexual assault, characterized by the Board to be a "vulgar prank", "caused the extreme emotional impact described by the grievor" and her fiancé (reasons, paragraph 144).

- While the Board accepted that the applicant "was angry and that she felt demeaned", on all of the evidence the Board could not make a finding that "this one unpleasant experience caused a sea change in the grievor's personality and lifestyle from confident, cheerful, and outgoing to timid, anxious and fearful" (reasons, paragraph 146).
- The Board could not conclude that the applicant's experience rendered her unfit to work at the Douglas port of entry for 5 ½ years as of the date of the hearing (reasons, paragraph 147).
- The Board concluded that the applicant's "reaction was extreme and that the pain and suffering that she feels she incurred as a result of the co-worker's act is grossly exaggerated" (reasons, paragraph 148).
- The Board found that there was no case for damages arising from CBSA's failure to exercise all due diligence to prevent the occurrence of harassment in the workplace (reasons, paragraph 152).

[18] Consistent with this conclusion is the Board's characterization of the medical evidence presented on the applicant's behalf. At paragraph 65 of the reasons the Board noted that "the reports do not indicate that [the significant change in the applicant's personality and outlook on life] necessarily resulted solely from the workplace incident."

[19] This finding is problematic for at least three reasons.

[20] First, the CBSA acknowledged that her co-worker's conduct had affected the applicant. Thus, in its response to the level two grievance the employer acknowledged that it was only after a specific discussion that "management gained further insight as to the impact the August 28, 2009 incident" had on the applicant. Further, in an email sent on October 7, 2009, from the chief of operations of the Douglas port of entry to, among others, the CBSA's district director and regional director, the chief of operations wrote that the applicant "has suffered significant emotional trauma over this incident" (applicant's record, volume 1, page 193). Finally, while in its written closing statement to the Board the CBSA sought to avoid any award of damages on a number of grounds, it did not argue that the applicant had not suffered harm as a result of the sexual harassment directed to her by the co-worker or that to be compensable the harm must be caused solely by the co-worker. In this circumstance it is not clear that the applicant knew that the issue of the cause of the harm she suffered was in play.

[21] Second, paragraph 53(2)(*e*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 allows an adjudicator to order that a person found to have engaged in a discriminatory practice "compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice." Under subsection 65(1) of the Act, any act committed by an employee in the course of employment is deemed to be an act committed by the employer.

[22] It is for the Board to determine in every case what "compensate" means and what, if any, payment is appropriate in the circumstances. The proper meaning of "compensate" is a

question within the Board's expertise and the Board's interpretation of the relevant statutory provision is reviewable on the standard of reasonableness.

[23] To discern the meaning of "compensate", the Board is therefore required to conduct an exercise in statutory interpretation. For the interpretation to be reasonable, the Board is obliged to ascertain the intent of Parliament by reading paragraph 53(2)(*e*) in its entire context, according to the grammatical and ordinary meaning of its text, understood harmoniously with the object and scheme of the Act. The Board must also be mindful that human rights legislation is to be construed liberally and purposively so that protected rights are given full recognition and effect.

[24] In the present case, the Board did not engage in the required analysis and did not explain why harm suffered by the applicant could only be compensated if the actions of the co-worker were the sole and only cause of the harm.

[25] In my view, the Board's interpretation of "compensate" was unreasonable for two reasons.

[26] First, the interpretation does not accord with the text of paragraph 53(2)(*e*) which provides:

53.(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to	**53.**(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un

have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:	acte discriminatoire :
…	…
(*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.	(*e*) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

[27] By requiring a discriminatory practice to be the sole and only cause of resulting harm the Board has unreasonably added words to the text of paragraph 53(2)(*e*) to the effect that compensation may be paid in respect of a discriminant practice only where that practice is the sole cause of harm.

[28] Second, as previously stated, the purposes of non-pecuniary damages include providing a remedy to vindicate a claimant's dignity and personal autonomy and to recognize the humiliating and degrading nature of discriminatory practices. The Board's restrictive interpretation of "compensate" results in a denial of compensation when degrading conduct exacerbates a pre-existing condition or contributes to harm caused by another source. This is contrary to the purpose of the remedy and unreasonable.

[29] Third, and finally, the Board's decision was contrary to the principle, accepted in arbitral jurisprudence, that once pain and suffering caused by a discriminatory practice are established, damages should follow:

- "[W]hen evidence establishes pain and suffering an attempt to compensate for it must be made" (*Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10, at paragraph 115, citing *Cruden v. Canadian International Development Agency and Health Canada*, 2011 CHRT 13, at paragraph 170).
- "When evidence establishes pain and suffering, an attempt to compensate for it must be made" (*Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36, at paragraph 213).
- "She suffered significant pain and suffering, which entitles her to compensation under s. 53(2)(e) of the *CHRA*" (*Legros v. Treasury Board (Canada Border Services Agency)*, 2017 FPSLREB 32, at paragraph 65).
- "By neglecting that aspect of accommodation, the [Correctional Service of Canada] caused the grievor to experience pain and suffering, which it is right to compensate" (*Duval v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 52, at paragraph 101).

[30] The applicant provided extensive medical evidence. In a Psychology Assessment Report prepared on May 12, 2012 for WorkSafeBC the applicant was diagnosed with "Adjustment Disorder With Mixed Anxiety and Depressed Mood" [page 263]. The report noted:

> Pre-existing Psychological Conditions: She does not have any pre-existing problems with depression, and she hasn't had any past victimization experiences that affected her psychological functioning.
>
> …
>
> She did not have a psychological disorder or symptoms in the few years prior to the work incident. However, she was likely vulnerable to the development of anxiety with [*sic*] when dealing with significant stress, due to her prior Panic Disorder episode.

> The Adjustment Disorder developed as a direct result of the August 28, 2009 critical incident. [Page 264]

[31] The medical evidence did detail difficulties related to the applicant's existing irritable bowel syndrome, but was to the effect that the pre-existing condition was worsened by the incident:

- "In addition to the impact of the Events on [the applicant's] physical well being, her emotional and psychological health, have also been significantly negatively affected. [The applicant] had a history of anxiety prior to the Events, however, her anxiety was greatly exacerbated by the Events. … In summary, the cumulative impact the Events had on [the applicant] has been significant in all aspects of her life" (Letter of Dr. Icton, dated February 13, 2015, applicant's record, volume I, page 217).
- "[A]lthough symptoms of irritable bowel predated the workplace events related to [the co-worker], they have been exacerbated at times since, when she has been under a great deal of stress" (Letter of Dr. Bannerman, dated February 13, 2015, applicant's record, volume I, page 230).

[32] At paragraph 148 of its reasons the Board relied on "a serious personal situation of emotional trauma" to conclude that the applicant's claim was "grossly exaggerated" that the pain and suffering she experienced was as a result of the acts of the co-worker. Yet this is contradicted by relevant evidence, which included the following:

- "Although she acknowledged significant emotional distress and turmoil as a result of the divorce, [the applicant] reported that workplace issues represent a

greater stressor. In addition to the sexual assault, the resulting vocational uncertainty and her lack of direction currently have been very unsettling" (Dr. Bannerman, Mental Health Treatment Report, dated May 19, 2010, applicant's record, volume I, page 243).

- "While issues related to her divorce remain, their role in contributing to her emotional distress currently is minimal" (Dr. Bannerman, Mental Health Treatment Report, dated November 8, 2010, applicant's record, volume I, page 248).

[33] The evidentiary record before the Board required the Board to consider a number of questions. At a minimum the Board was required to:

i. Review the evidentiary record and find as a matter of fact the extent that pre-existing conditions or domestic stress caused or exacerbated the applicant's many medical and psychological symptoms and conditions.

ii. Determine what symptoms or conditions were compensable as harm arising as a result of a discriminatory practice in light of its findings of fact (*Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, *supra*, at paragraph 216).

iii. Consider whether all of the harm could be attributed directly to the discriminatory practice (*Hunt v. Transport One Ltd.*, 2008 CHRT 23, at paragraph 47).

iv. Finally, quantify the compensation to be awarded to the applicant for the harm caused by the co-worker.

[34] In light of the Board's unreasonable interpretation of "compensate" and its failure to grapple meaningfully with the evidentiary record, I would allow the application for judicial review with costs, set aside the order of the Board to the extent it disentitled the applicant to compensation and remit the issue of remedy to the Board for redetermination by a different member of the Board in a manner consistent with these reasons.

Did the applicant establish a reasonable apprehension of bias on the part of the Board?

[35] The applicant asserts that the Board's decision "went beyond simply being unreasonable, and entered the realm of sexist prejudice and bias" (applicant's memorandum of fact and law, paragraph 36). She argues that the Board diminished the nature of the sexual harassment and assault, relied on myths and stereotypes, suggested that the applicant was not sufficiently harmed to warrant compensation and made comments reflecting personal hostility towards the applicant. These errors are said to establish a reasonable apprehension of bias on the part of the Board.

[36] My finding that the Board's decision was unreasonable makes it unnecessary to consider this issue and I decline to deal with it. It is sufficient that I comment briefly on two points argued by the applicant.

[37] First, it is correct that the Board never referred to the culminating incident as a "sexual assault", notwithstanding that in its reply to the final level grievance the CBSA acknowledged that the applicant had been "the victim of a sexual assault" [applicants record page 49].

[38] There are typically a number of reasons why a judge or adjudicator may use certain language to describe offensive, unacceptable conduct. One reason may be an effort to be sensitive to the victim of such conduct. However, at the same time, it is necessary to take care not to inappropriately downplay or diminish the seriousness of unacceptable conduct. The sexual assault at issue in this case could not be reasonably characterized as a "prank".

[39] Second, a review of the Board's reasons for not awarding compensation, read in the context of the medical evidence, shows that the Board failed to grapple with the evidence. The Board never explained, for example, why it preferred one expert's evidence over another on the issue of the impact of the applicant's divorce on her condition. Instead, again by way of example, the Board relied on its characterization of the applicant as a "confident employee" to find that there were steps a confident employee could have taken but the applicant did not take in order to conclude that the work environment created by the co-worker was to the applicant "not as difficult to cope with as [she] now describes it" (reasons, paragraph 143).

[40] Similarly, instead of dealing with the expert evidence as to the effect the sexual assault had on the applicant, the Board simply concluded "it seems unlikely, to say the least, that it caused the extreme emotional impact described by" the applicant and her fiancé (reasons, paragraph 144).

[41] The Supreme Court has cautioned that there is "no inviolable rule on how people who are the victims of trauma like a sexual assault will behave" (*R v. D.D.*, 2000 SCC 43, [2000] 2

S.C.R. 275, at paragraph 65). It follows from this that any delay in the disclosure of an assault may not give rise to an adverse inference against the credibility of a complainant.

[42] In my view, characterizing an employee as a "confident employee who handled the work easily and had aspirations of joining the management team" (reasons, paragraph 142) similarly does not permit an inference to be made that such an employee would react in a particular way to an escalating number of sexually explicit and violent comments made by a co-worker. One employee might complain immediately to management while another might "go along to get along". It was an error for the Board to conclude that the applicant exaggerated how difficult it was to cope with her work environment on the basis that the Board characterized the applicant to be a "confident" employee.

[43] Equally, because there is no one typical response by victims to a sexual assault, there was no basis for the Board to infer mainly from the applicant's responses that the co-worker's conduct could not have caused the harm described by the applicant. This is particularly troublesome when the Board's own concept of logic or common sense was substituted for its assessment of the actual evidence before it.

Conclusion

[44] For these reasons I would allow the application for judicial review with costs, set aside the order of the Board to the extent it disentitled the applicant to compensation and remit the issue of remedy to the Board for redetermination by a different member of the Board in a

manner consistent with these reasons. Given the delay to date, the Board may wish to expedite the redetermination.

"Eleanor R. Dawson"
J.A.

"I agree.
D. G. Near J.A."

"I agree.
Yves de Montigny J.A."

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NAMES OF COUNSEL AND SOLICITORS OF RECORD

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