Federal Court of Appeal | Cour d'appel fédérale

Date: 20120503

Dockets: A-115-11
A-162-11

Citation: 2012 FCA 135

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

DONNA CASLER

Appellant

and

CANADIAN NATIONAL RAILWAY

Respondent

Heard at Toronto, Ontario, on May 1, 2012.

Judgment delivered at Toronto, Ontario, on May 3, 2012.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: PELLETIER J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] Donna Casler filed a complaint with the Canadian Human Rights Commission alleging that the respondent Canadian National Railway ("CNR") had discriminated against her in the course of her employment by subjecting her to adverse differential treatment on the basis of disability and sex. An investigator prepared a report, concluding that the complaint should be dismissed. The Commission agreed and dismissed the complaint.

[2] Ms. Casler's application to the Federal Court for judicial review of the Commission's decision was dismissed. Before this Court is an appeal of the judgment dismissing her application for judicial review (2011 FC 148), as well as an appeal of a related judgment (2012 FC 287) holding Ms. Casler liable to CNR for costs in the Federal Court in the amount of $1,000.

[3] The principal issue in the Federal Court was the adequacy of the investigation of Ms. Casler's complaint. That is also the principal issue in this Court. For the reasons that follow, I have concluded that the investigation was not adequate, and that these appeals should be allowed.

The legal test for adequacy of an investigation

[4] The leading authority on the question of the adequacy of an investigation by the Commission is the decision of Justice Nadon in *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574, affirmed (1996), 205 N.R. 383 (F.C.A.). For the purposes of this appeal, the relevant part of the legal test is thoroughness, described by Justice Nadon as follows (my emphasis):

> **49** In order for a fair basis to exist for the [Commission] to evaluate whether a tribunal should be appointed pursuant to paragraph 44(3)(a) of the Act, I believe that the investigation conducted prior to this decision must satisfy at least two conditions: neutrality and thoroughness.
> …
> **56** 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. Such an approach is consistent with the deference allotted to fact-finding activities of the Canadian Human Rights Tribunal by the Supreme Court in the case of *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

[5] It is axiomatic that a decision of the Commission that simply adopts an investigator's report and recommendations cannot stand if it is established that the investigator failed to investigate obviously crucial evidence.

Analysis

[6] In this case, the Federal Court judge did not accept Ms. Casler's submissions that the investigation was inadequate. However, he assessed those submissions solely on the basis of procedural fairness, without considering whether the record raised an unreasonable omission in the investigation, an omission that had to be addressed before the Commission could make a screening decision about Ms. Casler's complaint. In my view, the failure of the judge to consider that question led him to an erroneous conclusion about the adequacy of the investigation.

[7] Ms. Casler was an employee of CNR from March 12, 1981 to September 28, 2006. She worked initially as a brakeman and, until October 13, 1998, as a locomotive engineer. That position ended because of technological advancements. In October of 1998, she was diagnosed with fibromyalgia and chronic fatigue syndrome. From October 14, 1998 to August 1, 1999, she was on sick leave. On August 1, 1999, she returned to work as a brakeman. At that time, her doctors and CNR's doctors agreed that she should avoid heavy work. She says that the work of brakeman was too difficult for her during this period, with the result that she missed some shifts. She was again on sick leave from December 11, 1999 to March 24, 2000. To this point, the facts are undisputed. Many of the remaining facts are in dispute to some degree.

[8] On June 30, 2000, CNR offered Ms. Casler a position that involved operating a weed trimmer. She stopped doing that work after two days on the advice of her physician because the physical demands of the work caused her condition to deteriorate. On July, 6, 2000, CNR offered Ms. Casler light duty work as a flagperson, which was accepted. It appears that she was able to do that work. This event is important because it indicates that at this point in time, CNR recognized a duty to accommodate Ms. Casler.

[9] Ms. Casler's work as a flagperson came to an end on August 25, 2000. Ms. Casler's allegation as to what she was told on that date is recounted as follows in her original complaint:

> On August 25, 2000, I was informed that the flagperson job was over and that there were no other jobs available to accommodate my restrictions and limitations. I found this to be strange as I was aware of other individuals who were being accommodated in light duty and other positions. One of the guys I was working with on the weed-eating duties, Bill Selby, was also in need of accommodation due to a heart condition, and he was kept on and continued to be accommodated until he got a retirement package, but I was told there were no duties available for me. I think that the reason I was treated differently from Bill Selby was partly because of the nature of my disability and partly because I am female.

[10] On September 3, 2000, Ms. Casler went back on sick leave. She alleges that she did so because she believed, because of what she had been told on August 25, 2000, she had no further prospect of accommodated employment with CNR. She remained on sick leave until March 7, 2001, when her sick leave benefits expired. Ms. Casler has not worked since that time.

[11] CNR admits it made no accommodation efforts for Ms. Casler after August 2000. The explanation offered is that Ms. Casler did not ask for accommodation or provide information about her condition until sometime in 2003, and by that time she was incapable of any work.

[12] The investigator seems to have searched for a specific, overt request from Ms. Casler after August of 2000. However, it appears that the investigator did not consider or investigate whether, given the facts as alleged by Ms. Casler, her need for accommodation in August of 2000 was or should have been known to CNR because of the state of affairs at that time.

[13] It is readily apparent from the record that the parties have opposing views about what happened during that crucial period at the end of August and the beginning of September 2000. Ms. Casler alleges that she was compelled to resort to sick leave benefits at the end of August 2000 because she understood, from what she had been told, that all efforts to accommodate her were at an end. CNR for its part relies on the fact that Ms. Casler went on sick leave as proof that she was medically unfit to work, which CNR argues absolved them of any obligation to consider further accommodation unless Ms. Casler specifically asked for it.

[14] And yet if it is true, as Ms. Casler alleges, that she pursued a claim for sick leave only because she felt that CNR had given her no option, on what basis can it fairly be said that CNR acted reasonably in ignoring the accommodation issue once Ms. Casler went on sick leave? This may well be the most important factual dispute, but the record does not disclose the position of

CNR on a number of questions that in my view are obviously crucial to a fair determination of this factual dispute. Specifically, the record does not disclose and the investigator apparently did not ask:

(a) why Ms. Casler's position as a flagperson came to an end on August 25, 2000;

(b) what, if anything, CNR officials said to Ms. Casler between August 25, 2000 and September 3, 2000, about her continued employment with CNR; or

(c) what consideration, if any, CNR gave to the question of accommodating Ms. Casler immediately after the weed trimming position ended.

[15] As I read the record, there were obvious avenues for further investigation about the situation as it was at the end of August of 2000. Some of these questions could have been put squarely to CNR. Also, Ms. Casler submitted on numerous occasions the names of workers apparently in Ms. Casler's work group who had been accommodated with lighter work, but no attempt was made to find more information specifically about those individuals. CNR was never asked for an explanation about those individuals, and no interviews were sought from them.

[16] In my view, these deficiencies in the investigation are sufficiently obvious and important to justify a conclusion that the investigation does not meet the *Slattery* test for thoroughness. It follows that the decision of the Commission cannot stand, and this matter must be returned to the Commission for a fresh investigation and a new decision.

Other observations

[17] I have noted other deficiencies in the investigation report which, although they are not cited as a basis for requiring a new investigation, indicate that the first investigation was in many respects cursory. In my view, it would be helpful if these additional points were addressed by the new investigator.

What did CNR know, and when?

[18] Ms. Casler insists that she kept CNR apprised of her condition in 2003 and 2004. Indeed, the record contains many medical reports prepared during that period. But is it far from clear who received those reports, and when. CNR denies receiving any reports until it contacted Ms. Casler in early 2003 to enquire about her status. I will not list all of the factual ambiguities in this regard, but I offer one example.

[19] The record contains many medical reports during the period relevant to Ms. Casler's complaint suggesting that Ms. Casler was capable of some work. CNR denies receiving many of these reports, including some bearing dates in 2004. However, CNR acknowledges that Ms. Casler filed a grievance on August 23, 2004 alleging a failure to accommodate her disability. The grievance, which is appended to Ms. Morrison's affidavit, states that a recent medical report describing her condition was attached. However, that medical report is not referred to in Ms. Morrison's affidavit, and it is not possible to determine from the record which report it is, when it was prepared, or whether it had been sent to CNR before the grievance was initiated. The grievance

was never considered on its merits and it failed for want of timeliness. The investigator did not attempt to determine what medical reports were received by CNR, and when.

The period relevant to the complaint

[20] Ms. Casler's complaint to the Commission is dated September 22, 2004. In January of 2005, the Commission determined that it would deal only with allegations by Ms. Casler of events that occurred from August 25, 2000 (the date of the termination of Ms. Casler's work as a flagperson) to September 24, 2004 (which I assume was meant to be September 22, 2004, the date of the complaint). That decision was never challenged, and Ms. Casler has not asserted a claim for any act of CNR that occurred before or after the specified period.

[21] Both parties made submissions to the investigator about events that occurred before and after the specified complaint period, and the investigator considered those submissions.

[22] It is reasonable to conclude that evidence of events before the specified period may assist in understanding events that occurred within the specified period. However, the justification for considering subsequent events is not clear. It might make sense to consider post-September 24, 2004 events if CNR were alleging that something that occurred after September 24, 2004 amounted to reasonable accommodation, or absolved them of any obligation to accommodate. However, that is not CNR's position. CNR says that it had no duty to accommodate after August 25, 2000. The investigator did not attempt to deal with the question of whether and in what way any of the events after September 24, 2004 were relevant to Ms. Casler's complaint.

Dates of Ms. Casler's final sick leave

[23] The record states different dates for the commencement of Ms. Casler's sick leave after August 25, 2000. At page 3 of CIRB Letter Decision No. 1757, the Canadian Industrial Relations Board states that her sick leave commenced on September 3, 2000, but also that her flagperson position ended on September 2, 2000 rather than August 25, 2000, the date alleged by Ms. Casler and apparently undisputed by CNR. The record does not indicate any attempt to resolve these factual differences, or to determine whether they are material.

The sex discrimination complaint

[24] The investigator appears to have concluded that Ms. Casler's allegation of discrimination on the basis of sex was completely answered by CNR's statement that some of the individuals named by Ms. Casler as having been accommodated are female, and that according to CNR's website, 90.5% of its employees are male, and 3.3% of male employees were disabled in comparison to 7.7% of female employees. While this point was not the subject of submissions, I question whether this is an inadequate answer (see, for example, the dissenting reasons of Justice Evans in *Public Service Alliance of Canada v. Canada Post Corp.*, 2010 FCA 56, [2011] 2 F.C.R. 221, adopted by the Supreme Court of Canada in *Public Service Alliance of Canada v. Canada Post Corp.*, 2011 SCC 57, [2011] 3 S.C.R. 572).

Conclusion

[25] For these reasons, I would allow both appeals and set aside both judgments of the Federal Court. I would allow Ms. Casler's application for judicial review of the decision of the

Commission, and I would refer this matter back to the Commission for reconsideration by a different decision maker after a new investigation by a different investigator. I would award Ms. Casler her costs in this Court and in the Federal Court.

"K. Sharlow"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-115-11 A-162-11

(APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE BARNES DATED FEBRUARY 9, 2011, NO. T-1168-09)

STYLE OF CAUSE:	Donna Casler v. Canadian National Railway
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 1, 2012
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	PELLETIER J.A. STRATAS J.A.
DATED:	May 3, 2012

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