Federal Court of Appeal  Cour d'appel fédérale

Date: 20191010

Docket: A-231-18

Citation: 2019 FCA 251

CORAM: **DAWSON J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

ARTHUR KEITH

Appellant

and

CANADIAN HUMAN RIGHTS COMMISSION
and CANADIAN ARMED FORCES

Respondents

Heard at Toronto, Ontario, on October 10, 2019.
Judgment delivered from the Bench at Toronto, Ontario, on October 10, 2019.

REASONS FOR JUDGMENT OF THE COURT BY: GLEASON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on October 10, 2019).

GLEASON J.A.

[1] The appellant appeals from the judgment of the Federal Court (*per* Brown, J.) in *Keith v. Canadian Human Rights Commission et al*., 2018 FC 645, in which the Federal Court dismissed the appellant's application for judicial review of the decision of the Canadian Human Rights Tribunal (the CHRT or the Tribunal) in *Keith v. Canadian Human Rights*

Commission et al., 2017 CHRT 32. In that decision, the CHRT dismissed the appellant's claim for discrimination arising from the refusal of the Canadian Armed Forces (the CAF) to employ him as a psychiatrist because he lacked specialist accreditation from the Royal College of Physicians and Surgeons of Canada (the RCPSC).

[2] The appellant was born in the United States of America and received all of his medical training and specialty training in psychiatry in the United States. He qualified as a specialist in psychiatry in the U.S. and was also accredited by the College of Physicians and Surgeons of Ontario (CPSO), which recognized him as a specialist in Ontario. However, the CPSO designation was not recognized in all other Canadian jurisdictions. At the times relevant to his complaint, the CAF required all the psychiatrists it employed to be accredited by the RCPSC (or by an equivalent body in the province of Quebec) in order to provide a consistent level of care for the CAF's nationally-mobile patient population.

[3] The Tribunal found that the appellant failed to make out a *prima facie* case of discrimination for two principal reasons. First, it found that the appellant failed to establish that he had a characteristic protected from discrimination under the *Canadian Human Rights Act*, 1985, c. H-6 (the CHRA), holding that the appellant had not established that his place of education was a proxy for national origin (one of the protected grounds in the CHRA). Second, the Tribunal held that the appellant failed to establish that his place of education or origin resulted in any adverse treatment, finding the evidence insufficient to establish that American-educated physicians or psychiatrists were adversely impacted by the CAF's requirement to obtain RCPSC accreditation. These findings were sufficient for the CHRT to dismiss the appellant's complaint. The Tribunal, however, went on to consider the defence of

the CAF and determined that the CAF's requirement for the RCPSC accreditation was a *bona fide* occupational requirement and that the CAF was therefore entitled to require the accreditation. In result, the CHRT dismissed the appellant's complaint.

[4] The Federal Court determined that the CHRT's decision was reviewable for reasonableness and concluded that the Tribunal's decision was reasonable. It also found that the CHRT had not violated the appellant's procedural fairness rights and thus dismissed the appellant's application for judicial review.

[5] As this appeal is taken from a judgment on a judicial review application, in accordance with the Supreme Court of Canada's decision in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-46, this Court is required to step into the shoes of the Federal Court and determine whether the Federal Court selected the appropriate standard of review and, if so, whether it correctly applied the standard it selected.

[6] Here, the Federal Court selected the appropriate standards of review, namely, no deference (sometimes called correctness) on the procedural fairness issue and reasonableness for the merits of the Tribunal's decision. On the latter point, it is now settled that the reasonableness standard applies to *both* the CHRT's interpretation of the CHRA and to the application of that statute to the facts before the Tribunal: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 at paras. 27-29. The case law that the appellant relies on that indicates that the Tribunal's interpretations of provisions in the CHRA are reviewable for correctness – principally the decision of this Court in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, [2015] 2 F.C.R. 595 and

the cases cite therein – has been overtaken by the Supreme Court's holding in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*.

[7] Turning first to the reasonableness of the Tribunal's decision on the merits, it is only necessary to comment on one of the issues raised by the appellant as he must be successful on this issue in order to have the CHRT's decision overturned. Contrary to what the appellant asserts, it was not unreasonable for the Tribunal to have concluded that the appellant failed to establish that his place of education or origin resulted in any adverse treatment by the CAF because the evidence was insufficient to establish that American-educated physicians or psychiatrists were adversely impacted in the RCPSC accreditation process. This finding was one that it was open to the Tribunal to make, particularly as there was no statistical evidence to indicate that American-trained physicians, specialists or psychiatrists were disproportionately unsuccessful or somehow disadvantaged in the accreditation process.

[8] As for the alleged procedural fairness failure, it was open to the Tribunal to consider – and find determinative – the lack of evidence of adversity. Indeed, this issue was at the heart of the appellant's claim challenging the CAF's hiring practices in which he asserted that he was adversely impacted by the CAF's requirement for RCPSC accreditation. There was accordingly nothing untoward in the Tribunal's focussing on this issue or in finding that the appellant had the burden to lead evidence on the issue, it being well-established that it is up to a claimant to make out a *prima facie* case of discrimination: *Moore v British Columbia*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 33.

[9] We finally note that, in substance, the appellant's submission is that the RCPSC accreditation was unnecessary for him to practice psychiatry for the CAF. That, however, is

not the issue in a discrimination case, where it is rather incumbent on a claimant to make out a *prima facie* case of discrimination.

[10] This appeal will accordingly be dismissed, with costs.

"Mary J.L. Gleason"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-231-18
STYLE OF CAUSE:	ARTHUR KEITH v. CANADIAN HUMAN RIGHTS COMMISSION and CANADIAN ARMED FORCES
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT OF THE COURT BY:	DAWSON J.A. NEAR J.A. GLEASON J.A.
DELIVERED FROM THE BENCH BY:	GLEASON J.A.

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