Date: 20091208

Docket: T-1852-08

Citation: 2009 FC 1252

Ottawa, Ontario, December 8, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

NANCY CAMPBELL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This case is about Nancy Campbell's bad back and whether her employer, the Canada Revenue Agency, discriminated against her because of it. She complained to the Canadian Human Rights Commission that, even though her immediate supervisor knew she had a bad back, she was ordered to perform a task which required considerable bending. She reinjured her back and was off work. When she returned, the efforts to accommodate her were too little, too late and led to harassment from her co-workers. Some months later she again injured her back, was off work again,

returned again, and at the time of the last entry in this file was scheduled to undergo surgery. She also alleges that she was passed over for better employment because of her disability.

[2] After investigating, the Commission dismissed her complaint. This is the judicial review of that decision.

THE LEGAL PARAMETERS

[3] The purpose of the *Canadian Human Rights Act* is to give effect to the principle that, within matters subject to federal jurisdiction, individuals should have equal opportunity. They are not to be hindered or prevented therefrom by discriminatory practices based on, among other things, disability, and their needs are to be accommodated.

[4] Section 7 provides that it is a discriminatory practice to differentiate adversely against an employee on a prohibited ground of discrimination. Section 14 goes on to say that it is a discriminatory practice to harass an employee on such grounds.

[5] The *Act* established the Commission, which has a multi-faceted jurisdiction, and clothed it with various powers, duties and functions. In Ms. Campbell's case it received her complaint, and decided to investigate. The Commission may then dismiss the complaint or refer it to the Canadian Human Rights Tribunal for an inquiry. In effect, it vets the complaint, not to determine if the complaint is justified, but rather to determine whether an inquiry is warranted. Its role is to determine whether there is a reasonable basis in the evidence, if believed, to substantiate the

complaint (*Bell v. Canada (Canadian Human Rights Commission)*; *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854 at paragraph 53).

[6] The investigator went about her work in a fairly typical fashion. She collected documents from Ms. Campbell, or her union representative, and from the Canada Revenue Agency (CRA). She conducted interviews, gave the CRA the opportunity to respond to Ms. Campbell's allegations, asked her some questions, summarized the CRA's reply and gave her an opportunity to respond. She also carried out some interviews in person or by telephone.

[7] The case law demands that the investigation be thorough. The thread which runs through the various components of Ms. Campbell's complaint is that the investigation was not thorough. The significance of that allegation is that it brings into issue the principles of natural justice, more particularly procedural fairness. The general rule is that if the Court comes to the conclusion that Ms. Campbell was not afforded procedural fairness, judicial review will be granted and the matter referred back to the Commission for a fresh investigation and fresh decision (*Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643).

<u>THE FACTS</u>

[8] Ms. Campbell began working for the CRA in 1999 as a data entry operator for revenue processing. She has not been guaranteed full-time employment as the work is seasonal in nature. In 2004 she injured her back at work while picking up a thimble she had dropped. Various Workplace

Safety & Insurance Board (WSIB) reports were prepared. The CRA was provided with a doctor's note which recommended that Ms. Campbell stand up and stretch briefly every 20 to 30 minutes.

[9] She entered two job competitions in 2005, but was unsuccessful. She grieved one competition to the highest level within the CRA. Her grievance was ultimately dismissed.

[10] In Ms. Campbell's complaint she said that thereafter she was off work now and then due to back pain. She was off work February 20 and 21, 2006. She said that she had a doctor's note not to do any lifting or pulling, but the note provided to the CRA makes no mention of that.

[11] When she returned to work on February 22, 2006 her team leader told her that she would not have to "pull lists" for the rest of the week, but would have to the week after. Pulling lists requires manipulating boxes full of cheques some 24 inches in length by 12 inches wide. The box is said to weigh about five pounds. Incidentally the job description requires occasional lifting of weights of up to 20 kilos.

[12] On February 27, 2006 she was directed to pull lists. She protested, and has a witness. Nevertheless she began to pull lists, as a result of which she reinjured her back.

[13] She was off work until March 14, 2006. The WSIB reports refer to a doctor's note which states "please two weeks of no bending and lifting heavy files." The CRA's internal functional abilities assessment form indicated that there should be no lifting or carrying at all.

[14] Ms. Campbell requested an ergonomic assessment. The CRA has a national ergonomics program. Because of the sedentary nature of much of the work, many of its employees develop lower back problems.

[15] The assessment was carried out in May, 2006. Its purpose was to evaluate the demands of the job, review the physical characteristics of her workstation, identify risk factors that could contribute to the discomfort and pain Ms. Campbell was experiencing in her lower back, and to provide recommendations to decrease or eliminate that risk. By that point her physician had recommended no lifting or carrying, no pulling or pushing, sitting no more than 15 minutes with frequent stretch breaks, and walking and standing every 30 minutes. The assessor recommended a special chair, footstool, and an electric sit/stand height adjustable work surface, which would allow her to alternate working in a sitting or standing position. Her doctor agreed with these recommendations.

[16] According to the manager of revenue processing the ergonomic chair and footstool were promptly provided. However, there was a problem with respect to the electric sit/stand workstation. There was one available in the building but it was too large to fit into Ms. Campbell's cubicle. It would take up two cubicles. However, as it was peak season for processing claims there was no space available. She conferred with CRA's public works component and was advised that it would take several months before a smaller workstation could be delivered and installed. She contacted CRA's ergonomist to inquire whether there was another way to accommodate Ms. Campbell. The

ergonomist recommended two workstations at different heights, one for sitting and one for standing. Ms. Campbell agreed to this arrangement but later on in her complaint said she felt she had no choice.

[17] The standing table was placed in a hallway close to Ms. Campbell’s workstation. Other employees used the table when Ms. Campbell was not.

[18] The workstation had the appearance of a bar, which led some jokesters to order drinks as they passed by. Ms. Campbell was humiliated. There is nothing in the record to suggest that she asked her co-workers to refrain from making these remarks, and there is a divergence of recollection as to whether she voiced her concerns to her team leader. In any event she stopped using the higher workstation.

[19] A co-worker who also used the higher workstation coped by putting a tip jar on the table. She too says that she was humiliated, and also stopped using that particular workstation. It is not clear whether this co-worker has any disability.

[20] Be that as it may, Ms. Campbell came in with a doctor’s note in which the doctor requested that she remain in her original work-station because working at the table caused her mental anguish.

[21] Thereafter the CRA referred her to Health Canada for a fitness-to-work assessment. Health Canada also recommended an electric sit/stand workstation or if not feasible a stationary sitting

station and stationary standing station should be tried again, but the standing station should afford Ms. Campbell privacy. Regular stretch breaks would still be required. She should not be called upon to bend repetitively, carry more than 10 pounds, or push or pull heavy objects.

[22] Ms. Campbell's contract ended September 29, 2006 and she was laid off with other employees until December 8, 2006. At about this time it was announced that in the near future a full-time position would be available for six weeks or so. Ms. Campbell was passed over, which led to intervention on the part of her union representative. The CRA's position is that she was not passed over because of her disability. There were only three full-time positions available and they went to the three fastest-typing employees.

[23] When she returned to work a new workstation was situated in front of her team leader, with high panels for privacy. She had two tables, one for sitting and the other for standing. There was a computer on each. However, it was realised that the computer on the higher table was in a potentially dangerous position. It was removed and the table returned to normal height.

[24] She only worked for three days before she was overcome by back pain. Nothing in the record indicates exactly what Ms. Campbell did during those three days that might have aggravated her condition.

[25] The WSIB investigated this last incident and conducted its own ergonomic assessment. It was of the view that an electric sit/stand workstation was required. It was made available upon Ms.

Campbell's return to work in February, 2007. She makes much of the fact that the WSIB ergonomist criticized the previous workstation arrangement. However, it must be kept in mind that the criticism was levelled at the workstation as modified in December, 2006. However, as regards the earlier workstation in the hallway he said "this workstation physically accommodates Ms. Campbell as it provides an adequate work surface at an appropriate height." The issue was the social interaction with co-workers.

[26] In January, 2007 Ms. Campbell had been issued a medical certificate by the Ottawa Hospital which stated that she would have to undergo surgery, and would probably need six months of recovery. Counsel was unable to say whether or not the surgery has taken place.

[27] Ms. Campbell continued to work until May, 2007. She has not returned, but according to the CRA as long as work is available she is welcome to return.

THE INVESTIGATOR'S REPORT

[28] The investigator concluded that the CRA was not on sufficient notice that Ms. Campbell should not pull lists on February 27, 2006. Thereafter her disability was accommodated. The teasing of co-workers was not connected to her disability and did not constitute harassment. As to being passed over and not obtaining full-time work, she unsuccessfully grieved on one occasion and did not get the full-time position because others were faster. There was no discrimination based on her disability.

[29] The report was sent to the parties for comment. Both responded. Ms. Campbell's representative, a Human Rights Program Officer at the Public Service Alliance of Canada, complained that Ms. Campbell was only subjected to a brief telephone interview which was limited to the alleged workplace harassment. The investigator should have interviewed other witnesses including at least two co-workers who had been mentioned in Ms. Campbell's earlier submissions and the union representative who was involved throughout the accommodation process.

[30] Issue was taken with Ms. Campbell's timesheet on February 27, 2006. I do not consider this point relevant because Ms. Campbell could have injured her back after only pulling lists for a few minutes, or for a few hours.

[31] According to Ms. Campbell, the CRA failed to provide an electric sit/stand workstation because it was inconvenient. It was only after the WSIB report that one was made available. The CRA was given a copy of her submissions and in its reply pointed out that there was no evidence provided by any medical professional that the lack of electric sit/stand workstation led to Ms. Campbell's requiring surgery. As to being passed over for promotions or full-time work, Ms. Campbell did not assert that she had raised her disability in the grievance. As to full-time employment in December, 2006, although the reviewer had noted that her keystrokes were very good only the three employees with the highest production were offered a full-time work week for a contract from January 15 to February 23, 2007. Finally, the CRA was prepared to rehire her, along with other members of her group, when the workload rose again and when she was fit to return to work.

[32] In a one-page letter the CHRC dismissed Ms. Campbell's complaint. It stated that the members of the Commission reviewed the report and submissions filed in response thereto. The Commission was of the view that the evidence indicated that the CRA did accommodate Ms. Campbell as recommended by professional assessments and that she was not harassed because of her disability. As nothing else was stated, in effect, the report of the investigation becomes the Commission's reasons for dismissing the complaint.

ISSUES

[33] There are four aspects to Ms. Campbell's complaint. Permeating throughout is the allegation that the investigation was not thorough. This spills over to the Commission's letter of dismissal in that the very detailed comments on the investigation report deserved a reply.

[34] The Court owes no duty to the Commission when it comes to procedural fairness (*Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539). Otherwise the standard of review is that of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[35] The first question is whether the CRA discriminated against Ms. Campbell and failed to accommodate her disability when she was directed to pull lists on February 27, 2006.

[36] The second question is whether the CRA adequately accommodated her upon her return to work in March, 2006 and throughout that year, a year in which an electric sit/stand workstation was not provided.

[37] The third question is whether the CRA failed to provide a harassment-free workplace.

[38] Finally, was she passed over for promotions or full-time work because of her disability?

THE INJURY ON FEBRUARY 27, 2006

[39] It is important to limit oneself to what was known on February 27, 2006, and not to be influenced by subsequent events. The only work restriction in Ms. Campbell's file went back to 2004. The recommendation was that Ms. Campbell stand up and stretch briefly every 20 to 30 minutes. There is no evidence that she was prevented from doing that. Although she was away for two days the previous week, the doctor's note did not put any restrictions on her work. Ms. Campbell contests this, but was unable to produce a letter which she claims did place restrictions upon her.

[40] The evidence is that she complained, which is backed up by an e-mail from a fellow worker.

[41] Her team leader claims that Ms. Campbell could have refused as she was well-aware of her rights.

[42] In my opinion there was no lack of procedural fairness. There was no need to personally interview the other co-workers. Although the telephone interview of Ms. Campbell did not touch upon this incident, she was sent a detailed questionnaire, a summary of the CRA's position and the investigator's report. In each instance a very detailed reply was sent by her union representative.

[43] Procedural fairness requires that the investigation be both neutral and thorough (*Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574, aff'd (1996), 205 N.R. 385 (F.C.A.)). Ms. Campbell submits not only that the investigation was not thorough in that important witnesses were not interviewed, those were witnesses who would have supported her. Only Ms. Campbell's team leader and the supervisor of the section were personally interviewed, which suggests a lack of neutrality.

[44] It is important to recall that it is not the role of the Court to micromanage the Commission and its investigator. In *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12 (C.A.) Lord Denning held that the investigating body is the master of its own procedure. He stated at page 19 that "it need not hold a hearing. It can do everything in writing -- moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them." This sentiment was adopted by the Supreme Court in requiring the Commission to comply with the rules of procedural fairness (*Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879).

[45] As regards the “pulling lists” incident, the investigator formed the view that there was nothing in the record to contradict the doctor’s note Ms. Campbell gave to the CRA with respect to her absence on February 21 and 22, 2006. That note placed no restrictions on her workload. The investigator was provided an e-mail from Ms. Campbell’s witness to the effect that Ms. Campbell protested and said she did not want to pull lists.

[46] Likewise with respect to the bartender remarks, the investigator accepted that such remarks were made, and had an e-mail from one of Ms. Campbell’s co-workers. Again she did not consider it necessary to carry out an interview.

[47] Nor did she interview the union representative who had things to say with respect to the delay in providing an electric sit/stand workstation. She considered the exchange of e-mails with which she had been provided to be adequate.

[48] On the other hand she did interview the three main protagonists, Ms. Campbell, her team leader, and the supervisor. She formed the view that the others were not key witnesses. Certainly this is not a case like *Grover v. Canada (National Research Council)*, 2001 FCT 687, 206 F.T.R. 207 in which it was found that the investigation was insufficient because a key witness, Mr. Grover’s boss, was not interviewed. In my view the investigation satisfied procedural fairness requirements as enunciated in such cases as *Slattery*, above, *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392, *Gravelle v. Canada (Attorney General)*, 2006 FC

251, *Egan v. Canada (Attorney General)*, 2008 FC 649, 341 F.T.R. 1, *Herbert v. Canada (Attorney General)*, 2008 FC 969, and *Hicks v. Canada (Attorney General)*, 2008 FC 1059, 334 F.T.R. 260.

FAILURE TO ACCOMMODATE

[49] Turning to her accommodation upon her return to work, it is not disputed that the ideal solution was an electric sit/stand workstation. However, there were space limitations, and the alternative, two workstations at two different heights, was approved by the ergonomist at the CRA and by Health Canada. It is unfortunate that Ms. Campbell injured herself again in December, 2006, but there is no indication whatsoever in the record that the CRA did not observe the restrictions on her workload, i.e. no lifting, etc. It is unreasonable based on this evidence to suggest that her disability was not accommodated.

[50] Although the union representative was not interviewed with respect to the accommodation given to Ms. Campbell after her February 27, 2006 injury, and the delays in providing an electric sit/stand workstation, the investigator had an exchange of e-mails in that regard.

[51] The issue was not whether having the two workstations was a perfect solution. Clearly it was not. Nor was the issue whether the employee wanted an electric sit/stand workstation. The issue was whether she was adequately accommodated. The investigator found that she was. The solution provided was acceptable to the CRA ergonomist and to Health Canada. The Commission accepted the investigator’s report and in so doing acted reasonably.

[52] The law requires reasonable accommodation, not perfect accommodation (*Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970).

WORKPLACE HARASSMENT

[53] The investigator stated that there was no intention on the part of the jokesters to harass her. As Ms. Campbell points out, this is the wrong legal test. The intention of the harasser is not relevant: see, e.g., *Stadnyk v. Canada (Employment and Immigration Commission)* (2000), 257 N.R. 385 (F.C.A.). However, that remark must be taken in context. The jokesters were not interviewed. Consequently the investigator has no idea what they intended. The only way to read the report is that the investigator herself would not have considered such remarks to constitute harassment, or to cause her to be humiliated.

[54] Ms. Campbell suggests that the higher workstation was placed in the hallway as a warning to co-workers as to what would happen should they demand an ergonomic assessment. However, it was logical for the workstation to be close to her regular workstation and she consented, although later she suggests that she was under some duress.

[55] Furthermore, this workstation was used by others, and there is no evidence that they were suffering from a disability. Consequently it was not unreasonable for the investigator to conclude that there was no causal link between the remarks and her disability.

[56] This is not to in any way suggest that Ms. Campbell did not consider herself humiliated. However, the test for harassment is an objective one: *Stadnyk v. Canada (Employment and Immigration Commission)*, above. In that case, the Federal Court of Appeal held that sexual harassment is to be determined objectively from the perspective of, where the complainant is a woman, the reasonable woman. Adapting the Court's reasoning to this case, the test would be that of the reasonable person with a disability. The Commission has considerable expertise applying that standard.

[57] Although a tort case, I also consider the Supreme Court's recent decision in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 to be instructive. In the course of replacing an empty bottle of drinking water with a full one, Mr. Mustapha saw a dead fly and part of another dead fly in the unopened replacement bottle. He became obsessed with health issues and developed a major depressive disorder, phobia, and anxiety. He sued the water supplier for psychiatric injury. He succeeded at trial, but was reversed by the Ontario Court of Appeal. The Supreme Court dismissed his appeal. Although Chief Justice McLachlin, speaking for the Court, was of the view that the defendant owed Mr. Mustapha a duty of care, was in breach thereof and that Mr. Mustapha suffered personal injury she held that the damages were too remote. Forseeability requires a victim to be considered objectively. One looks at a person of "ordinary fortitude" not at a particular victim with his or her particular vulnerabilities. She added at paragraph 16:

> To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line

> for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damage.

[58] The purpose of the *Canadian Human Rights Act* is to prevent and eliminate discrimination, not to punish: *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1134. It was not reasonably foreseeable that Ms. Campbell would be humiliated by being called a bartender. Her lack of privacy while working at the higher workstation in the hallway was later rectified.

STAFFING ACTIONS

[59] It was incumbent upon Ms. Campbell to establish a *prima facie* case (*Sketchley*). With respect to the competitions for positions in 2005, Ms. Campbell grieved one competition to the highest level of the grievance program. An independent third party reviewer determined that the staffing process had been conducted fairly and that she had not been treated arbitrarily. With respect to the application for full-time employment in September, 2006, she was assessed on objective criteria, the time related to keystroke production. The three best performing candidates were offered contracts. It is settled law that objective criteria can be discriminatory (*British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.* (*Meiorin*), [1999] 3 S.C.R. 3), but Ms. Campbell must do more than simply feel that she was discriminated against: she must present a *prima facie* case that the objective standard has a discriminatory effect. In addition, there is nothing to suggest that she asked for any accommodation, such as brief off-the-clock intervals in order to stretch her back, or that any requested accommodation was denied.

CONCLUSION

[60] Although it is most unfortunate that Ms. Campbell's workplace injuries have led to serious pain and discomfort, and perhaps even surgery, the decision of the Commission that she was not discriminated against and that her disability was accommodated, was reasonable, and so this judicial review shall be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review of the decision of the Canadian Human Rights Commission, dated October 23, 2008, is dismissed.

2. The whole with costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1852-08
STYLE OF CAUSE:	Nancy Campbell v. AG
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