Federal Court  Cour fédérale

Date: 20100601

Docket: T-1598-09

Citation: 2010 FC 592

Ottawa, Ontario, June 1, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

BRYAN HIGGINS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Higgins asks the Court to set aside the decision of the Human Rights Commission dismissing his complaint of discrimination and harassment in his workplace. For the reasons that follow, his application is dismissed.

Background

[2] Mr. Higgins is employed by the Canadian Security Establishment (CSE). In September 2006, he was invited to participate in a competition for a position of Senior Procurement Officer. He was told that the competition would consist of a written examination of 45 minutes and an oral interview of 45 minutes.

[3] Mr. Higgins informed his employer that he has a learning disability and would require accommodation with respect to the competition. In an email to his employer he disclosed that he had difficulty with spelling and grammar and requested that he be permitted to write the exam using a computer with spell check, that marks not be deducted for spelling and grammar, that he be given more time to complete the exam, and that he do the exam in a quiet environment. His message read as follows:

> My disability is a learning disability, specifically I have trouble with spelling and grammar. I also sometimes miss words or type a completely different word than the word I want to type if I'm rushed. I don't do this very often and I usually catch this type of error by reviewing my document over and over again. Will marks in the exam be deducted for spelling/grammar mistakes? If so that would put me at a disadvantage. Even with the use of a computer and spell check I would still be at a disadvantage. … Regardless if the exam is on a computer or not I will need more time to complete the exam. Also I would need to write the exam in a very quiet environment since any noise will break my concentration.

[4] CSE responded informing the applicant that spelling and grammar would be evaluated as part of the exam as "communication with clients is required in this position." It was indicated that the written exam would be on computer and thus he would have access to spell check and he would

be doing the exam in a quiet environment. CSE was prepared to provide him with a longer period of time to complete the exam and asked him how much extra time he thought he would need. It also asked for confirmation of his disability.

[5] In response, Mr. Higgins provided CSE with two documents: an assessment prepared by the Carleton Board of Education and an assessment from the Centre for Students with Disabilities at Algonquin College. The first stated that the applicant would benefit from using a computer with spell check, having extra time for reading and writing, and having a quiet place for writing examinations. The second was substantially to the same effect. It recommended that he be given extended time to complete tests and exams (typically time and one-half), the use of writing tools for in-class assignments such as a dictionary, thesaurus or spell check, and a separate place to write examinations.

[6] CSE then asked the applicant how much extra time he would require. Mr. Higgins said that that he usually received time and one-half, which in this case would be 67.5 minutes, and asked if that could be rounded up to 75 minutes. CSE agreed and told him that he would be given an hour and one-quarter for the written portion of the competition.

[7] The competition process took place on September 18, 2006. After 75 minutes the applicant requested “a lot more time” to complete the written portion of the exam. He was given an additional 5 minutes. He told CSE that would not be enough time.

[8] The written examination consisted of a series of questions. Within the time allotted the candidate was to answer these questions and prepare a case-study that would form the subject of the oral examination. Mr. Higgins received 70% on the written examination and passed; a passing mark being 70%. However, he had not prepared the case-study for the oral interview. He scored 58% on the oral interview and failed it; a passing mark being 70%. As a result he was screened out of the competition.

[9] On October 12, 2006, Mr. Higgins filed an internal complaint alleging that he had not been properly accommodated during the staffing process. The Commission Investigator records the following exchange between the CSE and the applicant during the course of handling that complaint.

> The Reviewing Officer asked the Complainant why he had never updated his Learning Disability Assessment or provided any updated information, citing that there were shared responsibilities between the Employer and the Employee in situations involving accommodation. The Complainant did not have an answer as to why his learning assessment was not updated and disagreed that it was a shared responsibility. He felt that it was the responsibility of the Employer to request updated information.

[10] Subsequently, on January 13, 2007, the applicant obtained an updated assessment of his disability. The accommodations indicated for written exams were consistent with those previously provided the CSE by the applicant. However, it also made recommendations with respect to oral exams stating:

> During an interview and/or oral exam the [*sic*] Mr. Higgins must be allowed to pause after being asked a question in order to process the

> information. The assessor must allow adequate time for the candidate to answer the question, and there should not be a time limit put in place for Mr. Higgins. He should not be penalized for the use of additional time.

[11] On January 26, 2007, Mr. Higgins filed an internal complaint alleging harassment. Specifically, he alleged that CSE management was attempting to coerce him to do work that was not a part of his job description and was withdrawing his legitimate work, required him to report to a different supervisor, and that he had been subjected to insults from other employees such that the work environment had become poisoned. CSE determined that this complaint was unfounded.

[12] In addition to his complaint of discrimination due to the failure to accommodate, Mr. Higgins also claimed that CSE had harassed him as a result of his staffing complaint. The Commission's Investigator concluded that the evidence did not support the allegation that there had been a failure to accommodate Mr. Higgins or that he had been harassed. On August 25, 2009 after receiving further submissions from the applicant and CSE on the Investigator's report, the Commission dismissed the complaint.

Issues

[13] The applicant raises two issues:

1. Whether the Commission's investigation was sufficiently thorough and procedurally fair; and
1. Whether the Commission made an error of law.

[14] The Commission is to be given deference with respect to fact-finding and its decisions are reviewable on the basis of reasonableness, except that issues of law, such as questions of procedural fairness, are reviewable on the basis of correctness.

[15] Where, as here, the Commission adopts the Investigator's report and provides scant reasons, it becomes the Commission's reasons, and any errors made by the Investigator become errors made by the Commission.

1. Whether the Investigation Was Thorough and Fair

[16] The applicant submits that he was denied procedural fairness in that the Commission failed to conduct a thorough investigation. Specifically, he says that the Commission failed to investigate his request after 75 minutes for more time than the 5 minutes CSE permitted him. He submits that the finding of the Commission that CSE did not refuse to accommodate his disability could not be reached unless his request for additional time was examined.

[17] He further submits that in suggesting that CSE had acted in good faith based on the expert reports provided to it by the applicant the Commission must have been satisfied that CSE met all three prongs of the test in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 S.C.R. 3 [*Meiorin*]. The third prong of that test requires that the employer prove that the individual employee could not be accommodated, or in this case, further accommodated, without undue hardship. The applicant submits that there was no investigation as to whether CSE could have granted Mr. Higgins more time, beyond the 5 additional minutes, without reaching the point of undue hardship. Further, he says that there was no "examination of the *bona*

fide occupational requirements ("BFORs") of the subject position or how the time constraints imposed in the course of the competition were engaged by these requirements."

[18] These allegations ignore that the applicant and CSE had agreed prior to the examination to the specific accommodation required by Mr. Higgins with respect to the time needed to complete the exam. Prior to the exam Mr. Higgins was asked how much time he would require in order to accommodate his disability. He proposed 75 minutes, a slightly higher percentage than his high school and college had previously provided him and, in addition, he was given a 5 more minutes by CSE.

[19] I adopt the submission made by the respondent:

> Clearly, the fact that the investigator found that the CSE acted in good faith in relying on the information provided to it in advance of the competition does not mean that the investigator ignored the aspect of the complaint relating to the Applicant's last-minute request for more time. It simply means that, with respect to its duty to accommodate, the CSE was entitled to rely on the level of accommodation negotiated with the Applicant in advance of the competition.

[20] I also reject the submission that the Commission erred in failing to conduct an "examination of the *bona fide* occupational requirements ("BFORs") of the subject position or how the time constraints imposed in the course of the competition were engaged by these requirements." This submission ignores completely that the process in which the applicant was engaged was a "competition" for a position. He was competing against other candidates. In order to assess all

candidates equitably there had to be a level playing field. Each of the non-accommodated candidates was provided with 45 minutes to complete the exam. Mr. Higgins asked for and was granted the time he required in order to put him at the same level as the others on that field. The *bona fides* of the time provided to Mr. Higgins cannot be assessed in the abstract, apart from the competitive process, and apart from the time he agreed placed him on the same level as other candidates. Once it is found, as it was, that the time he was given created the level field among the candidates, there is no need to consider whether he should have been provided with more time, as doing so would have placed him at an advantage over the others.

[21] Mr. Higgins submits that CSE failed to follow its own process on assessing persons with disabilities in that it failed to correctly inform him about the nature of the test he was to have. Specifically, it is alleged that CSE described the oral portion as an "interview" when it was an "oral examination." I find this submission without merit. The only difference, if there is any, between what Mr. Higgins expected and what he received was that this oral portion of the competition was based on a case study he and others were to complete as part of the written portion. The only disability identified by Mr. Higgins prior to the competition related solely to the written portion. The case study was part of the written portion and he was accommodated in that respect.

[22] Lastly, it is submitted that there was a failure to investigate Mr. Higgins' allegations of harassment. Specifically, he says that the Investigator refused to review his 2007 Performance Planning and Review Report (PPR). Mr. Higgins asserts that the PPR formed a part of a pattern of negative treatment that began immediately after he filed his internal complaint. The Investigator

stated that Mr. Higgins had not submitted information that he was given the PPR "because of his disability." Harassment under the Act requires that the employee establish harassment based on a prohibited ground. The Investigator found there was no such connection shown by Mr. Higgins.

[23] Counsel for the applicant at the hearing of this application focused her comments on the alleged unfairness of the process used by the Investigator. Issues of unfairness included the following:

a. The Investigator had only a 5 minute conversation with the applicant by phone regarding his complaint;

b. The Investigator communicated with him by phone when he had asked to be contacted by email; and

c. The report issued just one day after he had filed an additional document outlining his concerns.

[24] In my view, in light of the enormous workload of the Commission and its Investigators, they must be accorded considerable lee-way in determining how to conduct their investigations. Not every complaint requires the time a complainant thinks it should receive. Brief conversations and communication by phone rather than email do not directly point to any unfairness. It may be that this was all the time the Investigator determined was required given the nature of the complaint. I have no doubt that Mr. Higgins was of the view that his complaint was deserving of more time from

the Investigator; however, unless the report was such that it disclosed a failure to conduct a meaningful investigation, the process followed ought not to be dictated by the Court.

[25] Much the same may be said of the timing of the report and the complainant's submissions. While they followed quickly, there is nothing in the report or the record as a whole to suggest that Mr. Higgins did not have an opportunity to fully express his views concerning the complaint and the report. I can see no unfairness in the process followed in investigating this complaint.

2. Whether there was an Error of Law

[26] The applicant submits that the Commission erred in law in concluding that none of the alleged harassing events were linked to the applicant's disability. His complaint appears to be that the Commission failed to take a nuanced approach to discern patterns of discriminatory conduct which, if it had, would have led it to see that there was *prima facie* evidence of discrimination and harassment.

[27] I agree with the respondent that the question of whether Mr. Higgins was subjected to harassment based on a prohibited ground was largely if not completely a question of fact, not a question of law. The Investigator and Commission found that the events complained of did not constitute harassment because of his disability. It was found, with one exception, that the events raised by Mr. Higgins as constituting harassment were as a result of his failure to do his job or follow the normal workplace practices applicable to all. With respect to the one exception, a name-calling incident, it was found that name-calling was endemic in the workplace and was not directed

to Mr. Higgins because of his disability. These findings of fact are reviewable on a reasonableness standard. These findings led the Commission to determine that the allegation of harassment had not been shown. That finding is reasonable and this Court should not disturb it.

Conclusion

[28] This application is dismissed. The parties were canvassed with respect to costs. They agreed that it would be appropriate for the successful party to be awarded its costs fixed at $3000.00, inclusive of fees, disbursements and taxes. I agree and the respondent is awarded its costs in that amount.

JUDGMENT

THIS COURT ORDERS that:

1. This application is dismissed; and;

2. The respondent is awarded its costs fixed at $3,000.00, inclusive of fees, disbursements and taxes.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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