

Federal Court



Cour fédérale

Date: 20101202

Docket: T-1812-08

Citation: 2010 FC 1220

Ottawa, Ontario, December 2, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MUSTAFA IBRAHIM

Applicant

and

**SHAW CABLESYSTEMS G.P. AND
SHAW COMMUNICATIONS INC.**

Respondents

REASONS FOR ORDER AND ORDER

[1] Mr. Ibrahim is a Black Muslim of Somali origin. He has complained to the Canadian Human Rights Commission that his employers, collectively Shaw, adversely discriminated against him, failed to accommodate him following a workplace injury, and eventually fired him because of his race, religion, colour and disability.

[2] The Commission investigated and determined that his complaint should be dismissed. Mr. Ibrahim has come to this Court for a judicial review of that decision. The issue is whether it was reasonably open to the Commission to conclude that there was insufficient evidence to warrant a full inquiry by the Canadian Human Rights Tribunal. In my opinion it was. The judicial review shall be dismissed with costs.

[3] Mustafa Ibrahim began working as a cable installer for Shaw in October 2001. In April 2003, he suffered a work-related hip, groin and back injury. He went on Workers' Compensation and only returned to work in February 2005, in a more sedentary position. In September 2006, he complained to the Canadian Human Rights Commission that Shaw did not accommodate his disability, and that he was also discriminated against with respect to certain employee discounts because of the colour of his skin.

[4] On 20 February 2007, he was fired, allegedly for cause. The following month he filed a second complaint with the Commission, based on race, national or ethnic origin, colour, religion and disability. Mr. Ibrahim complained of adverse differential treatment, that Shaw failed to accommodate him, failed to provide a harassment-free work environment and terminated his employment on prohibited grounds.

[5] The Commission first decided not to deal with alleged discriminatory acts which occurred prior to February 2005. It has discretion pursuant to section 41(1)(e) of the *Canadian Human Rights Act* not to deal with complaints based on acts or omissions which occurred more than one year before the matter was brought to its attention. That decision was not challenged.

[6] The Commission then consolidated the two complaints and appointed an investigator. In his report, which was circulated to the parties in draft form, and with respect to which comments were invited, and received, he recommended that the complaint be dismissed because Mr. Ibrahim's needs were accommodated, because the employer took appropriate action to rectify racist graffiti and racist comments and because his employment was terminated for a legitimate non-discriminatory reason. The Commission accepted those recommendations and dismissed the complaint.

[7] Mr. Ibrahim's case is two-fold. He submits that for all intents and purposes there was no investigation at all. To the extent there was an investigation, it was superficial and plagued with inordinate delays which led to injustice. In any event, the Commission's decision to dismiss his complaint was unreasonable. It should have referred it to the Canadian Human Rights Tribunal, or, at the very least, called for a more exhaustive investigation before reaching a decision.

[8] Mr. Ibrahim, who is self-represented, prepared a disjointed application record, had difficulty drawing the line between representations based on the record before me and testifying anew, and during oral argument did not refer to all the many points alleged in his written submissions. However I take it he did not resile from them. Rather, I assume he simply had nothing further to add.

[9] I have concluded that the investigation was carried out in accordance with law, was fair, and that it was reasonably open for the investigator to make the findings he did. I also find that it was

reasonable for the Commission to accept his recommendations and to dismiss Mr. Ibrahim's complaint.

THE CANADIAN HUMAN RIGHTS ACT

[10] The purpose of the Act is to give effect, with respect to matters coming within federal jurisdiction, to the principle that all individuals should have equal opportunity, and to have their needs accommodated without being subjected to discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence which has been pardoned.

[11] The two sections of the Act at the forefront of Mr. Ibrahim's application are sections 7 and 14. Section 7 provides that it is a discriminatory practice to, among other things, differentiate adversely during the course of employment on a prohibited ground. Section 14 provides that it is a discriminatory practice in employment matters to harass someone on a prohibited ground.

[12] The Commission was established to deal with complaints. Among other things it may appoint an investigator who is to submit a report of his or her findings. With that report in hand, the Commission has a number of options. It may request the Canadian Human Rights Tribunal to conduct a full inquiry or it may dismiss the complaint if satisfied that in the circumstances an inquiry into the complaint is not warranted. It may also appoint conciliators or approve or reject settlements agreed on by the parties.

[13] In cases such as this, where the Commission endorses the investigator's report without additional reasons, that report becomes the reasons of the Commission itself, and is subject to judicial review (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at paragraph 37).

[14] In *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, [1989] S.C.J. No. 103 (QL), the Supreme Court plumbed Parliament's intention in the event there be insufficient evidence to warrant the referral of the complaint by the Commission to the Tribunal. Mr. Justice Sopinka said at paragraph 27: "it is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage." Mr. Justice La Forest also noted in *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115 (QL), at paragraph 53: "[i]t is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it."

[15] In reaching its decision, the Commission must act in accordance with natural justice. As noted by Madam Justice Layden-Stevenson in *Canada (Attorney General) v. Davis*, 2010 FCA 134, 403 N.R. 355, at paragraph 6:

The Commission must act in accordance with natural justice. This requires that the investigation report upon which the Commission relies be neutral and thorough and that the parties be given an opportunity to respond to it: *Sketchley v. Canada (Attorney General)*,

[2006] 3 F.C.R. 392 (F.C.A.) applying *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

See also *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] 2 F.C. 574, [1994] F.C.J. No. 181 (QL), affirmed in 2005 N.R. 383, [1996] F.C.J. No. 385 (QL).

[16] As also noted in *Davis*, above, the applicable standard of review is correctness with regards to natural justice and procedural fairness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190), and reasonableness on the decision whether or not to refer a complaint to the Tribunal.

[17] Although the relations between Mr. Ibrahim and Shaw had been festering for some time, there are two overarching circumstances to which most of Mr. Ibrahim's complaints relate. The first is the aftermath of his work injury, and the second is his relationship with coworkers.

[18] The work related injury has two major components. The first is that Mr. Ibrahim's disability was not accommodated. The second is that in the aftermath he was denied employee benefits because of the colour of his skin.

[19] All of this came to a head in February 2007. Shaw expressed concern both verbally and in writing that Mr. Ibrahim was failing to properly notify it of doctor appointments. Since he had stated it took up to three months to get a doctor's appointment, Shaw thought he should be able to provide it with appropriate advance notice to allow it to operate in his absence. It expected at least two business days notice. If he continued to fail to observe company guidelines with respect to absences

from scheduled shifts, further disciplinary action, including termination of his employment, might result.

[20] Mr. Ibrahim was also surreptitiously recording other employees. He accused one of making racist statements. Although he said he had a tape recording, initially he refused to produce it. That employee was transferred elsewhere so he could have no communication with Mr. Ibrahim.

[21] Two other employees, apparently afraid that they were being set up, wrote to the company to say that Mr. Ibrahim on many occasions had mentioned getting drugs and smoking pot while at work. They were invited to join him, but refused.

[22] On 20 February 2007, Mr. Ibrahim was fired for cause “including, but not limited to, your encouraging your coworkers to partake in illegal narcotics with you in violation of the *Criminal Code*, your surreptitiously taping coworkers in our workplace, your impeding with an investigation into an harassment allegation, [and] your either hiding or destroying evidence of that investigation.”

PROCEDURAL FAIRNESS

[23] Mr. Ibrahim complains that the investigator did not interview two potential witnesses he identified, and did not go out in the Somali community in Winnipeg to speak to the people and to soak up the atmosphere. Had he done so, he would have realized that the allegation that he consumed narcotics at work or encouraged others to do so was simply impossible, with no basis other than the colour of his skin. What he did consume at work was a prescription drug, Nabilone, which to some extent mimics marihuana. These pills had been prescribed for his back pain.

However, the two witnesses identified worked with Mr. Ibrahim in 2003, before his injury. The events investigated only began in 2005. The investigator set out in considerable detail the documents reviewed and identified the persons interviewed. The Commission enjoys considerable latitude in the way it carries out its business. What was at issue was what went on at work, not any presumption, as alleged by Mr. Ibrahim, that people on the streets of Winnipeg think that someone of Somali origin is a drug dealer.

[24] In my opinion the investigation was complete, neutral and fair. The results of an investigation are not, as Mr. Ibrahim suggest, a scorecard. Since the investigator found in favour of Shaw on all points, he must have been biased. Allegations like this are not helpful.

[25] In *Syndicat des employés de production du Québec*, above, Mr. Justice Sopinka adopted the following statement of Lord Denning in *Selvarajan v. Race Relations Board*, [1976] 1 All. E.R. 12 where he said at page 19:

In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave

much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.

DISABILITY ACCOMMODATION

[26] It is not in dispute that Mr. Ibrahim required accommodation following his workplace injury. Shaw worked closely with the Workers' Compensation Board to accommodate his needs when he returned to work in February 2005. The Board wrote a year later to Shaw stating that Mr. Ibrahim was capable of returning to his old job as a cable installer. Mr. Ibrahim disputed that opinion and following receipt of a medical certificate from his physician Shaw continued to accommodate him in a more sedentary position. The investigator determined that although Mr. Ibrahim may not have been satisfied with his modified duties, the evidence was that Shaw accommodated his needs at all times. That decision was reasonable.

RELIGIOUS ACCOMMODATION

[27] Mr. Ibrahim stated that Shaw was aware that he was a Muslim and needed his lunch break from 13:00 to 13:30 to allow him to pray. His lunch break was originally from 12:30 to 13:00. However, on his request the timing of his lunch break was granted. As his supervisor stated: "What Mustafa wanted Mustafa got." The investigator reasonably found that the evidence did not support the allegation that Mr. Ibrahim was refused religious accommodation. Mr. Ibrahim also complained that one year he did not receive a personal invitation to the firm's Christmas party. However that was because no one received a personal invitation. Rather, the invitation was posted on a bulletin board.

ADVERSE DIFFERENTIAL TREATMENT IN THE PROVISION OF EMPLOYEE BENEFITS

[28] Mr. Ibrahim complained that while he was on sick leave his employee discount for cable/internet service and employee health care benefits were discontinued and that work access to the Internet was cut off.

[29] There was clearly some confusion here in that Mr. Ibrahim had to pay for part of his benefits. Although Mr. Ibrahim received the same medical benefits package as all employees, when an employee goes on Workers' Compensation, the insurance company medical benefit is suspended until the employee returns to full-time work.

[30] Shaw admits suspending Mr. Ibrahim's work internet access for two reasons. The first was that while he was on sick leave, he came to work to access his Internet. The second was that his modified duties did not require access to the Internet.

[31] The investigator found that there was some administrative confusion as to when his benefits commenced and ceased. This arose from the fact that he was on and off work, and collecting Workers' Compensation benefits, many times between 2003 and 2007. His medical benefits worked hand in glove with Workers' Compensation. He was reasonably found to have been treated in the same way as any other employee.

HARASSMENT – GRAFFITI IN THE WASHROOM

[32] The evidence was that on occasion there was graffiti in the men's washroom linked to a prohibited ground of discrimination, not necessarily against Mr. Ibrahim. Some of the remarks were directed to Filipinos. However, the company took all necessary steps to remove all graffiti from the washroom whenever it appeared.

HARRASSMENT – ALLEGED RACIAL COMMENTS BY A COWORKER

[33] There was an incident involving Mr. Ibrahim and another employee. As soon as Mr. Ibrahim informed Shaw of the situation, an internal investigation began. The employee was reprimanded, was asked to write a note of apology which he did, was removed from the warehouse where Mr. Ibrahim worked and was placed on other duties.

[34] Mr. Ibrahim had taped a conversation with this employee, but refused to provide it. The investigator found that Shaw dealt with this harassment appropriately and that Mr. Ibrahim did not cooperate with the investigation.

[35] Mr. Ibrahim was also said to have taped other employees making racial comments. Before me, he denied that he had done so. However a draft of the investigator's report in which that statement was made was provided to Mr. Ibrahim, and he did not comment thereon.

[36] Mr. Ibrahim's practice of tape recording conversations with other employees caused those employees concern that he was trying to set them up as drug users. Two employees came forward in writing and alleged that he had asked them to smoke marijuana with him.

[37] At the hearing before me, Mr. Ibrahim accused the two employees of being drug dealers themselves and toadying up to Shaw to get promotions. As noted earlier, this was the final straw as far as Shaw was concerned.

[38] All and all, the investigator carried out a very thorough and neutral analysis. To the extent that I have not specifically dealt with other of Mr. Ibrahim's complaints, I consider that the investigator's analysis and conclusion were reasonable. The investigation report shows that each and every allegation was fully considered. There had been harassment, but Shaw acted very promptly and reasonably in dealing with it. There was also some confusion with respect to employee benefits, but this was administrative in nature and in no way discriminatory.

COSTS

[39] Mr. Ibrahim says that no price can be put on our way of life or on investigations of allegations of adverse discrimination. The investigator should have come to Winnipeg, and the investigation should have been faster. However, there are budgetary issues, and cost is a factor. There is no evidence whatsoever that the result would have been in any way different had the Commission had many more investigators so that the matter would have been concluded faster, or had decided that the investigator should visit Winnipeg.

[40] There is no reason why costs should not follow the event. In this case, Shaw retained its own counsel. However, it did not retain local Winnipeg counsel. It retained Toronto counsel. It had every

right to do so. Costs are, however, a matter of discretion and I see no reason why Mr. Ibrahim should have to pay for counsel's travel and accommodation.

[41] Costs shall be assessed at midrange of Column 2.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that the judicial review is dismissed, with costs.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1812-08

STYLE OF CAUSE: MUSTAFA IBRAHIM v. SHAW CABLESYSTEMS
G.P. AND SHAW COMMUNICATIONS INC.

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: NOVEMBER 17, 2010

**REASONS FOR ORDER
AND ORDER:** HARRINGTON J.

DATED: DECEMBER 2, 2010

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