Federal Court

Cour fédérale

Date: 20110118

Docket: T-551-10

Citation: 2011 FC 57

Ottawa, Ontario, January 18, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

CHARLES HENRY TUTTY

Applicant

and

**ATTORNEY GENERAL OF CANADA,
MTS ALLSTREAM INC.,
PETER VAN HORNE, RON HOSEMAN,
ELAINE ADAMSON, AND GRAHAM FISHER**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The underlying question raised on this application concerns the extent to which an employer is obligated to accommodate a medically disabled employee. Charles Tutty claims that his employer, MTS Allstream Inc. (MTS), discriminated against him by failing to accommodate his disability and by terminating his employment because of that disability.

[2] The subject matter of Mr. Tutty's application is the decision of the Canadian Human Rights Commission (Commission) rendered on March 8, 2010 by which his complaint of discrimination under the *Canadian Human Rights Act*, RS, 1985, c H-6 (Act) was summarily dismissed. Mr. Tutty contends that this decision was made in breach of the duty of procedural fairness and was otherwise unreasonable and unlawful. He claims relief in the form of an order quashing the decision of the Commission.

Employment Background

[3] Mr. Tutty was hired by MTS on November 25, 2002 in the position of Northern Alberta Sales Manager – Alliance Channel. On November 27, 2004 he was promoted to Senior Manager, Learning and Development. In October 2007 Mr. Tutty took disability leave from his employment because of a stress-related illness. In April 2008 Mr. Tutty was cleared to return to work on a gradual basis under the supervision of his treating physician and an independent Return to Work Coordinator, Des Hathaway. It is undisputed that Mr. Hathaway was paid by MTS for his services. The details of the proposed return to work plan involved a progressive increase in employment hours over a period of 3 to 6 months and included restrictions on overtime and travel. It was further understood that Mr. Tutty would continue to be assessed by his physician and Mr. Hathaway, presumably until his recovery had stabilized.

[4] On July 21, 2008 Mr. Tutty was cleared to return to full-time hours at full salary, but his capacity to return to unrestricted duties remained to be determined. On August 13, 2008 MTS wrote to Mr. Tutty's physician asking a number of questions directed at determining his "overall recovery and abilities to return to work without restriction/limitation". Notwithstanding this

outstanding request, MTS terminated Mr. Tutty's employment on August 21, 2008 on the ostensible basis of a corporate restructuring and the resulting elimination of Mr. Tutty's position. It is undisputed that before Mr. Tutty was terminated he was offered alternative employment at the same salary of $95,272.34 per annum. Mr. Tutty turned down this offer because the position involved "extensive travel and overtime" and because it involved "a demotion putting [me] at the level of the or to [my] disability". At or around the same time, Mr. Tutty was offered a lump sum separation allowance equivalent to 6 months of income and with continuation of benefits. Mr. Tutty declined this offer and subsequently commenced an action in the Alberta Court of Queens Bench for wrongful dismissal damages.

[5] On February 6, 2009 Mr. Tutty made a complaint to the Commission alleging that MTS had refused to reasonably accommodate his disability and had terminated his employment because of that disability. He claimed $15,000.00 for an injury to his dignity and self-respect, an apology and costs.

The Decision Under Review

[6] The Commission's decision to dismiss Mr. Tutty's complaint is set out in a letter dated March 8, 2010. That letter offered the following reasons for the decision:

- the evidence suggests that although the requirement to travel or work overtime had an adverse effect on the complainant due to a disability, the respondent appears to have accommodated the complainant's disability;

- the complainant's termination of employment does not appear to be linked to his disability; and

- given all of the circumstances of the complaint, further inquiry by the Canadian Human Rights Tribunal is not warranted.

[7] The above decision was based on an Investigator's Report which recommended the dismissal of Mr. Tutty's complaint as unfounded. In particular, the Investigator concluded that MTS had fulfilled its obligation to accommodate Mr. Tutty's medical disability and that the termination of his employment was unrelated to his health status.

[8] The record establishes that the Investigator conducted a thorough review of the available evidence including interviews with Mr. Tutty and Mr. Hathaway and a review of over 250 pages of documentary evidence and argument. Among other things the Investigator made the following findings or observations:

- The requirement to travel, work overtime and occupy a stressful position had an adverse effect on Mr. Tutty due to his medical disability.
- MTS acknowledged the need for accommodation which included time off and a gradual return to work.
- Mr. Tutty's legal counsel was asked to produce medical information to substantiate his employment restrictions after July 2008 but nothing was provided to the Investigator.
- MTS had offered Mr. Tutty continued employment but it was refused because of the requirement for travel and overtime and because it constituted a demotion.
- Mr. Hathaway substantiated the steps taken by MTS to accommodate Mr. Tutty's medical disability.

- The May 21, 2008 medical report made no mention of travel or overtime restrictions and Mr. Tutty provided no additional medical information to verify his alleged restrictions after July 2008.
- MTS had fully accommodated Mr. Tutty by continuing to pay his salary in the face of the disability insurer's denial of his claim, by hiring Mr. Hathaway and by implementing the recommended gradual return to work plan;
- MTS did not appear to have treated Mr. Tutty in an adverse differential manner;
- Documentary evidence provided by MTS indicated that the decision to abolish Mr. Tutty's position was made in or around May 2008 and appeared unrelated to Mr. Tutty's disability. This evidence was not rebutted by Mr. Tutty.
- The evidence indicated that, prior to the termination of Mr. Tutty's employment, he was offered a position for which he was qualified with full salary protection. The evidence further suggests that although the complainant was not considered for a senior management position in Human Resources, he did not appear to be qualified for that position.
- The evidence suggests that MTS terminated Mr. Tutty's employment because his position had been abolished due to a re-organization and because he would not accept the position offered to him to avoid his dismissal.

[9] The Commission invited the parties to comment on the Investigator's Report and they did so. The Commission considered the further submissions and dismissed Mr. Tutty's complaint.

Issues

[10] Did the Commission err in its assessment of the evidence?

[11] Was the Commission's investigation fair, thorough and complete?

Analysis

[12] The Commission's screening function under s 44 of the Act has been compared to the role of a judge presiding over a preliminary inquiry. The role was described by the Supreme Court of Canada in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 140 DLR (4th) 193 at para 53 as follows:

> 53 The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It 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. Justice Sopinka emphasized this point in *Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 899:
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>> The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. 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.
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> [Emphasis added]

[13] In screening complaints, the Commission relies upon the work of an investigator who typically interviews witnesses and reviews the available documentary record. Where the Commission renders a decision consistent with the recommendation of its investigator, the investigator's report has been held to form a part of the Commission's reasons: see *Sketchley v Canada (Attorney General),* 2005 FCA 404, [2006] 3 FCR 392 at para 37.

[14] As noted in the above authorities, the Commission's decision to dismiss or refer a complaint inevitably requires some weighing of the evidence to determine if it is sufficient to justify a hearing on the merits. It is this aspect of the process that has been said to require deference on judicial review. Deference is not required, however, in the context of a review of the fairness of the process including the thoroughness of the investigation. For such issues the standard of review is correctness.

[15] Mr. Tutty argues that the Investigator wrongly concluded that MTS was unaware of the need for continuing accommodation measures after July 2008. Two passages from the Investigator's Report Mr. Tutty relies on are the following:

> 19. The respondent states that it is unaware of the complainant's need for accommodation beyond July 21, 2008 and that no further accommodation needs were identified by its Return to Work Coordinator beyond that date.
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> […]
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> 24. The respondent reiterates that it was unaware of the complainant's need for accommodation beyond July 21, 2008.

In support of the argument that the Investigator erred, Mr. Tutty points to several pieces of evidence that were before the Investigator. According to Mr. Tutty, this evidence irrefutably indicated that as of July 2008 the question of his ability to return to unrestricted duties remained under review by his physician and, by the time he was terminated, had not been determined.

[16] The essential problem with this argument is that the passages relied upon by Mr. Tutty do not indicate that the Investigator made a finding that MTS was unaware of the need for further accommodation. The passages in question are nothing more than restatements of the MTS argument and nowhere in the Report are they adopted by the Investigator. The only point made by the Investigator on this issue was that Mr. Tutty had failed to produce further medical evidence to substantiate his inability to work overtime or to travel after July 2008. The record indicates that this point was not contested by Mr. Tutty and that his counsel had undertaken but failed to provide this evidence.

[17] There is no doubt that the Investigator was well aware that the extent of Mr. Tutty's capacity was an open issue both at the time of his termination and later during the Commission's investigation. This is verified by the Investigator's acknowledgment of Mr. Hathaway's evidence that Mr. Tutty's travel restriction "was never reassessed during the gradual return to work period". Indeed, there were no material factual disputes between the parties that required resolution in order to assess the adequacy of the accommodation measures employed by MTS or to determine the rationale for Mr. Tutty's termination. It was acknowledged by everyone that MTS had accepted Mr. Tutty's medical disability at face value, and had put in place a gradual return to work plan that was supervised by Mr. Hathaway. Although Mr. Tutty had claimed to the Investigator that MTS

had not continued to pay his salary during his medical leave, he now concedes that was incorrect and MTS had continued to pay him. It is also undisputed that before Mr. Tutty was terminated he was offered a new position at the same salary but with reduced responsibilities. Mr. Tutty refused that offer because it was a demotion and because he assumed that MTS would not continue to respect his travel and overtime restrictions. This is the essential factual foundation for the Commission’s conclusions.

[18] Mr. Tutty’s similar complaint about para 33 of the Investigator’s Report is equally unfounded. That passage from the Report was also the Investigator’s reiteration of MTS’s argument and did not represent a finding that Mr. Tutty was not medically disabled. Indeed the premise that underlies the entirety of the Investigator’s analysis is that Mr. Tutty was disabled and required accommodation. The point that MTS was apparently advocating was only that the disability insurer had denied Mr. Tutty’s claim to benefits because it had concluded that his condition did not fulfill the definition of disability in the insurance contract. Clearly, MTS accepted that Mr. Tutty was disabled for its corporate purposes because it paid his salary and adopted a graduated and supervised plan to return him to work. This point was obviously understood by the Investigator and no serious argument could be advanced by Mr. Tutty that the actions of MTS were not meaningful forms of accommodation.

[19] The Investigator found that the measures adopted by MTS were sufficient to accommodate Mr. Tutty’s medical disability and that he had not been treated in an adverse differential manner. This was a conclusion that was reasonably open on the evidence before the Investigator and the Commission and it cannot be successfully challenged on judicial review.

[20] Mr. Tutty also complains that the Investigator overstepped her authority by conclusively deciding the legal merits of his claim and by relying upon the fact that his disability insurance claim had been denied. According to Mr. Tutty, a human rights investigation is limited to factual matters and cannot delve into issues of law or rely upon irrelevant matters.

[21] I do not accept Mr. Tutty's assertions that matters of legal interpretation are outside of the Commission's authority. An investigation carried out under s 43 of the Act is intended to provide a foundation for the Commission's decision about whether a complaint warrants further inquiry. This is usually a fact-laden exercise but inevitably it involves the application of evidence to the applicable legal principles: see *Sketchley*, above, at para 77. It is well established that this is a screening exercise involving issues of mixed fact and law. Even if it is correct that a human rights investigation is purely a fact-finding exercise it is of no legal significance if the Investigator goes further provided that the Commission is the final arbiter of whether the matter ought to proceed. I can identify no misapprehension by the Commission about the role it was undertaking in this case.

[22] I also do not agree that the Investigator erred in her approach to the evidence concerning Mr. Tutty's disability insurance claim. The weight of the evidence clearly supported the Investigator's finding that MTS had stepped in to pay Mr. Tutty's salary when the disability insurer refused his claim. This had nothing to do with whether Mr. Tutty was actually disabled and the Investigator did not use it for that purpose. It was only relied upon by the Investigator as some evidence of accommodation. Furthermore, Mr. Tutty cannot reasonably complain about the

Investigator's approach to the disputed evidence on this point when he failed to produce available evidence to corroborate his position.

[23] Mr. Tutty argues that this investigation was inadequate and that, by relying upon it, the Commission breached the duty of fairness. The legal standard by which the fairness of a human rights investigation is to be measured was discussed by the Court in *Sketchley*, above, and, in particularly, in the following passages:

> 112 It is clear that a duty of procedural fairness applies to the Commission's investigations of individual complaints, in that the question of "whether there is a reasonable basis in the evidence for proceeding to the next stage" (*SEPQA*, supra at para. 27) cannot be fairly considered if the investigation was fundamentally flawed. As the Supreme Court of Canada noted in *SEPQA*, supra, "[i]n general, complainants look to the Commission to lead evidence before a tribunal appointed under s. 39 [now s. 49], and therefore investigation of the complaint is essential if the Commission is to carry out this role" (para. 24). This same consideration -- the indispensable nature of the investigation in the Commission's handling of each individual complaint -- applies equally to an investigation undertaken prior to dismissal of a complaint under section 44(3)(b). Where a proper inquiry into the substance of the complaint has not been undertaken, the Commission's decision based on that improper investigation cannot be relied upon, since a defect exists in the evidentiary foundation upon which the conclusion rests (*Singh*, supra at para. 7).
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> […]
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> 120 In *Slattery*, supra, the Applications Judge considered the degree of thoroughness of investigation required to satisfy the rules of procedural fairness in this context. He noted the "essential role that investigators play in determining the merits of particular complaints" (para. 53), and also the competing interests of individual complainants and the administrative apparatus as a whole (para. 55). He concluded as follows:
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> > 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...
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> 57 In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker. Therefore, it should be only where complainants are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it; or (2) where fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it.

> 121 Weighing the *Baker* factors, I agree that this is an appropriate description of the content of procedural fairness in this context.

[24] Mr. Tutty says that the Investigator ought to have interviewed a representative from MTS and re-interviewed Mr. Hathaway. According to Mr. Tutty, if the Investigator had done so she would not have misinterpreted the evidence about his ongoing employment limitations. The fundamental problem with this argument is that there is nothing in the Investigator's Report to show that she misunderstood Mr. Tutty's situation. She did not conclude that his condition had been fully resolved but only that MTS had adequately accommodated his circumstances up to the point of his termination for legitimate business reasons.

[25] It is at least implicit in the Commission's decision that MTS had no further accommodation obligation to Mr. Tutty once he had rejected its offer of new employment and his position was eliminated. So long as the Investigator was satisfied that the termination of Mr. Tutty's employment was unrelated to his disability it was of no consequence that his medical status had not yet been reassessed or that his return-to-work program had not yet come to its conclusion. An employer's duty to accommodate does not, afterall, require that it hold a legitimate corporate reorganization in abeyance pending the resolution of an affected employee's disability. I would add that the responsibility to accommodate does not rest solely with an employer: see *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970, 95 DLR (4th) 577. The affected employee must remain open to reasonable workplace adjustments including the prospect of taking a position of different or reduced responsibility.

[26] In this case, Mr. Tutty turned down an offer of new employment because he considered it to be a demotion (albeit at the same salary) and because it required overtime and travel. It was open to the Investigator to take Mr.Tutty's refusal into account. In the face of the elimination of his position, Mr. Tutty could only demand further accommodation for his apparently unresolved limitations if he accepted a new position while maintaining that he continue in his yet to be completed return-to-work plan. In the face of a legitimate business reorganization, Mr. Tutty had no special "right" to be maintained in his existing position simply because the accommodation he was receiving had not yet run its course. Furthermore, inasmuch as he claimed to be unable to fulfill the demands of his old position, Mr. Tutty was in no position to complain that the offer of continued employment came with reduced responsibilities. Mr. Tutty's refusal to accept new

employment was, in the human rights context at least, a highly relevant factor in the assessment of the accommodation question[1].

[27] Mr. Tutty had also initially disputed the assertion by MTS that it had voluntarily continued his salary notwithstanding the disability insurer's denial of the claim. As the Investigator noted and as the record indicates, Mr. Tutty had received a letter of denial from his disability insurer but, despite a request from the Investigator on December 8, 2009 and an assurance from Mr. Tutty's counsel to follow this up, nothing was provided to corroborate Mr. Tutty's evidence. This, too, was a relevant point because MTS maintained that it had substantially accommodated Mr. Tutty by continuing to pay his salary when it had no employment obligation to do so. According to a letter from MTS's counsel to the Investigator dated November 25, 2009, this was also an issue that had been directly addressed during the discovery process in Mr. Tutty's collateral wrongful dismissal action. Mr. Tutty was asked to waive the implied undertaking of confidentially so that this evidence and other potentially relevant evidence could be produced to the Investigator but, inexplicably, he refused. The fact that Mr. Tutty has now conceded the correctness of MTS's position on this point does not extinguish it as a live issue before the Investigator and one for which an adverse inference could be drawn.

[28] Although Mr. Tutty complains that the Commission's investigation was inadequate, the record discloses that he was not particularly forthcoming in producing evidence which could have contradicted his allegations. For example, the Investigator noted an unfulfilled request to Mr. Tutty's counsel for medical verification of the continuing need to limit Mr. Tutty's overtime

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1 I accept that in a wrongful dismissal action a different legal standard may apply to a decision to refuse such an offer of re-employment.

and travel after he returned to full-time hours in July 2008. This was an important issue for the Investigator because, as she noted in her report, the second medical report from Mr. Tutty's physician in May 2008 made no mention of ongoing concerns about travel or overtime. Nevertheless, there is nothing in the record to show that this request was ever satisfied. At the same time, the Investigator had evidence from Mr. Hathaway confirming that he had spoken with Mr. Tutty throughout his return to work and Mr. Tutty "was doing well". The Investigator's interview notes with Mr. Hathaway also state that, although Mr. Tutty's travel restriction had not been reassessed, MTS had accommodated his needs at least up to the point of his termination.

[29] As I noted in *Maciel v Canada Revenue Agency*, 2007 FC 244, 310 FTR 82 no human rights investigation will ever be perfect. There is almost always another witness who could have been interviewed or another question that might have been asked. But the Commission does not have unlimited resources and must be able to place reasonable limits over its investigative functions: see *Herbert v Canada*, 2008 FC 969, 169 ACWS (3d) 393, at para 18. The test is not one of perfection nor does it require that every line of enquiry be exhausted. This investigation was thorough and more than sufficient to determine what had happened. That Mr. Tutty is not in agreement with the outcome and can point to a different and more favourable interpretation of the evidence is not a basis for judicial review.

[30] While Mr. Tutty contested the assertion by MTS that his termination was the result of a legitimate business reorganization, he offered nothing beyond speculation to contradict the documentary evidence provided by MTS to corroborate its position. Mr. Tutty's only counter to the Commission and to the Court is that he was not privy to any evidence which might have supported

his suspicions. But the fact that he had no evidence does not establish an error on the part of the Investigator who reasonably relied upon the evidence that was produced. I do not agree with Mr. Tutty's argument that a tribunal hearing ought to proceed simply as a means of discovery and as a supplement to the Investigator's fact-finding role.

[31] Mr. Tutty also asserts that the Commission must have overlooked his response to the Investigator's report because its decision fails to mention any of the points he had raised. There is nothing, however, in those final submissions that had not already been considered by the Investigator and the Commission did not err by failing to explicitly comment on its contents. It was, in short, a bare re-argument of the case which was obviously insufficient to convince the Commission that its investigator's findings were unwarranted.

Conclusion

[32] In the result, this application is dismissed with costs payable to MTS in the amount of $2,500.00 inclusive of disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs payable to MTS in the amount of $2,500.00 inclusive of disbursements.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-551-10
STYLE OF CAUSE:	TUTTY v AGC ET AL.
PLACE OF HEARING:	Edmonton, AB
DATE OF HEARING:	November 29, 2010
REASONS FOR JUDGMENT:	BARNES J.
DATED:	January 18, 2011

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