Federal Court of Appeal | Cour d'appel fédérale

Date: 20151125

Docket: A-126-15

Citation: 2015 FCA 261

CORAM: **NOËL C.J.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

PETER TATICEK

Applicant

and

CANADA BORDER SERVICES AGENCY

Respondent

Heard at Ottawa, Ontario, on October 28, 2015.

Judgment delivered at Ottawa, Ontario, on November 25, 2015.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: NOËL C.J.
NEAR J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20151125

Docket: A-126-15

Citation: 2015 FCA 261

CORAM: **NOËL C.J.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

PETER TATICEK

Applicant

and

CANADA BORDER SERVICES AGENCY

Respondent

REASONS FOR JUDGMENT

RENNIE J.A.

I. Introduction

[1] This is a judicial review of a decision of an adjudicator appointed under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2). The applicant, Peter Taticek, asks this Court to set aside the adjudicator's determination that the respondent Canadian Border Services

Agency (CBSA) did not discriminate against him by failing to reasonably accommodate his medical condition in his workplace. For the reasons that follow, I would dismiss the application.

II. Background

[2] Mr. Taticek has been employed by the respondent CBSA since 2007. In November 2010, the applicant sent to his supervisor two notes from his doctor – dated the 10th and the 25th – that indicated a need for accommodation as a result of an unspecified medical condition. In those notes, Dr. Labrosse identified the need for a change of work environment and a different reporting structure, working under a different director.

[3] On December 6, 2010, the respondent sought additional information from Dr. Labrosse. However, on December 8, 2010, Dr. Labrosse informed the CBSA that Mr. Taticek would have to take medical leave due to the worsening of his condition since the November medical notes. On January 19, 2011, Dr. Labrosse reassessed Mr. Taticek and informed the respondent that he would not be able to return to work until May 2011.

[4] In February 2011, Mr. Taticek filed a grievance, alleging that his inability to work was due to the CBSA's untimely response to the November medical notes. Despite his doctor's earlier assessment that he would not be able to return to until May, the applicant did not return to work until September 2011.

[5] On his return to work the applicant was transferred from the border crossing team (ACROSS) to the Customs Commercial Systems (CCS) team. Both were within the same organizational division of the CBSA, reporting to the same director.

[6] On October 11, 2011, the CBSA was informed for the first time that Mr. Taticek's doctor believed that he should in fact be under the responsibility of a different director *general*, not merely a different director. However, neither Dr. Labrosse, nor his new physician, Dr. Henry, had explained why a change of director *general*, as opposed to director, was medically necessary. Nor is there any indication in the record that Mr. Taticek provided any insight as to why he had to report to a different director general.

[7] In March of 2012, the CBSA sought Mr. Taticek's consent to seek an explanation from Dr. Henry. After much back-and-forth about the appropriate form of the consent letter, the CBSA eventually decided that it had done all it could to accommodate Mr. Taticek.

[8] From March to June 2012, Mr. Taticek and the CBSA attempted to address the second aspect of the requested accommodation – an ergonomic assessment of the applicant's workspace. Again, the reasons for the delay in conducting the assessment vary. However, an assessment was ultimately scheduled for May 9, but had to be delayed until May 22 because the applicant left work ill mid-day on the 9th.

[9] It also came to light that one member of the human resources department referred to Mr. Taticek as "the Musketeer" in internal emails while his request for accommodation was under

consideration. According to the applicant, he suffered psychological harm and embarrassment when he found out about this after the fact.

III. The decision under review

[10] In a decision dated January 29, 2015, the adjudicator dismissed the complaint. She found, applying the test from *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 [*O'Malley*] that Mr. Taticek had established a *prima facie* case of discrimination because the work conditions interfered with his ability to do his job. However, she found that the CBSA had rebutted that allegation.

[11] The adjudicator determined that it took over a year and half for Mr. Taticek's accommodation requests to be fully resolved. She found that responsibility for some of this delay could be attributed to the respondent. Other periods of delay were clearly not the fault of the respondent; they either constituted reasonable implementation time, or were caused by the applicant himself. These included Mr. Taticek's leaving work on the day of the scheduled ergonomic assessment, his failure to provide adequate information on what accommodations were needed, and his failure to participate fully in an effort to identify a new posting that would be more appropriate and accommodating. There were also delays the responsibility for which was unclear and which the record before the adjudicator did not resolve.

[12] With respect to the references to Mr. Taticek as "the Musketeer", the adjudicator found that remark was derogatory. However, she noted that this comment did not have any impact or effect on the issues as the author of the comment had no decisional responsibility, and that Mr.

Taticek was not aware of them at the time that they were made. As such, she dismissed that element of the complaint.

IV. Analysis

A. *Standard of review*

[13] The parties agree that the standard of review is reasonableness. As the Supreme Court of Canada articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, an inquiry into the reasonableness of the decision:

> … is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[14] The Court's role in this application is not to substitute its conclusions for those of the Board. Instead, it is to evaluate whether the Board' conclusion was reasonable.

B. *The reasonableness of the CBSA's accommodation*

[15] While numerous issues have been raised by the appellant, there are only two which merit close consideration. The first is whether the CBSA's failure to move Mr. Taticek out of the organizational structure of the director general constituted a failure to accommodate, and the second is whether the delay in the process of accommodation itself constituted a lack of reasonable accommodation.

[16] The applicant objected to the transfer to the CCS team as being unresponsive to the medical notes. The applicant's doctors, and the applicant himself, believed that the applicant needed to be removed from the director general's organizational mandate and the employer did not do so. However, two factors militate against the refusal as being unreasonable. Firstly, as the adjudicator found and the respondent emphasizes, it was not until October 11, 2011 that the words "a change of reporting structure", as recommended in the first medical note of Dr. Labrosse, were construed by Mr. Taticek's subsequent doctor to entail a move to the responsibility a different director general.

[17] It is not at all clear from the record before the adjudicator that this was a logical consequence of the recommendation that he be moved "to another division." Secondly, given Mr. Taticek's position in the organization, it is not apparent why changing Mr. Taticek to a different division, in a different building, doing different work with a different management team, was not responsive to the substance of the request. As the adjudicator found, Mr. Taticek was now separated from the director general by four layers of management, compared to three previously.

[18] Absent an explanation as to why the applicant had to report to a different director general, the adjudicator's finding that the move to the CCS team satisfied the employer's responsibility to accommodate, was reasonable. Further, in assessing the issue of whether the transfer was responsive to the request, the adjudicator considered the appropriate principles; namely that there was no requirement that the new position be perfect or that the exercise be one of determining the "best fit" for the employee: *Andres v. Canada Revenue Agency*, 2014 PSLRB 86.

[19] I turn next to the adjudicator's consideration of the delays which the applicant suggests constitute a failure to accommodate.

[20] It is important to consider the nature of the evidence before the adjudicator. The medical notes were cryptic and vague. Further, the respondent's efforts to clarify what was precisely required in order to establish an appropriate workspace and work environment were frustrated, in part, by the applicant, such that the process of accommodating Mr. Taticek's medical needs dragged on for over a year and a half. But not all of this time was the respondent's fault. Some arose from Mr. Taticek's own conduct. As noted, some of this was the largely blameless result of an employee and employer attempting – albeit imperfectly – to work out an arrangement that would reasonably accommodate Mr. Taticek.

[21] The adjudicator could have made more explicit findings with respect to how the delay should be attributed, but the failure to do so does not render the decision unsound. The principal periods of time were accounted for. She also canvassed in some detail the lengthy history of Mr. Taticek's communications with the CBSA and the measures it took in response to the requested accommodation. Her conclusion that the CBSA reasonably accommodated Mr. Taticek and that the delay it took in so doing was not discriminatory has a solid foundation in the evidence and fell within a range of reasonable outcomes.

[22] With regard to the references to Mr. Taticek as "the Musketeer", I agree with the applicant that the fact that he was not aware of the comments at the time does not foreclose them being discriminatory. However, the author of the comments was quickly reprimanded and taken

off the file. There was nothing in the record to indicate that this epithet rose beyond trivialising the applicant's request. In the circumstances, it was open to the adjudicator to reasonably conclude that the use of this epithet, however unprofessional it was, did not rise to the level of discrimination. As such I would not interfere with her conclusion.

[23] I would dismiss the application, with costs.

"Donald J. Rennie"

J.A.

"I agree
Marc Noël
Chief Justice"

"I agree
D.G. Near"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A DECISION OF THE PUBLIC SERVICE LABOUR RELATIONS BOARD NO. 560-02-086 (2015 PSLREB 12)

DOCKET:	A-126-15
STYLE OF CAUSE:	PETER TATICEK V. CANADA BORDER SERVICES AGENCY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 28, 2015
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	NOËL C.J. NEAR J.A.
DATED:	NOVEMBER 25, 2015

APPEARANCES:

Steven Welchner	FOR THE APPLICANT
Christine Diguer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Welchner Law Office Professional Corporation Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Treasury Board Portfolio Legal Services Ottawa, Ontario	FOR THE RESPONDENT