

Date: 20090115

Docket: A-155-08

Citation: 2009 FCA 5

**CORAM: DESJARDINS J.A.
LÉTOURNEAU J.A.
TRUDEL J.A.**

BETWEEN:

STEVEN COLWELL

Appellant

and

**THE ATTORNEY GENERAL OF CANADA
(FISHERIES AND OCEANS CANADA)**

Respondent

Heard at Ottawa, Ontario, on January 13, 2009.

Judgment delivered at Ottawa, Ontario, on January 15, 2009.

REASONS FOR JUDGMENT BY:

LÉTOURNEAU J.A.

CONCURRED IN BY:

**DESJARDINS J.A.
TRUDEL J.A.**

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] The appellant sought the reversal of a decision of the Canadian Human Rights Commission (Commission) whereby the Commission dismissed the appellant's complaint of discrimination on the basis of disability. The complaint was dismissed pursuant to paragraph 44(3)(b) of the *Canadian Human Rights Act*, R.S.C. 1983, c. H-6. He brought an application for judicial review before the Federal Court which was dismissed with costs by O'Reilly J. (judge).

[2] Essentially, the appellant complained before the judge of an unfair treatment by the Commission because the Commission relied upon an investigation that was inadequate. In the appellant's view, the investigator appointed by the Commission failed to inquire into whether the positions offered by the employer were reasonable alternatives to the position that he occupied prior to his sick leave for serious emotional distress.

[3] The judge rejected the appellant's contention in the following terms at paragraph 15 of his reasons for judgment:

[15] In my view, it is clear from the investigator's report that he considered the proposed accommodations offered by DFO to be reasonable and that Mr. Colwell's corresponding obligation to facilitate those proposals had been triggered. It is also clear that Mr. Colwell had failed to discharge that duty. The investigator addressed the essential issues and carefully reviewed the relevant facts and law in arriving at his recommendation. I am satisfied that the report was sufficiently thorough and that the Commission did not err in relying on it. Accordingly, I must dismiss this application for judicial review, with costs.

[4] Before us, the appellant added another contention. He submitted that there was no evidence from the employer that his employer could not accommodate him in his former substantive job through a relocation from Port Hardy to Campbell River. I shall address this contention first.

[5] There was evidence before the investigator, both from a medical and an operational perspective, that the appellant could not perform his former job either from Port Hardy or from Campbell River: see the appeal book at pages 38 and 39.

[6] For example, in his report, Dr. Prendergast of Health Canada mentioned a number of important limitations which compromised the appellant's return to work in his previous capacity such as his incapacity to work overtime or travel long distance on a frequent basis, his limited ability to tolerate stressful working conditions, especially for long sustained periods of time: *ibidem*.

[7] Furthermore, the evidence shows that Port Hardy was a central location for the services provided to the Central Coast area. A relocation of the appellant in Campbell River would have aggravated traveling conditions for him while this was medically counter-indicated: *ibidem* at page 30.

[8] Finally, Port Hardy was the location of the headquarters and a regular interaction was required between the appellant and the Chief of Regulatory Affairs position who was his supervisor. A regular face-to-face interaction was also required of the appellant with other staff regarding planning and budget: *ibidem*.

[9] I am satisfied that there is no merit in the appellant's contention.

[10] This brings me to the subject of the review before the Federal Court and the conclusion of the judge that the investigation was adequate.

[11] Upon a review of the facts, the investigator's report and the submissions of the parties, I am also satisfied that there was sufficient evidence to support the conclusions reached by the Commission and the judge in this regard.

[12] The investigator recommended that the Commission dismiss the complaint because the evidence indicated that the appellant failed to cooperate with the employer to facilitate his return to work.

[13] While the investigator did not use the magic word "reasonable" in his conclusions, it would be completely illogical for the investigator to focus on the appellant's lack of cooperation and recommend dismissing the complaint on that basis if he did not believe the accommodations offered were reasonable. By applying to the conduct of the appellant the test established by the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud*, [1992] S.C.J. No. 75, it is evident that the investigator concluded that the accommodations offered were reasonable alternatives.

[14] Underlying the appellant's submission is the contention that the investigator should have further investigated the evidence submitted by the employer. As this Court said in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at paragraph 120, quoting the Federal Court in *Slattery v. Canada (Human Rights Commission)(T.D.)*, [1994] 2 F.C. 574, at paragraph 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".

[15] The investigator's report must be read as a whole. When this is done, there is simply no justification left for interfering with the judge's findings.

[16] For these reasons, I would dismiss the appeal with costs.

“Gilles Létourneau”

J.A.

“I concur

Alice Desjardins J.A.”

“I agree

Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-155-08

STYLE OF CAUSE: STEVEN COLWELL v. THE ATTORNEY
GENERAL OF CANADA (FISHERIES AND
OCEANS CANADA)

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 13, 2009

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CONCURRED IN BY: DESJARDINS J.A.
TRUDEL J.A.

DATED: January 15, 2009

APPEARANCES:

Steven Welchner FOR THE APPELLANT

Marie Crowley FOR THE RESPONDENT

SOLICITORS OF RECORD:

Welchner Law Office FOR THE APPELLANT
Ottawa, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada