Federal Court of Appeal  Cour d'appel fédérale

Date: 20140520

Docket: A-214-13

Citation: 2014 FCA 131

CORAM: **PELLETIER J.A.**
DAWSON J.A.
WEBB J.A.

BETWEEN:

THE CANADIAN HUMAN RIGHTS COMMISSION

Appellant

and

ATTORNEY GENERAL OF CANADA
and
BRONWYN CRUDEN

Respondents

Heard at Ottawa, Ontario, on March 26, 2014.

Judgment delivered at Ottawa, Ontario, on May 20, 2014.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the judgment of Justice Zinn (2013 FC 520) who allowed the application for judicial review of the decision of the Canadian Human Rights Tribunal dated September 23, 2011 (2011 CHRT 13), and set aside this decision. For the reasons that follow I would dismiss this appeal.

I. *Facts*

[2] The facts are set out in detail in the decision of the Tribunal and in the reasons of the Federal Court Judge. The facts are not in dispute and can be briefly summarized as follows. Ms. Cruden has type 1 diabetes and is insulin dependent. Ms. Cruden was an employee of the Canadian International Development Agency (CIDA) in its corporate section. She wanted to be a development officer in the program section but she lacked field experience. To gain field experience she applied for postings in Afghanistan. In 2007 persons who were to be posted on temporary assignments to Afghanistan were not required to have any medical assessment completed prior to being posted.

[3] She had two temporary assignments in Afghanistan. The first one was in 2007 and it was completed without incident. During her second temporary posting in 2008 she had a hypoglycemic incident which resulted in her posting being curtailed and, against her wishes, she was returned to Canada. Following this incident, persons who were to be posted to Afghanistan on temporary assignments were required to be assessed medically before being assigned to work there. Health Canada also developed the Medical Evaluation Guidelines for Posting, Temporary Duty or Travel to Afghanistan (the Afghanistan Guidelines). Although Ms. Cruden applied for other postings in Afghanistan, she was unable to convince CIDA that the Afghanistan Guidelines did not apply or should not have been applied to her and she was not offered any other assignment there. There is no dispute that if Ms. Cruden did not have type 1 diabetes or if the Afghanistan Guidelines had not been applied, she would have been posted in Afghanistan again.

II. *Decision of the Canadian Human Rights Tribunal*

[4] The Canadian Human Rights Tribunal (Tribunal) concluded that Ms. Cruden had established a *prima facie* case of discrimination against Health Canada because the Afghanistan Guidelines provided that "no one with a chronic medical condition is allowed to be posted to Afghanistan" (paragraph 72 of the decision of Tribunal and paragraph 34 of the decision of the Federal Court Judge). The Tribunal also found that Health Canada had failed to establish that the conduct was not discriminatory.

[5] In relation to the complaint against CIDA, the Tribunal found that Ms. Cruden had also established a *prima facie* case of discrimination against CIDA. In paragraph 90 of the decision of the Tribunal it is noted that:

> 90 The factual evidence established that she was always considered a competent employee and, if not for her disability and the application of the Afghanistan Guidelines, she would have been posted in Afghanistan like the rest of her team.

[6] The Tribunal also found that "CIDA has not met its procedural duty to accommodate the complainant. On this basis, CIDA has not provided a *bona fide* justification for its discriminatory practices under sections 7 and 10 of the *CHRA*" (paragraph 111 of the decision of the Tribunal).

[7] However, the Tribunal also noted that:

> Although CIDA did not establish that it considered every possible accommodative measure up to the point of undue hardship, I will examine whether it would cause undue hardship to CIDA to accommodate the complainant in Afghanistan. I find it necessary to perform this analysis as the parties made substantial submissions on

> this point and this determination relates to some of the remedies sought by the complainant.

[8] The Tribunal then went on to find that "it would pose an undue hardship on CIDA to have to accommodate [Ms. Cruden] in Afghanistan" (paragraph 117 of the decision of the Tribunal). As a result of this finding the Tribunal did not award any amount that would have been directly linked to a posting in Afghanistan. The Tribunal did, however, award certain other monetary amounts and other systemic remedies.

III. *Decision of the Federal Court*

[9] At the Federal Court hearing, the parties did not dispute the finding of the Tribunal that it would have imposed an undue hardship on CIDA to post Ms. Cruden to a position in Afghanistan. It was the position of the Canadian Human Rights Commission and Ms. Cruden that the decision of the Tribunal should stand even though there was a finding of undue hardship, on the basis that there was a procedural duty (separate and apart from the substantive duty) in the accommodation process. The Federal Court Judge disagreed and found that once a finding of undue hardship had been made, the complaint should have been dismissed as the conduct would not then be a discriminatory practice for the purposes of the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHRA*).

IV. *Standard of Review*

[10] As noted by this Court in *Telfer v. Canada Revenue Agency*, 2009 FCA 23, [2009] 4 C.T.C. 123, at para. 18:

> 18 …on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.

This approach was approved by the Supreme Court of Canada in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R 559, paragraph 45.

[11] The parties and the Federal Court Judge all agreed at the hearing of the application for judicial review that the appropriate standard of review for the decision of the Tribunal was reasonableness. In this appeal the parties also submitted that the appropriate standard of review was reasonableness, but the Canadian Human Rights Commission and Ms. Cruden submit that although the Federal Court Judge correctly identified reasonableness as the appropriate standard of review, he did not apply it correctly.

[12] Subsequent to the hearing of the appeal in this matter, this Court released its decision in *Attorney General of Canada v. Johnstone and Canadian Human Rights Commission*, 2014 FCA 110. In paragraph 44 of that decision this Court held that the standard of review was correctness in relation to the two legal issues that were to be decided, which were:

a) the meaning and scope of "family status" as a prohibited ground of discrimination, and

b) the applicable legal test under which a finding of *prima facie* discrimination may be made under that prohibited ground.

[13] While this decision raises the issue of whether reasonableness or correctness is the appropriate standard of review in this case, I would reach the same conclusion whether the standard of review is reasonableness or correctness.

V. *Analysis*

[14] The Federal Court Judge summarized the scheme of the *CHRA* in paragraph 63 of his reasons. In the following paragraph he noted that:

> 64 What is evident from the foregoing is the criticality of a finding of a discriminatory practice. It is an allegation of a discriminatory practice which grounds the complaint and it is the finding of a discriminatory practice that provides the Tribunal with jurisdiction to order remedial action. Moreover, and of particular relevance to this application, a BFOR finding negates, and is a complete defence to, any allegation of a discriminatory practice. In short, and in the context of this case, if CIDA establishes that it cannot accommodate Ms. Cruden's disability in Afghanistan without undue hardship, then there is no discriminatory practice and no violation of the *CHRA*.

[15] If the standard of review is correctness, I agree that this is the correct interpretation of the provisions of the *CHRA*. If the standard of review is reasonableness, the following comments of the Supreme Court of Canada in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, (which was rendered after the Federal Court decision in this case) are relevant. Justice Moldaver, writing on behalf of a majority of the justices of the Supreme Court of Canada, noted that:

> 38 It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily

> be limited to a single reasonable interpretation – and the administrative decision maker must adopt it.

[16] Therefore, if the standard of review is reasonableness, there may still only be one reasonable interpretation based on the wording of the statute and the tools of statutory interpretation. This was the conclusion of the Federal Court Judge and I agree with his conclusion, substantially for the reasons that he stated. Based on the provisions of the *CHRA* the only reasonable (or correct) interpretation of the applicable provisions is that once the Tribunal found that it would have imposed an undue hardship on CIDA to accommodate the needs of Ms. Cruden in posting her to Afghanistan, the complaint should have been dismissed. There is no separate procedural duty to accommodate under the *CHRA* that could give rise to remedies if the employer establishes that it has satisfied all three parts of the test for determining whether a *prima facie* discriminatory standard is a bona fide occupational requirement as set out in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin),* [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46.

[17] The Canadian Human Rights Commission and Ms. Cruden argued that the existence of a separate procedural duty to accommodate (notwithstanding that it may impose an undue hardship on the person to accommodate the needs of the particular person) is supported by the decision of the Supreme Court of Canada in *Meiorin*, the decision of the Ontario Superior Court of Justice, Divisional Court in *ADGA Group Consultants Inc. v. Lane*, 91 O.R. (3d) 649 and several human rights tribunal decisions.

[18] The particular paragraph in *Meiorin* that the Canadian Human Rights Commission and Ms. Cruden rely upon is paragraph 66 which is as follows:

> 66 Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, supra.

[19] The Federal Court Judge addressed this paragraph of *Meiorin* in paragraphs 69 and 70 of his reasons and I agree with his comments. It seems to me that it should also be noted that this paragraph is part of the discussion of the third step in the test proposed by the Supreme Court of Canada in paragraph 54:

> 54 Having considered the various alternatives, I propose the following three-step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[20] The comments in paragraph 66 of *Meiorin* are part of the discussion related to this third step. This discussion commences with the following:

> Step Three
>
> 62 The employer's third and final hurdle is to demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose, which by this point has been demonstrated to be rationally connected to the performance of the job. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship.

[21] I agree with the Federal Court Judge that the Supreme Court of Canada was not intending to create a separate procedural right to accommodate. There is simply one question for the purposes of the third step of the test: has the employer "demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer"? Once the employer has established this, then it has satisfied the requirements of the third step. Assuming that the first two steps are also satisfied (which they were in this case), it is a *bona fide* occupational requirement and it is not a discriminatory practice.

[22] In *Emergency Health and Services Commission v. Cassidy*, 2011 BCSC 1003, [2011] B.C.J. No. 1426, Justice Gray reached the same conclusion and she noted that:

> 34 While McLachlin J. wrote that it may often be useful to consider any procedure adopted in assessing accommodation, she did not write that such an analytical tool created a separate duty that can be breached. The single question remains of whether the employer could accommodate the employee without experiencing undue hardship.

[23] In *ADGA*, the tribunal had found that the employer had not established that it could not accommodate the employee without imposing undue hardship on the employer. Although there was a separate discussion of the procedural duty to accommodate, the Divisional Court did not

examine the statutory basis for this procedural duty but rather it appears to have assumed its existence as it commenced its analysis of the procedural duty to accommodate with a description of this duty in paragraph 107. This case is not a persuasive authority for the statutory existence of this duty.

[24] While there are other decisions of human rights tribunals that have found that remedies could be granted for a failure to satisfy a procedural duty to accommodate even though the accommodation of the particular person would impose an undue hardship on the employer, such decisions cannot lead to a conclusion that such interpretation is reasonable or correct if that interpretation cannot be supported by the applicable legislation. As noted in paragraphs 14 to 16 above, the *CHRA* does not support this interpretation.

[25] The Canadian Human Rights Commission also submitted that the finding of the Tribunal of undue hardship was based, in part, on incidents that occurred in Afghanistan after Ms. Cruden was denied any further postings in Afghanistan. The Canadian Human Rights Commission did not argue that the finding of undue hardship by the Tribunal (although based in part on subsequent events) was not reasonable, but rather that after-acquired evidence, although possibly relevant in relation to the remedy, was not relevant in determining whether an employer has complied with the procedural duty to accommodate. The Canadian Human Rights Commission argued that allowing employers to rely on after acquired evidence would mean that employers may establish a *prima facie* discriminatory standard without determining whether it is a bona fide occupational requirement and then later seek to justify such standard as a bona fide occupational requirement.

[26] However, this argument that after acquired evidence is not relevant to the procedural duty to accommodate presupposes that such separate procedural duty exists and that it could result in remedies under the *CHRA* even if the employer is able to establish that a *prima facie* discriminatory standard is a bona fide occupational requirement. In my opinion, if the employer is able to establish that a *prima facie* discriminatory standard is a bona fide occupational requirement (even if this is based on after acquired evidence) the complaint should be dismissed.

[27] In this case, the Tribunal found that to accommodate the needs of Ms. Cruden in posting her to Afghanistan would have imposed undue hardship on CIDA. In paragraph 117 of the decision of the Tribunal it is clearly stated that:

> 117 For the following reasons, I find that it would pose an undue hardship on CIDA to have to accommodate the complainant in Afghanistan.

[28] The reasons for finding that it would impose an undue hardship on CIDA are outlined in paragraphs 118 to 160 of the decision of the Tribunal. Having found that it would impose an undue hardship on CIDA to accommodate Ms. Cruden in Afghanistan, the Tribunal should have found that CIDA was not participating in a discriminatory practice in relation to its postings in Afghanistan. In paragraph 79 of his reasons the Federal Court Judge also noted that there were no allegations that the way in which Health Canada conducted itself in its dealings with Ms. Cruden was related to any prohibited ground of discrimination. As the Federal Court Judge concluded, once the Tribunal found that it would impose an undue hardship on Ms. Cruden's employer, CIDA, to accommodate her in Afghanistan, the complaint against Health Canada should also have been dismissed.

[29] The Federal Court Judge noted in paragraph 81 of his decision, there may be another situation where the application of the *Afghanistan Guidelines* could result in a particular employee being denied a posting in Afghanistan even though the needs of such person could be accommodated without imposing an undue hardship on the employer. However, this is not the case in this matter and the Tribunal did not identify any such particular situation. The Federal Court Judge also noted that Health Canada was planning to revise the *Afghanistan Guidelines*.

[30] Ms. Cruden also argued that the duty to accommodate included a duty to provide other accommodations that would have provided her with similar field experience to what she would have gained in Afghanistan. Ms. Cruden did not file a notice of appeal. This particular issue was not raised in the notice of appeal that was filed by the Canadian Human Rights Commission. The Crown, however, did not object to Ms. Cruden raising this argument.

[31] In any event, it is clear from the decision of the Tribunal that the alleged discriminatory practice was the refusal of CIDA to consider Ms. Cruden for further postings in Afghanistan (paragraph 90 of the decision of the Tribunal). It is also clear that the issue related to Health Canada was also in relation to postings to Afghanistan. Therefore, the issue was whether the discriminatory practice was the practice in relation to postings to Afghanistan and not in relation to postings to any other country. Ms. Cruden, in her complaint, also noted that she was not seeking accommodation. Therefore, Ms. Cruden cannot succeed in this argument.

[32] As a result, I would dismiss the appeal. While costs would normally follow the outcome, since the Canadian Human Rights Commission has a public interest mandate, I would not award

costs against it. Since Ms. Cruden did not file a Notice of Appeal and since she only raised one new issue, I would not award costs against her.

"Wyman W. Webb"

J.A.

"I agree,
J.D. Denis Pelletier J.A."

"I agree,
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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