

Court of Queen's Bench of Alberta

Citation: Cook v Alberta (Human Rights Commission Chief Commissioner), 2020 ABQB 239

Date: 20200407
Docket: 1801 13692
Registry: Calgary

Between:

Bryan Cook

Applicant

- and -

**Chief Commissioner Alberta Human Rights Commission
and Compass Group Canada Ltd.**

Respondents

**Reasons for Decision
of the
Honourable Madam Justice S.L. Hunt McDonald
for the Judicial Review of a Decision of the
Chief Commissioner of the Human Rights Commission**

Introduction

[1] This is an application for Judicial Review of the Decision of the Office of the Chief of the Commission and Tribunals, dated March 29, 2018, in respect of file No. N2014/05/0045, a decision rendered by Joanne B. Archibald, Member of the Commission, who was delegated with authority to decide this matter pursuant to Section 26(4) of the *Alberta Human Rights Act* ('the Act'), by the Chief of the Commission and Tribunals.

[2] Mr. Cook, filed a complaint with the Human Rights Commission of Alberta on April 4, 2014 against Compass Group Canada Ltd (“Compass Group”) alleging discrimination in the area of employment on the grounds of physical disability, pursuant to Section 7 of the *Act*.

[3] Section 20 (2)(b) of the *Act* requires that the complaint must be filed within one year of the alleged contravention of the *Act*. Information outside that time frame can only be considered as context and cannot independently ground a human rights complaint.

[4] Initially, a Human Rights Officer prepared an Investigation Report (the “Report”) dated March 3, 2017 for the Commission setting out a full record of the complaint made by the Applicant, the response of Compass Group, and stating all relevant information collected, including any documentation, and naming its source. The Report concluded that there was no reasonable basis to proceed to the next step in the complaint process. The Report was then sent to The Alberta Human Rights Commission Director (“Director”). The Director recommended on March 10, 2017 that Mr. Cook’s complaint should be dismissed.

[5] Mr. Cook then appealed the Director’s decision to the Chief of the Commission and Tribunals. Commissioner Joanne B. Archibald was delegated to decide the appeal. She rendered her written decision upholding the Director’s decision on March 29, 2018.

[6] The decision of Commissioner Archibald on behalf of the Chief of the Commission of the Human Rights Commission dated March 29, 2018 is the subject of this application for judicial review.

Factual Background Set Out in the Certified Record of Proceedings

[7] The Applicant, Bryan Cook, was employed as a cook by Compass Group at the CNRL Horizon Oil Sands worksite just north of Fort McMurray from March 18, 2011 until April 18, 2013.

[8] He sustained an injury to his left shoulder on November 21, 2012 after which he saw his physician, who diagnosed a mild shoulder strain and restricted him to light duties. He attended WCB approved physiotherapy from January to March 2013 at the hospital in Fort McMurray.

[9] The Applicant was deemed fit by WCB to return to work on April 10, 2013 from his left shoulder injury. He delayed returning to his worksite until April 15, 2013 due to an unrelated medical issue which required surgery.

[10] On his return to work April 15, 2013, he provided information from WCB to his employer Compass Group explaining he had a right shoulder injury. He had sought medical advice and gone for prescribed tests, but did not yet have a diagnosis. He was unable to provide proper medical evidence until Dr. Dickson, a physician with WCB, diagnosed a rotator cuff strain in his right shoulder.

[11] His employer Compass Group immediately accommodated the Applicant’s request for light duty assignment prior to receiving the torn rotator cuff diagnosis from Dr. Dickson dated April 25, 2013. His diagnosis confirmed that Mr. Cook had reported suffering the injury to his right shoulder on July 8, 2012 while rolling crepes and accordingly was only able to perform sedentary duties at his worksite due to the tear.

[12] On his return date, Compass Group contacted CNRL’s on site health centre to arrange physiotherapy treatments for Mr. Cook. CNRL advised Compass Group that due to Mr. Cook’s

previous harassment of their health centre employees that CNRL refused to provide further treatment to Mr. Cook. Accordingly, Compass Group provided transportation to the hospital in Fort McMurray for physiotherapy treatment. A note was provided to him at his first appointment restricting him to sedentary duties.

[13] On April 19, 2013 Mr. Cook was summoned to a meeting with his employer Compass Group. He was told that CNRL had issued a site ban against him. He was to leave the CNRL Horizon Oil Sands camp by 6:00 p.m. that day. Mr. Cook was informed by his union representative that the site ban was based on his alleged harassment of the CNRL health centre medical staff.

Position of the Applicant, Bryan Cook

[14] The Applicant, Mr. Cook, brings this application seeking judicial review of Commissioner Archibald's decision dated March 29, 2018. The Applicant alleges that the Commission erred in not finding that there was a *prima facie* contravention of the *Act*.

[15] The Applicant says that Compass Group and/or the Commissioner:

- a. Acted in an unreasonable fashion;
- b. Made unreasonable determinations of fact;
- c. Came to unreasonable conclusions and an unreasonable result;
- d. Made unreasonable decisions and otherwise committed reviewable errors in this matter.

[16] In the result, the Applicant seeks an order quashing and setting aside Commissioner Archibald's decision rendered on behalf of the Office of the Chief of the Commission and Tribunals which was dated March 29, 2018. Additionally, he seeks an order directing that the decision be reheard and reconsidered.

Position of Compass Group Canada Ltd.

[17] Compass Group submits that the Commissioner's Decision was reasonable and should not be overturned as the Applicant has not identified any evidence or authority to demonstrate otherwise.

[18] Compass Group submits that the Human Rights Officer investigated the complaint and concluded in his Investigation Report dated March 3, 2017 that there was no reasonable basis to proceed with the complaint. Among other things, the Human Rights Officer made the following factual findings:

- a) The Applicant had a physical disability within the meaning of the *Act* at times relevant to the Complaint;
- b) Compass Group accommodated the Applicant's disability. Among other things, Compass Group provided the Applicant with rides to appointments for physiotherapy at the hospital in Fort McMurray, granted his request for modified duties on his return date of April 15, 2013 even though the Applicant did not provide any medical information to support his request, and provided him with sedentary duties the next day;

- c) Compass Group was verbally told by CNRL on April 15, 2013 that the Applicant was unwelcome at its Horizon Oil Sands health centre as medical staff had complained of the Applicant exhibiting increasing harassing behaviour towards them. Compass Group, instead, provided Mr. Cook with transportation to the hospital in Fort McMurray for physiotherapy treatment;
- d) CNRL issued a site ban against the Applicant on April 18, 2013 due to the medical staff complaints of the Applicant's harassment; and
- e) As a result, Compass Group subsequently terminated the Applicant's employment at a meeting with him on April 19, 2013 solely because of the CNRL site ban.

[19] In its submissions, Compass Group stated that there was no suggestion that Compass Group failed to accommodate Mr. Cook's disabilities during the time frame of his return to work on April 15, 2013 until CNRL issued the site ban preventing Mr. Cook from working on their Horizon Oil Sands worksite. Compass Group asks this Honourable Court to dismiss this application for judicial review with costs payable to Compass Group.

Legislative Framework and Commission Process

[20] Pursuant to Section 20(1) of the *Alberta Human Rights Act, RSA 2000 Chapter A-25.5* (the "*Act*") any person who has a reasonable ground to believe the *Act* has been contravened may make a complaint to the Commission. In this case, Mr. Cook alleges a contravention of Section 7 of the *Act*.

[21] As discussed earlier, Mr. Cook's complaint was reviewed by a Human Rights Officer who issued the Investigation Report. After issuing the Report, he recommended that there was no reasonable basis to proceed to the next step in the complaint process. The Report was then forwarded to the Director of the Alberta Human Rights Commission. The Director, upon review, recommended that Mr. Cook's complaint be dismissed on the basis that he found the complaint was without merit.

[22] The Applicant then requested a review of the Director's decision by the Chief of the Commission and Tribunal pursuant to Section 26(1) of the *Act*.

[23] The Chief of the Commission and Tribunals appointed Commissioner Archibald to investigate Mr. Cook's complaint. She concluded that there was no reasonable basis in the evidence to proceed to a hearing. Commissioner Archibald reviewed the entire record of the proceedings which was the basis of the Director's decision and dismissed Mr. Cook's complaint as being without merit.

[24] Her decision was dated March 29, 2018. She upheld the Director's decision as she found that there was no reasonable basis in the evidence to proceed with the complaint of discrimination in the area of employment on the ground of physical disability.

[25] Section 26 of the *Act* provides that the Commissioner's decision is "Final and binding on the parties subject to the parties right to a judicial review."

[26] It is well established that the Director under s.22 of the *Act* and the Commissioner under s.26(3) of the *Act* plays a screening or gatekeeping function. The question they must ask is whether there is a "reasonable basis in the evidence for proceeding to the next stage": *Mis v Alberta Human Rights Commission*, 2001 ABCB 212 at paras 8-9. In so doing, they are to apply their own experience and common sense in evaluating whether the claim is without merit.

The threshold assessment of merit is low and the gatekeeper is given wide latitude in performing the screening function. The courts are not to lightly interfere: *Mis* at paras 8 and 9.

[27] The Commissioner's decision is final and binding subject to the right of judicial review: s.35 of the *Act*.

Standard of Review

[28] All parties in this proceeding agree that that the standard of review in this case is reasonableness.

[29] The Supreme Court of Canada in the recent case of (*Canada Minister of Citizenship and Immigration*) v *Vavilov*, 2019 SCC 65 held that a reasonable review is a "robust form of review" that requires the reviewing court to assess both the analysis of the decision maker and the outcome in the certified copy of the proceedings.

[30] Para 17 of the *Vavilov* case sets out situations where the presumption of reasonableness can be rebutted – "where the legislature has indicated that it intends a different standard or set of standards to apply" that would include a statutory right of appeal, or "where the rule of law requires the correctness standard to be applied in cases such as constitutional questions, general questions of law or jurisdictional boundaries between administrative bodies". None of the parties' written submissions in this case stated or suggested that one of these stated exceptions applies in this case, with which I agree.

[31] Accordingly, I am satisfied that the reasonableness standard applies to this judicial review.

Analysis

[32] Mr. Cook questions whether there was justification, transparency and intelligibility exhibited in the Commissioner's decision and whether the Human Rights officers gave a liberal interpretation of the *Act* when considering the factors surrounding his termination.

[33] Counsel for the Applicant suggested that he should not be prejudiced by his oversight in mentioning in his initial filed complaint that it was his position that Compass Group's reaction to the site ban was causally related to his physical disability as their representative stated in their response to the Investigator when he was preparing the Investigation Report at p 6, para 41 that "Compass has a zero tolerance policy towards workplace harassment, whether it is at our workplace or a client's workplace. Due to the site ban issued by CNRL, Mr. Cook was no longer able to fulfill his duties as an employee of Compass."

[34] Both the Human Rights Investigation Report and the Commissioner found no evidence of adverse treatment linked to a prohibited ground of discrimination in Compass Group's treatment of the Applicant. Mr. Cook's written complaint to the Human Rights Commission never mentioned that he felt that his dismissal was causally related to his physical disability.

[35] Further, the new evidence Mr. Cook presented at the hearing in front of Commissioner Archibald did not provide any evidence of discrimination.

[36] Mr. Cook denied any "increasingly harassing behaviour" towards the medical staff at the CNRL Health Centre.

[37] Mr. Cook suggests that the fact that his employment was terminated by Compass Group immediately after the site ban was issued by CNRL is proof of a reasonable presumption that his physical disability was the real reason for his termination. After the site ban was issued and he was terminated by Compass Group, Mr. Cook never requested Compass Group to request that CNRL lift the site ban.

[38] Counsel for Mr. Cook submits that the fact that Compass Group never sought removal of the site ban on Mr. Cook's behalf, nor did the Commissioner in her deliberations consider or think to ask how site bans are normally addressed as evidence provides proof of Mr. Cook's theory that Mr. Cook was terminated on the basis of his physical disability.

[39] Instead of requesting his employer to seek the lifting of the site ban, Mr. Cook requested his union representative to negotiate the reason stated in the Record of Employment be changed from "quit" to "other" and as well to have the stipulation by Compass on his termination slip "not for rehire CNRL" be removed.

[40] Evidence before the Commissioner did not suggest that the site ban was discriminatory. Compass Group confirmed it did not participate nor have any say in the decision by CNRL to issue the site ban based on the health centre staffs' complaints that they had been increasingly inappropriately harassed by Mr. Cook.

[41] There is evidence that Compass Group spent a lot of time accommodating Mr. Cook in providing transportation to Fort McMurray for his physiotherapy appointments and modified his work duties at his request and as well provided sedentary duties as recommended by medical staff.

[42] The evidence shows a strong pattern of accommodation by Compass Group prior to the termination, even to the point of arranging transportation to the Fort McMurray hospital when employees at the CNRL health center would no longer provide physiotherapy treatment to Mr. Cook. It was clearly the site ban due to the alleged harassment by Mr. Cook of CNRL's employees that lead to Compass Group terminating Mr. Cook's employment.

[43] I am mindful that if there was some evidence that the site ban by CNRL came about due to prohibited grounds of discrimination, then Compass Group may have had additional duties to advocate for Mr. Cook as part of the accommodation process. However, there is no evidence that the site ban came about because of Mr. Cook's physical disabilities or any other prohibited grounds of discrimination.

[44] The evidence strongly supports that the site ban instituted by CNRL was due to the alleged harassment reported by their health centre staff. The evidence supports that Compass Group then terminated Mr. Cook's employment because of the site ban, not because of any alleged discrimination either by CNRL or by Compass Group. In other words, there was no reasonable basis in the evidence that the site ban and resulting termination of Mr. Cook was in any way related to employment discrimination based on prohibited grounds. Whether Mr. Cook actually harassed the health centre staff does not engage a prohibited ground of discrimination which is subject to adjudication by the Human Rights Commission.

[45] In terms of any procedural fairness allegations, which were only made in a very general fashion, the Director provided a written decision to the Applicant and, as well, provided written procedural directions to ensure that Mr. Cook knew how to proceed next.

[46] After Mr. Cook requested review of the Commissioner's decision, the rules and appeal procedure of the Commission were clearly set out in correspondence titled "Information Sheet" which was sent to Mr. Cook.

[47] The Investigator, Director and Commissioner were quite lenient and fair in their treatment of Mr. Cook. They also spent considerable time considering issues raised by Mr. Cook which were outside the one-year limitation period set out in the *Act*. They pointed out that although any evidence prior to April 4, 2013 concerning transportation to medical appointments and harassment from his supervisor was outside the limitation provisions set out in the *Act*, that they took such evidence submitted by Mr. Cook into account as context in coming to their decision.

[48] I conclude there was no procedural unfairness by the Director and the delegated Commissioner.

[49] Accordingly, I dismiss the Judicial Review application of Mr. Cook.

[50] Costs are awarded to Compass Group pursuant to Column 2 of the *Alberta Rules of Court*.

Heard on the 8th day of January, 2020.

Dated at the City of Calgary, Alberta this 7th day of April, 2020.

S.L. Hunt McDonald
J.C.Q.B.A.

Appearances:

W.C. McCutchan
for the Applicant, Bryan Cook

M. Luhtanen
for the Respondent, Chief Commissioner Alberta Human Rights Commission

C. Hamill and S. Parker
for the Respondent, Compass Group Canada Ltd.