IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Trimble* v. *Human Rights Commission* 2006 YKSC 28

Date: 20060411
Docket No.: S.C. No. 05-AP006
Registry: Whitehorse

In the matter of the *Human Rights Act*, R.S.Y. 2002 , c. 116 and in the matter of a Decision of the Yukon Human Rights Commission dated September 29, 2005.

Between:

RONDA TRIMBLE

Petitioner

And

YUKON HUMAN RIGHTS COMMISSION and GOVERNMENT OF YUKON - PUBLIC SERVICE COMMISSION

Respondents

Before: Mr. Justice W.M. Darichuk

Appearances:

John MacTavish	Counsel for the Petitioner
Zeb Brown	Counsel for the Respondent Government of Yukon – Public Service Commission
Susan Roothman	Counsel for the Respondent Yukon Human Rights Commission

REASONS FOR JUDGMENT

OVERVIEW

[1] On July 16, 2003, the petitioner filed a complaint with the respondent, Yukon Human Rights Commission (the "respondent commission") alleging that the respondent Government of Yukon – Public Service Commission (the "respondent employer")

"breached sections 7(h), 9(b) and 8 of the Yukon *Human Rights Act*, R.S.Y. c. 116 (the "*Act*") by discriminating against her on the basis of her disability when it terminated her employment at the Department of Health and Social Services and failed to accommodate her disability."

[2] On September 29, 2005, the respondent commission dismissed her complaint. The petitioner seeks an order, *inter alia*, quashing this decision.

BACKGROUND

[3] The petitioner commenced employment with the respondent employer on April 1, 1997, as a Human Resources Advisor and Acting Director of Human Resources for Health and Social Services. Due to ill-health, she worked part-time from January 2000 to March 2000, when she was diagnosed with fibromyalgia and osteoarthritis. She commenced medical leave the following month and was authorized for long-term disability in July 2000. This leave for medical reasons continued until her employment was terminated, effective January 31, 2003. During this time, she maintained contact with the respondent employer. She provided required documentation to extend her medical leave and regularly submitted doctor's notes indicating she was medically unfit to resume her employment.

[4] On December 2, 2002, the Acting Manager of Reintegration advised the petitioner that her position was being filled. Further, that (a) the Department could offer her another position that obligated her to being at work immediately or be fired, or (b) her doctor could fill out a form entitled "Medical Form Re: Disability" which she would review to determine her ability to perform work duties, her needs for accommodation and the date she would be medically fit to return to work. Although she reviewed the

form with her doctor, it was not completed due to his imminent departure on vacation. However, her doctor stated in writing that the petitioner was medically unfit to work until July 2003, at which time he would review her ability to work. The petitioner mailed the information from her doctor together with a leave application to the respondent employer on December 10, 2002.

[5] The following month she received a letter dated January 16, 2003, from the Deputy Minister of Health and Social Services terminating her employment as of January 31, 2003.

[6] The Director of Human Rights, pursuant to section 4(1) of the *Human Rights Regulations*, O.I.C. 988/170 directed an investigation of the aforesaid complaint. Upon completion of this investigation, a written report dated June 14, 2005, and headed "Investigation Report" was prepared. To discharge its statutory obligations under sections 20 and 21 of the *Act*, a copy of the Investigation Report was sent to the respondent employer and the complainant together with a letter inviting their written submission in response to this report.

[7] By letter dated September 29, 2005, the parties were informed of the decisions of the respondent commission on September 21, 2005. It reads, in part:

> "The Commissioners first considered the allegations of the Complainant regarding the thoroughness of the Investigation Report in order to decide whether the Investigation Report presented an adequate basis to proceed. Based on a review of the following documents from File # W.272-03:
>
> 1. Investigation Report Dated June 15, 2005.
> 2. Submissions by the Complainant dated September 15, 2005.
> 3. Memorandum from legal counsel dated September 21, 2005.

> The Commissioners decided that the Investigation Report meets the requirement of thoroughness, i.e. that the investigator did not fail to investigate obviously crucial evidence and did not fail to address fundamental aspects of the complaint.
>
> The Commissioners then continue [*sic*] to consider the following documents from the complaint file to decide whether to dismiss, try to settle or refer the complaint for adjudication:
>
> 1. Subject Matter of the Complaint;
> 2. Respondent's Defense to the Complaint dated January 28, 2004;
> 3. The Complainant's Rebuttal dated April 21, 2004;
> 4. The Investigation Report dated June 15, 2005; and
> 5. The Complainant's submissions dated September 15, 2005.
>
> The Commissioners reviewed the above documents and the various issues involved and found that there is not a reasonable basis in the evidence to warrant proceeding to the next stage.

RELEVANT STATUTORY PROVISIONS

[8] The relevant provisions of the *Act* read as follows:

> **Objects**
> **1**(1) The object of this Act are
>
> (a) to further in the Yukon the public policy that every individual is free and equal in dignity and rights;
> (b) to discourage and eliminate discrimination;
> (c) to promote recognition of the inherent dignity and worth and of the equal and inalienable rights of all members of the human family, these being principles underlying the *Canadian Charter of Rights and Freedoms* and the *Universal Declaration of Human Rights* and other solemn undertakings, international and national, which Canada honours.
>
> (2) This Act does not affect rights pertaining to aboriginal peoples established by the *Constitution of Canada* or by a land claims agreement.
>
> …

Prohibited grounds

7 It is discrimination to treat any individual or group unfavourably on any of the following grounds

…

(h) physical or mental disability;

…

Duty to provide for special needs

8(1) Every person has a responsibility to make reasonable provisions in connection with employment, accommodations, and services for the special needs of others if those special needs arise from physical disability, but this duty does not exist if making the provisions would result in undue hardship.

(2) For the purposes of subsection (1) “undue hardship” shall be determined by balancing the advantages and disadvantages of the provisions by reference to factors such as

(a) safety;
(b) disruption to the public;
(c) effect on contractual obligations;
(d) financial cost;
(e) business efficiency.

(3) This Act does not apply to structures which at the commencement of this Act were existing and complied with the applicable requirements of the *Building Standards Act* and regulations under that Act.

Prohibited discrimination

9 No person shall discriminate

…

(b) in connection with any aspect of employment or application for employment;

…

Human Rights Commission

16 (1) There shall be a Yukon Human Rights Commission accountable to the Legislature and the commission shall

(a) promote the principle that every individual is free and equal in dignity and rights;

(b) promote the principle that cultural diversity is a fundamental human value and a basic human right;

(c) promote education and research designed to eliminate discrimination;

(d) promote a settlement of complaints in accordance with the objects of this Act by agreement of all parties;

(e) cause complaints which are not settled by agreement to be adjudicated, and at the adjudication adopt the position which in the opinion of the commission best promotes the objects of this Act.

(2) The commission shall conduct education and research on the principle of equal pay for work of equal value in the private sector.

Appointment of commission

17(1) The commission shall consist of a minimum of three and a maximum of five members who shall be appointed for a term of three years by the Legislature.

…

Director of Human Rights

19 There shall be a Director of Human Rights responsible to the commission for

(a) ensuring that complaints are dealt with in accordance with this Act;

(b) carrying out, in accordance with the commission's policies and directives, the administration of this Act.

Complaints

20(1) Any person believing that there has been a contravention of this Act against them may complain to

> the commission who shall investigate the complaint unless
>
> (a) the complaint is beyond the jurisdiction of the commission;
>
> (b) the complaint is frivolous or vexatious; or
>
> (c) the victim of the contravention asks that the investigation be stopped.
>
> …
>
> **Disposition of complaints by commission**
> **21** After investigation, the commission shall
>
> (a) dismiss the complaint; or
>
> (b) try to settle the complaint on terms agreed to by the parties; or
>
> (c) ask a board of adjudication to decide the complaint.

[9] Section 4(1) of the Human Rights Regulations, O.I.C. 988/170 reads:

> "The Director of Human Rights shall investigate or direct the investigation of each complaint."

[10] As noted by McLachlin C.J. at paras. 21 and 22 in *Dr. Q.* v. *College of Physicians and Surgeons of British Columbia*, 2003 SCC 19:

> "… In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach. In *Pushpanathan*, this Court unequivocally accepted the primacy of the pragmatic and functional approach to determining the standard of judicial review of administrative decisions. Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault*, at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining

> the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.
>
> To determine standard of review on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. Rather, the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo "significant searching or testing" (*Southam, supra*, at para. 57), or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness."

[11] The four contextual factors which must be analyzed to determine the appropriate standard of review (and resulting degree of curial deference owed to the administrative tribunal) are the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court or the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question – law, fact or mixed law and fact.

[12] A consideration of these contextual factors of the pragmatic and functional approach endorse the conclusion that the applicable standard of review herein is that of reasonableness *simpliciter*.

[13] There is no privative clause in the *Act* precluding judicial review. However, curial deference may still be appropriate. As noted by Major J. in *Zenner* v. *Prince Edward Island College of Optometrists,* [2005] S.C.J. No. 80, at para. 21:

> "… The absence of a privative clause (or a statutory appeal) does not necessarily imply a high standard of scrutiny, where other factors dictate a lower standard. The specialization of duties intended by the legislature may warrant deference notwithstanding the absence of a privative clause: *Law Society of New Brunswick* v. *Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 29."

[14] An analysis of the second contextual factor relating to the expertise of the tribunal (or commission) must characterize the expertise, consider its own expertise relative to that of the tribunal and identify the issue relative to that expertise. The decision of the Commissioners dealt firstly, with the adequacy or thoroughness of the report to deal with the fundamental aspects of the complainant and secondly, whether there was a reasonable evidentiary basis to warrant proceeding to the next stage. Subsumed in these questions were factual determinations by the investigator which included the nature and extent of her disability, whether she was treated unfavourably and whether her disability was a factor in her unfavourable treatment. These issues fall within the ambit of the superior expertise of a human rights tribunal relating to fact finding in a human rights context. Other issues such as the nature and extent of legal onus under s. 8(1) of the *Act* "are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal." (See *Canada (Attorney General)* v. *Mossop*, [1993] 1 S.C.R. 554 at para. 45.)

[15] The objects of the respondent commission set forth in the *Act* are to promote a settlement of the complaint after investigation or a review, dismiss the complaint or ask a board of adjudicator to decide it.

[16] Section 1(1) of the *Act* stipulates the objects of this legislation which include discouraging or eliminating discriminatory practices on any of the enumerated grounds. Specifically identified and prohibited under s. 7(h) is discrimination on the ground of physical or mental disability. As Linden J.A. observed in *Sketchley* v. *Canada (Attorney General),* [2005] F.C.J. No. 2056, at para. 74:

> "… The protection of human and individual rights is a fundamental value in Canada and any institution, organization or person given the mandate by law to delve into human rights issues should be subjected to some control by judicial authorities."

[17] Since the standard of review herein is reasonableness *simpliciter*, the following observations of Iacobucci J. in *Law Society of New Brunswick* v. *Ryan*, [2003] S.C.J. No. 17, at paras. 46 – 48, appear apt:

> Judicial review of administrative action on a standard of reasonableness involves deferential self-discipline. A court will often be forced to accept that a decision is reasonable even if it is unlikely that the court would have reasoned or decided as the tribunal did (see *Southam, supra*, at paras. 78-80). If the standard of reasonableness could "float" this would remove the discipline involved in judicial review: courts could hold that decisions were unreasonable by adjusting the standard towards correctness instead of explaining why the decision was not supported by any reasons that can bear a somewhat probing examination.
>
> The content of a standard of review is essentially the question that a court must ask when reviewing an administrative decision. The standard of reasonableness basically involves asking "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" This is the question that must be asked every time the pragmatic and functional approach in *Pushpanathan, supra*, directs reasonableness as the standard. Deference is built into the question since it requires that the reviewing court assess whether a decision is basically supported by the reasoning of the tribunal or decision-maker, rather than inviting the court to engage *de*

> *novo* in its own reasoning on the matter. Of course, the answer to the question must bear careful relation to the context of the decision, but the [page268] question itself remains constant. The suggestion that reasonableness is an "area" allowing for more or less deferential articulations would require that the court ask different questions of the decision depending on the circumstances and would be incompatible with the idea of a meaningful standard. I now turn to a closer examination of what a reviewing court should do when engaging in its somewhat probing examination of an administrative decision.
>
> (2) What Does the Reasonableness Standard Require of a Reviewing Court?
>
> Where the pragmatic and functional approach leads to the conclusion that the appropriate standard is reasonableness *simpliciter*, a court must not interfere unless the party seeking review has positively shown that the decision was unreasonable (see *Southam, supra*, at para. 61). In *Southam*, at para. 56, the Court described the standard of reasonableness *simpliciter*:
>
> > An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it.

[18] Commenting on the standard of review concerning a decision to dismiss a complaint after the investigation phase, Pelletier J.A., in *Hutchinson* v. *Canada (Minister of Environment)*, [2003] F.C.J. 439, states at para. 64:

> "… The decision in question is a decision to dismiss a complaint after the investigation phase, without referring the complaint to a tribunal. The clearest statement of the standard of review of such decisions is found in Bourgeois v. Canadian Imperial Bank of Commerce, [2000] F.C.J. 1655 (F.C.A.) (QL) where Décary J.A. said the following [at paragraph 3]:
>
> > MacKay J. was of the view, and rightly so, that the standard of review of a decision of the

> Commission to dismiss a complaint requires a very high level of deference by the Court unless there be a breach of the principles of natural justice or other procedural unfairness or unless the decision is not supportable on the evidence before the Commission. …"

[19] According to Sopinka J. in *Syndicat des employés de production du Québec et de l'Acadie* v. *Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 at para. 27, the question to be decided at the conclusion of the screening process in whether there was "a reasonable basis in the evidence for proceeding to the next stage". Without providing any reasons, this question was specifically addressed by the respondent commission after it decided that the report met "the requirement of thoroughness, i.e. that the investigator did not fail to investigate obviously crucial evidence and did not fail to address the fundamental aspects of the complaint."

[20] As Sopinka J. further notes "The investigator in conducting the investigation, does so as an extension of the Commission". Without having provided written reasons, the reasons contained in the Investigative Report must be treated as the reasons of the Commissioners.

[21] The failure to provide written reasons for its decision was the subject of comments by Linden J.A. in *Sketchley* v. *Canada (Attorney General), supra,* at para. 37. He observes:

> "… When the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons, the Courts have rightly treated the investigator's Report as constituting the Commission's reasoning for the purpose of the screening decision under section 44(3) of the Act (SEPQA, supra at para. 35; Bell Canada v. Communications, Energy and Paperworkers Union of Canada (1999) 167 D.L.R. (4th) 432, [1999] 1 F.C. 113 at para. 30 (C.A.) [Bell Canada]; Canadian Broadcasting Corp.

> v. Paul (2001), 274 N.R. 47, 2001 FCA 93 at para. 43 (C.A.))."

[22] Although no specific recommendation was made by the investigator, implicit in the decision of the respondent commission was its adoption of his findings embodied in the conclusion that "… the respondent accommodated the complainant to the point of undue hardship, but that the complainant did not meet her duty to facilitate accommodation."

[23] This conclusion is not in accord with his specific finding at para. 32 of his report that "There is insufficient evidence to determine whether the inability to fill the complainant's position constituted an undue hardship to the employer." *Per se*, this finding warranted proceeding to the next state.

[24] Having found evidence to support a *prima facie* case of discrimination based on disability, the remaining question mandated under s. 8 of the *Act* was whether the respondent employer discharged its statutory duty respecting accommodation. In view of his specific factual finding, the investigator erred in law in concluding that absenteeism from employment, coupled with uncertainty regarding future attendance and arbitral case law discharged the employer's statutory burden relating to undue hardship.

[25] The meaning of "undue hardship" was considered by Sopinka J. at para. 19 in *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970. He stated the following:

> "… More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words

> "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case. …"

[26] Section 8(1) of the *Act* mandates an employer to make "reasonable provisions in connection with employment … for the special needs of others if those special needs arose from physical disability, …"

[27] Although some hardship was identified, as staffing problems affecting workplace stability, the evidence falls markedly short of establishing undue hardship and reasonable accommodating measures to the point of undue hardship. It is not without significance that (a) the complainant's position was filled through a combination of re-distribution of duties and assignments, (b) the investigator found "there is some evidence to support the allegation that there was some hardship for the employer, but it is not detailed or specific," and (c) the respondent employer was asked to provide "detailed evidence" in support of its allegations of undue hardship "… and did not do so."

PROCEDURAL FAIRNESS

[28] The pragmatic and functional analysis "does not apply to allegations concerning procedural fairness, which are always reviewed as questions of law". (See *Sketchley* v. *Canada (Attorney General)*, [2005] F.C.J. No. 2056, para. 38.) The content of procedural fairness "goes to the manner in which the Minister went about making his decision whereas the standard of review is applied to the end product of his deliberations." Per Binnie J. at para. 102 in *Canadian Union of Public Employees (C.U.P.E.)* v. *Ontario*, [2003] 1 S.C.R. 539.

[29] The Investigation Report was fundamentally flawed in that it did not meet the requirement of investigative thoroughness. This constituted a breach of procedural fairness. The investigator neither investigated crucial medical evidence nor the measures implemented by the respondent commission to accommodate “several employees on medical leave that had been for more than 2 years, some as much as 10 years. Two of the employees in question also share one of the complainant’s conditions, fibromyalgia”. It remained to be determined if the complainant would continue to be totally incapacitated after June 30, 2003, and if so, under what conditions or circumstances, if any, could she return to assume modified employment duties.

[30] Dependant of the totality of the circumstances, procedural fairness may also require the provision of reasons, by the decision-maker. This subject was reviewed by L’Heureux-Dubé J. in *Baker* v. *Canada (Minister of Citizen and Immigration)*, [1999] 2 S.C.R. 817. As para. 43, she states:

> “In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in Orlowski, Cunningham, and Doody, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.”

[31] For similar reasons, the circumstances of this case “constitute one of the situations where reasons were necessary”.

CONCLUSION

[32] As an examination of the material before the Commissioners, particularly, the Investigative Report dated June 15, 2005, neither supports their decision that it presented an adequate basis to proceed, or their decision “that there is not a reasonable basis in the evidence to warrant proceeding to the next stage”, the impugned decision is quashed.

[33] An Order quashing the Commissioners’ decision is also justified on the basis of the breaches of procedural fairness.

[34] It is ordered that the complaint be referred to a board of adjudication for decision pursuant to s. 21(3) of the *Act*. The request to deviate from the normal hearing procedure set forth in s. 10 of the *Human Rights Regulations*, *supra,* or any other requests concerning this hearing, should be made to, and addressed by the board.

[35] The petitioner is awarded costs against the respondent employer.

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DARICHUK J.