Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Clay Mazurkewich

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

S & S Delivery Services Ltd.

Respondent

Decision

File No.: T1792/2212
Member: George E. Ulyatt
Date: March 5, 2014
Citation: 2014 CHRT 8

[1] The Complainant Clay Mazurkewich has filed a complaint against the Respondent, S & S Delivery Services Ltd. on June 16, 2011 alleging discrimination by the Respondent, his employer, under section 7 of the *Canadian Human Rights Act (*"the *CHRA*"*).*

[2] The Complainant and the Respondent were not represented by legal counsel at the hearing, and the particulars of the complaint, evidence on the extent of the disability of the Complainant and the position of the Respondent were far from satisfactory. The Complainant alleged that he was discriminated against by the Respondent due to a medical disability; in particular, chronic pain, which was exacerbated whilst working and therefore his termination was contrary to section 3 of the *CHRA*. It was implicit in the Complainant's evidence and submissions that there was a breach of section 7 (a) of the *CHRA*.

[3] The Respondent is a small trucking company that operates out of Saskatoon, Saskatchewan, and the Respondent was represented at all times by the President and principal shareholder of the corporation, Brian Slobodian.

[4] The Complainant had been employed by the Respondent previously, but had rejoined the Respondent's place of employment as a fork lift operator, as well as being required to do some manual lifting.

[5] The Complainant testified that he experienced severe lower back pain on April 18, 2011 as a result of the jarring/jolting action in operating a forklift during the course of his employment with the Respondent. The Complainant also experienced severe back pain on April 21, 2011 and April 29, 2011, and had reported same to his supervisor, John Simpson. As such, the Complainant had taken those days off. The back pain was later diagnosed as a result of a degenerative disc disease by the medical consultant of the Worker's Compensation Board (hereinafter referred to as WCB). The evidence disclosed that the supervisor, John Simpson, did not report the absences of the Complainant on the above dates to the principal of the company, Brian Slobodian.

[6] On May 2, 2011, the Complainant reported to his supervisor, John Simpson, that after the company baseball practice, he had seen his doctor over the weekend and the Complainant had been advised that he should take time off work. The Complainant was advised by his supervisor that a Workers Compensation claim would have to be completed.

[7] The Complainant testified that, later that same day, he received a telephone call from Brian Slobodian advising him that if he had filed a claim with the WCB, he was "a bastard" and Mr. Slobodian, during the call, terminated the Complainant's employment. The Complainant alleges that Brian Slobodian further stated that if the Complainant came on the employer's property, he would be charged with trespassing.

[8] The Complainant further testified that his mother, with whom the Complainant was currently residing, was on an extension phone and listening in on the conversation. The Complainant's mother did testify at the hearing and confirmed the Complainant's evidence as to the conversation with Mr. Slobodian.

[9] The Respondent did not contradict the evidence concerning the dismissal, the derogatory comment or the comment about having the Complainant charged with trespassing. The Respondent advised that he had been upset by the Complainant's actions inasmuch as the Complainant had attended a company baseball practice on April 30, 2011, but was unavailable for work on May 2, 2011. At no time did the Respondent challenge the Complainant's claim that he was disabled or injured. Whilst the Respondent did not take issue with the complainant's testimony regarding their conversation of May 2, 2011, the Respondent did testify that he thought that the conversation was on a cell phone and not a land line. Thus, it would have been impossible for the Complainant's mother to have monitored the conversation.

[10] The Complainant applied for WCB benefits pursuant to Saskatchewan Legislation, and was initially declined compensation as the initial finding was that the Complainant was not disabled. On appeal, which involved a review of the evidence submitted by the Complainant, the Complainant was successful and did receive benefits totaling $5,421.90, running from the

termination date until July 15, 2011, the date on which, according to the WCB findings, he was fit to return to work.

[11] The Complainant never returned to his employment with the Respondent, and ultimately found alternate employment with a new employer which lasted from August 21, 2011 to August 31, 2011. The Complainant left this position for a third position, commencing September 4, 2011. The evidence of the Complainant was that, for personal reasons which he did not disclose, nor was he asked to, he voluntarily left the third position after less than a day. There was no assertion by the Complainant that his departure from either position of employment obtained after his termination by the Respondent was for physical or medical reasons.

[12] On the issue of compensation for lost wages resulting from the discriminatory practice alleged, the Complainant's position was that he ought to receive pay over a period commencing on the date on which his Workers Compensation benefits ended, July 15th, 2011, when he was deemed fit to work, and continuing after his departure from the two subsequent jobs and extending to October 31, 2011, being the date he alleges his employment with the Respondent would have been terminated in any event: The evidence of the Complainant, unchallenged by the Respondent, was that a secondary operation of the Respondent was closed on October 31, 2011, at which time staff was terminated. The Complainant would as well have been terminated at that time. There is no issue between the Complainant and the Respondent that the secondary operation was now closed and that the Complainant's employment would have ended at that time, had the events of May 2 not intervened.

[13] Neither the Complainant nor the Respondent were clear as to precise calculation of the Complainant's applicable pay loss stemming from the Respondent's actions. The parties have agreed that the Complainant's final pay would have been $17.50 per hour. At the hearing, the Respondent did not challenge the injury or disability, or raise any issues relating to the mitigation of the Complainant's losses up to August 21, 2011.

[14] The issue of disability is a key criterion that the Complainant must satisfy. Moreover, in order to be successful under section 7(a) of the *CHRA*, the Complainant must establish a *prima facie* case of discrimination. In *Chaudhary v. Smoother Movers,* (2013) CHRT 15 (CanLII), the Tribunal at paragraphs 33 and 35 stated as follows:

> [33] The Complainant in proceedings before the Tribunal must establish a *prima facie* case of discrimination. A *prima facie* case is "…one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent." (*Ontario Human Rights Commission v. Simpsons-Sears,* (1985) CanLII 18 (SCC), (1985) 2 SCR 536 at para. 28).
>
> [35] Paragraph 7(a) of the *Act* provides that it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual on a prohibited ground of discrimination. In complaints under subsection 7(a), the Complainant must establish a link between a prohibited ground of discrimination and the employer's decision to refuse to employ or continue to employ him or her. (see *Roopnarine v. Bank of Montreal,* (2010) CHRT 5 (CanLII), 2010 CHRT 5 at para. 49). That said, discrimination does not need to be the only reason for the decision. It is sufficient that discrimination be one factor in the decision. (See *Holden v. Canadian National Railway Co.,* (1990) F.C.J. No. 419 (F.C.A.) (Q.L.); and, *Khiamal v. Canada (Canadian Human Rights Commission),* (2009) FC 495 (CanLII), 2009 FC 495 at para. 61).

[15] In this case, the alleged prohibited ground is disability. The question of what constitutes a disability was canvassed by the Federal Court of Appeal in *Desormeaux v. Ottawa (City),* (2005) FCA 311 at paragraph 15, wherein the Court stated:

> As the Supreme Court established in *Granovsky v. Canada,* (2000) SCC 29 (CanLII) (2000) 1 S.C.R. 703 at para.34 and in *City of Montreal* (supra) at para. 71, disability in a legal sense consists of physical or mental impairment which results in a functional limitation or is associated with a perception of impairment.

[16] Thus, in order to be successful, the Complainant must first establish on a *prima facie* basis: (1) that he suffered from a disability and (2) that his disability played a role in the Respondent's decision to terminate his employment, contrary to section 7(a) of the *CHRA*.

[17] The evidence confirms that the Complainant has met both criteria; that he was disabled and that the termination of his employment was based, at least in part, on his disability. Due to the complainant's back injury, he was advised by his doctor to take time off work. When he conveyed this advice to his supervisor, the supervisor told him he would have to complete a WCB form. When Mr. Slobodian learned of the possibility of a WCB claim, he terminated the complainant's employment. Thus, but for the complainant's disability, he would not have lost his job.

[18] Once a *prima facie* case of discrimination has been established the onus shifts to the Respondent, to demonstrate that the impugned conduct is justified. *Chaudhary v. Smoother Movers (supra)* stated at paragraph 52*:*

> Once a complainant has established a *prima facie* case of discrimination, the respondent must demonstrate that the *prima facie* discrimination did not occur as alleged or that the practice is justifiable under the *Act* (see sections 15-24 of the *Act*).

[19] The only potential explanation that I could garner from Mr. Slobodian's evidence and argument was that the Complainant's termination was not for disability but for fabricated assertion of disability given the Complainant's ability to attend a baseball practice. However, on the totality of evidence this explanation could not be accepted. The evidence before the Tribunal was clear in that the Respondent ought to have known that the Complainant was disabled due to the information shared with the supervisor. Moreover regardless of what Mr. Simpson may have done with the information he received, the Respondent's president, Brian Slobodian, specifically acknowledged during his May 2 conversation with the Complainant that the Complainant was being terminated based upon his inability to work for medical reasons. Having found no reasonable explanation to rebut the *prima facie* case, I conclude, on the balance of probabilities, that the Respondent's decision to terminate the complainant's employment was based on his disability, and that therefore the complaint is substantiated.

Remedy

[20] The Complainant has asked for lost wages, not only up to the time he accepted a second position on August 21, 2011, which ended on August 31, 2011, but also past the third job he accepted on September 4, 2011, which lasted less than one day. The Complainant sought compensation to the date when the Respondent's warehouse would have closed on October 31, 2011, at which time the Complainant acknowledged that he would have been permanently laid off.

[21] Pursuant to section 53(2)(c) of the *CHRA*, the Complainant is entitled to receive compensation for any and all wages that he was deprived of as a result of the discriminatory practice. The loss of income by the complainant is a result of the discriminatory act in the manner of termination, and I therefore find it is eligible for compensation.

[22] The evidence before the Tribunal was poor and inadequate. However, the parties did agree that the hourly wage for employment was $17.50 and the evidence disclosed that the Complainant was paid until the end of the disability period on July 15, 2011 by WCB. The new position that the Complainant accepted commenced on August 21, 2011.

[23] Upon considering the evidence and the submissions, I find that the Complainant should be compensated for the time period up to when he commenced his new employment on August 21st, 2011. It would be unreasonable for the Respondent to have to reimburse the Complainant for alleged loss of income arising from a choice on the part of the Complainant not to work. Therefore I set the amount of compensation for lost wages at five weeks from July 18, 2011 to August 21, 2011, being 200 hours at $17.50 per hour, for a total of $3,500.00

[24] The Complainant has also made a claim in respect of compensation for willful or reckless discrimination under section 53(3) of the *CHRA*. The evidence established that the Respondent, knowing the Complainant's medical condition, acted in a manner that was reckless in not considering the Complainant's physical condition. This claim is allowed. In considering all the

circumstances, including the fact that the negative comments and termination were done in private (to the best of the respondent's knowledge), I find an award of $1,000.00 in special compensation pursuant to section 53(3) of the *CHRA* is appropriate.

[25] I will retain jurisdiction in the event that any dispute arises regarding the quantification or implementation of any of the remedies ordered under this decision.

Order

[26] For the foregoing reasons, I hereby order that:

1. Pursuant to section 53(2)(*c*) of the *CHRA*, the respondent compensate the complainant in the amount of $3,500;

2. Pursuant to section 53(3) of the *CHRA*, the respondent compensate the complainant in the amount of $1,000.

Signed by

George E. Ulyatt
Tribunal Member

Ottawa, Ontario
March 5, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1792/2212

Style of Cause: Clay Mazurkewich v. S & S Delivery Services Ltd.

Decision of the Tribunal Dated: March 5, 2014

Date and Place of Hearing: August 26, 2013

Saskatoon, Saskatchewan

Appearances:

Clay Mazurkewich, for himself

No one appearing, for the Canadian Human Rights Commission

Brian Slobodian, for the Respondent