

CANADA / JUDGMENT

Holm v. Canada (Attorney General)

2006 FC 1170

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Decision Content

Date: 20061002

Docket: T-2096-05

Citation: 2006 FC 1170

Toronto, Ontario, October 2, 2006

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

JENNIFER HOLM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Canadian Human Rights Commission dismissed Jennifer Holm's human rights complaint against her former employer, the Canadian Border Services Agency, having concluded that the evidence did not support her claim to have been the victim of discrimination in her employment by reason of her disability.

[2] Ms. Holm now seeks judicial review of that decision, asserting that the Commission erred in basing its decision on a biased and insufficiently thorough investigation. The Commission further erred, she says, in failing to consider the written submissions that she filed in response to the Investigation Report, and in finding that the evidence did not support her allegations of discrimination.

[3] For the reasons that follow, I am satisfied that the Commission did not err as alleged by Ms. Holm, and, as a result, her application for judicial review will be dismissed.

Background

[4] Ms. Holm had worked for the Agency as a Student Customs Inspector, and was re-hired for a further four month term in the summer of 2004.

[5] It was a condition of Ms. Holm's employment that she successfully complete a "Use of Force" training course, and to this end, she underwent such training in June of 2004. There is no indication in the record as to whether she had previously undergone this form of training.

[6] There is no dispute that on June 12, 2004, during the training, Ms. Holm fell while she was involved in a "take down" procedure, hitting her back and head on a foam mat on the floor. The parties also agree that Ms. Holm's instructors were aware of the fact that she had fallen, although there is a question as to the instructors' knowledge regarding the extent of her injuries.

[7] Later on in the day, Ms. Holm underwent Use of Force testing. She failed her initial test, and was re-tested later on that day, after a period of rest. Once again, she failed the test.

[8] Having failed to satisfy a condition of her continued employment, Ms. Holm was dismissed that same day. The termination of Ms. Holm's employment, effective June 12, 2004, was subsequently confirmed, in writing, by letter dated June 14, 2004.

[9] On June 13, 2004, after consulting a doctor with respect to her injuries, Ms. Holm spoke to a supervisor, and asked that she be given light duties and a further test. Her request was denied.

[10] Ms. Holm then filed her human rights complaint with the Commission, in which she asserted that the Agency had discriminated against her in her employment by denying her medical attention after her fall, by being compelled to undergo testing, despite the fact that she was injured, and by terminating her employment.

The Commission Investigation

[11] An investigation of Ms. Holm's human rights complaint was carried out, which culminated in a report being issued on July 27, 2005.

[12] In the course of the investigation, the investigator interviewed a number of individuals, including Ms. Holm, her family doctor, the two instructors present on June 12, and three of the other students in the course.

[13] The investigator accepted that Ms. Holm was injured while performing a training exercise on June 12, 2004. According to Ms. Holm, she hit her head hard, and was dizzy as a result. Ms. Holm stated that her instructor did not ask her if she was hurt – rather, she advised him that she was, whereupon she was told to sit down and rub her head.

[14] Ms. Holm advised the investigator that she feared that if she did not continue with the training, she would lose any chance she might have had to be tested.

[15] Ms. Holm also stated that she advised her fellow students that she was injured, and that she mentioned her injuries to the instructors during her testing.

[16] Ms. Holm went to a walk-in clinic on June 12, and saw her own doctor some four days later. Her doctor reported that Ms. Holm had "spasm and tenderness with a limited range of motion in the left posterior cervical muscle". An x-ray showed that she had "loss of Lordosis of the cervical spine, no acute fracture subluxation, mild scoliosis which is felt to be due to spasm and inflammation".

[17] The doctor advised the investigator that by June 25, 2004, Ms. Holm had a full range of motion in her neck, and was fit to return to work. However, Ms. Holm advised the investigator that she still experienced stiffness in her neck.

[18] Both instructors present on June 12, 2004 confirmed having witnessed Ms. Holm's fall, with one instructor stating that he had been paying particular attention to Ms. Holm at the time, because of her poor performance during the training. This

instructor stated after Ms. Holm's fall, that he guided her to a seat and offered her an ice pack, which she refused, stating that she would be fine. A few minutes later, the instructor asked Ms. Holm how she was doing, to which she allegedly responded that she was fine, and was ready to continue with the training.

[19] This instructor further also the investigator that at no time during the rest of the day, including during the testing sessions, did Ms. Holm appear to be injured, nor did she mention her injury again. The instructor specifically denies that Ms. Holm mentioned her injury during the first test, and further states that she did not mention it during the debrief that followed her unsuccessful result in the first test.

[20] Finally, this instructor stated that even if Ms. Holm had passed the test, he would have been reluctant to pass her in the course because of "the way she had walked through the training course". The instructor expressed the concern that Ms. Holm would be put in a situation where she could get hurt trying to control people who were bigger and stronger than she was.

[21] The second instructor stated that he was told that Ms. Holm had been injured when he saw her sitting down during the training. After she performed "miserably" on the first test, Ms. Holm was given a learning plan, and was told what to do when she was retested. Before the re-test, Ms. Holm was asked if she was ready, and if there was anything that she did not understand. She did not mention her injury at that time. This instructor also stated that Ms. Holm had performed badly during the training.

[22] The investigator also interviewed three of the seven other students who had participated in the Use of Force training with Ms. Holm. One student did not recall Ms. Holm's fall, but stated that everyone fell during the training, and that the instructors would help them out. The student did recall that Ms. Holm was not putting much effort into the training.

[23] A second student did recall that Ms. Holm had fallen during the training, and that she was asked if she was alright, and that Ms. Holm allegedly replied that she did not need any assistance. When another student asked Ms. Holm if she should be taking the test, in light of her injuries, Ms. Holm is reported to have stated that she just wanted to get on with the test. The student interviewed also indicated that Ms. Holm was not as strong as the other students, and her attitude was that she would not pass the testing. Finally, this student is reported to have stated that the students were warned at the outset that they would be stiff and sore by the end of the training, as was this student.

[24] The third student interviewed confirmed that Ms. Holm had complained of a sore neck, and that one of the instructors had got her an ice pack. The student did not hear Ms. Holm say that she could not do the test because of her injury. This student also stated that Ms. Holm had not put much effort into the training, and was apprehensive about how she would fare in the testing.

[25] In his analysis, the investigator found that Ms. Holm had indeed been injured on June 12, 2004, as she claims, and that she recovered from her injuries in less than two weeks. The investigator further found that Ms. Holm had willingly undergone testing the day that she was injured, and had failed both the test and re-test. Moreover, the investigator found that even if she had been re-tested on a later date, the evidence suggested that she would likely still not have passed the test. Finally, the investigator found that Ms. Holm only sought accommodation for her injury after her employment had been terminated.

[26] Based upon these findings, the investigator recommended that Ms. Holm's human rights complaint be dismissed on the basis that the evidence did not support a finding that she had been discriminated against by the Agency by it having refused

to accommodate her disability and by terminating her employment.

The Commission's Decision

[27] Both Ms. Holm and the Agency provided written submissions in response to the investigation report, Ms. Holm by letter dated August 18, 2005, and the Agency by letter dated September 13, 2005.

[28] The Investigator's recommendation that the complaint be dismissed was accepted by the Commissioners of the Canadian Human Rights Commission, as is confirmed by a decision letter from the Commission's Secretary dated November 4, 2005, the operative portion of which simply adopts the reason cited by the investigator. It is this decision that forms the subject matter of this application for judicial review.

Issues

[29] The issues raised by Ms. Holm can be grouped under the following headings:

1. Whether the Commission investigation was sufficiently thorough;
2. Whether Ms. Holm had a reasonable apprehension that the Commission investigator was biased against her;
3. Whether Ms. Holm was denied procedural fairness in the Commission process as the Commissioners failed to consider the written submissions that she had filed in response to the Investigation Report; and
4. Whether the Commission erred in finding that the evidence did not support her allegations of discrimination.

Standard of Review

[30] The first three issues raised by Ms. Holm involve questions of procedural fairness. As the Federal Court of Appeal recently reiterated in *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056, 2005 FCA 404, the pragmatic and functional analysis does not apply where judicial review is sought based upon an alleged denial of procedural fairness. Rather, the task for the Court is to isolate any act or omission relevant to the question of procedural fairness, and to determine whether the process followed by the Commission satisfied the level of fairness required in all of the circumstances.

[31] That is, given that questions of procedural fairness are reviewed as questions of law, no deference is due: the decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has not:

Sketchley, at ¶ 53.

[32] Insofar as the fourth issue is concerned, it is unnecessary to carry out a pragmatic and functional analysis, as the result would be the same, whether the Commission's decision is reviewed against the patent unreasonableness standard, or the more exacting standard of reasonableness.

Content of the Record

[33] Before turning to address the various issues raised by this application, reference should be made to the state of the record. In addition to the material that was before the Commission when it made its decision to dismiss her complaint, Ms. Holm has also filed two affidavits containing numerous additional documents that were not before the Commission and at least some of which do not appear to have been provided to the investigator. A number of these documents actually post-date the Commission decision.

[34] Although counsel for the Agency raised an objection to the admissibility of the affidavit material in her memorandum of fact and law, at the hearing of this application, she indicated that her position had changed, and invited me to consider the documents.

[35] As requested by the parties, I have reviewed the documents, together with Ms.

Holm's affidavit. Most of the documents relate to her Workers' Compensation claim, her Blue Cross coverage, her Privacy Act application and her dispute with the Commission regarding the content of the tribunal record. Regardless of their admissibility, these documents are of limited relevance to the issues raised by this application.

[36] Also included with one of the affidavits are copies of submissions filed by Ms. Holm with the Commission during the course of the investigation, the report of Ms. Holm's family doctor and her letter of termination. These documents are relevant to this application, and given that Ms. Holm has raised issues with respect to the thoroughness and fairness of the investigation, I have considered these documents in my deliberations.

[37] Turning then to the merits of Ms. Holm's application, the first issue for consideration is the thoroughness of the Commission investigation. This will be dealt with next.

Was The Commission Investigation Sufficiently Thorough?

[38] Ms. Holm says that the Commission investigation was not sufficiently thorough, in part because only three of seven students present on June 12, 2004 were interviewed. As I understand her submissions, Ms. Holm is of the view that the evidence of the other students would assist her in establishing that she was indeed injured on June 12, 2004.

[39] The leading case regarding the degree of thoroughness required of Commission investigations is *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (T.D.), aff'd [1996] F.C.J. No. 385. In *Slattery*, the Federal Court held that an investigation may lack the legally required degree of thoroughness where, for example, the investigator makes an unreasonable omission, such as failing to investigate obviously crucial evidence.

[40] That said, in *Tahmourpour v. Canada (Solicitor General)*, [2005] F.C.J. No. 543, 2005 FCA 113, at ¶ 39, the Federal Court of Appeal observed that an investigation into a human rights complaint cannot be held to a standard of perfection, and that a Commission investigator is not required to turn every stone. The Court further noted that the Commission's resources are limited and its case load heavy. As a consequence, the Commission is required to balance the interests of complainants in the fullest possible investigation and the demands of administrative efficacy.

[41] In this case, I am not persuaded that the failure of the investigator to interview the other four students present on the day in question resulted in a failure to consider "obviously crucial evidence". Indeed, there is no dispute about the fact that Ms. Holm fell during training, and suffered some form of injury. What is really in dispute here is whether the circumstances surrounding the testing were such that the Agency's duty of accommodation was engaged.

[42] Ms. Holm also says that the investigation was deficient, as the investigator did not speak to the doctor from the walk-in clinic who she had consulted on the day of her injury. The investigator did speak to Ms. Holm's family doctor, who had treated her injuries a few days later, and there is nothing before me that would suggest that the evidence of the clinic doctor would have added anything to the analysis.

[43] The other alleged deficiencies in the investigation process really relate to the issue of the Agency's duty to accommodate, and will be dealt with in my consideration of the final issue.

Did the Commission Investigator's Conduct give Rise to a Reasonable Apprehension of Bias?

[44] Ms. Holm asserts that the investigator did not conduct a face-to-face interview with her, and that the questions posed by the investigator left her with the

impression that the investigator was biased against her. By way of example, she stated that the investigator would tell her that 'so-and-so' said 'x' – what did she have to say about that?

[45] Ms. Holm also says that the questions posed by the investigator were not open-ended, with the result that she was unable to get all of her story out.

[46] While acknowledging that she was unfamiliar with the investigation process, Ms. Holm nevertheless says that she was left feeling uneasy by the investigator's questioning, and, as a result, had a reasonable apprehension of bias on the part of the investigator.

[47] The test for bias is well known: that is, the question for the Court is what an informed person, viewing the matter realistically and practically - and having thought the matter through – would conclude: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369.

[48] The fact that the investigator chose not to interview Ms. Holm in person does not, in my view, give rise to a reasonable apprehension of bias. As the Federal Court of Appeal has observed, the Commission is master of its own process, and must be afforded considerable latitude in the way that it conducts its investigations: see *Tahmourpour*, previously cited, at ¶ 39.

[49] Moreover, based upon Ms. Holm's description of the conduct of the investigator, it appears that the questions posed by the investigator were intended to apprise her of the evidence and allegations that had been made against her, and to give her an opportunity to respond. This was entirely proper.

[50] Finally, it is clear from the record that Ms. Holm had ample opportunity to provide the investigator and the Commission with written submissions outlining her position, and that she took advantage of this opportunity on at least two occasions. In these circumstances, I am not persuaded that Ms. Holm was denied a fair opportunity to provide complete details of her version of the events surrounding her complaint.

[51] While I appreciate that Ms. Holm is not familiar with the complaint investigation process, the investigator's conduct would not, in my view, give rise to an apprehension of bias in the mind of an informed person.

Did the Commissioners Fail to Consider Ms. Holm's Written Submissions?

[52] In her memorandum of fact and law, Ms. Holm asserted that the Commissioners may not have considered the written submissions that she filed in response to the investigation report.

[53] At the hearing of the application, I asked Ms. Holm to elaborate on this point, and to explain why she thought that her submissions had not been considered. As I understand her explanation, Ms. Holm is of the view that the Commission could not have considered her submissions, as it adopted the investigator's recommendation that the complaint be dismissed. This would not have happened, in her opinion, had her submissions been properly considered.

[54] I cannot agree with this submission. The certified tribunal record indicates that Ms. Holm's submissions were before the Canadian Human Rights Commission when it made its decision to dismiss the complaint, and there is nothing in the record that would suggest that these submissions were not duly considered. The fact that the Commission did not adopt Ms. Holm's view of the case is not sufficient to establish that her submissions were overlooked.

Did the Commission Err in Finding That the Evidence did not Support the Complaint?

[55] At the outset, it should be noted that although the medical evidence before the Commission indicated that Ms. Holm had recovered from the effects of her fall

within two weeks of it happening, no issue has been taken by either the Agency or the Commission as to whether the apparently transitory injuries suffered by Ms. Holm on June 12, 2004 amount to a “disability” within the meaning of the Canadian Human Rights Act. As a consequence, I will proceed on the basis that Ms. Holm was indeed disabled.

[56] In reviewing the Commission’s decision to dismiss Ms. Holm’s complaint, it should also be noted that given the cursory nature of Commission decisions under section 44 of the Canadian Human Rights Act, investigation reports must be read as the Commission’s reasons: see *Sketchley*, previously cited, at ¶ 37.

[57] The essence of Ms. Holm’s complaint is that the Agency breached its duty to accommodate its disabled employees by requiring her to undergo Use of Force testing while she was injured, and by firing her when she was unsuccessful in that testing.

[58] In assessing the question of whether the Commission committed a reviewable error in determining that the evidence did not support Ms. Holm’s allegations of discrimination, it is helpful to start by reviewing the principles relating to the obligations of employers and employees respectively, insofar as the question of accommodation is concerned.

[59] It is the duty of the employer to accommodate the disabilities of its employees, and to do so to the point of undue hardship: see, for example, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (“*Meiorin*”). The burden is on employers to show that they have considered, and reasonably rejected, all viable forms of accommodation. The reason that the burden is on employers in this regard is because it is the employer that is in the best position to determine how the employee can best be accommodated without undue interference in the operation of the employer’s business.

[60] The burden on employers is a heavy one: to satisfy this burden, employers must be able to prove that incorporating aspects of individual accommodation would be impossible, short of undue hardship: see *Meiorin*, previously cited. Unions also have a duty to facilitate accommodation, where necessary: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

[61] However, as stringent as the duty on employers to accommodate disabled employees may be, as the Supreme Court of Canada noted in *Renaud*, at ¶ 43, the search for accommodation is a multi-party inquiry. That is, in addition to the obligations on employers and unions, there is also a duty on complainants to assist in securing appropriate accommodation.

[62] Fundamental to this duty is the obligation on the employee to bring to the attention of his or her employer the facts relating to the alleged discrimination: *Renaud*, at ¶ 44.

[63] With this understanding of the relevant legal principles, I turn now to consider the evidence that was before the investigator and the Commission.

[64] There is no question that Ms. Holm’s instructors were aware of the fact that she had fallen and injured herself during training. Although she complains of the fact that she was not offered medical attention, there is nothing in the record that would suggest that she had ever told her instructors that she required medical assistance.

[65] It is also clear from the evidence that Use of Force training was very physically demanding, and as Ms. Holm herself conceded, all of the students were battered and bruised by the end of the course.

[66] It is not disputed that Ms. Holm did not perform well during the testing, but the evidence also suggests that she had not performed well throughout the training, and thus there was no sudden deterioration in her performance during the testing that

could have alerted the instructors to the fact that something was wrong.

[67] Moreover, there was also evidence before the investigator that Ms. Holm had expressed a desire to go ahead with the testing, notwithstanding her injuries. Most tellingly, while Ms. Holm is emphatic that she told her instructors that she was injured during the testing (a point that is strenuously denied by the instructors), there is no indication in the record that at any time prior to the termination of her employment, did Ms. Holm ever ask to have the testing put off until she was feeling better, or tell her instructors that she required some other form of accommodation.

[68] In the absence of a timely indication from Ms. Holm that she had suffered a disabling injury, and required some form of accommodation, there was no duty on the Agency to explore alternatives to completing the testing on the day in question.

[69] It is uncontested that successful completion of the Use of Force training course was a condition of Ms. Holm's continued employment. Having failed to pass the test, and having failed to notify her employer that she was suffering from a disability and required accommodation, it was open to the Agency to terminate Ms. Holm's employment.

[70] While a more fulsome analysis on the part of the investigator would have been desirable, in all of the circumstances, the investigator's finding that the evidence did not support Ms. Holm's allegations of discrimination was one that was reasonably open to him. Similarly, the Commission did not err in adopting the investigator's recommendation that Ms. Holm's complaint be dismissed.

Conclusion

[71] For these reasons, the application for judicial review is dismissed. Counsel for the respondent advised the Court that her client was not pressing the issue of costs, and in the exercise of my discretion, I decline to make any order of costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is dismissed, without costs. "Anne Mactavish" Judge FEDERAL COURT NAMES OF COUNSEL AND SOLICITORS OF RECORD
DOCKET: T-2096-05 STYLE OF CAUSE: JENNIFER HOLM v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING: Calgary, Alberta DATE OF HEARING: September 26, 2006 REASONS FOR
JUDGMENT AND JUDGMENT: Mactavish J. DATED: October 2, 2006 APPEARANCES: Ms. Jennifer
Holm APPLICANT Ms. Tracy King FOR THE RESPONDENT SOLICITORS OF RECORD: Ms.
Jennifer Holm SELF REPRESENTED APPLICANT John H. Sims, Q.C. Deputy Attorney General of
Canada RESPONDENT

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