

Court of King's Bench of Alberta

Citation: NOV Enerflow ULC v Maude, 2024 ABKB 432

Date: 20240716
Docket: 1901 16582
Registry: Calgary

Between:

NOV Enerflow ULC

Applicant

- and -

Jon Maude

Respondent

Reasons for Decision of the Honourable Justice R.J. Hall

[1] This is a statutory appeal from a decision of the Human Rights Commission. The tribunal there ruled that the employer NOV Enerflow ULC (“NOV”) had discriminated against Mr. Jon Maude, and awarded damages to Mr. Maude for that discrimination, NOV was found to have violated section 7 of the *Alberta Human Rights Act*, which sets out:

Discrimination re Employment Practices

7(1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person,
- or

(b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

[2] NOV has appealed that decision, pursuant to section 37(4) of the *Alberta Human Rights Act*. Because the statute provides this right to appeal, the parties and the Commission all agree that appellate standards of review apply, in accordance with the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37. Strict questions of law are subject to review on the correctness standard. Questions of mixed fact and law are subject to review on the standard of palpable and overriding error. Where the findings in issue are strictly findings of fact the standard of review is also one of palpable and overriding error, and much deference should be given to the tribunal's findings.

[3] A brief overview of the occurrences in this matter is as follows:

[4] Mr. Maude began working for NOV in August, 2010 as a Journeyman Millwright Assembler, which is classified as a safety sensitive position. As such, Mr. Maude was subject to periodic drug testing pursuant to NOV's Drug and Alcohol Testing and Search Policy (the "Policy").

[5] In accordance with the Policy, on March 15, 2016 Mr. Maude was required to undergo a random drug and alcohol test. On March 22, 2016, Mr. Maude was informed by NOV that his test results were "non-negative" for cocaine. He was suspended from his duties and was referred, pursuant to the Policy, for an assessment by a Substance Abuse Professional at Lifeworks (Ceridian Canada); a company that was retained by NOV to perform such assessments.

[6] It is noted that there is no evidence to show that the "non-negative" test was ever confirmed under the Policy to have in fact been a positive test. Indeed the Policy does not refer at all to a non-negative test result. Rather, it refers to a screening test result which can then be confirmed (or not) to have been positive.

[7] However, Mr. Maude acknowledged using cocaine 4 or 5 days before the test occurred, and in his evidence he confirmed his understanding that he tested positive for cocaine. He did not, and does not, deny using cocaine. Rather, he denied that his job performance was adversely affected by its use; and most particularly he denied that he had a substance abuse disorder, as found by the Substance Abuse Professional.

[8] The Substance Abuse Professional is defined in the Policy as a professional who "must have knowledge of and clinical experience in the diagnosis and treatment of alcohol, drugs and related disorders". The subject Substance Abuse Professional in this case gave evidence she does not consider her assessments to be diagnoses, and she did not advance qualifications in diagnosing substance abuse disorders. She is a registered psychologist, trained in substance abuse assessments during her Masters degree and on the job training.

[9] The Substance Abuse Professional met with Mr. Maude on one occasion, for 60 to 90 minutes. She administered forms and tests to him, including the Michigan Alcohol Screening Test, the Drug Abuse Screening test, the Cannabis Use Disorder Identification Test, the Major

Depression Inventory, the DSM-5 form and SASS1-3 form. She concluded that Mr. Maude met the criteria for a moderate to severe substance abuse disorder for alcohol and cocaine.

[10] Mr. Maude was informed by Lifeworks on March 30, 2016, by email, of the treatment requirements as set out by Lifeworks. These included a requirement that he complete a 19-to-26-day residential treatment program for substance dependency.

[11] Mr. Maude looked into the availability of such government programs. He did apply to such a government run facility in Medicine Hat. However, he states that the Medicine Hat facility refused to accept him because he would not acknowledge that he had a substance abuse disorder.

[12] Mr. Maude attended upon an AHS counsellor to discuss his situation. He asked Lifeworks to have their Substance Abuse Professional discuss his case with the AHS counsellor, with a view to determining whether he could attend a three-week intensive outpatient treatment programme instead of the residential treatment program. Lifeworks indicated they were prepared to have their Substance Abuse Professional discuss the case with the AHS counsellor, but Mr. Maude would have to sign and provide to them a Release form, which would allow the AHS counsellor to hold discussions with the Substance Abuse Professional. Mr. Maude did not sign or provide the Release form. Instead he commenced his application to the Human Rights Commission.

[13] The Human Rights Tribunal conducted a 3-day hearing, following which the tribunal published the decision of the Chairperson, Sharon V. Lindgren, B.Comm. LLB on October 28, 2019.

[14] A *prima facie* case of discrimination is made out where the complainant has shown:

- i. That he has a characteristic protected from discrimination;
- ii. That he experienced an adverse impact in relation to his employment, and
- iii. That the disability was a factor in the adverse impact: ***Moore v B.C. (Education)*** 2012 SCC 61.

[15] The Chairperson correctly stated that this *prima facie* case had been made out, as Mr. Maude had a substance abuse disability and he was not allowed by the employer to continue in his employment, because of his disability. The Chairperson also properly concluded that Mr. Maude's denial that he had a substance abuse problem did not preclude him from being a person who actually has a disability, relying on paragraph 49 of ***Moore, supra***.

[16] The Chairperson sought to apply the test enunciated by the Supreme Court of Canada in ***B.C. (Public Service Employee Relations Commission v BC GEU)***, 1999 652 SCC; known as the Meiorin test.

[17] NOV, as appellant, argues that the tribunal misapplied the Meiorin test.

[18] The Meiorin test states that, where a *prima facie* case has been made out that a discriminatory standard is a bona fide occupational requirement, the employer has the onus of showing:

- 1) That the employer adopted the standard (ie its Drug and Alcohol Policy) 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 fulfillment 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 complainant without imposing undue hardship on the employer.

[19] The Chairperson held that while the NOV drug policy complied with the Meiorin test, the manner in which it was carried out did not comply; and that therefore Mr. Maude had made out a case of discrimination. The Chairperson stated in part (para 61):

In providing her assessment and recommendations the SAP was not engaged in an objective diagnosis and treatment exercise. Rather, she was engaged with an expressed predilection to focus on potential risks to safety in the respondent's operation. In fact, the SAP recommendation of residential treatment was relied on by the respondent as the only acceptable path forward. The evidence supports that the respondent relied on the SAP recommendations as an impermeable shield to support the decision not to consider any alternatives but the SAP's recommendation. The circular nature of the argument becomes obvious.

[20] The Chairperson further stated (para 65):

The facts themselves establish that attendance by the complainant at a residential treatment program was not required. The respondent gave no acceptable explanation for its refusal to consider the complainant's suggestion of attending a day treatment program ... In all of the circumstances here I find that the respondent relied on a less than convincing assessment of "risk of disorder" without regard to the complainant's expressed concerns and reasonable accommodation requests. (underlining added).

[21] It is clear that the Chairperson was of the opinion that a day treatment program was an acceptable alternative, and that NOV refused to consider it as an alternative. However, the Chairperson had no evidence that a day treatment program was an acceptable, effective alternative.

[22] It was NOV's evidence that Mr. Maude requested that the SAP discuss this proposal with Mr. Maude's AHC counsellor. NOV agreed to that proposal: see Record, Exhibit 20. However, because of privacy concerns, Mr. Maude was required to sign a Release, which would permit that discussion to take place. *He refused to do so.*

[23] Therefore, if it was the case that the AHS counsellor was in favour of a day treatment program and could enunciate reasons why, that possibility could not be pursued by NOV. Mr. Maude had blocked any such conversation.

[24] Mr. Maude presented no evidence to NOV, nor to the Tribunal, that a day treatment program was an effective alternative to the residential program indicated by the SAP.

[25] The Chairperson cross-examined the Substance Abuse Professional. The Substance Abuse Professional was asked why she made the residential treatment recommendation. She stated that, from her interview and testing of Mr. Maude, she came to the conclusion that Mr. Maude had a high probability of a severe substance use disorder, for which the preferable

treatment was a residential treatment program. No contrary evidence was submitted to the Chairperson. I cannot determine, on the evidence, how the Chairperson concluded “the facts themselves establish that attendance by the complainant at a residential treatment program was not required”, as quoted above.

[26] NOV and its agent Lifeworks, were stymied. The professional they had properly engaged had made a recommendation. Mr. Maude disagreed with the recommendation, but failed to sign the Release to allow for further discussion and determination.

[27] In order to make out a case of discrimination, it was incumbent on Mr. Maude to put forth evidence as to how he could have been accommodated by NOV. He failed to do so. It was not appropriate for the Chairperson to conclude, on her own, that a day treatment program was an alternative which NOV should have accepted.

[28] The Chairperson has made an error of mixed fact and law by reaching a conclusion not based on the evidence. There was a palpable and overriding error. NOV’s appeal is allowed.

[29] I find there has been no discrimination made out against Mr. Maude.

[30] Costs may be spoken to.

Heard on the 15th day of May, 2024.

Dated at the City of Calgary, Alberta this 16th day of July, 2024.

R.J. Hall
J.C.K.B.A.

Appearances:

Tari Hiebert
for the Applicant

Michelle De Cambra
for the Respondent

Melissa L. Luhtanen
for the Chief Commissioner Alberta Human Rights Commission