

Court of Queen's Bench of Alberta

Citation: Baum v. Calgary (City), 2008 ABQB 791

Date: 20081222
Docket: 0701 07403
Registry: Calgary

Between:

Robert Baum and the Director of the Human Rights and Citizenship Commission

Applicants

- and -

City of Calgary

Respondent

**Reasons for Judgment
of the
Honourable Madam Justice K.M. Eidsvik**

I. Introduction

[1] The Applicant, Robert Baum, is a former long time employee of the Respondent City of Calgary who asserts that he suffered discrimination by his employer by reason of his disability.

[2] Mr. Baum is a journeyman millwright. He commenced employment with the waterworks division of the City in 1982. In 1984, he was diagnosed with bursitis in his left shoulder, gout in both feet, and osteoarthritis. In 1987 Mr. Baum began work as a millwright and continued for some years, even with some difficulty because of his medical issues.

[3] In early 2001, Mr. Baum was given various projects to do that were non-millwright in nature because he was unable to do the heavier physical work as a millwright. These projects ran out and Mr. Baum was placed on disability in June 2003. While on disability, both Mr. Baum and the City tried to find other jobs for him that he had the capacity to do.

[4] Mr. Baum was part of a union with the City. He was with local 37, one of 11 locals within the City structure, each with its own collective agreement. While looking for a new accommodated job for Mr. Baum, certain considerations with respect to his union, the other unions of the City and the employees within them, had to be taken into account. In practice this meant that the City went through a process where first all jobs available within Mr. Baum's union were canvassed first, and then from other unions. A placement into a job which entailed a

promotion would only be considered as a last resort. This process had been followed by the City for some time and had been understood and accepted by the unions as appropriate and fair in all of the circumstances given all of the vested interests and legal obligations.

[5] Mr. Baum found the process of finding a new accommodated job frustrating to the point that he filed a Human Rights Complaint on January 24, 2004. He felt that he had been discriminated against because of a physical disability contrary to section 7 of the Act.

[6] Mr. Baum ultimately found a job outside the City in September 2006 and resigned.

[7] A Human Rights Panel Hearing was held from February 12 through to 15, 2007 and the Panel rendered its Decision June 20, 2007. The Panel dismissed Mr. Baum's complaint on the basis that there was no discrimination established and that the City had accommodated the Complainant to the point of undue hardship. The matter comes before this Court by way of an appeal pursuant to s. 37 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (the "Act") from this decision.

II. Issues

[8] The following issues arise in this matter:

- A. What is the appropriate standard of review?
- B. Have Mr. Baum and the Director made out a *prima facie* case of discrimination?
- C. If a *prima facie* case of discrimination has been made out, did the City make reasonable efforts to accommodate Mr. Baum?
- D. Are the Panel's reasons adequate ?

III. Standard of Review

[9] The Director asserts that the standard of review for a statutory appeal from a human rights panel is correctness. The City concedes that the standard of review is correctness, except in respect of credibility issues, for which it submits that the standard is reasonableness.

[10] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, (2008) SCC 9 revised the approach to the determination of the standard of review. While the Supreme Court was dealing specifically with judicial review of decisions of administrative bodies, rather than a statutory appeal as in this case, I am of the view that I should take guidance from that case.

[11] In *Dunsmuir*, the Supreme Court compressed the standards of review from three into two: correctness and reasonableness. The Court also proscribed a more streamlined process for the determination of the appropriate standard, with reliance on prior jurisprudence rather than a detailed analysis in each case. The Court stated as follows at paras. 57 and 62:

An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard ... This simply means that the analysis required is already deemed to have been performed and need not be repeated.

...

In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[12] In a recent decision of the Alberta Court of Appeal in *Walsh v. Mobil Oil Canada* (2008) A.J. No. 830 Ritter, J.A. writing for the majority, reviewed the application of the *Dunsmuir* case to the standard of review of an Alberta Human Rights tribunal. In following the Supreme Courts' direction, our Court of Appeal held at para 55:

In our view, in light of Alberta's human rights legislation, the existing case law answers the question of standard of review, at least in a general sense. It indicates that human rights tribunals, such as the panel in this case may be afforded some deference with respect to findings of fact and credibility, given their role in hearing viva voce evidence. However, reviewing courts will be constrained in their assessment of the evidence as it relates to the applicable law, particularly where an error is found in respect of the tribunal's articulation of the law.

[13] In light of the Supreme Court of Canada's direction in *Dunsmuir*, as applied by our Court of Appeal in a human rights case like this one, I find that correctness is the proper standard of review for this case. However, where the Panel's findings rest on his assessment of the credibility of witnesses, I am of the opinion that it is appropriate to show some deference.

IV. *Prima Facie* Discrimination

The Panel's Reasons

[14] After analysing the evidence before it, the Panel said at paras. 42 and 43:

The complainant and director have the burden to establish a *prima facie* violation of the Act. When this has been established, the respondent must provide evidence that the violation did not exist or that it was reasonable and justifiable such as a bone fide occupational requirement.

The Panel determined that insufficient evidence was submitted to establish the *prima facie* case of discrimination.

[15] The Director argued that the Panel did not apply the correct test to determine whether a *prima facie* case of discrimination was made out and did not give sufficient reasons for his decision in any event. As a result, the Director asked that this matter be remitted to a new human rights panel for reconsideration.

[16] The City argued that the Panel did use the right test to determine if there has been *prima facie* discrimination and that the reasons were adequate. In the alternative, the City argued that it was open to this court to consider the Record and reach its own conclusions on the law.

[17] As *Dunsmuir* stated at para. 47, and as applied in *Mobil Oil* at para. 59, a panel's reasons must be "justifiable, transparent, and intelligible..."

[18] As pointed out by the Director, s. 32(3) of the *Act* requires reasons. That section provides as follows:

(3) A human rights panel shall serve a copy of its decision, including the findings of fact on which the decision was based and the reasons for the decision, on the parties to the proceeding.

[19] The section does not specify the necessary breadth of those reasons. That remains to be determined in accordance with the case law.

[20] The Director referred to two appellate-level cases. In *Via Rail Canada Inc. v. National Transportation Agency*, Sexton J.A. held as follows at paras. 17-22:

The duty to provide reasons is a salutary one. Reasons serve a number of beneficial purposes including that of focussing the decision-maker on the relevant factors and evidence. ...

Reasons also provide the parties with the assurance that their representations have been considered.

In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision-maker erred and thereby render him or accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.

...

The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to

formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons.”

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

[21] In *Boyle v. New Brunswick (Workplace Health, Safety and Compensation Commission)* (1996) N.B.J. No. 291, Bastarache J.A., as he then was, held as follows at para. 26:

Reasons must explain to the parties why the Tribunal decided as it did; it must avoid the impression that its decision was based on extraneous considerations or that it did not consider part of the evidence. Reasons must also be sufficient to enable the Court of Appeal to discharge its appellate function; the Tribunal must therefore set out the evidence supporting its findings in enough detail to disclose that it has acted within jurisdiction and not contrary to law.

[22] The City referred to cases which used basically the same tests.

[23] It is my view that the Panel correctly identified the shifting onus required in analysing a discrimination case based on disability (which will be discussed further below), set out a great deal of the evidence including some findings in some of the limited areas where credibility findings needed to be made, and adequately set this out so that it is clear that extraneous considerations were not relied on. Further, the Panel’s reasons are sufficient to discharge the appellate review function this Court is required to do, and as such fulfill the requirements set out in the tests noted above. Therefore, I find that I am not obliged to consider afresh whether the *prima facie* case of discrimination was made out, but rather review the decision for correctness, deferring where necessary to credibility findings.

Legislation

[24] The provisions of the *Act* relevant to determining whether there has been discrimination in this case are s.7(1) and (3):

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, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or of any other person.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

(Emphasis mine)

The Applicants' position

[25] The Director argued that in human rights cases, a *prima facie* case of discrimination was described by the Supreme Court of Canada in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (hereinafter, "*O'Malley*") at para. 28:

The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context 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-employer.

[26] The Director also cited *Martin v. 3501736 Inc. (c.o.b. Carter Chevrolet Oldsmobile)*, (2001) BCHRT 37, in which the British Columbia Human Rights Tribunal referred at para. 19 to a prior decision of the same body setting out the test for a *prima facie* case of discrimination as follows:

In *Wu*, Tribunal Chair MacNaughton described the burden as follows: the complainant must persuade the Tribunal that **he had a disability**, he was **adversely treated** by the respondent, and there was evidence from which it was reasonable to infer that **his disability was a factor in his treatment**. When he met that burden, the burden then shifted to the respondent to show that its conduct was justified and that it had accommodated the complainant's disability to the point of undue hardship. [Emphasis mine]

[27] The Director argued that in this case, there was sufficient "expansive" evidence of *prima facie* discrimination lead on the following points which should have been sufficient to shift the onus of proof to the City to show that it had properly accommodated Mr. Baum. The headings of this evidence are as follows, the details of which I will deal with later in my reasons:

1. Mr. Baum was underemployed in his accommodated positions considering his qualifications
2. His treatment included doing labourious tasks when he was not able
3. His millwright position was not modified to meet Mr. Baum's physical demands

4. The City relied on union issues to delay a search of a permanent accommodated position
5. The City promoted a culture of treating disabled people like a liability
6. the City delayed a proper assessment of the complainant's physical capabilities
7. the City demeaned Mr. Baum with threats of financial harm
8. the City failed to investigate the "Duty to Accommodate" properly.

The Respondent's position

[28] The City argued that the legal burden of proving discrimination remains with the complainant throughout and that the complainant in this case did not discharge that burden. The City argued that the evidence did not bear out on the points raised above and that the Panel correctly found against these allegations. As such the Panel's decision on this issue should not be disturbed.

Discussion on the Law

[29] The law with respect to determining discrimination in physical disability cases has evolved significantly in the last 10 years, especially since the *Meiorin* case (*British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3). Unfortunately, despite the test for discrimination in *O'Malley*, which is correctly set out by the Director, many of the cases in the disability discrimination area jump over this first test of *prima facie* discrimination (or give it lip service) and head directly into a discussion of whether the employer properly accommodated the employee's disability. Accordingly, the law on the duty to accommodate has become quite well developed however, the initial test has been sparsely discussed until recently.

[30] Such a recent case is from the Supreme Court of Canada, *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de L'Hopital General de Montreal* (2007) 1 S.C.R. 161. In it, the majority (of six justices) focussed on discussing the duty to accommodate a disabled employee and its intersection with a clause in the collective agreement that was before them. Madam Justice Abella, writing on behalf of three concurring Justices, addressed the *prima facie* discrimination issue head on.

[31] Abella, J. felt that the central issue of the case, before dealing with the duty to accommodate, was whether the complainant had established a *prima facie* discrimination. In that regard she referred (at para. 47) to an often quoted definition of discrimination provided by Justice McIntyre in the Supreme Court of Canada case of *Andrews v. Law Society of British Columbia* (1989) 1 S.C.R. 143:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed

upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, **while those based on an individual's merits and capacities will rarely be so classed.**

[32] Justice Abella went on in *McGill* at paras. 48 and 49:

At the heart of these definitions is the understanding that a workplace practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based **not on their actual abilities, but on attributed ones.** The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.

What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. **It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy.** It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.

[Highlighting mine]

[33] She concluded by saying that it is when such a link is made that a *prima facie* case is made out. Further, that the determination of whether a *prima facie* case is made out depends on the facts of each case. For instance in the *Meiorin* case, “*prima facie* discrimination was established by the fact that the requirement at issue had the practical effect of excluding most women from employment as firefighters.” (para. 58).

[34] Another example where this test was recently used by our Courts, is in *United Food and Commercial Workers, Local 401 v. Real Canadian Superstore* (2008) ABQB 332. In this case, the complaint was dismissed on the basis that a *prima facie* case of discrimination had not been made out. Rawlins J. reviewed the test in *O'Malley*, and then stated at para 30:

I agree with the Arbitrator that the crux of this case is whether the Employer chose to dismiss Mr. Smith because of his disability or for some other reason. The question of whether there was a *prima facie* case of discrimination made out on the above test involves the interpretation of human rights principles and the application of the applicable law to the facts.

[35] Madam Justice Rawlins went on to find that the Arbitrator was correct in that case when he found that no *prima facie* case of discrimination resulting in the dismissal had been made out and dismissed the application.

Analysis

[36] Turning now to the facts in this case, as noted above, it is common ground that Mr. Baum is disabled. As such he fits within a group that is specifically protected against discrimination pursuant to the *Act*. The next question then is whether he has been “adversely affected” as per the *O’Malley* test for discrimination, or ‘arbitrarily or stereotypically disadvantaged’ as per the *McGill* discrimination test noted above.

[37] Firstly, I will review the evidence in the Record that deals generally with all of the complaints of discrimination raised by the Director. I will then deal with each of them individually.

[38] The Record shows that initially back in 2001, on an informal basis, Mr. Baum was given various projects to do that didn’t cause him concerns with his bursitis, gout and osteoarthritis. This included being given some jobs in another local (38) and paying union dues to them for awhile. These jobs ran out and he was placed on disability in June 2003. At no time was he ever fired.

[39] Mr. Baum testified that he continued to have contact with officials at the City regarding work, but that nothing came of it. He said that he complied with the City’s requests for various assessments, but did not seem to think that the results were representative of his capacities. He said he expressed interest in a number of specific positions, but either he was told that they were promotional in nature and that he could not be accommodated into them or he applied for them without success, which he felt was the result of the City blocking his interviews (although he admitted that he had no evidence that this was so).

[40] Judy McDermid, a return-to-work coordinator at the City, was in charge of Mr. Baum’s case starting in October 2003. She testified to her efforts to find an accommodated position for Mr. Baum. She also testified as to the process the City would follow and the various considerations it took into account in seeking an accommodated position. In essence, she said that she would first consider the employee’s current position and determine if modifications could be made to allow him to remain in that position. Failing that, she would look within the employee’s home department before going further afield. She indicated that union membership was a factor she had to consider and that she would search for a position in the employee’s own union before looking at other unions. Mr. Baum’s millwright position was within Local 37, which was made up primarily of “outside” workers. The City’s “inside” workers are primarily members of Local 38. Finally, she said that, while the City would look at placing a disabled employee in a position that was a promotion over their former position, they would do so only as a last resort if all other avenues had failed.

[41] Ms. McDermid initially had a report from Mr. Baum's physician indicating that he could not lift more than 5 pounds, which significantly restricted the options available within Local 37. However, Mr. Baum indicated to her that the medical report underestimated his capacity. Consequently, Ms. McDermid arranged for a functional assessment of Mr. Baum, which indicated that his physical abilities were greater than she had initially understood. She said this caused her to reconsider whether Mr. Baum's millwright position could be modified to suit his restrictions. She arranged for a worksite evaluation to determine what duties were required of a millwright. The Director argued that the worksite evaluation "was just assessing Mr. Baum doing a regular millwright job". However, Ms. McDermid's evidence was that this was done to determine whether modifications could be made to suit Mr. Baum and that part of the evaluation involved supervisory personnel canvassing other millwrights for their views on whether a person with Mr. Baum's restrictions could perform the job in a good faith effort to consider the possibility of modification of the millwright position. Ms. McDermid testified that Mr. Baum was very unhappy with the worksite evaluation, telling her that it was a waste of time and that he could not do millwright work. Mr. Baum denies having said this. Regardless, the fact is that an assessment was made and it did help in the end since it clarified on an objective basis that Mr. Baum could no longer perform even an accommodated millwright position.

[42] Having determined that Mr. Baum could not be returned to his millwright position, even with modifications, Ms. McDermid placed him in a custodial position in May 2004 which was supposed to fit his abilities to do moderate heavy work. However, this proved to be more physically demanding than she had been led to believe and, after a short time, Mr. Baum's physician indicated that he should be taken out of that job. Ms. McDermid advised Mr. Baum that he should cease reporting for that position and she began to look elsewhere.

[43] In February 2005, Ms. McDermid placed Mr. Baum in a data entry position having to do with the City's water efficiency program. However, she continued to look for other work for him, as this position was only temporary. She testified that she asked Mr. Baum for some indication of his typing skills, as this would be relevant to some of the Local 38 positions she was by then investigating. She says that Mr. Baum refused to cooperate with this request. Mr. Baum's version of events in this regard is different, but in any event, no assessment of Mr. Baum's typing skills was ever performed. Mr. Baum resigned in September 2006 while still employed with the water efficiency program.

[44] To return now to Mr. Baum's complaints, I will deal firstly with #5, and #7, the allegations that there was a culture of treating disabled people with disrespect and alleged threats of financial harm, or a poisoned work environment. If this had been accepted, it certainly would have been evidence of 'adverse treatment' based on being within a 'disabled group'. The Panel heard conflicting evidence on these points and found at para. 40 of its Reasons that this was not substantiated. In one potential instance of such disrespect of Mr. Baum, the Panel found that this was an example of "flippant behaviour" for which an apology was made as opposed to a "poisoned atmosphere". As this is a finding based on credibility, I give deference to the Panel who heard this *viva voce* testimony on this point. In any event, it appears to be a reasonable conclusion on the Record since, in addition, there was no evidence that there was a problem to any other "disabled person" beyond Mr. Baum's perceptions of his personal concerns. In other

words, neither of these points amounted to “adverse treatment” of Mr. Baum based on the findings of the Panel.

[45] The remaining complaints which the Director argued were evidence of *prima facie* discrimination are numbered 1, 2, 3, 4, 6, and 8. To repeat, these are:

1. Mr. Baum was underemployed in his accommodated position considering his qualifications
2. His treatment included doing labourious tasks when he was not able
3. His millwright position was not modified to meet Mr. Baum’s physical demands
4. The City relied on union issues to delay a search of a permanent accommodated position
6. the City delayed a proper assessment of the complainant’s physical capacities
8. the City failed to investigate the “Duty to Accommodate” properly.

[46] In order for the complainant to be successful with these complaints as *prima facie* discrimination based on disability, the Panel had to be, and now this Court in review, has to be satisfied that the alleged underemployment, unmodified position etc. was based on ‘attributed characteristics’ as opposed to ‘actual abilities based on the individual’s own merits and capacities’ or ‘that the employer’s conduct is based on stereotypical or arbitrary assumptions about persons with disabilities’ (to paraphrase the test in *McGill*).

[47] Reviewed on a global basis, a review of the Record shows that Mr. Baum was not treated in an arbitrary or stereotypical way, but instead was given opportunities based on his own physical capabilities within the City’s employment framework. I am of the view that the Panel was correct in finding insufficient evidence of *prima facie* discrimination in this case with respect to these specific complaints for the following reasons.

[48] Firstly, to come back to the evidence on complaint number 2, that Mr. Baum was forced to do “labourious tasks” when he was not able, it is questionable if this can be a human rights discrimination complaint at all, even if it was accepted by the Panel. In any event, the Record is clear that Mr. Baum was relieved of any heavy duty work when requested. The only time there is evidence that he may have had to perform some work which turned out to be too heavy was when he did a custodial job for a few weeks in 2004. According to the supervisor who spoke with the City’s placement person, this job was supposed to be within the capabilities of Mr. Baum based on his functional capacity test in December 2003. As soon as he advised this same coordinator that it was not working, he was relieved of this job.

[49] Next, I will deal with complaint numbers 3 and 6 together (3. his millwright position was not modified to meet Mr. Baum’s physical demands and 6. the City delayed a proper assessment of the complainant). Upon a review of the Record, it appears that the City accepted Mr. Baum’s word (or subjective complaints) for quite some time, along with his various medical reports from his own doctors which, as it turned out, underestimated Mr. Baum’s capabilities. The City can hardly be faulted for this. Further, when it came to their attention that Mr. Baum’s doctor’s

restrictions may be faulty, they arranged for a functional assessment within the month (December 2003). It then reassessed the millwright position and found that it was not possible to modify it because Mr. Baum just did not have enough physical capacities to do it. There was no evidence that it was attempting to spare expense or anything of that sort. Indeed, Mr. Baum did not indicate how this assessment was faulty or incorrect in any way. Accordingly, these complaints do not have merit in showing any arbitrary or stereotypical conduct on the part of the City that amounts to discrimination in my view. It is instead further evidence that the City dealt with Mr. Baum appropriately on his own personal merits and capacities.

[50] Next, I will deal with complaints 1, 4 and 8 together : that Mr. Baum was underemployed in his accommodated positions considering his qualifications, the City relied on union issues to delay a search of a permanent position, and the City failed to investigate the “Duty to Accommodate” properly.

[51] It is true that the jobs Mr. Baum was placed in likely did not match up to his qualifications and this was no doubt frustrating for him. However, the City was still looking for a better position when Mr. Baum quit. Further, there were a couple of positions that may have been much closer to Mr. Baum’s level of pay and qualifications available to Mr. Baum, but Ms. McDermid and others testified to Mr. Baum’s lack of enthusiasm for one of these positions, and his refusal to take testing to compete for another such position. While Mr. Baum either denied or downplayed any such lack of enthusiasm for the one position, the testing was never done for the other one, so he was not able to obtain the position. On the Record, this evidence does not show any arbitrary or stereotypical conduct on the part of the City.

[52] With respect to the union issue, there was evidence given to the Panel that the unions with which the City deals are very sensitive to matters such as seniority. The same may be said for promotion. Ms. McDermid testified that the City would consider accommodating an employee into a promotional position, but only as a last resort. She said that, in her view, they simply had not yet reached that point with Mr. Baum before he quit. For an employee to be accommodated into a promotional position potentially would prejudice other candidates for the position, particularly if they had more seniority than the accommodated employee. The evidence led by the City (and in particular the evidence of Wilf Steckler, the manager of labour relations for the City) confirmed that this process had been followed for some time and had been understood and accepted by the 11 unions as appropriate and fair in all of the circumstances given all of the vested interests and legal obligations. Accordingly, Mr. Baum’s treatment was not arbitrary but was based on City and union guidelines that all employees had to go through, not just disabled ones. It can hardly be said that Mr. Baum was being arbitrarily dealt with in that regard.

[53] I am bolstered in this regard by a review of some cases dealing directly with the duty to accommodate issue, as opposed to the *prima facie* discrimination issue, as they are instructive in order to assess whether arbitrary or stereotypical behaviour was happening.

[54] For instance, one test applied in this area was recently set out in *Callan v. Suncor Inc.*, (2006) ABCA 15 at para. 21, where our Court of Appeal discussed the standard an employer must meet in respect of its duty to accommodate:

There is no duty of instant or perfect accommodation, only reasonable accommodation. The reasonableness of the employer's accommodation must be evaluated considering the knowledge of the employer, together with the cost, complexity and expense of any physical accommodation required, and other similar factors. The test is not subjective, and the employee is not entitled to dictate the accommodation he or she will accept. Nor is the employer required to accept the complainant's own subjective assessment of his or her abilities.

[55] In view of the Court of Appeal's reference to "other similar factors" in *Callan*, I am satisfied that union and promotion issues are valid considerations in assessing the reasonableness of measures used by the City. Indeed, the case law cited by the City specifically also bears this out. In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at para. 38, the Supreme Court of Canada held as follows with respect to the effect of accommodation on other employees:

The primary concern with respect to the impact of accommodating measures is not, as in the case of the employer, the expense or disruption of the business of the union but rather the effect on other employees. The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted.

[56] In *British Columbia Public Service Agency v. British Columbia Government and Service Employees' Union (Riess Grievance)*, [2006] B.C.C.A.A.A. No. 64, the arbitrator held at para. 50:

The Union's position that the Employer ought to have accommodated him by changing other employees' job duties to allow the Grievor not to fight fires or to find him a position for which he was not qualified and would, in fact, for those positions suggested by the Union, have been a promotion and would be interfering with the agreements between the parties.

[57] In addition, the Ontario Arbitration Board in *Colonial Cookies v. U.F.C.W., Local 617P* (1999), 82 L.A.C. (4th) 101 at para. 18 referred to a case from the Ontario Divisional Court as follows:

Nevertheless, I am faced with the decision of the Divisional Court in *Etobicoke General Hospital* (which is binding on me) and several arbitration cases which

have said that the duty to accommodate should not be readily used (or used at all) to override seniority rights in job promotion cases. Although these latter cases are not binding on me, they are influential in that they recognize seniority rights as extremely important rights under any collective agreement. ...it is equally clear the rights of other employees must be considered when some form of accommodation is contemplated and one should try to seek accommodation with as little interference with those rights as possible...

[58] Another recent decision on point in this regard is *U.F.C.W., Local 1400 v. Westfair Foods Ltd.* (2007) SKCA 22. In that case, the employer was not found to have failed to properly accommodate a disabled cashier into a position in another union local that would have impacted the seniority and accrued rights of other employees. The Court said at para. 22:

...such a transfer...might reasonably be regarded as amounting to a substantial disruption in the work place, one apt to have serious repercussions in relation to employee morale and to the conduct of the business of the store, and could therefore be reasonably taken as amounting to undue hardship.

[59] Also, in this case, the Panel found that the City “did accommodate the complainant to the point of undue hardship”. The Panel made reference to:

- the early accommodated work the City had provided Mr. Baum in 2001,
- the fact that the City had held Mr. Baum’s millwright position open until December 2005 and that others would have had to fill in for him which would have been a hardship for the City,
- that although some of his accommodated work was of less pay he also received a top up from Great West Life, his disability insurer, and
- that Mr. Baum faced some issues because of union boundaries (since his union he was in represented the more physically demanding jobs and the issues surrounding promotions and seniority), but that the City was attempting to work those out.

[60] In sum, upon a review of the Record and the Panel’s reasons on the duty to accommodate, these last complaints made by Mr. Baum are not justified, and in any event, none of these complaints relate to a distinction based on “stereotypical or arbitrary characteristics” but rather on Mr. Baum’s personal merits and capacities with respect to his medical issues and positive efforts made to find him an accommodated position. This did not amount to any adverse treatment based on his disability, but on the contrary, reasonable treatment without any evidence of discrimination.

[61] In summary, upon a review of all the complaints, in my view, there was no link shown between Mr. Baum’s membership in a “disabled group” and any arbitrary or disadvantageous conduct on the part of the City that amounted to *prima facie* discrimination in this situation and the Panel’s finding in this regard is correct.

[62] Accordingly, the onus does not shift to the City to prove that the alleged discriminatory conduct or practice was justified because it was a *bone fide* occupational requirement and reasonable efforts on the part of the City were made as set out in the *Meiorin* and following cases. Given this finding, it is unnecessary for me to further consider this issue.

V. Conclusion

[63] In the result, the application is dismissed with costs to the Respondent City on Column 1.

Heard on the 29th day of April, 2008.

Dated at the City of Calgary, Alberta this 22nd of December, 2008.

K.M. Eidsvik
J.C.Q.B.A.

Appearances:

Arman Chak
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Deborah Dalton
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