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Alberta Human Rights Tribunal Decision Reinstates Reinstatement

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Case Commented On: *Pratt v University of Alberta*, 2019 AHRC 24 (CanLII)

While it has always been legally possible for an employer to be ordered to reinstate an employee after there has been a finding of discrimination, recent tribunals and courts have been reluctant to award this remedy. However, the *Pratt* case may open the doors again to this possibility in some circumstances.

Carmen Pratt (Mittelstadt) made a human rights complaint in June 2013 alleging discrimination on the ground of mental disability in the area of employment under s 7(1) of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*) (at paras 1, 4). After completing her Bachelor of Arts degree at the University of Alberta (U of A), in December 2011, Pratt started working as a casual employee at the U of A's Book and Record Depository. This became a permanent position on March 1, 2012. As an assistant, her job duties were split between the Special Collections Library (SCL) and the University Archives (at para 2), and she had one supervisor in each department. Three weeks later, on March 24, 2012 Pratt learned that her brother had committed suicide and she was thereafter involved with dealing with her brother's estate and burial (at para 2).

After this occurred, the U of A had concerns with Pratt's performance and these were formally discussed at a meeting on May 22, 2012 between Pratt and her SCL supervisor (at para 3). In mid-June 2012, the U of A sent Pratt a letter regarding their expectations for her performance during the probation period. On June 26, 2012 Pratt met with her SCL supervisor, explaining that she was only able to perform certain tasks (i.e., those not requiring sustained concentration) due to "everything going on in her life" (at para 3). Pratt also informed her SCL supervisor that she was seeing a counsellor. The next day, the employer decided to terminate Pratt. Her employment was terminated on July 5, 2012 (at para 3).

The U of A claimed that it had no knowledge of Pratt's mental disability and that she was terminated due to poor performance. The matter proceeded through the Human Rights Commission process, ending with a scheduled hearing before the Tribunal, wherein the Director of the Commission (Director) had carriage of the complaint (at para 4).

Having "carriage" means that the Director had found that the complaint had merit and the lawyer for the Commission was then responsible for presenting the Director's position. Usually, the complainant provides input about how they would like the complaint presented. However, the Commission's lawyer is not the complainant's lawyer, and does not take instructions from the complainant. In situations where the complainant and the Commission disagree on the remedy to be requested from the Tribunal, an individual can be self-represented, or can hire their own

lawyer. In *Pratt*, largely because of the desired remedy, the complainant was self-represented (at para 5).

After the matter was heard in September and October 2018 the Director, Respondent (U of A), and Complainant (Pratt) made written submissions to the Tribunal in December 2018 (at para 5).

The Tribunal Chair (D. Jean Munn, Q.C.) applied the three-part test for discrimination as set out by the Supreme Court of Canada (SCC) in *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61. In order to demonstrate that there has been *prima facie* discrimination, complainants must show that:

a) They have a characteristic protected from discrimination under the [Human Rights] Code;
b) They experienced an adverse impact with respect to the service [or other area]; and
c) The personal characteristic was a factor in the adverse impact (*Moore* at para 33).

Characteristic Protected from Discrimination:

After oral and documentary evidence was presented at the Tribunal hearing, the U of A conceded that Pratt was diagnosed with a mental disability as of April 19, 2012 and further conceded that Pratt was suffering from a mental disability at the time of her termination (at para 6).

Adverse Impact with Respect to Employment:

The termination of the complainant's employment was held to be an adverse impact (at para 13).

Connection Between the Complainant's Mental Disability and the Termination of Her Employment:

Most of the decision addresses this issue. First, the U of A argued that it had no knowledge of the disability, as Pratt had not disclosed that she was disabled, nor did she provide any medical information to the U of A indicating that she required accommodation (at para 6). Further, the U of A argued that it was Pratt's poor performance and lack of progress that were the reasons for termination (at para 15). However, Tribunal Chair Munn noted that the SCC had held in *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30 that the settled view was that the protected ground [mental disability] need only be a factor in the decision to terminate (at para 14).

While Tribunal Chair Munn did not quarrel with the performance concerns offered by the U of A, she noted that:

> This case will turn on whether the respondent knew, ought to have known, or had a duty to inquire as to whether the complainant was suffering from a disability and the extent to which, if any, the disability was a factor in the decision to terminate the complainant's employment (at para 17).

Pratt submitted that she was unwell, that she informed the U of A and that she had requested that her duties be modified. She also argued that the U of A failed to acknowledge its duty to accommodate after she had requested accommodation (at para 18).

The Director submitted that where the surrounding circumstances indicate that an employee has a mental disability, and the employer is considering termination, even if there are performance concerns, the employer must inquire whether the employee suffers from a disability and whether they can be accommodated (at para 19). The Director relied on several decisions to support this proposition: *Zaryski v Loftgard*, 1995 CanLII 10834 (SK HRT); *Willems-Wilson v Allbright Drycleaners Ltd*., [1997] BCHRTD No 26; *Sylvester v British Columbia Society of Male Survivors of Sexual Abuse*, [2002] BCHRTD No 14; *Gaisiner v Method Integration Inc.*, 2014 HRTO 1718 and *Lethbridge Industries Ltd. v Alberta (Human Rights Comm*), 2014 ABQB 496 (at paras 20-26).

The Respondent argued that a complainant cannot establish a *prima facie* case of discrimination when the respondent is not aware that the complainant has a disability. The U of A also argued that an employee must declare their disability and advise the employer about the required accommodations (at para 27). The U of A relied on several decisions to support these submissions: *Burgess v Stephen W. Huk Professional Corp*., 2009 AHRC 8 (CanLII); *Berridge v Calgary (City)*, 2007 AHRC 9; *Rezaei v University of Northern British Columbia (No. 2)*, 2011 BCHRT 118; *Gardiner v British Columbia (Attorney General)*, 2003 BCHRT 41; *Stewart v Ontario (Government Services)*, 2013 HRTO 1635; *Alexander v Northern Health Authority (No. 2)*, 2008 BCHRT 389 and *Gaisiner v Method Integration Inc.*, 2014 HRTO 1718 (at paras 28-35).

Tribunal Chair Munn summarized:

> The common thread running through all of the case law put before the Tribunal is that findings with respect to the employer's duty to inquire as to whether an employee is suffering from a disability will be heavily dependant on the facts of each particular case (at para 36).

Chair Munn found that Pratt had proven the connection between the termination and her disability. She accepted Pratt's evidence about what she had told her supervisors about her situation and that she was unable to perform her job duties. On several occasions, when she met with her supervisors, Pratt had explained that she had difficulties with her memory, and with focusing and concentrating. It should have been clear to her employer that she had a disability. Her supervisors were aware that she was attending counselling, had been attending a family doctor and had sought support for her difficulties from relatives. Further, Pratt had been told and believed that she was going to be accommodated, although there was no genuine intent to accommodate her (at paras 142-153).

After *prima facie* discrimination has been established, the burden shifts to the Respondent to demonstrate that the treatment of the complainant was a *bona fide* occupational requirement or otherwise was reasonably justified (at para 154). Chair Munn found that there was no evidence that the U of A ever considered whether Pratt needed accommodation for a disability. In particular, at the meeting of June 26, 2012 when Pratt told her supervisor about her limitations,

the U of A then had a duty to inquire as to her fitness. The only inquiry was the verification about whether Pratt had reported to the U of A's health and wellness service—this was a standard step in the termination process. Once Pratt had asked the supervisor to modify her job duties due to issues related to her mental health, the U of A should have inquired for further information (at para 155). Chair Munn also noted that the U of A had established accommodation policies, and that the U of A could have and should have asked Pratt to provide evidence from health professionals as to her limitations (at paras 155-156). Thus, she concluded that there was no justification for the U of A's failure to accommodate Pratt (at para 157).

Remedy

Having found that the case for discrimination was made out, Chair Munn turned to the remedy. This is where the three parties differed. The Director sought $25,000 to $30,000 in compensation for discriminatory treatment and lost wages for a period of 12 months. Pratt sought reinstatement and compensation for lost wages. The U of A argued that the appropriate range of damages for hurt feelings should be between $8,000 to $10,000 and that the claim for lost wages should be limited to the end of the six-month probationary period (August 31, 2012) (at para 158).

Having found that the U of A discriminated against Pratt, and the "impact on the complainant's mental health was profound", Chair Munn awarded damages for injury to dignity and self-respect in the amount of $20,000 (at para 162).

Chair Munn ordered an award for loss of income of $34,795.40 (at para 167).

As noted previously, Pratt sought the relatively rarely awarded remedy of reinstatement. She submitted that she had not been able to secure comparable employment and that since the U of A is a large and sophisticated employer, it should be able to accommodate her disability (at para 168).

The U of A opposed reinstatement, arguing that the employment relationship is no longer viable. The following reasons were presented:

- Pratt was unable to accept that the employer has the prerogative to assign employment duties and priorities, which may change over time;
- Pratt went over supervisor's head to complain about her supervisor and her job duties;
- Pratt had stated in her submission that she is no longer sure about how she feels about the U of A given the irregularities between the U of A's policies and practices;
- Pratt's fixation on the collective agreement demonstrated that she was fixated on her job duties and had a fundamental mistrust of the U of A and the union; and
- Pratt did not demonstrate that she was suitable for one position (Special Collections Library) and it had a very small staff; further, she had demonstrated animosity towards the Special Collections supervisor. (at paras 169-170)

Chair Munn looked at three decisions where reinstatement had been ordered: *Cowling v Her Majesty the Queen in Right of Alberta*, 2012 AHRC 12, *Fair v Hamilton-Wentworth District School Board*, 2013 HRTO 440, upheld as *Hamilton-Wentworth District School Board v Fair*,

2016 ONCA 421 and *Krieger v Toronto Services Board*, 2010 HRTO 1361. In all three cases, the workplace was large and sophisticated, and there was an opportunity for the employee to be placed in a setting outside of where the discrimination had occurred. Further, the complainants did not hold any ill-will toward the respondent organizations as a whole (at paras 171-177). In *Krieger*'s case, the Tribunal found that given the nature of his termination, his career would have come to an end without re-instatement (at para 177).

Noting the similarities in the *Pratt* case, Chair Munn also stated that Pratt had been unable to secure comparable employment and is unlikely to do so, thus eliminating her career options (at para 179). She held that Pratt's pursuit of legal rights and remedies within the employment setting and beyond should not be held against her. Further, there are numerous and varied library systems at U of A that would allow Pratt to be placed in an equivalent position but not in a position with her immediate SCL supervisor where there may remain "hard feelings" (at para 180). Chair Munn went on to order reinstatement for Pratt (Mittelstadt).

It would seem that the remedy of reinstatement could be a viable option if:

- the employer is "large and sophisticated",
- there is an opportunity to re-instate the person into an equivalent position but in a different setting, and
- the position is rather specialized or depends on particular training and education, and the employee's career would likely come to an end (e.g., teacher, police officer, library staff).

It should be noted that the U of A (and Pratt) can appeal this decision within 30 days.

This post may be cited as: Linda McKay-Panos, "Alberta Human Rights Tribunal Reinstates Reinstatement" (July 11, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/07/Blog_LMP_Pratt.pdf