COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *March v. Yukon (Human Rights Board of Adjudication)*, 2010 YKCA 3

Date: 20100317
Docket: 09-YU634

Between:

Darrell V. March

Appellant
(Petitioner)

And

Yukon Human Rights Board of Adjudication, Yukon Government, Edward Huebert and Yukon Human Rights Commission

Respondents
(Respondents)

Before: The Honourable Mr. Justice Mackenzie
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Neilson

On appeal from: Supreme Court of Yukon, April 24, 2009
(*Yukon Human Rights Commission and March v. Yukon Human Rights Board of Adjudication and Yukon Government*, 2009 YKSC 39, Whitehorse Docket No. 07-AP009)

Counsel for the Appellant:	S. Roothman
Counsel for the Respondents, Yukon Government and E. Huebert:	Z. Brown
Place and Date of Hearing:	Vancouver, British Columbia January 28 and 29, 2010
Place and Date of Judgment:	Vancouver, British Columbia March 17, 2010

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[1] This appeal is from an order of a judge of the Yukon Supreme Court dismissing an appeal from a decision of a Yukon Human Rights Board of Adjudication ("the Board") that dismissed the complaint of the appellant, Darrell V. March, of discrimination in employment contrary to the provisions of the *Yukon Human Rights Act*, R.S.Y. 2002, c. 116 ("the *Act*"). Mr. March's complaint alleged that the respondents Edward Huebert and the Yukon Government discriminated against him in his employment on the ground of mental disability contrary to ss. 7(h) and 9(b) of the *Act*. The complaint arose out of the circumstances in which Mr. March was involuntarily placed on temporary paid leave from his employment with the Yukon Department of Environment in May 2005. Edward Huebert was the deputy minister of the department at all relevant times, and involved in the decision to place Mr. March on temporary leave.

[2] The complaint was referred to the Board by the Yukon Human Rights Commission ("the Commission") which became a party to the proceedings in support of the complaint. The Board concluded that Mr. March was placed on leave because of his inappropriate conduct and not as a discriminatory stereotypical reaction to his bipolar mental disability. Under s. 28 of the *Act*, an appeal may be brought to the Court from a decision of the Board on a question of law. An appeal to a judge at first instance was dismissed. For the reasons that follow, I am satisfied that there was no reviewable error of law in the Board's decision and therefore the appeal to this Court must be dismissed.

Background

[3] Mr. March began working with the Yukon Department of Environment in July 1995. In 1999 he was diagnosed with bipolar disorder after experiencing an acute manic episode. He returned to work in 2000. Upon returning he made a presentation to management about his bipolar condition and has since continued with proactive education of fellow employees regarding his medical condition. The

department accommodated his condition by permitting flexible work arrangements, including more frequent breaks, restructuring of work tasks and providing him permission to work from home. Mr. March managed his condition under an integrated treatment plan that involved medical professionals and others.

[4] Mr. March's bipolar condition is typically experienced through a depressive phase of several months in the winter and a hypomanic phase in the spring. The complaint summary describes symptoms of hypomania as including "reduced need for sleep, increased energy levels, increased mental acuity but at times a reduced ability to sustain focus and concentration for prolonged periods."

[5] In August 2004 Mr. March started a one-year temporary assignment as Acting Assistant Deputy Minister of Corporate Services with the Department of Environment while the regular incumbent was on sabbatical. In March 2005 he advised the deputy minister, Mr. Huebert, that he was in a seasonal hypomanic phase. Mr. Huebert recognized that Mr. March could require greater levels of accommodation. Mr. March continued his flexible work routine, which included irregular hours, sometimes starting as early as 3 or 4 a.m.

The Circumstances of the Complaint

[6] The events giving rise to the complaint occurred near the end of May 2005. The Board summarized them as follows:

> ... On May 26, 2005, Mr. March attended a weekly senior management meeting. At that meeting, issues surrounding an upcoming departmental initiative, GIS or New Directions, were to be discussed. Mr. March criticized the project and challenged the course of action determined by the DM. Mr. Huebert, Deputy Minister for the Department of Environment, characterized Mr. March's behaviour at the meeting as "extremely aggressive," "argumentative," and "disruptive."
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> In a discussion after the meeting, Mr. Huebert asked Mr. March why he had been so aggressive. Mr. March replied, "I am not aggressive. I am passionate." Mr. Huebert testified that he felt Mr. March had moved away from a "solution-minded attitude to being very aggressive and judgemental."
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> On May 27, 2005, Mr. Huebert sent a letter to Mr. March in which he noted: "*It has become very apparent over the past week that you have become unable to perform your duties as Acting ADM, Corporate Planning. I am*

therefore directing you to be off work immediately. You will be on paid sick leave. I strongly advise you to seek medical assistance. Further I am a strong supporter of yours, Darrell, and I want to support you in any way I can and help you to return to work as soon as you are able to. In the meantime, I would like to again say that I feel you need to address your medical condition as soon as possible."

Mr. March saw this letter as "intended to be demeaning in a most appalling way."

On May 27, 2005, Nonie Mikeli, Director of Human Resources for the Department of Environment, on the direction of Mr. Huebert, asked Mr. Klassen, as the Network Administrator "to disable Darrell's computer account." Later that day Mr. March came into Mr. Klassen's office "in an agitated state demanding to know who had authorized me to disable his account," according the Mr. Klassen. Once informed by Mr. Klassen, "this agitated him more" particularly when Mr. Klassen testified "that there was concern expressed about him and his meds." This comment was given in "the context of his behavioural swing and his openness in requesting feedback from staff and friends."

On May 31, 2005, Mr. March saw his family doctor, Dr. Ross Phillips. He did not seek an assessment from Dr. Phillips at this time. Dr. Phillips noted that Mr. March exhibited 'pressure of speech,' a symptom of bipolar disorder but couldn't conclude that Mr. March was in a manic state without further evidence. Mr. March also met with Mr. Jon Breen, of the Workplace Diversity Employment Office, for the first time.

Mr. March met with Dr. Phillips again on June 2, 2007. Dr. Phillips reported that Mr. March was showing elements of hypomania. He placed Mr. March on Respiridone for this reason. Dr. Phillips did not complete a medical report for Mr. March and did not require him to take time off work because, as he testified, Mr. March was already on leave.

On June 8, 2005, Mr. March met with Ms. Mikeli and Mr. Huebert. Without informing the others present, Mr. March tape recorded the meeting. He expressed concerns about his e-mail being cut off and that people were being told to stay away from him as he was on leave. Mr. Huebert stated that he never told people to stay away from him but did have his e-mail disabled for Mr. March's own protection while he was on medical leave. They agreed to reinstate his access to his e-mail, on the condition that any out-going communications would be copied to Mr. Huebert. Ms. Mikeli e-mailed Mr. Klassen with instructions to this effect.

Mr. March met with Mr. Huebert, Mr. Breen and Michael Hanson, a Staff Development consultant, on June 10, 2005. Mr. March proposed a special assignment (a Yukon-wide tour of all campgrounds) to be conducted during his medical leave as an accommodation to his mental disorder. During the discussions, all agreed there would be value in seeking a psychiatric assessment. In a letter to Mr. March later that day, Mr. Huebert wrote, "I believe that, due to your behaviour exhibited in the workplace over the past three weeks, I would prefer that you remain on leave until you have received an assessment from your psychiatrist."

> Due to a series of unforeseeable delays, Mr. March was finally flown to Vancouver at the employer's expense to have his assessment done by his former psychiatrist, Dr. Jaime Smith. On August 10, 2005, Dr. Smith advises Mr. Breen that Mr. March is able to return to work.
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> In e-correspondence of August 17, 2005, with Mr. Breen, Mr. March notes that he had applied for annual leave from August 17 to September 7, 2005, and would return to work following his annual leave. He also suggests the need for a workplace accommodation; because "it may be inappropriate for me to return to a position directly or indirectly subordinate to Ed until the matter is fully resolved ... I will consider temporary assignments in other departments if there is something suited to my background."
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> Mr. March returned to work and continued to work in various departments other than in his substantive position with the Department of Environment.

[7] Mr. March continued to pursue his complaint related to the temporary suspension. The summary of his complaint filed with the Commission in December 2005 stated: "I believe that I was unfavorably treated on the basis of my mental disability by being directed off work involuntarily and unilaterally." The Commission referred the matter to the Board and it held a hearing extending over 19 days between April and September 2007. Before the Board, Mr. March argued that the Department should have initiated disciplinary action against him as they would have for any other employee, as formal discipline proceedings would have provided him with an opportunity to challenge his involuntary leave. The Commission contended that the employer's actions arose out of a stereotypical reaction to a mental disability rather than procedural compliance. The Board rejected those contentions. It concluded:

> Based on the evidence that Mr. March had provided extensive training, imparted honest information regarding bipolar disorder, and clearly expressed to coworkers and supervisors the symptoms of seasonal affect, it cannot be determined that the actions of the employer were based on stereotyping.
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> Based on the evidence, including the submission by the Complainant that the employer had effectively and successfully accommodated him for six years, the employer did not discriminate against the Complainant. Their determined course of action was to deal with his inappropriate behaviour in a manner that was beyond the usual route of discipline by considering his medical condition.

It dismissed the complaint.

[8] Mr. March and the Commission appealed the Board's decision. The judge dismissed the appeal, summarizing his conclusions at paras. 18 to 20 of his reasons:

> [18] It must be remembered that the essence of discrimination is arbitrary, negative treatment. The fact that March has characteristics of a protected group did not, in and of itself, preclude the Government from addressing workplace misconduct.
>
> [19] Discrimination arises only where there is a causal connection between the protected characteristics and the actual arbitrary, negative treatment. The Government was under a positive duty to seek out medical information and was entitled to request a medical assessment before March returned to work.
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> [20] If one views the Board's ultimate conclusion and result as one of employer accommodation neutralizing the initial presumptive discrimination [then] the complainant has ultimately failed to establish discrimination...

Analysis

[9] The senior management meeting of 26 May 2004 is at the centre of this dispute. Mr. March's position was that his conduct at the meeting, while passionate, was not disruptive or inappropriate. In the alternative, even if his conduct was inappropriate it was not caused by his mental disability and the action of the respondents in removing him from the workplace was a stereotypical reaction to his disability and discrimination contrary to s. 7 of the *Act*.

[10] The respondents' position was that his conduct was disruptive and justified his temporary removal from the workplace. Against the known background of Mr. March's mental disability, the respondents considered that his conduct was potentially related to his disability but reached no definite conclusion. They asked him to seek medical assistance and obtain a medical assessment of his condition. They expressed their support and desire to have him return to work as soon as he was able. Their position was communicated not only in the letter quoted by the Board but also in several conversations between Mr. March and Mr. Huebert that were secretly recorded by Mr. March. Mr. March saw his family doctor but he did not ask for a medical opinion, apparently because he thought at that stage the situation could be cleared up without a medical assessment.

[11] The unusual feature of this case is that the respondents were aware of Mr. March's disability and had been accommodating it for years. They recognized its potential involvement in Mr. March's conduct at the May 26 meeting and in the days leading up to it. They considered his conduct to be sufficiently disruptive as to require his temporary removal from the workplace while he arranged for a medical assessment to help determine what actions were necessary or appropriate. No decision was taken beyond those temporary measures.

[12] In this respect the case differs from most "hybrid" employment discrimination cases illustrated by *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union*, 2008 BCCA 357, ("*Gooding*"). Typically in such cases the employee is disciplined for misconduct and the disability to be accommodated is raised in a grievance. For example *Gooding* involved a liquor store employee discharged for theft of liquor, who grieved his dismissal on the ground that he had an alcohol dependency that required accommodation under the B.C. *Human Rights Code*.

[13] In the instant case, the respondents never reached a stage where disciplinary action was contemplated. They had accommodated Mr. March's disability in the past and were prepared to continue to accommodate him, short of tolerating disruptive and inappropriate conduct inconsistent with performance of his duties. The issues therefore involve actions taken by the employer at a preliminary stage to inquire into the cause of his inappropriate behaviour and determine if it was due to his medical condition or if it warranted discipline.

[14] Mr. March's position, which he maintained on appeal, is that his conduct was not disruptive and inappropriate and there were no grounds to temporarily remove him from the workplace. He contends that his removal was therefore a stereotypical reaction to his disability, arbitrary and discriminatory. The lack of any disciplinary action by the respondents deprived him of the ability to challenge their characterization of his conduct through a grievance procedure.

[15] Whether Mr. March's conduct was disruptive and inappropriate or not was a question of fact. The evidentiary facts were largely undisputed and the primary task of the Board was to resolve the conflicting interpretations and decide whether Mr. March's conduct was disruptive and inappropriate. The issue involved an individualized assessment of particular facts. The Board heard the evidence and concluded that Mr. March's conduct was disruptive and inappropriate and the respondents acted reasonably in the circumstances in removing him from the workplace pending a medical assessment. The action taken was temporary and responsive to the disruptive conduct and not an arbitrary reaction attributable to a discriminatory stereotyping of his disability. Instead, it was directed to ascertaining the cause of his conduct, and deciding how it should be addressed.

[16] Mr. March contends that the conclusions of the Board were in error and asks us to revisit the evidence. In my respectful view, he misconceives the appellate function. An appeal lies only on a question of law and the Board's findings on the conflicting evidence were findings of fact. They can only be reviewed on a standard of palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. Counsel referred us to aspects of the evidence which Mr. March contends the Board ignored or failed to take sufficiently into account in reaching their conclusion. It is trite law that reasons for decision do not require an exhaustive review of the evidence. Mr. March formed an antipathy to Mr. Huebert and made unsubstantiated allegations that the Board properly did not find it necessary to address explicitly in its reasons. I am not persuaded that the Board overlooked or misapprehended any material evidence in its deliberations. None of the points raised, separately or in combination, can meet the *Housen* standard of reviewable error.

[17] The complaint was dismissed because Mr. March failed to establish a *prima facie* case of discrimination on the facts found by the Board. The Board's decision does not express its conclusions in those terms but it does state clearly that Mr. March's behaviour was inappropriate and "it cannot be determined that the actions of the employer were based on stereotyping". In *Clifford v. Ontario (Attorney General)*, 2009 ONCA 670, Goudge J.A. observed (at para. 43) that legal perfection

is not required in administrative decisions made by non-lawyers, if there is an intelligible basis for the decision and the issue is straightforward and assumed to be familiar to the tribunal. Here the finding of the Board was that Mr. March's conduct was disruptive and inappropriate. That was a straightforward factual finding and it provided an intelligible basis for the conclusion that the action taken by the respondents in removing Mr. March from the workplace while the matter was investigated was not arbitrary or based on stereotype.

Conclusion

[18] In summary, the respondents temporarily removed Mr. March from the workplace to address and investigate unacceptable behaviour that they were not required to tolerate. It was not a stereotypical reaction to his mental disability. They could not ignore his disability and they asked for a medical assessment of his condition as part of that investigation. That assessment was delayed, in part because Mr. March considered that his conduct was appropriate and there was no cause for a medical opinion. Mr. March returned to employment after the eventual medical assessment. The investigation ultimately revealed no basis for disciplinary action, and the process never reached the stage of formal hybrid grievance considerations. Mr. March remains convinced that his behaviour was appropriate in the face of the Board's contrary conclusion. Nonetheless, he was given a fair and exhaustive hearing before the Board and there is no reviewable error in its conclusions of fact. Dismissal of the complaint inevitably followed. There was no error of law in the Board's dismissal that would permit this Court to disturb its decision.

[19] Accordingly, I agree with the conclusion of the judge on the first level appeal that the appellants failed to establish *prima facie* discrimination. I would dismiss the appeal. Costs of the appeal to the respondents follow the event.

"The Honourable Mr. Justice Mackenzie"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Madam Justice Neilson"