

**In the Court of Appeal of Alberta**

**Citation: Brewer v. Fraser Milner Casgrain LLP, 2008 ABCA 435**

**Date:** 20081219

**Docket:** 0603-0184-AC

0603-0221-AC

**Registry:** Edmonton

**Between:**

**Janice Brewer**

Respondent  
(Applicant)

- and -

**Fraser Milner Casgrain LLP &/or FMC Services Limited Partnership and  
the Chief Commissioner of the Alberta Human Rights and Citizenship Commission**

Appellants  
(Respondents)

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**The Court:**

**The Honourable Mr. Justice Ronald Berger  
The Honourable Mr. Justice Jack Watson  
The Honourable Mr. Justice Frans Slatter**

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**Memorandum of Judgment**

Appeal from the Order by  
The Honourable Mr. Justice B.R. Burrows  
Dated the 7<sup>th</sup> day of April, 2006  
Filed on the 3<sup>rd</sup> day of August, 2006  
(2006 ABQB 258, Docket: 0503-05118)

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## Memorandum of Judgment

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### **The Court:**

[1] This is an appeal from a chambers decision which quashed a decision of the Chief Commissioner of the Alberta Human Rights and Citizenship Commission. The Chief Commissioner upheld the dismissal of the respondent's complaint of discrimination on the basis of physical disability. The underlying issue is whether the appellant employer failed to accommodate the respondent's disability.

### Facts

[2] The respondent legal secretary developed symptoms of dyspnea (laboured breathing), chest tightness, light-headedness, headache, rashes, dizziness and disorientation. Her physician identified multiple chemical sensitivities as a likely cause. Specific triggers include scents, perfumes and chemical smells.

[3] The appellant took steps to accommodate the respondent. It asked its staff to refrain from the use of perfumes and fragrances. The respondent was permitted to use a washroom in the office sick room, rather than the public washroom. Air cleaners were placed in the area in which she worked. She was allowed to use charcoal filtered disposable air masks when necessary. Her work hours were changed slightly so she would arrive at and leave the office later than most of the other employees and thereby avoid contact with crowds. These measures were not totally effective.

[4] After discussions between the respondent's lawyer and the appellant, it was agreed that a further report would be commissioned from Dr. Hoffman, a specialist in occupational and environmental medicine. In October 2001 he examined the workspace, and made recommendations on minimizing the exposure of the respondent to other people, minimizing chemicals in the workplace, improving ventilation at the respondent's desk, and modifying her workspace. On October 19th, 2001 the respondent's lawyer asked that some of the specific recommendations made by Dr. Hoffman be implemented.

[5] At the same time that Dr. Hoffman was conducting his review, the appellant was renovating the 30th floor of the office building where it maintains its premises. On completion of those renovations on November 12th, 2001, the respondent's desk was moved to the 30th floor. This removed her access to the sick room washroom, and exposed her to some chemicals left over from the renovation. On November 14th, 2001 the respondent left work and went on short term disability.

[6] Discussions continued. About one month after the respondent was last at work, the appellant

advised that the respondent's work assignment would be changed. She would no longer work with a particular lawyer, but would be assigned to do word processing at a work station where (as requested) she would have reduced contact with other people. She was also advised that it was not possible to continue the washroom accommodation to her on the 30th floor because the only washroom on that floor was the public washroom.

[7] When the respondent's lawyer inquired again about the implementation of Dr. Hoffman's recommendations, the appellant replied that the respondent's ability to work in the new 30th floor environment would be monitored. She never returned to work.

#### Proceedings Before the Commission

[8] In October of 2002 the respondent filed a complaint with the Alberta Human Rights and Citizenship Commission. A Human Rights Officer issued an Investigation Report on June 18th, 2004. He concluded that the appellant was willing to accommodate the respondent, and had made attempts to do so. He found that the appellant had reasonably requested more up-to-date medical reports, which the respondent had not provided, and that the respondent had refused him direct access to her doctors. The Investigator regarded the failure to provide full medical information as being a failure on the part of the respondent to cooperate with the investigation. He also saw her failure to return to try the new work environment as uncooperative.

[9] The Human Rights Officer summed up his findings as follows:

Human rights law indicates that the employee cannot expect a perfect solution when attempts are made to accommodate the individual needing such. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged. The employee also has a responsibility to cooperate with the accommodation process. Evidence shows that the Complainant did not provide such cooperation. Evidence shows that the respondent had made reasonable attempts to accommodate the Complainant's physical disability and was prepared to continue doing so.

#### Recommendation

In the absence of evidence to show that the respondent failed in its duty to attempt to reasonably accommodate the Complainant to the point of undue hardship, there is no reasonable basis to proceed with the complaint. It is recommended that this complaint be dismissed.

The Director subsequently dismissed the complaint for the reasons given by the Investigator.

[10] The respondent then applied to the Chief Commissioner for a review of the Director's decision. The Chief Commissioner upheld the dismissal, holding that the appellant was justified in denying that the respondent had the physical disability she identified. In any event he found that the appellant had made reasonable attempts to accommodate the respondent's condition, and that the respondent had been unco-operative. He concluded: "I see no reasonable basis to advance this case to the panel hearing stage and hereby dismiss the appeal."

### Judicial Review

[11] The respondent successfully applied for judicial review of the Chief Commissioner's decision: *Brewer v. Fraser Milner Casgrain LLP*, 2006 ABQB 258, 399 A.R. 233, 46 Admin. L.R. (4th) 188. The chambers judge concluded:

- (a) The Chief Commissioner was mistaken in assuming that the appellant denied that the respondent had a disability. The appellant never took that position, and the Investigator did not cast any doubt on the existence of a medical condition as described by the respondent.
- (b) The Chief Commissioner was wrong to equate a physical disability with a firm diagnosis, because the presence of symptoms could be a sufficient disability under the statute even if the doctors were unsure of the cause.
- (c) It was reasonable for the respondent to deny the Investigator direct access to her doctors, and the Chief Commissioner was not justified in categorizing that as a failure to co-operate, nor in drawing any adverse inference from it.
- (d) The failure of the respondent to supply up-to-date medical information "does not have the significance the Chief Commissioner attached to it."
- (e) Surveillance evidence gathered by the respondent's long term disability insurer was insufficient to show she did not have a disability.
- (f) It was unreasonable to expect the respondent to try out the new work environment, and to characterize her refusal to do so as being uncooperative.

The chambers judge quashed the decision of the Chief Commissioner, leading to this appeal. (The parallel appeal by the Commission was quashed: *Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 160, 90 Alta. L.R. (4th) 201.)

### Application for Fresh Evidence

[12] The respondent has applied to supplement her book of authorities, or in the alternative to introduce fresh evidence. The material in issue is a “Policy on Environmental Sensitivities” recently published by the Canadian Human Rights Commission. The Policy states the position of the Commission that environmental sensitivity can amount to a disability that can trigger a duty to accommodate. It includes some possible ways that this type of disability can be accommodated.

[13] Alberta enactments, including policies that have the force of law, can be received by the court as authorities. Generally, enactments from other jurisdictions would not be considered an “authority”, unless used for comparative purposes. Decisions of courts and tribunals from all jurisdictions may also be received. Sometimes the distinction between a “policy” of a tribunal and a “decision” of a tribunal may be elusive. Some tribunals hold hearings and issue reasons and orders of general application that will apply to a large number of cases. The distinction between these global decisions and policies is not always apparent.

[14] The tendered Policy is not a decision of the Canadian Human Rights Commission that could qualify to be cited as an “authority” in this appeal. It is a policy of a legislative kind, and is not a part of the common law.

[15] Evidence may not be included in the book of authorities: *Langan v. Watson*, 2007 ABCA 94, 74 Alta. L.R. (4th) 201 at para. 5. To the extent that it suggests ways that chemical sensitivity can be accommodated, the tendered Policy is a form of expert evidence that must be the subject of a fresh evidence application. Given the issues before the Court, and the standard of review, that evidence is not material. The Policy was also tendered as evidence that chemical sensitivity can and should be included in the definition of “physical disability” in the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, s. 44(1)(l). Generally speaking, evidence of the meaning of ordinary words in a statute is not admissible: *R. v. S. (G.)* (1988), 67 O.R. (2d) 198 (C.A.), aff’d [1990] 2 S.C.R. 294; *Ontario (Ministry of Natural Resources) v. Ontario Federation of Anglers and Hunters* (2001), 143 O.A.C. 103, 32 Admin. L.R. (3d) 282 (Div. Ct.); *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904, 69 Alta. L.R. (4th) 98 at para. 48. The interpretation of the statute is a question of law. For that reason also the Policy is not admissible. The preliminary application is therefore dismissed.

#### Standard of Review

[16] The chambers judge concluded that the standard of review for decisions of the Chief Commissioner when deciding to refer complaints to a full human rights panel was reasonableness *simpliciter*. In *Mis v. Alberta (Human Rights and Citizenship Commission)*, 2001 ABCA 212, 293 A.R. 391 at para. 9 it was held the Chief Commissioner “is given wide latitude in performing the screening function”. This standard of review was confirmed in *Callan v. Suncor Inc.*, 2006 ABCA 15, 380 A.R. 247. The decision under appeal was rendered before the decision in *Dunsmuir v. New*

*Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9. Under the *Dunsmuir* analysis the equivalent standard of review is reasonableness: *Walsh v. Mobil Oil Canada*, 2008 ABCA 268, 94 Alta. L.R. (4th) 209 at para. 55.

[17] The test for reasonableness was described as follows in *Dunsmuir*:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The chambers judge used the pre-*Dunsmuir* formulation of the reasonableness standard, and concluded the test was whether the Chief Commissioner's decision could survive a "somewhat probing analysis." Under the present test, the Chief Commissioner's decision not to refer the complaint to a full panel should be tested for "justification, transparency and intelligibility", and for whether it is "within a range of possible, acceptable outcomes."

[18] While the chambers judge correctly stated that the standard of review is reasonableness, it is not clear that that standard was actually applied to the decision of the Chief Commissioner. The chambers judge stated that the Chief Commissioner "gave inappropriate emphasis" to the lack of a firm diagnosis; that he was "not justified" in his criticism of the respondent's failure to provide access to her doctors; that the request for current medical information did "not have the significance the Chief Commissioner attached to it"; that the evidence "did not justify the conclusion" that the respondent was not disabled. This is the wording of a correctness review. Rather than subjecting the decision to review for reasonableness, the chambers judge substituted his own decision for that of the Chief Commissioner on a number of points.

#### Failure to Co-operate

[19] There are two aspects of the failure to co-operate on this record that should be kept distinct. The first is the obligation of a complainant to co-operate with the Commission's investigation. The second is the obligation of a complainant to co-operate with his or her employer's attempts to

accommodate a disability.

[20] Once a complainant puts a matter in the hands of the Commission, the Commission is entitled to expect full co-operation in the resulting investigation. The Commission is entitled to conduct an independent and even-handed inquiry into the complaint: *Act*, s. 23. The complainant cannot legitimately assert a right to screen the evidence available to the Commission, nor direct how the investigation is to be conducted. Specifically, the Commission was entitled to take the view that the respondent could not legitimately control contact between the Investigator and her doctors with respect to relevant and material matters.

[21] Given the standard of review, it was not open to the chambers judge to conclude that while “it would not be unreasonable for the Investigator to speak directly to the physicians, it would, in my view, be unreasonable for him to expect consent to his doing so in Ms. Brewer's absence.” There was evidence on the record of the requests of the appellant and the Investigator for access to the respondent’s medical records, and the respondent’s responses. The respondent made written submissions to the Chief Commissioner challenging the Investigator’s finding that the level of co-operation had been insufficient. What information should reasonably be provided to the Commission during an investigation is directly within its mandate. The Chief Commissioner’s conclusion on the level of co-operation and access to medical evidence that he could expect was “within a range of possible, acceptable outcomes”, and so was not unreasonable. His conclusion that, given this lack of co-operation, he was not going to refer the complaint to a hearing was also reasonable.

[22] The respondent acknowledged that there was no clear medical diagnosis of her condition. The doctors had suggested at various times it was perhaps an olfactory induced migraine, asthma or epilepsy. It was never suggested that the appellant’s request for more medical information was colourable. In the circumstances the Chief Commissioner was entitled to conclude that the appellant’s request for an up-to-date specialist’s opinion was reasonable, and was entitled to put reasonable weight on the respondent’s failure to produce one.

[23] The second aspect of co-operation arising on this record is that a complainant has a duty to co-operate with an employer’s attempt to accommodate a disability. As the Court noted in *Callan v. Suncor* at para. 21, “The test is not subjective, and the employee is not entitled to dictate the accommodation he or she will accept.” In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at pp. 994-5, in the context of religious accommodation, the Court observed:

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. . . . When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal.

The willingness of a complainant to try the accommodation proposed by the employer is something that the Chief Commissioner is entitled to take into consideration and weigh in deciding whether to refer a complaint to a hearing.

[24] The respondent noted that the appellant had agreed to jointly engage Dr. Hoffman, and had subsequently agreed that some of his recommendations would be implemented. The chambers judge concluded at para. 48 that the appellant had unreasonably and without explanation “abandoned the course of action” to which it had agreed. However, as the chambers judge also noted at para. 46, before Dr. Hoffman’s recommendations could be implemented the respondent was moved to her new workspace. The appellant’s position was that the new assignment in the word processing unit was consistent with Dr. Hoffman’s recommendations, and that the respondent’s condition would be monitored. The Investigator concluded “there is no evidence to show that the [appellant] refused to implement Dr. Hoffman’s recommendations, but evidence shows that the [appellant] was still waiting for the Complainant’s cooperation and her return to work.”

[25] An employer has a duty to accommodate a disabled worker to the point of undue hardship. An employer under an obligation to accommodate is not precluded from making changes to its business and its premises within the limits of that obligation: *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, 294 D.L.R. (4th) 407 at paras. 11, 15. The chambers judge noted that it was not disputed that the appellant “did take significant steps to accommodate Ms. Brewer prior to 2001”. The Chief Commissioner was entitled to infer that the appellant would have followed through on its expressed intention to continue to seek an appropriate level of accommodation for her. In these circumstances, it was not unreasonable for the Chief Commissioner to conclude that when the appellant re-assigned the respondent to a new workspace, it was reasonable to expect that she would at least test the new work environment.

#### Denial of Disability

[26] The chambers judge concluded that the Chief Commissioner had ruled that symptoms that did not yield a specific medical diagnosis do not qualify as a “disability” under the *Act*. The appellant argues that, properly read, the reasons of the Chief Commissioner do not support this finding. Even if the Chief Commissioner fell into this error, it did not affect the result of his review. The Chief Commissioner noted that the appellant had attempted to accommodate the respondent. The Chief Commissioner then examined whether those attempts to accommodate were sufficient, even assuming the appellant was taking the position that the respondent had no disability. His conclusion that they were sufficient is not affected by any mistaken assumption he may have made about what constitutes a “disability”.

Conclusion

[27] In summary, the chambers judge applied too stringent a standard of review to the Chief Commissioner's decision. The Investigator decided: "In the absence of evidence to show that the respondent failed in its duty to attempt to reasonably accommodate the Complainant to the point of undue hardship, there is no reasonable basis to proceed with the complaint." The Chief Commissioner agreed that the duty to accommodate had been discharged, and stated: "I see no reasonable basis to advance this case to the panel hearing stage and hereby dismiss the appeal." This decision is "within the range of possible, acceptable outcomes." The reasons of the Chief Commissioner, particularly when read with the reasons of the Investigator, disclose the basis for his conclusion and provide "justification, transparency and intelligibility." The chambers judge should not have quashed the decision, and the appeal is allowed.

Appeal heard on November 27, 2008

Reasons filed at Edmonton, Alberta  
this 19th day of December, 2008

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Berger J.A.

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Watson J.A.

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Slatter J.A.

**Appearances:**

J.R. Carpenter and J.R. Kolmes  
for the Respondent

K.C. Verville and W.J. Pavlic, Q.C.  
for the Appellant