Federal Court  Cour fédérale

Date: 20151015

Docket: T-80-15

Citation: 2015 FC 1168

Ottawa, Ontario, October 15, 2015

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

IBRAHIM HAROUN

Plaintiff

and

NATIONAL RESEARCH COUNCIL OF CANADA

Defendant

ORDER AND REASONS

[1] The parties to this proceeding have moved under Federal Courts Rule 220 for the determination of a preliminary issue of law. The question they pose is whether the Plaintiff's underlying employment dispute with the Defendant must be resolved by way of an application for judicial review (the Defendant's position) or by way of an action (the Plaintiff's position). At the present time, the Plaintiff has initiated both an application and an action in this Court. The resolution of this issue will determine which of these two proceeding will move forward.

[2] To their credit, the parties have framed their legal arguments around an Agreed Statements of Facts, the particular of which are as follows:

1. Dr. Ibrahim Haroun is a research scientist and engineer by profession. He was employed as a Research Associate (RA) with the National Research Council of Canada ("NRC") for a term period that commenced on July 29, 2013. Dr. Haroun's Letter of Offer dated July 17, 2013 was accepted, signed and dated by Dr. Haroun on July 19, 2013. This Letter of Offer is attached (Tab 1).

2. The Letter of Offer stated that term employment would end at the "close of business on 24 July 2015" but also stated that "your employment may be for a shorter period depending on the availability of work, funding, the continuance of the duties to be performed, issues in regards to your performance, conduct, and/or other operational requirements."

3. The Letter of Offer refers to NRC's Human Resources policies. These policies are contained in the NRC Human Resources Manual. Chapter 5, Section 5.7 contains additional information regarding Termination of Employment (Tab 2). Specifically, Section 5.7.18.1 of the NRC Human Resources Manual provides: "Occasionally it may be necessary to terminate the employment of a term or short-term employee prior to the termination date specified when the employee was hired." In these circumstances, the policy provides for giving notice or, at NRC discretion, cash in lieu of notice.

4. On May 14, 2014, Dr. Haroun was formally advised of the decision to end his term employment early, effective at the close of business on May 14th, 2014 (Tab 3).

5. Based on the NRC's decision to end Dr. Haroun's term employment prior to the anticipated end of term as set out in his Letter of Offer, and given that he had less than one year of continuous service, the NRC provided Dr. Haroun with one (1) week's pay in lieu of notice pursuant to article 5.7.18.4(a) of the NRC Human Resources Manual.

6. On June 12, 2014, Dr. Haroun presented a grievance against the "Employer's decision, the National Research Council, to end my term employment early as of May 15, 2014, for alleged performance issues." The grievance

further stated: "This decision is disguised discipline and is without cause." (Tab 4)

7. Dr. Haroun is represented by the Professional Institute of the Public Service of Canada (PIPSC) and was assisted by PIPSC throughout the NRC grievance process. The collective agreement between PIPSC and the NRC is attached at Tab 5.

8. The grievance did not proceed to the first level of the grievance procedure as the grievor requested that the matter proceed directly to a final level determination.

9. During the final level grievance hearing on September 24, 2014, Dr. Haroun and his representative continued to rely on the allegation of disguised discipline.

10. The final level grievance response dated October 31, 2014 provided by the Vice- President, Emerging Technologies denied the grievance. (Tab 6).

11. On November 26, 2014, Dr. Haroun commenced an application for judicial review of the October 31, 2014 final level grievance decision. The Notice of Application is attached at Tab 7.

12. The NRC advised of its intention to oppose the application by filing a Notice of Appearance on December 2, 2014 (Tab 8).

13. The parties to the application have agreed to an extension for serving the filing of the relevant material in the possession of the NRC requested under Rule 317 of the *Federal Courts Rules*.

14. The extension was necessitated by a motion by the NRC, which has been drafted and consented to by the applicant, but not yet filed, seeking a confidentiality order in respect of certain commercially sensitive information which forms part of the material to be transmitted under Rule 318.

15. On January 20, 2015, the Court issued a civil action by Ibrahim Haroun against the NRC. A copy of the Statement of Claim is attached at Tab 9.

[3] The issue presented by the parties for determination is the following:

> Is the Plaintiff entitled to proceed with this action, given that the grievance contained under tab 4 of the Agreed Statement of Facts has been filed and determined under the *Public Service Labour Relations Act*, SC 2003, c 22?

[4] At the heart of the impasse between the parties lies the interpretation of section 236 of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [PSLRA]. That provision provides:

236. (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.	236. (1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.
(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.	(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.
(3) Subsection (1) does not apply in respect of an employee of a separate agency that has not been designated under subsection 209(3) if the dispute relates to his or her termination of employment for any reason that does not relate to a breach of discipline or misconduct.	(3) Le paragraphe (1) ne s'applique pas au fonctionnaire d'un organisme distinct qui n'a pas été désigné au titre du paragraphe 209(3) si le différend porte sur le licenciement du fonctionnaire pour toute raison autre qu'un manquement à la discipline ou une inconduite.

[5] It is common ground that the National Research Council [NRC] is a separate agency that has not been designated under subsection 209(3) of the PSLRA and is, therefore, subject to the

application of subsection 236(3). Notwithstanding the clear language of subsection 236(3) and its apparent applicability to Mr. Haroun's asserted performance-based termination, the NRC contends that he is bound to complete his grievance up to and including a judicial review of the final-level grievance decision. In other words, he is legally required to continue with a grievance that he prosecuted on the basis of an allegation of disguised discipline – an allegation the NRC disputes and he no longer wishes to advance. Instead, he now accepts that his termination was not disciplinary and he has brought an action in this Court alleging that the termination amounted to a wrongful dismissal at common law.

[6] The reason Mr. Haroun launched a discipline-based grievance in this case is quite apparent. If Mr. Haroun's termination was performance-based, he enjoyed no recourse to independent adjudication through the grievance process. Having been employed by a non-designated separate agency, his right to adjudication under paragraph 209(1)(b) of the PSLRA was limited to disciplinary actions involving termination, demotion, suspension or financial penalty. This point was addressed by the Public Service Labour Relations Board in *"A" v Canadians Security Intelligence Service*, 2013 PSLRB 3 at para 187, 2013 CRTFP 3:

> 187 Paragraph 209(1)(d) and subsection 209(3) of the Act are clear. Considering that the CSIS is a separate agency and that it has never been designated under subsection 209(3), the employer must present me with prima facie evidence that the real reason for dismissing Ms. A was related to employment, in this case an issue with performance. Once that evidence is established by the employer, the burden of proof shifts to the grievor, who must, for me to have jurisdiction in this matter, show that the reasons given by the employer are just camouflage, that the real reason for her dismissal is disciplinary in nature, and that the employer acted in bad faith by, for instance, harassing her or discriminating against her.

Also see *Agbodoh-Falschau v Canadian Nuclear Safety Commission*, 2014 PSLRB 4 at para 23, 2014 CarswellNat 167.

[7] The scope of section 236 of the PSLRA must be assessed in light of sections 209 and 230, both of which distinguish between performance-based and disciplinary dismissals. Paragraphs 209(1)(c) and (d) restrict the right of adjudication for unsatisfactory performance to core employees of the Public Service or to the employees of designated separate agencies. Section 230 requires that, in such cases, the adjudicator apply the deferential standard of reasonableness. Nowhere do these provisions purport to address or limit a cause of action at common law for the wrongful, non-disciplinary dismissal of employees of separate, undesignated agencies. Instead, the PSLRA consistently recognizes a distinction between core Public Service employees (including the employees of designated separate agencies) and the employees of non-designated separate agencies.

[8] I do not read section 214 as applying to this situation. Mr. Haroun effectively exhausted the option of prosecuting his grievance at least for a non-disciplinary termination and, therefore, had no further recourse under the PSLRA. That is not to say, however, that his right to proceed with an action at common law is ousted by section 214. It would take much clearer language than this to derogate from the preservation of that option as expressed in subsection 236(3) of the PSLRA.

[9] It seems to me that the purpose of subsection 236(3) is to preserve a common law right of action for employees of undesignated separate agencies in relation to performance-based

terminations. In the face of the clear language used and the gravity of the consequences of termination, it cannot be that Parliament intended that employees like Mr. Haroun be limited to the option of pursuing a restrictive internal grievance with no right to independent adjudication. Indeed, there is no reason to think that Parliament intended to deprive separate agency employees of the right to the independent assessment of the merits of their performance-based terminations.

[10] I also do not accept that, having pursued a discipline-based grievance, Mr. Haroun is no longer entitled to resort to an action at common law. If he had the right to challenge a performance-based termination through adjudication and chose not to do so, an argument based on *res judicata* or abuse of process would likely arise. But here, Mr. Haroun had no right to the adjudication of such a grievance. In these circumstances he is not obliged to pursue a likely futile allegation of a disciplinary termination to adjudication. He was fully within his rights to accept the rejection of his grievance before exhausting that process and, in the alternative, prosecute an action on a new ground that was not open to him in the context of the grievance process.

[11] I also do not agree that the reasoning in *Burchill v Canada*, [1981] 1 FC 109, 1980 CarswellNat 84F applies by an analogy or otherwise. That case involved an attempt by a grievor to assert a new ground at the adjudication stage of his grievance. The new allegation of disguised discipline was necessary to gain access to adjudication. Mr. Haroun is not attempting to reframe his grievance in mid-stream. Indeed, he has abandoned the grievance process in

favour of an action grounded in an entirely new allegation for which grievance adjudication was otherwise unavailable.

[12] It is also of no consequence that Mr. Haroun has a right to judicially review the denial of his grievance. Presumably he has accepted that disposition and his employer's characterization of the dismissal. It is not open to the NRC to force Mr. Haroun back into that process in lieu of pursuing a different cause of action protected by subsection 236(3) of the PSLRA – a cause of action that would not be the subject of judicial review.

[13] There is an argument that Mr. Haroun will enjoy the benefit of his grievance up to a point and a separate right of action. But that is a consequence of subsection 236(2) of the PSLRA which preserves a right to judicial recourse for non-disciplinary terminations where an independent adjudication is not otherwise available.

[14] I accept that the absence of a mechanism for independent or third-party adjudication of a grievance is not presumed to be legally inadequate provided, of course, that the limiting terms of employment clearly proscribe such an option. Here that is not the case. Although section 209 excludes independent adjudication for grievances involving performance-based terminations, recourse to common law remedies for such terminations is expressly preserved by subsection 236(3) for employees like Mr. Haroun. The decision in *Boutziouvis v Financial Transactions and Reports Analysis Centre of Canada*, 2010 PSLRB 135 at para 58, 204 LAC (4^{th}) 137, does not support the NRC's position. That case involved a challenge to the authority of an adjudicator to hear a disciplinary grievance under section 209 of the PSLRA based on

asserted competing provisions in other legislation. The adjudicator accepted jurisdiction and held that the "removal of the grievor's right to contest the Director's decision under paragraph 209(1)(b) of the PSLRA would require explicit statutory language of irresistible clearness". The same could be said of the NRC's attempt in this case to oust the authority in this Court to entertain Mr. Haroun's common law claim as preserved by subsection 236(3) of the PSLRA.

[15] On the basis of the foregoing, the Court answers the question posed by the parties in the affirmative. The disposition of the related proceeding in Court docket T-2430-14 will be resolved as stipulated in paragraph 2 of the Order of Prothonotary Mireille Tabib dated April 23, 2015.

ORDER

THIS COURT ORDERS that the question posed by the parties for determination is answered in the affirmative.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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