Federal Court Cour fédérale

Date: 20190307

Docket: T-985-18

Citation: 2019 FC 283

Ottawa, Ontario, March 7, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

KAINAI BOARD OF EDUCATION

Applicant

and

PERRY DAY CHIEF

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision made by an adjudicator [the Adjudicator] pursuant to section 242 of the *Canada Labour Code*, RSC 1985, c L-2 [the Code], dated May 6, 2018, that awarded the Respondent damages for unjust dismissal and reinstatement [the Decision].

II. Background

[2] The Applicant, the Kainai Board of Education, operates several schools on the Blood Reserve in southern Alberta.

[3] The Respondent, Perry Day Chief, operated a school bus for the Applicant beginning in 2011.

[4] The Respondent was a casual employee during the 2011/2012, 2012/2013, and 2013/2014 school years, and was laid off in the summer months following each school year.

[5] The Adjudicator found, and the Applicant does not now dispute, that the Applicant hired the Respondent as a full-time employee in the spring of 2015.

[6] The Respondent continued to work for, and receive pay from, the Applicant during the summer of 2015 while the Applicant's schools were not in session.

[7] The Applicant stopped paying the Respondent on June 7, 2016, at the conclusion of the 2015/2016 school year, on the belief that he was a casual employee not entitled to pay over the summer months.

[8] The Respondent returned to work in September 2016 when the school year began, but raised concerns with the Applicant as to why he had not been paid over the summer. I note that the Respondent also had concerns at this time regarding unpaid wages from past employment as a cook for the Applicant.

[9] At a meeting on November 3, 2016, the Applicant offered the Respondent a casual employment agreement for the duration of the 2016/2017 school year. During this meeting, the Applicant asked the Respondent if he would continue driving a bus, and the Respondent stated that he would not return to driving until his concerns were addressed.

[10] On January 30, 2017, the Respondent filed a Complaint of Unjust Dismissal [the Complaint] against the Applicant. On October 25, 2017, the Respondent requested that the Complaint proceed to adjudication pursuant to section 240 of the Code.

[11] On December 7, 2017, the Minister of Labour appointed the Adjudicator under section 242 of the Code. The Adjudicator held a hearing on February 26, 2018, during which both parties called witnesses.

I. Decision Under Review

[12] In the Decision, dated May 6, 2018, the Adjudicator found that by offering the Respondent a casual employment agreement for the 2016/2017 school year, the Applicant had constructively dismissed the Respondent, and that this dismissal was unjust.

[13] In a subsequent order, dated July 26, 2018, the Adjudicator ordered that the Respondent be reinstated as a full-time bus driver [the Reinstatement Order]. The Adjudicator also ordered back pay to the Respondent for the loss of work between June 2016 and the date of the Decision, including pension amounts owing and health expenses [the Back Pay Order].

[14] The Applicant does not dispute that the Respondent was constructively dismissed, or take issue with the Reinstatement Order. The Applicant challenges only the Back Pay Order, on the basis that the Adjudicator erred in determining that the Applicant had not proven that the Respondent failed to mitigate his damages.

[15] The Adjudicator's analysis on the issue of mitigating damages can be found at paragraphs 95-98 of the Decision, and is reproduced in its entirety below:

> 95. The Employer has argued Mr. Day Chief has failed to mitigate his damages. Mitigation refers to the obligation on an employee – even if treated wrongly – to take action to reduce his or her damages by pursuing other work while they are also pursuing their claim against a former employer. An individual cannot sit back and expect full compensation for their losses if they have not taken steps to try to find other employment to reduce their damages. An

Employer who raises a failure to mitigate bears the burden of establishing this failure has in fact occurred.

96. The Employer has argued that it had two jobs Mr. Day Chief could have pursued in mitigation: to stay with his job as a contract driver for the Employer, or to drive as an extra-curricular driver, also for the same Employer. I agree with the view of our Court of Appeal in *Christianson v. North Hill News* 1993 ABCA 232 (CanLII) that an employee is not under an obligation to accept employment with a dismissing employer, except in rare circumstances. That same authority also notes that the employee need not make the "best" decision with respect to alternative employment; he need only make an objectively reasonable decision (at para. 11). What is objectively reasonable, however, is not be assessed in relation to the position of the employer (i.e. to reduce the damages owed by the employer), but in relation to an employee – i.e. to maintain that employee's position in his industry, trade, or profession. In other words, context is important: *Forshaw v. Aluminex Extrusions Ltd.* 1989 CanLII 234 (BCCA); *Gryba v. Moneta Porcupine Mines Ltd.* 2000 CanLII 16997 (Ont.CA).

97. In the circumstances of this case, Mr. Day Chief was impoverished by the actions of the employer in not paying him for the summer months. His evidence was he had limited ability to look for jobs as he did not have gas money. However, his undisputed evidence was that he did seek the assistance of an organization to help him find a job, he did distribute resumes, and he did try to find work. This evidence was not challenged or refuted by the Employer. The Employer did not provide evidence of any other possible job options available to Mr. Day Chief at the time. While he had a Class 1 licence, Mr. Day Chief was of a similar age to Mr. Many Bears. It was Mr. Many Bears' undisputed evidence that it is difficult even for trained drivers to find employment as they age.

98. I find that Mr. Day Chief took what steps he could take, given his age and experience, to try to find alternative employment. I do not find the Employer has met its evidentiary burden to establish Mr. Day Chief failed to mitigate his damages, on the circumstances of this case.

II. Issues

[16] The issues are:

A. Does the Respondent have standing to address the Court?

B. Did the Adjudicator err by not applying the factors outlined in *Evans v Teamsters*?

C. Was the Adjudicator unreasonable in determining that the Respondent mitigated his damages?

III. Standard of Review

[17] The issue of whether the Adjudicator erred by not applying the factors set out in *Evans v Teamsters Local Union No 31*, 2008 SCC 20 [*Evans*] is a question of law to which the reasonableness standard applies (*Transport St-Lambert v Fillion*, 2010 FC 100 at para 22; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54 [*Dunsmuir*]). While the Applicant is correct to argue that questions of law are generally governed by the correctness standard, deference is warranted when an adjudicator has particular expertise in the application of a general common law rule in relation to a specific statutory context, which is the case here (*Dunsmuir,* above, at para 54).

[18] The issue of whether the Adjudicator erred in determining that the Respondent mitigated his damages is question of mixed fact and law to which the reasonableness standard applies.

IV. Analysis

A. *Does the Respondent have standing to address the Court?*

[19] The Respondent is self-represented. The Respondent indicated by way of a letter dated June 7, 2018, and an attached Federal Court Form 305, that he intended to oppose this application. The Respondent also indicated in an email dated December 18, 2018, that he would attend the hearing of this matter. The Respondent failed to file a record.

[20] The issue is whether the Respondent should be granted leave to make oral submissions to the Court.

[21] As a general rule, a party before the Court must limit its submissions to those advanced in its memorandum of fact and law (*Bridgen v Deputy Head (Correctional Service of Canada)*, 2014 FCA 237 at para 35). This ensures fairness, and allows each party to effectively prepare for the hearing.

[22] However, the Court has discretion, when a party has failed to file a record, to permit that party to make oral submissions if the opposing party is not prejudiced (*Gemstone Travel Management Systems Inc v Andrews*, 2017 FC 463 at para 6).

[23] In *Panqueva v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 493 at paragraphs 5-8 [*Panqueva*], the respondent failed to file an application record. Justice Dawson allowed the respondent to address the Court with respect to issues raised in the applicant's submissions, on the basis that (1) the applicant had notice of the respondent's intent to oppose, (2) there was no prejudice to the applicant, and (3) giving the respondent leave to speak promoted the just determination of the matter.

[24] The Respondent is granted leave to make arguments limited to responding to the Applicant's submissions, without raising any new issues. The Applicant has known since June 2018 of the Respondent's intention to oppose, there is no prejudice to the Applicant, and granting leave supports the just determination of this matter.

[25] At the hearing, the Respondent was late and missed the submissions of counsel for the Applicant. Nevertheless, I allowed Mr. Day Chief to speak of the issue of mitigation of damages.

B. *Did the Adjudicator err by not applying the factors outlined in Evans v Teamsters?*

[26] The Applicant put before the Adjudicator the decision of *Evans*, above, a leading decision regarding an employee's duty to mitigate damages upon wrongful dismissal. The Applicant argues that the Adjudicator had a duty to consider the framework outlined in *Evans*, and that the Adjudicator erred by failing to consider that framework.

[27] The Court in *Evans* recognized that in some circumstances, it will be necessary for a constructively dismissed employee to mitigate his or her damages by returning to work for the same employer (*Evans* at para 28).

[28] Where a dismissal has occurred, the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and the work could have been found (*Evans* at para 30).

[29] Where the employer offers the employee a chance to mitigate the damages by returning to work, the central question is whether a reasonable person would accept such an opportunity (*Evans* at para 30). Answering this question requires a multi-factored and contextual analysis (*Evans* at para 30).

[30] To answer this central question the Court, in *Evans* mentioned that the following factors may be relevant:

i. whether the salary offered is the same;
ii. whether the working conditions are substantially different or the work is demeaning;
iii. whether the personal relationships involved are acrimonious;
iv. the history and nature of the employment;
v. whether or not the employee has commenced litigation; and
vi. whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left.

[31] The Court went on to state that the critical element is that an employee not be obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation, and it is that factor which must be at the forefront of the inquiry into what is reasonable (*Evans* at para 30).

[32] I note that *Evans* makes clear that the required analysis is contextual and fact-specific, and that none of the above factors are determinative or even necessary to consider. Rather, the central question to be answered is whether a reasonable person would accept the employer's offer to return to work (thereby mitigating damages).

[33] From a review of the paragraphs of the Decision excerpted above, it is clear that the Adjudicator was alive to this question, and concluded that the Respondent acted reasonably in not accepting the Applicant's offer to return. The Decision is justifiable, transparent, and intelligible, and the failure to cite *Evans* does not take the Decision outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

C. *Was the Adjudicator unreasonable in determining that the Respondent mitigated his damages?*

[34] The Applicant argues that the Adjudicator made the following unreasonable findings of fact, which render unreasonable the conclusion that the Respondent mitigated his damages:

i. The Adjudicator found that submitting only three job applications, two of which were to relatives, constituted reasonable mitigation;

ii. The Adjudicator found that the Respondent spent two to three hours a day looking for jobs, despite the fact that he only sent out three applications in a period that lasted over a year; and

iii. The Adjudicator accepted that the only work that an able-bodied individual could find in over a year was two days of work driving a grader, and making arts and crafts at home for minimal pay.

[35] In addition to the analysis excerpted above, the Adjudicator also made findings regarding the Respondent's mitigation efforts at paragraph 52 of the Decision:

> 52. Mr. Day Chief was also questioned regarding the steps he had taken to try to find alternate employment after November 3, 2016. Mr. Day Chief stated he had a Class 1 driver's license with an S endorsement. He dropped out of school after grade 8 and eventually upgraded to a grade 10 education. His evidence [*sic*] he went to an organization that helps people develop resumes and find jobs ("B Test"). His brother also runs 3 graders and he helps him when that help is needed. He submitted applications to his brother, his nephew and to B Test. He did not get any interviews, although one seemed promising. He spent two to three hours a day looking for jobs, but he was hampered as he did not have any money for gas. In February of 2017 he was able to do a two day job for his brother, driving a grader. He is also a craftsman and does crafts at home to earn extra money but it is time intensive and does not pay very much. He was not asked to produce any tax returns for the 2016 or 2017 years.

[36] Paragraph 54 of the Decision also mentions Mr. Day Chief's evidence, which was not disputed by the Applicant, that jobs on reserve are hard to find.

[37] The Applicant submits that the Adjudicator's conclusion is unreasonable based on the findings listed above, but fails to meaningfully engage with other findings made by the Adjudicator which support the reasonableness of the Adjudicator's conclusion, including:

i. that it is difficult to get a job driving a bus, particularly as you get older;
ii. that jobs on reserve are hard to find; and
iii. that the Respondent was hampered in his job search by a lack of financial resources.

[38] The Applicant is effectively asking this Court to intervene and reweigh the evidence that was before the Adjudicator. It is not the role of this Court to intervene in such a way.

[39] The Adjudicator's conclusion that the Respondent mitigated his damages is reasonable.

[40] The Respondent requested damages at the end of the hearing. I advised him that there were no materials before the Court to support a finding of damages or costs.

[41] Nevertheless, I find that the Respondent is entitled to nominal costs and fix those costs at $500.00.

JUDGMENT in T-985-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. Costs to the Respondent in the amount of $500.00.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-985-18
STYLE OF CAUSE:	KAINAI BOARD OF EDUCATION v PERRY DAY CHIEF
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MARCH 6, 2019
JUDGMENT AND REASONS:	MANSON J.
DATED:	MARCH 7, 2019

APPEARANCES:

Mr. Grant Van Hal	FOR THE APPLICANT
Mr. Perry Day Chief	FOR THE RESPONDENT, ON HIS OWN BEHALF

SOLICITORS OF RECORD:

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