Federal Court  Cour fédérale

Date: 20090902

Docket: T-1086-08

Citation: 2009 FC 869

Ottawa, Ontario, September 2, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

KEN INSCH

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Mr. Ken Insch (the "Applicant") seeks judicial review pursuant to Section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of the decision of Ms. Lysanne M. Gauvin, Assistant Commissioner, (the "AC"), Human Resources Branch of the Canada Revenue Agency (the "CRA"). In that decision made on June 13, 2008, the AC dismissed the Applicant's grievance which challenged the decision of the CRA to refuse the Applicant's harassment complaint.

Background

[2] On March 10, 2003, the Applicant, formerly employed with the Tax Avoidance section of the Calgary Tax Services Office of the CRA, filed a harassment complaint pursuant to the Agency's policy on *Preventing and Resolving Harassment Policy* (the "CRA policy" or "CRA Harassment Policy"). Among other things, the Applicant alleged the following:

a. that on November 9, 2000, his manager, Mr. Hillen, yelled at him before a group of fellow employees;
b. that on May 2, 2001, his April 11, 2001 request for five weeks leave with income averaging was denied by another manager;
c. that on November 2, 2001, Mr. Hillen provided a performance evaluation with which the Applicant disagreed and informed the Applicant that he was on a work plan; and
d. that on November 30, 2001, following the performance review, the Applicant stated that he no longer trusted Messrs. Hillen and Lawrence and requested a transfer out of the Tax Avoidance section. On March 13, 2002, the Applicant was advised of his transfer to the Small and Medium Sized Enterprises ("SME") section.

[3] The Applicant, in his complaint, also summarized those allegations as they related to Messrs. Hillen and Lawrence respectively, together with a timeline of events. Among the complaints related to Mr. Lawrence, in addition to those named above, the Applicant alleged that on May 9, 2002, he learned that an individual at the Winnipeg Tax Services Office had been informed that the Applicant was on a work plan.

[4] The Applicant's complaint is dated March 10, 2003. His complaint was held in abeyance pending his receipt of certain information that he had requested pursuant to the *Access to Information Act*, R.S.C. 1985, c. A-1.

[5] On March 29, 2004, the Applicant provided an amended set of allegations and formally submitted them to his employer. The revised allegations purported to clarify his allegation that his transfer to SME was designed to undermine his career, since he had no training or experience in that field. The Applicant also included an additional complaint, alleging that on July 23, 2002, Mr. Hillen had provided a poor employment reference to a potential employer.

[6] The initial review of the complaint was assigned to Ms. Kathryn Turner, an Assistant Commissioner at the Agency's Prairie Regional Operations section. By letter dated March 16, 2005, Ms. Turner noted that the Applicant's complaint listed specific incidents between November 9, 2000 to December 5, 2001, with "vague references to additional incidents in the spring of 2002".

[7] Ms. Turner concluded that the allegations described in the original complaint fell outside the one year time limit prescribed by the Harassment Policy. As well, while finding that the allegation concerning the performance review had been filed in a timely manner, she concluded that there was no evidence to support it. On this basis, she refused to accept the complaint.

[8] The Applicant filed a grievance on April 2, 2005, relative to the March 16, 2005 decision of Ms. Turner. The grievance was sent directly to the final level. The AC observed that it had been

previously decided that the complaint did not meet the criteria for acceptance and she could find no reason to intervene.

Issues

[9] Two issues arise in this application for judicial review:

a. What is the applicable standard of review,

b. Does the decision meet that standard.

Discussion and Disposition

[10] The Applicant's grievance proceeded pursuant to the provisions of the *Public Service Labour Relations Act* ("PSLRA" or the "Act") which is Part 1 of the *Public Service Modernization Act*, S.C. 2003, c. 22.

[11] The Applicant's complaint did not fall within those complaints described in section 209 of the PSLRA which can proceed to adjudication following the final level grievance. Rather, this grievance was filed pursuant to section 208 of the Act. Subsection 208(1) is relevant and provides as follows:

Right of employee	Droit du fonctionnaire
208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	208. (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(a) by the interpretation or application, in respect of the	a) par l'interprétation ou l'application à son égard :

employee, of	
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award; or	(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	b) par suite de tout fait portant atteinte à ses conditions d'emploi.

[12] Pursuant to section 214, the decision of the AC was final and binding, for the purposes of the Act. Section 214 provides as follows:

Binding effect	Décision définitive et obligatoire
214. If an individual grievance has been presented up to and including the final level in the grievance process and it is not one that under section 209 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken on it.	214. Sauf dans le cas du grief individuel qui peut être renvoyé à l'arbitrage au titre de l'article 209, la décision rendue au dernier palier de la procédure applicable en la matière est définitive et obligatoire et aucune autre mesure ne peut être prise sous le régime de la présente loi à l'égard du grief en cause.

[13] In its decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Supreme Court of Canada said that decisions of administrative decision-makers are reviewable on one of two

standards, that is correctness or reasonableness. Questions of law and of jurisdiction will generally attract review on the standard of correctness. Questions of fact, discretion or policy will usually attract deference, that is review on the standard of reasonableness. The Supreme Court in *Dunsmuir* also said that where prior jurisprudence has addressed the applicable standard of review that standard can be adopted in subsequent decisions.

[14] In *Hagel et al. v. Canada (Attorney General)*, 2009 FC 329, Justice Zinn dealt with an application for judicial review of decisions made pursuant to the Act in respect of a number of individual grievances presented under section 208. He conducted a standard of review analysis, noting that under the regime of the repealed *Public Service Staff Relations Act*, R.S. 1985, c. P-35 the previous standard of review for non-adjudicable grievances was that of patent unreasonableness, a standard that no longer applies since the decision in *Dunsmuir*. Justice Zinn concluded that having regard to the presence of the privative clause in section 214 of the Act, the expertise of the decision-maker, the statutory scheme and the nature of the question, that is the interpretation of a policy, that the appropriate standard of review is that of reasonableness.

[15] The same standard will apply in this case where the Applicant has presented a grievance referring to the interpretation and application of an administrative policy, that is the Harassment Policy.

[16] This means that the AC was required to consider the May 16, 2005 decision of Ms. Turner in light of the policy which governed the decision-making process.

[17] Ms. Turner said in her decision that the allegations as to the events in the spring of 2002 were vague; however, the sole basis she actually gave for refusing to accept the Applicant's complaint was that it fell outside the time period for filing.

[18] Step 1 of Appendix "E" of the Harassment Policy requires that a complaint be filed within one year of the last incident, absent special circumstances; describe the nature of the allegations; and identify the respondent's incidents, date and witnesses. According to Step 3 of the same appendix, acceptance of the complaint requires that the complaint fall within the definition of harassment, meet the conditions in Step 1 and "have prima facie substantiation", e.g. description of incidents, dates and any witnesses".

[19] The complaint must be read as a whole, that is including the allegations contained within the March 2004 amendment. In my opinion, the complaint clearly discloses the allegations concerning the events of March 16 and May 9, 2002. The complaint was filed within one year from these dates and accordingly, was within the time period required under the CRA policy.

[20] Since the complaint was filed within one year of the March 16 and May 9, 2002 events, it was within the time period required under the CRA policy. Ms. Turner did not make any conclusions that the complaint failed to meet the additional criteria for acceptance. It is reasonable to expect that if this was the case, she would have said so.

[21] No ground other than timeliness was given by Ms. Turner for rejecting the complaint. It follows that if the AC relied solely upon Ms. Turner's finding, that is that the complaint could not be accepted for untimeliness, then the basis for the AC's decision was flawed.

[22] The AC reviewed Ms. Turner's decision and concluded that the Applicant's claim had been fairly considered. In my opinion, this conclusion is unreasonable since it is based upon an erroneous decision by Ms. Turner. Ms. Turner was in error when she concluded that the complaint was untimely. While it was open for Ms. Turner to consider and address the other factors for accepting the complaint, she did not do so.

[23] In the result, the application for judicial review is allowed, the decision of the AC is set aside and the matter is remitted for re-determination by a different decision-maker, in accordance with these Reasons. The Applicant shall have his costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, the decision of the AC is set aside and the matter is remitted to a different decision-maker for re-determination in accordance with these Reasons. The Applicant shall have his costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1086-08
STYLE OF CAUSE:	KEN INSCH v. CANADA REVENUE AGENCY
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