Federal Court  Cour fédérale

Date: 20110121

Docket: T-25-10

Citation: 2011 FC 77

Ottawa, Ontario, January 21, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE AND INTRIA ITEMS INC.

Applicants

and

MURUGANANDARAJAH MUTHIAH

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of Canada Labour Code Adjudicator, Ruth Hartman, dismissing the Applicants' jurisdictional objection to the Respondent's unjust dismissal complaint. The Applicants are related companies and are hereafter referred to collectively as CIBC.

[2] CIBC contends that that Mr. Muthiah's termination was the result of a discontinuance of a job function leading to the elimination of his position which should have led to the dismissal of his

complaint in accordance with ss 242(3.1)(a) of the *Canada Labour Code*, RS, 1985, c L-2) [Code]. That provision states:

242. (3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where	242. (3.1) L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :
(a) that person has been laid off because of lack of work or because of the discontinuance of a function; or	a) le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste;

It is of some significance to this application that no transcript of the testimony given before the Adjudicator is contained in the record, presumably because the proceeding was not recorded.

Background

[3] Mr. Muthiah was hired by CIBC as a clerical worker in 1998 and his employment was terminated on October 7, 2008. CIBC took the position that Mr. Muthiah was dismissed as a result of a national restructuring initiative and that he was chosen because some of his responsibilities were capable of being performed by others. When the position was eliminated, all of Mr. Muthiah's functions were either reassigned to others in the department or contracted out.

[4] Mr. Muthiah did not accept CIBC's characterization of his dismissal and on November 7, 2008 he made a complaint of unjust dismissal under s 240 of the Code. CIBC requested that the complaint be dismissed because the termination resulted from "a lack of work or discontinuance of function" and was thereby excluded from adjudication by ss 242(3.1) of the Code. It was this

jurisdictional issue that was resolved by the Adjudicator in favour of Mr. Muthiah and which is the subject of this judicial review.

The Decision Under Review

[5] It is clear from the Adjudicator's decision that she understood the jurisdictional issue she was required to resolve. She cited the relevant statutory provisions and the leading authorities that had considered them. She accepted CIBC's point that ss 242(3.1) "recognizes an employer's right to lay off employees for economic, financial and cost cutting reasons as long as the decision is 'genuine and made in good faith' and to reorganize the workforce and reassign the duties of the employees laid off". The Adjudicator also cited with approval the holding in *Fleiger v New Brunswick*, [1993] 2 SCR 651, 104 DLR (4th) 292 to the effect that "the decentralization by assignment to others, of duties formerly done by the holder of a position that no longer exists can be a discontinuance of function". The Adjudicator's decision recognized, though, that an employer's stated motives cannot always be accepted at face value and that it may be necessary to determine whether there was a mixed or ulterior reason for a termination. Accordingly, a dismissal that is engineered or disguised to prevent a challenge under the Code is not made in good faith and does not fall within the protective ambit of ss 242(3.1).

[6] The Adjudicator heard evidence from CIBC's Director of Cheque Remittance in Mississauga, Ms. Tina Maltese. Ms. Maltese testified about CIBC's national restructuring initiative (Project Saturn) which was the ostensible basis for Mr. Muthiah's termination. Ms. Maltese knew nothing about Mr. Muthiah or the specific reason for his termination and, interestingly, she

acknowledged that in Mr. Muthiah's department the number of positions eliminated exceeded the Project Saturn target by two. The Adjudicator characterized Ms. Maltese's evidence as follows:

> [61] Ms. Maltese had no direct knowledge and was not involved in the decision to eliminate Mr. Muthiah's job. When asked to explain how the elimination of Mr. Muthiah's position was cost-effective, Ms. Maltese confirmed she had no other information than that on these spreadsheets and assumed the savings were that his salary was no longer being paid.
>
> [62] Ms. Maltese speculated that Mr. Muthiah's job elimination may have been part of PS's general implementation of cost reduction by "redistributing work to others" or having "work absorbed by others", but had no direct knowledge. She said that she was aware of the use of a comparison matrix tool for identifying which of a group of persons doing the same job would be eliminated. She said that a list of persons doing the same job would be assessed and ranked using criteria such as accuracy, productivity and personal attributes (adaptability, attitude, progressive discipline). The person ranking lowest is the one whose job is eliminated. She said this process applies "if more than one person is doing the same job" and that an identification of the position as one chosen to be eliminated was a prerequisite for an employee to qualify for transition benefits or ETSP on termination.

[7] To establish the reason for Mr. Muthiah's selection as a redundant employee, CIBC led evidence from its Ontario Risk Manager, Mr. Rakesh Sharma. According to the evidence Mr. Sharma had little direct managerial involvement with Mr. Muthiah and the Adjudicator characterized his testimony in the following way:

> [67] Regarding the identification of Mr. Muthiah's position as one to be eliminated, Mr. Sharma appeared to have little direct knowledge. He frequently referred to "Ms. Gordon's vision", which he could not describe in any detail beyond stating that she had proposed that data entry operators could separate non-BCA slips from BCA slips while inputting data by making two piles rather than one,. thus eliminating the need for this to be done by someone else after the 3 day period. There was nothing in the record about this idea prior to the termination. Mr. Sharma said he was aware of nothing in writing but said he attended a brief meeting with Ms. Proc and

> Ms. Gordon where it was discussed, some time in September. He pointed to the following email from Ms. Gordon, addressed to him and Ms. Proc, on September 9, 2008, as evidence of "identification". In apparent reference to the subject line, which stated "Bag Opener name", Ms. Gordon rather succinctly responds, as follows:
>
> > Hello there:
> >
> > As requested:
> >
> > First Name: Last Name:
> >
> > Muruganandarajab (Rajah) MUTHIAH
> >
> > Regards,
>
> [68] While Mr. Sharma said this email resulted from his meeting with Ms. Gordon and Ms. Proc, it is not obvious how this was email related to their discussion of deposit slips.
>
> [69] Mr. Sharma's testimony was clear that he took no action of his own regarding the merits of the position elimination. He said that he made no inquiries or reviews, and simply concluded after a while that he thought Ms. Gordon's "vision" had merit and agreed with it and that his primary involvement was ensuring that the proper approval process was in place prior to meeting with Mr. Muthiah to tell him.

[8] The Adjudicator resolved the jurisdictional issue before her on the following basis:

> [84] It is the case that neither Ms. Maltese nor Mr. Sharma provided direct information regarding how Mr. Muthiah became part of the very broad restructuring undertaken by CIBC as PS. The projected head count reduction for November 2008 at his location was said to be 63, but 65 positions were eliminated. Whether Mr. Muthiah was part of the planned 63 or the added 2 is a matter of speculation as no rationale has been provided.
>
> [85] Having reviewed the jurisprudence in the context of the evidence presented by the employer in this case, I am unable to conclude that section 242(3.1)(a) applies. While employers are free to restructure and cut costs as they see fit, the Code applies unless the employee bringing the complaint can be said to have been "laid off because of a discontinuance of a function".

> [86] The employer has not met the necessary onus to show that there has been a discontinuance of a function and therefore I need not address at length whether he was "laid off because of" a discontinuance of a function. Suffice to say, the Code exemption does not contemplate reasoning done after termination.
>
> [87] The case law is clear that employers seeking to bar a complaint under the Code are expected to provide evidence of a reasoned, not arbitrary, choice of elimination of a position for cost-saving and to establish that this was the "actual and operative reason" at the relevant time. Even if the operative reason in this case was simply "head count", it is not clear how Mr. Muthiah and his salary fit into the head count restructuring decision.
>
> [88] Mr. Sharma was only superficially involved and had no direct information regarding how, when or why Mr. Muthiah became part of the restructuring process. He said he never spoke with Mr. Muthiah's immediate supervisors or anyone and merely agreed with a decision that had already been made by Ms. Gordon. This decision was reportedly based solely on separating deposit slips by type, a small part of Mr. Muthiah's overall duties.
>
> [89] Ms. Gordon or others more directly involved in the decision to terminate were not called and the rationale provided is largely anecdotal and indirect. The only contemporaneous evidence provided for the choice of Mr. Muthiah for position elimination, and eligibility for ETSP due to restructuring, was the terse email from Ms. Gordon in September 200[8], providing only his name in an unspecified context.
>
> [90] The evidence presented is insufficient to establish the circumstances necessary to apply section 242(3.1)(a) and remove my jurisdiction to hear Mr. Muthiah's complaint. Whatever the merits of that complaint, the onus for exclusion has not been met.

Issues

[9] Did the Adjudicator err in law in her interpretation of ss 242(3.1)(a) of the Code?

Analysis

[10] CIBC has framed the issue before the Court as a question of law going to jurisdiction and as such it must be reviewed on the standard of correctness: see *Ocean Services Ltd. v Guenette*, 2010 FC 188, [2010] FCJ No 214. Much of CIBC's argument, however, is based on an analysis of the Adjudicator's evidentiary findings which are required to be reviewed on the deferential standard of reasonableness.

[11] CIBC does not dispute that it carried the burden of proof to establish that the dominant reason for the termination of Mr. Muthiah's employment was the discontinuance of a job function. It argues, though, that the Adjudicator erred by assessing the merits of the decision to terminate Mr. Muthiah and by elevating certain evidentiary issues to legal prerequisites for the application of ss 242(3.1). These arguments are summarized in the following passages from CIBC's factum:

> 7. The Applicants submit that the Adjudicator's conclusion that INTRIA did not meet the evidentiary onus of establishing the section 242(3.1)(a) exemption under the *Code* is the product of errors in law and would lead to the imposition of an unworkable onus of proof on employers in section 242(3.1)(a) cases that in turn would render the jurisdictional exemption to the unjust dismissal regime created by Parliament ineffective. Significant inefficiency and unpredictability would arise where Parliament had intended section 242(3.1)(a) to allow employers to conduct business without being second-guessed by Adjudicators appointed under the *Code*. This decision arguably removes the operational freedom and insulation from arbitral scrutiny that section 242(3.1)(a) was intended by Parliament to provide employers in situations where business needs require reorganization of the workplace.
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> […]
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> 38. Notwithstanding the evidence in the record that clearly demonstrated the Respondent was the only employee responsible for deposit slip sorting function before the elimination of his position, the Adjudicator engaged in an efficacy analysis of the process change, which impacted the Respondent's position. The Adjudicator,

> in hindsight, assessed INTRIA's business judgment and came to her own conclusions about the relative efficiency gains achieved after the changes were implemented following the termination of the Respondent's employment and thereby substituted her own judgment for INTRIA's.
>
> […]
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> 63. The Adjudicator appears to rely on the *Howard and Maritime Telephone and Telegraph Co.* [2000] 5 C.P.E.L. (3d) 210 (Fed. T.D.) decision of this Court at paras. 33 to 36 for the proposition that there is a requirement for a pre-conceived comprehensive restructuring plan for the discontinuance of the employee's function. It is submitted that this case does not support this new and onerous evidentiary standard, nor does it stand for the proposition that action taken after the date of termination cannot be considered by an adjudicator in determining whether a function has been discontinued for section 242(3.1)(a) purposes. From a common sense perspective, the restructuring is necessarily implemented following the discontinuance of the employee's function.

[12] CIBC argues that in considering the application of ss 242(3.1)(a) an Adjudicator is not entitled to assess the wisdom of a termination. It says that the purpose of this provision is to preserve the employer's right to manage its business as it sees fit including the right to make decisions which might later be shown to be unwise. I agree with that position. When an employee is laid off on the basis of a lack of work or because of the discontinuance of a function the jurisdictional enquiry under this statutory provision is limited to the examination of the *bona fides* of the employer's decision, which ordinarily will not involve an assessment about whether that decision was economically or operationally astute. What the Adjudicator is entitled to examine, however, is whether the employer's decision to terminate was made for protected business reasons or for some other purpose, including a disguised form of discipline. The assessment of the *bona fides* of the employer's decision may require an examination of its ostensible rationale but, where

the decision is shown to be legitimately based on a lack of work or the discontinuance of a function, the merits of the choice are of no remaining concern.

[13] The essential weakness of the CIBC's assertion of error on this issue is that the Adjudicator did not examine the wisdom of the decision to dismiss Mr. Muthiah. Her decision clearly states that the question before her was not whether CIBC's decision was appropriate but whether she had sufficient evidence from CIBC to satisfy the burden of proof. She also held that "employers are free to restructure and cut costs as they see fit". In the end the Adjudicator was simply not satisfied with the quality of the evidence tendered by CIBC and dismissed its objection accordingly.

[14] If the concept of judicial deference is to mean anything it surely must apply to a decision like this one involving the weighing of evidence. The Adjudicator had the benefit of hearing the witnesses from both sides and concluded that CIBC had failed to meet the burden of proof required to oust her jurisdiction. The obvious and often-mentioned testimonial disadvantage of a reviewing court is magnified in this case by the absence of a transcript of the testimony from the hearing below. I am thus in no position to determine whether the Adjudicator's characterizations of the testimony could reasonably be drawn and I have to accept her findings more or less at face value.

[15] What is apparent from the decision is that CIBC failed to put forward sufficient plausible evidence of its motive for dismissing Mr. Muthiah to bring its decision within the protection afforded by ss 242(3.1). That is not an unreasonable conclusion to reach in the face of CIBC's apparent failure to tender the best available evidence. The documentary record submitted to the Adjudicator indicated that a number of CIBC managers had been involved in the decision to

terminate Mr. Muthiah and that Mr. Sharma was acting primarily as a messenger. The failure by CIBC to call the manager who was apparently directly responsible for the decision (Ms. Gordon) was appropriately noted by the Adjudicator and, by itself, could have supported an adverse inference: see *Thomas v Enoch Cree Nation Band*, [2003] FCJ No 153, 227 FTR 236 at paras 50-51. At the same time, CIBC's pre-termination documents offered almost nothing of substantive justification for the decision, and the weight of its post-termination business characterization was appropriately discounted by the Adjudicator. After all, what was important to the central issue was evidence bearing directly on why Mr. Muthiah was chosen for termination and not on how the decision was subsequently framed or packaged by someone in human resources.

[16] I do not agree with CIBC that the Adjudicator misapplied *Flieger*, above, by relying upon part of the dissenting opinion of Justice Claire L'Heureux-Dubé. It is clear that the Adjudicator correctly understood the legal test for applying ss 242(3.1) and acknowledged that a *bona fide* decision to eliminate a position through the re-assignment of duties to others will fall within that provision. In the end the Adjudicator simply held that CIBC had failed to make that case on the strength of the evidence it tendered. The fact that CIBC can now point to a more favourable interpretation of the evidence than was drawn by the Adjudicator is not a basis for judicial review. My role is only to decide if the Adjudicator's interpretation was reasonably supported by the evidence and clearly it was.

[17] There is nothing in the decision to support CIBC's further contention that the Adjudicator considered the absence of a re-organizational plan for the elimination of Mr. Muthiah's position to have more significance than it deserved or, conversely, that she erred by discounting the weight to

be assigned to CIBC's stated post-decision rationale. CIBC's failure to adequately document in advance its supposed business case for the decision is surprising and the Adjudicator was fully entitled to take that into account. Similarly, it is well-established that an employer's *ex post facto* justification for a termination may, in appropriate cases, be viewed with some scepticism: see *Howard v Maritime Teland Tel*, [2000] FCJ No 1758, 196 FTR 130. In the face of CIBC's failure to call a witness with some direct knowledge of the choice of Mr. Muthiah, these further deficiencies in its case provide ample justification for the Adjudicator's conclusion.

[18] Finally, I do not agree that the Adjudicator's discussion about the after-the-fact *ad hoc* reassignment of most of Mr. Muthiah's duties constituted, by itself, a reason for her denial of relief to CIBC. This part of the decision is nothing more than a further commentary on the strength of CIBC's case and this evidence was not treated as a bar or pre-condition to the application of ss 242(3.1)(a).

Conclusion

[19] The Adjudicator's decision is thorough, thoughtful, well-supported by the evidence and contains no discernable errors of law. This application is accordingly dismissed with costs payable to the Respondent in the pre-agreed amount of $5,000.00 inclusive of disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs payable to the Respondent in the amount of $5,000.00 inclusive of disbursements.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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