Federal Court  Cour fédérale

Date: 20110607

File: T-2086-09
T-2087-09

Citation: 2011 FC 642

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 7, 2011

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

ROBERT GRAVEL

Applicant

and

TELUS COMMUNICATIONS INC.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These are two applications for judicial review pursuant to sections 18 to 18.5 of the *Federal Courts Act* (RSC, 1985, c F-7) of two decisions of the adjudicator/referee, Léonce-E Roy, (the panel). Docket T-2087-09 concerns the decision dated November 6, 2009, regarding an unjust dismissal complaint. In that decision, the panel concluded that the applicant had been laid off, not dismissed. Docket T-2086-09 concerns the decision dated November 12, 2009, regarding

a wage recovery complaint in which the panel rescinded a payment order of $34,079.55 in favour of the applicant and denied other amounts claimed by him.

[2] The applicant represented himself at the hearing.

Facts

[3] On January 23, 2006, the applicant was hired by the respondent for a “Sales Specialist II” (SS) position.

[4] On November 12, 2007, the respondent terminated the applicant’s employment because of a restructuring that resulted in the discontinuance of his function.

[5] On December 21, 2007, the applicant filed an unjust dismissal complaint under section 240 of the *Canada Labour Code*, RSC, 1985, c L-2 (CLC).

[6] He also filed a wage recovery complaint in accordance with sections 188 and 247 of the CLC. On May 20, 2008, the inspector assigned to the case issued a payment order in favour of the applicant for $32,768.80 plus 4% of his wages, for a total of $34,079.55.

[7] This payment order was referred to a referee by both parties. The respondent contested the payment order itself, while the applicant challenged the amount awarded, claiming that it was not high enough.

[8] The present applications for judicial review therefore concern the decisions dated November 6 and 12, 2009.

Impugned Decisions

Unjust dismissal complaint (T-2087-09)

[9] The panel first conducted an analysis under sections 242 to 247 of the CLC and then referred to authors and the dictionary regarding the definitions of the words “congédiement”, or dismissal, and “licenciement”, or layoff (Decision, at paras 141 to 157).

[10] The panel then considered the applicant’s position, the structure of the respondent’s business and the context surrounding the applicant’s dismissal/layoff (Decision, at paras 158 to 177).

[11] In its analysis, the panel considered the fate of two other employees, Alain Brousseau and Michel Miglierina, the former having been laid off and transferred to another position while the latter was dismissed.

[12] The panel weighed and commented on the documentary and testimonial evidence and concluded that it could not intervene in this case because this was not a dismissal without just and reasonable cause, but a layoff (Decision, at paras 178 to 182).

[13] After 15 days of hearings and written and oral arguments by the parties, the panel stated that it was satisfied that the applicant was unable to unable to deny, contradict or refute this

national reorganization which entailed the discontinuance of his function. Likewise, he did not show that this discontinuance was window dressing, staging or a plot for the purpose of eliminating him (Decision, para 181).

[14] The panel therefore declared that it did not have jurisdiction to hear the applicant's unjust dismissal complaint on the merits (Decision, para 183).

Wage recovery complaint (T-2086-09)

[15] The panel called its decision on the wage recovery complaint a [TRANSLATION] "Decision on a Double Appeal". The applicant asked the panel to quash the payment order for $34,079.55 issued by the inspector assigned to the case and order the respondent to pay $432,890.19. An itemization of the applicant's claim appears in a table at page 9 of the decision.

[16] The respondent, however, claimed to have paid all of the amounts owed to the employee except for $9,099.98 in commission for revenue objectives and scorecard that it acknowledged owing the applicant but had not yet paid when the appeal was filed.

[17] At the hearing, each party called witnesses and filed documentary evidence. The panel considered and ruled on each amount claimed, concluding as follows at paragraph 176: [TRANSLATION] "There is no doubt that the complainant's appeal of the payment order seems to confuse a claim for wages and fringe benefits with compensation which he claims he is owed because of the termination of his employment which he describes as an unjust dismissal". The panel therefore denied the applicant's claim and rescinded the payment order because the

applicant had already received $9,009.98, the amount the respondent acknowledged owing him, directly from the respondent before the wage recovery decision was signed.

Issues

[18] The issues are as follows:

a. Did the panel err in concluding that the termination of the applicant's employment was a layoff, not a dismissal?

b. Did the panel err in denying the amounts claimed by the applicant and rescinding the payment order issued by the inspector?

c. Was procedural fairness respected at the hearings?

Standard of review

[19] Both parties cite *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The respondent adds *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339. Given that the first two issues go to the heart of the panel's jurisdiction, I find that the applicable standard here is reasonableness: *Dunsmuir*, above, para 47.

[20] As for the third issue, the applicable standard is correctness: *Dunsmuir*, above, para 50.

a. **Did the panel err in concluding that the termination of the applicant's employment was a layoff, not a dismissal?**

Applicant's Arguments

[21] The applicant challenges the adjudication decision because, he argues, the respondent did not demonstrate on a balance of probabilities that there was a shortage of work or that SS positions were cut.

[22] He also refers to an email written by Yves Sarault, the respondent's representative and Regional Manager of Telus, announcing the termination of his employment and using the following words: [TRANSLATION] " . . . until we can replace Robert Gravel . . . " (Applicant's Memorandum, pages 12 and 13, Tab 8, para 43). He further alleges that the respondent changed its position on this subject several times (Applicant's Memorandum, page 13, Tab 8, at paras 46(a), (b), (c) and (d)).

[23] He states that he proved to the panel that he was replaced by another SS working in Montréal, namely, Michel St-Gelais. The panel disregarded this evidence for no reason. Furthermore, the panel did not rule on essential evidence he had filed; for this reason, the decision was unreasonable.

[24] At the hearing, the applicant cited the following cases in support of his argument: *Enoch Cree Nation Band v Thomas*, 2004 FCA 2, *National Bank of Canada v Monique Lajoie*, 2007 FC 1130, *Plante v Entreprises Réal Caron Ltée*, 2007 FC 1104, *West Region Child and Family Services Inc. v North*, 2008 FC 85. He also cited the following authors: Michel Coutu, Julie

Bourgault and Annick Desjardins, with Guy Dufort and Annie Pelletier, *Droit fédéral du travail*, (Cowansville: Éditions Yvon Blais, Collection Droit fondamental du travail, May 2011).

Respondent's arguments

[25] The respondent relies on *Donohue Inc. v Simard* (1988) RJQ 2118, to argue that a panel lacks jurisdiction where a termination of employment is based on objective considerations. Where it can be demonstrated that a business's reorganization or restructuring is real, the panel is stripped of all jurisdiction to hear an unjust dismissal complaint on the merits.

[26] The respondent notes that in the case at bar, the panel took the necessary care to make sure that this was not a constructive dismissal. It analyzed the testimony and the documentary evidence in detail and declared that it was satisfied that the respondent's evidence on this aspect of the dispute was consistent and corroborative.

[27] The respondent adds that the panel compared the applicant's situation with that of two colleagues, one of whom had been dismissed with only two weeks' pay as severance after working there for three years.

[28] The respondent also argues that it satisfied the panel that the applicant's function had in fact been discontinued (Adjudication Decision, at paras 168 and 169).

[29] In light of the preceding, the respondent submits that the Court cannot reassess the evidence that was collected or substitute its own solution or decision as it sees fit. The Court

must instead consider whether the panel's chosen solution is within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Analysis

[30] Having considered and analyzed the documents and the parties' oral and written submissions, the Court cannot find that the panel's decision to decline jurisdiction is unreasonable.

[31] The panel had the opportunity to see and hear the parties, assess their credibility and scrutinize the documentary evidence. It considered the relevant case law and doctrine in such matters and found that this was a layoff, not an unjust dismissal.

[32] The panel supported its findings with reasons and gave specific details as to why it found certain witnesses and documents to be more credible than others.

[33] The panel's analysis is found at pages 11 to 35 of the decision. Objective considerations were used, and the Court notes in particular paragraph 171, page 34:

> [TRANSLATION]
> At no time during the conduct of this case did I have the impression that the employer's witnesses conspired to mislead the panel. Their testimonies were consistent, matching and impartial. The cross-examinations conducted by the complainant himself did not reveal anything worrying about the real intentions of upper management.

[34] Contrary to what the applicant argues, the Court finds that the panel considered, analyzed and assessed the evidence tendered by the applicant. Let us consider, for example, the allegation that the applicant was replaced in his position by Michel St-Gelais. In the decision, the panel

addresses this allegation in detail at paragraphs 124 to 140. The panel does the same with the evidence of a reorganization of the respondent's business leading to the discontinuance of the applicant's function. According to paragraphs 110 to 123, it is clear that the panel heard and analyzed the applicant's evidence but characterized the respondent's evidence as follows: [TRANSLATION] "It is obvious that the employer's evidence on this question exceeds the standard of proof on a balance of probabilities. The few doubts raised by the complainant's assertions simply do not hold up" (para 123).

[35] It is not the Court's role to reassess the evidence and impose the solution it deems appropriate where, as is the case here, a panel has rendered a decision supported by reasons and based on the evidence heard. The chosen solution in the present case falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, para 47).

[36] The Court's intervention is not warranted.

Wage recovery complaint (T-2086-09)

b. **Did the referee err in denying the amounts claimed by the applicant and rescinding the payment order issued by the inspector?**

Applicant's arguments

[37] The applicant alleges that the panel's decision is unreasonable. He submits that the employer breached his employment contract and that the panel did not give sufficient consideration to the documentary and testimonial evidence.

[38] He argues that the panel erred in interpreting the rules for awarding, calculating and paying commissions, bonuses and other forms of recognition as described in his employment contract with the respondent.

[39] He also notes that his contract is a contract of adhesion and therefore should be interpreted in his favour.

[40] The applicant has difficulty understanding why the panel accepted the respondent's evidence, which contained numerous contradictions, discrepancies and, in his view, fabrications. The panel had no grounds to disregard his documentary evidence and testimony, which were far more credible.

Respondent's arguments

[41] The respondent pleads that the applicant is confusing unpaid wages within the meaning of sections 166 and 247 of the CLC with the compensation and other like things to be determined by a panel in the case of an unjust dismissal under subsection 242(4) of the Code (Decision, para 176).

[42] It argues that several of the applicant's claims required the panel to substitute its judgment for that of the respondent's officers, when they alone had the authority to develop,

manage and administer the sales incentive programs. Now that the panel has not agreed with him, he is asking the Court to intervene and make its own assessment of the facts.

Analysis

[43] According to *Dunsmuir*, above, para 47, the role of the Court in judicial review is to ask whether the decision at issue has the qualities that make a decision reasonable, that is, whether the decision is transparent, justifiable and intelligible, and whether the chosen solution falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[44] Having meticulously analyzed the wage recovery decision, the Court is unable to conclude that the decision could be characterized as being unreasonable.

[45] The panel heard the witnesses, weighed the documentary evidence filed by the parties and analyzed each of the applicant's claims and the amounts awarded by the inspector in his payment order.

[46] The panel gives a detailed explanation for accepting Mr. Hamill's testimony regarding how the sales incentive program was applied and why the applicant was not entitled to recognition in the form of trips to Sonora, British Columbia, and Dubai under the President's Club program. The panel also justifies dismissing the applicant's claims regarding the non-competition clause in his employment contract, his alleged entitlement to pension benefits and stock purchases and his claim for extrajudicial fees paid to a labour lawyer.

[47] The panel's findings are logical and supported by the evidence. The Court's intervention is not warranted.

c. Was procedural fairness respected at the hearings?

Applicant's arguments

[48] The applicant submits that the panel did not give him enough time to present his evidence. He states that the respondent was given 11 days to present its evidence, while he only had two and a half days.

[49] He challenges the manner in which the proceedings were handled. He has grievances with the panel because the panel was allegedly much more flexible with counsel for the respondent than with him regarding the examinations and cross-examinations. For example, he refers to how the testimonies of Mr. Sarault and Mr. Hamill were handled.

[50] He also criticizes the panel for failing to maintain discipline during the hearings and for tolerating the unacceptable behaviour of counsel for the respondent. This made it impossible for him make full answer and defence to the respondent's arguments.

Respondent's arguments

[51] For its part, the respondent submits that the panel exercised its jurisdiction properly while respecting the parties' right to file their evidence. The onus was on the applicant to show that there was a breach of procedural fairness at the hearings, and he failed to do so.

[52] The respondent refers to the affidavit of Mr. Sarault to refute the applicant's grievances. It submits that the applicant had all the time he needed to adduce his evidence and avail himself of the right to cross-examine the opposing party's witnesses (Respondent's Record, Volume 1, page 11, Affidavit of Mr. Sarault, para 83). To support its argument, the respondent refers to a schedule of witnesses heard and the dates and periods during which they were examined and/or cross-examined by the applicant and the respondent (Respondent's Record, Volume 1, Exhibit 18, page 155).

[53] According to the respondent, the panel was very flexible and respectful toward the applicant and made sure that certain witnesses, such as Mr. Hamill and Mr. Cloutier, made themselves available so that the applicant could continue cross-examining at a convenient time.

[54] As regards the applicant's criticism of the panel concerning certain documents that he demanded from the respondent, the respondent points out that these documents were not relevant because they referred to facts arising after the events in dispute, to establish evidence of the quantum of damages should his termination be found to be an unjust dismissal. The panel was therefore correct to not consider them, given that it had determined that this was a layoff, not an unjust dismissal.

Analysis

[55] The panel's jurisdiction is set out at paragraph 242(2)(*b*) of the CLC:

(*b*) shall determine the procedure to be followed, but shall give full	b) fixe lui-même sa procédure, sous réserve de la double obligation de

opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and	donner à chaque partie toute possibilité de lui présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier, d'autre part;

[56] In the case at bar, the Court notes that, unfortunately, there are no stenographic notes. We must therefore refer to the affidavits and the submissions of the parties to try to determine whether there was a breach of procedural fairness.

[57] In *Université du Québec à Trois-Rivières v Larocque,* [1993] 1 SCR 471, the Supreme Court states that a panel has complete jurisdiction to define the scope of the issue presented to it, and that in this regard only a patently unreasonable error or a breach of natural justice could give rise to judicial review.

[58] Here, the Court is unable to conclude that the panel mishandled the proceedings. The respondent categorically refuted the applicant's criticisms. The details reported in Mr. Sarault's affidavit and corroborated by a precise hearing schedule show that applicant's grievances are unfounded.

[59] As regards the documents requested by the applicant, Mr. Sarault's affidavit states the following at paras 92 and 93 (Respondent's Record, Volume 1, pages 11 and 12):

> [TRANSLATION]
> 92. Therefore, the only documents not obtained and filed or produced by the applicant consist solely of layoff letters to sales specialists in the NAS division of TBS working outside Quebec and sales reports, all of which are dated after his layoff.

> 93. The chairperson of the adjudication panel told the applicant several times that these exhibits could only be used to establish the quantum of damages should the respondent's preliminary objection regarding whether there had been a layoff and that his requests were premature. (Emphasis added.)

[60] The burden of proof as to whether there has been a breach of the principles of natural justice or procedural fairness is on the person alleging the breach. The Court is not satisfied that the evidence presented by the applicant, contradicted by the respondent, shows that such a situation occurred at the hearings of this case before the panel.

[61] The parties left the issue of costs up to the Court.

JUDGMENT

THE COURT ORDERS that

1. The applications for judicial review be dismissed.

2. The applicant should pay the respondent costs in the amount of $3,000, including disbursements.

"Michel Beaudry"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2086-09 T-2087-09
STYLE OF CAUSE:	Robert Gravel and Telus Communications Inc.
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