Federal Court  Cour fédérale

Date: 20110711

Docket: T-1006-10

Citation: 2011 FC 866

Ottawa, Ontario, July 11, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

BURNT CHURCH (ESGENOÔPETITJ) FIRST NATION

Applicant

and

ANDREW CURTIS BARTIBOGUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Burnt Church (Esgennoôpetitj) First Nation, challenges the legality of the decision made on May 28, 2010 by Mr. E. Thomas Christie (the adjudicator), an adjudicator designated pursuant to section 242 of the *Canada Labour Code*, RSC 1985, c L-2 (the Code), allowing the complaint of unjust dismissal made by the respondent, Mr. Bartibogue, and ordering that he be compensated for the loss of pay as youth coordinator for the period indicated in the decision.

LITIGATION

[2] The applicant submits that the adjudicator erred in accepting to hear the matter or otherwise breached the rules of natural justice or procedural fairness. He also challenges the determination that the respondent was employed by the applicant as youth coordinator and that the cessation of pay was motivated by bad faith.

[3] In contrast, the respondent submits that the adjudicator had jurisdiction to hear the complaint, that there was no breach of the rules of natural justice or procedural fairness, and that the findings of fact made by the adjudicator are reasonable and supported by the evidence.

[4] In principle, the adjudicator's application of section 240 of the Code to the specific facts of the case is reviewable on the standard of reasonableness (*Delisle v Mohawk Council of Kanesatake*, [2007] FCJ No 62 at para 27). However, for matters of pure jurisdiction involving the interpretation of the Code and procedural fairness, the appropriate standard of review is that of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 42-43).

[5] For the reasons that follow, the Court concludes that the adjudicator had jurisdiction to hear and decide the complaint, that there was no breach of the rules of natural justice or procedural fairness and that his decision on the merits was reasonable and falls within a range of possible outcomes, according to the law and the facts.

LEGAL FRAMEWORK

[6] Sections 240 to 242 of the Code prescribe the conditions of making a complaint of unjust dismissal as well as the treatment of same by an inspector and the Minister who may appoint an adjudicator to hear and decide same:

240. (1) Subject to subsections (2) and 242(3.1), any person	240. (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si :
(a) who has completed twelve consecutive months of continuous employment by an employer, and	a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;
(b) who is not a member of a group of employees subject to a collective agreement,	b) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.	
(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.	(2) Sous réserve du paragraphe (3), la plainte doit être déposée dans les quatre-vingt-dix jours qui suivent la date du congédiement.
(…)	(…)
241. (1) Where an employer dismisses a person described in subsection 240(1), the person who was dismissed or any inspector may make a request in writing to the employer to provide a written statement	241. (1) La personne congédiée visée au paragraphe 240(1) ou tout inspecteur peut demander par écrit à l'employeur de lui faire connaître les motifs du congédiement; le cas échéant, l'employeur est tenu de lui

giving the reasons for the dismissal, and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made.

fournir une déclaration écrite à cet effet dans les quinze jours qui suivent la demande.

(2) On receipt of a complaint made under subsection 240(1), an inspector shall endeavour to assist the parties to the complaint to settle the complaint or cause another inspector to do so.

(2) Dès réception de la plainte, l'inspecteur s'efforce de concilier les parties ou confie cette tâche à un autre inspecteur.

(3) Where a complaint is not settled under subsection (2) within such period as the inspector endeavouring to assist the parties pursuant to that subsection considers to be reasonable in the circumstances, the inspector shall, on the written request of the person who made the complaint that the complaint be referred to an adjudicator under subsection 242(1),

(3) Si la conciliation n'aboutit pas dans un délai qu'il estime raisonnable en l'occurrence, l'inspecteur, sur demande écrite du plaignant à l'effet de saisir un arbitre du cas :

(a) report to the Minister that the endeavour to assist the parties to settle the complaint has not succeeded; and

a) fait rapport au ministre de l'échec de son intervention;

(b) deliver to the Minister the complaint made under subsection 240(1), any written statement giving the reasons for the dismissal provided pursuant to subsection (1) and any other statements or documents the inspector has that relate to the complaint.

b) transmet au ministre la plainte, l'éventuelle déclaration de l'employeur sur les motifs du congédiement et tous autres déclarations ou documents relatifs à la plainte.

1977-78, c. 27, s. 21.

1977-78, ch. 27, art. 21.

242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).	242. (1) Sur réception du rapport visé au paragraphe 241(3), le ministre peut désigner en qualité d'arbitre la personne qu'il juge qualifiée pour entendre et trancher l'affaire et lui transmettre la plainte ainsi que l'éventuelle déclaration de l'employeur sur les motifs du congédiement.
(2) An adjudicator to whom a complaint has been referred under subsection (1)	(2) Pour l'examen du cas dont il est saisi, l'arbitre :
(a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;	a) dispose du délai fixé par règlement du gouverneur en conseil;
(b) shall determine the procedure to be followed, but shall give full 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	b) fixe lui-même sa procédure, sous réserve de la double obligation de 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;
(…)	(…)

[7] With this legal framework in mind, the Court will now examine the factual background leading to the complaint of unjust dismissal and referral to an adjudicator.

FACTUAL BACKGROUND

[8] The respondent is a member of the Burnt Church (Esgenoôpetitj) First Nation (the applicant) and was elected Band Councillor in 2004, and was re-elected in 2008 and 2010. Each election was for a two-year term. As a Band Councillor, the respondent received a yearly honorarium of $7,000.

[9] According to evidence reviewed by the adjudicator in the impugned decision, the Chief has the discretion to assign Band Councillors to portfolios, for which the Councillor receives additional compensation. The applicant performed the duties of youth coordinator for short periods in 2004 and 2006, for which he received the compensation of $600 per week over and above the yearly honorarium as a Band Councillor. Upon the termination of his duties, he received a record of employment (ROE) from the applicant. The ROE identified the respondent as an employee and indicated his earnings as $600 per week.

[10] In April 2007, the respondent was once again made responsible for the duties of youth coordinator. He performed these duties until September 2008, when he was removed from the payroll. He was once again issued a ROE which identified the respondent as an employee and indicated that he was “laid off”.

[11] In parallel to these events, the respondent had run for the position of Chief of the applicant, against the incumbent, Chief Dedam, in the May 2008 election. The respondent was unsuccessful, and filed an appeal of the results with Indian and Northern Affairs Canada (INAC). He received notification in mid-September 2008 that his appeal was unsuccessful. Shortly after, his remuneration for his duties as youth coordinator was terminated.

[12] The respondent contacted Human Resources and Skills Development Canada (HRSDC) and filled out a complaint form. He indicated that his position with the applicant was that of "Band Councillor", attached the 2004, 2005 and 2008 ROE's and a pay stub as youth coordinator, and returned it to HRSDC.

[13] Sometime after the receipt of the respondent's complaint, HRSDC added the job titles of "Youth Coordinator" and Fisheries Manager". The applicant did not respond to requests for reasons sent to the applicant by HRSDC in December 2008 and February 2009 and the Minister referred the complaint to an adjudicator.

NO JURISDICTIONAL ERROR OR BREACH TO NATURAL JUSTICE

[14] The hearing before the adjudicator began on January 27, 2010, on which day the discrepancy in the complaint form was discovered. The respondent offered to proceed on the basis of the original complaint indicating his position as that of "Band Councillor", but the applicant held that this would not resolve the issue. Instead, the applicant sought an adjournment in order to discover who altered the form and why. The adjudicator granted the request, but in order to use the time already allocated efficiently, some witnesses were examined on January 27 and 28, 2010.

[15] When the hearing resumed on March 22, 2010, the applicant once again sought an adjournment, for three reasons: (1) the adjudicator was not seized of a complaint under section 240 of the Code; (2) the hearing process was leading to a denial of natural justice; and (3) continuing the hearing in light of the applications for judicial review that had been made was also a denial of natural justice.

[16] The adjudicator refused to adjourn. His reasoning was that although a stay had been sought, the Federal Court had not ruled on the issue and he had heard nothing new that would prompt him to refuse to hear the complaint. The adjudicator held that the matter should proceed in order to avoid delay and then subsequently heard the rest of the evidence.

[17] The Court finds that the adjudicator made no jurisdictional error in hearing the matter and dismissing the preliminary objection of the applicant.

[18] Regarding the complaint forms, the adjudicator rightly held that the additions made by HRSDC's representatives did not remove his jurisdiction. The Court finds that this is correct since the original complaint form was duly completed and submitted by the respondent in the 90 day delay prescribed in subsection 240(2) of the Code.

[19] Moreover, additions made by HRSDC's representatives did not result in a fundamental change to the complaint. Indeed, the adjudicator noted that the information added to the complaint form came directly from the ROE's, issued by the applicant. The adjudicator accepted the respondent's explanation that he had indicated "Band Councillor" on the complaint form because that is what he was, even after his pay for his portfolio duties had ended.

[20] That said, the adjudicator cautioned that the alteration of the complaint form by HRSDC is not a practice to be encouraged, but that it is understandable in the specific circumstances, given the duty of HRSDC staff to move complaints through the system and provide the Minister with full

information in light of the Minister's decision to appoint an adjudicator or not. While he could conceive of errors that would deprive the Minister of the jurisdiction to appoint an adjudicator, the adjudicator concluded that this was not one of them.

[21] The adjudicator also rejected the applicant's argument that the Minister was deprived of jurisdiction because the complaint form submitted to him was not "the" complaint in the sense of paragraph 241(3)(b) of the Code, on the basis that this was an overly narrow reading of the provision. Moreover, the adjudicator reasoned that if section 242(b) allows the adjudicator to consider "information relating to the complaint", it is reasonable to extend the same flexibility to the Minister. Again, the Court must agree with the interpretation of the Code given by the adjudicator which is the correct one.

[22] The applicant's allegation that the modifications to the complaint form were not made within the 90 day time limit set out in subsection 240(2) of the Code was also rightly rejected, as there is no evidence thereof. Indeed, this is clear from the language of the allegation itself, where the applicant says that it is "likely the Inspector added that substantive information … after the expiry of the 90 days". The Court finds that none of the jurisdictional challenges raised by the applicant at the hearing of the complaint were justified. As the adjudicator rightly mentions in his final decision, "To have found otherwise would be tantamount to saying that 'form over substance' should rule the day".

[23] There was no breach of natural justice or procedural fairness either.

[24] The adjudicator rightly found that the discovery of the modified complaint form at the hearing did not violate the applicant's right to natural justice and procedural fairness. The applicant requested and was granted a three month adjournment to resolve this very issue. Furthermore, as the adjudicator puts it, "[t]here should have been no surprise to the [applicant] as to what was the core issue in the complaint filed by the [respondent]. The Chief stopped the [respondent's] pay. The [applicant] issued an ROE noting the [respondent] was an employee. The [respondent] complains". Given that there is no evidence that the applicant suffered any prejudice from the admission of the two complaint forms, the Court concludes that the adjournment accomplished its purpose of safeguarding the applicant's right to natural justice and procedural fairness.

DECISION ON THE MERITS REASONABLE

[25] The determination made by the adjudicator that the respondent was employed as youth coordinator and was unjustly dismissed is also reasonable.

[26] Among the significant documents submitted by the parties during the hearing were the 2004, 2005 and 2008 ROE's. The ROE's were issued by a member of the applicant's administrative staff. The ROE's clearly and unequivocally identify the respondent as an employee and the applicant as his employer. When questioned about why he had written "Band Councillor" for his job title, the respondent testified that as he had been terminated from his position as youth coordinator, he had no choice but to put down his continuing position as Band Councillor. However, the respondent could not explain why one of the ROE's indicated his occupation to be "Fisheries Manager". The adjudicator accepted the respondent's explanations and the Court finds nothing unreasonable in so doing.

[27] The respondent, while recognizing that the portfolio concept exists within the Band structure, believed that he was performing a job when he received his salary as youth coordinator. Notwithstanding the fact that there was no written job description and no written contract of employment, indeed, it was the Chief who had the authority to hire and fire employees. The respondent thus argued that there was an employment relationship and a dismissal over which the adjudicator had jurisdiction. He had been employed for more than twelve consecutive months and this employment had stopped. The proof thereof was the ROE's prepared by the applicant and submitted to the Federal government. Moreover, he had never been informed by the applicant that his pay could be terminated at any point without cause or notice. Thus, the requirements in section 240 of the Code were met. On the merits, he also argued that the Chief's failure to testify at the hearing should be taken as an indication of the precarious nature of the applicant's position, and that the suspicious timing of the termination of pay should not be ignored.

[28] On the merits of the unjust dismissal complaint, the applicant's main argument was that the elimination of pay as youth coordinator was primarily a Band governance issue that should not be reviewed on the merits. According to the applicant, the portfolio system developed as part of the oral tradition of the Band's governance. The lack of documentary evidence pertaining to the portfolio system did nothing to diminish its central importance. The Chief, who exercised the delegated authority of the Council, clearly had the authority to grant or remove portfolio duties, as well as the pay normally associated with those duties. In this respect, the applicant submitted that any removal of duties and/or pay could be done without cause or notice. In this specific case, the respondent remained seized of his portfolio duties, notwithstanding the termination of his pay.

[29] Accordingly, the applicant argued before the adjudicator that if the respondent disagreed with the Chief's decision, he should have brought the matter before the Council, rather than proceed via the complaint route. Echoing these remarks, the applicant's Counsel told the Court at the hearing of this judicial review application that, instead of making a complaint under the Code, if the respondent was unhappy with the result, it was always open to him to challenge the legality of the Council's decision to cut his compensation as a youth coordinator by making a judicial review application. However, no particular case was provided by Counsel showing that this type of decision by Band Councils had ever been reviewed by the Federal Court.

[30] In the Court's opinion, the adjudicator could reasonably come to the conclusion that the respondent was, indeed, an employee as per section 240 of the Code. In support of this finding, the adjudicator could rely on the three ROE's in the record. The adjudicator could rely on the fact that in completing the ROE's, given the presence of the disclaimer that "[the employer] is aware that it is an offence to make false entries and hereby [certifies] that all statements on this form are true", the employer is certifying that all statements made are true. In the case at bar, the relevant ROE made the following assertions: (1) the employer's name was the Burnt Church First Nation; (2) the employee was the respondent; (3) the employee received pay from April 23 2007 – September 19, 2008; and (4) the respondent was the "youth coordinator". Absent any contrary evidence, the adjudicator was allowed to give significant weight to the ROE's as proof of employment.

[31] The adjudicator performed his task in assessing all relevant evidence. It was up to the applicant to present contradictory evidence refuting the assertions contained in the ROE's, as well

as the respondent's allegations that the cessation of pay as youth coordinator was a punitive measure taken by the applicant because he had run against the Chief.

[32] The adjudicator duly considered the testimony of Mr. Clark Dedam, who was an elected Councillor since 2001. The latter testified that the respondent had not made any verbal or written reports to Council regarding his work as youth coordinator, nor was there any set description of the duties involved with this portfolio. When questioned at the hearing before the adjudicator as to why there had been no response to the two registered letters from HRSDC asking for the written reasons for the dismissal, Mr. Dedam's answer was simply that the applicant was under no obligation to respond, as there had been no dismissal from a "Band Councillor" position. The respondent still held his position as Band Councillor, and indeed, his duties as youth coordinator. His pay had simply been reduced in order to reflect the fact that he was not carrying out his duties to any substantial degree. It was up to the adjudicator to weight Mr. Dedam's testimony in light of his own admissions and the rest of the evidence on record.

[33] In his decision, the adjudicator notably notes that Mr. Dedam acted as Comptroller for the applicant. The latter confirmed that portfolio duties could be removed by the Chief and/or Council if they were dissatisfied with the work performed, or if the Councillor was not re-elected. Mr. Dedam also testified that his office routinely issued ROE's when a Councillor's portfolio work ended. The ROE was issued as a means of allowing that person to qualify for receipt of employment insurance benefits. Such evidence seems to indicate that the issuance of ROE's was not accidental, that the Chief and/or Council exercised some control with respect of the quality of the work performed and that the sanction was the removal of the portfolio or the discontinuance of pay.

[34] It is also apparent that the arguments made by the applicant were duly considered and dismissed by the adjudicator. At the root of the matter, the adjudicator was tasked with determining whether the respondent satisfied the conditions enumerated in subsection 240(1) of the Code. Employees have certain rights upon termination without notice or cause, which the adjudicator upheld in his decision. It was open for the adjudicator to conclude that the existence of the portfolio system within the governance structure of the Band did not place the Chief, or Council, outside of the law and thus exempt from applicable legal obligations (*Long Lake Cree Nation v Canada (Minister of Indian and Northern Affairs)*, [1995] FCJ No 1020 at para 31 (TD)). The adjudicator could reasonably conclude that if the applicant issues ROE's to portfolio holders once their pay has been terminated for those duties, then these portfolio holders are employees in the eyes of the law.

[35] In final analysis, the Court rejects the applicant's argument that the adjudicator failed to consider the arguments made or give weight to evidence submitted by the applicant. The adjudicator's decision discussed the evidence submitted to him, and he gave detailed reasons for the conclusions that he reached. The adjudicator was not required to list every piece of evidence before him, and indicate the weight he has assigned to each. The weight that the adjudicator gave to particular evidence was his to decide, so long as the process was fair and the decision reasonable.

[36] For all these reasons, the present judicial review application must fail, and in view of the result, the respondent is entitled to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review application made by the applicant is dismissed with costs in favour of the respondent.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1006-10
STYLE OF CAUSE:	**BURNT CHURCH (ESGENOÔPETITJ) FIRST NATION v ANDREW CURTIS BARTIBOGUE**
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