Federal Court of Appeal | Cour d'appel fédérale

Date: 20150202

Docket: A-365-13

Citation: 2015 FCA 32

CORAM: **NADON J.A.**
WEBB J.A.
BOIVIN J.A.

BETWEEN:

ATAUR RAHMAN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on January 28, 2015.

Judgment delivered at Ottawa, Ontario, on February 2, 2015.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: WEBB J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision of Phelan J. of the Federal Court (the Judge) dated October 2, 2013 (2013 FC 1007) who dismissed the applicant's Judicial review application of a decision of Stephan J. Bertrand, an adjudicator of the Public Service Labour Relations Board (the Board) dated January 21, 2013.

[2] Before the Board was a grievance brought by the appellant following the termination of his employment. The appellant was hired by the Department of Indian Affairs and Northern

Development (Aboriginal Affairs) as an environmental scientist, effective January 28, 2008 at Iqaluit, Nunavut. Either on January 28, 2009 or February 2, 2009 the appellant was informed that his employment had been terminated. As a result, the appellant filed a grievance on March 9, 2009 seeking reinstatement and damages.

[3] The hearing of the appellant's grievance was fixed for May 29, 2012 at Iqaluit. The hearing proceeded, as scheduled, on May 29 until June 1, 2012 at Iqaluit and then resumed for one day in Toronto on August 27, 2012. The decision was rendered, as I have already indicated, on January 21, 2013.

[4] At the beginning of the hearing before the Board, the respondent made two objections to the Board's jurisdiction to hear the appellant's grievance. First, the respondent argued that as the grievance had not been filed within the 25 day period provided for in the collective agreement, the Board was without jurisdiction to entertain it. Second, the respondent argued that since the grievance concerned the termination of a probationary appointment made under the *Public Service Employment Act, (S.C. 2003, c. 22, ss. 12, 13)* (*PSEA*), it could not be referred to adjudication under the *Public Service Labour Relations Act,(S.C. 2003, c. 22, s. 2)* (*PSLRA).* Hence, the Board was without jurisdiction.

[5] After hearing the parties' arguments on the respondent's objections, the Board reserved its decision in regard thereto and proceeded to hear the evidence on the merits of the grievance.

[6] The following evidence was adduced by the parties. The appellant testified that his termination had nothing to do with his work performance or his suitability for the position, but rather resulted from retribution by his immediate supervisor Ms. Robin Abernethy-Gillis (Ms. Gillis). According to the appellant, Ms. Gillis took steps which eventually led to his termination because of his refusal to accept her ongoing sexual advances which commenced around April 15, 2008. The appellant never reported his supervisor's sexual advances prior to his termination nor did he inform anyone of these events.

[7] Ms. Gillis testified at the hearing and denied all of the appellant's accusations of sexual and professional impropriety. According to her, the appellant's work performance left much to be desired and as a result, she developed a plan to help him increase the level and quality of his work. More particularly, at a given point in time, i.e. after October 20, 2008, weekly work plan meetings took place to supervise the appellant's work more closely.

[8] At a meeting held on January 22, 2009, Mr. Michael Nadler, the regional director general of the Nunavut regional office, informed the appellant of his concerns regarding, *inter alia*, his misunderstanding of fundamental issues specific to the tasks assigned to him by his superiors.

[9] On January 26, 2009, the appellant was asked to attend a meeting scheduled for January 27, 2009 with Ms. Gillis and Mr. Nadler. The appellant did not attend this meeting because of sudden illness which forced him to go to the hospital for treatment. Shortly after leaving the hospital, the appellant informed his employer that he would not be returning to the office before Monday, February 2, 2009.

[10] Mr. Nadler telephoned the appellant at home on January 28, 2009. The subject of that conversation was disputed before the Board. According to Mr. Nadler, he told the appellant that the purpose of the January 27, 2009 meeting had been to inform him of his rejection on probation and that a letter confirming this had been sent to him. However, according to the appellant, Mr. Nadler called him to inquire about his health and to fix a meeting for February 2, 2009 when he would be returning to the office. According to the appellant, Mr. Nadler did not inform him that his employment had been terminated.

[11] Also on January 28, 2009, the appellant was in touch with Mr. Atiomo of Aboriginal Affairs' Winnipeg office to confirm his willingness to accept a term position in that city and that a deployment and secondment was not possible from Iqaluit. The appellant made it clear to Mr. Atiomo that he had decided to leave his employment at Iqaluit.

[12] The Board made a number of findings which are crucial to this appeal. With regard to the timeliness and validity of the rejection on probation, the Board held that it preferred Mr. Nadler's evidence regarding the conversation of January 28, 2009. In other words, the Board found that the appellant was notified, on January 28, 2009 during his conversation with Mr. Nadler that his employment was terminated. Thus, the Board held that the appellant had been rejected while still on probation and that he had been notified before the expiry of his probation period of one year. Consequently, the Board had no jurisdiction to hear the grievance.

[13] The Board also found that the appellant's grievance had not been filed within the 25 day period provided for in the collective agreement. In effect, the appellant having been notified of

his termination on January 28, 2009 was required to file his grievance by no later than March 4, 2009. In the circumstances, as the grievance had been filed on March 9, 2009, it had been filed out of time. Consequently, the Board concluded that it did not have jurisdiction to hear the grievance.

[14] The Board then turned to the merits of the grievance and stated that although it did not have jurisdiction to entertain rejections while on probation, it had jurisdiction where the termination was a sham or camouflage. In other words, if the termination is not based on a good faith dissatisfaction by the employer of the employee's suitability for the job, the Board will have jurisdiction to hear the grievance.

[15] The Board found the appellant's evidence with regard to Ms. Gillis' conduct "underhanded, unbelievable, improbable and self serving" (paragraph 62 of Board reasons). It did not believe the appellant's testimony that Ms. Gillis had behaved in the way he suggested. To the contrary, the Board found Ms. Gillis' testimony credible. In so finding, the Board indicated that it gave considerable weight to the fact that the appellant had never reported Ms. Gillis' behaviour to anyone prior to his termination.

[16] Further, the Board found that the documentary evidence supported Ms. Gillis' testimony that she had real and legitimate concerns regarding the appellant's work performance.

[17] The Board therefore rejected the appellant's claim that his termination while on probation was a sham and camouflage and not based on real concerns and dissatisfaction on the part of his employer. In so concluding, the Board also rejected the appellant's claim of discrimination.

[18] The appellant commenced a judicial review application in the Federal Court seeking to set aside the Board's decision. His application was heard on September 17, 2013 in Toronto.

[19] On October 2, 2013, the Judge dismissed the appellant's judicial review application. After a brief review of the facts and of the Board's decision, the Judge turned to the issues before him, namely the admission of additional evidence, procedural fairness before the Board and the validity of the Board's decision.

[20] The Judge refused the admission of the new evidence sought by the appellant other than in respect of two letters sent by the appellant's bargaining agent dated May 17 and May 22, 2012. In these letters, the bargaining agent first indicated to the Board that it would not be acting on behalf of the appellant at his hearing and in the second letter, it indicated that it would now be acting for the appellant.

[21] With respect to procedural fairness, the issue before the Judge was whether the appellant had had sufficient time to prepare for his hearing of May 29, 2012 in Iqaluit. Specifically, the appellant submitted that he had only found out, through his bargaining agent, on May 11, 2012 that his hearing was proceeding on May 29, 2012. The Judge disposed of that issue in the following terms at paragraphs 32 – 35 of his reasons:

> B. Breach of Procedural Fairness
>
> [32] It was difficult to determine from the Applicant in what manner the Adjudicator breached a principle of natural justice other than the claim that the Applicant had insufficient time to prepare for the hearing because he received notice of the hearing in mid-May.
>
> [33] The hearing occurred over four days in Iqaluit from May 29 to June 1, 2012 and a further day in Toronto on August 27, 2012. It is difficult to see how the Applicant could not have gathered his evidence and argument over that period of time.
>
> [34] Further, there was no request for an adjournment. Importantly the bargaining agent on May 25, 2012 accepted the hearing dates. The Applicant is bound by the consent of his bargaining agent.
>
> [35] Therefore, the Court concludes that there is no breach of procedural fairness.

[22] With respect to the validity of the Board's decision, the Judge found the decision to be reasonable. In particular, he noted that the Board had found that the appellant's evidence was not credible and that in making this finding, the Board had considered and applied the correct test. The Board had also given clear reasons for its findings.

[23] For the Judge, the case before him was one of "true credibility" and the Board, as trier of fact, was in the best position to make such a determination. Consequently, the Judge refused to intervene and, as a result, the appellant's judicial review application was dismissed with costs.

[24] Not satisfied with the Judge's decision, the appellant filed a notice of appeal on November 1, 2013 and filed his memorandum of fact and law on June 4, 2014 in which he raises a number of issues, namely:

(1) Did the Board deny him procedural fairness by not allowing him more time to prepare for the May 29, 2012 hearing in Iqaluit?

(2) Did his employer terminate his employment while he was on probation or after the one year period to do so?

(3) Was his employer's decision to terminate his employment made in bad faith?

[25] For the reasons that follow, I conclude that the appellant's appeal must be dismissed.

[26] First, I will deal with the issue of procedural fairness. In brief, the appellant's argument is that he only found out on May 11, 2012 that the hearing of his grievance was scheduled for May 29, 2012 at Iqaluit. As he was then residing in Toronto, he asked his bargaining agent to obtain an adjournment of the hearing and a change of venue. The bargaining agent's request to the Board was denied primarily because the hearing had been scheduled well in advance and the employer had already made all travel arrangements for its witnesses.

[27] In my view, the Judge did not err in dismissing the appellant's arguments on procedural fairness when he said that the bargaining agent had agreed to the May 29, 2012 date and that the appellant was bound by the consent of his bargaining agent. To this I would add that it is clear that the hearing date of May 29, 2012 had been agreed to by the bargaining agent long before the hearing date. Whether or not it is true that the bargaining agent did not so inform the appellant prior to May 11, 2012 is an issue which I need not decide as I find that in the circumstances, the Board's decision to deny the adjournment and the change of venue, when sought by the

bargaining agent either on May 22 or May 23, 2012, was not unreasonable. Thus, if the appellant was prejudiced, as he says he was, because of the short time which he was given to prepare for the hearing, his recourse, if any, is in my view against the bargaining agent. Consequently, I am satisfied that there was no denial of procedural fairness by the Board when it refused to grant the adjournment and the change of venue sought by the bargaining agent only a few days before the May 29, 2012 hearing date.

[28] I now turn to the second and third issues which I will address as one issue.

[29] There can be no doubt that the appropriate standard of review of the Board's decisions concerning issue numbers 2 and 3 is that of reasonableness which is the test that the Judge applied in deciding these issues. Thus, the question is whether the Judge, after identifying the correct standard of review, applied it correctly to the facts before him. In my view, he did. At paragraphs 39 and 40 of his reasons, he wrote as follows:

> [39] This was a true credibility case where there was direct conflict between key witnesses. The trier of fact is in a unique position to make the assessment of credibility. This Court is not in any position to make that kind of finding or to contradict the Adjudicator's decision. The Court is obligated to accord deference to the Adjudicator's conclusions.
>
> [40] What this Court can do is consider the way in which the Adjudicator came to his conclusions. The Court can find no grounds upon which to overturn the Adjudicator. The legal test used was proper, the reasoning was clear and the decision falls within a range of results reasonably open to the decision maker on both the issue of notice and of basis for termination.

[30] It is clear from the Board's reasons that it found the employer's witnesses more credible than the appellant. The Board's credibility findings are what led it to determine that the appellant had been terminated while on probation and that his employment had not been terminated in bad

faith or on arbitrary or discriminatory grounds. In other words, as the Judge made clear in his reasons, this was a "true credibility case" and, as a result, the credibility findings drove the Board to the conclusions which it reached on the second and third issues before us.

[31] At the hearing before us, the appellant took us through a number of documents which, in his view, showed that the Board had been wrong in making a number of findings and more particularly its findings on credibility. Unfortunately for the appellant, I have not been persuaded that the evidence to which he points actually supports his case. To the contrary, a review of the various pieces of evidence, to which both the appellant and the respondent referred us throughout the course of the hearing, leads me to the conclusion that the Board was right in making the credibility findings that it made. In any event, I am satisfied that there is nothing in the record which could justify intervention on our part. Consequently, I agree with the Judge that the Board's decision was entirely reasonable.

[32] For these reasons, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-365-13

(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE PHELAN OF THE FEDERAL COURT DATED OCTOBER 2, 2013 IN DOCKET NUMBER T-773-13)

STYLE OF CAUSE:	ATAUR RAHMAN v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 28, 2015
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	WEBB, BOIVIN JJ.A.
DATED:	FEBRUARY 2, 2015

APPEARANCES:

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