Federal Court of Appeal  Cour d'appel fédérale

Date: 20150326

Docket: A-196-14

Citation: 2015 FCA 84

CORAM: **GAUTHIER J.A.**
RYER J.A.
SCOTT J.A.

BETWEEN:

JONATHAN BRADFORD

Applicant

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA)

Respondents

Heard at Ottawa, Ontario, on March 11, 2015.

Judgment delivered at Ottawa, Ontario, on March 26, 2015.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: RYER J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Mr. Bradford (the applicant) seeks judicial review of the decision of the Canada Industrial Relations Board (the Board) (2014 CIRB 716). The Board dismissed his application to reconsider the Board's decision (2013 CIRB 696) dismissing his application for a religious

exemption from belonging to a union and paying dues pursuant to subsection 70(2) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code).

[2] Before turning to the factual background and the issues before us, it is important to keep in mind what is not in issue in this application. Indeed, although the sincerity of the applicant's religious beliefs was a factual issue to be assessed by the panel which initially heard his application regarding whether an exemption should be granted (the Original Panel of the Board), the applicant did not argue that there was a violation of section 2(a) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), which protects freedom of religion. This was made very clear to us at the hearing. Nor is this application about the validity of the test to be applied in determining whether to grant an exemption under subsection 70(2) of the Code.

[3] In his memorandum, the applicant framed the issues before this Court as being whether or not the Original Panel breached procedural fairness, whether the Original Panel failed to appropriately assess the sincerity of his objection based on his religious beliefs, and whether the Reconsideration Panel of the Board failed to balance the relevant *Charter* value (section 2(a)) with the statutory objectives of the Code (*Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*] at paragraph 58).

[4] However, as will be explained herein, it became very clear at the hearing that this application is basically about whether the Reconsideration Panel could reasonably conclude that there was enough evidence to support the Original Panel's decision.

[5] In my view, this conclusion was open to the Reconsideration Panel and I have not been persuaded that it made any reviewable errors that would justify this Court's intervention.

I. BACKGROUND

[6] The applicant has been employed as an air traffic controller with NAV CANADA since May 2010. Pursuant to the terms and conditions of employment outlined in the collective agreement between his employer and the National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-CANADA), he is required to be a union member and has indeed both been a member and paid the requisite dues since September 2010.

[7] The applicant is a Protestant Reformed Christian. Although he wandered from his religious upbringing between 1996 and 2011, he has since re-engaged with his faith.

[8] In June 2012, he was informed by a colleague and friend, Mr. Tomkinson, that CAW-CANADA had taken a pro-choice position on abortion, issuing a press release and publicly supporting some women's organizations. On June 26, the applicant sent an email to his union president protesting CAW-CANADA's actions on the basis that the union is forcing him to financially support "the advocacy of child sacrifice". After exchanging further emails with CAW-CANADA's president, including one where he states that he "will be working actively to ensure that [his] local 5454 separates from the CAW as quickly as possible", the applicant filed, on or around July 27, 2012, an application with the Alberta Labour Relations Board (the first application). In this application, the applicant asked that his union dues be redirected for religious reasons to a charity, pursuant to section 29 of the Alberta *Labour Relations Code*,

R.S.A. 2000, c. L-1 because of CAW-CANADA's position on abortion. He was promptly advised that he had filed in the wrong forum, and ought to file his application with the Board.

[9] After conducting legal and religious research and speaking to family members, on August 24, 2012, the applicant filed an application with the Board under subsection 70(2) of the Code (the second application) for a religious exemption from union membership and the payment of union dues. In the said application and the material filed in support thereof, the applicant explains that having learned through his research that unions have the legal right to make policy statements on social, moral, and religious issues on behalf of their members, he had no choice but to object to membership in any union.

[10] In his second application, the applicant made very clear that he could not remain a member of CAW-CANADA, even if it were not taking a stand on abortion. He provided two reasons for his position: first and foremost, that being a union member would "yoke" or bind him to other people who are non-believers; and second, that unions place the focus on representing the employees, while his religious beliefs based on biblical teachings tell him that he must submit to the employers' God-given authority. In effect, he believes that he must work for God first, then the employer, and then himself (Appeal Book, at pages 83 and 85).

[11] The Original Panel noted in its decision that the applicant attributed his change of position between the first and the second application in a mere matter of weeks to a progression in his religious views resulting from the religious and legal research he had conducted in the interim (Original decision, at paragraphs 35-36). It is during this period that he would have

learned that CAW-CANADA, and in fact any union, had the legal right to take positions on social, moral, and religious issues.

[12] However, the Original Panel also found that in his evidence, the applicant gave sparse details about this "key part" of his case. It held that it had some difficulty accepting the applicant's explanation (Original decision, at paragraphs 35-37). The Original Panel applied the test commonly referred to as the *Barker/Wiebe* test, which both parties acknowledged was the proper approach to applications under subsection 70(2) of the Code (Original decision, at paragraphs 27-28). The Original Panel concluded that the applicant had not convinced it of the sincerity of his objection to trade union membership *per se*. He had failed to establish that he had not rationalized his objection to unions on religious grounds after becoming aware of the provisions of the Code and the Board's jurisprudence (Original decision, at paragraphs 30 and 41).

[13] The applicant could have challenged this decision by way of judicial review, but chose not to. Instead, on October 25, 2013, he filed an application for reconsideration. The Reconsideration Panel summarizes the basis of his application as follows at paragraph 24 of its decision:

> The applicant in this matter has sought reconsideration of the decision in RD 696 on the grounds that the Board failed to respect the principles of natural justice by allegedly basing its decision on assumed facts and facts not in evidence; that the decision was erroneous in law as the Board misapplied the test to determine whether or not the applicant met the test for religious exemption; that the decision was erroneous in law in that the Board assumed the role of arbiter of religious dogma; that the decision was erroneous in law in that the Board failed to consider and follow the Supreme Court of Canada's jurisprudence, [***Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551[*Amselem*]**], and that the Barker/Wiebe test is not reflective of the legislature's intent.
>
> [My addition in bold]

[14] The applicant confirmed that the Reconsideration Panel had addressed each of the grounds he had raised, but noted that it had erred in dismissing them all. In order to avoid repetition, I will summarize the Reconsideration Panel's views on each issue in the course of my analysis.

II. ISSUES AND STANDARD OF REVIEW

[15] I have already summarized the issues before us in paragraph 3 above. However, I must add a few comments.

[16] Although in his memorandum the applicant lists only four issues (paragraphs 24-27), many of his written submissions do not, in reality, address these issues. For example, under the heading "The Barker/Wiebe test" (paragraphs 45-79), the applicant is actually challenging the reasonableness of the decision of the Original Panel, a decision that is not under review before us (*Canadian Airport Workers' Union v. Garda Security Screening Inc.*, 2013 FCA 106, [2013] F.C.J. No. 440 at paragraph 3; *Lamoureux v. Canadian Air Line Pilots Assn.*, [1993] F.C.J. No. 1128 (F.C.A.) at paragraph 2). The reasonableness of the decision of the Reconsideration Panel

including its findings at paragraphs 27 to 34 will be discussed as a whole based on the submissions to the Reconsideration Panel when dealing with the more limited issue of the application of *Doré* (Applicant's memorandum, at paragraph 26).

[17] Also, as the applicant's memorandum includes other submissions that warrant few comments, I will concentrate on the main arguments presented at the hearing.

[18] Apart from proper questions of procedural fairness which are reviewed on the correctness standard, all the other issues before us are subject to the reasonableness standard. This is not contested. However, and as will become evident under the subheading "The alleged breaches of procedural fairness", the arguments characterized by the applicant as matters of procedural fairness are not in fact directed at that doctrine.

III. ANALYSIS

A. *The alleged breaches of procedural fairness*

[19] The first issue before us is whether the Reconsideration Panel failed to consider that the Original Panel had breached the principles of natural justice by relying on assumed facts and facts not in evidence (Applicant's memorandum, at paragraph 25). This was also the first issue put before the Reconsideration Panel. It held that there was no such breach because the evidence before the Original Panel was sufficient to allow it to draw the conclusions and to make the decisions that it did.

[20] At the hearing before us, the applicant's counsel submitted that there was no evidence that the applicant rationalized his objection to unions on religious grounds after being made aware of the provisions of the Code (Original decision, at paragraph 30) and of the Board's jurisprudence (Original decision, at paragraph 38). In his view, the Original Panel had no choice but to accept the applicant's uncontradicted testimony. I cannot agree.

[21] It is indeed rare for a party to admit having rationalized his or her objection as mentioned above. In most cases, such a finding of fact will necessarily have to be inferred from the other facts in evidence before the Board. The Reconsideration Panel clearly understood this. Thus, the question becomes whether there was evidence supporting the Original Panel's inference.

[22] The applicant acknowledged at the hearing that there were clear differences between the grounds on which his first and second application were based. There was documentary evidence establishing what the applicant objected to on religious grounds prior to the first application, in the first application (Original decision, at paragraph 10), and in the second application. When asked to specify exactly why the inference referred to above was not available to the Original Panel on the facts before it, the applicant's lawyer pointed to paragraph 38 of the original decision and stated that there was no evidence on which the Original Panel could rely to say that the applicant's research between the filing of his first and second applications *per se*, included a review of the Board's jurisprudence on the application of subsection 70(2) of the Code.

[23] However, as noted by the Original Panel at paragraph 38 of its decision, it is apparent from the applicant's second application (Appeal Book, at pages 85-86), which he prepared

himself, that he reviewed decisions of the Board and was well aware of the criteria used to determine whether to grant an exemption under subsection 70(2). Indeed, he expressly cites two decisions of the Board and then proceeds to argue why he meets "the original criteria set out in the case of Richard Barker [1986]".

[24] In the circumstances, there was no breach of procedural fairness or natural justice. The applicant did give another explanation as to why his objection changed from one premised in the payment of union fees to the CAW-CANADA (first application) to one opposing membership in all unions (in the second application), but it is clear that his explanation was not found to be the most probable one (Original decision, at paragraph 38). The Original Panel's role was to weigh the applicant's *viva voce* evidence in the context of all the other evidence before it. When acting in its fact-finding capacity, the Board is entitled to deference. I am satisfied that the issue here cannot be characterized as a breach of procedural fairness.

[25] The applicant also argues that the Reconsideration Panel failed to consider that the Original Panel breached principles of natural justice by failing to properly understand his position (Applicant's memorandum, at paragraph 25).

[26] The Reconsideration Panel could not err in this respect, as this argument was never raised before it. This was confirmed at the hearing before us. Moreover, this submission is unfounded.

[27] Indeed, the applicant asserts that neither panel understood his position as to why, in a relatively short period of time (July 27 to August 24, 2012), he changed his objection from one

directed to the payment of union dues to CAW-CANADA to one directed to membership in all unions.

[28] The applicant made his position crystal clear in his written submissions, particularly in his reply to CAW's submissions to the Original Panel on his application (Appeal Book, at pages 123-126) and the trier of fact is presumed to have considered all the evidence before it (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraph 46),

[29] Furthermore, at paragraphs 12, 16, 17 and 20 of its decision the Original Panel accurately described the position of the applicant as to what changed between his first and his second application.

[30] In fact, the only argument offered to support the applicant's position on this point is really that if the panels had understood his position and evidence, they could not have concluded as they did. Here again, this submission goes to the reasonableness of the substantive decision. There was no breach of procedural fairness.

B. *The challenge to the first requirement in the Barker/Wiebe test*.

[31] As all the other arguments raised before us at the hearing go to the reasonableness of the Reconsideration Panel's decision, I will now deal with the issue described at paragraph 27 of the applicant's memorandum: does the *Barker/Wiebe* test require an applicant to object to membership in all unions?

[32] The Reconsideration Panel refused to deal with the applicant's challenge to the first criteria of the *Barker/Wiebe* test because he had not raised the issue before the Original Panel. In its view, it was thus not a proper ground for "reconsideration". The applicant says that the Board should have dealt with this pure question of law. I disagree.

[33] The Reconsideration Panel exercised its discretion as to what argument it would deal with on this reconsideration. Its decision was particularly appropriate when one considers that the applicant acknowledged before the Original Panel that the *Barker/Wiebe* test was the proper test to apply. There was nothing preventing him from raising this issue at that time. Also, this new issue could not be determinative of the reconsideration, given that the application to the Board was entirely based on the fact that the applicant's religious beliefs precluded him from being a member of any and all unions.

[34] Although this Court has a certain discretion to entertain new arguments, in my view, it should not be exercised here. In addition to what I have already said, it would be inappropriate for this Court to determine a question of law in respect of which the Board would be entitled to deference without the benefit of the Board's analysis (*Harakat v. Canada (Citizenship and Immigration)*, 2012 FCA 122 at paragraph 148; *Pardhan v. Coca-Cola Ltd.*, 2003 FCA 11 at paragraph 32). This rationale is especially relevant here as the applicant's argument could potentially change a long standing practice of the Board (Reconsideration decision, at paragraph 27).

[35] It may be that the applicant can file a new application on more limited grounds, in which case he could challenge the *Barker/Wiebe* test and raise other constitutional arguments if he so wished. But this cannot be done at this stage of the process: judicial review is to be conducted on the basis of the record that was before the administrative decision-maker.

C. *Reasonableness of the decision*

[36] The Reconsideration Panel noted that the Original Panel had correctly set out the *Barker/Wiebe* criteria at paragraph 27 of its decision. It held that the Original Panel reached a reasonable conclusion based on the evidence before it. It based this conclusion on two main grounds.

[37] First, the crux of the decision under reconsideration was that the applicant had neither persuaded the Original Panel (on the balance of probabilities) of his sincerity, nor that he had not simply rationalized his objections to unions after becoming aware of the provisions of the Code and the Board's jurisprudence.

[38] Second, the Original Panel's assessment of the applicant's sincerity based on *viva voce* evidence, a factual matter, is entitled to deference and was buttressed by the evidence before the Original Panel regarding his changed basis for objecting in his first and second applications and the short period of time between those applications.

[39] As mentioned earlier, the Reconsideration Panel was satisfied that the Original Panel had sufficient evidence to make an inference with respect to the rationalization. Thus, the Reconsideration Panel essentially confirmed that the Original Panel's inference was reasonable.

[40] The Reconsideration Panel also rejected the applicant's suggestion that the Original Panel conducted an analysis of the legitimacy or theological soundness of his religious beliefs and, that in so doing it acted as arbiter of religious dogma. It qualified the comments to which the applicant referred in his submissions before it as *obiter*.

[41] Finally, with respect to the applicant's allegations that the Original Panel failed to follow the direction set out by the Supreme Court of Canada in *Amselem*, the Reconsideration Panel found that the applicant's sincerity was a legitimate issue before the Original Panel, given the disparity between his two applications and the short time period involved. It held that there was no conflict between the decision of the Original Panel and the principles enunciated in *Amselem*. It also noted that the issue before the Original Panel was not whether union membership and the payment of dues violated the applicant's Charter right to freedom of religion.

[42] The Reconsideration Panel was entitled to focus as it did on the main rationale of the decision of the Original Panel.

[43] There is no transcript of the applicant's testimony and there is no affidavit evidence before this Court that would enable us to question the Reconsideration Panel's conclusion that the Original Panel did not misapply the test and could base its decision on a failure to meet the

Barker/Wiebe test's fourth criterion – the sincerity of his beliefs and that he had not rationalized his objections to unions after becoming aware of the provision of the Code and the Board's jurisprudence.

[44] The applicant insisted that the Original Panel's error is apparent from paragraph 29 of its decision. In that passage, the panel acknowledges the inherent difficulty of assessing a person's religious beliefs. First, because this involves assessing the sincerity of the person and second, because it must also ascertain the nature of the beliefs – that is, whether they are religious, moral, social or political (third criterion of the *Barker/Wiebe* test). Pursuant to subsection 70(2) of the Code, the objection must be grounded in religious beliefs. Thus, I understand the words "and incompatible with membership and/or payment of dues to trade unions" in that paragraph as referring to the need to ensure the required link between the religious beliefs and the objection. In the circumstances, I have not been persuaded that the Reconsideration Panel erred.

[45] It is implicit in its decision that the Reconsideration Panel recognized that the Original Panel's decision was not perfect and that some of its phraseology may be open to criticism. However, the Reconsideration Panel found that these flaws did not vitiate the core rationale of the Original Panel's decision. Again, I cannot conclude that this finding was unreasonable.

[46] In *Amselem*, the Supreme Court of Canada reminded us, albeit in a different context, that the assessment of the sincerity of one's religious belief "is a question of fact that can be based on several non-exhaustive criteria, including the credibility of the claimant's testimony […], as well as an analysis of whether the alleged belief is consistent with his or her other current religious

practices" (*Amselem*, at paragraph 53). I agree with the applicant that all decision-makers must be conscious of and abide by the Supreme Court of Canada's warning in *Amselem* (also at paragraph 53) that focusing too rigorously on past practices is inappropriate when determining whether current beliefs are sincerely held. This is because, by their very nature, beliefs are fluid and may well change and evolve over time.

[47] That said, the Original Panel was fully alert and alive to the fact that according to the applicant, his views on what a union can legitimately do had changed between July 27 and August 24, 2010, which changed his perception as to what his long-held religious beliefs required him to do in such circumstances. It clearly understood that beliefs can progress. It was simply not satisfied on the balance of probabilities that the applicant's beliefs actually progressed in the manner asserted by the applicant.

[48] Thus, in my view, although the Original Panel mentions how the applicant behaved in the past (such as his union membership at the age of 17), it was open to the Reconsideration Panel to conclude that the Original Panel made no error warranting its intervention. The Original Panel did not rigorously focus on past practices. Its true focus was on what took place shortly before the second application was filed.

[49] Finally, the applicant says that although he did not rely on *Doré* before the Reconsideration Panel, this Court should conclude that the decision is unreasonable because the Reconsideration Panel did not apply *Doré*. The applicant says that he did not need to invoke the *Doré* approach because the Reconsideration Panel was obligated on its own to follow it.

[50] I disagree. Both panels concluded that the exemption should be denied for failure to establish on a balance of probabilities the factual matter of the sincerity of the beliefs put forth as the basis for the applicant's objection. As a result, no Charter value was engaged. In other words, the *Doré* framework cannot apply if, on the facts of the case, there is no religious value to be balanced against other considerations.

[51] In view of the foregoing, in my opinion, the applicant has failed to establish the unreasonableness of the decision under review. Therefore, I would dismiss the appeal.

[52] At the hearing, the parties agreed that whoever succeeded, the costs should be assessed at $1, 500 all inclusive.

"Johanne Gauthier"
J.A.

"I agree
C. Michael Ryer, J.A."

"I agree
A.F. Scott, J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	MARCH 26, 2015

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