Date: 20060927

Docket: T-235-06

Citation: 2006 FC 1143

Ottawa, Ontario, September 27, 2006

Present: The Honourable Mr. Justice Beaudry

BETWEEN:

GILLES BÉGIN

Applicant

and

RADIO BASSE-VILLE INC. (CKIA FM)

Respondent

Docket: T-275-06

RADIO BASSE-VILLE INC. (CKIA FM)

Applicant

and

GILLES BÉGIN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] These are two applications for judicial review that were heard together at Québec on September 7, 2006, against an adjudicative decision dated June 16, 2006, made by adjudicator Mr. Michel G. Boulianne (the adjudicator), who was appointed under section 242 of the *Canada Labour Code* (the Code).

[2] After nine days of hearings, the adjudicator determined that Mr. Gilles Bégin (the applicant) had voluntarily resigned his position and had not been the victim of an unjust or constructive dismissal.

[3] Notwithstanding this conclusion, the adjudicator ordered Radio Basse-Ville Inc. (CKIA FM) (the respondent) to pay the applicant two months' salary as severance pay and $490 for statutory holiday pay.

[4] In docket T-235-06, the applicant is asking the Court to set aside the decision dismissing his complaint. In docket T-275-06, the applicant (respondent in docket T-235-06) is asking the Court to set aside the order to pay two months' salary and the sum of $490.

[5] The applicant is representing himself. He has not filed a respondent's record in docket T-275-06. However, the Court has analyzed and considered his submissions on holiday pay set out in his memorandum in docket T-235-06.

Factual context

[6] The applicant was hired by the respondent on April 17, 2000, as an advertising representative. His salary was established at $350 per week, 35 hours at $10 an hour.

[7] The respondent is a community radio station, a non-profit corporation. Seventy percent of its revenues are derived from public subsidies. In fact, the applicant's position was made possible because of government wage subsidies. They declined the following year and were subsequently cancelled.

[8] As a largely volunteer operation, the respondent had experienced serious financial difficulties since 1996. When the applicant assumed his marketing duties, the respondent had four employees. The applicant wrote to the general coordinator in November 2000 about some potential courses of action to remedy the situation, in particular, commercial development among business people.

[9] The situation changed little and the Board of Directors (Board) decided to reduce the staff. On May 30, 2003, the Board abolished the applicant's position and in July of that year reduced the general manager's hours from 40 to 10 per week. The person holding this position quit definitively at the end of the summer of 2003 and was replaced by a volunteer.

[10] On June 10, 2003, the applicant filed a complaint under section 240 of the Code alleging that he had been unjustly dismissed on May 30, 2003, from his position as an advertising consultant.

[11] In a detailed decision dated November 14, 2003, adjudicator Gauvin allowed the complaint and ordered the employer (the respondent) to reinstate the applicant in his advertising consultant position within ten days of receipt of the decision. He also ordered the employer to pay the applicant all of his lost salary with interest from the date of his dismissal until the date of his reinstatement. Last, the adjudicator retained his jurisdiction in case the parties were unable to reach agreement on the quantum.

[12] Now without a general manager, the Board established the conditions for the applicant's return scheduled for December 1, 2003. However, he did not return to the office until December 2, 2003, saying he had been ill the previous day. On December 3, he requested a meeting with his superior outside the station and told him that he planned to leave his job if his contract were bought out. The Board rejected this proposal and, in a letter dated December 5, counsel for the employer reminded him that he had to comply with the instructions and details of the previously established conditions for his return to work.

[13] On December 10, 2003, the applicant presented his superior with a number of requests in order to improve his work performance. On the same day, he left the office for health reasons. He asked for ten days of vacation during the holiday period, which was denied. He then

submitted a medical report and was absent from December 18 to January 6, 2004. On January 5, 2004, he submitted a new medical certificate extending his sick leave to January 30, 2004. At the end of January 2004, he submitted another medical certificate setting February 29, 2004 as the date of his return to work.

[14] However, on January 27, 2004, the respondent received a formal notice from the applicant in which he alleged he was being psychologically harassed. Last, on February 18, 2004, the respondent received a letter from Human Resources Development Canada stating that the applicant had filed a complaint for unjust and constructive dismissal. Taken by surprise and believing that the applicant was on sick leave, counsel for the employer replied, requesting the date of the applicant's alleged dismissal.

[15] On March 9, 2004, the applicant notified the respondent that his resignation took effect on February 20, 2004. On March 11, the respondent agreed to his request and issued a Record of Employment for him, indicating "Resignation" on February 20, 2004, as the reason.

[16] The adjudicator was appointed on June 9; some dates were scheduled in September, but the hearings did not occur until the following dates: January 24-26, 2005, February 11, 2005, and March 8, 9, 11, 15 and 16, 2005.

ADJUDICATOR'S DECISION

[17] At paragraphs 120 and 121 of the decision, the adjudicator wrote:

> [TRANSLATION]
>
> **And were it not for the fact that the complainant was entitled to not accept this modification, I would reject the complaint for constructive dismissal forthwith and consider that there was a resignation, pure and simple;**
>
> **However, in light of the job description in (E-27), compared with the description in the spring of 2003, I think he could personally consider it as a modification <u>that was inappropriate for him</u> and that he could choose to leave, in which case he is entitled to a notice of termination.**
>
> [Boldface and underlining in the original text]

[18] The following are the conclusions of the arbitration award:

> [TRANSLATION]
>
> **ORDERS** the employer to pay as severance pay the equivalent of two months' salary, less the sums collected by the complainant from unemployment insurance and any other deductions normally made from the salary, effective March 7, 2004;
>
> **ORDERS** the employer to pay the sum of $490.00 representing the paid holidays owing to the complainant, i.e. seven days during the Christmas period 2003;
>
> **THE WHOLE WITH INTEREST AT THE LEGAL RATE EFFECTIVE MARCH 7, 2004;**
>
> **RETAINS** his jurisdiction in case the parties are unable to agree on the actual determination of the quantum;
>
> (boldface characters in the original text)

ISSUE (docket T-235-06)

[19] Did the adjudicator make a decision or order based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before him when he decided that the applicant was not the victim of a constructive or unjust dismissal?

[20] For the following reasons, I answer this question in the negative.

RELEVANT LEGISLATION

[21] Section 242 of the Code states:

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.
(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall (*a*) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and	3) Sous réserve du paragraphe (3.1), l'arbitre : *a*) décide si le congédiement était injuste; …

…

[22] Section 243 of the Code provides:

243. (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.	**243.** (1) Les ordonnances de l'arbitre désigné en vertu du paragraphe 242(1) sont définitives et non susceptibles de recours judiciaires.
(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.	(2) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre exercée dans le cadre de l'article 242.

ANALYSIS

Standard of review

[23] It is not necessary to conduct a pragmatic and functional analysis as suggested in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, in order to determine the appropriate standard in this case. Indeed, in a similar matter, Mr. Justice Russell in *Lesy v. Action Express Ltd.*, 2003 FC 1455, [2003] F.C.J. No. 1900 (F.C.) (QL), stated at paragraphs 24 and 25:

> Notwithstanding s. 243 of the *Canada Labour Code*, this court may judicially review an adjudicator's decision on the grounds that an adjudicator either never had jurisdiction or exceeded or failed to

> exercise jurisdiction that he or she did have (*Pioneer Grain Company Limited v. David Kraus*, [1981] 2 F.C. 815 (F.C.A.)).
>
> The standard of review for decisions rendered by adjudicators appointed pursuant to s. 242(1) has been held to be patent unreasonableness when the question is one of fact which is within the tribunal's powers (*Lamontagne v. Climan Transportation Services*, [2000] F.C.J. No. 2063 (2747-7173 Québec Inc.), (F.C.T.D.)).

[24] I adopt the same reasoning here; faced with a privative clause as watertight as the one in section 243 of the Code, where the issues are, for the most part, factual in nature as in this case, the Court will not intervene absent a patently unreasonable error in the adjudicator's decision.

[25] The applicant submits that the adjudicator did not take into account the previous adjudicative decision of Mr. Gauvin in which the respondent was required to reinstate him. The applicant adds that the changes made by the respondent upon his return to work meant that the respondent intended to get rid of him.

[26] He maintains that the respondent required him to deal solely with advertising from business people and removed some of the duties he had been performing at the time his position was abolished. This contributed to altering the terms of his employment, which is illegal.

[27] However, a review of the decision reveals that the adjudicator did consider the decision of adjudicator Gauvin and the changes in the applicant's duties on his return to work set for

December 1, 2003. Relying on the case law on constructive dismissal, the adjudicator did not err in applying the principles set out therein to the facts of the case before him.

[28] He had to decide, in these particular circumstances, whether this was a constructive dismissal or whether the applicant had voluntarily resigned. He reached the latter conclusion taking into account the evidence that was available to him.

[29] It is not for me to determine whether the Court would reach some other conclusion, but rather to analyze the decision as a whole and to ascertain whether this adjudicative decision is supported by the evidence and is not based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material in the record.

[30] The adjudicator ruled on the changes made by the respondent when the applicant returned to work. The adjudicator considered the respondent's financial requirements and its explanation for asking the applicant to concentrate on advertising from business people. The respondent took away certain duties previously performed by the applicant so he could focus all his efforts on this sector. The applicant's salary was not reduced and the respondent added a 15% bonus for sales achieved over and above $52,000 per year. The evidence established that there was no reduction in salary if the applicant did not reach his objective. Last, given that the applicant worked only ten days after his reinstatement and considering the positive results in the two reports he submitted, it was not patently unreasonable for the adjudicator to find as he did that this was not a case of constructive dismissal but a voluntary resignation.

[31] This Court's intervention is therefore not necessary. The adjudicator analyzed the documents and exhibits that the parties filed in evidence and had the advantage of seeing the witnesses and assessing their credibility.

[32] The application for judicial review by the applicant will be dismissed.

ISSUE (docket T-275-06) (Application for judicial review by the applicant to set aside the orders regarding severance pay and the sum of $490 for paid statutory holidays)

[33] Did the adjudicator exceed his jurisdiction?

[34] For the following reasons, the application for judicial review is allowed in part.

RELEVANT LEGISLATION

[35] Subsection 242(4) of the Code reads as follows:

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to	(4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur :
(*a*) pay the person compensation not exceeding the amount of money that is	*a*) de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il

equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;	aurait normalement gagné s'il n'avait pas été congédié;
(*b*) reinstate the person in his employ; and	*b*) de réintégrer le plaignant dans son emploi;
(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.	*c*) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.

[36] According to the applicant, the adjudicator erred in law in partially allowing the respondent's complaint after determining that it involved a resignation, not a constructive dismissal.

[37] The Court adopts Mr. Justice Denault's comments in *Téléglobe Canada Inc. v. Larouche*, [1999] F.C.J. No. 1014 (T.D.) (QL), at paragraph 7:

> The adjudicator's jurisdiction comes from subsection 242(3) of the *Canada Labour Code*, which authorizes him to decide whether the dismissal was unjust. Only after holding that the dismissal was unjust can he use his powers under subsection 242(4) of the Code, namely pay the person compensation, reinstate the person in his employ, or do any other like thing that is equitable. In the case at bar, after holding that the dismissal was not unjust, he could not act on the authority of article 2091 of the *Civil Code* to grant the defendant compensation, without exceeding his jurisdiction in the process.

[38] The error of law made by the adjudicator in this case results, in particular, from paragraphs 119 and 120 of the adjudicator's decision:

> [TRANSLATION]

> That said, it is absolutely clear in my opinion that the respondent was entitled, under its management authority, to alter the duties of the employee responsible for advertising and marketing, within the employment context;
>
> **And were it not for the fact that the complainant was entitled to not accept this modification, I would reject the complaint for constructive dismissal forthwith and consider that there was a resignation, pure and simple;**
>
> [Boldface in the original text]

[39] There is, in fact, an obvious contradiction in the adjudicator's decision. On the one hand, the adjudicator finds that the applicant could, under its management authority, alter the duties of the respondent (applicant in docket T-235-06) when he returned to work. On the other hand, he states that the respondent could accept or reject these changes and then goes on to write that if it were not for this option available to the respondent, the adjudicator would consider that there had been a resignation, pure and simple.

[40] With respect, it is inconceivable to the Court that on the one hand, the adjudicator accepts that there was a voluntary resignation and subsequently grants a notice of termination. These two concepts are inconsistent, absent a statutory provision to that effect or a written stipulation in an employment contract or an oral agreement confirmed by both parties. This is evidently not the situation in the matter before us.

[41] As for the order to pay $490 for holiday pay, the Court notes that the adjudicator took into account a document filed by the respondent in reaching this conclusion. Even if the

respondent had not filed an official complaint on this point under the relevant provisions of the Code, the adjudicator, acting within his jurisdiction, could dispose of this issue. The issue was whether the respondent was entitled to these benefits considering the past practice in the company. Accordingly, this finding of the adjudicator will not be set aside.

JUDGMENT

THE COURT ORDERS that:

1. The application for judicial review in docket T-235-06 be dismissed, without costs;

2. The application for judicial review in docket T-275-06 be allowed in part. The following finding in the adjudicator's decision is set aside:

    [TRANSLATION]

    ORDERS the employer to pay as severance pay the equivalent of two months' salary, less the sums collected by the complainant in unemployment insurance and any other deductions normally made from the salary, effective March 7, 2004;

3. No costs are awarded.

"Michel Beaudry"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-235-05
STYLE OF CAUSE:	**GILLES BÉGIN AND RADIO BASSE-VILLE INC. (CKIA FM)**
DOCKET:	T-275-05
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