Federal Court  Cour fédérale

Date: 20100129

Docket: T-681-09

Citation: 2010 FC 100

Ottawa, Ontario, January 29, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

TRANSPORT ST-LAMBERT,
A DIVISION OF TRANSPORT TFI 2 S.E.C.

Applicant

and

CHRISTIAN FILLION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of an adjudication decision of François G. Fortier, (the adjudicator), under section 242 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code), following the dismissal of Christian Fillion (the respondent) by Transport St-Lambert (the applicant). In his decision, the adjudicator ruled that the respondent had been wrongfully dismissed and ordered his reinstatement with full compensation of his salary as well as the payment of his legal fees.

Facts

[2] The respondent was hired by the applicant as a trailer-truck driver in 1994 and made trips throughout Canada and the United States. During a trip in July 2006, he witnessed a road accident between Detroit and Chicago in which three persons died. He was considerably affected by this accident because he had not taken a first-aid course and was therefore unable to help the victims.

[3] In November 2006, he suffered from insomnia, anxiety and stomach pains. His attending physician ordered him to stop working. He returned to work in January and continued until April 2007, when he was again ordered to stop working.

[4] While he was on leave, the respondent received long-term disability benefits under the applicant's disability program with the Great-West Company (the insurer). On September 10, 2007, after having obtained the results of an independent medical examination, the insurer notified the respondent that the assessment had not revealed any limitations and that the payment of the benefits would stop immediately. On October 31, 2007, following the respondent's appeals and applications for review, the insurer notified the parties that it was maintaining its decision. The applicant sent the respondent a letter advising him to report to work on November 2.

[5] He read the letter only on November 5, 2007. He called the applicant's Director General (operations and sales). During the telephone conversation, the employer informed the respondent

that he had to report to work the next day; otherwise he would lose his employment. The respondent states that he does not remember this part of the conversation. He did not report to work and on November 6, 2007, the applicant advised him that it considered him to have voluntarily left his employment. On November 12, 2007, the respondent filed a complaint for wrongful dismissal under Part III of the Code, and Inspector Simard was assigned to the case.

[6] Meanwhile, on November 8, 2007, the respondent submitted a new medical report from his attending physician to the insurer. On November 30, 2007, the insurer advised the applicant of this new document and that the analysis of the file was continuing.

[7] During the conciliation process, the applicant offered to reinstate the respondent in this position with the same working conditions once his disability period was over. The respondent refused this offer claiming that labour relations would be difficult when he returned. The applicant then offered an identical position at one of its subsidiaries, but the respondent again refused this offer. The applicant claims that the respondent refused the offers because he wanted financial compensation instead of returning to work. The respondent alleges that he refused reinstatement because he was unfit. The offers were made through the inspector, as the parties did not communicate with one another directly.

[8] Vanessa Alberici, a human resources advisor for the applicant, who testified at the hearing, filed before the adjudicator the handwritten notes she had made during the discussions about the reinstatement offers on January 14, 18 and 23, 2008, with Inspector Simard (page 25,

paragraph 2, and Exhibit P-7, pages 48 and 49, of the Applicant's Record). In his decision, the adjudicator stated that [TRANSLATION] "these offers were refused for various reasons which were more or less well explained at the hearing" (page 8 of the decision).

[9] As far as disability benefits were concerned, on January 16, 2008, the insurer advised the respondent that the benefits would continue after September 10, 2007. In the end, the insurer paid benefits from September 11 to March 3, 2008.

[10] In fact, the respondent was declared fit to return to work on March 6, 2008 but he never resumed his position with the applicant.

[11] Considering how impossible it was to resolve the complaint, on March 10, 2008, the inspector notified the applicant that he could request a referral to an adjudicator under subsection 241(3) of the Code. Following a hearing held on February 11, 2009, the adjudicator rendered his decision on March 18 of the same year. This decision is the subject of the present application for judicial review.

Impugned decision

[12] The adjudicator began by explaining the facts of the case and specified that they were not contested. The Court will only state the most relevant and important facts. To that effect, the adjudicator's following statement is important: [TRANSLATION] ". . . offers to be reinstated at

St-Lambert or other divisions of Transforce were made. These offers were refused for various reasons which were more or less well explained at the hearing" (Applicant's Record, page 14).

[13] He then noted the following facts from the respondent's testimony: the respondent had worked part time for another employer from June to November 2008 but was laid off for lack of work; he was not working at the time of the hearing and had financial difficulties; he had looked for jobs, but had been unsuccessful; he did not accept the offer of reinstatement at the end of January because he was unfit and stated that he did not want to return to work because of the difficult labour relations resulting from his dismissal; he did not know why he was offered reinstatement in another subsidiary, but he did not accept the offer; and he was willing to be reinstated in his position with the applicant if he could keep his seniority. As far as his proceeding before the adjudicator was concerned, the respondent sought compensation for the salary lost since March 3, 2008, interest and payment of his legal fees. He considered that he was entitled to compensation, because he had had to fight both the insurer and the applicant.

[14] The adjudicator noted from the testimony of the applicant's representative that, in January 2008, she was informed of new medical documents which had been provided to the insurer, which had led her to revise her decision. In addition, she did not remember being told that the respondent was to consult his doctor on November 8, 2007. She had never personally communicated with the respondent and concluded, after two refusals to be reinstated, that the respondent did not want to return to work.

[15] The adjudicator concluded that the complaint had merit and that the respondent had been dismissed. He based his reasoning on the fact that the respondent was unfit to work in November 2007, despite the insurer's opinion. He therefore did not have to report to work. In addition, the applicant recognized its mistake in January 2008 when it was notified of the insurer's new position and offered to agree to the respondent's reinstatement. The adjudicator considered that the respondent had not left his employment in January 2008 because he was still disabled. Even though the inspector forwarded a proposal for financial compensation in exchange for the respondent's resignation, it was not accepted and he therefore did not resign.

[16] According to the adjudicator, the applicant presumed that the respondent had resigned. Considering the significant consequences resulting from a resignation, it must be clearly stated, which was not the case here. The adjudicator added that the respondent remained on disability until March 3, 2008, and that it could not be said that he left his position voluntarily at that time. The applicant was obliged to reinstate him at the end of his disability. It did not do so and did not even contact the respondent because it mistakenly believed that he had voluntarily left his employment. Finally, the adjudicator ruled that the respondent had to return to the position he held when he left and that the parties could agree on reasonable accommodation, if needed.

[17] The adjudicator stated that, at all relevant periods, the respondent was disabled and should not be penalized. He said that the situation had been difficult because no information had been exchanged between the applicant and the insurer or between the applicant's representatives and the applicant itself, to the respondent's detriment.

[18] Finally, in addition to the respondent's reinstatement, the adjudicator ordered the applicant to pay to the respondent [TRANSLATION] "all amounts of which he may have been deprived as a result of his dismissal" and reimburse him for counsel fees incurred for his complaint for wrongful dismissal and the interest on the amounts owing.

Issues

[19] The reformulated issues are as follows:

a. Did the adjudicator err in concluding that the respondent was wrongfully dismissed, meaning that he did not have jurisdiction to hear the complaint?

b. Did the adjudicator err in failing to analyze the respondent's obligation to mitigate his damages?

c. Did the adjudicator render an unreasonable decision by ordering the payment of the respondent's counsel fees?

Relevant legislation

[20] *Canada Labour Code*, R.S.C. 1985, c. L-2

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	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.

any statement provided pursuant to subsection 241(1).

. . .

(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

(b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

. . .

(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

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(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.

(. . .)

(3) Sous réserve du paragraphe (3.1), l'arbitre :

a) décide si le congédiement était injuste;

b) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.

(. . .)

(4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur :

a) de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;

b) de réintégrer le plaignant dans son emploi;

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.

Analysis

Standard of review

[21] Both parties cite *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and submit that the applicable standard of review for all of the issues in this case is that of reasonableness. In that decision, the Supreme Court ruled that existing case law can be helpful in identifying the applicable standard and that an analysis is not always necessary (at paragraphs 57 and 62).

[22] The first issue is a question of mixed fact and law and will therefore be subject to the standard of reasonableness (*Opaskwayak Cree Nation v. Booth*, 2009 FC 225, 71 C.C.E.L. (3d) 184); *Wu v. Royal Bank of Canada*, 2009 FC 933, [2009] F.C.J. No. 1446 (QL)). The second issue concerns an error in law, and I am satisfied that the standard of reasonableness can also be applied in this case (*Chuanico v. Bank of Montreal*, 2001 FCT 863, [2001] F.C.J. No. 1226 (QL) at paragraph 19). The third issue on the awarding of costs is also subject to the standard of reasonableness (*Fraser v. Bank of Nova Scotia*, 2001 FCA 267, 278 N.R. 154).

[23] Accordingly, the Court must show deference to the adjudicator's findings and intervene only if the decision does not "fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at paragraph 47).

Did the adjudicator err in concluding that the respondent was wrongfully dismissed, meaning that he did not have jurisdiction to hear the complaint?

Applicant's submissions

[24] The applicant submits that the adjudicator's decision on the issue of dismissal was unreasonable. It claims that despite his affirmations to the contrary, the respondent clearly showed his intention to resign. The applicant points out that case law has established that a resignation contains a subjective and objective element. The applicant acknowledges, however, that a resignation cannot generally be presumed.

[25] The applicant submits that the evidence, overall, showed that the termination of the employment relationship had been the respondent's decision. It argues that the respondent's behaviour, especially his refusal of the offers of reinstatement, show that he had decided not to return to work for the applicant at the end of his disability and that he therefore resigned.

[26] The applicant submits that it was quite unreasonable to refuse the offers of reinstatement as they were conditional on the respondent being fit to return to work and, to avoid difficult situations, he was even offered reinstatement in another branch. In addition, the conditions offered were the same as before: no loss of seniority and the same salary.

[27] The applicant alleges that the adjudicator's decision is unreasonable because, in his reasons, the adjudicator stated that the applicant had to reinstate the respondent but

acknowledged that the applicant had offered reinstatement to the respondent at the end of his disability (Applicant's Record, at page 20).

[28] Finally, on the basis of these arguments, the applicant submits that because the case does not involve a dismissal, the adjudicator did not have the jurisdiction required to hear the respondent's complaint.

Respondent's submissions

[29] The respondent submits that the adjudicator's decision regarding the wrongful dismissal was reasonable and supported by the facts he had to analyze. The respondent adds that the applicant terminated the employment relationship, blindly following the insurer's position and not making its own assessment of the situation. He recalled the facts noted by the adjudicator, especially that the applicant had never communicated with him when he was fit to return to work and that the insurer was keeping the applicant informed of developments in the file. The respondent alleges that the applicant's arguments on this point cannot be accepted as they are contrary to the evidence.

[30] As far as the settlement discussions are concerned, the respondent emphasizes that the applicant did not have the inspector testify before the adjudicator and that it was obvious from the history of the file that no settlement had been reached.

Analysis

[31] It must be noted that the applicant did not try to convince the adjudicator that it was warranted in dismissing the respondent. It based its arguments on the fact that it was the respondent himself who decided to resign.

[32] The Court agrees with this argument. First, the evidence shows that the applicant adjusted its position when it received new information from the insurer in January 2008. In fact, the handwritten note submitted to the adjudicator (Applicant's Record, at page 48) clearly shows that an offer of reinstatement without any loss of salary was made to the respondent through Mr. Simard on January 14, 2008. In fact, the adjudicator acknowledged this when he wrote: [TRANSLATION] ". . . It would have agreed to CHRISTIAN FILLION's reinstatement at the end of his disability . . ." (Applicant's Record, at page 20).

[33] Second, it is also clear when reading the comment dated January 15, 2008, in the same notes, that the respondent refused this offer, adding that he did not want to return to work for the applicant because of what would be conflicting labour relations resulting from his dismissal. In the margin of this comment dated January 15, 2008, one can read [TRANSLATION] "reason: unfit".

[34] Third, on January 18, 2008, Mr. Simard, again on behalf of the applicant, offered the respondent reinstatement at another entity, stating that the applicant was ready to sit down with the applicant to [TRANSLATION] "discuss this".

[35] Fourth, on the same date, the respondent informed Mr. Simard that he was refusing this offer and asked whether the applicant was willing to agree to financial compensation. It is obvious to the Court that this compensation was in exchange for a resignation.

[36] Fifth, the applicant refused this proposal on January 23, 2008, and reiterated its offer of reinstatement.

[37] With due respect for the contrary opinion, the Court considers that the adjudicator's decision must be set aside for the following reasons.

[38] First, the Court agrees with the adjudicator's statement that [TRANSLATION] ". . . the employer had to reinstate CHRISTIAN FILLION at the end of his disability . . ." (Applicant's Record, at page 21). However, on the preceding page, the adjudicator acknowledged that the applicant had agreed to the respondent's reinstatement at the end of his disability.

[39] The adjudicator then stated that the applicant's offers were refused for various reasons which were more or less well explained at the hearing (Applicant's Record, at page 14).

[40] It was his duty to consider, analyze and determine the reasonableness of the respondent's refusal of the applicant's offers of reinstatement (*Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661).

[41] Considering the above-mentioned facts, which are not contested, the Court considers that the adjudicator's decision to allow the dismissal complaint was unreasonable.

[42] The Court is satisfied that the parties communicated clearly through Inspector Simard when they tried to settle the dispute. No reproach can be made to the applicant for not having contacted the respondent directly, even though he was not represented, as Mr. Simard was the official spokesperson tasked with the file concerning the respondent's complaint.

[43] With such clear evidence, it is obvious, according to the Court, that by refusing the applicant's offers and by not reporting to work at the end of his disability, it was the respondent who decided to terminate the employment relationship and resigned.

[44] The adjudicator should have recognized these facts and dismissed the complaint for dismissal.

[45] Before reaching this conclusion, the Court examined whether the respondent was justified in refusing the applicant's offers. Unfortunately for him, the evidence is silent on the labour disputes resulting from his complaint in November 2007. As to his second reason, namely that he was unfit to return to work in January 2008, this reason is not justifiable since the applicant's offer involved reinstatement at the end of his disability.

[46] The Court also questioned the respondent's ability to accept offers and to respond to them in January 2008. The only evidence in the record is the medical report dated January 5, 2008, (Applicant's Record, at pages 72 and 73), but it is of no help to him.

Did the adjudicator err in failing to analyze the respondent's obligation to mitigate his damages?

[47] In principle, considering the conclusion reached in the preceding paragraphs, the Court should not answer the last two questions. However, if it erred and, instead of resigning, the respondent was dismissed, the Court will analyze the last two questions.

[48] The applicant submits that the respondent was obliged to mitigate his damages by accepting the offers of reinstatement. The adjudicator had to consider this issue, which he failed to do, and therefore made an error that warrants this Court's intervention. The applicant also alleged that if the respondent had accepted the offers of reinstatement, there would not have been any damages.

[49] The applicant points out that, in his decision, the adjudicator concluded that the offers of reinstatement were refused [TRANSLATION] "for various reasons which were more or less well explained at the hearing". It therefore claimed that the adjudicator also erred because he did not consider the fact that the respondent could not justify his refusal and, according to the applicant, this omission should have been fatal to his complaint. In support of its argument, the applicant cited Justice Bastarache in *Evans v. Teamsters*, at paragraph 29, to the effect that "in the absence

of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer". The applicant also noted that, in the proceeding before the adjudicator, the respondent asked to be reinstated, showing that he saw no difficulty in returning to work for the applicant.

Respondent's submissions

[50] On the issue of the obligation to mitigate his damages, the respondent points out that, in the circumstances, it was up to the applicant to demonstrate that he had not made reasonable efforts to mitigate his damages.

[51] The respondent notes that the adjudicator concluded that his job search had been unsuccessful and that it had begun on January 5, 2008. He therefore made reasonable efforts to mitigate his damages.

Analysis

[52] It is trite law that an employee who is dismissed without just cause always has an obligation to mitigate his or her damages. Failure to do so may affect the compensation that may be awarded to him (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324). This Court concluded that for the purposes of a remedy granted under subsection 242(2) of the Code, the existence of an offer of reinstatement is relevant evidence in the examination of the obligation to mitigate damages and the adjudicator should determine the reasonability of the offer (*Chuanico*, at paragraph 22).

[53] In the present case, it is true that the adjudicator concluded that the respondent did make some effort to lessen his damages by seeking new employment. The applicant's offers of reinstatement were not considered, however, when it was time to assess whether the respondent had mitigated his damages.

[54] The Court therefore considers that this amounts to a reviewable error.

Did the adjudicator render an unreasonable decision by ordering the payment of the respondent's counsel fees?

Applicant's submissions

[55] The applicant submits that the adjudicator also erred in awarding the respondent's counsel fees, although there was no evidence of the applicant's bad faith. It relies on the Federal Court of Appeal's judgment in *Banca Nazionale Del Lavoro of Canada Ltd. v. Lee-Shanok* (1988), 87 N.R. 178. The applicant submits that it did not act in bad faith and that it did everything it could to accommodate the respondent. It emphasizes that it never behaved in a reprehensible manner and that all of its decisions were made on the basis of the information provided by the insurer. Consequently, it was unreasonable to order the reimbursement of fees.

Respondent's submissions

[56] The respondent argues that evidence of bad faith is unnecessary to justify the awarding of costs on a solicitor-client basis. He referred to the broad discretionary power provided in

paragraph 242(4)(*c*) of the Code, which allows an adjudicator to issue an order against the employer to "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". He also relies on adjudication decisions which, in his opinion, describe the adjudicator's power to render such orders even in the absence of evidence of bad faith on the part of the employer (*Vigneault v. Innu Nation of Matimékosh and Lake John (Council)*, [2000] D.A.T.C. No. 689 (QL)). Consequently , he concludes, the adjudicator's decision in this respect was reasonable.

Analysis

[57] Even though some adjudicators are willing to award costs on a solicitor-client basis without describing exceptional circumstances, as is shown in the decision cited by the respondent, the principles established in *Banca Nazionale del Lavaro* must be followed, and I cannot accept the respondent's argument to the contrary. Case law is clear on this point. The reimbursement of fees is justified only in exceptional circumstances, and the party claiming them must establish some degree of reprehensible conduct (*National Bank of Canada v. Lajoie*, 2007 FC 1130, 320 F.T.R. 152).

[58] In this case, the adjudicator had the following to say on this issue:

> [TRANSLATION] I find that CHRISTIAN FILLION is entitled to be reimbursed for the counsel fees he incurred to establish the merit of his complaint for wrongful dismissal.
>
> CHRISTIAN FILLION was disabled at all relevant times and did not have to be penalized for this reason. It seems to me that the reason why the situation was so difficult for CHRISTIAN FILLION was, above all, because of the little information

> exchanged between Great-West and the employer, between the employer's representatives, and between the employer and CHRISTIAN FILLION, who, ultimately, was the only person to suffer from this. (Adjudicator's decision, at page 15).

[59] With respect, the Court cannot agree that, even if these facts had been proven, they do not meet the case law requirements. There are no exceptional circumstances that warrant the awarding of the respondent's counsel fees.

[60] There is no evidence here of abusive conduct, bad faith or harassment by the applicant regarding the respondent (*Royal Bank of Canada v. Kajos*, [2006] D.A.T.C. No. 170 (QL)).

[61] The parties agree that a lump sum stand in place of costs.

JUDGMENT

THE COURT ORDERS that the application for judicial review is granted. The adjudicator's decision is quashed. The respondent will pay a lump sum of $1,500 in costs.

"Michel Beaudry"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-681-09
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APPEARANCES:

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