Federal Court  Cour fédérale

**Date: 20121031**

**Docket: T-1516-11**

**Citation: 2012 FC 1276**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, October 31, 2012**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**DÉMÉNAGEMENT RIMOUSKI INC.**

**Applicant**

**and**

**PIERRE LAVOIE**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review filed by Déménagement Rimouski Inc. (the applicant) seeks to set aside the decision dated August 17, 2011, of adjudicator Jean-Paul Boily following a complaint of unjust dismissal submitted by Pierre Lavoie (the respondent) under Division XIV of Part III of the *Canada Labour Code*, RSC 1985, c L-2 (*Code*). In his decision, the adjudicator allowed the respondent's complaint and awarded him $29,741.89 for lost wages. For the reasons that follow, I am of the view that the application for judicial review must be dismissed.

I. Facts

[2] The parties disagree about the facts giving rise to this proceeding.

[3] The applicant stated that on June 14, 2010, the respondent was employed as a dispatcher. That day, Raymonde Grenier, Vice-President and General Manager of Déménagement Rimouski Inc., apparently found out that the respondent had to miss work to attend a medical appointment. She called the respondent into her office to clarify the situation regarding this medical appointment. During this meeting, the respondent told her that he could no longer work as a dispatcher because of health issues. Ms. Grenier claimed that she offered him the possibility of returning to his former position of driver-mover, which he had held from 1993 to 2007. Upon returning from his medical appointment, the respondent handed her a medical note on which the following was written: [TRANSLATION] "medical leave required for an indefinite period". The respondent went on leave that same day.

[4] The applicant alleged giving the respondent a record of employment for sick leave on June 30, 2010, and having contacted him a few weeks later to obtain clarifications with respect to his medical situation. However, on July 21, 2010, the applicant allegedly received confirmation by e-mail that the respondent had been working at another company since June 28, 2010. The parties agreed to meet the following day, but the respondent never showed up. Consequently, on August 3, 2010, the applicant sent the respondent a letter asking him to return to work on August 6, 2010. On that day, the respondent did not show up for work, but instead sent a medical note dated June 30, 2010, stating that he could gradually return to the workforce, but in a different work environment than Déménagement Rimouski. Concluding that the respondent had voluntarily left his

employment, the applicant sent him a final record of termination of employment on August 18, 2010.

[5] The respondent provided a completely different version of the facts. He claims that on June 2, 2010, Ms. Grenier told him that he could resign if he was incapable of doing his work and that she did not care. He further alleged that he had noticed that Ms. Grenier's behaviour towards him had recently become increasingly authoritarian and disrespectful and that she seemed determined to fire him. This work environment was a source of stress and anxiety, which led him to make an appointment with a doctor.

[6] On June 11, 2010, the respondent purportedly advised the applicant, through Julie Lachance, that he would have to miss work on June 14, 2010, to undergo a medical examination. On June 14, 2010, just before his medical appointment, Ms. Grenier told the respondent that the dispatcher position he used to hold was going to be eliminated. Following his doctor's appointment, the respondent confirmed that he gave the doctor's note to Ms. Grenier and took leave that same day.

[7] On June 15, 2010, Ms. Grenier apparently asked the respondent to return the service vehicle and the keys to the office and informed him that the company would no longer pay for his cell phone. At the same time, Ms. Grenier also told him that he was no longer welcome at Déménagement Rimouski. The respondent inferred from all of this that he had been dismissed and that was why he started working at Béton Provincial as a cement truck operator.

[8] Ms. Grenier later reportedly asked him to meet with her at his convenience in July 2010. The respondent stated that he contacted her a number of times, without success. On August 4, 2010, he received a letter from a bailiff ordering him to return to his employment with the applicant on August 6, 2010. However, after having noticed that the applicant had posted an offer of employment for his former position, the respondent felt that the applicant had no intention of rehiring him as dispatcher.

[9] Thus, on September 10, 2010, the respondent filed a complaint with Human Resources and Skills Development Canada (HRSDC) alleging wrongful dismissal. On December 13, 2010, investigator Maryline Fortier of HRSDC informed the respondent that his complaint had not been resolved within a reasonable period of time and that he could submit it to arbitration. On July 19, 2011, the Minister of Labour appointed adjudicator Jean-Paul Boily to hear the respondent's complaint.

II. Impugned decision

[10] The adjudicator first examined the employer's preliminary objection that he lacked jurisdiction because the respondent had not been dismissed but had instead resigned from his employment. Referring to *Agavni Ter-Martirosian c Les contrôles d'avant-garde SCC*, 2011 QCCRT 0274 (available on Quicklaw), the adjudicator noted that there must be a clear intention to resign. If there is any ambiguity, the evidence must show specific facts that attest to an intention to resign. However, in cases where there is ambiguity, the doctrine and case law generally refuse to infer that an employee intended to resign.

[11] In this regard, the adjudicator distinguished the present matter from *Stritzel v Anglo Canadian Shipping Co*, 11 CCEL (2d) 175, [1995] CLAD No 457, in which the employer had dismissed the employee after a number of concrete acts of resignation on the employee's part. In this case, the evidence shows that it was the employer who sought to terminate the employment contract:

- On June 14, 2010, the applicant offered to terminate the employment contract with the respondent and even provided him with his vacation pay;
- The applicant ceased paying for the respondent's cell phone;
- The applicant offered the respondent a job as a truck driver, thereby indicating that the services for which he had been hired were no longer required.

[12] In short, the respondent could reasonably infer that he had been dismissed.

[13] Next, the adjudicator sought to determine whether the respondent's dismissal was warranted. The parties had signed an employment contract effective until January 1, 2012. Under the terms of this contract, the respondent could not be dismissed without just and sufficient cause. According to the adjudicator, the applicant never provided any evidence of wrongdoing by the respondent while he was working. In addition, the applicant chose to interpret the respondent's conduct as a resignation. On August 3, 2010, the employer even advertised the respondent's position to further confirm his dismissal.

[14] In the absence of rebuttal expert evidence, the adjudicator also set aside the interpretation provided by counsel for the applicant of the medical reports submitted by the respondent that the

applicant could have worked in another work environment within the employer's company. Instead, the adjudicator accepted the evidence of Mr. Dionne, the respondent's former supervisor, to whom Ms. Grenier allegedly said that the respondent was no longer welcome at Déménagement Rimouski.

[15] Finally, the adjudicator refused to reserve jurisdiction on the quantum of damages. The adjudicator acknowledged that the respondent mitigated his damages by taking another job on June 28, 2010, and subtracted the remuneration received from the respondent's compensation accordingly. Therefore, the adjudicator awarded him compensation for wages of $8,941.80 for 2010 and $20,800.00 for 2011, totalling $29,741.80. However, the adjudicator refused to award the respondent the other benefits provided under the employment contract, i.e. kilometrage and the employer's contribution to his RRSP.

III. Issues

[16] This application for judicial review raises the following issues:

A) Did the adjudicator err in rejecting the applicant's preliminary objection as to its jurisdiction?

B) Did the adjudicator render an unreasonable decision in finding that the respondent had been unjustly dismissed?

C) Did the adjudicator breach the rules of natural justice by awarding damages to the respondent despite the request for reservation of jurisdiction made by the applicant in order to submit rebuttal evidence?

IV. Analysis

[17] Before assessing the substantive issues mentioned in the above paragraph, the applicable standard of review must be considered. The first issue is the adjudicator's jurisdiction to hear the respondent's complaint. It goes without saying that the adjudicator has jurisdiction only insofar as the respondent has in fact been "dismissed". Division XIV of Part III of the Code provides that the complaint may be filed by any person who believes that he or she has been "unjustly dismissed" by his or her employer and that the adjudicator must decide on this complaint. The issue of whether a person has been dismissed or, rather, resigned is a question of mixed fact and law, which relies essentially on the analysis of the evidence in light of the legal principles in this matter. This is an issue that goes to the heart of the duties assigned to the adjudicator and, therefore, to his expertise. The result is that the applicable standard of review is reasonableness, as both parties agree.

[18] The same applies to the second issue. The issue of whether the dismissal was justified involves factual and legal issues. The adjudicator had to assess the conduct of both parties to determine whether the employer was right to remove its employee. Again, the applicable standard of review in an issue of this kind is reasonableness.

[19] Finally, the case law is consistent that issues of natural justice are reviewable on a standard of correctness. In this regard, no deference is due from the Court and it is from this perspective that the third issue will be assessed.

A) *Did the adjudicator err in rejecting the applicant's preliminary objection as to its jurisdiction?*

[20] The applicant submitted that the adjudicator did not have jurisdiction to rule on the respondent's complaint, insofar as he was not dismissed, but had voluntarily terminated his employment. In this regard, the applicant submitted, among other things, that the adjudicator erred in finding that a record of employment issued because of the respondent's [TRANSLATION] "illness" favours the theory of dismissal. The applicant alleged that it simply wanted to comply with the requirements section 19 of the *Employment Insurance Regulations*, SOR/96-332 (Regulations). In fact, this section requires the employer to provide its employee with a record of employment showing an interruption of earnings so that he or she may receive benefits while off work.

[21] A careful reading of the decision shows that the adjudicator did draw a negative inference from the record of employment, as shown in the following paragraph:

> (93) In this case, the evidence submitted shows that, as early as June 14, the Employer offered to provide the Complainant with a notice of termination of employment and, although this approach seems to have been taken to allow the Complainant to obtain employment insurance, it is not without reason that the Complainant believed he had been laid off by his Employer, since he was even given his vacation pay.

[22] I agree with the applicant that the adjudicator erred in drawing a negative inference from the record of employment. However, the adjudicator did not rely solely on this factor in support of his decision, but relied on other factors in finding that it was indeed a dismissal and not a resignation.

[23] Both parties agree on the factors to consider in determining whether an employee resigned or was dismissed. These factors were identified in *Savard c M.B. Data Processing*, DTE 82T-857 (TA), and were repeated by the adjudicator in his decision (at para 70):

[TRANSLATION]

- All resignations have an objective and subjective element;
- Resignation is an employee's right, not an employer's right. It must therefore be voluntary;
- If an intention to resign has been expressed, the question of whether a person has resigned will be dealt with differently from cases where no such intention has been expressed;
- An intention to resign will only be presumed if the employee's conduct is inconsistent with another interpretation;
- The expression of an intent to resign is not necessarily conclusive of the employee's true intent;
- In the event of ambiguity, case law generally refuses to find that the employee resigned;
- The prior and subsequent conduct of the parties is relevant in determining whether an employee has resigned.

[24] In this case, the adjudicator relied on other actions of the employer in finding that it was not without reason that the respondent believed that he had been dismissed. The adjudicator wrote the following in this regard:

> (94) The fact that the Employer then tried to find out more regarding its employee's position regarding a return to work does nothing to change the state of affairs that had already been established: the termination of employment provided (S 1.3) corroborates the Complainant's statements that his employment contract had indeed been terminated by the Employer.
>
> (95) To that is added the fact that the Employer took other action which, although trivial, contributed to the fact that the Complainant did not resign from his employment but was indeed laid off.
>
> (96) The fact that his cell phone was no longer paid for and the fact that an offer was made to him to return to work as a driver, among other things, gave him to understand that the services for which he was under contract to provide were no longer wanted.

[25] In short, any error on the part of the adjudicator in not considering the fact that the employer was obliged by the Regulations to provide a record of employment is not determinative in itself. The adjudicator could reasonably conclude that it was a dismissal in light of the other evidence on the record, especially since resignation cannot be presumed.

[26] In the end, the applicant's argument as to the adjudicator's lack of jurisdiction is essentially summarized as a claim that the adjudicator should have preferred its version of events to the respondent's and, thus, found that the respondent resigned rather than being dismissed. It is not for the Court to substitute its own assessment of the evidence for that of the adjudicator. Having heard the oral evidence and examined all of the evidence on the record, it was open to the adjudicator to accept the respondent's version. There is no basis for the Court's intervention since this finding is within the range of possible, acceptable outcomes justifiable in respect of the facts and law.

B) *Did the adjudicator render an unreasonable decision in finding that the respondent had been unjustly dismissed?*

[27] The applicant also submitted that it is impossible to make a finding of a constructive dismissal and even less of an unjust dismissal, when the respondent took himself off work because of a physical and/or psychological disability. It also submitted that the adjudicator had made an unreasonable error by not considering the fact that the respondent had found a job with another employer while he was off work, without notifying the applicant.

[28] The adjudicator considered these arguments but rejected them for several reasons. First, he emphasized that the applicant ought to have known that the respondent had a valid employment contract until January 1, 2012, and could only be let go for just cause. There was no evidence

provided of any wrongdoing whatsoever and no advance notice was given to the respondent. In this context, the employer showed a cavalier attitude by interpreting the respondent's actions as a simple resignation.

[29] Second, the adjudicator found that the respondent could not be criticized for finding another job, insofar as he thought he had been dismissed by his employer, especially since the medical note of June 30 stated that he could return to work in another environment.

[30] More importantly, the applicant had posted the respondent's position on the Emploi Québec Web site on August 3, 2010. The applicant could not subsequently claim that it wanted the respondent to return to his position, while the documentary evidence irrefutably shows that it was trying to fill this position otherwise.

[31] Given all of these facts, the adjudicator could reasonably conclude that the applicant had not discharged its burden of proving that it had terminated its relationship with the respondent for just and sufficient cause. What is more, the adjudicator could reasonably accept the testimony of Mr. Dionne that Ms. Grenier had been trying to dismiss the respondent for some time. The previous conduct of the parties was relevant in determining not only whether the respondent had been dismissed, but also whether the dismissal was unjust.

C) *Did the adjudicator breach the rules of natural justice by awarding damages to the respondent despite the request for reservation of jurisdiction made by the applicant in order to submit rebuttal evidence?*

[32] The applicant argued that the adjudicator violated the *audi alteram partem* rule by refusing to reserve jurisdiction on the quantum of damages in order to allow rebuttal evidence to be submitted. This argument is unfounded, not only because the adjudicator was not required to rule on the applicant's preliminary objection to then reopen the hearing on the issue of damages, but also because, in any case, the applicant had every opportunity to make its representations as to the appropriate remedy.

[33] Paragraph 242(2)(*b*) of the Code authorizes the adjudicator to determine the procedure to be followed, "but shall give full opportunity to the parties to the complaint to present evidence and make submissions…". This paragraph does not provide that the adjudicator must necessarily provide the parties with the opportunity to present evidence through oral submissions and even less that he must split the hearing so that the parties may first submit their arguments on whether there was an unjust dismissal, then be heard with respect to damages, if any. Therefore, this Court must guard against imposing requirements on the adjudicator that Parliament had not intended; the adjudicator must remain in control of his own procedure. As the Supreme Court of Canada noted in *Komo Construction Inc et al c Commission des Relations de Travail du Québec et al*, [1968] RCS 172, at pp 175-176 (available on CanLII) :

> [TRANSLATION]
>
> As for the application of the *audi alteram partem* rule, it is important to note that it does not imply that a hearing must always be granted. The obligation is to provide a party with an opportunity to present its arguments. In the case at bar, where an objection was submitted which raised only a point of law, the Commission did not misuse its discretion in deciding that it did not need to hear anything more before rendering its decision. As this Court held in *Forest Industrial Relations Ltd v International Union of Operating Engineers*, [1962] S.C.R. 80, 37 WWR. 43, 31 DLR (2d) 319), a tribunal is not required to grant a hearing on all arguments raised in a matter before it. When

> it has available to it an analysis it considers sufficient, it has the power to reach its decision without further delay. It should be borne in mind that the Commission exercises its jurisdiction in a matter in which generally any delay is likely to cause serious and irreparable damage. While maintaining the principle that the fundamental rules of justice should be observed, it is important not to impose a code of procedure on a body to which the law intended to give complete control of its procedure.

[34] That said, the parties were entitled to a fair hearing and had every opportunity to be heard on all aspects of the case. The applicant had every opportunity to have its witnesses heard and chose to have Ms. Grenier testify, while the respondent had Hilaire Dionne testify. It is clear from paragraph 82 of the adjudicator's decision that the applicant did made submissions with respect to the quantum of damages, insofar as it submitted that the respondent was not entitled to any compensation because he was not dismissed or that, in the alternative, he was dismissed with just and sufficient cause.

[35] The applicant had only itself to blame if it did not see fit to submit rebuttal evidence on the quantum of damages claimed by the respondent. It cannot now rectify the situation it placed itself in by attempting to blame the adjudicator and by criticizing him for not giving it a second opportunity to submit evidence. The applicant was represented by a lawyer, which was not the case for the respondent, and it must now live with the result of the choices it made before the adjudicator. In the absence of any evidence to the contrary that the applicant might have submitted, the adjudicator could rely on the respondent's employment contract to establish the damages caused as a result of his unjust dismissal.

[36] For the foregoing reasons, the present application for judicial review is dismissed, with costs.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that** this application for judicial review be dismissed, with costs.

"Yves de Montigny"

Judge

Certified true translation

Catherine Jones, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1516-11 |
| **STYLE OF CAUSE:** | DÉMÉNAGEMENT RIMOUSKI INC v PIERRE LAVOIE |
| **PLACE OF HEARING:** | Rimouski, Quebec |
| **DATE OF HEARING:** | June 5, 2012 |
| **REASONS FOR JUDGMENT:** | de MONTIGNY J. |
| **DATED:** | October 31, 2012 |

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| | |
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| Philippe Thibault | FOR THE RESPONDENT |

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