Federal Court of Appeal | Cour d'appel fédérale

Date: 20160413

Docket: A-368-15

Citation: 2016 FCA 115

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

BETWEEN:

MARY ALICE LLOYD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 5, 2016.

Judgment delivered at Ottawa, Ontario, on April 13, 2016.

REASONS FOR JUDGMENT BY: RENNIE J.A.

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

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160413

Docket: A-368-15

Citation: 2016 FCA 115

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

BETWEEN:

MARY ALICE LLOYD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

RENNIE J.A.

[1] Mary Alice Lloyd has brought this judicial review application to set aside the decision dated July 23, 2015 of an adjudicator of the Public Service Labour Relations and Employment Board (the Board). In the decision (2015 PSLREB 67), the adjudicator dismissed the applicant's grievance against a 40-day disciplinary suspension by her employer, the Canada Revenue Agency (CRA).

[2] In my view, the decision should be set aside in part. A brief summary of the facts and reasons of the adjudicator provides the necessary context.

[3] In February 2006, the applicant was on long-term disability leave. A grievance relating to her disability leave was pending. One of the disputed issues in the grievance was whether the applicant had sent an email dated June 30, 2005 to her supervisor. At the grievance hearing, the applicant intended to prove that she had in fact sent that email.

[4] Because she was on leave, the applicant was required to ask CRA's IT department to copy data from her home drive (H: drive, which CRA employees used to store both personal information and work in progress) where the email resided, and deliver it to her.

[5] After advising her team manager of her request and obtaining his permission, the applicant communicated with the CRA's IT department in order to procure a copy of the desired email on her H: drive. The exact nature of these communications was a matter of dispute before the adjudicator – both the communication between the applicant and her manager (at least two conversations) and between the applicant and the IT manager she initially contacted to obtain a work authorization or "ticket", were contested. Neither this person, nor the applicant's team manager testified. The employee from IT who actually performed the work did testify.

[6] The IT department copied the entire H: drive, rather than just the email in question. This copy of the applicant's H: drive was delivered to her by CRA in the form of approximately 16 CDs.

[7] The applicant received the CDs in the lobby of her workplace. She took the CDs home, viewed them, and found the email she required. She labelled the CDs and stored them in a locked cabinet provided by CRA until the time they were required for the grievance hearing. In 2008, as her own computer was not working, she used the laptop of her then-boyfriend to make two copies of the relevant CD.

[8] In the course of the adjudication of the applicant's disability grievance the applicant produced a paper print-out of the June email. Counsel for CRA objected to its admissibility, and demanded production of the CD in order to prove the existence of the email. The applicant then produced all 16 of the CDs, advising that as they contained taxpayer information their confidentiality should be protected. CRA seized the CDs.

[9] The CRA's Internal Audit and Fraud Prevention Directorate (IAFPD) began an investigation. The CRA administratively suspended the applicant indefinitely on November 6, 2009 based on the IAFPD's preliminary findings. Over a year later, on December 22, 2010, the IAFPD released its final report.

[10] The CRA imposed a 40-day disciplinary suspension on March 17, 2011. The Notice of Disciplinary Action set out the reasons for imposing the suspension:

1. That the applicant had removed from the workplace unprotected CDs containing taxpayer information and downloaded them onto a non-CRA device.

2. That the applicant had not attempted to limit the quantity of information removed.

3. That the contents of the CDs had been downloaded to her computer and her then-boyfriend's laptop.

4. That her conduct breached section 241 of the *Income Tax Act* R.S.C., 1985, c. 1 (5th Supp.) (*ITA*), and that her job as a criminal investigator involved investigating such breaches in the criminal context, meaning she was familiar with the seriousness of such breaches.

5. That she did not cooperate in immediately turning over her computer and her then-boyfriend's laptop.

6. That there was continuous and ongoing risk of release and disclosure of high volumes of sensitive taxpayer information.

7. That the applicant did not show remorse.

[11] Ultimately, the adjudicator found that "the evidence clearly supports the employer's reasons for imposing discipline and that it considered all mitigating factors. In fact, the evidence supports the claim that, but for these mitigating factors, Ms. Lloyd's employment would have been terminated" (paragraph 360). He continued at paragraph 363, noting that "[r]emoving taxpayer information from the work site without a specific need and without very explicit approval is, I believe, an action not be condoned." He dismissed the grievance.

[12] The decision of the adjudicator is to be reviewed on a standard of reasonableness: *Bridgen v. Canada (Correctional Service)*, 2014 FCA 237. Reasonableness requires that the outcome be justified by transparent and intelligible reasons*: Dunsmuir v. New Brunswick*, 2008

SCC 9, [2008] 1 S.C.R. 190. The reasons in respect of the suspension of 40 days do not meet this standard.

[13] The adjudicator examined the events surrounding the delivery to the applicant of a copy of her H: drive, and whether the applicant requested the entire drive or simply her personal email, or whether she was told that they would have to copy the entire drive. The adjudicator's treatment of the evidence on these issues, and their relation to the appropriateness of the suspension, is problematic.

[14] The adjudicator noted that the applicant's position was that she requested that only the email be copied, and was told that the entire H: drive had to be copied. However, the adjudicator concluded that this issue was not "relevant", and declined to make a finding on the matter, although it was central to the allegations of misconduct that justified the 40-day suspension. He did conclude, as noted, that she had removed taxpayer information without need and express authorization in contravention of CRA policy.

[15] The adjudicator also discussed the contested issue of whether any information was downloaded to the applicant's computer or her boyfriend's laptop. He noted that this was one of the key factors considered in imposing the 40-day suspension, as it underlay the ongoing risk of disclosure of taxpayer information. However, the adjudicator was ultimately of the opinion that nothing significant turned on this point (paragraphs 310-317). He determined this to be "an irrelevant technical question" (paragraph 352), less important than the fact that the CDs had been inserted into a non-CRA device.

[16] In consequence, there was no factual basis upon which it could be concluded that section 241 of the *ITA* was breached. A breach of section 241 requires that the applicant knowingly disclosed taxpayer information, and thus the applicant would have needed to *know* that by inserting a CD into a computer or laptop in order to view or copy information that the information contained therein would be downloaded to the device's hard drive. The applicant testified that she did not *know* that information would be downloaded from the CDs when she inserted them first into her computer, and then her boyfriend's laptop. Again, the adjudicator never made a finding on this issue.

[17] I note, parenthetically, CRA's submission at the adjudication that the word "knowingly" in section 241 was mere "semantics". This is deeply troubling. The language of Parliament is never "semantics", and it is an elementary concept of law that the word "knowingly" engages a critical and essential element of *mens rea*. Allegations of violations of section 241, being a criminal provision, should not be lightly made, and there was, on the record here, no foundation for the allegation of its breach.

[18] One element of the Notice of Disciplinary Action remains. The applicant loaded a CD onto her ex-boyfriend's laptop for the purpose of viewing its contents and making a copy of the CD containing the June email (The email itself does not contain taxpayer information). This was in violation of the CRA policy which expressly precludes the copying of CRA information using computers that do not belong to CRA. The applicant admitted this was a breach of CRA policy and the adjudicator found accordingly.

[19] The applicant and CRA propose different interpretations of the adjudicator's conclusion at paragraph 360:

> I find that the evidence clearly supports the employer's reasons for imposing discipline and that it considered all mitigating factors. In fact, the evidence supports the claim that but for these mitigating factors, Ms. Lloyd's employment would have been terminated.

[20] Counsel for CRA contends that the adjudicator's assessment of the 40-day suspension was based solely on the two elements of the Notice of Disciplinary Action which he found to have been established – the removal of taxpayer information without express authority of her manager and the copying of the email using a non-CRA device. The applicant, on the other hand, says that the adjudicator confirmed the 40-day suspension based on all the elements of the Notice of Disciplinary Action having being established.

[21] The preferred reading of paragraph 360 is that offered by the Crown. The adjudicator expressly considered all of the elements in the Notice of Disciplinary Action and, after a review of the evidence, made no findings as to whether the applicant "knowingly" provided access to taxpayer information to anyone. Further, he considered whether the information was downloaded and thus disclosed to be irrelevant. This understanding of paragraph 360 has implications.

[22] The reasons in support of the 40-day suspension, however, cannot be sustained. The 40-day suspension was predicated on CRA's allegation that there was, in the language of the Notice of Disciplinary Action, "a continued and ongoing risk of disclosure of sensitive taxpayer information" arising from the downloading of the CDs on to the computers of the applicant and her then boyfriend, as well as the allegation that the applicant had breached section 241. The adjudicator dismissed these as either irrelevant or made no finding.

[23] The adjudicator was required to consider the appropriateness of the length of the 40-day suspension in light of the two acts of misconduct that had been established – the removal of taxpayer information without express authority and the use of the non-CRA devices to copy the CD containing the email. This he did not do.

[24] In light of the adjudicator's findings, even on a generous application of the principles in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the basis upon which the 40-day suspension was justified cannot be discerned without engaging in speculation and rationalization. As I noted in *Komolafe v. Canada (Citizenship and Immigration)*, 2013 FC 431, at para. 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[25] I would allow the application, in part, with costs, fixed in the agreed upon amount of $3,000.00, all inclusive. I would remit the matter to the adjudicator, or if unavailable to another duly appointed adjudicator, for re-determination of the appropriateness of the suspension in light of the findings that the applicant breached CRA policy by removing taxpayer information without express authority from her employer and her utilization of non-CRA devices to make copies of the CD containing her email. At this point the parties will be at liberty to make

submissions in respect of condonation or any other argument that the adjudicator may find relevant to determine the length of the suspension that could be justified by these two findings.

"Donald J. Rennie"

J.A.

“I agree

Johanne Gauthier J.A.”

“I agree

A.F. Scott J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION IN THE MATTER OF THE DECISION OF THE PUBLIC SERVICE LABOUR RELATIONS AND EMPLOYMENT BOARD DATED JULY 23, 2015, (2015 PSLREB 67)

DOCKET:	A-368-15
STYLE OF CAUSE:	MARY ALICE LLOYD V. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 5, 2016
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	GAUTHIER J.A. SCOTT J.A.
DATED:	APRIL 13, 2016

APPEARANCES:

Steven Welchner	FOR THE APPLICANT
Allison Sephton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Welchner Law Office Professional Corporation Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT