Federal Court of Appeal | Cour d'appel fédérale

Date: 20110314

Docket: A-368-09

Citation: 2011 FCA 98

CORAM: **EVANS J.A.**
LAYDEN-STEVENSION J.A.
MAINVILLE J.A.

BETWEEN:

SAMEH BOSHRA

Applicant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES (CAPE)

Respondent

Heard at Ottawa, on March 8, 2011.

Judgment delivered at Ottawa, Ontario, on March 14, 2011.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an application for judicial review by Sameh Boshra pursuant to paragraph 28(1)(*i*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, requesting the Court to set aside a decision of the Public Service Labour Relations Board (Board), dated August 18, 2009.

[2] In the decision under review (2009 PSLRB 100), the Board dismissed Mr Boshra's complaint that his bargaining agent, the Canadian Association of Professional Employees (CAPE), had committed an unfair labour practice contrary to the *Public Service Labour Relations Act*, S.C.

2003, c. 22 (Act), section 185. He alleged that CAPE had breached its duty under section 187 of the Act by representing him in the grievance process in a manner that was arbitrary or discriminatory, or not in good faith. Paragraph 190(1)(*g*) of the Act requires the Board to inquire into complaints of unfair labour practices within the meaning of section 185. The provisions of the Act relevant to this application are contained in the Appendix to these reasons.

[3] At all times relevant to this application, Mr Boshra was employed in the federal public service as an analyst recruit with Statistics Canada in Ottawa, and was a member of a bargaining unit for which CAPE was the bargaining agent. His complaint to the Board arose from his dissatisfaction with the manner in which CAPE labour relations officers, particularly Aleisha Stevens, had presented a grievance resulting from an incident in the workplace.

[4] In its response, CAPE raised preliminary objections to the complaint and requested that the Board dismiss it without determining its merits. It said that the complaint was out of time and did not constitute a *prima facie* case of unfair representation. Further, CAPE submitted that the Board should dispose of the complaint without an oral hearing.

[5] The Board agreed. It found that the essence of Mr Boshra's complaint was that Ms Stevens had insisted on arguing his grievance as one of sexual harassment in breach of the non-discrimination clause in the collective agreement, while Mr Boshra, fortified by an external legal opinion, wanted it to be argued as a breach of his right to privacy or security.

[6] The Board held that, when Mr Boshra filed his complaint with the Board on February 5, 2009, the 90-day limitation period imposed by subsection 190(2) of the Act had expired. It found that he knew or ought to have known of the action or circumstances giving rise to his complaint following meetings with CAPE officials over his grievance in September and October of 2008, and with an outside lawyer whom he consulted on September 30, 2008. The Board also held that, in any event, Mr Boshra's complaint did not demonstrate that CAPE had *prima facie* breached section 187.

[7] Mr Boshra submits that the Board committed three reviewable errors in dismissing his complaint. It breached the duty of procedural fairness by deciding the complaint without an oral hearing and by failing to receive documentary evidence that he wished to submit. In addition, the Board erred in its determination of the start of the limitation period.

[8] In my view, the Board committed no reviewable error in dismissing Mr Boshra's complaint as out of time and his application for judicial review should be dismissed. In these circumstances, it is unnecessary to review the Board's decision that Mr Boshra's complaint did not disclose a *prima facie* breach by CAPE of its duty of fair representation.

Procedural fairness

[9] A decision made by a federal administrative tribunal in breach of the duty of fairness is liable to be set aside on an application for judicial review: *Federal Courts Act*, paragraph 18.1(4)(*b*). In determining whether a breach has occurred, the Court applies a standard of correctness: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.

[10] When Mr Boshra filed his complaint with the Registry of the Board on February 5, 2009, he submitted some documents as “exhibits”. The Board returned them to him, explaining in a letter from a Registry Officer, dated February 24, 2009 (the February letter), that they were “evidentiary in nature”. Evidence that the parties wish to submit in support of their case, the letter said, should be presented during the hearing. The documents had been returned to Mr Boshra by the Registry before the Member was assigned to determine the complaint.

[11] In a letter dated April 28, 2009 (the April letter), the Registry of the Board notified the parties of the procedure that the Board Member assigned to the case had established for deciding Mr Boshra’s complaint. Because of its importance to the determination of both procedural fairness issues raised by Mr Boshra in the application for judicial review, I shall set out its operative terms.

> Further to the submissions already received in the above-noted matter, the Board Member assigned to consider the complaint has determined that he will render a decision based on written submissions unless he finds that there are substantial evidentiary issues in dispute. In that event, the Board Member may order an oral hearing.
>
> The Board Member invites the complainant to make any further written representations that he feels necessary to establish the grounds for his complaint, including any supporting documents that he wishes to bring to the attention of the Board. The respondent will have an opportunity to make further written submissions and the complainant will have a final opportunity to make rebuttal submissions to the Board.
>
> The written submissions process will proceed as follows:
>
> …
>
> [I have omitted the Board’s detailed timetable within which the parties were to file and serve their written representations]
>
> Unless the Board Member determines that an oral hearing is required, he will render a final decision based on the written submissions already received and on the written submissions subsequently filed by the parties in accordance with this direction.

(i) ***no oral hearing***

[12] In choosing to determine CAPE's preliminary objections to the complaint on the basis of a written procedure, the Board exercised its discretion under section 41 of the Act to decide any matter without an oral hearing. The Board explained its choice by saying (at para. 12) that it appeared from the parties' initial submissions that the questions in dispute were likely to turn on the interpretation of the relevant facts, not their existence. At the same time, it expressly left open the possibility that it might convene an oral hearing if it found that there were "substantial evidentiary issues in dispute."

[13] CAPE had requested that its preliminary objections be decided without an oral hearing, in order to avoid unnecessary expense and delay. Mr Boshra, on the other hand, had asked the Board for an oral hearing and, in his application for judicial review, maintained that fairness required nothing less.

[14] In view of the broad discretion conferred on the Board by section 41, the validity of which Mr Boshra did not challenge, and the fact that valid legislation trumps the common law, the duty of procedural fairness cannot be found to require the Board to hold oral hearings before deciding every complaint. However, in some circumstances it may be open to the Court to conclude that when, for example, serious conflicts in the evidence arise, a matter cannot be fairly decided without an oral hearing.

[15] Nonetheless, it is not for a reviewing court to substitute its exercise of discretion for that of the Board. Judicial intervention on the ground of procedural fairness is only warranted where an oral hearing is necessary to provide a reasonable opportunity for parties to effectively make their case or to answer that against them. The ultimate question in the present case is: was it fair in all the circumstances for the Board to decide CAPE's preliminary objections on the basis of written representations?

[16] Mr Boshra made two points in support of his argument that fairness required the Board to hold a hearing before making its decision. First, the Board erred in concluding that he had waived an oral hearing. The basis of this argument is that, after setting out the terms of the April letter establishing the procedure to be followed in this case, the Board noted in its reasons (at para. 13): "The complainant accepted the invitation and submitted his further account of events on May 19, 2009."

[17] In my view, the sentence in the Board's reasons on which Mr Boshra fixes merely states the facts: he accepted the invitation by making written submissions, rather than passing up the opportunity offered by the Board. This does not mean that the Board thought that he had waived a right to an oral hearing, assuming, of course, that he had one to waive.

[18] Second, he says that the Board made findings of credibility which it could not fairly make without an oral hearing. Mr Boshra relied on paragraph 25 of the Board's reasons to substantiate this point. In that paragraph, the Board declined to regard two statements in one of Mr Boshra's

copious written representations as definitively determining that he was alleging that a cumulative pattern of action by CAPE constituted its failure to represent him. The Board noted that, since he made these statements only after learning the details of CAPE's objection that his complaint was out of time, "they could possibly be viewed as an after-the-fact effort to justify the timing of the complaint." In addition, the Board stated, they were not consistent with his earlier statements that it was his receipt of the e-mail of November 11, 2008, that gave rise to the complaint.

[19] In my view, this was not a finding of Mr Boshra's credibility, but simply an assessment of the probative value to be given to the statements in question, in view of the context in which they were made, and the statements by Mr Boshra in earlier submissions that pointed to another conclusion. This is not sufficient for the Court to find that, in all the circumstances, fairness mandated an oral hearing in order to ensure that Mr Boshra could effectively participate in the Board's decision-making process.

[20] Indeed, far from being oblivious to appropriate procedural choices, the Board expressly stated in its April letter that it was keeping open the possibility of holding an oral hearing if it found that it had to resolve substantial evidential disputes in order to determine the complaint.

[21] Although Mr Boshra, who represented himself at the hearing before the Court, did not raise it, I would add this. In the February letter, a Registry Officer explained to Mr Boshra that the Board had returned the documents that he had attempted to file with his complaint, because they were "evidentiary in nature" and should be presented as evidence "during the hearing."

[22] Without more, it might have been open to Mr Boshra to argue that this gave rise to a legitimate expectation that he would receive an oral hearing, a factor relevant to determining the content of the duty of fairness: *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817 at para. 26.

[23] The February letter may indeed have contributed to Mr Boshra's belief that the Board would hold an oral hearing into his complaint, a belief that may explain why he did not resubmit any documents with his written submissions in response to the Board's invitation in the April letter. As a result, the documents that Mr Boshra submitted to the Registry with his complaint were never available to the Board Member as the adjudicator of the dispute, nor did they form part of the record on which the Board made its decision.

[24] However, the April letter superseded the February letter, which had been written before or very soon after the Member had been assigned to the case. In these circumstances, Mr Boshra had no legitimate expectation that rendered it unfair for the Board to exercise its statutory discretion to decide his complaint without an oral hearing.

[25] Accordingly, in view of the circumscribed scope of CAPE's preliminary objections that the Board had to decide, as well as the nature of the questions in dispute, the Board's decision to proceed on the basis of written representations was not unfair.

(ii) ***no opportunity to submit evidence***

[26] Mr Boshra says that he was denied a fair hearing because he was not afforded an opportunity to submit documentary evidence to the Board, including an e-mail communication to him from Ms Stevens, dated November 11, 2008. This document assumed importance in the Board's determination of the start of the limitation period. Mr Boshra referred to and quoted from this e-mail in his written submissions in response to the Board's April letter.

[27] As noted above, when the Board advised the parties in its April letter that it did not intend at that time to hold an oral hearing, it specifically invited Mr Boshra to make further "written representations" to support his complaint, "including any supporting documents that he wishes to bring to the attention of the Board." Following this letter, Mr Boshra made extensive written representations, but did not submit any documents to the Board as evidence in support of his complaint.

[28] Relying on Mr Boshra's own statements, the Board regarded the e-mail of November 11 as the event that triggered the complaint, and defined its essential subject matter: see para. 32. On the basis of the material before the Board, especially Mr Boshra's references to the content of the November 11 e-mail and quotations from it, the Board concluded that the essential core of his complaint was that Ms Stevens had insisted on presenting his grievance as one of sexual harassment, whereas he thought that it should be characterized as a breach of his right to privacy or security. The Board's view that this was the essential subject matter of the complaint, and that the

November 11 email triggered it, was critical to the Board's determination of the start of the 90-day limitation period.

[29] While regretting the absence from the record of the complete text of the e-mail, the Board felt able to determine its subject matter on the basis of Mr Boshra's description of and quotation from it. The Board found it inexplicable that he did not submit the complete text of the e-mail in response to the Board's procedural direction in its April letter. It surmised (at para. 30) that it was one of the "exhibits" which he had submitted to the Board when he filed his complaint, and which the Registry subsequently returned.

[30] The duty of fairness requires the Board to provide a reasonable opportunity to submit evidence to it. The Board says that it discharged this duty when, in its April letter, it specifically invited Mr Boshra to make further written representations on his complaint, "including any supporting documents that he wishes to bring to the attention of the Board." The reasonableness of that opportunity must be assessed in context.

[31] In this regard, Mr Boshra says that he did not submit any documents to support his representations because he understood the April letter as an invitation simply to include in his written representations references to or descriptions of any supporting documents. The documents themselves, he thought, were to be submitted later, at the oral hearing stage of the process. This interpretation may have resulted from the Board's February letter advising him when it returned his

evidentiary documents that, if he wished to provide evidence in support of his complaint, he should present it to the Board “during the hearing”.

[32] Although the Board was aware of the February letter, and that Mr Boshra had requested an oral hearing, in my opinion the Board’s April letter was clear enough. It superseded the February letter and informed Mr Boshra that this was his chance to submit any documentary evidence. True, the April letter could have been worded so as to invite Mr Boshra expressly “to submit documentary evidence supporting his complaint”, rather than to make written representations “including any supporting documents that he wishes to bring to the attention of the Board”.

[33] However, it would be inappropriate for a reviewing Court to hold the Board to this standard of precision when determining if it had provided Mr Boshra a reasonable opportunity to submit documentary evidence. Despite the Board’s knowledge of the background, it was, in my view, reasonable for it to think that the wording used in the April letter would be understood by Mr Boshra as an invitation to submit documents with his written representations.

[34] Nowhere did the April letter suggest that Mr Boshra could only refer to or describe the documents on which he intended to rely to support his complaint. Nor, given the terms of the letter, could he reasonably have assumed that there would necessarily be an oral stage to the Board’s process.

[35] Of course, the Board could have asked Mr Boshra if he wished to submit a copy of the e-mail of November 11, 2008, when: it realized its importance in characterizing the essential element of his complaint, and hence in determining the start of the 90-day limitation period; was puzzled by the absence of the complete text from the record; and believed that the reason for its absence might be Mr Boshra's mistaken belief that he would be able to present evidentiary documents to the Board later at an oral hearing.

[36] Again, it is not the Court's function in an application for judicial review to decide whether it would have asked Mr Boshra to produce the e-mail. We can only ask whether the Board's failure to do so was unfair in all the circumstances. In my view, it was not. It is not generally the responsibility of an administrative tribunal operating an adversarial form of procedure to ask a party to produce a document not requested by the other side. The Board had clearly set out its procedure in its April letter. The duty of fairness prescribes a minimum procedural standard, not perfection.

[37] Moreover, if Mr Boshra was uncertain whether the April letter permitted him to submit documents that he wished the Board to consider in making its decision, he could have asked it for a clarification. He did not. Similarly, if, as he stated, he thought that there were "substantial evidentiary issues in dispute" to cause the Board to consider holding an oral hearing, as it had indicated in the April letter that it would, he could have asked the Board to hold an oral hearing. He did not. It is evident from the record that Mr Boshra was neither reluctant to communicate with the Board, nor lacking in the ability to express himself in writing forcefully and at length.

[38] In my opinion, the terms in which the Board communicated the procedure that it established in its April letter for determining the preliminary objections raised by CAPE were sufficiently clear to provide Mr Boshra with a reasonable opportunity to submit whatever documentary evidence he wished.

Limitation period

[39] The Board held that the 90-day time limit prescribed in subsection 190(2) for filing complaints of unfair labour practices under paragraph 190(1)(*g*) is mandatory, and that the Board has no discretion to extend it. Since Mr Boshra filed his complaint on February 5, 2009, the limitation period started to run on November 7, 2008. Hence, his complaint was out of time if he knew or ought to have known of the action or circumstances giving rise to the complaint before that date.

[40] In order to apply this provision to the facts, the Board had to define “the complaint”, and to decide when Mr Boshra knew or ought to have known of the action or circumstances that gave rise to it.

[41] In determining the essential nature of the complaint, the Board held (at para. 23) that each of the seven allegations listed in the complaint constituted neither separate actions or circumstances that gave rise to the complaint, nor, cumulatively, a pattern of representation. Instead, on the basis of a careful review of Mr Boshra’s various written submissions, the Board concluded that the essential nature of his complaint was that Ms Stevens had persisted in arguing the grievance on the basis of

sexual harassment in breach of the non-discrimination clause of the collective agreement and not, as Mr Boshra urged, as a breach of his right to privacy or security.

[42] The Board based its characterization of the complaint largely on Mr Boshra's description of the content of the e-mail of November 11, 2008, and his references to it as "the triggering event". In addition, in two of the allegations in the complaint, Mr Boshra alleged that Ms Stevens had wrongly treated the grievance as one of sexual harassment and had refused to argue it as one of privacy or security.

[43] Given its characterization of the essential subject matter of the complaint, the Board found (at para. 36) in Mr Boshra's own submissions ample evidence that he knew, as early as September or October 2008, of Ms Stevens' reliance on sexual harassment in the grievance process. This would make the filing of the complaint more than a month outside the 90-day time limit.

[44] Determining when time started to run against Mr Boshra in this case involves questions of fact, and mixed fact and law. The standard of review of such questions is presumptively unreasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 53). The presumption is reinforced in this case by the presence of a strong privative clause in section 51 of the Act and the relevance of the Board's extensive labour relations expertise to resolving the questions in dispute.

[45] Mr Boshra says that the Board erred in its characterization of his complaint. What really offended him, he said, was that Ms Stevens denied that she had based her presentation of his grievance on sexual harassment, and that she had also misrepresented other aspects of her handling of his grievance. In my opinion, this argument does not establish any reviewable error by the Board for two reasons.

[46] First, none of the seven items listed in Mr Boshra's complaint alleges that CAPE officials made misrepresentations to him. The catalogue of criticisms of CAPE labour relations officers in Mr Boshra's complaint does not include misrepresentations. It does, however, include an allegation that Ms Stevens persisted in treating the grievance as one of sexual harassment, instead of privacy or security. Nor is clear from Mr Boshra's memorandum of fact and law in support of his application for judicial review that the essential subject matter of his complaint was a lack of truthfulness by CAPE officers, rather than dissatisfaction with the basis on which Ms Stevens pursued the grievance.

[47] In any event, Mr Boshra's allegations that Ms Stevens made misrepresentations to him about her conduct of the case and that she argued the grievance on the wrong basis are so closely related that it probably would not have affected the Board's determination of the timeliness issue if it had adopted the characterization of the complaint now advanced by Mr Boshra.

[48] Second, while it may be possible to detect in some of Mr Boshra's written submissions to the Board allegations of misrepresentation, they also contain ample references to Ms Stevens' use of sexual harassment as the basis of the grievance.

[49] Hence, the Board's characterization of the subject-matter of the complaint cannot be said to be unreasonable. Given the judicial deference owed to the Board's decision, it is not for the Court to decide if it would have characterized the essential subject matter of the complaint in the same way as the Board.

[50] Mr Boshra also suggested that the limitation period should not have been found to run while he was attempting to work out his differences with CAPE through its internal procedures. The Board disagreed (see paras. 42-47). Having found that Mr Boshra was aware of the facts giving rise to his complaint before November 7, 2008, and that it had no power to extend the limitation period in subsection 190(2), it concluded that the complaint was untimely. Significantly, Mr Boshra had not submitted evidence of CAPE's internal processes for resolving members' allegations that CAPE had breached the duty of fair representation, or that he had availed himself of them.

[51] Hence, I cannot conclude that it was unreasonable for the Board to refuse to take into account any time that Mr Boshra spent in attempting to resolve the complaint through CAPE's internal mechanisms.

Conclusions

[52] For these reasons, I would dismiss the application for judicial review with costs.

"John M. Evans"

J.A.

"I agree
Carolyn Layden-Stevenson J.A."

"I agree
Robert Mainville J.C.A."

APPENDIX

Public Service Labour Relations Act, R.S.C. 2003, c. 22

41. The Board may decide any matter before it without holding an oral hearing.

41. La Commission peut trancher toute affaire ou question dont elle est saisie sans tenir d'audience.

51. (1) Subject to this Part, every order or decision of the Board is final and may not be questioned or reviewed in any court, except in accordance with the Federal Courts Act on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.

51. (1) Sous réserve des autres dispositions de la présente partie, les ordonnances et les décisions de la Commission sont définitives et ne sont susceptibles de contestation ou de révision par voie judiciaire qu'en conformité avec la Loi sur les Cours fédérales et pour les motifs visés aux alinéas 18.1(4) a), b) ou e) de cette loi.

(2) The Board has standing to appear in proceedings referred to in subsection (1) for the purpose of making submissions regarding the standard of review to be used with respect to decisions of the Board and the Board's jurisdiction, policies and procedures.

(2) La Commission a qualité pour comparaître dans les procédures visées au paragraphe (1) pour présenter ses observations à l'égard de la norme de contrôle judiciaire applicable à ses décisions ou à l'égard de sa compétence, de ses procédures et de ses lignes directrices.

(3) Except as permitted by subsection (1), no order, decision or proceeding of the Board made or carried on under or purporting to be made or carried on under this Part may, on any ground, including the ground that the order, decision or proceeding is beyond the jurisdiction of the Board to make or carry on or that, in the course of any proceeding, the Board for any reason exceeded or lost its jurisdiction,

(3) Sauf exception prévue au paragraphe (1), l'action — décision, ordonnance ou procédure — de la Commission, dans la mesure où elle est censée s'exercer dans le cadre de la présente partie, ne peut, pour quelque motif, notamment celui de l'excès de pouvoir ou de l'incompétence à une étape quelconque de la procédure :

(a) be questioned, reviewed, prohibited or restrained; or
(b) be made the subject of any

a) être contestée, révisée, empêchée ou limitée;
b) faire l'objet d'un recours judiciaire,

proceedings in or any process of any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise.

notamment par voie d'injonction, de certiorari, de prohibition ou de quo warranto.

185. In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).

185. Dans la présente section, « pratiques déloyales » s'entend de tout ce qui est interdit par les paragraphes 186(1) et (2), les articles 187 et 188 et le paragraphe 189(1).

187. No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.

187. Il est interdit à l'organisation syndicale, ainsi qu'à ses dirigeants et représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi en matière de représentation de tout fonctionnaire qui fait partie de l'unité dont elle est l'agent négociateur.

190. (1) The Board must examine and inquire into any complaint made to it that

…

(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.

190. (1) La Commission instruit toute plainte dont elle est saisie et selon laquelle :

[…]

g) l'employeur, l'organisation syndicale ou toute personne s'est livré à une pratique déloyale au sens de l'article 185.

(2) Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint

(2) Sous réserve des paragraphes (3) et (4), les plaintes prévues au paragraphe (1) doivent être présentées dans les quatre-vingt-dix jours qui suivent la date à laquelle le plaignant a eu — ou, selon la Commission, aurait dû avoir — connaissance des mesures ou des circonstances y ayant donné lieu.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-368-09
(APPEAL FROM A DECISION OF THE PUBLIC SERVICE LABOUR RELATIONS BOARD DATED AUGUST 18, 2009, DOCKET NO. 2009 PSLRB 100)	
STYLE OF CAUSE:	Sameh Boshra and Canadian Association of Professional Employees (CAPE)
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 8, 2011
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	LAYDEN-STEVENSON AND MAINVILLE JJ.A.
DATED:	March 14, 2011

APPEARANCES:

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