Federal Court of Appeal | Cour d'appel fédérale

Date: 20110509

Docket: A-209-10

Citation: 2011 FCA 156

CORAM: **LÉTOURNEAU J.A.**
SEXTON J.A.
TRUDEL J.A.

BETWEEN:

JAMIE MCAULEY

Applicant

and

CHALK RIVER TECHNICIANS AND TECHNOLOGISTS UNION
and
ATOMIC ENERGY OF CANADA LIMITED

Respondents

Heard at Ottawa, Ontario, on May 4, 2011.

Judgment delivered at Ottawa, Ontario, on May 9, 2011.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
SEXTON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] This is an application for judicial review of a decision of the Canada Industrial Relations Board (the Board) dated April 28, 2010 (2010 CIRB LD 2336) dismissing the applicant's complaint pursuant to section 37 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code).

[2] In his complaint, the applicant alleged that the Chalk River Technicians and Technologists Union (Union) was arbitrary and unfair in its representation of him. The Union had filed a grievance following the applicant's termination of employment, ultimately deciding not to take the grievance to arbitration. The Board dismissed the complaint.

[3] The applicant argues that the Board denied him procedural fairness for a number of reasons: (1) it failed to compel the Union to produce highly relevant documents and information. More particularly, the applicant is concerned that neither the Union, nor the Board dealt with the contradictory evidence as to whether he was still on probation when terminated; (2) it failed to require the employer to participate in any manner; and (3) it denied him the opportunity to have an oral hearing.

[4] The applicant also argues that the Board should have found that the Union arbitrarily conducted itself given the lack of evidence to support a proper investigation, coupled with unreasonable delay in pursuing his case and the Union's failure to communicate with him about his complaint (applicant's memorandum at paragraph 72).

[5] On May 19, 2010, the applicant applied to the Board to have the decision reconsidered pursuant to section 18 of the Code (applicant's appeal book, tab M at page 92). The Board allowed the application for reconsideration and issued a second decision on June 22, 2010 (2010 CIRB LD 2373) rejecting the applicant's arguments (applicant's record, tab N at page 198). The applicant did not challenge this second decision.

[6] In light of this Court's decision in *Vidéotron Télécom Ltée v. Communications, Energy and Paperworkers Union of Canada*, 2005 FCA 90 at paragraphs 10 to 12 and *Veillette v. International Assn. of Machinists and Aerospace Workers*, 2011 FCA 32 at paragraph 3, the applicant must challenge both decisions, especially if the decision on the application for reconsideration affirms the first and if quashing the first would not eliminate the second, which is the case here. At the hearing of this application, it was agreed by both parties that the judgment to be rendered would dispose of both decisions.

Procedural Fairness before the Board

[7] On the issue of procedural fairness, I conclude that the Board committed none of the errors alleged by the applicant.

[8] Section 16.1 of the Code provides that the Board may decide any matter before it without holding an oral hearing. Our Court has already decided that issues of credibility or the existence of contradictory evidence do not automatically warrant an oral hearing (*Guan v. Purolator Courier Ltd*., 2010 FCA 103; *Nadeau v. United Steelworkers of America*, 2009 FCA 100).

[9] In this case, the contradictory evidence concerned the status of the applicant, i.e., whether he was on probation or a short-term service employee. The Board was alive to this issue, but a final determination was not essential to the outcome because the legal opinion obtained by the Union, before it made its decision, concluded that the grievance would not likely succeed even if the complainant was not a probationary employee (respondent's record, volume 1, tab 5 at page 30).

For the same reasons, the production of documents relating to the applicant's employment status was unnecessary.

[10] The applicant also argues that he was deprived of procedural fairness as he did not have a chance to present his side of the facts and to respond to the allegations that he had stolen time (applicant's memorandum at paragraphs 51 and 52). According to the applicant, there were mitigating factors, relevant to both his section 37 complaint and to the merits of his grievance that the Union failed to put to the Board: his legitimate explanations for his absence; his clean disciplinary record and positive performance review; his status of employment. I have two answers to this argument.

[11] First, a section 37 complaint is a different proceeding than the adjudication of the grievance. It is not the proper forum to argue the grievance on its merits, explaining why the employer is not a principal party to a section 37 proceeding (*McRaeJackson v. CAW-Canada*, [2004] C.I.R.B. No. 290 at paragraph 247; 115 CIRBR (2nd) 161 [*McRaeJackson*]). In this case, the applicant has failed to persuade me that the Board would have had reason to compel the employer's participation to the proceeding.

[12] Second, the applicant's explanations for his absences and the fact that he had no disciplinary record were known to the Board (see applicant's written submissions to the Board, applicant's record, volume 1, tab K at paragraphs 12 and f.; respondent's record, volume 1, tab 5 at page 28). The applicant has failed to show any exceptional circumstances warranting an oral hearing. I am

satisfied that the applicant's side of the facts and relevant material were properly in front of the Board.

The section 37 complaint

[13] Finally, the applicant contests the Board's finding with respect to the conduct of the Union. It is trite law that the standard of review applicable to the Board's decision on the Union's duty of fair representation is reasonableness (*Grain Services Union (ILWU-Canada) v. Friesen*, 2010 FCA 339 at paragraph 31).

[14] In *McRaeJackson*, the Board enunciated the test it applies in a section 37 complaint:

> [27] Accordingly, the Board will normally find that the union has fulfilled its duty of fair representation responsibility if: a) it investigated the grievance, obtained full details of the case, including the employee's side of the story; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the outcome of the grievance; and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.

[15] Here, the Board found that "the Union made a reasoned decision not to pursue the grievance based on its review of the evidence and a legal opinion that it obtained from outside counsel" (reasons at page 7). The Board highlighted that the Union based its decision on the following factors, which the Board considered uncontested (*ibidem*):

- the fact that the applicant was either a probationary employee or an employee with low seniority (Union's appeal book, tab 5 at page 27);

- the fact that the employer had evidence that the applicant had left work without permission and had been paid for time he did not work (*ibidem* at page 29); and
- the fact that he admitted leaving work without permission (*ibidem* at page 28).

[16] The applicant opines that the Board was wrong in considering these factors as uncontested since the legal opinion obtained by the Union "was based upon incomplete facts arising from a negligent investigation" (applicant's memorandum at paragraph 18). Had the Union conducted a proper investigation, the applicant's position would have prevailed. Having examined the record that was in front of the Board, I must disagree with the applicant. The record supports the Board's findings.

[17] For example, in his written submissions to the Board, the applicant explains that on two occasions, he left the workplace early due to child care commitments. He could not find a supervisor and was unable to leave a message because the supervisor's voicemail box was full. So, he left without permission. However, at no time upon his return to work or before pay day, did the applicant report his absences. This fact was confirmed by counsel for the applicant at the hearing of this application. No serious explanation was offered for this omission. Therefore, the applicant was paid for hours he did not work and during which his absence from work had neither been authorized, nor reported. This is the misconduct that led to his termination. The employer found that these actions contravened the "truthfulness and integrity" required in their business dealings (applicant's record, volume 1, tab D at page 143; applicant's affidavit, *ibidem* at pages 7-8, paragraph 8).

[18] As a final ground of complaint, the applicant raises the Union's unreasonable delay in pursuing his case and failure to communicate with him in a timely fashion. The Board addressed this issue in its reasons, called the situation "unfortunate", but held that there was no breach of the duty of fair representation.

[19] In light of the evidentiary record, it was open to the Board to conclude as it did. Its decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and the Code (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[20] Therefore, I would dismiss this application for judicial review without costs, as the respondents are seeking none. The judgment will dispose of the Board's decisions indexed as 2010 CIRB LD 2336 and 2010 CIRB LD 2373.

"Johanne Trudel"
J.A.

"I agree
Gilles Létourneau J.A."

"I agree
J. Edgar Sexton J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-209-10
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CONCURRED IN BY:	LÉTOURNEAU J.A., SEXTON J.A.
DATED:	May 9, 2011

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