Federal Court of Appeal | Cour d'appel fédérale

Date: 20120315

Docket: A-297-11

Citation: 2012 FCA 91

CORAM: **BLAIS C.J.**
EVANS J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

IRENE BREMSAK

Applicant

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA KATHLEEN KERR, GEOFF KENDELL, STEPHEN Y. LEE, SIDDIQ ANSARI, GARY CORBETT, DON BURNS, DAVID GRAY, DAN JONES, EVAN HEIDINGER, AL RAVJIANI, HELENE ROGERS, MARILYN BEST, ROBERT BOWIE-REED, YVON BODEUR, RICHARD DEPUIS, ROBERT HUNTER, PASCAL JOSEPH, SEAN O'REILLY, JOE PODREBARAC, NITA SAVILLE, GEOFFREY GRENVILLE-WOOD, ISABELLE ROY, QUINTON JANSEN, TERRY PETERS, STEPHANE CHEVALIER, REJEAN SIMARD

Respondents

Heard at Vancouver, British Columbia, on March 7, 2012.

Judgment delivered at Ottawa, Ontario, on March 15, 2012.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: BLAIS C.J.
LAYDEN-STEVENSON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20120315

Docket: A-297-11

Citation: 2012 FCA 91

CORAM: **BLAIS C.J.**
EVANS J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

IRENE BREMSAK

Applicant

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA KATHLEEN KERR, GEOFF KENDELL, STEPHEN Y. LEE, SIDDIQ ANSARI, GARY CORBETT, DON BURNS, DAVID GRAY, DAN JONES, EVAN HEIDINGER, AL RAVJIANI, HELENE ROGERS, MARILYN BEST, ROBERT BOWIE-REED, YVON BODEUR, RICHARD DEPUIS, ROBERT HUNTER, PASCAL JOSEPH, SEAN O'REILLY, JOE PODREBARAC, NITA SAVILLE, GEOFFREY GRENVILLE-WOOD, ISABELLE ROY, QUINTON JANSEN, TERRY PETERS, STEPHANE CHEVALIER, REJEAN SIMARD

Respondents

REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] Irene Bremsak has brought an application for judicial review to set aside a decision of the Public Service Labour Relations Board (Board), dated July 22, 2011 and reported at 2011 PSLRB 95. In that decision, the Board dismissed four complaints filed by Ms Bremsak under the *Public Service Labour Relations* Act, S.C. 2003, c. 22, s. 2 (Act), and five applications for the Board's consent to institute prosecutions for breaches of the Act (sections 200, 202, 203, and 205). The complaints and consent applications named various respondents: Ms Bremsak's union (the Professional Institute of the Public Service of Canada (PIPSC)), as well as some of its members and officers.

[2] The Board dismissed them all, on the ground that they were more appropriately dealt with in hearings currently being held by the Board, or in contempt proceedings brought by Ms Bremsak in the Federal Court. The Board's essential reason for its decision was that, in these circumstances, adjudicating numerous complaints arising from essentially the same subject matter, and involving many of the same parties, would serve "no legitimate labour relations purpose" (at para. 46).

[3] In my view, the Board made no reviewable error in reaching its decision. First, the Board's process was not unfair. Second, its decision to dismiss the complaints and the consent applications in order to prevent the unnecessary duplication of proceedings was not an unreasonable exercise of the Board's statutory discretion to control it own process.

Background

[4] Ms Bremsak has been locked in a bitter five-year battle with PIPSC and some of its officers and members. No one emerges from this sorry tale with much credit: intransigence on one side has been met by defiance from the other. Having started with a relatively minor incident, the dispute should have been settled long ago.

[5] Instead, the conflict has escalated, and has given rise to numerous trips to the Board. Ms Bremsak initiated some, PIPSC initiated others; some have resulted in wins for Ms Bremsak, others have gone PIPSC's way. Not content to stop at the Board, the parties have also instituted a flurry of proceedings in the Federal Courts.

[6] Of the many decisions rendered by the Board throughout this dispute, the decision most relevant to the decision under review is that ordering PIPSC to reinstate Ms Bremsak to office. The Board found the union policy under which she had been temporarily suspended from office to be invalid: 2009 PSLRB 103 (reinstatement decision).

[7] PIPSC refused to comply with this order. It argued that it could not reinstate Ms Bremsak to office because it suspended her union membership after the Board issued the reinstatement decision. Justice Lemieux of the Federal Court rejected this defence of lawful authority and found PIPSC in contempt: 2012 FC 213. PIPSC is appealing the contempt decision to this Court.

[8] The four complaints that were before the Board in the present case essentially concern two issues. First, the impropriety of PIPSC's application to Ms Bremsak of the policy that the Board found to be invalid in the reinstatement decision. Second, conduct by union committees and individuals resulting from the union's non-compliance. A prosecution consent application is attached to each of these complaints. Ms Bremsak says that her fifth consent application relates not to these complaints, but to her original complaint that led to the reinstatement decision.

[9] She says that she has made the present complaints and consent applications in an attempt to have the reinstatement decision enforced, and to ensure that those who have done her wrong are held accountable for their actions. She is challenging the validity of the Board's dismissal of the complaints and consent applications, on the grounds of procedural unfairness and abuse of discretion.

[10] **Procedural fairness:** The Board exercised its broad discretion under section 41 of the Act to deal with the complaints without an oral hearing. The Board's procedural choice is entitled to considerable judicial deference: *Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98, 415 N.R. 77 at paras. 14-15. At the hearing of her application for judicial review, Ms Bremsak stated that she was no longer alleging that the Board breached the duty of procedural fairness by failing to afford her an oral hearing.

[11] Rather, her procedural fairness argument turns on the fact that the Board did not render its decision until July 2011, nearly two years after she had filed her complaints and consent

applications. Given the length of this delay, Ms Bremsak argued that the Board ought not to have dismissed her complaints without indicating when it would make its decision and providing her with an opportunity to add new information to the representations made when she filed her complaints.

[12] In my view, this allegation does not constitute procedural unfairness. As she conceded, Ms Bremsak did not submit evidence to the Board that it refused to consider. She stated that she was concerned about the Board's delay in making a decision, but the Board did not reply to her inquiries. Nonetheless, she took no proactive steps to submit to it additional information that she thought was relevant to her complaints and consent applications.

[13] I appreciate that Ms Bremsak was representing herself. However, she had already acquired considerable experience with Board proceedings. I would also add that the information that Ms Bremsak says she would have submitted to the Board if she had been given the opportunity has little if any relevance to the disposition of her complaints and consent applications.

[14] On the facts of this case, the duty of fairness did not require the Board to advise Ms Bremsak when it was going to render its decision or to invite her to supplement her representations. Nor is there any basis in the record for concluding that the time taken by the Board to render its decision in and of itself invalidated its dismissal of her complaints.

[15] **Abuse of discretion:** The principal ground on which Ms Bremsak challenged the Board's dismissal of her complaints and consent applications was that the Board's duty to administer the Act

(section 36) requires it to deal with the merits of every complaint within its jurisdiction. She argues that her four complaints alleged fresh breaches of the Act by the individuals she named as respondents, and that it was the duty of the Board to protect complainants from the kinds of recurring unfair labour practices to which she had been subject. Accordingly, the Board should have adjudicated the merits of her complaints and consent applications.

[16] She further argued that the fact that the complaints may have overlapped with other proceedings did not justify the Board's decision not to determine their merits. Her complaints demonstrated a pattern of misconduct that would strengthen her applications for the Board's consent to prosecute those who had breached the sections of the Act that can give rise to criminal charges.

[17] Despite the clarity of Ms Bremsak's argument, and the forcefulness of her presentation, I am unable to agree.

[18] Determining the applicable standard of review is the starting point for any analysis of a challenge to a decision by an administrative tribunal. On the basis of the following considerations, it is clear that unreasonableness is the standard of review applicable in this case.

[19] First, subsection 51(1) of the Act contains a strong preclusive clause limiting judicial review of the Board's decisions. Second, the questions in dispute in this application are the Board's exercise of its discretion and the interpretation of the Act, the Board's enabling statute. Third, the Board's labour relations expertise is relevant to its determination of these questions. Fourth,

minimizing the scope of judicial review advances the underlying statutory objective of ensuring efficient and expeditious decision-making by the Board in order to promote good labour relations.

[20] Thus, in order to succeed in her application, Ms Bremsak must establish that the Board's decision was unreasonable. Unreasonableness is determined by considering whether the reasons given by a tribunal, or those that it could have given, provide a cogent and transparent justification for its decision. A reviewing court must also consider whether the decision itself falls within a range of acceptable outcomes reasonably open to the tribunal on the facts and the law.

[21] I do not accept Ms Bremsak's arguments that the Board's decision in this case was unreasonable. In my view, it was reasonable for the Board to conclude that it has a statutory discretion to dismiss complaints without deciding their merits in order to prevent a multiplicity of proceedings. Its exercise of that discretion on the facts of the present case was similarly reasonable.

[22] As an adjudicative administrative tribunal, the Board has an implicit discretion to control its own process, subject to the duty of fairness and any statutory limitations on its powers: *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at 568-69. In addition, section 36 confers on the Board the powers that are "incidental to the attainment of the objects of this Act". In my view, it was reasonable for the Board to have decided that it could dismiss complaints without adjudicating their merits when to do so would unduly duplicate and complicate its proceedings, and thereby serve no "legitimate labour relations purpose" (at para. 46).

[23] Contrary to Ms Bremsak's argument, the Board's general statutory responsibility to administer the Act is not inconsistent with the existence of an implicit discretion to control its own process by dismissing complaints on the ground that their substance will be better addressed in other proceedings. Without this discretion, the Board's docket could be overwhelmed. It must be able to manage its caseload in order to ensure that limited resources are used in a manner that enables it to discharge its responsibilities for the efficient resolution of labour-related disputes.

[24] Nor was the Board's dismissal of Ms Bremsak's complaints an unreasonable exercise of this discretion. These complaints do contain allegations of new instances of misconduct. However, they arise from the same subject matter as complaints that have already been decided, or are being litigated before the Board or in the Federal Courts: Ms Bremsak's temporary suspension from union offices under an invalid policy, and PIPSC's failure to comply with the reinstatement decision.

[25] As the Board pointed out, the reinstatement decision settled the question of the validity of both the policy and her suspension. The enforcement of that decision is the subject of the contempt proceedings. The Board is also currently hearing other complaints by Ms Bremsak concerning a harassment complaint by PIPSC members, and the validity of her suspension from membership in the union.

[26] The mere possibility that an adjudication of the merits of the complaints in Ms Bremsak's favour might have improved her prospects of obtaining the Board's consent to prosecution does not render its decision unreasonable.

[27] As for the dismissal of the consent applications, a prosecution may only be brought with the consent of the Board in relation to a well-founded complaint of a breach of specified provisions of the Act. Since the Board dismissed the complaints to which four of the applications were related, it was reasonable, if not inevitable, for the Board to dismiss those consent applications as well.

[28] Ms Bremsak says that her fifth consent application was not linked to these complaints, but related to her original complaint that led to the reinstatement decision. Accordingly, she says, the Board erred in dismissing it on the same ground as the other applications.

[29] Even if she is correct on this point, this is a case where the Court should take up the invitation of the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 48, and consider the reasons that the Board could have offered for dismissing the fifth consent application. In my view, there were good reasons that the Board could have given for its decision on this issue and, in the circumstances of this case, it would be unduly formalistic to remit the matter to the Board for re-determination. Nothing will be gained by the Court's adding another round of unnecessary litigation to a dispute that has already been bedevilled by a proliferation of administrative and judicial proceedings.

[30] Like the Ontario Labour Relations Board, the Board has stated that consent to prosecute is very rarely given. Criminal proceedings are authorized only in the most extraordinary situations, because of the serious legal consequences for those prosecuted, and the negative effects that a criminal prosecution is likely to have on good industrial relations: see *Quadrini v. Canada Revenue*

Agency, 2008 PSLRB 37 at para. 67; *Orbine v. Service Employees International Union*, [2011] O.L.R.D. No. 1695, 197 C.L.R.B.R. (2d) 189 at para. 27.

[31] In my view, there is no practical possibility that the Board would have consented to the prosecution of PIPSC and the named individuals for suspending Ms Bremsak from her union offices under the policy that the Board's reinstatement decision held invalid. That policy provided for the automatic temporary suspension from office of union members who took an internal union matter to an outside body, including the Board.

[32] The reinstatement decision recognized that it would be appropriate in some situations for the union to temporarily suspend a member from office who had gone to an outside body with an internal union issue. PIPSC has a legitimate interest in ensuring that members of the union's leadership avoid conflicts of interest and breaches of their duty of loyalty to the union. The problem that the Board found with the policy as drafted was its absolute character. In particular, the policy left no room for proportionality between offence and punishment. See 2009 PSLRB 103 at para. 17.

[33] Temporarily suspending a member from office under a policy that was simply too broad would almost certainly not be regarded by the Board as such a flagrant and egregious breach of the Act as to warrant criminal prosecution.

Conclusions

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

"John M. Evans"

J.A.

"I agree
Pierre Blais C.J."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-297-11
STYLE OF CAUSE:	Irene Bremsak v. The Professional Institute of the Public Service of Canada et al
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 7, 2012
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	BLAIS C.J. LAYDEN-STEVENSON J.A.
DATED:	March 15, 2012

APPEARANCES:

Irene Bremsak	ON HER OWN BEHALF
Steven Welchner	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Welchner Law Office Ottawa, Ontario	FOR THE RESPONDENTS