Federal Court of Appeal | Cour d'appel fédérale

Date: 20120625

Docket: A-238-11

Citation: 2012 FCA 193

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

GEORGE EDWARD BOULOS

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Heard at Vancouver, British Columbia, on June 19, 2012.

Judgment delivered at Ottawa, Ontario, on June 25, 2012.

REASONS FOR JUDGMENT OF THE COURT BY: GAUTHIER J.A.

CONCURRED IN BY: DAWSON J.A.
STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20120625

Docket: A-238-11

Citation: 2012 FCA 193

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

GEORGE EDWARD BOULOS

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Mr. George Edward Boulos worked as an Income/Excise Tax auditor at the Canada Revenue Agency (the employer) between November 2001 and September 24, 2008. Starting in 2005, a series of events led to the filing of six grievances against the employer. Having lost confidence in his exclusive bargaining agent, Public Service Alliance of Canada (PSAC), Mr. Boulos currently pursues these grievances alone.

[2] The application before us does not relate to the merits of any of these grievances. Rather, it relates to Mr. Boulos' complaint against PSAC under paragraph 190(1)(g) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (the *Act*), alleging an unfair labour practice within the meaning of section 185 of the *Act*, more particularly that the PSAC, including its component Union of Taxation Employees (UTE) that Mr. Boulos initially dealt with, was seriously negligent and exhibited bad faith in the way it investigated and analysed his grievance files and later represented him until he decided to simply go on his own.

[3] The said complaint was dismissed by a member of the Public Service Labour Relations Board (the Board) and Mr. Boulos now seeks judicial review of that 27-page decision. Mr. Boulos submits that:

- the Board failed to properly consider all the evidence in respect of his allegation that the PSAC's serious negligence had an impact on the jurisdictional challenge raised by the employer in the grievance 008 -1241-70043979. As a result, it failed to issue a remedial order that would prevent any negative decision on such objection.

- the Board was biased;

- the Board failed to ensure that certain sensitive information contained in PSAC's submissions would continue to be kept confidential until all his grievances were litigated.

[4] It is trite law that the standard of review applicable to the Board's decision on a bargaining agent's duty of fair representation is reasonableness [*Grain Services Union (ILWU-Canada) v. Friesen*, 2010 FCA 339, 414 N.R.171 at paragraph 31, *McAuley v. Chalk River Technicians and Technologists Union*, 2011 FCA 156, 420 N.R. 358, paragraph 13].

[5] During the hearing, Mr. Boulos submitted that the Court should first focus on the various deficiencies and flaws in the reasons. In his view, those deficiencies and flaws established that there was a breach of procedural fairness (bias) or that the decision was unreasonable.

[6] The Court also understood him to say that in addition to this, the Court should only review the reasonableness of the Board's conclusion in respect of PSAC's conduct which could have an impact on the jurisdictional challenge in his grievance number 008 -1241-70043979 (this issue has yet to be decided).

[7] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada confirmed that in reviewing a decision on the standard of reasonableness, the reviewing court should examine, among other things, the "justification, transparency and intelligibility" of the decision.

[8] To meet the criteria of the reasonable decision, the reasons must allow the reviewing court to understand why the decision maker made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes which are defensible in respect of the facts

and the law. Nothing more, in so far as reasons are concerned, is required to meet the reasonableness standard of review. Reasons need not be comprehensive. They are to be read in the context of the record as a whole. Indeed, reasons may be complemented by the record.

[9] Adopting the approach mandated by the Supreme Court of Canada, and having carefully reviewed the reasons in the context of the submissions and the evidence before the Board, I understand well why the Board rejected the applicant's allegation that the respondent made a serious and negligent error by failing to present the argument exactly as he wanted them to do in order to deal with the jurisdictional issue. In the Board's view, the decision to put emphasis on certain issues or facts to the exclusion of others fell within the respondent's right to make substantive and technical judgments about grievances as long as it did not act arbitrarily, discriminatorily or in bad faith.

[10] Having weighed the evidence, the Board was not convinced that the respondent had behaved improperly. Thus, it found that there was no breach of the duty of fair representation. The Board was also of the view that it should not comment further on the validity of the position taken by PSAC in that grievance file because this was to be decided by another adjudicator.

[11] I cannot agree that the Board ignored evidence in reaching this conclusion. First, the decision maker is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown [*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (C.A.) (Q.L.) at paragraph 1]. Second, a proper reading of the Board's reasons at

paragraphs 52 to 55(c), seen in the context of the submissions and the evidence, convinces me that the Board was alert and alive to the issue raised in respect of the jurisdictional objection in grievance number 008 -1241-70043979. This is especially so when one considers the Board's comments at paragraphs 3 and 4 of the decision to explain why, in its reasons, the Board had generalized the evidence that discusses merits and tactics so as not to prejudice any further discussion and adjudication of the grievances.

[12] I do not accept Mr. Boulos's view that this is an unconvincing excuse for not addressing the evidence. In fact, given the representations he had made in respect of the need to keep the details of his tactics and his communication with the respondent confidential (see particularly the letter dated August 18, 2010 at page 47 of the applicant's record) and the fact that the decision of the Board is necessarily a public document, it was indeed reasonable for the Board to adopt this approach.

[13] All this to say that Mr. Boulos has not persuaded me that the Board's conclusion in respect of his specific allegation that the PSAC had been seriously negligent with respect to the grievance number 008 -1241-70043979 was not open to it on the basis of the evidentiary record and the applicable law properly set out in the decision and codified in section 187 of the *Act*. In fact, having considered the decision as a whole, I can find no reviewable error that would justify our intervention. The Board applied the correct legal principles, its findings including its ultimate conclusion fall within the range of acceptable outcomes.

[14] Turning now to the allegation of bias, it has to be measured by the test articulated by the Supreme Court in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 S.C.R. 369, at page 394. It is as follows:

> [...] the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[15] The case law is clear that a reasonable person would require some clear evidence to support such an allegation [*R. v. S (R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193, at paragraphs 48-49].

[16] To meet his burden, Mr. Boulos made a paragraph-by-paragraph analysis of the Board's decision noting numerous elements that could fall under one or more of the following categories: (1) indicators of bias, (2) neglect or distortion of evidence, (3) areas where the complaint was analyzed out of context, (4) factual errors, all of which taken together established clearly in his view a reasonable apprehension of bias.

[17] Here again, one must keep in mind as a legal matter, that the Board did not have to write the type of detailed and comprehensive reasons that Mr Boulos appears to be insisting upon. Furthermore as noted, the decision contains no reviewable errors per se.

[18] It is true that language can hide biased assumptions and there are indeed instances where the Courts have found that certain strong language such as blatantly racist comments, unacceptable

comments about the abilities of an employee's non-lawyer representative or unacceptable sarcasm, was indicative of bias. However, after a close analysis of the submissions and the Board's reasons, I am not satisfied that Mr. Boulos met his burden.

[19] In fact, in my view, there is no evidence on which one could find a reasonable apprehension of bias. There is simply no negative connotation whatsoever in those portions of the Board's reasons highlighted by Mr. Boulos. There is nothing defaming or insulting in the decision as suggested in his affidavit. This not to say that Mr. Boulos was not truly affected by the decision and that the matter has not taken a heavy toll on him. Despite my sympathy for his situation, I cannot conclude that his complaint was not considered and decided fairly.

[20] In order to dispose of the confidentiality issue, it is necessary to put it in context.

[21] After indicating that he would like to invoke a litigation privilege in respect of certain information relating to the conduct of his grievances, the applicant requested that the Board put in place "certain controls" to avoid disclosure or dissemination of the information to the employer. The respondent opposed this request on the basis that it was too vague and insisted that this should not prejudice its ability to defend or delay the process before the Board.

[22] Given that the respondent did not oppose a direction that its submissions not be sent to the employer, the Board instructed PSAC "not to copy the employer at this time." On September 14, 2010 a confirmation was issued that the PSAC response dated July 28, 2010 would not be disclosed

to the employer “at this time.” On February 28, 2011, Mr. Boulos himself filed comprehensive submissions which included most of the communications that one would reasonably expect to contain at least some of the allegedly privileged information. At that time, he made no request to the Board for a direction or order prohibiting their disclosure to the employer.

[23] At the hearing, the parties could not shed light on the matter of whether the information filed with the Board prior to May 11, 2011, (the date of the decision) was accessed by the public.

[24] In its decision, the Board does not make any further order or direction in respect of the information referred to in Mr. Boulos’ correspondence.

[25] After he received the Board’s decision, Mr. Boulos made no request to the Board for an order protecting any of the alleged privileged information including the PSAC submissions during the judicial review of the Board’s decision.

[26] In August 2011, Mr. Boulos filed his affidavit in the present proceedings which includes as exhibits not only the PSAC submissions dated July 28, 2010 but also all of the information which, as mentioned above, could reasonably be assumed to include at least some of the information allegedly covered by litigation privilege. He sought no order for the protection of the confidentiality of that material before this Court. This documentation and information have been available to the public since then in any event.

[27] There is no evidence as to whether or not the employer or anybody on his behalf has already reviewed the documentation and information.

[28] Still, Mr. Boulos requests this Court to declare that the Board erred by failing to protect "the information" against disclosure to the employer after its decision was issued. He also seeks an order directing the Board to protect "the information" from improper disclosure to the employer.

[29] In my view, assuming without deciding that a litigation privilege did protect the confidentiality of any information currently on this Court's public record, Mr. Boulos waived that confidentiality by failing to take any steps to assert and protect it, such as by a motion to seal the Court's file.

[30] Now that the information has been placed in a public file, his submission that the Board should have kept it confidential is moot. I am not satisfied that Mr. Boulos has met the criteria established in *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342 governing this Court's exercise of its residual discretion to hear and determine a matter that is moot.

[31] There is no reviewable error justifying this Court's intervention and so I would dismiss the application with costs.

"Johanne Gauthier"

J.A.

"I agree.
Eleanor R. Dawson, J.A."

"I agree.
David Stratas, J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-238-11
APPLICATION FOR JUDICIAL REVIEW OF A JUDGMENT OF THE PUBLIC SERVICE LABOUR RELATIONS BOARD, DATED MAY 13, 2011	
STYLE OF CAUSE:	George Edward Boulos v. Public Service Alliance of Canada
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 19, 2012
REASONS FOR JUDGMENT OF THE COURT BY:	GAUTHIER J.A.
CONCURRED IN BY:	DAWSON, STRATAS JJ.A.

APPEARANCES:

Mr. George Edward Boulos	ON HIS OWN BEHALF
Mr. Andrew Raven	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Andrew Raven Raven, Cameron, Ballantyne & Yazbeck LLP Ottawa, ON	FOR THE RESPONDENT