

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130606

Docket: A-421-12

Citation: 2013 FCA 150

**CORAM: NOËL J.A.
PELLETIER J.A.
GAUTHIER J.A.**

BETWEEN:

OZCAN ILASLAN

Applicant

and

**HOSPITALITY & SERVICE TRADES UNION, LOCAL 261
AND THE NATIONAL ARTS CENTRE CORPORATION**

Respondents

Heard at Ottawa, Ontario, on June 4, 2013.

Judgment delivered at Ottawa, Ontario, on June 6, 2013.

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

**NOËL J.A.
PELLETIER J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130606

Docket: A-421-12

Citation: 2013 FCA 150

**CORAM: NOËL J.A.
PELLETIER J.A.
GAUTHIER J.A.**

BETWEEN:

OZCAN ILASLAN

Applicant

and

**HOSPITALITY & SERVICE TRADES UNION, LOCAL 261
AND THE NATIONAL ARTS CENTRE CORPORATION**

Respondents

REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Mr. Ozcan Ilaslan (the applicant) seeks judicial review of the interlocutory decision of the Chairperson of the Canadian Industrial Relations Board (the Board) denying his request for an order compelling his union, the Hospitality & Service Trades Union, Local 261 (the Union), and his employer, the National Arts Centre Corporation (the NAC, and collectively, the respondents) to disclose documents which, in his view, are in their possession. This request for a production order was made in the context of a request for reconsideration of an earlier board decision dismissing Mr.

Ilaslan's complaint that his union had failed in its duty of fair representation. The request for a production order was denied because the Board found it untimely.

[2] In his Notice of Application and Memorandum of fact and law, the applicant alleges that the decision should be quashed because he was not given a proper opportunity to make submissions on the timeliness of his request. In his view, this constitutes a breach of the Board's duty to act fairly. In that respect, he relies on subsection 16(f.1) of the *Canada Labour Code*, R.S.C., 1985 c. L-2, Part I (the Code), which gives general power to the Board to issue summons in respect of information or documents that may be relevant to a matter before it. This provision expressly provides that the power to compel should be exercised after providing the parties the opportunity to make representations.

[3] As always, when such allegations are made, context is important. For the reasons that follow, I have not been persuaded that the Board acted unfairly. In any event, even assuming that it did, I am not satisfied that this breach could have any impact whatsoever, given that the documents sought were either: i) already in the applicant's possession; ii) did not exist; or iii) were irrelevant to the issues before the Board.

Proceedings before the Board

[4] On February 1, 2011, the applicant filed a complaint with the Board pursuant to section 37 of the Code alleging that the Union had breached its duty to represent him fairly by failing to bring his termination grievance to arbitration. However, as the grievance effectively proceeded to

arbitration, the Board suspended the proceedings in the complaint until such time as the Arbitrator issued his decision.

[5] On March 6, 2012, the Arbitrator dismissed the termination grievance on the basis that the applicant had missed work on the 26th and 27th of June and the 1st of July 2009 for no good reason. Given the applicant's previous disciplinary record, the Arbitrator confirmed that termination was an appropriate penalty. More specifically, the Arbitrator found that the applicant had no *bona fide* reason in thinking that he needed the approval of the NAC's Human Resources Manager, Ms. Robyn Bouchard, before returning to work (applicant's record, page 34). Even if the Arbitrator were to accept the evidence of the applicant that numerous messages were left and were unanswered, in the circumstances and given his past history and behaviour, the Arbitrator found that it was unreasonable for the applicant not to send an email, phone another member of management or, as he did in the past, present himself at the workplace to find someone in management with whom he might talk.

[6] As a result of this decision, the Union sought a dismissal of the applicant's complaint with the Board. However, the applicant's counsel submitted that the complaint should not be dismissed given that the Union had failed to provide the applicant with fair representation during the arbitration. Among other things, the applicant argued that the Union had not seriously tried to obtain the needed objective evidence to support his testimony and, because of this, his credibility was ruined (see paragraphs 14 and 21(b) of the submissions of the applicant's counsel before the Board, dated April 12, 2012, applicant's record, pages 109-111). In this respect, he submitted that telephone records constituted critical evidence that would have been determinative of his case.

[7] On May 1, 2012, the applicant filed a reply to the submissions of the Union in which he expressly sets out his view that the Union had the NAC telephone records as well as Mr. Peter Freitas' records (Banquet Manager at the NAC, and the applicant's immediate supervisor). In his comments at paragraph 5.6, he states that:

...the fact is that NAC phone records do list time of call and not much else. But these records nevertheless corroborate the time at which I called NAC from my cell phone.

[8] The applicant also deals at length with his communications with Ms. Martel, the Health and Safety officer at the NAC, and what she says in the statement that was filed before the Arbitrator and the Board.

[9] In accordance with section 16.1 of the Code, the complaint was decided without holding an oral hearing, the Board being satisfied that there was no need for one. On May 17, 2012, the Board dismissed the applicant's complaint that his union had failed to fairly represent him in his termination grievance. Although the Board notes that the new telephone records obtained by the applicant did not constitute conclusive evidence in respect of the two issues for which they were presented (to confirm that the applicant had called Ms. Bouchard and left messages), this was not the basis on which it dismissed the complaint.

[10] The Board's primary ground for dismissing the complaint was that the Union had satisfied its duty of fair representation when it negotiated a settlement of the termination grievance according to which the applicant would be reinstated and any reference to his dismissal would be removed

from his record (applicant's record, page 42). The Board noted that by rejecting the settlement, the applicant was ultimately the author of his own misfortune. The Board went on to say that its role, in a duty of fair representation complaint, was not to undertake a microscopic examination of how a union conducts the case before an arbitrator.

[11] The Board was satisfied that the issues raised by the applicant would not likely have caused the Arbitrator to reach a different conclusion (applicant's record, page 43, last paragraph) It notes that the said Arbitrator did not accept that the applicant needed to contact Ms. Bouchard before coming in to work, and, as mentioned above, that he was not satisfied that the applicant had made enough efforts to contact management (applicant's record, page 44).

[12] The Applicant did not seek judicial review of this decision. Rather, on June 7, 2012, pursuant to section 18 of the Code, the applicant through his counsel filed what purported to be an application for reconsideration of the May 17, 2012 decision on the ground that "New facts are expected to become available, but this was not possible before the statutory deadline for filing an Application for Reconsideration. The new data will establish that the Applicant did in fact leave messages with his employer at the pertinent time and was not in a position to work without further contact with the employer" (applicant's record, page 157).

[13] On July 9, 2012, the Board advised the applicant that his application for reconsideration was incomplete. However, it granted him until September 4, 2012 to perfect it.

[14] On August 29, 2012, the applicant himself filed a request with the Board for a further extension of time to perfect his application and an order compelling the respondents to produce the following documents:

- a. The record of Mr. Peter Freitas' cell phone records during the month of June 2009.
- b. The record of incoming calls to Robyn Bouchard's extension for the months of June-July 2009.
- c. The detailed notes of the voice mail messages that the applicant left on Robyn Bouchard's answering machine that were recorded on CD.
- d. Ms. Nathalie Martel's written statement which was taken by employer Counsel Georges Rontoris on the 8th of February 2012.

[15] The applicant's request was detailed and set out a number of representations as to what efforts he and his counsel made to obtain the records from the respondents since January 2012. It included an email sent to the Union's counsel on August 20, 2012, which appears to have been the only step taken to obtain the records since March/April 2012.

[16] On August 30, counsel for the Union responded by communicating that:

- i) Mr. Freitas' cell phone records for the relevant period (June 24-July 1, 2009) had already been provided to the applicant's counsel on April 12, 2012 (a new copy was also included).
- ii) There was no statement of Ms. Martel other than the one already filed with the Board.
- iii) They have no record of the NAC's incoming calls nor does Ms. Bouchard have any notes or recording of the alleged voicemail messages for the relevant period.

[17] The applicant did not file a reply and, on September 4, the Board issued its decision on the basis of the written submissions received (per section 16.1 of the Code) denying the applicant's request as untimely. It nevertheless granted him an extra ten days to perfect his application.

[18] On September 19, having received no further communication from the applicant, the Board advised the parties that the file was closed.

Application of Judicial Review

[19] During the hearing before this Court, the applicant, acting on his own behalf, explained that his goal is to establish that he did not lie when he said that he had left several messages for Ms. Bouchard. He also wants to prove that his employer had his medical certificate as early as June 16, 2009. In his view, this would clear his name, and would have resulted in a different decision by the Arbitrator.

[20] However, these facts are not what is at issue before us. The only question before us is whether the Board failed to give the applicant an opportunity to make representations before it issued its decision on September 4, 2012. Then, if there was indeed a breach of the duty to act fairly, this Court must determine whether, as argued by the respondents, the outcome was in any event inevitable.

[21] There is no doubt that the Board was entitled to decide the August 29 request without an oral hearing (section 16.1 of the Code). Further, considering that his original complaint was decided

without an oral hearing, the applicant could not reasonably expect that one would be held to determine this interlocutory matter.

[22] Pursuant to subsection 16(f.1) of the Code, the Board cannot issue an order compelling the production of documents or information without giving an opportunity to the parties to make submissions in that respect. Since no production order was made, subsection 16(f.1) was not engaged. Had it been so, this section would still not require an oral hearing. In any case, Mr. Ilaslan, as the party affected, did have the opportunity to make written representations. That is all that was required.

[23] As mentioned earlier, the applicant made detailed submissions on his request. The fact that he knew of the existence of all the documentation requested in August 2012, well before the proceeding leading to the May 17, 2012 decision, made the timeliness of his request an issue.

[24] At the hearing, the applicant confirmed that he had nothing else to add in respect of efforts made to obtain this documentation after the filing of his incomplete application for reconsideration. He could not explain what else he could have added in respect of the timeliness of his request. In fact, apart from raising this breach of procedural fairness, the applicant does not contest the reasonableness of the Board's decision that his request was untimely.

[25] In such circumstances, I simply cannot conclude that the Board acted unfairly before issuing its September 4, 2012 decision.

[26] That said and in any event, it is clear in my view that the applicant's request for production was bound to fail. As mentioned, the applicant already had Ms. Freitas' records for the period of June 24, 2009-July 1, 2009 in his possession. He stated that the record of the NAC did not contain anything more than the time of the phone call. He also accepted that there was no evidence whatsoever that Ms. Bouchard or the respondents had any notes or recording of any messages he allegedly left on her voicemail prior to the date of his termination. Finally, he acknowledged that the Board already had before it the only statement made by Ms. Martel.

[27] Given the basis of the Board's decision on May 17, 2013, what occurred on June 16, 2009 with respect to the medical certificate or after his termination is irrelevant.

[28] In the circumstances, even assuming that there was a technical breach of procedural fairness, this is a case where the result was inevitable and this Court should dismiss the application (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at paragraph 51). I thus propose to dismiss the application with costs.

"Johanne Gauthier"

J.A.

"I agree.
Marc Noël J.A."

"I agree.
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-421-12

STYLE OF CAUSE: Ozcan Ilaslan v. Hospitality & Service Trades Union, Local 261 and the National Arts Centre Corporation

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: June 4, 2013

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NOËL J.A. & PELLETIER J.A.

DATED: June 6, 2013

APPEARANCES:

Mr. Ozcan Ilaslan	APPEARING ON HIS OWN BEHALF
Ms. Danielle Leon Foun Lin	FOR THE RESPONDENT HOSPITALITY & SERVICE TRADES UNION
Mr. George Rontiris	FOR THE RESPONDENT NATIONAL ARTS CENTRE CORPORATION

SOLICITORS OF RECORD:

Mr. Ozcan Ilaslan	APPEARING ON HIS OWN BEHALF
Nelligan O'Brien Payne LLP	FOR THE RESPONDENT HOSPITALITY & SERVICE TRADES UNION
Emond Harnden LLP	FOR THE RESPONDENT NATIONAL ARTS CENTRE CORPORATION