Federal Court of Appeal | Cour d'appel fédérale

Date: 20210422

Docket: A-144-20

Citation: 2021 FCA 79

[ENGLISH TRANSLATION]

CORAM: **PELLETIER J.A.**
GLEASON J.A.
LOCKE J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DANY DUVAL

Respondent

Heard by online videoconference organized by the registry on April 14, 2021.

Judgment delivered at Ottawa, Ontario, on April 22, 2021.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: PELLETIER J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The applicant seeks to set aside the May 15, 2020 decision of an adjudicator of the Federal Public Sector Labour Relations and Employment Board in *Duval v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 53, 2020 CarswellNat 2249 [*Duval FPSLREB 2020*]. In that decision, the adjudicator determined that the grievor had been the victim of discrimination on the basis of his disability as the employer had failed to discharge its duty to reasonably accommodate the grievor when the latter attempted to return to work

following an absence due to his disability. The adjudicator awarded the grievor compensation in the amount of $5,000 for pain and suffering under paragraph 53(2)(*e*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[2] The adjudicator rendered the decision at issue after this Court, in *Canada (Attorney General) v. Duval*, 2019 FCA 290, 2019 CarswellNat 6805 [*Duval FCA 2019*], set aside the adjudicator's previous decision in *Duval v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 52, 2018 CarswellNat 4040. In setting aside the original decision, this Court remitted the grievance to the Board for redetermination in accordance with the Court's reasons. In our reasons, this Court indicated that it was not open to the Board, in conducting the redetermination, to reconsider the findings made in its initial decision as to the reasonableness of certain aspects of the job search undertaken by the employer. This Court stated the following:

> [38] The applicant requests that, in lieu of remitting the grievance to the FPSLREB for redetermination, this Court should instead take the rather unusual step of deciding the grievance and should dismiss it. While there may well be cases where it is appropriate for a reviewing Court to so decide (see, for example, *Canada (Citizenship and Immigration) v. Tennant*, 2019 FCA 206, 436 D.L.R. (4th) 155 (F.C.A.)), this is not one of them as it is not a foregone conclusion that the grievance must be dismissed.
>
> [39] The FPSLREB heard several days of testimony in this case and, as is the usual course in labour cases, there is no transcript of the evidence. The decision is also quite brief in its comment on the evidence. Given the importance of factual determinations in accommodation cases, this Court is ill-equipped to step into the shoes of the Board and render a decision on the grievance. The better course is to remit the grievance to the FPSLREB for redetermination, preferably by the same adjudicator if she is able to hear the case.
>
> [40] In conducting the redetermination, it is not open to the Board to reconsider the findings made in the initial decision as to the reasonableness of CSC's decision to focus its job search only on permanent assignments or as to the reasonableness of CSC's concerns regarding bilingualism, the presence of the respondent's ex-spouse at Cowansville and the presence of the inmate who had assaulted the respondent at Donnacona. These matters are finally settled and there

> is no basis for finding any of these determinations to be unreasonable. The doctrine of issue estoppel would therefore prevent their re-litigation.
>
> [41] In conducting its redetermination, the FPSLREB should be mindful that the case law recognizes that workplace accommodation requires the cooperation of all the workplace parties – employer, employee and, where there is one, the bargaining agent – who are required to reasonably dialogue with one another with a view to finding work a disabled employee is able to do: *Renaud v. Central Okanagan School District No. 23*, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970 at pp. 989-991, 141 N.R. 185 (S.C.C.) [*Renaud*]. Thus, as the respondent conceded before us, it was perfectly appropriate for CSC to have solicited the respondent's preferences regarding where he wished to work and to have tried to find the respondent a position at one of the institutions he named.
>
> [42] The FPSLREB should also be mindful that what is required is reasonable but not perfect accommodation as the Supreme Court of Canada has underscored both in *Renaud* at pp. 994-995 and in *Elk Valley Coal* at para. 56.

[3] In this application for judicial review, the applicant argues that the adjudicator failed to follow these instructions and that, in light of these instructions, the adjudicator's finding that the employer breached its duty to accommodate is unreasonable.

[4] With all due respect, I disagree. As this Court noted in paragraph 38 of its reasons in *Duval FCA 2019*, it was not a foregone conclusion that the grievance must be dismissed; in other words, it was open to the adjudicator to allow the grievance.

[5] Additionally, in the decision that is the subject of this judicial review application, the adjudicator made no attempt to revisit her prior findings, which, in accordance with this Court's instructions, she could not reconsider. Instead, the adjudicator based her second decision on the following: (1) the fact that, for three months, the employer had limited its job search to only the three institutions that the grievor had identified in his transfer request (at paragraphs 39 and 44), and (2) the fact that the employer was more concerned with organizational considerations than its

duty to respect the grievor's limitations and facilitate his reinstatement (at paragraphs 42 and 46). Moreover, she noted that the grievor needed to inquire many times about the employer's progress in the job search (paragraph 45).

[6] On the basis of these findings of fact, the adjudicator drew the following conclusions at paragraphs 45 to 47:

> […] I did not receive any evidence that the grievor's situation had to be considered as a search for an accommodation measure, with the urgency that implies. The transfer was an acceptable procedure in itself, but it should have been acknowledged that it did not originate from a simple desire of the grievor as being from someone who wished to move but rather from a workplace injury.
>
> I am convinced that had the search for a position been viewed through the lens of a medical accommodation, the grievor would have been treated differently. Therefore, my view remains that the accommodation was deficient in the treatment imposed on him during that period. As a result, he was a victim of discrimination. It is not that a transfer was not a reasonable solution but rather that at no time was he reassured that a reasonable accommodation was being sought, given his medical situation. On the contrary, not only did barriers of a personal nature appear to his information requests (bilingualism and the presence of the former partner and the inmate) but also systemic barriers appeared (for example, the budget and the number of positions in the region).
>
> The Court asked me to take account of the principles in *Renaud.* It seems to me that according to that decision, everyone's cooperation is vital, which would have occurred had the employer met with the grievor and the bargaining agent on March 13, 2012, to report on the situation and talk about solutions for reassigning the grievor. It did not. Under the circumstances, the employer's limited cooperation is problematic.

[7] In my view, it was open to the adjudicator to make these findings in light of the material facts, and these findings do not contradict the instructions given by this Court in remitting the grievance to the Board for redetermination. Ultimately, the adjudicator's findings are highly

factual in nature. When conducting a judicial review, it is not for the Court to reassess the facts and substitute its opinion for that of the adjudicator.

[8] I agree with the applicant that the adjudicator appears to have erred in indicating that it was possible to list only three institutions on the employer's transfer form; however, this does not matter as this error was not relevant to the adjudicator's reasoning. The adjudicator did not find that the accommodation was insufficient because the grievor had been limited to selecting a set number of potential institutions, but rather found that the employer had breached its duty of reasonable accommodation in part because, for three months, it had limited its job search to only the positions proposed by the grievor without considering other options. It is not for this Court, but for the adjudicator, having had the benefit of hearing the evidence and observing the witnesses, to determine whether limiting the job search in this manner contributed to a breach of the duty to accommodate the grievor.

[9] Accordingly, I am of the opinion that this application for judicial review should be dismissed with costs.

"Mary J.L. Gleason"
J.A.

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

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-144-20
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. DANY DUVAL
PLACE OF HEARING:	BY ONLINE VIDEOCONFERENCE
DATE OF HEARING:	APRIL 14, 2021
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	PELLETIER J.A. LOCKE J.A.
DATED:	APRIL 22, 2021

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