Federal Court of Appeal | Cour d'appel fédérale

Date: 20211112

Docket: A-14-21

Citation: 2021 FCA 219

CORAM: **STRATAS J.A.**
DE MONTIGNY J.A.
MONAGHAN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MICHELINE HANNA

Respondent

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on November 12, 2021.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

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

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The applicant, the Attorney General of Canada, brings a motion to the Court in writing under Rule 369 of the *Federal Courts Rules*, S.O.R./98-106, with the consent of the respondent, for an order granting the application for judicial review and setting aside the adjudicator's remedial award pertaining to the reimbursement of salary and interest relating thereto for the

period beginning February 10, 2017, forward, as found in *Hanna v. Treasury Board (Department of the Environment)*, 2020 FPSLREB 116, dated December 17, 2020. The parties further seek from this Court an order remitting the matter for reconsideration of the sum of back pay owed for the above-mentioned period, after providing both parties an opportunity to present evidence and make submissions on this issue.

[2] The respondent was an evaluation manager at the EC-06 group and level with the Audit and Evaluation Division of Environment and Climate Change Canada (the Employer). She filed two grievances against her employer. In the first grievance filed on April 14, 2014, she alleged the Employer failed to address her treating physician's recommendations with respect to her return to work, thus violating its duty to accommodate, the collective agreement and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*). In the second grievance filed on July 6, 2015, she grieved the termination of her employment for unsatisfactory performance, which she alleged was also a violation of the Employer's duty to accommodate, the collective agreement and the *CHRA*.

[3] These two grievances were consolidated and referred to the Federal Public Sector Labour Relations and Employment Board (the Board), and a hearing was held from August 15 to 19, 2016, January 23 to 27, 2017 and February 9, 2017. Without any further communications to the parties, the Board rendered its decision allowing both grievances on December 17, 2020. As a remedy, the Board awarded damages pursuant to the *CHRA* as well as miscellaneous expenses and fees. The Board also ordered the Employer to reinstate the respondent as of June 12, 2015, and to reimburse her for all lost income, benefits, and credits as of that date less customary

deductions. In its decision, the Board referenced the respondent's evidence during the hearing that she had made efforts to find another job following the termination of her employment but that she was still unemployed as of the date of the hearing. The Board also remained seized, for 120 days, with respect to "the calculation of any amounts owed" pursuant to its order.

[4] Following the Board's decision, the applicant requested the opportunity to make further submissions to the Board on how the principles of mitigation may affect the amount owed for the post-hearing period. The respondent, on the other hand, submitted that "the calculation of any amounts owed" did not give the Board the power to change its decision about what back pay is owed based on mitigation, and was fully aware of the mitigation evidence at the hearing. The Board declined the applicant's request, finding that its remedial jurisdiction was not broad enough to address mitigation issues and that the appropriate avenue was judicial review: *Hanna v. Treasury Board (Department of the Environment)*, 2021 FPSLREB 44.

[5] I agree with the parties that the applicable standard of review is reasonableness. It is well settled that this standard applies to review of the Board's decision generally, and in particular to its remedial orders: *Canada (Attorney General) v. Gatien*, 2016 FCA 3, 479 N.R. 382 at para. 31; *Bahniuk v Canada (Attorney General)*, 2016 FCA 127, 484 N.R. 10 at para. 14 [*Bahniuk*].

[6] There is a large arbitral consensus that income otherwise earned from alternate employment from the date of dismissal to the date of reinstatement is to be deducted from any back pay amount for which the employer is liable. The rationale behind this consensus is that back pay awards, like any other special damages, are meant to place the employee back into the

financial position they would have been but for the employer's conduct: *Bahniuk* at para. 22; Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, 4th ed. (Toronto: Thomson Reuters, 2016) (loose-leaf), at 2:1512.

[7] Despite this broad consensus, and without any explanation, the Board ordered back pay from the time of termination to the time of reinstatement without deducting or otherwise accounting for any income earned from comparable sources from February 10, 2017, onward. The parties agree that such a decision is unreasonable. As the Supreme Court explained in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 131 [*Vavilov*], consistency with an administrative body's past decisions is a constraint that a reviewing court should consider when determining whether an administrative decision is reasonable. That is not to say that administrative decision makers are bound by institutional precedent; however, if they choose to depart from a long-established line of cases, they must justify that departure.

[8] In the case at bar, the parties agree that there was no evidentiary basis that would allow the Board to conclude that the respondent was without income from comparable sources between February 10, 2017 (the date following closing submissions) and December 17, 2020 (the date of the decision), or that she took reasonable steps to avoid the loss for which the award of damages is made. As a result, the remedial decision for this period cannot be considered reasonable under *Vavilov*.

[9] In those circumstances, I agree with the parties that the most appropriate course of action is to set aside the remedial award for back pay for the period of February 10, 2017 to the date of the respondent's reinstatement, and to remit back to the adjudicator for reconsideration the sum of back pay owed for that period. A new hearing should be held, at which the parties can fill the evidentiary gap and make updated submissions on the impact of this evidence *vis-à-vis* the back pay owed. Such a hearing would also provide both parties with an opportunity to speak to the respondent's entitlement to the sums claimed for this period, bearing in mind the requirement of a sufficient nexus between the loss and the dismissal as well as the duty to mitigate.

[10] Therefore, the application for judicial review should be granted, without costs.

"Yves de Montigny"
J.A.

"I agree
David Stratas J.A."

"I agree
K. A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-14-21
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. MICHELINE HANNA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	STRATAS J.A. MONAGHAN J.A.
DATED:	NOVEMBER 12, 2021

WRITTEN REPRESENTATIONS BY:

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