Federal Court of Appeal | Cour d'appel fédérale

Date: 20240321

Docket: A-204-21

Citation: 2024 FCA 55

CORAM: **GLEASON J.A.**
BIRINGER J.A.
WALKER J.A.

BETWEEN:

SHELLEY WEPRUK

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on March 12, 2024.

Judgment delivered at Ottawa, Ontario, on March 21, 2024.

REASONS FOR JUDGMENT BY: BIRINGER J.A.

CONCURRED IN BY: GLEASON J.A.
WALKER J.A.

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REASONS FOR JUDGMENT

BIRINGER J.A.

[1] The applicant seeks judicial review of a decision of the Federal Public Sector Labour Relations and Employment Board, 2021 FPSLREB 75 (Board Reasons). The Board dismissed the applicant's grievance, upholding the employer's termination decision.

[2] At the hearing in this Court, the applicant moved to exclude an affidavit filed by the respondent, on the basis that it was fresh evidence. The brief affidavit contains exhibits including the decision under review, interim decisions by the Board, the Board's decision relating to a separate staffing grievance, the employer's speaking points for the Board hearing, and exhibits presented to the Board, not all of which were included in the applicant's record. The applicant's concern that this is fresh evidence is without merit, as the material is not new. I would dismiss the motion.

[3] The applicant worked at Health Canada from 2002 to 2014. In July 2014, following her manager's refusal of a leave request, the applicant wrote an email to her bargaining agent representative indicating that one day soon she would "snap" and commit violence towards her manager.

[4] Following an administrative investigation and a disciplinary hearing, the applicant's employment was terminated for cause. The Board considered the applicant's termination grievance afresh, including oral and documentary evidence offered by the applicant and the employer, and declined to overturn the employer's decision.

[5] The standard of review for the Board's decision is reasonableness: *Walker v. Canada (Attorney General)*, 2020 FCA 44 at para. 2 [*Walker*]; *Samson v. Canada (Attorney General)*, 2021 FCA 212 at para. 2.

[6] As the Supreme Court held in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": para. 85. A reasonableness review is not a treasure hunt for error; any shortcomings in the decision must be sufficiently central or significant to warrant intervention: *Vavilov* at paras. 100 and 102.

[7] The focus of a reasonableness review is on the decision actually made and whether it is unreasonable. The reviewing court does not "redo" the analysis that the decision maker did to determine what the court might have decided in the circumstances: *Vavilov* at para. 83.

[8] The applicant also raises procedural fairness arguments. The standard of review for procedural fairness is best described as correctness, and the ultimate question is whether the applicant knew the case to meet and had a full and fair chance to respond: *Watson v. Canadian Union of Public Employees*, 2023 FCA 48 at para. 17; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras. 54 and 56.

[9] In my view, the Board's decision was reasonable, and its process was fair.

[10] In determining whether the applicant's termination was justified, the Board applied the well-established framework from *William Scott & Co. v. C.F.A.W., Local P-162*, 1976 CarswellBC 518, [1977] 1 Can. L.R.B.R. 1 [*William Scott*], asking whether there were grounds for discipline and, if so, whether the penalty imposed was appropriate: *Walker* at para. 4; *Basra*

v. Canada (Attorney General), 2010 FCA 24 at para. 24; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CanLII 378 (SCC), [1997] 1 S.C.R. 487 at para. 49.

[11] As the applicant conceded that her misconduct warranted discipline, the Board's analysis focused on the appropriateness of termination as a consequence. The Board properly recognized that threats of violence do not automatically justify termination, and that it had to consider both aggravating and mitigating factors, as it did: Board Reasons at paras. 263 and 265.

[12] The applicant argues that the Board failed to properly take into account her evidence of workplace bullying and harassment and the significant impact that it had on her state of mind. I disagree.

[13] A harassment grievance and other grievances filed by the applicant had been dismissed or settled and withdrawn prior to the Board hearing. Accordingly, the Board was not charged with determining whether there had been harassment as defined by the employer's policy or the law. The Board did, however, consider whether the applicant's perception of harassment and a toxic work environment were mitigating factors in its *William Scott* analysis: Board Reasons at para. 128.

[14] The Board carefully considered the evidence, finding that the applicant's belief that she was harassed was credible and reasonable, as was the evidence of a toxic work environment. However, the Board could "only go so far" in assigning weight to these as mitigating factors without medical evidence of a diminished mental state: Board Reasons at paras. 299 and 301.

The Board determined that there had been no immediate provocation and that the applicant's state of mind did not justify a threat of violence or mitigate the seriousness of the misconduct, such that it could set aside the employer's termination decision: Board Reasons at para. 303.

[15] The Board's conclusion was based on its factual findings and a weighing of the aggravating and mitigating factors. Absent exceptional circumstances, this Court must refrain from reweighing and reassessing the evidence before the Board: *Vavilov* at para. 125. The applicant has not shown that the Board fundamentally misapprehended, or failed to account for, the facts. Rather, the Board's reasons show that it meaningfully grappled with the evidence of harassment and the applicant's state of mind, which was and remains the cornerstone of the applicant's case.

[16] The Board's decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and is justified in relation to the relevant factual and legal constraints. There is no basis for this Court to intervene.

[17] Turning to the applicant's procedural fairness arguments, the applicant submits that she was denied discovery in the Board proceedings and not provided with a transcript of the proceedings. The applicant also takes issue with the order of the proceedings and being subject to the burden of proof in establishing mitigating factors in the *William Scott* analysis. The latter is well-established in the case law: *Wilson v. Treasury Board (Solicitor General Canada – Correctional Service),* [1995] C.P.S.S.R.B. No. 23 at para. 18; *King v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 31 at para. 186, aff'd 2012 FC 488, aff'd 2013 FCA 131.

[18] Concerning the applicant's other procedural fairness arguments, I note that the applicant was represented by counsel before the Board. No request for discovery was made, and the parties agreed with the order of proceedings. There is no requirement for a transcript of the Board's proceedings. Importantly, the Board's reasons show that the applicant fully understood the case that she had to meet and had a full and fair opportunity to respond. There are no procedural unfairness concerns warranting this Court's intervention.

[19] At the Board hearing, the applicant requested anonymization of the decision, which the Board refused. I see no reviewable error in the Board's decision on this issue, for which it gave detailed reasons: Board Reasons at paras. 13-25. It was open to the Board to reach its conclusion based on the circumstances of the proceeding before it and the open court principle. The Board's decision also accords with the Board's Policy on Openness and Privacy: Board Reasons at para. 19.

[20] For the foregoing reasons, I would dismiss the application for judicial review. As the respondent has withdrawn its request for costs, none shall be awarded.

"Monica Biringer"
J.A.

"I agree.
Mary J.L. Gleason J.A."

"I agree.
Elizabeth Walker J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-204-21
STYLE OF CAUSE:	SHELLEY WEPRUK v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 12, 2024
REASONS FOR JUDGMENT BY:	BIRINGER J.A.
CONCURRED IN BY:	GLEASON J.A. WALKER J.A.
DATED:	MARCH 21, 2024

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