Federal Court of Appeal

Cour d'appel fédérale

Date: 20140602

Docket: A-268-13

Citation: 2014 FCA 144

CORAM: STRATAS J.A.
WEBB J.A.
NEAR J.A.

BETWEEN:

BOB RAFIZADEH

Appellant

and

TORONTO DOMINION BANK

Respondent

Heard at Toronto, Ontario, on May 13, 2014.

Judgment delivered at Ottawa, Ontario, on June 2, 2014.

REASONS FOR JUDGMENT BY: WEBB J.A.

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

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the decision of Hughes, J. (2013 FC 781) who dismissed Mr. Rafizadeh's application for judicial review of the decision of the adjudicator dated February 20, 2013.

[2] Mr. Rafizadeh was employed by the Toronto Dominion Bank (TD) as a Mobile Mortgage Specialist. In December 2010, Mr. Rafizadeh was dismissed from his employment with TD. It is the position of TD that Mr. Rafizadeh was dismissed for cause. Mr. Rafizadeh, however, disputes this and he filed a complaint under the *Canada Labour Code*, RSC 1985, c. L-2 (CLC) alleging that he was unjustly dismissed. Stephen Raymond was appointed as the adjudicator to hear the complaint.

[3] During the adjudication process, the adjudicator issued an order in June 2012 requiring TD to produce certain documents and ordering Mr. Rafizadeh to produce any documents that he intended to rely upon at the hearing. As part of this disclosure of documents, Mr. Rafizadeh produced printouts of an exchange of e-mails on August 9, 2010 between Mr. Rafizadeh and his manager/supervisor, Craig Morrison, and an exchange of e-mails on July 15, 2009 between Mr. Rafizadeh and Jay Nicholson, Associate Vice President and District Manager at TD (and who was Craig Morrison's manager/supervisor). Mr. Rafizadeh's position is that these e-mails supported his argument that TD did not have cause to dismiss him. TD disputed the validity of these e-mails and a hearing to determine whether TD could establish that these e-mails were not valid was held on October 15 and 17, 2012 and on January 14, 2013.

[4] The adjudicator determined that Mr. Rafizadeh had fabricated these e-mails and as a result his complaint was dismissed without being heard on its merits. Mr. Rafizadeh applied for judicial review of this decision and as noted above, his application was dismissed.

[5] Based on Mr. Rafizadeh's Memorandum of Fact and Law and his oral arguments during the hearing of his appeal, the issues raised by Mr. Rafizadeh can be summarized as the reasonableness of the decision and whether there was a reasonable apprehension of bias.

I. *Reasonableness of the Decision*

[6] Mr. Rafizadeh expressed significant frustration with the result of the decision of the adjudicator. In particular he is frustrated that his case was not dealt with on its merits but rather his complaint was dismissed as a result of the finding by the adjudicator that he had fabricated the e-mails in question. In this appeal, the role of this Court is to determine whether the Federal Court Judge correctly identified and applied the appropriate standard of review in reviewing this decision of the adjudicator. There is no dispute that the standard of review applicable to the decision of the adjudicator is reasonableness and that this is the standard that the Federal Court Judge applied.

[7] The adjudicator reviewed the evidence that was presented to him in relation to the issue of whether the e-mails had been fabricated and found, on a balance of probabilities, that the e-mails had been fabricated. The adjudicator noted in his decision that:

> Having weighed all of the evidence, I am unable to come to any other conclusion on the balance of probabilities other than that the emails were fabricated. On the one hand, I had the testimony of the complainant that he had not fabricated the emails. He stated clearly that he would not have known how to do so. He firmly defended his reputation and character as a highly principled and professional person. On the other hand, I had (1) the testimony of the internal auditor who said they did not exist in the journalled entries, (2) the testimony of Nicholson that he had not sent nor received those emails, and (3) the testimony of Morrison that he had not sent nor received those emails. Although all three were cross-examined by the complainant, their positions were not shaken on the key evidentiary issue. The emails should have been in the journalled entries which are kept forever.

They were not. Accordingly, they had not been sent by Nicholson nor received by him.

> On the preponderance of the evidence, I am left with no other choice but to decide that the emails had been fabricated. It is possible had the complaint [sic] been represented by able and trained legal counsel (as he would have been had he chosen to have either Mr. Heeney or Mr. Fox represent him), he might have been able to deduce evidence to convince me otherwise. I was left with an unrepresented complainant who despite my attempts to fairly inform him of the procedure was not able to marshall his case in any compelling way. On the other hand, counsel for the bank presented the evidence necessary to convince me that there was no conclusion open to me other than that the emails had been fabricated. The facts set out in the notice of motion were proven through the testimony of the three witnesses called. I am satisfied that the emails were fabricated.

[8] The Federal Court Judge found that this was a reasonable decision and I would agree with this finding. This was simply a factual finding made by a trier of fact supported by the evidence available to him. As part of the evaluation of the evidence the adjudicator assessed the credibility of the witnesses who testified. Mr. Rafizadeh indicated that there were some inconsistencies in the testimony of the witnesses for TD and argued that the witnesses had committed perjury. Perjury is a serious allegation and must be supported by more than a mere assertion that a witness could not possibly remember whether a particular e-mail was received or sent two or three years ago when that witness receives and sends several e-mails each day. This assertion is but one factor that the trier of fact must weigh in deciding credibility. In this case the adjudicator accepted the testimony of the witnesses for TD on the key points and deference should be shown to the trier of fact on findings of credibility (*Canada (Attorney General) v Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203 at paragraph 62).

[9] TD was only required to establish on a balance of probabilities, (*i.e.*, that it was more likely than not), that the e-mails were fabricated. They were not required to establish this beyond a reasonable doubt. Since this was an application for judicial review of the decision of the adjudicator, the question is whether the decision of the adjudicator was reasonable. As noted by the Supreme Court of Canada in *Dunsmuir v. Her Majesty the Queen in Right of the Province of New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[10] The finding that the e-mails were fabricated was reasonable. Having made this finding, the decision to dismiss Mr. Rafizadeh's complaint was also reasonable. Both of these decisions fall within a range of possible acceptable outcomes which are defensible in respect of the facts and the law.

II. *Reasonable Apprehension of Bias*

[11] Mr. Rafizadeh argued that the adjudicator was biased. In *R. v. R.D.S.*, [1997] 3 S.C.R. 484, Cory, J. stated that:

> 111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

> [T]he 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. . . . [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through – conclude. . . ."

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram, supra*, at pp. 54-55; *Gushman, supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick,* [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark, supra,* at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

112 The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice and Liberty, supra*, at pp. 394-95:

> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. See *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850 (Q.B.D.); *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.); *R. v. Gough*, [1993] 2 W.L.R. 883 (H.L.); *Bertram, supra*, at p. 53; *Stark, supra*, at para. 74; *Gushman, supra*, at para. 30.

[12] At the hearing of his judicial review application Mr. Rafizadeh argued that the adjudicator's prior association with the law firm that was representing TD, Hicks Morley, demonstrated a real likelihood or probability of bias. While the adjudicator had been a partner in that firm, he ceased to be a partner in 2000 when he joined the Ontario Labour Relations Board. During the hearing of this appeal Mr. Rafizadeh stated that he was no longer alleging that the adjudicator was biased as a result of his prior affiliation with Hicks Morley but rather his conduct demonstrated a real likelihood of bias.

[13] The particular conduct of the adjudicator that Mr. Rafizadeh focused on was the conduct of the adjudicator in January 2012 in relation to the disclosure of e-mails. In January 2012, during a meeting with the adjudicator and representatives from TD, Mr. Rafizadeh indicated that he had a printout of certain important e-mails between himself and his manager. Although he was reluctant to disclose this printout, he did so because the adjudicator insisted that he disclose the e-mails. The printout of the e-mails that was disclosed at that time indicated a string of e-mail messages between Mr. Rafizadeh and Craig Morrison on July 17, 2009 and July 20, 2009. These were not the e-mails that were found to have been fabricated by the adjudicator. The printout of those e-mails was disclosed following the order of the adjudicator issued in June 2012. Mr. Rafizadeh's theory of the case is that after receiving the printout of the e-mails in January 2012 TD deleted the other e-mails that were found to have been fabricated. Mr. Rafizadeh does not have any proof that this occurred, only his suspicions.

[14] Insisting that a party who has a relevant document must disclose that document to the other side prior to a hearing under the CLC cannot give rise to a reasonable apprehension of bias. This is simply part of the disclosure process that must precede any such hearing.

[15] There is nothing more than mere suspicion on the part of Mr. Rafizadeh that the adjudicator was biased. Mere suspicion is not enough. Therefore, I would dismiss the appeal in relation to whether there was a reasonable apprehension of bias.

III. *Costs*

[16] The Federal Court Judge awarded costs in the amount of $10,000 because Mr. Rafizadeh made unfounded allegations of fraud and perjury. In this appeal Mr. Rafizadeh also made allegations of collusion (without any evidence of such) and perjury. These are serious allegations and the person making such allegations must be prepared to prove such allegations. Mere suspicions of alleged collusion or perjury are not enough. Also mere assertions that contradictory statements were provided or questions related to the recollections of witnesses who stated that they did not send certain e-mails two or three years earlier are not proof that such witnesses committed perjury. Since Mr. Rafizadeh was making these allegations, the onus was on him to prove them. It is simply not enough to make the allegation.

[17] I would award costs in the amount of $ 2,500.

IV. *Proposed disposition*

[18] As a result I would dismiss the appeal with costs fixed in the amount of $2,500.

"Wyman W. Webb"

J.A.

“I agree,

David Stratas J.A.”

“I agree,

D.G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-268-13
STYLE OF CAUSE:	BOB RAFIZADEH v. TORONTO DOMINION BANK
PLACE OF HEARING:	TORONTO, ONTARIO
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DATED:	JUNE 2, 2014

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