Federal Court of Appeal | Cour d'appel fédérale

Date: 20141103

Docket: A-301-12

Citation: 2014 FCA 251

CORAM: **NOËL C.J.**
GAUTHIER J.A.
NEAR J.A.

BETWEEN:

RACHEL EXETER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 10, 2014.

Judgment delivered at Ottawa, Ontario, on November 3, 2014.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NOËL C.J.
NEAR J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

I. Introduction

[1] Rachel Exeter (the applicant) seeks judicial review of the decision of the Chairperson of the Public Service Labour Relations Board (the Board) refusing to appoint an adjudicator other than the adjudicator already seized with the applicant's nine grievances to deal with the

applicant's allegations that the memorandum of agreement (MOA) meant to settle those grievances should be declared null and void.

[2] The applicant and her former employer, Statistics Canada (the employer) settled the applicant's nine grievances with the assistance of adjudicator Pineau (the Adjudicator) without prejudice to her power to continue the adjudication with respect to unresolved issues (see subsection 226(2) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22., s. 2 (the Act)). Both parties were represented by counsel during the lengthy mediation session which ended with the signature of a MOA setting out the terms of their settlement. Thus, the hearing of the grievances scheduled to resume the next day was cancelled.

[3] In her motion dated August 17, 2011 brought before the Board, the applicant sought an order:

> (i) Preventing the Adjudicator from scheduling, hearing, and making any order as they relate to the MOA, and
>
> (ii) Appointing an independent adjudicator to look into the validity of the MOA.

[4] In support of her motion, the applicant essentially argued that the Adjudicator could not retain jurisdiction over the matter because she was biased and had a conflict of interest within the meaning of subsection 224(2) of the Act. This conflict arose from her direct involvement in the process that led to the MOA, which was allegedly signed by the applicant under duress and only after pressure had been exerted by the Adjudicator, who had also dismissed the applicant's request(s) for an adjournment. In her view, the Board had the power to intervene pursuant to

section 36 of the Act and should do so to prevent a violation of her constitutional right to a fair process.

[5] On February 24, 2012, in its decision reported as 2012 PSLRB 24, the Board dismissed the applicant's motion on two bases. First, it held that it had no power under the Act to remove an adjudicator already seized with a grievance. Among other things, the Board noted that in its view, its interference in matters otherwise properly before an adjudicator would run contrary to the objective of fair, credible and efficient adjudication proceedings (paragraphs 12 and 13 of the decision).

[6] Second, the Board found that even if it had jurisdiction under section 36 of the Act to remove the Adjudicator, as argued by the applicant, "it would be inappropriate for the Board to exercise that power" as "it is more appropriate to let the [A]djudicator seized with Ms. Exeter's grievances decide the request for recusal" (paragraph 15 of the decision). In that respect, it noted that there was no doubt that an adjudicator has jurisdiction to decide a request for his or her recusal, and that any adjudicator seized with a grievance is bound by the rules of natural justice and procedural fairness. Also, the Board specified that any failure in that respect would be subject to judicial review by the Federal Court (paragraphs 12 and 14 of the decision).

[7] For the reasons that follow, in my opinion, the Board's conclusion that it was more appropriate to let the Adjudicator decide whether or not she should recuse herself is reasonable. I also conclude that there was no breach of procedural fairness by the Board in the process leading to this decision. I thus propose that the application be dismissed.

II. Background

[8] Although not strictly necessary to determine the issues before us, it is nevertheless useful to briefly describe the sequence of events leading to the present application in order to provide context for the issues raised by the applicant. In assembling these facts, I relied primarily on the material in the applicant's record, which included, *inter alia*, the Adjudicator's decision.

[9] First, the applicant states that she was unprepared for the long mediation session that started in the afternoon of February 11, 2009 and lasted almost twelve hours. Despite the presence of her counsel, she says that she did not really have the benefit of advice.

[10] According to her, she developed migraines, was sick, tired and hungry. She felt compelled to sign the MOA because of pressure exerted on her by the Adjudicator who, among other things, was insisting that the hearing of the grievances would resume the next day, unless the matter settled.

[11] She also alleges that she contacted her counsel around 8:15 a.m. on February 12, 2009 to discuss "negating" the MOA, but that the said counsel was unhelpful, stating that nothing could be done and the matter was out of her hands.

[12] Still, the parties did take steps to give effect to the MOA. For example, the employer remitted a settlement cheque in the agreed amount to the applicant who cashed it shortly

thereafter. But, according to the applicant, the employer was not complying with other provisions of the MOA as she understood them.

[13] On May 28, 2009, the applicant informed the Board that she would no longer be represented by counsel and that, as explained in an earlier letter dated April 30, 2009, the "Adjudicator Ms. Pineau who is seized with this matter" should intervene, as the employer was unwilling to properly comply with the MOA. On June 19, 2009, the employer replied that it was in fact the applicant who was not complying with the MOA. On July 17, 2009, the employer asked that the Adjudicator remain seized with the matter.

[14] By a letter dated February 2, 2010, the Adjudicator informed the applicant that her grievances would be held in abeyance pending the outcome of a separate application then before the Federal Court of Appeal, in which the Court considered whether an adjudicator appointed to hear grievances under the Act maintains jurisdiction over disputes relating to a settlement agreement entered into by the parties in respect of those grievances. As in the present application, in that case, Mr. Amos's grievance had been settled through mediation with the assistance of the adjudicator seized with his grievance and a MOA was signed. Like the applicant, Mr. Amos had not withdrawn his grievance when the dispute relating to the MOA arose.

[15] For reasons not explained in her letter, the applicant wrote to the Board on March 26, 2010 to withdraw her request that the Adjudicator intervene further in her matter. However, the employer did not withdraw its request for such intervention.

[16] The applicant was advised on May 6, 2010, that "your grievance matters will continue to be held in abeyance pending the outcome of Amos matter [sic]. Once, and only after, the Federal Court of Appeal has made its decision, Adjudicator Pineau will provide directions on how we are to proceed with your files…".

[17] On February 3, 2011, the Federal Court of Appeal issued its decision in *Andrew Donnie Amos v. The Attorney General of Canada*, 2011 FCA 38, [2012] 4 F.C.R. 67 [*Amos*]. This decision confirmed the adjudicator's determination that he had jurisdiction to consider an allegation that a party is in non-compliance with a final and binding settlement, where the dispute underlying the settlement agreement is linked to the original grievance and where the grievor has not withdrawn his grievance.

[18] On May 18, 2011, a pre-hearing teleconference was scheduled to discuss all outstanding issues in the applicant's grievance files.

[19] On May 24 and May 26, 2011, the applicant wrote to the Chairperson of the Board requesting that "prior to determining whether there has been compliance with the MOA", the Board should void the MOA, "as it was signed under intimidation, duress, undue influence, medical and physical incapacities, coercion and it is unconscionable". She also asked the Board for "an investigation into the Adjudicator's conduct on the account of procedural fairness".

[20] The applicant participated in a teleconference on June 6, 2011, in which she raised the conflict of interest she perceived with respect to the determination of the validity of the MOA by the Adjudicator because of her claims against the latter (page 32 of the applicant's record).

[21] Having been denied her informal requests to the Chairperson of the Board for the appointment of another adjudicator to determine the validity of the MOA, the applicant filed, on August 17, 2011, the motion which resulted in the issuance of the decision under review on February 24, 2012 (2012 PSLRB 24).

[22] Later on the same day, the Adjudicator issued her own decision (reported as 2012 PSLRB 25) on all outstanding matters in the applicant's grievance files, including her request for recusal. After analysing the arguments and the evidence submitted by the applicant in support of her August 17, 2011 motion, the Adjudicator dismissed the applicant's request, declared the MOA final and binding and made findings with respect to the parties' compliance with the MOA. She also ordered that the nine grievance files be closed.

[23] The self-represented applicant had difficulty determining in which forum she should file her applications for judicial review of the foregoing decisions. After some confusion, it was confirmed that the decision of the Board was to be reviewed by the Federal Court of Appeal, while the decision of the Adjudicator was to be reviewed by the Federal Court. The Federal Court has yet to hear her application for judicial review of the Adjudicator's decision in (file number T-943-12).

III. Issues

[24] The applicant lists several errors allegedly made by the Board on page 2 of her memorandum of fact and law. Having considered the subject of her detailed submissions made in writing and at the hearing, I believe that the questions for determination can be regrouped as follows:

(i) Did the Board err in its interpretation of its powers under section 36 of the Act?

(ii) Did the Board err in concluding that, in any event, even if it had the power to grant the Applicant's request, it would still dismiss it on the basis that it was more appropriate that the Adjudicator deal with the said request?

(iii) Did the Board breach procedural fairness by failing to solicit reply submissions from the applicant?

IV. Legislation

[25] The most relevant provision in the Act is section 36. It reads as follows:

Powers and Functions of the Board	Pouvoirs et fonctions de la Commission
36. The Board administers this Act and it may exercise the powers and perform the functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act, regulations made under it or decisions made in respect of a matter coming before the Board.	36. La Commission met en œuvre la présente loi et exerce les pouvoirs et fonctions que celle-ci lui confère ou qu'implique la réalisation de ses objets, notamment en rendant des ordonnances qui exigent l'observation de la présente loi, des règlements pris sous le régime de celle-ci ou des décisions qu'elle rend sur les questions qui lui sont soumises.

[26] Two other provisions of the Act are reproduced in Annex "A" to these reasons. Section 224(2), on which the applicant relied, but does not apply to an adjudicator as well as subsection 226(2).

V. Analysis

A. *Standard of review*

[27] The applicant argues that the first issue raises a jurisdictional question, whereas the second one constitutes a refusal to exercise one's jurisdiction. She submits that both should be reviewed on a correctness standard. I disagree with the applicant's characterisation of these issues.

[28] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 35, the Supreme Court of Canada warns courts against simply branding issues as involving jurisdictional questions in order to subject them to broader curial review (see also, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraph 34). In my opinion, whether the Board has the power to recuse an adjudicator seized with a grievance is no more a true jurisdictional question than the issue before this Court in *Amos* (see *Amos* at paragraph 24).

[29] The applicant does not dispute that the Board has the power to construe the Act. In fact, it is quite apparent from section 36 of the Act that to do so is at the core of its mandate. Although it was done in a somewhat different context, I adopt the analysis of Evans J.A. in *Bernard v.*

Canada (Attorney General), 2012 FCA 92, [2012] 4 F.C.R. 370 at paragraphs 32 to 38 (aff'd 2014 SCC 13). In my view, the deferential standard of reasonableness is also appropriate here in view of the Board's expertise in interpreting its home statute and the strong privative clause in subsection 51(1) of the Act.

[30] This standard also applies to mixed questions of fact and law and more particularly in this case, to the Board's conclusion as to how it would exercise its power, if, as argued, it had the authority to recuse the Adjudicator.

[31] As to the question of procedural fairness, it is trite law that the correctness standard applies *(Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R.339 at paragraph 43; *Exeter v. Canada (Attorney General)*, 2011 FC 86 at paragraphs 16-17, aff'd on this point 2012 FCA 119 at paragraph 6).

B. *Did the Board err in its interpretation of section 36 of the Act?*

[32] The applicant argues that the Board misunderstood the purpose of her motion. In her view, this led to an erroneous interpretation of the Act because the Board focused on its powers with respect to "grievances" instead of its power to recuse the Adjudicator solely in respect of the determination of the validity of the MOA on the basis of procedural fairness (applicant's memorandum of fact and law, page 1, paragraphs 6, 20-23 and 33).

[33] The applicant attempts to dissociate the authority of the Adjudicator to deal with the validity of the MOA from her authority over the applicant's grievances. But the fact remains

that, in *Amos*, this Court made it clear that the adjudicator's power to deal with the enforceability and implementation of a MOA arises from being seized with the grievances.

[34] Thus, although it may have been preferable for the Board to more precisely describe the applicant's request, I am satisfied that the Board knew exactly what she was seeking. I agree with the Board when it states that: "[b]asically, Ms. Exeter's request is for the recusal of the [A]djudicator who is seized with her grievances" (see paragraph 14 of the decision).

[35] That said, I am also satisfied that the reasoning of the Board is cogent and sufficient to dispose of the request as formulated by the applicant. The Board considered not only its power with respect to "grievances", as alleged by the applicant, but also the objectives of the Act and the applicant's argument regarding procedural fairness. The Board's decision that it does not have the power to recuse an adjudicator seized with a matter is reasonable, whether the request to recuse applies to all or part of the outstanding matters in the grievance files.

[36] I will not dwell further on the interpretation of section 36, in light of the Board's conclusion that even if it had the power to do what was requested by the applicant, it would still dismiss her motion. This finding would be sufficient to support the Board's decision regardless of its interpretation of section 36. Thus, I will now consider the reasonableness of this conclusion.

C. *Was it reasonable for the Board to conclude that, in any event, even if it had the power to grant the Applicant's request, it would still dismiss it on the basis that it was more appropriate that the Adjudicator deal with the said request?*

[37] The applicant did not address the Board's reasoning on this issue, other than to say that to leave the matter of her recusal to the Adjudicator constitutes a refusal by the Board to exercise its power and, as such, constitutes an error justifying our intervention. I disagree.

[38] If the Board indeed has the power to deal with the applicant's request, it also has the discretion to refuse to exercise that power when it is satisfied that there is an appropriate alternative remedy, as in this case.

[39] I agree with the Board that requests for recusal are more appropriately dealt with by the decision-maker seized with the matter in respect of which a reasonable apprehension of bias or conflict of interest is claimed. This is exactly how requests for recusal are dealt with in other forums, including courts: see for example, *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2012 FCA 73, 430 N.R. 190; *Canada (Attorney General) v. Khawaja*, 2007 FC 533 (Mosley J.); *Ihasz v. Ontario*, 2013 HRTO 233, [2013] O.H.R.T.D. No. 326; *Ng v. Bank of Montreal*, [2008] C.L.A.D. No. 221.

[40] In our system, one cannot presume that a decision maker cannot deal fairly with such requests simply because it is alleged that he or she is biased or has a conflict of interest. The Board's decision does not violate the applicant's constitutional rights or the Board's duty to act fairly, for the applicant was entitled, and she is currently exercising this right, to a review of the decision of the Adjudicator on a correctness standard. That standard ensures the full respect of all the applicant's rights to a fair and impartial adjudication of her recusal motion. In fact, all the applicant's concerns will be addressed by the judge who will hear her application in T-943-12.

D. *Procedural Fairness*

[41] The applicant submits that the Board denied her participatory rights, thereby breaching its duty to act fairly, by failing to contact her or provide her with an opportunity to file a reply to the employer's submissions. In her view, this also shows that the Board's action was discriminatory and in bad faith, given that it did write to the employer to ask for its submissions (paragraph 46 of the appellant's memorandum).

[42] In a letter to the employer and applicant dated September 22, 2011, the Board transmitted a copy of the applicant's motion to the employer, who was not included as respondent in the motion and did not appear to have received a copy of the motion. The Board also set a short delay for the employer to submit its representations, if any.

[43] Although the employer did file brief submissions, which were copied to the applicant on September 29, 2012, it basically objected to the motion and responded to the arguments already made by the applicant in her written representations to the Board. In fact, in its decision, the Board summarizes the employer's position as follows: "Statistics Canada opposes the request alleging that it is "… trivial, frivolous, vexatious, and made in bad faith …" The deputy head denies that the Adjudicator has an interest in the outcome of Ms. Exeter's grievances."

[44] These issues are not new. On reply, normally one is entitled to rebut new issues. In any event, it is difficult to understand on what basis the applicant believed that she needed an invitation to reply to those submissions if she had anything new and important to add. As noted

by the respondent in its memorandum, there was absolutely nothing precluding the applicant from filing a reply if she so wished during the five month period between the filing of those submissions and the issuance of the decision.

[45] In fact, as the applicant does not deal at all with this issue in her affidavit, there is no evidence before us that, at the relevant time, the applicant understood that she had no right to file a reply. She does not give any detail either as to what else she would have added to the detailed submissions included in her motion material filed before the Board.

[46] In the circumstances, although it might have been preferable for the Board to indicate to the self-represented grievor that she could file reply submissions if necessary, I cannot conclude that its failure to do so amounts to breach of procedural fairness.

VI. Conclusion

[47] In light of the foregoing, the application for judicial review should be dismissed.

[48] There remains the issue of costs in respect of which the applicant argued forcefully at the hearing. Among other things, she submits that the respondent withdrew paragraphs 18 to 20 of its submissions, which alleged that several paragraphs in her affidavit in support of the application should be struck, just two days before the hearing. This caused her prejudice as she had already prepared to deal with this argument at the hearing. She says that in another procedure before this Court (*Rachel Exeter v. Attorney General of Canada*, 2014 FCA 105 at

paragraph 22) the lateness of the respondent's argument that the application was moot was sufficient to justify awarding no costs to him.

[49] Each case must be decided on its own facts. In my view, disputing paragraphs in an affidavit on the basis that they are purely argumentative or based on hearsay is quite different from raising a substantive argument like mootness. That said, I believe that the respondent's costs should be limited. Thus, I would propose to fix them at an amount of $500.00 (all inclusive).

"Johanne Gauthier"

J.A.

"I agree
Marc Noël C.J."

"I agree
D.G. Near J.A."

Annex "A"

Public Service Labour Relations Act (S.C. 2003, c. 22, s. 2)	Loi sur les relations de travail dans la fonction publique (L.C. 2003, ch. 22, art. 2)
Board of Adjudication	Conseil d'arbitrage de grief
Constitution	Composition
Ineligibility	Incompatibilité
224. (2) A person is not eligible to be a member of a board of adjudication if the person has any direct interest in or connection with the grievance referred to the board of adjudication, its handling or its disposition.	224. (2) L'appartenance au conseil est incompatible avec tout intérêt, direct ou indirect, à l'égard du grief renvoyé à l'arbitrage, de son instruction ou de son règlement.
Power to mediate	Médiation
226. (2) At any stage of a proceeding before an adjudicator, the adjudicator may, if the parties agree, assist the parties in resolving the difference at issue without prejudice to the power of the adjudicator to continue the adjudication with respect to the issues that have not been resolved.	226. (2) En tout état de cause, l'arbitre de grief peut, avec le consentement des parties, les aider à régler tout désaccord entre elles, sans qu'il soit porté atteinte à sa compétence à titre d'arbitre chargé de trancher les questions qui n'auront pas été réglées.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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