Federal Court of Appeal Cour d'appel fédérale

Date: 20150304

Docket: A-360-12

Citation: 2015 FCA 62

CORAM: **GAUTHIER J.A.**
NEAR J.A.
SCOTT J.A.

BETWEEN:

PETER DONALDSON

Appellant

and

WESTERN GRAIN BY-PRODUCTS STORAGE LTD.

Respondent

Heard at Winnipeg, Manitoba, on February 3, 2015.

Judgment delivered at Ottawa, Ontario, on March 4, 2015.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: GAUTHIER J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Introduction

[1] Peter J. Donaldson appeals from the June 21, 2012 decision of the Federal Court (2012 FC 804), in which Justice Campbell allowed the application for judicial review of the respondent, Western Grain By-Products Storage Ltd. (Western Grain).

[2] The decision under review at the Federal Court was the November 9, 2011 decision of an adjudicator appointed under Division XIV of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code). The adjudicator, Dr. Daniel J. Baum, determined that Western Grain had unjustly dismissed Mr. Donaldson.

[3] For the reasons that follow, I would dismiss the appeal.

II. Facts and Judicial History

A. *Facts*

[4] At the relevant time, the appellant had been employed by the respondent, the operator of a grain terminal located in Thunder Bay, Ontario, for approximately 20 years.

[5] The chain of events in question began on May 9, 2007, when the appellant left work ill. He attended the emergency room at Thunder Bay Regional Health Sciences Centre complaining of abdominal pain and vomiting, and was hospitalized until May 20, 2007.

[6] On June 22, 2007, the appellant filed a claim with the Workplace Safety and Insurance Board (WSIB). In this claim, the appellant stated that the symptoms he experienced on May 9, 2007 possibly resulted from a toxic allergic reaction to grain dust.

[7] During the summer of 2007, in both July and August, the appellant visited the premises of Western Grain and notified his employer (the respondent) that his doctor had advised him that he could not return to work due to health concerns.

[8] In a decision dated October 17, 2007, the WSIB informed the appellant that the evidence did not establish an occupational disease. The WSIB based this conclusion on an examination of the appellant's medical records by one of its occupational medical consultants. In its decision, the WSIB explained that entitlement to compensation requires proving that "it is … more probable than not that your work contributed in a significant way to the development of a disease/condition" (at p. 202, Appeal Book (AB) Vol. I).

[9] The respondent was first advised of the finding of the WSIB on October 23, 2007. The record before this Court contains an objection to this finding completed by the appellant, but there is no information indicating that the decision of the WSIB was ever reversed.

[10] On October 25, 2007, the appellant attended the premises of Western Grain and presented a handwritten, two-line note from his family physician. The note, dated October 24, 2007, stated: "Mr. Donaldson is now capable of returning to his job & employment at Western Grain" (at p. 203, AB Vol. I). Upon receiving the note, Mr. Mailhot, Western Grain's principal, told the appellant that he could not return to work until he presented "a better doctor's note as to his fitness level in relation to his duties and the work environment" (at p. 113, AB Vol. I).

[11] Not long after, on October 31, 2007, the respondent notified the appellant in writing that the shipping season was reduced to very occasional work and that as a result, he was being placed on temporary layoff, effective November 9, 2007. Seasonal layoffs occur each year at Western Grain. In 2007, four other employees were also temporarily laid off.

[12] On November 16, 2007, the appellant filed a complaint with Human Resources and Social Development Canada (HRSDC), stating: "was not allowed to go back to work with a Dr.'s note, I feel unjust dismissal" (at p. 185, AB Vol. I).

[13] By way of letter dated December 12, 2007, in response to HRSDC's inquiry into the appellant's complaint, Mr. Mailhot indicated that he had found the doctor's note to be suspicious and had requested that the appellant obtain a better note. In the letter, Mr. Mailhot also explained that the appellant was currently on seasonal layoff along with four other employees.

[14] On March 5, 2008, Mr. Mailhot wrote to the appellant seeking "previously requested information", including: a doctor's certificate indicating that the appellant was unable to work during the period from May 9, 2007 to October 25, 2007, and a current doctor's certificate verifying that he was fit and able to resume normal work duties (at p. 208, AB Vol. I). Mr. Mailhot asked the appellant to provide this information within 15 days of receiving the request.

B. *Adjudicator's Decision*

[15] The adjudicator, in a rambling and disjointed decision, concluded that the respondent had constructively dismissed the appellant, and that this dismissal was unjust.

[16] The adjudicator defined constructive dismissal as "an alteration of a fundamental term of employment by the employer without justification" (at p. 28). In support, he cited *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, 145 D.L.R. (4th) 1 and *Shah v. Xerox Canada Ltd.*, 131 O.A.C. 44, [2000] O.J. No. 849 (QL).

[17] Early in his decision, the adjudicator made a finding which became the main basis upon which he concluded that the respondent had constructively dismissed the appellant:

> … In my view, the WSIB decision fully responds to the medical opinion apparently sought by Mr. Mailhot from Mr. Donaldson's physician.
>
> There was no medical basis for finding that Mr. Donaldson suffered from an allergic reaction in the handling of grain at Western Grain. That was the only issue to be resolved. … The question, indeed the only question faced by Mr. Mailhot, was whether, given the claimed allergic reaction by Mr. Donaldson, he was able to return to work. An authoritative answer to this question was given in the WSIB report, per se. The medical note "required" by Mr. Mailhot of Dr. Adams simply was not relevant to answering this question.
>
> (emphasis removed from original; at pp. 36-37)

[18] The adjudicator repeated this finding a number of times, in a number of different ways, throughout his decision. At page 39, he stated that Mr. Donaldson had a right to return to work on October 25, 2007 because "[t]he underlying cause of Mr. Donaldson's job absence ended on October 17, 2007 – the date on which the WSIB entered its finding and decision denying Mr. Donaldson's claim" (emphasis removed from original). At page 50, he stated that:

> … Mr. Donaldson needed no certification to return to work. It was as if he had never left work. His absence for 25 weeks was occasioned to allow for consideration, investigation and determination of Mr. Donaldson's claim for a finding of occupational disease resulting from a one-time exposure to grain dust. In such a situation there was no need for a "doctor's note."

[19] Later in his decision, in distinguishing the case at bar from *Re Thompson General Hospital*, [1991] M.G.A.D. No. 57, 20 L.A.C. (4th) 129 (Manitoba Grievance Arbitration), a case which the respondent had argued was analogous, the adjudicator stated: "… the only "illness" allegedly suffered by Mr. Donaldson was his claim to have suffered an allergic reaction to a one-time incident of grain dust exposure – an illness that the WSIB denied had occurred" (emphasis removed from original; at pp. 58-59).

[20] In considering whether the respondent had constructively dismissed the appellant, the adjudicator stated the following:

> What the record demonstrates is that Western Grain wanted the identity, the notes, and the production as witnesses for examination and cross-examination of all those doctors who treated Mr. Donaldson – at any point in time for any ailment that on the surface might affect his fitness to work at Western Grain beyond the one time claimed allergic reaction to grain dust. …
>
> The position of Mr. Mailhot was clear: Mr. Donaldson could not return to his job without first meeting Mr. Mailhot's demand of proof of fitness, as described above. And, this was a demand that went far beyond the asserted medical reason for Mr. Donaldson's absence – an absence that had its genesis in a WSIB claim by Mr. Donaldson of allergic grain dust reaction – a claim which the WSIB denied. Mr. Mailhot's position as to the required "medical note" in fact was a demand that, in the context of these hearings, Mr. Donaldson simply could not, as a practical matter, meet. The result, as I described in some detail, brought about the "dismissal" of Mr. Donaldson. A fundamental change in Mr. Donaldson's employment occurred as a result of the action of Mr. Mailhot. He was rendered unable to return to his job at Western Grain.
>
> … Contrary to what [counsel for the respondent] argued, it was no "simple" note with additional information that Mr. Mailhot demanded of Mr. Donaldson. It was a full list of physicians who treated Mr. Donaldson – a list that went back more than 20 years together with the nature of their treatment, their production as witnesses and their availability for examination and cross-examination, along with the relevant medical documents, including physician notes.
>
> (my emphasis; at pp. 64-65)

[21] In concluding that the appellant was unjustly dismissed, the adjudicator found that Mr. Mailhot "placed effective barriers" that denied the appellant the right to return to work, and that these barriers "exceeded any reasonable term of employment" (at p. 68).

[22] The hearing before the adjudicator was bifurcated into two portions, liability and damages. The damages portion of the hearing has been stayed by an Order of the Federal Court pending the final disposition of these proceedings (at pp. 441-447, AB Vol. 3).

C. *Federal Court Decision*

[23] The Federal Court judge allowed the respondent's application for judicial review.

[24] The Judge found that it was clear that the appellant's claim related only to the conversation between himself and Mr. Mailhot on October 25, 2007, and not to the seasonal layoff notice sent October 31, 2007.

[25] On this basis, the Judge held that although the adjudicator had properly cited the law, his conclusion was unreasonable as it was based on a fact that had nothing to do with the conversation of October 25, 2007.

[26] The Judge cited from the decision of the adjudicator, who stated in his conclusion:

> …Western Grain imposed conditions on Mr. Donaldson's return to work which went beyond the ken both of what was reasonable in the context of Mr. Donaldson's reason for absence (namely, a WSIB consideration of his claim of a one-time allergic reaction to grain dust that, in the result was denied by the WSIB) and Western Grain's demand for the production for examination and

> cross-examination of all doctors who have treated Mr Donaldson [*sic*] over a period of two decades.
>
> (at p. 69)

The Judge held that if Western Grain had made such a demand for production, which was disputed before him, this demand "could only be identified as an evidentiary incident in the course of the adjudication, and, as such, was not capable in any way of being linked to Mr. Donaldson's complaint …" (at para. 10).

[27] The Judge concluded that the adjudicator's decision was unreasonable and set it aside.

III. Positions of the Parties

[28] The appellant asks this Court to allow the appeal, set aside the decision of the Federal Court, and restore the decision of the adjudicator. The appellant submits that the Judge properly selected reasonableness as the standard of review, but did not apply this standard correctly. In the appellant's submission, the Judge failed to consider the adjudicator's finding that no further medical information was needed.

[29] The respondent asks this Court to dismiss the appeal. The respondent submits that the Judge properly allowed the application for judicial review, and that the adjudicator's decision is unreasonable in the following respects:

- Finding that he had jurisdiction to hear the complaint even though the appellant was subject to a *bona fide* layoff at the time he filed his complaint;

- Finding that the respondent's request for better medical information consisted of a constructive dismissal; and

- Finding that the appellant did not quit or resign for failing to provide the medical information requested.

[30] The respondent also submitted that the adjudicator should be prohibited from re-determining the liability portion of this matter or from hearing the damages portion due to his demonstrated bias in favour of the appellant.

IV. Issues

[31] It is not necessary to review all of the issues raised by the parties in order to render a decision in this appeal. In my view, this Court must only consider the following two issues:

1. Was the adjudicator's decision reasonable?

2. What is the appropriate remedy?

V. Standard of Review

[32] This Court must determine whether the Federal Court judge correctly chose and properly applied the standard of review. This has been described as "stepping into the shoes" of the Federal Court (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 46-47, [2013] 2 S.C.R. 559).

[33] The Judge properly selected reasonableness as the standard of review applicable to the adjudicator's decision (at para. 11). The issue that was before the adjudicator – whether or not the appellant was unjustly dismissed – is a question of mixed fact and law. As such, the standard of review is presumed to be reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 51, [2008] 1 S.C.R. 190). Moreover, this Court has held that the reasonableness standard generally applies to decisions of adjudicators considering unjust dismissal under the Code (*Guydos v. Canada Post Corp.*, 2014 FCA 9 at paras. 5, 7, [2014] F.C.J. No. 91 (QL), *Payne v. Bank of Montreal*, 2013 FCA 33 at paras. 32-35, 443 N.R. 253).

VI. Analysis

A. *Was the Adjudicator's Decision Reasonable?*

[34] In my view, the Federal Court judge properly found that the record clearly indicated that the appellant's complaint related to the conversation he had with Mr. Mailhot on October 25, 2007. Indeed, during the hearing of this matter, both the appellant and the respondent agreed that the crucial issue for determination was whether the employer was justified in asking for a more substantive medical note before the appellant could return to work. The parties agreed that this issue "crystallized" on October 25, 2007 as a result of the conversation between Mr. Mailhot and the appellant.

[35] I also agree with the Judge that the adjudicator's finding that the respondent sought from the appellant, prior to his complaint, medical evidence spanning twenty years is clearly untenable

based on the evidence. Even the adjudicator himself referred to the respondent's requests as "requests for what I believe to be discovery" in his decision (at p. 52).

[36] Nevertheless, the adjudicator repeated this erroneous finding multiple times in his analysis and conclusion. The respondent is incorrect in arguing that this erroneous finding was the sole basis for the adjudicator's decision (at paras. 16, 63, 65, respondent's Memorandum of Fact and Law); however, the gravity of the adjudicator's error seriously brings into question the soundness of his result. Therefore, it is my view that this Court would be justified in finding his decision unreasonable for this reason alone, as did the Judge.

[37] The appellant conceded during the hearing before us that the adjudicator had no basis in fact to conclude that the respondent had demanded medical evidence spanning 20 years, particularly at the pivotal October 25, 2007 date, or in any of its requests for a more fulsome doctor's note. However, the appellant argues that despite this fundamental error, the adjudicator's decision is reasonable.

[38] In the appellant's submission, there was enough evidence to support the adjudicator's finding that the respondent had no right to demand a more substantive medical note before allowing the appellant to return to work, and that as such, the respondent's requests amounted to constructive dismissal of the appellant. The appellant points to two pieces of evidence in support of this submission: the October 17, 2007 WSIB report, and the doctor's note dated October 24, 2007.

[39] In my view, even the most cursory examination of the October 17, 2007 WSIB decision indicates that the appellant continued to have substantial health problems. The decision, prepared by a claims adjudicator at the WSIB based on the observations of a WSIB occupational medical consultant, merely concludes that the appellant's claim based on a possible toxic allergic reaction was not supported by the medical evidence that the appellant had adduced. The decision did not give the appellant a clean bill of health. To the contrary, the adjudicator noted that the appellant's medical records indicate that the appellant has had multiple investigations into various medical conditions (at p. 201, AB Vol. I).

[40] There is therefore no evidence in the record that supports the adjudicator's finding that the WSIB report was conclusive as to the appellant's capability to return to work and precluded the respondent from asking for a more substantive medical note. Similarly, the two-line note from the appellant's physician lacks any explanation as to why the appellant was now fit to return to work.

[41] It is important to consider that the appellant had been off work for close to six months when he attempted to return to work, and that he had been hospitalized for nearly two weeks at the beginning of this period. The appellant had also indicated to the respondent during the summer months that he remained unwell and could not return to work. In addition, prior to the events in question, the appellant had never been off work for such a long period, nor had he ever made any WSIB claims.

[42] As mentioned above, while the WSIB report indicated that the appellant may not have suffered from an allergy to grain dust, it clearly indicated that as of October 17, 2007, the appellant was not particularly well. In addition, it is clear from the record that the respondent was not aware of the report's findings until the respondent received a copy on October 23, 2007, two days prior to receiving the two-line doctor's note stating that the appellant could return to work.

[43] No finding of fact was made that could support the conclusion that the respondent was unaware of the appellant's significant health issues prior to October 23, 2007, when it received the WSIB report. As such, there is no support for the adjudicator's conclusion that the WSIB report precluded the respondent from seeking a more fulsome explanation before allowing the appellant to return to work.

[44] Similarly, there is no support in the record or in the factual findings of the adjudicator for the conclusion that the respondent significantly changed the terms of the appellant's employment in such a way as to amount to constructive dismissal.

[45] While the adjudicator properly outlined the test for constructive dismissal (that from *Farber v. Royal Trust Co.*), there was no basis upon which he could have reasonably concluded that the respondent had constructively dismissed the appellant. The conversation that occurred between Mr. Mailhot and the appellant did not amount to a change in a fundamental term of the appellant's employment.

[46] The adjudicator improperly distinguished *Re Thompson General Hospital*, which stands for the proposition that in certain circumstances, employers may demand further medical information of employees before allowing them to return to work after being on sick leave. Considering the factual circumstances, it was reasonable for the respondent, who has an obligation to ensure the safety of its employees, to request further medical information from the appellant upon his return. The two-line doctor's note that the appellant provided did not contain enough information for the respondent to satisfactorily conclude that the appellant may safely return to work.

B. *What is the Appropriate Remedy?*

[47] The Federal Court judge issued an Order setting aside the adjudicator's decision. He did not, however, refer the matter back for re-adjudication. Subsequently, there was disagreement between the parties as to the effect of the Judge's Order on the appellant's underlying complaint.

[48] At the hearing of this appeal, however, the parties agreed that should this appeal fail, the matter will come to an end. They do not ask that this Court return the matter to a different adjudicator for re-determination. I agree entirely. As such, the appeal will be dismissed without any modification to the remedy ordered by the Judge.

VII. Conclusion

[49] I would dismiss the appeal. There will be no award of costs.

"David G. Near"
J.A.

“I agree
Johanne Gauthier J.A.”

I agree
A.F. Scott J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE CAMPBELL DATED JUNE 19, 2012, DOCKET NUMBER T-1987-11.

DOCKET:	A-360-12
STYLE OF CAUSE:	PETER DONALDSON v. WESTERN GRAIN BY-PRODUCTS STORAGE LTD.
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	FEBRUARY 3, 2015
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	GAUTHIER J.A. SCOTT J.A.
DATED:	MARCH 4, 2015

APPEARANCES:

Daniel J. Matson	FOR THE APPELLANT
Chantelle J. Bryson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Johansen Law Firm Thunder Bay, Ontario	FOR THE APPELLANT
WEILER, MALONEY, NELSON Thunder Bay, Ontario	FOR THE RESPONDENT