Federal Court  Cour fédérale

Date: 20150519

Docket: T-880-14

Citation: 2015 FC 648

Ottawa, Ontario, May 19, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

JEAN ROBINSON BAPTISTE

Applicant

and

3903214 CANADA INC. (GT GROUP)

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review in which the applicant, Jean Robinson Baptiste, seeks to have the decision of an adjudicator terminating his complaint under section 241 of the *Canada Labour Code*, RSC 1985, c L-2 (the *Code*) (file no. YM2707-9752) set aside. The decision of the adjudicator, Jean Boily, dated March 18, 2014, put an end to the applicant's complaint after being advised that the parties had reached a settlement. The applicant alleges that

he never agreed to the terms of the alleged settlement reached between his counsel and the respondent.

[2] The respondent argues that the applicant did indeed agree to the terms of the settlement and that he simply changed his mind before signing the written agreement. The respondent argues that (i) settlement was reached through discussions between counsel for the applicant and for the respondent, (ii) the applicant's counsel was acting on instructions from the applicant, (iii) the applicant was kept advised of and approved the negotiated settlement terms, and (iv) the agreement is binding even in the absence of a signed document.

[3] The respondent also argues that the question of whether a settlement was reached is peripheral to the real issue in the present application, which is whether the adjudicator erred in terminating the applicant's complaint. The respondent argues that recent jurisprudence, including *Dunsmuir v New Brunswick*, 2008 SCC 9, provides that the standard of review in an application for judicial review is either reasonableness or correctness, and that reasonableness applies except in certain limited circumstances. The respondent argues that the adjudicator's decision in this case was a question of mixed fact and law to which a standard of reasonableness applies. Accordingly, the respondent argues that I should defer to the adjudicator's conclusion that termination of the applicant's complaint was appropriate.

[4] For his part, the applicant argues simply that his complaint was terminated without good reason (since there was no settlement) and without him having an opportunity to be heard, either

on the merits of the complaint or on whether there was a settlement. The applicant argues that the adjudicator's decision was unfair, and asks that I set it aside.

[5] There are two issues that I must decide:

1. Did the parties reach an agreement to settle the applicant's complaint?
2. Did the adjudicator err in terminating the applicant's complaint on the basis of a settlement?

[6] For the reasons set out below, I conclude that no settlement was reached between the parties concerning the applicant's complaint, and that the adjudicator erred in terminating the applicant's complaint on the basis of a settlement.

II. Facts

[7] The applicant was employed with the respondent for almost four years. He was terminated on April 15, 2013. After failing to agree with the respondent on the terms of his termination, the applicant filed a complaint against the respondent on May 23, 2013, under Quebec's *Act Respecting Labour Standards*, CQLR c N-1.1 (the Quebec complaint). Following a suggestion from Quebec's *Commission des normes du travail* (apparently based on a concern that it did not have jurisdiction to hear the complaint), the applicant filed a second complaint against the respondent, this one on June 25, 2013, pursuant to the *Code*. This is the federal complaint whose termination by the adjudicator is the subject of the present application for judicial review.

[8] On or around July 23, 2013, Me Lucie Martineau, a lawyer with the *Commission des normes du travail* was given the mandate to represent the applicant in the Quebec complaint. Her mandate did not extend to the applicant's federal complaint.

[9] In January 2014, with a February 3, 2014 date for a hearing of the Quebec complaint approaching, Me Martineau received a letter from respondent's counsel advising that it intended to argue that the *Commission des normes du travail* had no jurisdiction to hear the complaint. Shortly after that, Me Martineau met with the applicant to discuss the letter and to discuss terms that the applicant would accept to settle his complaints. The parties agree that Me Martineau left that meeting with a mandate from the applicant to negotiate a settlement.

[10] On January 30, 2014, Me Martineau met with respondent's counsel and came to an agreement in principle. In the days that followed, draft settlement documents were prepared and revised, and Me Martineau discussed the proposed settlement terms with the applicant. On February 28, 2014, Me Martineau received several cheques, a letter of reference, a Record of Employment and a draft settlement agreement that reflected the terms agreed to between the parties' lawyers.

[11] Because he was unavailable at that time, the applicant did not see the settlement documents until April 4, 2014. In the meantime, the parties' lawyers learned that Jean Boily had been named as the adjudicator to deal with the applicant's federal complaint. By letter dated March 12, 2014 from respondent's counsel, the adjudicator was advised that a settlement had

been reached in the complaint. Me Martineau was copied on this letter. On March 18, 2014, the adjudicator terminated the complaint on the basis of the settlement.

[12] When the applicant finally saw the settlement documents on April 4, 2014, he refused to sign, stating that they did not reflect the terms he had agreed to. The applicant commenced the present application on April 10, 2014 seeking to set aside the termination of his federal complaint.

III. Analysis

A. *Did the parties reach an agreement to settle the applicant's complaint?*

[13] The evidence as to whether the parties reached an agreement is simple but contradictory. The applicant swears in his affidavit that the settlement documents he was asked to sign in April 2014 did not reflect the terms he had discussed with Me Martineau. For its part, the respondent cites the affidavit of Me Martineau who states that (i) the applicant gave her the mandate to negotiate a settlement, (ii) she kept the applicant informed regularly of developments in the settlement negotiations, and (iii) the applicant agreed to the proposed settlement terms. There was no cross-examination on either affidavit.

[14] Each party argues that I should accept its evidence over that of the other party. The respondent notes that the burden of proof in the present application is on the applicant, arguing that, in the face of conflicting evidence, I should side with the respondent and dismiss the application.

[15] I note that the applicant is somewhat vague about the details of the difference between the settlement terms he agreed to and those in the documents he was asked to sign. In his argument, he cited a number of conditions he had for a settlement, but I note that these conditions were not identified in his evidence. Nevertheless, I am not inclined to conclude simply from the vagueness of the applicant's evidence that he had in fact agreed to the alleged settlement terms.

[16] In fact, I find the respondent's evidence also somewhat vague. Though I accept that Me Martineau (i) had a mandate to negotiate a settlement with the respondent, (ii) discussed those negotiations with the applicant, and (iii) felt that the applicant had agreed to the proposed settlement terms, I am not satisfied from Me Martineau's affidavit that she communicated the terms of the proposed settlement in sufficient detail and clarity to inform the applicant of precisely what would be included in the agreement he would be asked to sign. It appears that all of the exchanges between Me Martineau and the applicant concerning settlement negotiations were oral.

[17] There is no evidence in writing confirming the settlement terms to which the respondent alleges that the applicant agreed, until the written documents which the applicant did not agree to and refused to sign.

[18] Though a mandatary (such as Me Martineau) acting within the limits of the mandate binds the mandator (here, the applicant) and makes him liable to third parties for the acts of the mandatary, that is not the case where the mandatary has exceeded the limits of the mandate and

the mandator has not ratified those acts by the mandatary: Articles 2158 and 2160 of the *Civil Code of Quebec,* CQLR c C-1991.

[19] In my view, it is entirely possible, and indeed likely, that Me Martineau simply misunderstood what the applicant was prepared to accept in a settlement and that, because nothing was confirmed with the applicant in writing earlier, this misunderstanding was not discovered until April 2014. The applicant's affidavit is quite specific in that he never agreed to the proposed settlement terms, while the respondent's evidence is not sufficiently specific to displace the applicant's evidence.

[20] Accordingly, I conclude that there was never an acceptance that corresponded substantially to an offer that could constitute a contract concerning terms to settle the applicant's complaint against the respondent: Article 1393 of the *Civil Code of Quebec*.

B. *Me Martineau's affidavit*

[21] Though it is not essential to my decision, I feel compelled to make a few comments about Me Martineau's affidavit in the present application. As indicated above, Me Martineau was assigned to act as counsel for the applicant in July 2013, near the beginning of this matter. She remained in that role until April 2014. It is common ground that Me Martineau and the applicant had many conversations during this time concerning the applicant's dispute with the respondent and concerning what terms he sought in a settlement. Naturally, these discussions involved the exchange of privileged and confidential information.

[22] It is surprising, to say the least, to see the same applicant's counsel now acting as a witness for the respondent in the very matter on which she advised the applicant, and in fact giving evidence on the very privileged and confidential discussions she had with the applicant.

[23] When asked about this, the respondent argues that the applicant waived any rights he had to the confidentiality of his discussions with Me Martineau when he alleged that the proposed settlement terms were not what he agreed to during those discussions.

[24] I have heard no argument that Me Martineau's behaviour was inappropriate because the applicant, who is not represented by counsel, did not raise the issue. However, all members of the bar in Quebec are subject to the *Code of ethics of advocates*, CQLR c B-1, r 3, which includes many obligations that lawyers have to maintain the confidentiality of their clients' information. Section 3.06.01 thereof states:

> 3.06.01. An advocate shall not use, for his benefit, for the benefit of the partnership or joint-stock company within which he engages in his professional activities or for the benefit of a person other than the client, confidential information obtained while he engages in his professional activities.
>
> [Emphasis added.]

[25] I am concerned that Me Martineau's affidavit constitutes use of the applicant's confidential information for the benefit of a third person (the respondent) and that the applicant's affidavit in the present matter did not disclose sufficient information to constitute a waiver of sufficient clarity to satisfy the requirements set out by the Quebec Court of Appeal in *Schenker du Canada ltée v Le Groupe Intersand Canada inc.*, 2012 QCCA 171 at para 25, and in *Pothier c Raymond*, 2008 QCCA 1931 at para 5. In his affidavit, the applicant simply states that the

written settlement documents did not correspond to the terms he agreed to, and attaches a copy of the letter he received from Me Martineau to which were attached the written settlement documents. Even if this made the applicant's privileged conversations with Me Martineau relevant in the present application (a question I need not answer here), I am not satisfied that this released Me Martineau from her obligations toward the applicant.

[26] When a person retains a lawyer in Quebec, they do so with a legitimate expectation that their confidential discussions will be kept confidential, and certainly that such discussions will not be communicated to the adversary in the very matter at issue. It is even clearer that disclosure of such confidential discussions should not happen while the dispute between the client and the adversary remains. I have been given no indication that Me Martineau was legally obligated to provide her affidavit, such as by a subpoena. I acknowledge that I have not had the opportunity to hear from Me Martineau herself on this issue, but I cannot understand how she could have felt that it was appropriate to share this information.

C. *Did the adjudicator err in terminating the applicant's complaint on the basis of such a settlement?*

[27] The parties' respective arguments as to whether the adjudicator erred in terminating the applicant's federal complaint are outlined near the beginning of this decision. Despite the able arguments of the respondent's counsel, I do not agree that a standard of review of reasonableness should apply, nor do I agree that the termination of the applicant's federal complaint should stand.

[28] If I were to apply a standard of reasonableness in the present situation, the applicant would see his complaint terminated on the basis of information that was later shown to be wrong, i.e. that a settlement had been reached. The applicant would effectively have lost his complaint without having been heard. In my view, that would constitute a denial of procedural fairness. The standard of review applicable to a question of procedural fairness is correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Exeter v Canada (Attorney General)*, 2014 FCA 251 at para 31.

[29] In the present case, the standard of review of correctness should apply. This corresponds well with the real intent of the adjudicator's impugned decision. The termination of the applicant's federal complaint was explicitly based on the settlement reached between the parties. It cannot reasonably be denied that the adjudicator would have refused to grant the request to terminate the applicant's federal complaint if there had been some doubt as to whether a settlement had been reached. It was implicit in the adjudicator's decision that it was dependent on the correctness of the information that a settlement has been reached.

[30] Applying the standard of correctness to the adjudicator's decision to terminate the applicant's federal complaint, I conclude that the decision should not stand because it is based on a settlement that never occurred, and was therefore incorrect.

[31] The respondent notes that Me Martineau was copied on the letter to the adjudicator advising him of the settlement. The respondent argues that it was reasonable for the adjudicator, in the absence of any objection from Me Martineau concerning the existence of a settlement, to

accept that there was a settlement and terminate the complaint on that basis. This argument is not applicable because the proper standard of review is correctness, not reasonableness. But it is also important to note that it is uncontested that Me Martineau never had a mandate to act on behalf of the applicant in relation to his federal complaint. Therefore, Me Martineau's silence concerning any issue related to the applicant's federal complaint is not informative.

[32] In its memorandum of fact and law, the respondent cites paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7, in support of its argument that a significant amount of deference should be shown to the adjudicator's decision to terminate the applicant's federal complaint. This provision permits a tribunal's decision to be set aside if it is based on "an erroneous finding of fact that it made in a perverse and capricious manner or without regard to the material before it." For convenience, I reproduce the whole of subsection 18.1(4) of the *Federal Courts Act* here:

Grounds of review	**Motifs**
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

[33] I prefer to focus on paragraph 18.1(4)(f) which provides that a tribunal's decision may be set aside if the tribunal "acted in any other way that was contrary to law." Given my finding above that the applicant never agreed to the terms of the alleged settlement, and never gave a mandate to agree to such terms, it would seem to be clear that the termination of his federal complaint without being heard was contrary to the law: paragraph 242(2)(b) of the *Code*, *Couchiching First Nation v Canada (Attorney General)*, 2012 FC 772 at para 28.

IV. Conclusion

[34] Accordingly, the present application should be granted and the termination of the applicant's federal complaint, file no. YM2707-9752, set aside.

[35] The respondent asked at the hearing that, in the event that I find that there was no settlement and that the applicant's federal complaint should be revived, I resolve the matter by considering the complaint and ruling on it. I appreciate that the respondent is eager to put this whole affair in the past; however, I have neither the mandate nor the information necessary to rule on the applicant's complaint. Therefore, I decline to do so.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application for judicial review is granted.

2. The termination of the applicant's complaint under section 241 of the *Canada Labour Code* (file no. YM2707-9752) by adjudicator Jean Boily on March 18, 2014, is set aside and said complaint shall be dealt with in accordance with the *Canada Labour Code*.

3. There is no award of costs.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-880-14
STYLE OF CAUSE:	JEAN ROBINSON BAPTISTE v 3903214 CANADA INC. (GT GROUP)
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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Annie Bourgeois	FOR THE RESPONDENT

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