Federal Court Cour fédérale

Date: 20151002

Docket: T-315-15

Citation: 2015 FC 1131

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 2, 2015

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

LAURENT DUVERGER

Applicant

and

2553-4330 QUÉBEC INC. (AÉROPRO)

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act,* RSC 1985, c F-7 (the Act), of a decision rendered on February 18, 2015, by a referee appointed under the *Canada Labour Code*, RSC 1985, c L-2 (CLC), annulling a payment order of $6,730.64 issued by an inspector of the Labour Program of Human Resources and Skills Development Canada (HRSDC) (Employment and Social Development Canada) on the ground that the action was time-barred. The applicant represented himself at the hearing.

[2] For the following reasons, the application for judicial review will be dismissed.

I. Factual background

[3] The applicant worked for the respondent at the Chibougamau Airport weather station from May 12, 2008, to June 21, 2010. He resigned on that date, alleging that he had been subjected to harassment.

[4] He moved to Gatineau in September 2010 and on December 11, 2011, he obtained a six-week contract to work as a meteorological observer in Red Lake, Ontario.

[5] On March 8, 2012, he filed a claim with the Commission de la santé et de la sécurité du travail (CSST) for an employment injury he allegedly suffered on June 21, 2010. The CSST denied his claim on the basis that it was time-barred, but the Commission des lésions professionnelles (CLP) overturned that decision and found in the applicant's favour.

[6] On August 6, 2013, the applicant filed a wage recovery complaint with the federal Labour Program. His complaint was received by HRSDC on August 15, 2013, and assigned to Inspector Johanne Blanchette (the inspector).

[7] On July 3, 2014, the inspector instructed the respondent to pay the applicant an amount of $6,730.64 less the deductions authorized by law. The respondent appealed this decision after paying the amount of $3,624.46 to the Receiver General for Canada.

[8] The appeal was heard by Léonce-E. Roy (the referee), appointed by Canada's Minister of Labour in accordance with Division XVI—Part III of the CLC.

[9] On February 18, 2015, the referee allowed the respondent's appeal and declared that the right of action of the applicant, Mr. Duverger, was prescribed.

[10] According to the referee, *Delaware Nation v Logan*, 2005 FC 1702 (upheld on appeal, 2007 FCA 170) [*Delaware*], which was relied on by the applicant and the inspector, should not be followed. In that case, the Court declared that there was no limitation period on wage recovery applications. The referee added that the *Civil Code of Québec* (CCQ) has a suppletive application to the CLC for cases from Quebec.

[11] After noting that section 251.1 of the CLC does not mention a limitation period, the referee concluded that article 2925 CCQ (three-year prescriptive period) applied to the case under consideration. Given that the applicant resigned on June 21, 2010, and that her application was dated August 6, 2013, her right of action is therefore prescribed.

[12] The referee also rejected the applicant's allegation that he was unable to act any earlier than August 2013. In his view, the applicant's actions—completion of his employment contract at Red Lake, the various proceedings with the CSST and the CLP—demonstrate beyond a shadow of a doubt that the applicant could have applied for a remedy within the prescribed timeframe. Therefore, there was no interruption of the prescription period.

[13] The referee also held that the medical certificate dated November 5, 2014, which the applicant wanted to file in evidence the morning of the hearing, was inadmissible. Because Dr. Séguin was not present, he could not be cross-examined, and no prior notice was sent to the respondent. The adjudicator referred to this report as a [TRANSLATION] "certificate of convenience".

II. Respondent's preliminary objections

[14] The respondent objects to the Court's taking into account the following pages from the Applicant's Record: 53 (L-2) 99, 100, 115, 119, 120, 124, 127, 130, 138, 143, 147, 170, 204, 205, 207, 208, 211, 116, 220, 222, 228, 229 and 230. In its view, these documents were not submitted to the adjudicator or attached to the applicant's affidavit, and some are merely hearsay. The respondent was therefore unable to cross-examine.

[15] Because the applicant could not respond immediately to this objection, he asked the Court for several extensions to review his record. The Court agreed and even postponed the hearing to the second day, then proceeded to review each of the documents with the parties so that they could justify their positions.

[16] During the hearing, the Court declared inadmissible page 53 (L-2, medical report dated February 23, 2015) because the adjudication decision was dated February 18, 2015. As for the medical report of November 5, 2014, at page 147, the Court accepted it because the adjudicator had the opportunity to examine it even though he refused to admit it in evidence (adjudicator's

decision, paras 34 to 36). During the discussions, the respondent withdrew its objections to pages 100, 119, 127 and 170.

[17] The Court, having verified the other challenged documents and heard the parties' submissions, finds the following:

- Pages 99 and 115 will not be considered by the Court because they are settlement offers from the respondent. The adjudicator's decision does not mention them, and regardless, they are irrelevant in this context;

- Page 120 (email from the inspector to the applicant confirming that in the report provided to the adjudicator, the applicant wished to raise an objection to the respondent's appeal because the amount of the cheque deposited was allegedly illegal): the respondent states that it did not receive this email. In the circumstances, the Court is willing to consider this document;

- Pages 124 and 130 (medical reports apparently sent to the adjudicator) and page 228 (medical reports sent to the inspector): at the hearing, the applicant declared to the Court that he had not received a reply from the adjudicator. In any case, the signatories of these documents did not testify before the adjudicator. Accordingly, the Court may not consider them;

- Page 138: the applicant was not certain whether he had sent this report to the adjudicator. The signatory of this medical report did not testify. This page will not be considered;

- Pages 204, 205 and 207: the Court agrees with the respondent that these constitute hearsay;

- Pages 208, 211, 220, 222, 229 and 230 were not attached to the applicant's affidavit; accordingly, they will not be considered;

- Pages 143 and 216 were allegedly sent by fax to the respondent on March 13, 2015, while the affidavit is dated March 16 of the same year and received by the respondent on March 25. The Court will not consider this document.

III. Issues

[18] According to the Court, the issues in this case are the following:

1. Did the referee err in agreeing to hear the respondent's appeal?
2. Did the referee err in finding that the applicant's action was time-barred?
3. Was the prescription period interrupted by the fact that it was impossible for the applicant to act?
4. Did the referee breach procedural fairness by refusing to admit the medical report (November 5, 2014, page 147, Applicant's Record) that the applicant sought to file on the morning of the hearing?
5. Is the prescription period established by the referee subject to the doctrine of reasonable accommodation?

IV. Standard of Review

[19] The applicant submits that the Court must follow *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. The respondent agrees that for questions of law, the standard of correctness applies, but that for questions of mixed fact and law, the applicable standard is reasonableness.

[20] The Court will apply the standard of correctness to issues 2 and 4 and the standard of reasonableness to the remaining three issues, in accordance with *Abel v Asselin*, 2014 FC 66 [*Abel*].

1. *Did the referee err in agreeing to hear the respondent's appeal?*

[21] The applicant submits that the referee did not have jurisdiction to hear the appeal because the respondent had not deposited the amount required by the CLC. The respondent was supposed to pay $6,730.68 less the deductions authorized by subsections 251.1(2) and 254.1(2) of the CLC. However, the respondent deposited only $3,624.46, meaning that the deductions equalled $3,106.18 (approximately 46%). Under the statutory requirements, this amount is abusive and disproportionate.

[22] The respondent submits that the $3,624.46 deposited was sufficient. The amount deposited was justified by the deductions, which were governed by the CLC. The adequacy of the deposit was recognized by Inspector Blanchette, who granted leave to appeal to the referee. The respondent refers the Court to the cheque stub, which is consistent with the required legal deductions.

2. Did the referee err in finding that the applicant's action was time-barred?

[23] The applicant relies on *Delaware*, decided by the Federal Court and upheld by the Federal Court of Appeal, in support of the argument that no prescription period applies to the recovery of wages and other benefits under the CLC. This Court has also informed the parties that another decision rendered in *Ridke v Coulson Aircrane Ltd,* 2013 FC 1183, confirms this principle.

[24] The respondent agrees with the referee's decision and notes that he correctly relied on the provisions of the CCQ, citing *Abel*, in which Justice Scott (now of the Federal Court of Appeal) cited *St-Hilaire v Attorney General of Canada,* 2001 FCA 63 [*St-Hilaire*], and *Gingras v Canada*, [1994] 2 FC 734, [1994] FCJ No 270 [*Gingras*]. The referee also noted that his colleague Mark Abramowitz had distanced himself from *Delaware* in the referee's decision that was subject to judicial review in *Abel* (see referee's decision, paragraphs 14 to 20).

3. Was the prescription period interrupted by the fact that it was impossible for the applicant to act?

[25] The applicant is challenging the referee's decision by submitting that the latter erred in finding that it was not impossible for the applicant to act within the meaning of article 2904 of the CCQ. It was impossible for him to act earlier on account of his post-traumatic stress, diagnosed by three different doctors between 2012 and 2013, and his strong fear of Mr. Dallaire (counsel for the respondent), in accordance with *Gauthier v Beaumont*, [1998] 2 SCR 3 at paras 67, 78 and 82 [*Gauthier*]. He could not act before obtaining his Canadian citizenship on July 16, 2013, for fear of being sent back to France. The applicant feared for his physical safety as well. On top of that, his post-traumatic stress prevents him from having legal representation because he avoids situations of powerlessness that might remind him of the trauma he experienced in Chibougamau.

[26] The respondent argues that the referee correctly dismissed the applicant's allegations that it was impossible for him to act before August 2013. The multiple examples provided in support of the referee's findings on this point were reasonable.

4. Did the referee breach procedural fairness by refusing to admit the medical report (November 5, 2014, page 147, Applicant's Record) that the applicant sought to file on the morning of the hearing?

[27] The applicant argues that the referee should have allowed him to file the report from Dr. Jacques Séguin dated November 5, 2014, on the morning of the hearing. That decision caused him irreparable harm.

[28] The respondent objected to that report, and now submits that the referee, who controls the proceedings and evidence, was correct to sustain the objection because, on the one hand, the respondent could not cross-examine the physician, who was not present at the hearing, and, on the other hand, it was taken by surprise by the applicant's request on the morning of the hearing.

5. Is the prescription period established by the referee subject to the doctrine of reasonable accommodation?

[29] The applicant argues that, in his memorandum, the reasonable accommodation argument is merely incidental to the three-year period designated by the referee. He criticizes the referee for failing to explain to him why he was not given reasonable accommodation in bringing his action in August 2013.

[30] The respondent alleges that this issue was never discussed before the referee and that, in any case, the doctrine of reasonable accommodation is not applicable to this case.

V. Analysis

1. Did the referee err in agreeing to hear the respondent's appeal?

[31] The Court notes that the referee's decision contains no reference to the applicant's objection to the respondent's appeal on grounds of an insufficient deposit. At the hearing, the applicant submitted that only a photocopy of the respondent's cheque had been filed in evidence. The respondent submits that the deduction calculations were part of the evidence, referring the Court to page 22 of its record. This is confirmed by the referee at page 10 of his decision. Moreover, no tax expert testified in support of the applicant's calculations, and the references he used for his own calculations are not applicable.

[32] The Court finds it somewhat odd that the applicant himself has filed in his record the deduction calculations performed by the respondent (page 64). Another thing that the Court finds perplexing is the fact that the applicant, in his submissions, denies having received the letter from Inspector Blanchette of July 25, 2014 (pages 25 to 30, Respondent's Record), in which she replied [TRANSLATION] "yes" to the question [TRANSLATION] "Were the deductions in accordance with subsection 254.1(2)", and which stated on the following line, [TRANSLATION] "however, the complainant claims that the deductions withheld by the employer (P-7), 46% of the established amount, are abusive".

[33] This letter of July 25, 2014, was received by the employer and its legal counsel but not by the applicant? Yet the applicant's name and up-to-date address appear on the first page. Moreover, on August 11, 2014, he received from the inspector a confirmation of his objection to the employer's appeal. This email was in response to a telephone call from the applicant to the

inspector, but was it also in response to the letter of July 25 in which it was mentioned that the deductions were withheld in accordance with subsection 254.1(2)?

[34] In any event, the referee did not address this issue. Did he take for granted that the deductions were appropriate upon examination of the inspector's letter of July 25, 2014? Did he find that the applicant had not made a separate appeal? Was he satisfied that the deductions were legal? The Court does not have the answers to these questions. Regardless, if the applicant's claim had not been declared time-barred, he could have made his submissions and recovered the allegedly illegal amounts from the tax authorities.

[35] The case law establishes that a decision-maker is not required to address each of the arguments raised by the parties. In light of the referee's decision as a whole, this issue is not determinative, so the Court cannot find in the applicant's favour.

2. Did the referee err in finding that the applicant's action was time-barred?

[36] The referee decided that a prescription period of three years applied to the case because it was a private dispute that had originated in Quebec. His reasoning is very well articulated at paragraphs 13 to 22 of his decision. He carefully analyzed cases from this Court rendered in provinces other than Quebec. In particular, he relied on the decision of Justice Scott (now of the Federal Court of Appeal) in *Abel*, in which *St-Hilaire* and *Gingras* are cited, to find that the CCQ prescription period applies to this case.

[37] There is no error in this reasoning. The Court is satisfied that the referee was correct in law in holding that the three-year prescription period applied.

3. Was the prescription period interrupted by the fact that it was impossible for the applicant to act?

[38] After explaining in his decision why the CCQ prescription period was applicable, the referee asked whether it had indeed been interrupted, given the applicant's allegation that he had not been able to act before bringing his action in August 2013.

[39] In his decision, the referee sets out his reasons at paragraphs 27 to 33 and 38 to 45 for rejecting the appellant's claim that he had been unable to bring his action before August 2013. This Court does not intend to reproduce all of the various events on which the referee based his decision to reject the applicant's argument that the prescription period had been interrupted. A few examples will suffice to justify the referee's finding: the applicant's trips from Chibougamau to Gatineau, the signing of a lease in Gatineau, a job search after his resignation on June 21, 2010, his work at Red Lake and his claims to the CSST and CLP.

[40] *Gauthier*, cited by the applicant in support of his arguments, is not useful because the facts in that case bear no resemblance to the facts in this case.

[41] The Court therefore declares that the referee correctly rejected the applicant's arguments on this point.

4. Did the referee breach procedural fairness by refusing to admit the medical report (November 5, 2014, page 147, Applicant's Record) that the applicant sought to file on the morning of the hearing?

[42] Paragraphs 34, 35 and 36 of the referee's decision specifically address this issue. Having reviewed the medical report of November 5, 2014, and faced with the respondent's formal objection, the referee found in favour of the respondent that the document was inadmissible because no prior notice had been given and the respondent was therefore unable to cross-examine the physician who had signed the certificate.

[43] In his letter to the parties on November 6, 2014, the referee wrote that the hearing would take place on November 24 and 25, 2014, at the Longueuil Courthouse, as requested by the applicant. He also advised them that all of their witnesses must be present and that they must have three copies on hand of any documents not yet filed (page 51, Applicant's Record).

[44] The applicant explains that he had not asked his physician to come and testify because he did not want to cause him to lose a day. Furthermore, by remaining in Gatineau, his physician had potentially saved somebody's life by giving advice preventing that person's suicide.

[45] The Court finds that the referee's decision is reasonable in the circumstances. The applicant's allegation that a suicide was prevented is speculative at best. The referee was correct not to accept as evidence the medical certificate of November 5, 2014. The applicant was aware no later than November 6 that he had to ensure that this witness would appear at the hearing, but he did not do so.

5. Is the prescription period established by the referee subject to the doctrine of reasonable accommodation?

[46] The applicant submits that the reasonable accommodation argument is merely a supplementary reason to challenge the referee's decision. He criticizes the referee for failing to explain why this concept is not applicable to this case. The respondent submits that this argument was not raised and that it is not applicable to this case in any event.

[47] The Court has no transcript of the hearing of November 24, 2014. In any case, even if the applicant did question the referee on this point, the latter had no obligation to decide the issue because, according to this Court, the concept is not applicable here. The Court believes that the applicant's reasonable accommodation argument is more applicable to his allegation that his circumstances left him unable to bring his action any earlier. The Court has already addressed that issue.

[48] At the Court's suggestion, the parties discussed the issue of costs in the form of a lump sum to be awarded to the successful party. The applicant proposed $7,000, while the respondent proposed $3,000.

[49] In exercising its discretion, the Court finds that an amount of $3,000 is reasonable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review be dismissed;

2. The applicant shall pay the respondent a lump sum of $3,000 in costs.

"Michel Beaudry"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-315-15
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DATED:	OCTOBER 2, 2015

APPEARANCES:

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