Date: 20070517

Docket: T-1875-06

Citation: 2007 FC 530

Ottawa, Ontario, May 17, 2007

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

AYR MOTOR EXPRESS INC.

Applicant

and

MERRILL MCKAY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] If a person wants to keep a job, it is never a good idea to tell the boss that he's an idiot. This is a particularly worthy rule for an employee with a less than stellar employment record. Such was the situation facing Mr. McKay when he was summarily dismissed on February 20, 2006.

[2] The question facing Canada Labour Code Adjudicator, Christine A. Fagan, Q.C. (the Adjudicator), was whether Mr. McKay's obviously objectionable behaviour constituted grounds for termination for cause. Following a hearing at Woodstock, New Brunswick on September 21, 2006,

the Adjudicator ruled that Mr. McKay's termination was not lawful and it is from that decision that this application for judicial review arises.

Background

[3] Mr. McKay was hired as a truck driver by the Respondent, Ayr Motor Express Inc. (the Company), in November 2003. During his relatively brief tenure, he was disciplined for falling asleep at the wheel causing the total loss of the Company tractor and trailer and, later, for taking two weeks of unauthorized leave. For each of those incidents, he received a formal letter of reprimand. Although each of the reprimands indicated that similar behaviour in the future would not be tolerated, neither contained a warning of the possibility that he could be terminated.

[4] It is undisputed that Mr. McKay left Inglis, Ontario on February 18, 2006 with a load bound for Winnipeg. From there, he had been dispatched to Calgary. Once in Winnipeg, Mr. McKay was legally required to rest (called a re-set) either for 24 hours for further driving in Canada or 34 hours for driving in the United States. Mr. McKay testified that he had arranged with the Company dispatcher, Toby Gerard, for a 34-hour re-set to permit him to drive in the United States if required after Calgary.

[5] The President of the Company, Joe Keenan, was unhappy when he found out that Mr. McKay had not left Winnipeg as had been initially planned. Mr. Keenan called Mr. McKay several times on February 20th and, when they finally spoke, an argument ensued. In the course of that argument Mr. McKay called Mr. Keenan an idiot several times. Needless to say, Mr. Keenan was

not impressed and he told Mr. McKay to remove his personal effects from the truck and to return to New Brunswick.

[6] Mr. McKay's employment with the Company was orally terminated by Mr. Keenan on February 20, 2006 followed by a letter of termination dated March 30, 2006. In addition to Mr. McKay's "insubordinate" conduct, that dismissal letter referred to Mr. McKay's earlier motor vehicle accident, to his unauthorized leave and to non-specific argumentative behaviour with Company dispatchers.

[7] Mr. McKay brought a complaint under Division XIV, Part III, of the Canada Labour Code, R.S.C. 1985, c. L-2, seeking financial compensation for unpaid severance. The Adjudicator found that Mr. McKay had been wrongly dismissed and awarded him one (1) month of salary in lieu of notice.

The Adjudicator's Decision

[8] The Adjudicator heard evidence from several witnesses including Mr. McKay and Mr. Keenan. She made a number of significant factual findings largely favouring Mr. McKay. Those findings included the following:

(a) the telephone exchange of February 20, 2006 between Mr. Keenan and Mr. McKay was heated and Mr. Keenan was "infuriated" when he learned that Mr. McKay had not left Winnipeg on time;

(b) Mr. McKay had made a new arrangement with the Company dispatcher for a longer Winnipeg re-set and Mr. Keenan had no knowledge of that change when he called Mr. McKay in Winnipeg;

(c) the Company witnesses did not place much emphasis on Mr. McKay's motor vehicle accident and one of them stated that he was not the first driver to have an accident;

(d) the Company's allegations of unprofessional or argumentative conduct were supported by "little evidence of substance" and were mostly "unsubstantiated";

(e) The events relied upon by the Company prior to the February 20, 2006 argument did not constitute "a progression of corrective discipline sufficient to view [that later dispute as] a culminating incident". Furthermore, the Company had failed to meet its onus to amplify those earlier incidents or to "link them in a meaningful or progressive manner";

(f) Mr. McKay did not refuse to drive to Calgary and therefore did not ignore an order to do so;

[9] It was largely against the above referenced findings that the Adjudicator considered the legal significance of the events of February 20, 2006 placing it into the following context:

> Mr. Mckay was insubordinate to his employer by calling him an idiot on several occasions in the February 20, 2006 telephone conversation. I note that while Mr. Mckay acknowledged he made a poor choice of words in that exchange, there was no evidence of a direct apology to Mr. Keenan. However, my earlier finding of fact substantiates Mr. Mckay's understanding of his arrangement with the Company dispatcher on February 18th for the Calgary trip. The Employer is not correct when it alleges that Mr. McKay refused to

> do the trip. I have therefore considered the context and misunderstandings underlying the telephone exchange. Tempers were acute on both sides and this was worsened by the differing knowledge of the circumstances that each party was operating on. It is a given that drivers must follow directions and in Mr. Bard's words cannot "self-dispatch".
>
> [Quoted from original text]

The Adjudicator concluded by holding that the Company's termination of Mr. McKay was an "excessive response".

Issues

[10] (a) What is the appropriate standard of review?

(b) Did the Adjudicator commit any reviewable errors in her decision?

Analysis

[11] For the reasons outlined below, I have concluded that the determinative issue resolved in this case by the Adjudicator was one of mixed fact and law – that is, it was a question about whether the proven facts of Mr. McKay's conduct satisfied the legal standard for dismissal for cause. The standard of review for such issues is reasonableness simpliciter: see *North v. West Region Child and Family Services Inc.*, [2005] F.C.J. 1686, 2005 FC 1366 and *Dynamex Canada Inc. v. Mamona* (2003), 305 N.R. 295, [2003] F.C.J. No. 907, 2003 FCA 248, at para. 45.

[12] Counsel for the Company argued that the proven events of February 20, 2006, including the mitigating factors identified by the Adjudicator, could lead to no other conclusion but that Mr. McKay's termination for cause was justified. He characterized this as an issue of law and not one of mixed fact and law.

[13] While there may well be forms of employee misconduct that can never be excused (theft comes to mind), I do not accept that the kind of conduct exhibited by Mr. McKay on February 20, 2006 would inevitably constitute just cause for dismissal. Such behaviour is subject to explanation and here the Adjudicator found enough mitigating evidence to reduce the gravity of Mr. McKay's misconduct below the termination threshold. The Adjudicator, of course, had the benefit of hearing the witnesses – a distinct advantage over the Court on judicial review. She found that Mr. McKay's objectionable remarks were delivered in the heat of the moment and in the course of an angry exchange of views. Mr. Keenan was described as infuriated when he placed the call and he was also found to be unaware of Mr. McKay's arrangement for a longer re-set in Winnipeg.

[14] Not every act of insolence by an employee will justify summary dismissal and it was not unreasonable for the Adjudicator to come to that conclusion on the strength of her factual findings. Indeed, the general rule appears to be that an isolated incident of insolent or disrespectful behaviour does not constitute cause for dismissal. This point is made by Harris on *Wrongful Dismissal*, looseleaf (Toronto: Thomson Canada Ltd., 2007) in the following passage at para. 6.12(c):

> However, dismissal for a single act of insubordination is comparatively rare in adjudications under the *Canada Labour Code*. More frequently, adjudicators have found "just cause" in a pattern of

> incidents of insubordination: *Donaghue v. Southwest Air Ltd*. (April 28, 1980) (Brent).

[15] The authorities also indicate that the level of appropriate discipline for such behaviour depends very much on the context giving rise to it. There may well mitigating circumstances that reduce the seriousness of an employee's behaviour: see *Newman v. ADM Milling Co.*, [2004] C. L.A.D. No. 448 and *Haldane v. Shelbar Enterprises Ltd. (c.o.b. Tool & Cutter Supply Co.)* (1997), 31 O.T.C. 78, [1997] O.J. No. 2295 (Ct. J. (Gen. Div.)). Given the contextual nature of this problem, the issue before the Adjudicator is, therefore, properly characterized as one of mixed fact and law for which judicial deference is owed.

[16] Counsel for the Company stated in argument that this was not a progressive discipline case. Nevertheless, he did not ever completely abandon his reliance on Mr. McKay's prior history of misconduct to support the termination decision. Suffice it to say that if the Company intended to rely upon the other matters leading up to a culminating incident on February 20, 2006, it had an obligation to give a clear and unequivocal warning to Mr. McKay that further misbehaviour could result in termination: see *Olson v. Richards Transport Ltd.*, [2001] C.L.A.D. No. 103, at para. 19. Here, no such warning of possible dismissal was extended to Mr. McKay and that appears to be the basis for the Adjudicator's holding that the Company had failed to link the disciplinary incidents "in a meaningful or progressive manner".

[17] There is Canada Labour Code authority to support the Adjudicator's approach to this issue including the decision in *Heaslip v. TST Overland Express*, [2004] C.L.A.D. No. 339 where the adjudicator held at para. 58:

> 58 It follows from the above that the Employer has failed in its burden of proof to establish a culminating incident which would justify the dismissal of the Complainant. The Employer did show that Mr. Heaslip had, in the past, been verbally abusive and/or inappropriate and/or excessively angry to drivers and customers on three occasions, as well as disrespectful and excessively angry with his Supervisor on one occasion. However, in each of these instances, the only punishment meted out by the Employer was the placing of a letter or note on Mr. Heaslip's personal file relating to the incident. There was no progressively severe discipline imposed upon the Complainant. In the absence of any acceptable evidence establishing a culminating incident, there can be no finding of just cause for dismissal. The "trigger" for the dismissal of Mr. Heaslip was the culminating incident of December 2, 2003 and the Employer failed to satisfy its burden of proof with respect to the allegations upon which it relied.

[18] This is a very clear situation where the Adjudicator's decision must be respected. She was dealing with an issue of mixed fact and law for which the standard of review is reasonableness. She heard the evidence from which she made reasonable factual findings. She then applied those findings to accepted legal principles of employment and dismissal and found Mr. McKay's termination to be unjustified. There is absolutely no basis for finding that the Adjudicator's decision cannot be supported on the record after a somewhat probing examination and, indeed, I would not be inclined to disturb her decision even if I had the right to do so.

[19] In the result this application for judicial review is dismissed with costs payable to the Respondent under Column IV.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed with costs payable to the Respondent under Column IV.

"R. L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1875-06
STYLE OF CAUSE:	Ayr Motor Express Inc v. Merrill McKay
PLACE OF HEARING:	Fredericton, New Brunswick
DATE OF HEARING:	May 7, 2007
REASONS FOR JUDGMENT AND JUDGMENT BY:	BARNES J.
DATED:	May 17, 2007

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