Date: 20070726

Docket: T-917-06

Citation: 2007 FC 780

Ottawa, Ontario, July 26, 2007

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

DR. NOEL AYANGMA

Applicant

and

TREASURY BOARD OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] If there is a lesson in this case, it is that one cannot steal from the employer and expect to retain the job. Dr. Noel Ayangma (Applicant), an employee of Health Canada, was alleged to have abused travel claims and been absent from work without permission. The abuse of travel claims amounted to allegations of fraud – being paid for travel which did not occur. His employment was terminated.

[2] An adjudicator (the Adjudicator) determined that the employer had proved most of the abuse of travel claims and further concluded that the employer had just cause for the termination. The Applicant had submitted no evidence to rebut the allegations that he had filed false travel claims; however, he has sought judicial review of the Adjudicator's decision and of the whole investigative process, principally on procedural grounds.

[3] The Applicant's Record and his oral argument were replete with allegations made against his superiors of suborning evidence, perjury and conspiracy. Added to these allegations were allegations against the Adjudicator which amounted to claims of bias, improper conduct and finally that of being a co-conspirator with the employer. None of these allegations had any basis whatsoever.

[4] On the substantive issue of whether the employer had grounds to conclude that the Applicant abused his travel claims, by engaging the fraud of claiming for trips which did not occur, the Applicant never availed himself of the opportunity, by taking the stand, to rebut each and every carefully detailed allegation made by the employer.

II. FACTUAL BACKGROUND

[5] The Applicant commenced working in January 1999 and was terminated in May 2004. He was required to travel frequently and he had a blanket authority to travel within the Atlantic Region. He lived in Charlottetown but reported to the Halifax office of Health Canada at the First Nations

and Inuit Health Branch (FNIHB). Prior to August 2003, the Applicant performed the duties, on an acting basis, of the Manager, Health Information & Analysis and E-Health Solutions.

[6] His acting position was taken over by a Ms. Hopkins through an exchange program with the Cape Breton Health Authority. The Applicant has obviously felt that this appointment was unfair and has alleged that the appointment was part of the conspiracy against him. He alleges that a number of misstatements about this appointment were made, none of which are relevant to whether the Applicant abused his travel claims.

[7] Ms. Hopkins, who was responsible for approving the Applicant's travel claims, found inconsistencies in his travel claims submitted to her. In the face of the Applicant's refusal to provide further information about those claims, Ms. Hopkins and the Director of Human Resources, Ms. Kitson, decided to review a number of the Applicant's past travel claims which had been paid.

[8] Independent of this local investigation, headquarters in Ottawa had already commenced an investigation of the Applicant's travel claims.

[9] After the Applicant was informed of the audit and of the information which the employer needed, he stopped coming to work claiming that he was sick. He provided a doctor's note recommending six weeks' leave for work-related stress.

[10] The Applicant met with the auditor, Mr. Cuthbert, for two days in November 2003 following which he was advised that there were numerous discrepancies uncovered in respect of his travel claims, use of his government cell phone, use of his government credit card and in respect of his leave and attendance records. He was then warned that he might be disciplined. Although he indicated that he would now like to return to work, he was suspended.

[11] The Applicant had a further interview with his employer in May 2004 at which he received a report (Report) that he had billed his employer $28,978.07 in travel expenses which he did not incur. The Applicant had a representative at that interview. He was informed that his employment was terminated.

[12] Pursuant to the *Public Service Staff Relations Act* and the applicable Collective Agreement, the matter of his termination was put before an adjudicator. There were 20 travel claims relied upon by the employer; the general allegation being that the Applicant claimed travel expenses but did not take the trips – that he claimed to be in one location for work but was elsewhere for personal reasons. There were nine days of hearings before the Adjudicator.

[13] The Adjudicator had to deal with several preliminary issues, some of which are relevant to this judicial review, either as to the points argued or as to the procedural difficulties encountered, and are summarized as follows:

- The Adjudicator dismissed the Applicant's allegation that the Adjudicator was biased because the Adjudicator had asked whether a document being produced by the Applicant had been stolen.
- The Adjudicator rejected the Applicant's attempt to submit an affidavit with 75 exhibits because the Applicant could not be cross-examined on it.
- He also dismissed the claim that the discipline meted out was void because the Applicant was denied union representation. The reason for dismissal was that the Applicant had been notified of his rights under the Collective Agreement to have a representative, if he so requested.
- The Applicant had made a broad disclosure demand which was, by agreement, reduced in scope. The Adjudicator, upon realizing that the Applicant had not received all the documents, suggested an adjournment to allow for disclosure. The Applicant stated that he had enough information to proceed and withdrew his request for disclosure.
- At the end of the employer's case, the Applicant stated that he would not give evidence to avoid delays and that he was tired. The Adjudicator advised him to seek advice on this matter. Since the Applicant persisted in his refusal to testify, the Adjudicator drew an adverse inference from his failure to give evidence.

[14] As to the merits of the Applicant's case, the Adjudicator made the following key findings:

- That the Applicant's contention that Ms. Hopkins received the job which should have been his and that the travel claims' issue had been fabricated to get rid of him was rejected. There was no evidence to support any such conspiracy.
- That the several versions of the audit reports of the Applicant's travel claim abuse were not particularly relevant. The important fact is that the Adjudicator's hearing was a *de novo* hearing and that Mr. Cuthbert's testimony formed the basis of the case, not any particular version of the audit reports on the travel claim abuse. It was recognized that one version contained an error as to the lack of authorization of the Applicant's attendance before a Parliamentary Committee.
- That the use of a comparison between cell phone records which recorded the location of calls made and received and the travel itinerary of the Applicant was a proper starting point (but not necessarily conclusive) as to the Applicant's true location on any particular day.

[15] The Adjudicator then went on to consider the pertinent documents, the Travel Expense Forms (TEF) and the Record of Travel Expenses (RTE) for various periods. I will summarize a few of the Adjudicator's findings below.

> July 27-August 1, 2003
>
> The RTE shows that he left Charlottetown at 3:30 on the 27th for Halifax and then to visit the Eel River Band in New Brunswick on July 30. He claimed $1,350.93 for this trip. His cell phone record shows that he was in Toronto on July 27. The phone was used in Halifax in the evening of the 27th and stayed in Halifax until early on the 30th. It was used in Charlottetown later that day. It does not appear that he ever went to Eel River. The evidence also includes an airplane ticket from Toronto to Halifax. The adjudicator concluded

that the grievor travelled from Toronto to Halifax, which is inconsistent with his RTE. His claim for travel from Charlottetown to Halifax on July 27 was false. He returned to Charlottetown on July 30, so his expenses for July 31 and August 1 were false.

July 15-18, 2003

The RTE shows that he left Charlottetown early July 15 to go to the Halifax office, he went to Eel Ground for July 16 and 17, and returned to Charlottetown on July 18. The claim was for $843.41. His cell phone shows that he returned to P.E.I. on July 16 and was there on the 17th and 18th.

When asked about these inconsistencies, the grievor told Mr. Cuthbert that he went to Eel Ground early and that the personal accommodation claimed was for his stay at home. Personal accommodation is meant to be used when an employee, while travelling, stays with friends or family rather than a hotel, and is not meant to be used when an employee simply stays at home. The adjudicator concluded that the claims for July 16 and 17 were false.

June 23-26, 2003

The RTE shows a trip from Charlottetown to Halifax on the 23rd. On the 25th, he travelled to Buctoche, New Brunswick, and then to Moncton and Indian Island on June 26. He returned to Charlottetown on the 26th as well. His cell phone was in Charlottetown on June 24 in the evening and remained there during the day on the 25th. In the evening, he made calls from Moncton, and later from Toronto and Hamilton. The phone remained in Ontario until the 28th and then moved east to New Brunswick. It was in Charlottetown on June 29 at night.

Mr. Cuthbert's notes show that the grievor stated that the personal accommodation claimed was for a stay at home and a vacation in Hamilton. Mr. Cuthbert confirmed at the hearing that the grievor admitted to taking vacation days on the 25 and 26th of June. The expenses claimed from June 24-26, 2003 were false.

This is but a small sample of the Adjudicator's many findings against the Applicant.

[16] The Adjudicator then concluded that the suspension was proper and not premature as it was only invoked when the Applicant insisted on returning to work.

[17] The Adjudicator found that although not all of the employer's allegations had been established, the Applicant had made false claims totalling $19,586.26.

[18] As to mitigating factors, the Adjudicator considered that the five years of discipline free time did not outweigh the Applicant's total lack of remorse even in the face of his own acknowledgement that he was at home while claiming for accommodation elsewhere. His failure to deny the allegations was particularly telling.

[19] The Adjudicator accepted that these instances were neither honest mistakes nor inflated claims for trips that had occurred. Rather than accept responsibility, the Applicant alleged he was the victim of a conspiracy or vendetta. The absence of remorse and the challenges to every aspect of the investigation were sufficient factors to cause the Adjudicator to conclude that there were no extenuating circumstances that would justify something other than termination.

[20] This judicial review has had a difficult history. The observations of other judges are pertinent to the Applicant's position in this judicial review which is to raise all manner of procedural issues not focused on the merits of the actual allegations.

[21] Justice Sharlow, in awarding costs against the Applicant, said:

> …it is an abuse of process to make an unsubstantiated allegation of perjury. Such an abuse of process may justify an award of costs on a solicitor and client basis. In this case, however, given the highly emotional circumstances, it seems more appropriate simply to fix the costs of this motion at a higher than normal scale, in the hope that Dr. Ayangma will be deterred from making further unsubstantiated allegations of this nature. Costs of this motion are fixed at $3,000, inclusive of fees, disbursements and GST, payable by Dr. Ayangma to the respondent forthwith.

[22] Justice Hugessen, in dismissing an appeal from Prothonotary Aronovitch in which she refused a motion to amend the Notice of Application to allege perjury on the grounds (in part) that the allegation would obscure the real question, stated:

> 12**.** **…** The prothonotary's description of the issues dealt with by such evidence as "peripheral" is entirely correct, it being the case that the matters dealt with at the interviews in question did not form part of the employer's case to the effect that the applicant had made false travel claims. Merely showing that a witness has been mistaken on some point in his evidence which is not relevant to the questions in issue does not establish that he has "perjured" himself. The pursuit *ad nauseam* of contradictions on matters wholly collateral to the main issues does not lead to the just, most expeditious and least expensive resolutions of the real matters in controversy. If I were deciding the matter *de novo* I would reach the same conclusions as the prothonotary.
>
> **…**
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> 15. Regrettably, Justice Sharlow's hope has not been realized. Not only has the applicant persisted in his abusive conduct but the unnecessary length and complexity of his materials justifies an even higher award of costs which I fix at $5,000

The appeal of Justice Hugessen’s decision was abandoned.

III. ANALYSIS

[23] The Applicant has raised a number of procedural issues involving the investigation process, the grievance process and the adjudication process as well as allegations of error of law and fact and entitlement to *Charter* remedies.

The two principal issues are:

(a) Was there a breach of procedural fairness because of inadequate disclosure, Crown bad faith and Adjudicator bias?

(b) Was the decision, that the Applicant's suspension and termination was warranted, patently unreasonable?

A. *Standard of Review*

[24] The courts have traditionally accorded considerable deference to labour boards and arbitrators/adjudicators in respect of the merits of a case. Issues relating to terminations and suspension are at the very heart of an adjudicator's expertise. The standard of review is patent unreasonableness (*Gale v. Canada (Treasury Board)*, 2006 FCA 117).

The other areas of challenge, procedural fairness and jurisdiction, are subject to a standard of correctness.

B. *Procedural Fairness*

[25] The Applicant placed great emphasis, both in writing and orally, on his claim that he was denied full and proper disclosure. He relies on *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 and similar cases to argue that he was entitled to very broad disclosure.

[26] Quite part from any issues as to whether disclosure rights exist under grievance procedures pursuant to the Collective Agreement, the fact remains that the Applicant waived his rights to further and better disclosure. As reported in the Adjudicator's decision:

> I advised the parties that these circumstances lead me to conclude that the proceedings should be adjourned so that full disclosure could be obtained by the grievor. The grievor then stated that he had sufficient information to proceed and that he wanted to proceed. He withdrew his application for disclosure.

[27] In argument before this Court, the Applicant says that the Adjudicator never offered to adjourn, that he never withdrew his application for disclosure and that it was because of non-disclosure that he did not testify – not because he wanted to avoid delays and was tired. In fact, the Applicant points to this "misstatement" as further evidence of the conspiracy and the Adjudicator's participation in it.

[28] The Court is not persuaded by this submission. There is no evidence of a conspiracy, much less of the Adjudicator's involvement in it. There is affidavit evidence which confirms what the Adjudicator described and counsel for the Respondent who was counsel at the hearing confirmed this evidence in his role as an officer of the Court.

[29] The events being as described by the Adjudicator, the Applicant cannot complain about the adequacy of disclosure even if there originally had been a basis for complaint.

[30] The Applicant argues that the Adjudicator was biased because he failed to determine whether an audio tape of an interview was truly inaudible as claimed by the Respondent. The Applicant has repeatedly claimed that he was entitled to the interview record which consisted of two taped sessions. For some reason, one day's tape was inaudible. Firstly, there is no evidence that this is false; secondly, the Adjudicator was in no position to deal with a tape that no longer existed; and thirdly, the tape is peripheral to the true issues in this case. The adjudication was a *de novo* review where the burden of proof rested on the employer. The issue of the tape had been dealt with by Prothonotary Aronovitch and Justice Hugessen as irrelevant to the true issues in this case.

[31] There is no basis for the attack on the Adjudicator. The Applicant's position is an obfuscation of the facts and a reliance on unfounded procedural challenges to avoid the central issue of the evidence against him concerning abuse of his travel claims.

C. *Reasonableness of Adjudicator's Decision*

[32] Some of the Applicant's arguments under this issue were grouped under the procedural issues in respect of disclosure and refusal to testify.

[33] The Applicant never substantially challenged the employer's evidence of falsification of travel claims.

[34] The Adjudicator based his decision on evidence of telephone records which, at least *prima facie*, indicated where the Applicant was at any given time, and on the evidence the Applicant was not where he said he was, e.g. travelling from Edmonston to Moncton when he was in Federal Court in P.E.I. on personal matters. Absent any rebuttal evidence, it was not patently unreasonable for the Adjudicator to accept the employer's evidence.

IV. CONCLUSION

[35] For these reasons, this judicial review will be dismissed with costs.

[36] Given that the Applicant persisted in the conduct of this judicial review in a manner which had already been criticized by Justices Sharlow and Hugessen, costs should be increased to the highest of the range of costs under Column V of the Court's tariff.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review will be dismissed with costs as described in the Reasons for Judgment.

"Michael L. Phelan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-917-06
STYLE OF CAUSE:	DR. NOEL AYANGMA and TREASURY BOARD OF CANADA
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	July 4, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	July 26, 2007

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