Date: 20080219

Docket: T-522-07

Citation: 2008 FC 209

Ottawa, Ontario, February 19, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

WALTER OLSON

Applicant(s)

and

ATTORNEY GENERAL OF CANADA

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by Dr. Walter Olson from an Adjudicator's decision made under section 92 of the *Public Service Staff Relations Act*, R.S.C 1985, c. P-35 (Act). By that decision, Dr. Olson's grievance concerning his layoff from the Canadian Food Inspection Agency (Agency) was dismissed. On this application, Dr. Olson contends that the Adjudicator erred by failing to apply the appropriate burden of proof and by incorrectly co-mingling the issues pertaining to disciplinary and non-disciplinary terminations. He also asserts that the Adjudicator erred by deferring to the Agency on the issue of whether it had complied with the provisions of the collective agreement dealing with retraining.

I. Background

[2] Dr. Olson had been an employee of the Agency for 19 years when he was told that his position as an Animal Care Veterinarian and Theriogenologist in the Animal Diseases Research Laboratory near Lethbridge was declared surplus.

[3] Under the terms of the Employment Transition appendix of the collective agreement, the Agency had a duty to look for alternate employment opportunities for Dr. Olson. If a vacant position was available, the Agency also had an obligation to facilitate Dr. Olson's appointment to it by providing appropriate retraining if necessary. During such retraining, a surplus employee like Dr. Olson would continue to be employed by the Agency but under the terms of the prior appointment. The collective agreement also provides that in cases where retraining was not successful, the surplus employee could be laid off. In other words, the new appointment was not effective until the employee successfully completed the retraining plan.

[4] The record indicates that the Agency did identify a potential employment opportunity for Dr. Olson as the veterinarian-in-charge at a meatpacking plant in Fort MacLeod, Alberta. This new position carried responsibilities that were very different from those pertaining to Dr. Olson's work in the Lethbridge laboratory. A six-month retraining plan was therefore created which, for the most part, involved supervised, hands-on technical training. This plan was reduced to writing and signed by the Agency and by Dr. Olson.

[5] The Adjudicator summarized Dr. Olson's retraining experience in the following passage from his decision:

> [23] The grievor accepted the position at the Fort MacLeod plant and engaged in the training plan. He had fully completed the first four months of the training program by April 23, 2004. The training program consisted of his shadowing Dr. Meszaros on the job at the Maple Leaf pork plant in Brooks. Dr. Meszaros was familiar with the HR and operational issues at the Fort MacLeod plant, as she was handling leave applications from that plant and had worked there in an *ad hoc* capacity. The grievor engaged in self-study of modules of the training programs.
>
> [24] The grievor then shadowed Dr. Fletcher, the supervising VM-02 veterinarian-in-charge at the Fort MacLeod plant, on the job for about four weeks, commencing on April 21, 2004. He was then on his own to run the plant as the acting veterinarian-in-charge. The grievor found the work at the Fort MacLeod plant to be difficult. There was a heavy workload and he was routinely working 50 hours per week. He had concerns about the plant's compliance with regulations. In some areas the plant was deficient, and in other areas its operation was marginal. The grievor had extreme anxiety about being left on his own, as he was unfamiliar with the audit and paperwork requirements at the Fort MacLeod plant. Dr. Fletcher came back on one occasion to assist him with the month-end reports.
>
> [25] Further, the Fort MacLeod plant appears to have had some HR difficulties. One of the difficulties was that there had not been much continuity in the VM-02 position and that the position had been filled on a rotational basis out of Lethbridge. There were difficulties in the relationships among the inspectors, the *ad hoc* supervising veterinarians who visited on a rotational basis and staff at the plant. At the time of the grievor's arrival, the plant was staffed with five inspectors. However, one inspector retired and was not replaced. The grievor found the work environment to be tense and lacking in collegiality. There were instances of insubordination by inspectors. It was the grievor's view that the lack of a permanent VM-02 at the plant had created a situation where the inspectors became self-supervising. There were conflicts between the inspectors due to differing personalities. The grievor felt that he had little or no support from Mr. Hwozdecki, who office is located in Calgary. The grievor found Mr. Hwozdecki difficult to contact. He

> was given no training in how to handle HR issues that could arise in the plant.
>
> [26] Dr. Fletcher described the inspectors as extremely resistant to taking direction from visiting veterinarians, particularly about the requirement to have two inspectors on the floor during processing. Dr. Fletcher described the HR situation at the Fort MacLeod plant as "a bit of a mess and the inspecting staff were difficult and there was a lack of support from HR and the inspection manager." He described the VM-02 position at the Fort MacLeod plant as a very busy VM-02 position, which he enjoyed.
>
> [27] It is apparent from the evidence that the grievor had no difficulties with the technical aspects of the VM-02 veterinary work. Dr. Meszaros noted that the grievor appeared to be unenthusiastic about the work.

[6] There seems to be little doubt that Dr. Olson's transition to the proposed new position in Fort MacLeod was far from smooth and that a large part of the difficulty had to do with his inability to deal effectively with the challenging labour relations environment at that location. The problems at Fort MacLeod were well known to the Agency. Included in the documentary record are references to the unfair distribution of work, inappropriate shift changes, arguing amongst the inspectors and insubordinate conduct by inspection staff directed at the veterinarian-in-charge. Dr. Olson was sufficiently bothered by these problems that he submitted a request to take an unpaid leave of absence but his request was denied by the Agency. For a time he was also away from work on sick leave.

[7] Shortly after the completion of the retraining program, the Agency determined that Dr. Olson was not suitable for supervisory employment. The Agency wrote to Dr. Olson on July 20, 2004 advising him that he had failed to demonstrate the required level of competency for

supervision and that he would not be appointed as the veterinarian-in-charge at Fort MacLeod. In the result, he reverted to surplus status and was subsequently laid off.

[8] Dr. Olson initiated a grievance on October 13, 2004 seeking to be restored to appropriate re-employment. His grievance was framed as follows:

> On approximately Sept. 14, 2004, I received a letter from my employer advising me that my services were no longer required. I believe that this action is disciplinary and was undertaking in bad faith. Furthermore, the actions of the Employer in relation to my employment status constitute unfair and unjust termination of my employment. All of the Employer's actions in this regard violate Appendix B of the Collective Agreement, Art. D.12 of the Collective Agreement and section 13 of the C.F.I.A. Act.

II. The Process Below

[9] In the adjudication below, Dr. Olson's grievance appears to have been somewhat oddly characterized and presented. Considerable emphasis was placed on the Agency's decision to lay off Dr. Olson. The layoff was asserted to be in violation of the collective agreement or carried out as disguised discipline. The Agency, in turn, took the position that Dr. Olson's layoff was not justiciable unless it was proven to be disciplinary in nature.

[10] Little if any evidence was tendered by Dr. Olson to show that the layoff was disciplinary and the Adjudicator reasonably found that it was not so motivated. [1]

---

[1] This point is no longer in issue.

[11] Dr. Olson also contended that the adequacy of the training program was in issue and it is apparent that some evidence was put forward in support of that position. However, instead of advancing this issue as a simple point of contractual interpretation, Dr. Olson argued that the Agency had a general legal duty to afford a training program to him equivalent to that which would be required before effecting a performance-based discharge.

[12] The Agency responded by asserting that the Adjudicator had no authority to consider the adequacy of the training program because such matters fall solely within its statutory mandate to organize the workplace and also because Dr. Olson's grievance was not adequate to support his allegation of a contractual breach.

[13] The Adjudicator held that Dr. Olson's grievance was adequately framed to support the allegation of a breach of the collective agreement and he accepted jurisdiction to rule on that matter under section 92(1)(a) of the Act. Nevertheless he dismissed Dr. Olson's grievance on the basis that "the adequacy of a training program is a matter that is purely within the purview of the Agency". The pertinent passage from the Adjudicator's decision on this issue is the following:

> [97] In my view, the adequacy of a training program is a matter that is purely within the purview of the Agency. The *PSSRA* does not remove the agency's right or authority to determine its organization, to assign duties or to classify positions. Dr. Turner, in my view, appears to have put careful effort into determining what training the grievor needed in order to be successful in a transition from a position as a research scientist to a position as veterinarian-in-charge of a meat packing plant. The grievor has not established a breach of the collective agreement.
>
> [98] The inadequacy of a training program was argued as a basis for finding a disciplinary element and rejected in *Earle*. This argument,

> however, is difficult to make in light of the authorities. In light of Note 15 in *Rinaldi*, where an employee fails to prove that the conditions required to terminate a position were not present, and the employer's decision is unchallenged, it may be difficult to prove disguised discipline based on inadequate training. *Earle* was a rejection-on-probation case from a central government department where the former PSEA applied and is of persuasive value only. I note that *Rinaldi* was a case that involved the former PSEA and the layoff provisions of that Act (section 29) and is also of persuasive value only.
>
> [99] As a theoretical possibility, an inadequate training program may be some evidence of disguised discipline. It may be part of a set-up designed to ensure that the employee fails and then is terminated. I cannot say, in looking at the training plan agreed to by all parties, that it was so grossly inadequate as to constitute a sham or camouflage for discipline. I see no basis for me to conclude that it was part of a set-up designed to ensure that the grievor failed. The contrary seems to be true; Mr. Hwozdecki would have liked the grievor to succeed in a training plan, as it would have solved the problem at the Fort MacLeod plant.

[14] It is with respect to this aspect of the Adjudicator's decision that this application for judicial review arises.

III. Issue

[15] Did the Adjudicator err by holding that the adequacy of the Agency's Employment Transition training program was a matter that fell solely within the Agency's discretion to manage the workplace and, absent disciplinary motivation, could not be the subject of adjudicative relief?

IV. Analysis

[16] Both of the parties took the position before me that the standard of review was that of patent unreasonableness. While that is undoubtedly correct for challenges to the Adjudicator's factual findings, I do not agree that it applies to the issue framed above. The refusal by the Adjudicator to determine whether the Agency had breached the collective agreement turns on a point of law which effectively goes to the Adjudicator's jurisdiction. For such an issue, the standard of review is correctness: see *Canada (Attorney General) v. Frazee*, 2007 FC 1176, 161 A.W.C.S. (3d) 747 at paras. 14 and 15.

[17] I do not agree that the adequacy of the retraining program created under the transition provisions of this collective agreement was a matter purely within the purview of the Agency and that the only basis for the Adjudicator to look behind that program was to determine whether it was surreptitiously set up to fail.

[18] The Employment Transition provisions of the collective agreement impose significant positive duties on the Agency to provide "reasonable" and "appropriate" retraining with a view to facilitating the continued employment of its surplus employees. Article 1.1.1 of the Employment Transition Appendix requires the Agency to give "every reasonable opportunity" to surplus employees to continue their careers; Article 4.1.1 stipulates that the Agency "shall make every reasonable effort to retrain" its surplus employees; Article 4.1.3 allows for up to two years of retraining; and, finally, Article 4.2.2 imposes upon the Agency the responsibility "for ensuring that an appropriate retraining plan is prepared".

[19] While I agree with the Adjudicator that the final determination as to whether a retrained employee is suitable for re-appointment is the employer's judgment call I do not accept that it is outside of the Adjudicator's mandate to determine if a particular retraining program fulfilled the employer's contractual obligations to a surplus employee. This distinction was recognized by the Supreme Court of Canada in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] S.C.J. No. 2, where Justice John Major noted at para. 32:

> 32 Generally management has a residual right to do as it sees fit in the conduct of its business. This right is subject to any express term of a collective agreement or human rights and other employment-related statutes providing otherwise: see *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 28. Here, art. 7.01 affirms the respondent's broad right to hire and select workers. However, this recognition is prefaced by the clause "Subject only to the terms of this Agreement".

[20] I accept that the burden of showing that the employer breached the collective agreement rests upon the affected employee. Nevertheless, the Adjudicator has a responsibility to decide, on the evidence, whether the retraining program was "reasonable" and "appropriate" to permit the employee to meet the expectations for the new position. Such a retraining program is not expected to be perfect but the Adjudicator must assess whether the program was objectively adequate, in the circumstances, to facilitate the reappointment of the surplus employee. In short, when an employer makes specific contractual promises to its employees of the sort made here by the Agency, it does not enjoy an unfettered, unilateral discretion to determine how those promises will be executed.

[21] Here, the Adjudicator identified a "gap" in the training program dealing with labour relations management issues. He also noted that the Agency essentially adopted a "sink or swim" approach to the serious labour relations problems confronting Dr. Olson at Fort MacLeod. Whether Dr. Olson bore some responsibility for identifying the weaknesses in the retraining program does not afford absolution to the Agency if, as it appears, the Agency was also aware of those difficulties and did nothing to address them.

[22] In summary, I am satisfied that the Adjudicator erred in law by holding that he was not required to determine whether the Agency breached the collective agreement in the design and implementation of the retraining program afforded to Dr. Olson. The employer had a contractual obligation to provide "reasonable" and "appropriate" retraining to Dr. Olson and which could have led to his appointment at Fort MacLeod. Whether it did so has yet to be determined. In the result, Dr. Olson's grievance must be redetermined by a different adjudicator on the merits.

[23] In the result, this application for judicial review is allowed with costs payable to the Applicant under Column III.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is allowed with the matter to be remitted to a different adjudicator for redetermination on the merits.

THIS COURT FURTHER ADJUDGES that the Applicant shall have his costs payable under Column III.

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-522-07
STYLE OF CAUSE:	WALTER OLSON v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	January 17, 2008
REASONS FOR JUDGMENT AND JUDGMENT BY:	Mr. Justice Barnes
DATED:	February 19, 2008

APPEARANCES:

Mr. Dougald Brown Tel: 613-238-8080 Fax: 613-238-2098	FOR THE APPLICANT
Mr. Simon Kamel Tel: 613-952-3405 Fax: 613-954-5806	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne LLP 1900 – 66 Slater Street Ottawa, Ontario	FOR THE APPLICANT
Department of Justice Treasury Board Portfolio Legal Services 5th Fl., West Tower 300 Laurier Ave. West Ottawa, Ontario	FOR THE RESPONDENT