

Date: 20090320

Docket: T-126-07

Citation: 2009 FC 293

Ottawa, Ontario, March 20, 2009

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

DEBBIE SOUCHEREAU

Respondent

REASONS FOR ORDER AND ORDER

[1] In the present Application, the Applicant (CN) challenges the jurisdiction of the Minister of Labour to appoint an adjudicator under the provisions of the *Canada Labour Code* R.S. c. L-1 (*Code*) to address Ms. Souchereau's argument that, as an employee of CN, she has been unjustly dismissed. It is agreed that the standard of review of the Minister's assumption of jurisdiction is correctness.

[2] The following are uncontested facts:

As at February 21, 2005, Ms. Souchereau was employed with CN in the position of Assistant Superintendent Transportation Winnipeg.

On February 22, 2005, CN notified Ms. Souchereau that as of February 25, 2005 she was being reassigned to the position of Traffic Manager at CN's Customer Service Centre. The reassignment was subsequently confirmed to Ms. Souchereau in a letter dated February 24, 2005.

On or about March 3, 2005, Ms. Souchereau wrote to CN and stated the following:

I am not prepared to accept this demotion and respectfully request the matters in my regard be reconsidered and I be re-instated to my position or equivalent. I do not believe removing me from my current position is warranted.

On March 17, 2005, CN wrote to Ms. Souchereau and advised her that they were holding the Traffic Manager position open for her and offered her additional time to consider her employment status with CN.

On April 5, 2005, Counsel for Ms. Souchereau wrote CN and expressed the opinion that the changes to Ms. Souchereau's employment status constitute an unjustified demotion, and, in addition stated the following:

Given the aforementioned, Debra has no option but to treat the employer's actions as an unjust constructive dismissal. She is not accepting the newly offered position and regards herself as being terminated by the employer as of this date.

Our instructions are that failing to reach a fair accommodation with respect to the action taken against our client we are to make application under the *Code* for reinstatement.

In response to the letter of April 5, 2005, by letter dated April 15, 2005, Counsel for CN denied that Ms. Souchereau was dismissed to which, by letter dated April 29, 2005, Counsel for Ms. Souchereau responded that:

She has treated the change in her employment as constructive dismissal. She is no longer an employee of CN. She will not be taking up any of the duties and

responsibilities which have been unilaterally imposed upon her.

On June 21, 2005, Counsel for CN wrote Counsel for Ms. Souchereau and advised that the position of Traffic Manager remained available to Ms. Souchereau.

On or about July 14, 2005, Ms. Souchereau received a CN Pension Plan document which indicated, amongst other personal pension plan information, that on July 14, 2005 her employment had been terminated.

On October 12, 2005, Ms. Souchereau filed a complaint of unjust dismissal against CN with Human Resources Development Canada pursuant to the provisions of the *Code* which states that the last day she worked for her employer was July 14, 2005. In the complaint, Ms. Souchereau stated the nature of her complaint against CN as “unjust dismissal; unfairly demoted to inferior position” and “refusal to reinstate in former position”.

On November 14, 2005, Ms. Donna Martin, an inspector with Human Resources and Skills Development Canada Labour Program wrote to CN and requested a written statement of the reasons for Ms. Souchereau’s dismissal. In response by letters dated December 13, 2005, April 7, 2006, October 5, 2006, and October 30, 2006, Counsel for CN argued that Ms. Souchereau’s complaint is not valid and is out of time because, as stated in the letter of April 5, 2008, it is Ms. Souchereau’s position that CN terminated her employment effective April 5, 2008. Counsel reiterated that CN did not terminate or dismiss the complainant either directly or constructively.

On November 16, 2006, Ms. Martin wrote to the Minister of Labour reporting that Ms. Souchereau made a complaint of unjust dismissal on October 4, 2005, and stated as follows:

In spite of my endeavour, the parties have not been able to settle the complaint. The complainant has requested that you appoint an adjudicator to hear the matter.

I am, therefore, enclosing the complaint as well as other related documents for your consideration.

On December 14, 2006, pursuant to s. 242(1) of the *Code*, the Minister of Labour appointed an arbitrator to hear Ms. Souchereau's complaint.

In the present Application, CN contests the jurisdiction of the Minister of Labour (Minister) to make the appointment of the adjudicator. The relevant provisions of Part XIV of the *Code* are reproduced in the Appendix to these reasons.

[3] It is agreed that a "dismissal" is a condition precedent to the filing of a complaint. It is also agreed that the Minister has jurisdiction to make the appointment of an adjudicator if the complaint was filed within 90 days of a dismissal, if any. The question is: who has the statutory duty to determine whether a dismissal has occurred and whether a complaint is filed within the 90 day period as required by s. 240(2) of the *Code*?

[4] Counsel for CN takes the following approach in paras. 40 and 53 of written argument to identifying the jurisdictional issue in the present Application:

40. The question then is: what is the date on which the respondent was dismissed? The applicant denies that it terminated the employment of the respondent, either constructively or otherwise, at any material time. That said, for the purpose of the within application for judicial review, the Court must proceed on the assumption that the applicant constructively dismissed the respondent (which is not admitted, but denied). This is what the respondent alleges, through her counsel, when she refers, in block capitals, in her "unjust dismissal" complaint to "UNFAIRLY DEMOTED TO INFERIOR POSITION" and to "REFUSAL TO REINSTATE IN FORMER POSITION". That is also what the respondent alleged, through her counsel, by letter dated April 5, 2005 indicating that she had been terminated "as of this date".

[...]

53. The Minister has an obligation to inquire into a complaint. The Minister has an obligation to determine, among other things, whether the complaint is or is not made within the 90-day limitation period. In a case such as this, where the respondent appended supporting documents to her complaint, the Minister must consider those documents in conjunction with the information provided on the face of the complaint.

[5] CN also makes an ancillary procedural argument. The Tribunal Record contains two documents which constitute evidence of the process followed subsequent to Ms. Martin filing her report and which resulted in the Minister making the appointment of an arbitrator to deal with Ms. Souchereau's complaint. The first is entitled "Certificate (Federal Court Rule 18)" which attaches a document entitled "Memorandum to the Minister", a copy of Ms. Martin's report, the complaint, and other documents known to the parties. The Certificate also makes the statement that "none of the documents referred to in this paragraph were personally seen by the Minister". Both the Certificate and the Memorandum are signed by the same Ministry official.

[6] The Memorandum contains the following statements:

You have received a request for the appointment of an arbitrator to hear a complaint for unjust dismissal under Division XIV of the Canada Labour Code – Part III. The complainant is Debbie Souchereau and the respondent is the Canadian National Railway Company, Winnipeg, Manitoba.

The inspector responsible for investigating Souchereau's case was unable to settle the complaint and submitted his report. Management of the Labour Program, Region of Manitoba, is of the opinion that the request of Ms. Souchereau is consistent with the requirements of the statute providing for the appointment by you of an arbitrator to hear the aforementioned matter.

We are submitting the following names for your consideration....

[7] Based on the content of the Certificate and the Memorandum as described, Counsel for CN makes the argument that the Minister could not have assumed jurisdiction as he did because he had not seen and considered the documents on file, and because he acted on an opinion that is devoid of content.

[8] I reject both arguments because they are in conflict with the plain meaning of the words used in the provisions under consideration, and are also in conflict with a contextual and purposive interpretation of the provisions in Division XIV of the *Code*.

[9] By s. 240(1) a complaint is directed to an inspector, and thereby, I find that the inspector has the statutory duty to either accept or reject the complaint. This is an entry level process related decision and does not involve a determination on the merits. The Minister is not involved at this stage of the decision-making process. In my opinion, the process is properly engaged by an aggrieved employee simply filing a complaint, without service of notice to the employer, confirming, pursuant to s. 240(1), that he or she has completed twelve consecutive months of continuous employment, is not a member of a group of employees subject to a collective agreement, and, pursuant to s. 240(2), stating a dismissal date within 90 days of the filing of the complaint. Once the process is engaged, the employer has an opportunity to make substantive objections with respect to the complaint in the subsequent steps of the process. The investigator's decision to accept a complaint as submitted is subject to judicial review.

[10] It is also clear that the purpose of the unjust dismissal provisions of the *Code* is to move a timely complaint to dispute resolution; first on a co-operative basis under the supervision of the inspector, and if this fails, to adjudication on the appointment of the Minister. I find that the purpose of s. 241(3)(a) is to only provide notice to the Minister that co-operative dispute resolution has failed, thus leaving it up to the discretion of the Minister to decide whether to make an appointment under s. 242(1).

[11] In the present case Ms. Martin accepted Ms. Souchereau's complaint on a determination that since the complaint states the day of her dismissal as July 14, 2005, and since the complaint was filed on October 12, 2005, which is a date within 90 days of the stated dismissal date, the complaint was filed within time. With respect to this determination, after the complaint was accepted, Counsel for CN sent protest letters arguing that Ms. Souchereau's complaint was not filed within 90 days after dismissal based on Ms. Souchereau's Counsel's assertions in the letter of April 5, 2008 that the constructive dismissal, if any, had taken place well outside of the 90 day filing period. As a result, Counsel for CN argued that the Minister had no jurisdiction to refer the complaint to an arbitrator. Nevertheless, Ms. Martin did not alter her determination that the complaint was filed in time.

[12] Following a failed attempt at settlement, Ms. Souchereau requested Ms. Martin to have the Minister of Labour appoint an adjudicator to resolve her complaint. Ms. Martin was able to engage the discretion of the Minister to do so by complying with the provisions of s. 241(3)(a) and (b) of the *Code*. The Tribunal Record proves that Ms. Martin did report to the Minister, and did deliver to the Minister the complaint and the documents required by s. 241(3)(b). The Tribunal record also

proves that the Minister received the documents; proof of this fact is the “received” stamp on the face of Ms. Martin’s report indicating receipt by Labour Standards Operations on November 23, 2006, and the statements made in the Certificate. As a result, pursuant to s. 242(1), upon receipt of Ms. Martin’s report and the documentation, I find that the Minister correctly assumed jurisdiction to make an appointment of an adjudicator, and, indeed, did so on December 14, 2006.

[13] With respect to the exercise of the Minister’s discretion, Counsel for CN relies on Justice Rothstein’s decision in *National Bank of Canada v. Canada (Minister of Labour)*, [1997] 3 F.C. 727 (F.C.). In that case, before the Minister was called upon to exercise jurisdiction to appoint an adjudicator, the claim had been settled. Nevertheless, Justice Rothstein decided that upon receipt of a report from an investigator the Minister had jurisdiction to exercise discretion to make an appointment. The point of the decision is that, on the basis of the report of an investigator the Minister must be satisfied that, in terms of natural justice, there is a reasonable basis to proceed to the next stage in the process which is the appointment of an arbitrator. In my opinion, in the present case, on the basis of Ms. Martin’s report and the opinion expressed in the Memorandum, the Minister was entitled to be so satisfied.

[14] In my opinion, the fact that the Minister did not see the documents on file is not critical to the exercise of discretion to appoint an adjudicator. There is no statutory requirement that the Minister make a qualitative decision with respect to the acceptance of the complaint by the investigator or the substance of the complaint itself. Regarding the Memorandum, I find that in reaching a decision respecting the appointment of an adjudicator it was permissible and appropriate

for the Minister to receive and accept the opinion of an official of the Ministry who was familiar with the file that, to that point in the process, the requirements of the *Code* had been met.

[15] As a result, I find no reviewable error in the Minister's decision to appoint an adjudicator.

ORDER

Accordingly, the present Application is dismissed.

I award costs to Ms. Souchereau in the amount of \$2,000.

“Douglas R. Campbell”

Judge

Appendix

Relevant Provisions of the *Canada Labour Code*

Complaint to inspector for unjust dismissal	Plainte
<p>240. (1) Subject to subsections (2) and 242(3.1), any person</p> <p>(a) who has completed twelve consecutive months of continuous employment by an employer, and</p> <p>(b) who is not a member of a group of employees subject to a collective agreement,</p> <p>may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.</p>	<p>240. (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si :</p> <p>a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;</p> <p>b) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.</p>
Time for making complaint	Délai
<p>(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.</p>	<p>(2) Sous réserve du paragraphe (3), la plainte doit être déposée dans les quatre-vingt-dix jours qui suivent la date du congédiement.</p>

Extension of time

(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.

Prorogation du délai

(3) Le ministre peut proroger le délai fixé au paragraphe (2) dans les cas où il est convaincu que l'intéressé a déposé sa plainte à temps mais auprès d'un fonctionnaire qu'il croyait, à tort, habilité à la recevoir.

Reasons for dismissal

241. (1) Where an employer dismisses a person described in subsection 240(1), the person who was dismissed or any inspector may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal, and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made.

Motifs du congédiement

241 (1) La personne congédiée visée au paragraphe 240(1) ou tout inspecteur peut demander par écrit à l'employeur de lui faire connaître les motifs du congédiement; le cas échéant, l'employeur est tenu de lui fournir une déclaration écrite à cet effet dans les quinze jours qui suivent la demande.

Inspector to assist parties

(2) On receipt of a complaint made under subsection 240(1), an inspector shall endeavour to assist the parties to the complaint to settle the complaint or cause another inspector to do so.

Conciliation par l'inspecteur

(2) Dès réception de la plainte, l'inspecteur s'efforce de concilier les parties ou confie cette tâche à un autre inspecteur.

Where complaint not settled within reasonable time

Cas d'échec

(3) Where a complaint is not settled under subsection (2) within such period as the inspector endeavouring to assist the parties pursuant to that subsection considers to be reasonable in the circumstances, the inspector shall, on the written request of the person who made the complaint that the complaint be referred to an adjudicator under subsection 242(1),

(3) Si la conciliation n'aboutit pas dans un délai qu'il estime raisonnable en l'occurrence, l'inspecteur, sur demande écrite du plaignant à l'effet de saisir un arbitre du cas :

(a) report to the Minister that the endeavour to assist the parties to settle the complaint has not succeeded; and

a) fait rapport au ministre de l'échec de son intervention;

(b) deliver to the Minister the complaint made under subsection 240(1), any written statement giving the reasons for the dismissal provided pursuant to subsection (1) and any other statements or documents the inspector has that relate to the complaint.

b) transmet au ministre la plainte, l'éventuelle déclaration de l'employeur sur les motifs du congédiement et tous autres déclarations ou documents relatifs à la plainte.

Reference to adjudicator

Renvoi à un arbitre

242 (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister

242(1) Sur réception du rapport visé au paragraphe 241(3), le ministre peut désigner en qualité d'arbitre la

considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

[.....]

personne qu'il juge qualifiée pour entendre et trancher l'affaire et lui transmettre la plainte ainsi que l'éventuelle déclaration de l'employeur sur les motifs du congédiement.

[.....]

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-126-07

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DEBBIE SOUCHEREAU

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: March 11, 2009

**REASONS FOR ORDER
AND ORDER:** CAMPBELL J.

DATED: March 20, 2009

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