Federal Court  Cour fédérale

Date: 20091027

Docket: T-1962-08

Citation: 2009 FC 1093

Ottawa, Ontario, October 27, 2009

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

LANCE ROGERS

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under section 18.1 of the *Federal Courts Act*, R.S.C., 2002, c.8, s. 14 in the matter of a decision (the Decision) of an adjudicator from the Public Service Labour Relations Board in Board File 166-34-37434, dated November 19, 2008, where the Adjudicator determined he did not have jurisdiction to consider the merits of the Applicant's grievance.

[2] For the reasons set out below the appeal is dismissed.

I. Facts

[3] The Applicant is employed by the Respondent, Canada Revenue Agency (CRA) as an auditor. The Applicant involved himself in a friend's tax matter, which was eventually resolved in the manner advocated by the Applicant. Prior to taking the action, the Applicant had discussed intervening in the friend's tax matter with his supervisors and was told not to involve himself in the file. After the friend's tax matter was resolved, the Applicant stated that he saw his role in the matters as an "accomplishment".

[4] At the time of his annual performance review, the Applicant advised his superior of the "accomplishment" and asked that it be mentioned in his appraisal review. Instead CRA launched an investigation into the event and determined that the Applicant had acted improperly by intervening on behalf of a taxpayer that resulted in the Applicant placing himself in a conflict of interest as well as disobeying management. The Applicant became stressed and hurt by the accusations and investigation and took two sick leaves, supported by a medical certificate.

[5] The Applicant received a five-day disciplinary suspension in relation to the allegations by his employer that he breached CRA's Conflict of Interest Code and committed an act of insubordination. The Applicant filed a grievance challenging this disciplinary decision. CRA reduced his suspension to a written reprimand. The Applicant then referred his grievance to adjudication in order to continue to challenge the written reprimand.

[6] Under the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the former Act), the Applicant was entitled to refer his grievance to adjudication if the employer's disciplinary action resulted in a financial penalty. It has been established that a written reprimand is neither a suspension nor a financial penalty (see *Canada (Attorney General) v. Lachapelle*, [1979] 1 F.C. 377 (T.D.), 91 D.L.R. (3d) 674; aff'd [1980] 1 F.C. 55 (C.A.), [1979] F.C.J. No. 128). CRA objected to the jurisdiction of an adjudicator in this case, arguing that the Applicant was no longer the subject of a disciplinary action that resulted in a financial penalty. The parties agreed that the Public Service Labour Relations Board's hearing would be limited to evidence and argument with regard to the Adjudicator's jurisdiction.

[7] At the hearing, the Applicant testified that as a direct result CRA's disciplinary actions he suffered from a stress-related disability and ultimately depleted his sick leave bank. When he needed to use his sick leave for unrelated reasons he was forced to take sick leave without pay. The Applicant argued that the use of his sick leave was a direct result of CRA's disciplinary action, and as such, CRA's disciplinary action resulted in a financial penalty. CRA argued that an employee leaving the workplace on sick leave rather than leaving because the employer asked them to is not disciplinary action and cannot be considered a financial penalty resulting from disciplinary action under paragraph 92(1)(c) of *Public Service Staff Relations Act*.

[8] The Adjudicator determined that he did not have the jurisdiction to hear the grievance because there was no financial penalty resulting from the disciplinary action taken as per paragraph 92(1)(c). At paragraph 31 of the Decision, the Adjudicator stated that the Applicant had

not presented any evidence to establish that the sick leave was the inevitable consequence of the employer's investigation and disciplinary action.

II. The Statutory Framework

[9] On April 1, 2005, the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, the reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act* (the former Act).

[10] Subsection 92(1) of the former Act reads as follows:

Adjudication of Grievances	Arbitrage des griefs
Reference to Adjudication	Renvoi à l'arbitrage
92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to	92. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur:
(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,	a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale;

(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or

(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or

b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)f) ou g) de la Loi sur la gestion des finances publiques;

(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,

c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

III. Standard of Review

[11] The standard of review with respect of the legal test applied to an adjudicator in determining questions of jurisdiction is correctness and a standard of reasonableness applies in reviewing the adjudicator's application of the facts to the correct legal test (*Canada (Attorney General) v. Basra*, 2008 FC 606, 327 F.T.R. 305 at paragraph 13).

IV. Issue

[12] The Applicant raised the following issue:

(a) Did the adjudicator apply an incorrect legal test in assessing whether the sick leave taken by Mr. Rogers amounted to a financial penalty resulting from disciplinary action?

[13] The Applicant argues that the Adjudicator erred in applying an "inevitability" test rather than a "causation/remoteness" test in assessing whether the Applicant's sick leave resulted from disciplinary action. The Respondent argues that the Court should not ignore the inevitability test established for such cases by transplanting the common law test for causation and remoteness established in negligence cases. Both parties rely on the Federal Court of Appeal decision in *Massip v. Canada (Treasury Board)*, 61 N.R. 114, [1985] F.C.J. No. 12 (F.C.A.).

[14] In *Massip*, above, a foreign service officer had her foreign posting cancelled for disciplinary reasons, resulting in her loss of the foreign service premium. The Deputy Chairperson of the Public Service Labour Relations Board determined he did not have the jurisdiction to hear the grievance as the cessation of payment of the Foreign Service Premium to the griever after she was recalled to Ottawa did not constitute a financial penalty under the relevant provision. Justice Patrick Mahoney, for the majority of the Federal Court of Appeal, determined that the Applicant had been the subject of a disciplinary action, the action resulted in a financial loss, and that the financial loss was a penalty. Therefore, Justice Mahoney concluded the Adjudicator had jurisdiction to hear the matter.

[15] Justice Mahoney wrote:

> I accept that Parliament's intention, in limiting access to adjudication to certain types of grievance, was to spare the Board the necessity of dealing with matters of little real detriment to the griever. However, why should parliament have intended that disciplinary action in the form of a directly imposed financial penalty of, say, $25 or $50, be amenable to adjudication, while disciplinary action of another sort, indirectly by inevitably leading to a $790 loss of pay should not. In choosing its words, Parliament did not, and had no reason to, foreclose access to adjunction entailing disciplinary action resulting indirectly in a financial penalty.
>
> The remoteness of the financial penalty from the disciplinary action is a proper consideration. However, it does not arise here. The loss arose immediately and inevitably from the disciplinary action […]

[16] There is agreement that in *Massip*, above, the Federal Court of Appeal established that a "financial penalty" can be imposed either directly or indirectly. What is at issue between the parties is the role played by the terms "inevitability" and "remoteness".

[17] The Applicant argues that a simple test of causation should have been applied by the Adjudicator. They cite *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333 for the position that the "but for" test applies in determining issues of causation. I note that *Resurfice Corp*., above, is a torts case.

[18] The Applicant also argues that in *Massip*, above, the Court of Appeal stated that the remoteness of the financial penalty from the disciplinary action is a proper consideration. The remoteness inquiry asks whether the harm is too unrelated to the wrongful conduct to hold the wrongdoer fairly liable (see *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27, [2008] 2 S.C.R. 114).

[19] When considering the correct test to apply in this case I am guided by the principles of statutory interpretation that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at paragraph 50, *Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, at paragraph 10). Finding the correct interpretation requires a purposive analysis giving such fair, large and liberal construction and interpretation as best ensures the attainment of the Act's objectives (see *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Interpretation Act*, R.S.C. 1985, c.1-12, s. 12, *Ruth Sullivan in Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at pages 195-196, 219).

[20] I agree with the Respondent that in *Massip*, above, the Federal Court of Appeal opened the door to indirect losses, but limited those losses to those that were inevitable. This is consistent with the purpose of the Act to limit the types of grievances, as stated in *Massip*, above, and the wording of the provision as "disciplinary action resulting in suspension or financial penalty" [emphasis added].

[21] Therefore, the Adjudicator applied the correct legal standard.

[22] At the hearing the parties agreed that the sole issue to be determined was the correctness of the legal test used by the Adjudicator. Therefore, it is not necessary for me to determine the issue of its application to the facts of this case. If I were to do so, I would have found the application to be reasonable. As noted at paragraph 31 of the decision, the Applicant did not present any evidence to establish that the sick leave was an inevitable consequence of the employer's investigation and disciplinary action. It was the Applicant's burden to prove this point (see *Canada (Attorney General) v. Demers*, 2008 FC 873, [2008] F.C.J. No. 1087, see also *Guay and Treasury Board (Revenue Canada, Taxation)*, [1995] C.P.S.S.R.B. No. 19 where the Board's decision with regard to the sick leave credits was supported by uncontradicted evidence provided by the griever).

[23] As I understand it, the Applicant argues that should I find that the Adjudicator erred by applying the "inevitability" test, then the matter should be sent back to a different Adjudicator for a new hearing. The Respondent argues that if I determine the wrong legal test was applied, the case should be submitted to the same Adjudicator in accordance with the correct legal standard. As I

have already determined that the Adjudicator applied the correct test and would have found that its application was reasonable if required to do so, it is not necessary for me to address this issue.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is dismissed with costs to the Respondent.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-1962-08**
STYLE OF CAUSE:	**ROGERS** **v.** **CANADA REVENUE AGENCY**
PLACE OF HEARING:	**OTTAWA**
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APPEARANCES:

Steven Welchner (613) 821-6100	FOR THE APPLICANT
Richard Fader (613) 952-2878	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Steven Welchner Welchner Law Office Ottawa, Ontario	FOR THE APPLICANT
Richard Fader Department of Justice Ottawa, Ontario	FOR THE RESPONDENT