Federal Court  Cour fédérale

Date: 20110329

Docket: T-1426-10

Citation: 2011 FC 377

Ottawa, Ontario, March 29, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

WANDA MACFARLANE

Applicant

and

DAY & ROSS INC.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a Canada Labour Code adjudicator (Adjudicator) dated August 4, 2010 whereby he declined to hear Wanda MacFarlane's wrongful dismissal complaint against Day & Ross Inc. (Day & Ross). Ms. MacFarlane challenges the Adjudicator's decision to decline jurisdiction to hear the matter on the merits.

Background

[2] Ms. MacFarlane worked for Day & Ross for 7 years as a computer programmer. On July 4, 2008 she was terminated by Day & Ross ostensibly for cause. On August 29, 2008 Ms. MacFarlane

made a complaint under s 240 of the Canada Labour Code, RS, 1985, c. L-2 alleging that she had been unjustly dismissed. This complaint led to the appointment of the Adjudicator under ss 242(1) of the Canada Labour Code and on April 21, 2009 he set the matter down to be heard on August 25 and 26, 2009.

[3] On May 28, 2009 Ms. MacFarlane initiated a complaint to the Canadian Human Rights Commission (Commission) alleging that the termination of her employment was discriminatory on the grounds of age and disability. However, in the face of Ms. MacFarlane's outstanding Canada Labour Code complaint the Commission had to decide under ss 41(1) of the *Canadian Human Rights Act*, RS, 1985, c H-6 [*CHRA*] whether it ought to proceed.

[4] The Commission provided the parties with its s 41 investigation report and invited them to respond. On December 2, 2009 the Commission decided not to proceed with Ms. MacFarlane's complaint because it was "one that could more appropriately be dealt with initially" under the Canada Labour Code. The Commission further advised Ms. MacFarlane that she could reactivate her human rights complaint within 30 days of the completion of the Canada Labour Code proceeding.

[5] In the meantime, on August 14, 2009 Day & Ross advised the Adjudicator that he lacked jurisdiction to proceed by virtue of ss 242(3.1)(b) of the Canada Labour Code. The Adjudicator proceeded to deal with the challenge to his jurisdiction and in a decision dated September 2, 2009 he ruled that, in the face of Ms. MacFarlane's then pending human rights complaint, he could not hear her wrongful dismissal case on the merits.

[6] Ms. MacFarlane challenged the Adjudicator's decision on judicial review and on May 26, 2010 Justice Robert Mainville, then of this Court, upheld the Adjudicator's decision: see *MacFarlane v Day & Ross Inc.*, 2010 FC 556, 82 CCEL (3d) 192. Justice Mainville held, however, that the Adjudicator had interpreted his jurisdiction too narrowly and the matter could be heard if it was referred under s 44 of the *CHRA*.

[7] Upon the receipt of Justice Mainville's decision, Ms. MacFarlane wrote to the Adjudicator asking him to proceed to hear her wrongful dismissal complaint on the merits. She advised him that the Commission had earlier declined to proceed with her human rights complaint and that the way was clear for him to assume jurisdiction. The Adjudicator disagreed and again declined to assume jurisdiction. It is from this decision that this application for judicial review arises.

Issue

[8] Did the Adjudicator err by declining to assume jurisdiction over Ms. MacFarlane's Canada Labour Code complaint?

Analysis

[9] The issue raised on this application concerns the Adjudicator's interpretation of the *CHRA* and, in particular, those provisions which deal with the referral of a complaint to another statutory authority for adjudication. Because these provisions do not form part of the Adjudicator's home statute, his legal interpretation is reviewable on a standard of correctness: see *MacFarlane v Day & Ross Inc.*, above, at para 35.

[10] When this matter initially came before the Adjudicator, he held that he was "without jurisdiction" to hear it because it was essentially a duplicative claim to Ms. MacFarlane's pending complaint to the Commission. He ruled that under ss 242(3) and (3.1) of the Canada Labour Code he was precluded from dealing with Ms. MacFarlane's complaint of unjust dismissal and, in any event, could not consider whether the circumstances of that dismissal were discriminatory in nature. The statutory provisions relied upon by the Adjudicator provide:

242(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall	242(3) Sous réserve du paragraphe (3.1), l'arbitre :
(a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and	a) décide si le congédiement était injuste;
(b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.	b) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.
(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect	(3.1) L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :

of a person where	
(a) that person has been laid off because of lack of work or because of the discontinuance of a function; or	a) le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste;
(b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.	b) la présente loi ou une autre loi fédérale prévoit un autre recours.

[Emphasis added]

[11] Ms. MacFarlane challenged the Adjudicator's decision in an application for judicial review heard by Justice Mainville at Fredericton, New Brunswick on April 12, 2010. Justice Mainville upheld the Adjudicator's decision and stated that an adjudicator appointed under ss 242(1) of the Canada Labour Code must refuse to hear a substantially similar complaint filed under ss 240(1) where another procedure for redress is available in another act of Parliament (e.g. *Canadian Human Rights Act*). Justice Mainville went on, however, to observe that a Canada Labour Code adjudicator is not wholly without jurisdiction where the Commission elects under either ss 41(1)(b) or ss 44(2)(b) of the *CHRA* to refer a matter for alternative adjudication. In such a situation a Canada Labour Code adjudicator would have the authority to hear and decide the human rights issues to the extent they were related to the circumstances of a dismissal. Justice Mainville concluded by saying that the Adjudicator's interpretation of his jurisdiction had been too restrictive.

[12] When Ms. MacFarlane again asked the Adjudicator to assume jurisdiction and to hear the merits of her unjust dismissal complaint she drew his attention to the December 2, 2009 decision of

the Commission where it had declined to deal with her human rights complaint pending the completion of the Canada Labour Code proceeding. The Adjudicator nevertheless again declined jurisdiction on the following basis:

> 32. Secondly, it is without doubt that the CHRC, at least as of December 2, 2009, had decided "not to deal" with the complaint pursuant to section 41(1)(b) of the *CHRA*. This is one of the sections of the *CHRA* that the learned trial judge indicated could be used to refer the matter to an adjudicator.
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> 33. I do not see how a decision not to deal with the complaint can be interpreted as a referral. Given the decision of the CHRC "not to deal" with the complainant's complaint, I fail to see how I would have jurisdiction to deal with the complaint at this juncture.
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> 34. The second paragraph of the *CHRA* that the learned trial judge referred to was 44(2)(b). This section requires that a complaint be investigated and that the investigator file a report. Neither party has suggested that an investigator was appointed and thus there can be no report filed. If this is the case, there can be referral pursuant to section 44(2)(b) of the *CHRA*.
>
> 35. Let me be clear, in my arbitral award I concluded that I did not have jurisdiction to hear the complaint as there was a parallel complaint before the CHRC. This decision was upheld as being correct as a result of the court decision. However, the learned trial judge pointed out that I might, at some time have jurisdiction referred to me, by the CHRC, pursuant to either section 41(1)(b) or 44(2)(b) of the *CHRA*.
>
> 36. Without a referral from the CHRC, who has control over the parallel complaint, I cannot assume jurisdiction. The decision to refer the matter to me or not is ou[t] of my hands.

It is clear from the above remarks that the Adjudicator was of the mistaken belief that the Commission's decision was not supported by an investigation and that the transmission of the decision by Ms. MacFarlane to him did not constitute a referral of the complaint under s 44 of the

CHRA. In fact an investigation by the Commission had been conducted and an investigation report dated October 29, 2009 prepared under s 41 of the *CHRA* had been provided to the parties. It was on the strength of that report that the Commission decided not to deal with the complaint at that time because it involved a matter that could more appropriately be dealt with under the Canada Labour Code. It is perhaps unfortunate that neither party advised the Adjudicator that the Commission's decision was supported by an investigation report. Nevertheless, it was wrong for the Adjudicator to have based his jurisdictional decision in part upon an assumption that the Commission's decision was somehow deficient. The Commission's decision was regular on its face and should have been accepted on that basis. I would add that there is no requirement in the *CHRA* that every decision by the Commission be supported by an investigation. Section 43 of the *CHRA* states only that the Commission "may" designate an investigator; it is not required to do so in all cases.

[13] The Adjudicator also erred in law by declining jurisdiction on the basis that the matter had not been referred to him by the Commission. The Adjudicator seems to have expected a formal requisition from the Commission before he could hear the matter on the merits. Ms. MacFarlane is correct that no such step is required. Section 44 of the *CHRA* stipulates that where the Commission decides to defer to another authority it "shall refer the complainant to the appropriate authority". Under ss 44(4) the Commission "shall notify in writing" the parties to a complaint of its decision to defer to another authority and it "may in such manner as it sees fit, notify any other person". When these provisions are read together it is clear that to support the reference of a complaint the Commission is only required to notify the parties of its decision and it is then up to one of them to request that the other authority assume jurisdiction. This approach is also consistent with several arbitral decisions where employment adjudicators have accepted jurisdiction without any formal or

direct communication from the Commission: see *Casey v Treasury Board*, 2005 PSLRB 46 at para 6; *Douglas v Canada*, 2004 PSSRB 60, [2004] LVI 3477-1 at para 101; *Whitherspoon v Treasury Board*, 2006 PSLRB 102, 2006 CRTFP 102 at paras 12-14 and *Djan v Treasury Board (Correctional Service of Canada)*, 2001 PSSRB 60 at para 97. In *Djan*, above, the Public Service Staff Relations Board dealt with the issue as follows:

> [97] Clearly the CHRC has no authority to order the PSSRB to undertake any proceeding. Paragraph 41(1)(a) provides the CHRC with a discretion in that it may, after examining the information relating to a complaint, advise the alleged victim that he/she ought to first exhaust the available grievance procedure. This is what was done in the instant case. Notwithstanding what was alleged by the employer, I am satisfied, in the circumstances, that the CHRC's letter of May 19, 2000, to Ms. Djan constitutes an adequate exercise of the CHRC's discretion under paragraph 41(1)(a) of the CHRA.

The above interpretation of the *CHRA* referral provisions is also consistent with a situation where a human rights complainant has not exploited an opportunity to pursue other available recourse. In such a situation the Commission is entitled to defer and to advise the complainant of that option -- clearly no form of direct referral would be available in such a situation. To be fair to Day & Ross, this is an interpretation that it accepted in argument before me when its counsel acknowledged that a referral under s 44 of the *CHRA* does not require the Commission to directly communicate its decision to anyone other than the parties (see pp 92-93 of the transcript).

[14] Day & Ross does argue that the Commission's decision of December 2, 2009 was only to the effect that "the human rights process was being held in abeyance, on consent, solely for the purpose of facilitating the 2009 judicial review proceeding" (see para 66 of the Respondent's Factum). It contends that Ms. MacFarlane had an obligation within 30 days of the

Justice Mainville's decision to ask the Commission to consider the matter again and only in the event that the Commission decided once again to defer to the Canada Labour Code process would a referral under s 44 of the *CHRA* result. Day & Ross also characterises Ms. MacFarlane's attempt to reactivate her Canada Labour Code complaint in the face of Justice Mainville's decision as resiling from an agreement.

[15] These are not arguments that I am prepared to accept. The Commission's decision of December 2, 2009 is not stated in qualified terms. The Commission's investigator appropriately observed that the parties wished to await the outcome of the judicial review before proceeding further with either matter but the Commission took the position that if recourse under the Canada Labour Code was available, it should be pursued first. On the other hand, if Justice Mainville were to find that recourse was wholly unavailable to Ms. MacFarlane under the Canada Labour Code, the Commission advised that she could, within 30 days, ask to have her human rights complaint reactivated. There is nothing in the Commission's decision to suggest that it was holding the matter in abeyance "on consent" or that it might be inclined to revisit its decision in the face of available Canada Labour Code redress.

[16] In this case the Commission and Ms. MacFarlane did what was required to effect a referral of her claim to the Adjudicator and he was wrong to expect anything more before hearing the matter on the merits.

[17] The Adjudicator has on two occasions declined to hear Ms. MacFarlane's complaint and in both instances his reasons for so deciding have been found to be lacking. In the result, the

resolution of her claim has been unduly delayed. In these circumstances it is appropriate that the matter should be determined on the merits by a different decision-maker.

[18] Ms. MacFarlane has been successful on this application and, as a self-represented party, she is entitled to an award of costs to compensate her in reasonable measure for her work and out of pocket expenses. In the result, the Respondent shall pay to the Applicant the sum of $950.00 inclusive of disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed with the matter to be remitted to a different Canada Labour Code adjudicator for determination on the merits.

THIS COURT'S FURTHER JUDGMENT is that the Respondent shall pay costs to the Applicant in the amount of $950.00 inclusive of disbursements.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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