Federal Court  Cour fédérale

Date: 20131002

Docket: T-773-13

Citation: 2013 FC 1007

Ottawa, Ontario, October 2, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ATAUR RAHMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review of the decision of an adjudicator [Adjudicator] of the Public Service Labour Relations Board [Board] dismissing the termination grievance of Mr. Rahman. The Adjudicator found that the Board had no jurisdiction over the grievance because termination of employment occurred before the expiry of the Applicant's probationary period.

[2] At the hearing the style of cause was ordered amended to name only the Attorney General of Canada as the Respondent.

II. STATUTORY PROVISIONS

[3] The relevant statutory provisions are:

Public Service Labour Relations Act, SC 2003 c 22

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to	209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :
…	…
(c) in the case of an employee in the core public administration,	*c)* soit, s'il est un fonctionnaire de l'administration publique centrale :
(i) demotion or termination under paragraph 12(1)*(d)* of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)*(e)* of that Act for any other reason that does not relate to a breach of discipline or misconduct, or	(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)*d)* de la *Loi sur la gestion des finances publiques* pour rendement insuffisant, soit de l'alinéa 12(1)*e)* de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,
(ii) deployment under the *Public Service Employment Act* without the employee's	(ii) la mutation sous le régime de la *Loi sur l'emploi dans la fonction*

consent where consent is required;

publique sans son consentement alors que celui-ci était nécessaire;

211. Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to

211. L'article 209 n'a pas pour effet de permettre le renvoi à l'arbitrage d'un grief individuel portant sur :

(a) any termination of employment under the *Public Service Employment Act*; or

a) soit tout licenciement prévu sous le régime de la *Loi sur l'emploi dans la fonction publique*;

(b) any deployment under the *Public Service Employment Act*, other than the deployment of the employee who presented the grievance.

b) soit toute mutation effectuée sous le régime de cette loi, sauf celle du fonctionnaire qui a présenté le grief.

Public Service Employment Act, SC 2003 c 12 ss 12 and 13

62. (1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of

62. (1) À tout moment au cours de la période de stage, l'administrateur général peut aviser le fonctionnaire de son intention de mettre fin à son emploi au terme du délai de préavis :

(a) the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the *Financial Administration Act*, or

a) fixé, pour la catégorie de fonctionnaires dont il fait partie, par règlement du Conseil du Trésor dans le cas d'une administration figurant aux annexes I ou IV de la *Loi sur la gestion des finances publiques*;

(b) the notice period determined by the separate

b) fixé, pour la catégorie de fonctionnaires dont il fait

agency in respect of the class of employees of which that employee is a member, in the case of a separate agency to which the Commission has exclusive authority to make appointments,	partie, par l'organisme distinct en cause dans le cas d'un organisme distinct dans lequel les nominations relèvent exclusivement de la Commission.
and the employee ceases to be an employee at the end of that notice period.	Le fonctionnaire perd sa qualité de fonctionnaire au terme de ce délai.

[4] The effect of these provisions is that an employee who is on probation has no right to grieve to the Board any termination of employment. Termination may only be reviewed where the termination was contrived, a sham or camouflage (*Tello v Deputy Head (Correctional Service Canada)*, 2010 PSLRB 134, [2010] CPSLRB No 133) to terminate for some other reason than performance.

III. BACKGROUND

[5] The Applicant was appointed on January 28, 2008 to an indeterminate position as an environmental scientist at the Department of Indian Affairs and Northern Development [INAC] in Iqaluit, Nunavut. The appointment was subject to a 12-month probationary period.

[6] The central issue in this case is the date of termination – whether it was January 28, 2009 and within the probationary period or February 2, 2009 and therefore outside the probationary period. If notice was given within the probationary period and was not a sham, contrivance or camouflage, the Board has no jurisdiction.

The case revolves around events on and between those dates.

[7] The last date for notice of termination was complicated by the fact that the Applicant took two days' leave without pay in October 2008 which extended the probationary period to January 29, 2009. INAC says that notice of termination was given on January 28, 2009; the Applicant claims he only received such notice on February 2, 2009.

[8] The essence of the Applicant's grievance is that starting on April 15, 2008, he was subjected to sexual harassment by his direct supervisor, Ms. Abernethy-Gillis. These acts consisted of repeated invitations and demands that he spend time with her. He also alleged that his constant refusals to become intimate were met by anger and threats to prejudice his employment. The harassment allegedly extended from April 2008 until just before his termination.

[9] The supervisor vehemently denied any and all parts of the Applicant's allegations of harassment and retribution. She outlined difficulties she had with his work and his adherence to instructions and policies. None of this "harassment" was ever reported until after termination.

[10] The Applicant was called to a meeting to be held on January 27, 2009 with his supervisor and Michael Nadler, Regional Director, Nunavut Regional Office, INAC. From their perspective, the meeting was to discuss the Applicant's employment and to give him notice of termination of his probation.

[11] Shortly before the meeting the Applicant says he fell ill and went to the hospital. He subsequently advised his supervisor that he would be on sick leave until January 30, 2009 which

was a Friday and therefore back in the office on February 2, 2009. Therefore, he would not be back at work until after his probationary period expired.

[12] It is at this point that positions and recollections diverge. The Applicant says that Nadler telephoned him, that they spoke briefly about his health and agreed to meet upon the Applicant's return on February 2, 2009.

[13] Nadler had a different recollection. He testified that since the January 27 meeting was to inform Rahman of the rejection of his probation, when he did not appear a letter of rejection was mailed to the Applicant; attempts were made to hand deliver the letter to his home. On January 28, Nadler reached Rahman by phone, told him that a letter had been sent the previous day, that he should retrieve it and it pertained to his dismissal and that Rahman should contact him once he had received it.

A copy of the rejection letter was faxed to the Applicant's bargaining agent that same day, January 28, 2009.

[14] On the issue of timeliness and validity of the rejection of probation, the Adjudicator preferred Nadler's evidence and concluded that it was more likely than not that Nadler notified Rahman of his termination in the telephone call of January 28, 2009. One can do no better than to quote the paragraph containing the key finding and the reasons for it:

> On balance, I prefer the evidence of Mr. Nadler on that issue for a number of reasons, including that he signed and mailed the letter of rejection on the previous day, that he faxed a copy of it to the grievor's representative that day after speaking to the grievor, that he went to the local post office to obtain a valid address for the grievor, and that he attempted to deliver the letter to the grievor at his home,

> without success. Given those actions, it is more likely than not that he also notified the grievor of his termination during the January 28, 2009 telephone conversation. It even seems inconceivable that Mr. Nadler would go through such efforts and not mention the rejection during the phone call. In addition, I agree with the respondent's suggestion that the grievor's actions on that day cast doubts as to his alleged unawareness that his employment had come to an end, including that he never denied speaking to Mr. Nadler on that day, that he communicated with Mr. Atiomo shortly afterward to confirm his willingness to accept a term position in Manitoba, that he informed Mr. Atiomo that a deployment or secondment would not be possible from Iqaluit, and that the contact information he provided consisted of a Toronto address and phone number. It is also worth noting that the grievor's position in Iqaluit was indeterminate and yet he was prepared to accept a term position elsewhere on January 28, 2009.

[15] The Adjudicator rejected any suggestion that the Applicant was so ill as to be unable to appreciate what was happening. As noted, the Applicant was able to write several coherent e-mails, both to his supervisor and to an INAC official (Mr. Atiomo) in Winnipeg indicating his willingness to take a term position there rather than to maintain his possible indeterminate position in Iqaluit.

[16] The Adjudicator made the principal finding that Rahman was notified of his rejection on probation on January 28, 2009. The finding meant that the Board did not have jurisdiction.

[17] The Adjudicator made a further finding that the grievance was filed outside the 25-day period prescribed in the collective agreement. This finding rests on notice being given on January 28, 2009.

[18] In addition to this finding on jurisdiction, the Adjudicator went on to consider, in accordance with Board precedent, whether Rahman had discharged his burden of establishing that there was a

contrived reliance on the *Public Service Employment Act* or that his termination was a sham or a camouflage.

[19] In addressing what was described as the classic "he said, she said" scenario, the Adjudicator found that Rahman's testimony "was not in harmony with the preponderance of probabilities that a practical and informed person would readily recognize as reasonable in the circumstances". The Adjudicator cites several instances which he found to be improbable that Rahman's supervisor engaged in the alleged acts of harassment and retribution.

[20] The Adjudicator did not find the Applicant's story credible. As part of his consideration, the absence of prior complaint and the absence of corrobative evidence played an important role. Therefore, the Adjudicator held that the Applicant had not met his burden.

[21] Moreover, the Adjudicator noted that there were concerns about the Applicant's work performance, that he had notice of the concerns and that his supervisor tried remedial action to address these concerns. Therefore, the Adjudicator concluded that the evidence did not support the allegation that the rejection of probation was for reasons unrelated to his work performance and suitability.

[22] As a consequence of these findings, the Adjudicator concluded that the Board had no jurisdiction over the grievance and that the grievance was filed outside the time limit prescribed.

[23] The Applicant filed for judicial review. In the course of the proceedings leading to the hearing, the Applicant filed several documents which were not part of the record. The Respondent has objected to the admissibility of this evidence.

IV. ANALYSIS

[24] There are three issues to be addressed:

- the admissibility of the additional evidence;
- any denial of procedural fairness; and
- the validity of the Adjudicator's decision.

A. *Admissibility*

[25] The additional documents are:

- the Applicant's letter summarizing his grievance;
- various hearing notes of the Applicant's bargaining agent representative;
- various handwritten notes;
- the Applicant's Employee Performance Plan (ruled irrelevant and inadmissible by the Adjudicator);
- employment offer to the Applicant after termination;
- notes re threat from Bernie McIsaac relating to events after termination;
- letter withdrawing offer of employment referred to above;
- Board decision in *O'Leary v Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 10, [2007] CPSLRB No 16 [*O'Leary*]; and

- letters from bargaining agent firstly refusing to represent the Applicant and then confirming that it would represent the Applicant.

[26] Even according some leeway to a self-represented litigant in respect of procedural steps, on substantive matters the law must be applied evenly. The admissibility of additional evidence in a judicial review is not some procedural nicety but is a substantive matter.

[27] The general rule, as filed in such decisions as *Tibilla v Canada (Attorney General)*, 2011 FC 163; *Barm v Canada (Minister of Citizenship and Immigration)*, 2008 FC 893, 169 ACWS (3d) 171, is that judicial review is to be confined to the evidentiary record before the tribunal. However, Rule 312 permits the Court to admit fresh evidence where the evidence is necessary to establish a jurisdictional fact or a breach of procedural fairness. In *Mazhero v Canada (Industrial Relations Board)*, 2002 FCA 295, 116 ACWS (3d) 146, the Court summarized some of the factors to be considered:

- the additional material will serve the interests of justice;
- the additional material will be of assistance to the Court;
- the additional material will not seriously prejudice the other side;
- the additional material could not have been made available at an earlier date; and
- the admission of the additional material will not result in an undue delay in the proceedings.

[28] The Applicant has alleged breach of procedural fairness but none of the documents address the substance of that allegation except the two letters from the bargaining agent firstly refusing to

act for the Applicant and then agreeing to act. The Applicant has claimed as the breach of procedural fairness that he had insufficient time to prepare for the grievance hearing.

[29] Many of the remaining documents are either irrelevant as arising after the hearing, inadmissible, or rejected at the hearing. Some documents, such as the bargaining agent representative's notes, are hearsay, not supported by affidavit and prejudicial because no cross-examination could be conducted on them.

[30] The *O'Leary* decision is irrelevant as the case before the Board related to the duty to accommodate. It was submitted as evidence of Nadler's propensity to be abusive to new employees.

The admission of this decision at this stage is highly prejudicial because it was never put to Nadler by the Applicant despite Nadler testifying at the grievance hearing. Its admission offends the rule against similar fact evidence, as applicable in civil cases (see *Kajat v Arctic Taglu (The)*, [2000] 3 FC 96 (FCA).

[31] Therefore, only the two letters from the bargaining agent are admitted. The remaining documents are considered as inadmissible and not part of the record.

B. *Breach of Procedural Fairness*

[32] It was difficult to determine from the Applicant in what manner the Adjudicator breached a principle of natural justice other than the claim that the Applicant had insufficient time to prepare for the hearing because he received notice of the hearing in mid-May.

[33] The hearing occurred over four days in Iqaluit from May 29 to June 1, 2012 and a further day in Toronto on August 27, 2012. It is difficult to see how the Applicant could not have gathered his evidence and argument over that period of time.

[34] Further, there was no request for an adjournment. Importantly the bargaining agent on May 25, 2012 accepted the hearing dates. The Applicant is bound by the consent of his bargaining agent.

[35] Therefore, the Court concludes that there is no breach of procedural fairness.

C. *Reasonableness of Decision*

[36] With respect to the Adjudicator's finding that the Applicant received notice of termination of probation within the one-year period, the Applicant says it was an unreasonable decision principally because the Adjudicator preferred the employer's evidence – that of Abernethy-Gillis and Nadler over that of the Applicant. He also alleges that they lied, both in respect of the matter of notice and in respect of the real reasons for termination.

[37] The Adjudicator applied the standard test for resolving credibility, both on the issue of the notice and on the issue of the basis for termination, as referred to in *Faryna v Chorney*, [1952] 2 DLR 354, 1951 CarswellBC 133:

> … the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[38] Having considered the test and applied it, the Adjudicator set out clearly the reasons for his findings and choice of evidence he found more compelling.

[39] This was a true credibility case where there was direct conflict between key witnesses. The trier of fact is in a unique position to make the assessment of credibility. This Court is not in any position to make that kind of finding or to contradict the Adjudicator's decision. The Court is obligated to accord deference to the Adjudicator's conclusions.

[40] What this Court can do is consider the way in which the Adjudicator came to his conclusions. The Court can find no grounds upon which to overturn the Adjudicator. The legal test used was proper, the reasoning was clear and the decision falls within a range of results reasonably open to the decision maker on both the issue of notice and of basis for termination.

V. CONCLUSION

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

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-773-13
STYLE OF CAUSE:	ATAUR RAHMAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 17, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	PHELAN J.
DATED:	OCTOBER 2, 2013

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