Federal Court  Cour fédérale

Date: 20131010

Docket: T-995-12

Citation: 2013 FC 1026

Ottawa, Ontario, October 10, 2013

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

AIR SPRAY (1967) LTD.

Applicant

And

MARK PAULSEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] Air Spray (1967) Ltd. (the "Applicant") seeks judicial review of the decision of Mr. Richard Bourassa (the "Adjudicator"), dated April 24, 2012. The Adjudicator found that Mr. Mark Paulsen (the "Respondent") had been unjustly dismissed by his employer, the Applicant. He awarded damages to the Respondent in the amount of $17,556.00 less the proper statutory deductions and costs of $500.00, pursuant to the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the "Canada Labour Code").

II. PRELIMINARY MATTERS

[2] The Respondent was served with the Notice of Application on May 21, 2012, according to the affidavit of Bill R. Vanson, Process Server. The Respondent filed a Notice of Appearance on May 28, 2012, indicating that he intended to oppose the application but he did not file a responding application record.

[3] According to a log of phone calls maintained by the Office of the Chief Justice in Ottawa, a voicemail had been left for the Respondent on October 5, 2012, advising that the matter would be heard in Edmonton, Alberta, for one day.

[4] By letter dated October 25, 2012, a certified copy of the Order setting the hearing date of January 17, 2013, was sent to the Respondent by registered mail. The letter was returned to the Registry of the Court at 90 Sparks Street as unclaimed.

[5] The January 17, 2013 hearing was adjourned by Order of Justice Kane made on January 15, 2013. A letter dated January 15, 2013, forwarding that Order was sent to the Respondent by registered mail on January 15, 2013; that letter was returned to the Registry of the Court in Ottawa because it had been sent to a non-existent address. The Respondent's address had been incorrectly entered on the envelope.

[6] By letter dated January 21, 2013, an Order setting a new hearing date of April 11, 2013, was sent to the Respondent by registered mail. This letter was sent to the address on file for the Respondent but was returned to the Registry of the Court at 90 Sparks Street, Ottawa.

[7] I am satisfied that reasonable steps were taken by the Court administration to advise the Respondent of the hearing dates. The fact that one communication was sent to the wrong address is not determinative since the subsequent letter of January 21, 2013, advising of the hearing date of April 11, 2013, was sent to the correct address provided by the Respondent. He did not take delivery of that letter.

[8] There is another procedural matter to be addressed. Upon review of the file prior to the hearing in April, I observed that no Tribunal Record had been filed, pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules"). A Direction was issued on April 4, 2013, directing the Applicant to file the Tribunal Record on or before April 11, 2013.

[9] Counsel for the Applicant responded to the Direction by letter dated April 5, 2013. In part that letter advised as follows:

> The Affidavit in the Applicant's Record includes all of the Applicant's documents that were put before the Adjudicator; no new or additional documents were included. We also included the documents of the Respondent that were referenced at the hearing. As the Adjudicator has not provided the Court with a Record, we enclose a complete package of all Exhibits and documents entered.

[10] I was not satisfied that the affidavit of Kirk Carleton, included in the Applicant's Record, included all the documents, nor was I satisfied that the further materials submitted by Counsel for

the Applicant included all the materials that were before the Adjudicator. Specifically, a comparison of the Applicant's Record with the Exhibit Book showed that Exhibit A to the affidavit of Kirk Carleton was not contained in the Exhibit Book and that Exhibit U to the affidavit of Mr. Carleton was not contained in the Exhibit Book.

[11] At the hearing on April 11, 2013, the Applicant provided a copy of the materials maintained by the Adjudicator. It subsequently became known that this material did not include a handwritten document submitted by the Respondent at the hearing before the Adjudicator. By further Direction of the Court issued on October 8, 2013, leave was given to file a Supplementary Certified Tribunal Record, *nunc pro tunc*, to include that document.

III. FACTS

[12] The Respondent was employed by the Applicant from October 2006 to February 17, 2011. He was hired as a Crew Chief but was demoted to the position of "Structures Mechanic 4" in October 2007. Between June 2008 and December 2009, he was disciplined five times, twice for using his cell phone in the hangar, once for failing to report his absence, once for falling behind schedule, and once for allowing someone else to do work assigned to him.

[13] On January 19, 2011, the Respondent and a co-worker, John Rowe, were working on a plane. Mr. Rowe asked the Respondent to hold onto a drill while he drilled holes into an airplane spar. Mr. Rowe did not follow the standard procedure of drilling the holes using the aircraft skin as a template. Full-size rather than pilot holes were also drilled. As a result, the holes in the spar were misaligned with the aircraft skin.

[14] The Respondent was more experienced than Mr. Rowe but neither corrected him or reported the incident. Co-workers were in the hangar at the time but did not hear or see what happened.

[15] On February 9, 2011, Mr. Bob Strain, the Structural Supervisor, noticed the defective work. On February 10, 2011, Mr. Rowe, the Respondent, and three other co-workers submitted incident/hazard reporting forms, as part of the Applicant's anonymous safety reporting system. Another co-worker submitted an incident/hazard reporting form on February 17, 2011.

[16] On February 17, 2011, the Applicant dismissed the Respondent. The dismissal letter states that on January 19, 2011, the Respondent drilled misaligned holes in an aircraft spar, in serious breach of the safety management system. The letter further said that the incident was exacerbated by the Respondent's considerable experience and his failure to recognize the seriousness of the error. The letter also stated that the incident followed previous written and oral warnings relating to the Respondent's job performance.

[17] On May 6, 2011, the Respondent submitted an unjust dismissal complaint to Human Resources and Development Canada, pursuant to Part III of the Canada Labour Code.

[18] A draft invoice dated March 21, 2012, indicates that the Applicant paid $10,666.73 to correct the damage to the aircraft (Exhibit 1, Tab 16).

[19] On March 22, 2012, a hearing was held before the Adjudicator.

IV. DECISION UNDER REVIEW

[20] In the decision of April 24, 2012, the Adjudicator found that the Respondent had been unjustly dismissed. The Adjudicator noted that the onus of proving the existence of just cause lay with the Applicant, and that just cause requires serious misconduct which is clearly inconsistent with an employee's express or implied service, and risks injury to the employer's interest through continued employment.

[21] The Adjudicator found that the Applicant had not met the burden of proving that the dismissal was just. He acknowledged the Applicant's argument that the error constituted serious misconduct with potentially catastrophic consequences, and that the Respondent was responsible for the error because he was the more experienced employee. He noted that the Respondent had not been the Crew Chief, and had similar experience to the employees other than Mr. Rowe. He also observed that Mr. Strain's incident report indicated that only two holes were misaligned on the wing on which the Respondent assisted Mr. Rowe, and that almost all the reports described the damage as "minor". The Adjudicator concluded that the Applicant was attempting to blame the Respondent rather than accepting responsibility for failing to have appropriate supervision for Mr. Rowe.

[22] With respect to damages, the Adjudicator stated that adjudicators are not limited to awarding compensation to what could be claimed under the common law, relying on the decision in *Alberta Wheat Pool v. Konevsky*, [1990] F.C.J. No. 877. The Adjudicator noted the dates when the Respondent found contract work and how much leave he took during that employment period. He noted that the Respondent followed an apprenticeship program to retrain as a welder. He also noted

that the Respondent supplemented his income by working overtime, so that his annual income was almost equal to what he would have made with the Applicant. The Adjudicator noted that the Respondent was out of work for approximately 21 days and that there was a difference in his hourly wage. He awarded the Respondent three months salary, that being $17,556.00 less statutory deductions, as well as $500.00 in costs.

V. APPLICANT'S SUBMISSIONS

[23] The Applicant argues that the Adjudicator erred by failing to analyze the Respondent's conduct in a contextual and proportionate manner as discussed by the Supreme Court of Canada in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, that is considering the nature and circumstances of the misconduct and the extent to which such misconduct is reconcilable with the employment relationship.

[24] Next, the Applicant argues that the Adjudicator failed to assess the Respondent's misconduct in relation to the history of discipline taken against the Respondent. The Adjudicator only referred to the two incidents where the Respondent had used his cell phone in the hangar, although the Respondent had been disciplined for other incidents, including the failure to complete his work in a timely manner, in June 2008.

[25] Third, the Applicant submits that the adjudicator erred by failing to consider the airline industry context and the strict guidelines that govern it. It relies on the decision in *Boeing Canada Technology Ltd. v. National Automotive Aerospace, Transportation and General Workers Union of Canada, Local 2169* (2005), 145 L.A.C. (4th) 225 at paras. 131 and 143, where an employee who

damaged a floor panel and attempted to hide the damage was found to have been dismissed with cause.

[26] The Applicant argues that in the present case, the Adjudicator did not discuss the aviation industry but stated that only two holes were misaligned and that nearly all the incident reporting forms referred to the damage as minor.

[27] Finally, the Applicant submits that the Adjudicator failed to consider the Respondent's dishonesty. It argues that according to *McKinley*, Courts require that the nature and degree of dishonesty be considered to determine whether it is reconcilable with maintaining the employment relationship. The Adjudicator accepted that the Respondent drilled the holes in the spar and that he assisted Mr. Rowe in drilling holes.

[28] As for the award of damages, the Applicant argues that the Adjudicator erred by failing to properly deduct the amount earned by the Respondent in mitigation from the award. It submits that the Adjudicator apparently based his award on the fact that the Respondent's hourly wage as a welder was less than his hourly wage while employed by the Applicant, together with the fact that the Respondent mitigated his losses by working overtime.

[29] The Applicant claims that this is an error since the case law provides that an employee should be compensated for actual losses and the Respondent did not suffer such loss. It argues that the failure to deduct income earned after his dismissal is inconsistent with the Canada Labour Code which is not intended to grant a windfall to an employee who has obtained employment of greater

value, relying in this regard in the decision in *Wolf Lake First Nation v. Young* (1997), 130 F.T.R. 115 at paragraph 52.

VI. DISCUSSION AND DISPOSITION

[30] The Applicant challenged both the Adjudicator's finding of unjust dismissal and the remedy that was granted, that is three months salary and costs in the amount of $500.00. The finding of unjust dismissal is a question of mixed fact and law reviewable on the standard of reasonableness; see the decision in *Payne v. Bank of Montreal* (2013), 443 N.R. 253 at paragraph 32. The issue of remedy is also reviewable on the standard of reasonableness; see the decision in *Payne* at paragraph 34.

[31] In my opinion, the Adjudicator's conclusion as to the unjust dismissal of the Respondent is reasonable having regard to the evidence submitted. Essentially, the Applicant is arguing that the Adjudicator ignored the context of the Respondent's dismissal, in particular his disciplinary history, his experience relative to Mr. Rowe and the safety standards for the airline industry.

[32] In my opinion, the decision and the contents of the Exhibit Book show that the Adjudicator did not ignore this evidence. He, the Adjudicator, specifically referred to the Applicant's argument about the potentially serious consequences of the error and the argument that the Respondent should have acted differently in light of his greater experience. He also referred to the Respondent's disciplinary history even if he did not mention the incident of December 2009.

[33] The Adjudicator also undertook a reasonable, contextual analysis of the alleged misconduct. The evidence before the Adjudicator was that the Respondent had been dismissed for having drilled the holes. From my reading of the decision, the Adjudicator accepted that Mr. Rowe had acknowledged drilling the holes and that the Respondent had only held the drill straight. The Adjudicator rightly and reasonably noted that all but one of the incident reports characterized the damage as "minor". The reports also said that the work was done under a tight deadline.

[34] The Applicant also argues that the Adjudicator failed to take into account the Respondent's dishonesty. However, in my view, the argument had no basis. There is nothing in the exhibit book to show that the Respondent did not acknowledge the mistake. The Adjudicator seems to have acknowledged the fact that the alleged misconduct occurred in the context of the airline industry. That he did not elaborate on this fact does not make his decision unreasonable. The decision meets the standard of "reasonableness" in that it is transparent and justifiable on the basis of the evidence; see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47.

[35] The Adjudicator reasonably found that the Applicant had failed to discharge its burden of showing that the Respondent had been dismissed for cause.

[36] Turning now to the questions of remedy, this issue is also reviewable on the standard of reasonableness, in the context of the Code.

[37] The Adjudicator's remedial powers in this case are governed by subsection 242(4) of the Canada Labour Code. Paragraph 242(4)(a) allows an adjudicator to make an order requiring the

employer to pay the person compensation equivalent to the remuneration that would have been paid during the notice period. Paragraph 242(4)(c) allows the adjudicator to require the employer to do "any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal". The jurisprudence of the Federal Court and Federal Court of Appeal emphasizes that adjudicators have broad remedial powers to "make whole" an employee who was unjustly dismissed; see the decisions in *Murphy v. Purolator Courier Ltd. et al.* (1993), 164 N.R. 150 and *Chalifoux v. Driftpile First Nation* (2002), 237 F.T.R. 142.

[38] The Federal Court has also held that there is a distinction between damages for unjust dismissal and compensation for the time that an employee would have been working. "Just cause protection" relates to the principle that the Code mandates compensation for those who are unjustly dismissed, even if they received severance pay.

[39] In *Redlon Agencies Ltd. v. Norgren*, 2005 FC 804 at paragraph 38, Justice O'Keefe distinguished between severance pay and damages, adopting the reasoning of Adjudicator J.M. Gordon in *Goodwin v. Conair Aviation Limited,* [2002] C.L.A.D. No. 602 (QL):

> 38 It is clear that the applicant is equating the award of damages with a severance payment. I do not agree with the applicant. By way of explanation, I would adapt the reasoning of Adjudicator J.M. Gordon in *Goodwin v. Conair Aviation Limited*, [2002] C.L.A.D. No. 602, (QL), as to the interplay between the termination and unjust dismissal provisions of the Code, and apply it to this case:
>
> …
>
> 31. […] As I have already observed, I find the reasoning of the Federal Court and the Adjudicators cited by the Complainant to be consistent with the purpose of this part of the Code and the intention of Parliament as expressed in the language of the Code.

> In MacDonald -and-Northern Thunderbird Air Ltd., [1995] C.L.A.D. No. 551, the Adjudicator rejected the employer's argument that it could terminate an employee without alleging cause by simply paying severance pay such that the employee's only recourse was to bring a civil action. The Adjudicator rejected that argument in the following terms:
>
> > If an employer terminates the employee and pays severance without alleging any cause, that does not in itself disentitle the employee from claiming that he/she has been unjustly dismissed. If that were so, then the intention of Parliament expressed in Section 240 of the Code to provide a remedy for employees who have been unjustly dismissed would be thwarted by employers simply paying the severance pay required under Section 235... .
> >
> > If Parliament intended to limit unjust dismissal complaints to those persons who were terminated and were provided with reasons for the dismissal, it would have clearly stated that to be the case in Section 240 and made Section 240 subject to Section 235. (at page 2).

[40] Similar reasoning was recently followed by Justice O'Reilly in his decision in *Atomic Energy of Canada Ltd. v. Wilson*, 2013 FC 733 at paragraph 37. The remedial scope of the Canada Labour Code was addressed by Justice Nadon in *Wolf Lake First Nation v. Young* (1997), 130 F.T.R 115 at paragraph 53 where he stated:

> An adjudicator awarding damages for unjust dismissal is entitled to set the amount of the award. The award is intended to compensate the employee for damages actually suffered as a result of the dismissal. While there is discretion in the amount of damages that may be awarded, an adjudicator commits an error when he or she limits the amount of the award to the amount of severance to which the employee would be entitled if the dismissal had been a justified one based on s. 235 or the common law.

[41] Justice Nadon relied on *Alberta Wheat Pool* in support of the above statement. Howard Levitt, in his text *The Law of Dismissal in Canada*, 3d ed. loose-leaf (consulted on July 26th, 2013), (Toronto: Canada Law Book, 2003) ch. 2 at 125-126, notes that in the Canada Labour Code context, "in most cases of unjust dismissal, damages in lieu of reasonable notice is a sufficient remedy where reinstatement is not requested or is inappropriate". He also observes that the objective of an award of damages is to place the aggrieved party in a position as near as possible to what he or she would have been in had the contract been performed.

[42] The Adjudicator addressed the issue of damages and the decision in *Alberta Wheat Pool* at paragraph 20 of his decision:

> With respect to the matter of damages in lieu of proper notice Chief Justice [Iacobucci] as he was then of the Federal Appeal Court found in [*Alberta Wheat Pool v. Konevsky*,] [1990] F.C.J. No 877 where the court stated "We are also of the view that interpretation of paragraphs 61.5(9)(a) of the Canadian Labour Code…cannot be read [down] so as to limit the compensation that [a] adjudicator is empowered to award to an employee to the amount that could be claimed under the common law".

[43] He went on to refer to the details of the Respondent's job search after his dismissal, including his lower wages and overtime pay. He further stated that the Respondent had been out of work for approximately 21 days and concluded by awarding him three months salary in the sum of $17,556.00 in lieu of proper notice. Reading the Adjudicator's reasons as a whole, it is clear that he relied on the decision in *Alberta Wheat Pool* to support the award.

[44] The Respondent had worked with the Applicant for over four years. Although his earnings in the new position at face value matched those that he would have earned if not unjustly dismissed by the Applicant, the Respondent was required to work longer hours, including overtime, in order to

generate the same income. Having regard to all the circumstances and the relevant legal principles, the Adjudicator's award was reasonable.

[45] In the result, there is no basis for judicial intervention and this application will be dismissed.

[46] There remains the question of costs. The Respondent did not participate in this proceeding, apart from filing a Notice of Appearance. Rule 400(1) confers full discretion on the Court relative to the award of costs and provides as follows:

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	400. (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

[47] Having regard to the circumstances and the fact that the Respondent did not actively respond to this application, having only filed a Notice of Appearance, in the exercise of my discretion, I make no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, in the exercise of my discretion no order as to costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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No one appearing	FOR THE RESPONDENT (ON HIS OWN BEHALF)

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