Federal Court  Cour fédérale

Date: 20140605

Docket: T-1467-13

Citation: 2014 FC 540

Ottawa, Ontario, June 5, 2014

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

JAMES MUTART

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision of an adjudicator made under the *Public Service Labour Relations Act*, SC 2003, c22 (*PSLRA*) dated August 1, 2013 dismissing the applicant's grievance because of a lack of jurisdiction and finding in the alternative, that had the adjudicator had jurisdiction, the respondent had accommodated the applicant to the point of undue hardship.

[2] The application shall be dismissed for the reasons below.

I. FACTS

[3] The parties submitted to the adjudicator an agreed statement of facts. The Court will restate here only the facts essential to the present application.

[4] The applicant worked as a Property Facilities Officer for Public Works and Government Services Canada (PWGSC) from 1981 until 2009.

[5] He suffers from chronic kidney disease. He received a kidney transplant in 1989, though his kidneys failed again and in September 1999, the applicant became disabled and was unable to continue working. He was placed on a transplant list in Ottawa and went on leave without pay due to disability. He also began receiving disability benefits and maintained his critical medical coverage.

[6] On December 19, 2003, the applicant received a letter from PWGSC informing him of a realignment of the department's organizational structure.

[7] On October 27, 2005, PWGSC contacted the applicant to inquire about his absence from work and advised him of the voluntary options available to him: return to work (subject to medical certification), resignation, or retirement on medical grounds. The applicant was given a deadline of December 16, 2005 to respond, which was later extended until January 31, 2006.

[8] After several exchanges between PWGSC and the applicant regarding leave and benefits, on April 26, 2006, he was informed that he was to provide medical documentation if he wished to return to work or undergo an assessment by Health Canada. During this period of time the applicant's doctor also requested that the applicant be transferred to the Hamilton area in order to better facilitate a transplant and to allow him to benefit from family support there.

[9] After a series of correspondences where the applicant provided medical documentation and PWGSC asked for clarification or precision, the applicant indicated in January 2007 that he was willing to undergo Health Canada assessment.

[10] On February 25, 2008, PWGSC wrote to the applicant confirming that work in the Hamilton region was not an option.

[11] The applicant's condition deteriorated and on March 26, 2008 he provided a medical note indicating that he could not return to work and that this could be reassessed in September 2008.

[12] On September 19, 2008, the applicant wrote to PWGSC to request that he be maintained on leave without pay.

[13] On October 14, 2008, PWGSC informed the applicant that he should provide an answer on whether he wants to return to work or to resign or medically retire, failing which they would recommend termination.

[14] On October 23, 2008, the applicant provided another medical note which specified that he could only return to work full-time if he were to receive a kidney transplant; however the timing of a transplant was unpredictable.

[15] On March 6, 2009, PWGSC wrote to the applicant indicating that it would be recommending termination of employment.

[16] On April 16, 2009, PWGSC requested that the applicant write a letter of resignation stating that his last day of employment would be April 5, 2009.

[17] On May 20, 2009, on the advice of his union representative, the applicant wrote a letter resigning as of May 29, 2009. In his letter he noted that he felt he had been forced to medically resign and that he would be filing a grievance.

[18] The applicant filed his grievance on June 26, 2009.

II. IMPUGNED DECISION

[19] The adjudicator found that she was without jurisdiction to hear the matter under section 209 of the *PSLRA* since it related to a voluntary termination, as defined by section 63 of the *Public Service Employment Act*, SC 2003, c22 (*PSEA*), and section 211 of the *PSLRA* specifically denies an arbitrator jurisdiction over any termination of employment under the *PSEA*. The adjudicator concluded that the grievance was not a request for accommodation but rather was in pith and substance about the applicant's termination of employment.

[20] In coming to this conclusion, the adjudicator noted that reinstatement was the only remedy sought by the applicant. It was too late for the applicant to argue at the hearing that the true nature of the grievance was not the forced resignation but rather the way the applicant was treated in the years leading up to his medical retirement. The arbitrator also noted that the applicant was assisted in drafting his grievance by his union a representative, an experienced labour relations advisor. She found that the decision in *Burchill v Canada (Attorney General)*, [1981] 1 FC 109 (FCA) [*Burchill*] required that she hold the grievor to the grievances that were put to the employer at the final level of the grievance process. The applicant had also offered no argument or evidence that his employer had perpetrated a fraud, a sham or camouflage or that it acted in bad faith.

[21] The adjudicator further found that even if she had jurisdiction over the matter, the employer had accommodated the applicant to the point of undue hardship.

III. ISSUES

[22] The two issues to be decided here are:

1) Did the adjudicator err in concluding that she lacked jurisdiction to hear the grievance?
2) Did the adjudicator err in finding that the respondent had accommodated to the point of undue hardship?

IV. STANDARD OF REVIEW

[23] As stated by both parties, the standard of review applicable to an adjudicator's interpretation of section 209 of the *PSLRA* is reasonableness (*Canada (Attorney General) v Amos*, 2011 FCA 38 at paras 27-33).

V. RELEVANT LEGISLATION

[24] The relevant legislation is found in Annex A at the end of this judgment.

Applicant's Arguments

[25] The applicant submits that adjudicators must not take an overly mechanical and restrictive interpretation of grievance wording but must instead look to the context and determine the grievor's objective in raising the grievance, regardless of whether it is explicitly or implicitly stated (*McMullen v Canada Revenue Agency*, 2013 PSLRB 64 at para 103). The applicant underscores that when read as a whole, it is clear that the grievance presented alleges violations of the *Canadian Human Rights Act* and the non-discrimination provision of the collective agreement. The applicant's explicit and overarching concern was his employer's failure to accommodate his disability both prior to and during the process which culminated in his forced resignation.

[26] The applicant alleges that it was unreasonable for the adjudicator to base her jurisdiction decision on an impermissibly restrictive interpretation of section 209 of the *PSLRA*. The adjudicator's reasoning that the applicant asking only for reinstatement demonstrated that he was contesting only his resignation is baseless, as the absence of a claim for damages does not affect

the subject matter of a grievance. Further, the evidence presented by the applicant throughout the grievance process detailing his requests for accommodation further demonstrated the applicant's concern with his employer's failure to accommodate. The applicant relies on *Sketchley v Canada (Attorney General)*, 2004 FC 1151, upheld on appeal 2005 FCA 404, which recognized that forced resignations can amount to discrimination where the process was implemented without regard to the individual employee's circumstances of the duty to accommodate.

[27] The applicant further submits that the adjudicator misapplied the rule found in *Burchill* at para 5 which specifies that it is not open to an individual to change their grievance or submit a new one when the process moves to arbitration. This is not the situation here, argues the applicant, since the respondent was aware of the applicant's claims of discrimination throughout the grievance process. The applicant is not trying to change the subject matter of his grievance or effectively present a new grievance for the first time at adjudication.

[28] The applicant also adds that the adjudicator's alternative conclusion on the merits of the grievance that the respondent had satisfied its duty to accommodate to the point of undue hardship failed to give consideration to the relevant evidence before her. The adjudicator looked exclusively at the length of the applicant's medical leave from work and ignored clear evidence of the respondent's consistent failure to accommodate, namely in not determining whether positions were available in the Hamilton/Niagara or Toronto regions and failing to accommodate a return to part-time work.

Respondent's Arguments

[29] The respondent submits that it was open to the adjudicator to find on the clear wording of the grievance that the applicant's resignation was the primary thrust of his grievance from which the human rights element could not be severed. The respondent argues that the applicant is incorrectly attempting to alter his original grievance from one on resignation to a standalone grievance on the duty to accommodate. The applicant's grievance did not use the term "duty to accommodate", did not challenge the accommodation during the period between 2005-2008 in a timely way, cited only the date of resignation as the date giving rise to the circumstances leading to the grievance, squarely focused on the issue of resignation, and did not cite the article of the collective agreement dealing with discrimination. It was reasonable for the adjudicator to have concluded that the grievance was primarily focused on the issue of resignation and that any reference to the *Canadian Human Rights Act* was inextricably linked to the issue of resignation and, therefore, that she was without jurisdiction pursuant to section 211 of the *PSLRA*.

[30] The respondent also argues that it was open to the adjudicator to render a decision in the alternative, finding that based on the evidence the employer had satisfied its duty to accommodate to the point of undue hardship. The evidence indicated that there was no likelihood of the applicant returning to work in a reasonably foreseeable future and at the point of resignation he had been off work for over ten years. The respondent notes that in order to succeed in his application for judicial review, the applicant must establish that the adjudicator's decision on both jurisdiction and undue hardship were unreasonable.

Analysis

[31] Section 211 of the *PSLRA* ousts an adjudicator's jurisdiction to hear a grievance with respect to a termination of employment under the *PSEA*. When considered on its face, the applicant's grievance is centered on his allegations that he was forced to take medical retirement. He states, "I grieve that I was forced by PWGSC to take medical retirement in order to maintain an income while I await a kidney transplant". The applicant does make a reference to his disability, undue hardship, and discrimination, though they are always tied to his loss of employment. He states in his grievance, "My temporary disability is the reason for my forced resignation and it would not have been an undue hardship to PWGSC to let matters stand until my transplant. My loss of employment is directly attributable to my disability and, as such, I have suffered discrimination in violation of my collective agreement and the Canadian Human Rights Act." Moreover, the applicant indicates May 30, 2009 as the date on which the act, omission or other matter giving rise to the grievance occurred. The applicant requests that he be reinstated on leave without pay until he has received his transplant and can return to work. If the grievance had related to the respondent's failure to accommodate the applicant in the years leading up to the resignation, one would expect that this would be reflected in the language of the grievance. Given all of these indications, it was open to the arbitrator to find that on its face the pith and substance of the applicant's grievance related to a resignation under section 63 of the *PSEA*.

[32] While it is true that the wording of a grievance should not be the only thing that ought to be considered by an adjudicator when characterizing a grievance, the Court disagrees with the applicant's contention that the adjudicator took an overly mechanical or narrow approach in the present case. The adjudicator made reference to contextual factors other than the language of the

grievance that supported her finding. She noted that even though the grievor had an experienced union representative assisting him, he chose to only file a grievance one month after his resignation, rather than in a timely manner to contest the respondent's alleged failure to accommodate in the years leading up to this event. The adjudicator also found that while the applicant had submitted evidence detailing the events leading up to the resignation, this was not enough to alter the nature of his grievance as these events were inextricably tied to his resignation. Based on both the wording of the grievance as well as other contextual indicators, the arbitrator came to a reasonable conclusion that the "crux" of the applicant's grievance was him allegedly being forced into medical retirement.

[33] The adjudicator recognized that according to *Burchill*, it was not open to the applicant to recharacterize his grievance so that it would be open to adjudication. This Court affirmed the importance of holding an applicant to their original grievance in *Boudreau v Canada (Attorney General)*, 2011 FC 868 at para 20 where Justice Martineau stated that "given the different treatment awarded to adjudicable and non-adjudicable matters under section 209 of the Act, an essential element of this system is that employees are not permitted to alter the nature of their grievances during the grievance process or upon referral to adjudication." The adjudicator was rightly concerned with ensuring that the nature of the grievance remained the same throughout the process.

[34] The Court fails to see any reviewable error in the adjudicator's reasoning. She addressed the arguments of both parties and thoroughly explained why she decided that she did not have jurisdiction to adjudicate the grievance under the *PSLRA* since she had found that the grievance

was properly characterized as relating to the applicant's resignation. The arbitrator's decision was grounded on the evidence before her and falls within a range of possible outcomes in accordance with the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[35] In the event the Court is wrong on the first issue, it will decide on the second one. The adjudicator found that even if she had jurisdiction in the present case, the employer had accommodated the applicant to the point of undue hardship. She conducted an analysis of the specific facts in this case when making an evaluation of the accommodation provided by the employer. She noted that the applicant had been on leave without pay for 10 years and had been awaiting a kidney transplant for 14 years at the date of the hearing. She added that there had also been several attempts made to accommodate the applicant and evidence showed that some seemed to come quite close to fruition, though each time it was the applicant who needed to postpone these possibilities. The adjudicator found that it was not unreasonable for the employer to require the applicant to choose one of the options considering that at the time of the hearing there was still no possibility that he could return to work or any indication of when he might be able.

[36] In *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 at paras 17-18, the Supreme Court of Canada clarified the duty of an employer to accommodate an employee with a chronic illness preventing him or her to report to work, stating that:

> If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties — or even authorize staff transfers — to ensure that the employee can do his or her work, it must do so to accommodate the employee.

> …However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.
>
> Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test.

[37] In the present instance, at the time of the hearing, the applicant remained unable to return to work. Although there was evidence that he would be able to return to work quite soon after he received a kidney transplant, the timing of the transplant remained entirely speculative. It was reasonable then for the adjudicator to find that the applicant was unable to work for the foreseeable future and to base her assessment of accommodation on this fact. Considering the length of time that the applicant had been on leave without pay and the evidence that the employer had attempted to accommodate on several instances, it was reasonable for the adjudicator to find that the employer had accommodated the applicant to the point of undue hardship. The intervention of this Court is therefore unwarranted.

[38] The parties agreed at the hearing that there was no issue as to costs.

JUDGMENT

THE JUDGMENTOF THE COURT is that the application for judicial review be dismissed with costs in the cause.

"Michel Beaudry"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1467-13
STYLE OF CAUSE:	JAMES MUTART v ATTORNEY GENERAL OF CANADA
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