Federal Court  Cour fédérale

Date: 20141016

Docket: T-1735-13

Citation: 2014 FC 994

Toronto, Ontario, October 16, 2014

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

GORDON TETI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This case illustrates the difficulties faced by some persons coming to Canada from very different cultures who seek to make their way in a Canadian cultural environment. The Applicant Gordon Teti is a black man from Kenya who came to Canada as an adult. He pursued graduate university studies in Winnipeg. He was joined there by his wife and three daughters.

[2] As I told Mr. Teti at the conclusion of the hearing before me, he is a fine man. He has been challenged by a different cultural environment in Canada. He has fallen into the confusion

often experienced by laypersons in dealing with the law and legal concepts. There is no doubt in my mind that the experiences that he endured while working within a Canadian government organization have had a profound negative influence on his life, and that of his family. In reviewing the record, there are decisions made by the Adjudicator – for instance, in respect of discrimination and harassment – which I would have decided differently. However, this being a judicial review, the question is not whether I would have come to a different conclusion based on the facts before the Adjudicator; rather, the question is: Was the decision of the Adjudicator within the acceptable bounds of reasonableness? With some regret, I find that I cannot set aside that decision, as I find that it is within the acceptable bounds of reasonableness.

[3] The Applicant (sometimes referred to as the grievor) accepted a fixed term appointment with the Federal Government as a Citizen Services Officer (sometimes referred to as a Program Officer or PO) which required that he move to Toronto – which he did – but his family remained in Winnipeg. His employment was renewed for several terms; but, following a series of events, was not further renewed. The Applicant brought three separate grievances, which were determined by an Adjudicator acting under the provisions of the *Public Services Labour Relations Act*, SC 2003, c 22 [*PSLRA*]. It is the decision of that Adjudicator, dated September 19, 2013 and cited as 2013 PSLRB 112 that is under review here.

[4] Since arriving in Canada, Mr. Teti has received a number of awards and commendations; particularly for public service work. He served with the Canadian delegation overseeing elections in the Ukraine. He has received favourable comments from customers that he served during his employment with the Federal Government

[5] On the other hand, Mr. Teti's employment was not renewed; he is being divorced from his wife; his landlord has undertaken eviction proceedings. He is currently on welfare.

[6] Mr. Teti represented himself in these proceedings. He says that the union, who provided a lawyer to represent him at the grievance hearing, will no longer represent him. He says that he cannot get Legal Aid . His material, which comprised his own affidavit and written argument, mixes assertions of fact and argument between the two. He sought to introduce new materials into evidence in these proceedings. Prothonotary Milczynski, in an Order dated May 1, 2014, ruled that the Applicant could not put new materials in evidence. To the extent that the Applicant refers to this material or other material not forming part of the record before the Adjudicator, I have had no regard to that material. The Applicants' affidavit and written argument mingle submissions between the two. I have attempted to consider submissions wherever made.

[7] At the outset of the hearing, the Applicant raised what he described as certain preliminary matters.

[8] The first was that he was indigent and had been unable to secure proper legal representation, whether through the union or legal aid. Our system provides limited but inadequate assistance through organizations such as Pro Bono Law, University Legal Aid clinics, and ad hoc pro bono services by individual lawyers and law firms. Clearly, there is a need which is not being well served. In Mr. Teti's case, this Court has the feeling that a point could have been made or better made whether at the Adjudicative level or at the Court level, that just wasn't well thought out and expressed.

[9] Often during his presentation, Mr. Teti said that he had evidence which he gave to his Counsel at the Adjudicative level, but that evidence was never presented. The hearing before me is not structured so as to admit evidence that "should have" been presented. I must consider the matter as it was presented. This is in no way intended as a criticism of Mr. Teti's Counsel at the Adjudicative level.

[10] Further, at the hearing before me, Mr. Teti acknowledged that he wrote certain emails, but had private reservations or didn't want to "rock the boat". Those private reservations are not in evidence before me, nor are they in the record before the Adjudicator. They cannot be considered.

[11] The Applicant argued that the Adjudicative Tribunal was requested to provide a transcript of the evidence given before it. The response was that no transcription was made. There is apparently no legal requirement that a transcription be made. Counsel for the Respondent advised the Court that, on occasion, the Tribunal or a party may request a transcript at the time of the hearing or before. There is no record before me to indicate that any such request was made. However desirable a transcript would be, there is no reviewable error on the basis that none was made.

I. THE GRIEVANCES AND THEIR DETERMINATION

[12] The Adjudicator dealt with three grievances, which he summarized at paragraphs 2 to 5 of his decision:

> *2 The events leading up to the employer's actions on March 29, 2012 ground the three grievances before me.*

> *3 The first, dated March 23, 2012, grieved "a sustained, constant and persistent policy of harassment and discrimination by [the grievor's] team leader, Carmen Varao-Phillips (Management) at [his workplace] contrary to the Values and Ethics Code of the Public Service [the "Ethics Code"]" (Exhibit U-1, Tab 1 (PSLRB file 566-02-7450)). The grievor is Black, and had emigrated some years earlier from Kenya. No particular remedy was specified in the grievance.*
>
> *4 The second grievance, dated March 27, 2012, grieved that he had been "disciplined unfairly contrary to the collective agreement as a whole and any related policy" (Exhibit U-1, Tab 2 (PSLRB file 566-02-7449)). It sought as a remedy the removal of a disciplinary letter dated March 26, 2012 from the grievor's personnel file as well as any other action required to make him whole.*
>
> *5 The third, dated April 2, 2012, grieved that he had been "terminated unjustly contrary to the collective agreement and the Canadian Human Rights Act" (Exhibit U-1, Tab 3 (PSLRB file 566-02-7448)). It sought as a remedy the following:*
>
> > *a. The employer remove the letters of March 29th disciplining me and terminating my employment from my file;*
> >
> > *b. That my record be made whole;*
> >
> > *c. That I be offered the extension of my term employment commensurate with my qualifications and the extensions offered to my co-workers;*
> >
> > *d. Damages in accordance with my rights under the Canadian Human Rights Code; and*
> >
> > *e. Any other remedy that the Adjudicator thinks just under these circumstances.*

[13] The determination made by the Adjudicator in respect of these grievances is summarized at paragraph 156 of his reasons and is set out in his Order at the end of his decision at paragraphs 159 to 161:

> *156 For all these reasons, I am satisfied that:*

> *a. I have jurisdiction to consider the allegation that the grievor's term contract was not renewed because of bad faith or discrimination that would make the non-renewal in law a "termination" within the meaning of paragraph 209(1)(b) of the Act,*
>
> *b. the grievor has failed to establish the existence of any such bad faith or discrimination, pursuant either to the collective agreement or the CHRA, and that accordingly*
>
> *c. the non-renewal of his term contract was not a "termination" within the meaning of paragraph 209(1)(b) of the Act, or discrimination within the meaning of the CHRA.*
>
> . . .
>
> *IX. Order*
>
> *159 I am without jurisdiction to hear the Letter of Reprimand grievance (PSRLB File No. 566-02-7449) and I order the file closed.*
>
> *160 The harassment grievance (PSLRB File No. 566-02-7450) is dismissed.*
>
> *161 While I have jurisdiction to hear the termination grievance (PSLRB File No. 566-02-7448), on the evidence the cessation of the grievor's term employment was not a termination within the meaning of paragraph 209(1)(b) of the Act and I accordingly have no jurisdiction, and I order the file closed.*

II. THE ISSUES BEFORE ME

[14] The Applicant, in his Notice of Application filed October 21, 2013, named several individuals, all federal civil servants, and the Deputy Head of the Department of Human Resources and Skills Development Canada, as Respondents. In that respect, the Notice claimed the following relief:

> *The applicant makes application for:*

1. *Be awarded lost income both in wages and benefit entitlement that he had prior to his termination date.*

2. *General damages to be determined by the Federal Court of Appeal.*

3. *The Employer be compelled to re-instate the applicant in his position as an indeterminate staff and the applicant be deployed to a different Unit within the same Department.*

4. *Any record of any disciplinary action be removed from the applicant's file.*

5. *Each manager be made to account and take responsibility for their actions individually.*

[15] Subsequently, the style of cause has been amended to remove the named individuals and Deputy Head as Respondents. The Respondent is now the Attorney General of Canada.

[16] The Applicant claims the following relief in his Memorandum of Fact and Law, dated the 27th day of June 2014, at page 13:

> *The Applicant respectfully requests an Order from this Honourable Court directing that the Adjudicator's decision be declared null and void and be quashed in the interest of the rule of law, fairness and justice for all.*

[17] The issue before me is, therefore, whether the Applicant has established a basis upon which the Adjudicator's decision should be set aside and returned to another Adjudicator for re-determination.

III. STANDARD OF REVIEW

[18] The Respondent submits, and I agree, that the standard of review is reasonableness in respect of both the question of jurisdiction and in respect of the Adjudicator's determination of questions of mixed fact and law.

[19] As to jurisdictional questions, reference can be made to the decision of Justice Gleason of this Court in *Chamberlain v Canada (Attorney General)*, 2012 FC 1027 at paragraphs 28 to 47, especially 45 to 47. In respect of mixed fact and law, reference can be made to the decision of Justice Boivin (as he then was) in *Canada (Attorney General) v Bergeron*, 2013 FC 365 at paragraph 27.

[20] The Applicant made no submissions in this regard. As I have said, he represents himself and was undoubtedly somewhat confused as to the nature of those proceedings. This is a judicial review wherein the Court must determine if the Adjudicator's decision was reasonable having regard to the record before him. The Adjudicator is given a degree of latitude in making the decision. The question is not whether this Court would have made a different decision. The question is whether the decision was within acceptable bounds of reasonableness (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47 ["*Dunsmuir*"]; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador Treasury Board)*, [2011] 3 SCR 708 at para 17 ["*Newfoundland Nurses*"]).

[21] The Applicant should also realize that this is not an appeal wherein the Court might make a different decision based on the record. Nor is this a new hearing where the record might be supplemented with further evidence. This is, as explained above, a judicial review.

IV. THE FACTUAL BACKGROUND

[22] The Adjudicator began with a summary at paragraph 1 of his Reasons:

> *1 The Treasury Board (Program and Administrative Services) ("the employer") and the Public Service Alliance of Canada ("the union") are parties to a collective agreement with an expiry date of June 20, 2014 ("the collective agreement"). In early 2012, the grievor, Gordon Teti, was working under a series of short-term acting appointments as a Program Officer (PM-02) at the Department of Human Resources and Skills Development Canada (Citizen Services) in its Toronto office. This series of appointments had commenced on April 1, 2011 (Exhibit E-13). The appointments had been renewed six times. The last renewal came on February 28, 2012. The employer extended his appointment from the previous end date of March 30, 2012 to April 30, 2012 (Exhibit E-19). However, on March 29, 2012, the grievor:*
>
> > *a. was placed on leave with pay;*
> >
> > *b. was escorted from the employer's offices and told not to come back without advance notice and permission from the employer; and*
> >
> > *c. was told that his employment with the employer would cease and not be extended at the close of business on April 30, 2012 (Exhibit U-1, Tab 18).*

[23] At paragraphs 18 to 70 of his Reasons, the Adjudicator provides a fulsome account of the facts of the case. I will briefly set out some of the background.

A. *APPLICANT'S RESPONSIBILITIES*

[24] During the Employment Period, the Applicant worked as a Program Officer (PO) at a call centre, answering questions about the Live-in Caregiver Program (LCP) and the Temporary Foreign Worker (TFW) program run by the Federal Government (the "Employer").

[25] The LCP dealt with specific applications by employers to permit the entry into Canada of temporary foreign workers that came to work in Canada as live-in caregivers. The TFW program proper dealt with employer applications from a variety of businesses to permit the entry into Canada of temporary foreign workers to work for those employers. Following his appointment to the TFW unit in December 2010, the Applicant worked exclusively on the LCP program.

B. *CECESSATION OF EMPLOYMENT AND GRIEVANCES*

[26] On March 29, 2012, the Employer placed the Applicant on leave with pay and had him escorted from the Employer's offices and told him not to come back without advance notice and permission from the Employer. The Employer told the Applicant his employment would cease as of the close of the business on April 30, 2012. The Employer did not renew the Applicant's employment subsequent to April 30, 2012, the date on which his last extension expired (the "Cessation of Employment").

[27] As a result of the Cessation of Employment and the incidents discussed below, the Applicant brought three grievances to the Public Servants Labour Relations Board ("PSLRB") under paragraphs 209(1)(a) and (b) of the *PSLRA* (the "Grievances").

1. PSLRB file 566-02-7540: The Applicant's manager Carmen Vararo-Phillips constantly harassed the Applicant and subjected him to discrimination based on his being "Black" and emigrated from Kenya, contrary to the Values and Ethics Codes of the Public Service (the "Harassment Grievance");

2. PSLRB file 566-02 7449: The Employer unfairly disciplined the Applicant contrary to the Collective Agreement as a whole and any related policy. The Applicant requested a remedy of removing the disciplinary letter of March 26, 2012 from the Applicant's personal file and any other action required to make him whole (the "Discipline Grievance");

3. PSLRB file 566-02-7448: Contrary to the Collective Agreement and the *Canada Human Rights Act* (CHRA) the Employer unjustly terminated the Applicant's employment. The Applicant sought a remedy to be made whole, his term of employment extended, and receive damages under the *CHRA*.

[28] The Applicant also brought a complaint of discrimination under the *CHRA* to the Canadian Human Rights Commission.

C. *INCIDENTS THAT LED TO THE GRIEVANCES*

(1) Overtime

[29] Ms. Varao-Phillips rejected the Applicant's request for overtime since, as a new hire conducting his four to six week training period, he could not receive overtime. The Applicant

found this odd since other new hires applied for and obtained overtime work, but he did not grieve this issue. However, the Applicant applied again for overtime in February, 2011 and the Employer allowed him to work overtime in May, 2011 once he began to work independently subsequent to completing his training.

(2) Additional Training

[30] In August of 2011, while working independently on the temporary LCP, the Applicant sought clarification regarding the low income cut-off criteria in evaluating an employer's application. In response, Ms. Varao-Phillips appointed Bill Shena as the Applicant's mentor to provide further guidance on the LCP. The Applicant initially provided a positive response to this arrangement. However, he thought he would receive new information but instead, and to his disappointment, received the same training as at the commencement of his employment.

(3) Incident with Mr. Shena

[31] On September 7, 2011, Mr. Shena approached the Applicant's cubicle and loudly questioned the Applicant's work to the attention of other employees. The Applicant felt humiliated and Avry Carty, another Program Officer and a Union representative, witnessed the incident and reported that she considered Mr. Shena's conduct unprofessional and unacceptable. As a result a meeting occurred with the Applicant, Ms. Vararo-Phillips, Ms. Hibberd who was one of four managers of the Applicant's unit, Ms. Carty and others, wherein the Applicant questioned his training and his treatment by Mr. Shena on September 7, 2011. Ms. Vararo-Phillips explained management's decision but agreed that management should discuss future

decisions regarding training with the PO, she also agreed that feedback should be conducted in private. The Applicant and Ms. Carty took this as an apology on Ms. Varo-Phillips's part regarding the handling of the training issue.

(4) Two Incidents with Mr. Rainville

[32] First, in early November of 2011, in the context of dealing with a an irritated client, the Applicant broke normal procedure and contacted a colleague, Padmavathi Iyer at the call centre handling the file, notwithstanding that he knew normal procedure of referring the client to the call centre. On or around November 11, 2011 his team leader, Jason Rainville stated that the Applicant was not authorized to give these instructions. The Applicant characterized this conduct as hostile. The Adjudicator noted that in his testimony, the Applicant "elided" several details regarding this event including his insistence on a meeting with management, Union representatives as well as Ms. Iyer "to put forward her position since she is the central focus on the matter" (Paragraphs 36-39). This meeting occurred on November 7, 2011 prior to the first incident with Mr. Rainville.

[33] Second, the Applicant put a request to a team leader that was not Mr. Rainville to take his vacation in November and December. When Mr. Rainville took over the position as team leader he denied the request. However, Ms. Hibberd, the team's manager, intervened and approved his application for vacation.

(5) Incident with Ms. Hibberd

[34] On November 1, 2011, an evacuation of the Unit's office building occurred. During the evacuation, the Applicant initially did not appear at the mandated assembly point outside the building for a head count with all other employees. Upon returning to the building and speaking to Ms. Hibberd, the individual responsible for taking the head count, she shouted at him and threatened discipline. Yet, later that day Ms. Hibberd apologized stating "she was like a parent in that situation, and that is why [she] acted" that way (Paragraph 41).

(6) Incident with a Lawyer

[35] On November 11, the Applicant contacted a client advising on the illegibility of the application faxed, and asked for a better copy. The client's lawyer contacted the Applicant accusing him of incompetence and informed the Applicant that he spoke with Ms. Varao-Phillips about the incident. Ms. Varao-Phillips testified that "There was nothing wrong in her view with a PO requesting a better copy", and "There was nothing unusual about this call" (Paragraph 44).

(7) The Sears Incident

[36] In late January 2012, the Applicant processed an application on behalf of Sears Canada ("Sears"). Subsequent to emailing Ismat Mizra, Senior Vice-President, Business Capability and HR at Sears that he approved the application, the Applicant called Ms. Mizra (the "Sears Phone Call"). The next day, January 24, 2012, corporate counsel for Sears called Ms. Varao-Phillips expressing concern regarding the Sears Phone Call. Ms. Varao-Phillips then spoke to both Ms. Mizra and corporate counsel. She summarized these conversations in an email to Ms. Hibberd. The Adjudicator noted that these notes contained hearsay and perhaps double hearsay, as well as

errors which Ms. Varao-Phillips and Ms. Mizra identified and corrected in the subsequent investigation. However, the Adjudicator made the following findings of facts regarding these notes for which no misunderstanding existed (the "Sears Findings of Fact") at paragraph 51 of his decision:

1. The Applicant spoke to Ms. Mizra within the context of an application filed under the TFW program that the Applicant handled;

2. The Applicant sent Ms. Mizra a link to a website that mentioned the charity he set up on behalf of his late mother;

3. They discussed the Applicant's daughter's search for work and whether Sears might be hiring; and

4. The Applicant sent Ms. Mizra his daughter's resume.

[37] In response, the Employer conducted an investigation wherein an investigator prepared a draft reported and submitted the same to Nicole Gowan, a labour relations consultant. The latter pressed the investigator to eliminate the "grey areas" and requested he prepare a black and white report with definite findings. The final report of March 22, 2012 concluded that the Applicant breached the Values and Ethics Code for the Public Service by using his position to contact a Sears vice-president for personal reasons (the "Report").

[38] As a result of the Report's findings of a conflict of interest, management decided not to renew the Applicant's employment.

(8) Union Email

[39] On March 20, 2012, the Union conducted an election for officers of its local. On March 21, 2012 the Applicant wrote an email congratulating the newly elected officials: "He suggested that the former officials had been working hand in glove with management, adding that he was 'extremely happy that Ken Horsford did not present himself for re-election for his leadership was a disgrace'" (the "Union Email") (Paragraph 57). He sent the Union Email on the Employer's internal email system, not the Union's and copied both Union and non-union members to the Union Email, such as Ms. Gowan.

[40] Mr. Horsford, a fellow employee, complained to management. On March 26, 2012, the Director, Mr. Azouz, provided the Applicant with a disciplinary letter with respect to the Union Email (the "Disciplinary Letter"). The Disciplinary Letter qualified his behaviour as inappropriate and grounds for discipline and would remain on his file for two years.

V. DECISION UNDER REVIEW

A. *CONCLUSION FOR EACH GRIEVANCE*

[41] With respect to each grievance, the Adjudicator found the following:

1. Discipline Grievance: the Adjudicator lacked jurisdiction to hear this grievance and ordered the file closed;

2. Harassment Grievance: the Adjudicator had jurisdiction to hear this grievance but found the Applicant failed to establish his

allegations against Ms. Varao-Phillips and thus the Adjudicator dismissed the Harassment Grievance; and

3. Termination Grievance: although the Adjudicator had jurisdiction to hear this grievance, the Applicant failed to establish termination within the meaning of paragraph 209(1)(b) of the *PSLRA* and thus the Adjudicator's jurisdiction ended and he ordered the file closed.

B. *DISCIPLINE GRIEVANCE*

[42] Based on his findings of fact, the Adjudicator characterized the Disciplinary Letter as disciplinary in nature but did not result in termination, demotion, suspension or financial penalty. The Employer merely put the Disciplinary Letter on the Applicant's file for two years. Therefore, the Adjudicator found he did not possess jurisdiction under paragraph 209(1)(b) of the *PSLRA* to consider the grievance and ordered closure of that file.

[43] The Adjudicator noted that he could consider facts leading to the Disciplinary Letter the latter itself with respect to the other grievances.

C. *HARASSMENT GRIEVNACE*

[44] Even assuming he had jurisdiction to consider this grievance, the Adjudicator found that the Applicant (grievor) failed to bring evidence to establish his allegations against Ms. Varao-Phillips.

[45] The Adjudicator conducted a point-by-point consideration of each incident described above that constituted an allegation against Ms. Varao-Phillips (the "Harassment Incidents"). He found that none of the facts "either alone or in combination" go in any way towards establishing the serious allegation contained in the grievance. The Adjudicator also noted the diversity of the workforce and stated that "the grievor would need more than simply the fact that he was from Kenya or was racially black to establish that Ms. Varao-Phillips, when exercising her responsibilities as a manager, was acting in a discriminatory fashion towards him" (Paragraph 115).

[46] The Adjudicator's point-by-point consideration of the Harassment Incidents included:

- Overtime: It made operational sense that the Applicant only received overtime work once he began to work independently. The evidence that several of the Applicant's co-workers received overtime does not in and of itself establish any impropriety on Ms. Varao-Phillip's part. Even if Ms. Varao-Phillips made an improper decision to refuse to assign overtime work to the Applicant, "one is left to wonder why she changed her mind and allowed the grievor overtime the second time" (Paragraph 105).

- Training: The Applicant's own evidence establishes that he initially welcomed the opportunity to receive retraining. Receiving the same training twice does not constitute harassment and at worst signifies a misunderstanding or a failure of the Employer to conduct the training properly.

- Mr. Shena Incident: Ms. Varao-Phillips properly responded to the Applicant's concerns, and made a valid managerial decision not to discipline Mr. Shena. Such a decision does not constitute discrimination against the Applicant.

- Lawyer Incident: One cannot fault Ms. Varao-Phillips for the arrogant and inappropriate conduct of the lawyer. In addition the Adjudicator took "notice of the fact that faxes, especially those of completed forms, are often hard to read, if not entirely illegible" (Paragraph 108). Hence Ms. Varao-Phillips's statement that she saw nothing wrong with the Applicant asking for another copy of an application meant that she did not criticize the Applicant. Moreover, given the hearsay nature of the lawyer's comments, no evidence exists to suggest that Ms. Varao-Phillips said what the lawyer said she said.

- Mr. Rainville's Conduct: No evidence existed that Mr. Rainville treated other employees any more brusquely than the Applicant. Moreover, when the Applicant pursued the issue of his vacation with Ms. Hibberd, his position prevailed.

- Disciplinary Letter: a written reprimand of the Union Email "is evidence in itself of no more than that the employer discriminated on the basis of content, not on the basis of race or national origin" (Paragraph 111).

- Sears Incident: the Adjudicator's Sears Findings of Fact appeared in the investigator's report which formed the basis of the decision not to renew the Applicant's term appointment rather than discrimination. I will discuss further the implications of the Sears Finding of Fact.

- Termination: Ms. Varao-Phillips did not make this decision.

D. *TERMINATION GRIEVANCE*

[47] The Adjudicator determined that:

1. He possessed jurisdiction to consider the allegation that the Employer did not renew the Applicant's term contract because of bad faith or discrimination that would make the non-renewal in law a "termination" within the meaning of paragraph 209(1)(b) of the *PSLRA*; but

2. The Applicant failed to establish the existence of any such bad faith or discrimination, pursuant to the Collective Agreement or the *CHRA*; and

3. Therefore, the non-renewal of his term contract was not a "termination" within the meaning of paragraph 209(1)(b) of the *PSLRA*, or discrimination within the meaning of the *CHRA*.

[48] The Adjudicator reached this conclusion through the following reasoning:

1. By providing a different interpretation of case-law on termination in the context of cessation of a term of employment; and

2. Applying that interpretation to the circumstances of the case.

(1) Interpretation of Termination

[49] Before applying the law to the facts of the case on this issue, the Adjudicator stated that he needed to determine the question of law of whether no termination occurred in every case of the cessation of a term contract pursuant to its terms.

[50] The Adjudicator rejected cases that applied *Miereille Dansereau* v *National Film Board*, [1979] 1 FC 100, 90 DLR (3d) 478 (CA) for the proposition that no termination occurred in every case of cessation of a term contract pursuant to its terms as overly formalistic in the context of routine renewals of term appointments.

[51] In those cases such as here, the Adjudicator determined that it may take a definite act on the Employer's part to alter the regular renewal of a particular term employment. If the Employer takes such an act in bad faith or on a prohibited ground of discrimination, that act could amount to a termination within the meaning of paragraph 209(1) of the *PSLRA*. This would mean that if a cessation amounts to a termination, an Adjudicator could conceivably award damages in the cessation context.

[52] Therefore, even in the situation of a cessation of employment, the Adjudicator found that he possesses jurisdiction under section 209(1)(b) of the *PSLRA* to consider whether, on the facts before him or her, the cessation of employment at the end of the term contract constituted a termination within the meaning of that paragraph, and if so, consider the possibility of awarding lost income beyond the cessation date. Specifically, the Adjudicator possesses jurisdiction to inquire into the circumstances of a cessation of a term contract where there is an allegation that

bad faith or some other wrongful conduct of the employer resulted in the non-renewal of the contract, when in the ordinary course the employer would have renewed said contract.

Applying this interpretation to the Termination Grievances required answering two questions:

1. Whether the Employer's telling the Applicant to leave and not come back on March 29, 2012 constituted termination; and

2. Whether the Employer acted in bad faith in deciding not to renew the Applicant's contract because of what it considered a breach of the Ethics Code. If the Employer acted in bad faith, then said cessation would constitute terminating the Applicant's contract within the meaning of paragraph 209(1)(b) of the *PSLRA*.

[53] On the first question, the Adjudicator found that no termination occurred: the Applicant remained an employee until the end of his term contract because he continued to receive his regular salary and benefits until the end of his term. Moreover, he found the incident of March 29, 2012 as similar to a suspension with pay pending an investigation into alleged wrongdoing "That employee remains an employee during the investigation, notwithstanding that he or she is told to leave the work site" (Paragraph 150).

[54] On the second question, the Adjudicator found the Applicant failed to establish that the Employer acted in bad faith in deciding not to renew his term appointment. The Employer had a reasonable basis to believe the Applicant breached the Ethics Code "by conducting himself in

such a way as to give rise to an appearance, if not an actual, conflict of interest" (Paragraph 152). The Adjudicator then provided a detailed explanation of the facts that led to such an appearance of a conflict. These facts satisfied the Adjudicator that the Employer made a good faith decision not to renew the grievor's contract.

[55] The Adjudicator found the Applicant did not establish even a prima face case that the Employer based its decision on a ground of discrimination under the *CHRA*:

> ***155*** *I also do not accept the grievor's argument that the decision not to renew the term appointment based on the ethics breach was in any way a veiled act of discrimination. I think it is important to note that the grievor failed to establish even a hint of discrimination based on race or national origin. The differential treatment that the grievor offered up as circumstantial evidence of such discrimination was in my opinion all treatment that was tied to his conduct, not to his race or national origin.*

[56] I have carefully reviewed the Adjudicator's findings and determination. I find, as I have previously stated, that while I would probably have concluded differently in respect of discrimination and harassment, the Adjudicator's decision was within the acceptable bounds of reasonableness as articulated by the Supreme Court of Canada in *Dunsmuir* paragraphs 47 to 49, as well as in *Newfoundland Nurses* at paragraphs 12-18.

[57] Accordingly, this Application will be dismissed. Given the Applicant's indigent circumstances, no Order as to costs will be made.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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