Federal Court of Appeal  Cour d'appel fédérale

Date: 20150610

Docket: A-44-15

Citation: 2015 FCA 142

CORAM: **TRUDEL J.A.**
RYER J.A.
RENNIE J.A.

BETWEEN:

DIANNE BENNETT AND JOHN KING

Applicants

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Heard at Toronto, Ontario, on June 3, 2015.

Judgment delivered at Ottawa, Ontario, on June 10, 2015.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: RYER J.A.
RENNIE J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20150610

Docket: A-44-15

Citation: 2015 FCA 142

CORAM: **TRUDEL J.A.**
RYER J.A.
RENNIE J.A.

BETWEEN:

DIANNE BENNETT AND JOHN KING

Applicants

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an application for judicial review of a decision of the Public Service Labour Relations Board (the Board), dated August 11, 2014, in which the Board dismissed as untimely complaints filed by the applicants against the Public Service Alliance of Canada (the Alliance or the bargaining agent). It did so without holding an oral hearing. The Board's reasons are cited as 2014 PSLRB 75.

[2] In front of the Court, the applicants raise a multitude of issues, including a Charter issue, but in my view only two questions matter here. They are as follows: (1) did the Board err in finding that the complaints of the applicants were statute-barred? and (2) did the Board err in deciding this issue without an oral hearing? I propose to answer both questions in the negative.

[3] Few facts are needed to understand the issues and assess the Board's decision. Mr. King was a border services officer. He also served as president of Local 024, a component of the bargaining agent. He posted statements on the website of Local 024 that led to his suspension and ultimately to his termination in November 2007.

[4] Mr. King unsuccessfully grieved his suspension and termination at all levels, culminating with the dismissal of his application for leave to appeal to the Supreme Court of Canada from the decision of our Court (*King v. Canada (Attorney General)*, 2013 FCA 131, [2013] F.C.J. No. 551, leave to appeal to S.C.C. dismissed with costs, 35479 (January 30, 2014)).

[5] Throughout the administrative and legal proceedings, Mr. King was represented by legal counsel. Indeed, the bargaining agent retained the services of Mr. Andrew Raven to represent Mr. King during the grievance process. Mr. Raven remained the solicitor of record until the time came to file the application for leave to appeal to the Supreme Court of Canada. It was then that Mr. King notified the Alliance of his intention to exercise his right to be represented by counsel of his choice. The Alliance was not "to interfere or proceed" with Mr. Raven as solicitor of record.

[6] The Alliance took notice of Mr. King's decision to continue pursuing his grievances at his own expense. As a result, it took no further action.

[7] As mentioned above, the Supreme Court of Canada refused leave to appeal. The applicants subsequently filed the present complaints with the Board on April 22, 2014.

[8] The applicants assert that the Board erred in failing to consider the individual Local 024 members' rights pursuant to the statutory collective bargaining scheme. In their view, the Board "failed in its duty to be fair … when it dismissed without a *viva voce* hearing a strong *prima facie* case that the [Alliance] failed to fairly represent Ms. Bennett and Mr. King" (applicants' memorandum of fact and law at paragraph 9). In particular, they assert that the Board should not have dismissed the complaints for being out of time without notifying the applicants of its intention to do so on the basis of their written submissions and without affording them the possibility to present further submissions.

[9] In my view, these arguments cannot succeed. The unfair labour practice complaints were filed under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the Act). Subsection 190(2) states that a complaint under subsection (1) "must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion, ought to have known, of the action or circumstances giving rise to the complaint".

[10] In a comprehensive set of reasons, the Board found that the complaints related for the most part, if not entirely, to alleged facts and violations dating back to Mr. King's suspension

and termination in 2007 (Board's reasons at paragraph 39). Thus, the complaints were caught by subsection 190(2) of the Act and out of time.

[11] The Board was satisfied that Mr. King and the members of Local 024 knew or ought to have known that he had been suspended and terminated in 2007 (Board's reasons at paragraph 37). The record clearly supports that finding.

[12] The Board was also satisfied that Mr. King knew that the Alliance had not filed an unfair labour practice complaint against the employer (*ibidem* at paragraph 38). In light of the record, this finding is reasonable. In its 2010 decision dealing with the grievance, the Board states this fact clearly (*King v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 125, [2010] C.P.S.L.R.B. No. 136 at paragraph 178). It is similarly mentioned in e-mails exchanged between the National President of the Alliance and Mr. King dated November 29, 2012 and January 18, 2013 (see record of the applicants, volume 1 at pages 118 and 120). Furthermore, the record shows that the Charter argument now put forward by the applicants was fully canvassed during the grievance proceedings (see *King v. Canada (Attorney General)*, 2012 FC 488, [2012] F.C.J. No. 537 at paragraph 158ff.).

[13] Nevertheless, the above considerations do not entirely dispose of the matter as the applicants allege that the Alliance failed to make any representations on Ms. Bennett's behalf with respect to the removal of Mr. King as the Local 024 membership representative. In her affidavit, Ms. Bennett deposes as follows:

> 17. Not until the issue of associative and collective rights were brought to my attention after January 31, 2014 and explained to me by Mr. King, after he had

> received notice of the dismissal of his application for leave to the Supreme Court of Canada, did I become aware that the PSAC had pursued only grievance action against the Canada Border Services Agency (CBSA), and not the complaint as previously asserted by the Union, and I understand that these actions may appear indistinguishable, but that they are distinct forms of action under the PSLRB.
>
> 18. It was when I first became aware that the PSAC did not advance my associative and collective rights, and my right to freedom from interference of my union representatives by the employer, that I decided to file this complaint.
>
> (record of the applicants, volume 1, tab 4 at page 31)

[14] The Board found that the members of Local 024 knew or ought to have known in 2007 that their representative had been suspended and then terminated for actions taken in that capacity. Once again, the record supports this finding. Ms. Bennett, then known as Dianne Farkas, was a member of the Local 024 steward body. She was often copied on e-mails exchanged between Mr. King and the Alliance. Notably, in June 2012, Mr. King wanted Ms. Bennett to sit in on a conference call with Mr. Raven to discuss Mr. King's concerns about the way his file was being handled by the Alliance (record of the applicants, volume 1 at page 112).

[15] As a result, I do not accept the applicants' specific arguments regarding Ms. Bennett's knowledge of the relevant events giving rise to the complaints. I am also aware that Ms. Bennett's complaint is, in reality, that of Mr. King, who had complained both as a member and as representative of Local 024. Mr. King's complaint is the only document attached to Ms. Bennett's complaint form (Form 16).

[16] As for the matter of costs associated with the Supreme Court of Canada proceedings, I agree with the Board when it stated as follows:

> [39] To try to shelter the pith and substance of their complaint[s] by referring to an issue … that was the very last event in a long chronology of events dating back to 2007 would be to let the tail wag the dog.

[17] Trying to circumvent the application of subsection 190(2) of the Act in this manner would render the provision meaningless.

[18] I therefore conclude that the Board committed no error in holding that the complaints were statute-barred.

[19] I now move on to the question of whether the Board breached its duty of procedural fairness to the applicants when it declined to hold an oral hearing before disposing of the complaints on the basis of subsection 190(2).

[20] Section 41 of the Act, which was in force both when the complaints were filed and when the Board rendered its decision, specifically allowed the Board to decide a matter solely on the basis of written submissions.

[21] Having considered the record, the Board was satisfied that a hearing was unnecessary to render a decision with regard to the respondent's preliminary objection that the complaints were out of time. On this finding, the Board is entitled to considerable judicial deference (*Bremsak v. Professional Institute of the Public Service of Canada*, 2012 FCA 91, [2012] F.C.J. No. 528 at paragraph 10). This is not an instance where the applicants were deprived of their right to make submissions on the preliminary objection raised by the respondent. As a result, the Board

committed no error of law in acting as it did. I conclude that there was no breach of the applicants' right to procedural fairness.

[22] Consequently, I propose to dismiss the application for judicial review with costs.

"Johanne Trudel"

J.A.

"I agree
C. Michael Ryer"

"I agree
Donald J. Rennie"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-44-15
STYLE OF CAUSE:	DIANNE BENNETT AND JOHN KING v. PUBLIC SERVICE ALLIANCE OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 3, 2015
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	RYER J.A. RENNIE J.A.
DATED:	JUNE 10, 2015

APPEARANCES:

Richard C. Edwards	FOR THE APPLICANTS DIANNE BENNETT AND JOHN KING
Paul Cavalluzzo	FOR THE RESPONDENT PUBLIC SERVICE ALLIANCE OF CANADA

SOLICITORS OF RECORD:

Richard C. Edwards Craven, Saskatchewan	FOR THE APPLICANTS DIANNE BENNETT AND JOHN KING
Cavalluzzo Shilton McIntyre Cornish LLP Toronto, Ontario	FOR THE RESPONDENT PUBLIC SERVICE ALLIANCE OF CANADA