Federal Court of Appeal | Cour d'appel fédérale

Date: 20181108

Docket: A-151-17

Citation: 2018 FCA 203

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

BRYAN NADEAU

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on November 5, 2018.

Judgment delivered at Vancouver, British Columbia, on November 8, 2018.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: PELLETIER J.A.
DE MONTIGNY J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20181108

Docket: A-151-17

Citation: 2018 FCA 203

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

BRYAN NADEAU

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

GLEASON J.A.

[1] Dr. Nadeau seeks to set aside the decision of an adjudicator of what was then the Public Service Labour Relations and Employment Board (the PSLREB) in *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 31, in which the adjudicator found that he had no jurisdiction to inquire into Dr. Nadeau's grievance.

[2] In his grievance, Dr. Nadeau alleged that he had been constructively dismissed. The grievance was referred to adjudication under paragraph 209(1)(*b*) and subparagraph 209(1)(*c*)(ii) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the PSLRA). Under the PSLRA, only certain types of grievances may be referred to adjudication. The two provisions that Dr. Nadeau relied on allow for the referral to adjudication of grievances relating to a disciplinary action resulting in termination, demotion, suspension or financial penalty (paragraph 209(1)(*b*) of the PSLRA) and, for employees in the core public administration (as that term is defined in the Act), for the referral of grievances relating to deployment under the *Public Service Employment Act*, S.C. 2003, c.22, ss. 12-13, where the employee's consent is required for deployment and the deployment is made without the requisite consent (subparagraph 209(1)(*c*)(ii) of the PSLRA).

[3] Dr. Nadeau was employed in the core public administration, having worked as a psychologist at the PS-02 group and level with the Correctional Service of Canada (CSC) at the Ferndale Institution. The facts surrounding Dr. Nadeau's employment history are discussed at length in the adjudicator's decision. For purposes of this appeal it is only necessary to note those detailed below.

[4] Dr. Nadeau was absent from work on sick leave and thereafter on an unpaid leave of absence from late 2010 until he submitted a letter of resignation in November 2012. While he was off on sick leave, Dr. Nadeau's managers became concerned that he lacked the requisite professional credentials to carry out certain tasks he had been performing and therefore wished to develop a plan with Dr. Nadeau when he returned to work to have him undertake additional

training. They also determined he would need to work under increased supervision until the training had been completed. CSC attempted to have Dr. Nadeau return to work several times, but Dr. Nadeau declined to do so. The final employer request to return to work directed Dr. Nadeau to report to CSC's Regional Reception and Assessment Centre where increased supervision could be provided that was not available at the Ferndale Institution. Instead of reporting to work as he had been directed, Dr. Nadeau resigned.

[5] Prior to the adjudication, the adjudicator ordered CSC to make certain documents available to Dr. Nadeau for inspection and to bring those documents to the hearing. CSC complied with the order. The evidence before this Court indicates that Dr. Nadeau declined to review the documents and submitted none of them in evidence before the adjudicator.

[6] At the adjudication, Dr. Nadeau, who was represented by his spouse, called two of his former managers to testify, and their testimony was largely unfavorable to him. He gave brief testimony himself, but little of it was found to be relevant by the adjudicator. There was no evidence before the adjudicator as to Dr. Nadeau's specific work requirements, his duties or as to what, if any, duties were changed or taken away by the employer. In addition, no position descriptions were filed to indicate the sorts of duties performed by a psychologist at the PS-02 level at CSC.

[7] In the decision under review, after outlining the facts, the adjudicator considered whether the grievance had been properly referred under subparagraph 209(1)(*c*)(ii) of the PSLRA. The adjudicator held that the grievance was not one that arose under that provision as it alleged

constructive dismissal, which suggests that the employment was severed and therefore Dr. Nadeau could not have been deployed within the meaning of paragraph 209(1)(*b*) of the PSLRA.

[8] The adjudicator next considered whether the grievance had been properly referred under subparagraph 209(1)(*c*)(ii) of the PSLRA and also considered whether the referral to adjudication could have been made under subparagraph 209(1)(*c*)(i) of the PSLRA, which allows for the referral to adjudication of grievances of employees in the core public administration related to demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 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. The adjudicator considered the latter provision so as to examine all possible bases for jurisdiction.

[9] The adjudicator held that neither subparagraph 209(1)(*c*)(i) or subparagraph 209(1)(*c*)(ii) of the PSLRA could apply as there was no evidence whatsoever that the employer removed duties from Dr. Nadeau or changed his working conditions. Thus, even if federal public servants can rely on the doctrine of constructive dismissal, a matter I need not decide, the adjudicator found that no such dismissal occurred and that Dr. Nadeau had not been terminated, suspended or demoted, but rather had merely resigned. In the absence of any employer conduct that might be characterized as a demotion, suspension or termination, the adjudicator found that the grievance could not be referred to adjudication under either subparagraph 209(1)(*c*)(i) or 209(1)(*c*)(ii) of the PSLRA and accordingly dismissed the grievance.

[10] Dr. Nadeau, who was also represented by his spouse before this Court with its permission, appears to submit the following as reasons for setting aside the adjudicator's decision. He first says that the adjudicator's decision should be set aside as there is a reasonable apprehension of bias due to comments that the adjudicator allegedly made during the hearing, the adjudicator's allegedly negative attitude towards Dr. Nadeau during the hearing and because, prior to being appointed, the adjudicator worked as counsel at the Department of Justice and had previously represented CSC in other proceedings before the predecessor to the PSLREB. Dr. Nadeau secondly alleges that his procedural fairness rights were contravened as he was not given access to the documents he wished CSC to produce and because these documents ought to have been before the adjudicator. He also says that his procedural fairness rights were violated as the adjudicator failed to adequately explain the process being followed. Dr. Nadeau thirdly asserts that the adjudicator's decision was unreasonable because he says he was constructively dismissed and alleges there was ample evidence to substantiate this fact before the adjudicator.

[11] For this Court to intervene, it must be satisfied that the adjudicator could reasonably be apprehended to have been biased, that the adjudicator denied Dr. Nadeau's procedural fairness rights or that the adjudicator's decision was unreasonable. No deference is owed to the adjudicator in respect of the allegations of bias and breach of procedural fairness, which are subject to full review by this Court: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69. The adjudicator's decision, on the other hand, is entitled to deference and may be set aside by this Court only if it is unreasonable: *Bergey v. Canada (Attorney General)*, 2017 FCA 30 at para. 74 (*Bergey*).

[12] The test for assessing bias in the instant case involves asking whether there is a reasonable apprehension of bias such that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it is more likely than not that the adjudicator, whether consciously or unconsciously, would not decide the matter fairly: *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817 at para. 46, 243 N.R. 22, citing *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394, (1976) 9 N.R. 115 (*per* de Grandpré J., dissenting); *Bergey* at para. 65; *Johnny v. Adams Lake Indian Band*, 2017 FCA 146 at para. 43.

[13] Here, there is no evidence (as opposed to unsworn allegations) before this Court to establish that the adjudicator made any of the comments Dr. Nadeau asserts were made or that he treated Dr. Nadeau in a negative fashion. These allegations therefore fail.

[14] Insofar as concerns the adjudicator's previous employment as counsel who appeared in other cases on behalf of CSC, this is not sufficient to give rise to a reasonable apprehension of bias in the absence of any evidence that the adjudicator had previously been involved in a matter involving Dr. Nadeau: *Agnaou v. Canada (Attorney General)*, 2014 FC 850 at paras. 44-54, aff'd 2015 FCA 294, leave to appeal to SCC refused 36730 (26 May 2016). Thus, the bias allegations are without merit.

[15] The same holds true for the allegations concerning the alleged breach of procedural fairness as the affidavit submitted by the respondent establishes that the documents that Dr. Nadeau requested were made available to him and that he declined to enter them into

evidence before the adjudicator. There is no evidence to support the allegations regarding the alleged failure of the adjudicator to explain the procedure being followed and, to the contrary, in the decision, the adjudicator details the explanations he gave at the hearing. These allegations therefore similarly fail. Accordingly, there was no denial of procedural fairness.

[16] Finally, in light of the facts before the adjudicator, his decision is eminently reasonable as there was no evidence capable of establishing that Dr. Nadeau had been dismissed, suspended, demoted or deployed. Rather, Dr. Nadeau resigned before any change was made to his working conditions. Thus, it was reasonable for the adjudicator to have concluded that he lacked jurisdiction to inquire into Dr. Nadeau's grievance.

[17] This application for judicial review must therefore be dismissed. In the circumstances, I would decline to make an award of costs.

"Mary J.L. Gleason"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-151-17
STYLE OF CAUSE:	BRYAN NADEAU v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 5, 2018
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	PELLETIER J.A. DE MONTIGNY J.A.
DATED:	NOVEMBER 8, 2018

APPEARANCES:

Gail Nadeau Dr. Bryan Nadeau	FOR THE APPELLANT
Joel Stelpstra	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT