Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20090401

Docket: A-349-08

Citation: 2009 CFA 103

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

FRANÇOIS BLANCHET

Applicant

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 712

Respondent

and

L-3 COMMUNICATIONS MAS (CANADA) INC.

Third Party

Hearing held at Montréal, Quebec, on March 31, 2009.

Judgment delivered at Montréal, Quebec, on April 1, 2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Introduction

[1] The applicant is seeking by way of judicial review to set aside a decision of the Canada Industrial Relations Board (Board) dated May 29, 2008.

[2] Under the terms of that decision rendered without an oral hearing, the Board determined that the applicant had not succeeded in establishing a *prima facie* case of his complaint against his union. The applicant accused his union of breaching its duty of fair and equitable representation under section 37 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code).

[3] To determine whether there was a *prima facie* case of a violation of section 37 of the Code by the union, the Board asked itself the following question:

> [I]f the Board deemed all of Mr. Blanchet's allegations to be true, could it find that the IAM (International Association of Machinists and Aerospace Workers, Local 712) violated the Code?

[4] After reviewing the facts and the evidence submitted by the applicant and assuming the applicant's allegations to be true, the Board was of the opinion that it could not find that the union had violated section 37.

[5] The applicant alleges that the Board failed to hold an oral hearing during which credibility issues regarding his version of events and that of the employer could have been argued. He also alleges that it misunderstood facts that were external to the complaint including, but not limited to, the fact that the Board was of the view that the counsel consulted by the union was an independent counsel.

Applicable standard of review

[6] To succeed in his application for judicial review, the applicant must establish that the Board's decision is unreasonable: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 45; *Société Télé-Mobile v. Telecommunications Workers Union*, [2004] F.C.J. No. 2123, at paragraph 47.

[7] This is a very strict test for intervention, which, in my opinion, the applicant failed to meet in this case for the following reasons.

Analysis of the Board's decision and the applicant's submissions

[8] It is not necessary to address each of the submissions in the applicant's written memorandum. I will focus on the two previously mentioned. I will also deal with issues raised at the hearing.

[9] The Board was not required to hold an oral hearing, even though one had been requested: *Nav Canada v. International Brotherhood of Electrical Workers, Local 2228*, 2001 FCA 30, at paragraphs 10 and 11; *Raymond v. Canadian Union of Postal Workers and Canada Post Corporation*, 2003 FCA 418. In this case, the credibility issues raised by the applicant do not constitute exceptional circumstances that warrant granting judicial review against the Board for its refusal to hold an oral hearing. At paragraphs 6 and 7 of *Nadeau v. United Steelworkers of America (FTQ) and Garda Security Group Inc.*, 2009 FCA 100, the Court wrote:

> [TRANSLATION]
> [6] With respect, I do not agree that, in the context of a section 37 complaint, credibility issues generally constitute exceptional circumstances requiring the Board to hold an oral hearing and that the failure to do so may be used as a basis for a valid application for judicial review. Credibility issues almost inevitably arise in antagonistic employer-employee relations, such that section 16.1 would then be rendered completely meaningless and deprived of Parliament's intended effect.
>
> [7] It is important to bear in mind that the issue under section 37 of the Code is not the merits of the complainant's grievance but rather the union's decision-making process. The Board "examines the union's conduct as to how the union managed the employee's grievance": see *Virginia McRaeJackson et al.*, [2004] CIRB no. 290, at paragraphs 10 to 12.

[10] The applicant insists that the Board was mistaken when it stated that the counsel from whom the union had sought a legal opinion was an independent counsel.

[11] With respect, that submission of the applicant is without merit. The union did not use in-house legal counsel. It retained the services of an outside law firm. It cannot be assumed that lawyers bound by a strict code of professional conduct lose their independence because they are remunerated for their legal services by those receiving the services.

[12] The applicant's other submission is also unfounded. He argued that the independent counsel's legal opinion was wrong in concluding that the agreement signed by the applicant for his reinstatement was a "last chance" agreement and that it could be set up against any subsequent dismissal.

[13] In response to questions from panel members at the hearing, the applicant's experienced counsel acknowledged that the union could err in analyzing the situation without this necessarily

resulting in arbitrary or discriminatory practice, bad faith or gross negligence on the part of the union: see also *Dutchak v. United Transportation Union*, 2005 FCA 328, at paragraph 15.

[14] However, he referred the Court to the following excerpt from the applicant's complaint, reproduced at page 24 of the applicant's record:

> [TRANSLATION]
> The association's decision to not refer my grievance was arbitrary since it was based on a legal opinion that was patently wrong and unreasonable. In fact, counsel for the association, Michel Cohen, refers to *Délisle v. Descoteaux*, 1999 CanLII 13780 (QC C.A.) on which he bases his opinion and incorrectly states that the adjudicator is bound by "last chance agreements". On the contrary, *Délisle v. Descoteaux* concludes that adjudicators are not bound by last chance agreements and that they retain jurisdiction. Moreover, the document signed November 10, 2006, was not a last chance agreement, and all prior disciplinary action had been dealt with by my four (4)-week unpaid suspension. Lastly, the dismissal itself was based on a trivial incident, which I myself brought to the supervisor's attention.
>
> [Emphasis added]

[15] He then contrasted it with this finding made by the Board at page 5 of its reasons for decision:

> In this case, based solely on the evidence submitted by Mr. Blanchet, and assuming that all his allegations are true, the Board has determined that Mr. Blanchet did not succeed in establishing a *prima facie* case that the IAM violated section 37 of the Code. Mr. Blanchet does not agree with the IAM's final decision to not refer his grievance to arbitration. However, all of the facts set out in the complaint and the documents submitted in support thereof show that the IAM did not act in an arbitrary manner when it considered whether to take the grievance to arbitration. In fact, the IAM fulfilled its duty under the Code.
>
> [Emphasis added]

[16] In assuming the applicant's allegations to be true as it did, how, he asks, could the Board find that there had been no violation of section 37 of the Code, when the applicant alleges that the union's decision to not refer his grievance [TRANSLATION] "was arbitrary since it was based on a legal opinion that was patently wrong and unreasonable"?

[17] As a general rule, when a court presumes the allegations to be true, they are allegations of fact. That rule does not apply in findings of law: see *Lawrence v. The Queen*, [1978] 2 F.C. 782 (T.D.). It is for the court, not the parties, to determine questions of law: *ibidem*.

[18] It is true that, in the passage quoted, the Board did not specify that it was referring to the applicant's allegations of fact. However, the reference to the applicant's allegations cannot be anything other than a reference to allegations of fact. Otherwise, a complainant would need only to state as a conclusion that his or her union's decision was arbitrary or discriminatory for the Board to be forced to find that there had been a violation, or at least a *prima facie* violation, of section 37 of the Code and rule on the merits of the complaint. Thus, the complaint screening process would become a thing of the past.

[19] With respect, the excerpt of the complaint to which the applicant refers contains a finding of law that the union's decision was arbitrary within the meaning of section 37 of the Code and that the legal opinion on which it was based was wrong in law and unreasonable. The explanation that follows in the excerpt serves only to demonstrate the merits of the finding of law made by the applicant.

[20] When those findings of law are disregarded, based solely on the allegations of fact in the applicant's complaint, it is not possible to conclude that the Board's decision is unreasonable.

Conclusion

[21] For these reasons, I would dismiss the application for judicial review with costs to the respondent.

"Gilles Létourneau"
J.A.

"I agree
M. Nadon J.A."

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

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-349-08
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CONCURRED IN BY:	NADON J.A. PELLETIER J.A.
DATED:	April 1, 2009

APPEARANCES:

Pierre-Louis Trudeau	FOR THE APPLICANT
Josée Lavallée	FOR THE RESPONDENT
Katherine Poirier	FOR THE THIRD PARTY

SOLICITORS OF RECORD:

2555 Le Corbusier Boulevard Laval, Quebec	FOR THE APPLICANT
Melançon, Marceau, Grenier & Sciortino Montréal, Quebec	FOR THE RESPONDENT
	FOR THE THIRD PARTY
Borden Ladner Gervais LLP Montréal, Quebec	