

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20101221

Docket: A-17-10

Citation: 2010 FCA 355

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

BETWEEN:

CHARLOTTE RHÉAUME

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on December 15, 2010.

Judgment delivered at Ottawa, Ontario, on December 21, 2010.

REASONS FOR JUDGMENT BY:

TRUDEL J.A.

CONCURRED IN BY:

**LÉTOURNEAU J.A.
NADON J.A.**

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20101221

Docket: A-17-10

Citation: 2010 FCA 355

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

BETWEEN:

CHARLOTTE RHÉAUME

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] This is an appeal from a decision of Justice Robert Mainville, J.A. (the judge), then of the Federal Court, dated December 16, 2009 (2009 FC 1273). The judge dismissed Ms. Rhéaume's application for judicial review of the decision of an adjudicator, who had dismissed her grievance filed on January 21, 2002, under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (the Act), for lack of jurisdiction.

[2] The appellant submits that the judge made a number of errors in fact and in law justifying the intervention of this Court. I disagree.

Relevant facts

[3] The factual background set out in the judgment under appeal provides us with the following information:

- In 2001, the appellant was working for the Canada Customs and Revenue Agency, now, for the revenue component, the Canada Revenue Agency (the Agency or the employer). She occupied the PM-2-level position of enquiries officer and was a member of the Public Service Alliance of Canada.
- Following an administrative reorganization, she was assigned to a new position, namely that of reviewing officer, another PM-2-level position, in Tax Services. Since her new tasks were very different, the appellant, while continuing to receive her PM-2 salary, was temporarily assigned to a training plan that involved performing PM-1-level tasks.
- Feeling aggrieved by this new assignment, and with the support of her union, the appellant filed a grievance on January 21, 2002. Her grievance went through the three levels of the grievance process and was eventually dismissed on February 2,

2004, in a decision of the Assistant Commissioner of the Agency's Human Resources Branch.

- The union refused to refer the grievance to adjudication before the Public Service Labour Relations Board.

[4] However, the appellant decided to refer the grievance to adjudication herself. To do so, she referred three grievances to adjudication, relying on subsection 92(1) and section 99 of the Act.

[5] Further to the Agency's preliminary objections, the adjudicator dismissed the grievance for lack of jurisdiction, hence the application for judicial review before the Federal Court and the appellant's alternative request to be allowed, out of time, to apply for judicial review of the final decision dated February 2, 2004.

[6] As to the reference under section 99 of the Act, the judge upheld the adjudicator's conclusion that the appellant could not seek this remedy reserved exclusively for employers and bargaining agents. The appellant is not appealing that conclusion.

Issues

[7] In her notice of appeal, the appellant makes no fewer than 20 criticisms of the judge. She proposes seven issues, all of which revolve around three themes:

- (1) the standard of review applicable to the adjudicators' decision, which according to the appellant is that of correctness;
- (2) the adjudicator's error, upheld by the judge, that the grievance was invalid under paragraphs 92(1)(a), (b) and (c) of the Act;
- (3) her alternative request.

(a) Standard of review

[8] As prescribed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (at paragraph 64), the judge performed an analysis to identify the proper standard of review. He then wrote at paragraph 42:

[42] Considering the nature of the labour relations scheme established by the statute in question and the legal issues raised, I consider that the adjudicator's decision should be reviewed on the standard of reasonableness. In any event, as I will point out later, the adjudicator's decision is not only reasonable but also correct from all points of view. Accordingly, although, in my view, the standard of review of reasonableness applies in this case, I would reach the same conclusions by applying the correctness standard. [Emphasis added.]

[9] This finding of the judge makes deciding between the parties' positions unnecessary since he was satisfied that the adjudicator's decisions met both the standard of correctness and that of reasonableness. I therefore do not intend to comment further on the judge's standard of review analysis. The Court will consider this issue another time.

Relevant legislation

[10] To better grasp the appellant's submissions concerning the two other references, it is worth reproducing subsections 92(1) and 92(2) of the Act.

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or

(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the *Financial Administration Act*, or

(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

92. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur :

a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale;

b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)f) ou g) de la *Loi sur la gestion des finances publiques*;

c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.

(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(a), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.

(2) Pour pouvoir renvoyer à l'arbitrage un grief du type visé à l'alinéa (1)a), le fonctionnaire doit obtenir, dans les formes réglementaires, l'approbation de son agent négociateur et son acceptation de le représenter dans la procédure d'arbitrage.

References under subsection 92(1) of the Act

[11] References under paragraph 92(1)(c) concern references to adjudication in cases of disciplinary action resulting in, among other things, termination of employment.

[12] In that respect, the appellant argues that the exhibits attached to her grievance [TRANSLATION] “show the sequence of the employer’s actions, which led to her demotion and her constructive dismissal, covered up as a workforce adjustment” (appeal book at page 107). The adjudicator and the judge therefore erred in not accepting her grievance under this paragraph.

[13] The judge examined this argument (see paragraph 46). He stated that neither a close reading nor a broad and generous interpretation of the grievance supported such a conclusion:

. . . The grievance concerns administrative reorganization, lack of training, the contested assignment of duties, requests for priority for other positions, and so on. The corrective measures requested are of the same type. This is not a grievance

about constructive dismissal, and the adjudicator's decision in this respect is not only reasonable but also correct.

[14] I see no error here warranting the Court's intervention.

[15] At the hearing before this Court, it was very clear that, as the adjudicator had noted at paragraph 9 of his reasons, the substance of the appellant's grievance concerned the application of the Workforce Adjustment Policy, an integral part of the collective agreement reached between the Agency and the Public Service Alliance of Canada for the Program Delivery and Administrative Service group, of which Ms. Rhéaume was a part (appellant's book of authorities, tab 6, appendix E).

[16] In reality, the grievance concerns the interpretation or application in respect of the appellant of a provision of a collective agreement, as described at paragraph 92(1)(a), above. Any grievance under that paragraph must be approved by the bargaining agent. The appellant admits that she did not receive such an approval. Moreover, she did not refer a grievance under that provision. The judge therefore did not err in finding that the conditions of paragraph 92(1)(a) had not been satisfied.

[17] The appellant also alleged that she had been unjustly dismissed under paragraph 92(1)(b), which applies only to designated public servants.

[18] She has not satisfied me that the judge erred in finding that the appellant was not covered by that paragraph. No more has she satisfied me that the judge erred in upholding the decision of the adjudicator, who wrote at paragraph 13:

In the second reference to adjudication, dated March 16, 2004, the grievor added “[translation] constructive dismissal, demotion and work force adjustment” to section 15 of the referral form. None of those topics are discussed in the grievance. Therefore, none of those topics can be raised during adjudication. By raising them, the grievor has in fact submitted a new grievance or significantly altered the grievance already filed. In accordance with the principles set out in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), the adjudicator must deal with the grievance as originally filed and cannot consider a grievance the essence of which has been changed.

(b) Alternative request

[19] The decision of whether or not to grant an extension of time is an exercise of discretion. Upholding the principles that guide this exercise, the judge found that the application had to fail for the reasons set out at paragraphs 50 to 59 of his decision. Again, I can see no error.

Conclusion

[20] The appellant is asking the Court to exercise its discretion by not awarding any costs against her. Counsel for the respondent has no mandate to agree to this request. He claimed costs in his memorandum.

[21] Having considered the factors and other discretionary powers of the Court in awarding costs (see section 400 of the *Federal Courts Rules*, SOR/98-106), I find there is no basis for allowing the appellant's request.

[22] Therefore, I propose to dismiss the appeal with costs.

“Johanne Trudel”

J.A.

“I agree.

Gilles Létourneau J.A.”

“I agree.

M. Nadon J.A.”

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-17-10

STYLE OF CAUSE: Charlotte Rhéaume v. Attorney
General of Canada

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: December 15, 2010

REASONS FOR JUDGMENT BY: TRUDEL J.A.

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

DATED: December 21, 2010

APPEARANCES:

Charlotte Rhéaume

ON HER OWN BEHALF

Adrian Bieniasiewicz

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Department of Justice Canada
Treasury Board of Canada
Ottawa, Ontario

FOR THE RESPONDENT