Federal Court of Appeal | Cour d'appel fédérale

Date: 20110218

Docket: A-91-09

Citation: 2011 FCA 62

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

BETWEEN:

LUC BEAULNE

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Heard at Ottawa, Ontario, on February 15, 2011.

Judgment delivered at Ottawa, Ontario, on February 18, 2011.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an application for judicial review, filed by the applicant, of a decision of the Public Service Labour Relations Board (the Board) rejecting his complaint made pursuant to section 13 of the *Parliamentary Employment and Staff Relations Act* (the Act) against the respondent, the Public Service Alliance of Canada.

[2] According to the applicant's complaint, filed February 13, 2007, the respondent breached its duty of fair representation by representing his former girlfriend, a non-member of the

bargaining unit, in a personal matter involving only the applicant and the former girlfriend, both of whom are employees of the House of Commons, but work in different locations. According to the applicant, the respondent took an adversarial position to his own in this matter by defending his former girlfriend.

[3] The complaint also states that the respondent failed to grieve the applicant's dismissal by his employer on November 6, 2006, despite the fact that the applicant had asked the respondent to do so many times.

[4] The applicant's complaint was heard over a period of nine days, before Board Member John A. Mooney (the "Member"). After finding that he had jurisdiction to hear the applicant's complaint, the Member turned to the merits of the complaint.

[5] In his view, the complaint concerned separate events, that is, the events that occurred during the period from 2001 to 2003, and other events that occurred in the year 2006. Regarding the events from 2001 to2003, namely, the respondent's breach of its duty of fair representation, the Member found that the respondent had breached its duty, in that the president of the bargaining unit to which the applicant belonged had acted in bad faith against him by taking the side of his former girlfriend, who was not a member of the bargaining unit.

[6] Unfortunately for the applicant, the Member held that the applicant had filed his complaint out of time, having filed it on February 13, 2007, nearly four years after the events. Consequently, the Member could not find in the applicant's favour. According to the Member,

there were no exceptional circumstances or circumstances beyond the applicant's control that could allow him to excuse the four-year delay. At paragraph 308 of his Reasons, the Member writes:

> [308] The complainant has not established that circumstances that were exceptional or outside of his control prevented him from acting sooner. His only explanation is that the matter was the fault of the respondent, which had made him ill. Although Dr. LaRue's testimony has established that the complainant was unwell starting as early as November 2003, that evidence does not establish that the complainant's state of health prevented him from filing a complaint.

[7] After making this finding, the Member then turned to the events of 2006, namely, the respondent's failure to grieve the applicant's dismissal by the employer on November 6, 2006.

[8] In finding that this part of the complaint, too, had to be dismissed, the Member considered several factors, including the fact that the applicant had not clearly expressed his intention to grieve his dismissal in the six e-mails he sent to the respondent between November 23, 2006, and January 1, 2007; the fact that the applicant, in his e-mail dated January 22, 2007, stated in no uncertain terms that he intended to file a grievance; and the fact that the respondent had not received the e-mails he had sent after November 23, 2006, including the one dated January 22, 2007, because of an automated mail-filter program designed to block e-mails containing language deemed to be pornographic.

[9] Although he found that the terms used by the applicant in his e-mails were not pornographic (in his view, they were at worst inoffensive swear words) and that the respondent should have informed senders that it used a mail-filter program, the Member concluded that, in the circumstances, the respondent had not treated the applicant in a discriminatory manner

because the mail-filter program was designed to screen all e-mails sent to the respondent union by its Members. In other words, the mail-filter program was not designed to block only the applicant's e-mails. More specifically, the Member took the view that although installing the filter showed a lack of good judgment on the respondent's part, it did not amount to arbitrary or capricious conduct or bad faith on its part.

[10] In finding as he did, the Member noted that the applicant could have filed his own grievance, given that he had been a union representative and the vice-president of his bargaining unit in 2003 and that during that same period, he had taken a course on filing grievances.

[11] The Member also noted that the applicant had not given a reasonable explanation for his failure to file a grievance himself, apart from his assertion that he was sick at the time because of the respondent's actions. In response to this explanation, the Member again stated that he had not been presented with any evidence that the applicant's illness made it impossible for him to take action to challenge his dismissal. At paragraphs 324 and 325 of his Reasons, the Member added the following:

> [324] In addition, the complainant should have paid attention to his employee status well before the date of his dismissal. Starting on December 9, 2004, he knew that his sick leave would run out in November 2006 (Exhibit P-2, at page 92). Well before the date of his dismissal, he should have asked the respondent to extend his sick leave, as Ms. Lemire explained in her testimony.
>
> [325] I reject the complainant's allegation that the respondent attempted to have him dismissed. There is no evidence that the bargaining agent is responsible for the complainant's dismissal.

[12] In my view, the application for judicial review must be dismissed.

[13] The applicant's representative, Mr. Doucet, tried to persuade us that there were exceptional circumstances justifying the delay in filing the complaint with regard to the first period. These circumstances, particularly the applicant's illness and the fact that he had tried to resolve the problem internally, were considered by the Member, but he was not persuaded that he should make an exception to the rule that a complaint must be filed within a reasonable time.

[14] Considering the evidence, I find that it was not unreasonable for the Member to conclude as he did in this regard.

[15] As an additional argument, Mr. Doucet submitted that, in any event, there had been no delay in filing the complaint because, in reality, there was only one period in issue. In other words, according to Mr. Doucet, the events from 2001 to 2003 could not be separated from those in 2006.

[16] In my view, this argument must fail, since it is obvious that the applicant's complaint concerns different events, namely, the lack of fair representation with respect to the events of 2001 to 2003 involving his ex-girlfriend, and the respondent's failure to grieve his dismissal in November 2006. With respect, I cannot see any connection between these two sets of events that would compel us to consider the complaint as concerning a single event.

[17] Regarding the events in 2006, the Member clearly explained why, in the circumstances, he could not find in the applicant's favour. In arriving at this conclusion, the Member considered

all the relevant facts adduced in evidence, weighed them and found that the respondent had not acted in an abusive or a discriminatory manner toward the applicant. In my view, that finding cannot be said to be unreasonable.

[18] I will make one final point before concluding. At the end of the hearing, Mr. Doucet, on behalf of the applicant, asked us to relieve the applicant of having to pay the costs granted against him by Justice Pelletier in an Order dated October 15, 2010. Justice Pelletier's Order denied a motion by the applicant to quash an Order of this Court dated May 28, 2010, and compel Member Mooney to testify before this Court.

[19] Having found that the applicant's motion was abusive and should be sanctioned, Justice Pelletier wrote the following at paragraphs 9 and 10 of his Reasons:

> [TRANSLATION]
> [9] The Court is of the opinion that this motion is a flagrant abuse of process and should be sanctioned. The record filed by the respondent shows that because of the two previous orders made by this Court, by which Mr. Beaulne was ordered to pay the costs in those motions, Mr. Beaulne owes the respondent the amount of $2,457.08 ($1,228.54 x 2). The respondent asks that Mr. Beaulne pay this debt within the next 30 days, failing which his application will be dismissed. In my view, this would place an unwarranted financial burden on Mr. Beaulne that would impede his rightful access to this Court. On the other hand, the obstinacy of Mr. Beaulne or his representative on this issue caused the respondent financial loss and slowed the case's progress.
>
> [10] The respondent is entitled to costs in this motion, which the Court assesses at $1,228.54 (including disbursements and taxes). The obligation to pay the costs in this motion is stayed until the Court rules on Mr. Beaulne's application.
>
> [Emphasis added]

[20] The applicant interprets paragraph 10 of Justice Pelletier's Reasons for decision as allowing us to relive him of having to pay the costs awarded by our colleague. In my view, this is clearly not how Justice Pelletier's words should be interpreted. There can be no doubt as to Justice Pelletier's intention. By staying the payment of the costs until this Court could dispose of the application for judicial review, he allowed the applicant to have his application for judicial review heard. Moreover, Justice Pelletier did not make his Order conditional on the appeal panel's decision; it was still to be enforced, no matter what the outcome of the appeal.

[21] For these reasons, I would dismiss the application for judicial review, but, because of the particular circumstances of this case, I would not allow costs to the respondent.

"M. Nadon"

J.A.

"I agree.
Marc Noël J.A."

"I agree.
Johanne Trudel J.A."

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	NOËL J.A. TRUDEL J.A.
DATED:	February 18, 2011

APPEARANCES:

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