Federal Court of Appeal | Cour d'appel fédérale

Date: 20110601

Docket: A-339-10

Citation: 2011 FCA 185

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

BETWEEN:

CHRISTIAN DUMONT

Applicant

and

CANADIAN UNION OF POSTAL WORKERS, MONTRÉAL LOCAL

Respondent

Heard at Montréal, Quebec, on May 25, 2011.

Judgment delivered at Ottawa, Ontario, on June 1, 2011.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

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

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] This is an application for judicial review of a decision of the Canada Industrial Relations Board (Board) dated August 25, 2010 (2010 CIRB LD 2416). The Board dismissed the applicant's complaint, in which he alleged that the Canadian Union of Postal Workers, Montréal Local (Union or respondent), had breached its duty of fair and equitable representation in his regard, contrary to section 37 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code).

[2] The applicant raises two basic grounds on which the Board should not have dismissed his complaint:

(a) The Union was not justified in failing to file a grievance following the applicant's dismissal announced on July 24, 2009 (in a letter terminating his employment as of August 28, 2009, on the grounds of his incapacity, applicant's record, tab E, at page 140);

(b) The Union did not act fairly and equitably in signing an agreement with the employer, thus putting an end to the applicant's claims from the employer. The Union knew that the applicant objected to this agreement, which, in his opinion, was causing him substantial financial losses related to his pension fund and harming his health.

[3] The applicant argues that had it not been for the erroneous findings of fact made by the Board, the Board would not have concluded as it did. Moreover, the applicant alleges that the Board breached the principles of natural justice by failing to hold a hearing even though the complexity and history of the case and the fact that he was representing himself warranted it (applicant's memorandum, at paragraphs 54 and 56).

[4] To dispose of the application for judicial review, I must review the evidence and determine whether, in the light of that evidence, the Board erred in dismissing the applicant's complaint.

[5] But before setting out the relevant facts of the applicant's position, I intend to immediately discuss whether the Board had to hold a hearing. In fact, if the applicant was right on that point, there would be no need to address the other issues. I would then simply propose referring the matter back to the Board for a hearing.

(1) The Board did not breach procedural fairness by refusing to hold an oral hearing

[6] Section 16.1 of the Code states:

Determination without oral hearing	Décision sans audience
16.1 The Board may decide any matter before it without holding an oral hearing.	**16.1** Le Conseil peut trancher toute affaire ou question dont il est saisi sans tenir d'audience.

[7] The case law of this Court has often reaffirmed the Board's discretion to decide matters without holding an oral hearing (*Grain Services Union (ILWU-Canada) v. Freisen*, 2010 FCA 339, at paragraph 22 [*Grain*]; *Raymond v. Canadian Union of Postal Workers*, 2003 FCA 418, at paragraph 4; *NAV Canada v. International Brotherhood of Electrical Workers, Local 2228*, 2001 FCA 30, at paragraphs 10 and 11).

[8] This Court has also specified that generally speaking and absent compelling reasons, credibility issues or contradictory evidence are not “exceptional circumstances” that warrant an oral hearing (*Nadeau v. United Steelworkers of America*, 2009 FCA 100, at paragraph 6; *Guan v. Purolator Courier Ltd.*, 2010 FCA 103, at paragraph 28).

[9] Lastly, this Court did not regard the fact that an applicant was self-represented as having any influence on the Board’s discretion under section 16.1 of the Code (*Bomongo v. Communications, Energy and Paperworkers Union of Canada*, 2010 FCA 126, at paragraphs 14 to 17).

[10] None of the applicant’s arguments satisfy me that the Board erred in not making an exception to its usual practice not to hold an oral hearing when the documentation on file suffices for it to make a decision. I therefore propose rejecting this argument and moving on to setting out the facts relevant to the other issues.

(2) Relevant facts and the Board’s decision

(A) <u>Relevant facts</u>

[11] Mr. Dumont worked as a letter carrier for Canada Post for almost 28 years. At the time of the dispute with his employer, he was assigned to the Delorimier postal station in Montréal.

[12] In 2000, the applicant and two of his colleagues denounced to the employer the [TRANSLATION] “under-the-table sale of afternoon mail routes”, a prohibited practice that had become increasingly popular at their postal station. The system in question had been established by certain letter carriers to allow them to relieve themselves of part of their workload on the route assigned to them and by which they subcontracted that part of their workload to other letter carriers for cash in hand, generally $20.

[13] Before what he considered to be his employer’s inaction, the applicant publically denounced the practice, by, among other things, participating in various reports broadcast in the media. He had allegedly also insulted some of his co-workers. All of this resulted in the applicant being sanctioned by the employer in 2003, in the form of notices of suspension ranging between 5 and 10 days without pay.

[14] The Union filed a number of grievances on his behalf, of which Adjudicator Guy E. Dulude disposed as follows in his decision dated July 13, 2005 (applicant’s record, tab B, at pages 97 and 98):

> [TRANSLATION]
>
> [282] ALLOWS, regarding Christian Dumont, grievances Nos. 350-00-8120 and 8119 against a disciplinary warning dated June 6, 2003, sanctioning him to a suspension of five (5) working days which he did not serve, finds this measure unwarranted, cancels it and orders that it be removed from Mr. Dumont’s file;
>
> [283] ALLOWS in part Mr. Dumont’s grievance No. 350-00-8403 against a disciplinary warning dated August 28, 2003, ordering a suspension of five (5)

> working days with no pay, finds this measure to be excessive in light of the evidence submitted and orders it to be replaced by a written warning with full compensation of the wage and benefit losses incurred;
>
> [284] ALLOWS grievances Nos. 350-00-8439, 8421, 8442, 8463 and 8465 filed by Mr. Dumont against a suspension of ten (10) working days without pay following his participation in various reports broadcast in the media and as a result of his comments, finds this measure to be unwarranted, orders the various notices relating to this measure to be removed from Mr. Dumont's file and orders the employer to fully compensate him for lost wages and benefits;

[15] In addition, Adjudicator Dulude reserved jurisdiction [TRANSLATION] "over any potential dispute concerning the establishment of quanta" and the enforcement of his decision (*ibidem*, at page 98).

[16] When this adjudication decision was rendered, the applicant had already not been working since September 2003, the Commission de la santé et de la sécurité du travail du Québec (CSST) having granted him income replacement benefits following his diagnosis of adjustment disorder with anxious mood (applicant's affidavit, applicant's record, tab 3, page 33, at paragraph 6).

[17] On April 13, 2009, Adjudicator Dulude rendered a second adjudication decision disposing, as follows, of the items claimed in damages by the applicant (adjudicator's decision dated April 13, 2009, applicant's record, tab C, pages 135 and 136, at paragraph 117):

[TRANSLATION]

ALLOWS complainant Christian Dumont's proceedings for an award for damages against the Employer for damage to his reputation and

ORDERS the Corporation to compensate Mr. Dumont in that respect for the amount of thirty-five thousand dollars ($35,000.00);

ALLOWS the complainant's proceedings and motion to amend for additional awards of thirty-five thousand dollars ($35,000.00) and ten thousand dollars ($10,000.00) in exemplary and punitive damages for the Employer's subsequent, persistent conduct to destroy his dignity, honour and reputation;

Consequently ORDERS the Employer to pay Mr. Dumont the above-mentioned compensation coming to a total of $80,000.00 within no later than fifteen (15) days of this decision, with interest, according to the rate prescribed at section 28 of the *Act respecting the ministère du Revenu*.

RESERVES the right for the complainant and the Union on the complainant's behalf to file, where applicable, a motion to amend for an additional claim of twenty thousand dollars ($20,000.00) in punitive damages for any later incidents;

RESERVES JURISDICTION in accordance with the provisions of section 80.99 of the collective agreement on any dispute concerning the complete resolution of the dispute.

[Emphasis added.]

[18] This adjudication decision resulting from an *ex parte* hearing, the employer having failed to attend, was followed by multiple proceedings between the employer and the Union, the main goal of the Union's proceedings being the prompt enforcement of the adjudicator's decision.

[19] The Union's job was made all the more difficult by the employer, who, albeit absent before the adjudicator, was now resolutely resisting the Union's efforts to obtain the $80,000.00 granted to the applicant in the adjudication decision. The affidavit of the respondent's

representative (respondent's record, book 1, tab B, at pages 8 and following) lists the various steps taken by the Union between April 13 and June 29, 2009, including a writ of seizure and sale for the employer and the challenge of (a) two motions for judicial review instituted by the Canada Post Corporation before the Superior Court of Quebec (December 15, 2008, and May 12, 2009); (b) a motion to quash the seizure on the grounds that Crown property was unseizable and (c) a motion to stay the adjudication decision. During all of this time, the Union also represented the applicant before the Commission des lésions professionnelles (CLP).

[20] Given the turn of events, the Union was concerned that the applicant would not receive his $80,000.00 quickly. It therefore decided, in parallel to the legal proceedings under way, to negotiate with the employer to reach an out-of-court settlement.

[21] To do so, the Union submitted a first draft agreement (respondent's record, book 2, tab 13, at pages 251 and following) to the applicant on May 27, 2009, which he refused.

[22] The legal proceedings therefore continued, albeit slowly and with a number of postponements. On June 10, 2009, the employer and the Union agreed on a second draft agreement. This one included the payment of the $80,000.00 established in Adjudicator Dulude's decision and the discontinuance of the legal proceedings instituted before the Superior Court (*ibidem*, tab 18, at pages 321 and following). A few days later, this agreement was submitted to the applicant, who again refused it, stating that he preferred going to court even if it resulted in a less advantageous settlement.

[23] On June 25, 2009, the employer sent the applicant a cheque for $84,800.00, including interest, to fulfill its obligation under the Adjudicator's decision (*ibidem*, tab 21, at pages 334 to 336).

[24] The Union continued negotiating with the employer. They agreed on a third draft agreement. This time, the Union signed it on July 15, 2009 (*ibidem*, tab 23, at pages 344 and 345), and informed Mr. Dumont of this on July 21 (*ibidem*, tab 23, at pages 342 and 343).

[25] A few days later, on July 24, 2009, the applicant received a letter from his employer stating that his employment was terminated on the grounds of his incapacity (applicant's record, tab E, at pages 140 and 141).

[26] On August 12, 2009, the applicant asked the Union to file a grievance on his behalf to challenge his unlawful dismissal, providing the following reasons (applicant's record, tab F, at page 142):

> [TRANSLATION]
>
> - My incapacity is the result of Canada Post's conduct towards me and its harassment of me. They simply have to rectify their behaviour so that I can return to work.
>
> - Canada Post's decision was made in reprisal against my success before Adjudicator Guy E. Dulude.
>
> - The letter alludes to statements made at a CLP hearing where I was not an official witness: all the remarks were informal and had to do with a

> request for postponement. My comments were therefore taken out of context.
>
> - There will be many points to make at pre-adjudication meetings and at the adjudication hearing itself.

[27] On August 25, the Union informed the applicant that it would not file a grievance (letter dated August 25, 2009, applicant's record, tab G, at page 143). An in-depth analysis [TRANSLATION] "of the reasons given by the employer" had led the Union to conclude that there was [TRANSLATION] "no positive prognosis" for the applicant's return to work. Two legal opinions obtained by the Union (respondent's record, volume 2, tab 24, at pages 349 and following, and tab 27, at pages 367 and 368) on July 29 and August 24, 2009, found that the proposed grievance was unlikely to succeed.

[28] Hence, the applicant's complaint under section 37 of the Code, the Board's negative decision and the application for judicial review before this Court.

(B) Decision of the Board

[29] Regarding the Union's duty of fair and equitable representation, the Board found that the Union

> [TRANSLATION]
> . . . analyzed the situation and that, after due consideration, it decided to close the file having obtained the best possible settlement in the complainant's interests (Board's reasons, at page 10).

[30] The Board came to this conclusion such after noting that the Union [TRANSLATION] "did everything to settle the dispute in the complainant's favour, but that the complainant seems to be set on a confrontation between the parties rather than a resolution of the conflict" (*ibidem*).

[31] Regarding the Union's refusal to file a grievance concerning the complainant's dismissal, the Board found that

> [TRANSLATION]
> (n)one of the evidence filed demonstrates that the union acted in a manner that was arbitrary, discriminatory or in bad faith (*ibidem*, at page 11).

[32] In addition, the Board noted that

> [TRANSLATION]
> . . . the documents filed reveal that the complainant was represented in a manner that went beyond what could be qualified as the norm . . .. (*ibidem*)

Analysis

(3) Standard of review

[33] The parties agree that the standard of review to be applied to Board decisions on the interpretation of the Code is that of reasonableness (*Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at paragraph 48; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraphs 54 and 55 [*Dunsmuir*]; *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32, at paragraph 21; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at paragraph 25; *Nolan v.*

Kerry (Canada) Inc., 2009 SCC 39, at paragraphs 33 and 34; *Canadian Federal Pilots Assn. v. Canada (Attorney General)*, 2009 FCA 223, at paragraphs 36 and 50). They are right.

[34] More particularly, this Court has found that great deference is owed to Board findings on how to interpret the Code and a union's duty of fair and equitable representation under section 37 of the Code (*Grain*, above, at paragraph 31; *McAuley v. Chalk River Technicians and Technologists Union*, 2011 FCA 156, at paragraph 13).

(4) The Board did not err in finding that the Union had acted fairly and equitably in signing the agreement dated July 15, 2009

[35] As the employee's exclusive bargaining agent, any union has the exclusive authority to represent its members in any proceedings relating to their rights under the collective agreement. This exclusive right is, however, subject to the union's duty to represent its members fairly, as provided at section 37 of the Code:

Duty of fair representation	Représentation
37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.	**37.** Il est interdit au syndicat, ainsi qu'à ses représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi à l'égard des employés de l'unité de négociation dans l'exercice des droits reconnus à ceux-ci par la convention collective.

[36] In the case at bar, the issue was not whether or not the Union could sign a settlement without the applicant's consent. The issue was whether the Union had acted fairly and equitably in its negotiations with the employer and whether it had accepted a settlement that was in the applicant's best interests. The Union's entire conduct therefore had to be examined, which the Board did.

[37] The applicant argued that the July 15 agreement was prejudicial to him in that it did not provide for his retirement, in contrast to the second agreement proposed, but that was rejected by him. Specifically, the agreement provided for his early retirement without monetary compensation for the resulting actuarial loss.

[38] In fact, the second agreement merely stipulated that, in addition to the employer paying a total amount of $115,000.00 and waiving its recovery of any money the applicant had received or would receive from the CSST, the applicant promise [TRANSLATION] "to irrevocably retire no later than June 30, 2009" (respondent's record, book 2, tab 18, at page 322).

[39] The applicant blames the lack of a clause providing for his early retirement without actuarial loss in the agreement concluded without his consent on the Union's bad faith. He infers from this that the Union knew that his employment would soon be terminated and criticizes the Union's inaction.

[40] This statement is not supported by the evidence. First, the termination decision falls exclusively under the employer's management rights. Moreover, the record shows rather that the Union was informed of the employer's decision only when it received a carbon copy of the termination letter dated July 24, 2009, sent to the applicant (applicant's record, tab E, at page 140). In addition, the Union had negotiated the third agreement knowing that the applicant would object to it. The Union could not come to an agreement on the applicant's retirement date, which explains why the agreement does not contain such a clause.

[41] It is clear that the applicant's pension entitlements are not such as he might have expected given that he was dismissed about two years before he would normally have completed his years of service for his employer. The applicant did not, among other things, want to settle his case without being compensated for the loss thus incurred, namely [TRANSLATION] "the 10% of the contribution to my pension fund" (applicant's affidavit, applicant's record, tab 3, page 36, at paragraph 55). The applicant's concern is entirely understandable, but he could not receive pension entitlements he had not yet earned. Having said that, the Board fairly examined all of the Union's efforts.

[42] In context, since the dispute between the parties had gone on for several years and even the $80,000.00 awarded to the applicant by the adjudicator was in jeopardy, the Board did not err in concluding, as mentioned above, that the Union had acted fairly and equitably and obtained the [TRANSLATION] "best possible settlement in the complainant's interests" (Board's reasons, at page 10).

[43] I would therefore dismiss the first ground for challenging the Board's decision.

(5) The Board did not err in finding that the Union had not breached its duty of fair and equitable representation by not filing a grievance following the applicant's dismissal.

[44] The applicant is of the opinion that, in refusing to file a grievance, the Union in fact wanted to get rid of him since the agreement had just been concluded. He completely disagrees with the Union's decision, finding rather that his dismissal was unlawful since, at the time of his dismissal, he was still on disability leave, the result of an occupational injury recognized by the CSST (applicant's memorandum, at paragraph 42). At the hearing, his counsel reinforced this argument by referring to section 32 of the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001 [AIAOD], which provides as follows:

32. No employer may dismiss, suspend or transfer a worker or practice discrimination or take reprisals against him, or impose any other sanction upon him because he has suffered an employment injury or exercised his rights under this Act.	32. L'employeur ne peut congédier, suspendre ou déplacer un travailleur, exercer à son endroit des mesures discriminatoires ou de représailles ou lui imposer toute autre sanction parce qu'il a été victime d'une lésion professionnelle ou à cause de l'exercice d'un droit que lui confère la présente loi.
A worker who believes that he has been the victim of a sanction or action described in the first paragraph may, as he elects, resort to the grievance procedure set down in the collective agreement applicable to him or submit a complaint to the Commission in accordance with section 253.	Le travailleur qui croit avoir été l'objet d'une sanction ou d'une mesure visée dans le premier alinéa peut, à son choix, recourir à la procédure de griefs prévue par la convention collective qui lui est applicable ou soumettre une plainte à la Commission conformément à l'article 253.

[45] However, this provision is not at issue here. It has been found that the wording of section 32 of the AIAOD does not apply to federal undertakings (*Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at paragraphs 290 and 291; *Purolator Courrier Ltée v. Syndicat canadien des communications de l'énergie et du papier*, [2002] R.J.Q. 310, [2002] J.Q. no 163 (C.A.), at paragraphs 18 to 20 and 36; *Cie de chemin de fer Canadien Pacifique v. Vincent*, [2002] J.Q. no 195 (C.A.), at paragraph 8; *Nutribec ltée v. Québec (Commission de la santé et de la sécurité du travail)*, [2002] R.J.Q. 2593, [2002] J.Q. no 4577 (C.A.), at paragraph 6).

[46] However, the documentary evidence on file confirmed the following facts: the applicant had been away from work since September 3, 2003, and his return to work was not anticipated in the foreseeable future. His attending physician had issued a final report dated February 5, 2007, stating on that date that his injury entailed a permanent impairment and functional limitations that would not allow him to return to work.

[47] On June 11, 2008, the CSST had decided that the applicant could not return to work for the employer and had examined the possibility of his taking up other employment, elsewhere on the labour market. Dr. Louis Côté, whose services had been retained by the Union, had found that the applicant was permanently impaired and incapable of returning to work for the employer.

[48] The two legal opinions obtained by the Union before deciding not to file a grievance are supported by this factual framework. It cannot be argued, as the applicant is attempting to do, that the Union took its duty lightly, without considering his situation.

[49] At the hearing, in response to a question from the bench, counsel for the applicant explained that her client saw his dismissal as an extension of the employer's harassment of him. Should not, as the applicant wished it, a grievance have been filed in that regard in the hope of obtaining additional damages?

[50] With respect, I do not think so. Just because the applicant saw his case through the lens of harassment does not necessarily mean that the Union had to follow suit. The Union had to assess Mr. Dumont's request in light of all the facts on file, and there is no evidence to suggest that this is not what it did. As one can read in the Board's decision, the Board must not review the merit of the Union's decision, only the process by which that decision was reached (Board's reasons, at page 9).

[51] It is trite law that the right to take a grievance to arbitration is reserved to the union and that the employee does not have an absolute right to arbitration, the union enjoying considerable discretion (*Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, at paragraph 38).

[52] The applicant clearly disagrees with the Union's decision. I agree with the following statement of a panel of the Canada Industrial Relations Board:

> It is not because a member is disgruntled over the results of the union's inquiries or the fact that its findings agree with those of the employer that the union has breached its duty of fair representation. The Board's analysis is limited to the union's conduct in reaching a decision. Thus, the complainant must be able to demonstrate persuasively that the union acted in a manner that was arbitrary, discriminatory or in bad faith. In the absence of severe negligence, the Board will not intervene in the union-member relationship. (*Misiura (Re)*, [2000] CIRB Decision No. 63, at paragraph 20).

[53] In the present case, the Board found that the applicant had not demonstrated this. Following a thorough analysis of this file, I find no error in the Board's conclusion. I therefore would also dismiss this ground of attack.

(6) The Board's decision was not made on erroneous findings of fact

[54] Having reached that conclusion, I do not deem it useful to comment at length on the applicant's argument that the Board reached its decision on the basis of erroneous findings of fact.

[55] I will confine myself to stating that the evidence on file provided ample support for the Board's conclusion. The evidence was contradictory on some issues. It was the Board's role to assess that evidence and to afford it the appropriate weight in light of the evidence as a whole. The Board did not need to mention every piece of evidence it admitted when making its findings.

Conclusion

[56] I am certainly not without sympathy for the applicant and the difficult events he has experienced, but it is my view that the Board's decision has the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes (*Dunsmuir*, at paragraph 47).

[57] Accordingly, I would dismiss the application for judicial review with costs.

"Johanne Trudel"
J.A.

"I concur.
Gilles Létourneau J.A."

"I concur.
Robert M. Mainville J.A."

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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DATED:	June 1, 2011

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