

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120208

Docket: A-23-11

Citation: 2012 FCA 44

**CORAM: EVANS J.A.
TRUDEL J.A.
STRATAS J.A.**

BETWEEN:

ZABIA CHAMBERLAIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on February 7, 2012.

Judgment delivered at Ottawa, Ontario, on February 8, 2012.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

**TRUDEL J.A.
STRATAS J.A.**

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an application for judicial review by Zabia Chamberlain, a long-time employee in the federal public service. Ms Chamberlain requests the Court to, among other things, set aside a decision of the Public Service Labour Relations Board (Board), dated December 13, 2010, and remit the matter to a different member of the Board for re-determination. The decision under review is reported as *Chamberlain v. Treasury Board*, 2010 PSLRB 130.

[2] In that decision, the Board dismissed aspects of Ms Chamberlain's complaints. All her complaints allege that the employer had taken reprisal action against her for exercising her rights under Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code).

[3] In his capacity as an Adjudicator, the Board member who decided the complaints also considered grievances brought by Ms Chamberlain arising from essentially the same factual matrix. The Adjudicator only had jurisdiction over the grievances if they concerned serious disciplinary action by the employer, including the imposition of a financial penalty. Finding that he had no jurisdiction to hear Ms Chamberlain's grievances, the Adjudicator dismissed them. His reasons can be summarized as follows.

[4] The grievances did not allege that the employer had taken any disciplinary action against her contrary to paragraph 209(1)(b) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2. Moreover, even if they did, Ms Chamberlain had not provided *prima facie* evidence of disciplinary action that would have given him jurisdiction to hear her grievances.

[5] Despite some overlap in the subject matter of the grievances and complaints, the present application for judicial review concerns only the Board's decision dismissing the complaints. The statutory provisions referred to in these reasons are included in an Appendix.

Decision under review

[6] The Board has jurisdiction under section 240 of the *Public Service Labour Relations Act* to hear complaints under Part II of the Code. This includes sections 133 and 147 which provide that employees may complain that an employer has taken reprisal action against them for, among other things, reporting conditions at work that might endanger employees' health and safety, and seeking to enforce a provision of Part II of the Code.

[7] The Board first considered Ms Chamberlain's complaint that, in the e-mails she sent to the Senior Assistant Deputy Minister on April 22 and May 25, 2008, she had stated that she refused to work because her work environment was unsafe, and that reprisals had been taken against her for invoking this right under section 128 of the Code.

[8] The Board rejected this argument. It concluded that Ms Chamberlain could not rely on the e-mails for this purpose because they did not specifically state that she was refusing to work, and she did not refer to the Code. Further, she had continued to work until the end of May 2008. Accordingly, the Board dismissed the complaints concerning her right to refuse to work because Ms Chamberlain had not given the employer the notice required by subsection 128(6).

[9] However, the Board took the view that the e-mails could also be construed as alleging a violation of section 124 of the Code, which requires employers to ensure that employees' health and safety at work are protected. The Board referred to the Adjudicator's finding in the grievance hearing that Ms Chamberlain had adduced no evidence that the employer had taken any disciplinary

action against her, including the imposition of a financial penalty. Similarly, the Board held that there was no evidence that the employer had taken reprisals against her as a result of the e-mails of April 22 and May 25, 2008, at least until the date of the grievance. All four complaints could therefore be dismissed in so far as they relate to those e-mails.

[10] The Board also held that it had no jurisdiction to deal with the complaints because they were time-barred by subsection 133(2) of the Code. This provides that a complaint may be made under section 133 within 90 days of the action allegedly giving rise to it. The first complaint was filed with the Board on April 23, 2009, a year after the e-mail of April 22, 2008, and eleven months after the e-mail of May 25, 2008.

[11] Nonetheless, recognizing the confusing way in which Ms Chamberlain had framed her complaints to the Board, the Board did not stop there. It considered that the complaints could also be taken to allege that the employer's failure to accommodate her health needs constituted reprisal action following the invocation of her right under section 124 of the Code to a safe workplace, and the employee's duty under section 126 to report safety concerns.

[12] However, because of the limitation period in subsection 133(2), the Board only had jurisdiction to deal with allegations of reprisals for invoking a right under the Code that occurred less than 90 days before the filing of the first complaint on April 23, 2009.

[13] Accordingly, the Board ordered that a hearing would be scheduled to hear the merits of the complaints, but only in so far as they alleged that the employer had taken reprisals against Ms Chamberlain after January 23, 2009, as a result of the exercise of her rights under the Code.

Issues and analysis

[14] Although Ms Chamberlain stated often at the hearing that the Board's decision was wrong and unreasonable, and its procedures were unfair, she found it difficult to be more precise. Nor do her extensive written submissions point specifically to errors of law or fact allegedly made by the Board that would engage this Court's powers on judicial review.

(i) procedural fairness

[15] A principal basis of her allegation that the Board denied her a fair opportunity to present her case and to answer that against her seems to be that the Board declined to issue summonses to witnesses whom Ms Chamberlain wished to call to give evidence. At the start of the hearing, the employer objected to summonses issued to four individuals. Two were not available to attend, Ms Chamberlain agreed that the summons issued to the third be quashed, and the Board ruled that a fourth person had no evidence to give that was relevant to the jurisdictional issues that the Board had to decide. The Board made it clear that, when the jurisdictional issues had been resolved, the question of summonses to these and other witnesses could be revisited at a hearing on the merits of the complaints.

[16] In my view, these rulings did not deny Ms Chamberlain her right to a fair opportunity to put her case before the Board on whether it had jurisdiction to entertain her complaints.

[17] I can appreciate that Ms Chamberlain did not expect that the five days scheduled for the Board hearing would be taken up entirely with the jurisdictional issues raised by the employer. I can also well appreciate that this may have caused her to be confused and frustrated. However, she agreed that neither she nor counsel assisting her asked the Board to explain any aspect of the procedure that she did not understand, nor did the employer's objections to the Board's jurisdiction take her by surprise. I see no basis here for impugning the fairness of the Board's procedure.

[18] Ms Chamberlain also says that the Board was not impartial. The basis of this allegation is not altogether clear, though during the hearing Ms Chamberlain reiterated that: the Board did not refer to many of the documents and prior decisions that she had placed before it; gave closer attention to the jurisprudence relied on by the employer; and made findings with which she disagrees.

[19] The fact that Ms Chamberlain may not agree with the Board's conclusions on issues, with its assessment of the relevance of the material before it, or with its selection of the material that it included in its reasons, comes nowhere near to establishing that a reasonable person, who had thought the matter through in a practical way, would infer that the Board had not adjudicated Ms Chamberlain's complaints fairly.

(ii) substantive errors

[20] I am not persuaded by Ms Chamberlain’s written or oral submissions that the Board committed any reviewable error of law or fact. She emphasized at the hearing that, in finding no evidence of any reprisal by the employer, the Board relied too heavily on the facts found by the Adjudicator in dismissing her grievances, namely the absence of *prima facie* evidence that the employer had disciplined Ms Chamberlain for invoking her rights under the Code.

[21] In the context of this case, there are substantial similarities between the concepts of reprisal and discipline, and the evidence pertaining to them. Accordingly, in my view it was not unreasonable for the Board to have given significant weight to the findings on the grievances when making analogous findings on the complaints.

[22] I would only add that the reasons given by the Board indicate that, despite the voluminous and confusing nature of Ms Chamberlain’s submissions, it dealt fully and fairly with her complaints and the issues that they raised.

Conclusion

[23] For these reasons, the application for judicial review will be dismissed with costs.

“John M. Evans”

J.A.

“I agree
Johanne Trudel J.A.”

“I agree
David Stratas J.A.”

APPENDIX A

Canada Labour Code, R.S.C. 1985, c. L-2

General duty of employer

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

Obligation générale

124. L'employeur veille à la protection de ses employés en matière de santé et de sécurité au travail.

Health and safety matters

126. (1) While at work, every employee shall

...

(j) report to the employer any situation that the employee believes to be a contravention of this Part by the employer, another employee or any other person.

Santé et sécurité

126. (1) L'employé au travail est tenu :

[...]

j) de signaler à son employeur toute situation qu'il croit de nature à constituer, de la part de tout compagnon de travail ou de toute autre personne — y compris l'employeur —, une contravention à la présente partie.

Refusal to work if danger

128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

...

Refus de travailler en cas de danger

128. (1) Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :

[...]

(b) a condition exists in the place that constitutes a danger to the employee; or b) il est dangereux pour lui de travailler dans le lieu;

(c) the performance of the activity constitutes a danger to the employee or to another employee. c) l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.

...

[...]

Report to employer

Rapport à l'employeur

(6) An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.

(6) L'employé qui se prévaut des dispositions du paragraphe (1) ou qui en est empêché en vertu du paragraphe (4) fait sans délai rapport sur la question à son employeur.

Complaint to Board

Plainte au Conseil

133. (1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

133. (1) L'employé — ou la personne qu'il désigne à cette fin — peut, sous réserve du paragraphe (3), présenter une plainte écrite au Conseil au motif que son employeur a pris, à son endroit, des mesures contraires à l'article 147.

Time for making complaint

Délai relatif à la plainte

(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

(2) La plainte est adressée au Conseil dans les quatre-vingt-dix jours suivant la date où le plaignant a eu connaissance — ou, selon le Conseil, aurait dû avoir connaissance — de l'acte ou des circonstances y ayant donné lieu.

Restriction

(3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6)... in relation to the matter that is the subject-matter of the complaint.

...

General prohibition re employer

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

(a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(c) has acted in accordance with this Part or has sought the enforcement of

Restriction

(3) Dans les cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128 ou 129, sa présentation est subordonnée, selon le cas, à l'observation du paragraphe 128(6) par l'employé ...

[...]

Interdiction générale à l'employeur

147. Il est interdit à l'employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu des droits prévus par la présente partie, ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :

a) soit il a témoigné — ou est sur le point de le faire — dans une poursuite intentée ou une enquête tenue sous le régime de la présente partie;

b) soit il a fourni à une personne agissant dans l'exercice de fonctions attribuées par la présente partie un renseignement relatif aux conditions de travail touchant sa santé ou sa sécurité ou celles de ses compagnons de travail;

c) soit il a observé les dispositions de la présente partie ou cherché à les faire

any of the provisions of this Part. appliquer

Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2

Reference to adjudication

Renvoi d'un grief à l'arbitrage

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

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

...

[...]

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire

Application to public service

Application à la fonction publique

240. Part II of the *Canada Labour Code* applies to and in respect of the public service and persons employed in it as if the public service were a federal work, undertaking or business referred to in that Part except that, for the purpose of that application,

240. La partie II du *Code canadien du travail* s'applique à la fonction publique et aux personnes qui y sont employées comme si la fonction publique était une entreprise fédérale visée par cette partie, sous réserve de ce qui suit :

(a) any reference in that Part to

a) en ce qui concerne la terminologie :

(i) "arbitration" is to be read as a reference to adjudication under Part 2,

(i) « arbitrage » renvoie à l'arbitrage des griefs sous le régime de la partie 2,

(ii) the "Board" is to be read as a reference to the Public Service

(ii) « Conseil » s'entend de la Commission des relations de

Labour Relations Board,

travail dans la fonction publique,

(iii) a “collective agreement” is to be read as a reference to a collective agreement within the meaning of subsection 2(1),

(iii) « convention collective » s’entend au sens du paragraphe 2(1),

(iv) “employee” is to be read as a reference to a person employed in the public service, and

(iv) « employé » s’entend d’une personne employée dans la fonction publique,

(v) a “trade union” is to be read as a reference to an employee organization within the meaning of subsection 2(1);

(v) « syndicat » s’entend de l’organisation syndicale au sens du paragraphe 2(1);

(b) section 156 of that Act does not apply in respect of the Public Service Labour Relations Board; and

b) l’article 156 de cette loi ne s’applique pas à la Commission des relations de travail dans la fonction publique;

(c) the provisions of this Act apply, with any modifications that the circumstances require, in respect of matters brought before the Public Service Labour Relations Board.

c) les dispositions de la présente loi s’appliquent, avec les adaptations nécessaires, aux affaires instruites par la Commission des relations de travail dans la fonction publique.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-23-11

STYLE OF CAUSE: Zabia Chamberlain and Attorney
General of Canada

PLACE OF HEARING: Ottawa, Ontario

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CONCURRED IN BY: TRUDEL AND STRATAS JJ.A.

DATED: February 8, 2012

APPEARANCES:

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