

Federal Court of Appeal



Cour d'appel fédérale

Date: 20120413

Docket: A-383-11

Citation: 2012 FCA 113

**CORAM: EVANS J.A.
SHARLOW J.A.
DAWSON J.A.**

BETWEEN:

MOHAMMAD ASLAM CHAUDHRY

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on March 26, 2012.

Judgment delivered at Ottawa, Ontario, on April 13, 2012.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

**SHARLOW J.A.
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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an appeal by Mohammad Aslam Chaudhry from a decision of the Federal Court, dated September 19, 2011, in which Justice Hughes (Motions Judge) granted a motion by the Crown, the Respondent, to strike out Mr Chaudhry's statement of claim and to dismiss his action in its entirety without leave to amend.

[2] The Motions Judge provided two bases for his decision. First, the statement of claim is an "abuse of powers" – by which I assume he meant "abuse of process" – because it seeks to re-litigate

matters already determined in other proceedings brought by Mr Chaudhry in the Federal Court and in this Court. Second, it requests the Court to advise Mr Chaudhry of the venues where he can litigate what he says is now his principal concern: whether the official who terminated his employment in the federal public service had the delegated authority to make this decision.

[3] The short reasons in the Motions Judge's speaking order may not be entirely accurate in the description of Mr Chaudhry's claim. Nonetheless, I am satisfied that he reached the correct conclusion when he granted the Crown's motion, struck Mr Chaudhry's statement of claim, and dismissed his action. It is clear that the action cannot possibly succeed.

[4] The statutory provisions relating to this appeal that were in force at the relevant time are set out in the Appendix to these reasons.

Background

[5] Mr Chaudhry has been litigating the termination of his employment in the federal public service for the last seven years. The issues raised in this appeal have a substantial history, some of which forms the immediate background to the present proceeding.

[6] Mr Chaudhry started his federal public service employment with the Correctional Service of Canada on February 17, 2003 as an Administrative Services Assistant at the Bath Institution. Like all employees from outside the public service, he was appointed for a probationary period of twelve months, which, in Mr Chaudhry's case, ended on February 16, 2004.

[7] On June 16, 2003, he was appointed to an indeterminate position in the central registry at Millhaven Institution, conditional on the completion of his probationary period. At Millhaven he worked first as a transfer clerk and, from October 2003, as an input and releases clerk.

[8] However, on February 6, 2004, the Warden of Millhaven issued a memorandum to Mr Chaudhry informing him that, pursuant to subsection 28(2) of the *Public Service Employment Act*, R.S.C. 1985, c. P-33, as rep. by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 284 (PSEA), he would be rejected on probation effective February 6, 2004 for unacceptable job performance and poor relations with office colleagues. He was also told that, following one month's paid leave, he would cease to be an employee of the Correctional Service of Canada after March 7, 2004.

(i) Adjudicator's decision

[9] Mr Chaudhry unsuccessfully grieved his termination to the final level of the employer's internal grievance process under section 91 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, as rep. by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 285 (PSSRA). The PSSRA is the predecessor of the current *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2; there are no material differences between these statutes for the purpose of the issues to be decided in this appeal.

[10] He then pursued his grievance to an Adjudicator under section 92 of the PSSRA. Mr Chaudhry also made an unfair labour practice complaint to the Public Service Labour Relations

Board (Board) under section 23 of the PSSRA, alleging, among other things, that the employer had breached subparagraph 8(2)(c)(ii) of the PSSRA by threatening him with reprisals for filing a grievance concerning his workload.

[11] Both matters were decided by Ian R. Mackenzie: the grievance, in his capacity as an Adjudicator, and the complaint as a member and Vice-Chairperson of the Board. The complaint is not relevant to this appeal. Suffice it to say that the Board dismissed it on the merits.

[12] In response to Mr Chaudhry's grievance under section 92(1) of the PSSRA, the Respondent argued that the Adjudicator had no jurisdiction to determine it. Subsection 92(3) provides that the right to grieve under subsection 92(1) does not apply to terminations under the PSEA, and Mr Chaudhry's employment was terminated following a rejection on probation under subsection 28(2) of the PSEA.

[13] On the basis of Board jurisprudence, Mr Chaudhry submitted that subsection 92(3) did not apply to his grievance because his rejection on probation was a nullity. It had been in bad faith, was procedurally unfair, and constituted disguised discipline. Accordingly, he was entitled to bring a grievance under subsection 92(1).

[14] The Adjudicator found that the Respondent had demonstrated employment-related reasons for terminating Mr Chaudhry's employment. While describing the rejection memorandum that the

Warden sent to Mr Chaudhry, the Adjudicator stated at paragraph 5 of his reasons that the Warden had the delegated authority to reject him on probation.

[15] Having concluded that Mr Chaudhry's probationary employment had been terminated under subsection 28(2) of the PSEA, the Adjudicator held that he had jurisdiction over the grievance only if Mr Chaudhry established that his termination was in bad faith or was disciplinary in nature.

[16] As evidence of the employer's bad faith, Mr Chaudhry stated that he had not been given sufficient notice before he was terminated to enable him to respond, and to correct deficiencies in his work performance. He argued that the employer had failed to follow the pre-termination procedural provisions prescribed in Treasury Board of Canada Secretariat, *Treasury Board Guidelines for Non-Disciplinary Demotion or Termination of Employment* (Ottawa: Labour Relations and Compensation Operations Division, July 2002) (Guidelines).

[17] The Adjudicator rejected this particular submission because a Note in the Guidelines states that they do not apply to rejections on probation, which continue to be governed by the PSEA. After reviewing the evidence as a whole, he concluded that Mr Chaudhry had not discharged his burden of proving that the rejection on probation was in bad faith or was disguised discipline. Hence, Mr Chaudhry had been given a notice of rejection under subsection 28(2) of the PSEA, and the Adjudicator therefore had no jurisdiction to determine the grievance because of subsection 92(3) of the PSSRA.

[18] An official of his bargaining agent, the Public Service Alliance of Canada, represented Mr Chaudhry throughout these proceedings. The decisions of the Adjudicator and the Board are reported as *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72.

(ii) Federal Court's decision

[19] Mr Chaudhry applied to the Federal Court for judicial review of the dismissal of both his grievance and his complaint. The hearing was held before Justice Simpson on February 26, 2007. The Court denied the application for judicial review with respect to both the grievance and the complaint in a reasoned judgment dated April 13, 2007, and reported at 2007 FC 389.

[20] The Court held that the Adjudicator had committed no reviewable error in dismissing Mr Chaudhry's termination grievance as outside his jurisdiction under subsection 92(1) of the PSSRA. The Court rejected his argument that the employer's failure to give him adequate notice before terminating his employment violated his rights under the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. The Court agreed with the Board that the Guidelines did not apply to Mr Chaudhry's termination because he had been rejected on probation.

[21] The Court also held that it had no jurisdiction over the dismissal of Mr Chaudhry's section 23 complaint because this was a decision of the Board. As such, it was reviewable only in the Federal Court of Appeal by virtue of paragraph 28(1)(i) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. He did not make an application for judicial review to this Court of the Board's dismissal of his complaint under section 23 of the PSSRA.

(iii) *Federal Court of Appeal's decision*

[22] Mr Chaudhry appealed to this Court from the Federal Court's decision on his termination grievance, not the complaint. In his appeal, he argued that the termination of his employment was invalid because subsection 28(2) of the PSEA confers this power on the deputy head, as defined in section 2 of the PSEA, and there was no evidence that the Warden of Millhaven Institution had authority to issue the notice of an intention to reject on probation.

[23] The Court declined to decide this issue. Mr Chaudhry had not included it in his notice of application for judicial review or in his memorandum of fact and law filed with the Federal Court. Opposing Mr Chaudhry's request that this Court consider the issue of the Warden's authority to terminate his employment, counsel for the Respondent said that he would have led evidence if he had been made aware of the issue earlier.

[24] The Court dismissed the appeal for essentially the reasons given by the Federal Court. The decision is reported at 2008 FCA 61. The Supreme Court of Canada refused Mr Chaudhry's application for leave to appeal: [2008] SCCA No. 349.

[25] I would only add that Mr Chaudhry was self-represented in the judicial review proceedings in the Federal Court and, on appeal, in this Court. As a lay litigant, he no doubt found it frustrating to be met with jurisdictional barriers that prevented both the Adjudicator from determining his grievance, and the Federal Court from reviewing the Board's dismissal of his complaint. He must also have been disappointed to be told by the Federal Court and this Court that they would not

decide whether the deputy head's power to reject an employee on probation had been subdelegated to the Warden, because he had not raised the issue in either his notice of application or his memorandum of fact and law in the Federal Court.

(iv) *re-consideration by the Adjudicator*

[26] In January 2009, Mr Chaudhry made an application to the Board under section 43 of the PSSRA to reconsider its dismissal of his complaint. The Board dismissed the application for both delay and lack of merit; the decision is reported at 2009 PSLRB 39. Mr Chaudhry based his application in part at least on the absence of any evidence that the Warden had the power to reject employees on probation.

[27] Vice-Chairperson Mackenzie noted that Mr Chaudhry seems to have started focussing on the delegation issue in January 2007, just before the hearing of his application for judicial review in the Federal Court. However, he held, it was not relevant to Mr Chaudhry's unfair labour practice complaint under section 23 of the PSSRA. The re-consideration application applies only to the complaint. Adjudicators' decisions on grievances are not subject to statutory reconsideration.

Issues and analysis

[28] **Re-litigation:** Mr Chaudhry says that the Motions Judge erred in dismissing his action on the ground that he was seeking to re-litigate matters that had already been decided by the Federal Court and the Federal Court of Appeal. He submits that neither the Board nor the Federal Courts have adjudicated the issue that he now believes to be of fundamental importance to the legality of

his termination, namely the authority of the Warden to reject him on probation. Accordingly, he argues, the present action cannot be characterized as an attempt to re-litigate an issue when that issue has never been decided.

[29] I do not agree. The general prohibition on re-litigation applies both to issues that have been determined by a tribunal and those that the litigant could have raised in the proceeding before the tribunal, but did not. Mr Chaudhry could have raised the authority of the Warden when he grieved the termination of his employment under section 91 of the PSSRA through the internal grievance process.

[30] If the decision-makers did not accept this argument and dismissed the grievance, Mr Chaudhry could have made an application for judicial review to the Federal Court for a determination of the legal question of whether the Warden had the authority to reject on probation.

[31] In addition, Mr Chaudhry might have been able to raise the lack of authority issue when he grieved his termination before the Board under section 92 of the PSSRA. Whether the Warden had the legal authority to reject him on probation might have constituted evidence that the termination of his employment was in bad faith, and might have enabled the Adjudicator to decide the grievance. The issue was not considered by the Federal Court or this Court in the application for judicial review of the Adjudicator's decision because Mr Chaudhry had not raised it in his notice of application and memorandum of fact and law.

[32] It is thus clear that Mr Chaudhry had opportunities to litigate the legal authority of the Warden in the context of his section 91 grievance proceeding and, possibly, before the Board in his section 92 grievance.

[33] The only remaining question is whether there was any basis on which the Judge should have exercised his discretion and allowed the action to proceed, despite Mr Chaudhry's failure to argue previously that the power to reject him on probation had not been subdelegated to the Warden. In my view there was not.

[34] On his own admission during the hearing of the present appeal, Mr Chaudhry did not become aware of the issue of whether the Warden had the necessary subdelegated authority until January 2007 when preparing for the upcoming hearing of his application for judicial review. He stated that he had previously assumed that the Guidelines applied to the termination of his employment. Section 1 of the Guidelines, headed "Authority", states that subsection 12(3) of the *Financial Administration Act* provides that a deputy head may subdelegate the authority to terminate other than for breaches of discipline or misconduct. When he realized that the Guidelines do not apply to rejections on probation, but the PSEA does, he then questioned whether there had been a subdelegation to the Warden of the deputy head's power to reject on probation under subsection 28(2) of the PSEA.

[35] While expressing no opinion on the merits of whether Mr Chaudhry's contention, I would make the following points.

[36] First, the Warden's letter dated February 6, 2004, advising him that he would be rejected on probation stated that he was being terminated under subsection 28(2) of the PSEA.

[37] Second, in his decision dated July 13, 2005, dismissing Mr Chaudhry's grievance as outside his jurisdiction under section 92 of the PSSRA, the Adjudicator stated that the Guidelines do not apply to probationary employees: 2005 PSLRB 72, para. 115. However, the Adjudicator also expressed the view (at para. 5) that the Warden "had the delegated authority to reject on probation (Exhibit E-17)." The document labelled Exhibit E-17 is the Guidelines: see 2007 FC 389 at para. 433.

[38] Third, the fact that the Guidelines do not apply to the rejection of employees on probation is not determinative of the Warden's authority to terminate Mr Chaudhry's employment under subsection 28(2) of the PSEA. Subsection 6(5) of the PSEA permits a deputy head to subdelegate the exercise of powers conferred by the Act.

[39] Fourth, Justice Simpson's reasons for dismissing Mr Chaudhry's application for judicial review of the Adjudicator's decision do not specifically mention the issue of the Warden's subdelegated authority. However, it appears to have been included in the nine points raised by Mr Chaudhry under the heading "Errors and Omissions", which Justice Simpson (at para. 41) declined to consider because they were not contained in his memorandum of fact and law.

[40] In all the circumstances of this case, there is no basis for permitting Mr Chaudhry to raise the issue in the present action or in any subsequent proceedings. The public interest in the finality of litigation must prevail.

[41] **Refusal to provide information:** Mr Chaudhry's statement of claim says that the Crown is under a duty to provide him access to an independent and impartial tribunal to determine his legal rights, and to inform him which tribunal has the jurisdiction to determine whether the Warden of Millhaven had the delegated legal authority to terminate his employment.

[42] Mr Chaudhry argues that the Motions Judge misunderstood the statement of claim by thinking that he was seeking advice from the Court on where he should litigate whether the Warden had the subdelegated power to terminate his employment under subsection 28(2) of the PSEA. Rather, the statement of claim requests the Court to order the Respondent to give him this information.

[43] Even if the Motions Judge did err as Mr Chaudhry alleges, the error is not material. As discussed above, Parliament had provided an opportunity for Mr Chaudhry to challenge the Warden's legal authority. He could have raised this issue when he grieved his rejection on probation in his grievance proceedings under section 91 of the PSSRA. If the argument had not succeeded, he could have made an application for judicial review of the dismissal of his grievance in the Federal Court and, if necessary, appealed from there to this Court.

[44] In addition, he could probably have raised the issue of the Warden's authority before the Adjudicator. If the Adjudicator had nonetheless dismissed his grievance under section 92 of the PSSRA, he could have included it in his notice of application for judicial review and in his memorandum of fact and law. His failure to do so led the Federal Court and this Court to refuse to determine the issue.

[45] Thus, in my view, the law provided Mr Chaudhry with adequate opportunities to litigate the Warden's legal authority to terminate his employment. Unfortunately, he failed to avail himself of them. His statement of claim is therefore unfounded in so far as it assumes he has been denied an opportunity to litigate this issue. Further, the Crown owes no legal duty to give legal advice or information to those litigating against it. In an adversarial litigation system, parties must obtain their own legal advice; they cannot look to their opponents, including the Crown, to provide it.

[46] To be clear, I repeat that I express no view on whether there is any merit to Mr Chaudhry's contention that the Warden had no power to issue him a rejection on probation notice under subsection 28(2) of the PSEA. Mr Chaudhry should have requested evidence that the deputy head had subdelegated this power to the Warden under subsection 6(5) of the PSEA when he was grieving his termination under sections 91 and 92 of the PSSRA.

[47] For all the above reasons, I would dismiss the appeal with costs.

“John M. Evans”

J.A.

“I agree

K. Sharlow J.A.”

“I agree

Eleanor R. Dawson J.A.”

APPENDIX A

Public Service Employment Act, R.S.C. 1985, c. P-33.

6. (5) Subject to subsection (6), a deputy head may authorize one or more persons under the jurisdiction of the deputy head or any other person to exercise and perform any of the powers, functions or duties of the deputy head under this Act including, subject to the approval of the Commission and in accordance with the authority granted by it under this section, any of the powers, functions and duties that the Commission has authorized the deputy head to exercise and perform.

28. (2) The deputy head may, at any time during the probationary period of an employee, give notice to the employee that the deputy head intends to reject the employee for cause at the end of such notice period as the Commission may establish for that employee or any class of employees of which that employee is a member, and the employee ceases to be an employee at the end of that period.

6. (5) Sous réserve du paragraphe (6), un administrateur général peut autoriser des subordonnés ou toute autre personne à exercer l'un des pouvoirs et fonctions que lui confère la présente loi, y compris, mais avec l'approbation de la Commission et conformément à la délégation de pouvoirs accordée par celle-ci en vertu du présent article, l'un de ceux que la Commission l'a autorisé à exercer.

28. (2) À tout moment au cours du stage, l'administrateur général peut aviser le fonctionnaire de son intention de le renvoyer, pour un motif déterminé, au terme du délai de préavis fixé par la Commission pour lui ou la catégorie de fonctionnaires dont il fait partie. Le fonctionnaire perd sa qualité de fonctionnaire au terme de cette période.

Public Service Staff Relations Act, R.S.C. 1985, c. P-35.

8. (2) Subject to subsection (3), no person shall

...

(c) seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee

8. (2) Sous réserve du paragraphe (3), il est interdit :

[...]

c) de chercher, notamment par intimidation, par menace de destitution ou par l'imposition de sanctions pécuniaires ou autres, à obliger un fonctionnaire :

...
(ii) to refrain from exercising any other right under this Act.

[...]
(ii) à s'abstenir d'exercer tout autre droit que lui accorde la présente loi.

23. (1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed

23. (1) La Commission instruit toute plainte dont elle est saisie et selon laquelle l'employeur ou une organisation syndicale ou une personne agissant pour le compte de celui-là ou de celle-ci n'a pas, selon le cas :

(a) to observe any prohibition contained in section 8, 9 or 10;

a) observé les interdictions énoncées aux articles 8, 9 ou 10;

...

[...]

91. (1) Where any employee feels aggrieved

91. (1) Sous réserve du paragraphe (2) et si aucun autre recours administratif de réparation ne lui est ouvert sous le régime d'une loi fédérale, le fonctionnaire a le droit de présenter un grief à tous les paliers de la procédure prévue à cette fin par la présente loi, lorsqu'il s'estime lésé :

...

[...]

(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, ...

b) par suite de tout fait autre que ceux mentionnés aux sous-alinéas a)(i) ou (ii) et portant atteinte à ses conditions d'emploi.

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

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

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 :

[...]

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

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

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.

[...]

...

(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the *Public Service Employment Act*.

(3) Le paragraphe (1) n'a pas pour effet de permettre le renvoi à l'arbitrage d'un grief portant sur le licenciement prévu sous le régime de la *Loi sur l'emploi dans la fonction publique*.

[...]

...

Federal Courts Act, R.S.C. 1985, c. F-7.

28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

...

[...]

(i) the Public Service Labour Relations Board established by the Public Service Labour Relations Act;

i) la Commission des relations de travail dans la fonction publique constituée par la Loi sur les relations de travail dans la fonction publique;

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-383-11

STYLE OF CAUSE: Mohammad Aslam Chaudhry v.
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J.J.A.

DATED: April 13, 2012

APPEARANCES:

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