Federal Court of Appeal  Cour d'appel fédérale

Date: 20130214

Docket: A-366-12

Citation: 2013 FCA 36

CORAM: **SHARLOW J.A.**
TRUDEL J.A.
WEBB J.A.

BETWEEN:

DWIGHT W. GASKIN

Applicant

and

CANADA REVENUE AGENCY

and

PUBLIC SERVICE LABOUR RELATIONS BOARD

Respondents

Heard at Winnipeg, Manitoba, on February 6, 2013.

Judgment delivered at Ottawa, Ontario, on February 14, 2013.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: SHARLOW J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an application for judicial review by Mr. Gaskin requesting that the Court set aside a decision of the Public Service Labour Relations Board (the Board), dated July 20, 2012 [2012 decision]. In the decision under review (2012 PSLRB 76), the Board dismissed Mr. Gaskin's complaint under sections 133 and 147 of the *Canada Labour Code*, R.S.C., 1985, c. L-2 (the Code) that the Canada Revenue Agency's (CRA) decision of October 31, 2011 to terminate him was a

retaliatory measure which violated his rights to occupational health and safety as provided for under Part II of the Code.

[2] Mr. Gaskin's circumstances were not new to the Board. In the 2012 decision, the Board notes that "the facts relating to the reasons for the alleged retaliation … remain the same as those already considered and decided by the [Board]" in 2008 (at paragraph 9). The 2008 decision is reported at 2008 PSLRB 96 and also dismisses Mr. Gaskin's complaint. The main difference between the two proceedings lies in the event that triggered the complaints: in 2008, it was the CRA's decision to take Mr. Gaskin off the list of employees on sick leave as of August 8 (as he had exhausted his sick leave credits) whereas in 2012, it was his termination from employment.

[3] To better understand Mr. Gaskin's position, it is useful to provide a brief overview of Part II of the Code, which deals with occupational health and safety. The stated purpose of Part II "is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment [to which Part II of the Code applies]" (see section 122.1). Sometime in the fall of 2007 and on the basis of section 128, Mr. Gaskin refused to work, alleging violence in the workplace and an unsafe work environment (p. 200 of applicant's record). Mr. Gaskin advanced these allegations while he was facing personal and family related issues relating to the custody of and access rights to his children. Mr. Gaskin also requested an investigation into possible criminal conduct by certain individuals. Mr. Gaskin is of the view that the supervisors with whom he shared his concerns about the well-being of his children, the lifestyle of their mother, and other various difficulties he encountered during proceedings in the family division of the Superior Court, did nothing to respond to these concerns including notifying the proper authorities. As a result, he

argues that the employer did not discharge its contractual and other legal obligations to protect him and his children. He asserts that this "failure to protect" constitutes a violation of the state's obligations and responsibilities under domestic and international law. These allegations form the basis of Mr. Gaskin's refusal to work and of what he describes as the substance of his occupational health and safety complaint.

[4] Mr. Gaskin argues that his complaint under Part II of the Code was met with retaliation, namely his removal from extended sick leave in 2008 and termination in 2011. Mr. Gaskin argues that the employer could not take these measures until his complaint was fully investigated and all his avenues of redress exhausted, "including under domestic procedure and international complaint and communication mechanisms" (applicant's memorandum of facts and law at paragraph 16).

[5] Had an occupational health and safety investigation been held and a report properly issued following his complaint, the whole matter, he claims, would have turned out differently. At the hearing of this application, it seems that Mr. Gaskin was asking this Court to intervene, amongst other reasons, on the basis that the Board was wrong on two counts: first in not ordering the employer to investigate his occupational health and safety complaint and report on it, and second in not waiting for that report before issuing its decision. I wish to address these particular grounds of complaint before turning to the decision under review.

[6] Part II of the Code lists the procedural steps to be followed once an occupational health and safety complaint has been filed. Put simply, complaints under Part II are referred to health and safety officers for investigation (section 129). In turn, their decisions can be appealed to the

Occupational Health and Safety Tribunal Canada (the Tribunal) to be considered by Appeals Officers designated by the Minister of Labour. The Tribunal exercises the functions of an administrative tribunal and although its decisions are final and binding, they may be subject to judicial review by the Federal Court pursuant to section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. This is not the scenario that brings the parties to our Court. We are not sitting in appeal of a decision of the Federal Court concerning the process for adjudicating the workplace health and safety concerns of Mr. Gaskin. Rather, we are reviewing a decision of the Board regarding Mr. Gaskin's allegations of retaliation by the CRA in light of his complaint relating to workplace health and safety filed pursuant to sections 133 and 147 of the Code. This type of complaint is properly in front of the Board. Indeed, subsection 133(1) of the Code provides that:

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
[Emphasis added.]	[Je souligne.]

[7] As a result, I find that Mr. Gaskin is wrong when he alleges that the Board "failed in the responsibility to exercise its jurisdiction and failed to discharge its legal obligation and duty to act" (application for judicial review at paragraph (d)).

[8] This being said, I move on to the 2012 Decision that is properly before us. While Mr. Gaskin's notice of application includes numerous and vague allegations grounded in very diverse

elements of the law, I have identified two issues to be analysed: (1) whether the Board denied Mr. Gaskin due process and erred in finding that an oral hearing was not required to determine the issues in the complaint; (2) whether it erred in finding that the complaint (a) established no *prima facie* case for the exercise of a right under section 147 of the Code and (b) was moot in light of the Board's 2008 Decision.

Procedural fairness

[9] In his application, Mr. Gaskin takes the position that the Board denied him both due process and a fair hearing. Under section 41 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s.2, the Board is vested with the discretion to determine matters without an oral hearing. In this case, the Board determined that it was possible to decide the matter on the basis of the record. I fail to see how that decision deprived Mr. Gaskin of the opportunity to present his case and have a decision made using a fair, impartial and open process (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 28), particularly given this complaint appears identical to the complaint considered in 2008, but for the circumstances underpinning the employer's decision.

[10] In its reasons, the Board explained its decision not to hold a hearing and stated that it had reviewed all of the documents on the record as well as the 2008 Decision. It also noted that although invited to provide a response to the respondent's request for summary dismissal of the complaint, Mr. Gaskin did not reply (2012 Decision at paragraph 3).

[11] I adopt here the reasoning of our Court in *Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98 at paragraph 9 where it was found that "it is not for a reviewing court to substitute its exercise of discretion for that of the Board. Judicial intervention on the ground of procedural fairness is only warranted where an oral hearing is necessary to provide a reasonable opportunity for parties to effectively make their case or to answer that against them". Mr. Gaskin's case does not meet these requirements.

Section 147 of the Code and the issue of mootness

[12] Section 147 of the Code prohibits employers from taking reprisal actions against an employee who has exercised a right pertaining to workplace health and safety matters protected in the Code:

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	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) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;	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) 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	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) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.	c) soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.
[Emphasis added.]	[Je souligne.]

[13] The Board determined that the applicant failed to establish a *prima facie* case for exercising any rights protected by section 147 of the Code. It noted that, in 2008, the Board determined that paragraphs 147(*a*) and (*b*) did not apply to Mr. Gaskin. The only question was whether, pursuant to paragraph 147(*c*), the CRA's actions constituted a reprisal because the complainant was exercising a right to refuse to work in light of his health and safety concerns protected by section 128 of the Code. On the evidence, it found that the applicant was not exercising a valid right to refuse to work, and the CRA's actions could not be considered a reprisal.

[14] In the current proceedings, the Board determined that the decision to terminate the complainant's employment was an extension of the decision to place the applicant on leave without pay. As Mr. Gaskin brought forward no new grounds or reasons nor any new exercise of a protected right to bring his complaint within the parameters of section 147, the findings of the previous decision applied to the current proceedings, and the question was moot.

[15] Having carefully examined the record, I conclude that the Board could reasonably conclude as it did in relying on the 2008 Decision, which provided detailed reasons setting out the facts and the law relating to the dispute. The applicant did not meet the requirements of a protected right to refuse to work, and never contacted the CRA as to his status or his intention to return to work.

[16] Although Mr. Gaskin's complaints against his employer are numerous, they remain vague and do not identify the danger that prevented him from attending to his responsibilities in the workplace. Indeed, at the hearing of this application, Mr. Gaskin was unable to show the link between the asserted danger and his employer, but for the alleged duty of the CRA to get involved in his personal life and to protect him and his children.

Conclusion

[17] For these reasons, I propose to dismiss Mr. Gaskin's application for judicial review with costs.

"Johanne Trudel"
J.A.

"I agree
K. Sharlow J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-366-12
STYLE OF CAUSE:	Dwight W. Gaskin v. Canada Revenue Agency and Public Service Labour Relations Board
PLACE OF HEARING:	Winnipeg, Manitoba
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REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	SHARLOW J.A. WEBB J.A.
DATED:	February 14, 2013

APPEARANCES:

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