Federal Court of Appeal  Cour d'appel fédérale

Date: 20200213

Docket: A-350-18

Citation: 2020 FCA 44

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

ANGELA WALKER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on February 11, 2020.

Judgment delivered at Ottawa, Ontario, on February 13, 2020.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: BOIVIN J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The applicant seeks to set aside a portion of the decision of the Federal Public Sector Labour Relations and Employment Board (the FPSLREB or the Board) in *Walker v. Deputy Head (Department of Environment and Climate Change)*, 2018 FPSLREB 78. In that decision, the Board dismissed both the applicant's termination grievance and her reprisal complaint, alleging a violation of section 147 of the *Canada Labour Code*, R.S.C., 1985, c. L-2. In this

application for judicial review, the applicant seeks to set aside the portion of the decision dismissing her termination grievance.

[2] While the applicant has raised several issues, I only need consider one of them, namely, the assertion that the Board's decision is unreasonable as it failed to address one of the principal arguments made by the applicant to the effect that her genuine fear of a subordinate was a mitigating factor that the Board was bound to consider.

[3] The existence of such fear was central to the applicant's case before the FPSLREB as the applicant's written submissions to the Board demonstrate. The applicant asserted that many of the actions for which she was disciplined were motivated by a desire to protect herself and other employees from threatening and possibly dangerous acts of her subordinate or were a non-premeditated response to what she perceived to be a managerial failure to address a volatile situation.

[4] It is a well-settled labour law principle that an adjudicator in a discipline case must assess whether disciplinable conduct occurred, whether the penalty levied was appropriate and, if not, what the appropriate penalty is (see, e.g. *Basra v. Canada (Attorney General)*, 2010 FCA 24, 398 NR 308 at paras. 24-26; *William Scott & Co. v. C.F.A.W., Local P-162*, [1976] B.C.L.R.B.D. No. 98, [1977] 1 Can. L.R.B.R. 1 [*Wm. Scott*] at paras. 13-14).

[5] The inquiry into the appropriate penalty requires review of all the relevant surrounding circumstances, including mitigating factors such as the employee's state of mind, which has a

direct bearing on culpability (see, e.g. *Wm. Scott* at para. 14; *Samuel-Acme Strapping Systems v. U.S.W.A., Local 6572* (2001), 65 C.L.A.S. 157, [2001] L.V.I. 3224-1 (Ellis) at para. 210; *Georgian Bay General Hospital and OPSEU, Local 367 (J. (K.)), Re* (2014), 243 L.A.C. (4th) 112, 119 C.L.A.S. 7 (Sheehan) at paras. 58, 65-66, 68; *Fundy Gypsum Co. v. U.S.W.A., Local 9209* (2003), 117 L.A.C. (4th) 58, 73 C.L.A.S. 220 at paras. 40, 45; and, more generally, Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, 5 ed. (Toronto: Thomson Reuters, 2019) (loose-leaf) at 7:4424).

[6] Here, determining whether the applicant genuinely feared her subordinate in respect of whom the acts of misconduct occurred was directly relevant to the issues the Board was called upon to decide as such fear could have made many of the applicant's impugned actions less culpable and more understandable, particularly given her lengthy service and previously blameless disciplinary record.

[7] Despite this, the FPSLREB did not address the issue of whether the applicant was motivated by a genuine fear for her and others' safety. Contrary to what the respondent asserts, this issue was not dealt with even inferentially by the Board in the decision. Indeed, the Board even went so far as to note in the portion of the decision dealing with the reprisal complaint that it was "not [its] role to determine whether … [the applicant] had a legitimate fear for her safety" (at para. 609 of the decision).

[8] While this comment was made in the portion of the decision dealing with the reprisal complaint, the said complaint was intertwined with the termination grievance. The presence or absence of just cause for the applicant's termination is a factor that may be relevant to whether

the applicant's termination constituted an act of reprisal for having raised health and safety concerns related to her subordinate, as the respondent conceded before us. Thus, contrary to what the Board said, it was precisely its role to consider whether the applicant had a genuine fear for her safety and whether, if so, that fear should mitigate the penalty of discharge levied by the employer.

[9] The Supreme Court of Canada recently underscored in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraphs 96-98, and again at paragraphs 127-128, that an administrative tribunal's failure to address a fundamental argument advanced by a litigant may well render its decision unreasonable as such failure may mean that the decision lacks transparency and intelligibility.

[10] Here, the applicant's alleged fear of the subordinate played a central role in and was fundamental to her defence. It was also directly relevant to the issues the FPSLREB was required to determine and could have changed the outcome in the termination grievance. Consequently, the Board's failure to consider whether such fear constituted a mitigating factor renders its decision on the termination grievance unreasonable as it is impossible to discern from the decision what weight would have been attributed to this factor by the Board, had it considered it.

[11] I would accordingly grant this application for judicial review, with costs, and would set aside the decision of the FPSLREB on the termination grievance. I agree with the applicant that the fairest course would be to remit the grievance to another FPSLREB member for re-determination, given this member's failure to grasp a key element of the applicant's defence and

the tone and tenor of the decision. I would therefore order that the applicant's grievance be returned to another member of the PSLREB for re-determination.

"Mary J.L. Gleason"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-350-18
STYLE OF CAUSE:	ANGELA WALKER v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	BOIVIN J.A. RIVOALEN J.A.
DATED:	FEBRUARY 13, 2020

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