Federal Court of Appeal | Cour d'appel fédérale

**Date: 20210201**

**Docket: A-390-19**

**Citation: 2021 FCA 18**

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

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**GREGORY PIUS BURKE**

**Respondent**

Heard by teleconference hosted by the Registry on February 1, 2021.
Judgment delivered from the Bench at Ottawa, Ontario, on February 1, 2021.

REASONS FOR JUDGMENT BY: GLEASON J.A.

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

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**REASONS FOR JUDGMENT**

**(Delivered from the Bench at Ottawa, Ontario, on February 1, 2021).**

**GLEASON J.A.**

[1] The applicant seeks to set aside the decision of an adjudicator of the Federal Public Service Labour Relations and Employment Board (the FPSLREB) in *Burke v. Deputy Head (Department of National Defence)*, 2019 FPSLREB 89. In that decision, Adjudicator Olsen found that the respondent's employer did not have cause to terminate his employment under

paragraph 12(1)(*e*) of the *Financial Administration Act* , R.S.C. 1985, c. F-11 by reason of the respondent's refusal to undergo a Fitness-to-Work Evaluation (FTWE) with Health Canada.

[2] In the present application for judicial review, the applicant submits that Adjudicator Olsen's decision was unreasonable as he failed to apply the doctrine of issue estoppel and unreasonably neglected to follow what the applicant asserts was a binding determination made by another adjudicator, Mr. Michael McNamara, in an earlier case, reported as *Burke v. Deputy Head (Department of National Defence)*, 2014 PSLRB 79. In that earlier case, Adjudicator McNamara ruled on a preliminary objection to his jurisdiction to hear an earlier grievance challenging the employer's earlier decision to place the respondent on a period of unpaid sick leave, which the respondent characterized as a constructive dismissal. Adjudicator McNamara determined he had no jurisdiction to inquire into this earlier grievance as the employer's decision to hold the respondent out of the workplace was not a disciplinary one. In reaching this determination, Adjudicator McNamara commented at paragraph 88 of his reasons that the employer had provided "ample evidence on which to conclude that it was well within its rights" to the request a FTWE.

[3] In the decision that is the subject of this application for judicial review, Adjudicator Olsen determined that the foregoing comments did not settle the issue of whether the employer had just cause to request the FTWE or to terminate the respondent's employment because the earlier comments were not central to the previous decision and thus were non-binding *obiter*.

[4] We see no reviewable error in this determination. The comments on which the applicant relies may be reasonably characterized as *obiter* because they were not a central part of Adjudicator McNamara's reasoning, who was tasked with deciding whether he had jurisdiction to inquire into the earlier grievance and whether the employer's motives in seeking the FTWE were disciplinary. Adjudicator McNamara was not charged with deciding whether the employer had cause on a non-disciplinary basis to request the FTWE and terminate the respondent's employment, the central questions before Adjudicator Olsen. For issue estoppel to apply, among other things, the question decided in the earlier and later cases must be the same (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 at para 25).

[5] As the questions before the two adjudicators who ruled on the two different grievances submitted by the respondent were different, it was entirely reasonable for Adjudicator Olsen in the second case to have declined to follow the comments that the applicant sought to rely on. Moreover, as was recently noted by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paragraph 113, citing its earlier decision in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 (*Nor-Man*), "… administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable". Indeed, in *Nor-Man*, the Supreme Court upheld a labour arbitrator's decision, who had applied the doctrine of promissory estoppel in a way the employer asserted was different from the way in which a court would apply the doctrine.

[6] The decision under review is therefore reasonable. This application will thus be dismissed, with costs, fixed in the all-inclusive amount of $250.00 as the respondent represented himself and incurred relatively little in the way of recoverable disbursements.

"Mary J.L. Gleason"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-390-19 |
| **STYLE OF CAUSE:** | ATTORNEY GENERAL OF CANADA v. GREGORY PIUS BURKE |
| **PLACE OF HEARING:** | HEARD BY ONLINE TELECONFERENCE |
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| **REASONS FOR JUDGMENT DELIVERED AT OTTAWA, ONTARIO BY:** | GLEASON J.A. |
| **CONCURRED IN BY:** | NEAR J.A.<br>BOIVIN J.A. |
| **DATED:** | FEBRUARY 1, 2021 |

**APPEARANCES:**

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| Richard Fader | FOR THE APPLICANT |
| Gregory Pius Burke | SELF-REPRESENTED FOR THE RESPONDENT |

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