Federal Court of Appeal | Cour d'appel fédérale

Date: 20210416

Docket: A-90-20

Citation: 2021 FCA 74

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CAROL YATES

Respondent

Heard by online video conference hosted by the Registry on March 18, 2021.

Judgment delivered at Ottawa, Ontario, on April 16, 2021.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: PELLETIER J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] This is an application for judicial review of a decision of the Federal Public Sector Labour Relations and Employment Board (the Board), reported as *Yates v. Deputy Head*

(Department of Citizenship and Immigration), 2020 FPSLREB 21, 2020 CarswellNat 3809 (WL Can) [*Yates*].

[2] The Board allowed a grievance brought by the respondent, Carol Yates, challenging her dismissal for unsatisfactory performance. The Attorney General of Canada (Canada) argues the Board's decision was unreasonable and should be set aside.

[3] I find the Board's decision to be reasonable in light of the applicable law and the facts of the case. I would accordingly dismiss the application for judicial review with costs.

II. Facts

[4] The respondent was a Case Processing Agent with the Department of Citizenship and Immigration (the Department). Facing a heavy backlog in immigration cases requiring processing, the Department began introducing new computerized processing methods, along with more demanding productivity targets for processing agents.

[5] The respondent struggled to meet these targets and was put on a performance improvement plan in 2011. She was on performance plans for three years, during which time she had regular, usually weekly, meetings with her supervisor to discuss her performance. At times, the respondent's productivity would improve; however, department managers were also concerned with the amount of errors the respondent was making in processing her files.

[6] On April 7, 2014, the Department issued a “last chance” letter to the respondent, informing her that if she continued to fail to meet productivity standards, she would be terminated for unsatisfactory performance. The letter set out “graduated targets” for file processing times, along with dates by which she was required to meet those time targets. The letter stated that a final performance evaluation would be carried out on July 3, 2014, and that if the respondent failed to meet all standards she would be terminated. The letter did not mention standards for error rate.

[7] The respondent signed a new performance management plan the next day, April 8, 2014, in which she also acknowledged that failure to meet the productivity standards would result in her termination.

[8] Shortly thereafter, on May 16, 2014, the respondent’s supervisor informed management that she remained concerned with the number of errors the respondent was making. The respondent was also failing to meet the required productivity standards. Management began preparations to terminate the respondent.

[9] On July 3, 2014, the respondent was terminated for unsatisfactory performance. Her termination letter, signed by the Assistant Deputy Minister for Operations, states:

> … It has been determined that you have failed to consistently meet the required level of performance and perform all aspects of the position. You have been provided additional mentoring and coaching to assist you in meeting performance expectations. In spite of these measures, you have failed to demonstrate a significant and sustained improvement in your performance.
>
> I have reached the conclusion that you are not able to perform the full range of duties of your position as a Case Processing Agent. Further, since all previous efforts to assist you in improving your performance have been unsuccessful, I

> have determined that additional training or coaching would not overcome the identified deficiencies.
>
> In view of the above, and in accordance with the authority vested in me pursuant to section 12(1)(d) of the *Financial Administration Act*, your employment with Citizenship and Immigration Canada is terminated for reasons related to unsatisfactory performance effective July 3, 2014, at close of business.

[10] The respondent filed the grievance challenging her dismissal that same day. After the Department's internal grievance system denied her grievance, she brought it to the Board.

III. The Board's Decision

[11] The Board referred to section 230 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 [*FPSLRA*], for instruction as to how it was required to treat the grievance. That section reads:

Determination of reasonableness of opinion	**Décision sur le caractère raisonnable de l'avis**
230. In the case of an employee in the core public administration or an employee of a separate agency designated under subsection 209(3), in making a decision in respect of an employee's individual grievance relating to a termination of employment or demotion for unsatisfactory performance, an adjudicator or the Board, as the case may be, must determine the termination or demotion to have been for cause if the opinion of the deputy head that the employee's performance was unsatisfactory is determined by the adjudicator or the Board to have been reasonable.	**230** Saisi d'un grief individuel portant sur le licenciement ou la rétrogradation pour rendement insuffisant d'un fonctionnaire de l'administration publique centrale ou d'un organisme distinct désigné au titre du paragraphe 209(3), l'arbitre de grief ou la Commission, selon le cas, doit décider que le licenciement ou la rétrogradation étaient motivés s'il conclut qu'il était raisonnable que l'administrateur général estime le rendement du fonctionnaire insuffisant.

[12] According to the Board, it was required to "determine if it was reasonable, based on the evidence, for the deputy head to deem the performance of the employee in question unsatisfactory": *Yates* at para. 9. This meant the Board's focus was not on whether there was cause for termination but rather on the reasonableness of the Deputy Head's assessment of the respondent's performance: *Yates* at para. 9.

[13] The Board referred to *Raymond v. Treasury Board*, 2010 PSLRB 23, 192 L.A.C. (4th) 375 [*Raymond*] for criteria by which it could determine if the Deputy Head's performance assessment was reasonable. At paragraph 10 of its decision, the Board cited the following passage from *Raymond*:

> [131] … I do not see how it would be possible to find that it was reasonable for a deputy head to consider the performance of one of his or her employees unsatisfactory if the evidence showed the following:
>
> - the deputy head or the supervisors who assessed the employee's performance were involved in a bad faith exercise;
> - the employee was not subject to appropriate standards of performance;
> - the employer did not clearly communicate the standards of performance to the employee that he or she was required to meet; or
> - the employee did not receive the tools, training and mentoring required to meet the standards of performance in a reasonable period.

[14] Ultimately, the Board concluded that the Department had failed to meet the third criteria, lacking clearly communicated performance standards. The Board found that while the Department had clearly articulated the productivity standards the respondent was required to meet, it had failed to do so regarding error rate standards.

[15] The Board found as fact that the respondent's error rate was of concern to the Department and was determinative in the Deputy Head's decision to terminate the respondent, rather than demote her: *Yates* at para. 28. However, the Board found that the Department's messaging to the respondent regarding errors was vague, and often contradicted its messaging regarding productivity.

[16] The Board based this conclusion in part on the testimony of the respondent herself, who testified that she felt pressure to "risk manage" files to increase efficiency, which she understood to mean work more rapidly, even if this risked introducing more errors: *Yates* at paras. 31–35. She thus thought her error rate was relatively unimportant.

[17] In the Board's view, the respondent's testimony was corroborated by evidence from Colleen Wheatley, an experienced employee assigned by management to monitor the quality of the respondent's work. Ms. Wheatley testified that her impression was that management preferred employees to process applications rapidly, even if it meant an increased error rate, rather than work slowly to avoid making errors: *Yates* at para. 38. Ms. Wheatley also testified that she had never heard of other agents being monitored for error rates, nor was she aware of an established error rate standard: *Yates* at para. 39.

[18] The Board also considered various materials presented to it in relation to the increase in productivity expected of the respondent's office in light of the backlog of cases: *Yates* at paras. 41ff. In the Board's view, these materials corroborated Ms. Wheatley's testimony that

management's messaging to employees was to sacrifice accuracy in order to achieve productivity gains: *Yates* at para. 46.

[19] Further, the Board found that what constituted an "error" for the purposes of measuring the respondent's error rate was not defined. Ms. Wheatley's testimony indicated that the office had no definition of what constituted an error: *Yates* at para. 58. The Board also reviewed communications between the respondent and her supervisor, finding that the topic of the respondent's "error rates and what qualified as an error to be counted against the standard was addressed inconsistently, if at all": *Yates* at para. 80.

[20] According to the Board, while a 5% error rate standard *was* mentioned once in a November 2011 performance plan, and again in the respondent's final "Performance Improvement Plan", these were the only times that this standard was communicated to the respondent, despite multiple intervening performance plans and regular weekly meetings regarding performance. How the standard would be calculated was never discussed. The Board thus concluded that "no intelligible and objective error rate existed and that if it did, it was not clearly communicated to the grievor": *Yates* at para. 94.

[21] The Board did find that the respondent was given the tools and training to meet the performance standards that were communicated to her, rejecting the respondent's arguments to the contrary: *Yates* at para. 103. The Board also did not accept the respondent's contention that management acted in bad faith towards her, although it acknowledged the respondent's supervisor's actions contributed to a "cold" workplace atmosphere: *Yates* at para. 118.

[22] The Board concluded its reasons with the following paragraphs:

> [119] I might have been persuaded by the employer counsel's submissions and the evidence regarding the grievor failing to consistently meet productivity standards had this factor alone been relied upon in the decision to terminate her employment.
>
> [120] However the evidence does not persuade me on a balance of probabilities that an error rate standard had been created or effectively communicated to the grievor.
>
> [121] Since the employer relied upon both the grievor's productivity and her error rate, I must allow the grievance, as I cannot conclude that the deputy head's opinion was reasonable that her performance was unsatisfactory.

[23] The Board allowed the grievance and remained seized of the matter in the event the parties could not agree on the issue of remedy.

[24] Canada now applies to this Court for judicial review of the decision.

IV. Issues and standard of review

[25] The parties agree the standard of review is reasonableness and that nothing rebuts this presumptive standard: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, paras. 16–17. Thus, the only issue raised by this application is whether it was reasonable for the Board to conclude that the Department's assessment of the respondent's performance was unreasonable.

V. Analysis

[26] Before the Board, Canada argued that the Department's assessment of the respondent's performance as unsatisfactory was reasonable because it was based on two documented performance problems: failure to meet productivity standards; and failure to achieve an acceptable error rate. Canada argues that the Board, by acknowledging the validity of the first problem but nonetheless allowing the grievance, made an unreasonable decision.

[27] As noted, the wording of section 230 of the *FPSLRA* focuses the Board's inquiry on the reasonableness of the Deputy Head's assessment of the terminated employee's performance. Canada argues the section places the Board in a reviewing position that is akin to that of a judge conducting judicial review of an administrative decision. In other words, deference is owed by the Board to the Deputy Head. According to Canada, this meant that if the Board found that only one of the Deputy Head's alleged performance problems existed, the Board could conclude that the Deputy Head's performance assessment was reasonable. Canada argues that the failure of the Board to fully consider the failure to meet productivity standards as a separate and discreet ground made the Board's decision unreasonable.

[28] Canada's position is that when an employer alleges multiple grounds for termination, the employer is not necessarily required to prove all grounds for the termination to nonetheless be for cause. According to Canada, so long as only one proven ground justifies termination, the employer's failure to prove other grounds does not invalidate the termination decision.

[29] Canada argues that the respondent's unacceptable error rate was a "secondary" performance issue, and the primary issue with the respondent's performance was her failure to meet productivity standards. Canada points out that the Board noted, in its concluding paragraphs, that it might have dismissed the grievance if the unsatisfactory performance assessment had been based on the productivity issue alone. Canada argues that the Board was required to continue this analysis, and address whether failure to meet productivity standards alone was sufficient grounds to support the negative performance assessment, thus making the assessment reasonable and the termination for cause.

[30] The respondent counters that the Board's decision was reasonable in light of the facts of the case and relevant Board jurisprudence. According to the respondent, the Board relied on the established principle that a Deputy Head's performance assessment cannot be considered reasonable when the assessment is based on a performance standard that was not clearly communicated to the employee. According to the respondent, the Board found as fact that the error rate standard likely did not exist, or was at least not communicated to the respondent. Based on that factual finding, which Canada does not challenge, it was reasonable for the Board to conclude that the Deputy Head's assessment of the respondent's performance was unreasonable.

[31] The respondent also argues that "unsatisfactory performance" was the singular ground for termination offered, and that the employer did not allege multiple grounds for termination. According to the respondent, the employer determined that the respondent's performance was unsatisfactory, writ large. It based this determination on her failure to meet performance standards and her unacceptable error rate. The respondent argues that the Board was not required

to consider whether productivity problems alone warranted termination as the Board was instead focused on whether the Department's performance assessment was reasonable. According to the respondent, given that the Department based its assessment in part on an error rate standard that the Board found did not in fact exist, or at the very least had not been communicated to the respondent, this assessment could not be reasonable.

[32] In my view, the Department's performance assessment was premised both on a failure to meet productivity standards and a failure to meet error standards. Taken together, the Department decided that the respondent failed to meet the required level of performance. The Board found that the issue of productivity standards and error rate were so intrinsically connected throughout the assessment of the respondent's performance that the Department's failure to establish clear error rates and communicate them to the respondent was sufficient to render the Department's assessment of the respondent's performance unreasonable. In my view, on this record this conclusion was open to the Board.

[33] The evidence before the Board showed that the Department sought to address a large backlog of cases by increasing the number of cases assessed by the employees. There was an understanding that this increase in the number of cases to be assessed may lead to more error and that the Department, while wishing to minimize errors, prioritized productivity over the elimination of error under the rubric of "risk management". The respondent's productivity rate did improve over time but her rate of error also increased, as expected by the Department. In my view, the Board reasonably concluded that productivity and error were integral both to one another and to the negative assessment as to performance overall.

[34] As such, in my view, the decision of the Board was reasonable. It may be that, on another set of facts, proof of one of the grounds for a negative performance assessment may be sufficient to find that assessment reasonable, but that is for another day.

VI. Conclusion

[35] I would dismiss the application, with costs.

"D.G. Near"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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