Federal Court of Appeal | Cour d'appel fédérale

Date: 20220926

Docket: A-12-22

Citation: 2022 FCA 159

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

BETWEEN:

JILL ANDREWS

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 6, 2022.

Judgment delivered at Ottawa, Ontario, on September 26, 2022.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

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

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an application for judicial review of a decision by the Federal Public Sector Labour Relations and Employment Board (the Board), dated December 20, 2021, which dismissed the applicant's duty of fair representation complaint (the complaint) against her bargaining agent, the Public Service Alliance of Canada (the Union). The Board came to the conclusion, based on the written submissions of the parties, that the applicant's allegations

against the Union, even if taken as true, did not amount to an arguable case that the Union acted in an arbitrary manner or in bad faith: *Andrews v. Public Service Alliance of Canada*, 2021 FPSLREB 141 (Board's decision).

[2] Having carefully considered the record before the Court and the written and oral submissions of the parties, I would uphold the decision of the Board and dismiss the application for judicial review. In my view, the Board's decision is entirely reasonable and the applicant's submissions amount to an attempt to relitigate the issues decided by the Board.

I. Background

[3] The applicant was an employee of Fisheries and Oceans Canada and a member of the Union of Health and Environment Workers, a component of the Union. In March 2019, she was put on leave with pay pending a fitness to work evaluation. She was placed on unpaid leave in April 2019 until her termination in January 2020.

[4] The applicant first met with representatives of the Union on June 4, 2019 to discuss a variety of topics related to her employment situation, including workplace harassment, the fitness to work evaluation, and the ensuing unilateral unpaid leave of absence. Over the next several months, the evaluation process ran its course; she eventually took the fitness to work evaluation and the applicant's treating physician deemed that she was able to return to work. In the meantime, the applicant had moved to Ottawa from St. John's, Newfoundland, and as a result, requested that the employer allow her to telework. The employer did not approve that request, and instead sent her a letter with four options: return to work in Newfoundland, submit a valid

leave request, resign, or retire. The applicant was given until October 16, 2019 to respond to that letter, a deadline that was extended until December 10, 2019. On December 9, 2019, a representative of the Union asked the employer for another 30-day extension, which was granted, and a final extension was granted until January 31, 2020. The applicant did not choose any of the options given to her, and her employment was accordingly terminated.

[5] The applicant spoke with the Union in January 2020, and enquired about the next steps that the Union could take in the event of a termination. She was told that she would need to advise the Union of her termination, that the Union would then file a termination grievance with her consent, and that she would need to provide documentation supporting her grievance. Unfortunately, the applicant misunderstood the process and believed that she needed to provide factual evidence and a detailed account of the events leading up to her termination before a grievance could be filed; she did not realize there was a deadline for filing a grievance.

[6] As a result, the applicant did not inform the Union of her termination until July 2020. On August 7, 2020, she informed the Union that she had compiled all relevant documents pertaining to her grievance and that she was thus ready to file a grievance. In September 2020, the Union wrote to the applicant explaining that there was a 25-day deadline for filing a grievance which had long since expired and that they would not file a grievance on her behalf. The salient part of that email reads as follows:

> The collective agreement is a legal contracted [*sic*] linked to the Federal Public Sector Labour Relations Act (FPSLRA), the mother ship legislation covering the terms and conditions of employment for federal public servants and is immutable. Our records show that you did not contact us in regards to your termination until mid-August, which is 5 months past the legal timeline. We could have attempted to request for an exception for a week or so given the issues with the Covid-19

> virus, but not for 5+ months. In addition, I have previously sent you emails informing you of the 25-day time limit to file a grievance, but you have never informed of your intent to do so.
>
> For these reasons, we are unable to file a grievance on your behalf…

[7] In January 2021, the applicant again contacted the Union to further request a grievance against her termination. In response, the Union wrote to the applicant reiterating that it would not file a wrongful dismissal claim against the employer, that she was well outside of the time limits to file a grievance, that the arguments she invoked in justification for the delay would not affect the time limits for filing a grievance and that a grievance was no longer a possibility.

[8] After contacting the Board, the applicant became aware of the possibility of seeking an extension of time to file a grievance. She contacted the Union by text message about this possibility on February 5, 2021. She received no response.

[9] In May 2021, the applicant filed an unfair labour practice complaint under section 190 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s.2 (the Act) against the Union. In that complaint, she alleged that the Union failed to: 1) properly explain the grievance process; 2) advise of the possibility to apply for an extension of time to file a grievance; and 3) apply for an extension of time to file her grievance after she made an explicit request to that effect. The Union filed its response in July 2021, and the applicant filed a reply later that month.

II. Decision Under Review

[10] On December 20, 2021, the Board dismissed the applicant's complaint against the Union on the basis of the parties' submissions and without holding an oral hearing, as it is entitled to do pursuant to section 22 of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365. The factual record underlying the parties' submissions was based exclusively on the documents filed with the Board in writing, specifically the complaint, the parties' written submissions, and the documents the parties had appended to their submissions.

[11] The Board first noted that for the applicant to succeed pursuant to section 187 of the Act, she had to show that the Union acted "in a manner that is arbitrary or discriminatory or that is in bad faith…". Since discrimination was not alleged within the complaint, it was not addressed in the Board's decision.

[12] Relying on the jurisprudence, the Board first noted that to fulfill its duty, the bargaining agent's actions must be "fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee": *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, 9 D.L.R. (4th) 641 at 527 [*Gagnon*]. A disagreement with how the bargaining agent handled the situation does not amount to bad faith or arbitrariness: *Gagnon* at 527; *Mangat v. Public Service Alliance of Canada*, 2010 PSLRB 52 at para. 43; *Boudreault v. Public Service Alliance of Canada*, 2019 FPSLREB 87 at para. 32; *Bergeron v. Public Service Alliance of Canada*, 2019 FPSLREB 48 at paras. 89, 91.

[13] The Board then found that the applicant's concerns with the Union's actions did not amount to a breach of the Union's duty of fair representation, and that the Union had taken appropriate steps to explain the grievance process and the relevant timelines to the applicant prior to her termination. On this topic, the Board wrote:

> [31] In her reply, the complainant did not refute the respondent's assertions that it indeed explained the grievance process to her and that it offered to file a grievance as soon as it received a copy of the termination letter. She focused instead on the fact that the [Union] told her that she would need to have detailed allegations for her grievance. Clearly, there was a misunderstanding, but I cannot fault the [Union] for it. The complainant did not send the termination letter to the [Union] as soon as she received it, as it had advised her to.

[14] Turning to her complaint that the Union failed to respond to her request for assistance to file an application to extend the time to file a grievance, the Board found that the Union had already turned its mind to the timeliness issue in September 2020 when it declined to file a termination grievance. The Board did not doubt the applicant's belief that she was asking the Union to apply for an extension of time when she texted the Union's representative in early February 2021. Once again, however, the Board concluded that the Union's inaction in that respect was the result of an honest misunderstanding:

> [34] I also understand why the respondent did not see in this text a request that it act on the complainant's behalf. Nothing in the text requests any action from the respondent; it seems to simply have been provided as information. Again, it was a misunderstanding, but I cannot fault the respondent for it. On two separate occasions, it had already clearly stated that, given the five-month delay, it would not be pursuing a grievance on her behalf. This was not carelessness or bad faith; it was the respondent's estimation of the situation, based on its consideration of the situation, the collective agreement, and the application of the law.

[15] Finally, the Board determined that the respondent had met with the applicant, discussed her situation, advised her on different matters, and that it was the applicant's failure to

communicate with the respondent that limited the respondent's actions: Board's decision at paras. 35-36. In sum, the Board found that the respondent's representatives "were ready and willing to act on the complainant's behalf. She did not allow them that opportunity at the proper time": Board's decision at para. 36.

III. Issues

[16] In my view, this application raises three issues:

A. Is the applicant's new evidence admissible?

B. Was the Board's decision reasonable?

C. Was the applicant deprived of procedural fairness?

IV. Analysis

A. *Is the applicant's new evidence admissible?*

[17] The applicant argues that her affidavit and its numerous exhibits should be admitted by this Court as fresh evidence, even if most of the exhibits were not before the Board. She concedes that fresh evidence is generally inadmissible in the context of an application for judicial review, but contends that exhibits 1 to 33 and 35 to 39 fit within the general background information exception to this rule. In her view, the impugned exhibits are non-argumentative and will assist this Court's understanding of the relevant circumstances and nature of the case in a factually complex matter. Striking them would prevent the Court from understanding the entirety of the matter. Moreover, the applicant argued that no prejudice to the respondent would arise

from accepting these exhibits because the respondent has copies of many of them, and some were alluded to by the respondent in their response filed with the Board.

[18] It is beyond dispute that, in principle, the only evidence that can be considered in a judicial review application is the evidence that was before the decision maker: see, for example, *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paras. 18-20 [*Access Copyright*]; *Connolly v. Canada (Attorney General)*, 2014 FCA 294, 466 N.R. 44 at paras. 7-8; *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 261 A.C.W.S. (3d) 441 at paras. 13-22, 29-36 [*Bernard*]. This principle derives from the role of a reviewing court, which is not to make findings of fact or to determine matters on the merits, but rather to examine the reasonableness of the administrative decision maker's decision. For a reviewing court to accept fresh evidence on judicial review would be tantamount to performing a *de novo* analysis of the evidence itself.

[19] There are three established exceptions to this rule that align with this Court's role as a reviewer, one of which is known as the "general background" exception upon which the applicant relies in her submissions. Under that exception, a party can file an affidavit providing fresh information in circumstances where the information might assist the reviewing court to better understand the relevant issues: *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at paras. 44-46; *Sharma v. Canada (Attorney General)*, 2018 FCA 48, 288 A.C.W.S. (3d) 790 at para. 8 [*Sharma*]. The general background information exception is limited to non-argumentative statements or summaries of the evidence which were before the merits-decider; in

no circumstances should it introduce new information that goes to the merits of the case: *Bernard* at para. 23.

[20] In the case at bar, the evidence that was before the Board is easily identifiable since the decision was made on the basis of the applicant's initial complaint, the Union's submissions in response, and the applicant's reply. Had the applicant wished to file the numerous exhibits that she appended to her affidavit and filed with this Court, she could have done so before the Board. Even though some of the information contained in those exhibits was before the administrative decision maker, the documents themselves were not before the Board when it made its decision. Moreover, the impugned exhibits are not mere summaries of the evidence that was before the Board, nor do they truly qualify as general background information. To the contrary, the information contained in these documents goes directly to the merits of the case and the applicant relies on them to challenge the Board's findings of fact.

[21] Whether the affidavit and the impugned exhibits would prejudice the respondent or cause unnecessary interruptions are considerations largely irrelevant to the issue before us. This Court's jurisprudence is to the effect that the key consideration when determining the admissibility of fresh evidence on judicial review is the court's limited role in fulfilling this function: *Bernard* at paras. 14-18; *Access Copyright* at paras. 17-19; *Sharma* at para. 8. In this case, admitting nearly 40 documents – which were available at the time of the Board's decision and were not put before it – clearly conflicts with the Court's role on judicial review.

[22] Moreover, I am not convinced that none of the exhibits are prejudicial to the respondent. For example, the applicant claims that the Union was notified of her termination on July 7, 2020, as a result of being copied on a letter that she sent on that day to the Minister of Public Services and Procurement Canada. In that correspondence, she addressed two letters that she received from the Canada Pension Centre according to which she had left Fisheries and Oceans Canada in February 2020 and was no longer employed in the public service. As noted by the respondent, the applicant's letter is ambiguous and does not clearly state that her employment had been terminated; had this letter been filed with the Board, the Union could have made representations in that respect.

[23] Finally, the applicant relied on the fresh evidence that she seeks to introduce before this Court to make a number of new arguments. This Court cannot consider these new arguments because its role is strictly limited when performing a judicial review as noted above. For example, she alleges in her written representations that the Union "correctly informed her of the proper grievance procedure, including the 25-day limit to file a grievance, in June 2019" (Applicant's Memorandum at para. 77), but goes on to say that the Union thereafter misdirected her as to her obligations and gave her inconsistent explanations (Applicant's Memorandum at para. 78). The applicant also claims, on the basis of the affidavit and exhibits filed with this Court, that the Union was incompetent in neither responding nor following-up on her impending termination, an argument that she did not raise before the Board and that is nowhere to be found in her initial complaint.

[24] For all of the foregoing reasons, I am therefore of the view that exhibits 1 to 33 and 35 to 39 of the applicant's affidavit should be struck from the record.

B. *Was the Board's decision reasonable?*

[25] It is by now well established that reasonableness is the presumptive standard of review where a court is called upon to review the merits of an administrative decision: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 23 and 72 [*Vavilov*]. None of the situations outlined by the Supreme Court where this presumption of reasonableness would be rebutted apply to the case at bar.

[26] The applicant has attempted to characterize a number of her arguments as matters of procedural fairness. More specifically, she claims that some findings of the Board were unsupported by the evidence before it, or that the Board reached "unfounded conclusions". In essence, however, the applicant's arguments take issue with the reasonableness of the Board's findings of fact and amount to a disagreement with the Board's conclusions. Such arguments do not pertain to procedural fairness and are best addressed in a substantive review of the merits under the reasonableness standard. Indeed, this Court has confirmed that the standard of review of Board decisions on the merits in cases of a duty of fair representation complaint is reasonableness: *Osman v. Public Service Alliance of Canada*, 2021 FCA 227, 340 A.C.W.S. (3d) 84 at para. 9; *Pierre v. Public Service Alliance of Canada*, 2013 FCA 223, 454 N.R. 223 at para. 11.

[27] Questions of procedural fairness are ones that concern the procedure used by the administrative decision maker, or ones which question the opportunity of those affected by the decision to be heard and have their views and evidence considered by the decision maker: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 22. None of the arguments presented by the applicant address the procedure used by the Board or allege a denial of her right to fully participate in a fair and open procedure.

[28] Reasonableness is a deferential standard. As stated by the Supreme Court in *Vavilov*, the role of a court reviewing an administrative decision under that standard is not to come up with the decision it would have made and to decide the issues itself, but rather to focus on the decision actually made and to ascertain whether it is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para. 85.

[29] The applicant submitted that the Board reached unfounded conclusions which either directly contradicted the evidence before it or were not supported by the evidence. More specifically, she argued that the Board erroneously concluded that the Union had turned its mind to the issue of applying for an extension of time to file a grievance in September 2020, that she had not specifically requested the Union file for an extension of time, and that the Union had told her that she had to "immediately" inform the Union of her termination if she wanted to file a termination grievance. When properly considered, these submissions are an invitation to reweigh the evidence and to come to a different interpretation of the correspondence exchanged between the parties. The submissions therefore ask this Court to step beyond its role on judicial review.

The applicant is obviously entitled to disagree with the Board's findings of fact and its interpretation of the evidence before it, but more is required for the decision to be deemed unreasonable.

[30] The same is true of the applicant's other arguments which all relate to a "failure to consider overall circumstances of the matter": Applicant's Memorandum at para. 74. She claims that the Board failed to give proper regard to the Union's inconsistent and confusing explanations regarding the grievance process and its failure to follow up when made aware of her impending termination. She also submits that the Board neglected to properly consider the Union's failure to file a termination grievance despite undertaking to do so, failed to let her know of the possibility to apply for an extension of time to file a grievance and did not apply for such an extension of time when instructed to do so.

[31] The Board considered all of these allegations but concluded that they did not amount to a violation of the duty of fair representation. The Board's decision is in keeping with well-established legal principles, and is the result of a rational chain of analysis. A union enjoys considerable discretion in deciding how best to represent its members. The Board's role in a duty of fair representation complaint is not to sit on appeal of decisions made by the union in its capacity as bargaining agent, nor to determine whether its decisions were correct, but rather to determine if its actions fall within the parameters of section 187 of the Act. It is not sufficient for an employee to disagree with a decision made by his or her bargaining agent to prove a breach of section 187 of the Act. Indeed, a reviewing court will not interfere with the decision made by the

union provided that it observes the fundamental principles established by the Supreme Court in *Gagnon* (at 527):

> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
>
> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
>
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
>
> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[32] The Board's analysis aligns with these principles (see Board's decision at paras. 28-29), and the applicant did not argue that the Board erred in law or misdirected itself in its identification of the relevant legal principles. The Board's decision is also consistent with the perennial principle that members of a bargaining unit do not have an absolute right to representation; as long as the union acts on the basis of relevant considerations and does not engage in discriminatory, arbitrary or bad faith decision-making, it is free to determine whether or not to provide representation in any given matter.

[33] On the basis of these principles, and after a careful review of the facts, the Board found that the Union's conduct did not amount to a violation of the duty of fair representation. The Board came to that conclusion on the basis of the following key determinations: a) the Union

provided representation and advocacy to the applicant while it could, beginning in June 2019, and negotiated a 30-day extension for her to consider her options; b) the applicant did not refute the Union's assertions that it explained the grievance process to her, and offered to file a grievance once it had received notification of termination; c) the applicant failed to comply with those instructions, and failed to inform the Union of her termination; d) the applicant stated that she could not document her grievance and respect the time limit, yet failed to contact the respondent about her dilemma; e) when the applicant finally contacted the respondent, she was not informed of the possibility of applying for an extension of time, but the respondent clearly turned its mind to the issue and determined that the delay was both too long and unexplained; and f) when the applicant later sent a brief text message to the Union enquiring whether the Union could file a request for an extension of time on her behalf, it did not respond. However, the Union could not be faulted because it had previously stated on two occasions that it would not be pursuing a grievance on her behalf given the five-month delay. In my opinion, all of these findings were open to the Board on the basis of the evidence that was before it.

[34] The Board acknowledged that there were clearly misunderstandings between the applicant and the Union's representatives, first with respect to the grievance process and then as to the text message she sent to the respondent in February 2021 (which she intended to be a request for an extension of time but which the Union interpreted as mere information). The Board refused to fault the Union for these misunderstandings. Instead the Board found, and I agree, that they do not rise to the level of carelessness or bad faith when they are considered in light of the whole context.

[35] For all of the above reasons, I am therefore of the view that the Board's decision was reasonable and justified in relation to the law and the facts. The Board applied the relevant legal standards, and its factual findings are well supported by the evidence. I would therefore dismiss this application for judicial review, with costs.

"Yves de Montigny"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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