

Federal Court of Appeal



Cour d'appel fédérale

Date: 20221208

Docket: A-226-21

Citation: 2022 FCA 212

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

BETWEEN:

**MAURICE KENNY and THE FEDERAL GOVERNMENT
DOCKYARD TRADES AND LABOUR COUNCIL EAST**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Halifax, Nova Scotia, on December 8, 2022.
Judgment delivered from the Bench at Halifax, Nova Scotia, on December 8, 2022.

REASONS FOR JUDGMENT OF THE COURT BY:

GLEASON J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Halifax, Nova Scotia, on December 8, 2022).

GLEASON J.A.

[1] Mr. Kenny and his bargaining agent have applied to set aside the decision of an adjudicator of the Federal Public Sector Labour Relations and Employment Board (FPSLREB) in *Kenny v. Deputy Head (Department of National Defence)*, 2021 FPSLREB 91.

[2] In that decision, the adjudicator dismissed two grievances. One challenged the employer's alleged refusal to allow Mr. Kenny to return to work in his substantive position at the Canadian Forces Ammunition Depot (CFAD) Bedford and a failure to accommodate him (the return-to-work grievance). The other challenged a series of suspensions and the termination of Mr. Kenny's employment following his failure to return to work after a lengthy period of absence, sparked by Mr. Kenny's concerns regarding what he felt was the employer's failure to adhere to its policy on the use of cellular telephones in restricted areas within CFAD Bedford (the termination and suspension grievance). The adjudicator also had before him a third grievance that the bargaining agent withdrew during the hearing. It alleged that the employer was failing to enforce its cell phone use policy.

[3] Insofar as concerns the termination and suspension grievance, the adjudicator determined that the medical evidence established that Mr. Kenny was fit to return to work when he was directed to do so by his employer. The adjudicator accordingly held that Mr. Kenny's failure to return to work amounted to insubordination, which afforded his employer cause to discipline Mr. Kenny. The adjudicator further held that the penalties imposed, which commenced with suspensions of increasing severity and culminated in termination, were appropriate. The adjudicator therefore held that the employer possessed cause to impose the suspensions and to terminate Mr. Kenny's employment and accordingly dismissed the grievance challenging them.

[4] Insofar as concerns the return-to-work grievance, the adjudicator noted that "[...] the parties did not spend much, if any, time dealing with [it...]" (at paragraph 281 of the decision). The adjudicator determined that return-to-work grievance arose from the employer's request in

early 2018 for updated medical information from Mr. Kenny, to substantiate his position that he was then able to return to work in his substantive position at CFAD Bedford. The adjudicator dismissed this grievance, finding that the employer was justified in its request for medical information because Mr. Kenny changed what he was seeking from the employer in early 2018. Prior to that, he had asserted that he could not return to his substantive position at CFAD Bedford. However, in 2018, after being unsatisfied with the accommodation that the employer had offered him in a temporary assignment at the Cape Scott location, Mr. Kenny sought to return to work in his substantive position at CFAD Bedford.

[5] It is undisputed before us and, indeed, indisputable that the reasonableness standard applies to the review of the adjudicator's decision, it being firmly settled that this is the applicable standard of review for decisions like this of FPSLREB adjudicators (see, e.g., *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 85, 100, [2019] 4 S.C.R. 653, 441 D.L.R. (4th) 1; *Canada (Attorney General) v. Douglas*, 2021 FCA 89 at para. 5, 331 A.C.W.S. (3d) 129; and *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41 at para. 34.)

[6] In terms of the reasonableness of the adjudicator's decision, the applicants do not contest the adjudicator's evaluation of the medical evidence nor the adjudicator's determination that Mr. Kenny was insubordinate. They rather say that the adjudicator erred in his assessment of the return-to-work grievance, and that the adjudicator should have determined that the employer failed to accommodate Mr. Kenny when it declined to require him to accept the assignment at the Cape Scott location. Had the employer done so, according to the applicants, the circumstances leading to Mr. Kenny's termination would have been avoided.

[7] There are several problems with the applicants' argument, which finds no support in the evidence and contradicts the adjudicator's finding as to the scope of the return to work grievance. In this regard, the adjudicator held that the return-to-work grievance did not challenge the failure to allow Mr. Kenny to return to work in the temporary assignment at Cape Scott but instead grieved the alleged failure to allow Mr. Kenny to return to his substantive position at CFAD Bedford. This finding was open to the adjudicator in light of the terms of the grievance, which state precisely the same thing.

[8] In addition, Mr. Kenny told the employer that he was only prepared to accept the assignment at Cape Scott under protest. The employer did not force him to accept the assignment over his objections. While it is true that the adjudicator found that the employer would nonetheless have been entitled to require Mr. Kenny to accept the Cape Scott assignment, the assignment became irrelevant during or shortly following the meeting held to discuss it. Mr. Kenny then advised the employer that he wished to return to his substantive position at CFAD Bedford and had updated medical information to support such return. Given this, it was open to the adjudicator to have determined that the facts that transpired rendered the back to work grievance largely moot.

[9] There is accordingly no merit in the applicant's challenge to the adjudicator's decision. This application will therefore be dismissed with costs, fixed in the all-inclusive amount of \$1500.00.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-226-21
STYLE OF CAUSE: MAURICE KENNY and THE
FEDERAL GOVERNMENT,
DOCKYARD TRADES AND
LABOUR COUNCIL EAST v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: DECEMBER 8, 2022

**REASONS FOR JUDGMENT OF THE COURT
BY:** STRATAS J.A.
BOIVIN J.A.
GLEASON J.A.

DELIVERED FROM THE BENCH BY: GLEASON J.A.

APPEARANCES:

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FEDERAL GOVERNMENT
DOCKYARD TRADES AND
LABOUR COUNCIL EAST

FOR THE RESPONDENT
ATTORNEY GENERAL OF
CANADA

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FOR THE APPLICANTS
MAURICE KENNY and THE
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