Federal Court of Appeal | Cour d'appel fédérale

Date: 20230307

Dockets: A-220-21
A-240-21

Citation: 2023 FCA 50

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
LEBLANC J.A.
GOYETTE J.A.

Docket: A-220-21

BETWEEN:

MARC-ANDRÉ ROUET

Appellant

and

DEPUTY HEAD (DEPARTMENT OF JUSTICE)

Respondent

Docket: A-240-21

AND BETWEEN:

MARC-ANDRÉ ROUET

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on March 7, 2023.

Judgment delivered from the bench at Montréal, Quebec, on March 7, 2023.

REASONS FOR JUDGMENT OF THE COURT BY: LEBLANC J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Montréal, Quebec, on March 7, 2023.)

LEBLANC J.A.

[1] Mr. Rouet is appearing before this Court in two related but separate proceedings, both of which have as their backdrop the challenge to the dismissal, by a member of the Federal Public Sector Labour Relations and Employment Board (the Board) acting on behalf of a Board panel (the Decision-maker), of an individual grievance that he had filed against his rejection on probation when he was working as a lawyer for the Department of Justice Canada. This termination was carried out on March 31, 2011 under the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13.

[2] Mr. Rouet's grievance was initiated under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 and was referred, in accordance with paragraph 223(2)(*d*) of that Act, as it read at that time (i.e. before the coming into force on November 1, 2014 of the legislative amendments made through the *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40 (the 2013 Amendments)), to an adjudicator designated by the Chairperson of the Board "from amongst the members of the Board." However, paragraph 211(*a*) of that Act provided at that time—and still provides today—that referral to adjudication of an individual grievance with respect to any termination of employment under the *Public Service Employment Act* is not permitted. Consequently, this raised before the Decision-maker the issue of whether this referral to adjudication was within the Decision-maker's jurisdiction. The adjudicator will retain jurisdiction if the public servant in question demonstrates, to the adjudicator's satisfaction, that the public servant's rejection on probation resulted from a contrived reliance on the *Public*

Service Employment Act. In this case, the Decision-maker concluded that section 211 of the *Public Service Labour Relations Act* (renamed the *Federal Public Sector Labour Relations Act* in 2017) barred this referral to arbitration.

Docket A-220-21

[3] In the first of the two proceedings before this Court, docket A-220-21, Mr. Rouet is appealing a judgment of the Federal Court ordering that the application for judicial review of the Decision-maker's decision that was initially filed before the Federal Court be transferred to this Court.

[4] After hearing the oral submissions of the parties at the outset of the hearing, this Court dismissed the appeal at the hearing with reasons to follow, without costs. These are those reasons.

[5] As this appeal raises a question of law, the applicable standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). Before the Federal Court, Mr. Rouet argued that although the Decision-maker was a member of the Board, it was not in that capacity that he had heard the referral to adjudication of his grievance, but rather in his capacity as an adjudicator subject to, in his opinion, the superintending power of the Federal Court.

[6] As the Federal Court correctly noted, that was the state of the law before an amendment was made to section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 in 2014. Following that amendment, which added paragraph 28(1)(*i*.1), this Court gained exclusive jurisdiction to hear

and determine not only applications for judicial review of the decisions of the Board, which is a jurisdiction that the Court already had under paragraph 28(1)(*i*), but also, moving forward, applications for judicial review of the decisions made by adjudicators within the meaning of subsection 2(1) of the *Federal Public Sector Labour Relations Act*.

[7] In some ways, the addition of paragraph 28(1)(*i*.1) simplified things, at least in relation to the judicial review of decisions rendered by those bodies, in terms of, as this Court noted in *Sincère v. Canada (Attorney General)*, 2005 FCA 103 (*Sincère*), the confusion that often existed between the roles of adjudicator, Board member and the Board itself, which notably "g[a]ve rise to different remedies in case of legal challenges" (*Sincère* at para. 3). Insofar as Mr. Rouet's arguments were based on case law predating that amendment, they were bound to fail.

[8] The Federal Court also rejected Mr. Rouet's argument that the Decision-maker was not acting, in this case, as an adjudicator within the meaning of subsection 2(1) of the *Federal Public Sector Labour Relations Act* because his grievance is an individual grievance, not a policy grievance. According to the Federal Court, nothing in the text of that Act supported such a distinction. Mr. Rouet did not repeat that argument before this Court.

[9] However, Mr. Rouet raised new arguments on appeal, which he justified by referencing [TRANSLATION] "his better understanding of the legislative amendments since the decision rendered by the trial judge" (Memorandum of the Appellant at para. 7). Other than the fact that an appellant, in theory, is not authorized to raise new arguments on appeal (*Quan v. Cusson*,

2009 SCC 62, [2009] 3 S.C.R. 712 at para. 36), there is no basis at all for the arguments raised by Mr. Rouet in this case.

[10] Mr. Rouet, in a demonstration largely inspired by the judgment rendered by this Court in *Sincère* before, it should be recalled, the addition of paragraph 28(1)(*i*.1) to the *Federal Courts Act*, is now claiming that the definition of adjudicator in subsection 2(1) of the *Federal Public Sector Labour Relations Act* did not authorize the Decision-maker to consider himself tasked to hear a grievance referred under paragraph 223(2)(*d*) of the *Public Service Labour Relations Act*, as it read at the time of the referral.

[11] In his opinion, this is a legal void that his adjudication may have fallen into; this void allegedly does not allow the individual to identify who specifically made the administrative decision and therefore to select the correct forum in the event of a legal challenge. He is asking this Court to fill this void for future cases. In any event, Mr. Rouet contends that the adjudicator described in paragraph 28(1)(*i*.1) of the *Federal Courts Act* cannot only be the one defined in the *Federal Public Sector Labour Relations Act*, to the exclusion of the one defined in the *Public Service Labour Relations Act*, because, as a result of the amendments made to the *Public Service Labour Relations Act*, including the 2013 Amendments, the adjudicator allegedly no longer has the same powers as they had in the past. Consequently, as was the case before the addition of paragraph 28(1)(*i*.1), it would appear that this Court only has jurisdiction over decisions of the first, and not over those of the second. From the outset at the hearing, Mr. Rouet acknowledged that he was proposing a narrow interpretation of the relevant statutory provisions, in particular of the applicable transitional provisions.

[12] These arguments do not stand up to scrutiny. As the respondent noted, the transitional provisions regulating, notably, the continuation of proceedings commenced under the *Public Service Labour Relations Act* leave no legal void. These proceedings continue "under" and in conformity with that Act, as it is amended, and may continue, in cases like this one, at the request of the Chairperson of the Board, before the adjudicator who was tasked with hearing the referral under that Act. If the adjudicator accepts, which is what happened in this case, he or she then has the power to "continue to hear and decide" this grievance (*Economic Action Plan 2013 Act, No. 2* at sections 393 and 396).

[13] In doing so, this adjudicator has all the same powers as he or she had under the *Public Service Labour Relations Act* as it read before the 2013 Amendments. In this way, "[t]he Chairperson of the new Board has supervision over and direction of the work of" the adjudicator (*Economic Action Plan 2013 Act, No. 2* at subsection 396(4)).

[14] In short, in the case of an individual grievance being referred to adjudication, there is, fundamentally, through the amendments made to the *Public Service Labour Relations Act*, which later became the *Federal Public Sector Labour Relations Act*, continuity in the role of the adjudicator and in the conduct of proceedings instituted under its scheme. The dichotomy that Mr. Rouet stated that he observed because of his better understanding of the amendments made to that Act since the Federal Court judgment simply does not exist. Not only does it not exist, but as the Federal Court noted, when referral to an adjudicator does not seem possible, it is the Board itself, under subsection 223(2.1) of the *Federal Public Sector Labour Relations Act*, which came into force through the 2013 Amendments, that hears the grievance. In both cases, any legal

challenge of the decision resulting from the referral to adjudication must be brought before this Court under paragraphs 28(1)(*i*) and 28(1)(*i*.1) of the *Federal Courts Act*. There is no void to fill, nor is there any inconsistency to rectify.

[15] As we stated at the hearing, we are all of the opinion, like the Federal Court was, that the appeal of the Decision-maker's decision falls under the jurisdiction of this Court, and not of the Federal Court.

Docket A-240-21

[16] The second proceeding before this Court is docket A-240-21, which involves the judicial review of the Decision-maker's decision. The applicable standard of review in this case is the deferential standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653). In cases like ours, subject to a privative clause, this deference is "considerable" (*Canada (Attorney General) v. Alexis*, 2021 FCA 216 at paras. 2 and 22 (*Alexis*)).

[17] Mr. Rouet criticizes the Decision-maker of ignoring—or misunderstanding—some of his arguments, including the argument, which he considers central, related to the failure to comply with the employer's guidelines on rejection on probation, and of consequently refusing to exercise its jurisdiction. He also criticizes the Decision-maker of erring by concluding that his termination was the result of the employer's *bona fide* dissatisfaction with his ability to perform his duties. He also claims that the termination letter that he received did not sufficiently substantiate the reasons for this dissatisfaction.

[18] We are all of the view that this application for judicial review cannot succeed, given that we are satisfied that the Decision-maker correctly applied the law; that his decision, which consists of 329 paragraphs, covers all of Mr. Rouet's criticisms regarding the Decision-maker; and that the conclusions of fact that he drew, after carefully reviewing the testimony heard at a hearing that spanned six days, were supported by the evidence.

[19] As this Court reiterated in *Alexis*, employers are afforded "considerable discretion to assess the suitability of probationary employees and there is minimal scope for review of their decisions" (*Alexis* at para. 10). Like most adjudication decisions in this area, this case is heavily dominated by the facts. Mr. Rouet is asking us, for all intents and purposes, following a [TRANSLATION] "sentence-by-sentence" review of the Decision, to reconsider the entire case, to question the Decision-maker's findings, and ultimately, to substitute our opinion for that of the Decision-maker. That, however, goes far beyond this Court's role in relation to judicial review (*Vavilov* at paras. 102 and 125; *Alexis* at para. 22). We would also like to reiterate that the written reasons given by an administrative decision-maker must not be assessed, on judicial review, against a standard of perfection and do not need to include "all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" to pass the reasonableness test (*Vavilov* at para. 91). Mr. Rouet seems to have forgotten these two important principles in this case.

[20] In short, we are of the opinion that the Decision-maker's decision is based on an internally coherent and rational chain of analysis and that it is justified in relation to the facts and law that constrained the Decision-maker.

[21] This application for judicial review will consequently be dismissed, with costs to the respondent in the fixed all-inclusive amount of $1,500. These reasons will be included in docket A-220-21. A copy will be included in docket A-240-21.

"René LeBlanc"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-220-21
STYLE OF CAUSE:	MARC-ANDRÉ ROUET v. DEPUTY HEAD (DEPARTMENT OF JUSTICE)
AND DOCKET:	A-240-21
STYLE OF CAUSE:	MARC-ANDRÉ ROUET v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MARCH 7, 2023
REASONS FOR JUDGMENT OF THE COURT BY:	BOIVIN J.A. LEBLANC J.A. GOYETTE J.A.
DELIVERED FROM THE BENCH BY:	LEBLANC J.A.

APPEARANCES:

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