Federal Court of Appeal

Cour d'appel fédérale

Date: 20140121

Docket: A-131-13

Citation: 2014 FCA 11

CORAM: DAWSON J.A.
TRUDEL J.A.
NEAR J.A.

BETWEEN:

IRENE BREMSAK

Applicant

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA
KATHLEEN KERR
GEOFF KENDELL
STEPHEN Y. LEE
SIDDIQ ANSARI
TERRY PETERS
QUINTON JANSEN
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JOE PODREBARAC
NITA SAVILLE
GEOFFREY GRENVILLE-WOOD
ISABELLE ROY
PAUL GODIN

Respondents

Heard at Vancouver, British Columbia, on December 9, 2013.

Judgment delivered at Ottawa, Ontario, on January 21, 2014

REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	DAWSON J.A. NEAR J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an application for judicial review from a decision of the Public Service Labour Relations Board (the Board) dismissing complaints filed by Ms. Bremsak (the applicant) against her bargaining agent, the Professional Institute of Public Service of Canada (the Institute), and its named employees and members (collectively the respondents), as well as her applications for the Board's consent to prosecute the respondents under sections 200 and 202 of the *Public Service Labour Relations Act,* S.C. 2003, c. 22, s. 2, (the Act) (2013 PSLRB 22) [*Bremsak 15*].

[2] This is one of many visits by the parties to this Court, in a judicial saga that has been ongoing since 2007 when Ms. Bremsak, an elected official of the Institute, filed her first complaint with the Board alleging that the Institute had subjected her to a discriminatory disciplinary penalty when its Board of Directors apologized on her behalf for comments she had made regarding another member.

[3] Soon after, the Institute adopted the *Policy Related to Members and Complaints to Outside Bodies (PRMCOB)* whereby the referral of a matter, which ought to have been referred to the Institute's internal procedure, to an outside process brought an automatic temporary suspension

from elected or appointed office. Pursuant to the *PRMCOB*, Ms. Bremsak was temporarily suspended from her elected and appointed positions because of her first complaint to the Board. She successfully challenged that disciplinary action and secured an order forcing her reinstatement.

[4] Despite the order, Ms. Bremsak was never reinstated. Moreover, while she was attempting to enforce that order, the Institute's Executive Committee, on October 20, 2009, suspended her from membership for five years following an investigation of harassment complaints made against Ms. Bremsak by other Institute members. An independent investigator hired by the Institute conducted the investigation. As a result of the suspension, the applicant was disqualified from holding office in the Institute for the term of the suspension.

[5] The Board's decision under review, *Bremsak 15*, deals more specifically with three applications made by the applicant to the Board in which she alleges that the Institute committed unfair labour practices under section 188 of the Act in that:

a) she has not been reinstated in her elected positions;
b) she has been the subject of a retaliatory act committed by the individual members of the Institute who have chosen to personally file harassment complaints against her; and
c) she has been suspended from membership in the Institute for five years;

[6] The Board, in a comprehensive set of reasons, dismissed Ms. Bremsak's complaints and, as a result, refused to consent to prosecute the respondents. It found that the reinstatement and retaliation complaints were an abuse of process (*Bremsak 15* at paragraph 500). As for the five-year suspension, it found that there was "a rational reason" for it and that the suspension "was connected

to Ms. Bremsak's misconduct" in that "[s]he behaved in a harassing manner towards other …members over a period of more than a year" (*Bremsak 15* at paragraph 497).

The applicant's position

[7] In her Notice of Application, Ms. Bremsak alleges that the Board committed several errors of law and of fact that would justify our Court in referring the matter back to the Board for determination by a different member. Of importance is her allegation that the Board erred in law in not finding that the Institute breached her right to procedural fairness and natural justice. This finding, she argues, demonstrates the Board Member Love's "bias against the protection of individual members from unfair labour practices of the union" (Notice of Application at paragraph 25). This accusation toward Board Member Love is very serious and goes to the heart of his jurisdiction. I shall put it to rest immediately by saying that there is not an iota of evidence permitting me to question the impartiality of Board Member Love, who wrote the Board's impugned decision.

[8] Additionally, Ms. Bremsak alleges that the Board committed multiple factual and legal errors in its assessment of the evidence; its treatment of the investigator's findings; and its understanding of the impact of a previous decision made by the Board in *Veillette v. Professional Institute of the Public Service of Canada and Rogers*, 2009 PSLRB 64. In *Veillette*, the Board found that the provisions of the Institute's *PRMCOB*, upon which it had relied to justify Ms. Bremsak's first suspension, violated the Act. All this, she argues, renders the decision unreasonable.

Standard of review

[9] Matters of procedural fairness are to be reviewed on a standard of correctness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 43) while other questions raised by Ms. Bremsak, at best mixed questions of fact and law, are to be determined on a standard of reasonableness. As stated by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*] at paragraph 47:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[10] After a careful review of the record and the parties' written and oral submissions, I have not been persuaded that the Board committed any errors justifying appellate intervention. Neither the Board nor the Institute has deprived Ms. Bremsak of her right to procedural fairness. Moreover, the Board's decision is reasonable and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. I will now address each of Ms. Bremsak's allegations, starting with the issue of procedural fairness.

Analysis

a) Procedural fairness

[11] Counsel for the applicant specifically advanced four reasons supporting his client's view that she was denied procedural fairness. Three of these reasons concern the Institute's Executive Committee and its members:

i) the applicant was not afforded an opportunity to make representations before the Executive Committee imposed the five-year suspension;

ii) the reasons given for the suspension were inadequate;

iii) the members of the Executive Committee were in conflict of interest because, amongst other reasons, they had acted in contempt of the reinstatement order. As a result, the Federal Court had imposed a fine of $400,000 on the Institute. Also, they had had the benefit of the legal services of counsel for the Institute when defending themselves against Ms. Bremsak's retaliation complaint commenced on June 29, 2009, well before the Executive Committee's decision of October 15, 2009 to suspend her for 5 years (see paragraphs 122ff. of the applicant's memorandum of fact and law);

[12] The fourth reason concerns the Board. Apart from the general allegation made against Board Member Love that I have previously discussed at paragraph [7] of these reasons, the applicant alleges that the Board should have entertained her argument under section 2b of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (the *Charter*). She explains at paragraph 160 of her Memorandum of fact and law that

> Board Member Love erred in law when he concluded that the Applicant has committed harassment by giving legitimate legal notice to protect her rights according to the Act. Ms. Bremsak's interpretation that the suspension violated the Act (upheld in *Bremsak 2*) and statement regarding Section 200 of the Act [dealing with offences and punishment of every person who contravenes section 188 of the Act] is protected under the freedom of expression.

[13] In my view, the Board adequately turned its mind to Ms. Bremsak's concerns about procedural fairness (See *Bremsak 15* at paragraphs 463*ff*). In *Dunsmuir*, at paragraph 79, the Supreme Court of Canada defines procedural fairness as follows:

> Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (references omitted) [my emphasis].

[14] Here, the Board paid attention to the labour relations context of the ongoing litigation. Having examined the Institute's *Harassment Policy* (respondent's application record, volume 3, tab 56, at page 590) and *2009 Dispute Resolution Policy* (respondent's application record, volume 1, tab 17 at page 112) (together the *policies*), the Board first held that the *policies* represented "a modern approach to resolving harassment disputes and to bargaining agent discipline" and that they did not offend the Act *(Bremsak 15* at paragraph 463). It added that "the model adopted by the Institute for dealing with discipline in this case had sufficient procedural fairness to provide for a determination of the dispute on its merits" (*ibidem* at paragraph 464): Ms. Bremsak had been provided with the appropriate procedure; she knew "the case against her and was given full opportunity to participate in the investigations" (*ibidem)*… "but chose not to participate fully" (*ibidem* at paragraph 467).

[15] As a result, the Board was satisfied that the Institute's dispute resolution process was neither discriminatory nor arbitrary or otherwise unreasonable. I conclude that the Board committed no error in finding so. I now turn to the specific grounds of complaint raised by the applicant.

i) No representations on the remedy

[16] At the hearing of this application, the applicant put emphasis on the fact that she was not given the opportunity to be heard on the remedy. The Board gives a full answer to this ground of complaint. It states that the *2009 Dispute Resolution Policy* provides for an appeal to the Institute's Board of Directors against the decision of the Institute's Executive Committee but that the applicant did not avail herself of that right which included the right to make written submissions in support of the appeal. The Board concluded that "her failure to exercise her right of appeal completely disposes of any alleged lack of natural justice in the process followed by the Institute in this case" (*Bremsak 15* at paragraph 470). I agree.

ii) Adequacy of reasons

[17] The Board also commented on the adequacy of reasons for the applicant's suspension. It found that the Institute advanced "cogent reasons" for suspending the applicant. The suspension letter stated:

> The behaviour you have demonstrated represents a pattern of threats and intimidation of members that has no place in our organization. Your actions have created a toxic environment and have led otherwise committed members to question their involvement with the Institute. This behaviour will not be condoned or tolerated by the Institute (*Bremsak 15* at paragraph 487).

[18] The Board's finding is reasonable having regard to the factual background, the investigator's conclusions and the ultimate outcome.

iii) Conflict of interest

[19] There remains the applicant's allegation of bias on the part of the members of the Executive Committee (see paragraphs 122 and 123 of her memorandum of fact and law) because of their alleged conflict of interest. The Board's finding on this issue can be found at paragraph 473 of *Bremsak 15*. Relying on the cases of *Beaven v. Telecommunications Workers Union*, (1996), 100 di 96, [1996] 32 C.L.R.B.R. (2d) 230 [*Beaven*] and *Tomko v. Nova Scotia (Labour Relations Board)*, [1974] N.S.J. No. 20 (C.A.); aff'd on other grounds [1975] S.C.J. No. 111, the Board found that the applicant had not shown, on a balance of probabilities, that members of the Executive Committee "... lacked the will to reach an honest conclusion about the facts in her case ...". At the hearing of the application, Counsel for the applicant took issue with the formulation of the test for a finding of bias.

[20] This bias test applied by the Board had been relied upon in the labour relations context before (*Association des employeurs maritimes et syndicat Canadien de la fonction publique, section locale 375,* [1997] D.A.T.C. no 314; *Sheet Metal Workers International Association, Local 437 v. 048545 N.B. Ltd.,* [1994] N.B.I.R.D. No. 23). In *Beaven*, the Canada Labour Relations Board set out the test for bias of a union panel at paragraph 60:

> In reaching to this conclusion, the Board in *Val Udvarhely*, [(1979), 35 di 87; [1979] 2 Can L.R.B.R. 569)] cited and approved the following test, developed by the Privy Council, for bias of a union tribunal; see *White et al. v. Kuzych*, [1951] 3 D.L.R. 641 [*White*].

> Whatever the correct details may be, their Lordships are bound to conclude that there was, before and after the trial, strong and widespread resentment felt against the respondent by many in the Union and that Clark, amongst others, formed and expressed adverse views about him. If the so-called 'trial' and the general meeting which followed had to be conducted by persons previously free from all bias and prejudice, this condition was certainly not fulfilled. It would, indeed, be an error to demand from those who took part the strict impartiality of mind with which a Judge should approach and decide an issue between two litigants - that 'icy impartiality of a Rhadamanthus' which Bowen L.J. in *Jackson v. Barry R. Co.*, [1893] 1 Ch. 238 at p. 248, thought could not be expected of the engineer-arbitrator - or to regard as disqualified from acting any member who had held and expressed the view that the 'closed shop' principle was essential to the policy and purpose of the Union. What those who considered the charges against the respondent and decided whether he was guilty ought to bring to their task was a will to reach an honest conclusion after hearing what was urged on either side, and a resolve not to make up their minds beforehand on his personal guilt, however firmly they held their conviction as to Union policy and however strongly they had shared in previous adverse criticism of the respondent's conduct. [My emphasis.]

[21] Undoubtedly, the language used by the Board, *i.e.* the lack of will to reach an honest conclusion, differs from the language used by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*] where, at paragraph 46, it endorses once again de Granpré J.'s expression of the test, written in dissent, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at page 394:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[22] The context of an internal union disciplinary matter is a specific one. The Board has been reluctant to interfere stating that its mandate is not to sit on appeal from internal union disciplinary decisions but to ensure that they are free from discriminatory practices (*Horsley v. Canadian Union*

of Postal Workers (1991), 84 di 201, 15 C.L.R.B.R. (2d) 141 citing *Ronald Wheadon et al.* (1983), 54 di 134, 5 C.L.R.B.R. (NS) 192 at pages 150, 209 and 14,036-14,037).

[23] Regardless which test for bias is applied, the Board's reasons and the record support the finding that the applicant has not met the required burden (*Bremsak 15* at paragraph 473). The hostile relationship between the parties, the prior litigation and the naming the members of the Executive Committee, as respondents, are insufficient facts, *per se*, to satisfy the burden placed on the applicant. Either test must be applied keeping in mind the relevant factual and contextual background. Here, the Institute retained a third party to investigate both the April 2009 and June 2009 harassment complaints. The investigator submitted four final reports, which included factual findings that remained uncontested. The Institute relied on those reports and the conclusions therein and came to a decision regarding the appropriate sanction.

[24] I am unable to conclude that a reasonable person, in those circumstances, would conclude that it is more likely than not that the Institute through its Executive Committee, did not decide the matter fairly, whether consciously or unconsciously.

[25] As for the alleged financial interest of the members named in the retaliation complaint, this is a new argument. Counsel for the applicant admits that, in front of the Board, this point was raised in a "more general way", subsumed under a much wider allegation that the harassment complaints were supervised by the Institute. Moreover, counsel for the applicant was unable at the hearing to point to evidence relevant to this new argument. This said, I note paragraph 453 of *Bremsak 15* where the Board specifically mentions that "[e]ach named respondent to the retaliation complaint

testified. Their testimonies were unshaken despite extensive cross-examination by Mr. Bremsak's representative, in that each made a personal decision to raise allegations of harassment and to file a complaint of harassment without the involvement of the Institute's Board of Directors ". I also note that the *Harassment Policy* states that "the Institute acknowledges its responsibility to do everything within its power to prevent harassment, and to support and assist the employee(s) and/or member(s) subjected to such harassment ". This undertaking by the Institute does not rule out the possibility that counsel for the Institute would defend employees or members against a retaliation complaint like the one lodged by Ms. Bremsak against the named respondents. I take from this that the respondents were not treated differently than any other employee or member would have been under that policy.

iv) Section 2 of the *Charter*

[26] I now move on to the applicant's allegations that the Board also violated her right to procedural fairness in refusing to entertain her argument under section 2 of the *Charter*. As mentioned above, the gist of Ms. Bremsak's argument is that her various communications with the Institute and its members are protected under the freedom of expression. She was defending her legal and membership rights. As a result, the dismissal of her retaliation complaint and the findings of harassment of the investigator violate her constitutional right of freedom of expression guaranteed under section 2b of the *Charter*. Board member Love should have examined the applicant's position in light of section 2.

[27] On the facts of this case, this argument cannot succeed. First, counsel for the applicant admits that this *Charter* argument came very late in the proceeding in front of the Board who sat

approximately 15 days between August 2011 and June 2012 to hear this file. Under those circumstances, it is hard to imagine that the Board committed an error in dismissing the applicant's suggestion to adjourn the hearing to give the Institute time to react to this new argument. Moreover, I agree with the Institute that the freedom of expression guarantee in the *Charter* cannot be used as defense against otherwise harassing conduct. As stated by the Board, "Ms. Bremsak had a duty to behave with a minimum degree of civility toward other Institute members. She was obliged to not engage in harassing conduct" (*Bremsak 15* at paragraph 433).

b) Other alleged legal and factual errors committed by the Board

[28] The applicant has failed to demonstrate that the Board's decision is unreasonable. More specifically, I do not accept the applicant's contention that there are serious issues with the investigator's findings regarding the harassment complaints and that the Board was wrong in adopting the investigator's conclusions. The investigator's mandate was to conduct an investigation pursuant to the *Policy on Dispute Resolution* and having regard to the *Harassment Policy*. Therefore, he analyzed the facts brought to his attention in light of the definition of harassment as found in the *Harassment Policy*. The Board rejected Ms. Bremsak's narrow interpretation of the word "harassment" finding that the applicant "does not get to choose which harassment definition applies to the ... harassment complaints" (*Bremsak 15* at paragraph 477). The applicant takes issue with the Board's view that the focus of an investigation into harassment conduct "is on the likely impact on the recipient and not on Ms. Bremsak's intentions" (*ibidem* at paragraph 481). This finding is reasonable. Any attempt by Ms. Bremsak to defend her behavior on her desire to communicate with the Institute or its members for a "law-abiding purpose" is overshadowed by the

Board's finding that "(t)he evidence clearly shows that, on a balance of probabilities, Ms. Bremsak engaged in a pattern of harassing conduct ..." (*ibidem* at paragraph 482).

[29] As for the *Veillette* case argument, it lacks merit. At paragraph 433 of its reasons, the Board found that “the illegality of Ms. Bremsak’s suspension from elected offices … has no bearing on the assessment of whether Ms. Bremsak’s conduct, committed between April 2008 and June 3, 2009, was harassment”. The Board found that the matters before it were about what Ms. Bremsak “said and did to other Institute members and not the filing of her complaints with the [Board]” (*ibidem*). Ms. Bremsak’s personal circumstances had to be weighed, as each case is unique. Once again, the applicant has not persuaded me that the Board erred in finding that the Institute had legitimate reasons to continue to respond to the original complaints that were proceeding before the Board rather than automatically reinstate Ms. Bremsak on the basis of *Veillette*, a decision rendered by another panel of the Board in a matter which did not involve the applicant directly (*Bremsak 15* at paragraph 441).

Conclusion

[30] Consequently, I propose to dismiss this application for judicial review with costs. The costs are set at the amount of $4,500 inclusive of disbursements and tax.

"Johanne Trudel"
J.A.

“I agree
Eleanor R. Dawson J.A.”

“I agree
D.G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-131-13
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PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: DECEMBER 9, 2013

REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	DAWSON J.A. NEAR J.A.

DATED: JANUARY 21, 2014

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