Federal Court  Cour fédérale

Date: 20130702

Docket: T-1531-12

Citation: 2013 FC 733

Ottawa, Ontario, July 2, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ATOMIC ENERGY OF CANADA LIMITED

Applicant

and

JOSEPH WILSON

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2009, the applicant, Atomic Energy of Canada Limited (AECL), dismissed Mr Joseph Wilson without cause. AECL paid Mr Wilson 6 months' severance pay. Mr Wilson complained of unjust dismissal.

[2] A labour adjudicator appointed under the *Canada Labour Code*, RSC 1985, c L-2, s 242(1) (CLC - see Annex for provisions cited) concluded that the CLC only permits dismissals for cause.

Therefore, he found that Mr Wilson's complaint of unjust dismissal was made out. The question of the appropriate remedy remained. He directed the parties to discuss an appropriate remedy, and adjourned a hearing into the issue until this application for judicial review could be heard and decided.

[3] AECL argues that the adjudicator's decision was unreasonable because it did not accord with a proper interpretation of the CLC or the applicable jurisprudence. It asks me to quash the adjudicator's decision and declare its conclusions to be wrong.

[4] Mr Wilson contends that the adjudicator's decision was reasonable and that I should dismiss AECL's application for judicial review. Further, he argues that this application for judicial review is premature because the adjudicator's decision on an appropriate remedy remains outstanding. Accordingly, AECL is seeking judicial review on an interlocutory decision which is strongly discouraged in the case law.

[5] I am satisfied that the adjudicator's decision represented a final decision on the merits of Mr Wilson's complaint and, therefore, that this application for judicial review is not premature. Further, I find that the adjudicator's conclusion that the CLC only provides remedies for dismissals for cause was unreasonable. Therefore, I must allow this application for judicial review and order the adjudicator to consider the appropriate remedy.

[6] There are two issues:

1. Is this application for judicial review premature?

2. Was the adjudicator's decision unreasonable?

II. The Adjudicator's Decision

[7] The adjudicator observed that there exist two streams of cases relating to dismissals without cause. One holds that the CLC provides a remedy of notice or severance pay for dismissals made without cause (ss 230 and 235). Another group of cases states that, in any case where an employee challenges his or her dismissal, the broad remedies for unjust dismissal (s 242) are available, regardless of whether the employer paid the employee severance pay.

[8] The adjudicator decided that he need not resolve this issue because the Federal Court's decision in *Redlon Agencies Ltd v Norgren*, 2005 FC 804 [*Redlon*] was binding on him. There, Justice John O'Keefe stated that employers cannot avoid the unjust dismissal remedies under the CLC simply by awarding severance pay. The adjudicator interpreted this ruling to mean that employees who have been dismissed without cause can seek remedies for unjust dismissal. Therefore, AECL could not lawfully dismiss Mr Wilson without just cause.

[9] Accordingly, the adjudicator found that AECL could not avoid a determination that Mr Wilson's termination was unjust simply by pointing to the severance payment made to him. He had a valid claim that his termination was carried out without just cause, which should result in a remedy under the CLC.

III. Issue One – is the application for judicial review premature?

[10] Mr Wilson argues that this application for judicial review was brought prematurely. The adjudicator had not completed his task. While he had decided the question of whether Mr Wilson's dismissal was unjust – it was, the adjudicator said, because AECL had offered no cause for firing him – he left open the question of the appropriate remedy. Therefore, according to Mr Wilson, AECL should have awaited the final outcome before commencing this application.

[11] In my view, this application is not premature.

[12] As a general proposition, courts discourage the breaking up of proceedings into discrete parcels and encourage parties to finish their business in the tribunal below before coming to court: *Canada (Border Services Agency) v CB Powell Ltd v*, 2010 FCA 61, at paras 31-32.

[13] However, courts have also recognized exceptions. Special circumstances can sometimes justify making an application for judicial review even though the tribunal's work has not been completed: *Powell*, above, at para 33.

[14] Here, as I see it, the adjudicator had, in effect, bifurcated the proceeding before him. He had made a final decision on the merits of Mr Wilson's complaint and left open the question of remedy. He hoped the parties might settle that issue making further proceedings unnecessary.

[15] In this situation, I believe it was proper for AECL to pursue its application for judicial review of the adjudicator's decision that Mr Wilson had been unjustly dismissed. The adjudicator had made a final determination on the substance of the matter before him. Further, had AECL waited until the adjudicator had decided the issue of remedy, the legal question to which it sought an answer might have been moot (*eg*, if the adjudicator found that the severance payment AECL had already made to Mr Wilson amounted to just compensation). Under that scenario, AECL would likely not have been able to challenge the adjudicator's finding that the CLC only recognizes dismissals with cause.

[16] Dealing with this application for judicial review at this point in time does not raise issues of additional costs or delay that animate the general rule against fragmentation of administrative proceedings. The adjudicator expressly held off deciding the issue of remedy while this proceeding was pending. Further, this is not a situation where the applicant should have waited to see whether it might ultimately have succeeded before the tribunal; a ruling on the merits had already been made against it.

[17] Therefore, I am satisfied that this application for judicial review is not premature.

IV. Issue Two – Was the adjudicator's decision unreasonable?

[18] Mr Wilson argues that the adjudicator reasonably concluded that he was bound by the *Redlon* decision.

[19] I disagree. *Redlon* does not stand for the proposition for which the adjudicator cited it – that is, that the CLC only permits dismissals for cause.

[20] In *Redlon*, the employer had dismissed an employee based on its belief that he had reached retirement age under provincial law. The employer also had some concerns about the employee's ability to continue in the position.

[21] The employee complained on the basis that his employment was governed by the CLC, not provincial law. Further, he argued that the employer had not proved that he was unable to perform the job.

[22] The adjudicator agreed that the CLC applied to the employer. Further, she concluded that the employer had not shown just cause for dismissing its employee and awarded damages of $5,500 for unjust dismissal.

[23] On judicial review, the employer argued that the adjudicator erred by ordering it to pay compensation for unjust dismissal since it did not have an obligation to pay severance. At the time, the CLC provided that an employer who dismissed a person who was entitled to a pension was deemed not to have terminated that person's employment (s 235(2)(*b*) – now repealed). Therefore, that person was not entitled to severance pay.

[24] Justice O'Keefe concluded that the adjudicator's award of compensation was not severance pay. It was compensation for unjust dismissal. He also deferred to the adjudicator's factual finding

that the employer had not shown just cause for dismissing its employee. In turn, the award of damages was not unreasonable. Justice O'Keefe found that, although the employer did not have to pay severance under the CLC, it did have to pay compensation for unjust dismissal. In that context, he stated that the employer could not "avoid the operation of the unjust dismissal provisions by resorting to the severance payment provisions" (at para 39).

[25] Justice O'Keefe did not state that the CLC only recognizes dismissals for cause. His general statement that making a severance payment is not a defence against an award of damages for unjust dismissal is uncontroversial. This simply means that where an adjudicator concludes that the employer's reason for dismissing an employee does not stand up, the employee may be entitled to compensation in an amount greater than any severance payment the employer may have made. However, it does not follow from that statement that employers governed by the CLC cannot dismiss employees without cause. Justice O'Keefe simply did not, and did not have to, deal with that issue on the facts before him. No severance payment had been made by the employer, so there was no basis for any suggestion that the employer had evaded payment of compensation for unjust dismissal by having made a severance award. The fact that the employee was not entitled to severance did not mean that he could not obtain compensation for unjust dismissal.

[26] Accordingly, the adjudicator here unreasonably relied on *Redlon* for the proposition that employers governed by the CLC must show just cause for all dismissals. The adjudicator also cited two arbitration decisions in support of his conclusion that the CLC only recognizes dismissals for just cause. But those cases do not stand for that proposition either.

[27] In the first (*Chan v Okanagan Indian Band*, [2010] CLAD No 192 [*Chan*]), the complainant contended that he had been unjustly dismissed when his three-year contract was terminated after two years, even though his employer had agreed to pay the severance pay owed to him under the contract. Before the adjudicator, the employer attempted to withdraw its initial contention that it had just cause to terminate the complainant. The adjudicator found that neither the termination of the contract with severance pay, nor the employer's withdrawal of its allegation of cause, prevented consideration as to whether the employee's dismissal was unjust. The adjudicator stated that "payment of the minimum severance required under the *Code* does not automatically exclude a determination that a dismissal is unjust for the purposes of Division XIV, even where an employee has agreed to such an arrangement in his contract of employment" (at para 33). Simply put, where the employer alleged that it had cause to dismiss the employee, the adjudicator found that the payment of severance does not necessarily prevent an inquiry into whether the employee had been unjustly dismissed. He did not state that the CLC only permits dismissals for cause.

[28] In the second case (*Connors v H&R Transport Ltd*, [2011] CLAD No 355 [*Connors*]), the complainant argued that he had been unjustly dismissed when his employer concluded that he had failed to observe company policies and practices. The employer paid him about one month's wages as severance pay. Before the adjudicator, the employer attempted to argue that the dismissal was actually without cause and, therefore, that the complainant was only entitled to severance pay, not compensation or any other supplementary remedy. The adjudicator concluded that the employer could not resile from its initial suggestion that the complainant was dismissed for cause. The question, therefore, was whether the employer's reason for terminating the complainant was just. The adjudicator found that the employer's reason was not supported by the evidence and, therefore,

did not amount to just cause. It ordered payment of an additional month's wages as compensation. The adjudicator noted that "the expression 'unjust dismissal' bypasses the entitlement of an employer to terminate an employee at any time without cause provided the employee is compensated by way of severance pay or damages in lieu of notice" (at para 42). Out of context, that statement sounds supportive of the adjudicator's position in Mr Wilson's case. However, the adjudicator went on to explain that the question of the justness of the complainant's dismissal must be analyzed even though the employer had paid him severance pay. Again, as in *Chan*, the adjudicator was simply noting that the payment of severance does not prevent consideration of the justness of an employee's dismissal in cases where it is in issue. He did not state that there can be no dismissal without cause under the CLC.

[29] Neither of these cases supports the proposition that the CLC only recognizes dismissals for cause. *Chan* tells us that payment of severance does not preclude an inquiry into whether the employee was unjustly dismissed. *Connors* holds that an employer who purports to dismiss an employee for cause cannot avoid paying compensation when the evidence does not show that the dismissal was just, even though the employee had been given severance pay.

[30] Accordingly, I see no evidence of the two divergent camps to which the adjudicator referred in his decision. Neither of the arbitral decisions he cited for the proposition that the CLC only permits dismissals for cause actually says that.

[31] I also note that the only arbitration decision cited by Justice O'Keefe in *Redlon* was also cited in *Connors*: *Goodwin v Conair Aviation Ltd*, [2002] CLAD No 602. There, the employer

attempted to characterize the complainant's dismissal as being without cause, yet identified a number of reasons for its decision to terminate the complainant's employment. The adjudicator distinguished between economic and administrative dismissals, on the one hand, and those based on alleged cause. He found that employers could not, in effect, contract out of the provisions of the CLC that provide remedies for unjust dismissal, or simply avoid them by providing severance pay. In the result, the adjudicator found that the employer's reasons for dismissing the complainant were insufficient and, therefore, unjust. Again, the decision does not stand for the proposition that employers governed by the CLC can only dismiss employees for just cause.

[32] Mr Wilson also relied heavily on Justice Marc Nadon's decision in *Wolf Lake First Nation v Young* [1997] FCJ No 514 (FCTD) (QL), in support of his contention that the CLC only permits dismissals for just cause. I would first note that Justice Nadon's discussion of this issue was purely obiter. He concluded that the application for judicial review before him was made out of time (at paras 11-12). However, he undertook to make a "few brief remarks" on the merits on the case. In the passage relied on by Mr Wilson, Justice Nadon observed that a person who has been unjustly dismissed must be compensated with more than mere severance pay. Such a person has suffered a wrong and should be "compensated for having been mistreated" (at para 47).

[33] Justice Nadon's remarks were made under the heading "Quantum". He was discussing the question of the appropriate damages for someone who had been wrongly dismissed for cause. He was merely pointing out that compensation beyond severance pay would be an appropriate remedy in that situation. He specifically distinguished between administrative dismissals, where severance

pay was the appropriate remedy, and other forms of unjust dismissal, where further compensation would be required. Nowhere does he state that the CLC only permits dismissals for cause.

[34] Therefore, as I see it, the CLC sets out the following regime for dismissals.

[35] An employer can dismiss an employee without cause so long as it gives notice or severance pay (ss 230, 235). If an employee believes that the terms of his or her dismissal were unjust, he or she can complain (s 240). The only exceptions to the general right to make a complaint are where the dismissal resulted from a lay-off for lack of work or a discontinuance of the employee's position, or the employee has some other statutory remedy (s 242(3.1)).

[36] In addition, an employee can complain if he or she believes that the reason given by the employer for the dismissal was unjustified or if the dismissal is otherwise unjust (*eg*, based on discrimination or reprisal) (s 240(1)). If the adjudicator appointed to entertain the complaint concludes on any basis that the dismissal was unjust, he or she has broad remedial powers to compensate the employee, reinstate the employee, or grant any other suitable remedy (s 242(4)).

[37] The fact that an employer has paid an employee severance pay does not preclude an adjudicator from granting further relief where the adjudicator concludes that the dismissal was unjust. Similarly, there is no basis for concluding that the CLC only permits dismissals for cause. That conclusion would fail to take account of the clear remedies provided in ss 230 and 235 (*ie*, notice and severance) for persons dismissed without cause.

[38] My construction of the CLC is supported by the following arbitral decisions: *Halkovich v Fairford First Nation*, [1998] CLAD No 486, at paras 99-110; *D McCool Transport Ltd v Bosma*, [1998] CLAD No 315, at para 15; and *Chalifoux v Driftpile First Nation-Driftpile River Band No 450*, [2000] CLAD No 368, at paras 12-13, upheld on other grounds in *Chalifoux v Driftpile First Nation*, 2001, FCT 785, and *Chalifoux v Driftpile First Nation*, 2002 FCA 521; and *Prosper v PPADC Management Co*, [2010] CLAD No 430, at para 16.

[39] I also note that if Parliament's intention had been to create in Part III of the CLC a regime under which employers could only dismiss employees for cause, it obviously would not have included ss 230 and 235. Further, a desire to create such a regime could easily have been expressed, as it is in the *Financial Administration Act*, RSC 1985, c F-11, s 12(3), and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, s 49(3)(*b*).

[40] Accordingly, I must conclude that the adjudicator's decision was unreasonable. Under the circumstances, it is unnecessary to order a new hearing before a different adjudicator. Since the issue of remedy is still outstanding, it simply remains for the adjudicator to decide whether the terms of Mr Wilson's dismissal were just.

[41] Accordingly, I would remit this matter to the adjudicator for a decision on the appropriate remedy.

IV. Conclusion and Disposition

[42] This application was not brought prematurely because the adjudicator had arrived at a final decision on the merits of Mr Wilson's complaint. However, I find that the adjudicator unreasonably decided that he was bound by the *Redlon* decision to conclude that the CLC only permits dismissals for cause. That case simply does not stand for that broad proposition.

[43] Accordingly, I must allow this application. I would refer the matter back to the adjudicator to determine whether the terms of Mr Wilson's severance were unjust. However, I make no order for costs against Mr Wilson because this application permitted the resolution of an important legal issue applicable well beyond the dispute between the parties.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The matter is returned to the adjudicator to determine an appropriate remedy; and

3. There is no order as to costs.

"James W. O'Reilly"

Judge

Annex

***Canada Labour Code*, RSC, 1985, c L-2**

Division X: Individual Terminations of Employment

Notice or wages in lieu of notice

230. (1) Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either

(*a*) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate his employment on that date, or

(*b*) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

…

Division XI: Severance Pay

Minimum rate

235. (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of

(*a*) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the

***Code canadien du travail*, LRC (1985), ch L-2**

Section X : Licenciements individuels

Préavis ou indemnité

230. (1) Sauf cas prévu au paragraphe (2) et sauf s'il s'agit d'un congédiement justifié, l'employeur qui licencie un employé qui travaille pour lui sans interruption depuis au moins trois mois est tenu :

a) soit de donner à l'employé un préavis de licenciement écrit d'au moins deux semaines;

b) soit de verser, en guise et lieu de préavis, une indemnité égale à deux semaines de salaire au taux régulier pour le nombre d'heures de travail normal.

[…]

Section XI : Indemnité de départ

Minimum

235. (1) L'employeur qui licencie un employé qui travaille pour lui sans interruption depuis au moins douze mois est tenu, sauf en cas de congédiement justifié, de verser à celui-ci le plus élevé des montants suivants :

a) deux jours de salaire, au taux régulier et pour le nombre d'heures de travail normal, pour chaque année de service;

employer, and

(*b*) five days wages at the employee's regular rate of wages for his regular hours of work.

…

Division XIV: Unjust Dismissal

Complaint to inspector for unjust dismissal

240. (1) Subject to subsections (2) and 242(3.1), any person

(*a*) who has completed twelve consecutive months of continuous employment by an employer, and

(*b*) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

…

Reference to adjudicator

242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

Powers of adjudicator

(2) An adjudicator to whom a complaint has

b) cinq jours de salaire, au taux régulier et pour le nombre d'heures de travail normal.

[…]

Section XIV : Congédiement injuste

Plainte

240. (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si :

a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;

b) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.

[…]

Renvoi à un arbitre

242. (1) Sur réception du rapport visé au paragraphe 241(3), le ministre peut désigner en qualité d'arbitre la personne qu'il juge qualifiée pour entendre et trancher l'affaire et lui transmettre la plainte ainsi que l'éventuelle déclaration de l'employeur sur les motifs du congédiement.

Pouvoirs de l'arbitre

(2) Pour l'examen du cas dont il est saisi,

been referred under subsection (1)

(*a*) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;

(*b*) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and

(*c*) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(*a*), (*b*) and (*c*).

l'arbitre :

a) dispose du délai fixé par règlement du gouverneur en conseil;

b) fixe lui-même sa procédure, sous réserve de la double obligation de donner à chaque partie toute possibilité de lui présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier, d'autre part;

c) est investi des pouvoirs conférés au Conseil canadien des relations industrielles par les alinéas 16*a*), *b*) et *c*).

Decision of adjudicator

(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall

(*a*) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and

(*b*) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Décision de l'arbitre

(3) Sous réserve du paragraphe (3.1), l'arbitre :

a) décide si le congédiement était injuste;

b) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.

Limitation on complaints

(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

(*a*) that person has been laid off because of lack of work or because of the discontinuance of a function; or

(*b*) a procedure for redress has been provided elsewhere in or under this or any

Restriction

(3.1) L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :

a) le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste;

b) la présente loi ou une autre loi fédérale prévoit un autre recours.

other Act of Parliament.

Where unjust dismissal

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(*b*) reinstate the person in his employ; and

(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Cas de congédiement injuste

(4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur :

a) de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;

b) de réintégrer le plaignant dans son emploi;

c) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.

FEDERAL COURT

SOLICITORS OF RECORD

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