Federal Court Cour fédérale

Date: 20150126

Docket: T-893-14

Citation: 2015 FC 98

Ottawa, Ontario, January 26, 2015

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

NANCY RENAE

Applicant

and

CHAMP'S MUSHROOMS INC.

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicant brings this judicial review application to set aside the decision of Paul D.K. Fraser, QC (the Adjudicator), dismissing the applicant's complaint of unjust dismissal made under section 240 of the *Canada Labour Code*, RSC 1985, c L-2 (the *Code*). For the reasons that follow the application is dismissed.

II. Facts

[2] The applicant is Nancy Renae, a 53 year old longhaul truck driver. She was employed by Champs Mushrooms Inc. (the respondent) for 3½ years from July, 2009 until January 14, 2013 when she alleges she was unjustly dismissed.

[3] The respondent is a food growing and distribution company located in Aldergrove, a community in the lower mainland area of British Columbia. The company sells a variety of mushrooms both in Canada and the United States. The applicant's immediate supervisor was the Transportation and Logistics Manager, Mr. Tri Quach. Mr. Quach was responsible for setting drivers' schedules and recording payroll. Mr. Paul Crosby, controller for Champs was in charge of Human Resources. Mr. Crosby ultimately reported to the Vice-President of the company Tony Vuu and the President Duke Tran.

[4] The first year of the applicant's employment with the respondent was uneventful; however during the remaining years the relationship between the applicant and Mr. Quach deteriorated. As a result, the parties have been involved in multiple proceedings from August, 2011 through to the applicant's filing of the complaint at issue in this application on January 30, 2013. As these events have been addressed through other recourse mechanisms, the purpose of timeline below is to provide the necessary context to the applicant's dismissal.

1) August 15, 2011 – The applicant filed a complaint to HRSDC that the respondent failed to pay her wages and other amounts [complaint investigated and dismissed].

2) August 18, 2011 – The applicant damaged a case of Portobello mushrooms. Mr Quach asked to meet with her and she refused to meet without a witness present. After multiple text messages were exchanged the applicant texted Mr. Quach on August 22, 2011 stating "pls do not contact me on my off duty time anymore. This is considered harassment and I will be calling the rcmp."

3) December 5, 2011 – The applicant filed a complaint to HRSDC for unjust constructive dismissal [complaint adjudicated and dismissed].

4) January, 2012 – The applicant made a complaint to the RCMP against Mr. Quach for allegedly threatening her [after conducting interviews with the applicant and Mr. Quach the RCMP declined to investigate the allegations].

5) January 25, 2012 – The applicant filed a complaint to HRSDC for unjust constructive dismissal [complaint adjudicated at same time as complaint of December 5, 2012 and dismissed].

6) May, 2012 – The applicant complained to the Canadian Human Rights Commission that she was "being discriminated against of because of her sex and harassed because of her sex".

7) May 24, 2012 – The applicant received a verbal warning for failure to wear a hairnet on the loading dock.

8) June 2012 – The applicant received a written letter of reprimand for failure to wear a hairnet on the loading dock.

[5] The applicant was dismissed for her refusal to abide by the respondent's delivery policies. The applicant was expected to deliver mushrooms from Aldergrove, BC to the Seattle, Washington area three times per week. Her truck was loaded for her and ready to leave Aldergrove at approximately 10:00 p.m., although sometimes delays in loading would result in a departure time of midnight or later. The estimated driving time to Seattle and return was approximately 6½ hours, although with traffic and cargo unloading factored in the total time could be considerably longer.

[6] The cargo was loaded on the truck in the sequence it was to be delivered to customers along her route. The deliveries were expected to be made according to a load manifest that was created by the sales department in order to meet the delivery times requested by various customers. The load manifest was also provided to United States Customs, as entry inspection procedure requires that the cargo be loaded in the exact order of delivery. Failure to do so can result in a fine and potentially revocation of a United States transport license.

[7] The applicant delivered to a Seattle area customer known as "Restaurant Depot", which had one drop site in Seattle and another in Fife, Washington, approximately 15 to 30 minutes from Seattle. The scheduled delivery time to the Seattle Restaurant Depot was 6:00 a.m., while the Fife delivery time was scheduled for 9:00 a.m. However, during the months of November and December 2012, the applicant changed the order of delivery on three occasions, delivering to the Fife location before the Seattle location.

[8] On November 2, 2012, after the applicant changed the drop order, Mr. Quach sent her a text message asking her not to change the drop order again. He did not receive a response from the applicant.

[9] On November 7, 2012, after the applicant again changed the drop order, the respondent provide her with a written Record of Disciplinary Action. This document was addressed to the applicant and stated that "[r]uns are to never be changed without confirmation from the Logistics Manager", and listed "Immediate Dismissal" as the sole consequence for failure to correct her behaviour. Mr. Quach attempted to hand the written disciplinary warning to the applicant but she did not accept the letter and walked away. The letter was then sent to her home by registered mail but was returned undelivered.

[10] The last unilateral change that the applicant made to the drop order occurred on December 7, 2012. As a result she received another Record of Disciplinary Action but refused to accept it.

[11] On December 12, 2012, Mr. Quach approached the applicant and provided her with her pay cheque. He again told her that she had to stop changing the drop order. That same day the applicant received the load manifest which included the following note in bold block letters:

> *** DO NOT CHANGE MANIFEST ORDER ***

[12] The applicant responded to this note by printing on the document:

> IF IT MEANS THAT I WILL NOT BE ABLE TO DO THIS RUN
> IN THE ALLOTED 14 HRS. IT WILL BE CHANGED.

[13] The applicant's justification for writing this statement was that she could not comply with the drop order because doing so would result in her violating the "11/14 rule". The "11/14 rule" is a reference to the US Department of Transportation Hours-of-Service Regulations, which provide that drivers can only drive for a total of 11 hours in an operating run lasting no more than 14 hours before taking a 10 hour break.

[14] I note, parenthetically, that there was no evidence before the Adjudicator which supported Ms. Renae's concern. Ms. Renea had done the Aldergrove-Seattle route many times without approaching the regulatory maximum. There was also evidence before the Adjudicator from other drivers who had done the run, to the same effect. There is no issue whether there were extenuating circumstances which justified a change in the drop order.

[15] To recapitulate, the adjudicator found that as of December 11 2012, the applicant had made three changes to the drop order in a five week period and indicated her intention to do so again if she considered it necessary. Management attempted to arrange a meeting with the applicant, but given the time of year, had difficulty in finding a time convenient to Ms. Renae. The Adjudicator observed that:

> In my view, she well knew how seriously Champs management viewed her conduct. The best evidence of her understanding of the situation was revealed when she testified that she wondered why it had taken senior management 20 days to meet with her after the December 7th incident. That meeting – like virtually all meetings Champs management tried to arrange with her over the 17 month period referred to in paragraph 8 of this decision – was, on the evidence before me, difficult to arrange. But it did not occur on December 27th and was a key event in the dismissal decision that was ultimately made.

[16] On December 27, 2012, Mr. Quach, Mr. Crosby and Mr. Vuu finally met with the applicant. At this meeting numerous issues were discussed including food safety policy, the practice of requiring employees to wear hairnets in the loading dock area in response to the applicant's May and June, 2012 discipline for failing to wear a hairnet, the applicant's failure to file a report following an incident when a pallet of mushrooms was damaged and whether there were any extenuating circumstances as to why the applicant continued to unilaterally change the delivery drop times. The meeting concluded with no final disciplinary decision having been taken. The applicant's employment continued.

[17] In early January, 2013, the applicant made two runs to Seattle without incident. However, on January 11, 2013, Restaurant Depot advised they were terminating its $800,000 contract with the respondent. After receiving this news, the respondent made the decision to terminate the applicant's employment. The termination letter of January 14, 2013, cited the following three reasons for just cause:

> 1. You did on several occasions change the scheduled order of the Restaurant Depot drops for Seattle and Fife without authorization and without informing the employer. You were clearly instructed to discontinue this practice. You still continued to intentionally change the drop order in direct contravention of your delivery schedule.
>
> 2. As a result of your actions Champ's received official complaints, incurred penalties and finally the customer, Restaurant Depot, has terminated its contracts for both locations citing as its reasons unacceptable late deliveries.
>
> 3. This represents a considerable loss of business for the employer.

III. The Decision Under Review

[18] On March 13, 2014, the Adjudicator rendered his decision, dismissing the applicant's complaint and finding that her dismissal was not unjust.

[19] The Adjudicator reviewed the facts before turning to a consideration of the relevant provisions in the *Code* and the jurisprudence on unjust dismissal. The Adjudicator found that the respondent's policies with respect to the order of delivery drops and food safety on the loading dock satisfied the tests of clarity, notice and reasonableness: *Wareham v United Grain Growers*, [1985] CLAD No 88; *Stein v British Columbia (Housing Management Commission)*, (1992) 41 CCEL 213 (BCCA). The Adjudicator was also satisfied that the applicant was notified that a breach of the policy could result in dismissal. The Adjudicator found that the applicant was the only driver in the employ of Champs who did not comply with the policy, that "it was a practice well known by all drivers as essential to customer satisfaction, especially with respect to Restaurant Depot and their Seattle outlet."

[20] Further, the Adjudicator found that the applicant's writing on the December 12, 2013 load manifest constituted a "culminating incident" from which the respondent was entitled to impose further discipline. Specifically, the Adjudicator noted this incident was a "legitimate final act of deliberate misconduct." The Adjudicator found the respondent had not condoned the applicant's behaviour and that the four weeks taken by the respondent to act and to terminate the applicant was reasonable in the circumstances.

[21] The Adjudicator concluded that the respondent took a contextual approach in its investigation of misconduct and in its determination of the appropriate sanction. That is, a contextual analysis of the applicant's misconduct demonstrated that dismissal was a proportionate response by the respondent. Finally, the Adjudicator noted that the applicant's cumulative behaviour was such that the employment relationship could no longer viably exist.

A. *The Adjudicator's Decision was Unreasonable Because he Relied on Facts that were not Tendered in Evidence or Argued by Either Party*

[22] The applicant argues that the Adjudicator's decision was unreasonable because the Adjudicator relied on a recitation of facts that were not tendered in evidence or argued by either party and could not reasonably been inferred. This argument pivots on the Adjudicator's characterization and findings in respect of the December 27, 2012 meeting.

[23] The applicant contends that the purpose of the December 27, 2012 meeting between the applicant and management was to identify appropriate corrective discipline, and not, as the Adjudicator found, for the respondent to continue to deliberate as to the appropriate form of discipline to provide to the applicant. Corrective discipline was required because at that time the respondent incorrectly believed that the applicant had continued to change drop orders beyond December 7, 2012.

[24] Further, the two members of the management team who ultimately made the decision to dismiss the applicant, Mr. Tran and Mr. Vuu, did not provide evidence in the proceedings. Accordingly, there is no evidence from the ultimate decision-makers to contradict the inference that the appropriate disciplinary response reached at the meeting was to put Ms Renae under an

on-going assessment of her performance. The applicant contends that the only reasonable conclusion from the evidence is that the purpose of the meeting was to give the applicant a warning and the opportunity to correct her behaviour so that the respondent would not have to dismiss her.

[25] The applicant submits that the Adjudicator made his decision without considering that at the time of the December 27, 2012 meeting and at the time of the applicant's dismissal, the respondent incorrectly believed the applicant continued to switch delivery orders. The respondent therefore believed that the loss of the Restaurant Depot contract was the result of the applicant having continued to switch her delivery orders through January, 2013. The respondent therefore justified its decision to dismiss the applicant on the basis of events which did not occur.

[26] These three points centre around the characterization of the December 27 meeting. Mr. Quach testified that the purpose was to take "corrective action" and that he wanted to give Ms. Renae the opportunity to explain to senior management whether there were any extenuating circumstances which justified her changes to the drop order.

[27] In my view, the use of the term "corrective action" by management does not render the overall characterization of the December 27 meeting by the Adjudicator unreasonable. Mr. Quach's e-mails to the applicant of December 19, 2012 and December 21, 2012 make clear the purpose and possible consequences of the proposed meeting:

> Your presence is requested to attend a disciplinary meeting regarding several recent workplace violations. […] Failure to appear may result in your indefinite suspension so I urge you to make yourself available. [December 19, 2012)]

> It would be best to address our concerns as we would not want Champs to be seen as condoning the poor work performance and allowing you to continue your work without the appropriate skill set or training. As a reminder, your attendance is mandatory so please make yourself available. [December 21, 2012]

[28] Importantly, once agreement was finally reached on the date for the meeting, Mr. Quach advised Ms. Renae that the meeting was rescheduled to December 27, 2012 and informed her that "[p]ending the outcome of your disciplinary meeting" she was still on her regular schedule "for the time being."

[29] Viewed contextually, beginning with the November 7, December 7 and December 12 warnings, there can be no challenge to the Adjudicator's finding that dismissal was a potential outcome of the meeting.

[30] The fact that the decision was taken, in the end, by Mr. Tran and Mr. Vuu, who did not testify, does not undermine the reasonableness of the finding. There was sufficient documentary and *viva voce* evidence before the Adjudicator to support the conclusion that the parties had not agreed on a path forward at the meeting, and that it concluded with Champs management's need "to consider next steps". The Adjudicator found that there was no evidence that the parties had reached "a common resolution of the issue."

[31] I turn to the third factual error, namely that the Adjudicator ignored evidence that management was under the misapprehension that the applicant had in fact changed the drop orders in January, 2013. On this point, the Adjudicator is clear:

> In early January, 2013, Ms. Renae made a couple of trips to Seattle, apparently without incident. In the meantime, the Champs management team were continuing to consider what discipline would be imposed following upon the meeting that had occurred on December 27. Then, on January 11, in a phone call to the sales department, Restaurant Depot advised they were terminating their contract with Champs, and "were getting another vendor."
>
> When Champs senior management received this news, the decision was made to terminate Ms. Renae's employment.

[32] In support of her third argument the applicant places considerable emphasis on the language of the January 14, 2013 dismissal letter, which states, in part:

> This letter represents formal notice that your employment with Champ's Mushrooms Inc. is terminated effective immediately January 14, 2013 for just cause due to the following reason:
>
> - You did on several occasions change the schedule order of the Restaurant Depot drops for Seattle and Fife without authorization and without informing the employer. You were clearly instructed to discontinue this practice. You still continued to intentionally change the drop order in direct contravention of our delivery schedule.

[33] I agree that this sentence admits of two interpretations, including an interpretation which suggests that the applicant had changed the drop order on her January, 2013 runs to Seattle, which she had not. Another interpretation is that it refers to her change to the drop order in December 2012, subsequent to written warning that this could result in dismissal. It could also refer to the applicant's written statement, on the December 11, 2012 manifest that she would change the drop order if she saw fit.

[34] The sentence is, perhaps, a somewhat awkward conflation of the two thoughts, and infelicitously worded, but it is not evidence that the employer was under a mistaken belief that the applicant had changed the order in January 2013. There was no evidence of this before the Adjudicator, and based on the management response and considerable documentation generated on previous occasions when the applicant had changed the drop order, it would have been reasonable to expect there would have been evidence of changes to the drop order in January and of knowledge of the changes on the part of management. There was no evidence of such misunderstanding on the part of management before the Adjudicator.

B. ***The Adjudicator's Decision was Unreasonable Because he Relied on a Culminating Incident not Cited by the Respondent as a Reason for Dismissal***

[35] The applicant argues the Adjudicator unreasonably relied on the applicant's action of writing on the load manifest on December 12, 2012 as a further incident worthy of discipline and a "culminating incident that justified reviewing her disciplinary history during the entire course of her employment." The applicant urges that this is especially problematic given that the incident does not appear anywhere in the respondent's termination letter or the written responses to the applicant's unjust dismissal complaint. Mr. Crosby was not aware of this incident and expressly stated that he had no knowledge of any actions by the applicant warranting discipline after December 7, 2012, apart from the cancellation of the Restaurant Depot contract.

[36] The applicant argues that, generally speaking, an employer will have difficulty justifying a termination of employment on the basis of reasons not initially provided to an employee: *Defence Construction Canada Ltd. V Girard*, [2005] FCJ No 1468 (FCC). That is, an employer "must justify its decision to dismiss for just cause on the same grounds as it relied upon

originally in its statement.": *Gould v Aliant Telecom*, [2002] CLAD No 498 (Canada Labour Arbitration). As the employer did not specifically rely on the December 12, 2012 incident in its reasons for dismissal, the Adjudicator's decision was therefore unreasonable.

[37] As discussed earlier, the letter is awkwardly phrased, but, viewed in the context of the employment history, the interpretation of it by the Adjudicator was reasonable – the applicant demonstrated a continuing intention to change the drop order in contravention of a clearly communicated management direction.

[38] In assessing whether an employer has just cause for dismissal, the court must consider whether the employee's misconduct "gave rise to a breakdown in the employment relationship": *McKinley v British Columbia Telephone*, 2001 SCC 38. The courts must evaluate the employee misconduct cumulatively as is required by a contextual approach: *McKinley*; *Poliquin v Devon Canada Corporation*, 2009 ABCA 216. There is no question that the Adjudicator adopted the correct legal framework.

[39] Second, an employer has the right to determine how its business will be conducted, including establishing policies and procedures, so long as they are not contrary to law and within the range of duties for which an employee has been hired. The employee cannot opine on the wisdom of such policies and ignore them if he or she chooses: *Stein* at 217. However, before an employer can rely on the breach of a company policy as just cause for dismissal, the employer must first establish that the policy was distributed to employees; it was known to the employee affected; it was unambiguous and consistently enforced; that employees were warned they will

be dismissed should they breach the policy; that the policy is reasonable and that the breach is sufficiently serious to justify dismissal: *Roney v Knowlton Realty Ltd*., 1995 CanLII 3132 (BC SC). The Adjudicator found that these criteria were met.

[40] The Adjudicator found that the applicant repeatedly failed to follow workplace policies and instructions from management. The applicant chose to be insubordinate in a confrontational manner. The applicant refused to meet with management for disciplinary meetings. Further, the load manifest, oral instructions and disciplinary notices provided to the applicant were clear and unequivocal, and the applicant expressed, in writing, her intention to disregard management direction when she saw fit. Despite having been warned on November 7 that changes to the drop order could result in dismissal, she subsequently changed the drop order.

[41] With respect to condonation, the employer has a reasonable amount of time to investigate the misconduct and consider its options: *Tracey v Swansea Construction Co Ltd*., [1965] 1 OR 203. What constitutes "reasonableness" depends on the circumstances of each case. In this proceeding, the four week investigation period was a reasonable amount of time given the previous difficulties the respondent experienced in meeting with the applicant, and the intervening holidays. The Adjudicator's finding that the continued employment of the applicant from December 12, 2012 to January 14, 2013 was not condonation has a solid evidentiary foundation. The Adjudicator carefully tracked the efforts of management to set up an early meeting with Ms. Renae and her unavailability.

[42] In sum, it is not a fair characterization of the evidence to suggest, as the applicant has, that the incident on December 12, 2012 did not play a part in the deliberations to terminate the applicant's employment. Mr. Quach specifically testified that the applicant's writing on the load manifest that she would not comply with management's instructions. Some of the pertinent evidence before the Adjudicator in this regard as noted in the respondent's memoranda:

> Both Mr. Quach and Mr. Crosby, however, gave evidence that the management team, which they were both members of, considered the Applicant's entire history with the company. Mr. Quach stated that, during management's meetings about disciplining the applicant, he opined that the applicant was "continuing to disobey… the order she had been given".
>
> Mr Quach also stated that, when asked by the management team whether he thought they should dismiss the applicant, he told the rest of the management team that he thought the applicant would continue to be a "rogue employee" based on her "past history… and the constant problems we've had and the inability to communicate or provide any type of training or corrective behaviour". He went on to state that the decision to terminate the applicant's employment was made "after careful consideration with the entire management team".

[43] The evidence of Mr. Quach was that the management team considered the applicant's entire history with the company in deciding whether to terminate the applicant's employment. This history includes multiple complaints filed by the applicant to various agencies, including HRSDC, the Canadian Human Rights Commission, the Worker's Compensation Board, and the Royal Canadian Mounted Police. This history also includes the applicant's previous suspension from work, the result of an incident involving the loss of product. Numerous attempts were made to meet with the applicant after this incident and the applicant would either not communicate with the respondent or would refuse to meet.

IV. The Standard of Review is Reasonableness

[44] The appropriate standard of review in a judicial review of an adjudicator's decision on an unjust dismissal complaint is reasonableness: *Payne v Bank of Montreal*, 2013 FCA 33. Although reasonableness is a deferential standard of review, this does not mean that decisions of adjudicators are immune from review. The decision must be justifiable, transparent and intelligible and fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9. For the reasons given, the decision meets this standard.

[45] A review of dismissal decisions must be taken in the framework developed by the Supreme Court of Canada in *McKinley*. In *McKinley*, at para 57, Justice Iacobucci indicated that a reviewing court is to employ "an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship."

[46] The Adjudicator properly examined the applicant's conduct as a whole. This is especially important where the events in question are closely linked in time and substance. The applicant's insubordination was closely linked in time and in fact was substantive. As the Adjudicator properly stated, the applicant's insubordination had "crystallized into defiance." As such, an employment relationship was unsustainable and resulted in serious prejudice to the respondent's business.

[47] When assessing the proportionality of an employer's reaction to an employee's misconduct, the Adjudicator is entitled to take into account the cumulative effect of an employee's record in determining whether his or her dismissal was justified: *Poliquin* at para 73. In this case, the applicant repeatedly failed to follow workplace policies regarding drop orders and clear instructions from her supervisors. The applicant argues that these policies were guidelines and not mandatory *per se*; however, it is clear that management did not see it that way, and had notified her that a policy breach may result in immediate dismissal.

V. Conclusion

[48] In sum, the Adjudicator's finding with respect to condonation, the cumulative incident and the appropriateness of the response all have an evidentiary foundation, and the conclusions and inferences that he drew from the evidence before him were reasonable and do not justify intervention.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, with costs.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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