Federal Court Cour fédérale

Date: 20150317

Docket: T-904-14

Citation: 2015 FC 334

Ottawa, Ontario, March 17, 2015

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

FILO SIGLOY

Applicant

and

DHL EXPRESS (CANADA), LTD.

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicant seeks to set aside the decision of adjudicator Joseph B. Rose 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 granted.

II. Facts

[2] The applicant, Mr. Filo Sigloy, was employed by DHL Express (Canada) Ltd. from September 20, 2010 until the date of his dismissal on October 9, 2012, when he alleges he was unjustly dismissed. The applicant was first hired into a bargaining unit position, however on May 1, 2012, he was promoted to "Bilingual Key Accounts Specialist", a non-union position. Subsequent to his dismissal, the applicant filed a complaint pursuant to section 240 of the *Code*.

[3] The position of Bilingual Key Accounts Specialist was governed by an employment contract agreed to and signed by the applicant. Section 8 of the employment contract provided that the respondent could terminate the applicant's employment at any time:

> (8) This agreement and your employment hereunder may be terminated as follows:
>
> > (a) You may terminate this agreement for any reason upon fourteen (14) days prior notice in writing to the Company.
> >
> > (b) By the company at any time without notice:
> >
> > For Cause in which case your employment shall terminate immediately upon receipt of written notice setting out the Cause of termination. "Cause" shall include, but not be limited to, a material breach of the terms of this Agreement.
> >
> > (c) The Company may terminate your employment at any time giving you the greater of two (2) weeks' notice in writing or severance requirement, expressed or implied, shall apply. Upon termination of your employment you will return all DHL property, materials, reports, keys, cards, etc. that you have in your possession or control to DHL. (emphasis added)

[4] On October 9, 2012, the respondent advised the applicant in writing that his employment would cease effective immediately. The termination letter did not explicitly state that the applicant was being dismissed without cause; however it does so implicitly as the letter states that the applicant was to be provided with all severance entitlements required by the "without cause" term of the contract. Those entitlements were two weeks of pay in lieu of notice and five days of severance, less required deductions.

[5] The applicant filed an unjust dismissal complaint with Human Resources and Skills Development Canada (HRSDC) (now Employment and Social Development Canada). The complaint alleged that there were no reasonable grounds to justify the applicant's dismissal, that the dismissal was not due to a lack of work or because of a discontinuance of a position and that any allegation of just cause would be without merit and that just cause had not, to that date, been alleged.

[6] In accordance with the process under the *Code*, the respondent subsequently received letters from HRSDC requesting that the respondent provide a "written statement giving the reasons for dismissal". A human resources officer with the respondent wrote to HRSDC outlining the reasons why the applicant's employment was terminated. These reasons included: poor performance, attendance and attitude; multiple complaints from internal and external customers regarding the quality of the applicant's work, level of professionalism, timeliness of follow-ups and a demonstrated inability to sustain the requirements of his position. The letter did not state that the dismissal was for cause.

[7] The Minister of Labour appointed an adjudicator to hear the applicant's complaint and a hearing date was set for October 17, 2013. At the outset of the hearing the respondent raised a preliminary objection regarding whether the Adjudicator had jurisdiction to hear the applicant's complaint. Specifically, the respondent argued that as the dismissal was without cause in accordance with a contract of employment, the Adjudicator had no jurisdiction to conduct a hearing on the merits of the unjust dismissal Complaint. The parties provided the Adjudicator with written submissions with respect to the objection, and the Adjudicator ultimately concluded on March 20, 2014, that he had no jurisdiction to consider the applicant's Complaint.

III. Decision

[8] On March 20, 2014, the Adjudicator rendered his decision, dismissing the applicant's complaint for want of jurisdiction.

[9] The Adjudicator identified the main issue before him as "whether an adjudicator has jurisdiction where an employer dismisses an employee without cause in compliance with a valid and enforceable contract of employment and the Code".

[10] The Adjudicator commented on the applicant's concern that the without cause dismissal was "false". The Adjudicator found that just because an employer has reasons for dismissal does not mean it has to automatically resort to the "for cause" option under the contract, should there be such a clause. Further, the Adjudicator observed that the concern regarding false without cause terminations imposed an obligation on him to "carefully scrutinize contracts of

employment" . He also noted that "just as each case will be decided on its own particular facts, each contract of employment will possess its own particular characteristics".

[11] The Adjudicator found that there was no indication of impropriety surrounding the applicant's dismissal. He found that there was a "consensual contract of employment that provides the statutory entitlements under the Code". As the applicant had not made any other allegations of unjustness, the Adjudicator concluded that where "consensual agreements satisfy the aforementioned requirements, they do not conflict with the contracting out provision in s. 168 of the Code".

[12] The Adjudicator also considered the applicant's argument that the respondent could not "resile from the written reasons for dismissal" provided to HRSDC. The Adjudicator found that DHL's response to HRSDC's request for reasons for dismissal did not mean it was asserting cause. The Adjudicator concluded by noting that although the DHL provided reasons for dismissal, it was not "alleging they amounted to cause" as "[i]ndeed, the employer has maintained from the outset it dismissed the [applicant] on a without cause basis pursuant to a valid and enforceable contract of employment".

[13] Finally, the Adjudicator stated there was no foundation for the applicant's claim of settlement privilege with respect to the termination letter. The letter was therefore admissible.

[14] The Adjudicator also concluded that the applicant "entered into a valid and enforceable contract of employment, the terms of which were in compliance with the Code. Further, the

[applicant's] initial complaint does not allege the dismissal involved discrimination, reprisal or bad faith". As such, he was without jurisdiction and granted the respondent's preliminary objection.

IV. Issues

[15] In light of developments in the jurisprudence since the hearing of this application, the single question framed before me is whether it is permissible to determine the merits of a complaint under section 240 of the *Code* in the absence of an evidentiary hearing. The standard of review of this question is correctness.

V. Analysis

[16] The jurisdictional issue raised before the Adjudicator had been previously considered by Justice James O'Reilly in *Atomic Energy of Canada Limited v Wilson*, 2013 FC 733. In *Wilson*, Justice O'Reilly found that the "fact that an employer has paid an employee severance pay does not preclude an adjudicator from granting relief where the adjudicator concludes that the dismissal was unjust". Therefore, in order to determine if further relief is warranted there must be jurisdiction to conduct a hearing on the merits. Justice O'Reilly's decision was appealed, and the matter was under reserve at the time of this judicial review hearing.

[17] On January 22, 2015, the Court of Appeal dismissed the appeal in *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17. This Court invited the parties to make further submissions in response to that decision.

[18] The Court of Appeal upheld Justice O'Reilly's decision. Stratas JA, writing for the Court wrote at paragraphs 93-94:

> Finally, I wish to address one final submission made by the appellant. The appellant warns of severe implications associated with AECL's position. He raises the spectre of employers being able to dismiss employees without cause, paying them an amount of money the employers think is adequate, leaving employees with no meaningful right of recourse under section 240 of the Code.
>
> That is simply not so. It will always be for the adjudicator to assess the circumstances and determine whether the dismissal, whether or not for cause, was unjust.

[19] The significance of the Court of Appeal decision is that an adjudicator errs in assuming that a dismissal of an employment without cause and with payment of the statutory or agreed upon amounts is necessarily just: *Wilson* at para 97. It remains for the adjudicator to still consider the common law principles governing the law of dismissal, including duress, and to inquire into whether the compensation complied with the requirements of the *Code* or the employment contract: see *Wilson* at para 98.

[20] Curiously, but perhaps predictably, both parties contend that the decision of the Court of Appeal supports their respective position.

A. *The issue*

[21] The Court of Appeal gave clear guidance that adjudicators have jurisdiction to hear complaints in the face of objections rooted in allegations that the dismissal was without cause, or that the minimum requirements of the *Code* or employment contract had been met. This does

not necessarily engage a full evidentiary hearing on the merits; rather it may be disposed on a summary basis.

[22] The circumstances in *Wilson* are directly analogous to those before the Court. Here, the Adjudicator determined the payment of the minimum compensation required by the *Code*, or those of the contract, if greater, ousted his jurisdiction. What is clear from the Court of Appeal decision is that the question whether a dismissal is unjust is an evidentiary matter.

[23] In sum, the Adjudicator was required to hold a hearing. The form, shape and duration of that hearing is, although framed by legal principle, within the discretion of the Adjudicator. The crux of the Court of Appeal decision lies, in my view, in paragraph 97, which instructs that it is incorrect to assume that the dismissal of an employee dismissed without cause and who has been paid the required compensation is automatically just. There must be an evidentiary inquiry, whether cursory or extensive, into the circumstances of the dismissal.

[24] To conclude, "[i]t will always be for the adjudicator to assess the circumstances and determine whether the dismissal, whether or not for cause, was unjust": *Wilson* at para 94. This result is consistent with *National Bank of Canada v Canada (Minister of Labour)*, [1998] FCJ No 872 at para 4 which held that section 168 of the *Code* protects the right of an employee to complain of an unjust dismissal even in the face of a settlement or employment contract.

B. ***Application of the Wilson decision***

[25] The respondent contends that the Adjudicator did precisely that which the Court of Appeal in *Wilson* instructs. He held a summary proceeding in which he determined that there was a valid employment contract allowing a dismissal without cause. The respondent also contends that the hearing conducted, whether viewed as jurisdictional or evidentiary, covered the ground that an Adjudicator is, post-*Wilson*, required to canvass. It notes that the Adjudicator found that cause was not alleged in the termination letter and the reasons it gave to HRDSC did not amount to cause. The Adjudicator then considered the fact that the termination occurred pursuant to a valid employment contract, the statutory requirements for severance and termination pay were met and there were no allegations of unfairness, reprisal or discrimination. The Adjudicator concluded that there "was no acceptable or defensible basis: upon which he could conclude that the dismissal was unjust".

[26] Although there is considerable merit to the respondent's submission, I cannot agree. All of these conclusions may be well founded, but judicial review and procedural fairness is concerned with the process of decision making, not its outcome. *Wilson* directs that there be an evidentiary hearing, something to which neither the Adjudicator nor the parties directed their minds. The issue before the Adjudicator was, on consent, a preliminary legal determination.

[27] While it is true that some evidence was put before the Adjudicator to frame the pure legal issue, the Court cannot assume that was all of the evidence that the parties would bring forward, or that it came forward in the form and manner of counsel's choice, subject, of course, to the discretion of the Adjudicator to manage the process before him or her.

[28] Even if the respondent is correct and the proceedings before the Adjudicator conformed to the inquiry mandated by *Wilson*, that, again, is a result, whereas procedural fairness is directed to the process by which a decision is reached. Procedural fairness requires, at minimum, that the applicant have the opportunity of making submissions as to the form and content of the hearing that the adjudicator is required, in light of the Court of Appeal's decision, to hold.

JUDGMENT

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

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-904-14
STYLE OF CAUSE:	FILO SIGLOY v DHL EXPRESS (CANADA), LTD.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 24, 2014
JUDGMENT AND REASONS:	RENNIE J.
DATED:	MARCH 17, 2015

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