

Federal Court



Cour fédérale

Date: 20170707

Docket: T-1213-16

Citation: 2017 FC 664

Ottawa, Ontario, July 7, 2017

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

CLAUDIO ORTU

Applicant

and

CFMB LIMITED

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Claudio Ortu, seeks judicial review of the decision of Arbitrator Mr. Guy Lafrance [the Arbitrator] dated June 7, 2016. The Arbitrator found that pursuant to paragraph 242(3.1)(a) of the *Canada Labour Code*, RSC, 1985, c L-2 [CLC], he had no jurisdiction to determine Mr. Ortu's unjust dismissal complaint.

I. The Decision Under Review

[2] Mr. Ortu's employment was terminated by CFMB Radio Station on May 13, 2015. He filed a complaint under the CLC for unjust dismissal. An arbitrator was appointed to resolve the complaint. The hearing before the Arbitrator was held on May 26, 2016.

[3] The Arbitrator declined jurisdiction pursuant to paragraph 242(3.1)(a) of the CLC upon determining that Mr. Ortu had not been unjustly dismissed; rather he had been terminated by his employer CFMB Limited [CFMB] because of the discontinuance of his functions following a restructuring of CFMB by its new owners for the purpose of addressing CFMB's financial difficulties.

[4] The Arbitrator noted that Mr. Ortu had been hired on contract in November 2013 and that his principle duties were administrative, including among other things, coordinating communications within the department and performing research on potential program topics.

[5] The Arbitrator noted that Mr. Ortu was provided with a letter from the former Vice President of CFMB, in November 2014, directed to the Ministry of Immigration, Diversity and Inclusion of Quebec [MIDI], which described Mr. Ortu's duties, including establishing relationships with clients, selling advertising space on the radio, and co-hosting a weekly radio program. (I note that the same letter was also directed to the Department of Citizenship and Immigration, Canada [CIC]) .The Arbitrator acknowledged that the duties described by the

former Vice President were disputed by Mr. Luigi Valente, the Station Manager, who testified that he refused to sign a similar letter as it did not accurately describe Mr. Ortu's duties.

[6] The Arbitrator accepted the evidence provided by CFMB which described its economic situation, including five years of declining revenue. CFMB was sold to Dufferin Communications Inc. on April 1, 2015. Dufferin Communications launched a plan for restructuring and reorganization designed to make the station more profitable. The plan included changes to programming. As part of this restructuring, five employees were terminated, including Mr. Ortu, on May 13, 2015.

[7] The Arbitrator accepted the evidence of CFMB that programming schedules were changed, the Italian radio show co-hosted by Mr. Ortu was eliminated, and Mr. Ortu's script writing duties were assigned to another employee with more seniority.

[8] The Arbitrator noted the impact on Mr. Ortu who was a temporary foreign worker with a work permit limited to his employment at CFMB. The Arbitrator found that CFMB did not have a fiduciary obligation to continue to employ Mr. Ortu. The Arbitrator also commented that Mr. Ortu had married a Canadian citizen and could also seek to modify his work permit if he obtained new employment.

[9] The Arbitrator concluded that the evidence demonstrated that the changes made by the new owners of CFMB were justified; the position of Mr. Ortu no longer existed; CFMB had no

concerns about Mr. Ortu's performance; and, the reorganization was done in good faith, based on objective and serious reasons, namely the financial difficulties.

II. The Applicant's Position

[10] Mr. Ortu submits that the Arbitrator erred in finding that his position was eliminated due to the reorganization and for financial reasons.

[11] Mr. Ortu submits that the Arbitrator ignored evidence that showed his duties were broader than those stated by Mr. Valente. He explains that he had assumed more responsibilities, including hosting a daily "drive home" show in Italian, replacing news readers and selling advertising. In particular, he points to two contracts he obtained for the station from a Cruise Line that were valued at \$20,000 and \$23,500 respectively as evidence that he was a sales person and that the contracts had a positive impact on CFMB's revenue.

[12] Mr. Ortu believes that his termination was not the result of a shortage of work or the elimination of his position, but due to difficulties in his relationships with other employees, particularly those in sales. He submits that there was no reason for his dismissal as his duties had expanded and there was no shortage of work for him at CFMB, given his versatility.

[13] Mr. Ortu submits that the Arbitrator erred by failing to consider his sales duties; failing to consider that CFMB hired another employee to replace him as a newsreader days after his termination; incorrectly stating that CFMB had become profitable; and, failing to address the evidence that his termination was not a financial benefit to CFMB.

[14] Mr. Ortu adds that the Arbitrator misstated that he is married, and submits that this is another example of mistakes in the decision which suggest that the Arbitrator did not consider all the evidence before him.

III. The Respondent's Position

[15] The Respondent submits that the Arbitrator did not err. Having accepted the evidence of CFMB that the termination of Mr. Ortu was based on discontinuance of his functions due to the reorganization arising from financial difficulties, the Arbitrator applied paragraph 242(3.1)(a) of the CLC and declined jurisdiction.

[16] The Respondent submits that most of Mr. Ortu's duties were eliminated and the rest were reassigned to another employee.

[17] The Respondent acknowledges that Mr. Ortu independently secured two contracts from personal relationships with prior clients, but argues that this was done on an *ad hoc* basis. The Respondent disputes that Mr. Ortu was a sales person, noting that this aspect of his job description, as set out in the former Vice President's letter of November 2014 to CIC and MIDI was disputed by Mr. Valente in his testimony before the Arbitrator. The Respondent also points to a proposed letter of recommendation which Mr. Ortu sought from Mr. Valente, which does not include reference to his sales function.

[18] The Respondent also disputes that the contracts would offset Mr. Ortu's salary to the extent that CFMB could not justify its reorganization based on its financial situation. The

Respondent adds that if Mr. Ortu had not secured these contracts, the station's sales persons would have secured other contracts, and more than two contracts. Moreover, there is no evidence that the value of the contracts resulted in profits for the Respondent given other related expenses.

[19] The Respondent also submits that Mr. Ortu was not a newsreader; rather he filled-in as a newsreader only when necessary.

[20] The Respondent disputes Mr. Ortu's submission that his termination did not save CFMB any money, noting that the termination of 5 employees followed by the hiring of a few others, primarily part-time, saved at least \$70,000 per year. This evidence was before the Arbitrator.

[21] The Respondent also notes that Ms. Laurignano's testimony before the Arbitrator clearly indicated that as a result of the reorganization CFMB had shown a profit.

[22] The Respondent acknowledges the Arbitrator's error in misstating that Mr. Ortu was married to a Canadian citizen. The Respondent suggests that the Adjudicator inadvertently confused Mr. Ortu's marital status with that of another employee who had been terminated by CFMB following the restructuring, and whose complaint had been heard by the same Arbitrator the previous day. The Respondent submits that the error has no impact on the Arbitrator's decision, which was clearly based on the CLC and the governing jurisprudence.

IV. The Issue

[23] The key issue is whether the Arbitrator erred in finding that he had no jurisdiction to consider the complaint of unjust dismissal pursuant to paragraph 242(3.1)(a) of the CLC.

[24] Determination of this issue requires consideration of whether the Arbitrator ignored or misconstrued the evidence before him.

[25] The relevant provisions of the *Canada Labour Code* are set out in Annex A.

V. The Standard of Review

[26] In *Connelly v Société de communication Atikameckw-Montagnais*, 2013 FC 909 [*Connelly*], Justice de Montigny addressed the standard of review applicable to the issue of whether the adjudicator erred in his interpretation of paragraph 242(3.1)(a) and concluded that it is reasonableness. Justice de Montigny noted that there had been differing views in the earlier jurisprudence, but that the Court of Appeal had clarified this, noting at para 14:

However, I feel that I am bound by the more recent Federal Court of Appeal decision on this same question in *Canadian Imperial Bank of Commerce v Muthiah*, 2011 FCA 276 at para 4, [2011] FCJ No 1426 (QL). On that occasion, the Court clearly stated that the appropriate standard of review for an adjudicator's interpretation of section 242(3.1) is reasonableness.

Justice de Montigny added at para 15:

[15] In this case, we are clearly not dealing with a true question of jurisdiction as the Supreme Court described in the above-noted judgments. It is clear that Parliament conferred on adjudicators the

power to determine whether a complainant was laid off or dismissed. There is no doubt that this is a question of law regarding the interpretation of the home statute from which adjudicators derive their mandate. Moreover, the Code contains a watertight privative clause in section 243 that shows Parliament's intention to put adjudicators' decisions out of reach of the courts except in the clearest cases of abuse or excess of jurisdiction. Accordingly, the first question must also be analyzed by applying the reasonableness standard.

[27] Whether the adjudicator erred in his assessment of the facts is also reviewed on the standard of reasonableness (*Connelly* at para 11).

[28] The reasonableness standard focuses on “the existence of justification, transparency and intelligibility within the decision-making process” and considers “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). The Court will not re-weigh the evidence.

[29] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16 [*Newfoundland Nurses*], the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting that the decision-maker is not required to set out every argument, reason or detail. Nor is the decision-maker required to make an explicit finding on each element that leads to the final conclusion. The reasons are to “be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes” (para 14). In addition, where necessary, courts may “look to the record for the purpose of assessing the reasonableness of the outcome” (para 15).

VI. The Arbitrator's Decision is Reasonable

[30] I acknowledge that Mr. Ortu and the Respondent CFMB have different views about the reason for the termination of Mr. Ortu, and that Mr. Ortu questions his dismissal in light of his contribution to CFMB. However, the issue before the Court is whether the Arbitrator's decision is reasonable on the record of evidence before the Arbitrator.

[31] In *Rogers Cablesystems Ltd v Roe* [2000], [2000] FCJ No 1457, 193 FTR 240 (TD), Justice Dawson addressed whether the arbitrator had properly exercised his jurisdiction under the CLC, noting at paragraphs 31-32 the policy underlying paragraph 242(3.1)(a):

[31] The policy underlying the provision is that an employer is best placed to determine how to organize the employer's business. Paragraph 242(3.1)(a) precludes an adjudicator from interfering with the employer's reactions to changing conditions. In consequence, as noted by Muldoon, J. in *Air Canada v. Davis* (1994), 72 F.T.R. 283 (T.D.), paragraph 242(3.1)(a) recognizes that in some circumstances a blameless employee may be terminated, without that termination amounting to an unjust dismissal.

[32] It follows that, before accepting jurisdiction an adjudicator must determine, correctly, whether any termination was the result of lack of work or the discontinuance of a function, in circumstances where the employer's decision is made in good faith. See, for example, *Flieger v. New Brunswick*, 1993 CanLII 104 (SCC), [1993] 2 S.C.R. 651.

[32] Justice Dawson reviewed the jurisprudence and concluded that based on the arbitrator's finding that the employer had established that its reorganization was *bone fide*, it was entitled to terminate the affected employees due to lack of work, and the arbitrator had no jurisdiction to

consider the merits of Ms. Roe's dismissal (at para 35). Justice Dawson noted the relevant jurisprudence in support of this position, explaining at paragraphs 36-37:

[36] I find this conclusion to be supported by the decision of this Court in *Davis, supra*, in which the Court held the adjudicator to lack jurisdiction where the adjudicator found a shortage of work and the employer retained those staff members who would make the strongest management team, and by another decision of this Court in *Atomic Energy of Canada Ltd. v. Jindal* (1996), 110 F.T.R. 221 (T.D.), aff'd (1998) 229 N.R. 212 (F.C.A.), where Cullen, J. held that where there was a discontinuance of the employee's function the adjudicator had no power to consider the merits of the dismissal.

[37] I also find support for my conclusion in the decision of the Federal Court of Appeal in *Canadian Airlines International Ltd. v. Husain* (1998), 1998 CanLII 7934 (FCA), 161 D.L.R. (4th) 381 (F.C.A.). There, once the Court was satisfied that the decision to discontinue functions was made in good faith, and that there was no clear evidence that the decision to terminate the respondent's employment was not a good faith decision, the Court found the adjudicator to be without jurisdiction to make an award.

[33] In *Canadian Pacific Railway v Clerk*, 2004 FC 715 [CPR], Justice Russel addressed similar findings of an arbitrator in circumstances where the employee was terminated due to changes in the employer's organization. Justice Russel reiterated that business decisions were the purview of the employer, noting at paragraph 57:

[57] It is trite law that an employer has every right to decide how to organize its business and can lay off employees for legitimate business reasons without facing a wrongful dismissal claim. Muldoon J. made the following point in *Moricetown Indian Band v. Morris*, [1996] F.C.J. No. 1268 (T.D.) at paras. 30 and 31:

30. Although the Code places certain restrictions on employers it does not strip employers of the freedom to restructure and reorganize their businesses. Mr. Justice Pratte in *Transport Guilbault Inc. v. Scott*, A-618-85 (May 21, 1986) (F.C.A.), [1986] F.C.J. No. 321, speaking about decisions to cut staff, stated: "Provided [the]

decision is genuine and there is nothing artificial about it, s.61.5(3)(a) [now s.242(3.1)(a) of the Canada Labour Code] cannot be interpreted otherwise without unduly limiting the employer's freedom to plan and organize its business as it wishes." Mr. Justice Pratte was of course referring to restructuring which resulted in "discontinuance of a function". Therefore, in circumstances such as these, provided the employer makes its decision in good faith as the adjudicator found, and for legitimate reasons there is said to be a discontinuance of a function.

[34] In *Kassab v Bell Canada*, 2008 FC 1181 [*Kassab*], Justice Pinarud explained that reliance on subsection 242(3.1) of the CLC requires that the employer demonstrate that there is an economic justification for the layoff or termination and that there is a reasonable explanation for the choice of the employees laid off (at para 24, citing *Thomas v Enoch Cree Nation Band*, 2004 FCA 2 at para 5). Once an employer establishes this, it would be up to the complainant to then persuade the arbitrator that the termination was a "sham", *i.e.*, for other reasons (at para 25, citing *Flieger v New Brunswick*, [1993] 2 SCR 651 (SCC)).

[35] In *Connelly*, Justice de Montigny referred to the principles from *Kassab* and the jurisprudence relied on therein, summarizing at paragraph 18:

[18] In other words, the protection against unjust dismissal will not come into play if the loss of employment results from economic circumstances (lack of work or the discontinuance of a function). Nonetheless, the employer has the burden of establishing that these circumstances motivated its decision and that there is a reasonable explanation for the choice of the employee who was dismissed.

[36] The Arbitrator accepted the testimony of Mr. Valente and Ms. Laurignano, on behalf of the Respondent, which indicated (i) that CFMB had declining revenues, which was also supported by documentary evidence; (ii) that a reorganization was implemented, including the termination of five employees to improve the financial situation; (iii) that Mr. Ortu's duties were eliminated or reassigned, specifically, that his assistance in Italian was not needed by Mr. Valente, programming was reduced, the "drive home" show was eliminated, and his script writing duties were reassigned to an employee with more seniority; and, (iv) that as a result of the reorganization, CFMB was more profitable.

[37] The Arbitrator acknowledged that there was a disagreement regarding Mr. Ortu's duties, but nonetheless was satisfied that his duties had been reassigned or eliminated, resulting in the elimination of his position, and that this was due to the reorganization. In other words, the Arbitrator found that CFMB had met its burden of establishing that the circumstances justified its decision to terminate Mr. Ortu's employment.

[38] Mr. Ortu now submits that the Arbitrator ignored the evidence of the contracts he obtained which net more revenue than his annual salary, and which he submits demonstrates that his termination was not for financial reasons. The fact that the Arbitrator did not refer to the contracts does not establish that he ignored this evidence. Moreover, the Arbitrator was not tasked with extensively reviewing CFMB's financial records, but with determining if CFMB had established that Mr. Ortu's termination was the result of lack of work or discontinuance of a function. As noted in *CPR*, an employer has the right to decide how to organize its business.

[39] In addition, as the Respondent notes, the two contracts secured by Mr. Ortu do not necessarily result in a profit for CFMB and other sales persons would have continued to seek other contracts as they were responsible to do so.

[40] With respect to Mr. Ortu's submission that the Arbitrator failed to consider that CFMB hired another employee to replace him as a newsreader days after his termination, the evidence provided by Mr. Valente and Ms. Laurignano on behalf of CFMB, which the Arbitrator accepted, showed that a part-time newsreader was hired at a reduced cost and that Mr. Ortu had only been a replacement newsreader; this was not part of his duties.

[41] The Arbitrator did not err in stating that CFMB had become profitable as a result of the reorganization as that evidence had been provided in Ms. Laurignano's oral testimony.

[42] As noted above, a decision will be found to be reasonable where it is justified, transparent and intelligible, and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". The Arbitrator's decision, based on the evidence before him, which the Court will not re-weigh, falls squarely within an acceptable outcome. The Arbitrator reasonably found that the termination of Mr. Ortu was based on CFMB's reorganization to address its financial situation and that Mr. Ortu's primary functions were discontinued; some were eliminated and others were divided among other employees. As a result, and in accordance with the jurisprudence, the Arbitrator lacked jurisdiction to consider Mr. Ortu's complaint.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no order for costs.

"Catherine M. Kane"

Judge

ANNEX ARelevant Provisions of the *Canada Labour Code*

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).	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.
(2) An adjudicator to whom a complaint has been referred under subsection (1)	(2) Pour l'examen du cas dont il est saisi, l'arbitre :
(a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;	a) dispose du délai fixé par règlement du gouverneur en conseil;
(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	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) 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).	c) est investi des pouvoirs conférés au Conseil canadien des relations industrielles par les alinéas 16a), b) et c).
(3) Subject to subsection (3.1), an adjudicator to whom a	(3) Sous réserve du paragraphe (3.1), l'arbitre :

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.

(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 other Act of Parliament.

(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

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;

(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.

(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;

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.

243 (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.

[Emphasis added]

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.

243 (1) Les ordonnances de l'arbitre désigné en vertu du paragraphe 242(1) sont définitives et non susceptibles de recours judiciaires.

(2) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre exercée dans le cadre de l'article 242.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1213-16

STYLE OF CAUSE: CLAUDIO ORTU v CFMB LIMITED

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: JUNE 27, 2017

JUDGMENT AND REASONS: KANE J.

DATED: JULY 7, 2017

APPEARANCES:

Mr. Claudio Ortu

FOR THE APPLICANT

Mr. Thang Nguyen

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Evanov Radio Group
In-House Legal Counsel
Montréal, Quebec

FOR THE APPLICANT

FOR THE RESPONDENT