Federal Court  Cour fédérale

Date: 20171108

Docket: T-1899-16

Citation: 2017 FC 1016

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 8, 2017

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

CONSEIL DES INNUS DE PESSAMIT

Applicant

and

GITHANE BELLEFLEUR

Respondent

JUDGMENT AND REASONS

Nature of the case

[1] This is an application for judicial review of a decision made by Bruno Leclerc (the adjudicator) on October 6, 2016, allowing the respondent's complaint for unjust dismissal against her employer, the Conseil des Innus Pessamit (the applicant).

[2] For the reasons that follow, I am of the opinion that the adjudicator did not err, and that this application must be dismissed.

Facts

[3] The respondent was employed by the applicant as Director of Social Services until June 19, 2015, when she was dismissed. The applicant's primary mandate is to manage and promote the economic, political, and social affairs of the First Nation on its ancestral territory. As director of one of the sectoral branches, under the responsibility of Jean-Claude Vollant (the Director General), the respondent was in charge of the social aspect, focusing on protecting the community's youth and elderly.

[4] In September 2012, the First Nation's fiscal deficit reached alarming proportions, which forced it to implement an administrative and financial reform (the reform) to stabilize and optimize its financial and organizational resources. The reform arose from an administrative resolution by the applicant that was adopted on February 3, 2015. The reform included merging two sectoral branches—Health Services, for which Chantal Bacon was responsible, and Social Services, which was under the responsibility of the respondent. Under the merger, the new sectoral branch would be passed on to a third party.

[5] On June 2, 2015, the respondent was verbally informed by the Director General that she was being dismissed from her employment. She received a letter on June 15, 2015, confirming that she would be relieved of her duties as of June 19, 2015, and that she would be assigned new duties and responsibilities on August 3, 2015. The letter dated June 15, 2015, also stated that this

change was necessary given the [TRANSLATION] “general state of Social Services and findings of the organizational psychologist following an evaluation of the sector” and “the fact that the organization is undergoing a process of reform.”

[6] Ms. Bacon was demoted to the position of Health Advisor, but only in January 2016. During the period from June 19, 2015 to January 2016, Anne St-Onge, the assistant at the branch, took over Social Services, while Ms. Bacon continued managing Health Services.

[7] On August 4, 2015, the respondent learned that she was assigned to a position as social policy advisor. After reviewing the duties outlined for this new position, the respondent realized that she did not have the necessary skills. She also learned that the salary associated with her new position was much lower than her former salary.

[8] Some time after, the respondent went to see her doctor because she was experiencing emotional symptoms. She subsequently received a doctor’s note for work stoppage until August 23, 2015, which was then extended to October 26, 2015.

[9] She filed a complaint for unjust dismissal on September 11, 2015. In a letter dated September 22, 2015, a Government of Canada inspector confirmed to the parties that the letter from June 15, 2015, met the requirements of the *Canada Labour Code*, RSC 1985, c. L-2 [the Code], which require a written statement of the reasons for dismissal.

[10] On October 19, 2015, the respondent submitted a letter to the applicant's Branch stating that she [TRANSLATION] "was permanently leaving her position with the Conseil des Innus de Pessamit." The parties did not agree on the meaning of said letter; this disagreement is discussed below.

[11] In addition to the facts described above, the applicant referred to a conflict between Social Services and Health Services, as well as between their respective directors, that allegedly began in May 2015 and required the hiring of an organizational psychologist. This situation resulted in a bundle of correspondence addressed by or to the Director General, the respondent, and/or Ms. Bacon. However, the adjudicator excluded this correspondence from the evidence; the relevance of this correspondence is discussed below.

III. Decision

[12] The hearing of the complaint took place on June 28 and 29, 2016, before the adjudicator, during which only the Director General and the respondent testified. It should be noted that there is no recording or transcript of this hearing, which has prevented the parties from supporting various allegations with respect to these proceedings.

[13] The adjudicator allowed the respondent's complaint for unjust dismissal and ordered that she be reinstated. He found that it was a case of constructive dismissal and that the dismissal was unjust within the meaning of sections 240 to 246 of the Code.

[14] The adjudicator found that the reasons provided by the applicant in its letter dated June 15, 2015, did not constitute sufficient cause to warrant the dismissal. The employer failed to prove the three alleged reasons for dismissal, namely (i) the general state of Social Services; (ii) the organizational psychologist's findings; and (iii) the organization's reform process. The adjudicator was of the opinion that there was no evidence submitted in support of the first factor regarding the overall state of Social Services. The adjudicator also noted that the applicant had refused to introduce the findings of the organizational psychologist in evidence. Finally, the adjudicator found that the changes related to the last reason remained undefined at the time and were not implemented in 2015. The adjudicator therefore found that there was an arbitrary aspect to the employer's decision.

[15] As noted above, the adjudicator excluded from the evidence the correspondence regarding the conflict between the Social Services and Health Services sectors, as well as their respective directors. Although the applicant submits that this correspondence establishes the general state of Social Services (one of the alleged reasons in the letter dated June 15, 2015), the adjudicator found that it was irrelevant because he was not satisfied that this conflictual situation was covered by the expression [TRANSLATION] "the general state of Social Services." For the same reason, the adjudicator prohibited any question on the conflictual situation or the excluded correspondence.

Issues

[16] The following issues must be considered in this application for judicial review:

1. Did the adjudicator demonstrate bias and procedural unfairness against the applicant?

2. Did the adjudicator consider whether he had jurisdiction over the abolition of the respondent's position?
3. Was the adjudicator correct in excluding certain documents?
4. Did the adjudicator err by not considering the respondent's resignation and the facts subsequent to the letter dated June 15, 2015?
5. Did the adjudicator err by interfering with the reform process?

[17] Before considering these issues, the applicable standard of review for each must be examined.

[18] The respondent submitted other issues, mainly related to the evidence submitted by the applicant that could have been put before the adjudicator. The respondent submits that this evidence is ineligible. However, since I am dismissing this application, it is not necessary for me to consider the additional issues raised by the respondent.

Analysis

A. *Standard of review*

[19] The arbitral decision subject to this judicial review raises two competing aspects (different in nature), thus triggering the segmentation of issues for analysis: *Canadian Broadcasting Corp. v SODRAC 2003 Inc*., 2015 SCC 57 at para 42. The reasonableness standard of review generally applies to findings of fact and law by a specialized tribunal: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51–58.

[20] However, the issues of procedural fairness and bias are reviewable on the correctness standard: *Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 43. Despite the respondent's argument to the contrary, the presence of a privative clause is inconsequential in this respect: Donald J M Brown and John M Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), Toronto, Ontario, Carswell, 2013, at para 14:4211.

[21] In applying the reasonableness standard, I must exercise restraint and deference with respect to the adjudicator's decision and recognize his expertise in the area. I should not simply substitute my opinion for his. This instruction is even more important in a case as this where (i) the adjudicator saw and heard the witnesses in person and (ii) there is no recording or transcription of the hearing.

B. *Bias and procedural unfairness*

[22] The applicant submits that [TRANSLATION] "the adjudicator was biased against the applicant due to its status as an Aboriginal council, resulting in partiality in his decision at the hearing but also in his findings." The applicant alleged several facts to support this argument:

1. In three other cases involving the applicant in which the adjudicator made a decision (between 2006 and 2016), he never ruled in favour of the applicant;
2. The adjudicator required all the documents relating to the reform, without the respondent requesting them;
3. The adjudicator intervened and interrupted the applicant's counsel several times during the hearing;

4. The adjudicator excluded several documents from the evidence, including various email correspondence and medical documents submitted by the respondent, and dismissed various issues raised by the applicant; and
5. The adjudicator improperly assessed and weighed the respondent's letter of resignation (the applicant submits that the respondent's resignation is evidence of her inability to manage).

[23] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court: "What would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly." (See *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 20, citing *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at p. 394.)

[24] Allegations of bias are extremely serious and, in the absence of any evidence to support them, should not be raised: *Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 105 at para 19.

[25] With respect to the three other cases involving the applicant, this argument is clearly insufficient to establish a reasonable apprehension of bias. I would first note that only one of the decisions in question was challenged. Furthermore, any apprehension of bias that may have existed in relation to these decisions existed prior to the hearing before the adjudicator in this

case. The applicant's failure to raise the issue of bias before the adjudicator indicates that it had no such apprehension at the time. Nothing has changed since.

[26] With respect to the adjudicator's requirement that certain documents be filed even though the respondent did not request them, this argument is also insufficient to establish a reasonable apprehension of bias. Adjudicators are entitled to determine their procedure (see paragraph 242(2)(*b*) of the Code), and his interest in the documents relating to the reform is not surprising. There seems to be no doubt that the documents regarding the reform were relevant.

[27] With respect to the adjudicator's interventions and interruptions that were alleged by the applicant, I note that Ms. St-Onge's and the Director General's affidavits refer to them. However, I note that that the respondent's affidavit challenges these allegations. I am not satisfied by the applicant's argument. This is an example of how difficult it is for the parties to support their arguments when there is no recording or transcription of the hearing before the adjudicator.

[28] With respect to the exclusion of certain documents and issues, it is not necessary for me to deal with this issue in the context of allegations of bias. It is sufficient for me to address this issue below in the context of analyzing the reasonableness of the adjudicator's decision. If the applicant fails to establish that excluding the documents and issues was reasonable, I am satisfied that it would no longer be able to establish apprehension of bias.

[29] My finding with respect to the allegation that the adjudicator suggested several facts and issues is the same as my finding regarding the alleged interventions and interruptions: given that the parties disagree on the conduct of the hearing before the adjudicator and that there is no recording or transcript, I am not satisfied by the applicant's argument in this respect.

[30] In short, I do not see any basis for a reasonable apprehension of bias, and especially given the applicant's status as an Aboriginal council.

[31] In this section, I have considered each of the applicant's arguments individually. However, I confirm that I arrive at the same conclusion when I consider these arguments together.

C. *Abolition of the respondent's position and the adjudicator's jurisdiction.*

[32] The applicant submits that the adjudicator erred by failing to recognize that the respondent was relieved of her duties as Director of Social Services in the context of the reform intended to merge the Social Services and Health Services sectors.

[33] I do not agree that the adjudicator erred. He weighed the applicant's evidence in this respect, including the fact that the purpose of the reform was to merge the two sectors gradually. However, the adjudicator found that the delay between the respondent's dismissal in June 2015 and Ms. Bacon's demotion in January 2016, in the context of the reform, was sufficient to contradict the applicant's allegation that the respondent's dismissal was part of the reform. I am

not satisfied that this finding is unreasonable or made without regard for all the relevant evidence.

[34] The applicant submits that the adjudicator lacked jurisdiction in this case, citing paragraph 242(3.1)(a) of the *Code*: "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."

[35] Since I am satisfied that the adjudicator's finding in this respect was reasonable, it follows that the adjudicator was not satisfied that the reason for the respondent's dismissal was the abolition of her position. Thus, paragraph 242(3.1)(a) of the *Code* does not apply.

D. *Exclusion of certain documents*

[36] The applicant submits that certain documents were excluded from the evidence without justification. The documents in question fall into two categories:

1. The correspondence sent to or received by the Director General, the respondent, and/or Ms. Bacon regarding the conflictual situation between Social Services and Health Services, and their respective directors, between May 2014 and May 2015.
2. The respondent's documents and psychological assessments.

[37] The applicant submits that the correspondence regarding the conflictual situation was relevant to the general state of Social Services referred to in the letter dated June 15, 2015, advising the respondent that she was relieved of her duties.

[38] As noted in paragraph [15] above, the adjudicator found that this correspondence was irrelevant once the conflictual situation was not included in the reasons that allegedly resulted in the respondent's dismissal.

[39] In my opinion, the adjudicator was correct in noting that the reasons given for demoting the respondent did not include the conflictual situation. It is reasonable to conclude that the reference to the general state of Social Services in the letter dated June 15, 2015, was not sufficiently precise.

[40] Furthermore, the applicant knew (according to the letter dated September 22, 2015, drafted by a Government of Canada inspector) that the letter dated June 15, 2015, could be construed as a complete statement of the reasons for dismissal. If the applicant wished to allege additional reasons for relieving the respondent from her duties as Director of Social Services, it should have noted them in writing. The applicant apologized for this omission at the hearing. The applicant noted that after receiving the letter of resignation on October 19, 2015, it believed that the case was closed and that there was no longer any need to clarify the reasons for dismissal. I do not accept this argument. Even if the applicant believed in October 2015 that the case was closed, it became clear, by December 2015, that this was not the case when counsel for the respondent indicated that it would not be possible to reach a settlement in the case and that an adjudicator had to be appointed to hear the complaint.

[41] Since the conflictual situation was not one of the reasons for the respondent's dismissal, it was reasonable to exclude the correspondence establishing this conflictual situation. The

reasoning is not compromised by the fact that the documents in question were filed by the respondent.

[42] The same reasoning can justify the exclusion of the respondent's documents and psychological assessments. They are not relevant to the reasons outlined in the letter dated June 15, 2015; however, it is unclear whether these documents were excluded. As noted by the respondent, in his decision, the adjudicator recognized the respondent's psychological state after becoming aware of the duties associated with her new position.

E. *The respondent's resignation and the subsequent facts*

[43] The applicant submits that the adjudicator should not preclude evidence of the respondent's free and voluntary resignation and the events after June 15, 2015 (the date of the respondent's dismissal).

[44] First, the adjudicator did not systematically ignore the facts subsequent to June 15, 2015. He considered the respondent's letter of resignation dated October 19, 2015, as well as the circumstances surrounding it. He considered its lack of clarity and the respondent's explanation, during her testimony, that she did not consult her counsel before sending the letter and that she simply wanted to indicate that she was not accepting her new position. The applicant did not provide any arguments or evidence to the contrary before the adjudicator.

[45] Before me, the applicant submits that there are several indications in the letter dated October 19, 2015, that this was the respondent's letter of resignation as an employee of the

applicant: (i) the respondent refers to the position that she held and not to the new position created by the applicant; (ii) the respondent indicated that she was permanently leaving her job and requested her severance pay; and (iii) there was no other reason to submit this letter.

[46] Despite the absence of an explicit finding in this regard in his decision, it is clear that the adjudicator accepted the respondent's testimony regarding the meaning of the letter. In my opinion, this finding was reasonable. The purpose of sending the letter dated October 19, 2015, could well have been to simply notify the applicant that she was not returning to work on October 26, 2015, as provided for in her medical certificate.

[47] The applicant submits that the evidence of the subsequent facts was intended to establish, among other things, the phases of the reform. I am not satisfied that the adjudicator ignored or excluded the evidence regarding the reform. In fact, this allegation seems to contradict the allegation that the adjudicator required all the documents relating to the reform (see paragraph [22] above). As noted, the adjudicator weighed all the evidence regarding the reform and found that it was not related to the reform.

[48] In my opinion, it was reasonable to find that no fact subsequent to June 15, 2015, would have changed the adjudicator's finding that the respondent was reportedly subject to an unfair constructive dismissal.

F. *Interference in the reform process*

[49] Given the adjudicator's reasonable finding that the respondent's dismissal was not part of the reform, it follows that the adjudicator did not interfere with the reform process.

VI. Conclusion

[50] I do not find that the adjudicator erred. He accepted the letter dated June 15, 2015, as an indication of reasons for dismissal. He analyzed each of the reasons outlined in this letter: (i) the general state of Social Services; (ii) the findings of the organizational psychologist; (iii) the organization's reform process. He found that the evidence did not support any of these reasons. There was no evidence to support the first two reasons. With respect to the reform, he found that evidence showed that the dismissal was unrelated to it. In addition, the adjudicator excluded the evidence regarding the conflicts between the sectors and their respective directors because these conflicts were not among the reasons for dismissal and, therefore, were irrelevant. In my view, all these findings are reasonable.

[51] At the end of his decision, the adjudicator found that the new position offered to the respondent amounted to a demotion, and that this constituted a constructive and unfair dismissal. This finding is also reasonable.

[52] I find that this application for judicial review must be dismissed with costs.

[53] The respondent asked that the costs be calculated on a solicitor-client basis. To support this request, she submitted that one of the applicant's arguments was frivolous. Specifically, the applicant explained the reason that, during the hearing before the adjudicator, it did not ask the

Director General to introduce the correspondence that showed a conflictual situation between Social Services and Health Services, as well as their respective directors. It claimed that the Director General had a visual impairment and that his mother tongue was Innu. In my view, this argument by the applicant was not important or central and should not result in an increase in costs. This may be another example showing the difficulties for the parties to support their arguments in the absence of a recording or transcription of the hearing before the adjudicator.

[54] The respondent could have also based her request for higher costs on the applicant's unfounded allegation that the adjudicator was biased against it. Although there appears to be no indication that any bias existed due to the applicant's status as an Aboriginal council (as the applicant claims), I am of the opinion that the issue of bias was not frivolous. The standard of review on the issue of bias, as well as on the exclusion of evidence and related issues, is correctness. Thus, the burden of proof for the applicant on these issues was much less than for the others.

JUDGMENT in T-1899-16

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

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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