Date: 20080124

Docket: T-1177-07

Citation: 2008 FC 95

Ottawa, Ontario, the 24th day of January 2008

Present: the Honourable Mr. Justice de Montigny

BETWEEN:

SANDRA SIGOUIN

Applicant

and

NATIONAL BANK OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision by an adjudicator on May 30, 2007, dismissing the applicant's complaint and upholding the dismissal by the respondent. I would allow this application for judicial review for the reasons that follow.

FACTS

[2] The applicant had worked for the respondent since June 30, 1986: she held several positions in various departments. On May 2, 2005, the applicant applied for the position of administrative officer, Special Loans. Despite the fact that she did not have the academic training suggested for the position, she got it and began her new duties on July 18, 2005.

[3] In the next two weeks the applicant worked under the supervision of Christine Dusseault. However, the applicant maintained that she could not be properly trained during this period on account of the large number of files that had accumulated following Ms. Dusseault's vacation. At the end of this period the applicant retained the right to consult Ms. Dusseault when necessary.

[4] The head of the department, Chantal Evoy, quickly noticed the errors of inattention made by the applicant. When informed of this, the applicant promised to be careful.

[5] On November 14, 2005, the applicant made a self-appraisal in which she acknowledged certain of her shortcomings. She met with Ms. Evoy to complete this appraisal on December 7, 2005. A plan of action for improved performance was prepared by Ms. Evoy and accepted by the applicant on December 14, 2005.

[6] However, the applicant was unable to achieve the objectives set: Ms. Evoy accordingly contacted the human resources office to initiate the procedure required for cases of incompetence.

On January 23, 2006, a letter was sent to the applicant telling her that she would be dismissed if the objectives set were not met before February 15, 2006.

[7] On January 27, 2006, the applicant failed to renew a letter of credit, which caused the respondent to lose US$830,000. In her testimony before the adjudicator, she admitted that this was her mistake: she had not seen the date despite the schedule sent to her daily. Consequently, the applicant received a letter of dismissal on January 31, 2006.

[8] On June 9, 2006, the applicant filed a complaint for unjust dismissal with the Department of Human Resources Development Canada pursuant to section 240 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code). This complaint was dismissed by an adjudicator on May 30, 2007.

IMPUGNED DECISION

[9] The applicant maintained that her dismissal was a disciplinary action which resulted from her failure to renew a letter of credit, and not an administrative action resulting from her incompetence. She asked to be reinstated or, failing that, to be given a compensatory payment equivalent to one year's salary.

[10] For its part, the respondent argued that this was a purely administrative action resulting from the many errors of inattention made by the applicant. It admitted having set the date of February 15, 2006 to terminate the employment but considered that it was justified in doing so immediately after

the applicant's serious omission which caused it to lose US$830,000. The respondent mentioned that it had done everything in its power to help the applicant to overcome her shortcomings.

[11] The adjudicator concluded that the dismissal was indeed an administrative action taken on account of the incompetence shown by the applicant in the performance of her duties.

[12] He noted that there was no evidence to indicate that the applicant had made this type of error previously or that her problems of inattention resulted from the state of her health. In fact, there was nothing in the evidence to explain the problems encountered by the applicant. The adjudicator also mentioned that the applicant's supervisor knew three months after the applicant began work in this new position that she would be unable to perform her duties properly. However, the adjudicator said that the applicant was not clearly informed that she should be transferred to another department, and failing that she would be dismissed.

[13] The adjudicator went on to consider the question of whether the respondent had complied with the requirements for getting rid of an incompetent employee. The adjudicator mentioned that the respondent had to tell the applicant about the shortcomings in her work, give her proper support to correct those shortcomings and achieve the objectives sought, allow her a reasonable time in which to do this and inform her of the risk of dismissal which she ran if there was no improvement by her.

[14] The adjudicator considered that this was a valid dismissal since the respondent had complied with all the requirements. He mentioned that the applicant knew what her employer expected of her. Not only was she told several times, she was also notified in writing in her appraisal of December 7, 2005. The adjudicator further noted that a plan of action had been established to help the applicant meet her objectives. He considered she had received adequate support: she worked for two weeks under Ms. Dusseault's supervision; she could obtain assistance from her fellow workers; and she had to have all the documents she prepared checked. The adjudicator mentioned that Ms. Evoy was justified in denying the applicant's request for a training course since at that time it had already been established that she could not meet the conditions of employment. Finally, the adjudicator said that the applicant was informed by the letter of January 23, 2006 of the dismissal that might result if she did not meet her objectives by February 15, 2006.

ISSUES

[15] The issue is whether in ruling on the fairness of the dismissal the adjudicator erred in concluding that this was a valid dismissal for incompetence, since the respondent had complied with the requirements for getting rid of its employee. In particular, the Court must examine whether the adjudicator erred in failing to consider whether the employer had made every reasonable effort to find the applicant alternative employment within its operation.

ANALYSIS

(1) What is applicable standard of review?

[16] The respondent submitted two cases to indicate that the adjudicator's decision should be treated by this Court with great deference. It argued that in alleging that the adjudicator had a duty to analyse the efforts made by the employer to find her alternative employment, the applicant was in fact seeking a review of the remedy ordered by the adjudicator. Accordingly, the respondent argued that the courts have consistently held that the less stringent standard of review should be applied, namely that of the patently unreasonable decision, and the adjudicator's decision reviewed only if it is "clearly irrational, that is to say evidently not in accordance with reason" (*Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 46).

[17] It is true that the Court must exercise great restraint when reviewing points of fact and inference. Not only does the Code contain a very strict privative clause and broad powers for adjudicators, it also gives such adjudicators with special expertise the responsibility of quickly and effectively resolving disputes resulting from unjust dismissals.

[18] However, the judgments cited by the respondent to support application of this standard of review are not applicable to the case at bar on account of the nature of the question raised. The question in the case at bar is not so much whether the adjudicator misjudged the facts leading him to conclude that the dismissal was for incompetence (and so presumably justified), but rather to determine whether he applied the correct established tests in deciding that the dismissal was justified. This is a mixed question of fact and law. In *Bitton v. HSBC Bank Canada*, 2006 FC 1347, I had to consider the standard of review applicable to such a question:

> [44] As for the appropriate standard of review to be applied in this case, it should be noted that the error committed by the adjudicator involves a

> question of mixed law and fact. I am not calling into question his findings of fact drawn from the evidence submitted by the parties. As I pointed out above, these findings are entitled to considerable deference, which the Court must respect. At no time were the adjudicator's findings of fact clearly irrational. For example, the companies' complaints brought to the attention of the employer with respect to Mr. Bitton's unsatisfactory work and the verbal reprimands he received from his supervisors are not called into question here.
>
> [45] However, when the adjudicator bypasses the last stage of the test set out by the Supreme Court in *Toronto Board of Education* and jumps to the conclusion that the dismissal was justified purely on the basis of the fault committed, he committed an error in applying a legal rule to the facts. Because we are dealing with a question of mixed law and fact, the degree of deference owed to the resulting findings is necessarily lesser and entitles this Court to intervene to the extent that the adjudicator's decision "is not supported by any reasons that can stand up to a somewhat probing examination" (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paragraph 56).

[19] Further, the hearing in this Court was not in any way concerned with the facts, which were not disputed by the parties, but with the established tests that should be considered by an adjudicator in analysing the fairness of a dismissal. Accordingly, this is clearly a question of the application to facts of tests developed by the courts, which constitutes a mixed question of fact and law requiring application of the standard of reasonableness *simpliciter*.

(2) Did adjudicator err in failing to consider whether employer had made every reasonable effort to find applicant alternative employment in its operation?

[20] The Code provides the following regarding an adjudicator's power in matters of dismissal:

242. (3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall	**242.** (3) Sous réserve du paragraphe (3.1), l'arbitre :
(*a*) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and	*a*) décide si le congédiement était injuste;
(*b*) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.	*b*) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.

[21] The Code provides no definition of what an unjust dismissal is: by not limiting the scope of the analysis, Parliament thus intended to give the decision-maker greater flexibility. Consequently, in his assessment of the circumstances of each case and his search for a solution that will be fair to everyone, the adjudicator has a free hand. He has great latitude in considering the particular facts and mitigating circumstances in his analysis. Each case thus stands on its own merits and the outcome will depend essentially on the facts.

[22] In his decision, the adjudicator mentioned that the applicant had been the subject of an administrative dismissal for incompetence, and this was not disputed by the parties. At the hearing, counsel for the respondent discussed the differences existing between an administrative dismissal and a disciplinary dismissal and emphasized the fact that in the case of an administrative dismissal an adjudicator does not have the power to substitute his own penalty for that of the employer. Consequently, he contended that the adjudicator did not have the power to order the respondent to

find the applicant alternative employment, since the employer had the prerogative of choosing the appropriate penalty.

[23] The Code makes no distinction between an administrative and a disciplinary dismissal: the adjudicator's only task is to determine whether the employee was unfairly dismissed. However, a dismissal may be described as administrative or non-disciplinary when incompetence or problems of performance are at the root of the dismissal. Without any deliberate act being committed by the employee, there is nevertheless an inability to carry out the duties associated with the employment with a minimum level of competence. A disciplinary dismissal clearly has a punitive connotation, since it is intended to deal severely with negligent acts or misconduct by an employee.

[24] The chief difference between these two types of dismissal appears to lie in the relative severity of the applicable penalties. In the case of an administrative dismissal, an employer may dismiss the employee without determining whether in the circumstances some other penalty would be more appropriate. However, before coming to this last resort penalty the employer must go through certain stages in order to establish its good faith and its willingness to work with the employee and assist him or her to improve performance.

[25] Adjudicators analysing the fairness of a dismissal under the Code have developed certain procedural requirements that must be observed by an employer before it can get rid of an incompetent employee. These criteria were summarized as follows in the adjudicator's decision in *Edith Cavell Private Hospital and Hospital Employees' Union Loc. 180* (1982), 6 L.A.C. (3d) 229:

(a) The employer must define the level of job performance required;

(b) The employer must establish that the standard expected was communicated to the employee;

(c) The employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard;

(d) The employer must establish an inability on the part of the employee to meet the requisite standard to an extent that renders her incapable of performing the job and that reasonable efforts were made to find alternate employment within the competence of the employee;

(e) The employer must disclose that reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal.

[26] These procedural requirements framed by Adjudicator Hope were subsequently followed, although the duty on the employer to find an incompetent employee alternative employment in its operation is not universally accepted by adjudicators.

[27] I do not think these criteria are exhaustive or that they are binding on the courts in giving effect to section 242 of the Code. Such an approach would be contrary to the broad latitude given to an adjudicator by Parliament. The only requirement set by the Code continues to be the fairness of the dismissal, and consequently the criteria to be considered will depend on the particular facts of each case.

[28] At the conclusion of his assessment of the evidence in the record, the adjudicator noted that no objection had ever been made against the applicant in her 20 years of service leading up to her promotion. Six months after obtaining managerial employment despite her lack of qualifications, she was dismissed for incompetence. The adjudicator noted that her superior Ms. Evoy knew that the applicant could not perform her duties correctly barely three months after she began carrying out her new duties, but this was not clearly communicated to her.

[29] The adjudicator concluded that the procedure used by the respondent in getting rid of the applicant was fair. He considered that the applicant was aware of her superiors' expectations and that she was told of her shortcomings both orally and in writing. The adjudicator also approved the assistance given to the applicant by her employer to allow her to make corrections and attain her objectives. He noted that a deadline was set for meeting the objectives in the letter of January 23, 2006, and that the applicant knew that if this was not achieved she was at risk of dismissal. Accordingly, the adjudicator concluded that the dismissal was for incompetence and that the respondent had complied with the requirements it had to meet in dismissing the applicant.

[30] At no time, however, did the adjudicator analyse the dismissal in light of the applicant's long history of employment with the Bank and her hitherto impeccable record. While I am prepared to concede that the adjudicator does not have to systematically consider the employer's efforts to reassign the employee to some other employment, I feel that not doing so in the circumstances at bar is an error requiring this Court's intervention. It is worth considering what message would be

given to employees if this were not so. An employer could then allow an employee who did not have the necessary qualifications to attain promotion and subsequently dismiss him or her. In these circumstances, it would be understandable that few employees would take the risk of applying for a promotion in the certain knowledge that their dismissal could follow if they were not up to the situation. One might also wonder whether in these circumstances the employer was not in part responsible for the applicant's difficulties and did not make an error of judgment by giving her a promotion for which she did not have the necessary qualifications.

[31] This Court is not required to rule on the fairness of the dismissal: that analysis concerns only the adjudicator's jurisdiction. However, I feel that the adjudicator had at least a duty to consider the fact that the applicant had been employed by the Bank for some 20 years without any complaint ever being made against her. I find it hard to conclude that a decision which did not take that into account was reasonable.

[32] What is more, the adjudicator never expressly mentioned that he considered the applicant's dismissal to be fair. I feel it is insufficient simply to say that this was an administrative dismissal for incompetence, nothing more. *Bell Canada v. Hallé* (1989), 29 C.C.E.L. 213 (at 217-218), involved a dismissal for unsatisfactory work of an employee who had worked for the employer for seven years. The Federal Court of Appeal *per* Pratte J.A. set out the criteria for analysis of whether a dismissal is fair. The adjudicator must consider the nature, sufficiency and validity of the reasons for dismissal. Accordingly, the employer must have reasonable grounds for complaining of the applicant's performance that justified dismissal. If such grounds exist, the adjudicator should then

determine whether the dismissal procedure followed by the respondent was fair. Although he considered that the procedure followed by the respondent was fair, the adjudicator failed to rule on the reasons given for dismissing the applicant.

[33] Accordingly, I would allow this application for judicial review and would refer the matter back to the same adjudicator. However, the evidence appears to be contradictory as to whether the applicant wished to obtain another position with the Bank. While the respondent maintained that offers had been made and refused, the applicant submitted that at no time had she been offered other employment. This is a point that should be clarified by the adjudicator in a re-hearing: he will then determine whether he has sufficient evidence on the point or whether the parties should be allowed to submit further evidence.

ORDER

THE COURT ORDERS that the application for judicial review be allowed and the matter referred back to the same adjudicator for re-hearing.

"Yves de Montigny"
Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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