Date: 20080604

Docket: T-440-07

Citation: 2008 FC 699

Ottawa, Ontario, June 4, 2008

PRESENT: The Honourable Mr. Justice Hugessen

BETWEEN:

JOHANNES CORNELIS STURKENBOOM

Applicant

and

THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is an appeal by way of motion in writing pursuant to Rule 369 of the *Federal Courts Rules* appealing a decision refusing in part a motion by the applicant seeking to add certain paragraphs to his application for judicial review and to convert it into an action.

II. Background

[2] The applicant, who is self-represented, is a former employee of the respondent. He commenced a period of sick leave in July 2002, as a result of certain unspecified mental health issues. In March and May 2003, the respondent asked the applicant to attend a medical assessment, but the applicant did not attend his scheduled appointments. In August 2003, the applicant was institutionalized after having been found Not Criminally Responsible on a charge of criminal harassment. Sun Life, the respondent's Long-Term Disability (LTD) carrier, agreed to provide the applicant with LTD benefits without the need for a formal medical assessment.

[3] However, in January 2005, after the applicant had been released from the institution, Sun Life requested a formal medical assessment in order for the applicant to continue receiving benefits. When the applicant refused, Sun Life terminated his LTD benefits, and the respondent changed the applicant's status to leave without pay. The respondent requested again that the applicant attend a medical assessment, and advised the applicant that failure to attend would result in the termination of his employment. The applicant refused, and the respondent terminated the applicant's employment, effective March 26, 2005.

[4] The applicant grieved his termination with the assistance of his union and the matter was referred to the adjudicator, who allowed the grievance on August 23, 2006, concluding that the respondent was not entitled to terminate the applicant's employment as a disciplinary sanction for his refusal to attend a medical examination. The adjudicator ordered that the applicant be reinstated on leave without pay, on the condition that he undergoes a medical assessment to determine his

fitness to work. However, the adjudicator declined to address the human rights issues that had been raised, which related to the respondent's duty to accommodate the applicant. The adjudicator also retained jurisdiction for a period of 90 days to resolve "any issues related to the interpretation or application of this order or this decision".

[5] There was no communication between the applicant and the respondent following the adjudicator's decision until September 21, 2006, when the applicant tendered his resignation.

[6] The applicant then asked the adjudicator to reconsider his decision on the basis that the decision did not provide him with the remedy he hoped to achieve, and that he had been improperly represented at the hearing. As the applicant had resigned, he was no longer represented by his union.

[7] After receiving submissions from both parties, the adjudicator denied the request for reconsideration, on February 14, 2007. The adjudicator concluded that, although he had retained jurisdiction over the interpretation of his previous order, he did not have jurisdiction to reconsider the remedy that had been ordered. With regard to the applicant's representation at the hearing, the adjudicator concluded that this was a separate issue that was "not something upon which I can now decide".

[8] The applicant commenced this application for judicial review on March 14, 2007 and claimed two initial grounds for review of both of the adjudicator's decisions:

a. The Adjudicator committed a patently unreasonable error of law in finding that he did not have the jurisdiction to make findings he did

have jurisdiction to make;

b. The Adjudicator violated the principles of procedural fairness and natural justice when he failed to have proper regard for the fact that despite finding the Respondent wrongfully terminated the Applicant and consequently ordering the reinstatement of his employment, no effective remedy was ordered to ensure the situation would be corrected, despite having the jurisdiction to order a proper remedy and consequently the situation was not corrected.

[9] Eleven months later, the applicant brought a motion to amend his Notice of Application and to have the application converted into an action.

[10] The amended allegations sought to be invoked were as follows:

Paragraph 5:

a. The Adjudicator made patently unreasonable errors in law and in finding in his orders when he ruled that he did not have jurisdiction, authority or the duty to make remedies for lost wages, legal fees and financial damages and duress in spite of clear evidence the employer had wrongfully terminated the applicant's employment asserting disability and insubordination.

b. The Adjudicator made patently unreasonable errors in law and in finding when he ruled in his initial order that he did not have jurisdiction, authority or duty provide remedies in his orders under the Canadian Human Rights Act as required per section 226 of the Public Service Labour Relations Act and Section 53 of the Canadian Human Rights Act in spite of infringements by the employer and the crown of the applicant's Canadian Charter Rights and Freedoms (especially those detailed in sections 6, 7, 11 & 15) that led to unlawful and unwarranted detention, restriction of liberties, severe psychological distress, various other damages and significant financial loss and opportunity.

c. The Adjudicator and the Public Service Labour Relations Board made patently unreasonable errors in law and in findings, violated principles of natural justice and contributed to infringements by the employer and the crown of the applicant's Canadian Charter Rights

and Freedoms when Adjudicator retained jurisdiction over the order and did not provide immediate remedies knowing this would contribute further to the applicant's duress while requiring that the applicant submit to a fit to work evaluation when the evidence before him indicated the employer had no intention to restore the applicant's employment and had sought to induce the applicant to apply for and provide evidence to support a disability pension.

d. The Adjudicator and the Public Service Labour Relations Board ("PSLRB") made patently unreasonable errors in law and in findings, violated principles of natural justice and contributed to existing prejudice; when the Adjudicator retained jurisdiction over his order subsequently ruling not to provide remedies when the applicant provided clear additional evidence of wrongful dismissal, infringements by the employer and the crown to the Applicant's Canadian Charter Rights and Freedoms and legislative references and examples responding to requests by the adjudicator of his jurisdiction, authority and duty to provide remedy.

e. The Adjudicator and the PSLRB made patently unreasonable errors in law and in finding that the neither Adjudicator nor the PSLRB had jurisdiction to make remedies for damages attributable to infringements by the employer and the crown of the applicant's reputation from their deliberate infringements of the applicant's Canadian Charter Rights and Freedoms (especially those detailed in sections 6, 7, 11 & 15) which led to a finding of not Criminally Responsible under section 672 of the Canada Criminal Code, subsequent detention and inappropriate derogatory reports to his credit, insurance, medical and employment records.

f. The Adjudicator and the PSLRB made patently unreasonable errors in law and in finding that the neither Adjudicator nor the PSLRB had jurisdiction, authority or duty to make remedies when presented with clear evidence that the applicant did not receive adequate legal or union representation in proceedings and matters before the employer, Ontario Court of Justice, the Ontario Review Board, the employer's Long Term Disability Insurance Administrator: Sun Life Assurance of Canada, the PSRLB or the National Joint Council of the Public Service of Canada where there were clear infringements of the applicant's Canadian Charter Rights and Freedoms, privacy, unlawful and unwarranted detention, restriction of liberties, severe psychological distress and financial loss.

g. The Adjudicator and the PSLRB made patently unreasonable errors in law and in finding and contributed to prejudice when they decided they lacked jurisdiction, authority or duty to make an order to the employer to make representations and corrective disclosures to third parties, mitigate loss and provide an immediate release from subrogation from all liabilities arising from a fraudulent disability claim initiated by the employer to an insurer when the Applicant presented with the Adjudicator and the PSLRB clear evidence of perjury and false evidence against the Applicant made to the PSLRB and the other judicial bodies.

h. The Adjudicator and the PSLRB made patently unreasonable errors in law and in finding that the neither Adjudicator nor the PSLRB had jurisdiction, authority or duty to provide temporary employment under Sections 20 & 21 of the Public Servants Disclosure Protection Act or to recommend that the Public Service Commission provide outplacement services to the applicant; and to report and request from the Attorney General for Canada relief for the applicant who was clearly the subject of reprisals from agencies of the crown, the employer and previously supervised entities.

[11] The case management prothonotary allowed the motion to amend in part only and that aspect of his decision is not disputed by the respondent. The applicant, however, appeals those parts of the prothonotary's decision which refused leave to amend by adding other paragraphs to the application as well as the request to convert the application into an action**.**

III. The decision of the prothonotary

[12] In his endorsement the prothonotary dealt with the proposed amendments as follows:

> The proposed ground in paragraph 5 (a) provides details of the Applicant's position regarding "proper remedy" and will be allowed. The proposed ground found in paragraph 5 (b) alleges failure to consider remedies under Canadian human rights legislation. The Adjudicator held that his order was "not based on human rights law". The proposed ground in paragraph 5 (b) is tangentially relevant to the decision and will be allowed. In paragraph 5 (c), the Applicant again

> refers to human rights legislation and provides elaboration of the "findings" and "proper remedy". This amendment will also be allowed. The proposed ground in paragraph 5 (d) is repetitive of prior paragraphs and will be disallowed. Paragraphs 5 (e) through (h) speak to issues that include, *inter alia*, references to the Applicant being unlawfully detained having a "restriction of liberties, severe psychological distress and financial loss" and the like. These paragraphs 5 (e) through (h) are disallowed. These were not issues before the PSLRB Adjudicator and are not properly raised at this stage of the proceedings. There is ample authority for the proposition that on judicial review the record is restricted to that which was before the decision-maker.

IV. Analysis

[13] The applicant makes no cohesive argument with regard to that part of the prothonotary's decision which refused to convert the judicial review application into an action. Such a conversion is an exception to the general rule and the burden is on the applicant to persuade the Court. In my view he has not even attempted to discharge it. I would not interfere.

[14] Likewise, I can find no fault with the decision not to allow the proposed paragraph 5 (d) or with the prothonotary's characterization of it as repetitive. It can serve no useful purpose and was properly refused.

[15] Similarly, and while I have some difficulty relating the prothonotary's characterization of proposed paragraphs 5 (e), (g) and (h) to the actual texts reproduced above, there is nothing in the materials before me which would indicate that there was any error in his holding that they represented an attempt to introduce matters that were not before the adjudicator and therefore should be refused. The Order refusing them will not be disturbed.

[16] The decision that the allegations in paragraph 5 (f) raise matters that were not before the adjudicator is far more problematical. It will be recalled that the original application attacked both the first decision of the adjudicator and his subsequent decision not to reconsider it. The applicant's request for reconsideration was contained in a letter to the adjudicator the relevant part of which reads as follows:

> Thank you for hearing my grievance with the Office of the Superintendent of Financial Institutions, Canada: ("OSFI"). By now I expect you have received a copy of my resignation letter to the employer. I have not held your decision in contempt; nor was I unwilling to make myself available for a fit to work evaluation to demonstrate my capacity and return to work; rather as I can clearly demonstrate I have no choice but to resign from the employ of the OSFI to be able gain access to severance to pay my delinquent accounts.
>
> The adjudication did not provide the remedy I hoped to achieve. I am not a lawyer, but I understand there is precedent for this request. My limited research of legal issues indicates that the statutory limitation on notice period for appeal may be set aside where representation was inadequate and led to an unjust decision. I believe I can demonstrate that I was not properly represented at the Public Services Labour Relations Board and the Canadian Human Rights Commission in the representations made in our May 2006 hearing and that there is reason for your remedy to be reinterpreted.

[17] Making due allowance for the fact that the applicant is self-represented, it seems to me that this text clearly puts before the adjudicator the issue of reconsideration of his original order on the ground of the inadequacy of the applicant's representation at the hearing, as argued in proposed paragraph 5 (f). That is not to say, of course, that the new allegation can be or has been proven or that the judicial review application will be successful in relation to the request for reconsideration, but simply that, in my respectful view, the prothonotary was clearly wrong to hold as he did. Since

the refusal of the proposed allegation may obviously affect the final outcome of the case, I find it necessary to intervene.

V. Conclusion

[18] In the result, the motion will be allowed in part only and the applicant will be granted leave to add proposed paragraph 5 (f) to his application for judicial review.

[19] No order as to costs.

ORDER

THIS COURT ORDERS that

1. The applicant has leave to add the proposed paragraph 5 (f) to the application.

2. The motion is otherwise refused.

3. No order as to costs.

"James K. Hugessen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-440-07
STYLE OF CAUSE:	JOHANNES CORNELIS STURKENBOOM v. THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

MOTION IN WRITING PURSUANT TO RULE 369

REASONS FOR ORDER AND ORDER:	HUGESSEN J.
DATED:	June 4, 2008

WRITTEN SUBMISSIONS BY:

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