Date: 20090916

Docket: T-1385-08

Citation: 2009 FC 922

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

JOHN KING

Respondent

REASONS FOR JUDGMENT

HUGHES J.

[1] The Applicant, the Attorney General of Canada seeks to set aside a decision of the Public Service Labour Relations Board file numbers 166-02-36572 and 36573, dated August 8, 2008 and either restore a 30 day suspension imposed upon the Respondent King by his employer, the Canada Border Services Agency (CBSA) or require a re-determination by the Board of the Respondent's grievance. For the reasons that follow I have dismissed this application with costs to the Respondent fixed at the quantum agreed upon by Counsel for the parties of $4,000.00.

[2] The Respondent King was at all material times an employee of the CBSA however during the relevant period he was on leave with pay as he was serving as First National Vice-President of

the Customs Excise Union Douanes Accise (CEUDA). During the relevant period, which was following the time of events commonly known as 9/11 (destruction of the World Trade Centre, the "Twin Towers" in New York, and damage to the Pentagon among other events of September 11, 2001) there were ongoing discussions between the CBSA and CEUDA. On May 25, 2004 the Respondent King wrote a letter addressed to Tom Ridge, Secretary of the U.S. Department of Homeland Security, with a copy to the Honourable Anne McLellan, then Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness which letter began by stating:

> *The intent of this letter is to provide you with information, which may prove useful when assessing risk to public safety and security and which will hopefully attribute the further enhancement of border protection. At this time, I will focus on matters pertaining to the recruitment and staffing of front line officers protecting Canada's borders.*

The letter was written on CEUDA letterhead and is signed by the Respondent only in his capacity of National Vice-President of CEUDA. The letter addresses issues including the hiring by CBSA of persons other than Canadian citizens, to the employment of students and, the lack of provision of what is described as first response capability (firearms). The Applicant's Counsel conceded in argument that nothing that was set out in that letter was false and that all that was set out was in the public domain.

[3] There is no evidence as to whether Tom Ridge actually saw the letter, there is evidence that some officials in the relevant United States agency saw the letter and informed an official of the Canadian government that the letter had been received. There is no evidence as to what effect, if any, the letter had on any United States agency or official.

[4] There is evidence that a copy of the letter was received by someone in Ms. McLellan's department and that she was briefed as to the letter. A copy of the letter found its way into the hands of Ms. Hébert, Vice-President Operations of CBSA who wrote to Mr. King on July 26, 2004 saying in opening:

> *This is with respect to your letter of May 25, 2004, to Tom Ridge, Secretary of the United States Department of Homeland Security.*
>
> *Mr. King, the content of your letter causes me significant concern. I am profoundly disturbed by both the message you convey to the Department of Homeland Security with respect to non-Canadian citizens and your references to our operations that are intended to, or could be construed as, pointing to weaknesses in Canada's border management practices.*

[5] This letter concludes by informing Mr. King that he was suspended without pay for a period of 30 working days. Mr. King commenced a grievance which resulted ultimately in the decision under review in which the adjudicator, Dan Butler allowed the grievance and set aside the suspension with consequential relief.

[6] The Applicant Attorney General raises three issues on the judicial review:

1. What is the appropriate standard of review of this decision?
2. Was the adjudicator's conclusion that the Respondent was acting within the scope of his union duties unreasonable?
3. Was the adjudicator's decision that the Respondent's actions were not malicious unreasonable?

Issue #1: Standard of Review

[7] Although the position of the Applicant's Counsel was slightly nuanced, the Applicant accepts that the standard of review of this decision is to be determined in accordance with the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 including that which is set out at paragraphs 45 to 47 and 60:

> ***45*** *We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.*
>
> ***46*** *What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?*
>
> ***47*** *Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*
>
> …

> ***60*** *As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (Toronto (City) v. C.U.P.E., at para. 62, per LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in Toronto (City) v. C.U.P.E., which dealt with complex common law rules and conflicting jurisprudence on the doctrines of res judicata and abuse of process issues that are at the heart of the administration of justice (see para. 15, per Arbour J.).*

[8] In the present case Counsel for the parties are agreed that the adjudicator considered the correct legal principles in arriving at his decision including those as set out in *Shaw v. Deputy Head (Department of Human Resources and Skills Development)*, 2006 PSLRB 125 and *Fraser v. Canada (Public Service Staff Relations Board)*, [1985] 2 S.C.R. 455.

[9] It is clear that the adjudicator was dealing with matters within the scope of his mandate and expertise thus, with respect to Applicant's Counsel's argument that the adjudicator failed to give sufficient weight to the *Fraser* line of decisions, I cannot accept that the adjudicator's decision must be reviewed on the standard of correctness. Even if I were to conduct a review on that standard I would concur findings of the adjudicator as set out in his reasons at paragraphs 224 to 229 including:

> ***225*** *The employer argues that I should also consider the case law led by Fraser in view of the alleged extreme nature of the grievor's criticism of his employer and of his consequent violation of the duty of loyalty that he owed the CBSA.*
>
> ***226*** *I do not agree. The grievor's status as a full-time elected union official is central to the circumstances of this case. The Fraser line of decisions does not address whether, or the extent to which,*

> *that status alters the legal principles at play. To that extent, Fraser and other decisions in that line can be distinguished.*
>
> ***227*** *As to Fraser itself, I wish also to note that the Court based its finding that the public statements of the appellant in that case impaired his ability to perform his public service job on evidence of a "pattern of behaviour." The Court found that a public servant "... must not engage ... in sustained and highly visible attacks on major government policies." If he or she does so, there is a violation of the duty of loyalty.*
>
> ***228*** *There is no evidence in the case before me of a pattern of writing to foreign government officials on the grievor's part or that he engaged in "sustained" or "highly visible" attacks on government policy. The subject of this case is a single act. The parties stipulated that the grievor's disciplinary record is clear for purposes of this decision. His letter was visible only to a very small group of people and not to the public. It is even unproven that the intended recipient ever received it.*

[10] These findings of the adjudicator are based on the evidence, both opinion and factual and afford appropriate weight to the evidence. They are to be reviewed on the standard of reasonableness, affording appropriate scope to the adjudicator who is experienced in matters of this kind and conducted an extensive hearing into the matter and provided copious, clear and cogent reasons. These findings are reasonable.

Issue #2: Findings on the Scope of Union Duties

[11] Applicant's Counsel focuses, in respect of this issue, on two matters, the first being the treatment of certain evidence, particularly that of Ms. Hébert, as opinion evidence and second on the consideration of a "plausible" theory as to the activities of a union member as set out in paragraph 186 of the adjudicator's reasons.

[12] First, as to the treatment of Ms. Hébert's evidence, the adjudicator said at paragraph 163 to 165 of his reasons:

> ***163*** *Part of the dilemma in this case may well be the emotive nature of the post-9/11 context to which the employer refers. Few observers would disagree that many things changed in the wake of the terrorist attacks of September 11, 2001, or that issues regarding border security appropriately acquired heightened visibility and sensitivity. Some people hold very strong views about the nature of the security threat that they believe has since existed. The evidence certainly indicates that Ms. Hébert, for one, felt strongly from the beginning that sending a letter of the type written by the grievor was absolutely inappropriate in the context. Her testimony at the hearing, almost three years after the fact, expressed views that were still notable in their intensity. She stated that she was "incensed" by the letter when she learned about it. In her view, the letter was a "betrayal." She continues to describe the letter today as "completely inappropriate" in the circumstances and as a "reprehensible" act.*
>
> ***164*** *I am convinced that Ms. Hébert, as author of the discipline imposed on the grievor, held those views with confidence and sincerity in 2004 and continues to do so today. I am persuaded that she was personally satisfied from the outset that the grievor's letter went beyond the pale in the context of her understanding of the "extreme sensitivity" of Canadian-American border relations. Her convictions about the seriousness of sending a letter in that context, however, comprise opinion evidence, as do the similar convictions expressed by other employer witnesses. Someone else might legitimately have a different view. In general, adjudicators must treat opinion evidence with caution.*
>
> ***165*** *The employer did not present any other substantial evidence on which I might depend to find either that a critical letter of the type authored by the grievor as a union official has caused harm to the employer in the past within a comparably sensitive context or that, in this case, the letter actually did cause harm to the employer. In any event, it remains problematic in my view whether such evidence could prove on its own that the grievor's letter necessarily fell outside the legitimate scope of what he could undertake as an elected union official. I do not read the case law as prohibiting full-time union officials from choosing activities or expressing criticisms that have the potential to affect an employer in a sensitive political or security context as long as their actions are not malicious or they do*

> *not make statements that are knowingly or recklessly false (the second part of the Shaw test). To the contrary, it may sometimes be that the intent of a union official's actions or words is to take advantage of a sensitive political or security situation to leverage a desired outcome from the employer. If the employer is to prove that the grievor acted outside the proper scope of his role in that context, I believe that something more is required than just the conviction that the context was sensitive, however well-founded that conviction.*

[13] Counsel are agreed that the adjudicator was correct in stating as he did in paragraph 165 that there was no substantial evidence that harm was caused to the employer. Ms. Hébert's feeling that she was "insensed" and "betrayed" while expressing strong emotion does not in itself, give rise to justifiable disciplinary action. Her convictions as to what the effect of the letter might have on Mr. Ridge or his colleagues was correctly characterized as opinion. I find that the adjudicator's treatment of this evidence, the weight given to it and his determinations in this regard were reasonable.

[14] Second, as to the use of the words *"plausible theory"* by the adjudicator, these words are set out in paragraph 186 of his reasons:

> ***186*** *As reported above, the grievor testified that the result he sought in writing Secretary Ridge was a discussion of issues for the purpose of achieving change, for example, the arming of officers. He stated his view that his letter would link to ongoing discussions between the two countries about standardizing border policies and programs. For purposes of this section, it is not necessary that I accept or reject the grievor's evidence of why he sent his letter. I also need not agree that the tactic that he chose of writing a letter to Secretary Ridge was either good, prudent or one that held a reasonable promise of success. The point, I believe, is that there is at least a plausible theory, based on the evidence, as to why it might make sense for a union representative cognizant of the issues of his membership in the CBSA to select a powerful American official who*

> *was strategically involved in border management questions as the target of his representations.*

[15] I note that the adjudicator uses the word *"plausible"* again in paragraphs 205 and 206 of his reasons when describing arguments advanced by CBSA. I find that his use of *"plausible"* is not indicative of conclusions that he has reached rather it is indicative that he has heard and considered arguments raised by a party as having some weight.

[16] Following paragraph 186 the adjudicator states his conclusions as to the propriety of an employee/union representative in writing the letter in question, at paragraph 189. That conclusion is based on the *"balance of the evidence and arguments"*:

> ***189*** *That said, I understand the employer's concern about the propriety of any employee writing to an official of a foreign government about issues of direct importance and sensitivity to the employer. I suspect that most readers of this decision would intuitively react that there is something worrisome, if not wrong about that scenario. The issue to be determined in this section, however, is whether the employer has proven its argument that the grievor was acting outside the proper scope of his union duties when he sent his letter to Secretary Ridge. My assessment, on the balance of the evidence and arguments placed before me, viewed in the light of the case law offered by the parties, is that the employer has not met its burden. It has not proven that a prohibition exists against union representatives contacting foreign government officials. It has not convinced me that I would be justified in this case to place a limitation on the grievor's union expression or activities that would necessarily confine his legitimate union role to activities that occur within our national borders and that involve only a domestic public audience. Absent that proof or justification or other compelling reasons, I cannot make a finding that the grievor was acting outside the proper scope of his union role when he sent his letter to Secretary Ridge.*

[17] These findings and conclusions of the adjudicator in this regard are reasonable.

Issue #3: Malice

[18] It must be recognized that it was, as already stated, conceded by Applicant's Counsel that the statements were not false or misleading.

[19] The adjudicator did consider malice. Applicant's Counsel invited this Court to step back and simply view the letter and the context in which it was written in a post 9/11 era and conclude that there must have been malice. That is not what a judicial review is about. This is not an appeal, nor a fresh hearing of the matter.

[20] The adjudicator gave careful consideration to the matter of malice and concluded, on balance, that malice had not been established. He concluded at paragraph 203, 204 and 206:

> ***203*** *The evidence indicated on balance that all or most of the information contained in the letter was already in the public domain. This is not, then, a case about betraying secrets or disclosing confidential or proprietary information. How does information already in the public domain inflame bilateral relations or incite fear? Did the same information have that effect when previously placed into the public domain?*
>
> ***204*** *In the circumstances, and given the available evidence, I doubt that a reasonable person would accept as probable the more severe impacts that the employer argues could be associated with the grievor's letter. Nor, in my view, is this is a situation where the manner of expression in the letter is itself so egregious or vitriolic that the malicious intent of the author cannot be mistaken.*
>
> …
>
> ***206*** *Having conceded that it is plausible to impute what might be viewed as a degree of ill will to the grievor's motives, I find that I am unable to take the further step of ruling that the employer has proven maliciousness on a balance of probabilities. I believe that the letter can alternatively be read as motivated by an intent to try to place*

> *pressure on the employer in a situation where the parties were "on opposite ends of the spectrum" regarding difficult and contentious issues in the labour-management relationship. The case law has recognized that appeals to external audiences can be used as legitimate pressure tactics in the context of an interest dispute. Judged through the contents of the letter, as the employer urges, I believe that it is as possible to view the grievor's action as a pressure tactic as it is to depict it as having malicious intent. As stated earlier, I might agree that it was neither a particularly prudent nor effective pressure tactic, but that is not the issue. To sustain the employer's position, I must be convinced that it is more likely than not that the grievor acted with the conscious intent to injure or to harm or was motivated principally by an element of ill will. On balance, I am not convinced that the employer has made the case to that effect.*

[21] These findings and conclusions were reasonable; there is no basis for setting them aside.

Conclusion and Costs

[22] In conclusion, I find no basis for setting aside the decision of the adjudicator. Counsel for the parties are agreed that costs should be fixed at the sum of $4,000.00.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1385-08
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. JOHN KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 14, 2009
REASONS FOR JUDGMENT:	HUGHES J.
DATED:	September 16, 2009

APPEARANCES:

Richard Fader	FOR THE APPLICANT
Andrew Raven	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
Andrew Raven Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. Barristers & Solicitors Ottawa, Ontario	FOR THE RESPONDENT