Federal Court Cour fédérale

Date: 20110526

Docket: T-686-11

Ottawa, Ontario, May 26, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

COUCHICHING FIRST NATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA
(MINISTER OF LABOUR)
AND AIMEE ADAMS

Respondents

ORDER

UPON Motion dated May 13, 2011, on behalf of the Applicant, for: (i) an Order staying the second phase of the bifurcated hearing (the "Hearing") of the complaint of the Respondent Aimee Adams (the "Complaint") under the *Canada Labour Code*, RSC 1985, c L-2 (the "CLC"), in respect of an assessment of damages following a finding of unjust dismissal made by Adjudicator Dr. D.J. Baum in the first phase of the Hearing (the "Decision"); and (ii) certain related relief;

AND UPON considering the withdrawal of the Attorney General of Canada from this proceeding;

AND UPON reading the Motion Record and other materials filed by the Applicant in support of this Motion;

AND UPON reading the Reply and the materials appended thereto filed on behalf of the Respondent Aimee Adams;

AND UPON hearing the oral submissions of the Applicant;

AND UPON considering the conjunctive tri-partite test, set forth in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 and in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA), that must be satisfied before a stay of the second phase of the Hearing can be granted;

AND UPON concluding that the tri-partite test has been satisfied for the reasons set forth in the Endorsement below;

THIS COURT ORDERS that:

1. The second phase of the Hearing is stayed pending the final determination of the underlying application for judicial review of the undated Decision, which was received by the Applicant on March 29, 2011, and in which Dr. Baum found the Applicant to be liable for dismissing the Respondent Aimee Adams without just cause; and

2. The costs of this Motion shall be paid by the party who is unsuccessful in the underlying application for judicial review.

ENDORSEMENT

(i) Serious Issue to be Tried

The test for the first prong of the tri-partite test applicable to this motion is a low one. I simply have to be satisfied that the Applicant has raised at least one issue that is serious, in the sense of being "neither vexatious, nor frivolous" (*RJR-MacDonald*, above, at 335 and 337) nor "destined to fail" (*Laperrière v D&A MacLeod Company Ltd*, 2010 FCA 84, 66 CBR (5th) 96, at para 11).

I am satisfied that the Applicant has raised a serious issue in respect of Dr. Baum's refusal to hear evidence in respect of, and make a determination upon, the cause for termination of Ms. Adams' employment with the Applicant. In my view, this issue is reviewable on a standard of correctness, as it essentially involves elements of Dr. Baum's interpretation of his jurisdiction and the appropriate legal test to apply in adjudicating such complaints, as well as procedural fairness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 55, 59, 79 and 87; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12, at paras 42 and 43; *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7, at para 26; *Carry the Kettle First Nation v O'Watch*, [2007] FCJ No 1127, at para 64).

Pursuant to paragraph 242(2)(b) of the CLC, Dr. Baum was required to "give full opportunity to the parties to the complaint to present evidence and make submissions" to him, and to "consider information relating to the complaint." Pursuant to paragraph 242(3)(a), an adjudicator to whom a complaint has been referred under subsection 242(1) is required to "consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon."

However, notwithstanding repeated attempts by the Applicant to adduce evidence regarding the merits of its decision to dismiss Ms. Adams, the Decision and the letters or portions of letters reproduced in the Decision reflect that Dr. Baum steadfastly refused to allow such evidence to be adduced. The reason for that refusal was stated to be that the focus of the initial phase of the Hearing would be solely upon whether Ms. Adams was denied a right to speak before the Chief and the Band Council before she was terminated or suspended. (The Decision is somewhat inconsistent as to whether Ms. Adam was terminated or suspended.) Dr. Baum repeated on several occasions in the Decision and in his correspondence to the parties' representatives that his intent was to focus solely on this procedural issue.

In *Hallé v Bell Canada* (1989), 99 NR 149 at 154 (FCA), it was held that, to make the determination contemplated by paragraph 242(3)(a) of the CLC, an adjudicator must first "consider the nature, sufficiency and merits of the reasons for dismissal." In other words, it is incumbent upon an adjudicator to "determine, in light of the evidence, what would probably have happened if the employer had acted as he ought to have done" (*Hallé*, above). Only once an affirmative decision has been made on the merits issue should the adjudicator then consider "whether the procedure leading to the dismissal of the employee was fair," without regard to any directives or policies that the employer may have issued previously (*Hallé*, above). If it is ultimately determined that the procedure leading to the employee's dismissal was unfair, and that because of this the dismissal was unjust, then the affirmative finding regarding the nature, sufficiency and merits of the reasons for

dismissal would nonetheless be relevant in determining the compensation to which the employee may be entitled as a consequence of the dismissal.

Consistent with the approach taken in *Hallé*, my colleague Justice Heneghan determined, in *Carry the Kettle First Nation*, above, that an adjudicator under the CLC had committed a reviewable error of law by focusing upon the manner in which the employer had handled the termination in question and the consequences of that termination, rather than upon the cause for dismissal. I do not agree with Dr. Baum's view that the case at bar is distinguishable based on the facts in *Carry the Kettle First Nation*.

The principle that adjudicators under the CLC have an obligation to determine, as a first step in reviewing a complaint made under the CLC, whether an employee was actually responsible for the misconduct alleged by the employer has also been recognized in a number of other cases, including *Toronto Board of Education v Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 SCR 487, at para 49; *Innu Nation of Uashat Mak Mani-Utenam v Fontaine,* 2005 FCA 357, at para 6; *Bitton v HSBC Bank Canada*, 2006 FC 1347, at para 31.

Based on the foregoing, I am satisfied that a serious issue has been raised in respect of whether Dr. Baum applied the appropriate legal test in assessing Ms. Adams' complaint of unjust dismissal and whether he erred in refusing to exercise his jurisdiction to hear the Applicant's evidence pertaining to the merits of its decision to terminate Ms. Adams.

The Applicant has also raised an issue with respect to whether Dr. Baum erred by refusing to provide an opportunity to the Applicant to present submissions and evidence on various other matters, including the Applicant's Personnel Policy that was in place at the time of the alleged unjust dismissal, Dr. Baum's narrowing of the issues in the Hearing, his refusal to hear certain witnesses and to permit "after acquired" evidence from the police investigation and Crown record of prosecution of Ms. Adams to be adduced, his treatment of certain other evidence, his failure to allow for reply questions to certain witnesses, and certain disclosure to Mr. Dubinsky which the Applicant submits was improper and irrelevant.

In *Jennings v Shaw Cablesystems Ltd*, 2003 FC 1206, at para 15, my colleague Justice Snider observed that, while the wording of paragraph 242(2)(b) of the CLC makes it clear that adjudicators are masters of their own procedures, they have "not only the discretion to admit evidence of the employer's reasons for dismissal … but an obligation to do so." In my view, this observation applies equally to other evidence and submissions that a party may wish to present on important issues and information relating to the complaint.

Having regard to the foregoing, I am satisfied that a serious issue has been raised with respect to whether Dr. Baum erred by refusing to provide the Applicant with an opportunity to present submissions and evidence in respect of the matters identified above, all or most of which appear to have been important in the context of the Complaint and the jurisdiction conferred upon Dr. Baum pursuant to paragraph 242(2)(b).

It is trite law that there is a general duty of fairness resting on all public decision-makers (*Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, at para 105). This

includes a duty to permit a party to make submissions and adduce evidence on important issues (*Université du Québec à Trois-Rivières v Larocque*, [1993] 1 SCR 471, at 491-493), as well as a duty to permit a party to cross-examine another party's witnesses (*B.R.E.S.T. Transportation Ltd v Noon*, 2009 FC 630, at para 7).

In my view, collective impact of the refusals by Dr. Baum to provide the Applicant with an opportunity to present submissions and evidence on the matters identified is such that a serious issue has been raised as to the fairness of the entire liability phase of the Hearing.

(ii) Irreparable Harm

Irreparable harm "refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured" (*RJR-MacDonald*, above, at para 64). At this stage of the analysis, the harm in question is harm that will be suffered by the applicant. Any harm that will be suffered by the respondent is considered in assessing the balance of convenience (*RJR-MacDonald*, above, at 341).

I am satisfied that the Applicant is likely to suffer irreparable harm if the stay that it has requested is not granted. This is because Ms. Adams is impecunious, as recognized in the Decision and as underscored in her Reply on this motion. Accordingly, there is a real possibility that the Applicant would not likely be able to recover any damages that are assessed against it in the damages phase of the Hearing and then paid to Ms. Adams. Indeed, it appears that the CLC does not provide for the granting of remedies to an employer.

I recognize that damages would only be payable by the Applicant after the completion of the damages phase of the Hearing. However, deferring the granting of the requested stay until such time would simply place the Applicant in the position of having to expend significant additional resources to bring another motion before this Court essentially requesting the same relief, pending the disposition of its underlying application for judicial review, which is not without significant *prima facie* merit. In such circumstances, "it seems to me that the interests of justice will generally be better served" if the damages phase of the Hearing is stayed while the underlying application is dealt with on a priority basis (*Monit International Inc v Canada*, 2004 FCA 108, at para 7).

(iii) Balance of Convenience

The focus of this prong of the tri-partite test for a stay or injunction is upon "which of the two parties will suffer the greater harm from the granting or refusal of … [the] injunction" (*RJR-MacDonald*, above, at 342). In addition, other factors may be taken into consideration in determining where the balance lies (*RJR-MacDonald*, above, at 342).

I am satisfied that the balance of convenience favours the Applicant on this motion. As noted above, the Applicant is likely to suffer potentially significant harm that is not likely to be curable if the stay is not granted and it is required to pay damages to Ms. Adams. By contrast, it is difficult to see how Ms. Adams would be prejudiced if the stay is granted, other than by having to wait additional time before obtaining any damages that may ultimately be awarded to her (*Choken v*

Lake St. Martin Indian Band, 2003 FCA 431, at para 17). In the meantime, her damages will continue to accumulate, subject to her obligation to mitigate her damages.

In addition to the foregoing, based on the evidence and submissions filed on this motion, while recognizing that Ms. Adams did not appear before the Court and was not able to retain anyone to prepare significant submissions, I find that the Applicant's case on this motion is disproportionately stronger than Ms. Adams' case and that this further tips the balance of convenience in the Applicant's favour (*Turbo Resources Ltd v Petro Canada Inc*, [1989] 2 FC 451, at 474 (CA)).

It follows from the foregoing that the Applicant has met the test for obtaining a stay of the damages phase of the Hearing, pending a final determination of the underlying application for judicial review of the Decision in the liability phase of the hearing, in which Dr. Baum found the Applicant to be liable for dismissing the Respondent Aimee Adams without just cause.

"Paul S. Crampton"

Judge