

Federal Court



Cour fédérale

Date: 20111025

Docket: T-1629-10

Citation: 2011 FC 1215

Ottawa, Ontario, October 25, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

HAIYAN ZHANG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Haiyan Zhang's employment with the Privy Council Office [PCO] was terminated after her Secret security clearance was revoked because of concerns about her loyalty to Canada. Ms. Zhang grieved the termination of her employment, and the Public Service Labour Relations Board [PSLRB] allowed her grievance, in part. Amongst other things, the PSLRB ordered that the PCO conduct a diligent search over a period of two months for a new position for Ms. Zhang elsewhere in the Public Service.

[2] When two months passed and the search did not result in a new job for Ms. Zhang, her employment with the PCO was once again terminated. The PSLRB dismissed Ms. Zhang's grievance with respect to the second termination. Ms. Zhang now seeks judicial review of this decision, asserting that the Board erred in its interpretation of the order made by the PSLRB in relation to her first termination. Ms. Zhang says that the Board also erred in failing to properly address post-termination evidence of what she says was bad faith on the part of the PCO.

[3] For the reasons that follow, I am not persuaded that the Board erred. As a consequence, Ms. Zhang's application for judicial review will be dismissed.

Background

[4] Ms. Zhang was first employed by the Public Service in 2002. In February of 2003, she was recruited by the PCO to work as a Senior Communications Analyst.

[5] Ms. Zhang obtained a 'Secret' security clearance prior to starting work at the PCO. When the PCO sought to upgrade her security clearance to 'Top Secret', the Canadian Security Intelligence Service [CSIS] found that there were reasonable grounds to believe that Ms. Zhang had engaged in intelligence-gathering during her previous employment with Xinhua News Agency. CSIS further found that Ms. Zhang had maintained contacts with individuals still engaged in intelligence-gathering in China. As a consequence, CSIS questioned Ms. Zhang's loyalty to Canada, and recommended that the Clerk of the Privy Council deny Ms. Zhang the Top Secret clearance.

[6] Based on the CSIS security assessment, the Clerk of the Privy Council revoked Ms. Zhang's Secret clearance. Since all PCO employees require a Secret clearance at a minimum, the PCO terminated Ms. Zhang's employment effective November 28, 2003.

[7] Ms. Zhang filed a complaint with the Security Intelligence Review Committee [SIRC] with respect to the revocation of her security clearance. Following seven days of hearings, the SIRC upheld the decision to revoke Ms. Zhang's security clearance.

[8] The SIRC concluded that there were reasonable grounds for the Clerk of the Privy Council to believe that as a former employee of the Xinhua News Agency, Ms. Zhang may have engaged in intelligence collection on behalf of a foreign state. The SIRC further found that there were reasonable grounds to believe that Ms. Zhang had maintained contact with foreign representatives who might be involved in intelligence collection activities. Ms. Zhang did not seek judicial review of the SIRC decision.

[9] In a December 8, 2005 decision, the PSLRB accepted that the loss of Ms. Zhang's security clearance meant that she could no longer work at the PCO. However, the Board noted that the PCO's Personnel Security Standard provided that in such cases, "consideration must be given to reassignment of appointment to a less sensitive position at an equivalent level". The Standard went on to state that if no equivalent position is available, then an appointment to a position at a lower level must be considered. The Standard concluded by stating that "[t]ermination of employment may be considered only in exceptional circumstances and only when all other options have been exhausted."

[10] The PSLRB held that the obligation to “search diligently” for a new position rests with the Treasury Board, as the employer. The Board was not satisfied that there were “exceptional circumstances” in Ms. Zhang’s case. As a result, it held that the PCO was obliged to conduct a search for alternate positions within those parts of the Public Service for which the Treasury Board was the employer.

[11] In particular, the PSLRB ordered the PCO to conduct a “diligent search” for alternate employment for Ms. Zhang within the public service “at an equivalent (IS-5) or lower level”. The search was to continue for a period of two months. The PSLRB also ordered that Ms. Zhang be reinstated to leave with pay status during the search period: *Zhang v. Treasury Board (Privy Council Office)*, 2005 PSLRB 173, [2005] C.P.S.L.R.B. No. 175 at paras. 76-77 [*Zhang #1*]. The PSLRB’s decision was subsequently upheld on judicial review: *Canada (Attorney General) v. Zhang*, 2007 FC 235.

[12] The PCO asked the Treasury Board to conduct the search, and a Treasury Board employee by the name of Jeff Laviolette was assigned to carry out the search. Mr. Laviolette testified before the PSLRB that between February 14 and April 13, 2006, he spent between an hour and a half and two hours every day looking for positions for Ms. Zhang. Amongst other things, Mr. Laviolette consulted Publiservice on a daily basis looking for internal postings at the IS-03, IS-04 and IS-05 levels. He also attempted to place Ms. Zhang on a priority hiring list, although this effort was unsuccessful. In addition, Mr. Laviolette discussed possible job opportunities for Ms. Zhang with

Human Resources personnel in other departments. Over the two-month period, Mr. Laviolette communicated information with respect to seven positions to Ms. Zhang.

[13] Ms. Zhang applied for three out of the seven positions. She was unsuccessful in one case because of her limited French language skills, and in another case due to her lack of knowledge regarding a sales system. It is not clear why she did not win the third competition. However, Ms. Zhang conceded in argument that there is no evidence that PCO interfered in any way in relation to any of these competitions.

[14] When the search period expired, Ms. Zhang had still not secured an offer of employment elsewhere in the Public Service. As a result, the PCO terminated her leave with pay status on April 13, 2006, and administratively cancelled her reliability status five days later.

[15] In June of 2006, two months after her employment with the PCO was terminated, Ms. Zhang asked the PCO to facilitate a secondment to a position with Service Canada. A secondment would have required the PCO to reinstate Ms. Zhang as an employee and would have also entitled her to return to her substantive position at the end of the term of the secondment. The PCO considered the matter for three months and ultimately refused to approve the secondment arrangement. The PCO did, however, reinstate Ms. Zhang to leave without pay status in order to bridge her pension rights.

[16] Ms. Zhang grieved the April, 2006 termination, alleging that her employment was terminated without just and sufficient cause, and that the termination was carried out in contravention of the Order made by the PSLRB in *Zhang #1*.

The PSLRB Decision

[17] In a decision that will be referred to as *Zhang #2*, the PSLRB determined that as long as the employer had carried out a diligent search during the required period, the termination of Ms. Zhang's employment at the end of an unsuccessful search period would be for just and sufficient cause.

[18] The PSLRB examined the scope and extent of the search that Mr. Laviolette had conducted, and determined that the employer had indeed conducted a "diligent search". The Board did not accept Ms. Zhang's argument that the employer was required to expand its search to job categories beyond the IS category. Rather, the Board interpreted the *Zhang #1* order as limiting the scope of the required search to the IS occupational group at the 03-05 levels.

[19] The Board also considered the post-termination evidence that Ms. Zhang had presented to demonstrate the PCO's alleged bad faith. It noted that it had the jurisdiction to consider this evidence if it was relevant and reliable, citing paragraph 226(1)(d) of the *Public Service Labour Relations Act*, S.C. 2003, c. C-22, and *LaBranche v. Treasury Board (DFAIT)*, 2010 PSLRB 65, [2010] C.P.S.L.R.B. No. 84. However, the PSLRB determined that the evidence was "not persuasive or relevant to the grievance at hand".

[20] Much of the post-termination evidence related to Ms. Zhang's request that the PCO approve her secondment to Service Canada. The PSLRB found that the PCO's decision to deny Ms. Zhang a secondment was neither unreasonable nor illegal, observing that Ms. Zhang had only told the PCO about the Service Canada position some two months after her termination. The Board further noted that Service Canada had other options to facilitate the hiring of Ms. Zhang, if it wanted to expedite the process.

[21] The PSLRB was also not satisfied that amendments made to the PCO's Personnel Security Standard Policy demonstrated bad faith. Those amendments allowed the PCO to reassess an employee's reliability status after an adverse security assessment. The Board found that the amendments fell within the government's discretion. As a result, it had no jurisdiction to reverse or disregard the Policy.

[22] Ms. Zhang challenges the decision in *Zhang #2* on two grounds. She argues that the PSLRB erred in its interpretation of the order made in *Zhang #1* as it related to the scope of the required search. She also asserts that the Board erred in its treatment of the post-termination evidence.

Was the PSLRB's Interpretation of the *Zhang #1* Order Unreasonable?

[23] The material provision of the *Zhang #1* order states that:

I order that the employer conduct a diligent search for an alternate position for the grievor at an equivalent (IS-5) or lower level within the parts of the public service for which it is the employer, for a period of two months from the date of this decision. [at para. 76]

[24] Ms. Zhang took the position before the Board that the use of the word “equivalent” in the *Zhang #1* order meant that her employer was obligated to search for positions in all of the occupational groups within the federal government that were suitable for someone with her qualifications. By confining its search to positions within the IS classification, Ms. Zhang says that the PCO failed to comply with the *Zhang #1* order.

[25] The PSLRB considered Ms. Zhang’s argument, noting that the *Zhang #1* order “contains no terms of art” and that the words used “must be given their plain meaning”. According to the Board, the proper interpretation of the order was that “the employer (Treasury Board) was to conduct a two-month diligent search for an alternative position classified at the IS-05 level or lower ... within the parts of the public service for which it is the employer”: *Zhang #2*, at para. 86.

[26] The Board held that by specifying the occupational group in the order, the scope of the search contemplated by the *Zhang #1* order was limited to a search of IS positions. The employer had no obligation to enlarge the search and look for alternate positions outside the IS group.

[27] Ms. Zhang submits that the PSLRB erred in its interpretation of the *Zhang #1* order by improperly limiting the scope of the search mandated by the order to the IS occupational group. According to Ms. Zhang, the PSLRB omitted the word ‘equivalent’ from its interpretation of the *Zhang #1* order when it concluded that “the order was limited to a search at those [IS] levels”. In doing so, Ms. Zhang contends that the Board effectively re-wrote the order, substituting ‘identical’ for ‘equivalent’.

[28] In omitting the word ‘equivalent’ from the order, Ms. Zhang says that the Board failed to address the parties’ evidence and arguments with respect to the meaning of the word. She further submits that the PSLRB unreasonably conflated the ‘method’ of the search with the ‘scope’ of the search, when it concluded that there was “no evidence that the grievor ever questioned the search method”. Rather, what Ms. Zhang questioned was the scope of the search.

[29] As a result of the Board’s erroneous interpretation of the order, Ms. Zhang contends that it unreasonably concluded that the employer had conducted a diligent search, and that the termination of her employment was therefore for just and sufficient cause.

[30] I agree with the parties that the PSLRB’s interpretation of the *Zhang #1* order is reviewable against the standard of reasonableness. However, the question for the Court is not whether the interpretation of the *Zhang #1* order suggested by Ms. Zhang is reasonable, but rather whether the interpretation of the remedial provision adopted by the PSLRB in *Zhang #2* was unreasonable.

[31] In other words, I must determine whether the Board’s interpretation of the *Zhang #1* order exhibits the justification, transparency and intelligibility required of the decision-making process, and whether it falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

[32] It is clear that the order made in *Zhang #1* was not as clear as it might have been. The interpretation of the order suggested by Ms. Zhang is certainly one which the words of the order could reasonably bear. However, as the respondent points out, the use of the word “equivalent” in the order, immediately followed by “(IS-5)” could also reasonably be interpreted as specifying that IS-5 positions are the positions that are equivalent to the position previously held by Ms. Zhang at the PCO.

[33] In my view, the Board did not re-write the *Zhang #1* order. Rather, it adopted a reasonable interpretation of it, and provided an adequate explanation for that interpretation. In the face of some ambiguity, the Board’s interpretation falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law.

The Board’s Treatment of the Post-Termination Evidence

[34] Ms. Zhang also submits that the Board erred in its treatment of the post-termination evidence. Ms. Zhang had put considerable evidence before the PSLRB, including a number of internal PCO emails, which, she says, demonstrated that the PCO acted in bad faith in its efforts to implement the *Zhang #1* order.

[35] According to Ms. Zhang, it is clear from the post-termination evidence that the PCO was vehemently opposed to her continued employment in the Public Service. The PCO did not agree with the PSLRB decision in *Zhang #1*, and had no genuine intention of complying with it. Ms. Zhang says that this shows that the PCO did not approach the job search in good faith, and that it

would never have permitted the search to actually lead to Ms. Zhang's re-employment in the Public Service.

[36] Ms. Zhang further argues that the PSLRB treated Ms. Zhang unfairly by disregarding the post-termination evidence and by failing to resolve the conflicts in the evidence. Notably, the PSLRB ignored evidence relating to the PCO's refusal of her secondment opportunity, which further demonstrated PCO's bias against Ms. Zhang. The evidence reveals that PCO staff called the secondment opportunity a "problem" and stated that her continued employment with the government was contrary to the national interest.

[37] Ms. Zhang submits that the Board erred by focusing on the legality of the secondment refusal, rather than examining whether the evidence surrounding that refusal demonstrated bad faith on the part of the PCO, which might have permeated the entire search process.

[38] The post-termination evidence clearly shows that the PCO was unhappy with the PSLRB's decision in *Zhang #1*. Moreover, the exchange of internal emails demonstrates that senior PCO employees did not want to see Ms. Zhang continue to be employed in the Public Service. Indeed, the PSLRB was well aware of this fact: see, for example, *Zhang #2* at para. 30. However, the question for the PSLRB was whether this evidence shed any light on the *bona fides* of the search for alternate employment for Ms. Zhang that Mr. Laviolette conducted in February, March and April of 2006.

[39] I am not persuaded that it did.

[40] As the PSLRB pointed out, the PCO did not even conduct the search mandated by the *Zhang #1* order. Rather, the PCO asked the Treasury Board to take responsibility for the search.

[41] Jeff Laviolette testified that the PCO did not interfere with his search efforts, and that he did not even report to the PCO in relation to the search. Mr. Laviolette also stated that he conducted the search as diligently as he could. This evidence was not challenged by Ms. Zhang before this Court. Indeed, counsel for Ms. Zhang stated in her submissions that “There is no question - Mr. Laviolette did his job”.

[42] Moreover, Ms. Zhang also did not challenge the sufficiency of Mr. Laviolette’s search efforts before the PSLRB, other than to question the decision to limit the search to jobs within the IS occupational group – a decision based upon an interpretation of the order that I have already found to have been reasonable.

[43] Indeed, Ms. Zhang has not questioned Mr. Laviolette’s good faith in searching for an alternative position for her. She has not alleged that his efforts to find her a new IS position were insufficient, or that the PCO interfered in any way in the search. Rather, Ms. Zhang contends that the post-termination evidence shows that if she had been the successful candidate for any of the few jobs that were identified for her by Mr. Laviolette, the PCO would have thwarted her attempts to secure the position.

[44] This argument is obviously speculative, given that Ms. Zhang did not in fact succeed in competing for any of the alternate positions identified for her by Mr. Laviolette.

[45] More fundamentally, however, even if the PSLRB had accepted all of the post-termination evidence as to the views of the PCO with respect to Ms. Zhang's continued employment in the Public Service, that evidence would not have had any impact on the unchallenged evidence regarding the *bona fides*, independence and adequacy of Mr. Laviolette's job search.

[46] There is a dispute between the parties as to the standard of review to be applied in relation to this issue. Ms. Zhang says that the failure of the PSLRB to deal properly with the post-termination evidence resulted in a denial of procedural fairness. The respondent submits that the PSLRB's treatment of the evidence is reviewable on the standard of reasonableness.

[47] Even if I view this matter in light of the more intrusive standard of review applying to issues of procedural fairness, I am not persuaded that the Board erred in concluding that the post-termination evidence was not persuasive or relevant to Ms. Zhang's grievance.

[48] Ms. Zhang's grievance related to the termination of her employment in April of 2006 as a result of what she says was the failure of her employer to properly comply with the job search requirements of the *Zhang #1* order. The PSLRB clearly explained why it found that the search carried out by Mr. Laviolette on behalf of Treasury Board was carried out in good faith and this finding was not challenged on judicial review. The Board also explained why it found that the search was sufficiently diligent and complied with the order made by the PSLRB in *Zhang #1*. Any

animosity or bias on the part of the PCO directed at Ms. Zhang simply did not have a bearing on that issue.

[49] As a consequence, I am satisfied that the PSLRB did not err in finding that the post-termination evidence was “not persuasive or relevant to the grievance at hand”,

Conclusion

[50] For these reasons, Ms. Zhang’s application for judicial review is dismissed, with costs. In accordance with the agreement of the parties, costs are fixed in the amount of \$3,500.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed, with costs to the respondent in the amount of \$3,500.

"Anne Mactavish"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

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ATTORNEY GENERAL OF CANADA

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