Federal Court  Cour fédérale

Date: 20120417

Docket: T-1009-11

Citation: 2012 FC 442

Ottawa, Ontario, April 17, 2012

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

RALPH PICHER

Applicant

and

INNOTECH-EXECAIRE, A DIVISION OF I.M.P. GROUP LIMITED

Respondent

REASONS FOR ORDER AND ORDER

[1] This is the judicial review of the decision of Guy Dufort who was appointed as adjudicator under the *Canada Labour Code* to rule on Mr. Picher's complaint that he was unjustly dismissed from his employment by the respondent. In his decision, dated 19 May 2011, Mr. Dufort held there was no unjust dismissal. For the reasons that follow, I am of the opinion that his decision should stand and shall therefore dismiss Mr. Picher's application for judicial review.

[2] Mr. Picher left work early one day saying his wife was ill. He personally called in sick the following day. After a week went by, his employer called to ask when he would be back. He said he did not know. The next day they received a note from Mr. Picher's family physician, Doctor Morris. It simply said: "Mr. Picher is unable to work at present for medical reasons."

[3] In the days that followed, Innotech-Execaire sent Mr. Picher short-term disability forms to be filled in both by him and his family physician. The forms were completed and returned. Dr. Morris indicated that it was only by 1 April 2010, then three months away, that Mr. Picher would be capable of returning to work. He was said to be in a depressive state.

[4] Innotech-Execaire called Mr. Picher again to inquire about his intentions. The evidence before the adjudicator was that Mr. Picher said that he did not feel he was ready to go back to work. He said he was still caring for his spouse and had issues with some co-workers. He declined to go to the office to discuss the matter.

[5] Innotech-Execaire then wrote to him to say they wished to evaluate his situation and get a second medical opinion. They said: "We require that you undergo a psychological assessment." He was given a date on which he was to meet with a Doctor Gauthier, a psychiatrist. He met with Dr. Gauthier at the appointed time. Dr. Gauthier then issued a report in which he said that, although Mr. Picher had anxiety issues, he was capable of carrying out his duties as a receiver in the shipping department on a full-time basis.

[6] This led to Innotech-Execaire's letter, dated 18 January 2010, in which they informed Mr. Picher that his application for short-term disability had been denied. If he did not return to work within one week, he would be "deemed to have resigned". Mr. Picher did not return. Rather, he filed a complaint with Human Resources Development Canada, Labour Branch. He took the position that he could not be fired because he was sick and was therefore protected by section 239(1) of the *Canada Labour Code*.

[7] It reads:

239. (1) Subject to subsection (1.1), no employer shall dismiss, suspend, lay off, demote or discipline an employee because of absence due to illness or injury if	**239.** (1) Sous réserve du paragraphe (1.1), l'employeur ne peut congédier, suspendre, mettre à pied ni rétrograder un employé, ni prendre des mesures disciplinaires contre lui, pour absence en raison de maladie ou d'accident si celui-ci remplit par ailleurs les conditions suivantes :
(*a*) the employee has completed three consecutive months of continuous employment by the employer prior to the absence;	*a*) il travaille sans interruption pour lui depuis au moins trois mois;
(*b*) the period of absence does not exceed twelve weeks; and	*b*) il n'est pas absent pendant plus de douze semaines;
(*c*) the employee, if requested in writing by the employer within fifteen days after his return to work, provides the employer with a certificate of a qualified medical practitioner certifying that the employee was incapable of working due to illness or injury for a specified period of time, and	*c*) il fournit à l'employeur, sur demande de celui-ci présentée par écrit dans les quinze jours du retour au travail, un certificat d'un médecin qualifié attestant qu'il était, pour cause de maladie ou d'accident, incapable de travailler pendant la période qui y est précisée, celle-ci

that that period of time coincides with the absence of the employee from work.	devant correspondre à celle de l'absence.

[8] Mr. Picher's complaint led to the appointment of Mr. Dufort as an adjudicator under Part III of the *Canada Labour Code*. It is common ground that Mr. Picher satisfied section 239(1) (a) and (b). The only issue is the medical certificate.

THE HEARING BEFORE THE ADJUDICATOR

[9] Prior to the hearing, Mr. Dufort wrote to the parties to say, among other things, that he must act as an impartial adjudicator and would not be in a position to act on Mr. Picher's behalf even though he was self-represented while the employer was represented by in-house counsel. He said that the hearing would be fairly informal. The parties were entitled to file documents as evidence at the hearing, which would not be recorded. Parties were entitled to raise objections at the hearing.

[10] The initial report of Dr. Morris, the short-term disability forms, including Dr. Morris' second report, and the report of Dr. Gauthier were filed. Neither doctor was called as a witness.

[11] Mr. Picher did not ask for production of Dr. Gauthier's report prior to the hearing. He now makes much of the fact that the report was in French. Mr. Picher's mother tongue is English and the interview with the doctor was in that language. However, he did not ask for a translation or for a postponement at any time.

[12] Although more will be said below when analysing the positions of the parties, Mr. Dufort concluded that Mr. Picher had agreed to meet Dr. Gauthier and that the employer was entitled to act as it did in requiring him to return to work and deeming him terminated when he failed to do so. These actions were not in violation of section 239(1) of the *Canada Labour Code*, in that he was not terminated for being absent because of illness or injury, but rather because he failed to return to work when requested, after having been found medically fit to do so.

MR. PICHER'S CASE

[13] Broadly speaking, Mr. Picher, who is now represented by counsel, takes the position that this Court owes no deference to Mr. Dufort because he acted in breach of natural justice and erred in law. Subsidiarily, to the extent deference is owed, the decision is unreasonable and so should be set aside.

[14] It is alleged that there were breaches of natural justice in that no English version of Dr. Gauthier's report was made available and that, therefore, Mr. Picher was unable to properly prepare to contradict the report or to call Dr. Morris as a witness.

[15] In addition, Mr. Dufort was aware that Mr. Picher was not a lawyer and was self-represented. He failed in his duty to give appropriate directions and guidance, taking into account that the employer was represented by in-house counsel.

[16] He erred in law in deciding that section 239(1) of the *Canada Labour Code* has no application if the employer comes up with a contradictory medical report.

[17] The decision was unreasonable in that, contrary to Mr. Dufort's finding, Mr. Picher had not consented to a medical examination by Dr. Gauthier, but rather was required to do so as a condition of his employment.

[18] The employer was acting in bad faith, a point Mr. Dufort failed to seize upon.

[19] Mr. Picher set out in an affidavit his recollection of what happened at the hearing.

INNOTECH-EXECAIRE'S POSITION

[20] The employer's position is that Mr. Dufort got it right on all counts, both in his findings of fact and his application of the law. There was no breach of natural justice.

[21] Kate Hopfner, in-house counsel of I.M.P. Group Ltd., who attended the hearing, filed an affidavit which is at odds with Mr. Picher's. Neither affiant was cross-examined.

[22] She attached to her affidavit the 11 exhibits which had been filed before Mr. Dufort and said that in his decision he reported all relevant evidence in conformity with the testimony and representations made. More particularly, Mr. Picher did not testify that he decided not to work

because of his family physician's medical opinion. Rather, he testified that he believed he could not be legally terminated due to section 239 of the *Canada Labour Code*.

[23] As to Mr. Picher's statement in his affidavit that he did not consent to submit to an examination by Dr. Gauthier but rather that he was required to attend, he testified that he had consulted on the point with his own doctor who told him that nothing was wrong with submitting to such an examination.

[24] During the hearing, there was a break to allow Mr. Picher to review Dr. Gauthier's report with his wife, who apparently was more at ease in French. After the break, he commented on a number of paragraphs and took issue with some of the doctor's statements, as indeed set out in Mr. Dufort's decision. He did not request additional time to review the document, nor did he request an adjournment.

ANALYSIS

[25] Without in any way resiling from the written submissions filed before the hearing, Mr. Picher's counsel focused on two prime issues, being that he had not consented to being examined by Dr. Gauthier and that no reasons were given as to why Dr. Gauthier's opinion was preferred over that of Dr. Morris.

[26] It is not for me to decide whether Mr. Picher consented to the examination; rather, it is for me to decide whether it was reasonably open for Mr. Dufort to make that finding. In my opinion, it

was. Not only do we have the uncontradicted evidence of Ms. Hopfner that Mr. Picher had discussed the attendance before hand with Dr. Morris, we also have Dr. Gauthier's report. Dr. Gauthier sets out therein that he informed Mr. Picher that he was an independent psychiatrist, that confidentiality rules applied, and that Mr. Picher authorized him to proceed with the evaluation and to send his report to the employer. He signed a consent form. It is too late to now invoke a master-servant relationship which allegedly compelled him to attend, and to therefore argue that his consent was not freely given.

[27] As to preferring Dr. Gauthier's opinion over that of Dr. Morris, Mr. Picher's counsel submits that no reasons whatsoever were given for this preference. If that were so, there may well have been a breach of procedural fairness. Counsel relies upon paragraph 40 of Mr. Dufort's set of reasons which reads:

> 40- The last medical evidence we have regarding Mr. Picher's capacity to return to work is Dr. Gauthier's expertise which is clear:
>
> > A mon avis Monsieur Picher est apte à effectuer les tâches essentielles de son poste de magasinier. À mon avis monsieur Picher ne présente pas de limitations mentales fonctionnelles qui l'empêchent d'effectuer les tâches essentielles de son poste.

[28] It was submitted that, if Dr. Gauthier's report was preferred because it was the most recent report, this was an irrelevant distinction because Dr. Gauthier's report was based on a consultation which occurred only three weeks after Dr. Morris completed the assessment forms.

[29] That paragraph of the adjudicator's decision, however, must be read in context. Mr. Picher had done some research and had come across section 239(1) of the *Canada Labour Code* and had

then contacted a Labour Canada inspector. He wrote to the employer citing the *Canada Labour Code* and then made the official complaint which led to the adjudication.

[30] This brings me to paragraphs 38 and 39 of Mr. Dufort's decision, in which he said:

> 38- Rather than relying on his own physician to review or contest Dr. Gauthier's expertise, Mr. Picher chose to rely on his understanding of Article 239(1) and his perception of the Labour Canada's role in the circumstances through its representative, a Mr. Purnell.
>
> 39- I have great difficulty with Mr. Picher's testimony regarding Mr. Purnell's role and advise in this case. Either he received misguided advise from Mr. Purnell, which I strongly doubt, or he completely misunderstood whatever advice he received.

[31] It is clear that Mr. Dufort preferred Dr. Gauthier's opinion because of his expertise and not merely because it was more recent.

[32] One might legitimately suggest that Mr. Dufort should have gone into greater detail to explain why he preferred the opinion of the psychiatrist over that of the family physician. However, this does not mean that the reasons are not transparent within the meaning of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. That case was recently commented upon by the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, which held that *Dunsmuir* does not support the proposition that inadequacy of reasons is a stand-alone basis for setting aside a decision. In speaking for the Court, Madam Justice Abella said at paragraph 15:

> In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it

> necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[33] This is not a case of no reasons being given for a decision. I find it appropriate in this instance to look to the record for the purposes of assessing the reasonableness of the decision as a whole. Dr. Gauthier's report is far more detailed. He stated that Mr. Picher felt overcome by anxiety on a number of fronts: communication with his former wife; a recent automobile accident which led to insurance issues; financial preoccupations; and his current wife's recently encountered health problems, which were under study at the time. He felt he had difficulty in concentrating and that he committed errors at work as a result. He was tired, lacked energy and had lost interest in a number of matters. He did not identify conflicts with co-workers.

[34] Dr. Gauthier considered he was able to carry out his tasks, notwithstanding his anxiety. He mentioned that Mr. Picher was not taking the antidepressant medicine prescribed by Dr. Morris and suggested that, if he did, it was likely that his anxiety would diminish. He also suggested that Mr. Picher might be helped by psychotherapy sessions. However these sessions would not prevent him from working on a full-time basis.

[35] Having reviewed the record, and not personally being called upon to choose between Dr. Gauthier and Dr. Morris, I find it was reasonably open for adjudicator Dufort to prefer the former's opinion.

[36] The record suggests that Mr. Picher was guilty of hubris. He thought his case was bullet proof because of section 239 of the *Canada Labour Code*.

[37] In his decision, Mr. Dufort noted that, as general rule, employers are not entitled to insist upon an independent medical examination in order to verify the accuracy of a medical certificate produced by the employee's own doctor. However, an independent medical examination is permitted if the employee consents. It was held that Mr. Picher consented. It was open for Mr. Dufort to make that finding.

[38] Furthermore, the employer had every reason to be concerned. The reason or reasons for Mr. Picher's absence were somewhat of a movable feast. He was sick, his wife was sick, he had problems with co-workers. There are occasions when the employer is entitled to inquire into the *bona fide*s of an absence from work (*Charter Bus Lines of British Columbia Ltd and Tardif*, [1998] CLAD No 15 (QL) at para 8).

[39] The other complaints can be disposed of in a short order. There is simply no evidence in the record to suggest bad faith on the part of the employer. Self-represented litigants have no right to expect that a decision maker will act as their counsel. One may expect some guidance as to the procedure, and that was given. See the decision of the Federal Court of Appeal in *Wagg v R*, 2003 FCA 303, 308 NR 67.

[40] The language issue was not raised at the hearing and it is too late to raise it now. He should have been aware that Dr. Gauthier's report would be produced, as that was the very basis of the demand that he return to work. He knew the report was being sent to his employer, and had no right to expect that it would be written in English if he did not ask for it to be prepared in English or

translated. Had he asked for a postponement upon being presented with the report at the hearing, in order to study it and perhaps to call Dr. Morris as a witness, matters might have been different.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that

1. The application for judicial review of the decision of the adjudicator, Guy Dufort, dated 19 May 2011, File No. Z2969, Assignment No. MJIC01202, dismissing Mr. Picher's complaint of unjust dismissal under Part III of the *Canada Labour Code*, is hereby dismissed

2. The whole with costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1009-11
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