Federal Court  Cour fédérale

Date: 20120618

Docket: T-686-11

Citation: 2012 FC 772

Ottawa, Ontario, June 18, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

COUCHICHING FIRST NATION

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision issued on March 12, 2011 of an Adjudicator appointed under section 242 of the *Canada Labour Code*, RSC, c L-2 (CLC). The Adjudicator found that the Respondent, Aimee Adams, was unjustly dismissed from her employment because the Personnel Policy of the Applicant, Couchiching First Nation (CFN), provided a legal right to a pre-termination hearing before Chief and Council.

[2] For the reasons set out below, I am allowing the application.

[3] Given my conclusion with respect to the main application it is unnecessary to deal with the Applicant's Motion to Strike the Respondent's Record. It should be noted, however, that the Respondent's record was deficient in many respects.

I. Preliminary Matters

[4] Due to technical difficulties at the hearing on February 13, 2012, the Respondent missed the initial remarks of the Applicant. By way of a Direction from the Chief Justice of this Court, the hearing was re-opened on March 28, 2012 for the Respondent to make further submissions on the relevant portion of the transcript. At that time, the Respondent requested an adjournment citing additional time needed to prepare and gather cases. This request was denied as the cases referred to were considered wholly irrelevant to the matter at hand.

[5] Mr. Morrisseau, on behalf of his wife as the Respondent, also asked that I recuse myself from these proceedings. I invited both parties to make submissions in this regard and indicated my intention to reserve on that motion. I am now providing the following written reasons in response.

[6] The Respondent submits that it was unfair for the trial to start before they were present, even though this was a technical issue. They object to comments made regarding their lateness. According to the Respondent, the decision was made before they arrived and there was no chance to

give submissions and be fully heard. It was stated “we would like another shot at it with another Judge.”

[7] The Applicant opposes the motion for recusal insisting that there was no material prejudice to the Respondent from the technical difficulties. They were given various opportunities to make submissions, including the provision of two recesses. The issues raised had been put to the Respondent several times prior to the hearing. The nature of the process and what had occurred before the Respondent arrived was fully explained to them.

[8] Based on these submissions, I am prepared to dismiss the Respondent’s motion for recusal. I went out of my way to ensure the Respondent’s were given a full opportunity to be heard on the main application. Unaware of the technical difficulties, I stopped the proceedings to allow the Respondent to join us via video-conference. Thereafter, I summarized where we stood up until that point. I also clarified the three issues raised by the Applicant and gave the Respondent an opportunity to consider its position and make submissions.

[9] On being made aware of the technical issues following the hearing, the proceedings were reopened by the Court to accommodate the Respondent and allow further submissions on the matters discussed prior to their joining the hearing as available in the transcript. The Respondent did not make substantive submissions, but again asked for additional time to prepare.

[10] The Respondent was accorded procedural fairness and given ample opportunity to be heard on the issues raised by the Applicant. I also see no basis for concluding that an informed person,

viewing the matter realistically and practically, and having thought the matter through, would conclude that I demonstrated a reasonable apprehension of bias in allowing the Respondent to make full submissions or in my consideration of the case presented by both parties (see for example *R v RDS*, [1997] 3 SCR 484, [1997] SCJ no 84). The Respondent has provided no concrete evidence in this regard.

[11] With these preliminary matters resolved, I am prepared to address the legal issues raised by this application for judicial review.

II. Background to Main Application

[12] The Respondent was employed as a Personal Support Worker with the CFN Home and Community Care Program providing care to elders. CFN terminated her employment in March 2007 due to admissions relating to the theft and attempted replacement of prescription narcotic medications of an elder patient.

[13] On hearing the Respondent's admissions, the Band Manager, Mr. Morrisseau, first suspended her without pay. He also told her that he would convey the admissions to Chief and Council at the next regularly scheduled meeting for a final decision regarding her employment status. A hearing was ultimately held in camera and the decision made by the Chief and Council to dismiss the Respondent from her position.

[14] Following this termination, the Respondent brought an unjust dismissal complaint against CFN and requested the appointment of a labour Adjudicator.

[15] The Adjudicator held a bifurcated CLC hearing with phase I devoted to the determination of liability as to whether the Respondent was denied a legal right to a hearing before Chief and Council prior to her termination. A decision was rendered in the Respondent's favour on March 16, 2011.

[16] Justice Paul Crampton granted a stay to the Applicant in an order dated May 26, 2011 of phase II of the hearing in the assessment of damages for unjust dismissal pending the outcome of this application.

III. Adjudicator's Decision

[17] According to the Adjudicator, the critical issue was that the Respondent never had an opportunity to state her case to the Chief and Council, a matter of procedural fairness. It rejected the Applicant's submissions based on previous jurisprudence that he had to address the cause for dismissal.

[18] Considering the CFN Personnel Policy related to suspension and dismissal binding on all employees along with the actions of CFN, the Adjudicator stated:

> Chief and Council, however, took the facts as given by Mr. Morrisseau, allegedly supported by a "confidential" memorandum from a CFN employee, and determined to impose the discipline of discharge. In that sense, *I believe Chief and Council, on the facts as given by Mr. Morrisseau, acted beyond their authority within the meaning of §11.2(c) of the CFN Personnel Policy. Within*

> *the meaning of that section the Complainant should have been notified of the in camera meeting and have been given the opportunity to speak.*
>
> [Emphasis in original]

[19] The Adjudicator concluded:

> […] Chief and Council never had the opportunity to hear from Ms. Adams her "side of the story" and, in that regard, whether any claimed drug use existed and, if so, how she was coping with that problem (including its origin and its relationship to her job function as a personal care worker).
>
> In listing these points, I emphasize that *in no way am I commenting on the truth of what the Complainant has alleged. Rather, CFN failed to apply its own rules for employee discipline as to fundamental procedural fairness.*
>
> I point out again the insistent position of CFN Counsel that CFN had afforded the Complainant not only the opportunity but the invitation to appear before Chief and Council to state her case. (See, II(B), *supra*.) It was an argument which the facts presented in this hearing simply would not support. But, it evidenced a position relative to an interpretation of CFN Personnel Policy that was significant. *It was a position that stated that CFN saw it as a right for an employee faced with a serious disciplinary charge to come before Chief and Council at its in camera meeting to decide that person's employment status, and to state her case.*
>
> The result must be that, on the facts, the decision by Chief and Council to dismiss the Complainant must be set aside.
>
> [Emphasis in original]

IV. Issues

[20] This application raises the following issues:

(a) Did the Adjudicator apply the proper legal test for a finding of unjust dismissal under the CLC?

(b) Did the Adjudicator fail to grant the Applicant the right to make full submissions on the matter of reasons for termination and other matters material to the complaint?

(c) Did the Adjudicator breach the principles of natural justice by failing to allow for a hearing on the reasons for termination?

(d) Did CFN Personnel Policy grant Ms Adams the legal right to a pre-termination hearing before Chief and Council in the circumstances of admissions of theft and dishonesty, or in any circumstances?

V. Standard of Review

[21] The correctness standard is applicable to all issues raised by the Applicant. The use of the proper legal test is a question of law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 50). The right to make full submissions and be heard on the reasons for termination constitute matters of procedural fairness (*Canada (Minister of Citizenship and Immigration) v*

Khosa, 2009 SCC 12, 2009 CarswellNat 434 at para 43). Finally, assessing CFN's Personnel Policy is sufficiently similar to the interpretation of a Band Constitution where this Court has adopted the standard of correctness in the past (see *Ermineskin Cree Nation v Minde*, 2008 FCA 52, [2008] FCJ no 203 at para 32).

VI. Analysis

A. *Proper Legal Test for Unjust Dismissal*

[22] The Applicant submits that the Adjudicator erred in his application of the proper legal test for unjust dismissal by refusing to hear evidence and make a determination as to the cause for termination.

[23] Based on my review of the relevant authorities, I am inclined to agree with this position. While procedural deficiencies in the handling of the Respondent's termination by CFN were considered significant, the Adjudicator was still required to consider the cause for her termination at the outset.

[24] This was stressed by this Court in *Bell Canada v Halle*, [1989] FCJ no 555, 99 NR 149 in discussing the appropriate test to be applied by an Adjudicator:

> To begin with, I would say that the respondent's dismissal, assuming it to be otherwise justified, cannot be regarded as unjust solely because the applicant did not follow the dismissal procedure described in its internal directives to the letter. So far as I am aware, this procedure is not a condition of the employment contracts of Bell Canada employees. The applicant can therefore depart from it

> without giving rise to any objection, unless the departure causes an injustice. Contrary to what the adjudicator thought, therefore, it does not matter that the applicant did not follow the procedure described in its directives before dismissing the respondent. The question presented to him was whether the respondent had been unjustly dismissed. In order to answer this, he first had to consider the nature, sufficiency and merits of the reasons for dismissal. Accordingly, in the case at bar the adjudicator should have considered whether the applicant had any basis for complaint about the respondent's performance and whether this provided grounds for dismissal. [Footnote: Certain passages of the adjudicator's decision suggest that it may be worth noting that the adjudicator should have answered this question by taking account of the respondent's entire record since she was hired (a chronic problem and an accidental problem are not treated in the same way) and also by looking at the special position an employer is in when it comes to appraising his employees' competence and performance.] If the adjudicator had answered these questions in the affirmative, he should then have considered whether the procedure leading to dismissal of the employee was fair. However, his duty was then to make a judgment on whether the dismissal procedure used by the employer, taken by itself, was fair or unfair regardless of the procedure described in the directives; and if the adjudicator concluded that the procedure used in the case at bar was unfair in itself, and that because of this the dismissal had been unfair, he should then in determining the compensation to which the respondent was entitled as a consequence of the dismissal have taken into account the fact that, though premature, the dismissal was not entirely groundless.

[25] More recently, Justice Elizabeth Heneghan in *Carry the Kettle First Nation v O'Watch*, 2007 FC 874, [2007] FCJ no 1127 at paras 63-64 found an error of law in failing to apply the correct legal test where an Adjudicator addressed the manner in which the termination was handled and its consequences but neglected the issue of cause for dismissal.

[26] I must therefore find that the Adjudicator adopted the incorrect legal test by failing to consider the cause for termination and directing his attention solely to the procedures followed by CFN in the Respondent's dismissal.

B. *Right to Make Full Submissions on Reasons for Termination*

[27] I also agree with the Applicant's contention that the Adjudicator breached procedural fairness in failing to allow evidence to be submitted and submissions made regarding the reasons for the Respondent's termination.

[28] Subsection 242(2)(b) of the CLC makes clear that while Adjudicators can establish their own procedures they must "give full opportunity to the parties to the complaint to present evidence and make submissions" and "consider the information relating to the complaint." This procedural fairness requirement was highlighted in *Jennings v Shaw Cablesystems Ltd*, 2003 FC 1206, [2003] FCJ no 1539 at paras 15, 21.

[29] The Applicant was not given the full opportunity to present evidence and make submissions as to the reasons for the termination, a critical aspect of the complaint. As a result, the Adjudicator did not consider all of the pertinent information in rendering his decision. This resulted in a breach of procedural fairness that on its own warrants intervention by this Court.

C. *Natural Justice and Hearing on Reasons for Termination*

[30] Similarly, natural justice or procedural fairness was violated by the Adjudicator's related decision not to allow any hearing on the cause for termination. He focused solely on the procedures

followed and the Respondent's right to present her side of the story, but seemingly ignored the circumstances that gave rise to disciplinary action on the part of the Applicant.

[31] In *Université du Québec à Trois-Rivières v Laroque*, 101 DLR (4th) 491, [1993] SCJ no 23, the Supreme Court found a violation of the right to be heard resulted when a grievance arbitrator rejected relevant evidence.

[32] The same principle applies in this instance where the Applicant was denied the opportunity to be heard on evidence related to the reasons for the Respondent's termination. Having heard all evidence on crucial aspects of the complaint, it may have been appropriate for the Adjudicator to ultimately focus his attention on procedural concerns. That is, however, not what occurred in this instance. Instead, the Adjudicator refused to consider the reasons underlying termination and confined the hearing to procedural matters. This prevented all aspects of the complaint from being fully assessed.

D. *CFN Personnel Policy and Legal Right to Pre-Termination Hearing*

[33] Given my findings that the Adjudicator applied the incorrect legal test and breached procedural fairness in failing to hear the issue of the cause for dismissal, it is unnecessary for me to deal with the correct interpretation of the CFN Personnel Policy. This matter must now be addressed by a new Adjudicator who will consider not only the procedure followed but also the reasons for termination by the Applicant. I do recognize, however, that the interpretation of this

Personnel Policy and the obligations flowing from it will likely continue to play a significant role in any reconsideration.

VII. Conclusion

[34] As demonstrated, by failing to provide an opportunity to address the issue of the cause for termination at the hearing and consequently in his decision, the Adjudicator breached natural justice and procedural fairness owed to the Applicant and disregarded the proper legal test for unjust dismissal.

[35] Accordingly, this application for judicial review is allowed. The matter is remitted back to a different Adjudicator for re-determination.

[36] Costs will be awarded to the Applicant in the nominal amount of $100.00.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed. The matter is remitted back to a different Adjudicator for re-determination. Costs will be awarded to the Applicant in the nominal amount of $100.00.

"D.G. Near"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-686-11**
STYLE OF CAUSE:	**COUCHICHING FIRST NATION v THE ATTORNEY GENERAL OF CANADA (MINISTER OF LABOUR) AND AIMEE ADAMS**
PLACE OF HEARING:	**HELD BY VIDEOCONFERENCE IN OTTAWA, THUNDER BAY AND FORT FRANCES, ONTARIO**
DATE OF HEARING:	**FEBRUARY 13, 2012 & MARCH 28, 2012**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**JUNE 18, 2012**

APPEARANCES:

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Aimee Adams & Calvin Morrisseau (authorized to speak for Respondent)	SELF-REPRESENTED

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