Federal Court Cour fédérale

Date: 20140204

Docket: T-54-13

Citation: 2014 FC 126

Ottawa, Ontario, February 4, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

STANLEY BAHNIUK

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is an application for judicial review of the decision [Decision] of an adjudicator [Adjudicator] under the Public Service Labour Relations Board in relation to several grievances in respect of disciplinary actions taken against the Applicant, culminating in the termination of employment. The Adjudicator upheld part of the grievance but ordered compensation in lieu of reinstatement.

[2] The Applicant asks for an order allowing some or all of the grievances, reinstatement, costs and fees, interest and compensation for loss of reputation and effects on future employment. In the alternative, the Applicant asks for compensation of approximately $1.5 million plus costs.

[3] For the reasons to follow, this application will be dismissed with costs.

II. BACKGROUND

[4] The arbitration is established under paragraph 209(1)*(b)* of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [Act]. A strong privative clause set out in subsection 233(2) governs the review of an adjudicator's decision.

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to	209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :
(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;	*a)* soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;
(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;	*b)* soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;
…	…
233. (1) Every decision of an adjudicator is final and may not	233. (1) La décision de l'arbitre de grief est définitive et ne peut

be questioned or reviewed in any court.	être ni contestée ni révisée par voie judiciaire.
(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any of the adjudicator's proceedings under this Part.	(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou *dequo warranto* — visant à contester, réviser, empêcher ou limiter l'action de l'arbitre de grief exercée dans le cadre de la présente partie.

A. *Preliminary Facts*

[5] The Applicant was employed in the Accounts Receivable Division, Calgary Tax Service Office [TSO], Canada Revenue Agency for 24 years. For the past 20 years, he was a Team Leader.

[6] The Record discloses that the Applicant and management have had a strained relationship since 2002. The Applicant advised the Court during his oral argument that he had filed approximately 55 grievances in the past 8-10 years.

[7] In April 2007 the Applicant received a one-day suspension for inappropriate behaviour during a meeting with his manager. Following an altercation on May 2, 2008 with the Assistant Director of Calgary TSO, the Applicant received a three-day suspension.

[8] On July 30, 2009, the Respondent retained Randy Mattern [Mattern] to investigate thirteen pending allegations of management harassment. The Applicant did not provide Mattern with any documentary evidence and refused to review and sign a statement he had given.

[9] On October 2, 2009, the Assistant Director of the TSO instructed the Applicant to stop unprofessional conduct occurring in his team. The Applicant refused because he felt such a responsibility was not part of his duties. The Applicant later claimed that the instruction was a direct order and a form of management harassment.

[10] The events of November 19, 2009 are significant in this case. The Applicant met with the same Assistant Director and another Team Leader to discuss a file. The Applicant refused to make a decision on how to proceed with the file. He apparently objected to being required to determine the "correct course of action". He also refused to meet with the Assistant Director concerning file transfers – citing "personal" reasons.

[11] The meeting resumed the next day in the presence of a witness where the Assistant Director changed the wording of his order from "correct" course of action to "recommended" course of action. The Applicant again refused to meet to discuss file allocation but ultimately agreed to attend the meeting but said that he would not participate. The Assistant Director found the Applicant's position to be unacceptable, terminated the meeting and informed the Applicant that the next meeting would be a fact-finding one for disciplinary purposes.

[12] The fact-finding meeting was held and a disciplinary hearing was conducted on November 24, 2009. At that meeting the Applicant was confrontational, hostile and failed to present mitigating circumstances explaining his conduct. He was placed on administrative suspension without pay pending an investigation of his insubordination and his allegations of being harassed by the Assistant Director.

[13] The Director of the Calgary TSO, Mr. Leigh, conducted that investigation following which a disciplinary hearing was held on December 10, 2009. The Applicant received a 10-day suspension for two acts of insubordination committed on November 19, 2009 and a 20-day suspension (to be served consecutively) for misuse of the Respondent's harassment policy. This decision by the employer, like all the earlier ones, was grieved by the Applicant.

[14] At the end of December 2009, the Mattern investigation found all 13 allegations of harassment to be unfounded.

[15] Continuing in this vein of tension between the employer and employee, and following a meeting of January 18, 2010 called to discuss the employment relationship, Leigh determined that he needed further time to consider the matter and placed the Applicant on paid leave.

[16] Finally, on January 22, 2010, Leigh gave the Applicant a letter of termination based on the employer-employee relationship being irreparably damaged. The Applicant grieved the termination.

[17] The several grievances were referred to adjudication pursuant to paragraph 209(1)*(b)* and a hearing over six days was conducted by Stephen B. Katkin [Adjudicator]. The Applicant was present throughout and had representation from his union throughout. While the Respondent called witnesses who were cross-examined, the Applicant did not testify.

B. *Adjudicator's Decision*

[18] The Adjudicator ultimately had to deal with four grievances related to the following disciplinary actions:

- a three-day suspension without pay for unprofessional and disrespectful conduct;
- an indefinite suspension without pay pending investigation into the grievor's conduct;
- a 10-day suspension without pay for insubordinate behaviour and a 20-day suspension without pay for inappropriate use of the CRA's harassment policy; and
- termination of employment.

[19] The Adjudicator wrote a thorough and balanced decision addressing all the major issues in the various grievances.

C. *Three-Day Suspension*

[20] The Adjudicator found this suspension was appropriate. He noted that in respect of unprofessional and disrespectful conduct, the Applicant did not testify and there was nothing to contradict the evidence of the person who had been the target of this unseemly conduct. In fact, the Applicant had apologized.

D. *Indefinite Suspension*

[21] The Adjudicator held this grievance to be moot because the indefinite suspension became 10 and 20-day suspensions which were applied retroactively to the first day of the indefinite suspension.

E. *10 and 20-day Suspensions*

[22] The 10-day suspension was applied to two acts of insubordination. The first was the Applicant's failure to acknowledge the Assistant Director's direct order to meet with co-workers to determine the "correct" course of action. The second was the initial refusal to meet to discuss file allocation and the subsequent agreement to meet but refusal to participate.

[23] With respect to the first act, the Adjudicator found that the employer had not proven on a balance of probabilities that the Applicant had engaged in the alleged insubordination. Because the Applicant had ultimately attended the meeting, the Adjudicator found that he had acquiesced to the order.

[24] With respect to the second act, the Adjudicator accepted that the Applicant had initially refused to attend a meeting to discuss file allocation, and then attended the meeting but refused to participate. This was an act of insubordination warranting discipline.

[25] As the result was that only one of the two acts of insubordination was sustained, the 10-day suspension was halved to five days.

[26] With respect to the 20-day suspension for misuse of the CRA harassment policy, the Adjudicator found the Applicant's various grievances, as investigated by Leigh, to be baseless and made maliciously. The Adjudicator found the Applicant to have contravened that policy which

required complaints to be made in good faith. In particular, the grievances against the Applicant's suspension were unfounded and filed to be used as a weapon against the superior.

[27] The Adjudicator, basing the result on the earlier halving of the 10-day suspension, reduced the 20-day suspension to 10 days.

F. *Termination of Employment*

[28] The Adjudicator found that the termination was done for disciplinary reasons. The employer was disentitled to rely on the Applicant's failure to cooperate with the investigation because he had not been informed that he could be disciplined for his failure.

[29] The Adjudicator also found that the employer could not rely on the Applicant's statement on January 18, 2010 that he had not been disrespectful to management. The employer had not taken the statement sufficiently seriously to justify it being a "culminating event" justifying termination. In light of the absence of any culminating event and the revised disciplinary record, the Adjudicator found that the Applicant's termination was excessive.

[30] The Adjudicator concluded that there were exceptional circumstances which justified the payment of compensation in lieu of reinstatement. The employer had repeatedly made good faith efforts to improve the relationship with the Applicant – all of which had been rejected. The Adjudicator saw no reasonable prospect that the Applicant would accept direction from senior management and concluded that the employment relationship was clearly broken.

[31] Having concluded that the employment relationship was no longer viable, the Adjudicator, despite upholding some of the grievances and dismissing others, found that compensation in lieu of reinstatement was the appropriate remedy. The Adjudicator left the quantum of compensation to the parties for determination.

[32] Apparently the parties have not reached a settlement of quantum nor have either of them requested Board assistance.

At the hearing of this judicial review, the Applicant did not seriously challenge the conclusion that compensation was the only viable remedy.

III. ANALYSIS

[33] The Adjudicator's decision is reviewable on a standard of reasonableness (*Canada (Attorney General) v Amos*, 2011 FCA 38, [2012] 4 FCR 67). In this field of employment adjudication, the Court is to accord considerable deference to the Adjudicator's decision.

> Issues relating to the termination of an employee's employment fall within the very heartland of the adjudicator's jurisdiction. Thus, considerable curial deference applies. Adjudicators, in coming to their decisions, must observe witnesses' demeanour, hear and weigh evidence, make findings of fact, and draw the necessary conclusions. In the case at bar, that is precisely what the adjudicator did.
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> *McCormick v Canada (Attorney General of Canada)* (1998), 161 FTR 82, at para 16

[34] The Adjudicator not only has the expertise in this area, the Adjudicator heard the witnesses, assessed credibility and reached conclusions on the nature and viability of the employment relationship based on a far better position than this Court sitting in judicial review.

[35] I have set out the facts in this case thoroughly in order to show what was before the Adjudicator. A review of his decision shows that it was complete, thorough and thoughtful.

[36] In terms of reasonableness, others may find the Adjudicator to be unduly lenient to the Applicant who had a long history of challenging authority. However, it is impossible, on the facts of this case, to say that the Adjudicator was unreasonable.

[37] It was entirely open to the Adjudicator to find that the Applicant was engaged in maliciously filing grievances. It was also open to the Adjudicator to accept the evidence of other employees and management particularly where the Applicant did not testify and challenge that evidence.

[38] The Adjudicator applied the proper legal test in respect of discipline and exhibited a clear line of reasoning. It was not only open to the Adjudicator to find that the employment relationship was irreparably broken, it was the only conclusion a reasonable person could reach.

[39] The Applicant made arguments in the nature of complaints about breach of natural justice (procedural unfairness). However, he was unable to show any examples of where the Adjudicator breached or permitted a breach of procedural fairness.

[40] The Applicant attempted to canvas a number of issues he had with his employer which were outside the specific grievances before the Adjudicator. Whatever unfairness or complaints the Applicant had about the manner of investigation by the employer or about the employer's failure to follow time limits in CRA policy, these were not matters before the Adjudicator. The Applicant's

suggestion that he did not know what grievances were the subject of malicious filing is difficult to comprehend since he was the only person filing the multitudes of grievances.

IV. CONCLUSION

[41] There is no basis whatsoever for this Court to interfere with the Adjudicator's decision.

[42] The application for judicial review will be dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-54-13

STYLE OF CAUSE: STANLEY BAHNIUK v CANADA REVENUE AGENCY

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: JANUARY 21, 2014

REASONS FOR JUDGMENT AND JUDGMENT: PHELAN J.

DATED: FEBRUARY 4, 2014

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