Federal Court Cour fédérale

Date: 20140430

Docket: T-544-13

Citation: 2014 FC 400

[REVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 30, 2014

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

ODA KAGIMBI

Applicant

and

ATTORNEY GENERAL OF CANADA (DEPUTY HEAD – CORRECTIONAL SERVICE OF CANADA)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision issued February 27, 2013, by a Public Service Labour Relations Board [PSLRB] adjudicator. The decision was rendered subsequent to a grievance filed by the applicant against the respondent, the Deputy Head of the

Correctional Service of Canada [CSC], her employer at the time, in which she contested her rejection on probation of September 17, 2007.

I. Factual background

[2] On December 19, 2006, the applicant was hired as a correctional officer for the CSC at the Cowansville Institution in Quebec for an indeterminate period. This employment was subject to 12 months of probation.

[3] In January 2007, Benoit Leduc, the applicant's principal acting correctional supervisor, met with her to ask if she was comfortable with all the shifts, which she confirmed.

[4] The following week, Mr. Leduc informed her that she would have to retake the two-week orientation period at the institution. Mr. Leduc and Warden France Poisson testified that management wanted the applicant to retake these two weeks of orientation to assist her in addressing shortcomings, which she did from February 9 to 20, 2007.

[5] Following this two-week period, a series of incidents occurred at the institution. Correctional officers, including the applicant, who witnessed the events wrote observation reports. A number of people who wrote these reports were summoned to testify and testified at the hearing before the adjudicator.

[6] The applicant's performance appraisal report was prepared by Mr. Leduc on September 17, 2007, in which he noted that her performance was unsatisfactory given that she

was having difficulty performing her duties, seemed to lack confidence and required constant supervision.

[7] The same day, on the basis of that report, the applicant was dismissed by the warden, Ms. Poisson. In her dismissal letter, she explained the employer's reasons for rejecting the applicant on probation. According to Ms. Poisson, although the applicant had taken a second training session, no improvement in her performance was noted. She did not meet the expected objectives with respect to mastering security equipment and security posts, the ability to learn and the ability to react to a critical incident.

[8] On September 18, 2007, the applicant filed a grievance against her dismissal, asking for reinstatement in her position and reimbursement of the salary and benefits owed to her as well as damages incurred.

[9] On May 19, the adjudicator dismissed the applicant's grievance (*Kagimbi v Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 67). She filed an application for judicial review with the Federal Court, which was allowed by Justice Scott (*Kagimbi v Canada (Attorney General)*, 2011 FC 527). He found that the "[f]ailure to take into account the applicant's objections renders the adjudicator's principal finding that 'the facts are indeed related to the grievor's employment, performance or conduct' arbitrary". The Court therefore referred the grievance before another adjudicator for redetermination.

[10] A new hearing took place before Adjudicator Renaud Paquet.

[11] On February 27, 2013, the adjudicator issued his decision that he did not have jurisdiction to hear the grievance and therefore ordered that the file be closed.

II. Statutory framework

[12] The sections of the pertinent statutes are set out in the Appendix to this judgment..

III. Adjudicator's decision

[13] After an overview of the relevant jurisprudence (*Jacmain v Attorney General (Canada) et al*, 1977 CanLII 200 (SCC), [1978] 2 SCR 15 at para 37; *Canada (Attorney General) v Penner*, [1989] 3 FC 429 (FCA) [*Penner*]; and *Canada (Attorney General) v Leonarduzzi*, 2001 FCT 529) [*Leonarduzzi*], the adjudicator determined that an adjudicator does not have jurisdiction to hear a grievance on the merits if it is against a rejection on probation and that his or her role is limited to determining whether the dismissal was a rejection on probation. If the adjudicator finds that the employer acted in bad faith or dismissed the employee for a reason unrelated to the employee's ability to perform the duties, the adjudicator could have jurisdiction to hear the grievance.

[14] In light of the evidence in the record, the adjudicator found that the applicant was still on probation when she was dismissed and concluded that the respondent had proved unequivocally that it believed the applicant was incapable of performing the duties of a correctional officer.

[15] The adjudicator accepted the applicant's allegation that she had not been made aware of her shortcomings. However, he rejected the suggestion that the employer's lack of transparency amounted to bad faith. He determined that the employer was not required to give the applicant a warning.

[16] As for the employer's error regarding the payment in lieu of notice, that error did not invalidate the rejection on probation because it had nothing to do with whether the dismissal was appropriate. The applicant's only substantive right, faced with this error, was to obtain payment in lieu of notice as should have been done from the start.

[17] With respect to the employer's guidelines on dismissal, the adjudicator found that it was not necessary for him to comment on the guidelines since they are not legally binding and are meant merely to guide the employer's managers.

IV. Issues

[18] The issues are as follows:

1. What is the appropriate standard of review?

2. Was the employer's decision unreasonable on the basis of bad faith?

3. Did the employer's failure to pay one month's salary to the applicant as notice, when it was obliged to do so, invalidate the decision?

4. Are the employer's guidelines on dismissal legally binding such that the decision may be set aside because they were not complied with?

V. **Standard of review**

[19] The appropriate standard of review is reasonableness for the assessment of facts and for questions of mixed law and fact. As Justice Boivin stated in *Canada (Attorney General) v Bergeron*, 2013 FC 365 at paragraph 27:

> With respect to the second issue, i.e., in the event that the adjudicator has correctly identified the burden of proof but has applied it erroneously, it is the standard of reasonableness that applies. The issue of whether the evidence before the adjudicator discharges the burden imposed on each party is a determination made by examining questions of fact, as well as questions of mixed fact and law, which calls for a standard of reasonableness, given the adjudicator's expertise in the field of public service labour relations and the privative clause at section 233of the *Public Service Labour Relations Act* (*Dunsmuir*, above, at paras 52-55). In such cases, it must be acknowledged that more than one finding is possible and that the adjudicator's expertise plays an important role in that determination (*Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12 at paras 25 and 59, [2009] 1 SCR 339; *Canada (Attorney General) v King*, 2009 FC 922 at para 10, [2009] FCJ No 1137 (QL)). Deference is therefore owed to the adjudicator's findings regarding questions of fact and questions of mixed fact and law; what is to be examined is the reasonableness of her findings about whether the burden of proof was met.

VI. Arguments of the parties

[20] The applicant submits that the adjudicator had jurisdiction to rule on the issue of whether the employer met the basic requirements towards the applicant at the time of her dismissal.

[21] The applicant maintains that the employer made a number of errors at the time of her dismissal. Specifically, the applicant was not informed of her right to notice or compensation, she received compensation for a two-week period, which should have been thirty days, and her regular salary was not paid when it should have been.

[22] In addition, the guidelines, which require that employees on probation be advised when they have to improve their performance or behaviour, are legally binding and that, in any event, if the Court finds that they are not legally binding, they are relevant for determining whether the employer acted in good faith. In this case, the applicant was never advised in a transparent manner of the shortcomings, contrary to the guidelines.

[23] She also alleges a number of serious anomalies in the observation reports that were the basis of the performance appraisal report, which shows that the employer used the rejection on probation as a sham to hide another reason for dismissal.

[24] Consequently, the adjudicator made an unreasonable error in interpreting the PSEA when he found that he did not have jurisdiction to hear the grievance.

[25] On the other hand, the respondent submits that the adjudicator's role is to ensure that the employer's decision was indeed a decision made in good faith for a reason related to employment, having regard to the individual's abilities and aptitudes.

[26] In the applicant's case, the employer filed in evidence the dismissal letter, which states the reasons for the dismissal. A number of witnesses heard by the adjudicator testified about the employer's dissatisfaction with her ability to work as a correctional officer. In light of such evidence, the only reasonable conclusion the adjudicator could reach was that he did not have jurisdiction to hear this grievance because the employer dismissed the applicant for an employment-related reason during probation. I agree.

VII. <u>Analysis</u>

[27] Under sections 209 and 211 of the PSLRA as well as section 62 of the PSEA, a PSLRB adjudicator does not have jurisdiction to hear a grievance involving a rejection on probation. A grievance can be referred to arbitration before the PSLRB only in the cases set out in section 209 of the PSLRA.

[28] However, the Federal Court of Appeal determined in *Penner*, above, that an adjudicator hearing a grievance filed by an employee rejected on probation is entitled to look into the circumstances of the case to ensure that the termination of employment arose from *bona fide* dissatisfaction as to suitability for the position in question.

[29] With respect to the burden of proof, the onus is on the employer to present some evidence that the rejection was related to employment issues and not for any other purpose (see *Leonarduzzi*, above at para 37). If that is done, the public servant must demonstrate that the termination was "based on a cause other than a *bona fide* dissatisfaction as to suitability, in other words, that the employer had acted in bad faith or that the termination was a camouflage or sham. This is admittedly a heavy burden" (*Bergeron*, above at para 35).

[30] In this case, the evidence before the adjudicator clearly showed that the employer had reasons for the applicant's employment-related dismissal. The rejection on probation letter listed shortcomings with respect to mastering security equipment and security posts, the ability to learn and the ability to react to a critical incident. A number of public servants testified before the adjudicator referring to these shortcomings.

[31] In light of this evidence, the adjudicator could only conclude that the employer had discharged its burden of proof. The applicant then attempted to show the employer's bad faith based on the unfair treatment she received because the employer and its representatives had not confronted her or informed her of the shortcomings in her work prior to the day of her dismissal.

[32] In this regard, the adjudicator determined that "[his] role is not to decide whether the employer acted fairly toward Ms. Kagimbi in how it managed the alleged shortcomings in her work or whether the management practices of the correctional supervisors were appropriate".

[33] Certainly, the employer could have shown the reports to the applicant so that she could improve her weaknesses, but that is not a criterion required to reject an employee on probation. As the adjudicator properly stated in his decision at para 77:

> . . . in a rejection on probation, the employer must demonstrate good faith in its decision to terminate employment during probation. It cannot use a rejection on probation to camouflage another form of dismissal. However, it does not mean that the employer is required to be transparent with the employee during his or her probation and to inform the employee of shortcomings in his or her work, to give the employee a chance to correct them. Common sense and good management practices would dictate doing so, but the law does not require it.

He therefore concluded that the decision to dismiss the applicant was a decision made in good faith, i.e. that it was based on dissatisfaction as to the employee's abilities to do the work in question.

[34] In my opinion, that conclusion was reasonable. The jurisprudence shows that the statute is drafted such that the employer has a great deal of flexibility during the probation period, precisely so that it can evaluate the skills of a potential employee.

[35] The applicant also raises the employer's error in not paying her a month's salary as notice. Subsection 62(2) of the PSEA states that, in dismissing an employee on probation, instead of giving the notice under subsection (1) of that section, an employer may pay the employee an amount equal to the salary they would have been paid during the notice period.

[36] In this case, the employer should have paid the equivalent of one month's salary to the applicant, not the equivalent of two weeks' salary, which was subsequently corrected.

[37] This defect in the notice payment does not change the decision made in good faith to dismiss an employee on probation. Parliament's intention was that an adjudicator does not have jurisdiction to rule on a grievance involving a rejection on probation. An error in the length of notice cannot contravene a requirement clearly expressed by Parliament.

[38] Last, with respect to the guidelines, "generally speaking, such policies are not legally binding unless the enabling statute requires a department to issue the policy" (*Hughes v Canada (Attorney General)*, 2008 FC 832 at para 16). The adjudicator properly determined that this did not invalidate the rejection on probation.

[39] Indeed, for such a policy to be considered as having the force of law, its nature must be analyzed, which was done in *Gingras v Canada*, 1994 CanLII 3475 (FCA), [1994] 2 FC 734 (CA), where the Federal Court of Appeal determined that a Treasury Board policy entitled "Bilingualism Bonus Plan" had the force of law because it was precise, conferred a benefit and left no discretion to government departments, which is not the case here.

[40] The guidelines in question were not filed into evidence. No witness before the adjudicator was able to provide the necessary clarifications. The applicant has not therefore demonstrated how the employer's internal document could be legally binding.

[41] Accordingly, the adjudicator took into consideration the statutory and jurisprudential framework in which he operated; he heard all the evidence and determined that the employer had

unequivocally shown that it dismissed the applicant in good faith for an employment-related reason.

[42] I am of the view that, in its entirety, both the process of articulating the reasons and the outcome have the qualities that make the decision reasonable (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 para 47).

[43] Accordingly, the application for judicial review is dismissed with costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs.

"Danièle Tremblay-Lamer"
Judge

APPENDIX

***Public Service Employment Act*, SC 2003, c 22, ss 12 and 13 [the PSEA]**

61. (1) A person appointed from outside the public service is on probation for a period	61. (1) La personne nommée par nomination externe est considérée comme stagiaire pendant la période:
(a) established by regulations of the Treasury Board in respect of the class of employees of which that person is a member, in the case of an organization named in Schedule I or IV to the Financial Administration Act; or	a) fixée, pour la catégorie de fonctionnaires dont elle fait partie, par règlement du Conseil du Trésor dans le cas d'une administration figurant aux annexes I ou IV de la Loi sur la gestion des finances publiques;
(b) determined by a separate agency in respect of the class of employees of which that person is a member, in the case of an organization that is a separate agency to which the Commission has exclusive authority to make appointments.	b) fixée, pour la catégorie de fonctionnaires dont elle fait partie, par l'organisme distinct en cause dans le cas d'un organisme distinct dans lequel les nominations relèvent exclusivement de la Commission.
(2) A period established pursuant to subsection (1) is not terminated by any appointment or deployment made during that period.	(2) Une nouvelle nomination ou une mutation n'interrompt pas la période de stage.
62. (1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of	62. (1) À tout moment au cours de la période de stage, l'administrateur général peut aviser le fonctionnaire de son intention de mettre fin à son emploi au terme du délai de préavis:
(a) the notice period established by regulations of	a) fixé, pour la catégorie de fonctionnaires dont il fait

the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the Financial Administration Act, or	partie, par règlement du Conseil du Trésor dans le cas d'une administration figurant aux annexes I ou IV de la Loi sur la gestion des finances publiques;
(b) the notice period determined by the separate agency in respect of the class of employees of which that employee is a member, in the case of a separate agency to which the Commission has exclusive authority to make appointments,	b) fixé, pour la catégorie de fonctionnaires dont il fait partie, par l'organisme distinct en cause dans le cas d'un organisme distinct dans lequel les nominations relèvent exclusivement de la Commission.
and the employee ceases to be an employee at the end of that notice period.	Le fonctionnaire perd sa qualité de fonctionnaire au terme de ce délai.
(2) Instead of notifying an employee under subsection (1), the deputy head may notify the employee that his or her employment will be terminated on the date specified by the deputy head and that they will be paid an amount equal to the salary they would have been paid during the notice period under that subsection.	(2) Au lieu de donner l'avis prévu at paragraphe (1), l'administrateur général peut aviser le fonctionnaire de la cessation de son emploi et du fait qu'une indemnité équivalant au salaire auquel il aurait eu droit au cours de la période de préavis lui sera versée. Le fonctionnaire perd sa qualité de fonctionnaire à la date fixée par l'administrateur général.

A. *Public Service Labour Relations Act*, SC 2003, c 22, s. 2 [the PSLRA]

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	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

employee's satisfaction if the grievance is related to

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;

(c) in the case of an employee in the core public administration,

c) soit, s'il est un fonctionnaire de l'administration publique centrale:

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(i) la rétrogradation ou le **licenciement** imposé sous le régime soit de l'alinéa 12(1)d) de la Loi sur la gestion des finances publiques pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(ii) la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

d) soit la rétrogradation ou le **licenciement** imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

(2) Before referring an individual grievance related to

(2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage

matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

un grief individuel du type visé à l'alinéa (1)a), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage.

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).

211. Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to

(a) any termination of employment under the Public Service Employment Act; or

(b) any deployment under the Public Service Employment Act, other than the deployment of the employee who presented the grievance.

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

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(b) a disciplinary action resulting in termination, demotion, suspension or

financial penalty;

(c) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).

211. Nothing in section 209 is to be construed or applied as permitting the referral to

211. L'article 209 n'a pas pour effet de permettre le renvoi à l'arbitrage d'un grief

adjudication of an individual grievance with respect to	individuel portant sur:
(a) any termination of employment under the Public Service Employment Act; or	a) soit tout **licenciement** prévu sous le régime de la Loi sur l'emploi dans la fonction publique;
(b) any deployment under the Public Service Employment Act, other than the deployment of the employee who presented the grievance.	b) soit toute mutation effectuée sous le régime de cette loi, sauf celle du fonctionnaire qui a présenté le grief.

FEDERAL COURT

SOLICITORS OF RECORD

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