Federal Court of Appeal  Cour d'appel fédérale

Date: 20160429

Docket: A-529-14

Citation: 2016 FCA 136

CORAM: **NOËL C.J.**
DAWSON J.A.
SCOTT J.A.

BETWEEN:

MAGDALENA FORNER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on January 12, 2016.

Judgment delivered at Ottawa, Ontario, on April 29, 2016.

REASONS FOR JUDGMENT BY: SCOTT J.A.

CONCURRED IN BY: NOEL C.J.
DAWSON J.A.

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REASONS FOR JUDGMENT

SCOTT J.A.

[1] This is an application for judicial review of a decision of the Public Service Labour Relations Board (PSLRB) rendered by an adjudicator (the Adjudicator) on October 31, 2014 (2014 PSLRB 95). In his decision, the Adjudicator dismissed a grievance filed by Magdalena Forner (the applicant) challenging the termination of her employment as a PC-02 Scientist by the Deputy Head of Environment Canada pursuant to paragraph 12(1)(*d*) of the *Financial*

Administration Act, R.S.C. 1985, c. F-11. Pursuant to section 230 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the Act), the Adjudicator concluded that it was reasonable to terminate the applicant's employment.

[2] This application for judicial review was set for a hearing in Ottawa at the applicant's request. However, the applicant failed to appear on January 12, 2016, without having advised the Court in advance. As a result, it was decided that this appeal would be disposed of on the basis of the written submissions of the parties.

I. The Facts

[3] The facts are set out in detail in the reasons of the Adjudicator. For the purpose of this application, the following facts are sufficient.

[4] In June 2009, the applicant was hired by Environment Canada as an "atmospheric processes scientist". At the Edmonton office, she worked for the Meteorological Service of Canada (Prairie and Northern Region) in the Air Quality Science Unit.

[5] At the beginning of January 2011, the applicant's professional conduct started to raise criticism.

[6] Considering that she had failed to sufficiently improve her work performance, her employment was terminated by letter dated January 26, 2012.

II. The Adjudicator's decision

[7] The applicant argued before the Adjudicator that the decision of the Deputy Head was unreasonable because: i) the standards on which her work performance was assessed were never clearly communicated to her; ii) she was not given appropriate assistance, tools, guidance and monitoring to improve her work performance; iii) she was denied a reasonable time to improve her work performance. In essence, the applicant pleaded three of the four factors set out in *Raymond v. Treasury Board,* 2010 PSLRB 23, [2010] C.P.S.L.R.B. No. 24 at paragraph 131 [*Raymond*].

[8] The Adjudicator framed the issue to be whether the assessment that the applicant's performance was unsatisfactory was reasonable. In the Adjudicator's view, this was a two-part question. First, was the applicant's performance unsatisfactory? Second, if so, was the assessment reasonable (reasons at paragraph 184)? Accordingly, the Adjudicator first considered all of the evidence adduced by the parties in order to determine whether the applicant's performance was unsatisfactory (reasons at paragraphs 185-199). He concluded that the applicant's performance was unsatisfactory from June 2011 until her termination in January 2012. The Adjudicator then went on to find the assessment of the applicant's performance was reasonable (reasons at paragraphs 200-225).

[9] He found that the evidence adduced clearly showed that the applicant was apprised of the requirements of her position (reasons at paragraph 213), the employer provided the appropriate assistance and guidance to the applicant (reasons at paragraphs 216-219) and she was afforded a

reasonable amount of time to improve her performance (reasons at paragraphs 221-224). Consequently, he concluded that it was reasonable for the Deputy Head to terminate the applicant's employment.

III. The standard of review

[10] On an application for judicial review, this Court must first consider whether the case law has established the relevant standard of review (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 62 [*Dunsmuir*]). It has previously been determined that the standard of review applicable to a decision of an adjudicator of the PSLRB reviewing a grievance challenging a dismissal under the Act, must be reviewed under the reasonableness standard (*King v. Canada (Attorney General)*, 2013 FCA 131, 446 N.R. 149).

[11] The Adjudicator's construction of section 230 of the Act should also be reviewed on a standard of reasonableness, but in this case the margin of appreciation is narrower (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paragraphs 37-41).

IV. The arguments

[12] In the instant proceeding, the applicant has raised seven issues pertaining to the findings of facts of the Adjudicator.

[13] The applicant has introduced, through her affidavit and appended exhibit "A", new evidence to challenge the Adjudicator's overall conclusion that it was reasonable for the Deputy Head to terminate her employment for unsatisfactory performance.

[14] The respondent argues that the applicant is using her affidavit to qualify or add to the evidence adduced before the PSLRB.

[15] The applicant also submits that the Adjudicator: i) made his decision without regard to the evidence she adduced; ii) erred in law by imposing a higher standard; and iii) violated the rules of natural justice. The respondent disputes these submissions on grounds that the Adjudicator did consider all the evidence presented. Moreover, the respondent underlines that the applicant had the benefit of a more thorough review than necessary because the Adjudicator examined whether the applicant's performance was unsatisfactory which he needn't do and which he ought not to have done.

V. Analysis

[16] Before turning to the applicant's submissions, it is important to note that in coming to his decision, the Adjudicator unreasonably interpreted the test set out in section 230 of the Act. Section 230 provides:

230. In the case of an employee in the core public administration or an employee of a separate agency designated under subsection 209(3), in making a decision in respect of an employee's individual grievance relating to a termination of	**230**. Saisi d'un grief individuel portant sur le licenciement ou la rétrogradation pour rendement insuffisant d'un fonctionnaire de l'administration publique centrale ou d'un organisme distinct désigné au titre du paragraphe 209(3),

employment or demotion for unsatisfactory performance, an adjudicator or the Board, as the case may be, must determine the termination or demotion to have been for cause if the opinion of the deputy head that the employee's performance was unsatisfactory is determined by the adjudicator or the Board to have been reasonable.	l'arbitre de grief ou la Commission, selon le cas, doit décider que le licenciement ou la rétrogradation étaient motivés s'il conclut qu'il était raisonnable que l'administrateur général estime le rendement du fonctionnaire insuffisant.

[17] The Adjudicator first proceeded to determine whether the applicant's performance was unsatisfactory, he then examined the issue of the reasonableness of the assessment of the Deputy Head, using three criteria taken from *Raymond* that were raised by the applicant. Since the Deputy Head had determined that the applicant's performance was unsatisfactory, the Adjudicator should have restricted his discussion to the issue of whether the Deputy Head's decision was reasonable instead of proceeding to a two-step analysis as he did.

[18] The Adjudicator thus failed to follow a well-settled line of cases decided by the PSLRB on the applicable test (See *Raymond*; *Plamondon v. Deputy Head (Department of Foreign Affairs and International Trade)*, 2011 PSLRB 90, [2011] C.P.S.L.R.B. No. 89; *Mazerolle v. Deputy Head (Department of Citizenship and Immigration)*, 2012 PSLRB 6, [2012] C.P.S.L.R.B. No. 6; *Reddy v. Office of the Superintendent of Financial Institutions*, 2012 PSLRB 94, [2012] C.P.S.L.R.B. No. 88). He should not have made an independent analysis of the applicant's performance.

[19] That being said, the decision of the Adjudicator is still reasonable as there was sufficient evidence, in my view, to come to the conclusion that the Deputy Head's decision was reasonable (reasons at paragraphs 208-225).

[20] The level of deference owed to the Adjudicator's decision depends on the context. Where the decision is mostly factual, the range of defensible outcomes is wide. In an application for judicial review of a decision of the PSLRB, this Court cannot go beyond the evidence that was adduced before the Adjudicator. This Court does not normally accept new evidence (*Bernard v. Canada Revenue Agency*, 2015 FCA 263, [2015] F.C.J. No. 1396 at paragraphs 31-32, *Connolly v. Canada (Attorney General)*, 2014 FCA 294, [2014] F.C.J. No. 1237 at paragraphs 6-7).

[21] Having carefully reviewed the record, the applicant has failed to point to evidence in the record that would show that the Adjudicator has made errors in his findings of facts that render his decision unreasonable. The applicant has also failed to provide the exhibits that were introduced before the Adjudicator or to clearly identify the evidence in the record on the basis of which she challenges the findings of the Adjudicator. Rather, she relies on her affidavit and the timeline of events appended thereto which were not before the Adjudicator.

[22] As I turn to the Adjudicator's decision in light of the applicant's remaining claims: i) that the standards according to which she was being assessed were never clearly communicated to her and ii) that she was not given appropriate assistance or afforded a reasonable period of time to improve her performance, I must reject those submissions. Firstly, it is clear from the decision of the Adjudicator that the evidence adduced showed that the applicant was informed on numerous

occasions of what was expected in terms of performance (reasons at paragraphs 211-213). Secondly, the Adjudicator pointed to evidence that, starting in June 1, the applicant's manager was meeting with her on almost a daily basis (reasons at paragraph 216). Finally, the Adjudicator's finding that the applicant was afforded a reasonable period of time to improve her performance is reasonable as it is based on the evidence (reasons at paragraphs 222-224).

[23] The submission of the applicant that the Adjudicator imposed a higher standard must also fail. It is clear from the decision that the Adjudicator did not apply an elevated standard of proof. The use of the phrase "clearly unreasonable" in paragraph 184 of his reasons was in fact corrected when the Adjudicator wrote immediately thereafter that the test was quite simply to determine "…[W]hether or not the assessment that the grievor's performance was unsatisfactory, by Ms. Mintz and Ms. Best, and accepted by the deputy head was reasonable".

[24] Furthermore, in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, Justice Abella for the majority reiterated:

> [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed.

[25] In my opinion, when viewed as a whole, the Adjudicator applied the proper standard of proof to the decision of the Deputy Head.

[26] I must also reject the applicant's submission that the Adjudicator rendered his decision without taking into consideration that some of the evidence adduced was missing from the file. The letter written by the Senior Legal Counsel from the PSLRB in response to enquiries made by the applicant clearly shows that there were no exhibits missing from the file (Exhibit C, Maier's affidavit, respondent's record at page 65).

[27] I cannot accept the applicant's position that the Adjudicator arrived at his decision in violation of the rules of natural justice because he failed to point to the evidence on which his decision is based. In fact, the Adjudicator's decision is replete with references to the evidence that was adduced during the course of the hearing (reasons at paragraphs 208, 211, 213, 214, 216, 218 and 224).

[28] Finally, for the sake of completeness, I must add that the applicant in her submissions is seeking relief that cannot be granted by this Court in an application for judicial review. This Court does not have the authority to grant the corrective measures the applicant seeks from her former employer.

VI. Conclusion

[29] I conclude that the decision of the Adjudicator was reasonable.

[30] For these reasons, I would dismiss this application for judicial review, with costs.

"A.F. Scott"

J.A.

“I agree.
Marc Noël C.J.”

“I agree.
Eleanor R. Dawson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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