

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160429

Docket: A-397-15

Citation: 2016 FCA 125

**CORAM: DAWSON J.A.
BOIVIN J.A.
DE MONTIGNY J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CRAIG DYSON

Respondent

Heard at Ottawa, Ontario, on April 19, 2016.

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

REASONS FOR JUDGMENT BY:

BOIVIN J.A.

CONCURRED IN BY:

**DAWSON J.A.
DE MONTIGNY J.A.**

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] Mr. Craig Dyson began employment as a Fishery Officer Trainee at the Department of Fisheries and Oceans Canada (DFO) on May 26, 2008 and was subject to a probationary period until he completed the Fishery Officer Career Progression Program. The DFO terminated Mr. Dyson's employment on July 5, 2010, while he was still on probation.

[2] The relevant portions of Mr. Dyson's letter of dismissal read as follows:

The purpose of this letter is to advise you that, in accordance with the authority delegated to me under [sub]section 62 (1) of the *Public Service Employment Act*, I have concluded with regret that your employment with the Department of Fisheries and Oceans [DFO] will be terminated, effective today, July 5, 2010, at the close of business. ...

The reason for terminating your employment is due to your unsuitability for the position of Fishery Officer Trainee, more specifically ...

- Concerns related to reliability and attendance;
- Failure to meet work requirements[;]
- Failure to adhere to established policies, procedures, practices, and codes of conduct.

[3] Mr. Dyson grieved the decision to terminate his employment and referred his grievance to the Public Service Labour Relations and Employment Board. His grievance was denied at all three levels of the grievance process. Mr. Dyson then referred it to adjudication pursuant to paragraph 209(1)(b) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 s. 2 (the Act). The adjudicator, Mr. John C. Jaworski, allowed the grievance and ordered that Mr. Dyson be reinstated in his position at the GT-02 group and level, the rank at which he was first appointed.

[4] The adjudicator concluded that he had jurisdiction and was not barred by section 211 of the Act to hear the grievance because he found that the DFO had acted in bad faith and had not based its decision on *bona fide* dissatisfaction with his suitability.

[5] The standard of review of a decision of an adjudicator with respect to dismissal or disciplinary action is reasonableness (*Payne v. Bank of Montreal*, 2013 FCA 33, [2013] F.C.J. No. 123 at paras. 32 and 33; *King v. Canada (Attorney General)*, 2013 FCA 131, [2013] F.C.J.

No. 551 at para. 3). Also, Public Service Labour Relations and Employment Board's adjudicators are owed deference in their exercise of interpretive discretion, because they have a particular expertise in interpreting and applying the Act (*Kagimbi v. Canada (Attorney General)*, 2014 FC 400, 453 F.T.R. 286 at para. 19, affirmed 2015 FCA 74, [2015] F.C.J. No. 474 [*Kagimbi FCA*] at para. 4).

[6] In this appeal, the Crown asserts that the adjudicator erred in finding that the DFO acted in bad faith and that Mr. Dyson's dismissal was not based on a *bona fide* dissatisfaction as to employment suitability. The Crown also submits that the adjudicator erred and exceeded his jurisdiction, because he did not explicitly identify his reason for assuming jurisdiction under section 209 of the Act.

[7] I cannot agree.

[8] In my view, the adjudicator's decision was reasonable in the circumstances, because the DFO failed to provide evidence or facts in support of its decision to terminate Mr. Dyson's employment. Indeed, on many occasions, the adjudicator repeats that the existence of evidence or facts is lacking (see for example the adjudicator's decision at paras. 64, 79, 80, 81, 113, and 134). On another occasion, he found that the evidence tendered by DFO was "disconcerting" (para. 139).

[9] More specifically, on the allegation of performance issues, the adjudicator found that the DFO failed to demonstrate proper existence of facts. The adjudicator mentioned at paragraph 136 of his reasons:

... It is clear that Mr. Lambert relied on the information provided to him in support of this assessment; however, for this reliance to be in good faith and to meet the test of a *bona fide* dissatisfaction as to the grievor's suitability, the facts must exist to support that finding. Here, if those facts exist, they were never provided to me, despite the clear question being asked to the three people who made the determination. ... [Emphasis added]

[10] On the allegation of failure to adhere to policies and procedures, the adjudicator found that the individual responsible for the termination decision, Mr. Robert Lambert, Director of Conservation and Protection for the Newfoundland and Labrador Region of DFO, erroneously took into an account incident that did not take place during the relevant probationary period and relied on policies that had never previously been enforced and never been made clear to Mr. Dyson. For example, with regard to the allegation of the failure to follow the firearms policy, the adjudicator noted at paragraph 64 of his reasons that he heard no evidence of:

1. what, if any, training the grievor received with respect to the firearms policy;
2. whether the grievor was provided a copy of the firearms policy;
3. what, if any, information or training the grievor was given with respect to accessing the firearms policy on the DFO intranet site; and
4. whether the firearms policy was actually available on the DFO intranet site at the time the loss of the magazine incident occurred.

[11] On the allegation of issues with attendance and reliability, the adjudicator found that the DFO failed to adduce evidence to support their allegation that Mr. Dyson did not engage in the appropriate steps for taking sick leave and that he had misused that leave. The adjudicator noted at paragraph 149 of his reasons:

... Although there was an allusion by the employer that the grievor did not submit medical certificates when required, there was no actual evidence that this was the case; in fact the grievor testified that whenever he was required to provide medical certificates, he did so. [Emphasis added]

[12] It is well-settled law that “an adjudicator seized of a grievance by an employee rejected on probation is entitled to look into the matter to ascertain whether the case is really what it appears to be” (*Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), [1989] F.C.J. No. 461 at para. 17). Thus, it was open to the adjudicator to inquire as to whether the “employer had used rejection on probation as a sham to camouflage another reason for the dismissal and had therefore acted in bad faith” (*Kagimbi FCA* at para. 2) and, on that basis, assume jurisdiction under paragraph 209(1)(b).

[13] In the present case, I am of the view that, confronted with the lack of evidence and the absence of facts provided by the DFO, it was reasonable for the adjudicator to find that the employer acted in bad faith.

[14] Finally, I agree with the Crown that the adjudicator did not explicitly state that Mr. Dyson’s termination amounted to “disguised discipline” as enumerated under paragraph 209(1)(b) of the Act. This deficiency, however, is not fatal. While it would have been preferable to make explicit reference to the provision, a holistic reading of the adjudicator’s reasons supplemented by a review of the record supports that this was the basis of the adjudicator’s assumption of jurisdiction (*Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] S.C.J. No. 62 at para 14). As such, section 211 of the Act could not operate to bar the adjudicator’s jurisdiction.

[15] For these reasons, I propose to dismiss the appeal with costs in the amount of \$1,500 all inclusive.

“Richard Boivin”

J.A.

“I agree

Eleanor R. Dawson J.A.”

“I agree

Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-397-15

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA v. CRAIG DYSON

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: APRIL 19, 2016

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: DAWSON J.A.
DE MONTIGNY J.A.

DATED: APRIL 29, 2016

APPEARANCES:

Richard Fader FOR THE APPLICANT

Andrew Astritis FOR THE RESPONDENT
Morgan Rowe

SOLICITORS OF RECORD:

William F. Pentney FOR THE APPLICANT
Deputy Attorney General of Canada

Raven, Cameron, Ballantyne & Yazbeck LLP FOR THE RESPONDENT
Ottawa, Ontario