Federal Court of Appeal | Cour d'appel fédérale

Date: 20160426

Docket: A-329-15

Citation: 2016 FCA 127

CORAM: **WEBB J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

STANLEY BAHNIUK

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 13, 2016.

Judgment delivered at Ottawa, Ontario, on April 26, 2016.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] This appeal involves a narrow question about the reasonableness of a portion of a remedial award made by a Public Service Labour Relations Board [PSLRB] adjudicator in the context of a dismissal grievance in *Bahniuk v. Canada Revenue Agency*, 2014 PSLRB 73. The award in question was unusual in that the adjudicator, as opposed to ordering reinstatement, ordered payment of damages in lieu of reinstatement. In the impugned portion of the award, the

adjudicator determined that monies earned by the appellant from self-employment were to be deducted from the damages that were ordered to be paid by the employer.

[2] Justice Locke of the Federal Court upheld the award as being reasonable (*Bahniuk v. The Attorney General of Canada*, 2015 FC 831), and the appellant has appealed the dismissal of his judicial review application to this Court.

[3] In the unique circumstances of this case and in light of the way in which the adjudicator structured the damages award, I agree with the appellant that the impugned portion of the award is unreasonable. I would therefore allow this appeal, with costs before this Court and the Federal Court, and would set aside the impugned portion of the adjudicator's remedial award. I would not remit the matter to the adjudicator for reconsideration as, in the unique circumstances of this case, there is nothing that remains to be decided.

I. Background

[4] The appellant was an employee of the Canada Revenue Agency [the CRA] with 24 years' seniority. He had a lengthy disciplinary record and had shown a repeated inability to get along with his managers. In 2010, the CRA imposed a series of disciplinary measures on the appellant, namely, a 3-day, 10-day and 20-day suspension, followed by termination. The appellant grieved all the measures, and the adjudicator heard all the grievances at the same time.

[5] In his initial award in the case (*Bahniuk v. Canada Revenue Agency*, 2012 PSLRB 107), the adjudicator upheld the 3-day suspension, reduced the 10 and 20-day suspensions to 5 and 10

days, respectively, and set aside the termination. However, he declined to order reinstatement in light of the poisoned nature of the appellant's workplace relationships. The adjudicator remitted to the parties the issue of quantification of damages in lieu of reinstatement, but the parties were unable to reach agreement on the amount of compensation to be awarded.

[6] In the interim, the appellant brought an unsuccessful judicial review application in respect of the adjudicator's initial award (*Bahniuk v. Canada Revenue Agency*, 2014 FC 126). Due to the intervening judicial review application, there was a two year delay before the issue of remedy was considered by the adjudicator.

[7] In the decision under review, issued on July 25, 2014, the adjudicator stated that he had chosen to apply what has been termed the "economic loss approach" to fashioning damages and attempted to quantify the value of the loss of the appellant's bargaining unit position at the CRA. Under this approach, which has been adopted by several labour arbitrators, damages are fixed on a different basis than damages at common law for wrongful dismissal, which are based on a reasonable notice period. Under the economic loss approach, damages are premised on the basis that the loss of job security inherent in a bargaining unit position needs to be quantified by applying the following steps:

1. Calculate the maximum value of the salary the grievor could have earned in the bargaining unit position had he or she been reinstated;

2. Add to that amount the value of lost benefits associated with the bargaining unit position over the same period; and

3. Reduce the sum to reflect various contingencies that might have prevented the grievor from continuing in the employment.

Some arbitrators further reduce the foregoing sum to reflect a grievor's mitigation obligation.

[8] In most of the decided cases, if there is a reduction for mitigation, it is done on a percentage basis with reference to the entire period in respect of which damages are awarded (see, e.g., *George Brown College of Applied Arts and Technology v. Ontario Public Service Employees Union*, 214 L.A.C. (4th) 96, [2011] O.L.A.A. No. 459 at paragraphs 35-36 [*George Brown College*]; *Hay River Health and Social Services Authority v. Public Service Alliance of Canada*, 201 L.A.C. (4th) 345, [2010] C.L.A.D. No. 407 at paragraphs 143, 149 [*Hay River*]).

[9] In applying this methodology in the present case, the adjudicator first determined the appellant's likely retirement date. Based on the evidence the parties filed, he concluded that the appellant would have retired when he became eligible for a 35-year pension at age 63, had he remained employed at CRA. This represented a period of roughly 11 additional years of service. The adjudicator then calculated the value of the appellant's salary and benefits over this 11 year period and concluded they equalled $964,262.92.

[10] Next, the adjudicator considered contingencies and found that the amount that the appellant could have earned over the 11 years should be reduced by 90% largely to reflect the likelihood that the appellant would have been terminated for cause shortly after reinstatement, had he been ordered reinstated. The adjudicator stated as follows at paragraph 119 of the award:

> It is my belief that had I ordered the grievor's reinstatement, his conduct would have caused the employer to again terminate his employment within a shorter, rather than longer, time period. In view of his disciplinary record, it seems probable that it would have succeeded. Indeed, I am certain that the grievor would have, had he not been terminated but merely disciplined, continued to behave as he had in the past and that it is a virtual certainty that those continued actions would have provided the employer with just cause for termination. Given the facts in this case and my evaluation of the grievor, such a result is almost a foregone conclusion. Accordingly, it is highly unlikely that the grievor would have continued in his employment until age 63. In the circumstances, my assessment is that the amount of $964,262.92 should be reduced by 90% to reflect this probability, along with the other general contingencies mentioned earlier in this decision. Thus the amount to be paid by the employer to the grievor for loss of employment is $96,426.29.

[11] The appellant does not contest this portion of the award and concedes that to this point the adjudicator's approach was reasonable, even though the contingency was higher than that awarded in the previous cases the adjudicator relied on (*George Brown College* at paragraphs 34-36; *Hay River* at paragraphs 148-149).

[12] The appellant takes issue with the next step in the adjudicator's reasoning, involving his treatment of the issue of mitigation. On this issue, the evidence indicated that the appellant had searched for alternate work but had found nothing for two years post-termination. In 2012, he commenced his own business as a general contractor and earned an undisclosed amount of income from this business. The adjudicator accepted that the appellant had made reasonable efforts to mitigate his damages through looking for alternate work post-termination. Stating that he was following the decision of the Saskatchewan Court of Appeal in *IATSE, Local 295 v. Saskatchewan Centre of the Arts*, 2008 SKCA 136, 178 L.A.C. (4th) 385 [*IATSE*], the adjudicator held it was appropriate to consider mitigation and ordered the full amount the appellant earned as a general contractor, up to the date of the decision, be set-off from the

damages payable. The adjudicator gave no explanation for the selection of this date or as to why he found all of the monies earned to this date should be set-off from the damages he ordered to be paid.

II. Analysis

[13] In this appeal, this Court is required to step into the shoes of the Federal Court and determine whether it selected the appropriate standard of review and whether it applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47; *Canada (Attorney General) v. Gatien*, 2016 FCA 3 at paragraph 30, 479 N.R. 382 [*Gatien*]; *MacFarlane v. Day & Ross Inc.*, 2014 FCA 199 at paragraph 3, 466 N.R. 53.

[14] I agree with the Federal Court that the reasonableness standard applies in this case, it being firmly settled that this standard applies to review of PSLRB decisions, generally, and most especially to its remedial orders. As I noted in *Gatien* at paragraph 39, "remedial matters are at the very heart of the specialized expertise of labour adjudicators, who are much better situated than a reviewing court when it comes to assessing whether and how workplace wrongs should be addressed". The adjudicator's award must therefore be afforded considerable deference.

[15] Despite this, a remedial award like the present cannot stand if it is irrational or if it is flatly contrary to the principles accepted in the arbitral jurisprudence. Where the relevant case law has supplied standards, a failure to follow these standards will typically render a decision unreasonable as the result reached will not be defensible on the facts and the law:

Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34, [2013] 2 S.C.R. 458 at paragraphs 6, 16 (*per* Abella J.), 75 (*per* Rothstein and Moldaver JJ. dissenting, but not on this point); *Canadian Pacific Railway Company v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 1 at paragraph 59, 466 N.R. 132; *Attaran v. Canada (Attorney General)*, 2015 FCA 37 at paragraph 49, 467 N.R. 335; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14, 444 N.R. 120.

[16] Here, I believe that the impugned portion of the adjudicator's award is unreasonable because it flies in the face of the authorities applicable to mitigation by contradicting the well-established principle that amounts set-off from contractual damages on account of mitigation must be referable to the loss for which damages were awarded.

[17] In *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at 330-331, 5 N.R. 99 [*Red Deer College*] the Supreme Court of Canada discussed mitigation in the context of a wrongful dismissal action, stating as follows:

> The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he [or she] would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.
>
> In short, a wronged plaintiff is entitled to recover damages for the losses he [or she] has suffered but the extent of those losses may depend on whether he [or she] has taken reasonable steps to avoid their unreasonable accumulation.

[18] In reaching his decision in *Red Deer College*, Chief Justice Laskin quoted the House of Lords in *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd.*, [1912] A.C. 673 at 689 for the proposition that if the plaintiff "has taken action ... which … has diminished his [or her] loss, the effect in actual diminution of the loss he [or she] has suffered may be taken into account even though there was no duty on [the plaintiff] to act".

[19] These comments on the general nature of the function of mitigation in contractual damages apply equally in the unionized context. Indeed, in their leading text, *Canadian Labour Arbitration*, looseleaf, 4th ed. (Toronto: Thomson Reuters, 2016) at 2:1512, Donald J. M. Brown and David M. Beatty [*Brown and Beatty*] note that the principles from *Red Deer College* are applied by labour arbitrators in assessing mitigation.

[20] Under these principles, monies earned by a dismissed employee are deductible on account of mitigation only if they are referable to the loss for which the award of damages is made.

[21] Thus, in the common law wrongful dismissal context, only monies earned prior to the expiry of the notice period are set-off against damages payable, which are premised on losses incurred over the relevant notice period: *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327 at paragraphs 46-47, 292 D.L.R. (4th) 58; *Schumacher v. Toronto Dominion Bank*, 147 D.L.R. (4th) 128, 1997 CanLII 12329 (ON S.C.) at paragraph 207. Damages may also be reduced if a plaintiff fails to take reasonable steps to find alternate work during the notice period.

[22] In a typical dismissal case in the unionized context, if the dismissal is set aside, the grievor is reinstated and is compensated for losses from the date of dismissal to the date of reinstatement. Monies earned from alternate employment during this period are set-off from the damages payable by the employer. Damages may also be reduced if the grievor does not take reasonable steps to find alternate work during the period between dismissal and reinstatement: *Brown and Beatty* at 2:1512.

[23] In both the typical unionized and non-unionized dismissal contexts, the losses and amounts set-off in mitigation are referable to the same period.

[24] However, the same cannot be said in the present case. In deciding that a 90% reduction for contingencies was appropriate, the adjudicator held that the appellant would have been terminated shortly following reinstatement, had he been reinstated. The amount of the award represents approximately 14 months' pay and benefits. In light of the adjudicator's comments regarding the virtual certainty that the grievor would have been finally terminated shortly following reinstatement, the adjudicator's damages award is referable to the 14 months following the date of termination.

[25] The appellant earned no monies during this 14 month period, and did not commence his business as a general contractor until several months later. Thus, the monies earned in the present case are not referable to the damages awarded by the adjudicator. His set-off of these amounts on account of mitigation is therefore unreasonable.

[26] This determination does not mean that a set-off for monies actually earned cannot ever reasonably be made in an appropriate case where damages in lieu of reinstatement are awarded by a labour arbitrator under the economic loss approach. Such a set-off was found to be required by the Saskatchewan Court of Appeal in *IATSE*, where the grievor found a better job after 26 weeks but was awarded 85 weeks' damages. There, set-off was appropriate because, unlike the present case, the damages awarded were referable to the same period as the monies earned in mitigation.

[27] Here, given the unusual fact pattern, the finding that the grievor almost certainly would have been dismissed for cause shortly following reinstatement had he been reinstated, the modest nature of the damages awarded and the lengthy delay incurred in settling the remedy, the amounts set-off cannot be said to be referable to the period for which the damages were awarded. They thus cannot be monies earned in mitigation.

[28] It follows that I would set the impugned portion of the decision aside. As only one result is possible with respect to the impugned portion of the adjudicator's award, there is no point in sending the matter back for re-determination. I would therefore grant the appeal, with costs before this Court and the Federal Court, and would amend paragraph 1 of the adjudicator's

remedial order in *Bahniuk v. Canada Revenue Agency*, 2014 PSLRB 73 by striking that part of paragraph 1 following $96,426.29 so that paragraph 1 will read: “damages for loss of his employment in the amount of $96,426.29”.

"Mary J.L. Gleason"

J.A.

“I agree

Wyman W. Webb J.A.”

“I agree

Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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