

Federal Court of Appeal



Cour d'appel fédérale

Date: 20161201

Docket: A-297-15

Citation: 2016 FCA 308

[ENGLISH TRANSLATION]

**CORAM: NOËL C.J.
TRUDEL J.A.
BOIVIN JA.**

BETWEEN:

GANDHI JEAN PIERRE

Applicant

and

**DIANNE CLÉMENT, CATHIE GIROUX AND
THE DEPARTMENT OF CITIZENSHIP AND
IMMIGRATION CANADA**

Respondents

Heard at Montreal, Quebec, on December 1, 2016.

Judgment delivered from the bench at Montreal, Quebec, on December 1, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

BOIVIN J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the bench at Montreal, Quebec, on December 1, 2016.)

BOIVIN J.A.

[1] This is an application for judicial review brought by Gandhi Jean-Pierre (applicant).

I. Reasons on the preliminary motion to adjourn

[2] The hearing date for this application for judicial review was communicated to the applicant on September 19, 2016. At the beginning of the hearing, the applicant requested an adjournment on the grounds that he intended to file a written motion seeking the recusal of two of the three panel members. The alleged basis of the motion to be presented is related to the fact that the two judges in question co-signed the judgment in *Ghandi Jean Pierre v. Public Service Alliance of Canada*, 2013 FCA 223, which dismissed a previous application by the applicant (leave to appeal dismissed by the Supreme Court, File No. 35102, 2013 CanLII 21755 (SCC)).

[3] Counsel for the respondents objects to the motion, characterizing it as late and dilatory. We agree, at least as regards undue delay. Under a directive of the Court, published on its website, the composition of the panel that is to sit is made available, on request, two weeks before the hearing; thus the motion should have been made returnable this morning at the latest.

[4] Furthermore, the case has been marked by delays and required the issuance of a notice of status review and several extensions of time, all benefiting the applicant.

[5] The applicant did not explain why he waited until the day of the hearing to make his request; we denied the request and invited the parties to proceed on the merits.

II. Reasons on the merits

[6] The applicant has been an immigration officer with the Department of Citizenship and Immigration Canada (employer) at the PM-03 group and level since 2002. While in an acting position as a pre-removal risk assessment (PRRA) officer at the PM-04 group and level, he was informed, on October 26, 2011, that, given his performance as a PRRA officer, his acting assignment would not be renewed past October 28, 2011.

[7] On January 22, 2012, the applicant filed an initial unfair labour practice complaint with regard to that decision under, in particular, sections 185 and 190 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (Act). The complaint alleged that the non-renewal of the applicant's acting assignment was in reprisal for a grievance he had filed in 2009 against his manager at the time, Mr. Vassallo, and for a complaint in 2010 against his union, which had refused to represent him in his grievance.

[8] On April 13, 2012, the applicant filed a second complaint in which he alleged that he was a victim of a reprisal when he was given negative references in relation to his application for a position with the Canada Border Services Agency.

[9] A hearing concerning the two complaints was held before the Public Service Labour Relations and Employment Board (Board) from April 29 to May 2, 2014. The Board rendered a single decision (2015 PSLREB 49) on the basis that the facts were the same for the two complaints.

[10] In its decision rendered on May 26, 2015, the Board dismissed the applicant's two complaints on the ground that he had failed to meet his burden of presenting arguable (*prima facie*) evidence of discrimination or reprisals. And in the event that it had erred regarding the discharge of the burden of proof, the Board dismissed the applicant's two complaints in any case. It concluded that, considering the evidence presented, the non-renewal of the applicant's acting assignment in a PM-04 position and the negative references provided to other managers were based on his poor performance and were not reprisals.

[11] The applicant applied to this Court for judicial review of the Board's decision.

[12] In this case, the applicable standard for the Board's decision regarding questions of mixed fact and law is reasonableness. In support of his application for judicial review, the applicant alleges that the Board committed several errors. While the applicant characterized some of the errors as [TRANSLATION] "procedural defects" under the heading [TRANSLATION] "procedural fairness" in his memorandum (paras. 7, 29, 42, 47 and 49), the alleged errors actually fall under the Board's own case management. Notwithstanding the applicable standard, we are all of the opinion that it was open to the Board to find as it did and that this Court should not intervene.

[13] First of all, the applicant maintains that the Board erred in hearing his evidence before that of the respondent. This Court has recently reiterated that "[t]he Board is master of its own procedure" (*Gal v. Canada (Revenue Agency)*, 2015 FCA 188, [2015] F.C.J. No. 1055 (QL)). More specifically, in unfair labour practice complaints, the procedure developed by the Board is

to hear the evidence of the individual who filed the complaint first, without regard to the burden of proof, so as to allow the other party to know the nature of the allegations. Indeed, the evidence shows that during the pre-hearing teleconference with the Board, the matter of the presentation of the evidence was discussed and it was agreed that the applicant would present his evidence first (Affidavit of Sylvia Grznar, Respondents' Appeal Book, Vol. I, Tab 2, at para. 12).

[14] The applicant further argues that he was entitled to have a court reporter present. However, where there are no exceptional circumstances, as is the case here, the Board was justified in not allowing that request. The same is true of the requests to exclude witnesses and to submit evidence, which are within the discretion of the Board and with respect to which we see no error.

[15] In its reasons, the Board found that the applicant failed to establish a link between the non-renewal of his assignment and the unfair labour practices set out in the Act. For one thing, the Board noted that the employer offered the applicant an acting assignment after he had filed both his grievance and his complaint. For another, despite certain deficiencies in the applicant's work, the assignment was renewed twice to allow the applicant to overcome the difficulties identified. Moreover, the terms of the secondment agreements very clearly stipulated that at the end of the term, the public servant would return to his substantive position at the PM-03 level (Board's Decision, at para. 84). The Board assessed the evidence and found that the testimony of Ms. Clément and Ms. Giroux was credible, that it was given in good faith and that neither one of the complaints was supported by evidence of reprisals against the applicant. The Board's finding regarding the credibility of the witnesses is a central aspect of its expertise and the applicant has

not persuaded us that it is appropriate to intervene. Lastly, the applicant must also fail with respect to the other errors alleged by him.

[16] The Court took note of the respondents' observation concerning the style of cause (Respondents' Memorandum, at para. 38). An order will be issued to replace the "respondents" identified therein with the "Attorney General of Canada".

[17] Accordingly, the application for judicial review will be dismissed with costs.

"Richard Boivin"

J.A.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-297-15

STYLE OF CAUSE: GANDHI JEAN PIERRE v.
DIANNE CLÉMENT,
CATHIE GIROUX AND THE
DEPARTMENT OF CITIZENSHIP
AND IMMIGRATION CANADA

PLACE OF HEARING: MONTREAL, QUEBEC

DATE OF HEARING: DECEMBER 1, 2016

REASONS FOR JUDGMENT OF THE COURT BY: NOËL C.J.
TRUDEL J.A.
BOIVIN J.A.

DELIVERED FROM THE BENCH BY: BOIVIN J.A.

APPEARANCES:

Ghandi Jean Pierre FOR THE APPLICANT
(for himself)

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