Federal Court of Appeal | Cour d'appel fédérale

Date: 20170331

Docket: A-91-16

Citation: 2017 FCA 66

[ENGLISH TRANSLATION]

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DAVID FÉTHIÈRE

Respondent

Heard at Montréal, Quebec, on January 10, 2017.

Judgment delivered at Ottawa, Ontario, on March 31, 2017.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

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

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] The Attorney General of Canada (the AGC) filed an application for judicial review to set aside a decision of the Public Service Labour Relations and Employment Board (the Board) dated February 22, 2016, neutral citation 2016 PSLREB 16 (the Board's decision). The Board first determined that it had jurisdiction not only under paragraph 209(1)(*b*) but also under

paragraph 209(1)(*c*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (PSLRA) to decide the grievances of David Féthière (the respondent). On the merits, the Board determined that the suspension and revocation of the respondent's reliability status were not based on legitimate security reasons, but rather a disguised disciplinary action. Consequently, the Board set aside the respondent's suspension and termination because they were based on a false pretext. The Board thus allowed all of the respondent's grievances except the discrimination grievance.

II. Relevant facts and background

[2] The respondent, a civilian employee of the Royal Canadian Mounted Police (RCMP), held the position of clerk (CR-04) in the investigations unit of the Centre of Operations Linked to Telemarketing Fraud. As part of his duties, the respondent had access to RCMP databases and provided administrative support for the unit's operations.

[3] The event that triggered the dispute occurred on July 7, 2012. At a party held at the house of his unit head, the respondent used some marijuana. Two female police officers present at the party took away his car keys and seized the rest of the marijuana. Since the amount of marijuana handed over to the female police officers by the respondent was small, the next day the female police officers applied the practice of local destruction, a sort of tolerance with respect to the seizure (no-case seizure). A report was also filed, and two investigations that were separate but concurrent were launched: (i) a disciplinary investigation concerning an allegation of misconduct in connection with the incident of July 7, 2012; and (ii) a security investigation to determine whether the respondent could keep his reliability status in connection with the same incident.

[4] On or about August 15, 2012, the respondent went on sick leave.

[5] A little over a week later, on August 24, 2012, the respondent received a letter informing him that his reliability status had been suspended given his precarious financial situation, his alcohol consumption, his use of illegal drugs and the fact that he was not taking the situation seriously (the Board's decision, paragraphs 39–41).

[6] On August 28, 2012, following the suspension of his reliability status, the respondent was suspended without pay from his duties because he no longer met one of the essential conditions of employment, that is, holding RCMP reliability status.

[7] On November 4, 2013, when the respondent was preparing to return to work on the advice of his doctor, he received a letter indicating a 10-day suspension in connection with the incident of July 7, 2012. A new investigation regarding the respondent's reliability status was launched because he had been absent from work for over a year and his file had to be reassessed to determine whether the risk that led to the suspension of his reliability status had changed.

[8] On June 20, 2014, following this new investigation, the respondent's reliability status was revoked.

[9] On July 31, 2014, the employer recommended terminating the respondent.

[10] On August 28, 2014, the respondent was terminated for cause under paragraph 12(1)(*e*) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (FAA) because, having lost his reliability status, he no longer met an essential condition of employment.

[11] Following his termination, the respondent filed several grievances disputing the suspension and revocation of his reliability status as well as the suspension from his duties and his termination. He also filed a grievance alleging discrimination.

[12] On February 22, 2016, the Board allowed all of the respondent's grievances except the one concerning discrimination. The Board set aside the suspension and the revocation of the respondent's reliability status because the employer's action was disciplinary in nature. It also set aside the suspension and the termination of his duties because they were based on a false pretext.

[13] Before this Court, the AGC is seeking to have the Board's decision set aside.

[14] In my view, the Board did not commit a reviewable error, and I would dismiss the application with costs.

III. Analysis

A. *Standard of review*

[15] The applicable standard of review in this case is reasonableness, and the parties agree on this point. The Board is recognized for its expertise in labour relations in the federal public

service, and the interpretation of the FAA and the PSLRA is at the heart of that expertise. Reasonableness "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47 [*Dunsmuir*]).

B. *The issue raised concerning the Board's jurisdiction*

[16] The main issue in this case concerns the Board's jurisdiction. More specifically, does the Board have jurisdiction under paragraph 209(1)(*c*) of the PSLRA to examine the merits of the employer's decision in order to determine whether the reason given, that is, the revocation of reliability status, is well-founded?

[17] Section 209 of the PSLRA enables public servants to submit certain specific grievances for adjudication. Subsection 209(1) of the PSLRA reads as follows:

Reference to adjudication	**Renvoi d'un grief à l'arbitrage**
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	**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 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;
. . .	[…]
[Emphasis added.]	[Mon soulignement.]

[18] Paragraph 209(1)(*c*) of the PSLRA refers to paragraphs 12(1)(*d*) and (*e*) of the FAA.

Those paragraphs read as follows:

Power of deputy heads in core public administration	**Pouvoir des administrateurs généraux de l'administration publique centrale**
12 (1) Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,	**12 (1)** Sous réserve des alinéas 11.1(1)f) et g), chaque administrateur général peut, à l'égard du secteur de l'administration publique centrale dont il est responsable :

. . .	[…]
(d) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory;	**d)** prévoir le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur de toute personne employée dans la fonction publique dans les cas où il est d'avis que son rendement est insuffisant;
(e) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct; and	**e)** prévoir, pour des raisons autres qu'un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur d'une personne employée dans la fonction publique;
. . .	[…]

[19] Paragraph 12(3) provides that a termination, regardless of whether it is for a disciplinary reason or for any other reason that does not relate to a breach of discipline or misconduct, may only be for cause.

For cause	**Motifs nécessaires**
12 (3) Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(c), (d) or (e) or (2)(c) or (d) may only be for cause.	**12 (3)** Les mesures disciplinaires, le licenciement ou la rétrogradation découlant de l'application des alinéas (1)c), d) ou e) ou (2)c) ou d) doivent être motivés.

[20] The AGC's main argument in the application for judicial review before this Court rests on the premise that the Board erred in relying on an unprecedented and overly broad interpretation of paragraph 209(1)(*c*) of the PSLRA to come to the conclusion that it did have jurisdiction to examine the reasons for the employer's decision to revoke its employee's reliability status. According to the AGC, the Board does not have this power.

[21] More specifically, the AGC alleges that, under paragraph 209(1)(*c*) of the PSLRA, the Board's jurisdiction to hear a grievance that deals with a termination resulting from the revocation of reliability status is limited to noting that the termination is based on the loss of reliability status and nothing more. If that is the case, the Board's analysis under paragraph 209(1)(*c*) ends, and the analysis under paragraph 209(1)(*b*) may begin in order to determine whether the termination is a "disciplinary action". In accordance with that reading of paragraphs 209(1)(*b*) and (*c*), the AGC alleges that the Board acted beyond its jurisdiction in considering whether the reason for the revocation of the reliability status was valid under paragraph 12(1)(*e*) of the FAA. The AGC thus argues that the Board erred in examining whether the respondent posed an unacceptable risk to the security of RCMP operations, information, assets and staff and in concluding that the revocation of the reliability status did not address actual security concerns.

C. *Conflicting decisions*

[22] This case arises in the context of recent conflicting decisions from the Board.

[23] On the one hand, there is a majority interpretative approach, relied on by the AGC, according to which the Board does not have jurisdiction under paragraph 209(1)(*c*) of the PSLRA to examine the merits of an employer's decision to revoke an employee's reliability status in the absence of disguised discipline or to examine whether the decision was made in bad faith or in breach of procedural fairness (*Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151, [2004] C.P.S.S.R.B. No. 137 (QL); *Zhang v. Treasury Board (Privy Council Office)*, 2005 PSLRB 173, [2005] C.P.S.L.R.B. No. 175 (QL); *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2009 PSLRB

19, [2009] C.P.S.L.R.B. No. 19 (QL); *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63, [2010] C.P.S.L.R.B. No. 62 (QL); *Nasrallah v. Deputy Head (Department of Human Resources and Skills Development)*, 2012 PSLRB 12, [2012] C.P.S.L.R.B. No. 13 (QL); *Bergey v. Treasury Board (Royal Canadian Mounted Police)*, 2013 PSLRB 80, [2013] C.P.S.L.R.B. No. 94 (QL)). According to this line of decisions, the Board cannot consider whether the reasons for the revocation of the reliability status are reasonable; only the Federal Court has this jurisdiction in judicial review.

[24] On the other hand, that majority approach is challenged by another emerging line of decisions according to which the Board has jurisdiction under paragraph 209(1)(*c*) to examine the merits of an employer's decision to revoke an employee's reliability status (*Heyser v. Deputy Head (Department of Employment and Social Development)*, 2015 PSLREB 70, [2015] LNPSLREB 70 (QL) [*Heyser*]; *Grant v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 37, [2016] LNPSLREB 37 (QL) [*Grant*]).

[25] The decisions in *Heyser* and *Grant*, which acknowledge the Board's jurisdiction, were brought for judicial review before this Court by the AGC. The hearing before this Court in *Heyser* has taken place, and the decision is still under reserve. In *Grant*, this Court rendered its decision, but the issue of the Board's jurisdiction under paragraph 209(1)(*c*) of the PSLRA was not dealt with because it was not necessary to do so to decide the dispute.

[26] The issue of the Board's jurisdiction resurfaced in another recent decision of this Court involving an RCMP employee: *Bergey v. Canada (Attorney General)*, 2017 FCA 30, [2017]

F.C.J. No. 142 (QL) [*Bergey-FCA*)] In that decision, this Court, *per* Justice Gleason, provided a detailed summary of the legislative history of the relevant statutory provisions of the *Public Service Employment Act*, S.C. 2003, c. 22, sections 12 and 13 (the PSEA), the FAA and the PSLRA (*Bergey-FCA* at paragraphs 11–20). In that decision, the Court made three findings, among others, that I consider relevant to this case: (i) the jurisprudence decided under the legislation that precedes the PSLRA must be read with care (paragraph 11); (ii) the relevant provisions of the PSLRA, the FAA and the PSEA set out the principle that indeterminate employees in the public service may only be terminated for cause (paragraph 12); and (iii) the statutory amendments made over the course of the last several decades have broadened and clarified the scope of the Board's jurisdiction over non-disciplinary terminations of indeterminate employees (paragraph 15). Even though the issue of the Board's jurisdiction was mentioned by the Court in *Bergey-FCA*, the Court did not address it directly because Ms. Bergey did not raise the issue in the appeal (paragraph 72). However, the Court took care to indicate in *obiter* that there seems *a priori* to be a strong argument pursuant to paragraph 209(1)(*c*) of the PSLRA for enabling the Board to examine whether the grounds given by the employer to revoke the employee's reliability status are well-founded (*Bergey-FCA* at paragraphs 68 and 71).

[27] For the reasons that follow, I am of the view that the Board did not err in assuming jurisdiction under paragraph 209(1)(*c*) to examine the merits of the employer's decision in order to determine whether the grounds given, that is, the revocation of reliability status, are well-founded. It follows that the Board's majority interpretative approach, discussed at paragraph 23 of these reasons, must be rejected.

D. *The Board's jurisdiction*

[28] In this case, following the incident of July 7, 2012, during which the respondent used marijuana, a letter recommending his termination for reasons other than a breach of discipline or misconduct was signed on July 31, 2014, by Deputy Commanding Officer François Deschênes. The letter was sent to Gordon Cook, Director of Labour Relations and Human Rights:

> [translation]
>
> …
>
> An investigation was conducted and revealed that on July 7, 2012, in the St-Hippolyte area, at a work-related event, the employee [the respondent] was in possession of and used marijuana. The results of that investigation were then submitted to the Departmental Security Branch in Ottawa for review and decision. Mr. Féthière's [the respondent's] reliability status was subsequently suspended on August 24, 2012, and permanently revoked on June 20, 2014.
>
> As such, Mr. Féthière [the respondent] no longer meets the security standards required by the Royal Canadian Mounted Police [RCMP] for hiring, *i.e.*, maintaining a reliability status during the period of employment. Thus, we cannot consider the employee [the respondent] for other positions within the organization.
>
> Therefore, I recommend the termination of Mr. David Féthière's [the respondent's] employment for reasons other than a breach of discipline or misconduct. …
>
> (Letter recommending termination, Applicant's Record, Vol. 2, Tab 29 at page 466.)

[29] Following that letter, the respondent was dismissed on August 28, 2014, by the RCMP Commissioner for cause in accordance with paragraph 12(1)(*e*) of the FAA, on the alleged ground of the revocation of his reliability status, an essential condition for his employment:

> [translation]
>
> … RCMP reliability status is a condition of employment for your position. Given that you no longer meet one of the conditions required for you to continue working at the RCMP, I must inform you of my decision to terminate your employment for cause, in accordance with paragraph 12(1)(*e*) of the *Financial Administration Act* [FAA]. This decision is retroactive to August 24, 2012, when you were suspended without pay pending an investigation. …
>
> (Letter dated August 28, 2014, Applicant's Record, Vol. 2, Tab 30 at page 467.)

[30] Subsection 12(3) of the FAA, entitled "For cause", specifies that the termination of an employee in the federal public service under, *inter alia*, paragraph 12(1)(*e*) of the FAA may only be for cause. In French, subsection 12(3) of the FAA uses the expression "doivent être motivés".

[31] Therefore, the wording of section 209 of the PSLRA, paired with that of section 12 of the FAA, does not put the limit on the Board's jurisdiction that the AGC wishes to impose, and I cannot agree with the restrictive interpretation of the AGC. I am instead of the view that the wording of paragraphs 209(1)(*c*) and 12(1)(*e*) supports an interpretation that gives the Board the jurisdiction needed to examine whether the grounds for termination with respect to the revocation of the respondent's reliability status were valid and were based on security concerns rather than on a reaction to misconduct.

[32] More specifically, regardless of whether the basis for the termination is disciplinary or administrative, subsection 12(3) of the FAA does not make a distinction and provides that termination may only be for cause. It goes without saying that to determine whether there are grounds, the Board must necessarily examine the alleged cause of the termination. I am therefore of the view that the Board has jurisdiction to verify whether a termination pursuant to

paragraph 12(1)(*e*) of the FAA, be it disciplinary or administrative, is based on a valid reason. In sum, the Board's interpretation of its jurisdiction is consistent with the text and spirit of the PSLRA and the FAA, and I am of the view that it is reasonable (*Dunsmuir*; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland and Labrador Nurses' Union*]).

E. *The Board's decision*

[33] In the alternative, the AGC alleges that even if the PSLRA enables the Board to determine the merits of the employer's decision to revoke reliability status, the Board erred in its analysis. The AGC's arguments are summarized as follows (Applicant's Memorandum of Fact and Law at paragraphs 19–22):

> [translation]
>
> I. The Board erred in failing to analyze an essential element of the employer's reasons, that is, the respondent's carelessness;
>
> II. The Board erred in that its finding that the respondent does not pose an unacceptable risk consists of conclusions that have no rational basis;
>
> III. The Board speculated on the various responses by the respondent with respect to the various questions he was asked in 2012 and 2013 about his current and past use of illegal drugs;
>
> IV. The Board's finding that there was disciplinary action is unreasonable.

[34] The AGC has not convinced me of the merits of her allegations.

[35] First, the Board's decision, which is 242 paragraphs long, contains a complete, exhaustive and thorough analysis of the issues. Second, the Board analyzed the risk factors posed

by the respondent and decided, after a careful review of the evidence, that the revocation was not a response to real security concerns. Having noted that the respondent worked as a clerk on telemarketing fraud investigations, the Board rejected, on the balance of probabilities, the only risk alleged by the employer, that is, that of the RCMP being infiltrated by organized crime (Board's decision at paragraphs 176–180):

> [176] This is at the heart of the employer's risk argument. According to Ms. Quesnel, passing on a joint constitutes trafficking and is a criminal act. One would think that the RCMP would have wanted to locate the grievor's [respondent's] associates who traffic when his drugs were seized on July 7, 2012. Instead, it chose to apply a policy of no-case seizure.
>
> [177] Ms. Quesnel and Mr. Aubin tried to convince me that the fact that the grievor [respondent] smoked a joint on a Friday evening could allow organized crime to gain access to information contained in RCMP databanks.
>
> [178] The grievor [respondent] worked in the Commercial Crimes section in telemarketing fraud. The main database he used contained incident reports. It is true that he had access to other databanks, but according to his testimony, which was uncontradicted, he did not use them.
>
> [179] I accept that the RCMP has police experience that I do not have. I also accept that risk assessment is part of its daily activities. However, infiltration of the RCMP by the grievor being manipulated by organized crime seems so unlikely to me that I must reject that unreasonable theory on which all the employer's claims are based. If that risk of a leak is set aside (again, by an employee working as a clerk on telemarketing fraud investigations), everything falls apart.
>
> [180] I believe the grievor [respondent] when he stated that he will take a joint if it is being passed around and that he willingly accepts small amounts of marijuana that are given to him. I tried to understand the employer's position by asking Mr. Aubin what the fear was. That on learning that the grievor smokes a joint once a week, organized crime will try to pressure him with blackmail? By telling the RCMP what it already knows? That they would offer him what he already gets? Mr. Aubin replied that the infiltration of the RCMP is a constant concern for organized crime. Agreed. If I apply the balance of probabilities, the scale does not lean in favour of a possible infiltration through the grievor [respondent] who was before me.

[36] I am satisfied that, contrary to the AGC's claims, the Board weighed the carelessness factor to conclude that the link between the risk and the carelessness had not been established (Board's decision at paragraphs 198–200). The Board also determined after hearing the respondent that although he tended to be vague, he never lied (Board's decision at paragraphs 165–166):

> [165] What strikes me, to the contrary, is the grievor's [respondent's] honesty. It would have been much easier for him to lie in 2013 to get his reliability status back. On July 7, 2012, when the police asked him to give him the marijuana that he had on him, he promptly did so. He admitted to his use of marijuana in every interview and did not conceal it.
>
> [166] In the grievor's [respondent's] testimony, I found that he tended to be vague, particularly about dates. For instance, to determine the dates when he was on sick leave, I had to make a continuous effort and rely on performance assessment documents. However, I do not see that imprecision as dishonesty on the grievor's [respondent's] part. I understand that at different times, depending on how the interviewer asked the questions, the grievor [respondent] might have answered differently. As for the important issue for the RCMP of his use of marijuana, the grievor [respondent] never lied, although the temptation to lie must have been strong, in November 2013, when he wanted to return to work.

[37] That assessment of the evidence and of the respondent's credibility is part of the Board's expertise and requires deference.

[38] I do, however, agree with the AGC that the Board's statement that "[t]he grievor's [respondent's] supervisors never unequivocally told him that he was prohibited from smoking marijuana" is perplexing (Board's decision at paragraph 220). Is the Board suggesting that the employer was obliged to explicitly indicate that smoking marijuana is prohibited, failing which an employee could be justified in using marijuana? I would point out that, under the current state of the law, marijuana is a prohibited substance (*Controlled Drugs and Substances Act*, S.C. 1996, c. 19, section 4 and Schedule II). In the circumstances of this case and considering the

respondent's history, it might have been advisable for the employer to "officially" inform the respondent that smoking marijuana is prohibited. Nevertheless, the employer cannot be faulted for not "officially" informing him of the prohibition. Indeed, it is obvious that a public servant, especially an employee of the RCMP like the respondent, should come to his or her own realization that using illegal drugs is by definition prohibited. The Board could have abstained from implying that it was for the employer to make that prohibition explicit. Regardless, this does not warrant this Court's intervention. In considering the record in its entirety, the fact remains that this shortcoming is circumscribed and isolated and cannot in itself be fatal to the Board's decision (*Newfoundland and Labrador Nurses' Union*).

[39] The piecemeal and fragmented approach relied upon by the AGC to challenge the Board's conclusion on the disguised or camouflaged disciplinary action also cannot be adopted. On this point, an objective reading of the Board's decision in its entirety persuades me that it was open to the Board to find that disguised or camouflaged disciplinary action was taken by the respondent's employer.

[40] Lastly, the AGC alleges that, even if there was disciplinary action, the Board made an unreasonable decision by failing to determine whether there was misconduct and whether the termination was a justifiable measure. That argument is also rejected because those issues were not raised before the Board.

IV. Conclusion

[41] For all of these reasons, I would dismiss the application for judicial review with costs.

"Richard Boivin"
J.A.

"I agree
A.F. Scott J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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