Federal Court of Appeal | Cour d'appel fédérale

Date: 20170906

Docket: A-404-16

Citation: 2017 FCA 176

CORAM: **GAUTHIER J.A.**
GLEASON J.A.
WOODS J.A.

BETWEEN:

SHIV CHOPRA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 6, 2017.
Judgment delivered from the Bench at Ottawa, Ontario, on September 6, 2017.

REASONS FOR JUDGMENT OF THE COURT BY: GLEASON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on September 6, 2017).

GLEASON J.A.

[1] While the record before us is quite voluminous, the question we are called upon to decide in this application for judicial review is straightforward, namely, whether the decision of a Public Service Labour Relations and Employment Board (PSLREB) adjudicator, upholding the penalty of dismissal, is reasonable. The decision in question was made in *Chopra v. Deputy Head*

(Department of Health), 2016 PSLREB 89 [Reasons] and followed lengthy litigation between the applicant and his employer.

[2] The following antecedents are relevant to this application.

[3] In a previous decision in *Chopra et al. v. Treasury Board (Department of Health)*, 2011 PSLRB 99 [*Chopra 1*], the PSLREB adjudicator dealt with three grievances: one contesting a 10-day suspension, another contesting a 20-day suspension and the third contesting the applicant's dismissal. The adjudicator dismissed all three grievances.

[4] The Federal Court set aside the decision in *Chopra 1* in part, remitting the 20-day suspension grievance and the dismissal grievance to the adjudicator for reconsideration (*Chopra v. Canada (Attorney General)*, 2014 FC 246, 451 F.T.R. 172). The Federal Court's judgment was affirmed by this Court in two judgments: *Chopra v. Canada (Attorney General)*, 2015 FCA 205 and *Chopra v. Canada (Attorney General)*, 2015 FCA 206.

[5] The Federal Court found that the adjudicator's treatment of condonation in respect of the 20-day suspension grievance was unreasonable and remitted the grievance to the adjudicator for reconsideration of that issue. Because the dismissal was premised in part on the 20-day suspension being part of the applicant's disciplinary record, the Federal Court also remitted the dismissal grievance for reconsideration in the event the adjudicator were to set aside the 20-day suspension.

[6] In the decision under review, the adjudicator found that the employer had condoned the applicant's conduct for which the 20-day suspension was levied. He thus allowed the grievance contesting that suspension, thereby removing the 20-day suspension from the applicant's record. The adjudicator nonetheless upheld the dismissal, finding that the penalty was warranted in light of the applicant's misconduct that gave rise to the termination and the remaining disciplinary record of the applicant. This included a 5 and a 10-day suspension, the latter for acts of insubordination that showed an attitude similar to that evinced in the act of insubordination that led to the termination of the applicant's employment.

[7] The applicant submits that the adjudicator's decision was unreasonable, asserting that it was not open to the adjudicator to uphold the dismissal when part of the prior record on which the decision to terminate was based was set aside. The applicant more specifically says that the adjudicator at least implicitly found in *Chopra 1* that but for the entirety of the prior record (including the 20-day suspension), termination would not have been appropriate. The applicant also asserts that the employer recognized this fact as well as it waited until there was a 20-day suspension on Dr. Chopra's record before moving to terminate his employment.

[8] We disagree with these assertions. Contrary to what the applicant says, we do not see anything in *Chopra 1* to indicate that the adjudicator determined that the 20-day suspension was a necessary pre-condition to a dismissal for cause. Nor do we see anything in the employer's conduct to indicate that a 20-day suspension was required before moving to terminate Dr. Chopra's employment for the final act of misconduct. In short, there is nothing in the fact pattern or in *Chopra 1* that prevented the adjudicator from upholding the termination.

[9] We also note that there is no hard and fast rule that must be applied by labour adjudicators in situations like this that would require that a termination decision be set aside when part of the prior record is overturned. A decision similar to the one in the present case was made in *King v. Canada (Deputy Head - Border Services Agency)*, 2010 PSLRB 125 [*King*], where part of the prior record on which the decision to terminate was based was set aside after the employee had been dismissed. The adjudicator in that case found the dismissal to nonetheless have been for cause, and the award was upheld by the Federal Court and this Court: *King v. Canada (Deputy Head – Border Services Agency)*, 2012 FC 488, 409 F.T.R. 216; 2013 FCA 131, 446 N.R. 149. It was therefore open to the adjudicator in the instant case to determine whether the dismissal was for cause in light of the applicant's most recent act of insubordination and the portions of the applicant's record which were left intact.

[10] The applicant attempts to distinguish *King* by saying that the culminating act in that case was much more serious than Dr. Chopra's final act of misconduct. The adjudicator disagreed and found that Dr. Chopra, like Mr. King, had reached the point where rehabilitation was impossible such that "reinstatement '… would vindicate his actions and invite a repetition'" (Reasons at para. 101).

[11] This assessment is entitled to considerable deference as determination of the appropriate penalty in a disciplinary matter lies at the very core of the PSLREB's expertise: *Canada (Attorney General) v. Gatien*, 2016 FCA 3 at para. 39, 479 N.R. 382 and *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127 at para. 14, 484 N.R. 10.

[12] In light of the facts before the adjudicator and the deference to be afforded to his decision, we see no basis to intervene and accordingly shall dismiss this application for judicial review with costs, fixed in the all-inclusive amount of $2,500.00.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-404-16
STYLE OF CAUSE:	SHIV CHOPRA v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	SEPTEMBER 6, 2017
REASONS FOR JUDGMENT OF THE COURT BY:	GAUTHIER J.A. GLEASON J.A. WOODS J.A.
DELIVERED FROM THE BENCH BY:	GLEASON J.A.

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