

Federal Court of Appeal



Cour d'appel fédérale

Date: 20181002

Docket: A-297-16

Citation: 2018 FCA 177

[ENGLISH TRANSLATION]

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

BETWEEN:

CONSEIL DES INNUS DE PESSAMIT

Applicant

and

SONIA MICHAUD

Respondent

Heard at Quebec City, Quebec, on October 2, 2018.

Judgment delivered from the bench at Quebec City, Quebec, on October 2, 2018.

**REASONS FOR JUDGMENT OF THE
COURT BY:**

DE MONTIGNY J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20181002

Docket: A-297-16

Citation: 2018 FCA 177

[ENGLISH TRANSLATION]

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

BETWEEN:

CONSEIL DES INNUS DE PESSAMIT

Applicant

and

SONIA MICHAUD

Respondent

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the bench at Quebec City, Quebec, on October 2, 2018.)

DE MONTIGNY J.A.

[1] This application for judicial review concerns a decision rendered by the Canada Industrial Relations Board (the Board) on August 3, 2016, in which one of two complaints respecting

unfair practices filed by Sonia Michaud (the respondent) against the Conseil des Innus de Pessamit (the applicant) was allowed. Considering that the applicant had violated subsection 94(3) of the *Canada Labour Code* (Code), R.S.C. 1985, c. L-2, which prohibits any employer from terminating or refusing to continue to employ a person because of that person's union activities, the Board ordered the respondent's reinstatement and, as compensation, the payment of the salary and other benefits that she lost as a result of her dismissal.

[2] Despite Mr. Gauthier's able submissions, the applicant has not persuaded us that the Board erred in its assessment of the evidence. He also conceded that the Board did not err in its interpretation of the Code.

[3] It should first be noted that this Court cannot consider new evidence introduced by the applicant. It is well established that only the evidence that was before the administrative decision-maker is admissible in a judicial review proceeding: see, for example, *Delios v. Canada (Attorney General)*, 2015 FCA 117, at paras. 41–42; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at paras. 17 and 19. This is because Parliament entrusted the administrative tribunal with finding the facts necessary to decide the substantive issues under its jurisdiction. The limited exceptions to this principle recognized in the case law do not apply in this case.

[4] There is no dispute that this Court must show deference when it is called upon to review the legality of the Board's decisions; therefore, it is by applying the standard of reasonableness

that we must examine the application of the Code to the specific facts raised in the respondent's complaint.

[5] Subparagraph 94(3)(a)(i) of the Code states that an employer cannot lay off any person or refuse to continue to employ any person by reason of that person's involvement in union activities. Furthermore, subsection 98(4) provides for a reversal of the burden of proof: from the moment a complaint is filed, the onus is on the employer to show on a balance of probabilities that its actions were not motivated by any anti-union sentiment. However, the applicant argues that the Board erred by applying the presumption set out in subsection 98(4) without considering the evidence to the contrary, namely that the lay-off of the respondent and three other teachers was the result of sound management, and that the respondent had indicated her intention to resign.

[6] Contrary to the applicant's argument, it was not necessary to demonstrate by direct evidence any anti-union attitude or conduct on its part; such a requirement would render the presumption set out in subsection 98(4) of the Code meaningless. It was up to the applicant to establish that its decision was not motivated by its disapproval of the respondent's union activities; this burden is particularly high when the termination of employment, as is the case here, occurs between the filing of the application for certification and the union's certification.

[7] The Board was entitled to reject the evidence of sound management presented by the applicant. Far from ignoring this evidence, the Board referred to it on several occasions in its summary of the arguments put forward by the applicant (see paras. 18, 121 and 126 of its

decision), and reviewed the testimony of Ms. Ross (at para. 28), Ms. Rock (at para. 48) and Mr. Vollant (at paras. 74, 78 and 80) in this regard. Although it would have been desirable for the Board to have been more explicit on this ground in its analysis, it must be presumed that the Board made its decision based on the evidence before it. Moreover, certain elements in the record support the Board's decision to not accept the argument of sound management, namely the fact that the decision to terminate the four teachers was suspended the very next day, that the three other teachers were reinstated, and that Ms. Rock (then school principal) sent a request for staff in her letter to the applicant dated June 29, 2012. In these circumstances, we are of the view that it was reasonable for the Board to consider that the evidence of sound management presented by the applicant was insufficient to reverse the presumption set out in subsection 98(4) of the Code.

[8] We also do not accept the applicant's claim that the Board erred by [TRANSLATION] "imputing" [TRANSLATION] "alleged union activities" to the respondent in the absence of [TRANSLATION] "even minimal" evidence. The Board was entirely justified in relying on the respondent's testimony, which was not contradicted by the employer's witnesses; at most, these witnesses said that they did not know what steps the respondent purportedly took to obtain union certification. It is not for this Court to reassess the evidence, much less to set aside the Board's decision on the basis of evidence that was not before it. As for the period during which the respondent allegedly ceased her union activities, it is clear that the Board was aware of this.

[9] Finally, the applicant has not persuaded us that the Board made an unreasonable decision by ignoring the evidence that would tend to show that the respondent resigned from her position.

On the contrary, the Board repeatedly referred to the applicant's arguments in this regard (at paras. 127–129, 133–136), and to the evidence presented in support of its submissions (at paras. 35–37, 42, 49–50). The Board did not, however, accept the applicant's argument and preferred the respondent's testimony over that of Ms. Rock, as it was entitled to do. The Board was also entitled to reject the applicant's claim that the respondent understood the contents of the letter dated April 5, 2012, and to instead find that said letter was confusing because of the fact that it indicated both that the employer was postponing the application of its decision and that the decision would be reassessed. That constitutes a highly factual assessment. The issue is not whether this Court would have reached the same conclusion as the Board, but rather whether the Board's decision is intelligible and within the range of possible, acceptable outcomes that are defensible in respect of the facts and law. After carefully reviewing the record and the submissions of the parties, we believe that that is the case.

[10] For all of these reasons, the application for judicial review is dismissed without costs.

“Yves de Montigny”

J.A.

Certified true translation
Janine Anderson, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-297-16

STYLE OF CAUSE: CONSEIL DES INNUS DE
PESSAMIT v. SONIA MICHAUD

PLACE OF HEARING: QUEBEC CITY, QUEBEC

DATE OF HEARING: OCTOBER 2, 2018

REASONS FOR JUDGMENT OF THE COURT BY: GAUTHIER J.A.
BOIVIN J.A.
DE MONTIGNY J.A.

DELIVERED FROM THE BENCH BY: DE MONTIGNY J.A.

APPEARANCES:

Kenneth Gauthier FOR THE APPLICANT

Karim Lebnan FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kenneth Gauthier, Counsel FOR THE APPLICANT
Baie-Comeau, Quebec

Laroche Martin, CSN Legal Department FOR THE RESPONDENT
Montreal, Quebec