Date: 20070615

Dockets: A-471-06
A-472-06

Citation: 2007 FCA 238

CORAM: **RICHARD C.J.**
LÉTOURNEAU J.A.
NADON J.A.

BETWEEN:

GILLES BÉGIN

Appellant

and

RADIO BASSE-VILLE (CKIA FM)

Respondent

Hearing held at Québec, Quebec, on June 13, 2007.

Judgment delivered at Ottawa, Ontario, on June 15, 2007.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: RICHARD C.J
NADON J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] The appellant filed two appeals (A-471-06 and A-472-06) of two decisions by Mr. Justice Beaudry of the Federal Court (judge) in dockets T-235-06 and T-275-06.

[2] Pursuant to an order by our colleague, Mr. Justice Décary, docket A-471-06 was designated as the lead file, and both appeals were heard together. A copy of these reasons in docket A-471-06

will be filed in docket A-472-06 in support of the formal judgment which will be made in that docket.

[3] The appellant represented himself in Federal Court on the applications for judicial review and on the appeal before us. At the hearing, we explained to him the judge's role on the applications for judicial review challenging the decision of the adjudicator appointed under section 242 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code). We also clarified the limits of our powers of intervention on an appeal.

The proceedings in Federal Court

[4] In his application for judicial review, the appellant disputed an adjudicator's order that was favourable to him and contained the following findings against the respondent:

> **ORDERS** the employer to pay as severance pay the equivalent of two months' salary, less the sums collected by the complainant from unemployment insurance and any other deductions normally made from the salary, effective March 7, 2004;
>
> **ORDERS** the employer to pay the sum of $490.00 representing the paid holidays owing to the complainant, i.e. seven days during the Christmas period 2003;
>
> **THE WHOLE WITH INTEREST AT THE LEGAL RATE EFFECTIVE MARCH 7, 2004;**

[5] The respondent also brought an application for judicial review disputing the adjudicator's order requiring it to pay severance pay and an amount for statutory holidays.

The Federal Court decision

[6] At the outset, I must say that the adjudicator's decision that the judge had to review was not very clear.

[7] The judge understood from that decision that the adjudicator had determined that the appellant was neither wrongfully nor constructively dismissed, but that he resigned from his employment.

[8] In fact, the appellant resigned on February 20, 2004, as acknowledged by both the adjudicator and the judge: see paragraph 49 of the adjudicator's decision and paragraph 15 of the judge's decision.

[9] Furthermore, the adjudicator acknowledged that the respondent, which was experiencing serious financial difficulties, was justified, in the exercise of its management rights, in carrying out an administrative reorganization made necessary by its financial situation. In his view, the administrative restructuring was not humiliating or degrading as the appellant alleged in a document described by the adjudicator as "very emotional".

[10] Last, the adjudicator concluded that there was nothing in the two- or three-week period at issue that amounted to harassment or constructive dismissal. Paragraphs 109 to 112 of the decision

containing these findings are reproduced below:

> [TRANSLATION]
>
> [109] Considering that his return to work was quite recent, i.e., December 2, he completed or was in the process of completing close to three to four thousand dollars in sales, and if we assume that he was a bit out of practice, this situation could only improve and is difficult to reconcile with the statement that the goal of $56,000 was completely unreachable. Furthermore, the document that was filed as E-45 contained many statements that were not necessarily supported by the testimony and must be read with caution;
>
> [110] This very emotional self-laudatory document incorporates in a general way the entire 2003 conflict with the facts of the last three weeks of 2003 and alleges that the situation continued;
>
> I cannot agree with the complainant on this point;
>
> [111] Considering the improvement in his work in the first two and a half weeks in December 2003, I believe that E-27 constituted a reorganization under his employment contract that was not humiliating or degrading and did not exceed the respondent's management rights; considering the administrative reorganization that had taken place during the complainant's absence; considering the report done in July 2003 on the need to refocus the respondent's sales; considering also that the complainant adjusted immediately to this duty that had been previously part of his work, but more emphasis was put on his sales for the balance of his employment; in my view, the complainant should have continued working to see whether his suspicions would prove to be true regarding the provision of equipment and various types of tools that would facilitate the achievement of his goals and to confront his employer, if necessary, if those goals were not reached because of the employer's lack of co-operation;
>
> [112] There is nothing in the two- or three-week period to support the allegation of harassment or constructive dismissal:
>
> [Emphasis added]

[11] These are the findings that the adjudicator wrote in the following conclusion in support of his decision:

5. DECISION

In light of these considerations, it is appropriate to dispose of this grievance as follows:

WHEREAS the employer modified the complainant's duties;

WHEREAS this case involves the exercise of the employer's management rights;

WHEREAS, despite these modifications at his place of employment, the complainant functioned in an acceptable manner during the two or three weeks following his return to work in December 2003;

WHEREAS these modifications were a result of administrative changes caused by financial difficulties that the business experienced between May 2003 and the complainant's return in December 2003;

WHEREAS the modifications in the complainant's conditions of work are within the same sphere of activity, are permitted and tolerable, and the complainant was not justified in leaving his employment in February 2004 on the pretext of constructive dismissal;

WHEREAS the complainant's behaviour between his return to work and his departure *de facto* demonstrates a negative attitude fuelled mainly by the desire to rekindle the dispute of spring 2003;

WHEREAS, apart from all these facts and in light of the doctrine and the jurisprudence, the complainant may not want to perform these new duties although they fall under the exercise of management rights and he may be justified in leaving his employment;

WHEREAS however, he should be given a notice of dismissal;

[12] Despite these conclusions, the adjudicator allowed the appellant's complaint in part and, as already mentioned, granted him severance pay and holiday pay.

[13] On this aspect of the adjudicator's decision, the judge found that there was an inconsistency in determining that there had been a voluntary resignation and, in the same breath, granting

severance pay since, under subsection 242(4) of the Code, compensation may only be ordered where a person has been unjustly dismissed:

242.	**242.**
…	[…]
(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to	(4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur:
(*a*) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;	*a*) de payer au complainant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;
(*b*) reinstate the person in his employ; and	*b*) de réintégrer the complainant dans son emploi;
(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.	*c*) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.

[14] Last, the judge upheld the adjudicator's decision regarding holiday pay, and the respondent chose not to appeal this issue.

Analysis of the decision of the Federal Court judge

[15] I have spent some time summarizing the adjudicator's most significant findings so that the role of the judge on applications for judicial review can be understood more readily.

[16] The judge was correct in raising the inconsistency in the adjudicator's decision, which found that the appellant had resigned but nonetheless allowed, in part, the appellant's complaint of unjust dismissal. The judge therefore properly set aside the order to pay severance pay.

[17] Despite the written and oral representations of Mr. Bégin, I am not persuaded that the judge made an error warranting our intervention. Since he was dealing with questions of mixed fact and law, except for the interpretation of subsection 242(4) of the Code, his powers of intervention in the adjudicator's decision were limited by the strict standard of review applicable in this case. The judge could not substitute his assessment of the facts and the evidence for that of the adjudicator. He was quite careful not to do so.

[18] The appellant criticizes the judge for not allowing his request for payment for his accumulated sick days. The adjudicator considered this issue. He referred to the conditions regarding sick days in the [TRANSLATION] *Agreement establishing the working conditions for employees of CKIA FM 88,3 (Radio Basse-Ville)*: see appeal book, volume 2, at pages 247 and following.

[19] Article 16.3 of the agreement states that [TRANSLATION] "sick days that have not been used during the year of reference are not cumulative and will not at any time be paid in cash": *ibid*, at page 254. Accordingly, the adjudicator rejected the appellant's request on this point. In my view, there was no basis for the judge to intervene.

[20] For these reasons, I would dismiss the appeals in dockets A-471-06 and A-472-06 with one set of costs.

"Gilles Létourneau"
J.A.

"I concur.
J. Richard C.J. "

"I concur.
M. Nadon J.A. "

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKETS:	A-471-06 and A-472-06
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DATED:	June 15, 2007

APPEARANCES:

Gilles Bégin	FOR THE APPELLANT
Laval Dallaire	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gagné, Letarte Québec, Quebec	FOR THE RESPONDENT