Federal Court of Appeal | Cour d'appel fédérale

Date: 20190404

Docket: A-351-17

Citation: 2019 FCA 68

[ENGLISH TRANSLATION]

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

BETWEEN:

YAN RIVERIN

Appellant

and

CONSEIL DES INNUS DE PESSAMIT

Respondent

Heard at Québec, Quebec, on February 18, 2019.

Judgment delivered at Ottawa, Ontario, on April 4, 2019.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

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

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REASONS FOR JUDGMENT

RIVOALEN J.A.

[1] Yan Riverin (the appellant) is appealing from a judgment rendered by Justice Annis (the Judge) of the Federal Court on January 19, 2017 (2017 FC 934). The Judge allowed the respondent's application for judicial review of the adjudicator's decision dated June 8, 2016 that allowed the appellant's complaint for unjust dismissal under section 240 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code).

[2] For the reasons that follow, I am of the opinion that this appeal should be allowed.

I. Background

A. *Summary of facts*

[3] The facts are well described in paragraphs 2 to 28 of the Judge's decision. To summarize, the Conseil des Innus de Pessamit (the respondent) consists of a chief and six councillors who are elected for two years. At the time of the events relevant to this case, the First Nation's administrative structure consisted of a general directorate that reported directly to the respondent, and ten sectoral branches that reported in turn to the general directorate. One of the sectoral branches was economic affairs and natural resources.

[4] On December 16, 2009, the respondent hired the appellant as Director of Economic Affairs and Natural Resources. The appellant's job consisted in planning, organizing and monitoring his sector's administrative and operational activities.

[5] On December 8, 2011, the appellant became a shareholder of Uapats-Pessamit (Uapats), a business specializing in silviculture. He disclosed this to his superiors named in his letter of appointment, i.e., Grand Chief Raphaël Picard, Vice-Chief Paul Vollant and the director general, Jean-Marie Vollant. The Grand Chief indicated to the appellant that he did not object to his involvement in the business, in particular because Uapats does not receive contracts from the respondent.

[6] Following the election of a new chief and councillors in August 2012, relations between the appellant and the director general grew more tense. In late 2012, some of the duties and responsibilities associated with his position were taken away from the appellant. On March 13, 2013, he went on sick leave. The next day, he filed with the Commission de la santé et de la sécurité du travail (CSST) a harassment complaint against the director general and the respondent.

[7] On October 30, 2014, the respondent dismissed the appellant, notably on the grounds that he had placed himself in a conflict of interest and had been insubordinate toward his director general. The appellant is contesting his dismissal under Division XIV of Part III of the Code, which enables any persons who believe they have been unjustly dismissed to file a complaint with an inspector from Employment and Social Development Canada (ESDC) – Labour Program (section 240 of the Code).

[8] On June 8, 2016, Bruno Leclerc (the Adjudicator) allowed the appellant's complaint for unjust dismissal and ordered that he be reinstated in his position.

B. *Procedural history*

(1) Adjudicator's decision

[9] The Adjudicator allowed the appellant's complaint for unjust dismissal and ordered that he be reinstated in his position. He concluded that the respondent had [TRANSLATION] "failed to

demonstrate misconduct by the appellant or to provide any serious ground or reason that could justify his dismissal" (Adjudicator's decision, at paragraph 150).

[10] To begin with, regarding the first aspect of the Adjudicator's decision, I am satisfied, on a reading of the Adjudicator's reasons, that he analyzed the evidence produced and concluded that there had been no conflict of interest in this case. Agreeing with the appellant's arguments, the Adjudicator noted that, in his testimony, the director general, Jean-Claude Vollant, stated that the respondent's functions are to protect and safeguard the rights of the members of the community, promote cultural and traditional values and provide services to the population. Moreover, the evidence shows that the respondent does not award contracts for forestry work, that Uapats never signed a contract with the respondent and that the appellant and his partner at Uapats had agreed not to bid on any work that might be put out to tender by the respondent. Thus, the Adjudicator inferred that the appellant did not through his involvement in Uapats place himself in any situation that could lead him to be in direct or indirect competition with the respondent (Adjudicator's decision, at paragraphs 136, 145).

[11] Next, the Adjudicator concluded that there had not been any potential conflict of interest either, basing this finding on the definition used in *Richard Bergeron v. Agence métropolitaine de transport*, 2007 QCCRT 482, [2007] D.C.R.T.Q. No. 482, which states that there is a potential conflict of interest in a situation in which an employee [TRANSLATION] "would be likely to put his or her own interests or those of a third party ahead of those of the employer". In this case, it is acknowledged that the appellant had no decision-making power and that it would

therefore have been impossible for him to place himself in such a situation (Adjudicator's decision, at paragraph 137).

[12] Lastly, the Adjudicator noted that, when Uapats was incorporated, the appellant disclosed his involvement in that company to his superiors. Therefore, the appellant had fulfilled his obligations, since he disclosed the necessary information. The Adjudicator concluded, on the basis of the evidence produced, that the appellant was neither actually nor potentially in a conflict of interest (Adjudicator's decision, at paragraph 138).

[13] With regard to the matter of the appellant's insubordination, the Adjudicator rejected the respondent's argument because, in his opinion, the evidence demonstrated rather that the appellant had simply exercised his rights and sought to have them respected (Adjudicator's decision, at paragraph 146).

(2) Federal Court decision

[14] On judicial review, the Judge concluded that the arbitral award was unreasonable on the grounds that (1) the Adjudicator "did not recognize the applicable legal principles that govern conflicts of interest and thus did not conduct an adequate analysis of the relevant facts related to those principles" and (2) he "unreasonably concluded that the [respondent] had acted in bad faith and thus summarily dismissed, with no true analysis, the allegations of insubordination, particularly the allegation that the [appellant's] complaint of harassment was malicious" (Reasons, at paragraph 174).

[15] With regard to the appellant's insubordination, the Judge concluded that the Adjudicator had unreasonably determined that the respondent had acted in bad faith and thus dismissed, with no true analysis, the allegations of insubordination. More specifically, the Judge reproached the Adjudicator with not having considered whether the appellant's complaint of harassment was malicious and whether his repeated refusal to turn over the keys to the outfitting business and to provide the information requested by his superior justified his dismissal.

II. Issue

[16] The issue in this case is whether the Judge erred in not showing deference with respect to the Adjudicator's decision allowing the appellant's complaint for unjust dismissal.

III. Applicable standard of review

[17] The standard of review applicable in an appeal of a Federal Court decision examining an application for judicial review of an administrative decision is set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45–47 [*Agraira*]. This Court must first determine whether the Judge selected the appropriate standard of review and, if so, whether he applied it correctly. To do so, the Court must step into the shoes of the Judge and focus on the administrative decision (*Agraira*, at paragraph 46; *Hoang v. Canada (Attorney General)*, 2017 FCA 63, at paragraph 16, [2017] F.C.J. No. 321; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at paragraph 247, [2012] 1 S.C.R. 23). Therefore, in this case, we must focus on the arbitral award.

[18] It is well settled that, generally speaking, the reasonableness standard applies to judicial review of adjudicators' decisions regarding Division XIV of Part III of the Code and to adjudicators' interpretations of what constitutes unjust dismissal by an employer (*Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at paragraphs 15–16; *Yue v. Bank of Montreal*, 2016 FCA 107, [2016] F.C.J. No. 350, at paragraph 5; *Payne v. Bank of Montreal*, 2013 FCA 33, 443 N.R. 253, at paragraphs 32–33; *MacFarlane v. Day & Ross Inc.*, 2014 FCA 199, [2014] F.C.J. No. 951, at paragraph 3; *Donaldson v. Western Grain By-Products Storage Ltd.*, 2015 FCA 62, 251 A.C.W.S. (3d) 143, at paragraph 33).

[19] 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*]). This Court, in reasons by Justice Gleason, reiterated this principle in *Bergey v. Canada (Attorney General)*, 2017 FCA 30, [2017] F.C.J. No. 142, as follows:

> [74] . . . This standard is a deferential one and requires a reviewing court to assess whether the administrative decision-maker's decision is transparent, justified and intelligible and whether the result reached by the decision-maker falls within the range of acceptable alternatives in light of the facts and applicable law: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190. The case law further recognizes that decisions like the ones impugned by Ms. Bergey, which are heavily fact-infused and within the heartland of the specialized expertise of a labour board, are to be afforded a wide margin of appreciation: *Bahniuk* at para. 14; *Gatien* at para. 39.

[20] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*], the Supreme Court of

Canada emphasized that the reasons provided in support of a decision subject to the reasonableness standard "must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (at paragraph 14). Therefore, reviewing courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at paragraph 48), and should not "substitute their own reasons" (*Newfoundland Nurses*, at paragraph 15).

[21] I am of the opinion that the Judge correctly identified the applicable standard of review, which is that of reasonableness. However, the Judge erred in applying that standard by failing to show deference for the reasons of the Adjudicator.

IV. Analysis

[22] From the outset, it is important to note that the Adjudicator's analysis is rather limited. Nevertheless, that does not necessarily make his decision unreasonable. The Supreme Court of Canada addressed the issue of adequacy of reasons in *Newfoundland Nurses*:

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[23] Therefore, it must be determined whether the Adjudicator's reasons allow us to understand the basis of his decision and to then determine whether the conclusion is within the range of acceptable outcomes. In my view, considering the Adjudicator's assessment of the evidence as presented in the decision as a whole, the reasons are sufficient to allow one to understand the basis of his decision.

[24] In addressing the matter of conflict of interest, I note that the Judge erred in relying on this Court's decision in *Canadian Imperial Bank of Commerce v. Boisvert*, [1986] 2 F.C. 431 to conclude that the Adjudicator incorrectly interpreted the law concerning conflicts of interest (Reasons, at paragraph 44). That is a case in which the Court ultimately did not base its decision on the notion of conflict of interest, considering that notion to be too restrictive (at paragraph 28). Instead, it focused on the more general question of whether the employee had acted in a manner incompatible with the due or faithful discharge of his duties. That is precisely the question that the Adjudicator considered in this case and, in that regard, it was open to him to focus on the absence of competition between the appellant and the Conseil, as well as on the question of whether the appellant had any decision-making power. These are relevant factors in evaluating whether a dismissal is unjust (see Brown & Beatty, *Canadian Labour Arbitration*, 2018, at pages 7-86 to 7-88). In short, the Adjudicator's decision was reasonable as regards his interpretation of the notion of conflict of interest.

[25] In my view, the Judge also erred in undertaking a reanalysis of the evidence. The Judge thus conducted an exhaustive review of the evidence and drew therefrom completely different conclusions of fact than those of the Adjudicator. He erred by not showing the necessary

deference toward the Adjudicator and his findings of fact. More particularly, the Judge erred in substituting his own findings for those of the Adjudicator on multiple points, notably the following:

a) by asserting that the Adjudicator failed to recognize that the promotion and development of economic activities related to Pessamit resources were among the duties and interests of the Conseil when in fact the Adjudicator expressly addresses this at paragraph 19 of his reasons and concludes that the appellant's activities with Uapats were in no way opposed to the respondent's interests (Reasons, at paragraph 69);

b) by disregarding the Adjudicator's finding of fact concerning the appellant's lack of decision-making power and substituting his own finding of fact for that of the Adjudicator (Reasons, at paragraphs 75–76);

c) by arriving at a different conclusion than the Adjudicator regarding the objective of the meeting of May 3, 2012 (Reasons, at paragraphs 79–81);

d) by reanalyzing the whole of the evidence, thereby substituting himself for the Adjudicator and arriving at different conclusions than the Adjudicator as to when the appellant informed his superiors of his involvement in Uapats. I note that it would be unreasonable to require of an employee, as the Judge did, the disclosure of the employee's interests each time there is a reorganization in the directorate following an election (Reasons, at paragraphs 82–85); and

e) by arriving at different conclusions than those of the Adjudicator as to whether Uapats and the appellant would benefit financially from agreements the respondent was invited to accept (Reasons, at paragraph 89).

[26] In my view, the Judge was also wrong in intervening with regard to the matter of the appellant's insubordination. The Adjudicator's reasons are sufficient to satisfy me that, in rendering his decision, he considered the respondent's allegations of insubordination and the evidence adduced. In particular, the Adjudicator considered the respondent's argument based on the appellant's demand and on his claim with the CSST for employment injury and found that, in a context in which the appellant had a number of tasks and functions taken away from him, he justifiably questioned his future in the organization (Adjudicator's decision, at paragraphs 146–148). In light of the evidence adduced and given the considerable deference that must be shown for the Adjudicator's decision under these circumstances, the Adjudicator's decision is reasonable.

[27] This case is based on the facts that were before the Adjudicator and on his assessment of the evidence, which commands considerable deference from a reviewing court. Here, in light of the evidence before him, it was reasonable for the Adjudicator to conclude that the appellant's dismissal could not be justified on the basis of the respondent's allegations of conflict of interest and insubordination. The evidence demonstrates that the appellant's involvement with Uapats was known to and accepted by his superiors. The evidence supports the Adjudicator's conclusion that the appellant never put, and was never in a position to put, his company's interests before those of his employer.

[28] I note that the Adjudicator considered several items of evidence produced, in particular, the time that elapsed between the complaint and the dismissal, the non-progressive application of disciplinary measures and the appellant's clean disciplinary record, in concluding that the dismissal was not justified.

[29] In light of the evidence adduced and in view of the considerable deference that must be shown for the Adjudicator's decision under the circumstances, I consider the Adjudicator's decision to be reasonable.

V. Conclusion

[30] For the reasons set out above, I am of the opinion that the Judge erred in his application of the reasonableness standard to the Adjudicator's decision. The Adjudicator's decision is reasonable and therefore should be restored.

[31] Consequently, I would allow the appeal, set aside the Federal Court decision (2017 FC 934) dated January 19, 2017, dismiss the application for judicial review and restore the Adjudicator's decision of June 8, 2016, with costs to the appellant.

"Marianne Rivoalen"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Yves de Montigny J.A."

Certified true translation
Erich Klein

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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