Federal Court of Appeal | Cour d'appel fédérale

Date: 20100415

Docket: A-297-09

Citation: 2010 FCA 103

CORAM: **SHARLOW J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

JOSEPH JIN KAI GUAN

Applicant

and

PUROLATOR COURIER LTD.
and
TEAMSTERS LOCAL UNION NO. 31

Respondents

Heard at Vancouver, British Columbia, on March 9, 2010.

Judgment delivered at Ottawa, Ontario, on April 15, 2010.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: SHARLOW J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Overview

[1] Mr. Guan (or the applicant) was employed by Purolator Courier Ltd. (Purolator) and had been disciplined on a number of occasions for alleged failures to follow company practices and policies. Following the termination of his employment, the applicant grieved his termination along with three other disciplinary actions. The respondent union, Teamsters Local Union 31 (Union), ultimately decided not to pursue the grievances to arbitration. The applicant then filed a complaint

with the Canada Industrial Relations Board (CIRB or Board) alleging that his union breached its duty of fair representation under section 37 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code).

[2] The applicant's complaint was dismissed originally (in CIRB Letter Decision No. 2121 of April 29, 2009 [Letter 2121]) and upon reconsideration (in CIRB Letter Decision No. 2158 of June 23, 2009 [Letter 2158]). Hence the within application for judicial review of the Board's reconsideration decision. The Union is the only respondent in front of this Court. Mr. Guan alleges that he was denied natural justice or procedural fairness by the CIRB.

[3] For the reasons that follow, I am of the view that this application for judicial review (the application) cannot succeed.

[4] The applicant feels that, because his English skills are poor, his allegations of intimidation, harassment and discriminatory treatment by Purolator management were neither comprehended by the original Board, nor by the Board. Had his allegations been understood, he firmly believes that his complaint would have been successful.

[5] Except for some assistance in preparing his request for reconsideration, Mr. Guan was self-represented until recently. At the hearing in front of this Court, Mr. Eastwood appeared on behalf of the applicant and was helpful in refocusing the arguments raised by his client throughout the

proceedings. The panel, with the consent of the Union, accepted Mr. Eastwood's written submissions prepared specifically for the hearing of this application (the written submissions).

[6] The core of the applicant's position is that given the relevant allegations made by him and the lack of probative counter-evidence on the part of the Union, the Board, short of allowing his complaint, should have found that it had insufficient information to rule on the matter. Under such circumstances, he opines that the Board was obligated to either conduct an oral hearing or to specifically resolve the conflicts in the information provided by the parties (see Submissions of the Applicant, at paragraph 36).

[7] As it did not, the applicant argues that the Board denied him natural justice

a. in failing to grant him an oral hearing with the assistance of an interpreter in accordance with section 14 of the *Canadian Charter of Rights and Freedoms*, R.S.C. 1985, Appendix II, No. 44;
b. in failing to address relevant information in both the original decision and the reconsideration decision; and
c. in failing to understand and consider his written submissions on key issues.

[8] The applicant is of the view that his allegations constituted a *prima facie* case of a breach of section 37 of the Code.

[9] Section 37 imposes a duty of fair representation to the bargaining agent union or its representative. They "shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the [bargaining] unit with respect to their rights under the collective agreement that is applicable to them".

[10] In *McRaeJackson (Re)*, [2004] CIRB No. 290, the CIRB enunciated the test it applies to a section 37 complaint:

> 37 […] the Board will normally find that the union has fulfilled its duty of fair representation responsibility if: a) it investigated the grievance, obtained full details of the case, including the employee's side of the story; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the outcome of the grievance, and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.

[11] Of course, the present application concerns the reconsideration decision of the Board as the applicant did not seek judicial review of the original decision. In such a case, section 44 of the *Canada Industrial Relations Board Regulations*, 2001, SOR/2001-520 provides that the power of reconsideration is founded upon either the existence of new facts that could not have been brought to the Board's attention at the time it made its earlier decision, an error of law or policy or the failure of the original Board to respect a principle of natural justice (see also *Williams v. Teamsters, Local Union 938*, 2005 FCA 302, at paragraph 6 [Williams]) (emphasis added). The third element is the only one at play in this application.

Standard of Review

[12] This Court has consistently held that Board decisions must be accorded the highest curial deference except in cases where the issue is one or procedural fairness where it is for the Court to provide the legal answer (*Williams*, at paragraph 4).

[13] This Court has also stated that unless an application for judicial review has been made, an initial decision will not be reviewed during the judicial review of a reconsideration decision (*Lamoureux v. Canadian Air Line Pilots Assn.*, [1993] F.C.J. No. 1128 (FCA), at paragraph 2).

[14] However, for the purposes of the present application where the applicant alleges that his right to procedural fairness was breached, I must determine whether the Board's reconsideration decision discloses a reasonable apprehension of the issues that were put to it, as well as in front of the original Board. To that extent, the original Board's decision must be examined.

[15] Being understood is an aspect of the right to a fair hearing (*MacDonald v. Montreal (City)*, [1986] 1 S.C.R. 460). Moreover, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 79 citing *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

[16] I shall therefore be mindful of the nature of the administrative decision under review and of the fact that the parties had ample opportunity to express their respective positions in writing.

Issue

[17] Did the Board commit a breach of natural justice in how it disposed of the applicant's request for reconsideration?

The decision of the Board

[18] Having reviewed the file, the Board was satisfied that the original Board had fully considered Mr. Guan's submissions. Therefore, the Board dismissed the application for reconsideration.

[19] The Board wrote:

> His [the applicant's] allegations were considered to be serious ones, and the [original] Board required the union and Purolator … to respond to them. On the basis of all of the materials before it at the time, the [original] Board concluded that the evidence did not support the allegations that the union had acted in an arbitrary, discriminatory or bad faith manner when it decided not to pursue Mr. Guan's discipline and discharge grievances. Mr. Guan has not provided any new evidence to support his allegations" (Letter 2158, at page 2).

[20] Turning its attention to the applicant's request for an oral hearing, the Board reiterated its policy stating that "an applicant is expected to submit all of his evidence when he files the original complaint" because the complaint may be decided solely on the basis of the written submissions

(Letter 2158, at page 2). Then, the Board concluded that nothing in the applicant's complaint indicated that there was insufficient information or issues of credibility that required the original Board to grant an oral hearing. The applicant takes issue with these findings. I shall come back to them in my analysis.

[21] Finally, the Board discussed Mr. Guan's request for the assistance of a Mandarin interpreter. I need not say more on that point as the applicant did not press this argument at the hearing of this application.

The decision of the original Board

[22] The original Board first denied the applicant's request for an oral hearing, being satisfied "that the documentation before it [was] sufficient to decide this matter…" (Letter 2121, at page 2).

[23] As stated above, the parties had ample opportunities to make their position known to the original Board. After receipt of the complaint, both respondents filed a response to which the applicant replied. Subsequently, the original Board invited the Union to provide additional submissions regarding the processing of the four grievances. Once again, the applicant responded to the Union's allegations.

[24] Against this background and in light of the *McRaeJackson* test, the original Board thoroughly analyzed the applicant's four grievances and concluded that Mr. Guan's allegations were not supported by the evidence. The Board wrote:

> … the Union did investigate the circumstances and allegations relating to each of the various grievances and obtained and considered the explanation of the complainant in each instance. … the Union put its mind to each of the grievances and made a reasoned judgment not to pursue the grievances to arbitration. Once the Union was convinced that the employer would not relent in its position to deny the grievances and refused to reinstate the complainant, the Union presented the matter to the grievance panel. Then, after careful consideration, the union decided not to proceed to arbitration, because it concluded that the grievance would not be successful" (Letter 2121, at page 10).

Analysis

[25] Mr. Guan questions the probative value afforded by the original Board to the Union's evidence because the allegations he raised in his sworn affidavit were either ignored by the Union or challenged by it through unsworn statements.

[26] Unsworn evidence is customary in front of boards and commissions. In this context, the weight given to a party's evidentiary record does not depend on whether or not it was submitted in support of an affidavit.

[27] It is true that the Union did not specifically address some of the applicant's allegations, namely those made in reply to the Union's last set of submissions to the original Board, and that the Union did not seek permission to do so. Nonetheless, this argument, by itself, does little to advance the applicant's position.

[28] Firstly, the mere fact that evidence is contradictory does not automatically warrant an oral hearing absent other compelling reasons. Otherwise, section 16.1 of the Code would be devoid of all sense and use. Obviously when parties end up before the CIRB, chances are that they have taken a different stance on a particular issue.

[29] Secondly, Mr. Guan must show that the Board, on reconsideration, erred by failing to conclude that the original Board had failed to consider the applicant's allegations on determinative issues and erred by failing to afford him the opportunity to present his case in person.

[30] At paragraphs 13 and 15 of his written submissions, Mr. Guan repeats some of these allegations to show, contrary to what the Board found, that there were issues of credibility and insufficient information to decide without an oral hearing.

[31] The eight examples given by Mr. Guan at paragraphs 13 and 15 fall under five general submissions:

(1) the applicant was laughed at;

(2) he was invited to seek employment elsewhere because the Employer would not change its behaviour;

(3) he was ignored by the Union representative (Mr. Coleman);

(4) he had support from his colleagues; and

(5) he was denied arbitration for improper reasons.

[32] Having carefully reviewed the record, I note that these considerations were in front of the original Board. They were all, if not specifically, at least generally addressed by the Union. For instance, the evidentiary record contained information from the Union to the effect that Mr. Coleman neither laughed at the applicant's command of the English language, nor ignored him (respondent's record, at page 97). To the contrary, the Union's evidence showed that Mr. Coleman had presented all the relevant information pertaining to the grievances hoping to have the discipline reduced, as he had successfully done for Mr. Guan in the past (*Ibidem*, at pages 124-128). Also, the evidence clearly indicated why the grievances were not pursued.

[33] A union has a considerable discretion in decisions involving the representation of its members. The applicant was undeniably entitled to the Union's good faith in dealing with his grievances, but not to an absolute right to arbitration (*Williams*, at paragraph 10 citing *Guild v. Guy Gagnon et al*., [1984] 1 S.C.R. 509 at 527).

[34] The original Board correctly applied section 37 in reaching its conclusion. Its reasons adequately explain to Mr. Guan why the panel did not find that the Union had breached its duty of fair representation; they show that the original Board had a good grasp of the parties' submissions.

[35] Moreover, a reasonable reading of the Board's decision satisfies me that the Board did examine the totality of the arguments and the totality of the evidence. It cannot be said that the Board failed to reconsider what it was its duty to reconsider.

[36] So, although Mr. Guan feels that he was not heard because he was unsuccessful, his criticisms are unwarranted. No denial of justice has been demonstrated.

Disposition

[37] Consequently, I propose to dismiss this application for judicial review. In its factum, the respondent has sought costs against the applicant but did not discuss the matter at the hearing. In view of Mr. Guan's personal situation, I am not inclined to order costs without further specific submissions.

[38] Therefore, if the respondent intends to pursue its request for costs, it shall serve and file submissions of no more than one page within 3 days of the Order to issue. If need be, the applicant shall also have 3 days to serve and file a reply of no more than one page.

"Johanne Trudel"
J.A.

"I agree
K. Sharlow J.A."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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