Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20100519

Docket: A-334-09

Citation: 2010 FCA 126

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

CHRISTIAN BOMONGO
PATRICK KENABANTU
TARIK LAASSEL

Applicants

and

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA
and
BELL CANADA

Respondents

Heard at Montréal, Quebec, on May 17, 2010.

Judgment delivered at Montréal, Quebec, on May 19, 2010.

REASONS FOR JUDGMENT BY: THE COURT

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REASONS FOR JUDGMENT

THE COURT

Preliminary question: Request to reconsider the Direction dated May 13, 2010.

[1] At the beginning of the hearing, the applicants requested that the Court review and dispose differently of the Direction dated May 13, 2010, which refused the filing of the motion

they wished to file on the morning of the hearing. The motion was refused for filing because, among other reasons, it was out of time, irrelevant and sought conclusions that are beyond our jurisdiction.

[2] In any event, the applicants wished to establish that the arbitrator hearing their grievances had not yet ruled on the admissibility of the evidence he had received, which counsel for the Communications, Energy and Paperworkers Union of Canada (Union) agreed was the case.

[3] Consequently, the questions regarding the review of the Direction and the filing of the motion became moot.

Issues

[4] This is an application for judicial review of a decision by the Canada Industrial Relations Board (Board), dated July 30, 2009, with written reasons in support.

[5] In that decision, the Board rejected the applicants' allegations that their Union was breaching its duty of fair and equitable representation under section 37 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code).

[6] Did the Board err in its findings, exceed its jurisdiction and breach the rules of natural justice, as the applicants allege? Before addressing those issues, a short summary of the facts and proceedings is in order.

Facts and proceedings

[7] After the applicants were dismissed by their employer in 2004, the Union filed grievances on their behalf to contest the employer's decision.

[8] When the appointed arbitrator commenced hearing the grievances, the applicants filed a complaint under section 37 of the Code. The complaint alleged, in substance, that the Union and its counsel had breached their duty of fair and equitable representation. More specifically, the applicants complained that their Union and counsel exhibited a complacent attitude and that their defence was grossly negligent and deliberately arbitrary, false or misleading: see the Applicants' Record at page 26.

[9] As the complaint makes clear, the applicants' dissatisfaction results from the preliminary administration and management of the evidence by counsel for the Union at the beginning of the hearing of their grievances before the arbitrator. They felt betrayed because, according to their allegations, counsel had not objected to the employer's filing of a piece of evidence even though it had been agreed to take the opposite approach.

[10] The filing of the complaint resulted in the hearing before the arbitrator being suspended until the Board ruled on the complaint. It stands to reason that the suspension is still in effect as a result of the proceedings before us.

Decision of the Board

[11] In its decision, the Board explained the limits of the role it is called upon to play in a section 37 dispute. Its role, as it said, is not to review the Union's decisions or determine whether the decisions made are correct.

[12] In addition, within the strict bounds of section 37, the Board acknowledges that it does not hear appeals of arbitrators' interlocutory decisions. The Board describes its role as consisting of reviewing the conduct, rather than the competency, of the union and its representatives or counsel to determine whether they acted in a manner that was arbitrary, discriminatory or in bad faith.

[13] After analyzing the allegations by the applicants and the Union, the Board made the following finding on the merits of the complaint, at pages 8 and 9 of its decision:

> In the case before the Board, the documents submitted did not satisfy the Board that the union had acted in a manner that was arbitrary, discriminatory or in bad faith. In fact, the evidence on file shows that the union has represented and continues to represent the complainants before the grievance arbitrator through counsel of record; indeed, several more days of hearing will be needed to examine the complainants' dismissal grievances.
>
> It is not the Board's role to rule on the conduct or strategy of counsel of record, much less assess the admissibility of the evidence introduced before the grievance arbitrator. In the Board's view, a complaint of a breach of the duty of fair representation is not the "proper vehicle for complaining" about the conduct of counsel. In any event, the evidence on file shows that counsel kept the complainants informed of developments and consulted them on factual matters at issue
>
> The Board understands that the complainants are going through some rough times as a result of their dismissal in 2004, but the fact is that the union is still representing them. Without judging the quality of the union's representation at arbitration, the Board cannot find that the union has thus far acted in an arbitrary, discriminatory or bad faith manner toward the complainants.

Analysis of the Board's decision and the parties' submissions

[14] The applicants are self-represented. Their lack of knowledge of our legal system is reflected in both the allegations submitted and the conclusions sought before the Board and this Court. That is, no doubt, part of the reason that the Board took great care to reiterate the parameters of its jurisdiction under section 37 of the Code.

[15] In this Court, the applicants are alleging that the Board did not take into account conduct which is, in fact, beyond the scope of its mandate when analyzing a section 37 complaint. For example, as previously mentioned, the applicants are once again challenging the conduct of counsel for the Union by criticizing her for having failed to object to the admissibility of a piece of evidence before the arbitrator, whereas section 60 of the Code gives the arbitrator the power to receive and accept such evidence as the arbitrator in his or her discretion sees fit, whether admissible in a court of law or not. In any case, the hearing had only just begun, and the evidence was filed subject to its admissibility and to any other objection. The applicants misunderstood and misinterpreted the initial stages of the conduct of proceedings before the arbitrator. It may easily be understood that the Board must not rashly involve itself with the quality of representation before the arbitrator or the matter of the competency or strategy of counsel for the Union.

[16] The applicants allege that counsel for the Union and counsel for the employer are conspiring against them so that their grievances will ultimately fail. As became apparent from the arguments before us, the applicants are clearly confused as to the notions of allegations,

submissions, inferences and evidence. There is also confusion in their oral submissions between the merits, or lack thereof, of their dismissal and their Union's duty of representation. The panel members tried to shift the focus of the hearing to the real issue in dispute, but in vain. In the end, no evidence in the record was identified as establishing a lack of transparency by the Union intended to undermine them.

[17] In the applicants' view, the rules of natural justice were breached because the Board did not hold a hearing. Yet, section 16.1 of the Code gives the Board the legal authority to proceed as it did after it considered that the evidence filed and the parties' written submissions were sufficient to allow it to decide the matter without an oral hearing. Therefore, that argument is without merit.

[18] The applicants are also criticizing the Board for having devoted more time to explaining the limits of its role under section 37 than to analyzing the applicants' allegations. However, it should be noted that the Board scarcely had a choice. As previously mentioned, the applicants' allegations exceeded the Board's jurisdiction under section 37. The Board excluded them by explaining the limits of its mandate. Nothing to that effect in the Board's reasons for decision warrants our intervention.

[19] In short, after carefully reading the Board's decision with regard to the parties' respective allegations, we do not see that it contains any material error of fact or law that would warrant our intervention.

Conclusion

[20] For these reasons, the application for judicial review will be dismissed with costs.

"Gilles Létourneau"
J.A.

"M. Nadon"
J.A.

"J.D. Denis Pelletier"
J.A.

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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