Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20110131

Docket: A-197-10

Citation: 2011 FCA 32

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

BETWEEN:

MARIO VEILLETTE

Applicant

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
and
AIR CANADA INC.

Respondents

Heard at Montréal, Quebec, on December 13, 2010.

Judgment delivered at Ottawa, Ontario, on January 31, 2011.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NADON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Preliminary issue and issues

[1] This is an application for judicial review of a decision of the Canada Industrial Relations Board (Board) dated April 22, 2010 (2010 CIRB LD 2331).

[2] Without notifying this Court, the applicant, Mr. Veillette, applied to the Board for reconsideration of its decision, as provided by section 18 of the *Canada Labour Code* (Part 1 – Industrial Relations), R.S.C. 1985, c. L-2. The Board allowed the application for reconsideration. In a second decision (2010 CIRB LD 2466) dated December 1, 2010, and brought to this Court's attention only a few days before the hearing of the application for judicial review of the first decision, the Board rejected the applicant's arguments.

[3] In a Direction to the parties dated December 9, 2010, the Court inquired about the applicant's intentions regarding his application for judicial review scheduled to be heard on Monday, December 13, 2010, in light of this Court's decision in *Vidéotron Télécom Ltée v. Communications, Energy and Paperworkers Union of Canada*, 2005 FCA 90. According to that decision, the applicant must challenge both decisions, especially if the decision on the application for reconsideration affirms the first and if quashing the first would not eliminate the second.

[4] An exchange of correspondence ensued between the parties and the Court. This exchange established that the applicant, who was advised by legal aid, wanted to proceed with the hearing of both decisions on December 13, 2010. It was understood that the respondent, the International Association of Machinists and Aerospace Workers (IAMAW), objected to proceeding in this way, even though, as the applicant noted, section 55 of the *Federal Courts Rules* allows the Court, in special circumstances, to vary a rule or dispense with compliance with a rule.

[5] As a matter of fairness for the parties and to avoid an adjournment and additional costs and delays, the members of the panel deciding the issue carefully reviewed both decisions of the Board

and the applicant's grounds of attack. They noted and submitted to the parties at the hearing that all of the grounds of attack stated in the application for judicial review and those raised in the application for reconsideration essentially overlap.

[6] In fact, in both cases, the applicant complains that

a) the Board breached the rules of natural justice and procedural fairness in failing to hold a public oral hearing with witnesses, even though the credibility of witnesses had to be gauged;

b) the Board breached the rules of natural justice and procedural fairness in deeming an expedited arbitration procedure to be valid, without any valid legal grounds;

c) the Board, confronted with conflicting evidence regarding the arbitration hearing held in English, had given preference to the union's version without any acceptable explanation; and

d) the Board shifted his union's burden of proof onto him with respect to obtaining a medical assessment.

[7] Following discussions and a proposal by this Court, the parties agreed on the overlap and the fact that this Court's decision to intervene on these issues in the context of the application for judicial review of the first decision would determine the outcome of the second decision made further to the application for reconsideration. In other words, both decisions of the Board would either stand or fall.

[8] An agreement was also reached with the parties to allow them to make written submissions on the Board's second decision. To accommodate the parties faced with certain time constraints, the applicant was given until January 14, 2011, to produce a short memorandum of no more than 10 pages. The respondents had until January 21, 2011, to produce a memorandum subject to the same length restriction.

[9] The parties agreed to this approach, which was suggested by the panel members and which had been dictated by the unique circumstances of the case. These circumstances included the applicant's grounds of attack in the reconsideration and judicial review proceedings, the very short time between the date of the second decision further to the reconsideration and the date of the hearing of the application for judicial review, the fact that this Court's decision would determine the fate of the Board's two decisions, the fact that the applicant still had time to challenge the second decision and that the hearing of the application for judicial review would then have had to be adjourned and, lastly, the fact that the parties were ready to proceed, not to mention the fact that, in strict accordance with the tradition of the Federal Court of Appeal, the panel had properly instructed itself as to the facts and sources of the issues and was prepared for the hearing.

Analysis of the applicant's arguments and the Board's decisions

[10] At the hearing, counsel for the applicant filed submissions in which the wording of the issues differs from what is found in the notice of application for judicial review and the memorandum of fact and law:

[TRANSLATION]

A. Did the Board, in its decision dated April 22, 2010, act beyond its jurisdiction and/or fail to observe a principle of natural justice that it was required by law to observe in concluding that the applicant had not been forced to accept the expedited arbitration procedure?

B. Did the Board, in its decision dated April 22, 2010, act beyond its jurisdiction and/or fail to observe a principle of natural justice that it was required by law to observe in concluding that the applicant had been unable to obtain a medical assessment to refute that of the employer?

C. Did the Board, in its decision dated April 22, 2010, act beyond its jurisdiction and/or fail to observe a principle of natural justice that it was required by law to observe in concluding that the applicant had made no request whatsoever related to the fact that the hearing was held in English?

[11] I will instead refer to the grounds as worded in the notice of application for judicial review and combine the two for the purposes of the analysis.

Failure to hold a public oral hearing with witnesses

[12] In both the first and the second decision, the Board was of the opinion that it could decide the matter on the basis of the written documentation. Section 16.1 of the Code authorizes it to proceed thus, even when issues of credibility arise: see *Nadeau v. United Steelworkers of America*,

2009 FCA 100. I am not satisfied that, under the circumstances, the Court has been given any good reason for interfering with this aspect of the Board's decisions.

Expedited arbitration procedure deemed valid and preference given to the union's conflicting version without reasonable explanation

[13] In its second decision, the Board noted "that the reasons given in LD 2331 for dismissing the applicant's submissions and accepting those of the respondent regarding the expedited arbitration process and the language at arbitration were insufficient": see the second decision, at pages 10 to 11. It then proceeded to justify that conclusion of the Board in its first decision.

[14] The applicant submits in his supplementary memorandum that, in reconsideration, the Board acknowledged that it had breached the principles of procedural fairness and natural justice in its first decision. He equates inadequate reasons for the decision with a breach of these principles. He therefore submits that [TRANSLATION] "the decision then became invalid, and the Board could not speculate on the fact that the outcome would have been the same regardless of these breaches": see Supplementary Memorandum at paragraph 9.

[15] With respect, I see nothing in the Board's reconsideration decision that amounts to an admission that it breached the principles of procedural fairness or natural justice.

[16] Moreover, one cannot equate the content of these principles with that of the duty to provide adequate reasons for a decision and thereby conclude that the decision is necessarily invalid. Even a breach of the principles of natural justice or procedural fairness does not automatically invalidate

the decision, as is established in case law that is more recent than that on which the appellant relies: see *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Mobil Oil Canada Ltd. v. Canada-Newfoundland (Offshore Petroleum Board)*, [1994] 1 S.C.R. 202, at page 228; *Halifax Employers Ass. Inc. v. Council of ILA Locals for the Port of Halifax*, 2006 FCA 82; *Société des arrimeurs de Québec v. Canadian Union of Public Employees, Local 3810*, 2008 FCA 237; *Palonek v. Canada (Minister of National Revenue – M.N.R.)*, 2007 FCA 281; and *Cartier v. Canada (Attorney General)*, 2002 FCA 384.

[17] Weak or inadequate reasons for a decision can be remedied, as the Board did, in the context of a reconsideration of its first decision, to the extent that this first decision was and remains the right decision.

[18] At the end of the reconsideration and on the basis of its previous decisions, the Board found that the expedited arbitration procedure was an acceptable grievance process and that it was up to the union, not the employee, to choose the appropriate procedure in a given case: see page 11 of the second decision. This was the procedure in effect while Air Canada was subject to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, given the large number of grievances. The two parties, that is, the employer and the union, agreed that the arbitration procedure developed and implemented with Arbitrator Teplitsky allowed for speedy and effective settlement or arbitration of disputes. They agreed that this procedure would continue to apply.

[19] The Board also found that the union had reasonable grounds for deciding to use the expedited procedure, considering the weak evidence that it had in the applicant's favour and the

employer's incriminating evidence. Given all of the circumstances, Board found that the union, in deciding thus, had not breached its duty of fair representation: see page 12 of the second decision.

[20] In the appellant's opinion, he had a say in the grievance process against his employer's decision, thus implying that he could tell his union how to conduct proceedings: see paragraphs 10 and 11 of his supplementary memorandum. He alleges that the union set itself up as a judge of his behaviour and found that he had been at fault for having performed massages: *ibidem*, at paragraphs 13 to 15.

[21] Again, in my view, the appellant's claims do not reflect the actual proceedings and surrounding facts. Faced with medical and testimonial evidence that weighed heavily against the appellant, a matter that I will discuss below, the union had to make tactical choices to minimize the impact of such evidence. The appellant now disagrees with these choices, but, as the Board determined, this does not mean that the union breached its duty of fair representation.

[22] As for the language at the oral hearing in reconsideration, the Board reviewed the emails between the parties and was satisfied that the appellant did not raise this question until after the hearing. It also upheld a finding in the Board's first decision. Lastly, it reiterated that the union has carriage of the grievance and must, in handling the grievance, act in a manner that is not arbitrary, discriminatory or in bad faith, which, in the Board's opinion, it did.

[23] On this subject, the Board wrote the following at page 12 of its second decision:

> In regard to the use of English at the arbitration hearing held on April 1, 2009, the Board was correct in making the following determination in LD 2331:
>
> > In addition, nothing in the complaint before the Board shows that the complainant made any request whatsoever to his union representative, either during the meetings held with him to prepare his grievance file, in the hours preceding the hearing, or even at the hearing itself, related to the fact that the hearing was being held in English.
>
> In reconsideration, the Board checked the emails exchanged between the parties and noted that the applicant did not raise this question until after the hearing, on April 27, 2009 (Exhibit P-12).
>
> However, even if the Board had found that the applicant had specified that he wanted the arbitration hearing to be held in French prior to the date of the hearing, the union would still have had the discretion to act as it did. In fact, the union has carriage of the grievance and its referral to arbitration, and the Board has no jurisdiction to assess the quality of representation at arbitration unless there is evidence of arbitrariness, discrimination or bad faith on the part of the union.
>
> [Emphasis added.]

[24] I cannot say that these findings of the Board are wrong or unreasonable. Therefore, in my view, there is no merit in these grounds for judicial review.

The shifting of the burden of proof for obtaining a medical assessment

[25] A proper understanding of this argument of counsel for the appellant requires that I lay out certain facts specific to the issue.

[26] On or around April 11, 2008, the applicant injured his right elbow (traumatic epicondylitis). He sustained this injury while turning the crank of a loading bridge on a plane. Consequently, he was absent from work until he tried to go back to work in June, an attempt that was unsuccessful because the injury to his right elbow had not yet healed sufficiently.

[27] On September 22 of the same year, he returned to work on light duty for 20 hours a week. On October 18, 2008, he began a gradual return to his job as a sheet metal mechanic and finally resumed his position on November 18, 2008.

[28] On November 26, he was suspended prior to being dismissed on the ground that, while on disability leave and receiving disability benefits from the CSST, he had worked as a massage therapist and had thereby exacerbated the symptoms of his injury. The employer alleged that, by abusing the workers' compensation system, the appellant had defrauded his employer and the CSST. That is what led to the appellant's grievance.

[29] In the context of that grievance, the employer informed the union that it had in its possession a medical assessment report concerning the complainant. According to this report, the complainant was to avoid all repetitive movements of his right elbow.

[30] Furthermore, the employer stated that it had evidence that, for payment in cash, the applicant had performed at least two massages lasting more than an hour each on September 13 and 25, 2008, while receiving disability benefits from the CSST. The union knew that the applicant had performed at least one other massage, unbeknownst to his employer.

[31] The employer sought the opinion of Dr. Yvan Comeau, an orthopaedic surgeon and member of the Société des médecins experts du Québec. In light of the audio and video evidence of the appellant, the medical expert was asked

a) whether the activities that the appellant had performed were consistent with the injury diagnosed and/or whether they were inconsistent with the disability and functional limitations diagnosed by the attending physician; and

b) whether, in his opinion, the appellant could have feigned his symptoms and/or exaggerated the consequences.

[32] In the audio and video surveillance, the appellant claimed that he was very busy with various types of massage therapy and performed 10 or so massages per week. The treating physician who had ordered the appellant to cease all work until September 18, 2008, and to perform only light duties thereafter, had also indicated the following restrictions in his report: [TRANSLATION] "Avoid all repetitive movements, vibrations and contrecoups to the right elbow". On the basis of this evidence, the medical expert concluded that the appellant had disobeyed his treating physician's recommendations in performing massage therapy treatments on September 13, 2008, since his physician [TRANSLATION] "had advised against any sustained manual activity with the upper limbs, as he was to cease all work": see the report in the Applicant's Record, Vol. 1, at page 186.

[33] He also based his conclusion on the fact that the appellant [TRANSLATION] "had performed intensive activities that work the epicondyle in particular, not to mention the fact that he engaged in

this kind of activity even on weekends, whereas his physician had wanted him to take advantage of that time to rest": *ibidem*, at page 187.

[34] Lastly, while the medical expert was unable to confirm that the appellant's massage therapy activities had aggravated the injury, he did not hesitate in concluding that the appellant had exaggerated his clinical picture to justify not working from April to mid-September. He added that [TRANSLATION] "there is no doubt that Mr. Veillette would have been incapable of performing his massage therapy treatments had he suffered from severe epicondylitis warranting a cessation of work": *ibidem*. [TRANLATION] "There is no doubt that Mr. Veillette, in the course of the evolution, feigned symptoms with Dr. Masri and exhibited grossly exaggerated behaviour when I met with him": *ibidem*, at page 189.

[35] The union was notified of the employer's audio-visual evidence, as well as of the conclusions of Dr. Comeau's assessment. It therefore met with the appellant to inform him of this new evidence and the proper procedure to follow.

[36] At that meeting, according to counsel for the union, the appellant admitted the fact but [TRANSLATION] "claimed that giving massages involved the same movements as the treatments he was undergoing for his injury": see the union's response, Applicant's Record, Vol. 1, page 173, at paragraph 9.

[37] Given this statement of the appellant, the union asked him to obtain from his treating physician a certificate to this effect, which the appellant failed to do.

[38] It is in this factual context that counsel for the appellant stated the following at paragraph 53 of his memorandum of fact and law:

> [TRANSLATION]
> 53. Thus, by putting the "blame" on the applicant for not having been able to obtain a medical assessment, the Board shifted the union's responsibility onto him, whereas it was the union that failed to meet its obligations regarding the applicant. In doing so, the Board unfairly and unjustifiably denied the fact that the International Association of Machinists and Aerospace Workers (IAMAW) breached its duty of fair representation with respect to the applicant.

[39] It is true that, in its first decision, at page 20, the Board had noted that "the complainant [had been] unable to obtain a medical assessment to refute that of the employer".

[40] In its second decision, the Board recognized that there was a factual error in that statement, as the appellant had never been asked to produce such a medical assessment: see the second decision, at page 13.

[41] However, it is not denied that the union did ask the appellant to obtain from his treating physician a certificate stating that the massage therapy treatments that he had performed were compatible with his epicondylitis. The union was confronted with evidence that was, to put it mildly, damaging to the appellant. The union had carriage of the grievance and bore the burden of rebutting that evidence if it could. This burden was never shifted.

[42] However, to discharge this burden, the union needed the appellant's cooperation. The treating physician who had diagnosed him and ordered him to cease all work was the proper person

for providing the medical certificate required, but, as mentioned above, the appellant was unable to obtain the assessment from his treating physician.

[43] In any event, the Board recognized its factual error in its second decision and corrected it. I agree with the Board that this was not an error of law that cast doubt on the interpretation of the Code and that resulted in a shifting of the burden of proof.

Conclusion

[44] For these reasons, I would dismiss the application for judicial review, without costs in the circumstances. I would indicate in the judgment to be rendered that these reasons apply in support of the decision 2010 CIRB LD 2466 of the Board in reconsideration dated December 1, 2010.

"Gilles Létourneau"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Johanne Trudel J.A."

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-197-10
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