Federal Court of Appeal | Cour d'appel fédérale

Date: 20190930

Docket: A-175-18

Citation: 2019 FCA 240

CORAM: **NADON J.A.**
DAWSON J.A.
MACTAVISH J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

TIMOTHY PHILPS

Respondent

Heard at Vancouver, British Columbia, on September 17, 2019.

Judgment delivered at Ottawa, Ontario, on September 30, 2019.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

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

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] A number of witnesses testified in disciplinary proceedings brought against the respondent, Timothy Philps, before the Public Service Labour Relations and Employment Board. At issue in this application for judicial review is whether the Board erred in refusing to refer to certain of the witnesses who testified against Mr. Philps by their initials in the public version of the Board's decision, along with another individual who did not testify, but whose name also appears in the Board's decision.

[2] For the reasons that follow, I believe that the Board made reviewable errors in reaching its decision of May 16, 2018. Consequently I would grant this application for judicial review and set aside the Board's decision. In the unusual circumstances of this case, I would also direct the Board to redact the names of non-managerial Canada Revenue Agency employees from the public version of the Board's November 24, 2016 decision, and that it refer to these individuals by their initials in that decision.

I. The Board's First Decision

[3] Mr. Philps was a manager at the Canada Revenue Agency (CRA) who received a 30-day suspension for inappropriate acts involving a number of younger female subordinate employees. Mr. Philps grieved this suspension, and his grievance was referred for adjudication before the Public Service Labour Relations and Employment Board. In a decision reported as 2016 PSLREB 110 (the first decision), the Board dismissed Mr. Philps' grievance, finding that he had indeed engaged in inappropriate acts with his female subordinates.

[4] Several non-managerial CRA employees testified at Mr. Philps' hearing as part of the employer's case. Prior to their testifying, the witnesses were assured by representatives of the employer that their full names would not appear in the Board's decision.

[5] There is a dispute as to what transpired before the Board with respect to the employer's request to redact the names of non-managerial CRA employees from the Board's decision. The CRA's Assistant Director of Labour Relations stated in an affidavit that counsel for the employer had requested that all non-managerial employee witnesses be referred to by their initials in the

Board's decision, and that this request was not opposed by Mr. Philps. However, Mr. Philps stated in his affidavit that the request for the use of initials only related to a former CRA employee, and that he only agreed to have the identity of this individual redacted from the Board's decision.

[6] While it is not entirely clear what went on before the Board with respect to the redaction issue, the full names of all of the witnesses who testified against Mr. Philps appeared in the Board's first decision. The decision also included the full names of the former CRA employee, as well as that of a current CRA employee who was involved in the events at issue in Mr. Philps' grievance who did not testify at the hearing.

[7] After receiving the Board's first decision, counsel for the employer wrote to the Board requesting that it redact the names of the four non-managerial CRA employees identified in the decision as well as that of the former CRA employee, and that it instead refer to these individuals by their initials in its decision. The Board refused this request, stating that the employer had only asked that the name of the former CRA employee be redacted and that, in any event, it could not amend its decision as it was *functus officio* and thus without jurisdiction to address the redaction issue after the release of the award.

[8] The Board did, however, accede to the employer's request that the unredacted decision not be published on the Board's website, and the decision has not yet been made public pending the resolution of the redaction issue.

II. The Federal Court of Appeal's Decision

[9] The employer sought judicial review of the Board's first decision as it related to the redaction issue. The application for judicial review of this decision was granted: *Canada (Attorney General) v. Philps*, 2017 FCA 178, 23 Admin. L.R. (6th) 185 (*Philps* #1).

[10] The Court found that it was unlikely that counsel for the employer would have only requested that the name of the former CRA employee be redacted. In the Court's view, such a request would have made little sense given that current CRA employees would have a far greater privacy interest in having their identities protected than former employees.

[11] This led the Court to conclude that there had likely been a misunderstanding at the hearing before the Board as to the extent of the employer's redaction request. This being the case, the Court held that the adjudicator could have amended her decision as the common law doctrine of *functus officio* permits the correction of such errors. The Court further found that even if there had been no misunderstanding as to the extent of the redaction request, section 43 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 s. 2 (now the *Federal Public Sector Labour Relations Act*) nevertheless gave the Board jurisdiction to amend its decisions.

[12] The Court thus concluded that the Board's finding that it did not have the power to make the requested redactions was unreasonable. Accordingly, the application for judicial review was granted, and the employer's redaction request was remitted to the same adjudicator so that she could consider the request on its merits. The Court directed the adjudicator to "weigh afresh the privacy interests of the individuals in question against any possible need to publish their names".

As Mr. Philps claimed that he had not been afforded an opportunity to express his position with respect to the employer's redaction request, the Court further directed that the adjudicator give the parties an opportunity to make submissions on the issue before ruling on it.

III. The Board's Second Decision

[13] In accordance with this Court's decision in *Philps* #1, the matter was remitted to the Federal Public Sector Labour Relations and Employment Board (the successor to the Public Service Labour Relations and Employment Board) for redetermination.

[14] A hearing was then held at which two of Mr. Philps' subordinates testified about their concerns if their names were made public in the Board's decision. Although the other affected individuals did not testify before the Board with respect to this issue, it is apparent from a review of the record that at least one such individual was very upset that his full name had appeared in the Board's decision and it is reasonable to assume that the other current CRA employee had similar concerns.

[15] In a decision reported as 2018 FPSLREB 43 (the second decision), the Board once again refused to redact the names of the non-managerial CRA employees from its decision.

[16] The Board commenced its second decision by noting that the name of the former CRA employee had appeared in its first decision through inadvertence, contrary to the order that had been issued at the hearing. Consequently the Board agreed to amend its decision to identify the former employee by the first letter of her surname.

[17] After reviewing the evidence of two of the non-managerial employee witnesses and the arguments of the parties, the Board stated that it had no doubt that employer representatives had indeed promised the witnesses that their names would not appear in the Board's decision. The Board further found that these promises were made in order to secure the witnesses' testimony, and that the assurance that the names of the affected individuals would not appear in the Board's decision had had an impact on the depth of the evidence given by these individuals.

[18] The Board held that justice demanded that the best evidence be put before the decision-maker, that the grievor know the case against him, and that he be able to face his accusers. According to the Board, the employer "should not be allowed to secure 'better' evidence through promises that are not theirs to make or keep", and that "[e]vidence secured by promises introduces a question of bias into the process". If the employer truly believed that the identification of witnesses raised a serious risk to an important interest, the Board stated that it was incumbent on the employer to raise the issue while the witnesses were under examination, rather than after the decision had been released.

[19] The Board concluded that granting the redaction request "would have the effect of promoting a highly undesirable and offensive practice of securing evidence through inducement resulting in biased testimony", which was not in the interests of justice. Consequently the employer's redaction request was denied.

IV. Standard of Review

[20] This application raises two issues: the test to be applied in considering a redaction request, and the application of that test to the facts of the case. I agree with the applicant that the first issue involves a question of law that is reviewable on the correctness standard: *Canada (Attorney General) v. Bodnar et al*., 2017 FCA 171 at para. 22, [2017] F.C.J. No. 819.

[21] In contrast, an administrative decision that requires the application of a legal test to the facts of the case involves a question of mixed fact and law is reviewable on the reasonableness standard.

V. Analysis

[22] As will be explained below, I am of the view that the Board failed to follow this Court's direction to "weigh afresh the privacy interests of the individuals in question against any possible need to publish their names". It further failed to reasonably balance the relevant interests in accordance with the binding jurisprudence, focusing instead on assurances that were provided to witnesses testifying on behalf of the employer.

[23] The test to be applied in relation to the redaction of names in decisions is that set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at paras. 48 and 53, [2002] 2 S.C.R. 522. There the Supreme Court of Canada considered its jurisprudence relating to publication bans in the criminal law context, specifically cases such as *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104 and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442. These cases held that where a restriction on freedom of expression is

sought in order to preserve or promote an interest engaged by legal proceedings, the fundamental question will be whether, in the circumstances, the right to freedom of expression should be compromised. This requires courts to balance freedom of expression on the one hand, and the right to a fair trial of the accused on the other.

[24] The Supreme Court has since held that the analytical approach developed in *Dagenais* and *Mentuck* applies to all discretionary decisions affecting the openness of legal proceedings: *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 at para. 13, [2011] 1 S.C.R. 65. That said, *Dagenais* and *Mentuck* were criminal cases, whereas *Sierra Club* involved a request for a confidentiality order in the context of an administrative law proceeding. The Supreme Court held that in such cases, confidentiality orders should not issue unless the order is necessary to prevent a serious risk to an important interest in the context of litigation because reasonably alternative measures will not prevent the risk.

[25] The Court further held in *Sierra Club* that the risk in question must be "real and substantial", that is, one that is well-grounded in the evidence, which poses a serious threat to the interest in question. In addition, the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, must outweigh its deleterious effects, including the effects on the right to free expression: *Sierra Club*, above at paras. 53-54.

[26] In this case, the Board identified the *Dagenais*/*Mentuck* test as the governing test in its second decision. It was not, however, the test that was applied by the Board in considering the employer's redaction request. The Board was instead preoccupied by the promises that had been

made to the employee witnesses by the employer, promises that the Board found the employer had no business making.

[27] This is evident from paragraph 36 of the Board's second decision where it framed the issue that it was to decide as being "whether or not it is in the best interests of justice for this Board to give effect to the promise made to these witnesses by the employer and its counsel at the time and anonymize the witnesses' names as promised or whether the open court principle and the public interest in a fair and open judicial process demands that this extraordinary measure be denied".

[28] Not only is this statement contrary to the test enunciated in the governing jurisprudence, it is also contrary to the guidance provided by this Court in *Philps* #1, where the Court directed the Board to "weigh afresh the privacy interests of the individuals in question against any possible need to publish their names".

[29] In addition to the failure of the Board to apply the proper legal test, there are several other reasons why its decision is unreasonable.

[30] First of all, the Board was prepared to redact the name of a former CRA employee, presumably because it was satisfied that the privacy interests of that individual outweighed the public interest in a fair and open process. The Board was not, however, prepared to redact the names of current CRA employees, even though this Court had already determined that these

individuals had a far greater privacy interest in having their identities protected: *Philps* #1, above at para. 7.

[31] It was also unreasonable for the Board to discount concerns raised by Ms. R.A. (one of the current CRA employees) with respect to the negative impact that the disclosure of her name could have for her career as "purely speculative", on the basis that she had received several promotions since the events giving rise to Mr. Philps' grievance. While it is true that Ms. R.A. has achieved considerable success in her career since the events in issue took place, this success was achieved during a period in which her name and her association with this case had not been made public.

[32] The two employee witnesses who testified at the second Board hearing also expressed concern that their involvement in this matter could be uncovered through internet searches, and that this could have negative repercussions for themselves and their families. The Board found this concern to be without merit as the Board uses a "web robot exclusion protocol" that would prevent the witnesses' names being uncovered through internet searches. While this may be true, Board decisions are reported in other legal databases such as CanLII that may not employ the same software, and web searches of the witnesses' names using these databases could well disclose their involvement in this case.

[33] The Board's minimization of the employee witnesses' privacy interests was also unreasonable in light of this Court's finding in *Philps* #1 that the witnesses had a legitimate concern about publicizing their names, and its finding that identifying these individuals by their

initials would result in little, if any, derogation from the open court principle as the identity of the witnesses was not germane to the Board's decision: *Philps* #1, above at para. 10.

[34] Finally, the Board gave no consideration to the broader public interest with respect to the privacy rights at issue in this proceeding. That is, the Board failed to consider whether the publication of the affected individuals' names could discourage other complainants from coming forward with complaints of their own with respect to inappropriate conduct on the part of their superiors.

[35] As the Supreme Court observed in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para. 42, [1996] S.C.J. No. 38, society has a legitimate interest in encouraging the reporting of sexual assaults and this societal interest is furthered by protecting the privacy of complainants. While this case involved inappropriate behavior rather than sexual assaults, the same policy considerations apply here but were not considered by the Board.

[36] For these reasons I am therefore satisfied that the Board's decision was unreasonable.

VI. Remedy

[37] Having concluded that the Board's decision was unreasonable, the question is what remedies should be granted in this case.

[38] The Attorney General asks that the Court allow the request for redaction and order that the non-managerial CRA employees mentioned in the Board's November 24, 2016 decision be referred to by their initials. Mr. Philps did not appear at the hearing of the application, and he took no position with respect to the appropriateness of such a remedy in his memorandum of fact and law.

[39] Where an administrative tribunal has made an unreasonable decision, the usual practice is to send the matter back to the tribunal for redetermination, potentially in accordance with such directions as the Court may deem appropriate. Reviewing courts will not ordinarily substitute their own judgment for that of the administrative tribunal, as Parliament has delegated this type of decision-making power to expert tribunals rather than to the Courts: *Maple Lodge Farms Ltd. v. Canada (Food Inspection Agency)*, 2017 FCA 45 at para. 52, 411 D.L.R. (4th) 175.

[40] That said, remedies in applications for judicial review are discretionary: *Maple Lodge*, above at para. 48; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 52, [2010] 1 S.C.R. 6. Courts have, moreover, recognized that, in exceptional circumstances, they may render the decision that should have been rendered by the administrative decision-maker.

[41] Exceptional circumstances include situations where an administrative decision-maker could not reasonably come to any other decision on the facts and the law: see, for example, *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at paras. 52-53, 341

D.L.R. (4th) 710; *Robbins v. Canada (Attorney General)*, 2017 FCA 24 at para. 17, [2017] F.C.J. No. 182.

[42] Courts have also directed a specific outcome in situations where remitting the matter to the administrative decision-maker would undermine confidence in the administration of justice: see, for example, *Giguère v. Chambre des notaires du Québec*, 2004 SCC 1 at para. 34, [2004] 1 S.C.R. 3; *LeBon v. Canada (Attorney General)*, 2013 FCA 55, 444 N.R. 93; *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167. In my view, this is such a case.

[43] The events giving rise to Mr. Philps' grievance took place nearly 10 years ago and the Board rendered its decision with respect to the merits of his grievance in 2016. The redaction issue has now been outstanding for approximately three years during which time the affected employees have had to live with the fear that their involvement in this matter may become public.

[44] Moreover, as was the case in *LeBon*, the Board has already been afforded two opportunities to render a reasonable decision. This Court concluded in *Philps* #1 that the Board had misunderstood the nature of the redaction request made by the employer during the course of the hearing, and that its subsequent decision refusing to redact the names of the non-managerial CRA employees on the basis that it was *functus* was unreasonable. After the Board's first decision was quashed by this Court, the Board then failed to follow the clear guidance provided in *Philps* #1 to "weigh afresh the privacy interests of the individuals in question against any

possible need to publish their names", focusing instead on the promises that had evidently been made to the employees by CRA representatives.

[45] Finally, this Court has already found in *Philps* #1 that the affected employees had legitimate privacy interests in protecting their identities, and that referring to these individuals by their initials in the Board's first decision would result in little, if any, derogation from the open court principle as the employees' identities were not germane to the decision.

[46] In all of these circumstances I am satisfied that remitting the matter to the Board would undermine confidence in the administration of justice, and that it is therefore appropriate to make the order that the Board should have made.

VII. Conclusion

[47] For these reasons I would therefore grant the application for judicial review, set aside the Board's second decision, and order that the non-managerial CRA employees referred to in the Board's first decision be identified by their initials.

[48] The applicant has not requested costs and none should be awarded.

"Anne L. Mactavish"
J.A.

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

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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