Federal Court of Appeal | Cour d'appel fédérale

Date: 20191004

Docket: A-248-18

Citation: 2019 FCA 248

CORAM: **RENNIE J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

EKARINA SANTAWIRYA

Respondent

Heard at Ottawa, Ontario, on September 4, 2019.

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

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: WOODS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

I. Overview

[1] The Attorney General of Canada applies for judicial review of an interlocutory decision of the Federal Public Sector Labour Relations and Employment Board (the Board) dated July 18, 2017, (*Santawirya v. Deputy Head (Canada Border Services Agency)*, 2017 FPSLREB 10). In

that decision, the Board found that Ms. Santawirya was an employee under the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (PSLRA) and the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (PSEA). The Board held that the material facts giving rise to the grievance occurred before she lost her status as an employee and "while she was still an employee" (at para. 198). As a result of this finding, the Board held that Ms. Santawirya was entitled to grieve the decision of the Canada Border Services Agency (CBSA) to exclude her from a hiring process and that it had jurisdiction over the grievance.

[2] The Attorney General argues that the Board's decision is unreasonable and requests that the application for judicial review be allowed and that the Board's interlocutory decision be quashed. If successful, he also requests that the final grievance decision, which proceeded on the basis that there was jurisdiction and addressed the question of remedy (*Santawirya v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 58), also be quashed. For the reasons that follow, I would allow the application.

II. **The Factual Context**

[3] Ms. Santawirya began working at Industry Canada in 2000. In April of 2012, Ms. Santawirya was informed that she was an affected employee under the federal government's financial restraint measures. Pursuant to the Work Force Adjustment Directive (WFAD), she became a surplus employee. For a period of one year, from October 24, 2012, until October 24, 2013, Ms. Santawirya remained in the workplace and held *surplus priority status*, which entitled

her to be appointed to another position in the core public service ahead of any other candidate so long as she met the essential qualifications of that position.

[4] Ms. Santawirya did not obtain a position in the public service during the year in which she held surplus priority status. Effective October 24, 2013, she was laid off under the PSEA. On this day, she ceased to be an "employee" under subsection 64(4) of the PSEA, which reads:

Effect of lay-off	**Effet de la mise en disponibilité**
(4) An employee ceases to be an employee when the employee is laid off.	(4) Le fonctionnaire mis en disponibilité perd sa qualité de fonctionnaire.

[5] Under subsections 41(4) and 64(1) of the PSEA, Ms. Santawirya was entitled to a further 12 months of priority status, this time *lay-off priority status*, which carries with it the same practical benefits as surplus priority status. This 12-month period ran from October 25, 2013 to October 24, 2014.

[6] On September 23, 2014, while she held lay-off priority status, but after she ceased to be an employee under subsection 64(4) of the PSEA, Ms. Santawirya applied for a position at the CBSA.

[7] The CBSA excluded Ms. Santawirya from the hiring process when she did not demonstrate that she met the essential qualifications for the position. Ms. Santawirya subsequently re-applied for the same position. This time, the CBSA screened her out of the process on the basis that she had not provided the requested information within the timeframe it had set.

[8] Ms. Santawirya is a person with a disability and identified herself as such in her application. On February 12, 2015, Ms. Santawirya grieved the CBSA's decision, alleging discrimination in the staffing process on the basis of her disability. The grievance was then referred to the Board for adjudication.

[9] The Board held a hearing to address preliminary objections raised by the employer. The employer argued among other things that Ms. Santawirya was not an employee when the grievance was filed and the Board therefore did not have jurisdiction to hear the grievance. The Board concluded that the material facts giving rise to the grievance occurred while she was still an employee (see paras. 196-198). The Board therefore found that it had jurisdiction to hear the grievance (see paras. 248-249).

III. **Issues**

[10] I agree with the parties' submission that the applicable standard of review for the issue on this application is reasonableness (*Bahniuk v. Canada (Attorney General)*, 2016 FCA 127 at para. 14, 484 N.R. 10). There is therefore only one issue before this court: was the Board's decision that it had jurisdiction reasonable? As noted, I have concluded that it was not.

IV. **Analysis**

[11] Section 208 provides that an "employee" can file a grievance under the PSLRA. The law is clear, however, that the scope of the term "employee" is broader than the definition set out in

subsection 206(1) of the legislation, which confines "employee" to "a person employed in the public service of Canada." If the material facts giving rise to a grievance occurred while a person was an employee, that person is entitled to file a grievance, even if his or her employment has subsequently ended. There are many examples of the application of this principle in the case law, stretching back close to half a century (*The Queen v. Lavoie*, [1978] 1 F.C. 778 (C.A.) at p. 783, 18 N.R. 521; *Salie v. Canada (Attorney General)*, 2013 FC 122 at paras. 60-61, 225 A.C.W.S. (3d) 1001; *Price v. Canada (Attorney General)*, 2016 FC 649 at para. 24, 268 A.C.W.S. (3d) 866).

[12] The crux of the applicant's argument is that the material facts giving rise to the grievance in this case arose from a situation that took place after Ms. Santawirya ceased to be an employee under subsection 64(4) of the PSEA. The Board referred, once, to subsection 64(4) of the PSEA when it summarized the submissions of the parties. Apart from that, the Board did not consider subsection 64(4) of the PSEA in its analysis. As a result, the applicant argues, the Board's decision is unreasonable.

[13] The respondent relies on the same line of case law as does the applicant to argue that former employees maintain the right to grieve issues "arising from" the employment relationship (*Lavoie*, at p. 783; *Salie*, at para. 61; *Price* at para. 24; *Cawley v. Treasury Board (Department of Fisheries and Oceans)*, 2013 PSLRB 135 at para. 44). The respondent contends that although the specific facts giving rise to the grievance occurred after the respondent ceased to be an employee, the issue that was the subject of the grievance formed part of the "employment relationship" since the respondent only had lay-off priority status because she had formerly been

an employee in the public service. The respondent argues that subsection 64(4) of the PSEA is not determinative of who is an "employee" entitled to file a grievance under the PSLRA.

[14] The Supreme Court of Canada teaches that on certain questions, "[t]ribunals have a margin of appreciation within the range of acceptable and rational solutions" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190). The range of reasonable outcomes expands or contracts, depending in part, on the extent to which the decision is based on policy considerations in which the tribunal has expertise. For some questions however, there may be one reasonable outcome (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 38, [2013] 3 S.C.R. 895). Decisions of the Federal Public Sector Labour Relations Board are subject to reasonableness review.

[15] Subsection 64(4) is a clear expression of Parliament's intention with respect to whether a person with lay-off priority status is an employee. There is no doubt or uncertainty about its meaning or the scope of its application. Parliament has decided that a person who is laid off under subsection 64(1) of the PSEA ceases to be an employee. Parliament was equally clear in subsection 206(2) of the PSLRA that "former employees" can grieve in limited circumstances, none of which are in issue here. Neither of the provisions are, however, determinative of who may file a grievance. As noted, grievances may be filed even though the employment relationship has ended where the material facts which underlie the grievance occurred when the employment relationship existed.

[16] When courts and tribunals interpret related statutes or statutes dealing with the same subject matter, harmony, coherence, and consistency are to be assumed (*R. v. Ulybel Enterprises Ltd*., 2001 SCC 56, at para. 52, [2001] 2 S.C.R. 867; *Stoddard v. Watson*, [1993] 2 S.C.R. 1069 at 1079, 14 O.R. (3d) 799). Subsection 64(4) is relevant insofar as it establishes the temporal limits or parameters of the employment relationship, within which the principal or indirect facts which underlie the grievance must be located. Therefore, Parliament's determination of who is an employee under the PSEA, according to *Lavoie* and its progeny, necessarily bears on who is an employee entitled to file a grievance under Part 2 of the PSLRA.

[17] The respondent's argument, which found favour with the Board, is that jurisdiction flowed from the fact that Ms. Santawirya had previously been an employee, and, but for her former status as an employee, she would not have been entitled to lay-off priority status. The grievance therefore "arises out of the employment relationship".

[18] This argument does not align with the established jurisprudence.

[19] The jurisprudence concerning the interpretation of "employee" under the PSLRA requires a nexus between the material facts which underlie the grievance and the grievor's status as an employee. The Federal Court of Appeal in *Lavoie* stated that "any person who feels himself to be aggrieved as an 'employee'" is entitled to grieve (p. 783, emphasis in original). Read in context, it is clear that the Court made this statement to guard against a situation where a person who had a grievance *while employed* would not be deprived of the right to grieve by a termination of employment or retirement (p. 783).

[20] The principle emanating from *Lavoie* is that if the material facts transpired while the aggrieved person was employed then the Board has jurisdiction regardless of whether that person is still employed when he or she files a grievance. If the material facts did not transpire while the aggrieved person was employed then the Board does not have jurisdiction. The Board's role is to determine the factual basis for the grievance and to assess whether or not sufficient material facts occurred while the grievor was employed.

[21] In consequence, there are circumstances where a person may no longer be an employee when some material facts arise, but the required nexus to the employment relationship is nevertheless established. An example of this is the Board's decision in *Cawley*, where the issue which underlies the grievance, a dispute about job classification, arose while the grievor was employed, but was only settled after retirement (para. 44). As noted by the Federal Court in *Price* (at para. 26), *Lavoie* preserves the right of former employees to grieve where the matter giving rise to the grievance arose during the course of the individual's employment where the individual was aggrieved as an employee.

[22] Any analysis of whether Ms. Santawirya was an employee for the purpose of filing a grievance under subsection 206(1) of the PSLRA must necessarily include consideration of subsection 64(4) of the PSEA, as it fixes the boundaries within which most of the material facts must be found. As the Board's decision does not discuss the provision nor does it articulate the material facts arising when the respondent was employed, it fails to meet the *Dunsmuir* criteria of reasonableness.

V. **Conclusion**

[23] I would allow the application and set aside the decisions of the Board dated July 18, 2017 and July 9, 2018, with costs to the applicant. The matter is remitted to the Board for redetermination in accordance with these reasons.

"Donald J. Rennie"
J.A.

"I agree
Judith Woods J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION FOR JUDICIAL REVIEW OF THE DECISIONS OF THE FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD DATED JULY 18, 2017 and JULY 9, 2018.

DOCKET:	A-248-18
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. EKARINA SANTAWIRYA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 4, 2019
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	WOODS J.A. LASKIN J.A.
DATED:	OCTOBER 4, 2019

APPEARANCES:

John Craig	FOR THE APPLICANT
Jean-Michel Corbeil	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE APPLICANT
Goldblatt Partners LLP Ottawa, Ontario	FOR THE RESPONDENT