Federal Court of Appeal | Cour d'appel fédérale

**Date: 20191129**

**Docket: A-66-19**

**Citation: 2019 FCA 294**

**CORAM:** **WEBB J.A.**
**NEAR J.A.**
**LASKIN J.A.**

**BETWEEN:**

**LORRAINE LORTIE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Halifax, Nova Scotia, on October 28, 2019.

Judgment delivered at Ottawa, Ontario, on November 29, 2019.

REASONS FOR JUDGMENT BY: NEAR J.A.

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

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## REASONS FOR JUDGMENT

**NEAR J.A.**

I. Overview

[1] The applicant, Ms. Lorraine Lortie, seeks judicial review of a decision of the Federal Public Sector Labour Relations and Employment Board (the Board) dated January 30, 2019, dismissing the applicant's grievance on the basis that the deputy head's opinion that the applicant's performance was unsatisfactory was reasonable and that her termination was for cause.

## II. Background

[2] This matter arises from the applicant's dismissal from her position with the Canada Border Services Agency (CBSA). CBSA hired the applicant as its Disability and Accommodations Case Coordinator for the Atlantic Region in 2008. As outlined in the job description for the position, the position required strong interpersonal and communication skills as well as the ability to influence others. It quickly became apparent that the applicant's behaviour, attitude, and communication style at work negatively affected her relationships and interactions. The applicant's supervisors received complaints about her behaviour, which were communicated to the applicant verbally and were reflected in her performance reviews. As the Board's decision describes it, she frequently became defensive, abrupt, and abusive if challenged.

[3] Beginning in 2009-2010, the applicant's yearly performance agreements established objectives relating to professionalism, integrity, and respect in her actions and communications. Throughout her employment the applicant was offered assistance by multiple supervisors, received counselling, and was given the opportunity to pursue training courses to improve her skills. Following her year-end performance assessment for 2013-2014, the employer created an action plan with the applicant's input establishing timelines for the applicant to demonstrate improvement.

[4] Despite these efforts, the applicant's behaviour and communications continued to be unsatisfactory. At the time of the 12-month review of the action plan in December 2015, the

applicant's supervisor informed her that she had been evaluated as not having successfully met the plan's requirements and would have three further months to demonstrate significant improvement, or have her employment terminated. The applicant continued to resist the action plan and her supervisor concluded that the applicant was not meeting expectations at her annual performance review in February 2016, with one month remaining in the action plan. On April 6, 2016, following the final action plan review, the applicant was informed that her performance remained unsatisfactory. The applicant was advised of the termination of her employment for reasons of unsatisfactory performance. The applicant filed a grievance with the Board alleging that she had been terminated for disciplinary reasons and that her dismissal constituted an act of discrimination against her.

## III. The Board's Decision

[5] The Board identified its role under section 230 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the Act) as assessing the reasonableness of the employer's opinion that the employee's performance was unsatisfactory. If the employer's opinion is determined to be reasonable, section 230 provides that the Board must determine the termination to have been for cause. The Board also stated that if the applicant's supervisors were engaging in bad faith in assessing the applicant's performance, the employer's determination that her performance was unsatisfactory could not be reasonable.

[6] The Board found that, on the evidence, it was reasonable for the employer to deem the applicant's performance unsatisfactory. The Board found that the evidence did not support a finding that the applicant's termination was an act of reprisal by the employer: other than

asserting that she had filed a human rights complaint against one supervisor in 2011, the applicant presented no evidence to support this allegation. The Board found that the applicant's termination was not related to the applicant's harassment complaints against two of her supervisors. The Board further found that neither telework arrangements made to accommodate the applicant nor her attempts to be relocated to Ottawa were related to the termination. It found that there was no evidence that the employer's action plan was retaliation for the applicant's teleworking. Finally, it found the termination was not a result of the applicant's requests to have her position reclassified or her attempts to preserve CBSA's use of a Regional Placement System used to match employees seeking accommodation with job vacancies.

## IV. Standard of Review

[7] The Board's decision is reviewable on the reasonableness standard: *Forner v. Canada* (*Attorney General*), 2016 FCA 136 at para. 11. To be reasonable, a decision must be transparent, justified, and intelligible, and must fall within a range of acceptable outcomes on the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47.

## V. Issues

[8] In my view, the issues on judicial review are as follows:

1. Are the materials filed by the applicant before this Court, which were not before the Board, admissible?
2. Was the Board's decision reasonable?
3. Was the Board member biased?

## VI. Analysis

### A. *Are the materials filed by the applicant before this Court, which were not before the Board, admissible?*

[9] Generally, on judicial review an applicant will be limited to the record before the Board or decision maker. In this matter, the applicant did not bring a motion to introduce new evidence that was not before the Board. Further, the new evidence the applicant sought to introduce did not meet the test for new evidence on judicial review: *Sharma v. Canada* (*Attorney General*), 2018 FCA 48 at paras. 7-9. As a result, this Court did not accept the new evidence at the hearing.

### B. *Was the Board's decision reasonable?*

[10] The applicant submits that the Board member made unjustified assumptions, that she distorted evidence and testimony, and that she made errors in referencing exhibits and excluding certain evidence presented by the applicant from her decision.

[11] In my view, the Board's decision was reasonable. The decision was transparent, justified, and intelligible: the Board reviewed at great length the position of both parties and identified the scope of the task before it pursuant to section 230 of the Act. In large measure, the applicant asked this Court to reweigh the evidence. This is not the role of the Court. Rather, our role is to determine if the decision of the Board was reasonable given the evidence before us.

[12] The Board's conclusion that it was reasonable for the employer to find that the applicant's performance was unsatisfactory was amply supported by the evidentiary record. There were no fewer than 18 separate complaints regarding the communication skills of the applicant over an eight-year period.

[13] Further, the Board's finding that the applicant's dismissal was not the result of a bad faith reprisal by the employer was reasonable on the evidence. The Board's finding that the applicant's dismissal did not constitute discrimination was also reasonable on the evidence as the applicant did not establish that she possessed a protected characteristic under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, the necessary first step for a finding of discrimination: *Canada (Attorney General) v. Bodnar*, 2017 FCA 171 at para. 21; *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para. 24.

C. *Was the Board member biased?*

[14] The applicant submits that the Board member's conduct amounted to bias. In my view, the applicant has not met the high threshold for a finding of a reasonable apprehension of bias set out in *Yukon Francophone School Board, Education Area #23 v. Yukon* (*Attorney General*), 2015 SCC 25 at paras. 20-21 and in *Nadeau v. Canada* (*Attorney General*), 2018 FCA 203 at para. 12.

[15] The applicant has not provided any proof that the Board member was biased or that any apprehension of bias was reasonable. The applicant has made a series of bald assertions, none of

which are supported by the evidence in this matter. Clearly, the applicant is unhappy with the conclusion reached by the Board member, but this is not the basis upon which a finding of bias or reasonable apprehension of bias can be supported.

## VII. Conclusion

[16] For these reasons, I would dismiss the application for judicial review with costs.

"D. G. Near"
J.A.

"I agree
Wyman W. Webb J.A."

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

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A DECISION OF THE FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD DATED JANUARY 30, 2019, CITATION NO. 2019 FPSLREB 10, FILES 566-02-12442 AND 12738**

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| **DOCKET:** | A-66-19 |
| **STYLE OF CAUSE:** | LORRAINE LORTIE v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | HALIFAX, NOVA SCOTIA |
| **DATE OF HEARING:** | OCTOBER 28, 2019 |
| **REASONS FOR JUDGMENT BY:** | NEAR J.A. |
| **CONCURRED IN BY:** | WEBB J.A.<br>LASKIN J.A. |
| **DATED:** | NOVEMBER 29, 2019 |

**APPEARANCES:**

| | |
|---|---|
| Lorraine Lortie | ON HER OWN BEHALF |
| Caroline Engmann | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Nathalie G. Drouin<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |