Federal Court of Appeal | Cour d'appel fédérale

Date: 20210510

Docket: A-142-20

Citation: 2021 FCA 89

CORAM: **NADON J.A.**
RENNIE J.A.
RIVOALEN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

KHRISTINA DOUGLAS

Respondent

Heard by online video conference hosted by the Registry

on April 29, 2021.

Judgment delivered at Ottawa, Ontario, on May 10, 2021.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

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

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REASONS FOR JUDGMENT

RIVOALEN J.A.

[1] The Attorney General of Canada seeks judicial review of a decision of the Federal Public Sector Labour Relations and Employment Board (the Board) dated May 13, 2020 (2020 FPSLREB 51). The Board allowed a grievance brought by Khristina Douglas (the respondent), against failures to accommodate pursuant to the "no discrimination" clause of the collective

agreement between the Treasury Board of Canada (the employer) and the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada.

[2] The respondent is a correctional officer for Correctional Service Canada. During her pregnancy, she sought accommodations from her employer and provided a medical note dated November 29, 2012, recommending, *inter alia*, that she should have no physical or visual contact with offenders and that she should be in areas of no stress. The employer re-assigned the respondent to clerical duties and provided her with an office where she would have no physical contact with offenders. After working three shifts under the new work arrangements, the respondent grieved her work accommodations on January 6, 2013, because she continued to have visual contact with offenders. In mid-January 2013, the employer further accommodated the respondent by agreeing that she could perform her clerical duties by working from home 4 out of 5 days of the week.

[3] The Board granted the respondent's grievance. The Board ordered the employer to: (1) reimburse the sick leave credits that the respondent used from November 29, 2012, to January 14, 2013; (2) pay the sum of $5,000 in compensation for pain and suffering under paragraph 53(2)(*e*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act); and (3) pay the sum of $5,000 for recklessly engaging in a discriminatory practice under subsection 53(3) of the Act.

[4] This application for judicial review focusses solely on the special compensation awarded to the respondent pursuant to subsection 53(3) of the Act. That subsection reads as follows:

Special compensation	**Indemnité spéciale**
53(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.	53(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

[5] There is no dispute that the standard of review of a decision of the Board under the *Vavilov* framework is reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 85 and 100 [*Vavilov*]; *Canada (Attorney General) v. Association of Justice Counsel*, 2021 FCA 37). A reasonable decision, *Vavilov* states, is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker." A reviewing court must defer to a decision with these qualities (*Vavilov* at para. 85).

[6] *Vavilov* further instructs that when reviewing the reasonableness of an administrative decision, it is determined using the hallmarks of justification, transparency and intelligibility. A decision will be unreasonable where the conclusion reached cannot follow from the analysis undertaken or "if the reasons for it, read holistically, fail to reveal a rational chain of analysis" (*Vavilov* at paras. 103-104).

[7] For the reasons that follow, I would allow the application for judicial review, with costs. In my view, the Board's decision to award special compensation pursuant to subsection 53(3) of the Act was unreasonable.

[8] There is little jurisprudence from this Court involving subsection 53(3) of the Act. However, in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, [2015] 2 F.C.R. 595 [*Johnstone FCA*], this Court primarily dismissed an appeal from the Federal Court's decision in *Canada (Attorney General) v. Johnstone*, 2013 FC 113, [2014] 3 F.C.R. 170 [*Johnstone FC*], which dismissed an application for judicial review of the Canadian Human Rights Tribunal (the Tribunal). The Tribunal had concluded that the respondent's employer, Canadian Border Services Agency, had discriminated against the respondent on the ground of family status by refusing to accommodate her childcare needs through work scheduling arrangements. As noted in *Johnstone FC*, subsection 53(3) "is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the *Act* is intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly." (*Johnstone FC* at para. 155) I would agree with this characterization of recklessness.

[9] With this description of recklessness in mind, I will now turn to the Board's reasons and explain why I find them to be unreasonable.

[10] A decision will typically be unreasonable "[w]here a decision-maker departs from a long and well-established line of authority… especially where it fails to provide an adequate explanation for the departure" (*Canada (Attorney General) v. Duval*, 2019 FCA 290 at para. 20). A review of the Board's jurisprudence considering findings of recklessness under subsection 53(3) of the Act depicted an employer's actions as more egregious (see *e.g.*, *Rogers v. Canada Revenue Agency*, 2016 PSLREB 101; *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35; *Audet v. Canadian National Railway*, 2006 CHRT 25). However, unlike in other decisions awarding special compensation, in the case before us, the employer acted quickly in its attempts to accommodate the respondent and in fact largely did so two weeks after she filed her grievance. Therefore, the Board here failed to provide an adequate explanation or analysis for the departure from its authorities.

[11] Further, a review of the Board's findings demonstrate a lack of reasoning justifying an award of special compensation under subsection 53(3) of the Act. For example, the Board held at paragraph 105 of its reasons that "a complete absence of stress is impossible to achieve in any situation". Later, the Board held at paragraph 117 of its reasons that "I cannot conclude that the employer completely disregarded [the respondent's] accommodation needs". Then the Board, at paragraph 118 of its reasons, made three findings against the employer. It found that: (1) "the employer neglected to fully understand the functional limitations in order to offer proper accommodation"; (2) "[i]t did not seek further information from [the respondent's] physician about visual inmate contact, despite stating that it would"; and (3) "[i]t decided unilaterally what 'visual contact' and 'stress' meant for [the respondent], without taking her point of view into

account." "In so doing", the Board found the employer caused the respondent pain and suffering and acted recklessly.

[12] It is not clear to me from a review of these conclusory statements how the Board found the employer to have acted recklessly. While the employer has accepted that it acted in a discriminatory manner that might justify an award for pain and suffering under paragraph 53(2)(*e*) of the Act, the reasons, read holistically, fail to reveal a rational chain of analysis for an award of special compensation under subsection 53(3) of the Act. Here, there is no explanation or finding that the employer disregarded or showed indifference for the consequences of its actions such that its conduct was wanton or heedless. In short, the Board's reasons fail to explain how it came to a finding that the employer acted recklessly.

[13] Finally, the time element suggests that the employer acted quickly to accommodate the employee by allowing her to change her duties from primary worker, that is, to be a role model and general support worker to a few female offenders, to clerical worker. The employer met with her and provided her with an office with no offender access to perform the clerical work. Thereafter, and as the Board found at paragraph 111 of its reasons, the respondent was largely accommodated by a telework arrangement that began in mid-January, approximately two weeks from the date her grievance was filed. This would suggest that the employer was alive to the respondent's needs and was diligent in attempting to accommodate her. In my view, no basis to support the finding of recklessness exists in this case to warrant such a punitive award.

[14] In conclusion, I am of the view that the Board's decision is unreasonable as the decision fails to explain its finding of recklessness under subsection 53(3) of the Act in a justifiable, intelligible and transparent manner. Its analysis to justify such a punitive award is lacking. Further, I am of the view there is no basis on this record to support such a finding of recklessness.

[15] For these reasons, I would allow the application for judicial review with costs and I would set aside the Board's decision awarding special compensation under subsection 53(3) of the Act for recklessly engaging in a discriminatory practice.

"Marianne Rivoalen"
J.A.

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

"I agree.
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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