Federal Court of Appeal Cour d'appel fédérale

Date: 20211109

Docket: A-82-20

Citation: 2021 FCA 216

CORAM: **WEBB J.A.**
GLEASON J.A.
MONAGHAN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

VICTORIA ALEXIS

Respondent

Heard by online video conference hosted by the registry on October 14, 2021.

Judgment delivered at Ottawa, Ontario, on November 9, 2021.

REASONS FOR JUDGMENT BY: GLEASON J.A.

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

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this application for judicial review, the Attorney General of Canada seeks to set aside the decision of an adjudicator of the Federal Public Sector Labour Relations and Employment Board (the FPSLREB) in *Alexis v. Deputy Head (Royal Canadian Mounted Police)*, 2020 FPSLREB 9. In that decision, the adjudicator allowed the respondent's grievance, finding that her employer had acted in bad faith in its decision to terminate her employment during the

probationary period. The adjudicator ordered her reinstatement, with compensation for lost wages and benefits.

[2] It is common ground between the parties and firmly settled that the deferential reasonableness standard of review applies to the adjudicator's decision: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1; *Gulia v. Canada (Attorney General)*, 2021 FCA 106, 2021 CarswellNat 1617 at para. 8; *Canada (Attorney General) v. Douglas*, 2021 FCA 89, 2021 CarswellNat 1289 at para. 5.

[3] The Attorney General submits that the adjudicator's decision is unreasonable because the adjudicator departed from the well-established test set out in the case law to determine whether the FPSLREB possesses jurisdiction to hear a grievance challenging a rejection on probation and instead applied the test for determining if an employer has cause to release an indeterminate employee.

[4] In support of this assertion, the Attorney General points, in particular, to paragraphs 208- 210 of the adjudicator's Reasons, where the adjudicator discussed the interplay of the case law governing grievances that challenge a rejection on probation and the decisions of this Court in *Canada (Attorney General) v. Heyser*, 2017 FCA 113, [2018] 1 F.C.R. 245 [*Heyser*], *Canada (Attorney General) v. Féthière*, 2017 FCA 66, 2017 CarswellNat 962 [*Féthière*] and *Bergey v. Canada (Attorney General)*, 2017 FCA 30, 2017 CarswellNat 276 [*Bergey*]. The adjudicator stated that these two lines of authority are not "[…] mutually exclusive, and, that they may […] be applied in conjunction with one another" (at para. 209). He went on in paragraph 210 to hold

that "[…] the grievor's employment was terminated for reasons that were other than legitimate and employment related" and that the "[…] rejection on probation was a sham and a camouflage, and it was done in bad faith". He continued by noting that the termination "[…] amounted to a termination of employment for the grievor under s. 209(1)(c)(i) of the [*Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the FPSLRA)], rather than under s. 62 of the [*Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA)]" (at para. 210).

[5] The Attorney General also says that a review of the adjudicator's reasoning demonstrates that the adjudicator unreasonably cast the burden of proof on the employer, contrary to the applicable case law, because he rested his determination in part on the absence of evidence on certain points. The Attorney General further contends that the adjudicator unreasonably relied on the respondent's demeanor during the hearing in support of his conclusion that the respondent had not exhibited a belligerent attitude when employed. In the submission of the Attorney General, this final point is sufficient, in and of itself, to result in the adjudicator's decision being set aside.

[6] Contrary to what the Attorney General submits, a review of the adjudicator's decision in its entirety demonstrates that the adjudicator in fact followed and applied the accepted test for reviewing an employer's decision to release an employee during the probationary period.

[7] By virtue of section 211 of the FPSLRA, the FPSLREB possesses no jurisdiction to inquire into terminations of employment under the PSEA. Section 62 of the PSEA provides the employer authority to terminate public servants during the probationary period.

[8] Despite this apparent bar to the jurisdiction of the FPSLREB to hear termination grievances from probationary employees, the case law of the Supreme Court of Canada, this Court, the Federal Court and the FPSLREB (or predecessor versions of that Board) has long recognized that the foregoing sections are not a complete bar to the FPSLREB's jurisdiction in such cases and that it may intervene if it determines that a termination of a probationer was a camouflage, sham or made in bad faith. Such terminations are not valid ones under section 62 of the PSEA and may be remedied by the FPSLREB under what is now section 209 of the FPSLRA: see, i.e., *Jacmain v. Attorney General (Can.) et al*., [1978] 2 S.C.R. 15, 81 D.L.R. (3d) 1 at 36-37 [*Jacmain*]; *Canada (Attorney General) v. Penner,* [1989] 3 F.C. 429, 1989 CarswellNat 118F at 440; *Canada (Attorney General) v. Leonarduzzi,* 2001 F.C.T. 529, 205 F.T.R. 238 at paras. 31-32; *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, 2010 CarswellNat 5316 at paras. 109-111 [*Tello*]; *Rouet v. Deputy Head (Department of Justice)*, 2021 FPSLREB 59, 2021 CarswellNat 2311 at para. 14; *Ebada v. Canada Revenue Agency*, 2021 FPSLREB 94, 2021 CarswellNat 4138 at para. 152; *Ricard v. Deputy Head (Canada Border Services Agency)*, 2014 PSLRB 72, 2014 CarswellNat 3022 at para. 126.

[9] It is likewise settled that the burden of proof is on a grievor to establish that the termination was a camouflage, sham or conducted in bad faith: *Tello*, at para. 111; *Kagimbi v. Canada (Attorney General),* 2014 FC 400, 453 F.T.R. 286 at para. 29, aff'd 2015 FCA 74, leave ref'd 2015 CanLII 72361 (SCC).

[10] As noted at page 39 of *Jacmain* and paragraph 16 of *Bergey*, this approach is similar to that applied by labour arbitrators in the private sector. In both the federal public sector and the private sector, employers are afforded considerable discretion to assess the suitability of probationary employees and there is minimal scope for review of their decisions.

[11] Contrary to what the Attorney General says, the adjudicator did not stray from this case law in the instant case. He set out the applicable test at paragraphs 200-206 of his Reasons and grounded his findings in the lack of good faith on the part of the employer. The adjudicator noted at paragraph 211 that "[…] the evidence disclosed that the […] employer's representatives acted in a manner that can be described only as bad faith".

[12] He then proceeded to discuss that evidence. Among other factors that the adjudicator relied on, he found that, contrary to what the employer stated in the termination letter:

- the employer had not provided the respondent mentoring and that its assertion to have done so was disingenuous (at para. 238);

- the employer had not provided the respondent with training (at paras. 232 and 243);

- the employer had provided the respondent with only five working days to improve her performance after being warned it was unsatisfactory (at paras. 224 and 229); and

- the individual who made the decision to terminate the respondent and signed the termination letter had no knowledge of the respondent's alleged failure to improve after the date she signed the termination letter, despite her intention that the respondent should have been given an opportunity to improve before being terminated (at paras. 226-230).

[13] The foregoing factors provided the adjudicator more than ample basis to have reasonably concluded that the employer had not acted in good faith.

[14] The adjudicator's mention of the lack of evidence on certain points must be read in context. When this is done, it is evident that he accepted the respondent's version of events and found a lack of good faith based on the totality of the evidence. In a case such as this, there is virtually never a direct admission of bad faith; rather, it is something that must be gleaned from all the evidence. This is precisely what the adjudicator did.

[15] In his conclusion on these points at paragraphs 230-231 of his Reasons, the adjudicator wrote as follows:

> [230] There is absolutely no evidence of the following:
>
> - the grievor's performance between May 8 and 20, 2015;
> - anyone providing her with any form of instruction, guidance, training, or mentoring between May 8 and 20, 2015;
> - either Sgt. McAuley or Ms. Lakeman providing any instruction, guidance, training, or mentoring to the grievor between May 8 and 20, 2015;
> - anyone communicating any information about her performance to Ms. Ryan between May 20 and June 5, 2015; and
> - Ms. Ryan having any information about the grievor's performance between May 20 and June 5, 2015.
>
> [231] In fact, the grievor's evidence was that no one provided her with any form of instruction, guidance, training or mentoring after she received the May 8 letter.

[16] When read in context, these comments do not show that the adjudicator cast the burden of proof on the employer. Rather, they are a summary of his factual findings, which highlight why

he found there to have been a lack of good faith. When read in conjunction with his other evidentiary findings, the use of the phrase "absolutely no evidence" in paragraph 230 can only be understood to mean that there was no credible evidence to contradict the respondent's version of events and that the employer therefore did not terminate her employment for the reasons set out in the termination letter.

[17] As the respondent notes, this case is somewhat similar to *Canada (Attorney General) v. Dyson*, 2016 FCA 125, 2016 CarswellNat 1390 [*Dyson*], where another panel of this Court commented as follows in respect of another decision upholding a similar FPSLREB decision overturning a release on probation:

> [8] In my view, the adjudicator's decision was reasonable in the circumstances, because the DFO failed to provide evidence or facts in support of its decision to terminate Mr. Dyson's employment. Indeed, on many occasions, the adjudicator repeats that the existence of evidence or facts is lacking (see for example the adjudicator's decision at paras. 64, 79, 80, 81, 113, and 134). On another occasion, he found that the evidence tendered by DFO was "disconcerting" (para. 139).
>
> [9] More specifically, on the allegation of performance issues, the adjudicator found that the DFO failed to demonstrate proper existence of facts. The adjudicator mentioned at paragraph 136 of his reasons:
>
>> … It is clear that Mr. Lambert relied on the information provided to him in support of this assessment; however, for this reliance to be in good faith and to meet the test of a bona fide dissatisfaction as to the grievor's suitability, the facts must exist to support that finding. Here, <u>if those facts exist, they were never provided to me</u>, despite the clear question being asked to the three people who made the determination. … [Emphasis added]

[18] I accordingly do not accept that the adjudicator unreasonably altered the applicable burden of proof.

[19] As concerns the adjudicator's comments in paragraphs 208-210 of his Reasons, while the reference to the decisions of this Court in *Heyser*, *Féthière* and *Bergey* is somewhat confusing because those cases did not deal with probationary employees, I read the adjudicator's comments in these paragraphs as merely indicating that where a release on probation is a sham, camouflage or made in bad faith, it is not a valid release on probation but, rather, a termination which the FPSLREB may remedy under section 209 of the FPSLRA. This is in accordance with the prior case law and does not mean that the adjudicator applied a cause standard akin to that applicable to the termination of an indeterminate employee.

[20] Turning to the adjudicator's reliance on the respondent's demeanor, I concur with the Attorney General that lack of belligerence during a hearing is not necessarily indicative of whether a grievor was belligerent when employed. However, the impugned statements regarding the respondent's demeanor during the hearing are not the only reasons the adjudicator offered on the point. He had found the employer's evidence to be generally less credible than the respondent's and found her supervisor's notation regarding the respondent's attitude, made well before she was hired, to be suspicious (at para. 245).

[21] The brief comments made by the adjudicator regarding the respondent's demeanor are insufficient to overturn the decision, particularly in light of the many other factors the adjudicator relied on to support his finding regarding the employer's lack of good faith. Once again, on this point, this case is similar to *Dyson*, where this Court noted as follows:

> [14] Finally, I agree with the Crown that the adjudicator did not explicitly state that Mr. Dyson's termination amounted to "disguised discipline" as enumerated under paragraph 209(1)(b) of the Act. This deficiency, however, is not fatal.

> While it would have been preferable to make explicit reference to the provision, a holistic reading of the adjudicator's reasons supplemented by a review of the record supports that this was the basis of the adjudicator's assumption of jurisdiction (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] S.C.J. No. 62 at para 14). As such, section 211 of the Act could not operate to bar the adjudicator's jurisdiction.

[22] In closing, I underscore that the decision in this case is heavily factually-suffused and is the type of case that is the daily fare of labour adjudicators. It is not the role of this Court in judicial review to second-guess their factual findings or to substitute our views for those of an adjudicator regarding findings of bad faith. This is particularly so in light of the considerable deference decisions of this nature are to be afforded, as evidenced by the privative clause in subsection 34(1) of *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365 (see, in this regard, *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, 432 D.L.R. (4th) 170 at para. 34).

[23] I would therefore dismiss this application, with costs.

"Mary J.L. Gleason"
J.A.

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

"I agree.
K.A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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