Federal Court Cour fédérale

Date: 20160601

Docket: T-1609-15

Citation: 2016 FC 614

Ottawa, Ontario, June 1, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

INTER TRIBAL HEALTH AUTHORITY

Applicant

and

WILLIAM J. SINCLAIR

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Inter Tribal Health Authority [ITHA] challenging the decision of an Adjudicator appointed under section 242 of the *Canada Labour Code*, RSC 1985, c L-2 [the Code] to accept the Respondent's withdrawal of his complaint that he had been unjustly dismissed from his employment with ITHA.

I. Background

[2] The Respondent, Mr. William Sinclair, filed a complaint under section 240 of the Code alleging that his dismissal from his employment as a Community Support Worker Development Coordinator with the Applicant, ITHA, on August 19, 2011, was without cause [the Complaint].

[3] The Complaint was referred under section 242 to Joseph B. Martin [the Adjudicator] in mid-2012. Following approximately seven days of hearings that took place over the span of a year, Counsel for the parties were invited to provide submissions and further reply. By August 2014, the Adjudicator had all material necessary to render a decision.

[4] Approximately nine months later, in May 2015, the Applicant contacted the Adjudicator to inquire when the parties might expect a decision. In response, the Adjudicator advised that his judgment had been delayed due to vacation absence, illness and competing professional obligations, but that he expected to have a decision within thirty days.

[5] Over two months later, on July 13, 2015, the Respondent, through Counsel, emailed the Adjudicator asking if the parties could expect a decision shortly, to which the Adjudicator replied "You will be advised".

[6] The following day, the Respondent withdrew the Complaint. The withdrawal letter states that pursuant to *McKeown v Royal Bank*, [2001] 3 FCR 139 [*McKeown*], the Adjudicator no longer had jurisdiction to issue any rulings on this matter. The Respondent had been patiently

awaiting a decision for over nine months, and after waiting another 30 days beyond when the Adjudicator stated his decision would be rendered, the Respondent "decided to give up waiting" and would be pursuing the case in court.

[7] The Adjudicator responded, noting that a determination on the merits was made some time ago, but that his reasons needed to be amplified given a decision of the Federal Court of Appeal rendered in January 2015, six months prior.

[8] By letter dated July 17, 2015, to both parties, the Adjudicator inquired whether the Applicant would be opposing the Respondent's withdrawal through a motion requesting that he proceed and render a decision. The letter states:

> I will await hearing from Ms. Lanine [Applicant's Counsel] on the issue of whether I have lost jurisdiction by virtue of the withdrawal and am therefore functus officio. If she will not oppose the withdrawal, that will end my involvement. If she does, I will set the matter down on motion for submissions.

[9] On August 3, 2015, the Respondent informed the Applicant that, absent settlement, the Respondent would be making a claim in the British Columbia Supreme Court.

[10] That day, the Applicant wrote to the Adjudicator to oppose the Respondent's withdrawal of the Complaint. The letter emphasized that a re-hearing of the Complaint in Court would incur significant costs and time, particularly where the Adjudicator had already made a determination on the merits.

[11] Without setting the matter down on motion for submissions, on August 24, 2015, the Adjudicator sent a letter to the parties, conveying that upon further review of the *McKeown* decision: (i) he did not have jurisdiction to hear submissions on the issue of whether the Respondent may withdraw a complaint; (ii) he is *functus officio*; and (iii) is unable to make any further ruling or other pronouncement in the matter.

II. Issues

[12] The issues are:

A. Whether an adjudicator appointed under section 242 of the Code loses jurisdiction if a complainant withdraws his or her complaint.

B. If the Adjudicator did not lose jurisdiction following withdrawal:

   i. did the Adjudicator deny the Applicant its right to procedural fairness; and

   ii. did the Adjudicator err in accepting the withdrawal of the Complaint?

III. Standard of Review

[13] Though the Applicant claims the first issue is jurisdictional, and thus is to be reviewed on a standard of correctness, I note that the Supreme Court has expressed serious reservations about the existence of true jurisdictional issues: they are narrow and will be exceptional (*ATA v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at paras 33-41 [*ATA*]).

[14] The decision under review involves the Adjudicator's interpretation of whether he has jurisdiction pursuant to his home statute and in consideration of applicable case law. The

standard of review to be applied is reasonableness: this issue does not involve a question of law of importance to the legal system as a whole that falls outside the decision-maker's specialized expertise, and the Applicant has not rebutted the presumption in *ATA*, above, at paras 39-41, by demonstrating that this situation falls within the exceptional circumstances warranting correctness review. Moreover, this conclusion is supported by the Supreme Court's decision in *MAHCP v Nor-Man Regional Health Authority Inc*, 2011 SCC 59 at paras 31, 38, 44-45, where the Court determined that the reasonableness standard is appropriate in reviewing a decision where an arbitrator applies or adapts, for example, common law concepts emanating from the courts. Though this decision is in the context of adjudication, not arbitration, the justifications for deference are the same. However, this case does not turn on the standard of review, and I find that whether reviewed on a correctness or reasonableness standard, the outcome would be the same.

[15] Issues of natural justice and procedural fairness are reviewed on a standard of correctness.

IV. Analysis

A. *Did the Adjudicator have jurisdiction to hear submissions on the issue of withdrawal, or to prevent the Respondent from withdrawing his Complaint?*

[16] The Applicant asserts the Adjudicator erred in determining he did not have jurisdiction to receive submissions in relation to the Respondent's withdrawal of the Complaint. The Applicant submits the Adjudicator was required to determine whether he had either an express grant of jurisdiction under the Code, or an implicit grant of jurisdiction under the common law doctrine

of jurisdiction by necessary implication to hear submissions in relation to withdrawal of the Complaint (*ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 38 [*ATCO*]).

[17] Further, the Applicant claims there is no evidence in the Adjudicator's reasons that he considered the ordinary meaning of the governing provisions, the context, or the intent of the Code in coming to his conclusion (*ATCO*, above, at paras 41, 48 and 49).

[18] Subsection 242(2)(b) of the Code states that an adjudicator to whom a complaint has been referred may determine the procedure, "but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint."

[19] According to the Applicant, although this provision grants the Adjudicator clear authority to master his proceedings – including the procedures to be followed in determining whether a complaint may be withdrawn – it also mandates that he permit the Applicant to make submissions prior to concluding he lacked jurisdiction.

[20] The Applicant argues that to apply the decision in *McKeown*, above, to the case at hand, as relied upon by the Respondent, is not only inconsistent with the object and remedial nature of the Code, but produces the following absurd and prejudicial results that run contrary to the

doctrine of issue estoppel and promote waste, duplication and forum shopping, without regard to delay or fairness to both parties:

i. the Applicant would be subjected to re-litigation in a civil proceeding of a matter that has been heard in full and upon which the Adjudicator has already made a decision;

ii. the Applicant will be forced to expend substantial funds to defend itself in relitigation;

iii. four and half years have passed since the Respondent's termination, and the Applicant will be prejudiced by the loss of key witnesses;

iv. the Respondent would not be prejudiced by having to complete the process under the Code, as the Code does not require him to withdraw the Complaint prior to filing a civil suit (section 246(1));

v. the Applicant was denied the right to make submissions or present evidence on the Respondent's improper motivation for withdrawal; and

vi. having the opportunity to make submissions on this matter would have allowed the Applicant to distinguish *McKeown*, as in that case, the withdrawal arose in the midst of the proceeding.

[21] Effectively, the Applicant takes the position that Parliament cannot have intended to allow the process prescribed under the Code to be circumvented by a complainant's unilateral withdrawal, particularly at a late stage where all submissions have been made and the parties are awaiting the Adjudicator's decision.

[22] The Respondent submits that given the decision in *McKeown*, above, the Adjudicator's decision to decline jurisdiction was correct and not unreasonable. Particularly considering the

further delay with no decision of the Adjudicator, notwithstanding repeated requests it be rendered. Moreover, there was no evidence that the Adjudicator had made a decision at the time the Complaint was withdrawn, and the Respondent argues unless and until the Adjudicator published his decision to the parties, there is no decision on the merits.

[23] *McKeown*, above, like the present case, concerned a complaint of unjust dismissal made by a Bank employee under Part III of the Code. Justice O'Keefe of the Federal Court determined that the foundation of the Adjudicator's ability to decide the matter was removed upon withdrawal because his jurisdiction was triggered by the complaint. At paragraph 31, Justice O'Keefe wrote:

> 31 I agree that with the withdrawal of the complaint the "foundation for the tribunal to continue was gone". Pursuant to subsections 242(1) and (2) of the Act, the task of the adjudicator is to "hear and adjudicate on the complaint". By virtue of the applicant's letter to the adjudicator, the complaint is gone. He no longer has anything to hear and adjudicate. The only authority the adjudicator had was given to him by statute. I am of the view that once the applicant withdrew her complaint, the adjudicator had no jurisdiction to proceed any further. I find that his decision to refuse to allow the applicant to withdraw her application was not only a patently unreasonable decision, but it was a decision made without jurisdiction. The decision of the adjudicator must therefore be quashed.

[24] In my view, to resolve the issue of whether the Adjudicator had jurisdiction to hear submissions on the issue of withdrawal, it is first necessary to determine whether the Adjudicator is provided authority under the Code to refuse the unilateral withdrawal of the Complaint. The Applicant's ability to make submissions opposing withdrawal would be meaningless if the Adjudicator loses jurisdiction in relation to a complaint, once it has been properly withdrawn.

[25] Division XIV of Part III of the Code provides the statutory basis for the adjudication of unjust dismissal complaints of employees not subject to collective agreements. It also defines the limits of the Adjudicator's jurisdiction in relation to a complaint.

[26] Subsection 242(1) provides that:

> The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1)
>
> [Emphasis added]

[27] This provision indicates that the Adjudicator's authority derives from his appointment by the Minister in respect of a particular complaint.

[28] Subsection 242(2) provides that an adjudicator to whom a complaint has been referred has authority and exclusive jurisdiction over evidence and procedure in the arbitration process. An adjudicator:

> (b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint.

[29] The Code is entirely silent on the issue of withdrawal of a complaint, and does not explicitly convey whether or not the Adjudicator's broad discretion to control its procedure confers on the Adjudicator the power to disallow unilateral withdrawal of the Complaint.

[30] In the absence of express direction in the legislation on withdrawal, the Court must look to the object of the Act and the intention of Parliament. In *Beothuk Data Systems Ltd, Seawatch Division v Dean*, [1997] FCJ No 1117 at paras 33-35, the Federal Court of Appeal analysed the objective of the unjust dismissal provisions under Part III, Division XIV of the Code as affording non-organized workers under federal jurisdiction an avenue for redress against unjust dismissal similar to that enjoyed by unionized workers under collective agreements. Moreover, the overall purpose of the Act is to make benefits available to the unemployed (also see *Société Radio-Canada c Coderre*, 2004 FC 639 at paras 14-16). The Applicant concedes this is the Code's objective.

[31] The Code's underlying remedial object ought to inform its interpretation, and in my view justifies the resolution of ambiguities in favour of the complainant. In the absence of direction on the issue of withdrawal, the Respondent, who initiated the Complaint, is entitled to withdraw the Complaint by providing proper notice to the Adjudicator and ensuring affected parties are notified. Once he has done so, the Adjudicator's jurisdiction to act in this matter has been exhausted, as under section 242, the Complaint's continued existence is a condition precedent for the Adjudicator's authority in relation to a complaint.

[32] While I share the Applicant's concerns over the potential for relitigation, duplicitous processes and forum shopping that could ensue by permitting a complainant to withdraw at advanced stages of an arbitration proceeding, the Court's role in this instance is to interpret the Code, and not to read into it words and meaning that simply are not there. If there is a problem in the ambiguity or void created by the language of the Code relating to the ability and timing to

withdraw a complaint, that language should be corrected by legislative amendment. Moreover, issues of estoppel, forum shopping and abuse of process raised by the Applicant are matters that appear to more properly be resolved by the British Columbia Supreme Court, if the Respondent proceeds with that litigation.

[33] While the Adjudicator should not have promised the Applicant an opportunity to make submissions, which he later determined he could not follow through with, the Adjudicator correctly and reasonably concluded he was without jurisdiction to issue further orders in relation to the Complaint. This is because the Complaint ceased to exist upon the Respondent's withdrawing it. Any order made by the Adjudicator after such withdrawal, including whether to receive submissions or not, would have been void as he lacked any jurisdiction to do so.

[34] Given my above finding, there is no need to assess arguments of procedural fairness.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. Costs to the Respondent in accordance with the middle of Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1609-15
STYLE OF CAUSE:	INTER TRIBAL HEALTH AUTHORITY v WILLIAM J. SINCLAIR
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 30, 2016
JUDGMENT AND REASONS:	MANSON J.
DATED:	JUNE 1, 2016

APPEARANCES:

Jeanie Lanine	FOR THE APPLICANT
Dominique Roelants	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cedar Law Victoria, British Columbia	FOR THE APPLICANT
Dominique Roelants Barrister and Solicitor Victoria, British Columbia	FOR THE RESPONDENT