Federal Court  Cour fédérale

Date: 20191105

Docket: T-1247-18

Citation: 2019 FC 1384

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, November 5, 2019

PRESENT: The Honourable Madam Justice Roussel

IN THE MATTER OF THE *CANADA LABOUR CODE*, RSC 1985, c L-2 AS AMENDED

AND IN THE MATTER OF AN AGREEMENT BETWEEN THE MARITIME EMPLOYERS ASSOCIATION ("MEA") AND THE SYNDICAT DES DÉBARDEURS CUPE, LOCAL 375 ("UNION") RATIFIED BY ARBITRATOR JEAN-PIERRE LUSSIER ON APRIL 5, 2016, EMPLOYER GRIEVANCE FILE 2016-0001

AND IN THE MATTER OF THE FEDERAL COURT FILING OF THE AFOREMENTIONED ARBITRAL AWARD PURSUANT TO SECTION 66 OF THE *CANADA LABOUR CODE*

BETWEEN:

THE MARITIME EMPLOYERS ASSOCIATION

Applicant

and

ANDRÉ JR RACETTE

Respondent

and

THE SYNDICAT DES DÉBARDEURS, LOCAL 375 OF THE CANADIAN UNION OF PUBLIC EMPLOYEES

Impleaded Party

ORDER AND REASONS

I. Introduction

[1] This is an appeal filed by the applicant, the Maritime Employers Association [MEA], pursuant to Rule 51 of the *Federal Courts Rules*, SORS/98-106 [Rules], against a decision dated March 18, 2019, by Madam Prothonotary Alexandra Steele. In the decision, Prothonotary Steele dismissed the MEA's motion for a show cause order pursuant to rule 467 of the Rules, requiring the respondent, André Jr Racette, to appear and answer allegations of contempt of court.

[2] For the reasons that follow, the Court finds that the motion to appeal must be dismissed.

II. Background

[3] The MEA is an employers association recognized by order of the Canada Industrial Relations Board as representing maritime stakeholders from the ports of Montréal, Trois-Rivières, Bécancour, Hamilton and Toronto. It negotiates and administers the collective agreements of its members, which include ship owners, operators and agents as well as stevedoring companies.

[4] Mr. Racette is a union representative of the impleaded party, the Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees [Union]. He represents employees engaged in the loading and unloading of vessels, and in other related work, in the territory of the Port of Montréal.

[5] On February 5, 2016, the MEA filed an employer's grievance against Mr. Racette in relation to certain comments he made about one of the MEA's employees. The parties agreed to settle the employer's grievance and, under an agreement signed by all of the parties on March 29, 2019, Mr. Racette undertook to send the MEA a letter, the terms of which are reproduced in Appendix 1 to the agreement. That letter reads as follows:

> [TRANSLATION]
>
> I, André Jr Racette, union representative of the CUPE, acknowledge that the comments I made about [Mr. X] on January 22 and 28, 2016, were wrong and inappropriate.
>
> I recognize that such comments have no place in an employer/union relationship, especially in an arbitration.
>
> I hereby pledge to managers and employees of [the MEA], and more specifically to [Mr. X], to no longer engage in such personal attacks. I agree that a grievance arbitrator order me to comply with this commitment not to engage in personal attacks against any manager or employee of [the MEA].

[6] The agreement further provides that the parties agree to ask the arbitrator to acknowledge the agreement between the parties, which comes into effect from the date of signature, and to order Mr. Racette to comply with the undertakings contained in the letter.

[7] On April 5, 2016, the arbitrator issued his arbitral award in which the agreement and Mr. Racette's letter are reproduced. The arbitrator concluded as follows in the arbitral award:

> [TRANSLATION]
> [9] ***THE ARBITRATOR ACKNOWLEDGES*** the agreement between the parties—which constitutes the settlement of employer grievance number 2016-0001 that was before him—and ***ORDERS*** Mr. Racette "*to comply with the undertakings he made in the letter, the content of which is reproduced in Appendix 1*".
>
> [Bold font and italics in original.]

[8] Two years later, that is to say, on June 26, 2018, the MEA sent Mr. Racette a demand letter in which he was accused of making derogatory, abusive, intimidating and harassing comments about the MEA and its representatives on June 13 and 18, 2018. The MEA requested that he provide a sworn statement confirming that he would cease any form of intimidation of MEA employees, that he would not raise his voice when speaking to them and that he would fully comply with his previous undertakings.

[9] On June 27, 2018, a certificate of filing of the arbitral award was issued by this Court pursuant to section 66 of the *Canada Labour Code*, RSC 1985, c L-2, which allows the MEA to avail itself of the enforcement measures set out in Part 12 of the Rules, once the certificate has been issued. This part includes provisions that cover contempt of court.

[10] In a response dated July 3, 2018, Mr. Racette indicated that some context was needed with respect to the incidents of June 13 and 18, 2018, and reiterated the undertakings he had previously agreed to comply with.

[11] On October 12, 2018, the MEA filed a motion for a show cause order for contempt pursuant to rule 467 of the Rules, in order to require Mr. Racette to appear and respond to allegations made against him. In that motion, the MEA accused Mr. Racette of having deliberately contravened the arbitral award [TRANSLATION] “as a result of his aggressive, offensive and inappropriate behaviour when he personally attacked [Mr. X], industrial relations counsellor with [the MEA]”.

[12] On March 18, 2019, Prothonotary Steele dismissed the MEA's motion. She concluded that the MEA had not discharged its burden of showing *prima facie* evidence that it was entitled to the contempt of court order.

[13] After reviewing the two stages and three constituent elements of contempt of civil court, Prothonotary Steele concluded that the MEA had established the first element, namely the existence of a compliance order at the time of the alleged facts on June 13 and 18, 2018. Relying on judgments issued in *Professional Institute of Public Service of Canada v Bremsak*, 2012 FCA 147, and *Canada (Human Rights Commission) v Warman*, 2011 FCA 297, she dismissed Mr. Racette's argument that the arbitral award could not apply to him prior to its filing in Federal Court. She determined that the arbitral award was binding from the moment it was issued on April 5, 2016.

[14] Prothonotary Steele concluded that the second constituent element was not met. She found that the case, as presented by the MEA, did not support a *prima facie* conclusion that Mr. Racette had real or constructive knowledge of the arbitral award. She therefore dismissed the MEA's argument that Mr. Racette would have known about the arbitral award based on the fact that he had consented in the agreement to the arbitrator ordering him to comply with his contractual undertakings. Despite this finding, which was fatal in her view, Prothonotary Steele nonetheless proceeded with an analysis of the third element of contempt, namely a deliberate violation of the order, from a hypothetical perspective wherein her finding with regard to the second element was flawed.

[15] After having noted the parties' arguments, Prothonotary Steele found that the MEA's evidence was sufficient to establish that interactions between Mr. Racette and the MEA's representatives took place on June 13 and 18, 2018, and that the comments reported by the MEA had been made by Mr. Racette. However, in her view, she was not satisfied that the MEA had proven that a deliberate *prima facie* violation of the order had occurred, for two reasons.

[16] First, she was of the view that the arbitral award was not clear and unequivocal, noting that the parties did not agree on the scope of the expression [TRANSLATION] "personal attacks". Mr. Racette argued that the expression was ambiguous and open to interpretation, and that, at any rate, that interpretation should be limited to a prohibition on insulting the MEA and its representatives, as had been the case earlier, for example, when Mr. Racette used the term [TRANSLATION] "poodle" in reference to an individual. For its part, the MEA submits that the arbitral award, which obviously cannot foresee every potential prohibited word or comment, is sufficiently precise for one to understand what is prohibited. Prothonotary Steele pointed out that if an order can, depending on the context, be interpreted narrowly, as Mr. Racette suggests it should be, or more broadly, as the MEA suggests, then it is ambiguous. Accordingly, in the absence of a clear and unambiguous order, there can be no deliberate violation of an order. She added that where there is ambiguity, the Court tends to prefer an interpretation that is more favorable to the accused and that in this case, the more favorable interpretation is that which is the most restrictive, namely the one proposed by Mr. Racette.

[17] She finished her analysis by stating the following:

> [TRANSLATION]
>
> In the circumstances of this case, even though the comments attributed to [M]ister Racette may be deemed to be highly inappropriate, particularly in the context of employer and employee relations, they are not, on their face, personal attacks in that they do not directly attack the person and/or the reputation of the MEA or of [Mr. X]. Even the coarsest of the expressions reported in this case ([TRANSLATION] "You can go and fuck off, go fuck yourself") does not strike me as being a personal attack, but is rather more of an expression drawn from Québécois slang used, among other things, to tell someone where to go. In the absence of comments that constitute "personal attacks", there cannot be a deliberate violation of the arbitral award.

[18] As was the case with the second constituent element of contempt of civil court, she concluded that the lack of *prima facie* evidence of a deliberate violation of the arbitral award was fatal to the MEA's motion.

[19] The MEA is now requesting that this Court set aside the decision rendered by Prothonotary Steele and to issue a show cause order for contempt pursuant to rule 467 of the Rules, requiring Mr. Racette to appear before a judge at specified date, time and place, to be prepared to hear proof of the act alleged against him, and to be prepared to mount a defence.

[20] The MEA argues that Prothonotary Steele erred in finding that there was no *prima facie* evidence of knowledge and violation of the order.

[21] First, the MEA submits that the arbitral award dated April 5, 2016, had been sent to the union's counsel. In the MEA's view, Mr. Racette showed wilful blindness when he stated he did

not receive or read the arbitral award when in fact, in the agreement he signed on March 29, 2016, it is indicated that the parties agree to ask the arbitrator to acknowledge the agreement and order him to comply with the undertakings set out in the letter that was signed that same day. In that letter, he undertakes [TRANSLATION] "to no longer engage in such personal attacks" against MEA employees or managers. The MEA maintains that Mr. Racette could not have been unaware of the contents of the order included in the arbitral award without having shown wilful blindness.

[22] Second, the MEA submits that Prothonotary Steele's reasoning is flawed with respect to the words used by Mr. Racette. In the MEA's view, it is inconceivable that a reasonable person who was singled out by someone who was yelling the words used by Mr. Racette would not feel personally targeted. In this regard, the MEA criticizes Prothonotary Steele in particular for having applied the beyond a reasonable doubt burden of proof, on which a contempt of court finding is based, rather than that of a *prima facie* case that contempt has been committed as set out in subsection 467(3) of the Rules. The MEA further complains that she failed to address all of Mr. Racette's personal attacks.

III. Standard of review

[23] The applicable standard of review for appeals of discretionary prothonotary orders is the one set out by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]: (1) the standard of correctness applicable to questions of law and to questions of mixed fact and law, where an extricable legal principle is at stake; and (2) the "palpable and overriding error" standard applicable to findings of fact and to questions of mixed fact and law (*Housen* at

paras. 19–37; *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras. 28, 79; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para. 74).

IV. Analysis

[24] It is well established that power in matters of contempt is discretionary. Its purpose is to ensure the smooth functioning of the judicial process and to uphold the Court's dignity (*Carey v Laiken*, 2015 SCC 17 at paras. 30, 36 [*Carey*]; *Canada (National Revenue) v Chi*, 2018 FC 897 at para 12; *Joly v Gadwa*, 2018 FC 746 at para 31).

[25] In *Carey*, the Supreme Court of Canada reiterated that there are two forms of contempt of court: criminal contempt and civil contempt. Civil contempt has three elements which must be established beyond a reasonable doubt. The first element is that the order alleged to have been breached must state clearly and unequivocally what should and should not be done. The second element is that the party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge of the order on the basis of the wilful blindness doctrine. Finally, for the third element, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (*Carey* at paras 32–35).

[26] Before a party can be found to be in contempt of court, a show cause order pursuant to rule 467 of the Rules must be issued by the Court against the party that is allegedly in contempt.

According to subsection 467(3) of the Rules, the Court must be satisfied that there is *prima facie* proof of the alleged contempt.

[27] After reviewing the matter, the Court is of the view that Prothonotary Steele committed no error that would warrant the intervention of this Court. First, she set out the proper legal principles that are applicable to contempt of court. Moreover, even if it were possible to conclude that Prothonotary Steele committed an error in interpreting the facts in this matter, the Court is of the view that it would not be an "overriding" error, given that the Court concurs with her conclusion that the arbitral award was not clear and unequivocal.

[28] In *Carey*, the Supreme Court of Canada pointed out that the purpose of the requirement of clarity is to ensure that a party will not be found in contempt where an order is unclear. An order may be deemed to be unclear if, *inter alia*, it incorporates overly broad language (*Carey* at para 33).

[29] That is the case here. First, the arbitral award ordered Mr. Racette [TRANSLATION] "to comply with the undertakings he made in the letter, the content of which is reproduced in Appendix 1". One must therefore refer to the content of the letter, even if it is reproduced elsewhere in the arbitral award. Furthermore, the expression [TRANSLATION] "personal attacks" found in the letter signed by Mr. Racette can be used to describe various types of behaviour. Were the attacks comments that directly attacked the person, their characteristics, their personal qualities or their reputation? Was the expression accompanied by body gestures or a raised

voice? Must it include an added element of threat? Did the expression include coarse or offensive language that was not aimed at a specific person?

[30] Considering that the expression [TRANSLATION] “personal attacks” lacks clarity and that the parties themselves were unable to agree on their scope, the Court finds that it was open to Prothonotary Steele to conclude, even in applying the *prima facie* burden of proof, that there was an absence of a clear and ambiguous order that would warrant a show cause order in this case.

[31] Given that this finding is fatal to the MEA’s motion, the Court does not intend to dispose of the arguments raised by the MEA.

V. Conclusion

[32] In summary, the Court finds that the MEA has not persuaded it that Prothonotary Steele committed an error of law or a palpable and overriding error that would warrant the intervention of the Court. The motion to appeal the decision of Prothonotary Steele, dated March 18, 2019, is therefore dismissed.

ORDER in Docket T-1247-18

THIS COURT ORDERS that:

1. The motion to appeal the decision of Prothonotary Steele, dated March 18, 2019, is dismissed;

2. Costs in the amount of $2,000 are awarded in favour of the respondent, André Jr Racette.

"Sylvie E. Roussel"
Judge

Certified true translation
This 27th day of November 2019

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1247-18
STYLE OF CAUSE:	THE MARITIME EMPLOYERS ASSOCIATION v ANDRÉ JR RACETTE ET AL
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