Date: 20080219

Docket: T-294-07

Citation: 2008 FC 212

Ottawa, Ontario, February 19, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant(s)

and

DANIEL O'LEARY

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by the Attorney General of Canada from an Adjudicator's decision made under section 92 of the *Public Service Staff Relations Act*, R.S.C. 1985 c. P-35 (PSSRA). That adjudication concerned a grievance brought by the Respondent, Daniel O'Leary, from a decision by his employer, the Department of Indian Affairs and Northern Development (Department) to demote Mr. O'Leary. The Adjudicator ruled in favour of Mr. O'Leary, ordering him reinstated to his former position. That reinstatement order was subject to the additional requirement that Mr. O'Leary be compensated for all lost earnings and benefits with such compensation to be continued until the Department made a new offer of employment at an equivalent level in a location other than an isolated post.

[2] The Applicant does not challenge the Adjudicator's decision that Mr. O'Leary's demotion was not justified or that he be reinstated to his former position in Iqaluit. Rather the Applicant challenges the Adjudicator's authority to impose an indefinite order of compensation upon the Department which could be satisfied, in lieu, by an offer of a new appointment in a different location. The Applicant says that this order has the unlawful effect of ordering the appointment of Mr. O'Leary to a new position.

I. Background

[3] On August 11, 2003, Mr. O'Leary commenced his employment with the Department as a Human Resources Advisor in Iqaluit. In part because of medical issues associated with his pre-existing visual impairment, Mr. O'Leary experienced difficulties in meeting the expectations of the Department. On June 1, 2004, he applied for leave without pay so that he could return to the south to deal with his deteriorating medical situation. This request was denied for supposedly "operational" reasons.

[4] On June 10, 2004, Mr. O'Leary was demoted, ostensibly on performance grounds. Mr. O'Leary submitted a grievance from this decision on June 28, 2004. Thereafter his medical situation continued to worsen and, in December 2004, Health Canada confirmed that he was medically unfit for work in Iqaluit or any other isolated post. By this time Mr. O'Leary had returned south for medical treatment. Although he was medically fit for southern employment, nothing was offered to him by the Department. Mr. O'Leary did find some part-time warehouse and security

work but, for the most part, he was unemployed from June 2004 to the time of the adjudication of his grievance in March 2006.

[5] The Adjudicator found that the demotion decision was unwarranted and he was sharply critical of the way in which the Department had treated Mr. O'Leary. The Adjudicator's concluding reasons for allowing the grievance were as follows:

> [316] As I indicated at the beginning of the reasons for my decision, there is a sequence of events necessary in order for the employer to establish that the performance of an individual is unsatisfactory to the point of warranting a demotion. It is my view that the employer has failed to demonstrate that its assessment of Mr. O'Leary was reasonable. While the employer, through its evidence, has established grounds to show that the grievor had serious difficulties in meeting the level of performance that Ms. Hodder expected of him, this level of performance was somewhat excessive given the experience of the grievor. The employer can only blame itself for having hired the grievor. I am also of the view that the employer failed to provide sufficient training to assist the grievor in overcoming his difficulties. The training and assistance provided were deficient in more than one way. The action plan did not propose any real means to remedy the problems, additional training was refused until files and backlog were cleaned up, and, other than two days with Mr. Millican, no on-the-job training was offered. Furthermore, the employer failed to show, in any explicit way, that the grievor continued to have the same problems. The documentary evidence of problems submitted by the employer in support of its decision to demote related to problems that occurred very early on in the grievor's tenure. At one point counsel for the employer argued that Mrs Hodder should not have been expected to bring the 50 files the grievor worked on. That may be correct in a general sense but it is nonetheless incumbent on the employer to bring forward the files that support their case. If anything, the fact that the employer allowed the grievor to work on so many files demonstrates that he was doing something right.
>
> [317] Consequently, I find that the demotion was unreasonable in the circumstances and that Mr. O'Leary should be reinstated in his position at the PE-02 group and level.

> [318] Mr. O'Leary became so ill that he left Iqaluit on sick leave prior to his demotion taking effect. The following December he was found unfit to work in an isolated post. The employer has not offered any position to the grievor other than an AS-01 position in Iqaluit. As a result, other than two weeks of employment as a security guard, the grievor has remained unemployed ever since his grievance was lodged. It appears that the responsibility within the DIAND to find alternate employment resides with the Iqaluit region of the DIAND, which has little else to offer than positions in isolated posts. I find this appalling; the obligation to accommodate an employee who is incapacitated because of a medical condition is employer-wide and not limited to a region of a department.
>
> [319] In these circumstances, I believe it necessary, in order to make Mr. O'Leary whole, that the employer pay for his lost earnings as a PE-02, up until such time as he is reappointed to a PE-02 position in the Public Service.
>
> [320] For all of the above reasons, I make the following order:
>
> Order
>
> [321] That the grievor be reinstated in the PE-02 position he occupied prior to his demotion.
>
> [322] That he be compensated for all lost earnings and benefits since he left Iqaluit on sick leave minus what was earned during the same period and that such compensation be continued until such time as the employer provides him with an offer of employment at his substantive group and level of PE-02, in a location other than an isolated post.

II. Issue

[6] Did the Adjudicator err in law or exceed his jurisdiction by ordering the Department to compensate Mr. O'Leary until such time as he was given an offer of employment at a PE-02 level in a location other than an isolated post?

III. Analysis

[7] For the sake of argument, I am prepared to accept the Applicant's submission that the standard of review pertaining to the scope of the remedial jurisdiction of the Adjudicator is correctness. However, in assessing whether the Adjudicator's order was rationally connected to the Department's breach, the standard of review is at least that of reasonableness simpliciter: see *Via Rail Canada Inc. v. Cairns et al.* 2004 FCA 194, 241 D.L.R. (4th) 700. In light of my findings below, it is, however, unnecessary to carry out a functional and pragmatic analysis because I can identify no reviewable error in the Adjudicator's decision.

[8] The broad parameters of an adjudicator's remedial jurisdiction under section 92 of the PSSRA are well defined in the jurisprudence. What is in issue here is the extent to which the Adjudicator could fashion a remedy which, according to the Applicant, amounted to an effective order of appointment. The Applicant says that this order accomplished indirectly what the Adjudicator could not do directly, that is, to make an appointment contrary to the stipulation in section 29 of the *Public Service Employment Act*, S.C. 2003 c. 22, that public service appointments be made exclusively by the Public Service Commission.

[9] The remedial jurisdiction of an adjudicator is very broadly defined by subsection 97(4) of the PSSRA which states:[1]

97. (4) Where a decision on any grievance referred to adjudication requires any action	97. (4) L'employeur prend toute mesure que lui impose une décision rendue à l'arbitrage sur

[1] The above authority is somewhat constrained by subsection 96(2) which prohibits an adjudicator from rendering a decision which would require the amendment of a collective agreement or of an arbitral award.

> by or on the part of the employer, the employer shall take that action.
>
> un grief.

[10] By virtue of section 96(1) of the PSSRA, an adjudicator is also granted all of the powers of the Board. Under section 21 of the PSSRA, the Board is required to exercise such powers as are expressly conferred or incidental to the attainment of the objects of the legislation, including the making of orders requiring compliance with that Act.

[11] This generous grant of remedial authority is a clear reflection of Parliament's intention to permit adjudicators to construct effective and case specific remedies. This point was made by Justice Brian Dickson (as he then was) in *Heustis v. New Brunswick (Electric Power Commission),* [1979] 2 S.C.R. 768, 98 D.L.R. (3d) 622 in the following passage:

> There is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final, and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained.
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> Take the present case. The appellant misconducted himself. The external tribunal to which the matter was referred considered that he should be disciplined, but only to the extent of a suspension. If the exercise of adjudicative authority does not permit remedial action by making the punishment fit the offence, then the decision of the adjudicator becomes largely a hollow pronouncement, signifying nothing. Either the grievance is allowed, in which case the appellant goes unpunished, a result which would seem wrong in the circumstances; or the appellant is discharged from employment, a result which, in the opinion of the adjudicator, for the mitigating reasons given by him, would result in injustice to the employee. In either case, the purpose of the adjudicative process in the

administration of the collective agreement would be defeated. Relations between employer and union would become further exacerbated. If the process is to make any sense, a right to modify the severity of the discipline by imposing a lesser penalty must surely inhere in the exercise of adjudicative authority: see Re *Polymer Corporation and Oil, Chemical, and Atomic Workers International Union, Local 16-14* [(1959), 10 L.A.C. 51; (1961), 26 D.L.R. (2d) 609 (Ont. H.C.); (1961), 28 D.L.R. (2d) 81 (Ont. C.A.); [1962] S.C.R. 338 (Sub nom *Imbleau v. Laskin*).

In a similar vein, in the recent case of *Newfoundland Association of Public Employees v. Attorney General for Newfoundland* [[1978] 1 S.C.R. 524], Chief Justice Laskin, with whom Ritchie J. concurred, had occasion to discuss the remedial powers of arbitrators. Two passages would appear particularly apposite in this case, at pp. 529 and 530:

> Counsel for the respondent at first took the position that a board of arbitration, and the particular board here, could not interfere with the penalty of discharge once cause for some discipline existed, but he receded from it on realizing that this could work to the serious disadvantage of an employer if a board was required to say either yes or no to discharge and, if it said no, the discharged employees would have to be reinstated with consequent entitlement to lost pay (perhaps for a long period) and any fault on their part would have gone unpunished. Equally, he conceded that it could not be that an employer, having some basis for disciplining an employee for a minor infraction, say, lateness in reporting work on one or two occasions, could impose discharge and defend the penalty against interference by an arbitration board empowered to adjudicate on whether the dismissal was for just cause.
>
> Cause and penalty are intertwined especially in discharge cases. I hold the view that arbitration boards, as domestic tribunals of the parties, should be given latitude, no less than that given by Court decisions to statutory government tribunals, to exercise their powers so as best to effectuate their raison d'être. For a Court to say that a penalty substituted by a board is beyond its powers is no

> different from interfering with a finding that either upholds or sets aside an assigned penalty without more.
>
> As I have sought to demonstrate, the collective agreement in this case and, more importantly, the applicable statutory provisions respecting adjudication, can be readily distinguished from those operating in the Port Arthur Shipbuilding case. There being nothing in either the agreement, or the Act, which expressly precludes the adjudicator's exercise of remedial authority, I am of the opinion that an adjudicator under the Public Service Labour Relations Act of New Brunswick has the power to substitute some lesser penalty for discharge where he had found just and sufficient cause for some disciplinary action, but not for discharge.
>
> [Emphasis added]

[12] The recognition that labour boards and adjudicators should not be unduly fettered in the crafting of appropriate remedies was similarly expressed by the Supreme Court of Canada in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, 133 D.L.R. (4th) 129:

> 58 In my view remedies are a matter which fall directly within the specialized competence of labour boards. It is this aspect perhaps more than any other function which requires the board to call upon its expert knowledge and wide experience to fashion an appropriate remedy. No other body will have the requisite skill and experience in labour relations to construct a fair and workable solution which will enable the parties to arrive at a final resolution of their dispute. Imposing remedies comprises a significant portion of the Board's duties. Section 99(2) of the Canada Labour Code recognizes the importance of this role and accordingly, gives the Board wide latitude and discretion to fashion "equitable" remedies which it feels will best address the problem and resolve the dispute. By providing that the Board may fashion equitable remedies Parliament has given a clear indication that the Board has been entrusted with wide remedial powers. Furthermore, a broad privative clause in s. 22(1) provides that, not only are the Board's decisions final, but so too are its orders. This provision lends support to the position that the court should defer to the remedial orders of the Board which are made within its jurisdiction. That is to say there should be no judicial

> interference with remedial orders of the Board unless they are patently unreasonable.

[13] I accept the Applicant's submission that the Adjudicator did not have the jurisdiction to make a new appointment to Mr. O'Leary. That is the clear holding in *Marinos v. Canada (Treasury Board)*, (1998) 157 F.T.R. 70, 85 A.C.W.S. (3d) 582 and it is a jurisdictional limitation that the Adjudicator appears to have identified. On the other hand, the Federal Court of Appeal has held, in at least one other case, that a PSSRA adjudicator can, in deciding a grievance, give directions to the employer under subsection 97(4) of the PSSRA. In *Canada (Attorney General) v. Tourigny*, (1989) 97 F.T.R. 147, 15 A.C.W.S (3d) 335 (F.C.A.), the Court upheld an adjudicator's order that reinstated an employee to his former position but with a caveat that the order could be fulfilled by a new and different appointment. This decision was subsequently applied by the Canadian Public Service Staff Relations Board in *Fontaine-Ellis and Treasury Board (Health Canada)*, [1998] C.P.S.S.R.B. No. 3, where the employer was given a similar option of either reinstatement or a new appointment.

[14] The only aspect of the award to Mr. O'Leary that differs from the awards made in the above-noted authorities is the requirement that the Department continue to pay Mr. O'Leary notwithstanding his inability to return to his former position. This, though, is a purely financial obligation which indisputably fell within the Adjudicator's jurisdiction. In the absence of a statutory limitation I do not accept that this combination of a financial award tied to an optional direction to the Department to find Mr. O'Leary a new position exceeded the Adjudicator's jurisdiction.

[15] The Adjudicator was, after all, faced with somewhat of a dilemma. The usual remedy of reinstatement was of no real value in this case because Mr. O'Leary could not work in an isolated post. The only place where Mr. O'Leary could work was in the south but the Adjudicator had no jurisdiction to order the Department to appoint him to a new position. The Adjudicator did, however, have the authority to provide a deployment or appointment option to the Department and he exercised that authority coupled with an obligation to provide ongoing salary and benefits.

[16] The Applicant complains that the Adjudicator's order was onerous and certainly it was. The Adjudicator used the ongoing financial obligation as a means of motivating the Department to find Mr. O'Leary a new position. In the absence of such leverage, it was apparent to the Adjudicator that the Department was likely to continue to do nothing and Mr. O'Leary would remain unemployed. The Adjudicator was appropriately troubled by the Department's poor treatment of Mr. O'Leary and by the fact that the Department's misconduct contributed to the medical problems which precluded his reinstatement in Iqaluit. In such circumstances, an order limited to the payment of past salary and benefits would not achieve the desired result of ensuring Mr. O'Leary's return to gainful public service employment.

[17] While the Adjudicator's order was burdensome, it was still a measured response to what he had found to be the "appalling" conduct of the Department. The Department was not ordered to appoint Mr. O'Leary to a new position albeit that the Adjudicator's order provided a strong incentive to do so. The Adjudicator fashioned a creative remedy that was appropriate and well suited to the

unique circumstances of Mr. O'Leary's situation - an order that was, after all, only as financially exacting as the Department chose to make it.

[18] I find that the Adjudicator did not exceed his jurisdiction by making the order that he did. Both aspects of his order were, as framed, jurisdictionally permissible and, in these circumstances, the order was reasonable and fair. This was a remedy that was rationally connected to the desired outcome of returning Mr. O'Leary to employment in the face of an intransigent employer. The only other available option would represent the kind of "hollow pronouncement" that was of concern of the Court in *Heustis*, above.

[19] The Applicant also complains about the Adjudicator's reference to the Department's obligation to accommodate Mr. O'Leary. It argues that the Adjudicator strayed beyond his jurisdiction into the realm of human rights law and, in so doing, failed to carry out the necessary legal analysis.

[20] It seems to me, however, that the Adjudicator's reference to accommodation was a simple observation of the obvious and it formed no part of the order that he made. The Adjudicator was only saying that, despite the common medical understanding that Mr. O'Leary could not work in an isolated setting, the Department had done nothing to find him a position in the south at a level even commensurate with his demotion. The Adjudicator quite properly found the Department's explanation for not looking for a southern posting to be unacceptable and it was precisely for that

reason that he fashioned a labour remedy that would motivate the Department to meet its legal obligation to Mr. O'Leary.

[21] The Applicant also contends that the Adjudicator erred by ordering that the Department find Mr. O'Leary new public service employment either within or outside of the Department. I do not need to determine whether or not such direction is permissible because I do not agree that the Adjudicator's order went that far. When read in its complete context, the order does not oblige the Department to seek out a position for Mr. O'Leary anywhere in the public service. Rather the order directs the Department to conduct an internal search but not limited to the administrative confines of its Iqaluit office.

[22] In the result, this application for judicial review is dismissed with costs payable to the Respondent under Column III.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed with costs payable to the Respondent under Column III.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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