

Federal Court



Cour fédérale

Date: 20090916

Docket: T-1350-08

Citation: 2009 FC 913

Ottawa, Ontario, September 16, 2009

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

THU-CUC LAM

Applicant

and

**ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant began her employment with the federal public service on April 15, 1998. She was dismissed on July 12, 2006. In her final decision, the adjudicator determined that the dismissal was unjustified and that the applicant should be compensated; however, the adjudicator refused to order that the applicant be reinstated, which is the basis of this application for judicial review.

[2] For the following reasons, the application is allowed in part.

[3] An adjudicator clearly has the power under section 228 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (the new PSLRA) to render “the order that he or she considers appropriate”, taking into consideration the particular circumstances of the case. This is a very broad remedial power, and it would be contrary to the object and spirit of the new PSLRA to limit the adjudicator’s discretion by requiring that he or she order the reinstatement of a public servant every time a dismissal is unjustified.

[4] In this case, I do not believe that the decision in *Gannon v. Canada (Treasury Board)*, 2004 FCA 417, has the legal significance that the applicant wants to give to it, especially since the Federal Court of Appeal in that case did not have to consider the specific interpretation and effect of section 228 of the new PSLRA. Be that as it may, if an adjudicator can legally refuse to order reinstatement, he or she must have given each party to the grievance the opportunity to be heard on this issue. In this case, the parties found out by reading the impugned decision that reinstating the applicant was not “a reasonable or viable option in the circumstances”, but this crucial issue was not raised or argued at the hearing. This is a very significant breach of natural justice.

[5] Although there is no automatic right to reinstatement, as Mr. Justice Létourneau of the Federal Court of Appeal has noted, “[T]he presumption is, in my view, clearly in favour of reinstatement unless there is clear evidence to the contrary” (*Atomic Energy of Canada Ltd. v. Sheikholeslami*, [1998] 3 F.C. 349 at paragraph 31 (C.A)). The authorities and jurisprudence cited by the parties confirm that reinstatement seems to be the rule and non-reinstatement the exception, which the adjudicator in the impugned decision seems to recognize. Based on the evidence in the

record, it is clear in this case that the applicant was deprived of the opportunity to present evidence and arguments before a final decision was rendered on the issue of the applicant's potential non-return to the same workplace. It follows that those parts of the adjudicator's decision and order to the effect that reinstating the applicant is not a "reasonable or viable option in the circumstances" are flawed at the outset. Accordingly, it is unnecessary to ask whether the adjudicator's finding is reasonable in this case.

[6] A new hearing will therefore be required but only on the issue of an appropriate remedy in the circumstances. I agree with the respondent that, in the circumstances, the matter should be remitted to the same adjudicator with appropriate directions, if necessary. There is no suggestion here of bias. Nor is there any suggestion of a reasonable apprehension of bias in this case, and I see no reason why the matter may not be redetermined by her (*Gale v. Canada (Treasury Board)*, 2004 FCA 13, at paragraphs 16 to 19).

[7] In accordance with the directions in the order that follows, the adjudicator must hold a new hearing as soon as possible on the issue of an appropriate remedy in the circumstances. In particular, the adjudicator must give the parties the opportunity to present evidence and arguments on both the advisability of reinstating the applicant and the remedial actions that would be indicated to adequately compensate the applicant for the loss of her employment. The adjudicator will be free to establish her own procedure in all other respects.

[8] In addition, the applicant is entitled to costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed in part;
2. Those parts of the adjudicator's decision and order to the effect that reinstating the applicant is not a reasonable or viable option in the circumstances are set aside;
3. The adjudicator will schedule a hearing as soon as possible to hear the parties on the issue of the appropriate remedy in the circumstances. In particular, the adjudicator shall give the parties the opportunity to present evidence and arguments on both the advisability of reinstating the applicant and the remedial actions that would be indicated to adequately compensate the applicant for the loss of her employment. The adjudicator is free to establish her own procedure in all other respects.
4. The applicant is entitled to costs against the respondent.

"Luc Martineau"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1350-08

STYLE OF CAUSE: **THU-CUC LAM and
ATTORNEY GENERAL OF CANADA**

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 14, 2009

**REASONS FOR ORDER
AND ORDER BY:**

DATED: September 16, 2009

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