Federal Court  Cour fédérale

Date: 20110516

Docket: T-1727-10

Citation: 2011 FC 555

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 16, 2011

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

JOCELYN LORD

Applicant

and

CONSEIL DES ATIKAMEKW D'OPITCIWAN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated September 23, 2010, by Nicol Tremblay, Adjudicator (panel), under the *Canada Labour Code*, R.S.C., 1985, c. L-2 (CLC). The panel found that it did not have jurisdiction to hear the complaint filed by the applicant.

[2] For the reasons set out below, the application for judicial review will be dismissed.

Factual background

[3] The applicant was hired by the Conseil des Atikamekw d'Opitciwan (respondent) as an English teacher at the École secondaire Mikisiw in Opitciwan by means of written contracts.

[4] The terms of the contracts were as follows:

a. From August 18, 2003, to August 14, 2004;

b. From August 16, 2004, to August 12, 2005;

c. From August 15, 2005, to August 13, 2006;

d. From August 14, 2006, to August 10, 2007.

[5] In 2007, the respondent presented to the applicant a new draft contract for the 2007-2008 school year, but the applicant refused to sign it. Nevertheless, the applicant did work for the respondent starting on August 13, 2007.

[6] In December 2007, the applicant suffered a cardiovascular accident which made him unable to resume work in January 2008.

[7] The respondent stopped the applicant's pay as of January 10, 2008. On June 17, 2008, it sent the applicant a notice of termination of employment effective August 8, 2008.

[8] On July 8, 2008, the applicant filed a complaint of unjust dismissal in accordance with subsection 240(1) of the CLC.

[9] The complaint was heard in Roberval, province of Quebec, on February 26, 2009.

[10] On September 23, 2010, the panel rendered its decision, allowed the respondent's preliminary objection and dismissed the applicant's complaint, stating that it did not have jurisdiction to hear his complaint. It is this decision that is the subject of this judicial review.

Impugned decision

[11] In its preliminary objection, the respondent raised the following three arguments:

a. The adjudicator does not have jurisdiction to hear this complaint because the applicant cannot claim to have completed twelve consecutive months of continuous employment with the respondent, as required by paragraph 240(1)(*a*) of the CLC.
b. This is not a case of unjust dismissal of which the applicant was a victim, but simply a non-renewal of a term contract of employment that had expired.
c. In the alternative, if the adjudicator were to come to the conclusion that this is an indeterminate contract of employment, this is not a dismissal because the contract contains a clause accepted by both parties on the manner of terminating the contract.

[12] With regard to the first argument, the panel found that the contracts for the periods between 2003 and 2007 did not constitute continuous employment within the meaning of paragraph 240(1)(*a*) of the CLC because periods without employment had been provided for between each contract. The panel noted that, according to the evidence, the applicant had always accepted this situation, including the automatic non-renewal of each contract he signed.

[13] The second argument raised the issue of whether they were bound by a term or indeterminate contract of employment. The applicant claimed that since he had never signed the contract for 2007-2008, he was bound to the respondent by an indeterminate contract. In analyzing the applicant's testimony, the panel found that his reluctance and refusal to sign the draft contract were motivated by considerations other than the term of the contract or its automatic non-renewal. The panel therefore found that the absence of a written contract in 2007-2008 did not in any way take away from the fact that the verbal contract accepted by both parties was by nature a term contract.

[14] Finally, by applying the relevant caselaw to the facts of the case, the panel found that the applicant did not establish a period of at least twelve months of continuous employment.

Analysis

[15] The respondent submitted that the standard of reasonableness should apply here (*Dunsmuir v. New Brunswick*, [2008], 1 S.C.R. 190), since this is an issue that concerns the assessment of the evidence (*Canadian Imperial Bank of Commerce v. Muthiah*, 2011 FC 77).

[16] The applicant did not make written submissions on this issue, but stated that he was in agreement with this standard at the hearing.

[17] The decision must therefore be analyzed with regard to the existence of justification, transparency and intelligibility within the decision-making process, as well as to whether the

decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, *supra*, para. 47).

[18] The primary issue here is whether the panel made an unreasonable error in stating that it did not have jurisdiction to hear the applicant's complaint.

[19] The applicant is arguing that the panel erred in finding that the annual contracts signed by the parties did not constitute continuous employment within the meaning of paragraph 240(1)(*a*) of the CLC (*Lemieux v. Canada*, (1998) 4 FC 65 (FCA), applicant's memorandum, page 138).

[20] He adds that continuous employment may exist when term contracts succeed each other in such a way that, between the end of one contract and the start of another, it is impossible to note a sufficient period of time for a third person to occupy the position in question (*Vigneault v. Conseil de la Nation Innu de Mastimékiosh et Lac John* (December 12, 2000), Québec, 210-15-G/00, AZ-01141080 (arbitral award); see also *Ménard et Collège de Maisonneuve* DTE 99T-415 (February 16, 1999)).

[21] He also argues that the panel could not base its decision on the simple fact of being in the presence of successive term contracts. It also had to take into account the fact that, at the time the contracts expired, the parties were already bound by a new contract, which shows continuity. The applicant did not find it relevant that he had not been on the work premises during the summer (*Ferguson v. Wills Transfert Ltd*, [2002] C.L.A.D. No. 222, applicant's memorandum, pages 140 and 141).

[22] The panel also erred in its interpretation of paragraph 240(1)(*a*) of the CLC concerning the period of at least twelve months of continuous employment. In fact, according to the applicant, he had completed at least twelve months of continuous employment because he had been in the respondent's employ from August 18, 2003, to his last pay on January 10, 2008. Even without a written employment contract, he criticizes the panel for having found that the parties' intention was to be bound by a term contract.

[23] The Court has before it a file in which the hearing was not recorded. There is therefore no transcript. The applicant appeared alone before the adjudicator.

[24] With respect for the contrary view, the Court cannot find that the panel's decision is unreasonable.

[25] In fact, the panel had the benefit of hearing the parties and their witnesses and assessing the context in which the various contracts were concluded. From this, the panel made findings based on the history of the contracts. The panel took into account, among other things, the exhibits filed during the hearing as well as the testimony that explained these documents.

[26] The panel's analysis of the case law is not exhaustive, but its application to the facts of the case is intelligible and justifiable and falls within a range of possible, acceptable outcomes (decision, paragraphs 11, 46 and 49). Was there another solution that could have been equally acceptable and justifiable? Of course. However, the solution adopted here is intelligible and is based

on all of the evidence that the parties wished to submit. The Court cannot substitute the solution that it itself considers appropriate for that which was adopted (*Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009], 1 SCR 339, para. 59).

[27] The Court's intervention is not warranted.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. The respondent is entitled to costs of $1500 in addition to disbursements.

"Michel Beaudry"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1727-10
STYLE OF CAUSE:	Jocelyn Lord v. Conseil des Atikamekw d'Opitciwan
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