Federal Court  Cour fédérale

Date: 20120621

Docket: T-1987-11

Citation: 2012 FC 804

Toronto, Ontario, June 21, 2012

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

WESTERN GRAIN BY-PRODUCTS STORAGE LTD.

Applicant

and

PETER DONALDSON

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns a decision by an Adjudicator acting under the authority of section 240 of the *Canada Labour Code*, *Canada Labour Code*, RSC 1985, c L-2. The central question was whether the Respondent, Mr. Donaldson, was unjustly dismissed from his employment by the Applicant corporation (Western Grain) operating as a repository for grains out of Thunder Bay, Ontario. Counsel for Western Grain argues that the Adjudicator's decision was rendered in reviewable error on the primary ground that the Adjudicator's conclusion that Mr. Donaldson was constructively dismissed from his employment is erroneous. For the reasons that follow, I agree with this argument.

[2] The Adjudication arose from a fact scenario in which a request was made by Western Grain's principal, Mr. Maurice Mailhot, of Mr. Donaldson arising from the fact that Mr. Donaldson left work on May 9, 2007 and did not return until October 25, 2007, some five and a half months later. Upon return to work Mr. Donaldson presented the Applicant with a doctor's note, dated October 24, 2007, which stated the following: "Mr. Donaldson is now capable of returning to his job and employment at Western Grain" (Application Record, Volume 3, Exhibit 6). In his affidavit filed in the present Application, Mr. Mailhot, attested to having the following conversation with Mr. Donaldson:

> […] I asked Mr. Donaldson to get a better doctor's note as to his fitness level in relation to his duties and the work environment before I could allow him to return to work. Mr. Donaldson indicated that he would get a better note and I anticipated that once he provided the note that he could return to work.
>
> (Application Record, Volume 1, Tab 6, para. 15)

In his affidavit filed in the present Application, Mr. Donaldson attests that "Mr. Mailhot indicated that he wanted more information but he did not challenge the note until the 4th day of January, 2008", and also offers the following opinion:

> There was no need for me to have brought a doctor's note to be called back to work. Nor was there any reason for Mr. Mailhot to ask for more medical information.
>
> (Application Record, Volume 5, Exhibit G, para. 5)

[3] An important intervening feature of the fact scenario is that, shortly after leaving work on May 7th, on June 22, 2007, Mr. Donaldson filed a Workplace Safety and Insurance Board (WSIB) compensation claim on the report that that he had experienced "abdominal pain and possible toxic

allergic reaction" attributed to exposure at the workplace (Application Record, Volume 3, Tab 5, p. 784). The WSIB's response to Mr. Donaldson's claim came in a letter dated October 17, 2007 in which the WSIB rejected his claim on a finding that "an occupational disease ha[d] not been established" (Application Record, Volume 3, Tab 5, p. 785). The Applicant received notice of this rejection on October 23, 2007. Two days later, Mr. Donaldson returned to work with his doctor's note and the conversation with Mr. Mailhot ensued.

[4] On November 16, 2007, Mr. Donaldson filed a complaint with the Human Resources and Social Development Canada (HRSDC) Labour Branch in which he stated that his reason for filing was because he "was not allowed to go back to work with a dr.'s note, I feel unjust dismissal" (Application Record, Volume 3, Tab 9).

[5] On two occasions, specific detail was put to Mr. Mailhot's request of October 25, 2007. In response to a November 26, 2007 inquiry from HRSDC about the complaint, Mr. Mailhot provided the following reply on December 12, 2007:

> Peter Donaldson left work ill during the day on May 9/07. He did not return.
>
> On June 28/07 we received an accident claim regarding Peter Donaldson from WSIB for a toxic allergic reaction due to exposure at the work place.
>
> Mr. Donaldson stopped at the work place for coffee with the crew in July and August and was asked when he anticipated returning to work. His answer was my doctor says I cannot return to work. I'm not allowed in the building.
>
> On October 23/07 we received a letter from WSIB dismissing Mr. Donaldson's claim.

> On October 25/07 Peter Donaldson presented me with a hand written note dated Oct.24/07 suggesting he was capable of returning to his job. The time, working and handwriting was suspicious and at that time I requested Mr. Donaldson obtain a letter from the doctor who treated him on his long term claim. The letter would have to indicate that Mr. Donaldson was fit to resume normal duties at Western Grain.
>
> On November 9/07 our shipping season was reduced to very occasional work and Mr. Donaldson, along with four other employees were sent lay off notices.
>
> It is our position that Mr. Donaldson is on seasonal layoff until deliveries of rail cars resume in February or March.
>
> (Application Record, Volume 3, Tab 11)

By letter dated March 5, 2008, Mr. Mailhot made the following formal request to Mr. Donaldson:

> Dear Peter,
>
> Just a reminder that we still have not received the following previously requested information from you:
>
> 1. we require that you provide us with a written doctors [sic] certificate, certifying that you were unable to work for the 25 week period from May 9/07 until October 25/07.
>
> 2. the reason you have been unable to report your accident on June 1/07 to your supervisor – WSIB claim number 24678476.
>
> 3. a current doctor's certificate verifying that you are fit and able to resume normal work duties.
>
> You have 15 days from receipt of this letter to reply.
>
> (Application Record, Volume 3, Tab 12)

[6] On the face of this record, it is clear that the Mr. Donaldson's complaint, which resulted in the Arbitration under review, crystalized in the conversation between Mr. Mailhot and Mr.

Donaldson on October 25, 2007. While Mr. Donaldson received a seasonal lay-off notice on November 9, 2007, the complaint filed did not relate to this fact.

[7] Going into the arbitration under consideration, Mr. Mailhot's position with respect to the request made of Mr. Donaldson was as follows:

> I did not terminate the employment of Mr. Donaldson on the basis of the WSIB claim or for any other reason, but only requested a better medical note that he was fit to resume his duties given that WSIB found he did not have a work-related illness due to grain or otherwise. […]
>
> (Application Record, Volume 1, Tab 6, para. 59)

However, the characterization of the request advanced by Mr. Donaldson was that it constituted a constructive dismissal because it was a breach of his employment contract with Western Grain. In the decision under review dated November 9, 2011, the Adjudicator found constructive dismissal. In my opinion, this conclusion is made in fundamental error because it is based on a fact that has absolutely nothing to do with the complaint crystalized in the conversation between Mr. Mailhot and Mr. Donaldson on October 25, 2007.

[8] In the decision under review the Adjudicator correctly cited the law with respect to constructive dismissal as follows:

> Again, I accept Mr. Firman's [Counsel for Western Grain in the Adjudication] general proposition that *Farber v. Royal Trust Company* (1996), (1997) 1 S.C.R. 846 (S.C.C.) [Farber] is the seminal case on the subject of constructive dismissal for setting out the legal criteria relating thereto. Where we differ is in the application of the holding in Farber.
>
> Mr. Firman quoted *in extensio* relevant portions of Farber, at [paragraphs] 24-27. See, Volume 1, General Written Argument on

Behalf of the Employer, at pp. 67-70. The underlining is that of Mr. Firman:

> "¶ 24 - Where an employer decided unilaterally to make substantial changes to the essential terms of an employee's contract of the employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as constructive dismissal. By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances the employee is entitled to compensation in lieu of notice and, where appropriate, damages.
>
> "¶ 25- On the other hand, an employer can make any changes to an employee's position that are allowed by contract, inter alia, as part of the employer's managerial authority. Such changes to the employee's position will not be changes to the employment contract, but rather applications thereof. The extent of the employer's discretion to make changes, will depend on what the parties agreed to when they entered into the contract....
>
> "¶26 - To reach the conclusion that an employee has been constructively dismissed, the Court must therefore determine whether the unilateral changes imposed by the employer substantially alter the essential terms of the employee's contract of employment. For this purpose, the Judge must ask whether at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have.

> "¶ 27 - Moreover, for the employment contract to be resiliated, it is not necessary for the employer to have intended to force the employee to leave his or her employment or to have been acting in bad faith when making substantial changes to the contract's essential terms. However, if the employer was acting in bad faith, this would have an impact on the damages awarded to the employee."
>
> (Decision, pp. 66 – 67)

[9] In reaching the final conclusion on the arbitration that a constructive dismissal had taken place, the Adjudicator applied the following analysis at pages 67 – 68 of the decision:

> 1. Mr. Donaldson was absent from work essentially during the pendency of the WSIB investigation, consideration and determination of Mr. Donaldson's claim for compensation for an alleged allergic reaction to a single incident of grain dust at Western Grain. Mr. Mailhot was notified of the application and he was given the opportunity to respond to it. He chose not to seek further information, or to question Mr. Donaldson in the WSIB proceedings. In the result, the WSB claim of Mr. Donaldson was rejected by the WSIB, and Mr. Mailhot was notified of that decision. That rejection was a denial by the WSIB that Mr. Donaldson had suffered a compensable allergic reaction while on the job. There was no reason for Mr. Mailhot to require a "doctor's note" -- simple or detailed -- as a condition for Mr. Donaldson to return to his job.
>
> 2. The facts do not support the conclusion that Mr. Mailhot only wanted a "better" doctor's note that might explain in somewhat more detail Mr. Donaldson's physician's conclusion that he was "fit" to return to work.
>
> I have set out in some detail Mr. Firman's [Counsel for Western Grain in the arbitration] argument -- reflecting the view of Mr. Mailhot -- that Mr. Donaldson should be compelled to name *all doctors who treated Mr. Donaldson over a period of two decades, and to produce such doctors at Mr. Donaldson's expense, along with their medical records, including their notes, for examination and cross-examination*.
>
> 3. Such a demand far exceeds the subject matter which was the cause for Mr. Donaldson's absence, namely, a claimed allergic reaction to a single incident of grain dust. Rather, what Mr. Mailhot was seeking was not only a medical pronouncement that Mr. Donaldson was "fit"

> to do his job in general, but that *he would be fit to do his job in general in the future.*
>
> 4. Mr. Mailhot placed effective barriers, that is, conditions quite outside the employment relationship between Western Grain and Mr. Donaldson, that denied Mr. Donaldson the right to return to work. On the face of it, they were barriers to which Mr. Donaldson and other Western Grain employees had not been subject in the past. And, insofar as they related to past and future guarantees of physical health -- in their generality -- they exceeded any reasonable term of employment.
>
> [Emphasis in original]

The following passage of the decision on page 69 clearly emphasizes the reason upon which the constructive dismissal finding is based:

> On the record, for the reasons stated, I have found that Western Grain imposed conditions on Mr. Donaldson's return to work which went beyond the ken both of what was reasonable in the context of Mr. Donaldson's reason for absence (namely, a WSIB consideration of his claim of a one-time allergic reaction to grain dust that, in the result was denied by the WSIB) and Western Grain's demand for the production for examination and cross-examination of all doctors who have treated Mr Donaldson over a period of two decades.
>
> [Emphasis added]

[10] If Counsel for Western Grain acting in the adjudication made the "demand for production", which is contested by Counsel for Western Grain acting in the present Application, I find that it could only be identified as an evidentiary incident in the course of the adjudication, and, as such, was not capable of being linked in any way to Mr. Donaldson's complaint made on November 16, 2007; at best, it was merely an irrelevant litigation feature of a fractious arbitration that ran for some 32 days.

[11] Therefore, I find that the decision under review does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (see: *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190, para. 47).

ORDER

THIS COURT ORDERS that:

1. The decision under review is set aside.

2. I make no award as to costs.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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N/A	FOR THE RESPONDENT