Federal Court  Cour fédérale

Date: 20130312

Docket: T-2071-11

Citation: 2013 FC 226

Ottawa, Ontario, March 12, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

TL'AZT'EN NATION

Applicant

and

KENNY SAM

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr Kenny Sam began working for the Tl'azt'en Nation as a Public Works Manager in 2006. He previously held the same position from 1999 to 2003. In 2010, the Nation dismissed Mr Sam for having abandoned his position.

[2] Mr Sam complained that he had been unjustly dismissed. An adjudicator (appointed under *Canada Labour Code*, RSC 1985, c L-2) [*CLC*]) agreed with Mr Sam and concluded that he should be compensated for lost wages and benefits, and reinstated in his position.

[3] The Nation seeks judicial review on a number of grounds. It asks me to overturn the adjudicator's decision, or limit the amount of compensation to Mr Sam.

[4] I can find no basis for disturbing the adjudicator's decision and must, therefore, dismiss this application for judicial review.

II. The Issues

[5] It is not clear what the issues are in this case. In its notice of application, the Nation listed ten issues relating primarily to the adjudicator's treatment of the evidence, his findings of fact, and his lack of impartiality. The Nation did not expressly address any of those grounds in its memorandum of fact and law. Instead, it questioned whether the adjudicator had jurisdiction to deal with Mr Sam's dismissal, and suggested that the adjudicator had made an error of law. At the hearing, the Nation presented arguments that were beyond both its notice of application and its memorandum. In general terms, it submitted that the adjudicator's decision was unreasonable.

[6] Applicants for judicial review must set out in their notices of application the grounds on which they rely, and cannot present new grounds in their memoranda of fact and law, even if the respondent has not been prejudiced (*Federal Courts Rules*, SOR/98-106, s 301(*e*) (see Annex);

Arora v Canada (Minister of Citizenship and Immigration), [2001] FCJ No 24 (FCTD) at para 9; *Williamson v Canada (Attorney General of Canada)*, 2005 FC 954; *Spidel v Canada (Attorney General of Canada)*, 2011 FC 601).

[7] However, there is some room for discretion where, for example, relevant matters have arisen after the notice was filed; the new issues have some merit, are related to those set out in the notice, and are supported by the evidentiary record; the respondent would not be prejudiced; and no undue delay would result (*Al Mansuri v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22 at paras 12-13).

[8] Here, two of the issues raised in the Nation's memorandum – relating to the jurisdiction of the adjudicator – are completely unrelated to the issues set out in the notice of application. There is no reason why they could not have been identified in the notice. They are not clearly meritorious and depend on evidence not in the record. The respondent experienced some prejudice by having to respond to a greater number of issues than originally disclosed. In these circumstances, I cannot exercise my discretion in the Nation's favour.

[9] However, the third issue – whether the adjudicator made an error of law relating to the nature of Mr Sam's employment contract – is referred to at least indirectly in the notice of application. It cites the contractual relationship between the parties and Mr Sam's obligations under the Nation's Policy and Procedure Manual. In my view, the respondent had adequate notice of this issue, and I should consider the Nation's submissions on it.

[10] As for the Nation's submissions at the oral hearing, these were directed mainly at the reasonableness of some of the adjudicator's findings. A number of the grounds set out in the notice of application could be described as allegations of unreasonableness. Therefore, I will consider whether certain of the adjudicator's findings were unreasonable.

[11] That leaves two issues to decide:

1. Was the adjudicator's decision unreasonable?
2. Did the adjudicator err in law?

III. Factual Background

[12] In January 2010, the Nation's Tache reserve experienced an e.coli outbreak. Mr Sam was responsible for the Nation's water treatment, water distribution, and wastewater collection systems. Obviously, this was a difficult time for the Nation, its leadership, and its administrative personnel.

[13] Around 10:00 am on January 29, 2010 Mr Sam left work for a medical appointment. He claimed to be under physical stress and lacking sleep. After the appointment, he returned to the Tache reserve and spoke with interim Chief Morris Joseph. Mr Sam claims he informed Chief Joseph that he was under his doctor's care and unable to work. Chief Joseph passed away before the adjudication, so there is no direct corroborating evidence of this conversation.

[14] Later that same day, Mr Sam spoke with Councillor Herbert Felix at the Tache water treatment plant. Mr Sam explained that he was going on medical leave and would be applying for

Workers' Compensation. Councillor Felix confirmed that Mr Sam told him about his prior conversation with Chief Joseph.

[15] However, Mr Sam did not inform his immediate supervisor, Mr Gregg Drury, that he was leaving his position, and he did not fill out a leave form. Still, he was paid sick leave for the remainder of January 29, 2010 and for the following week. In the first or second week of February, Councillor Felix told Mr Drury that Mr Sam was on stress leave.

[16] On February 8, 2010, Mr Drury received a faxed note from Mr Sam's doctor that read: "Certified off work as of 29 Jan 2010 for medical reasons. Under my care".

[17] Mr Drury claims to have drafted a letter to Mr Sam on February 15, 2010 advising him to gather the necessary documentation to prove that he had not voluntarily abandoned his position. However, there is no evidence that this letter was sent. In the draft, Mr Drury stated "On January 29, 2010 you traveled to Tache and spoke with Interim Chief Morris Joseph and Herbert Felix. You did not speak with me on the 29th – nor have you attempted to communicate with me since then".

[18] The Nation was copied on a February 23, 2010 letter from the provincial Workers' Compensation Board, WorkSafeBC, denying Mr Sam's compensation claim. The letter stated that the stress arising from threats of Mr Sam's being fired did not meet the criteria for compensation. Mr Sam subsequently applied for medical employment insurance. He was told that he needed a Record of Employment and a doctor's note. He attempted to obtain a Record of Employment but

was unsuccessful. Nevertheless, Mr Sam testified that he was granted medical employment insurance.

[19] On March 29, 2010, Mr Drury, on behalf of the Nation, wrote a termination letter to Mr Sam stating:

> On January 29, 2010 you walked off the job. During the ensuing 2 full months that have passed you have not made a single attempt to speak or communicate with me in any way. I can only conclude that you abandoned your job. In other words you voluntarily quit your job.

[20] Mr Sam subsequently made the following complaint under the *CLC*: "I am claiming an unjust dismissal complaint against Tl'atz'en Nation as I was fired while I was on medical leave under Dr's care".

IV. The Adjudicator's Decision

[21] Over the course of a three-day hearing, the adjudicator heard testimony from Mr Sam, Mr Drury, Councillor Felix, and Councillor Joshua Hallman. The Nation argued that Mr Sam was bound by the terms of his Employment Agreement, the Nation's Policy and Procedure Manual, and the Nation's Code of Ethics. As his employer, the Nation felt it was justified in concluding that Mr Sam had abandoned his position and voluntarily resigned. The Nation also claimed that Mr Sam was employed in a managerial capacity, so his termination was not subject to the unjust dismissal provisions of the *CLC* (s 167(3) – see Annex). The Nation also submitted that the adjudicator lacked jurisdiction to hear a complaint about an "administrative dismissal," as the unjust dismissal provisions of the *CLC* are reserved for "disciplinary dismissal."

[22] The adjudicator concluded that Mr Sam was not a manager within the meaning of s 167(3) of the *CLC*. On the issue of jurisdiction, the adjudicator found that the *CLC* does not distinguish between an administrative dismissal and a disciplinary dismissal, unlike the *Public Service Staff Relations Act*, RSC 1985, c P-35, s 92 (see: *Lindsay v Canada (Attorney General)*, 2010 FC 389). Accordingly, he concluded that he had jurisdiction to determine whether Mr Sam was unjustly dismissed.

[23] Finally, the adjudicator concluded that the Nation's contention that Mr Sam had abandoned his position was "fatally flawed." Under the Nation's Policy and Procedure Manual, an employee who is absent for five or more consecutive days without permission or reasonable cause is considered to have voluntarily resigned. However, Mr Sam was never made aware that his absence was without permission. Further, the Nation could not show that his absence was without reasonable medical cause.

[24] Indeed, there was no evidence that Mr Sam intended to abandon his position. Mr Drury testified that he had no idea if Mr Sam intended to return. He never communicated with Mr Sam during his absence from work, never indicated that the doctor's note was considered insufficient, and never advised Mr Sam that his absence would be considered an abandonment of employment.

[25] The adjudicator noted that Mr Sam sought a Record of Employment during his absence in order to apply for medical benefits – this amounted to further evidence that he lacked an intention to quit. The adjudicator also noted that Councillor Felix provided a note similar to Mr Sam's and had

been granted stress leave for a number of weeks in 2010, suggesting that an inconsistent standard had been applied to Mr Sam. The adjudicator concluded that Mr Sam was unjustly dismissed.

[26] Regarding potential remedies, the Nation argued that reinstatement was not possible as Mr Sam's absence during the e.coli outbreak demonstrated that he could not be relied on in an emergency. However, the adjudicator looked at the criteria for refusing reinstatement and found that Mr Sam's circumstances did not meet any of them. He held that the relationship of trust and confidence between Mr Sam and the Nation had not been destroyed, and that Mr Sam's primary difficulty had been with his supervisor, Mr Drury, who no longer works for the Nation. The adjudicator accepted Mr Sam's claims of incapacity while noting that leaves of absence were loosely administered by the Nation. In these circumstances, reinstatement was appropriate.

[27] Regarding compensation, the adjudicator ordered that Mr Sam be compensated for all lost wages and employee benefits from the date of termination until the date of the award. The employment insurance benefits Mr Sam collected were deliberately not taken into account.

V. Issue One – Was the adjudicator's decision unreasonable?

[28] The Nation argues that the adjudicator unreasonably concluded that Mr Sam had complied with the Policy and Procedure Manual. At the hearing, the Nation also argued that the adjudicator failed to apply the requirements that employment policies must meet according to *KVP Co v Lumber Sawmill Workers' Union, Local 2537*, [1965] OLAA No 2. This does not appear to have been an issue raised before the adjudicator, although he did, in passing, mention the *KVP* case. In

any case, there is no serious dispute about the validity of the Nation's employment policies. The adjudicator treated those policies as valid, and concluded that Mr Sam had complied with them. Therefore, I need not address the Nation's arguments, raised for the first time at the hearing, relating to the validity of its employment policies.

[29] According to the Policy and Procedure Manual, any employee absence for five or more consecutive days without permission or reasonable cause amounts to a voluntary resignation. (Policy 1.2). Based on this clause, the Nation claims that Mr Sam effectively resigned after he was absent for five consecutive days.

[30] In my view, the adjudicator's conclusion that Policy 1.2 did not apply to Mr Sam was not unreasonable on the evidence. Mr Sam was never made aware that his absence was without permission, as he had notified the Acting Chief and a Councillor, and had a doctor's note faxed to his immediate supervisor. In addition, the Nation did not establish that Mr Sam's absence was without reasonable medical cause.

[31] The Nation also argues that the adjudicator misinterpreted Policy 2.0(*c*) and Policy 5.5. The former states that an employee must complete the leave form for an absence due to illness on his or her return to work, while the latter requires an employee to produce a medical certificate as proof of illness after three consecutive days' absence from work. The certificate can be given to "the senior portfolio director, General Manager, or Chief and Council".

[32] Again, I cannot conclude that the adjudicator's interpretation of these policies was unreasonable. He found that Mr Sam could report his absence "at three levels, whatever makes sense". This is a defensible reading of the Manual, which states in Policy 2.0 that leave is granted at the discretion of "the senior portfolio director, General Manager, or Chief and Council, whichever is appropriate". Similarly, Policy 5.5 states that an administrator at one of those three levels must be provided with a medical certificate for proof of illness.

[33] While the adjudicator did not specifically refer to Policy 5.5, he presumably accepted that the faxed doctor's note constituted a medical certificate proving illness. Although the note was received by the Nation on February 8, 2010 – eleven days after Mr Sam began his absence from work – Policy 5.5 requires an employee to provide the certificate *after* three days, with no deadline for its delivery.

[34] Accordingly, I see no basis for concluding that the adjudicator's decision was unreasonable.

VI. Did the adjudicator err in law?

[35] The Nation claims that Mr. Sam's dismissal was non-disciplinary and that non-disciplinary terminations are not subject to the provisions of the *CLC*.

[36] In fact, as noted by the adjudicator, the *CLC* makes no such distinction between disciplinary and non-disciplinary termination. Accordingly, the only question is whether the employee was

unjustly dismissed. The answer to this question turns on whether Mr Sam abandoned his job or was dismissed by the Nation.

[37] Here, the adjudicator found that the evidence did not support the Nation's allegation that Mr Sam quit and, as I have concluded above, the adjudicator's factual conclusions were not unreasonable. The adjudicator reviewed all of the evidence in light of the employment relationship between Mr Sam and the Nation, and concluded that Mr Sam had not abandoned his position. I can find no error in the adjudicator's decision.

VII. Conclusion and Disposition

[38] On my review of the issues that are properly before me, I cannot find that the adjudicator erred in law or rendered an unreasonable decision. I must, therefore, dismiss this application for judicial review with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, with costs.

"James W. O'Reilly"
Judge

Annex

***Federal Courts Rules*, SOR/98-106**

Contents of application

301. An application shall be commenced by a notice of application in Form 301, setting out
…

(*e*) a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on;

***Règles des Cours fédérales*, DORS/98-106**

Avis de demande — forme et contenu

301. La demande est introduite par un avis de demande, établi selon la formule 301, qui contient les renseignements suivants :
[…]

e) un énoncé complet et concis des motifs invoqués, avec mention de toute disposition législative ou règle applicable;

***Canada Labour Code*, RSC 1985, c L-2.**
…

Part III: Standard Hours, Wages, Vacations and Holidays
…

Application of Part

167. (3) This Part applies

Non-application of Division XIV to managers
(3) Division XIV does not apply to or in respect of employees who are managers.

***Code canadien du travail*, LRC 1985, ch L-2.**
[…]

Partie III : Durée normale du travail, salaire, congés et jours fériés
[…]

Application de la présente partie

167. (3) La présente partie s'applique :

Exception : section XIV
(3) La section XIV ne s'applique pas aux employés qui occupent le poste de directeur.

***Public Service Staff Relations Act*, RSC 1985, c P-35**

Reference of grievance to adjudication
92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

(*b*) in the case of an employee in a department or other portion of the public

***Loi sur les relations de travail dans la fonction publique*, LRC (1985), ch P-35**

Renvoi d'un grief à l'arbitrage
92. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur :

a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale;

b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration

service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or

(ii) termination of employment or demotion pursuant to paragraph 11(2)(*f*) or (*g*) of the Financial Administration Act, or

(*c*) in the case of an employee not described in paragraph (*b*), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)*f*) ou *g*) de la Loi sur la gestion des finances publiques;

c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.

Approval of bargaining agent

(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(*a*), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.

Approbation de l'agent négociateur

(2) Pour pouvoir renvoyer à l'arbitrage un grief du type visé à l'alinéa (1)*a*), le fonctionnaire doit obtenir, dans les formes réglementaires, l'approbation de son agent négociateur et son acceptation de le représenter dans la procédure d'arbitrage.

Termination under P.S.E.A. not grievable

(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the Public Service Employment Act.

Exclusion

(3) Le paragraphe (1) n'a pas pour effet de permettre le renvoi à l'arbitrage d'un grief portant sur le licenciement prévu sous le régime de la Loi sur l'emploi dans la fonction publique.

Order

(4) The Governor in Council may, by order, designate for the purposes of paragraph (1)(*b*) any portion of the public service of Canada specified in Part II of Schedule I.

Décret

(4) Le gouverneur en conseil peut, par décret, désigner, pour l'application de l'alinéa (1)*b*), tout secteur de l'administration publique fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2071-11
STYLE OF CAUSE:	TL'AZT'EN NATION v KENNY SAM
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 3, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	O'REILLY J.
DATED:	March 12, 2013

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