Federal Court Cour fédérale

Date: 20130408

Docket: T-1234-12

Citation: 2013 FC 352

Ottawa, Ontario, April 8, 2013

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

DEAN FONTAINE

Applicant

and

THE ASSEMBLY OF FIRST NATIONS

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] This is an application for judicial review of a decision of an Adjudicator made under the *Canada Labour Code*, RSC 1985, c L-2 (Code), dated May 23, 2012. In the decision, the Adjudicator determined that he did not have the jurisdiction to consider whether the applicant was unjustly dismissed pursuant to the Code.

BACKGROUND

[2] Beginning in September 2005, the applicant began working as a Special Advisor for the Assembly of First Nations.

[3] He was employed under a series of short-term contracts. Some contracts were renewed by new contracts, while others were renewed by letters confirming such renewals.

[4] The applicant's second contract was executed in March 2007. On page 4 of this contract, the following sentence is found for the first time: "Furthermore, nothing in this contract should be construed as an offer of continuing employment beyond the specified dates of employment."

[5] The same sentence was contained in the March 14, 2008 version of the contract, which extended the employment to March 31, 2009. The applicant's employment continued to be extended by a series of letters. A letter dated June 29, 2009 confirmed the termination of the applicant's employment as of July 31, 2009.

[6] On July 19, 2009, the issue of the applicant's employment status was raised *in camera* at a meeting of the National Executive of the respondent. Witnesses who attended this meeting gave evidence before the Adjudicator that the respondent's National Executive passed a motion to offer permanent employment to the applicant. There was inconsistent evidence before the Adjudicator regarding whether the offer of permanent employment was funding dependent. The Adjudicator noted that Mr. Bob Watts, Chief Executive Officer of the respondent at the time, suggested in an email that the move to permanent employment be dependent on funding, but the witnesses who attended the July 19, 2009 meeting denied that the move was funding dependent. The Adjudicator noted, however, that one of the witnesses, Grand Chief Phil Fontaine, acknowledged the funding issue in a tangential way in an email conversation with Mr. Watts.

[7] On July 31, 2009, the day the applicant's employment was scheduled to terminate, the applicant alleges that Mr. Shawn Atleo, the newly-elected Grand Chief of the respondent, ran into him in the hallway and said that he looked forward to working with the applicant. That same day, the respondent's interim Chief Executive Officer, Mr. Richard Jock, sent an email and letter to the applicant, allowing a further one-month extension of his contract. Another letter dated August 17, 2009 extended the applicant's employment to September 25, 2009.

[8] At a September 10, 2009 meeting, during an *in camera* session, a newly appointed National Executive passed a motion authorizing Mr. Jock, in light of new circumstances occurring since the previous executive passed motions regarding human resource matters, to take all the necessary decisions and actions in the best interests of the respondent regarding the Human Resource matters of the organization.

[9] On September 21, 2009, Mr. Jock sent the applicant a letter, extending his employment to October 30, 2009 and indicating there would be no further extensions.

[10] On December 14, 2009, the applicant's complaint under the Code was received. It was heard before the Adjudicator on September 7 and 9, 2011.

THE ADJUDICATOR'S DECISION

[11] The Adjudicator accepted without reservation the evidence of former Grand Chief Phil Fontaine and Regional Chief Erasmus that on July 19, 2009, the National Executive passed a motion to offer permanent employment to the applicant. However, the Adjudicator was not

persuaded that the applicant was actually offered permanent employment. The Adjudicator analyzed the issue as follows:

> Unfortunately for the Complainant, [the intention of the National Executive] does not end the matter. No such change was actually implemented by the AFN. There was no actual offer of permanent employment extended to Mr. Fontaine. The best that can be said of Mr. Watts' email was an acknowledgement that, this change would occur if funding were to be found. Other emails outlined the fact that no such funding was found. The new National Executive reconsidered the July 19 motion and effectively rescinded it on September 10. Mr. Fontaine's employment was extended one further time but then ended pursuant to that extension.

[12] The Adjudicator also found that the case of *Blair v Western Mutual Benefit Assn.*, [1972] BCJ 620, [1972] 4 WWR 284 (BCCA) [*Blair*] applied to the present case, given that in *Blair* the B.C. Court of Appeal found that although the employer's directors had passed a resolution to offer a retirement package to an employee, absent some actual change in the relationship between the employer and employee, the employee had no entitlement to the retirement package.

[13] The issue arising out of this application for judicial review is whether the Adjudicator erred in finding that he had no jurisdiction to consider whether the applicant was unjustly dismissed.

STANDARD OF REVIEW

[14] The question of whether the applicant was dismissed within the meaning of section 240 of the Code, or whether his fixed-term contract merely expired, is a question of mixed fact and law reviewable on the reasonableness standard (*Stirbys v Assembly of First Nations*, 2011 FC 42 at para 25 [*Stirbys*]; *Young v Assembly of First Nations*, 2012 FC 597 at para 22 [*Young*]).

[15] Accordingly, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

ANALYSIS

[16] The applicant submits the Adjudicator erred in deciding that there was no formal offer of employment to the applicant, given that the resolution making him a permanent employee passed and its results were acknowledged by the newly elected Grand Chief Shawn Atleo when he shook the applicant's hand.

[17] The applicant also maintains that the Adjudicator erred in finding that the new National Executive reconsidered the July 19, 2009 motion and effectively rescinded it on September 10, 2009, given that the mover of the September 10, 2009 motion was not a member of the Board of Directors, nor was he the mover of the July, 19, 2009 motion allegedly making the applicant a permanent employee.

[18] The respondent submits it is clearly not the role of the reviewing Court to re-weigh the facts (*League for Human Rights of B'nai Brith Canada v Canada*, 2010 FCA 307 at para 85 [*B'nai Brith Canada*]; *Stirbys*, above, at para 25). Moreover, the respondent submits the Code's adjudication process is not available to employees who lose their employment as a result of the expiry of the term of their employment contract (*Eskasoni School Board/Eskasoni Band Council v MacIsaac*, [1986] FCJ 263 (FCA) [*Eskasoni*]). I agree with the respondent for the following reasons.

[19] The Adjudicator had the benefit of hearing the parties and their witnesses, as well as the benefit of exhibits regarding the nature of the applicant's employment, all of which was taken into account by the Adjudicator. The Court, on the other hand, has neither a transcript of the hearing nor copies of exhibits filed before the Adjudicator. As noted by the respondent, it is not the role of the Court to re-examine the weight the Adjudicator ascribed to various portions of the evidence (*B'nai Brith Canada*, above, at para 85; *Stirbys*, above, at para 25).

[20] The Adjudicator considered the evidence before him, as well as relevant case law (*Eskasoni* and *Blair*), and found that no actual offer of permanent employment was extended to the applicant. He accepted the evidence of former Grand Chief Phil Fontaine and Regional Chief Erasmus that they wanted to change the applicant's status to a permanent employee but found that the intention did not end the matter. Prior to any actual offer of permanent employment being made, the National Executive changed its mind and rescinded the July 19 motion concerning the applicant's employment. Thus, the applicant's employment contract terminated on October 30, 2009 and the Adjudicator did not have jurisdiction to hear the applicant's complaint.

[21] It is well-established that the Code's adjudication process is not available to employees who lose their employment as a result of the expiry of the term of their employment contract (*Eskasoni*; *Stirbys*, above, at para 2; *Young*, above, para 2). Given that the applicant has not pointed to any evidence that was before the Adjudicator that demonstrates the Adjudicator's factual findings were unreasonable, I am satisfied that the Adjudicator's conclusion is intelligible, justifiable and transparent, and falls within a range of possible, acceptable outcomes.

[22] Moreover, with respect to the applicant's argument that the mover of the September 10, 2009 motion was not a member of the Board of Directors nor the mover of the July, 19, 2009 motion that was effectively rescinded, I am not persuaded that the Adjudicator made an error in this regard because the applicant has not pointed to any evidence that was before the Adjudicator that attested to the applicant's procedural concerns.

CONCLUSION

[23] For these reasons, I dismiss the application for judicial review with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed with costs.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Kenneth B. Young	FOR THE APPLICANT
D. Bruce Sevigny	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kenneth B. Young, Barrister & Solicitor Winnipeg, Manitoba	FOR THE APPLICANT
Sevigny Westdal, LLP Ottawa, Ontario	FOR THE RESPONDENT