Federal Court  Cour fédérale

Date: 20140506

Docket: T-1538-13

Citation: 2014 FC 426

Toronto, Ontario, May 6, 2014

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

WAYNE SKINNER

Applicant

and

FEDEX GROUND LTD.

Respondent

ORDER AND REASONS

[1] The present Application concerns a challenge by the Applicant, a past employee of the Respondent, who seeks to set aside the decision of an Adjudicator, dated August 19, 2013, in which the Adjudicator dismissed the Applicant's unjust dismissal complaint against the Respondent pursuant to s. 240 of the *Canada Labour Code*, RSC, 1985 c. L-2 (the *Code*).

I. Background Leading to the Dismissal

[2] The Applicant worked for the Respondent from September 6, 2005, until June 1, 2012, when he was terminated for just cause. At the time of the termination the Applicant held the position of "Senior Customs Associate". The Applicant's work record discloses chronic inability to arrive at work on time. As a result, on December 16, 2011, the Respondent gave the Applicant a "pre-final warning" that "any further tardiness...will result in a final written warning [and] [a]ny subsequent tardiness after that will result in termination". Following the Applicant arriving late for work on February 16, 2012, on February 21st a "final warning" was given that "this is a final written warning and any subsequent violations will result in termination of your employment" (Adjudicator's Decision, pp. 3 – 4).

[3] To record the time that an employee arrives at his or her work station, the Respondent implemented an "eTime" honour recording system. The Applicant was required to be physically present at his work station each work day at 8:30 am and to accurately record his arrival time at the work station. The culminating event leading to the Applicant's termination occurred on May 25, 2012, when he arrived and signed in at the security area at 8:30 am, but did not arrive at his workstation until 8:34 am. After the Applicant arrived at his workstation he recorded his arrival time in the eTime system as 8:30 am. The Applicant's late arrival and his dishonest misconduct grounded his dismissal for just cause.

II. The Adjudicator's Decision

[4] On June 15, 2012, the Applicant filed an Unjust Dismissal Complaint which resulted in a hearing by an Adjudicator over the course of two days, May 8, 2013, and July 10, 2013. On August 19, 2013, the Adjudicator dismissed the Applicant's complaint for the following reasons:

> The employer has made multiple efforts, over a protracted period, to manage and help Mr. Skinner to overcome his pattern of habitual tardiness. Numerous times at his request, the employer adjusted his schedule in an effort to maximize the likelihood of on-time attendance. But, while Mr. Skinner did make some improvement, the problem was not resolved. Still, Mr. Skinner was given a final chance, which was clearly identified as such at the time. And, even if a four-minute late arrival might, in and of itself, be seen as an offence approaching the trivial, Mr. Skinner had a significant problematic history. And on May 25, not only was he late once more, but he also opened an entirely new front-dishonest misconduct.
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> In this context, I am satisfied that the complainant's dismissal was just and that this complaint must therefore be dismissed.
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> (Decision, pages 17 and 18)

III. Arguments and Findings

[5] It is agreed that the appropriate standard of review for cases of unjust dismissal under the *Code* is reasonableness and the appropriate standard of review for issues of procedural fairness is correctness.

[6] The Applicant challenges the decision under review on three distinct grounds: a reasonable apprehension of bias on the part of the Adjudicator; the Adjudicator's failure to

perform a two-step inquiry to determine if just cause existed for dismissal; and a breach of the duty of fairness owed.

A. *Apprehension of Bias*

[7] The Applicant argues that "the Adjudicator created a reasonable apprehension of bias in the mind of the Applicant on more than one occasion as a result of both his comments and his actions during the course of the proceedings" (Applicant's Argument, para. 55). The test for a reasonable apprehension of bias is stated by the Supreme Court of Canada in *R v. R.D.S.*, [1997] 3 SCR 484 at paragraph 111 as follows:

> The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:
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> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. . . ."

[8] Prior to the hearing of the Applicant's complaint, the Adjudicator engaged in an attempt to mediate the complaint with the agreement of the Applicant, who was unrepresented, and Counsel for the Respondent. During the course of the hearing of the present Application, Counsel for the Respondent confirmed that, with respect to wrongful dismissal complaints under the *Code*, it is an established and accepted practice that adjudicators attempt to reach a mediated settlement before hearing and deciding a particular complaint. While the Adjudicator makes no

mention of the conduct of the mediation in the decision rendered, the Applicant in his affidavit provides the following evidence in support of the apprehension of bias argument:

> During our private discussions [the Adjudicator] Mr. Herlich shared with me his view that based on what he had seen of my complaint so far, the fact that I had been disciplined on several occasions suggested that my case was not very strong (Paragraph 6).
>
> Further during our private discussions and in reference to my stated intention of claiming damages for reasonable notice, Mr. Herlich felt obliged to share with my wife and me his recollection of watching a certain television cartoon in his childhood. Mr. Herlich recalled that at the beginning of many episodes of that particular cartoon the main character would be contemplating a plan for acquiring money. The money to be acquired on the successful execution of the plan would be represented by the image of a bag of money in the top comer of the television screen. Mr. Herlich ended his recollection of watching the television cartoon by stating that at the end of the episode the cartoon character's plan to acquire money would inevitably fail and that the image of the bag of money would disappear with a "poof " (Paragraph 7).

In addition to the details recounted in Paragraphs 6 of the Applicant's affidavit, in the Applicant's Memorandum of Fact and Law the Applicant provided the following clarifying statement:

> During the course of these private discussions the Applicant asked the Adjudicator for his opinion on the merits of his complaint. The Adjudicator replied by saying that based on what he had seen of the complaint so far, the fact that the Applicant had been disciplined on several occasions suggested that the Applicant's case was not very strong (Paragraph 63).
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> [Emphasis added]

[9] Upon applying the test, I find that no apprehension of bias arises from the incidents recounted by the Applicant. The Adjudicator's use of allegory and frank opinion regarding the

Applicant's chances of success were clearly directed at assisting the Applicant to understand that a realistic risk existed in taking the complaint to hearing. In my view, the Adjudicator's attempt to assist the Applicant was very much in keeping with what might be reasonably expected of a competent mediator.

[10] In paragraph 34 of this Affidavit, the Applicant recounts one further incident that preceded the hearing which is also advanced to support the apprehension of bias argument:

> Based on my understanding of the HRSDC's Guide to an Adjudication Hearing, I sent an email to Mr. Herlich dated May 10, 2013 requesting the issuance of subpoenas to six potential witnesses. To my surprise, in his reply dated May 13, 2013 Mr. Herlich advised me that it was not his practice to prepare summonses for parties and that I should not be seeking legal advice from him. See Exhibit "A".

In my opinion, this allegation is frivolous and is of no evidentiary value on the issue.

B. *Two-Step Inquiry Process*

[11] The Applicant argues that the Adjudicator failed to follow the two-step inquiry for assessing just cause for dismissal without notice, as established by the Supreme Court of Canada in *McKinley v. BC Tel* (2001 SCC 38). Under this two-step inquiry, the Adjudicator was required to first find whether the conduct relied on as the basis for dismissal has been established on a balance of probabilities, and then find whether the nature and degree of such conduct warrants dismissal in the specific context of the case, having regard to all the circumstances. The Applicant argues that the Adjudicator erred by failing to conduct the first step of the inquiry.

[12] I do not accept the Applicant's argument because it is clear from the record that the Adjudicator did complete the first step; the uncontested evidence with respect to the Applicant's disciplinary history, including his admission that on May 25, 2012, he arrived at his workstation at 8:34 am, but recorded his arrival time as 8:30am, accomplished this requirement.

C. *Procedural Fairness*

[13] Finally, the Applicant argues that the Adjudicator denied him the right to a fair hearing by refusing to allow him to make certain submissions during his closing argument on certain issues: the difference between culpable vs. non-culpable incidences of arriving late for work; the fact that the Applicant thought that the Respondent was targeting him; and the difference between guaranteed as opposed to non-guaranteed delivery time services offered by the Respondent (Applicant's Memorandum of Fact and Law, paras. 75 – 85). As explained at paragraph 78 of the Applicant's Memorandum, the Adjudicator placed the limit on the first and second instances for the reason that the Applicant should have raised the issues during the evidence stage of the hearing.

[14] There is no issue that it was within the Adjudicator's discretion to decide questions of hearing procedure and relevance with respect to evidence giving and argument. In my opinion, given the focussed grounds for the Applicant's dismissal, being his undisputed chronic inability to arrive at work on time, the Adjudicator acted well within his discretion to limit argument to only relevant issues raised on the evidence presented. By way of explanation for doing so, the Adjudicator commented as follows:

> I should note as well that the complainant's lack of legal training was not a significant obstacle to his effective participation in these proceedings. Mr. Skinner struck me as highly intelligent, possessed of an impressive range of social skills. He was also utterly tenacious in his presentation. He did, however, fail to completely understand the distinction between evidence and legal argument. Much of his testimony included the latter. And despite my explicit caution during his testimony that he insure that all of the facts he intended to rely upon be put in evidence, his final argument included the presentation or assertion of facts that were not in evidence.
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> […]
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> Ultimately, however, I am satisfied that even accepting the otherwise unproven facts asserted in final argument as true, those facts have no significant impact on the disposition of the matter.
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> (Decision, p. 6)

[15] I find no breach of the duty of fairness owed to the Applicant.

IV. Conclusion

[16] I find that the Adjudicator's decision is reasonable.

ORDER

THIS COURT ORDERS that the present Application is dismissed. I make no award as to costs.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1538-13
STYLE OF CAUSE:	WAYNE SKINNER v FEDEX GROUND LTD.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 22, 2014
ORDER AND REASONS:	CAMPBELL J.
DATED:	MAY 6, 2014

APPEARANCES:

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