Federal Court of Appeal | Cour d'appel fédérale

Date: 20231025

Docket: A-320-21

Citation: 2023 FCA 213

CORAM: **DE MONTIGNY J.A.**
LOCKE J.A.
ROUSSEL J.A.

BETWEEN:

SIMON MACKEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Fredericton, New Brunswick, on October 25, 2023.
Judgment delivered from the Bench at Fredericton, New Brunswick, on October 25, 2023.

REASONS FOR JUDGMENT OF THE COURT BY: LOCKE J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Fredericton, New Brunswick, on October 25, 2023).

LOCKE J.A.

[1] This is an application for judicial review in which Simon Mackey seeks to quash a decision of the Federal Public Sector Labour Relations and Employment Board (the Board). The impugned decision (2021 FPSLREB 115, *per* Augustus Richardson, the Decision) dismissed Mr. Mackey's grievance of his dismissal from employment with the Correctional Service of Canada (the employer).

[2] Mr. Mackey agrees that the Board applied the correct legal test in considering his grievance. Mr. Mackey also accepts that this Court can intervene only if the Decision was unreasonable in the sense contemplated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.

[3] Mr. Mackey argues that the Board erred in three respects.

A. The Adjudicator erroneously concluded that the employer had sufficient grounds to terminate the employment;

B. The Adjudicator determined that the criminal charges that the Applicant was accused of upon termination were "unnecessary [gilding of the] lily"; and

C. The Adjudicator determined that the [employer's] discipline was not excessive.

[4] Having considered Mr. Mackey's written and oral submissions, we are not convinced that there was anything unreasonable in the Decision.

[5] With regard to the first alleged error, Mr. Mackey argues that though the Board should have considered both aggravating and mitigating factors, it considered only the former. Mr. Mackey cites the following as mitigating factors that were ignored: (i) his years of unblemished service from 2005 (when he was hired) until 2013 (when his disciplinary issues

began), and (ii) his misconduct (repeated failures to report to work and to follow procedure to report his absences) being due to medical issues.

[6] We find no merit in this argument. The Board took into account Mr. Mackey's years of service and service record at paragraphs 2 and 40 of the Decision, and was clearly aware of when his disciplinary issues began (see paragraphs 12 and following of the Decision).

[7] With regard to his alleged medical issues, Mr. Mackey refers to paragraph 72 of the Decision that refers to the absence of evidence to negate his misconduct. He asks us to infer from this that the Board failed to consider evidence of his efforts to address the medical problems that led to his misconduct. We are not prepared to do that. First, we note that paragraphs 50 and 55 of the Decision acknowledge this evidence and Mr. Mackey's argument based thereon. We can presume that the Board had this evidence in mind when making its decision. Second, the evidence of Mr. Mackey's efforts in this regard predates much of the misconduct for which he was eventually terminated. While it would have been preferable if the Board had addressed this evidence directly as a mitigating factor, we are not convinced that its failure to do so was sufficient to make the Decision unreasonable.

[8] With regard to Mr. Mackey's second argument, he submits that his final suspension was not due to his behaviour at work. He notes that he was suspended only when his employer became aware of pending criminal charges against him. He argues that it was therefore unreasonable for the Board to conclude that the employment relationship was broken as a result of his behaviour at work.

[9] We do not accept that the timing of Mr. Mackey's suspension prohibited the Board from reasonably concluding that his behaviour at work was sufficient on its own to break the employment relationship and justify his termination. The Board carefully considered this issue and concluded that the series of suspensions without pay against him for increasing periods of time (15 days, then 20 days, then 30 days) did not have the effect of curbing his problematic behaviour, such that termination was the only option left for the employer. That conclusion was reasonable.

[10] In support of his argument that the discipline of termination was excessive, Mr. Mackey argues that the employer should have imposed a more lengthy suspension without pay rather than termination. However, even the authority upon which Mr. Mackey principally relies, *Calgary (City) v. Canadian Union of Public Employees, Local 38 (Morrison Grievance)* (2015) 256 L.A.C. (4th) 217 (Alta. Grievance Arbitration), acknowledges as follows at paragraph 93:

> …If the employee has not corrected his or her behaviour after progressively severe discipline, then it is assumed that termination is the only recourse…

[11] The Board reasonably applied this presumption in concluding that further progressive discipline short of termination was not necessary.

[12] It follows from the foregoing that the present application will be dismissed with costs in the all-inclusive amount of $1000.

"George R. Locke"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-320-21
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REASONS FOR JUDGMENT OF THE COURT BY:	DE MONTIGNY J.A. LOCKE J.A. ROUSSEL J.A.
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