Federal Court of Appeal | Cour d'appel fédérale

Date: 20220718

Docket: A-41-21

Citation: 2022 FCA 133

CORAM: **RENNIE J.A.**
GLEASON J.A.
ROUSSEL J.A.

BETWEEN:

JAMES KOT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on June 23, 2022.

Judgment delivered at Ottawa, Ontario, on July 18, 2022.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

CONCURRED IN BY: RENNIE J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

ROUSSEL J.A.

[1] The applicant, James Kot, seeks judicial review of a decision made by an adjudicator of the Federal Public Sector Labour Relations and Employment Board (Board) on March 23, 2020 (2020 FPSLREB 29). In its decision, the Board determined that it had no jurisdiction over the applicant's grievance, as he was a probationary employee and had failed to demonstrate that his

employer's decision to terminate his employment was not based on a *bona fide* dissatisfaction with his suitability for employment.

[2] Specifically, the Board found that when the applicant was laid off in 2015 from his employment at Transport Canada, he ceased to be an employee under subsection 64(4) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (PSEA). Thus, when appointed in April 2016 to a position in the National Forensic Laboratory Service of the Royal Canadian Mounted Police (RCMP), he was considered to have been hired from outside the public service. As a result, a twelve-month probationary period applied to him, pursuant to subsection 61(1) of the PSEA, and subsection 2(1) of the *Regulations Establishing Periods of Probation and Periods of Notice of Termination of Employment During Probation*, SOR/2005-375 (Regulations). The applicant was therefore on probation when his employment was terminated in April 2017.

[3] The Board then considered the fact that the applicant's initial letter of offer did not mention the probationary period but held that, as it was statutory, the probationary period could not be overridden by waiver, by consent or by omission in the letter of offer. Finally, the Board concluded that the employer's reliance on the PSEA was not a camouflage or a sham, as there were *bona fide* reasons to question the applicant's suitability for employment since he had implicated his employer in a personal dispute by using his work email address and telephone on several occasions.

[4] Before this Court, the applicant challenges the Board's conclusion that he was on probation when his employment was terminated in April 2017 and disputes the Board's findings

that his employer had legitimate reasons to question his suitability for employment. He essentially argues that the Board ignored relevant evidence, as it did not refer to it in its reasons. The applicant also submits that the Board gave insufficient weight to certain evidence and based its decision on hearsay evidence. He further alleges that his employer "fabricated evidence with the intention of tarnishing his reputation".

[5] The Board's decision is reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 10, 16-17 (*Vavilov*); *Canada (Attorney General) v. Alexis*, 2021 FCA 216 at para. 2 (*Alexis*); *Gulia v. Canada (Attorney General)*, 2021 FCA 106 at para. 8). When this standard applies, the Court's focus is on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para. 83). It must ask itself "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para. 99). The "burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para. 100).

[6] Upon review of the Board's reasons and the record, I am satisfied that the Board's decision is reasonable. In its reasons, the Board conducted a detailed review of the evidence and provided an extensive summary of the parties' arguments. It applied the proper test for reviewing the employer's decision to reject the applicant during the probationary period and its conclusions are amply supported by the evidence and the law. The relevant provisions are set out in Appendix A to these reasons.

[7] The applicant submits that he was not on probation when the RCMP hired him in 2016, as he was not hired from outside the public service. He argues that he enjoyed priority status and that he was entitled to participate in internal appointment processes. To support his position, he further relies on the absence of a probationary clause in his initial letter of offer and on an excerpt from a briefing note allegedly stating that the twelve-month probationary period did not apply in a priority situation.

[8] The applicant's arguments cannot succeed.

[9] The applicant does not dispute that he was laid off from his previous employment in 2015. As observed by the Board, subsection 64(4) of the PSEA provides that an "employee ceases to be an employee when the employee is laid off". It was therefore reasonable for the Board to conclude that "once he was laid off, the [applicant] ceased to be an employee in 2015 and that he was hired from outside the public service on April 28, 2016". In reaching this conclusion, the Board appropriately relied on this Court's decision in *Canada (Attorney General) v. Santawirya*, 2019 FCA 248, where the Court explained:

> [15] Subsection 64(4) is a clear expression of Parliament's intention with respect to whether a person with lay-off priority status is an employee. There is no doubt or uncertainty about its meaning or the scope of its application. Parliament has decided that a person who is laid off under subsection 64(1) of the PSEA ceases to be an employee…

[10] While the applicant's priority status under subsection 41(4) of the PSEA entitled him "to participate in any advertised appointment process for which [he] would have been eligible had [he] not been laid off" (s. 44 of the PSEA), he had nonetheless ceased to be an employee under subsection 64(4) of the PSEA. The Board could therefore reasonably conclude that the applicant

was hired from outside the public service and that pursuant to subsection 61(1) of the PSEA, the applicant was subject to a probationary period as defined in the Regulations.

[11] At the hearing, the panel permitted the applicant to introduce a document that refers to an RCMP briefing note allegedly stating: “Management of NFLS-Ottawa were informed that the 12 month probationary period did not apply in a ‘priority’ situation”.

[12] The applicant mistakenly relies on this document, as the Board addressed the issue of the RCMP’s error in its reasons. The Board explicitly acknowledged in its decision the absence of a probation clause in the original letter of offer. It also accepted the evidence that when the amended letter of offer was sent to the applicant, no one expressly pointed out to him that a new paragraph about probation was added. The Board held that, while the applicant’s circumstances were unfortunate, the language in subsection 61(1) of the PSEA was clear and could not be ignored. The applicant has failed to establish that the Board’s interpretation of the relevant statutory provisions is unreasonable.

[13] The Board also considered the applicant’s argument that the employer’s decision to reject him on probation was a ruse, a sham or a disguised attempt to terminate him. The Board reviewed the evidence relating to the events leading to the applicant’s written reprimand in August 2016 and acknowledged that there were issues between the applicant and his initial supervisor. The Board explained why it felt that this event did not support the applicant’s argument that he was punished by his employer, as evidence in the record demonstrated how the situation had improved to the point of the applicant’s assignment being renewed and that it was

envisaged to make it permanent. The Board further noted that the decision to reject the applicant while on probation was made only when the employer became aware of the applicant's actions through a public complaint filed in March 2017. The Board considered the evidence regarding the applicant's actions and was satisfied that the employer had some serious concerns regarding the applicant's suitability for employment in the organization. While the applicant alleges that his employer fabricated evidence when it issued the amended letter of offer, he failed to provide any evidence to support such a serious accusation.

[14] Furthermore, contrary to the applicant's assertion, the Board was not required to refer to every piece of evidence, including the testimony of all the witnesses. It was also not required to respond to every argument or to make an explicit finding on each constituent element leading to its conclusion (*Vavilov* at paras. 91, 128; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16). In my view, there is no basis for concluding that the Board ignored evidence or failed to grapple with any of the issues raised by the applicant. There is also no merit to the applicant's argument that the Board unreasonably relied on hearsay evidence. Pursuant to subsection 20(*e*) of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365, the Board has the power to accept any evidence, whether admissible in a court of law or not.

[15] In addition, it must be borne in mind as this Court noted in *Alexis*, that "employers are afforded considerable discretion to assess the suitability of probationary employees and there is minimal scope for review of their decisions" (*Alexis* at para. 10). The burden of establishing that the termination was a camouflage, sham or conducted in bad faith lies with the grievor (*Alexis* at

para. 9). In this instance, the Board concluded that the applicant had not met his burden, and the applicant has not convinced me that this conclusion was unreasonable.

[16] After considering the applicant's submissions, I am of the view that he is essentially asking this Court to reassess and re-weigh the evidence that was before the Board and to come to a different conclusion that is favourable to him. That is not this Court's role on judicial review (*Vavilov* at para. 125). Moreover, I consider that the applicant is putting too much emphasis on certain passages used by the Board in its reasons and is engaging in a "line-by-line treasure hunt for errors" (*Vavilov* at para. 102), which a reviewing court cannot do. Based on the record before it, it was open to the Board to find that it had no jurisdiction over the applicant's grievance pursuant to subsection 211(*a*) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2, and subsection 62(1) of the PSEA.

[17] Finally, the applicant vaguely alleges in his submissions a lack of procedural fairness rooted in the documentary disclosure. This argument is without merit. Since the applicant maintained throughout the hearing before the Board that he did not receive all the relevant documents, the Board deemed it necessary to review the chronology of the document disclosure at the outset of its reasons. The Board noted that, at the end of the hearing, it went over the chronology with both parties and no objection was raised about its accuracy. It was satisfied that the applicant had received the documents he had asked for or those which might have been relevant to the hearing and was afforded time to address them. Based on the applicant's submissions, I fail to see a reviewable error in the Board's treatment of the documentary disclosure.

[18] For these reasons, I would dismiss this application. In the circumstances, I would decline to make a costs award.

"Sylvie E. Roussel"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Mary J.L. Gleason J.A."

APPENDIX A

***Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13**	***Loi sur l'emploi dans la fonction publique*, L.C. 2003, ch. 11, art. 12 et 13**
Priority – persons laid off	**Priorités – personnes mises en disponibilité**
41 (4) Priority for appointment over all other persons shall be given, during the period determined by the Commission, to a person who is laid off pursuant to subsection 64(1).	**41 (4)** La personne mise en disponibilité au titre du paragraphe 64(1) a droit à une priorité de nomination absolue pendant la période fixée par la Commission.
…	[…]
Participation in advertised process — lay-offs	**Droit de se présenter à un processus annoncé — mise en disponibilité**
44 A person who is laid off under subsection 64(1) is entitled, during any period that the Commission determines for any case or class of cases, to participate in any advertised appointment process for which the person would have been eligible had the person not been laid off.	**44** La personne mise en disponibilité au titre du paragraphe 64(1) a le droit, durant la période fixée selon les cas ou catégories de cas par la Commission, de participer à tout processus de nomination annoncé auquel elle aurait pu participer si elle n'avait pas été mise en disponibilité.
…	[…]
Probationary period	**Durée de la période de stage**
61 (1) A person appointed from outside the public service is on probation for a period	**61 (1)** La personne nommée par nomination externe est considérée comme stagiaire pendant la période :
(*a*) established by regulations of the Treasury Board in respect of the class of employees of which that person is a member, in the case of an organization named in Schedule I or IV to the *Financial Administration Act*; or	***a*)** fixée, pour la catégorie de fonctionnaires dont elle fait partie, par règlement du Conseil du Trésor dans le cas d'une administration figurant aux annexes I ou IV de la *Loi sur la gestion des finances publiques*;
(*b*) determined by a separate agency in respect of the class of employees of which that person is a member, in the case of an organization that is a separate	***b*)** fixée, pour la catégorie de fonctionnaires dont elle fait partie, par l'organisme distinct en cause dans le cas d'un organisme distinct dans lequel les

agency to which the Commission has exclusive authority to make appointments.

…

Termination of employment

62 (1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of

(*a*) the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the *Financial Administration Act*, or

(*b*) the notice period determined by the separate agency in respect of the class of employees of which that employee is a member, in the case of a separate agency to which the Commission has exclusive authority to make appointments,

and the employee ceases to be an employee at the end of that notice period.

…

Effect of lay-off

64 (4) An employee ceases to be an employee when the employee is laid off.

…

***Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2**

Exception

nominations relèvent exclusivement de la Commission.

[…]

Renvoi

62 (1) À tout moment au cours de la période de stage, l'administrateur général peut aviser le fonctionnaire de son intention de mettre fin à son emploi au terme du délai de préavis :

***a*)** fixé, pour la catégorie de fonctionnaires dont il fait partie, par règlement du Conseil du Trésor dans le cas d'une administration figurant aux annexes I ou IV de la *Loi sur la gestion des finances publiques*;

***b*)** fixé, pour la catégorie de fonctionnaires dont il fait partie, par l'organisme distinct en cause dans le cas d'un organisme distinct dans lequel les nominations relèvent exclusivement de la Commission.

Le fonctionnaire perd sa qualité de fonctionnaire au terme de ce délai.

[…]

Effet de la mise en disponibilité

64 (4) Le fonctionnaire mis en disponibilité perd sa qualité de fonctionnaire.

[…]

***Loi sur les relations de travail dans le secteur public fédéral*, L.C. 2003, ch. 22, art. 2**

Exclusion

211 Nothing in section 209 or 209.1 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to

(*a*) any termination of employment under the *Public Service Employment Act*; or

(*b*) any deployment under the *Public Service Employment Act*, other than the deployment of the employee who presented the grievance.

…

***Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365**

Powers of Board

20 The Board has, in relation to any matter before it, the power to

…

(*e*) accept any evidence, whether admissible in a court of law or not; and

…

***Regulations Establishing Periods of Probation and Periods of Notice of Termination of Employment During Probation*, SOR/2005-375**

2 (1) The probationary period referred to in paragraph 61(1)(*a*) of the *Public Service Employment Act*, for the class of employees described in column 1 of an item of the schedule, is the period set out in column 2 of the item.

211 Les articles 209 et 209.1 n'ont pas pour effet de permettre le renvoi à l'arbitrage d'un grief individuel portant sur :

***a*)** soit tout licenciement prévu sous le régime de la *Loi sur l'emploi dans la fonction publique*;

***b*)** soit toute mutation effectuée sous le régime de cette loi, sauf celle du fonctionnaire qui a présenté le grief.

[…]

Loi sur la Commission des relations de travail et de l'emploi dans le secteur public fédéral, L.C. 2013, ch. 40, art. 365

Pouvoirs de la Commission

20 Dans le cadre de toute affaire dont elle est saisie, la Commission peut :

[…]

***e*)** accepter des éléments de preuve, qu'ils soient admissibles ou non en justice;

[…]

***Règlement fixant la période de stage et le délai de préavis en cas de renvoi au cours de la période de stage*, DORS/2005-375**

2 (1) La période de stage visée à l'alinéa 61(1)*a*) de la *Loi sur l'emploi dans la fonction publique* est, pour la catégorie de fonctionnaires figurant dans la colonne 1 de l'annexe, la période figurant dans la colonne 2 en regard de cette catégorie.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-41-21
STYLE OF CAUSE:	JAMES KOT v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 23, 2022
REASONS FOR JUDGMENT BY:	ROUSSEL J.A.
CONCURRED IN BY:	RENNIE J.A. GLEASON J.A.
DATED:	JULY 18, 2022

APPEARANCES:

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Joel Stelpstra	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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