Federal Court of Appeal  Cour d'appel fédérale

Date: 20220330

Docket: A-127-20

Citation: 2022 FCA 55

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

BETWEEN:

DAVID GLENN BABB

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the registry

on February 8, 2022.

Judgment delivered at Ottawa, Ontario, on March 30, 2022.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: GAUTHIER J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] In this application for judicial review, David Glenn Babb, the applicant, seeks to set aside the decision of an adjudicator of the Federal Public Sector Labour Relations and Employment Board (the Board) rendered on April 23, 2020 (*Babb v. Canada Revenue Agency,*

2020 FPSLREB 42). In the Board's decision (the Decision), the adjudicator dismissed the applicant's grievances, finding that the Canada Revenue Agency (the CRA or the employer) had not discriminated against him and had not acted in bad faith when it terminated his employment due to his incapacity. The Board dismissed the discrimination claim by finding that the employer's duty to accommodate had come to an end on the basis that the applicant could not return to work in the foreseeable future.

[2] This application for judicial review is simply about whether the Board reasonably applied the Supreme Court's teachings in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161 [*McGill*] and in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000* (SCFP-FTQ), 2008 SCC 43, [2008] 2 S.C.R. 561 [*Hydro-Québec*] to the evidence before it.

[3] For the following reasons, I would dismiss the application for judicial review.

II. Background

[4] A brief summary of the facts is helpful to put these reasons into context.

[5] In 2002, the applicant started working for the CRA. His work responsibilities changed in 2005 when he became a Revenue Processing Clerk, requiring him to work in an office and to use office equipment to assist him in retrieving documents upon request from various tax offices. In

2006, his health issues linked with environmental sensitivities in the workplace became prevalent. In early 2007, the applicant left on short-term sick leave, and then on a leave without pay (LWOP) on April 19, 2007. The applicant provided the employer with a doctor's note dated February 15, 2008, which stated that the applicant was not fit to return to work at that time and that his return date was unknown.

[6] The applicant was a member of the union but his collective agreement had no provision for a medical LWOP. Other forms of LWOP found in the collective agreement, such as for the care of children or for the long-term care of a parent, provided for a total LWOP of up to five years.

[7] In April 2009, the employer informed the applicant that because the two-year mark of his LWOP was fast approaching, he would soon receive a letter pursuant to the employer's *Illness and Injury Policy* relating to his employment. By letter dated May 11, 2009, the applicant was advised that he could choose one of three options: (1) returning to duty; (2) resignation or retirement on medical grounds; or (3) termination for reasons other than breaches of discipline or misconduct, pursuant to paragraph 51(1)(*g*) of the *Canada Revenue Agency Act*, S.C. 1999, c. 17. The letter also informed the applicant that his failure to select one of the three options by July 10, 2009, would result in termination of his employment.

[8] The applicant requested an extension of his LWOP as he was waiting for an appointment with an environmental health physician to explore treatment options. The employer granted an extension of the applicant's LWOP from July 20, 2009, to September 18, 2009.

[9] On August 28, 2009, the applicant's environmental health physician stated in a medical note provided to the employer that the applicant was unable to return to work at this time due to his ongoing medical condition. In addition, the physician advised that the applicant had been referred to another medical team for further assessment. The employer granted an extension of the applicant's LWOP from October 2009, to February 15, 2010, to allow for the completion of a medical specialist's assessment and report.

[10] On October 23, 2009, the physician stated in a medical note provided to the employer that the applicant was unable to return to work at this time due to his ongoing medical condition, and that a return to work date was still unknown. The applicant's assessment before the specialist was scheduled for November 2009. From then, the specialist report would take approximately two months to complete. The employer granted a further extension of the applicant's LWOP from February 2010, to March 31, 2010, in order for the applicant's physician to review the report.

[11] The applicant received the specialist report in January 2010, but he never provided it to the employer. The employer received the specialist report at the start of the proceedings before the Board.

[12] Although the applicant never provided a copy of the specialist report to the employer, on February 2, 2010, he emailed the employer to advise that he had received the specialist report and quoted a passage of the report, which stated: "Mr. Babb is currently fully disabled' […] and

then stated in his email that “it was unclear when and how I will be able to return to employment”.

[13] In March 2010, the applicant requested an additional extension of his LWOP in order to allow his physician to review the specialist report and provide recommendations for treatment. The employer refused this request.

[14] On March 30, 2010, the physician stated in a note provided to the employer that the complexity of the applicant’s case made him unfit to return to work. She added that there were no specific accommodations that would be appropriate or adequate for the applicant as “he is not able under any conditions to work at this time.” The employer provided no further extensions of the applicant’s LWOP after March 31, 2010.

[15] As of March 31, 2010, the employer had provided extensions totalling about 11.5 months of the applicant’s LWOP beyond the original end date. The employer claimed to have done so on the expectation that the applicant would provide it with information relating to his needs and limitations for a return-to-work with accommodations. Despite repeated requests from the employer, the applicant refused to provide such information and refused to consent to a medical assessment by Health Canada.

[16] By letter dated April 13, 2010, the employer terminated the applicant’s employment for reasons of incapacity. The letter informed the applicant that he had received each extension to his LWOP on the premise that he required time to meet with his medical practitioners to identify his

medical limitations or restrictions. The letter stated that with each extension to the LWOP, the applicant was reminded of the need to cooperate and submit the requested information and that the failure to do so could result in the termination of his employment.

[17] The applicant grieved his termination on grounds of discrimination and bad faith. The grievances were dismissed at the final level on September 16, 2011. The grievances were then referred to the Board for adjudication.

III. The Decision

[18] After 8 days of hearing, in a 61-page decision, the Board dismissed the applicant's grievances. The Board's analysis is captured in paragraphs 239 to 303 of the Decision.

[19] Starting with the claim of discrimination found at paragraphs 240 to 280 of the Decision, the Board stated its authority under paragraph 226(2)(*a*) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2, to interpret and apply provisions of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the *CHRA)*, and noted that section 7 of the *CHRA* provides that it is a discriminatory practice to refuse to employ or to continue employing an individual based on a prohibited ground (Board's decision at paras. 241-242). The Board confirmed that the applicant must establish a *prima facie* case before it can consider the employer's answer to the allegation, and that the applicant need only show that discrimination was one of the factors in the employer's decision.

[20] The Board found that the applicant established a case of *prima facie* discrimination because he suffered from a disability within the meaning of section 25 of the *CHRA*—a fact uncontested by the employer—and that he suffered an adverse impact in which his disability was a factor, seeing as he was terminated for incapacity (Decision at paras. 245-246).

[21] Moving to the employer, the Board held that it could avoid an adverse finding by calling evidence to provide a reasonable explanation showing that its actions were not in fact discriminatory, or by establishing a statutory defence, such as a *bona fide* occupational requirement (BFOR) under subsection 15(2) of the *CHRA*. The Board found that it was incumbent on the employer to prove that the application of its two-year standard set out in its *Illness and Injury Policy* for dealing with long-term sick leave cases was justified (Decision at paras. 247 to 250).

[22] Relying on the Supreme Court of Canada's decision in *McGill*, the Board reiterated the three-part test to justify the two-year standard (the *Meiorin* test) (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 at para. 54 [*Meiorin*]), namely requiring the employer to prove:

1) That the standard was adopted for a purpose rationally connected to the performance of the job;

2) That the standard was adopted in honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and,

3) That the standard is reasonably necessary to accomplish that purpose, demonstrated by showing that it would be impossible to accommodate the individual without imposing undue hardship on the employer.

[23] The applicant conceded the first two parts of the *Meiorin* test, and thus the Board only examined the third constituent element: reasonable necessity without imposing undue hardship (Decision at para. 251). The crux of the case was the application of the evidence to the third part of the *Meiorin* test.

[24] The Board rejected the applicant's argument that it was discriminatory for the employer to apply a rigid two-year limit on sick leave cases as per the *Illness and Injury Policy* while the collective agreement provided for LWOP of up to five years in other situations. The Board similarly dismissed the applicant's contention that keeping him on sick leave LWOP for a few more years would not constitute undue hardship.

[25] It noted that, in *Edwards v. Treasury Board (Canada Border Services Agency)*, 2019 FPSLREB 62, a case relied upon by the applicant, the Board had confirmed that it was open for the employer to rely on a similarly worded internal policy unless it denied a benefit otherwise included in the collective agreement. In the case at bar, as found by the Board, the collective agreement did not provide for sick leave LWOP (Board's decision at paras. 237 and 254).

[26] The Board also emphasized that the applicant's argument failed to address the Supreme Court's express guidance in *McGill* at para 38, and in *Hydro-Québec* at paras. 12-19. In the Board's view, these decisions stand for the proposition that the employer will have met its duty to accommodate if it can establish that the employee was incapable of returning to work in the foreseeable future (Decision at paras. 255, 258-260).

[27] Following its review of the medical and other evidence, the Board found that the employer had met its duty to accommodate (Decision at para. 279). I will deal in more detail with the Board's reasoning and relevant findings in that respect in my analysis.

[28] Turning next to the claim of bad faith, the Board held that the applicant bore the onus of proving, on a balance of probabilities, that bad faith tainted his termination (Decision at para. 281). The applicant relied principally on two pieces of documentary evidence: a fact sheet and a termination briefing paper, both of which he obtained via an access to information request. The Board found no evidence that the employer's witnesses had relied on the fact sheet in making the termination decision. In the Board's view, the fact sheet could also be interpreted as saying that, should the applicant not submit the requested medical information by March 31, 2010, he would be terminated. That is precisely what transpired.

[29] The Board further rejected the argument that the briefing paper had been prepared before the employer received the physician's note dated March 30, 2010. The Board also rejected the allegation that a phone call that the applicant received from his manager in November 2008 had been suspicious or nefarious. It found that neither her contemporaneous notes nor her testimony

on the subject showed anything of the sort, but simply confirmed that she had inquired as to how she could accommodate the applicant's return to work.

[30] Overall, the Board found none of the applicant's arguments that the employer's actions "reek[ed] of bad faith" convincing. The Board found that the applicant had not met his onus to establish bad faith as he did not prove that it is more likely than not that the employer's decision to terminate him was tainted by bad faith (Decision at para. 303).

IV. Standard of Review and Issues

[31] The parties agree that the reasonableness standard of review applies to the adjudicator's decision (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*]; *Gulia v. Canada (Attorney General)*, 2021 FCA 106, 2021 CarswellNat 1617 at para. 8; *Canada (Attorney General) v. Douglas*, 2021 FCA 89, 2021 CarswellNat 1289 at para. 5; *Canada (Attorney General) v. Alexis*, 2021 FCA 216, 2021 CarswellNat 4869 at para. 2).

[32] The reasonableness standard is a deferential one, which examines the administrator's decision with respectful attention and attempts to understand the conclusion and the reasoning that brought it to bear (*Vavilov* at paras. 83-84; *Mudie v. Canada (Attorney General)*, 2021 FCA 239, 2021 CarswellNat 5626 at para. 18). A decision is reasonable when it flows from an internally coherent chain of analysis and is justified in light of the relevant legal and factual

constraints (*Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, 441 D.L.R. (4th) 269 at para. 2; *Vavilov* at paras. 84-85).

[33] The issues that must be addressed by this Court are as follows:

a) Was it reasonable for the Board to conclude that the employer had not discriminated against the employee because it met its duty to accommodate, having made out its BFOR defence set out in subsection 15(2) of the *CHRA*?

b) Was it reasonable for the Board to conclude that the employer acted in good faith when it terminated the applicant for reasons of incapacity?

V. The Applicant's Position

A. Discrimination

[34] The applicant submits that the Board improperly analysed the third constituent element of the *Meiorin* test, and should have found that the employer had not established undue hardship, rendering the Decision unreasonable.

[35] The main thrust of the applicant's argument is that the Board based its finding of undue hardship on an unreasonable chain of analysis that included a fundamental gap. According to the applicant, the Board failed to consider whether the two-year standard set out in the *Illness and Injury Policy* was a BFOR.

[36] During oral submissions, the applicant spent most of his time on what he says was the Board's major deficiency. According to the applicant, the Board never addressed the primary issue of whether LWOP is a form of accommodation. The applicant referred this Court to the other types of LWOPs provided in the collective agreement, which allow for a total of five years of absence from work. The evidence before the Board confirmed that these types of LWOP fell under the same code and the same costs for the employer as those associated with the medical LWOP in question (Decision at para. 102).

[37] According to the applicant, the employer had to show that it could not adapt the standard to accommodate an employee's individual needs without undue hardship. In *Hydro-Québec*, the applicant submits that the employee in question was deemed unable to return to work after intermittent absences from the workplace over seven years despite multiple unsuccessful attempts by the employer to accommodate her. Here, the applicant argues, the employer provided evidence that extending the LWOP would not be an undue hardship for them, and merely relied on their *Illness and Injury Policy* that sick leave cases are to be resolved once the two-year LWOP timeframe has been reached. By ignoring this component, the applicant submits that the Board unreasonably shifted the burden onto him, requiring the applicant to prove his ability to work in the foreseeable future.

[38] In summary, the applicant says that the employer has not established hardship in this case based on the evidence before the Board. Thus, the Decision is unreasonable for finding that hardship exists and that the employer's duty to accommodate was at an end.

B. Bad Faith

[39] The applicant then addressed the Board's finding that the employer did not exercise bad faith when his employment was terminated. The applicant submits that the Board applied an exceedingly high threshold by requiring him to show that the termination decision "reeked" of bad faith, as opposed to showing that it was "tainted" with bad faith. Further, he alleges that the Board engaged in a selective and piecemeal analysis of the evidence without considering its totality. When the Board recognized that "other reasons" than incapacity may have motivated the employer's termination decision, the applicant argues that it failed to consider whether those other reasons were "honest and forthright" or "misleading" and "overly insensitive".

[40] In the applicant's view, the totality of the evidence paints a clear picture: he was viewed negatively by management, disciplined and cautioned for speaking out, and accused of falsifying medical certificates. By ignoring these facts, he submits, the Decision is unreasonable.

VI. Analysis

[41] At the outset, it is important for us to be reminded pursuant to *Vavilov* that it is not the role of this Court in judicial review to re-weigh the evidence and second-guess the Board's factual findings or to substitute our views for those of the Board regarding its findings of no discrimination or bad faith (*Vavilov* at para. 125). This is particularly so in light of the considerable deference decisions of this nature are to be afforded, as evidenced by the privative clause in subsection 34(1) of the *Federal Public Sector Labour Relations and Employment*

Board Act, S.C. 2013, c. 40, s. 365 (*Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, 432 D.L.R. (4th) 170 at para. 34).

A. Was it reasonable for the Board to conclude that the employer had not discriminated against the employee because it met its duty to accommodate, having made out its BFOR defence set out in subsection 15(2) of the CHRA?

[42] The parties agree, as do I, that the Board identified and applied the proper test for discrimination and identified the proper tests for the employer's BFOR defence and the accommodation of needs (Decision at paras. 243-246, 247-249).

[43] For the following reasons, I cannot agree with the applicant's submission that the Board unreasonably applied the third constituent element of the *Meiorin* test to the evidence before it. It is useful to be reminded that to meet this third constituent, a standard "must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship" (*Meiorin* at para. 62).

[44] The Supreme Court provided important guidance on the interpretation of the third element of the *Meiorin* test in the *McGill* and *Hydro-Québec* decisions. In those decisions, the Supreme Court grappled with the interaction between the employer's duty to accommodate a sick employee and the employee's duty to do his or her own work. The preconditions for the duty to accommodate were not at issue. Rather, the real issue before the Supreme Court was the interpretation and the application of the undue hardship standard and the impact of a determination that an employee is unable to resume work in the foreseeable future

[45] Thus, the Board appropriately considered the third element of the *Meiorin* test by relying on both *McGill* and *Hydro-Québec* in its analysis. Before us, as he did before the Board, the applicant did not really address paragraphs 18 and 19 of *Hydro-Québec*, where the Supreme Court stated that an employer's duty to accommodate ends where the employee will not be able to fulfil the basic obligations associated with the employment relationship for the foreseeable future despite attempts to accommodate him.

[46] It is important to consider each of the findings made by the Board with respect to the right of the employer to rely on its policy, on whether or not it applied the said policy mechanically or automatically, and whether the employer could reasonably conclude that the applicant could not return to work in the foreseeable future. It is those findings that led to the conclusion that is now being challenged.

[47] Turning to the employer's application of the two-year standard set out in its *Illness and Injury Policy*, the Board found that the collective agreement did not have a provision for sick LWOP, and it was therefore open to the employer to apply its *Illness and Injury Policy* (Decision at para. 254). In the present case, as noted, the employer and the bargaining agent had expressly excluded sick leave from the collective agreement, and it was reasonable for the Board to find that the employer could apply its own policy. It was also reasonable for the Board to find that *Edwards* was distinguishable on the facts. In *Edwards*, the Board found that the employer had discriminated against employees who were on sick leave when it denied their requests for personal leave because the collective agreement provided for a leave of one year for personal

needs without precluding the application of this leave to employees currently on sick leave (Decision at paras 234-237).

[48] Next, the applicant argued that the two-year standard set in the employer's *Illness and Injury Policy* was applied automatically and mechanically. He did not argue before the Board that the *Illness and Injury Policy* was *per se* discriminatory and should be quashed. During oral submissions before this Court, the applicant confirmed that it was not his intention to attempt to have the policy quashed, although his arguments seemed to point in that direction. In any event, the question of whether the policy itself was discriminatory was not argued before the Board and therefore it is not for this Court to entertain such an argument. The reasonableness of the Decision cannot be impugned on the basis of an issue not put before the Board (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 22-29).

[49] I will focus therefore only on the manner in which the Board considered the employer's application of the two-year standard, and whether it was applied automatically and mechanically when considering the duty to accommodate the applicant, up until that duty came to an end. As discussed in *Hydro-Québec*, when narrowing in on the employer's duty to accommodate, the duty implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to return to work and does not cause the employer undue hardship (*Hydro-Québec* at para. 13).

[50] Beginning with the termination letter, the Board found that the employer's *Illness and Injury Policy* triggered the events leading to the termination. Contrary to the applicant's assertions, he had not been terminated at the two-year mark of his LWOP. Rather, the applicant had been on sick leave since April 19, 2007, and was terminated on April 13, 2010 (Decision at para. 264).

[51] The Board determined that the applicant had been granted several extensions to provide medical information setting out his limitations and restrictions to enable a return to work. The termination letter referenced these extensions, which total approximately 11.5 months (Decision at paras. 264, 267, 273). In my view, based on this record, it was reasonable for the Board to find that the employer showed flexibility in its application of the two-year standard set out in its *Illness and Injury Policy*.

[52] Further, it was reasonable for the Board to reject the applicant's argument that the employer should have continued to provide him with extensions of LWOP, because even after three years of being absent from work, there was no indication from the applicant's doctors of a possible return to work date (Decision at para. 279). In order to make this determination, the Board examined the medical and other evidence available to it to ascertain whether the applicant was able to return to work in the foreseeable future.

[53] Regarding the medical evidence and whether the applicant was able to return to work, the Board relied on the contents of the termination letter that referenced the medical certificates provided to the employer, dated August 24, 2009, and March 30, 2010. In those certificates, the

physician states that the applicant is not fit to return to work at this time and there are no specific accommodations that would be appropriate or adequate as the applicant was not able under any conditions to work at this time (Decision at paras. 268-270).

[54] The Board considered the most recent medical evidence available to the employer at the time CRA decided to terminate the applicant, namely the physician's March 30, 2010, certificate indicating that no return to work would be possible "at this time […] under any conditions" (Decision at paras. 270 and 275).

[55] The Board also considered an email that the applicant wrote to the employer in February 2010, on the question of his ability to return to work in the foreseeable future. The applicant notified the employer that he was unfit to return to work based on the specialist report he received in January 2010 (Decision at paras. 268 and 276). In particular, the Board, at paragraph 276, found that the applicant had communicated with the employer by email on February 2, 2010, that "'Mr Babb is currently fully disabled' as written by Dr. Ellie Stein in her report dated Jan. 6, 2010 which I have recently received by fax… It is unclear when and how I will be able to return to employment…".

[56] Finally, the termination letter also highlighted the efforts made by management to obtain a return-to-work date, including attempts to have the applicant undergo a Health Canada assessment and to obtain more detailed information on his limitations (Decision at paras 263, 267, 268 and 269).

[57] Thus, faced with the medical evidence as to the applicant's unfitness for work and no anticipated date for a return to work, coupled with his unwillingness to provide information on his limitations and restrictions for accommodation purposes, the Board found that the employer reasonably concluded that the applicant was incapable of returning to work in the foreseeable future. (Decision at para. 279).

[58] I note that the Board found that the applicant had not informed the employer of the most salient part of the specialist report, which clearly indicated that not only was the applicant "currently fully disabled" but "in [her] experience very few people with this degree of symptomatology are able to return to gainful employment," and that "the prognosis for anything approaching full or functional recovery is very small." In the Board's view, it was appropriate to consider this report, as at paragraph 38 of *McGill*, the Supreme Court indicated that the grievor had to provide the Board with evidence on the basis of which it could find in its favor (Decision at para. 277). This simply meant that, had this report been available to the employer in full prior to the termination of the applicant, it would have confirmed that the applicant was unable to work in the reasonably foreseeable future (Decision at paras. 278 and 279).

[59] In my view, it was reasonable for the Board to be satisfied that the employer's duty to accommodate was at an end (Decision at para. 279).

[60] An employer's duty to accommodate is only triggered when an employee informs an employer of his wish to return to work and provides evidence of his ability to return to work, including any specific needs that would allow him to do so (*Katz et al. v. Clarke,* 2019 ONSC

2188, 2019 CarswellOnt 6703 at para. 28). However, as stated earlier, in this case, the applicant never provided any such information to the employer. It was reasonable for the Board to find that the employer was not required to do anything further, given the length of time the applicant was absent from work and the medical evidence that he was unable to return to work in the foreseeable future.

[61] The Board accepted the employer's evidence and recognized that the employer was not bound to retain the applicant because he was still unable to work due to illness after three years of LWOP, and would be unable to return to work in the foreseeable future. The Board was satisfied that the employer had established undue hardship on that basis and met the BFOR defence (Decision at paras. 4, 279-280). The Board was alive to the applicant's argument but did not accept it.

[62] Far from the applicant's suggestion that the Board reversed the onus, rather it found that the applicant had failed to provide evidence contradicting the employer's evidence that the applicant was unable to return to work in the foreseeable future (Decision at para. 277).

[63] Again, the Board's reliance and application of *Hydro-Québec* to the facts before it was reasonable. The purpose of the duty to accommodate is to ensure that employees who are otherwise fit to work are not improperly excluded. As stated earlier, in this case, the employer was not required to alter the terms of the applicant's employment contract given that there was no return to work in sight and one does not need to accommodate an employee who is no longer

able to fulfill the basic obligations associated with the employment relationship for the foreseeable future (*Hydro-Québec* at para. 19).

[64] I also note, as at paragraph 21 of *Hydro-Québec*, that a decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must necessarily be based on an assessment of the entire situation. In the present judicial review, I find the Board, after 8 days of hearing, did just that.

[65] In my view, the Board weighed all of the evidence, its decision flows from an internally coherent chain of analysis and is justified in light of the relevant legal and factual constraints. Its conclusion that the employer met its BFOR defence under subsection 15(2) of the *CHRA* is reasonable.

B. Was it reasonable for the Board to conclude that the employer acted in good faith when it terminated the applicant for reasons of incapacity?

[66] Regarding the issue of whether the employer acted in bad faith when it dismissed the applicant for incapacity, I find that it was reasonable for the Board to conclude that the applicant had failed to discharge his burden to show bad faith.

[67] The Board logically and objectively examined the evidence and reasonably concluded that, taken together or individually, the pieces of evidence did not show bad faith. I do not accept the applicant's submission that there was a failure to account for certain evidence, but rather I am reminded of the general prohibition on a reviewing court's "reweighing and reassessing the

evidence considered by the decision maker" (*Vavilov* at para. 125, referred to above at paragraph [42]). I see no reviewable error in the Board's analysis.

[68] Contrary to the applicant's submissions, I find that the Board did not use an excessively high standard when analysing the claim for bad faith. The Board references the terms "reek[ed] of bad faith" because those terms were taken from an earlier Board decision in *Laird v. Treasury Board (Employment & Immigration)*, PSSRB File No. 166-02-19981 (19901207), [1990] C.P.S.S.R.B. No. 213 (QL) relied upon by the applicant. It was the applicant, and not the Board, who advanced the argument that the employer's decision "reek[ed] of bad faith". In any event, the Board used the term "tainted by bad faith" in its opening paragraph at 281 and in its conclusory paragraph at 303.

VII. Conclusion

[69] In conclusion, I am of the view that the Decision is reasonable. It flows from an internally coherent chain of analysis and is justified in light of the relevant legal and factual constraints. The Decision is justifiable, clear, and intelligible, and we owe deference and should not interfere (*Vavilov* at paras. 75, 83, 85 and 86).

[70] For these reasons, I would dismiss the application for judicial review. The parties agreed that costs should be fixed in the amount of $1500. I would therefore award costs of $1500, all inclusive, in favour of the respondent.

"Marianne Rivoalen"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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