Federal Court of Appeal Cour d'appel fédérale

Date: 20230614

Docket: A-89-21

Citation: 2023 FCA 139

CORAM: **PELLETIER J.A.**
RIVOALEN J.A.
ROUSSEL J.A.

BETWEEN:

GABRIEL ROULEAU-HALPIN

Appellant

and

BELL SOLUTIONS TECHNIQUES INC.

Respondent

Heard by online video conference hosted by the Registry on November 24, 2022.

Judgment delivered at Ottawa, Ontario, on June 14, 2023.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: RIVOALEN J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] This is an appeal from the decision of Justice St-Louis of the Federal Court dismissing the appellant's application for judicial review of the decision of an adjudicator appointed under the *Canada Labour Code*, R.S.C 1985, c. L-2 as it appeared on October 9, 2019 (the Code) dismissing the appellant's complaint of unjust dismissal. The adjudicator found that the

appellant's dismissal fell within the exception found at paragraph 242(3.1)(*a*) of the Code which denies access to the remedies for unjust dismissal if the complainant "has been laid off because of lack of work or because of the discontinuance of a function".

[2] In reasons reported as 2021 FC 177, the Federal Court found, at paragraph 68 of its decision, that the appellant had not satisfied it that "the adjudicator's conclusions were irrational or arbitrary or that the adjudicator's decision was unreasonable under established principles." For the reasons which follow, I would dismiss the appeal with costs.

II. Facts and Legislation

[3] In the latter half of 2018, the respondent Bell Solutions Techniques Inc. (BST) was directed by its parent company BCE Inc. to reduce its workforce for economic reasons. As a result, management was directed to identify which supervisory positions could be eliminated. The appellant was a supervisor in the Laval Region, one of a number of such supervisors, each of whom supervised 26 technicians who installed telecommunications equipment (television, internet and land-line telephones) on customer premises.

[4] The selection of the positions to be eliminated was made at the regional management level. The Divisional Finance Chief, Mr. Pathak, undertook an analysis that led him to believe that, in the Laval district where the appellant worked, three positions could be eliminated. The Regional Manager, Mr. Jean-Luc Riverin, conducted his own analysis that showed that only two positions could be cut and the target was changed to reflect this. The Regional Manager decided that the appellant's position would be one of those eliminated, relying on the appellant's score on

the leadership criterion in the evaluation grid. The appellant had the lowest score on this criterion (“Partially Achieve Leadership”) among the supervisors in the Laval district in his mid-year evaluation in June 2018. This criterion was chosen because it was management’s intention that, following the restructuring, the number of technicians supervised by each of the remaining supervisors would increase from 26 to 28.

[5] The adjudicator began his analysis by setting out the relevant legislative provisions of the Code:

240 (1) Subject to subsections (2) and 242(3.1), any person	240 (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d’un inspecteur si :
(*a*) who has completed twelve consecutive months of continuous employment by an employer, and	*a*) d’une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;
(*b*) who is not a member of a group of employees subject to a collective agreement,	*b*) d’autre part, elle ne fait pas partie d’un groupe d’employés régis par une convention collective.
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.	
242 (3) Subject to subsection (3.1), the Board, after a complaint has been referred to it, shall	**242** (3) Sous réserve du paragraphe (3.1), le Conseil, une fois saisi d’une plainte :
(*a*) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and	*a*) décide si le congédiement était injuste;

(*b*) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.	*b*) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.
242 (3.1) No complaint shall be considered by the Board under subsection (3) in respect of a person if	**242 (3.1)** Le Conseil ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants :
(*a*) that person has been laid off because of lack of work or because of the discontinuance of a function; or	*a*) le plaignant a été licencié en raison du manque de travail ou de la suppression d'un poste;
…	(…)

[6] The adjudicator then observed that when an employer invokes the exception set out in subsection 242(3.1), a two-step analysis is mandated. In the first step, the adjudicator must be satisfied that a work force reduction has in fact taken place. In the second step, the adjudicator must be satisfied that the process followed to choose the positions to be eliminated was reasonable and was not simply a bad faith strategy to get rid of a particular employee.

[7] The adjudicator found that BST went through a genuine work-force reduction.

[8] The adjudicator then examined the process leading to the appellant's termination. He found that BST made its decision solely on the leadership criterion for two reasons. The first reason was that, since management intended to increase the number of technicians supervised by each supervisor, leadership was important because it was directly relevant to supervision. The second reason was that there was little difference between supervisors on the other elements of the evaluation grid such that those other elements did not lend themselves to distinguishing between candidates. The adjudicator found that this explanation was not unfounded.

[9] The adjudicator then considered the adequacy of the means taken to assess the leadership qualities of the supervisors in the district, finding that a management meeting to discuss the merits of all the supervisors, as was held in this case, was a normal way of assessing performance.

[10] The adjudicator rejected the appellant's suggestion that acting supervisors chosen from within the bargaining unit should have been let go before him. The adjudicator found that the use of acting supervisors allowed the employer to respond to changing needs. In fact, at the end of the restructuring exercise, there was two fewer supervisory positions, while the number of acting supervisors had not increased.

[11] The adjudicator also found that the fact that two vacancies opened up in the Gatineau district when the incumbents resigned was irrelevant. He found that his decision had to be made on the basis of the information known at the date the termination decision was taken and not on the basis of information which subsequently came to light. The adjudicator commented that the situation would have been different if a hiring process for the appellant's position had been launched within a few weeks after his termination.

[12] In addition, the adjudicator found that, whatever antipathy existed between the appellant and his manager, it was not put forward in a way that allowed him to conclude that the appellant was unjustly dismissed.

[13] In the end, the adjudicator held that the evidence did not establish that BST had used a sham restructuring as a cover for getting rid of the appellant. As a result, the exception found at subsection 242(3.1) of the Code applied and the appellant's complaint was dismissed.

III. Statement of Issues

[14] The appellant's notice of appeal lists a number of grounds for the appeal which fall into two broad categories. Firstly, the appellant argues that the adjudicator breached his right to procedural fairness. The appellant claims the adjudicator failed to read and understand the Quebec jurisprudence which was cited to him. In his decision, the adjudicator commented that this jurisprudence was not particularly relevant to the case before him. The appellant also argues that the adjudicator denied him procedural fairness when he accepted hearsay evidence without explaining why he rejected the appellant's objection to its admissibility.

[15] Secondly, the appellant argues that the adjudicator's decision is unreasonable.

IV. Analysis

[16] Since this is an appeal from the Federal Court sitting as a court of revision, this Court's task is to determine if the Federal Court correctly identified the standard of review and applied it correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 45 [*Agraira*]. The Supreme Court of Canada recently rejected an invitation to reconsider *Agraira*, thus confirming that it remains good law: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 12. The practical effect of *Agraira* is that the

appellate court steps into the shoes of the reviewing court and focuses on the administrative decision itself.

[17] The first ground of appeal is that the adjudicator breached procedural fairness when he: (1) failed to read the Quebec jurisprudence which had been cited to him and (2) accepted hearsay evidence without dealing with the appellant's objection to the admissibility of that evidence.

[18] In his decision, the adjudicator, while not identifying the jurisprudence cited to him, dealt with it as follows at paragraph 47 of his award:

> I can see no reason to depart from these principles which have been endorsed by the majority opinion in the case law. Furthermore, I note that the decisions to which [appellant's counsel] has referred are less relevant because they concern proceedings commenced under the Quebec *Act respecting labour standards*, which bring into play very different legislative texts.
>
> (Translation by the Court)

[19] In dealing with this argument, the Federal Court commented that the appellant did not mention the decisions referred to or explain how this jurisprudence would have changed the result. On appeal, the appellant draws our attention to a certain number of cases: *Siemens Énergie Canada Ltd. c. AIMTA, section locale 2468, district 11*, 2021 CanLII 95111 (QC SAT) [*Siemens*], *Câblage Dynamique (2008) inc. c. Kaci*, 2017 CanLII 66293 (CA SA) [*Câblage Dynamique 2017*], *Câblage Dynamique (2008) inc. c. Kaci*, 2018 CanLII 65801 (CA SA) [*Câblage Dynamique 2018*], *Québec (Commission des normes du travail) v. Asphalte Desjardins inc.*, 2014 SCC 51, [2014] 2 S.C.R. 514 [*Asphalte Desjardins*], and *Société Radio-Canada, c. Association des Professionnels et des superviseurs*, 2018 CanLII 119223 (CA SA) [*Société Radio-Canada*].

[20] Counsel argues that, notwithstanding the adjudicator's setting aside of the Quebec jurisprudence, the latter applied Canadian jurisprudence in Quebec cases he presided over (*Siemens* at para. 55), and applied Quebec jurisprudence to cases he decided under the Code (*Câblage Dynamique 2018* at para. 94). While this may show that the adjudicator was inconsistent in his application of the jurisprudence, it does not prove that he did not read it.

[21] Counsel further argues that there is a "negative presumption that Tribunals draw when an Employer goes out of its way to avoid maintaining a link of Employment with an Employee": appellant's memorandum of fact and law at para. 9. This assertion is made without reference to the case or cases which apparently support it. A review of this jurisprudence discloses that a proposition similar to that put forward by counsel can be found in *Société Radio-Canada*, where the following appears at paragraph 117:

> The consistent jurisprudence teaches that an employer's failure to undertake significant efforts with a view to maintain in his employment the employee who is otherwise subject to layoff can legitimately lead to the conclusion that the layoff could conceal a dismissal disguised as a layoff.
>
> (Translation by the Court)

[22] Counsel argues that the Supreme Court's decision in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 [*Wilson*], should be interpreted so as to make the Canadian and Quebec jurisprudence on unjust dismissal more uniform. It will be recalled that one of the issues in *Wilson* was whether judges could intervene, using correctness as the standard of review, to break deadlocks in the arbitral jurisprudence on a given issue. In *Wilson*, the issue was whether payment of the common law notice period meant that a dismissal was not unjust

and therefore not subject to adjudication under the Code. The Supreme Court held that, even in those cases, the standard of review remained reasonableness:

> It is true that a handful of adjudicators have taken a different approach to the interpretation of the *Code*, but as this Court has repeatedly said, this does not justify deviating from a reasonableness standard: (citations omitted)
>
> *Wilson* at para. 17

[23] It follows from this that differences in arbitral jurisprudence must be worked out by the arbitral community and not by judges: see *Hussey v. Bell Mobility Inc*., 2022 FCA 95, 2022 A.C.W.S. 358 at para. 63.

[24] In any event, the issue of the uniformity of the arbitral jurisprudence does not arise in this case. The principle enunciated in *Société Radio-Canada* is that, an adjudicator can draw an adverse inference from an employer's failure to undertake significant "efforts with a view to maintain in his employment the employee who is otherwise subject to layoff": *Société Radio-Canada* at para. 117. As we shall see, the facts upon which the appellant relies are not such as to give rise to this adverse inference.

[25] Without knowing what exactly was cited by the appellant, it is difficult to know if the adjudicator owed it to the appellant to justify his disinclination to follow the jurisprudence cited to him. It may be that the difference in legislative texts was a sufficient rationale. The failure to refer to the Quebec jurisprudence is not evidence that the adjudicator did not read it.

[26] The appellant also argues that the adjudicator breached procedural fairness when he overruled the appellant's objections to two pieces of evidence on the ground that they were

hearsay. The first was the evidence given by a BST executive who testified as to postings calling for applications for supervisors shortly after the appellant's employment was terminated. In cross-examination, counsel established that the witness had not requested that the posting be issued, did not produce it, was not aware when it was requested and did not participate in the decision to issue the posting.

[27] The second piece of evidence to which the appellant objected was the press release issued by BCE around the time of the appellant's layoff, announcing that it had reduced its management workforce by 4%, that is, 700 positions, generating annual savings of approximately $75 million dollars.

[28] In both cases, the adjudicator accepted the evidence without referring to the appellant's objection to its introduction.

[29] Subsection 242(3) provides that complaints are adjudicated by the Canada Industrial Relations Board (the Board) so that adjudicators appointed under section 12.001 of the Code are the Board's delegates and their decisions are decisions of the Board: see subsection 12.001(3) of the Code. Subsection 12.001(2) provides that adjudicators have all the powers of the Board in relation to any matter for which they have been appointed. Paragraph 16(*c*) of the Code provides that the Board's powers include the power:

16 The Board has, in relation to any proceeding before it, power:	**16** Le Conseil peut, dans le cadre de toute affaire dont il connaît :
…	(…)
(*c*) to receive and accept such evidence and information on oath,	*c*) accepter sous serment, par voie d'affidavit ou sous une autre forme,

affidavit or otherwise as the Board in its discretion sees fit, whether admissible in a court of law or not;	tous témoignages et renseignements qu'à son appréciation, il juge indiqués, qu'ils soient admissibles ou non en justice;
…	(…)

[30] As a result, there was no legal impediment to the adjudicator's acceptance of hearsay evidence. In fact, there were circumstantial guarantees of the trustworthiness of the evidence in question.

[31] The job posting was for supervisor positions in all areas of Quebec and provided that candidates who responded would be examined once a position was vacant. The intention was to create a bank of qualified candidates so as to speed up the process of filling vacancies as they occurred. The adjudicator found that there was nothing inherently improbable in this evidence.

[32] Similarly, the BCE press release was a public document. We have no means of knowing what was said during the hearing in response to counsel's objection to the introduction of this evidence, but in the normal course, the adjudicator would have given an indication of his reasons for dismissing the objection. The absence of written reasons does not mean that reasons were not given. Once again, there is a difference between administrative justice and judicial justice. In any event, a ruling on a point of evidence is not a breach of procedural fairness.

[33] The appellant then argues that the adjudicator's decision was unreasonable for three reasons. Firstly, the appellant submitted that the adjudicator stopped his analysis three months before the actual termination took place.

[34] This argument is based on the fact that the appellant was advised of his layoff on October 1, 2018. The appellant argues that the effective date of his termination was January 5, 2019. In fact, the appellant's termination letter reads:

> Further to today's discussion, this is to advise you that, because of changes in the company, your position has been eliminated and your services will no longer be required after today. Your period of salary continuance will end on January 5, 2019 (your "End of employment date").
>
> Appeal Book at p. 95 (Translation by the Court) (my emphasis)

[35] The termination date is relevant because, in late December 2018 and early January 2019, two supervisor positions became vacant in Gatineau. The appellant complains at paragraph 36 k) of his affidavit that the employer did not deign to offer him one of these positions, although he does not say that he would have been willing to relocate to Gatineau if a position had been offered to him. It appears from the appellant's affidavit that the significance of these vacancies is his invocation of the principle that the failure of an employer to relocate an employee who is terminated for economic reasons is a significant indication of a disguised firing.

[36] The adjudicator took note of these vacancies but held that he was required to assess the employer's conduct as of the date of the decision to terminate the appellant's employment and not retrospectively. However, he went on to say that if a permanent position had been offered to someone in the Laval district in the weeks following the appellant's termination, the situation would have been different. It appears from this that the adjudicator's issue is not retrospectivity but rather the time/place horizon. The closer to the time and place of termination a change is made, the more likely it is to be an indication of a disguised firing. This reasoning is not unreasonable. In this case, the fact that two vacancies arose in Gatineau approximately two

months later does not, without more, suggest that the appellant's termination was a disguised firing.

[37] Secondly, the appellant argues that the adjudicator unreasonably declined to deal with the impact of the reasonable notice period, relying on *Asphalte Desjardins*. That case involved an employee who gave his employer notice of his intention to leave his employment in approximately three weeks. When the employer was unable to persuade him to stay on, the employer dismissed the employee immediately without payment in lieu of notice. As the Supreme Court noted, the case involved the interplay between the provisions of the *Civil Code of Quebec*, C.Q.L.R., c. CCQ-1991 and the *Act respecting labour standards*, C.Q.L.R., c. N-1.1 of Quebec. The *Act respecting labour standards* is not relevant to federally regulated employees.

[38] The appellant argues that the prolongation of this employment contract during the notice period, as decided in *Asphalte Desjardins*, called for the adjudicator to deal with the Gatineau vacancies and the offer of a supervisory position in the appellant's district during that time. It appears from paragraph 73 of BST's memorandum of fact and law that this argument was not made before the adjudicator. It is therefore difficult to criticize him for not grappling with *Asphalte Desjardins*.

[39] The appellant's termination letter also provided for an indemnity of six months' wages following his period of salary continuance. The appellant treats this entire period, 9.75 months, as his notice period so that the resignations in Gatineau would fall within the notice period. Even so, this would not assist the appellant. The adverse inference arising from the failure to retain a

redundant employee would not be made more compelling because the notice period had not expired. The appellant's argument is, essentially, that the employer was required to maintain a recall list so that laid off employees would have the first opportunity to fill vacancies in the workforce. This is a feature of many collective agreements, but it is not a requirement imposed by the Code.

[40] Finally, the appellant argues that the adjudicator's decision is unreasonable because it failed to deal with the Supreme Court's decision in *Wilson*.

[41] The appellant's view is that, because the Supreme Court commented in *Wilson* that the Quebec labour standards scheme displays significant structural similarities to the Code, the adjudicator ought to have provided an explanation as to how the Quebec provisions differed from equivalent provisions under the Code:

> Although it is true that sections 124 of the [*Act respecting labour standards*] and section 240 of the [Code] are worded differently, the Arbitrator does not ever explain how the overall text, context and object of art. 240 [of the Code] and 124 [*of the Act respecting labour standards*] are different in substance or why they should be interpreted differently, given the Supreme Court's findings in *Wilson* and *Rizzo Shoes*.
>
> Appellant's memorandum of fact and law at para. 32

[42] This argument was dealt with when disposing of the appellant's procedural fairness argument. The responsibility of achieving uniformity in the interpretation of the unjust dismissal legislation in Quebec and under the Code is that of the adjudicators interpreting this legislation.

[43] The appellant's argument that the adjudicator was unreasonable in not grappling with *Wilson* fails.

[44] In the end, the essence of the appellant's case is found at paragraph 37 of his memorandum of fact and law:

> The Adjudicator also needed to grapple with the Appellant's argument that the Employer could not simply abolish supervisor positions (performed by employees that the Employer considered undesirable) by saying that there were too many supervisors, while giving "temporary" promotions to unionized employees (that the Employer considered high-performing) because there were not enough supervisors.

[45] The appellant's statement of the problem (editorial comments aside) does not deal with the fact that there was a restructuring with BCE, in which BST employees were terminated. Pursuant to the direction received from BCE and particularized by Mr. Pathak, each district was given a number of positions to eliminate. The appellant could not realistically argue that the whole exercise was a subterfuge designed to get rid of him. At paragraph 52 of his award, the adjudicator found that there had been a legitimate restructuring exercise.

[46] The issue then was who was to be let go. The adjudicator reviewed the criteria used to identify the unlucky employees and found that there was no reason to believe that these factors were unreasonable.

[47] The appellant's complaint is due to the fact that "temporary" supervisors kept their jobs while he lost his. The appellant's view was that they should have been let go before him. This ignores the fact that the restructuring at BST was directed at permanent supervisory staff.

Essentially, this argument is that terms of the restructuring should have been different. That is not a determination the adjudicator could have made.

[48] The appellant's affidavit discloses that he was very troubled by the fact that one of the temporary supervisors was promoted to a permanent position in June 2019, some 9 months or so after he was advised of his termination. This suggests to him that his termination was a disguised firing. One can understand why he felt this way, without necessarily agreeing that his assessment is correct.

[49] Unfortunately, the adjudicator did not deal with this issue explicitly. However, when one reads paragraph 59 of the adjudicator's award, one can see that the adjudicator's time horizon was considerably shorter than the appellant's:

> The situation would be obviously different if the employer had terminated Mr. Rouleau-Halpin's employment, justifying this act by the need to reduce its staff and then proceeded to hire this type of employment, <u>in Laval,</u> <u>a few weeks later</u>. In effect, it would then be possible to perceive the existence of a pretext which would illustrate the employer's bad faith. (my emphasis)
>
> (Translation by the Court)

[50] It is relatively clear from this passage that the adjudicator, while reluctant to consider the employer's post-termination behaviour, was prepared to do so if the conduct flagged by the appellant occurred within a few weeks of the decision to terminate and was such as to suggest that the employer had acted in bad faith. It is apparent from this passage that the adjudicator would not review conduct which occurred months later. Given that the conduct complained of in this case occurred several months after the decision to terminate the appellant was taken, the adjudicator's reluctance to reach ahead that far was not unreasonable.

V. Conclusion

[51] As result, I find that the appellant's right to procedural fairness was not breached and that the adjudicator's decision was reasonable. For these reasons, I would dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree.
Marianne Rivoalen J.A."

"I agree.
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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