Federal Court  Cour fédérale

Date: 20190704

Docket: T-465-19

Citation: 2019 FC 892

Ottawa, Ontario, July 4, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Introduction

[1] The Respondent, the Attorney General of Canada, acting on behalf of Employment and Social Development Canada [ESDC], brings a motion in writing to dismiss in a summary manner the application for judicial review launched by the Applicant, the Public Service Alliance of Canada. The application for judicial review challenges the decision of the Respondent in

regard to the entitlement to retroactive pay arising from a review of the job description and proper classification of certain positions; this is explained in more detail below.

[2] The Respondent argues that the Applicant should pursue the grievance it has filed instead of bringing an application for judicial review. The Applicant says the subject-matter of the dispute cannot be dealt with by grievance, pursuant to the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 [*Act*], and that it only filed a policy grievance to protect against the expiry of the time limit.

[3] For the reasons that follow, I am dismissing this motion to strike, because I am not persuaded that the application for judicial review is "so clearly improper as to be bereft of any possibility of success" (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588, at page 600 (CA) [*David Bull Laboratories*]).

II. Context

[4] In 2008, ESDC decided to try to simplify the number of work descriptions for its employees involved in service delivery. This led to the filing of approximately 4,500 grievances relating to the description of the job content and the classification of the new work descriptions. In order to deal with these, the Applicant and the Respondent sensibly agreed upon a Memorandum of Understanding (MOU), by which the grievances would be dealt with by grouping similar claims together, and applying the results of one case to other similar claims. This agreement did not, however, specify how disputes relating to its implementation were to be addressed.

[5] The MOU included the following provision at section 8: “The outcome of the grievance(s) processed will be applied to all other incumbents of the applicable national work descriptions retroactive to September 14, 2006.” The Applicant states that in reliance upon this provision, it did not continue its efforts to ensure that all incumbents in the various positions filed grievances, in addition to the 4,500 already filed. It should be noted that, in the natural course of things, over the period of time since the original MOU the group of potential beneficiaries of retroactive pay was not static; during that time-frame many employees would have been appointed into the positions covered by the MOU, and many would have left those positions for other jobs. The dispute before the Court pertains to a sub-set of these employees.

[6] Following various processes which do not need to be described in detail here, decisions were reached regarding changes to the new work descriptions, and the appropriate classification of the positions. This resulted in a pay increase for all officers performing Program Service Officer duties, as well as an entitlement to retroactive pay for current and former incumbents of these positions, pursuant to article 8 of the MOU.

[7] In implementing these changes, the Respondent decided that current incumbents would be entitled to receive both the pay increase and retroactive payment (depending on when they first occupied the position). The Respondent also extended the entitlement to retroactive pay to previous incumbents who had filed a grievance; this did not, however, include previous incumbents who had not filed a grievance.

[8] The Applicant complains that the Respondent has breached the MOU by limiting the entitlement to retroactive pay in this manner. That is the essence of the application for judicial

review filed by the Applicant on March 15, 2019. It is also the essence of the policy grievance filed by the Applicant on March 29, 2019 pursuant to section 220 of the *Act*.

[9] The Respondent has brought a motion requesting the Court to "dismiss" the application for judicial review. Because this motion is brought before the filing of affidavits, any cross-examination on these affidavits, the filing of the Application Record by both parties and the argument of the merits, it is in effect a motion to strike the application at an interlocutory stage.

III. Issue

[10] The only issue at this stage is whether the motion to strike should be granted.

IV. Analysis

[11] The Respondent argues that the application for judicial review is an "employment-related issue" which should be pursued by way of grievance rather than judicial review. The Applicant argues that the legislative regime does not allow it to file a grievance in relation to an alleged breach of the MOU, and that individual employees cannot file a grievance about the breach of an agreement to which they were not a party. It states that it filed the policy grievance only to protect against the expiry of the timelines, and the grievance states expressly that it is without prejudice to the application for judicial review. The Applicant argues that this is one of the "rare circumstances" in which the Court can accept jurisdiction over the matter.

[12] The resolution of this question involves consideration of a number of different principles.

[13] First, both the legislative context and the jurisprudence indicate that courts should generally not intervene in employment disputes before the process provided for in the comprehensive labour relations process contained in the *Act* has run its course. Justice McLachlin (as she then was) encapsulated the principle in *Weber v Ontario Hydro*, [1995] 2 SCR 929, at para 54 [*Weber*]: "disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts." This approach has been applied to disputes arising in federal workplaces governed by the *Act*: see, for example, *Amos v Canada (Attorney General)*, 2011 FCA 38 [*Amos*].

[14] The provisions of the *Act* reinforce this approach, including the strong privative clause in section 233, as well as the wording of section 236, which appears under the heading "No Right of Action":

Disputes relating to employment	**Différend lié à l'emploi**
236 (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.	**236 (1)** Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.
Application	**Application**
236 (2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.	**236 (2)** Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.

[15] The guiding principle was stated in relation to the prior legislation by Justice Binnie in *Vaughn v* Canada, [2005] 1 SCR 146, at para 2: "while the courts retain a residual jurisdiction to deal with workplace-related issues… the courts should generally in my view, as a matter of discretion, decline to get involved except on the limited basis of judicial review." To be clear, the reference by Binnie J to judicial review refers to a review of a decision-maker (for example, an arbitrator) appointed to hear a matter under the labour relations legislation. This is reinforced by the more general administrative law principle that parties can generally "proceed to the court system [to seek judicial review] only after all adequate remedial recourses in the administrative process have been exhausted" (*Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61, at para 30).

[16] This all points in favour of the Respondent's position. The underlying dispute is undoubtedly in relation to the terms and conditions of employment, a matter otherwise governed by the collective agreement reached between the parties and the applicable policies of the employer Treasury Board. In addition, a grievance has already been filed, and the process provided for under the legislation should be allowed to run its course before a court gets involved. The question of whether the Applicant can properly file a grievance, or whether individual employees could file grievances deriving from the alleged breach of the MOU should first be determined by the grievance process. If any of these decisions do not resolve the matter to the satisfaction of either party, an application for judicial review would be available.

[17] However, there are other principles that tend in the opposite direction.

[18] Under the *Federal Courts Act*, RSC, 1985, c F-7, section 18.4 provides that applications for judicial review "shall be heard and determined without delay and in a summary way." The

jurisprudence is consistent in finding that interlocutory motions in the context of applications for judicial review should be brought only in the clearest of cases.

[19] While the Court has the jurisdiction to dismiss in a summary manner an application for judicial review, this should only be done where the motion "is so clearly improper as to be bereft of any possibility of success… Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion" (*David Bull Laboratories*, at page 600). Justice Strayer observes that the *Federal Courts Rules*, SOR/98-106 are designed to ensure that applications for judicial review proceed under strict timelines: "the focus in judicial review is on moving the application along to the hearing stage as quickly as possible" (*David Bull Laboratories*, at page 598).

[20] More recently, the principle has been explained by Justice Stratas in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*], at para 47:

> There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 (CanLII) at paragraph 7; *Donaldson v. Western Grain Storage By-Product*s, 2012 FCA 286 (CanLII) at paragraph 6; cf. *Hunt v. Carey Canada Inc*., 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.

[21] A related principle is that interlocutory motions or requests for an "advance ruling" prior to the hearing of the merits of an application for judicial review are a matter of discretion, and "the Court will only exercise its discretion to provide an advance admissibility ruling where it is clearly warranted. Those embarking upon an interlocutory foray to this Court to seek such a ruling will not often find a welcome mat when they arrive" (*Association of Universities and*

Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22, at para 11). In that decision, Justice Stratas found, at paragraph 12, that in considering whether to exercise this discretion, relevant considerations include: whether such a ruling "would allow the hearing to proceed in a timelier and more orderly fashion"; whether the question being raised at the preliminary stage "turns on discretionary matters over which reasonable minds may differ, rather than a clear question of law"; and finally, whether the issue is "relatively clear cut or obvious". Although this case concerned a request for an advance ruling on a question of admissibility, the principles it stated apply more generally in the context of judicial review.

[22] This would argue in favour of allowing the judicial review to proceed to a hearing, where a judge will be able to consider all of the evidence presented in light of the submissions of the parties. On the face of it, the legal and factual foundations for the arguments do not appear to be overly complex, and the parties should not have to expend significant time and resources to prepare for the hearing.

[23] Allowing the judicial review to run its course may result in a decision that the application should be dismissed because the Applicant should have pursued the grievance route; it may result in a decision that the application has been rendered moot (depending on whether there is a decision on the grievance in the intervening period); it may result in a decision to grant the application for judicial review. Whatever the result, the matter will be decided "without delay and in a summary way" and that decision will be based on a full consideration of the evidence, the law, and the submissions of the parties, rather than on a summary motion brought in writing and on the basis of a very limited record.

[24] The decision on this motion involves the application of these principles to the facts of this particular case.

[25] As noted previously, the Respondent says that the application should be dismissed now because the Applicant should pursue the grievance route that it has already initiated; in the alternative, the Respondent says that any employees who are disappointed with the decision on eligibility for retroactive payments can file grievances, and the Applicant can support these employees in that process.

[26] The Applicant points to the wording of the relevant provisions of the *Act* and argues that none of them explicitly allow a grievance to be filed in relation to compliance with the MOU. It argues that section 220(1) allows policy grievances "in respect of the interpretation or application of the collective agreement or arbitral award", and that section 215 allows group grievances to be filed only in relation to the same matters. Further, individual employees cannot file grievances about the denial of retroactive payments because they are not a party to the MOU: see *Wray et al v Treasury Board (Department of Transport)*, 2012 PSLRB 64, at paras 21 and 25; *Cossette v Treasury Board (Department of Transport)*, 2013 PSLRB 32.

[27] A number of considerations point in the direction of exercising my discretion to strike the application for judicial review at this preliminary stage:

- The *Weber* line of jurisprudence signals that courts should generally defer to dispute resolution processes under comprehensive labour relations regimes rather than getting involved at the outset. This doctrine has been reinforced by the addition of section 236 (the "ouster" clause) to the *Act*. Several courts have noted the importance of the addition of this

provision as a signal that Parliament intended the labour relations regime to be the venue for addressing the full range of employment disputes at first instance: see *Bron v Canada (Attorney General)* (2010), 99 OR (3d) 749, at para 20 [*Bron*]; *Amos* at paras 57-61;

- The judge hearing the application for judicial review will not have the benefit of the expertise of the decision-makers in regard to the grievance, and thus will be put in a position of ruling on a matter involving an employment-related dispute without the benefit of a grievance decision. Indeed, it is precisely because of the need for familiarity with the workplace and ongoing labour relations expertise that Parliament created the scheme under the *Act* and doubly shielded it with both privative and "ouster" clauses. This speaks in favour of allowing the grievance process to be concluded rather than dealing with the judicial review at this stage;

- The dispute at the heart of this matter arises because of the application by the Respondent of the Treasury Board Bulletin on "Retroactive Reclassification and Appointment" dated May 27, 2011 in regard to the entitlement to retroactive pay under the MOU. This is not, at its core, a dispute that relates solely to the MOU, but rather it involves the interplay between the application of the Bulletin and the terms of the MOU. It is not entirely clear at this stage that this does not relate to the terms of the collective agreement or that the Applicant cannot pursue its claim by way of the policy grievance it has already filed, or by way of a group grievance under section 215 of the *Act*. Furthermore, it is not clear

whether the Directive is incorporated by reference into the MOU, either directly or indirectly;

- In addition, it appears that the individual employees affected by the application of this Bulletin may be able to grieve this decision under sub-paragraph 208(1)(a)(i), since it appears to involve "a direction or other instrument made or issued by the employer, that deals with the terms and conditions of employment". In *Glowinski v Canada (Treasury Board)*, (2006) FCJ No. 99, at paras 17-18, it was found that an employee could grieve under the predecessor legislation where the dispute involved the intersection of employer policy and the collective agreement;

- There are several cases which have found that "[a]lmost all employment-related disputes can be grieved under s. 208 of the PSLRA or s. 91 of the [*Public Service Staff Relations Act*, RSC 1985, c P-35]"; *Bron*, at para 15; *Van Duyvenbode v Canada (Attorney General)*, [2007] OJ No. 2716, at para 9. This suggests that a wide interpretation of grievance rights will guide the decision-maker in dealing with the Applicant's grievance.

[28] Against this, however, I must take into account the following factors:

- Most importantly, it is not clear at this preliminary stage of the proceeding that the application "is so clearly improper as to be bereft of any possibility of success" (*per David Bull Laboratories*), in view of the debate between the parties as to whether or not a grievance can be filed

about the alleged breach of the terms of the MOU, and in the absence of any binding authority that deals with this precise situation;

- The argument that the matter involves the interplay between the Treasury Board Directive and the MOU, and therefore falls within the terms of the collective agreement, was not squarely put before the Court in the submissions of the parties, and should be left to the judge hearing the merits of the application on the basis of a full evidentiary record and submissions on the point;

- While the dispute between the parties about work descriptions and position classifications has been going on for a very long time, the application here relates to a decision which was communicated to the Applicant on or about February 22, 2019. The application for judicial review of that decision was filed on March 15, 2019. If the process follows the usual timelines for a judicial review in this Court, it should normally be set down for hearing within six months from the date of filing and the hearing can be expedited if necessary;

- The process of preparing for the hearing of the application on its merits does not appear, on the material before me, to be particularly complex, expensive or lengthy, and so this does not weigh in favour of striking the application in order to avoid a needless and significant expenditure of time and money by the parties;

- Dismissing the application at this stage requires a determination that the Respondent's decision on retroactive pay pursuant to the MOU can be the subject of a grievance by the Applicant. This determination would be made on the basis of a very limited record and submissions. I agree with the Applicant that such a determination by the Court on this question could have an impact on other similar situations, and this also tends to favour not ruling on such a question at a preliminary stage.

[29] Having considered the matter, I am not persuaded that this application should be struck at this stage. Although there is force to the Respondent's argument that the dispute can be the subject of a grievance under the *Act*, I have not found that the Respondent has presented "a 'show stopper' or a 'knockout punch' – an obvious, fatal flaw striking at the root of this Court's power to entertain the application" (*per* Stratas JA in *JP Morgan*). Rather, I find that the arguments of the parties present a "debatable issue"; this is precisely the situation that Justice Strayer found not to warrant the exercise of such an exceptional discretionary jurisdiction in *David Bull Laboratories*.

[30] I want to underline, however, that this is not a determination that this case is "one of the rare circumstances" in which the Court can or should take jurisdiction to hear this matter (to borrow the phrasing of the Applicant). That is not what I am required to determine at this stage; rather, all that I have found is that I am not persuaded that – at this preliminary stage – the application is doomed to fail. Whether or not this is one of the "rare circumstances" in which judicial review may be granted before the labour relations process set out in the *Act* runs its course is a matter to be determined by the judge hearing the application.

[31] For these reasons, the motion to strike the application for judicial review is dismissed, with costs to be calculated in accordance with column III of the table to Tariff B, pursuant to Rule 407 of the *Federal Courts Rules*, SOR/98-106.

[32] As requested by the Respondent, I am ordering that the time limits pursuant to Rules 307, 309, and 310 shall run from the date of the issuance of this decision.

ORDER in T-465-19

THIS COURT ORDERS that:

1. The present application is dismissed;
2. The Respondent shall pay to the Applicant its costs of this Motion, calculated in accordance with column III of the table to Tariff B, pursuant to Rule 407; and
3. The time limits pursuant to Rules 307, 309, and 310 shall run from the date of the issuance of this decision.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-465-19
STYLE OF CAUSE:	PUBLIC SERVICE ALLIANCE OF CANADA v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	PENTNEY J.
DATED:	JULY 4, 2019

APPEARANCES:

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