Date: 20071010

Docket: T-2240-06

Citation: 2007 FC 1038

Ottawa, Ontario, October 10, 2007

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

GERALD WRY, GAVEN LEWIS and DANIEL AMUNDSON

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicants received summonses to attend a Public Service Labour Relations Board (PSLRB) adjudication hearing in relation to a co-worker. When they claimed overtime pay and expenses, the employer denied their claims. They grieved and their grievances were denied. They referred the matter to adjudication. PSLRB Adjudicator Dan Butler upheld the employer's denial of the claims.

[2] The applicants seek judicial review of the adjudicator's decision and assert that his interpretation of the relevant article of the Collective Agreement is patently unreasonable. They

contend that the adjudicator's interpretation cannot be supported rationally by the grammatical and ordinary language of the relevant article, or the Collective Agreement generally. For the reasons that follow, I conclude that the adjudicator's decision was not patently unreasonable.

Background

[3] The applicants are correctional officers at a federal medium-security institution at Dorchester, New Brunswick. Their employment is governed by a Collective Agreement between Treasury Board and the Union of Canadian Correctional Officers.

[4] On October 18, 2005, the applicants attended an adjudication hearing regarding another correctional officer (the Rose adjudication). Summonses had been issued, on behalf of the grievor, by the chairperson of the PSLRB. Each of the applicants was scheduled for a day of rest on October 18th. Based on article 23.01 of the Collective Agreement, the applicants claimed overtime pay and expenses with respect to their attendance at the hearing. As noted earlier, the employer denied the claims and their grievances were dismissed. The applicants referred the matter to adjudication under paragraph 209(1)(a) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (PSLRA). PSLRB member Dan Butler was appointed adjudicator pursuant to paragraph 223(2)(d) of the PSLRA.

[5] At the adjudication hearing on September 22, 2006, the applicants agreed that Adjudicator Butler would render one common decision for the three grievances. No evidence was called at the hearing. The parties agreed to rely on the three individual grievances and the employer's responses to them as the factual basis for the hearing. The only exhibit was the Collective Agreement.

The Collective Agreement

[6] The pertinent articles of the Collective Agreement are:

Article 2.01(1)
"leave" means authorized absence from duty by an employee during his or her regular or normal hours of work (congé)

Article 14.06

Where operational requirements permit, the Employer will grant leave with pay to an employee who is:

(a) a party to the adjudication,

(b) the representative of an employee who is a party to an adjudication, and

(c) a witness called by an employee who is a party to an adjudication.

Article 23.01

An employee, who is required by subpoena or summons to attend as a witness, or a defendant, or a plaintiff in an action against an inmate or any other person, in any of the proceedings specified in Clause "30.17", sub-clause "C" of this Agreement, as a result of the employee's actions in the performance of his or her authorized duties, shall be considered on duty and shall be paid at the applicable rate of pay and shall be reimbursed for reasonable expenses incurred for transportation, meals and lodging as normally defined by the Employer.

Article 30.17

The employer shall grant leave with pay to an employee for the period of time he or she is required:

(a) to be available for jury selection;
(b) to serve on a jury;
(c) by subpoena or summons to attend as a witness in any proceeding held:

(i) in or under the authority of a court of justice or before a grand jury,

(ii) before a court, judge, justice, magistrate or coroner,
(iii) before the Senate or House of Commons of Canada or a committee of the Senate or House of Commons otherwise than in the performance of the duties of the employee's position,
(iv) before a legislative council, legislative assembly or house of assembly, or any committee thereof that is authorized by law to compel the attendance of witnesses before it, or
(v) before an arbitrator or umpire or a person or body of persons authorized by law to make an inquiry and to compel the attendance of witnesses before it.

The Decision

[7] The adjudicator denied the applicants' grievance on the basis that "the adjudication hearing in question on October 18, 2005 was not 'an action against an inmate or any other person' as contemplated by article 23.01".

[8] In arriving at his decision, the adjudicator made the following findings:

- The phrase "an action against an inmate or any other person" is not completely open-ended. It must have a meaning that makes sense within the context of clause 23.01 and the overall architecture of the Collective Agreement;

- It cannot be said that the employer, acting as a party to an adjudication hearing where an employee is challenging the termination of his employment, can fall within "any other person" as contemplated by the phrase: "an action against an inmate or any other person" in Article 23.01;

- The parties to the Collective Agreement intended that the wording of clause 23.01 apply to something specific to the work of correctional officers or specific to their workplace. They intended that there are certain types of proceedings that correctional officers may be compelled to attend, specific to their work, that merit the special benefits associated with being accorded "on duty" status;

- There is nothing in a reference to adjudication contesting a disciplinary termination that, *per se*, is specific to the work of correctional officers or their workplace;

- To accept the notion that attendance as a witness under summons at any and all of the classes of proceedings outlined in clause 30.17(c) gives rise to an entitlement under clause 23.01 equates to reading clause 23.01 as if "an action against an inmate or any other person" were not included or had no significance.

The Standard of Review

[9] The parties jointly submit, based on *Canada (Attorney General) v. Public Services Alliance of Canada*, [1993] 1 S.C.R. 941 (*PSAC*), that the applicable standard of review is patent unreasonableness. *PSAC* involved a decision of the Public Service Staff Relations Board, the predecessor to the decision-making body in this case.

[10] There is ample authority from the Federal Court and the Federal Court of Appeal holding that, in circumstances where an adjudicator's decision turns on the interpretation of a provision of a collective agreement (and no external statutes or constitutional issues are involved), the standard of

review is patent unreasonableness: *Banton v. Canada (Treasury Board)* (1995), 90 F.T.R. 222 (F.C.T.D.); *Canada (Attorney General) v. Cleary* (1998), 161 F.T.R. 238 (F.C.T.D.); *Barry v. Canada (Treasury Board)* (1997), 221 N.R. 237 (F.C.A.); *Currie v. Canada (Canadian Customs and Revenue Agency)*, [2007] 1 F.C.R. 471 (F.C.A.).

[11] The reasonableness standard of review applied in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004[1 S.C.R. 609 (*Voice Construction*) is not appropriate in this case. The Federal Court of Appeal noted, in *Public Service Alliance of Canada v. Canada (Canadian Food Inspection Agency)* (2005), 343 N.R. 334 (F.C.A.), that an adjudicator of the PSSRB is not an *ad hoc* adjudicator appointed by the parties. Rather the adjudicator is an individual with institutional expertise. Additionally, the Court determined that the question of whether the provisions of the collective agreement are triggered on the facts of the case is one of mixed fact and law.

[12] Unlike the situation in *Voice Construction*, section 233 of the PSLRA contains a privative clause regarding the decision of the adjudicator. Further, article 49.01(h) of the Collective Agreement contains a strong privative clause with respect to the adjudicator's determination.

[13] For the foregoing reasons, I concur with the parties that the applicable standard of review is that of patent unreasonableness.

Analysis

[14] The applicants submit that the adjudicator's decision was patently unreasonable because it is at odds with the plain and literal meaning of the words used in the article and with the scheme of the Collective Agreement. They claim that the decision turns on the meaning attributed to the phrase "any other person". According to the applicants, the word "any" in article 23.01 refers to "any" of the cases set out in article 30.17(c). In plain English, it cannot mean anything else. The words simply mean what they say. The adjudicator's decision renders the clause meaningless and yields an absurd result.

[15] I disagree with the applicants' position. It is evident that the adjudicator fully appreciated his task. He stated that the basis of his determination had to begin with the words in article 23.01 and that he was required to give plain meaning to the words. He was satisfied that an "adjudication hearing" was among the classes of proceedings listed in article 30.17(c), as cross-referenced in article 23.01. He defined the critical issue as "whether an adjudication hearing can be 'an action against an inmate or any other person' within the meaning of [article] 23.01".

[16] After analysing the defined issue, the adjudicator opined that it "stretches the imagination to hold that the parties intended the words 'any other person' to mean anyone or any entity 'under the sun'". Rather, its meaning had to be discerned contextually within article 23.01 as well as the Collective Agreement. He determined that the phrase "any other person" took its colour from the word "inmate" as well as from the words "specific to the work of correction officers or specific to their workplace".

[17] The adjudicator was not convinced that the employer, acting as a party to an adjudication hearing where an employee was challenging the termination of his employment, could be interpreted as being an "other person" within the meaning of the phrase "inmate or any other person". Further, there was nothing in a reference to adjudication contesting a disciplinary termination that, *per se*, was specific to the work of correctional officers or their workplace. While the details and circumstances of a reference "might well reflect conditions specific to corrections work", the action of referring a termination decision to adjudication itself did not.

[18] The adjudicator did not accept that the phrase "as a result of the employee's actions in the performance of his authorized duties" indicated that the proceeding must be "work-related" in the general sense. Notably, there was no evidence before the adjudicator establishing that the adjudication in question was, or could have been, specific to the work of correction officers, or specific to their workplace. Hence, it is difficult to conceive that the conclusion could have been otherwise.

[19] The adjudicator left the door open as to whether an action against the employer "could qualify in some circumstances" as specific to the correctional workplace. Whether any such action could involve an adjudication hearing (that would qualify for the purposes of article 23.01) also remained an open question.

[20] Further, the adjudicator specifically addressed the presence of the word "any" in article 23.01. He did not accept that the mere presence of the word constituted sufficient reason to conclude that the parties intended that attendance as a witness under summons at any and all of the

classes of proceedings outlined in article 30.17(c) would give rise to an entitlement under article 23.01. Meaning had to be given to the conditional or modifying phrase “an action against an inmate or any other person”. Any other interpretation would ignore the presence of the phrase or render it insignificant.

[21] In conclusion, the adjudicator determined that the most reasonable interpretation of the cross-reference to “any of the proceedings specified in [article] 30.17, sub-clause “C” of this Agreement”, consistent with the intent of the parties, required that the action triggering court duty must also be “a proceeding listed in article 30.17(c)(v)”. The cross-reference constituted a device used by the parties for simplicity. While the drafting might have been clearer, the words did not bear the meaning argued by the applicants.

[22] Returning to the standard of review regarding PSLRB adjudicators’ decisions, curial deference is the norm. It is for the applicants to establish that the decision is patently unreasonable, that is, it is clearly irrational. This they have failed to do.

[23] The adjudicator had regard to the relevant provisions of the Collective Agreement and to the specific impugned provision. He correctly identified his task, analysed the issue, and provided cogent reasons justifying his determination. Even in circumstances where the court might have interpreted the provision differently (and I do not suggest that is the case here), absent a clearly irrational result, judicial intervention is not warranted.

[24] Correctness is not the test. The interpretation need only be a rational one. The interpretation advanced by the adjudicator, in my view, is more rational than that advanced by the applicants. In this respect, I note the respondent's submission that, on the applicants' interpretation, the article would give the applicants more benefits for a day of rest than for a day of duty.

[25] In the result, the application for judicial review must be dismissed.

ORDER

THIS COURT ORDERS THAT the application for judicial review is dismissed with costs to the respondent.

"Carolyn Layden-Stevenson"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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