Date: 20080125

Citation: 2008 FC 84

Docket : T-1362-07

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

YVES NANTEL

Respondent

Docket: T-1386-07

BETWEEN:

YVES NANTEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] Two applications for judicial review have been consolidated. In docket T-1362-07, the Attorney General of Canada (hereinafter "the applicant") is seeking judicial review of the decision by the Public Service Labour Relations Board (hereinafter the "PSLRB") ordering it to pay interest to Mr. Nantel (hereinafter "the respondent") on his salary adjustment. In docket T-1386-07, the respondent seeks judicial review of the same decision with respect to the calculation of the amount to be paid.

* * * * * * * *

[2] On January 5, 1993, the respondent was appointed to a material management officer position (PG-02) with the Correctional Service of Canada at the La Macaza Institution. As of January 6, 1997, he had reached the top of his salary scale.

[3] On March 4, 2002, the respondent received a letter indicating that an error had been discovered in his file for the period of January 5, 1993, to January 5, 1997, and that he was owed a salary adjustment of $6,393.01. He received this amount on March 8, 2002.

[4] By letter received on April 8, 2002, the respondent requested that interest be paid on the retroactive pay, for the period of January 5, 1993, to March 13, 2002. The applicant denied this request, and the respondent eventually filed a grievance with the PSLRB on October 26, 2004, under the *Public Service Labour Relations Act*, R.S.C. 1985, c. P-35 (hereinafter the "PSLRA").

[5] On April 1, 2005, a new *Public Service Labour Relations Act* (hereinafter the "new Act") was proclaimed in force. However, under section 61 of the *Public Service Modernization Act*, S.C. 2003, c. 22, referrals to adjudication under the PSLRA must be determined under the old Act.

* * * * * * * *

[6] On June 28, 2007, the PSLRB allowed the grievance in part and ordered the applicant to pay simple interest to the respondent on the salary adjustment, for the period of 1993 to 1996.

[7] The adjudicator accepted the applicant's argument that there is a common law principle that interest is payable by the Crown only where a statute or contract so provides. However, in keeping with *Nova Scotia Government and General Employees Union v. Nova Scotia (Public Service Commission)*, 2004 NSCA 55, [2004] N.S.J. No. 144 (QL), the adjudicator concluded that "the remedial power set out in the former *Act* and in the collective agreement may supplant the principle of Crown immunity"; this power was stated in subsection 21(1) and section 96.1 of the PSLRA, which read as follows:

21. (1) The Board shall administer this Act and exercise such powers and perform such duties as are conferred or imposed on it by, or as may be incidental to the attainment of the objects of, this Act including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Act, with any regulation made hereunder or with any decision made in respect of a matter coming before it.	**21.** (1) La Commission met en œuvre la présente loi et exerce les pouvoirs et fonctions que celle-ci lui confère ou qu'implique la réalisation de ses objets, notamment en prenant des ordonnances qui exigent l'observation de la présente loi, des règlements pris sous le régime de celle-ci ou des décisions qu'elle rend sur les questions qui lui sont soumises.

96.1. An adjudicator has, in relation to the adjudication, all the powers, rights and privileges of the Board, other than the power to make regulations under section 22.	**96.1** L'arbitre de grief a, dans le cadre de l'affaire dont il est saisi, tous les droits et pouvoirs de la Commission, sauf le pouvoir réglementaire prévu à l'article 22.

[8] After finding that he had the power to order interest against the Crown, the adjudicator considered the submissions about the calculation of interest at paragraph 63 of his decision:

> In *Morgan*, a majority of Federal Court of Appeal judges determined that the compensation period begins at the time of the wrongful action. If this reasoning is applied to this case, the employer's error occurred on January 5, 1993, at the time of the grievor's acting appointment to a material management officer position at the PG-02 group and level, when the revision of his pay should have been made. The pay period is to continue throughout the time the grievor lost pay, which would be until 1996. I cannot grant the grievor the interest he claims for the period from 1997 to 2002 or up to the date of this decision.

[9] Finally, the adjudicator concluded that the respondent had not demonstrated "that awarding compound interest is necessary to compensate for the loss suffered" and that, therefore, simple interest would be awarded.

* * * * * * * *

[10] The applicant in docket T-1362-07 contends that the adjudicator erred in law and/or exceeded his jurisdiction by ordering the employer to pay interest to the respondent. I agree.

[11] According to the common law principle of Crown immunity, the Crown is not required to pay interest on monies owing, unless a statute or contract so provides. The case law is very clear on this point. In *His Majesty the King v. Roger Miller & Sons Limited*, [1930] S.C.R. 293, the Supreme Court of Canada stated the following:

> It was argued that the interest claimed should be treated as part of the cost of the work, and therefore is payable under the terms of the contract, but this argument seems quite unsound. It is a mere case of moneys becoming due to respondents at certain times and being withheld beyond the due dates, in which case the Crown is not liable to pay interest during default except under special circumstances such as the existence of statutory provision or contractual obligation.
>
> (Emphasis is mine.)

[12] Subsequently, in *His Majesty the King v. Carroll*, [1948] S.C.R. 126, the Supreme Court of Canada again clearly affirmed:

> . . . There can be no recovery of interest against the Crown apart from contract or statute; *The King v. Racette* [[1948] S.C.R. 28], and cases referred to.

[13] In *Eaton v. Canada*, [1972] F.C. 185, the Federal Court of Canada unequivocally concluded that interest could not be awarded against the federal Crown in the context of the PSLRA. At paragraph 14, the Court determined that "[t]here is no provision for payment of interest in the collective agreement [which was governed by the PSLRA] or in any relevant statute." It is important to note that no decision to the contrary by this Court, or even any other Court, in the specific context of the PSLRA, was brought to my attention.

[14] This jurisprudence was applied consistently and unequivocally by the PSLRB which, apart from the adjudicator involved in the decision *a quo*, has always held that it did not have jurisdiction to order the federal Crown to pay interest, absent a provision to the contrary in a statute or contract (see *Ogilvie and Treasury Board (Indian and Northern Affairs)*, [1984] C.P.S.S.R.B. No. 122, *Puxley and Treasury Board (Transport Canada)*, [1994] C.P.S.S.R.B. No. 95, *Dahl and Treasury Board (Agriculture Canada)*, [1995] C.P.S.S.R.B. No. 59, *Matthews and Canadian Security Intelligence Service*, [1999] C.P.S.S.R.B. No. 31 and *Guest v. Canada Customs and Revenue Agency*, [2003] C.P.S.S.R.B. No. 73).

[15] The decisions in *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391 (C.A.), *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (C.A.), *Autocar Connaisseur Inc. v. Canada (Minister of Labour)*, [1997] F.C.J. No. 1363 (T.D.) (QL) and *Pommerleau v. Autocar Connaisseur Inc.*, [2000] F.C.J. No. 907 (C.A.) (QL), cited by the adjudicator in support of his decision and relied on by counsel for the respondent before me, were not made in the context of the PSLRA. These decisions deal with complaints filed under the *Canadian Human Rights Act* or the *Canada Labour Code*. The relevant provisions of these statutes provide that "compensation" may be awarded to the complainant. In those decisions, interest was awarded under the heading of "compensation". In *Rosin*, the Court specifically stated that "[c]ourts, including this Court, have held that interest may be awarded in other similar contexts, under the concept of 'compensation', for to deny it would be to fail to make the claimant whole, especially in these days of high interest rates." The

PSLRA does not contain a heading for “compensation” or any other heading of a similar nature under which a PSLRB arbitrator can award interest.

[16] In relying on *Nova Scotia Government and General Employees Union*, above, the adjudicator accepted that there is a common law principle that the Crown is not required to pay interest on monies owing, unless this principle is supplanted by a statute or contract that provides otherwise. However, when the adjudicator determined, on the basis of the same case and the provisions in subsection 21(1) and section 96.1 of the PSLRA, that this common law principle was supplanted by the PSLRA and/or the collective agreement, I am of the view that he erred in law.

[17] Unlike the *Eaton* decision, *supra*, the *Nova Scotia Government and General Employees Union* case was not decided in the context of a federal regime and did not deal with the power to award interest under the PSLRA. Moreover, in that decision, the Court found, at paragraph 36, that the power to award interest “is implied by the terms of the *Civil Service Collective Bargaining Act* or by the Collective Agreement between the parties . . . Whether that power to award interest should be implied is a matter of interpretation of the governing statute and Collective Agreement.” In *Eaton*, the Federal Court determined unequivocally that interest could not be awarded in the context of the PSLRA. I agree with the applicant that, pursuant to that decision, there is no implied power to award interest under the PSLRA or the collective agreement and therefore *Nova Scotia Government and General Employees Union* does not apply to decisions made in the context of the PSLRA and is not relevant in this case.

[18] Against this backdrop, it seems clear to me that the PSLRB adjudicator erred in law in ordering, as he did, that the Crown pay interest to the respondent. In my view, the adjudicator was bound by the *Eaton* decision, *supra*, the only case that appears to have been decided in the context of the PSLRA, and which found that this Act did not authorize awarding interest against the federal Crown. Despite the deference that the respondent would like to see accorded to the adjudicator in this case, I am of the view, under the circumstances, that the intervention of this Court is warranted and that the decision, which is erroneous in law, must be set aside.

[19] Accordingly, the decision by the PSLRB adjudicator dated June 28, 2007, in this Court's docket T-1362-07 is set aside, and the matter is returned to the PSLRB for rehearing by a different adjudicator. The application for judicial review in docket T-1362-07 is therefore allowed, with costs against the respondent.

[20] As a result of the foregoing, the application for judicial review in docket T-1386-07 must necessarily be dismissed. However, there is no award of costs in this regard.

"Yvon Pinard"
Judge

Ottawa, Ontario
January 25, 2008

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1362-07 and T-1386-07
STYLES OF CAUSE:	ATTORNEY GENERAL OF CANADA v. YVES NANTEL / YVES NANTEL v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 14, 2008
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Pinard
DATED:	January 25, 2008

APPEARANCES:

Adrian Bieniasiewicz	FOR THE APPLICANT / RESPONDENT
Sean T. McGee Adrian Ishak	FOR THE RESPONDENT / APPLICANT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT / RESPONDENT
Nelligan O'Brien Payne LLP Ottawa, Ontario	FOR THE RESPONDENT / APPLICANT