Date: 20100216

Docket: T-743-09

Citation: 2010 FC 154

Ottawa, Ontario, February 16, 2010

PRESENT: The Honourable Justice de Montigny

BETWEEN:

CANADA POST CORPORATION

Applicant

and

CANADIAN UNION OF POSTAL WORKERS

Respondent

REASONS FOR ORDER AND ORDER

[1] This case involves a complaint by the Canadian Union of Postal Workers ("CUPW") under the occupational health and safety provisions contained in Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("the *Code*"). CUPW filed a complaint alleging that Canada Post Corporation ("Canada Post") violated several provisions of the *Code* by excluding the CUPW health and safety representatives from participating in a process implemented by Canada Post to assess the safety of delivery to rural mail boxes.

[2] At issue in this application for judicial review is whether an Appeals Officer erred in his interpretation of the time limits for occupational health and safety appeals contained in s. 146(1) of the *Code*. The Applicant seeks judicial review of the Appeals Officer's interlocutory decision in which he accepted the appeal of CUPW as timely under s. 146(1). For the reasons that follow, I have found that the Appeals Officer erred in his interpretation of that provision.

I. The facts

[3] The Applicant, Canada Post, is an agent of Her Majesty in right of Canada, pursuant to section 23 of the *Canada Post Corporation Act* (R.S.C. 1985, c. C-10), and has exclusive jurisdiction over the establishment and operation of postal services in Canada. It seeks judicial review of an interlocutory decision dated April 17, 2009 by Appeals Officer Richard Lafrance of the Occupational Health and Safety Appeals Tribunal Canada ("the Tribunal").

[4] The Respondent CUPW made a complaint, dated September 20, 2007, to a Health and Safety Officer of Human Resources and Skills Development Canada under Part II of the *Code*. The complaint alleged that Canada Post violated several provisions of the *Code* by excluding the CUPW's health and safety representatives from participating in a process implemented by Canada Post to assess the safety of delivery to some 845,000 rural mail boxes across Canada.

[5] The complaint was referred to Health and Safety Officer (HSO) Nicole Dubé for investigation and decision. On December 8, 2008, she concluded that Canada Post had violated certain *Code* provisions and issued a Direction to Canada Post pertaining to certain locations in the

Ottawa/Eastern Ontario region. A copy of that Direction was to be posted, without delay, and be given to the Policy Health and Safety Committee and Work Place Health and Safety Committee. She also required to be informed in writing, no later than December 15, 2008 of the measures taken to comply with those directions, and she directed Canada Post to provide a copy of that written response to the Policy Health and Safety Committee and Work Place Health and Safety Committee. Finally, she informed Canada Post that it could request, within thirty days of the date of the direction being issued or confirmed in writing, a review by the appeals officer pursuant to subsection 146(1) of the *Code*.

[6] On December 23, 2008, Ms. Dubé wrote to the CUPW at its National Office, to let it know that she had investigated its complaint and had noticed some violations of the *Code*. She also informed the CUPW that she issued a direction to the employer on December 8, 2008, and that Canada Post had put in place activities in order to mitigate the issue, as per its response dated December 19, 2008. Therefore, she advised that the file regarding the complaint was to be closed, and that the Labour program of Human Resources and Skill Development Canada "can, therefore, take no further action on your behalf", although other activities would be conducted to ascertain continuous compliance.

[7] The CUPW alleges not to have received the December 23, 2008 letter until January 5, 2009 due to the closure of its offices for the holiday season. CUPW filed its appeal of Officer Dubé's decision on January 30, 2009. Canada Post objected to the appeal, alleging that it was filed in excess of the statutory limit of 30 days from the date of the confirmation of the direction.

II. The impugned decision

[8] In an interim decision dated April 17, 2009, Appeals Officer Lafrance concluded that the appeal by CUPW was made within the 30-day time limit because the decision had not come to the attention of CUPW until January 5, 2009. The Tribunal consequently received CUPW's application for appeal.

[9] The Appeals Officer first noted that s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-23, provides that statutes must be interpreted in a fair, large and liberal way to ensure the attainment of their objectives. He found that the key issue was the interpretation of the term "confirmed in writing" in s. 146(1) of the *Code*, and noted that Black's Law Dictionary defines "confirm" as "to verify or corroborate". He then considered that, in the context of s. 146(1) of the *Code*, this means that the 30-day period starts either from the moment a party receives the direction from the health and safety officer, or from the moment a party aggrieved by the direction receives and verifies that the written confirmation corroborates the pre-issued direction. Based on this reasoning, he concluded:

> In this case, the written confirmation was prepared by the HSO on December 23, 2008; two days before the holiday period. I find that because of this holiday period, were [sic] mail deliveries may be delayed and work places, such as the Unions office, may be closed during the holyday period, it is quite believable that CUPW received the written confirmation only on January 5, 2009. Therefore, by applying for an appeal of the direction on January 30, 2009, the time limit of 30 days was respected.

III. The issues

[10] This application raises the following three issues:

A. What is the standard of review?

B. Did the Appeals Officer err in his interpretation of s. 146(1) of the *Code*?

C. Should the Court decline to exercise its discretion to review the Appeals Officer's interlocutory decision?

IV. Relevant statutory provisions

[11] Section 146(1) of the *Code* provides:

Appeal of direction	**Procédure**
146. (1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.	**146. (1)** Tout employeur, employé ou syndicat qui se sent lésé par des instructions données par l'agent de santé et de sécurité en vertu de la présente partie peut, dans les trente jours qui suivent la date où les instructions sont données ou confirmées par écrit, interjeter appel de celles-ci par écrit à un agent d'appel.

[12] The predecessor provision, in force prior to 2000, read as follows:

146.(1) Any employer, employee or trade union that considers himself aggrieved by any direction issued by a safety officer under this Part may, within fourteen days of the date of the direction, request that the direction be reviewed by a regional safety officer for the region in which the place, machine or thing in respect of which the direction was issued is situated.	**146.(1)** Tout employeur, employé ou syndicat qui se sent lésé par des instructions données par l'agent de sécurité en vertu de la présente partie peut, dans les quatorze jours qui suivent, en demander la révision par un agent régional de sécurité dans le ressort duquel se trouve le lieu, la machine ou la chose en cause.

[13] At the same time as s. 146(1) was amended, s. 146.2 was added to the *Code*. It provides Appeals Officers with various powers including the power to “abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence”: see s. 146.2(f).

[14] Two other provisions are also relevant to a proper understanding of the issue raised by this application for judicial review:

Decision final	**Caractère définitif des décisions**
146.3 An appeals officer’s decision is final and shall not be questioned or reviewed in any court.	**146.3** Les décisions de l’agent d’appel sont définitives et non susceptibles de recours judiciaires.

No review by certiorari, etc.	**Interdiction de recours extraordinaires**
146.4 No order may be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an appeals officer in any proceeding under this Part.	**146.4** Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de certiorari, de prohibition ou de quo warranto — visant à contester, réviser, empêcher ou limiter l'action de l'agent d'appel exercée dans le cadre de la présente partie.

V. Analysis

A. *Standard of review*

[15] There is no dispute between the parties that the issue to be determined in this application for judicial review is the interpretation to be given to s. 146(1) of the *Code*, and is therefore legal in nature. It is also well established, following the decision of the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (at paras. 54-55) that deference will usually be accorded to a tribunal interpreting its own statute or statutes closely connected to its function. This has been confirmed by this Court and the Federal Court of Appeal in the context of the *Code*: see *Martin v. Canada (Attorney General)*, 2005 FCA 156, [2005] 4 F.C.R. 637, at paras. 17-18; *P&O Ports Inc. v. International Longshoremen's and Warehousemen's Union, Local 500*, 2008 FC 846, [2008] F.C.J. No. 1067.

[16] There is a presumption, therefore, that a tribunal's interpretation of its enabling legislation will normally be reviewable on a standard of reasonableness; aside from *Dunsmuir*, this was confirmed in *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*,

2008 SCC 32, [2008] S.C.J. No. 32 (at para. 21) and in *Canada (Minister of Immigration and Citizenship) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12 (at para. 25).

[17] That being said, the Supreme Court has identified certain issues to be determined according to the correctness standard. Such will be the case, for example, for constitutional questions, for "true" questions of jurisdiction, that is, "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (*Dunsmuir*, above, para. 59), for questions regarding the jurisdictional lines between two or more competing specialized tribunals (*Dunsmuir*, para. 61), and where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise (*Dunsmuir*, para. 60).

[18] It is not debatable that the Appeals Officer had the authority to make the inquiry and, in so doing, to interpret and apply s. 146(1) of the *Code*. As Justice Evans stated in *Canadian Federal Pilots Assn*. v. *Canada (Attorney General)*, 2009 FCA 223, [2009] F.C.J. No. 822 at para. 51, "…administrative tribunals performing adjudicative functions (…) normally have explicit or implied authority to decide all questions of law, including the interpretation of its enabling statute, necessary for disposing of the matter before it…"

[19] Having found that the Appeals Officer had the legal authority to interpret s. 146(1) of the *Code*, I must now determine the applicable standard of review of his interpretation. As previously mentioned, if previous decisions of this Court and of the Court of Appeal are to be a guide, the

reasonableness standard should be applied when an Appeals Officer interpret a provision of the *Code* – indeed, the Federal Court of Appeal applied the patently unreasonable standard in *Martin*, above, but that decision was reached before *Dunsmuir*, above. But the provisions at stake both in *Martin* and in *P&O Ports Inc*, above. were substantive in nature and consequently different from s. 146(1). Accordingly, it cannot be said that the standard of review analysis has already been performed, and I must therefore consider the factors set out by the Supreme Court to determine the proper standard of review.

[20] First of all, the decisions of Appeals Officers are protected by a stringent privative clause and may not be appealed: see sections 146.3 and 146.4 of the *Code*. This factor clearly militates in favour of substantial deference, as Parliament has indicated its intention to shield decisions made by Appeals Officer from intrusive review by the courts.

[21] The purpose of Part II of the *Code* is set out in section 122.1, which states that "[t]he purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies". In the words of my colleague Justice Russell, "[t]he thoroughness of the statutory scheme embodied by Part II of the Code has been found to indicate that a high level of deference to decisions or direction under this Part is appropriate…" (*P&O Ports Inc.* at para. 16).

[22] The most important factor to consider in determining the applicable standard of review is the relative expertise of the tribunal. Consistent with the purpose of Part II of the *Code*, the expertise of

appeals officers lies in finding whether circumstances in a workplace violate the purposes of the *Code*. This is a fact-intensive determination, as reflected by the wide powers of investigation and inquiry conferred on Appeals Officers by section 146.2 to gather evidence. It is on account of this fact-finding mission, which is at the core of their jurisdiction to determine whether a workplace is safe, that appeals officers have been found to have relatively more expertise than this Court.

[23] But the nature of the question at hand does not engage the dangerousness of a workplace and, by way of consequence, the expertise of the appeals officers. The statutory interpretation of s. 146.1, and more precisely the determination of the point at which the thirty day time limit starts running, is not a context specific issue. It is essentially a legal issue, over which the appeals officers have no comparative advantage in terms of expertise or experience vis-à-vis this Court.

[24] Indeed, the issue raised in the application at bar bears much resemblance with the question that was recently examined by the Federal Court of Appeal in *Canada (Attorney General) v. Mowat*, 2009 FCA 309, [2009] F.C.J. No. 1359. At issue in that case was the Canadian Human Rights Tribunal's finding that it had the authority to award costs, under s. 53(2) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. Writing for a unanimous court, Justice Carolyn Layden-Stevension stated:

> 43. There is no debate that the Tribunal is a specialized one in relation to matters of human rights. However, the concern is not with either general or specialized expertise. Rather, it is with the Tribunal's expertise in relation to the specific issue before it. I do not believe that the nature of the question at hand engages the human rights subject matter in which the Tribunal has expertise.

> 44. This is not a context-specific setting. There is no factual component entailed in the analysis. Expertise in human rights is not required and does not assist in the interpretation of the narrow question arising from the provision. The Tribunal's authority to award costs of a proceeding to a successful complainant has nothing to do with the substance of human rights. Rather, the Tribunal must determine a pure question of law, specifically, one that determines the bounds of its authority. The Tribunal has no institutional or experiential advantage over the court and is no better-positioned than the court in this respect.

[25] Moreover, I am also of the view that the proper interpretation of s. 146(1) calls for certainty and consistency. In other words, it is hard to see how two opposite ways to compute the thirty day time limit can both be held as reasonable: see *Canada (Attorney General) v. Mowat*, above, at para. 45, quoting with approval *Abdoulrab v. Ontario (Labour Relations Board)*, 2009 ONCA 491, [2009] O.J. No. 2524, at para. 48. Employers, employees and trade unions that feel aggrieved by a direction issued by a health and safety officer under Part II of the *Code* are entitled to know with precision the delay for appealing such direction and, conversely, at which point in time that direction has become final. To that extent, I therefore find that the interpretation of s. 146(1) of the *Code* is not only a question that is outside the specialized area of the Appeals Officers' expertise, but is also a question of general law.

[26] For all of the foregoing reasons, I am therefore of the view that the applicable standard of review is correctness. It follows that no deference is owed to the Appeal Officer's decision; if the Court disagrees with his determination, it ought to substitute its own view of the correct answer.

B. Did the Appeals Officer err in his interpretation of s. 146(1) of the Code?

[27] Counsel for the Respondent submitted that the Appeals Officer's decision is supported by the principle set out in s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 that statutes are to be interpreted in a fair, large and liberal way so as to ensure the attainment of their objectives. In the case at bar, it is contended that s. 146(1) should be interpreted so as to provide CUPW with a meaningful opportunity to review and assess whether the Health and Safety Officer's directions appropriately gave effect to the duties of the joint policy and workplace health and safety committees under the *Code*.

[28] The problem with this argument is that it is premised upon the assumption that there is an ambiguity in the wording of s. 146(1) as to the moment where the 30 day time limitation starts to run. But there is no such ambiguity in my view. Section 146(1) states "within thirty days after the date of the direction being issued or confirmed in writing". Contrary to the Appeal Officer's interpretation, there is no indication whatsoever that the confirmation has to do with the reception of communication of the direction to the concerned parties. Both "issued" and "confirmed in writing" refer to acts by the person rendering the direction; that is, the direction may be appealed within 30 days of the direction being issued by the Health and Safety Officer, or within 30 days of the direction being confirmed in writing by the Health and Safety Officer.

[29] The relevant question is not when the direction was confirmed in writing *to* the union, but rather when it was issued or confirmed in writing *by* the Health and Safety Officer issuing the direction. There is no question that the direction was both issued and confirmed in writing on

December 23, 2008. In fact, CUPW knew that HSO Dubé's decision was forthcoming. On December 19, 2008, HSO Dubé sent an e-mail to the parties advising that the "complaint had been resolved". While the failure to see a direction may, in the proper circumstances, be a factor considered by the Tribunal in exercising its remedial authority to extend time limits pursuant to s. 146.2(f), it does not as a matter of law delay the starting point at which the 30-day limitation period begins to run.

[30] Had Parliament intended the delay to start running from the communication of the decision by the federal agency to the affected party, it could have used language to that effect. Section 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for example, provides that the thirty day time limit runs from the time the decision or order was first "communicated by" the federal board or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it. In that section, the emphasis is clearly on the party affected by the decision. Moreover, "communicated by…to…" is a wording that necessarily implicates a sender and a receiver, whereas "issued or confirmed in writing" refers only to the person who makes the decision and not to the person affected by the decision.

[31] The Respondent also relied on the legislative history of s. 146(1). It is true that Parliament modified the starting point of the delay from "the date of the direction" to "after the date of the direction being issued or confirmed in writing", but this change in wording does not support the Respondent's position that Parliament thereby intended to change the starting point of the time limit from the date of the direction to the date it was actually received by the parties. Had this been

Parliament's intention, it could have been stated more explicitly, as already mentioned. Moreover, there is a far more satisfying explanation for the amendment made in 2000. As illustrated by the decision of this Court in *Brink's Canada Ltd.* v. *Canada (Labour, Regional Safety Officer)* (1994), 84 F.T.R. 142, [1994] F.C.J. No. 1328, there was an ambiguity in the previous version of s. 146(1) as to whether the delay started to run from the issuance of the oral or of the written direction. With the current version of that section, it is now clear that the delay starts from the later of the two events.

[32] The interpretation proposed by the Respondent would also make section 146.2(f) redundant. Added in 2000, this provision allows an Appeals Officer to extend the time limitation when appropriate. This provision was obviously inserted to relieve the harshness that could result from a strict application of the 30-day delay. If s. 146(1) was to be interpreted in such a way as to allow an Appeals Officer to extend the delay when external circumstances prevented a party from appealing within that 30-day period, there would be no need for the remedial power found in s. 146.2(f).

[33] Counsel for the Respondent also submitted that all appellants should have a meaningful opportunity to benefit from the thirty day period to evaluate and undertake an appeal of an HSO's direction. It would be unfair and inequitable, he argued, if certain appellants have their appeal period truncated because of a delay in notification of an HSO's direction. But this is precisely why s. 146.2(f) has been enacted. If, for some reasons beyond the control of a party – a delay in the mail, for example – the right to appeal cannot be exercised within the 30-day period, an Appeals Officer has the authority to extend that delay.

[34] The Respondent is correct in stating that the general objectives of the *Code*, and more particularly of its Part II, are the protection, prevention and promotion of occupational health and safety. But this is not sufficient to support the Appeals Officer's interpretation. Parliament no doubt intended to promote these interests, and created different mechanisms to do so, one of which is the right to appeal. One of the rules governing such an appeal is the time limitation period. Section 146(1) aims to provide some foreseeability in that procedure and to set out clearly the point at which a direction issued by a health and safety officer becomes final. Time limitation to file an appeal, just as the time limitation to file an application for judicial review, exists to protect the public's interest in the finality of decisions.

[35] The Appeals Officer's interpretation of section 146(1) would nullify the foreseeability purpose of the time limitation period. If this were a correct interpretation of the law, a party could artificially extend its time limits by wilfully preventing the delivery of a direction through inadvertence or negligence. The Appeals Officer's interpretation would also raise the possibility of two parties having different appeal deadlines for the very same direction, based on the actions of the defaulting party. No party should be permitted to circumvent statutory time limits by actions that are solely within its control.

[36] I am therefore of the view that the interpretation of section 146(1) by the Appeals Officer is incorrect. Indeed, to interpret the phrase "confirmed in writing" as referring to the moment when the direction is confirmed and received by CUPW is an interpretation that the statute cannot reasonably

bear and that falls outside the range of acceptable statutory interpretation. Accordingly, the decision meets neither the test of reasonableness nor that of correctness.

C. *Should the Court decline to review the Appeals Officer's interlocutory decision?*

[37] Counsel for the Respondent submitted that the Court should decline to exercise its discretion to review the Appeals Officer's interlocutory decision because this would have been an appropriate case for him to exercise his discretion to extend the time limit if he had found the appeal untimely under s. 146(1). It was also suggested that this Court should refuse to intervene on the basis of prematurity.

[38] The first argument is without merit. Despite being invited by CUPW, by way of an alternative argument, to consider the possibility of extending the time limit on the basis of the significance of the appeal and of the legal issues for the parties, the short delay involved and the existence of a *prima facie* case, the Appeals Officer declined to rely on s. 146.2(f) and preferred to anchor his decision solely on the basis of his interpretation of s. 146(1). The CUPW cannot now defend the Appeals Officer's decision on a ground that he did not even consider. On judicial review, a reviewing Court is only concerned with the decision actually rendered and its conformity with the law and the facts, and should refrain from deciding the opportunity of an alternative decision that a tribunal could have made.

[39] CUPW's second argument cannot stand either. It is trite law that judicial review of interlocutory decisions should only be undertaken in exceptional circumstances. Several reasons

militate in favour of not intervening until a tribunal has issued a final decision. These reasons include the risk of the fragmentation of the process and the likelihood that such intervention will lead to additional costs and delays. As well, judicial review of interlocutory decisions risks wasting judicial resources, as judicial review applications may become unnecessary following a tribunal's decision on the merits: see, for ex., *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68, [2008] F.C.J. No. 312; *Canada (Attorney General) v. Brar*, 2007 FC 1268, [2007] F.C.J. No. 1629.

[40] In the present case, I believe there are special circumstances justifying the judicial review of the Appeals Officer's decision, despite its interlocutory nature. First of all, if the Appeals Officer decides to hear an appeal that is time barred, the continuation of the procedure would be costly in time and money to Canada Post and to the system as a whole, and this waste of time and resources could not be compensated. Furthermore, a judicial review of the final decision could not address any potential error in the early decision to accept the appeal as timely. In those circumstances, the factors weighing against the Court's early intervention do not outweigh the potential adverse consequences of the Court's declining to intervene. The judicial economy principle is better served by putting an end to the appeal procedure at this early stage.

[41] For all of the foregoing reasons, this application for judicial review is therefore granted, with costs awarded to the Applicant as per Tariff B, mid Column III.

ORDER

THIS COURT ORDERS that this application for judicial review is allowed. The interlocutory decision of Appeals Officer Lafrance dated April 17, 2009 is quashed and set aside.

The Applicant is entitled to its costs as per Tariff B, mid Column III.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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