Federal Court		Cour fédérale

Date: 20100316

Docket: T-819-09

Citation: 2010 FC 299

Ottawa, Ontario, March 16, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

THOMAS BEARSS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by an adjudicator from the Public Service Labour Relations Board dated April 22, 2009, allowing the respondent's acting pay grievance against his employer and ordering the readjustment of the respondent's annual rate of pay retroactively to July 1, 2005, from $91,233 to $94,873.

FACTS

Background

[2] The respondent, Mr. Thomas Bearss, is a retired public servant who was employed by the Department of Foreign Affairs and International Trade. The applicant acts for Mr. Bearss' employer. The employer recalculated Mr. Bearss' rate of pay following the conversion of his acting position to a higher classification level in accordance with the "Public Service Terms and Conditions of Employment Regulations" (hereinafter the "Policy" or "PSTCER"). This Policy was incorporated as part of the collective agreement with respect the Mr. Bearss employment. Mr. Bearss grieved the recalculation of his acting pay and succeeded before the adjudicator. The applicant now applies for judicial review of the adjudicator's decision.

[3] The parties jointly introduced an agreed statement of facts before the adjudicator. The relevant paragraphs setting out the background facts are as follows:

> **Introduction**
>
> At issue in this grievance is the acting FS-4 rate of pay to which the grievor became entitled on July 1, 2005.
>
> **Background**
>
> 1. Mr. Thomas Bearss was a substantive CO-02;
>
> 2. He initially joined the Public Service on February 19, 1973;
>
> 3. He worked for Revenue Canada/Customs and first served abroad as Customs Attache/Representative at CNGNY from 1975 to 1978;
>
> 4. In September, 1988, he joined the Department of Foreign Affairs and International Trade on a Secondment from the Department of

Finance where he worked as an Economist ES-5 in the International Trade and Finance Branch; the work, however, was similar and equivalent to that done by FS-02 Trade Commissioners in the Branch;

5. In February 1992, he transferred to DFAIT as a CO-2 and continued to perform the work of an FS-02 Trade Commissioner;

6. On August 29, 1998, he was posted to Port of Spain, Trinidad as a Commercial Counsellor- Although working in an FS-2 position, he continued to receive CO-2 pay as the maximum rate of pay of the CO-2 level [which] was higher than the maximum rate of pay of the FS-2 level;

7. For 8 months in 2001-2002, Mr. Bearss was Acting High Commissioner, an EX-3 position;

8. In the summer of 2002, the FS group signed a new collective agreement which led to a pay restructure yielding a higher FS-2 maximum rate of pay than the CO-2 maximum; as a result, he began receiving acting FS-2 pay;

9. On August 25, 2002, Mr. Bearss was posted to Buffalo as Consul/Senior Trade Commissioner, an FS-2 position where he remained until his retirement on August 29, 2006;

10. As a result of a conversion of the FS group on July 1, 2005, all substantive FS-2s were converted to FS-3.

11. On the same day, July 1, 2005, the assignment position of Consul/Senior Trade Commissioner was converted from FS-2 to an FS-4 Senior Advisors IB, Abroad; as such, he was entitled to acting FS-4 pay;

12. Mr. Bearss's acting FS-4 rate of pay as of July 1, 2005 was recalculated from his substantive CO-2 rate of pay of 84,908 by adding the smallest increment in the FS-4 scale of rates (3,508) and locating the rate of pay in the FS-4 scale which was nearest to but not less 88,416 (84,908+3,508);

13. On August 1, 2005, his rate of pay was increased by an increment to 94,873;

> 14. Colleagues who were substantively FS-02 prior to conversion (unlike Mr. Bearss who was substantively a CO-02) were converted to FS-03. For employees who were substantively FS-03, the rate of pay for assignment positions at FS-04 rate was calculated based on the substantive FS-03 salary, which after the application of the promotion rule yielded an acting FS-4 rate of 94,873, one increment higher than Mr. Bearss's acting FS-4 rate of 91,223;
>
> 15. Mr. Bearss filed a grievance on November 4, 2005. See attached the grievance form.

Decision under review

[4] In a 12-page decision the adjudicator held that the employer had made a mistake and the adjudicator ordered that Mr. Bearss' annual rate of pay be increased from $91,223 to $94,873 retroactively from July 1, 2005. The decision under review held that Mr. Bearss was entitled to an additional $3,650 yearly increment. Mr. Bearss retired in 2006.

[5] Mr. Bearss submitted that the employer miscalculated his acting pay from the date his acting position was converted from FS-2 to FS-4. Mr. Bearss submitted that the employer erred in not taking into account the conversion of the "substantive" FS-2s to FS-3s, which also occurred on July 1, 2005.

[6] On July 1, 2005 the employer recalculated the respondent's acting pay by reference to the respondent's substantive classification, CO-2, pursuant to subsections 24, 26, 46(b), and 46(E)(b)(ii) of the Policy. As a result, Mr. Bearss received less acting pay than his FS-2 colleagues who were "substantively" at the FS-2 level when they were converted to the FS-3 level on July 1, 2005, but were acting FS-4s.

[7] Mr. Bearss' main submission before the adjudicator was that the applicant erred in applying subsections 24, 26, 46(b), and 46(E)(b)(ii) of the Policy to recalculate the respondent's pay rate since the following two factors were not present:

1. the applicant was not being "appointed" on July 1, 2005. He was rather occupying the same position he has had since August 25, 2002; and
2. the applicant was not assigned "other duties to perform".

Consequently, Mr. Bearss submits that the applicant should have recalculated Mr. Bearss' acting pay by reference to subsection 46(C), which required the recalculation of pay with regard to the substantive conversion of Mr. Bearss' acting assignment.

[8] The adjudicator held that the Policy was incorporated in the collective agreement and as such he had jurisdiction to interpret it and determine whether the Policy had been appropriately applied by the employer.

[9] The adjudicator noted that if Mr. Bearss had been assigned to a new position, or if his duties had changed, the applicant's method of recalculation would have been correct.

[10] The adjudicator found that between 2002 and June 30, 2005 Mr. Bearss was treated "according to the PSTCER…insofar as his rate of pay was considered, as if he were an FS-02". On July 1, 2005, two events combined to form the circumstances of this case which in the adjudicator's view rendered subsections 24, 26, 46(b), and 46(E)(b)(ii) of the Policy inapplicable:

1. The Consul/Senior Trade Commissioner was converted from FS-2 to FS-4

2. The "substantive FS-2s were converted to FS-3s, but were acting FS-4s.

[11] In dissecting the Reasons for Decision of the adjudicator, the Court finds that the adjudicator made six separate findings:

1. subsection 24(2) of the Policy only applied if Mr. Bearss had been promoted. On July 1, 2005 Mr. Bearss continued in his assignment without any change in his duties. Accordingly, he was not promoted;

2. subsection 26(2) of the Policy does not apply because Mr. Bearss was not "appointed" to a new position. On July 1, 2005 he maintained exactly the same position which he had been appointed to on August 25, 2002;

3. paragraph 46(E)(b)(i) of the Policy is not applicable because Mr. Bearss was not required "to perform other duties". This is a condition precedent to this paragraph applying;

4. section 46(B) of the Policy is not applicable because Mr. Bearss was not "deployed" or "appointed" to a new position. He continued in the position to which he was appointed on August 25, 2002;

5. subsection 46(C)(2) of the Policy is applicable since it provides that employees in acting positions are entitled to receive "revisions to the salary range of the higher classification level";

6. Mr. Bearss' colleagues having positions similar to Mr. Bearss received acting pay in their FS-4 positions at $94,873, rather than the $91,223 that Mr. Bearss received. The adjudicator concluded that the employer did not apply the Policy appropriately in this case. At paragraph 14 of the Agreed Statement of Facts, the parties acknowledged that colleagues of Mr. Bearss were receiving this higher level of pay in their acting positions as FS-4s.

[12] The adjudicator therefore allowed the grievance and ordered the adjustment of the respondent's annual rate of pay retroactively from July 1, 2005 until his retirement in 2006.

LEGISLATION AND POLICY

[13] This application requires the interpretation of certain provisions of the "Public Service Terms and Conditions of Employment Regulations" which is one of a number of policies issued by the Treasury Board which form part of the collective agreement governing Mr. Bearss' employment.

[14] The Policy defines "deployment", "acting assignment", "higher classification level", and "substantive level" as follows:

> **Deployment** means an assignment to another position, made pursuant to the *Public Service Employment Act*; or
> […]
> **Acting assignment** is a situation where an employee is required to perform temporarily the duties of a higher classification level for at least the qualifying period specified in the relevant collective agreement or the terms and conditions of employment applicable to the employee's substantive level;
> […]
> **higher classification level**, in the context of an acting assignment, means a level where the maximum annual rate of pay exceeds the maximum annual rate of pay of the employee's substantive level;
> […]
> **substantive level** means the group and level to which an employee has been appointed or deployed under the Public Service Employment Act, other than in an acting assignment situation.

[15] Subsections 22, 23, 24, and 26 of the PSTCER set out the method of calculating the pay rate of an employee upon appointment or promotion:

> **Rate of pay on appointment or deployment**
> 22. Subject to these regulations and any other enactment of the Treasury Board, the rate of pay of a person on appointment to Part I

Service shall be the minimum rate applicable to the position to which the employee is appointed.

23. The rate of pay on appointment or deployment of an employee, a person in the Public Service, a member of the Royal Canadian Mounted Police or of the Canadian Armed Forces to a position to which these regulations apply, shall be established in accordance with the promotion, deployment and transfer by appointment or demotion rules as applicable.

Rate of pay on promotion
24. (1) The appointment of an employee described in Section 23 constitutes a promotion where the maximum rate of pay applicable to the position to which that person is appointed exceeds the maximum rate of pay applicable to the employees substantive level immediately before that appointment by:

> a. an amount equal to at least the lowest pay increment for the position to which he or she is appointed, where that position has more than one rate of pay; or
>
> b. an amount equal to at least four per cent of the maximum rate of pay for the position held by the employee immediately prior to that appointment, where the position to which he or she is appointed has only one rate of pay.

24. (2) Subject to Sections 27 and 28, on promotion, the rate of pay shall be the rate of pay nearest that to which the employee was entitled in his or her substantive level immediately before the appointment that gives the employee an increase in pay as specified in subsection (1) above; or an amount equal to at least four per cent of the maximum rate of pay for the position to which he or she is appointed, where the salary for the position to which the appointment is made is governed by performance pay.

[…]

Rate of pay on deployment or transfer by appointment
26. (1) A person described in Section 23 is deployed or transferred by appointment where the deployment or appointment to a position to which these regulations apply does not constitute a promotion or demotion.

> 26. (2) Subject to Sections 27 and 28, where the appointment constitutes a deployment or transfer by appointment, the employee shall be paid the rate of pay that is nearest to but not less than the rate of pay the employee was entitled to in his or her substantive level immediately before the deployment or appointment, or if there is no such rate, at the maximum rate of pay for the position to which he or she is deployed or appointed.

[16] Subsections 46(A), (B) and (C) of the Policy set out the rules for calculating the pay rate of an employee on an acting assignment:

> **Remuneration – Acting assignment**
> **46. (A) General**
> Where a deputy head requires an employee to perform duties of a higher classification level for at least the qualifying period specified in the relevant collective agreement or the terms and conditions of employment applicable to the employee's substantive level, the employee shall be paid acting pay calculated from the date the employee began to perform such duties.
>
> **46. (B) Rate of pay**
> Acting pay is the rate of pay that the employee would be paid on deployment or appointment to such higher classification level, as calculated pursuant to Sections 24 or 26 of these regulations.
>
> **46. (C) Recalculation of pay**
> 1. An employee in receipt of acting pay is entitled to a recalculation of the acting rate of pay pursuant to Sections 24 or 26 when increments within and revisions to the salary range for the substantive level occur. If following recalculation the rate of pay in the higher classification level is less than the rate of pay received immediately prior to the recalculation, the employee shall be paid at the rate of pay received immediately prior to the recalculation.
>
> 2. An employee in receipt of acting pay is entitled to revisions to the salary range of the higher classification level.

[17] Subsection 46(E) of the Policy sets out the pay calculation rules for employees employed on subsequent acting assignments:

46. (E) Subsequent assignments
An employee in receipt of acting pay who is required to perform other duties:

a. of the same group and level as those for which acting pay is being paid shall:

i. be paid at the same rate of pay; and

ii. at the end of the increment period for the higher classification level, be eligible for an increment in accordance with the applicable provisions in Section 46.(D).

b. of a group and/or level higher than that for which acting pay is being paid shall:

i. be paid the rate of pay that the employee would be paid on deployment or appointment to such higher classification level, as calculated pursuant to Sections 24 or 26. Should such rate be less than the employee's previous acting rate of pay, the employee shall be paid at the rate of pay in the higher classification level that is nearest to but not less than the previous acting rate of pay; and

ii. upon reverting to the previous acting duties, be paid the rate of pay that would have been paid had the previous duties been continuously performed.

c. of a group and level lower than that for which acting pay is being paid, shall:

i. be paid a rate of pay as calculated pursuant to Sections 24 or 26, and

ii. receive credit for increments from the date the acting duties in the higher level position commenced, in accordance with the provisions of Section 46.(D).

ISSUE

[18] The applicant raises the following issue:

1. Did the adjudicator render an unreasonable decision in determining that the calculation of the Respondent's rate of pay should be on the acting assignment position rather than his substantive position?

[19] The respondent has raised a preliminary objection with respect to the applicant's affidavit.

STANDARD OF REVIEW

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question": *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[21] Interpretation of administrative policies governing the employment of public sector employees has been recently held to be reviewable on a standard of reasonableness: *Spencer v. Canada (Attorney General)*, 2010 FC 33, per Justice Near at paragraph 23.

[22] In reviewing the adjudicator's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra* at paragraph 47, *Khosa*, *supra*, at paragraph 59.

[23] In *Dunsmuir*, the Supreme Court of Canada specifically recognized at paragraph 68 the "relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decision should be approached with deference". The Court also held that adjudicators appointed under labour legislation can be presumed to hold "relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions". Accordingly, the decision of the adjudicator in the case at bar with respect to the interpretation of the Policy and the collective agreement is entitled to deference within the standard of reasonableness.

ANALYSIS

Preliminary objection

[24] Mr. Bearss objects to paragraphs 7 to 9 of Ms. Colette Lussier's Affidavit which seek to respond to a verbal submission before the adjudication where the respondent submitted that his circumstances were "unique". The applicant offered its response at the hearing.

[25] Paragraph 7 sets out the information provided to the adjudicator at the hearing, namely that the situation presented in Mr. Bearss' case was not unique because other employees were treated similarly. As such, this evidence is admissible.

[26] Paragraph 8 of Ms. Lussier's Affidavit states that the respondent's circumstances were not unique in that the pay rate of 161 employees was recalculated in the same manner by the employer. This evidence about 161 employees was not before the adjudicator and as such it is improperly

brought before the Court. It is not permissible to bring new evidence on judicial review for the purpose of bolstering submissions before the administrative tribunal. Accordingly, paragraph 8 of Ms. Lussier's Affidavit will be struck out.

[27] In any event, the adjudicator's interpretation of the Policy did not turn on whether Mr. Bearss' situation was unique.

<u>Issue No. 1</u>: Did the adjudicator render an unreasonable decision in determining that the calculation of the Respondent's rate of pay should be on the acting assignment position rather than his substantive position?

[28] The parties acknowledge that this is a highly technical case requiring the interpretation of a complex Policy which is not clearly written. The difficulty in applying this Policy is compounded by the fact that Mr. Bearss was actually a Commerce Officer (CO-2), had been appointed to an "acting" position as a Foreign Service Officer, and had remained in that "acting" position for 14 years. In this case, the employer submits that the adjudicator erred in applying this Policy when making the decision that Mr. Bearss was entitled to $3,650 annual increments from July 1, 2005 to the date he retired in 2006. At the outset, the Court agrees with the applicant that the adjudicator erred by incorrectly considering Mr. Bearss' "acting" position as his "substantive" position for the purpose of his rate of pay recalculation. However, this error is not material in that it does not affect the ultimate result.

First the facts

[29] Mr. Bearss was "acting" as a Foreign Service Officer (FS) from 1992 until he retired in 2006. His "substantive position" was as a Commerce Officer (CO).

[30] In 2002, Mr. Bearss was posted to Buffalo, New York as "Consul/Senior Trade Commissioner in an "acting" FS-2 position where he remained until his retirement in 2006. However, on July 1, 2005 his "acting" position was converted to a FS-4 position. At the same time, all "substantive" FS-2s were converted to FS-3s.

Adjudicator's Decision

[31] The employer relies on sections of the Policy under the headings "Rate of Pay on Appointment or Deployment" and "Rate of Pay on Promotion". The adjudicator found that these sections are not applicable to Mr. Bearss because he was not "appointed" to the position of Trade Commissioner or "promoted" on July 1, 2005. The Court has reviewed the applicable provisions of the Policy and finds that the adjudicator's decision was reasonably open him. The adjudicator has expertise in interpreting collective agreements and the terms and conditions of employment incorporated as part of those collective agreements. The six finding of the adjudicator stated above were reasonably open to the adjudicator.

[32] With respect to "acting" pay, the Policy provides in subsection 46(C)(2):

> An employee in receipt of acting pay is entitled to revisions to the salary range of the higher classification level.

This is clear. Mr. Bearss was entitled to "acting pay" in accordance with the revisions to the salary range of the higher classification level, i.e. the FS-4. The adjudicator's decision was reasonably open to him based on this subsection.

[33] With respect to the appropriate rate of pay in the scale or range of rates of pay for FS-4s, the adjudicator found colleagues of Mr. Bearss who were doing the same job and whose substantive FS-2 positions had been converted to FS-3 positions, but were being paid rates of pay at the FS-4 rate because they were in acting FS-4 positions like Mr. Bearss, received a rate of pay in the amount of $94,873 within the range of FS-4 rates. This was one increment higher than Mr. Bearss' acting FS-4 rate of $91, 223. Accordingly, the adjudicator agreed with Mr. Bearss that the appropriate rate of pay for Mr. Bearss in the acting FS-4 position was the same as his colleagues. The Court has reviewed the Policy and does not find anything in the Policy which speaks to this issue. Moreover, the adjudicator determined that the sections of the Policy which were relied upon by the employer did not apply to Mr. Bearss because he was not "appointed", not required to perform new duties, and not "promoted". Since Mr. Bearss was continuing to perform his same duties in the acting position, subsection 46(C)(2) of the Policy applies and he was entitled to "acting pay" in accordance with revisions to the salary range of the higher classification level.

[34] Counsel for the employer made strong and forceful submissions, and offered the Court the employer's interpretations of the Policy as they pertain to Mr. Bearss. While these interpretations are reasonable and were reasonably open to the adjudicator if he agreed with them, the Court finds that the adjudicator's different interpretation was also reasonably open to the adjudicator.

CONCLUSION

[35] The Court concludes that the adjudicator's decision was reasonably open to him. At the same time, the interpretation of the employer would have also been reasonably open to the adjudicator. Because the Court must be deferential to the adjudicator, who has expertise in interpreting collective agreements and pay administration policies, the Court cannot interfere since the adjudicator's decision was reasonably open to him.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. Paragraph 8 of the Lussier Affidavit is struck; and

2. The application for judicial review is dismissed with costs.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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