Federal Court  Cour fédérale

Date: 20110111

Docket: T-1717-09

Citation: 2011 FC 25

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 11, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS

Applicant

AND

CANADA POST CORPORATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion for nonsuit brought by the respondent, the Canada Post Corporation (CPC), in the context of a contempt proceeding brought by the applicant, the Canadian Union of Postal Workers (CUPW), pursuant to Rules 466 to 469 of the *Federal Courts Rules*, SOR/98-106 (Rules), according to which it argues that the CPC has refused to comply with two arbitral awards rendered by André Bergeron, the grievance arbitrator. For the following reasons, the motion for nonsuit is dismissed.

Background

[2] In February 2004, the CUPW filed a national grievance in which it alleged that the CPC had breached clause 37.01(a) of the collective agreement when it modified the Isolated Posts Vacation Travel Allowance Policy without its consent.

[3] The grievance was allowed by Arbitrator Bergeron, who rendered, on September 16, 2008, an initial award, at the end of which he allowed the grievance. The implementation of that award resulted in a disagreement between the parties with respect to its meaning and scope. The CUPW again brought the matter before the arbitrator and asked him to complete the disposition of his award, arguing that he had failed to rule on some questions raised by the grievance. The CPC objected to the motion, arguing that the arbitrator was *functus officio*. In an award rendered on September 1, 2009, the arbitrator allowed the CPC's objection and dismissed the CUPW's motion. He further explained that he did not have to complete his award because he had already implicitly ruled on the questions raised by the CUPW in his award of September 16, 2008.

[4] The CUPW argues that that award clarified the scope of the award of September 16, 2008, and that the CPC must, in order to comply with it, calculate the allowance amount based on the actual expenses incurred by employees and allow them to receive a travel advance. The CPC does not interpret the arbitral award in the same way. Arguing that the CPC is still refusing to comply with the arbitral awards, the CUPW filed the two arbitral awards in the Court under section 66 of the *Canada Labour Code* and Rule 424 of the Rules, which resulted in them having the status of orders of the Court.

[5] On April 1, 2010, the CUPW filed a contempt proceeding and filed a motion under Rule 467 of the Rules for a show cause order naming the CPC's labour relations director. Justice Beaudry granted the consent motion and issued an order requiring the CPC's labour relations director to appear in Court to hear proof that the CPC had disobeyed Arbitrator Bergeron's arbitral awards and to be prepared to present a defence.

[6] The hearing took place on October 21, 2010, in Ottawa. After the CUPW completed its case, the CPC filed a motion for nonsuit. The CUPW stated that it was unable to respond to the motion forthwith and a timeline was established with the parties to allow the CPC to set out its motion and to allow the two parties to proceed on the basis of written representations in accordance with Rule 369 of the Rules.

[7] The CPC maintains that a contempt order could not be issued in this case for the following reasons:

(1) Arbitral awards are declaratory in nature;

(2) The dispositions of the arbitral awards are ambiguous;

(3) The awards are not final decisions because the arbitrator expressly retained jurisdiction over the amounts owing in the event of disagreement;

(4) The contempt proceeding was used to put pressure on the CPC.

[8] The CUPW raised the following arguments in opposition to the motion:

(1) A motion for nonsuit cannot be brought in the context of a contempt proceeding;

(2) The questions raised by the CPC are questions of law whereas only findings of fact may be decided in a motion for nonsuit;

(3) The test to counter a motion for nonsuit is the same as that for a show cause order and the issue has already been determined by Justice Beaudry's order;

In the alternative,

(4) Arbitrator Bergeron's decision is fully enforceable;

(5) The decision is clear;

(6) The arbitrator did not retain jurisdiction over the issues regarding the implementation of the decision, but only over the issue of quantum.

Analysis

[9] Motions for nonsuit are not specifically contemplated in the Rules. Rule 339 of the *General Rules and Orders of the Federal Court of Canada, 1978,* CRC c 663 (Rules of 1978) dealt with judgments of nonsuit (*jugements déboutant un demandeur*) and specified their effect:

> A judgment of non-suit, unless the Court otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but, in any case of mistake, surprise or accident, a judgment of non-suit may be set aside by the Court, on such terms as to payment of costs or otherwise as seem just.

[10] That rule was repealed when the Rules were adopted in 1998. Does that mean that it is no longer possible for the respondent to bring a motion for nonsuit? I do not think so.

[11] The Court has not frequently ruled on motions for nonsuit. In *Canada v Crosson*, 1999 CanLII 7607 (FC), Justice Evans, then at the trial division, stated that, after the repeal of Rule 339 from the Rules of 1978, motions for nonsuit were no longer possible. He stated the following:

> The *Federal Court Rules, 1998* do not provide for a motion for a non-suit. Since the previous Rule permitting such a motion was repealed and not replaced by the current Rules, there is no "gap" in the Rules to be filled by Rule 4.

[12] Furthermore, in *Tucker v Canada*, 2004 FC 1729, 264 FTR 299, the Court allowed a motion for nonsuit without, however, making a determination concerning the basis for such a motion.

[13] With respect to opposing opinions, I do not believe that the repeal of Rule 339 from the Rules of 1978 resulted in eliminating the possibility for a respondent to bring a motion for nonsuit. Rule 339 of the Rules of 1978 dealt with the value of judgments of nonsuit and scenarios in which such judgments could be set aside in the given circumstances, but it did not directly state the right of a party to bring a motion for nonsuit. Therefore, I believe that the repeal of Rule 339 eliminated the possibility of requesting that a judgment of nonsuit be set aside in any case of mistake, surprise or accident, but it could not abrogate a right that it had not created. The right to bring a motion for nonsuit existed under the Rules of 1978 and I do not believe that that right was eliminated when the Rules of 1998 were adopted. The Federal Court of Appeal addressed motions for nonsuit in *Gerald's Machine Shop Ltd v Melina & Keith II* (1999), 243 NR 189 (FCA) (available on Quicklaw), without, however, discussing the basis for such a motion. I therefore do not see what would stop a party from asserting that the party that has the burden of proof must fail because it has no cause of action against it, even if the facts alleged are accepted as true.

[14] The concept of "nonsuit" is well known in civil law and it is useful to be guided by the parameters that have been developed. The applicable tests for this type of motion have been well defined by Sopinka, Lederman & Bryant in *The Law of Evidence in Canada*, 3rd edition. The authors defined the concept of a motion of nonsuit as follows:

> The word "non-suit" is still used, but in relation to a motion by a defendant for a final judgment on the ground that a plaintiff has made out no case against him or her.

[15] The authors described the role of a judge who is faced with a motion for nonsuit as follows, at page 183:

> The trial judge, in performing this function, does not decide whether he or she believes the evidence. Rather, the judge decides whether there is any evidence, if left uncontradicted, to satisfy a reasonable person. The judge must conclude whether a reasonable trier of fact could find in the plaintiff's favour if he or she believed the evidence given in the trial up to that point. The judge does inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it.

[16] The test to be applied to a motion for nonsuit and the burden imposed on the party that is the subject of the motion were also addressed as follows by the Court of Appeal for Ontario in *Calvin Forest Products Ltd v Tembec*, 208 OAC 336, 147 ACWS (3d) 401 at paragraph 14:

> **14** In determining a motion for non-suit, the trial judge must take into consideration the most favourable facts from the evidence led at trial, as well as all supporting inferences. In attempting to set aside the granting of the non-suit, a plaintiff simply has to show that there is evidence which, if believed, would form the basis for a *prima facie* case. A *prima facie* case is no more than a case for the defendant to answer (see *Hall et al. v. Pemberton* (1974), 5 O.R. (2d) 438 (C.A.) and *Ontario v. Ontario Public Service Employees Union* (1990), 37 O.A.C. 218 at 226 (Div. Ct.)).

[17] In *Prudential Securities Credit Corp v Cobrand Foods Ltd*, 2007 ONCA 425, 158 ACWS (3d) 792, at paragraph 35, the Court of Appeal for Ontario specified the principles that must guide a judge who is faced with a motion for nonsuit in his or her assessment of the evidence:

> On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences. This court discussed this latter principle in *Hall et al. v. Pemberton* (1974), 5 O.R. (2d) 438 at 438-9, quoting *Parfitt v. Lawless* (1872), 41 L.J.P. & M. 68 at 71-72.

[18] The concept of nonsuit (and of directed verdict in a jury trial) also exists in criminal law and refers to the absence or incompleteness of evidence on at least one of the essential elements of the offence. Authors Sopinka, Lederman & Bryant addressed directed verdicts as follows:

> Thus, the preliminary hearing judge or the trial judge determines whether the Crown adduced evidence on every essential definitional element of the crime for which the Crown has the evidential burden. (page 192).

[19] Authors Pierre Béliveau and Martin Vauclair addressed the issue as follows in *Traité général de preuve et de procédure pénales*, 11th edition, 2004:

> [TRANSLATION]
>
> 1802. Before closing its case, the prosecution must have submitted *prima facie* evidence of the offence, which means that there must, at that point, be admissible evidence in the record pertaining to each element of the offence . . . . Therefore, there is no need for the judge, at that stage, to assess the weight of the evidence or the credibility of the witnesses.

[20] The CUPW claims that a motion for nonsuit cannot be brought in the context of a contempt proceeding and has referred me to *Penthouse International Ltd v 163564 Canada Inc* (1995), 101 FTR 25, 56 ACWS (3d) 978, in which Justice Gibson stated that contempt proceedings do not give rise to motions for nonsuit. Justice Gibson, however, did not provide reasons underlying his assertion. With respect for the contrary view, I do not see any impediment to a motion to dismiss in a contempt proceeding, when a similar concept exists in criminal law and contempt has a quasi-criminal component. I believe that, in this case, the CPC was entitled to bring a motion for nonsuit. However, I believe that the arguments raised by the CPC in support of its motion are premature and that they should be decided at the outcome of the contempt proceeding and not at the motion for nonsuit stage.

[21] The contempt proceeding is governed by Rules 466 to 469 of the Rules. Rule 466(b) sets out that a person who disobeys an order of the Court is guilty of contempt of Court. Rule 469 states that a finding of contempt shall be based on proof beyond a reasonable doubt.

[22] The parameters applicable to civil contempt are well established in the case law. The contempt proceeding is a very serious one that is quasi-criminal in character (*Bhatnager v Canada (Minister of Employment and Immigration)*, [1990] 2 SCR 217 (available on CanLII), *ProSwing Inc v Elta Golf Inc*, 2006 SCC 52, [2006] 2 SCR 612). At the hearing on the merits stage, a party claiming that another party is guilty of contempt must prove the following beyond a reasonable doubt:

1- the existence of an order;

2- the other party's knowledge of the order;

3- the other party's knowing disobedience of the order.

[23] To rule on the motion for nonsuit, I must determine whether the CUPW submitted a *prima facie* case in support of each constituent element of the contempt. I believe that the CUPW satisfied that burden.

[24] The evidence submitted by the CUPW made it possible to establish the existence of the arbitral awards rendered by Arbitrator Bergeron and the CPC's knowledge of them. Mr. Girard's testimony also shed light on the CUPW's understanding of the arbitral awards and their scope. The CUPW argues that the CPC is not complying with the arbitral awards. The parties seem to have very different interpretations of the awards rendered by Arbitrator Bergeron and of their scope and ultimately, the Court must determine whether the awards have the requisite characteristics that could give rise to a contempt order and, if necessary, whether the CUPW has discharged its burden of demonstrating beyond a reasonable doubt that the CPC knowingly disobeyed the awards.

[25] In support of its motion for nonsuit, the CPC argues that the award of September 16, 2008, does not have the requisite characteristics for an order to result in a finding of contempt: it is declaratory in nature, it is ambiguous and it is not final, as the arbitrator retained jurisdiction.

[26] It is true that the case law requires, in a contempt proceeding, that the order alleged to have been disobeyed must be neither ambiguous nor merely declaratory (*Telus Mobility v Telecommunications Workers Union*, 2004 FCA 59, [2004] FCJ No 273). It also requires an intentional element related to the failure to comply with the decision. Without any need to prove the

mens rea like in criminal law, the party that is raising the contempt must demonstrate a knowing disobedience of the order (*Chaudhry v Canada*, 2008 FCA 173, [2008] FCJ No 712). Good faith is not relevant in the determination of guilt, but only in considering the appropriate penalty for contempt (*Merk and Co v Apotex Inc*, 2003 FCA 234, [2003] FCJ No 837; *Canadian Private Copying Collective v Fuzion Technology Corp*, 2009 FC 800, 349 FTR 303).

[27] The issues raised by the CPC are relevant for the purposes of determining the merits of the contempt proceeding, but, in my view, they seem premature at the motion for nonsuit stage. The CUPW submitted evidence regarding each constituent element of the contempt. The issues raised with respect to the characteristics of the arbitral awards and their scope are at the heart of the dispute between the parties, but, in my opinion, they are not an argument on the sufficiency or insufficiency of the evidence. I believe that a parallel can be drawn with the principles stated in *Woodmasters Enterprizes Inc v Solcom Group of Companies Inc*, 2009 SKQB 295, 2009 CarswellSask 517, at paragraph 17 and *Prince Rupert Grain Ltd v British Columbia Terminal Elevators Operators' Association*, 2006 CanLII 62922 (CIRB) at paragraph 54, according to which a question of law or of interpretation cannot be determined in a motion for nonsuit. I believe that it is inappropriate to determine the questions raised by the CPC in a motion for nonsuit and that those questions should instead be determined on the merits after having the benefit of the evidence from the CPC, if it chooses to submit evidence, and especially the final arguments from the two parties. Given that finding, it is unnecessary for me to determine the issue of the scope of the order rendered by Justice Beaudry.

ORDER

THE COURT ORDERS that the motion for nonsuit is dismissed. The hearing will continue on February 7, 2011, at 9:30 a.m.

Marie-Josée Bédard
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1717-09
STYLE OF CAUSE:	CANADIAN UNION OF POSTAL WORKERS v. CANADA POST CORPORATION
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 21, 2010
REASONS FOR ORDER AND ORDER:	Bédard J.
DATED:	January 11, 2011

APPEARANCES:

Jean-Marc Eddie Joël Dubois	FOR THE APPLICANT
Nicola Di Iorio	FOR THE RESPONDENT

SOLICITORS OF RECORD:

PERLEY-ROBERTSON, HILL & McDOUGALL LLP/s.r.l. Ottawa, Ontario	FOR THE APPLICANT
HEENAN BLAIKIE Montréal, Quebec	FOR THE RESPONDENT