Federal Court Cour fédérale

Date: 20120405

Docket: T-857-11

Citation: 2012 FC 398

Ottawa, Ontario, April 5, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

THE ELSIPOGTOG FIRST NATION
BAND COUNCIL

Applicant

and

MARY JANE PETERS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an Adjudicator made under the *Canada Labour Code*, RSC 1985, c L-2 (*Code*), dated April 22, 2011. The Adjudicator determined that he was not *functus officio* and retained jurisdiction to address issues that had not been resolved by the parties to perfect his initial award of compensation for unjust dismissal.

I. Background

[2] Mary Jane Peters (the Respondent) was employed by Elsipogtog First Nation Band Council from June 1998 until she was dismissed on April 8, 2009. She filed a complaint against this dismissal under the *Code*.

[3] On February 10, 2011, the Adjudicator, Charles LeBlond, Q.C., upheld her complaint and declared that she was unjustly dismissed. He awarded 18 months pay for a total of $93,000.00 in compensatory damages for loss of income plus $2,715.00 in accumulated interest.

[4] From this amount, there was to be a deduction of $2,000.00 for earnings during the compensatory period plus any additional earnings from employment during the 18 month compensatory period. The exact amount of these additional earnings in mitigation was not specified in the Award.

[5] The Adjudicator also awarded unknown monthly pension contributions of the employer and Ms. Peters for the 18 month period. The amount of these monthly contributions was to be agreed to by the parties. Failing an agreement, the Adjudicator stated that he would hear the parties on the issue.

[6] The Respondent was given her costs in the amount of $5,000.00 plus HST.

[7] As a consequence, the parties were left with two outstanding issues from the Adjudicator's Award – the amount of additional earnings in mitigation and the pension contributions.

[8] In an effort to resolve these issues, their respective counsel (Jane MacEachern for the Applicant and Judith Begley for the Respondent) began corresponding.

[9] There were some initial communications to clarify the amounts that proved unsuccessful. Ms. Begley stated a figure for the pension component while Ms. MacEachern suggested that Ms. Peters had received benefits that would have to be deducted in mitigation of damages. Ms. Begley was not aware of any such benefits.

[10] On March 17, 2011, Ms. Begley sent a fax to Ms. MacEachern noting that she had not yet received any response to several inquiries regarding the employer's calculation of the pension award. She also provided a list of the amounts owing. A deadline of March 25, 2011 at 5pm for the receipt of a cheque in that amount was imposed, otherwise she would "remit this matter immediately thereafter to Mr. LeBlond for determination, and to seek additional costs."

[11] In response, Ms. MacEachern stated it was her client's position that the Adjudicator's decision is "his final decision on the merits of the matter, with the exception of the issue of Ms. Peters' pension entitlement" and "any matters pertaining to Ms. Peters' mitigation and her resulting income during the relevant mitigation period are a matter to be determined by the parties." She also suggested that the wording of the Award with respect to pension entitlement was a

misnomer and Ms. Peters was only entitled to the employer's pension contributions throughout the relevant time period.

[12] On March 22, 2011, Ms. Begley insisted the Adjudicator's decision is "crystal clear" that Ms. Peters was to receive the monthly pension contributions she made in addition to those of her employer. She added:

> There is nothing about this Award that is unusual, or complicated, or that requires significant time to address. It is extraordinary that your client has failed to date to implement its clear terms. We are able to see no reason why your client should not be able to make the necessary arrangements for payment in full by the end of this week, which is a full six weeks after the Award was issued. I therefore request that you arrange for delivery of a cheque in the amount of $109,660.84 made payable to Begley Lordon in Trust, by 5 p.m. on Friday, March 25, 2011. If we do not receive full payment by then, in accordance with our instructions, we will refer the matter to Adjudicator LeBlond for final determination […]

[13] On March 24, 2011, Ms. MacEachern maintained that the Adjudicator's decision is final and "Mr LeBlond therefore does not retain any further jurisdiction in this matter as a result of the privative clause contained in the *Canada Labour Code* and relevant case law and is therefore *functus officio*."

[14] On March 28, 2011, Ms. Begley informed Ms. MacEachern that the pension and mitigation issues had been referred to Adjudicator LeBlond for final determination and specification. Based on a recent case from this Court, she claimed that "an Adjudicator under the *Canada Labour Code* always retains jurisdiction to make such clarifications as may be required to ensure that the precise amounts awarded under a decision are clearly stipulated, and the decision is capable of enforcement."

[15] In her correspondence with Adjudicator LeBlond, Ms. Begley intimated that she had not been successful in achieving an agreement with the employer on three outstanding issues; including the amount of monthly pension contributions, whether Ms. Peters is to be compensated for her contributions or just those of her employer, and any additional amounts earned as income that must be deducted in mitigation. However, she made no mention of the Applicant's contention that the Adjudicator might lack jurisdiction as *functus officio*.

[16] Adjudicator LeBlond responded on March 31, 2011 that "[i]t was unfortunate the parties should not be able to resolve what should be straightforward calculations." He suggested that Ms. Peters produce proof of earnings for the 18 month period whether by T4s or otherwise and requested confirmation that this evidence was available before he would make a decision as to whether a further hearing was necessary. On the issue of pension contributions, the Adjudicator clarified his intention that "[t]he award is designed to have the employer pay the contributions which the employer would have been made during the 18 month period."

[17] He asked to be advised if an agreement could not be reached on these issues. Before a hearing could be held, he would need to request related documentary evidence.

[18] On April 4, 2011, Ms. Begley confirmed that proof of earnings was available for the relevant period in the form of a T4. Based on the Adjudicator's comments, she took the position that the pension contribution amount from the employer should be $5,197.92.

[19] The Adjudicator asked Ms. MacEachern if she agreed with these figures. If so, he could issue an addendum to the award.

[20] However, Ms MacEachern advised the Adjudicator that his "Award was a final decision of this matter capable of being quantified by the parties and you are now *functus officio* and lack the jurisdiction necessary to consider additional evidence or make additional collateral or final orders." She referred the Adjudicator to a range of jurisprudence in support of this contention.

[21] In an email that same day, the Adjudicator stated he "was simply trying to assist in finalizing the matter on the understanding both counsel were seeking assistance." Since Ms. MacEachern took the position that he was *functus officio*, he would not deal with the matter any further.

[22] Ms. Begley immediately objected to the conclusion that the Adjudicator was *functus officio*. She insisted that he was "obliged to take all necessary steps to issue a decision that specifies a fully ascertained amount of damage that is capable of enforcement." The Adjudicator could not presume that he was *functus officio* simply because the Applicant suggested it.

[23] Accordingly, the Adjudicator gave both parties the opportunity to deal with the issue of *functus officio* and he would review the authorities and advise them of his position.

[24] Ms. MacEachern maintained that the Adjudicator had already concluded he lacked jurisdiction to proceed. She claimed that the "[t]he Complainant's continued submission of

additional evidence, opinion, and information to you on matters in dispute has caused you to receive information which you have acted upon in the absence of submissions from the Respondent."

[25] Regardless, both parties submitted their arguments related to *functus officio*. Adjudicator LeBlond issued his decision on April 22, 2011. The Applicant (Elsipogtog First Nation Band Council) now asks this Court to review that decision.

II. Decision Under Review

[26] The Adjudicator noted that the parties were unable to reach an agreement on issues that remained outstanding in his decision of February 10, 2011, namely the earnings in mitigation and the employer's pension contributions.

[27] He determined that the authorities clearly permitted him to retain jurisdiction and deal with issues that need to be resolved in order to "perfect the decision" but not to re-hear, re-consider or vary the decision.

[28] Referring to case law where it was found that an administrative tribunal can clarify an award as the continuation of an original proceeding so long as it does not create new or broader rights, the Adjudicator found that he could hold a hearing only for the purpose of addressing issues that would allow him to complete his work. He insisted that he had "no intention of going beyond the issues which the parties have been unable to resolve amongst themselves."

III. Issues

[29] The Applicant raises the following issues:

(a) What is the appropriate standard of review?

(b) Was the Adjudicator *functus officio* upon release of the Award?

(c) Did the Adjudicator commit a breach of natural justice or procedural fairness?

IV. Analysis

A. *What is the Appropriate Standard of Review?*

(i) Functus Officio

[30] The parties disagree on the standard of review to be applied to the Adjudicator's determination that he was not *functus officio*. The Applicant argues that an assessment of whether the Adjudicator acted outside his jurisdiction or erred in the application of a legal test requires the correctness standard, while the Respondent contends that this raises a question of mixed fact and law that should be reviewed based on reasonableness. The authorities on this issue appear divided.

[31] In *Canada Post Corp v Canadian Union of Postal Workers*, [2008] OJ no 2633, 238 OAC 195 at para 13, the Ontario Superior Court of Justice (Divisional Court) determined that "whether the arbitrator was *functus officio* is a pure question of law for which the standard is correctness."

[32] Justice Snider of this Court implied in *IMP Group Ltd Aerospace Division (Comox) v Public Service Alliance of Canada*, 2007 FC 517, [2007] FCJ no 698 at paras 25-28 that assessing whether an exception to *functus officio* applied could be a question of mixed fact and law. She nonetheless found that in the particular case of a collective agreement "while acknowledging that there is some factual content to the decision, my view is that the question is more heavily weighted to a question of law." The correctness standard was applied.

[33] By contrast, the Nova Scotia Court of Appeal in *Capital District Health Authority v Nova Scotia Government and General Employees Union*, 2006 NSCA 85, [2006] NSJ no 281 determined that these questions were at the fact intensive end of the spectrum and deserving of deference. Writing for the Court, Justice Cromwell, as he then was, concluded at paragraphs 52-53:

> [52] The critical question in this case was whether the language of the main award gave effect to the board's manifest intent. Much of the analysis of the four contextual factors supports giving the board some deference on this issue. The issue is one of mixed fact and law, central to the board's purpose and close to the core of its labour relations expertise. However, the resolution of that question defines the limits of the board's authority to act. This suggests that its resolution of that issue should not be afforded the highest level of deference. I would conclude, therefore, that absent some error in legal principle (either express or extractable from the way it applied the principles) on which the board had to be correct, its determination of whether the initial award gave effect to its manifest intent should be reviewed for reasonableness. In other words, the board's determination of what it manifestly intended must be reasonably supportable by the text of its original award, read as a whole and in context.
>
> [53] The reasonableness standard of review seems to me to strike an appropriate balance between the goals of finality and effectiveness in the context of interest arbitration. Affording the board a measure of deference in relation to determining its own manifest intent will help ensure that the board is able to finish the job assigned to it.

> Insisting that its conclusion in this regard be reasonable, however, ensures that due weight will be given to the goal of finality.

[34] Having reviewed these determinations, I am of the opinion that the reasonableness standard should be applied based on the reasoning provided in *Capital District*, above. I cannot resolve the question of whether the Adjudicator was *functus officio* without considering the nature of his initial Award. In this respect, the Adjudicator is deserving of at least some deference. Although I acknowledge that the issue relates to the Adjudicator's authority to act, this does not preclude me from applying the reasonableness standard, given the factual content involved.

[35] As articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 47, reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

(ii) Natural Justice or Procedural Fairness

[36] There is no dispute that the standard to be applied in determining whether a breach of natural justice or procedural fairness has occurred is correctness.

[37] However, the Respondent notes that relief may not be warranted when "the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice" (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43).

B. *Was the Adjudicator Functus Officio Upon Release of the Award?*

(i) Positions of the Parties

[38] The Applicant submits that the Adjudicator was *functus officio*. The initial Award constituted a final decision on the merits. The Adjudicator was not entitled to retain jurisdiction to deal with the matters in dispute or to receive additional evidence to resolve them. By his intervention, the Adjudicator was attempting to augment his reasons or vary the Award where such actions are not permissible.

[39] The Applicant reiterates that the monthly pension contributions and earnings in mitigation were capable of being quantified by the parties. According to the Applicant, it follows that the initial Award in its present form would be enforceable.

[40] The Respondent contends, however, that the Adjudicator was not *functus officio* and could provide clarification flowing from his obligation to complete the initial Award. The Adjudicator is able to remain seized of matters and determine his own procedures for doing so.

[41] According to the Respondent, the initial Award is not enforceable because it cannot be ascertained without further precision. Contrary to public policy, the Respondent would be deprived from receipt of compensation awarded for her unjust dismissal should the Applicant be successful in this application for judicial review and refuse to cooperate in addressing the outstanding issues.

[42] To assess their respective positions, I begin with a brief summary of the general principles of *functus officio*. In light of these principles, I will consider the nature of the Adjudicator's initial Award and his subsequent intervention. This will enable me to assess the Adjudicator's April 22, 2011 decision that he was not *functus officio* and could address the outstanding issues of monthly pension contributions and earnings in mitigation.

(ii) General Principles

[43] As a general rule, *functus officio* ensures finality in the decision-making process. As described by Donald J.M. Brown, Q.C. and the Honourable John M. Evans in *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 2010):

> The doctrine of *functus officio* provides that once an adjudicator has done everything necessary to perfect the decision, they are barred from revisiting them other than to correct clerical errors or other minor technical errors.
>
> […]
>
> Administrative adjudicators and other decision-makers to whom the duty of fairness applies have no inherent jurisdiction to rehear, reconsider or vary a decision once it has been finalized. Rather, having rendered a final decision, they are *functus officio*. Thus, subject to the exception to the general rule, or perhaps where the parties agree otherwise, any authority to rehear, reconsider or vary a decision must be found in statute.

[44] These principles are reflected in the leading case on *functus officio* in the administrative law context, *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848, [1989] SCJ no 102, where Justice Sopinka stated:

> [20] I do not understand Martland J. to go so far as to hold that functus officio has no application to administrative tribunals. Apart

from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in Paper Machinery Ltd. v. J. O. Ross Engineering Corp., supra.

[21] To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

[22] Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in Grillas, supra.

[23] Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See Huneault v. Central Mortgage and Housing Corp. (1981), 41 N.R. 214 (F.C.A.)

[45] *Chandler*, above recognizes that there should be some flexibility to reopen decisions in the administrative context, but only in instances where it is authorized by statute or if there is an error in expressing "manifest intention."

[46] In *IMP Group Ltd*, above at paragraph 58 it was found that hearing further submissions from parties and issuing a decision on issues previously addressed would not fall under the exception for an error in expressing "manifest intention" as the arbitrator in that instance was "augmenting" the reasons.

[47] The critical test is "whether the Adjudicator could be said to have finally determined the complaint before him" (*Murphy v Canada (Adjudicator, Labour Code)*, [1994] 1 FC 710, [1993] FCJ no 1236 at para 16 (FCA); *Huneault v Central Mortgage Housing Corp*, [1981] FCJ no 905, (1981) 41 NR 214 at para 7). If this is the case, the adjudicator is *functus officio* and cannot revisit the earlier decision.

[48] This reasoning is further supported by the decision in *Jacobs Catalytic Ltd v International Brotherhood of Electric Workers, Local 353*, 2009 ONCA 749, [2009] OJ no 4501 at para 60 where it was stated:

> [60] […] Retaining jurisdiction over an aspect of a case is generally acceptable only where that aspect has not been fully addressed; a tribunal cannot arbitrarily reserve for itself extended jurisdiction over a completed aspect of a case. […]

[49] An adjudicator is not, however, precluded from issuing a clarifying award as long as it does not create new or broader rights than those initially conferred (see the confirmation of this principle in *Sherman v Canada (Customs and Revenue Agency)*, 2005 FC 173, [2005] FCJ no 209).

[50] As a consequence, I must consider whether the Adjudicator's initial Award constituted a final decision and if he is still permitted to provide clarification and hear the parties on outstanding issues.

(iii) Nature of the Initial Award

[51] I acknowledge certain factors pointing to the conclusion that the Adjudicator's initial Award was final. For example, section 243 of the *Code* contains a strong privative clause stating that every order of an Adjudicator "is final and shall not be questioned or reviewed in any court." There is no authority in the *Code* to reconsider a decision.

[52] In this instance, however, the Adjudicator left two matters to be resolved by the parties. "[A]ny additional earnings from employment" in mitigation during the relevant period were to be subtracted from the overall Award. Included in compensation were "additional amounts of her and the Employer's monthly pension contributions to her pension account."

[53] In *Paley v Fishing Lake First Nation*, 2005 FC 1448, [2005] FCJ no 1772 at paras 26-27, Justice Michael Kelen found that even though an order did not specify a particular quantum, it was still capable of being enforced by the Court and constituted a final order. He stated:

> [26] […]
>
> The Court is satisfied that the remedy ordered specifies the nature of the relief, namely the payment of compensation to the respondent under paragraph 242(4)(a) of the Code in an amount that, although not numerically quantified, is specified by an ascertainable and certain mechanism, namely an amount equal to that paid to McKee during the relevant period.
>
> [27] In my view, the fact that the adjudicator did not specify the means by which the information of McKee's salary would be disclosed does not in any way make the quantum less final […] As such, the adjudicator exhausted his statutory powers and became functus officio. The adjudicator did not retain jurisdiction thereafter to make further orders in respect of the respondent's now-complete complaint.

[54] Central to Justice Kelen's determination that this was a final order is that the amount "although not numerically quantified, is specified by an ascertainable and certain mechanism."

[55] By contrast, *Larocque v Louis Bull Tribe*, 2008 FC 1402, [2008] FCJ no 1817 held that an Award referring to "prevailing interest rate" and "reasonable costs" could not be enforced due to lack of precision. At paragraph 16, Justice Michael Phelan stated "the Adjudicator is not *functus* until he at least completes the task of rendering an award where the amounts are clearly stipulated." He also noted at paragraph 21 that a critical part of the Adjudicator's role is to issue an award capable of enforcement and "[u]ntil at least that is accomplished, the Adjudicator remains seized of the matter."

[56] Having considered the relevance of these cases, I conclude that the wording in the Adjudicator's initial Award and the concerns that have already arisen regarding its precision more closely resemble the situation in *Larocque*, above. As in this instance, the matters were capable of quantification by the parties but without clearly stipulated amounts would pose challenges for enforcement proceedings. The "ascertainable and certain mechanism" referred to in *Paley*, above, is unlikely to be present in many cases.

[57] I also note situations where the Adjudicator's ability to expressly retain jurisdiction to deal with issues that have not been addressed has been recognized. For example, *Joudrey v Canadian Atlantic Railway, a division of Canadian Pacific Ltd*, [1995] FCJ no 1159, 100 FTR 189 at para 39 upheld an Adjudicator's decision to remain seized of an issue of the amount of salary paid to an employee if the parties were unable to agree. He was also prepared to hear submissions on the matter. The Court confirmed that an Adjudicator had discretion to establish his own procedures in this regard.

[58] This is directly relevant to the issue of pension contributions where the Adjudicator stated he would hear the parties on the issue failing an agreement. Although no jurisdiction was expressly reserved to resolve earnings in mitigation, I see no reason why this outstanding issue cannot also be raised with the Adjudicator as part of his role in ensuring the completion of the Award.

[59] Irrespective of whether the initial Award is final, an Adjudicator is able to provide clarification for the parties so long as no broader rights are provided (see *Sherman*, above).

[60] This was evident in the dispute that arose as to the appropriate interpretation of the Award as read literally or referring solely to those pension contributions made by the employer. The email of Adjudicator LeBlond on March 31, 2011 clarified his intention that the employer's contributions were to be paid to the Respondent. This was a clarification that only he could provide to the parties. I also note that his interpretation was to the Applicant's benefit. The Adjudicator's email did not amount to augmenting reasons or substantively varying the Award as the Applicant claims.

(iv) Assessment of the Adjudicator's Decision on *Functus Officio*

[61] Given the above observations, it was reasonable for the Adjudicator to conclude that he was not *functus officio* and could deal with outstanding issues of pension contributions and earnings in mitigation. It was also appropriate for him to stress that he would not go beyond the issues that have yet to be completed.

[62] With precise amounts left to be resolved by the parties, the Adjudicator would not necessarily be *functus officio* upon release of the Award. He could still remain seized of the matter until there is an "ascertainable and certain mechanism" or, to put in another way, the "amounts are clearly stipulated." This would ensure finality and allow for the enforcement of the Award. It is also supported by sound public policy considerations because, without an enforceable Award and agreement between the parties, the Respondent would be prevented from receiving the compensation awarded for her unjust dismissal.

[63] The Adjudicator also has a role by retaining jurisdiction on the issue of pension contributions or in clarifying his original intentions.

C. *Did the Adjudicator Commit a Breach of Natural Justice or Procedural Fairness?*

[64] I cannot find any merit to the Applicant's assertion that there was a breach of natural justice or procedural fairness in this instance. While the Applicant may have concerns regarding the initial referral of the matter to the Adjudicator as handled by Ms. Begley, this does not reflect on the Adjudicator's conduct, particularly given my above conclusion regarding the issue of *functus officio*.

[65] When the Adjudicator received information from Ms. Begley, he asked Ms. MacEachern whether she was in agreement. The raising of concerns regarding *functus officio* prompted the Adjudicator to seek submissions and issue a formal decision before proceeding. The Applicant was not prevented from presenting its case based on the procedure followed by the Adjudicator.

V. Conclusion

[66] The Adjudicator reasonably found that he was not *functus officio* upon release of the Award and was able to deal with outstanding issues. No breach of natural justice or procedural fairness was committed in this instance.

[67] Accordingly, this application for judicial review is dismissed, with costs awarded to the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, with costs awarded to the Respondent.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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Judith K. Begley	FOR THE RESPONDENT

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