

Federal Court



Cour fédérale

Date: 20120402

Docket: T-1292-11

Citation: 2012 FC 383

Ottawa, Ontario, April 2, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

**SCOTT BURDEN
MARTIN CYR**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is the second judicial review of an adjudicator's decision (2nd Decision) regarding the right to reimbursement of travel expenses for seasonal workers under the terms of the *Isolated Post Policy* (IPP). The first judicial review by Justice de Montigny found the initial adjudicator's decision (1st Decision) to be unreasonable and the matter was "referred back to another Adjudicator

to be decided in accordance with the reasons of this Court”. This is the judicial review of the second adjudicator’s decision.

II. BACKGROUND

[2] The parties agree upon the basic facts of this case. The Respondents are indeterminate seasonal workers of Parks Canada Agency (PCA) who work in remote areas of Canada during the summer season. They are members of the Public Service Alliance of Canada (union).

[3] The employer, PCA, is a separate employer listed in accordance with the then applicable legislation.

[4] The parties are bound by PCA’s *Isolated Post Policy*. The IPP is deemed to be part of the collective agreement between PCA and the union effective April 1, 2003. Disputes arising from the alleged misinterpretation or misapplication of the IPP are subject to PCA’s grievance procedures.

[5] The parties disagree as to the application of s. 2.1 of the IPP which provides for the reimbursement of travel and transportation expenses for non-elective medical or dental care for employees assigned to isolated posts.

[6] The parties do agree that both grievors have met the standards set out in s. 2.1.2 of the IPP – that is, that the treatments in question were non-elective, not available at their headquarters, and were required without delay. Both Respondents filed grievances because their claims were denied.

[7] Mr. Burden was a seasonal employee at the “isolated post” under the IPP, L’Anse Aux Meadows National Historical Site. His daughter became acutely ill in July 2003 but the earliest date she could obtain an appointment with a specialist in St. John’s was two weeks after Mr. Burden’s seasonal employment ended for the year.

[8] Mr. Cyr was a seasonal employee at another “isolated post” – Mingan Archipelago National Park Reserve. He had to travel with his daughter to Sept-Îles for an orthodontist’s appointment approximately seven weeks after his seasonal lay-off began.

[9] The first adjudicator (an adjudicator of the Public Service Labour Relations Board) concluded that the benefits claimed were only available during seasonal employment and not during the off-season with the only exception being when, for operational requirements, the employer cannot grant an employee’s request during his seasonal employment.

[10] The IPP contains a “General” section which includes an Application provision as follows:

General	Généralités
[...]	[...]
Application:	Champ d’application
This Policy applies to all eligible employees of Parks Canada; the Agency is listed in Part II of Schedule I of the Public Service Staff Relations Act and has elected to follow this Policy.	La présente politique s’applique à tous les fonctionnaires éligibles de Parcs Canada; l’Agence est inscrite à la Partie II de l’annexe 1 la Loi sur les relations de travail dans la fonction Publique; l’Agence a choisi de suivre cette politique.
Persons employed:	Les personnes employées :

<p>a) for a specified term of less than three (3) months or b) working less than one-third of the normal working hours of a full time indeterminate employee of the same occupation group and level</p>	<p>a) pour une durée déterminée de moins de trois (3) mois ou b) qui travaillent moins d'un tiers des heures normalement exigées d'un fonctionnaire à plein temps nommé pour une période indéterminée à un poste du même groupe et du même niveau</p>
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<p>are not eligible for any of the benefits provided in Part II (Expenses and Leave) or those provided in Sub-section 3.2.2 or Section 3.6 of Part III (Relocation to an Isolated Post) of this Policy.</p>	<p>Ne peuvent se prévaloir des avantages prévus à la Partie II (Frais et congé) ou au paragraphe 3.3.2 ou à l'article 3.6 de la Partie III (Réinstallation dans un poste isolé) de la présente politique.</p>
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[...]

[...]

Definitions**Définitions**

[...]

[...]

Employee (fonctionnaire) – means, subject to the Application section, a person

a) To whom this policies applies
b) Whose salary is paid out of the Consolidated Revenue Fund.

Fonctionnaire (employee) – désigne, sous réserve des dispositions du Champ d'application, une personne :

a) visée par la présente politique,
b) touchant un traitement tiré à même le Trésor.

[11] The IPP sets forth the relevant Travelling and Transportation provisions in s. 2.1:

Travelling and Transportation Expenses**Frais de transport et de voyage****2.1 Non-Elective Medical or Dental Treatment****2.1 Recours non facultatif à un traitement médical ou dentaire**

2.1.1 Employees who are granted leave without pay for

2.1.1 Les fonctionnaires qui obtiennent un congé non payé

the following reasons are also entitled to the benefits of this section: illness, injury-on-duty, or maternity/parental leave.

2.1.2 Subject to this section, when employees or their dependents obtain medical or dental treatment at the nearest location in Canada where adequate medical or dental treatment is available, as determined by the attending medical or dental practitioner, and they satisfy their FUS by means of a certificate of the attending medical or dental practitioner that the treatment

- a) was not elective,
- b) was not available at their headquarters, and
- c) was required without delay,

the FUS shall authorize reimbursement of the transportation and traveling expenses in respect of that treatment.

pour les raisons suivantes ont droit aux prestations mentionnées au présent article : maladie, accident de travail ou congé de maternité/parental.

2.1.2 Sous réserve du présent article, lorsque les fonctionnaires ou les personnes à leur charge subissent un traitement médical ou dentaire dans la localité canadienne la plus proche où un traitement approprié peut être obtenu, de l'avis du dentiste ou du médecin, et qu'ils convainquent leur DUG, au moyen d'un certificat délivré par le dentiste ou le médecin, que le traitement :

- a) n'était pas facultatif
- b) n'était pas offert à leur lieu d'affection et
- c) s'imposait de toute urgence,

Le DUG autorise le remboursement des frais de voyage et de transport engagés à l'égard de ce traitement.

[12] Section 2.7 of the IPP outlines provisions for "Part-time and Seasonal Employment"; the critical subsection being 2.7.3:

2.7 Part-time and Seasonal Employment

2.7.1 Subject to the Application section of this Policy, part-time and seasonal employees shall be entitled to the benefits of Appendix I or J, in the same proportion as their total annual hours of work compare to the

2.7 Emplois à temps partiel et saisonniers

2.7.1 Sous réserve de l'article sur le Champ d'application, un fonctionnaire à temps partiel ou saisonnier est admissible aux avantages décrits à l'Appendice I ou J, proportionnellement au nombre total des heures

total annual hours of work of a full-time employee occupying a position at the same occupational group and level (prorating).	annuelles de travail du dit fonctionnaire, par rapport à celui d'un fonctionnaire à temps plein occupant un poste de même groupe et niveau (calcul au prorata).
2.7.2 Employees will be eligible to be reimbursed the lessor of:	2.7.2 Le fonctionnaire est admissible à un remboursement équivalant au moindre des montants suivants :
a) the prorated maximum entitlement (Appendix I); or	a) le montant maximal auquel le fonctionnaire a droit calculé au prorata (Appendice I), ou
b) the actual expenses incurred (Appendix J).	b) les dépenses remboursables engagées (Appendice J).
2.7.3 When, because of operational requirements, an indeterminate seasonal employee who resides at the headquarters cannot be granted the benefits of this section during the operational season, the employer shall, at the employee's request, grant the benefits of this section during the off-season.	2.7.3 Quand au fonctionnaire saisonnier nommé pour une période indéterminée résidant au lieu d'affection ne peut pas se prévaloir des prestations accordées en vertu du présent article pendant sa saison de travail, en raison des nécessités du service, l'employeur les lui accorde pendant sa période de congé, s'il en fait la demande.
2.7.4 Part-time and seasonal employees may choose the 80% non-accountable Vacation Travel Assistance which will then be prorated.	2.7.4 Un fonctionnaire à temps partiel ou saisonnier peut choisir de demander de l'aide à 80% au titre des voyages pour congé annuel qui sera alors calculée au prorata.

[13] Justice de Montigny's decision found the first adjudicator's decision to be unreasonable. In that regard, he found:

- the adjudicator's reliance on s. 2.7.3, separate and apart from the provisions governing travel expenses for non-elective medical or dental treatment, was an

unreasonable basis for concluding that indeterminate seasonal workers were not entitled to those benefits.

- that error was compounded by the failure to consider or mention the “Application” section of the IPP which arguably establishes that employees under the IPP are generally entitled to the benefits that the policy offers.
- the adjudicator failed to explore the question of whether as “employees”, the grievors were entitled to the s. 2.1.1 medical and dental-related travel benefits, which the policy states are available to “employees”.

[14] Justice de Montigny’s basic conclusion is this:

In the absence of any explanation as to why the Application section of the IPP and its section 2.1 must be interpreted to exclude seasonal employees from the benefit of reimbursement of transportation and travelling expenses incurred for non-elective medical or dental treatment, it can hardly be said that the decision of the Adjudicator is reasonable.

[15] The matter was referred to a 2nd adjudicator who upheld the grievance. The basis of this decision was that:

- the Federal Court had determined that s. 2.7.3, relied on heavily by the first adjudicator, applied to vacation travel-related benefits, but not to the non-elective medical or dental treatment.
- the issue before the second adjudicator was whether the grievors were employees for the purposes of s. 2.1.2 of the IPP while they were on seasonal lay-off.

- if the intention of the IPP was to exclude people in the position of the grievors, it should have been mentioned in the General clauses or specified in the appropriate sections or subsections of the IPP.
- the “Application” section applied to the whole policy and the “Application” section excludes only two categories of employees (three-month term hires and those working less than one-third of the normal working hours of a full-time employee) but did not exclude seasonal employees on seasonal lay-off.
- the definition of “employee” under the IPP covers a person to whom the policy applies and whose salary is paid out of the Consolidated Revenue fund – a reference to the source of payment rather than the time of payment (being or not being paid).

[16] The 2nd adjudicator concluded that in the absence of the exclusion of employees who were on seasonal lay-off, these people were employees for purposes of the IPP and entitled to the expenses in dispute.

III. ISSUES

[17] The issues in this judicial review are:

- Did the adjudicator comply with the reasons for judgment of Justice de Montigny?
- Did the adjudicator err in his interpretation of the IPP?

IV. ANALYSIS

[18] The above description of the issues represents the single issue raised by each party. The two issues attract different standards of review.

A. *Standard of Review*

[19] The Applicant argued that the adjudicator failed to comply with Justice de Montigny's reasons for judgment. Thus, the Applicant argues for the correctness standard of review and only pleads the reasonableness standard as an alternative. The Respondents argue that this issue is subsumed in the adjudicator's decision on the interpretation of the IPP and thus is subject to the reasonableness standard.

[20] It is now well established pursuant to the decision in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 57, that where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard.

[21] In *Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 FCA 53 [*Superior Propane*], the Federal Court of Appeal had to determine a similar issue – whether the Competition Tribunal followed a direction given to it by the Federal Court of Appeal. While the Court did not specifically address the standard of review because even on a correctness standard, the Tribunal had complied, the Court gave some guidance that suggests that as this is a matter of law, the correctness standard is applicable.

[22] Justice Rothstein set out the basic obligation to comply with a Court's direction as a matter of *stare decisis* and legal duty.

54 The principle of *stare decisis* is, of course, well known to lawyers and judges. Lower courts must follow the law as interpreted by a higher coordinate court. They cannot refuse to follow it: *Re Canada Temperance Act, Re Constitutional Questions, Re Consolidated Rules of Practice*, [1939] 4 D.L.R. 14 at 33 (Ont. C.A.), aff'd [1946] 2 D.L.R. 1 (S.C.C.); *Woods Manufacturing Co. v.*

Canada (Attorney General), [1951] S.C.R. 504 at 515. This principle applies equally to tribunals having to follow the directions of a higher court as in this case. On redetermination, the duty of a tribunal is to follow the directions of the reviewing court.

[23] The conclusion that correctness is the applicable standard of review on this first issue is supported by the Alberta Court of Appeal decision in *Shuchuk v Alberta (Workers' Compensation Board)*, 2012 ABCA 50 at para 14.

[24] As to the second issue, Justice de Montigny determined the applicable standard to be reasonableness, which reasoning I adopt.

14 ... Indeed, the jurisprudence of this Court indicates that a measure of deference is owed to adjudicators confronting issues of this kind: see, for example, *Public Service Alliance of Canada v Canada (Food Inspection Agency)*, 2005 FCA 366, at para 18; *Currie v Canada (Customs and Revenue Agency)*, 2005 FC 733, at paras 11-15, rev'd on other grounds 2006 FCA 194, at para 20; *Nitschmann v Canada*, 2008 FC 1194, at para 8, var'd on other grounds 2009 FCA 263 at para 8; *Chan v Canada (Attorney General)*, 2010 FC 708, at para 17. On a standard of reasonableness, the task of this Court is to determine whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47.

B. *Compliance with Court Direction*

[25] At paragraph 10 of the *Superior Propane* decision, above, the Court of Appeal outlined the matters that must be considered in determining whether a Tribunal has complied with a court direction.

10 In order to determine whether the Tribunal, in its redetermination decision, failed to follow the directions of the Federal Court of Appeal, it is necessary to consider:

1. the relevant legislative scheme;
2. the relevant findings of the Tribunal in its original decision;
3. what the Court found to be in error in the Tribunal's original decision;
4. what the Court concluded and directed the Tribunal to do; and
5. whether the Tribunal, in its redetermination decision, did what it was directed to do by the Court.

[26] The first four factors have already been discussed in the Background section of these Reasons. More specifically, the Court did not give a specific direction to reach any conclusion or do anything other than to make a redetermination in accordance with Justice de Montigny's reasons.

[27] Justice de Montigny's reasons pointed to the error in reliance (without considering other parts of the IPP) on s. 2.7.3 of the IPP given that the provision did not apply to the benefits in dispute. Justice de Montigny's direction was effectively that the second adjudicator not make the same error. It was not, as argued by the Applicant, a direction to consider specifically either section 2.1 or 2.7.3.

[28] The second adjudicator did what Justice de Montigny directed in not relying on s. 2.7.3 of the IPP alone as justification for dismissing the grievances.

[29] The Applicant's arguments that the adjudicator failed to follow the Court's directions because he did not follow the modern approach to interpretation and allegedly ignored a central

aspect of the case cannot succeed. There was no such direction and moreover those matters are more properly a question of the reasonableness of the decision.

C. *Reasonableness of Decision*

[30] The Applicant did not substantively argue that the adjudicator's decision was unreasonable. It rested its case on the adjudicator's failure to follow Court directions.

[31] The adjudicator's conclusion was that seasonal employees were "employees" under the IPP even when seasonally laid off. His conclusion was based on such factors as apparent intent of the IPP and the absence of an exclusion for seasonal employees, the "Application" section outlining the scope of that policy and the definition of "employee" in the policy.

[32] The adjudicator applied the modern approach to the interpretation of the IPP in a manner consistent with Justice de Montigny's comments at paragraph 15:

15 It is fair to say that the principles of interpretation of statutes also apply to the interpretation of collective agreements and to the policies that form part of collective agreements. The primary approach to statutory interpretation, which is referred to as the "modern approach", is described as follows by Professor Ruth Sullivan:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the parties.

Elmer A. Driedger & Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at pp 19-24.

[33] The Applicant has not identified any applicable exclusion of seasonal employees nor has it pointed to anything unreasonable in the adjudicator's reasoning.

[34] Given the Supreme Court of Canada's reasons in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, this is the very type of decision to which the Court should give considerable deference. It arises in the specialized area of labour relations, directed at a specific provision of a collective agreement and decided within the area of expertise of the decision maker.

V. CONCLUSION

[35] For all these reasons, this judicial review will be dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1292-11

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA

and

SCOTT BURDEN
MARTIN CYR

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**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: April 2, 2012

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