Federal Court  Cour fédérale

Date: 20120612

Docket: T-320-11

Citation: 2012 FC 719

Toronto, Ontario, June 12, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

**MARK TIMSON, ROBERT DAVIS,
DAVID BENTLEY, BERNARD JONES,
ROB FINUCAN, MIKE CARDINAL,
TAMMY MACQUEEN, AYSHA WILSON,
DOUG VELLA, JEAN-LUC CHAMAILLARD,
ÉRIC TESSIER, GRAHAM HUGHES,
CURTIS THOMPSON, SHANNON COLE,
TRAVIS ROGERS, CHRISTIAN PLANTE,
ANDREW CATHCART, SERGE THERRIAULT,
CHRISTOPHER SMITH, CURTIS FISHER,
BRUCE GABRIEL, TED GRAUS, JOSEPH HART,
ROBERT SCHULTZ, TERRY WALSH,
BRIAN SQUIRES, RANDY WELSH,
TREVOR KEMBLE, DANIEL BEAUCHAMP,
RORY MUNRO, JULIE BRISSON**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of the February 1, 2011 decision of Adjudicator Pineau of the Public Service Labour Relations Board [PSLRB or the Board] granting the respondents' 42 grievances seeking acting pay for time spent providing training to colleagues [the *Timson* matters]. The applicant alleges that the decision in the *Timson* matters should be set aside because the Adjudicator violated principles of natural justice or procedural fairness or, alternatively, issued an unreasonable decision in granting the grievances.

[2] I have determined that the decision must be set aside because the procedure adopted by the Adjudicator was fundamentally unfair and, indeed, resulted in her ruling on the merits of the grievances in the *Timson* matters without affording the parties an opportunity to make submissions or file evidence in respect of the merits of the grievances. Accordingly, there was a breach of the principles of procedural fairness which necessitates the decision being set aside, with the matter being remitted back to a different PSLRB adjudicator for re-hearing. Given this determination, it is not necessary or appropriate to address the applicant's alternative submission regarding the unreasonableness of the decision.

Background to the Decision

[3] The respondents are security officers, employed in the Correctional Service of Canada [CSC] and classified at the CX-01 or CX-02 levels. They are members of a bargaining unit represented by the Union of Canadian Correctional Officers-Syndicat des Agents Correctionnels du Canada-CSN [CSN or the union]. CSC denied their claims for acting pay for time spent delivering various forms of training, including chemical agent, first aid, self-contained breathing apparatus, firearms, personal safety refresher, community disengagement and emergency response training.

The respondents filed grievances, alleging that this refusal violated provisions of the collective agreement applicable to them, and the CSN referred their grievances to adjudication under the *Public Service Labour Relations Act*, SC 2003, c 22, s 2.

[4] The collective agreement contains the following provisions:

> **43.05 Instructor allowance**
>
> When an employee acts as an instructor, he shall receive an allowance equal to two dollars fifty cents ($2.50) per hour, for each hour or part of an hour.
>
> […]
>
> **49.07** When an employee is required by the Employer to substantially perform the duties of a higher classification level in an acting capacity and performs those duties for at least eight (8) hours of work, the employee shall be paid acting pay calculated from the date on which he or she commenced to act as if he or she had been appointed to that higher classification level for the period in which he or she acts.

[5] Clause 49.07 appeared in the predecessor agreement (albeit differently numbered) but clause 43.05 was added during the last round of bargaining for the renewal of the agreement.

[6] Under the predecessor collective agreement, a group of CSC employees classified at the CX-2 level filed similar grievances, alleging that they were entitled to be paid acting pay when they provided firearms training; their grievances were allowed by the PSLRB in *Lavigne et al v Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 117, [2009] CPSLRB No 117 [*Lavigne*]. That case, however, did not deal with any form of training other than firearms training, arose under a different collective agreement between the employer and the CSN (which lacked clause 43.05) and dealt with claims where the grievors had provided training for eight or more consecutive hours within the 25 working days preceding the date the grievances were filed.

[7] Of the 42 grievances at issue in the decision, only 19 were initially referred to adjudication. The employer wrote to the Board and asked it to hold 18 of them in abeyance, pending disposition of Mr. Timson's grievance as a "test case". The CSN opposed this request and took the position that the *Lavigne* decision had already decided the matters raised in the grievances, so there was no need for a test case. The PSLRB convened a telephone conference call to discuss the employer's request, during which it became apparent that additional acting pay grievances had been filed. Following the call, the Board wrote to the employer and the union to request a list of all grievances which had been referred to adjudication on the issue of acting pay for CSC instructors and to request dates for a further telephone conference call to discuss how to deal with them.

[8] The PSLRB convened a subsequent telephone conference call with the employer, the union and their respective counsel, which was chaired by Adjudicator Pineau. During the course of this call, Ms. Pineau indicated that she was of the view that the *Lavigne* decision did have some bearing on the matters at stake, and the employer representatives understood her to indicate that she would review whether the *Lavigne* decision should be given significant weight in the *Timson* matters and whether the employer's request to hold certain of the grievances in abeyance should be granted. The parties discussed dealing with these issues by way of written submissions.

[9] Following the teleconference, the PSLRB wrote to the employer and the CSN on November 12, 2010, to confirm what was discussed during the teleconference. The terms of the letter are significant to the issues in this application for judicial review; it provided in relevant part as follows:

> This letter follows the pre-hearing teleconference held on November 10, 2010 with respect to the attached list of files. This will serve to confirm the following:

> 1. All grievances presently referred to adjudication on the issue of acting pay for instructors including those on Mr. Graham's list provided on October 18, 2010 have been reassigned to Adjudicator Pineau;
>
> […]
>
> 1. After review of the *Lavigne's* decision, Adjudicator Pineau is of the view that it deals with a similar subject matter and is relevant to these files;
>
> 2. Adjudicator Pineau has requested written submissions on the applicability of the *Lavigne* decision (2009 PSLRB 117);
>
> 3. The relevance of the *Lavigne* decision may be decided on the basis of written submissions at the discretion of Adjudicator Pineau. If not, an oral hearing will be convened to deal with the issues […]

[10] The employer and the CSN filed submissions in accordance with a timetable established by the Board in its November 12th letter. The parties confined their submissions to the issue of the binding effect of the *Lavigne* precedent as a matter of principle, including whether it should be given weight under the new (and different) collective agreement which had subsequently come into force. Significantly, the employer did not raise any arguments as to why or how the situations involved in the 42 *Timson* matters were different from those in *Lavigne* in involving different types of training, employees who did not work eight consecutive hours or who made claims for time worked more than 25 working days prior to the date their grievances were filed. Each of these matters might well provide a valid basis for distinguishing the *Lavigne* precedent. The employer did not address these matters in its written submissions because it understood that all that was at issue was the potential applicability of *Lavigne*, as a matter of principle, under the successor collective agreement. The CSN likewise did not address these issues in its written submissions.

[11] Although the PSLRB has the statutory authority to dispose of grievances without holding an oral hearing under section 227 of the PSLRA, as counsel for the applicant notes, its common practice is to hold oral hearings in grievances and during such hearings to receive sworn testimony, which is provided by way of examinations-in-chief, cross-examination and re-examination of witnesses, to have documents formally tendered and marked as exhibits and to receive submissions at the conclusion of a case. In short, the procedure typically followed by the PSLRB is similar to that followed by a court.

The Decision

[12] In her February 1, 2011 decision, Adjudicator Pineau characterized the issues before her as being twofold: first, whether the employer was seeking to re-litigate an issue that had already been decided in *Lavigne* and, second, whether there was any basis for reaching a conclusion different from that reached in *Lavigne*. She went on to hold, without hearing any evidence on the point, that the circumstances in the *Timson* matters were not materially different from those in *Lavigne*. She also determined that there was no material difference between the predecessor collective agreement and the new agreement applicable in the *Timson* matters and that, while the principle of *stare decisis* did not apply in labour arbitration, the need for "finality and certainty" meant she should follow the *Lavigne* precedent, without adjudicating each of the 42 grievances on their merits. She accordingly allowed the grievances.

Was There a Breach of Procedural Fairness?

[13] No deference is owed to an inferior tribunal where a breach of procedural fairness is alleged because the determination of whether the tribunal has respected the principles of procedural fairness

is a matter for the reviewing court to decide (see e.g. *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539 at para 100; *Canada (Attorney General) v Grover*, 2004 FC 704, [2004] FCJ No 865 at para 34).

[14] As the of Supreme Court of Canada noted in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 at paras 21-28, the content of the duty of procedural fairness will vary from one tribunal to another, depending upon the following factors:

1. the nature of the decision in question and the process followed making it, and, in particular, the degree to which the decision-making process resembles that followed by a court (in which event greater procedural guarantees ought to be afforded to a party);
2. the statutory scheme applicable to the tribunal;
3. the importance of the decision to the affected parties;
4. the legitimate expectations of the parties; and
5. the procedural choices made by the tribunal, especially where the choice of procedure is left to the tribunal by statute.

Application of these factors to the PSLRB results in the conclusion that the Board must observe a high degree of procedural fairness. In terms of the first, fourth and fifth criteria, as noted, the process typically followed by the PSLRB is a highly structured one, akin to the process followed by a court. The legitimate expectations of the parties before the PSLRB, therefore, lead them to anticipate that their issues will not be determined without the opportunity to file evidence and make submissions. Indeed, the procedural choices made by the Board, of typically holding hearings, give

rise to these expectations. The statutory scheme likewise indicates that the Board should be held to a high degree of procedural fairness; the PSLRA creates a comprehensive scheme for final determination of adjudicable workplace disputes of federal public servants, and provides the PSLRB primary (and often exclusive) jurisdiction to determine such disputes to the exclusion of the courts (*Vaughan v Canada*, 2005 SCC 11 at paras 33-41, [2005] 1 SCR 146). Finally, grievances such as the present concerning the application of provisions of collective agreements may well have application across the entire federal public service and, therefore, decisions made in respect of them may well have wide-ranging impacts, extending beyond the grievors in a particular case (*Ryan v Canada (Attorney General)*, 2005 FC 65, [2005] FCJ No 110).

[15] While the PSLRB is bound to give parties a high degree of procedural fairness, this case turns less on this conclusion than on the significance of the breach committed by the adjudicator in failing to provide the applicant with the right to be heard on the merits of the grievances. Indeed, it is axiomatic that a tribunal cannot dispose of a key point without affording the parties the right to be heard in respect of it. In *Université du Québec à Trois-Rivières v Larocque*, [1993] 1 SCR 471, [1993] SCJ No 23 [*Larocque*], the Supreme Court of Canada set aside a decision of a labour arbitrator who had refused to hear the employer's evidence concerning the employer's reason for terminating the grievors' employment, which related to a lack of funds resulting from the poor quality of the work done by the grievors. The Supreme Court of Canada, relying in part on the *audi alterem partem* principle, held that the refusal to hear the evidence in question impacted the fairness of the decision, due to the key nature of the evidence. Former Chief Justice Lamer, writing for the majority of the Court, stated at p 491 [citing to SCR]:

> […] I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. The grievance arbitrator is

> in a privileged position to assess the relevance of evidence presented to him and I do not think it desirable for the courts, under the guise of protecting the rights of the parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.

[16] To somewhat similar effect, in *Gale v Canada (Treasury Board)* 2004 FCA 13, [2004] FCJ No 186 [*Gale*], the Federal Court of Appeal set aside a decision of an adjudicator who rendered a decision prior to receiving evidence that he had requested. The Federal Court of Appeal found that the adjudicator's failure to consider the requested evidence amounted to a breach of procedural fairness because:

> […] the Adjudicator established a procedure in respect of the receipt of certain evidence and then departed from that procedure without notice. The appellant was entitled to expect that the Adjudicator would not make his decision without the evidence that he, himself, had said was of interest which he gave the parties an opportunity to produce (at para 14).

[17] The applicant argues that in light of the PSLRB's typical practice, the nature of the discussions that took place during the telephone conference calls and the content of the Board's November 12, 2010 letter, it was perfectly reasonable for the employer to conclude that all that was to be decided by Adjudicator Pineau was the applicability of the *Lavigne* precedent to the *Timson* matters, as a matter of principle, and that this issue would involve consideration only of the extent to which *Lavigne* might be applicable under the new collective agreement. This, in turn, necessitated arguments like those made by the parties in their written submissions which were directed only to the differences in the collective agreement language between the two collective agreements and the binding effect of arbitral awards in the labour relations context. According to the applicant, there was no way for it to have anticipated that the Adjudicator would have determined the merits of the

grievances and, accordingly, the employer did not seek to file evidence or make submissions relevant to the merits. As noted, these submissions and evidence would have addressed three issues: first, the differences in the training given by the grievors as compared to that involved in *Lavigne* (and the implications of the differences in light of the relevant job descriptions); second, the temporal limits on damages (which are limited to work done within the 25 days preceding the date the grievance was filed under clause 20.10 of the 2006 collective agreement); and, finally, the fact that many of the grievors did not work eight consecutive hours (which the employer submits is a condition precedent to payment under clause 49.07 of the collective agreement).

[18] The CSN, for its part, argues in effect that that the employer "had its chance" and should have raised its three arguments on the merits in its written submissions. The union asserts that it should have been apparent to the employer that Adjudicator Pineau was going to decide the grievances on the merits. The CSN also submits that the employer's argument regarding the temporal limits on the recoverability of damages is really an objection as to arbitrability, which ought to have been made much earlier, either during the grievance procedure or when the grievance was referred to adjudication, in accordance with the requirements of section 95 of the *Public Service Labour Relations Board Regulations*, SOR/2005-79 [Regulations]. It finally argues that the doctrine of issue estoppel was applicable and ought to have prevented the employer from seeking to make the arguments it asserts it was denied the opportunity to raise.

[19] The arguments regarding section 95 of the Regulations and issue estoppel are without merit and may be disposed of quickly.

[20] Insofar as concerns the 25 day time limit, the employer is not asserting that the grievances are inarbitrable due to being filed outside the mandatory time limit, as they are of a continuing nature; rather, the employer's argument is to the effect that damages are temporarily limited to the 25 day period, and that the Adjudicator erroneously awarded damages outside that time period for many of the grievors in allowing the grievances in their entirety. In this regard, it is well-settled that in the face of a mandatory time limit, like that contained in section 95 of the Regulations, damages in a continuing grievance will be limited to the time period in respect of which the grievance may be filed. Donald J.M. Brown and David M. Beatty, in their leading text on labour arbitration, *Canadian Labour Arbitration*, 4th ed (Toronto: Canada Law Book, 2011) at section 2:1418, write as follows on this point: "Generally, where the claim for damages relates to a breach that has continued for some time, recovery can only be made retroactively for the period of time permitted for filing the grievance." Arguments on the temporal limitation of damages need not be raised in a preliminary fashion during the grievance process. Thus, the CSN's argument on this point fails because section 95 of the Regulations applies to objections to arbitrability and not to the extent of damages that may be awarded in a continuing grievance.

[21] The union's argument on issue estoppel also fails. A necessary condition for the application of the doctrine of issue estoppel is that that the issues in the two cases be the same (see e.g. *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25, [2001] 2 SCR 460). The doctrine of issue estoppel is clearly inapplicable here as the employer asserts that the *Timson* matters are distinguishable from those decided in *Lavigne* and, thus, the issues in the two cases are not the same.

[22] In terms of whether the PSLRB breached the rules of procedural fairness in deciding the 42 grievances on their merits following receipt of the parties' written submissions, it is my view that the Adjudicator failed to provide the parties with an opportunity to call evidence and make submissions on key points in the grievances and, accordingly, that she violated the principles of procedural fairness. While it is incontrovertible that the PSLRB adjudicators possesses authority under the PSLRA to decide matters, including grievances, without holding an oral hearing, in the circumstances of this case, the employer had a legitimate expectation that it would be afforded the right to file evidence and make submissions on the merits of the grievance. In this regard, its position was not unlike that of the applicants in the *Gale* and *Larocque* cases, cited above.

[23] In light of the Board's typical practice, the content of the parties' discussions with Adjudicator Pineau and, most especially, the terms of the Board's November 12, 2010 letter, there was no basis upon which the employer could have reasonably concluded that the Board might decide the grievances on the merits, following receipt of the written submissions. Nowhere was this made clear by Ms. Pineau, and, indeed, the tenor of the discussions indicated precisely the opposite. Likewise, so did the November 12th letter, which requested written submissions only on "the applicability of the *Lavigne* decision". The letter, moreover, went on to indicate that the "relevance of the *Lavigne* decision may be decided on the basis of written submissions" and "if not an oral hearing will be convened to deal with the issues" (meaning the issues associated with the applicability of the *Lavigne* precedent as a matter of principle). There was simply no indication that the Board intended to or even reserved the possibility of deciding the grievances on their merits, without further submissions from the parties. Thus, the employer was not put on notice that it ought to have sought to file its evidence or to make submissions on the merits of the grievances. It

reasonably assumed it would have the opportunity to do so following the Board's preliminary ruling on the applicability of *Lavigne* as a matter of principle.

[24] Indeed, the reasonableness of the way in which the employer interpreted what was to occur is borne out by the union's own conduct, which mirrored that of the employer in that the CSN, like the employer, confined its written submissions to the issue of the applicability of the *Lavigne* decision as a matter of principle and did not address the individual circumstances in any of the 42 grievances other than to argue that Mr. Timson's experience was directly captured by the *Lavigne* decision.

[25] This case is distinguishable from *Boshra v Canadian Association of Professional Employees*, 2011 FCA 98, [2011] FCJ No 411 [*Boshra*], cited by the CSN. There, unlike here, the Board clearly put parties on notice that it intended to render a decision on the merits based on the parties' written submissions (see *Boshra* at para 11). Here, on the other hand, the Board failed to provide any such indication to the parties, and, indeed, led the parties to believe that the grievances would not be decided without the usual opportunity to call evidence and make submissions on the merits.

Conclusion

[26] Accordingly, the Board denied the employer procedural fairness in these grievances in deciding them on their merits without allowing the employer the opportunity to call evidence or make submissions on the merits of the grievances. The decision of Adjudicator Pineau will therefore be set aside and the grievances will be remitted to the PSLRB for re-determination, by

another adjudicator. In my view, the entire decision must be set aside because it is impossible to separate the portions of the decision dealing with the effect of *Lavigne* as a matter of principle from the rest of the decision disposing of the grievances on their merits.

[27] During the hearing, the parties agreed that costs should be awarded to the successful party in the amount of $2500.00. In light of the issues involved, this amount is reasonable and, accordingly, the applicant is entitled to its costs in the all-inclusive amount of $2500.00.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted and the decision of Adjudicator Pineau of the PSLRB, dated February 1, 2011 is set aside;

2. The 42 grievances are remitted back to the PSLRB for re-determination by a different adjudicator; and

3. The applicant is awarded costs in the all-inclusive amount of $2500.00.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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