

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160218

**Dockets: A-379-15
A-380-15**

Citation: 2016 FCA 56

**CORAM: STRATAS J.A.
RYER J.A.
DE MONTIGNY J.A.**

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on February 17, 2016.

Judgment delivered at Ottawa, Ontario, on February 18, 2016.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

**RYER J.A.
DE MONTIGNY J.A.**

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The applicant, Association of Justice Counsel, has brought two applications for judicial review against an order and a decision of an adjudicator acting under the *Public Service Labour Relations Act*, S.C. 2003, c. 22. These are the applications:

- *File A-379-15*. In this application, the Association alleges that an order made by the adjudicator on February 4, 2015 concerning a policy grievance does not accord with the reasons he gave for the order. The Association requests that the order be set aside and the matter sent back to the adjudicator to make a new order that accords with the reasons he gave.
- *File A-380-15*. After the adjudicator issued his February 4, 2015 order and reasons for order, the Association asked the adjudicator to correct the order. On March 3, 2015, the adjudicator decided that he could not do so. He wrote that he was “*functus officio*...and [did] not possess the legal ability to amend [the order].” In this application, the Association requests that that decision be set aside. It alleges that the adjudicator had the legal ability to amend the order and should have.

[2] For the reasons set out below, I would allow both applications with costs. A copy of these reasons shall be placed in both court files.

A. Background

[3] The Association represents the interests of certain federal government lawyers. The Association, on behalf of the Law Group (LA) bargaining unit, is party to a collective agreement with the Treasury Board of Canada (the “Employer”).

[4] The Association filed a policy grievance against the Employer alleging a violation of the collective agreement in force at the time.

[5] The collective agreement provided a range of salary for each level within the LA classification group. Part of the overall salary can be pay based on an evaluation of the lawyer's performance. The alleged violation of the collective agreement concerns how these pay increases are calculated in the case of lawyers who receive a promotion during a particular year.

[6] Specifically, the policy grievance concerned, among other things, two discrete issues, a timing issue and a rate-of-pay issue:

- *The timing issue.* The Association alleged that under the collective agreement performance pay must be paid for all months that a lawyer holds a performance-pay-eligible position. So, for example, if a lawyer was promoted from one eligible position to another in the middle of the year, the lawyer must receive performance pay for the full year and not just the second half of the year when the lawyer was at the higher level.
- *The rate-of-pay issue.* The Association alleged that under the collective agreement if a lawyer is promoted mid-year, the lawyer's performance pay should be calculated on the basis of the higher rate of pay on March 31 of that year.

[7] Before us, the Association submits that the Employer conceded the timing issue during the hearing of the grievance. It relies on paragraphs 93 and 94 of the adjudicator's reasons for order. However, before us, the respondent, on behalf of the Employer, submits that the timing issue was not conceded to the extent the Association contends. The respondent relies on other portions of the adjudicator's reasons for order (*e.g.*, paragraphs 24 and 25) and a chart entered into evidence before the adjudicator.

[8] From this record, I cannot determine with any certainty exactly what the Employer conceded on the timing issue in the grievance. However, I can determine two things with certainty: something on the timing issue was conceded before the adjudicator in favour of the employees represented by the Association, and that issue was part of the grievance.

[9] The adjudicator's order regarding the grievance reads as follows: "The grievance is dismissed." However, part of the grievance was resolved in favour of the employees. There is a discrepancy.

[10] The Association noticed this discrepancy and asked the adjudicator to correct his order. As mentioned above, in his decision of March 3, 2015, the adjudicator declined to correct his order because he considered himself *functus officio*—or finished with the matter as a matter of law.

B. Analysis

[11] There is no need to consider the standard of review in these applications. For the reasons that follow, even if we were to review on the basis of the deferential standard of reasonableness, both the February 4, 2015 order and the March 3, 2015 decision are indefensible and unacceptable.

[12] The adjudicator's order purportedly dismisses "the grievance." For this purpose, "the grievance" in this case is what was set out in the originating document, here the Policy Grievance Presentation Form submitted by the Association.

[13] By dismissing the grievance, the order effectively states that all aspects of the grievance set out in the Policy Grievance Presentation Form had no merit. Plainly, this is not the case. As mentioned above, something on the timing issue in the grievance was conceded before the adjudicator in favour of the employees represented by the Association. The Association was successful on part of the grievance.

[14] The respondent submits that this is just a minor issue that can be overlooked. It adds that the order need not set out a ruling on every single aspect of the grievance. In any event, the reasons are clear.

[15] I disagree. The wording of the order is an important matter and the Association was prudent in taking prompt steps to correct it.

[16] Section 234 of the *Public Service Labour Relations Act* provides for the enforcement of adjudicators' orders. Under that section, the terms of the order are enforced, not the reasons an adjudicator offers in support. When a party wants to enforce an order, it may request that a certified copy of the order be filed with the Federal Court. Once the order is filed, it becomes an order of the Federal Court. As an order of the Federal Court, it can be enforced through the use of a number of mechanisms, including the serious mechanisms of contempt and committal.

[17] In my view, the adjudicator could have entertained the Association's request to correct the order: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. His decision not to do so on the ground that he was legally barred from doing so cannot stand, even under deferential reasonableness review.

[18] In *Chandler*, the Supreme Court held (at pages 860-863) that an administrative decision-maker (including the adjudicator here) can reopen an order if it does not express the decision-maker's manifest intention. As mentioned above, the adjudicator's reasons show that the Employer had conceded part of the grievance. Having accepted the concession, the adjudicator's manifest intention, then, must have been to uphold part of the grievance in the Association's favour. But the adjudicator's order fails to express that intention. Rather, it dismisses the grievance in its entirety.

C. Proposed disposition

[19] For the foregoing reasons, I would allow the application in file A-379-15, quash the adjudicator's February 4, 2015 order, and remit the matter to the adjudicator for the sole purpose of issuing a new order that accurately reflects his reasons for decision. For reasons of procedural fairness, I would direct that the adjudicator receive submissions from the parties regarding the wording of the new order.

[20] I would allow the application in file A-380-15 and quash the adjudicator's March 3, 2015 decision not to correct the February 4, 2015 order.

[21] I would grant the Association its costs in both applications.

“David Stratas”

J.A.

“I agree
C. Michael Ryer J.A.”

“I agree
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:

A-379-15 AND A-380-15

**APPLICATIONS FOR JUDICIAL REVIEW FROM THE DECISIONS DATED
FEBRUARY 4, 2015 AND MARCH 3, 2015 OF AN ADJUDICATOR APPOINTED
UNDER THE *PUBLIC SERVICE LABOUR RELATIONS ACT***

STYLE OF CAUSE:

ASSOCIATION OF JUSTICE
COUNSEL v. ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING:

OTTAWA, ONTARIO

DATE OF HEARING:

FEBRUARY 17, 2016

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

RYER J.A.
DE MONTIGNY J.A.

DATED:

FEBRUARY 18, 2016

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