Federal Court of Appeal  Cour d'appel fédérale

Date: 20160614

Docket: A-436-15

Citation: 2016 FCA 179

CORAM: **WEBB J.A.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

ROBERT ARSENAULT
and
FEDERAL GOVERNMENT DOCKYARDS TRADES AND LABOUR COUNCIL (EAST)

Applicants

and

ATTORNEY GENERAL OF CANADA
and
TREASURY BOARD OF CANADA SECRETARIAT (DEPARTMENT OF NATIONAL DEFENCE)

Respondents

Heard at Halifax, Nova Scotia, on April 25, 2016.

Judgment delivered at Ottawa, Ontario, on June 14, 2016.

REASONS FOR JUDGMENT BY: SCOTT J.A.

CONCURRED IN BY: WEBB J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

SCOTT J.A.

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act) to set aside a decision rendered by an adjudicator (the Adjudicator)

of the Public Service Labour Relations Board (PSLRB) dated June 22, 2015. The Adjudicator dismissed Mr. Robert Arsenault's (the grievor) grievance on the ground that he was entitled to compensation solely under clause 17.03(d) of the collective agreement dated June 16, 2008 between the Treasury Board and the Federal Government Dockyard Trades and Labour Council (East) for the Ship Repair Group (the collective agreement).

I. The facts

[2] The facts were not disputed. The grievor was required by his employer to travel from Halifax to Stockholm, Sweden, in order to carry out systems repairs on a ship. He therefore left Halifax and took an overnight flight on Saturday, June 5, 2010 at 23:35 local time and arrived in London on Sunday, June 6, 2010 at 9:35 local time. He spent the day in London at a hotel and left for Stockholm the following morning. The issue before the Adjudicator was the grievor's total pay entitlement for the portion of the trip from Halifax to London as June 5 and 6 were days of rest.

[3] For that portion of the trip, including the flight and the transportation to and from each airport, the grievor spent a total of 11 hours apportioned as follows: 3.5 hours on Saturday and 7.5 hours on Sunday.

[4] The Employer paid the grievor, under clause 17.03(a) of the collective agreement, for the hours travelled on June 5 and 6 at the double time rate as both days were days of rest for the employee. The total amount of pay was the equivalent of 7 hours straight time on the first day and 15 hours straight time on the second day for a total of 22 hours.

[5] Clause 17.03 governs travel pay under the collective agreement. It provides as follows:

Ship Repair - East (SRE)	**Réparation des navires - Est (SRE)**
17.03 Where an employee is required by the Employer to travel to a point away from the employee's normal place of work, the employee shall be compensated as follows:	17.03 Lorsqu'un employé est tenu par l'Employeur de se rendre à un endroit qui est éloigné de son lieu de travail normal, il est rémunéré dans les conditions suivantes :
a. on any day on which the employee travels but does not work, at the applicable straight-time or overtime rate for the hours travelled, but the total amount shall not exceed fifteen (15) hours' straight time;	a. Durant n'importe quel jour pendant lequel il voyage mais ne travaille pas, il est rémunéré au taux des heures normales ou au taux des heures supplémentaires applicables durant ses heures de trajet mais le montant total ne doit pas dépasser quinze (15) heures normales.
b. on a normal workday in which the employee travels and works:	b. Durant une journée de travail normale où il voyage et travaille :
i. during the employee's regular scheduled hours of work at the straight-time rate not exceeding eight (8) hours' pay,	i. pour les heures de travail normales prévues à son horaire, il est rémunéré au taux normal et ne touche pas plus de huit (8) heures de rémunération;
ii. at the applicable overtime rate for all time worked outside the employee's regular scheduled hours of work,	ii. au taux des heures supplémentaires pour toute heure effectuée en dehors des heures de travail normales prévues à son horaire;
iii. at the applicable overtime rate for all travel outside the employee’s regular scheduled hours of work to a maximum of fifteen (15) hours’ pay at straight time in any twenty-four (24) hour period;	iii. au taux des heures supplémentaires applicable pour tout trajet effectué en dehors des heures de travail normales prévues à son horaire jusqu'à un maximum de quinze (15) heures de rémunération calculées au taux normal dans toute période de vingt-quatre (24) heures.
c. on a rest day on which the employee travels and works, at the applicable overtime rate:	c. Durant un jour de repos où il voyage et travaille, au taux des heures supplémentaires :

i. for travel time, in an amount not exceeding fifteen (15) hours' straight-time pay, and	i. pour tout temps de trajet et pour un montant ne devant pas excéder quinze (15) heures de rémunération au taux normal, et
ii. for all time worked;	ii. pour toute heure travaillée.
d. notwithstanding the limitations stated in paragraphs 17.03(a), (b) and (c), where an employee travels on duty, but does not work, for more than four (4) hours between 2200 hours and 0600 hours, and no sleeping accommodation is provided, the employee shall be compensated at the applicable overtime rate for a maximum of fifteen (15) hours' straight-time pay.	d. Nonobstant les restrictions énoncées aux alinéas a), b) et c) du paragraphe 17.03, l'employé qui voyage en service commandé, mais ne travaille pas, durant plus de quatre (4) heures au cours de la période allant de 22 heures à 6 heures, sans que le coucher lui soit fourni, est rémunéré au taux des heures supplémentaires applicable, jusqu'à concurrence de quinze (15) heures de rémunération au taux normal.

II. The Adjudicator’s decision

[6] The Adjudicator dismissed the grievance on the ground that the grievor was entitled to compensation solely under clause 17.03(d) of the collective agreement. Clause 17.03(d) provides for travel pay when an employee travels overnight for at least four hours between 10 pm and 6 am and no sleeping accommodation is provided. The Adjudicator determined that no other compensation was due under the other paragraphs of clause 17.03, notwithstanding the submissions of the parties.

[7] In dismissing the grievance, the Adjudicator ignored the common interpretation of clause 17.03(a) of the collective agreement accepted by all parties according to which the grievor was entitled to compensation under clause 17.03(a) and that the issue to be determined was whether he could receive additional compensation pursuant to clause 17.03(d). The applicants had argued

that the grievor was entitled to an additional 15 hours of pay, whereas the respondents had taken the position that he was entitled to an additional 7 hours of pay under clause 17.03(d).

[8] The Adjudicator framed the issue as a disagreement by the parties on the meaning of clause 17.03(d) of the collective agreement (reasons at paragraph 54). He then rejected the interpretation of clause 17.03(d) agreed upon by both parties and went on to conclude that clause 17.03 sets out four distinct options to compensate an employee for travel (reasons at paragraphs 69-70). In this case, he concluded that clause 17.03(d) was meant to cover exactly the situation that the grievor was in: that is an overnight trip overlapping on two days with no sleeping accommodation being provided (reasons at paragraph 75). Consequently, he determined that the grievor should be compensated only under clause 17.03(d) and not under a combination of clause 17.03(a) and 17.03(d) (reasons at paragraph 81).

III. The issues

[9] The first issue in this application are whether the Adjudicator committed a breach of procedural fairness and violated the grievor's legitimate expectations by failing to provide notice that he was considering an interpretation of the collective agreement that was not raised at the hearing and not contemplated by either party. In other words, did the Adjudicator thereby prevent the applicants from making submissions and adducing evidence to challenge that interpretation of clause 17.03?

[10] The second issue is whether the adjudicator's decision is reasonable.

IV. The standard of review

[11] The law is well settled: an issue raising a breach of procedural fairness should be reviewed on a standard of correctness (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at paragraph 79; *Henri v. Canada (Attorney General)*, 2016 FCA 38, [2016] F.C.J. No. 129 at paragraph 16; *Abi-Mansour v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 135, [2015] F.C.J. No. 682 at paragraph 6). In addition, an issue raising the reasonableness of an adjudicator's decision is reviewable on a standard of reasonableness which commands much deference in view of an adjudicator's specialized expertise in the interpretation of collective agreements (*Delios c. Canada (Attorney general)*, 2015 FCA 117, 472 N.R. 171 at paragraphs 18-21).

V. The submissions

[12] I will now turn to the first issue. Was there a breach of procedural fairness?

[13] This case raises a novel issue: whether the Adjudicator had, in the circumstances of this case, a duty to apprise the parties that he was considering an interpretation of clause 17.03 of the collective agreement that neither party had contemplated? Was there a duty to afford the applicants an opportunity to make submissions and adduce evidence to challenge his interpretation of the collective agreement in view of the fact that it was not raised at the hearing and ran counter to the parties' mutual understanding that the grievor was entitled to 22 hours of compensation under clause 17.03(a)?

[14] The applicants refer to the factors outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 243 N.R. 22 in order to determine the extent of procedural fairness that the grievor should be afforded. This Court must consider: (i) the nature of the decision and the process followed; (ii) the nature of the statutory scheme under which the decision-maker operates; (iii) the importance of the decision for the grievor; (iv) his legitimate expectations, and; (v) the choices of procedure (*Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504) at paragraph 42.

[15] First, the applicants submit that the adjudication process is, in substance, judicial, since the Adjudicator has the power to summon witnesses, order the production of documents and compel parties to produce oral or written evidence. In addition, an applicant may be represented by counsel. Thus, they claim that a broad duty of procedural fairness applied. The applicants refer to paragraph 75 of the decision of the Supreme Court in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 [*Moreau-Bérubé*]:

> [75] The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority (see *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker*, supra, at para. 20; *Therrien*, supra, at para. 81). Within those rules exists the duty to act fairly, which includes affording to the parties the right to be heard, or the *audi alteram partem* rule. The nature and extent of this duty, in turn, "is eminently variable and its content is to be decided in the specific context of each case" (as per L'Heureux-Dubé J. in *Baker*, supra, at para. 21). Here, the scope of the right to be heard should be generously construed since the Judicial Council proceedings are similar to a regular judicial process (see *Knight*, supra, at p. 683); there is no appeal from the Council's decision (see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 1, at pp. 7-66 to 7-67); and the implications of the hearing for the respondent are very serious (see *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113).

[16] Second, the applicants point to subsection 228(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (PSLRA) which provided that the parties must be given an opportunity to be heard. That provision was drafted in mandatory terms as it uses the word "must".

[17] The applicants also refer again to *Moreau-Bérubé*, a case which stands for the proposition that the absence of a right to appeal calls for more generous procedural protections.

[18] Third, the applicants stress that the result of the proceeding is important not only for the grievor, but more generally for his bargaining unit as it affects the earnings of all the members of the unit who are called to provide ship repair services outside of Halifax. Indeed, subsections 208(4) and 209(2) of the PSLRA contemplate the impact of a grievance that raises the interpretation of a clause of the collective agreement: an individual member is prohibited from filing such a grievance without the approval of, and representation by, the bargaining agent to which the collective agreement or arbitral award applies.

[19] Fourth, the applicants submit that they had a legitimate expectation that they would be allowed to make submissions on the issues on which the Adjudicator would rule, as provided for by subsection 228(1) of the PSLRA. The applicants argue that a full hearing with written evidence and legal submissions constituted an implicit recognition of the importance of the matter; hence, broad procedural protections were required.

[20] The applicants then turned to the case law which, in their view, has consistently recognized and sanctioned the principle that a party has the right to know the case to be met and respond to the central issues raised.

[21] The applicants cited first *Bulat v. Canada (Treasury Board)*, [2000] F.C.J. No. 148, 252 N.R. 182 where this Court decided that an individual adversely affected by a decision should be given an adequate opportunity to address issues that he could not have reasonably expected to be central to his or her case. In that particular case, the grievor had grieved the classification of his job because he had been assigned a low numerical rating. In the absence of the grievor and his representative, management's representative made some representations to the Classification Grievance Committee to indicate that the grievor had performed a number of duties involving outside contacts on a voluntary or developmental basis that should not be considered in the evaluation, thereby justifying a lower classification. Those representations were never disclosed to the grievor. This Court determined that the failure to inform the grievor of these representations constituted a breach of procedural fairness.

[22] In *Canada (Attorney General) v. Garg*, 2004 FCA 410, 329 N.R. 188 [*Garg*], there was no dispute between the parties that the respondent was involved in farming. However, the Umpire concluded that the respondent's activities did not constitute farming, without having given the parties an opportunity to address the issue. This Court ruled that that conduct also breached procedural fairness.

[23] Prior to *Garg*, in *Dankas v. Canada (War Veterans Allowance Board)*, [1985] F.C.J. No. 32, 59 N.R. 309, this Court had determined that it was unfair for the War Veterans Allowance Board to dismiss an application for war veterans allowance since the decision turned on a point that was never argued at the hearing.

[24] Finally, the applicants also cited *Fischer v. Canada (Attorney General)*, 2012 FC 720, 413 F.T.R. 64. In that case, the issue of procedural fairness related to whether or not a classification grievance committee had to disclose a potential downgrade where the grievor could not reasonably anticipate it, even though it had disclosed all the evidence necessary to make such a determination. Gleason J., as she then was, concluded that the committee had breached its duty of procedural fairness by omitting to do so:

> [25] In my view, in the circumstances of this case, the requirements of procedural fairness did require that the Committee disclose that it was considering downgrading the Professional Responsibility factor and did require that it afford the parties the opportunity to make submissions on the potential downgrade prior to rendering its decision. While it is certainly true that the content of the duty of fairness, in the context of classification grievances in the federal public service, falls "somewhere in the lower zone of the spectrum" (*Chong II* at para 12), in my view, even the minimal requirements of procedural fairness were not respected here. Mr. Fischer is not seeking the right to call *viva voce* evidence, cross-examine witnesses or other trappings of a full-blown adversarial hearing; rather, he is seeking the minimal right to be aware of and be afforded an opportunity to make arguments regarding the determinative issue in his grievance…

[25] The respondent took the position before us that the onus of proof rested with the grievor and that it was incumbent on the applicants to advance all the arguments and present evidence to ensure that their interpretation of clause 17.03(d) would prevail.

[26] The respondents did acknowledge that the parties were not afforded prior notice of the interpretation adopted by the Adjudicator and that it had never been discussed at the hearing, but argued nonetheless that, in light of the Adjudicator's expertise, he could not look at clause 17.03(d) in isolation. Therefore, the Adjudicator could legitimately conclude that clause 17.03(a) did not apply, even though both parties had agreed that it did.

[27] In the respondents' view, the Adjudicator's interpretation was open to him and it is a reasonable and acceptable outcome in view of the fact that the Adjudicator's decision is to be reviewed on a standard of reasonableness.

VI. Analysis

[28] I disagree with the respondents for the following reasons.

[29] In the present case, both parties were in agreement that clause 17.03(a) was applicable. The applicants and the respondents had no indication whatsoever that their common and accepted interpretation could be questioned. I am of the view that, on the facts of this case, procedural fairness dictates that they should, at the very least, have been put on notice and afforded an opportunity to address the issue and adduce evidence to counter the Adjudicator's interpretation of clause 17.03(d) collective agreement.

[30] The factual matrix before us is somewhat similar to *Garg*. In that case, this Court determined at paragraphs 7 and 8 that where an Umpire raises *sua ponte* an issue that had not been raised by any of the parties in the proceedings, and does so without giving the applicant an

opportunity to be heard on the matter and to make representations, it is objectionable because it amounts to a breach of procedural fairness within the meaning of subparagraph 18.1(4)(b) of the Act.

[31] Since the collective agreement is the contract that governs the relationships between the parties, it is critical, in my view, that the parties be afforded an opportunity to be heard since they must live by the terms of their contract. Both parties had a vital interest in the Adjudicator's interpretation of their collective agreement. In this case, the Adjudicator came to a different interpretation of clause 17.03(d) without any input from the parties on how that interpretation could possibly impact on the application of clause 17.03 generally.

[32] In the particular circumstances of this case, it is my opinion that the Adjudicator's failure to give notice to the parties that he was contemplating an interpretation of clause 17.03(d) that negated their joint understanding of clause 17.03(a) constituted a breach of procedural fairness. Both agreed that the grievor was entitled to the payment of 22 hours for his travel between Halifax and London. In fact, the employer had already paid the grievor for the 22 hours. The dispute was clearly restricted to the interpretation of clause 17.03(d) of the collective agreement and it was well delineated. What amount of additional payment was the grievor entitled to receive under clause 17.03(d)? The applicants argued that 15 additional hours were payable under clause 17.03(d) whereas the respondents took the position that only 7 additional hours were payable. Before propounding his interpretation, the Adjudicator should have placed the parties on notice because his failure to alert the parties deprived them of an opportunity to make

representations and adduce evidence to support their common understanding that payments under clause 17.03(d) were additional to those under clause 17.03(a).

[33] The standard of review for issues of procedural fairness is correctness. In this case, the Adjudicator decided to reject the accepted interpretation of a clause of a collective agreement and found that, notwithstanding the interpretation as agreed upon by the parties, the grievor was not entitled to any compensation under clause 17.03(a) of the collective agreement. The parties to that agreement should, in my view, have been given an opportunity to present arguments and to adduce evidence regarding such a determinative issue. In circumstances such as these, this Court must intervene to enforce procedural fairness.

[34] For these reasons, I propose that this application for judicial review be allowed, the decision of the Adjudicator be quashed, and the matter referred back for redetermination before a different adjudicator, with costs.

"A.F. Scott"

J.A.

“I agree.
Wyman W. Webb J.A.”

“I agree.
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-436-15
APPLICATION FOR A JUDICIAL REVIEW FROM THE DECISION DATED JUNE 22, 2015 OF AN ADJUDICATOR APPOINTED UNDER THE *PUBLIC SERVICE LABOUR RELATIONS ACT*	
STYLE OF CAUSE:	ROBERT ARSENAULT AND FEDERAL GOVERNMENT DOCKYARDS TRADES AND LABOUR COUNCIL (EAST) v. ATTORNEY GENERAL OF CANADA AND TRESURY BOARD OF CANADA SECRETARIAT (DEPARTMENT OF NATIONAL DEFENCE)
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	APRIL 25, 2016
REASONS FOR JUDGMENT BY:	SCOTT J.A.
CONCURRED IN BY:	WEBB J.A. DE MONTIGNY J.A.
DATED:	JUNE 14, 2016

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