Date: 20060524

Docket: A-302-05

Citation: 2006 FCA 194

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
PELLETIER J.A.

BETWEEN:

GLEN CURRIE, DOUGLAS FILLMORE,
ANDREW MCAULEY AND VINCENT O'NEILL

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
as represented by CANADA CUSTOMS AND REVENUE AGENCY

Respondent

Heard at Ottawa, Ontario, on April 26, 2006.

Judgment delivered at Ottawa, Ontario, on May 24, 2006.

REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	DÉCARY J.A.
DISSENTING REASONS BY:	LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] It is not uncommon for employees who have a common Work Description to have different duties and responsibilities. So long as those different duties and responsibilities all fall within the general language of their common Work Description, all is well. But, when some of those duties and responsibilities fall outside that Work Description, does article 56.01 of the Collective Agreement permit the adjudicator to order an employer to provide a customized Work Description

to the affected employee? The adjudicator in this case was of the view that he could only respond to changes in work assignment which affected all those subject to the common Work Description, so that any changes to be made would have to be made to the common Work Description. The issue in this appeal is whether that conclusion withstands review on the most deferential standard of review.

[2] This is an appeal of a decision of the Federal Court, reported at 2005 FC 733, dismissing the appellants' application for judicial review of the decision of a member of the Public Service Staff Relations Board (as it then was), sitting as an adjudicator, dismissing their job description grievance.

[3] The appellants are employed as investigator/auditors. Their positions are classified as PM-03. Exercising their rights under article 56.01 of the Collective Agreement, the appellants demanded from their employer a "complete and current statement of the duties and responsibilities" of their positions. Their employer provided them with a copy of Work Description PM-0286 which is applicable to classification PM-03. The appellants allege that Work Description PM-0286 does not represent a complete and current statement of the duties and responsibilities of their positions because they are regularly assigned work beyond the scope of that Work Description. The adjudicator dismissed the grievance, finding that Work Description PM-0286 was "capacious" enough to encompass the duties in question.

[4] The appellants applied for judicial review of the adjudicator's decision. After a brief review of the facts, the application judge examined the issue of the standard of review with care and concluded that he could only intervene in the case of a patently unreasonable decision. He then

dismissed the application for judicial review, saying that "the operative paragraphs of the decision cogently address the evidence and demonstrate a rational basis for the decision." See paragraph 15 of the application judge's reasons. For the reasons which follow, I am unable to agree with this conclusion.

FACTS AND PROCEDURAL HISTORY

[5] This dispute arises because of the division of the investigator/auditor function into two classifications, PM-03 and PM-04. The responsibilities of those classifications are described in Work Descriptions PM-0286 and PM-0677 respectively. The two Work Descriptions are largely the same except for the complexity of the files to be handled. Any other differences are simply consequences of the difference in file complexity.

[6] In the introduction to the PM-0286 and PM-0677 Work Descriptions, the employer describes its complexity rating system, which consists of an objective grid in which various factors are assigned point values. The complexity rating of a given file is a function of the total points attributed to that file. Thus, files with a point value of less that 30 are rated as complexity 10/11 which is defined as Simple/Routine while files with a point value between 30 and 43 are rated as complexity 20/22 which is defined as Difficult.

[7] The primary distinction between Work Descriptions PM-0286 and PM-0677 is that the former provides that persons classified as PM-03 will be assigned files of complexity 10 (Simple/Routine) while the latter provides that persons classified as PM-04 will be assigned files of

complexity 20 (Difficult). There are consequential differences throughout the balance of the Work Descriptions which reflect the difference in complexity. The adjudicator acknowledged the relationship of the complexity rating and consequential changes in the Work Descriptions at paragraph 23 of his reasons.

[8] A partial side by side comparison of the two Work Descriptions illustrates their structure:

Work Description PM-0286 (applicable to classification PM-03):	Work Description PM-0677 (applicable to classification PM-04):
KEY ACTIVITIES	KEY ACTIVITIES
Investigating *routine* domestic and international tax fraud schemes, *complexity 10*, that require minimum or medium accounting knowledge, through the analysis and evaluation of information and allegations from numerous sources to ascertain whether available facts indicate fraud in order to ensure compliance with the Statutes administered by the Agency.	Investigating *difficult* domestic and international tax fraud schemes, *complexity 20*, that require minimum or medium accounting knowledge, through the analysis and evaluation of information and allegations from numerous sources to ascertain whether available facts indicate fraud in order to ensure compliance with the Statutes administered by the Agency.
Planning and conducting *routine* investigations, including searches and seizures under the Income Tax Act, Excise Tax Act, Excise Act and/or the Criminal Code.	Planning and conducting *difficult* investigations, including searches and seizures under the Income Tax Act, Excise Tax Act, Excise Act and/or the Criminal Code.

INTERACTION	INTERACTION
	All investigation cases involve some degree of difficulty of interaction as outlined below. *Cases with a complexity rating of 20 will contain more elements, as compared to complexity 10 cases, and those that are present will have a greater degree of difficulty.*
Conducting interviews of taxpayers, third parties and witnesses, including hostile and uncooperative witnesses, and interrogating suspects to determine the extent of their knowledge and to judge their credibility while respecting the taxpayer's rights under the Canadian Charter of Rights and Freedoms. Discretion, sensitivity and persuasion are needed when dealing with reluctant parties.	Conducting interviews of taxpayers, third parties and *a variety of* witnesses, including hostile and uncooperative witnesses, and interrogating suspects to determine the extent of their knowledge and to judge their credibility while respecting the taxpayer's rights under the Canadian Charter of Rights and Freedoms. Discretion, sensitivity and persuasion are needed when dealing with reluctant parties.
Interacting with third parties, including chartered banks, trust companies, credit unions, accounting firms, law firms, and the taxpayer's customers, clients or suppliers when serving requirements for information and documents.	Interacting with third parties, including chartered banks, trust companies, credit unions, accounting firms, law firms and the taxpayer's customers, clients or suppliers when serving requirements for information and documents. *Cases with a higher complexity rating will have more third parties, will likely include more foreign witnesses thus requiring more difficult interaction.*

INFLUENCE	INFLUENCE
The conduct of investigations and the outcome of the criminal prosecutions of cases may have national implications for establishing jurisprudence. Cases *are less likely to* contain complexity factors where it is possible that decisions made by the investigator could lead to precedent setting court decisions that impact on the operation of the national Investigations programs as well as other future criminal proceedings outside of the CCRA.	The conduct of investigations and the outcome of the criminal prosecutions of cases may have national implications for establishing jurisprudence. Cases *often* contain complexity factors where it is possible that decisions made by the investigator could lead to precedent setting court decisions that impact on the operation of the national Investigations programs as well as other future criminal proceedings outside of the CCRA.
SKILL AND KNOWLEDGE	SKILL AND KNOWLEDGE
All investigations cases contain some degree of the elements of skill and knowledge as outlined below. *Cases with a complexity rating of 10 likely require less skill and knowledge than do cases with a complexity rating of 20.* The existence *of fewer* skill and knowledge factors produces *a less complex* environment. In total, this environment could be classified as *routine.*	All investigations cases contain some degree of the elements of skill and knowledge as outlined below. *Cases with a complexity rating of 20 require more skill and knowledge than do cases with a complexity rating of 10.* The existence *of more* skill and knowledge factors, *many of them having a higher degree of complexity*, produces *a more complex* environment. In total, this environment could be classified as *difficult*.

[9] This comparison is a mere sampling of the terms of the two Work Descriptions but it illustrates the fact that the description of the tasks and challenges of the positions is simply a function of the degree of complexity of the files handled.

[10] The appellants demanded a statement of their duties and responsibilities, as provided in article 56.01 of the Collective Agreement:

> 56.01 Upon written request, an employee shall be provided with a complete and current statement of the duties and responsibilities of his or her position, including the classification level and, where applicable, the point rating allotted to his or her position, and an organization chart depicting the position's place in the organization.

[11] The appellants did not attempt to conceal the fact that their request under article 56.01 was intended to be the first step in the reclassification of their individual positions from PM-03 to PM-04. We were advised by counsel for the appellants at the hearing of this matter that a request for reclassification will not be processed unless the employee agrees that his or her job description is accurate. An accurate description of the extent to which the appellants worked on files with a complexity rating of 20 or higher is therefore a critical element of their Work Description since, as noted, it is the complexity of the files assigned which distinguishes between the PM-03 and PM-04 classifications.

[12] The adjudicator's reasons make it clear that there was evidence that the appellants, whose positions were all classified at the PM-03 level, were being assigned to work on files of complexity 20:

> [8]… For example, the grievor Currie has since September 2003 to the date of hearing been handling a case rated at the 20+ complexity code level, descriptor 'difficult' and as such is being remunerated at the PM-04 investigator auditor pay rate. It is more unusual that a file originally complexity rated at the PM grade and level and subsequently re-rated up award to the AU grade and level (where more formal accounting qualifications are required) would remain assigned to an investigator in the PM group mot possessing those formal qualifications. But this is not unheard of. Thus, in 1966, grievor Currie was assigned a case given an initial complexity rating at the PM-03 grade and level which, two years later, following repeated inquiries on his on his part, was rerated to the AU-02 level. In that case, the employer agreed to the payment of 2.5 years wages in back pay at the AU-02 pay-rate and the continued payment of wages on that basis for the hours continued

> to be worked by Currie on the file, until the conclusion of legal proceedings arising out of it in 1998-1999.

[13] Under the heading of Representations of the Parties, the adjudicator's reasons reflect that the appellants argued that they were asked to work on files whose complexity rating was greater than 10:

> [14] The employer chose to lead no evidence to counter that given by the grievors O'Neill and Currie as to the duties and responsibilities actually performed by each of them. They are often and on a regular basis called for them [sic] to handle files which are complexity rated at the PM-04 level or even higher. … But here the employer is requiring on an ongoing basis the performance of the same work by employees at the PM-03 level as it does for employees at the PM-04 level.

[14] Unfortunately, we cannot tell from the adjudicator's reasons whether he accepted that the appellants worked on files of complexity 20, and whether they did so "often and on a regular basis".

[15] At paragraph 20 of his reasons, the adjudicator speaks of the horizontal and vertical challenge confronting the appellants. After a succinct statement of the difference between a classification grievance and a job description grievance, the adjudicator focuses on the consequences of a national, multi-position job description. Referring to the appellants' horizontal challenge, he notes, at paragraph 21 of his reasons, that:

> … the evidence heard here before me is referable solely to the particular positions occupied by the grievors; they can speak only of the duties and responsibilities they each perform. Without agreement on the part of the employer that their testimony is to be considered representative of each PM-03 investigator/auditor position across its entire enterprise, the effect of any relief granted could only be the development of a position specific Work Description which comprises "a complete and current statement of the duties and responsibilities" of each individual grievor's position:…

[16] The adjudicator goes on to describe the consequences of the appellants' position as the "balkanization of the employer's generic Work Descriptions...". This leads him to observe that:

> It is not surprising then that the jurisprudence of the Board sets a high standard of proof where, as here, grievors assert that the employer's work generic descriptions do not comprise that 'complete and current statement of the duties and responsibilities of [the] position' which must be submitted upon written request to any employee a stipulated at article 56 of the Collective Agreement. It is standard which has not been met, the grievors having failed to overcome this 'horizontal' barrier to their grievances.

[17] I take it from these comments that the adjudicator did not deal with the extent to which the appellants worked on files with a complexity rating of 20 or more because the employer would not agree that the testimony of the appellants was applicable to the other investigator/auditors classified at the PM-03 level.

[18] The adjudicator then goes on to discuss the appellants' vertical challenge, that of overlapping job descriptions. The adjudicator's position is that the appellants have failed to take into account the complexity factor when proposing changes to their Work Description:

> [22] … It is simply not appropriate to that end to carve out of the higher-rated Work Description [PM-04] particular duties and responsibilities which arguably fall within the Work Description of the lower-rated job classification, when the latter is capacious enough to comprehend those duties and responsibilities. This is precisely what has occurred here.
>
> [23] I say this because, by focusing upon particular terminological usage in Work Description PM-0677 for the higher-rated PM-04 classification, the grievors fail to acknowledge that this usage is driven by the principal feature which distinguishes the two Work Descriptions and their correlative classifications: the complexity rating of the files assigned to employees engaged as investigator/auditor.

[19] In the end, the adjudicator dismisses the appellants' grievances as it is his view that Work Description PM-0286 is broad enough to include the appellants' actual work assignments. In doing

so, he was prepared to accept that even if the appellants were doing work beyond their Work Description on an ongoing and permanent basis, their Work Description was not affected even though they might be entitled to additional compensation. This view of the issues is made clear in the adjudicator's oral reasons given at the conclusion of the hearing:

> For fuller reasons to be given, I am satisfied… PM-0286 effective 18-05-00 (Exhibit 3B) comprises a complete and current statement of the duties and responsibilities of [the appellants'] positions as investigator/auditor at the PM-03 level. That said, the grievors are entitled to the wage rate agreed to by the collective bargaining process for the work which they are in fact performing. If that work substantially comprises duties and responsibilities within the higher rated PM-04 classification as detailed in Work Description PM-0677, they may seek relief either by filing an acting pay grievance under article 64.07 of the Collective Agreement where such work is temporary, or *where on an ongoing and permanent basis, through the CCRA classification grievance process.*
>
> [Emphasis added.]

STANDARD OF REVIEW

[20] I am prepared to accept, for purposes of this appeal, that the standard of review is that which the application judge identified, the patently unreasonable decision. Relying upon the decision of the Supreme Court of Canada in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, the application judge described a patently unreasonable decision as one which borders on the absurd. I prefer, however, to describe a patently unreasonable decision as one which is "so flawed that no amount of curial deference can justify letting it stand." *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 52. My preference is rooted in the fact that the issues raised in applications for judicial review are generally questions about which reasonable people can disagree. See for example *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, where four members of a seven member panel found that the decision under review was not patently unreasonable while three

members (Sopinka J., McLachlin J. and Major J.) found that it was. Whether or not one believes intervention is warranted at the most deferential end of the spectrum ought not to be justified in terms which undercut the legitimacy of those who hold a different view.

[21] More fundamentally, I subscribe to the view expressed by Professor David Mullan when he said:

> … In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.
>
> Mullan, David J. "Recent Developments in Standard of Review", in *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners.* Canadian Bar Association (Ontario), October 20, 2000.

[22] If we must have three standards of review, it seems to me that our commitment to a rational system of law is best served by describing the most deferential standard in terms which allow for deference on a basis other than an acceptable degree of irrationality, or a tolerable proximity to absurdity.

[23] In *Dr. Q v. College of Physicians and Surgeons of British Columbia,* 2003 SCC 29, [2003] 1 S.C.R. 226, the Supreme Court held that the role of an appellate court reviewing the decision of a court of review is to identity whether that court properly identified and applied the correct standard of review. See paragraphs 43 and 44. Where the reviewing court has not correctly identified the standard of review, the appellate court is to identity and apply the correct standard. Where the reviewing court has identified the appropriate standard of review, it may nonetheless have improperly applied it. Unfortunately, the judge has not given us the benefit of his reasoning and I

am therefore not in a position to read the adjudicator's decision in the light of that reasoning. Upon conducting my own analysis of the adjudicator's decision, I come to a different conclusion, which is that the adjudicator's decision is so deeply flawed that no amount of curial deference justifies letting it stand.

ANALYSIS

[24] It is clear from the adjudicator's reasons that he felt he could not, or felt he should not, require the employer to provide position specific Work Descriptions. As noted, he was of the view that this would lead to the balkanization of the employer's generic Work Descriptions. This view led him to suggest, in an oral ruling pronounced at the conclusion of the hearing before him and subsequently reproduced in his reasons for decision, that where an employee is required on an ongoing and permanent basis to do work which is substantially outside the Work Description applicable to his or her position, the employee's remedy is to apply for reclassification.

[25] This speaks of a relatively rigid conception of the role of an employee's Work Description. That view is not shared by all adjudicators. Adjudicator Galipeau pointed out in *Breckenridge and The Library of Parliament*, [1996] C.P.S.S.R.B. No. 69 (Q.L.) that:

> [70] The job description, or, to use the expression enshrined in the collective agreement, "the statement of duties and responsibilities", is the cornerstone of the employment relationship between these employees and the Library of Parliament. It is a fundamental, multipurpose document which is referred to with regard to classification, staffing, remuneration, discipline, performance evaluation, identification of language requirements, and career planning. It is erroneous to limit its scope solely to use with regard to classification. It must be sufficiently complete to lend itself to the other uses I have just mentioned.

[26] This view of the role of a Work Description suggests that it is a document which must reflect the realities of the employee's work situation since so many aspects of the employee's rights and obligations in the workplace are bound to his or her Work Description.

[27] The adjudicator's suggestion that reclassification is the appropriate remedy for an employee regularly engaged in doing work beyond the scope of his or Work Description is a particularly relevant example of this point. In argument before us, counsel for the appellants, without contradiction from opposing counsel, advised that a reclassification grievance will not proceed unless the employee agrees that his or her Work Description is accurate. Consequently, a person whose position is classified at the PM-03 level but who is regularly working on files of complexity 20 or greater cannot apply for reclassification unless he or she agrees that Work Description PM-0286 accurately describes their duties and responsibilities. As we have seen, the distinguishing characteristic of Work Description PM-0286 is the fact that the incumbent is assigned to work on files of complexity 10. Consequently, the applicant who seeks reclassification from PM-03 to PM-04 must agree that their job consists of working on files of complexity 10, which effectively undercuts the basis of their request for reclassification.

[28] As a result, the only way in which individual employees can access the reclassification process is by means of a revised job description which accurately describes the duties and responsibilities of their position. Article 56.01 of the Collective Agreement is the mechanism by which the employee is able to demand such a job description. An interpretation of article 56.01

which forecloses its use in the very circumstances which give it a purpose cannot withstand even the most deferential review by this Court.

[29] I would therefore allow the appeal with costs, set aside the order of the application judge, set aside the decision of the adjudicator and remit the matter to be decided by a different adjudicator on a basis consistent with these reasons. I would point out that nothing in these reasons should be taken as a finding of fact as to whether, and to what extent, the appellants are engaged in working on files of complexity 20 or greater. That is a question for the adjudicator to decide on the basis of the evidence which is put before him or her.

"J.D. Denis Pelletier"

J.A.

"I agree

Robert Décary J.A."

LÉTOURNEAU J.A. (Dissenting reasons)

[30] This is an appeal against a decision of Strayer J. (judge) who dismissed the appellants' application for the judicial review of a decision rendered by an Adjudicator appointed under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (PSSRA) to hear the appellants' grievances regarding their job description.

[31] The appellants contend that the judge erred in applying a standard of patent unreasonableness to the review of the decision of the Adjudicator. They argue that the appropriate standard is correctness or, in the alternative, reasonableness. The respondent takes the position that patent unreasonableness is the appropriate standard.

[32] Furthermore, the appellants submit that the Adjudicator committed reviewable errors of law and jurisdiction in dismissing their grievances. Therefore, it was an error of law for the judge not to intervene and correct those errors, especially after having acknowledged that the Adjudicator took into account an irrelevant consideration. That irrelevant consideration, it is alleged, is the impact that the appellants' grievances would have on the employer's classification system if they were allowed.

[33] As previously mentioned, the grievances filed by the appellants were job description grievances. The appellants complained that the employer failed to provide to them, upon request, the complete and current statement of the duties and responsibilities of their position as

investigator/auditor, as required by article 56 of the Collective Agreement binding them. Article 56.01 is the relevant provision and reads:

> Statement of Duties
>
> 56.01 Upon written request, an employee shall be provided with a complete and current statement of the duties and responsibilities of his or her position, including the classification level and, where applicable, the point rating allotted by factor to his or her position, and an organization chart depicting the position's place in the organization.
>
> (Emphasis added)

[34] I believe that there is no merit in the appellants' contention that the Adjudicator took into account the irrelevant consideration mentioned above.

[35] First, the Adjudicator properly reminded the parties that what was brought in issue by article 56.01 was a job description grievance, not a job classification grievance over which the Board would be without jurisdiction in light of the exclusionary provisions contained in section 7 of PSSRA.

[36] This precision brought by the Adjudicator was made necessary by the fact that the appellants sought in their grievance presentations to obtain that their "current job description be re-written to include the additional duties identified and that [their] job description be properly point rated and classified" (emphasis added): see the grievance presentations in the Appeal Book, at pages 271 to 282.

[37] Then the Adjudicator proceeded to highlight the interrelationship between job descriptions and job classifications as well as the similarities and differences regarding job description grievances and job classification grievances. He also examined and compared the appropriate relief warranted in a job classification grievance and the relief available under article 56.01 pursuant to a job description grievance. It is in this context that he pointed out that the relief sought by the appellants was specific to their particular situation or position and not representative of the duties and responsibilities assumed by the members of the PM-03 investigator/auditor group across the employer's enterprise.

[38] I cannot say that the Adjudicator's discussion of the appellants' purpose in invoking article 56.01, and of the resulting effect of the appellants' claims on the classification system, is irrelevant to the assessment and determination of either the proper scope of that article or the relief to be afforded to claimants pursuant to that provision. In any event, the judge did not see that discussion as the operative paragraphs of the decision: see paragraph 15 of the judge's decision.

[39] I am satisfied, as the judge was, that the Adjudicator's decision was in substance "an interpretation of article 56.01 of the Collective Agreement as applied to the facts of these particular grievances": see the judge's decision at paragraph 12. That being said, I am willing to recognize, as the judge found, that the Adjudicator's decision contains a number of considerations that are sources of ambiguity. However, when the decision is read as a whole, I am satisfied that the Adjudicator addressed the question that was put to him pursuant to article 56.01. I cannot conclude that his decision was either unreasonable or patently unreasonable.

[40] In view of the conclusion that I have reached, it is therefore not necessary to decide whether the applicable test in this case is unreasonableness *simpliciter* or patent unreasonableness. I would point out, however, that this is yet another case where this Court, the judge in his decision and the parties in their written and oral submissions spent more time trying to ascertain the applicable standard of review than discussing the merits of the case. In the end, the debate focussed on reasonableness *simpliciter* as opposed to patent unreasonableness, a metaphysical exercise akin to trying to determine the sex of angels. I agree with Scurfield J. in *Flin Flon School Division No. 46 v. Flin Flon Teachers' Assn. of the Manitoba Teachers' Society*, [2006] M.J. No. 71, at paragraph 30 that "in practice, the compression of the two most deferential standards will rarely, if ever, make any difference to the result". The net advantage of this compression would be a considerable saving of both the litigants' and the Courts' time.

[41] Furthermore, when applicable, the standard of patent unreasonableness means that the courts must defer to a decision rendered by an expert tribunal even if that decision is unreasonable. The compression would also avoid this result which offends litigants' sense of justice.

[42] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	DÉCARY J.A.
DISSENTING REASONS BY:	LÉTOURNEAU J.A.
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