Federal Court of Appeal Cour d'appel fédérale

Date: 20070420

Docket: A-326-06

Citation: 2007 FCA 152

CORAM: DESJARDINS J.A.
LÉTOURNEAU J.A.
NOËL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

PERSONS WISHING TO ADOPT THE PSEUDONYMS OF EMPLOYEE NO. 1,

EMPLOYEE NO. 2 ET AL.

Respondents

Heard at Montréal, Quebec, on March 27, 2007.

Judgment delivered at Ottawa, Ontario, on April 20, 2007.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: DESJARDINS J.A.
LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision by Madam Justice Gauthier of the Federal Court dated June 5, 2006 (2006 CF 699), allowing in part the respondents' application for judicial review of the decision of the Director of the Canadian Security Intelligence Service (CSIS) dismissing their group grievance seeking to have certain undertakings given when they were hired in 1984 honoured.

[2] Following an exhaustive analysis, Gauthier J. determined that some of the 119 respondents, all former members of the Royal Canadian Mounted Police (RCMP), were entitled to the bilingualism bonus. The appellant is appealing this part of the decision.

Background

[3] This proceeding follows this Court's decision in *Gingras v. Canada (C.A.)*, [1994] F.C.J. No. 270 (*Gingras*). In that decision, the Court held that members of the RCMP as well as members of CSIS who came from the RCMP were entitled to the bilingualism bonus. Following this judgment, the bilingualism bonus was paid to members of the RCMP and continues to be paid to this day.

[4] With regard to members of CSIS who came from the RCMP, however, the Court held that the Director of CSIS had the power to terminate this bonus under the transitional rule found in subsections 66(1) and (2) of the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21 (the Act):

66. (1) Subject to subsection (5), (*a*) all officers and members of the Force, and (*b*) all persons appointed or employed under the *Public Service Employment Act* assigned to the security service immediately prior to the coming into force of this section become employees of the Service on the coming into force of this section.	66. (1) Sous réserve du paragraphe (5), les personnes suivantes affectées aux services de sécurité deviennent employés à l'entrée en vigueur du présent article : *a*) les officiers et les membres de la Gendarmerie; *b*) les personnes nommées ou employées en vertu de *la Loi sur l'emploi dans la Fonction publique*.

(2) Every person mentioned in subsection (1) continues, on the coming into force of this section, to have employment benefits equivalent to those that the person had immediately prior thereto, until such time as those benefits are modified pursuant to a collective agreement or, in the case of persons not represented by a bargaining agent, by the Service.	(2) Le paragraphe (1) ne porte pas atteinte à l'équivalence des avantages attachés aux postes des personnes qu'il vise, sous réserve des éventuelles modifications consécutives aux conventions collectives ou, dans le cas des personnes qui ne sont pas représentées par un agent négociateur, à une décision du Service.

[Emphasis added.]

[5] The Court found in *Gingras* that the Director of CSIS had decided on March 5, 1985, to pay the bilingualism bonus to employees from the RCMP, but only those who were unionized. As for the others, including Mr. Gingras, they were refused the bonus. The Court of Appeal thus confirmed that Mr. Gingras, as a former member of the RCMP, was entitled to the payment of the bonus by CSIS from the time he was hired on July 16, 1984, until March 5, 1985, but not beyond that date (*Gingras*, at paragraph 61).

[6] A first group grievance was filed on March 27, 1996, on behalf of a group of non-unionized CSIS employees, claiming parity with the RCMP employees and seeking to have their right to the bilingualism bonus recognized. The Director of CSIS (then Mr. Elcock) dismissed the grievance on May 17, 1996. The brief reasons read as follows:

> [TRANSLATION]
> In response to your grievance, I point out that the Federal Court of Appeal in *Gingras v. Her Majesty the Queen in Right of Canada* held that CSIS as a separate employer was not required to pay any money to any non-unionized employee of the Service, with the exception of Yvon Gingras. This decision confirms that the

> Service's policy of paying the bilingualism bonus only to unionized employees working for CSIS is legal and valid.
>
> In this context, having considered all of the circumstances surrounding your bilingualism bonus grievance, as well as the Service's current policy, I must dismiss your grievance.

[7] A few years later, on August 20, 1999, the respondents sent the Director of CSIS a formal demand claiming wage parity with members of the RCMP. Further, the respondents asked that entitlement to the bilingualism bonus be recognized in their case, just as it was for the RCMP officers.

[8] This formal demand went unanswered and, following numerous interlocutory proceedings, which need not be elaborated on, Mr. Justice Beaudry of the Federal Court ruled that the formal demand dated August 20, 1999, was to be treated as a third-level grievance and that the failure to respond to it was equivalent to its dismissal by the Director of CSIS. This decision was confirmed by the Court of Appeal (*Persons Wishing to Adopt the Pseudonyms of Employee No.1 v. Canada*, [2005] F.C.J. No. 1039; 2005 FCA 228).

[9] So it was that the respondents filed an application for judicial review of the decision of the Director of CSIS refusing to follow up on their formal demand dated August 20, 1999. It was this application that was heard by Gauthier J. and that led to the decision now under appeal.

Decision under appeal

[10] Gauthier J. first pointed out that in *Gingras*, above, the Court of Appeal held that the bilingualism bonus was a benefit within the meaning of subsection 66(2) of the Act, and that in principle, therefore, CSIS had to provide equivalent treatment when employees were transferred.

[11] Since the Director of CSIS had not responded to the grievance dated August 20, 1999, in Gauthier J.'s opinion it was impossible to know whether he had dismissed it on the basis of the 1996 decision, or for other reasons. Gauthier J. therefore undertook a review of the decision on a standard of correctness.

[12] Applying this standard, Gauthier J. determined that the Director of CSIS was justified in dismissing the wage parity grievance (Reasons, at paragraphs 52 to 55). However, he was wrong in refusing to grant the respondents the bilingualism bonus (Reasons, at paragraphs 67 to 69).

[13] According to Gauthier J., the representations contained in a circular letter of June 1984 signed by the Director designate of CSIS, which were intended to encourage RCMP employees to join CSIS, reflected undertakings which prevented and continue to prevent the Director from denying the respondents entitlement to the bilingualism bonus. The respondents therefore retained entitlement to the bilingualism bonus.

[14] With regard to the date from which the respondents could claim an adjustment, Gauthier J., relying on the notion of the continuing grievance, determined that it was 25 working days before the grievance was filed on August 20, 1999 (Reasons, at paragraphs 39 to 42). For

the respondents who had retired 25 working days before the date of receipt of the grievance of August 20, 1999, their recourse was statute-barred (Reasons, at paragraph 43).

[15] Finally, with regard to the implementation of her decision, Gauthier J. chose to refer the matter back to the Director to be dealt with on the basis set out by her (Reasons, at paragraph 79):

> [TRANSLATION]
> In view of the time that has elapsed, the parties agree that it is appropriate for the Court to make an order giving precise instructions on the settlement of the grievance instead of proceeding with a mere reconsideration. Since a good deal of the information needed to render a definitive judgment on the merits is lacking, the Court has chosen to refer the matter back to the Director for him to make an exact determination, in accordance with these reasons, of the amount owing to each of the applicants whose claim was not statute-barred at the time the grievance was filed.

Alleged errors

[16] The appellant submits that Gauthier J. carried out her analysis using the wrong standard of judicial review. According to the appellant, the appropriate standard was that of reasonableness *simpliciter* and, by that standard, the Director of CSIS did not make any error of fact or law in dismissing the grievance.

[17] Neither the appellant nor the respondents call into question the other aspects of Gauthier J.'s decision regarding the starting point of the respondents' entitlement to the bilingualism bonus, the application of the limitation period with regard to certain respondents, and the terms of the referral of the matter back to the Director.

Analysis and decision

[18] The appellant's argument based on the standard of review is difficult to understand and defend when one considers that the decision of the Director of CSIS which is being challenged was not accompanied by any reasons. In these circumstances, Gauthier J. had to carry out her own analysis. Just as she had to uphold the Director's decision if the relevant facts, considered under the applicable law, could have justified that decision, so also she had to intervene if the opposite was true. In the absence of reasons, Gauthier J. cannot be accused of showing a lack of deference toward the Director (see in this regard Iacobucci J.'s analysis in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, where it is indicated that the duty of deference is to be exercised according to the reasoning used by the decision maker in making the decision; see also *Canadian Airlines International Limited and Air Canada v. Canadian Human Rights Commission, Canadian Union of Public Employees (Airline Division) and Public Service Alliance of Canada*, [2000] F.C.J. No. 220 (C.A.), at paragraph 7).

[19] Gauthier J. therefore turned her mind to the question of whether the Director's decision dismissing the grievance was justified according to the facts and the applicable law. The undertakings given in June 1984 were among the facts that the Director had to consider in his review of the grievance. As Gauthier J. pointed out, these undertakings were given with the specific purpose of persuading RCMP employees to leave their former positions by allaying any fears they may have had about finding themselves in a less advantageous work environment. Nothing in *Gingras*, above, suggests that the Director was not bound to honour these undertakings since no evidence or submissions had been provided in that regard (Reasons, at paragraph 11).

[20] Gauthier J. therefore undertook an in-depth review of the June 1984 circular letter and the letter dated January 24, 1984, attached thereto. In the part of her decision dealing with wage parity, she suggests that there is a distinction between the undertakings given in regard to "salary" ("traitement") and those relating to certain employee benefits (Reasons, at page 49). In her opinion, the Director's power to determine the employees' salaries as he did was not affected by those undertakings (Reasons, at paragraphs 52 to 55). As this aspect of the decision has not been appealed, I need not rule on its validity.

[21] With regard to the bilingualism bonus, Gauthier J. first suggested that it is a "benefit" rather than "salary" ("traitement"). She must have then noticed, however, that even the circular letter of June 1984 referred to the bilingualism bonus under the heading "salary" (Reasons, at paragraph 73). It was this observation that led Gauthier J. to abandon the distinction that she had tried to make between "salary" and a "benefit" and to reach the following conclusion (Reasons, at paragraph 74):

> [TRANSLATION]
> Indeed, whether it is a benefit or salary, the bilingualism bonus was part of the compensation and employment benefits associated with the applicants' positions prior to 1984. The Director of CSIS could not abolish it in March 1985, in view of the specific undertakings by which he was bound and which went beyond what was provided in subsection 66(2) of the Act.

[22] This finding, which is the basis of the judgment at first instance granting the respondents entitlement to the bilingualism bonus, is problematic in two respects. On the one hand, it suggests that the circular letter of June 1984 could thwart the effect of the Act, which, I point out, vested in the Director the ultimate power to change the benefits associated with the positions of persons assigned to CSIS (see, for comparative purposes, *Canadian Museum of Nature v. Bélanger*, [1995] F.C.J. No. 1631).

[23] On the other hand, the circular letter of June 1984 provided on its very face that the Director could make changes to CSIS employees' compensation package (Appeal Book, Vol. I, at pages 130 and 131:

> [TRANSLATION]
> The Government made a firm commitment that no RCMP Security Service employee would be without a job or find his or her future compromised as a result of the creation of the new service. Moreover, CSIS has an ongoing need for people with the expertise, experience and integrity that have characterized the Security Service. <u>All of the current employees of the Security Service will be offered, within CSIS, positions which, as far as compensation and benefits are concerned, are at least the equivalent of those they have in their current positions. Any changes to the compensation package in the future will only be proposed following consultations with elected employee representatives or the bargaining agent</u>. We also believe CSIS will offer appealing and interesting careers to those who choose to become its employees.
>
> [Emphasis added.]

[24] There is no doubt that the bilingualism bonus is a form of compensation or benefit that is included in the compensation package so that, according to the above excerpt, the Director retained the power to change the bonus. We note, however, that the right to consultation is no longer reserved for employees represented by a bargaining agent, but has been extended to non-unionized employees through their elected representatives.

[25] In my humble opinion, the trial judge should have focussed her attention on this undertaking. The respondents as non-unionized CSIS employees are included in the group of employees that the future Director undertook to consult. That undertaking had to be honoured, even though it in no way affects the ultimate decision-making power conferred on the Director by subsection 66(2). The right to consultation was granted in order to reassure RCMP employees and

to persuade them to join CSIS. Hence, it falls within the management power conferred on the Director of CSIS by subsection 8(1) of the Act:

8. (1) Notwithstanding the *Financial Administration Act* and the *Public Service Employment Act*, the Director has exclusive authority to appoint employees and, in relation to the human resources management of employees, other than persons attached or seconded to the Service as employees,	8. (1) Par dérogation à la *Loi sur la gestion des finances publiques* et à la *Loi sur l'emploi dans la fonction publique*, le directeur a le pouvoir exclusif de nommer les employés et, en matière de gestion des ressources humaines du Service, à l'exception des personnes affectées au Service ou détachées auprès de lui à titre d'employé :
(*a*) to provide for the terms and conditions of their employment; and	*a*) de déterminer leurs conditions d'emploi;
(*b*) subject to the regulations,	*b*) sous réserve des règlements :
(i) to exercise the powers and perform the functions of the Treasury Board relating to human resources management under the *Financial Administration Act*, and	(i) d'exercer les attributions conférées au Conseil du Trésor en vertu de la *Loi sur la gestion des finances publiques* en cette matière,
(ii) to exercise the powers and perform the functions assigned to the Public Service Commission by or pursuant to the *Public Service Employment Act*.	(ii) d'exercer les attributions conférées à la Commission de la fonction publique sous le régime de la *Loi sur l'emploi dans la fonction publique*

[26] The appellant attempted to argue that the consultation undertaking concerned the compensation package, and not any one or more of its components. In the appellant's opinion, as

long as the overall monetary value of the compensation did not change, the Director was free to modify its components, including the bilingualism bonus, without being obligated to consult (appellant's memorandum, at paragraphs 134 to 140).

[27] This interpretation is likely to give rise to highly complex assessment exercises that make it unrealistic. I believe rather that, as the words suggest, the term "compensation package" ("rémunération globale" in the French text) identifies the two components mentioned in the preceding sentence, namely "compensation" and "benefits". On its very face, the promise of consultation applied to compensation as well as benefits. As I mentioned earlier, there is no doubt that the bilingualism bonus is embraced by these elements and is part of the compensation package.

[28] The trial judge therefore had to consider whether any of the Director's decisions refusing the respondents the bilingualism bonus had been preceded by the consultation that the Director had undertaken to hold. If so, she had to dismiss the application for judicial review. If not, she had to allow the application in accordance with the terms that she determined.

[29] It is not necessary to refer the matter back to the Federal Court to answer this question since this Court is in just as good a position to respond to do so. The decision dated March 5, 1985, granting only unionized employees entitlement to the bilingualism bonus could not have been preceded by the required consultation since, at the time, the parties were unaware of the existence of this right. The same applies to the decision of May 17, 1996, insofar as it denied the respondents entitlement to the bonus on the grounds that only unionized employees were entitled thereto.

Finally, it is unlikely that the third decision satisfies this requirement since it is the result of the Director's refusal to respond to the respondents' grievance.

[30] I would add that the appellant had the burden of establishing that the consultation took place. On that point, the evidence shows that there is a consultation process between the non-unionized employees association and the Directors' delegate and that annual meetings take place to discuss work conditions, cost of living increases, etc. (Appeal Book, Vol. III, at pages 540 and 541). However, there is nothing in the evidence to suggest that any of the decisions relating to the bilingualism bonus were preceded by the consultation that the Director had undertaken to hold.

[31] Since the Director had to hold this consultation with the elected representatives of the non-unionized employees, I find that Gauthier J. properly allowed in part the application for judicial review.

[32] I would dismiss the appeal with costs.

"Marc Noël"

J.A.

"I concur.
Alice Desjardins J.A."

"I concur.
Gilles Létourneau J.A."

Certified true translation
Erich Klein

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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APPEARANCES:

Raymond Piché	FOR THE APPELLANT
Jacques Béland	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANT
BÉLAND LACOURSIÈRE Montréal, Quebec	FOR THE RESPONDENTS