Federal Court of Appeal | Cour d'appel fédérale

Date: 20110628

Docket: A-301-10

Citation: 2011 FCA 214

CORAM: **BLAIS C.J.**
SHARLOW J.A.
MAINVILLE J.A.

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

SENATE OF CANADA

Respondent

Heard at Ottawa, Ontario, on June 14, 2011.

Judgment delivered at Ottawa, Ontario, on June 28, 2011.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: BLAIS C.J.
SHARLOW J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The Public Service Alliance of Canada (the PSAC) is challenging by way of judicial review an arbitral award of the Public Service Labour Relations Board (the Board) rendered pursuant to the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.) (the Act) which rejected its proposal to incorporate into a collective agreement a provision requiring the Senate of Canada to post bargaining unit vacancies. The Board found that it did not have jurisdiction to consider such a proposal in light of subsection 55(2) of the Act which prohibits arbitral awards from dealing with procedures or processes governing the appointment, promotion or transfer of employees.

Background and context

[2] The House of Commons and the Senate of Canada are the two fundamental law making institutions of Canada, and they hold a special position within the Canadian constitutional framework. In light of their exceptional position, the Act provides for a special regime governing the labour relations of the employees who work within these institutions. Part 1 of the Act provides for certification of employee organizations as bargaining agents, negotiation of collective agreements, and the resolution of employee grievances, while Parts 2 and 3 (which are not in force) govern respectively certain minimum labour standards and occupational health and safety. Only the provisions of Part 1 of the Act concerning the negotiation of collective agreements are of interest for the purposes of this judicial review.

[3] Section 73 of the Act states that no employee shall participate in a strike. The collective bargaining process is consequently based on a system of good faith negotiations and conciliation, and in the event of a deadlock in negotiations, on binding arbitration by the Board. Certain limits are however set out in the Act restricting the scope of what may be included in a collective agreement through arbitration.

[4] Subsection 5(3) of the Act protects the right of the House of Commons and of the Senate "to determine the organization of the employer and to assign duties and classify positions of employment" while subsection 55(2) prohibits the Board from including in an arbitral award any matter dealing with the standards, procedures or processes governing the appointment, promotion or transfer of employees. Subsection 55(2) of the Act reads as follows:

55. (2) No arbitral award shall deal with the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees, or with any term or condition of employment of employees that was not a subject of negotiation between the parties during the period before arbitration was requested in respect thereof.	**55.** (2) Sont exclues du champ des décisions arbitrales les normes, procédures ou méthodes régissant la nomination, l'évaluation, l'avancement, la rétrogradation, la mutation, la mise en disponibilité ou le renvoi d'employés, ainsi que toute condition d'emploi n'ayant pas fait l'objet de négociations entre les parties avant que ne soit demandé l'arbitrage à son sujet.

[5] Staffing and hiring in the House of Commons and the Senate have been governed by employer policies rather than by collective agreements. The Clerk of the Senate has approved a "Senate Staffing and Recruitment Policy" as well as an appendix thereto which set out certain guiding principles, including the application of the merit principle for appointments. Two appointment processes are provided for under that policy, one is an "internal appointment process" in which only Senate employees may be considered, and the other is an "external appointment process" in which both employees and the general public may apply. The choice of an "internal" or "external" appointment process is decided by management based on certain factors.

[6] The Senate's policy also provides that managers may choose either an "advertised" or a "non-advertised" appointment process. In an "advertised" process, persons in the area of selection are informed of a job opening and have an opportunity to apply and to demonstrate their suitability based on the merit criteria. The appointment process in such cases may be advertised in writing by notice, posting or email, or announced verbally. In a "non-advertised" appointment process, a manager need not solicit applications, but rather considers one or more persons for the position. In

the staffing policy, acting appointments, reclassification of an employee in a unique position, and change of tenure are given as examples of when a non-advertised process may be used.

[7] Though not required to do so under the policy, the administration of the Senate nevertheless has followed the practice of advising members of the concerned bargaining unit of its intention to appoint through a non-advertised appointment process. However, under that practice, no notice of any vacant position is given unless the Senate intends to fill that position and an appointment process is consequently initiated.

[8] The PSAC has been certified to act as the bargaining agent for the "Operational Group" of the Senate, comprising of approximately 101 employees engaged principally in committee room support and mail services, installations and transport, maintenance, printing and trades services. A prior collective agreement for this group expired on September 30, 2007, and bargaining negotiations for the renewal of this agreement were pursued by the parties. Many issues remained outstanding in these negotiations, and on May 22, 2009 the PSAC sought binding arbitration under the Act in order to have these outstanding matters resolved by the Board.

[9] After receiving the parties' representations and holding hearings, the Board issued its arbitral award dated August 16, 2010 and bearing citation number 2010 PSLRB 87 in which it made determinations in a long series of outstanding collective agreement issues. The PSAC takes exception with only one of these determinations which concerns the posting of bargaining unit vacancies, hence this judicial review.

[10] The dispute revolves around a proposal by the PSAC to include a new provision in the collective agreement which would require the Senate to "post bargaining unit vacancies when they occur." The PSAC justified its proposal as follows in its submissions to the Board (Applicant's Application Record at p. 34):

> Over the life of the current agreement there have been instances where positions have become available at the Senate and employees have been unaware of these vacancies and therefore missed the opportunity to apply. Recently the Employer's practice has been to provide notification of vacancies via the Intranet, an internal system available to Senate employees. The Union wishes to enshrine this practice in the parties' collective agreement, so that all bargaining unit employees might be made aware of bargaining unit vacancies when they occur. Clearly the Employer sees the benefit of this, as it has been the Employer's practice for over two years. The Union is simply asking that it be included in the agreement in order to ensure that it continues for the life of the contract.

[11] Before the Board, the Senate objected to this proposal on the basis that subsection 55(2) of the Act, reproduced above, prohibits such a proposal from being considered, and alternatively on the basis that its practice was not to post all vacancies, but only those vacancies that are part of a staffing competition.

The Board's decision

[12] The Board's decision on the posting of vacancies is hereby reproduced in full:

> **A. Article 11: Information (notification to bargaining unit regarding vacancies)**
>
> **14** The bargaining agent proposed the following new provision:
>
> ***11.08 The Employer shall post bargaining unit vacancies when they occur.***
>
> **15** The bargaining agent submitted that the current practice of the employer is to send an email to all bargaining unit members when a vacancy occurs. The purpose of the proposal is to enshrine that practice into the collective agreement.

> **16** The employer submitted that the proposal was outside the jurisdiction of the Board because it related to staffing. Subsection 55(2) of the *PESRA* states the following:
>
> > *No arbitral award shall deal with the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees...*
>
> **17** The employer relied on *Public Service Alliance of Canada v. House of Commons*, Board File No. 485-H-12 (19910213), in which the Board determined that a similar posting requirement was not within its jurisdiction.
>
> **18** The Board has determined that it does not have the jurisdiction to consider this proposal.

The position of the parties

[13] The PSAC argues that the question under review is whether the Board correctly concluded that it did not have the jurisdiction to include the proposed provision on the posting of vacant positions in the arbitral award. The PSAC asserts that this question is one of "true" jurisdiction in the sense described in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) and therefore reviewable by our Court on a standard of correctness.

[14] The PSAC adds that that the simple posting of job vacancies cannot be described as falling within the standards, procedures and processes governing the appointment of employees captured by the prohibition set out under subsection 55(2) of the Act. The posting of a position does not affect the employer's prerogative to hire who it wishes for the position, nor does it interfere with the employer's discretion to establish processes or procedures for staffing positions. The requirement to post simply seeks to ensure that the employees are notified when bargaining unit vacancies occur.

[15] The PSAC added during the oral hearing before this Court that the Board's decision also lacked intelligibility since the reasoning used by the Board to reach its conclusion on postings of vacant positions is not articulated in its decision.

[16] The Senate argues that the appropriate standard of review in this case is reasonableness, not correctness. Relying principally on *Dunsmuir*, *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678 (*Nolan*) and *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, 2009 FCA 223, [2010] 3 F.C.R. 219 (*Pilots Association*), the Senate asserts that "true" questions of jurisdiction reviewed on a standard of correctness are to be narrowly construed.

[17] The Senate argues that a provision which requires the posting of vacancies deals with procedures or processes governing the appointment, promotion or transfer of employees and is thus precluded by subsection 55(2) of the Act, and it relies on *Public Service Alliance of Canada v. House of Commons*, [1991] C.P.S.S.R.B. No. 36 (QL) to support its interpretation of that subsection. The Senate also argues that the inclusion of a provision concerning posting within the collective agreement would open the door to the grievance and arbitration process determining the scope of the rights contained in that provision. Though PSAC asserts that its proposal is purely informational, the Senate fears that an arbitrator may well find otherwise. It relies for this proposition on various grievance arbitration decisions interpreting analogous provisions in other collective agreements as restricting an employer's right to keep a position vacant or to divide the duties of a vacant full time position into two or more part time positions.

The standard of review

[18] This is the first application for judicial review of an arbitral award in which the interpretation and application of subsection 52(2) of the Act has been in issue. Consequently, the degree of deference to be accorded on that issue has not yet been determined by this Court and must be determined in this case.

[19] A standard of review analysis must be contextual and is dependent on the application of a number of factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of its enabling statute; (3) the nature of the question at issue, and; (4) the expertise of the tribunal: *Dunsmuir* at para. 64.

Privative clause

[20] Section 72 of the Act reads as follows:

72. (1) Except as provided in this Part, every order, award, direction, decision, declaration or ruling of the Board, an arbitrator appointed under section 49 or an adjudicator is final and shall not be questioned or reviewed in any court.	**72.** (1) Sauf exception dans la présente partie, toute ordonnance, décision arbitrale ou autre, instruction ou déclaration de la Commission, d'un arbitre nommé en vertu de l'article 49 ou d'un arbitre de griefs est définitive et non susceptible de recours judiciaire.
(2) No order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the Board, an arbitrator appointed under section 49 or an adjudicator in any of the	(2) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action de la Commission, d'un arbitre nommé en vertu de l'article 49 ou d'un arbitre des griefs.

> proceedings of the Board, arbitrator or adjudicator.

Purposes of the Board under the Act

[21] Under section 10 of the Act the Board is provided with wide authority to manage labour relations involving the House of Commons and the Senate, including under sections 50 to 61 of the Act, the extraordinary power to determine through arbitration the binding conditions of employment which the parties must implement. The purposes of the Act, as well as the purposes of the Board operating under the Act, are clearly to facilitate the resolution of labour disputes involving the Senate and the House of Commons expeditiously, inexpensively and with relatively little formality.

Nature of the question

[22] Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its functions, and such deference has been found particularly relevant in regard to adjudication in labour law: *Dunsmuir* at para. 54. Barring a question beyond the tribunal's jurisdiction, or outside the tribunal's expertise, or of central importance to the legal system, a tribunal's interpretation of its "home" statute will normally be reviewed on a standard of reasonableness.

[23] The parties concede that the interpretation and application of subsection 55(2) does not raise an issue of central importance to the legal system nor does it delineate the Board's authority in regard to another tribunal. Under the criteria developed in *Pilots Association* at para. 50, this would be the end of the standard of review inquiry. Moreover, it is clear that subsection 55(2) of the Act

concerns matters closely related to labour relations which fall under the core expertise of the Board. The PSAC nevertheless contends that since this subsection limits the jurisdiction of the Board, its interpretation and application consequently raise a "true" question of jurisdiction. The PSAC relies on paragraph 59 of *Dunsmuir* where Bastarache and LeBel JJ. note that "true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it authority to decide a particular matter" adding that "[t]he tribunal must interpret the grant of authority correctly or its actions will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction."

[24] Bastarache and LeBel JJ. however also note in paragraph 59 of *Dunsmuir* that these "true" questions of jurisdiction will be narrow, and they caution against reviewing judges branding as jurisdictional questions that are doubtfully so. Rothstein J. further clarified what is meant by a "true" question of jurisdiction in *Nolan* at paragraphs 33 and 34:

> [33] Administrative tribunals are creatures of statute and questions that arise over a tribunal's authority that engage the interpretation of a tribunal's constating statute might in one sense be characterized as jurisdictional. However, the admonition of para. 59 of *Dunsmuir* is that courts should be cautious in doing so for fear of returning "to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years".
>
> [34] The inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness of standard when interpretation of that statute raises a broad question of the tribunal's authority.

[25] Subsection 55(2) of the Act does not raise "a broad question of the tribunal's authority." It requires the Board to exclude from an arbitral award all matters dealing with standards, procedures

or processes governing the “appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees,” and in that respect it is a provision that speaks to the Board’s jurisdiction. However, in the context of a standard of review analysis, the more important point is that it requires the Board to analyse a proposal from a party for inclusion in the arbitral award in order to determine whether it falls under the scope of the exclusion. The interpretative activities and processes carried on by the Board under subsection 55(2) thus principally concern the wording of the proposals made to it by a party in order to determine if a standard, procedure or process referred to in that subsection would be impacted by these proposals. That determination is fact specific, and necessarily engages the Board’s special expertise in relation to the content, operation and enforcement of arbitral awards, as well as its understanding of what acts or activities are contemplated by the phrase “standards, procedures or processes governing the appointment, appraisal promotion, demotion, transfer, lay-off or release of employees.”

[26] Such an inquiry is far from raising a broad question of jurisdiction. Consequently, irrespective of whether the criteria developed in *Pilots Association* should apply here, a matter on which I need not express an opinion, the nature of the question at issue in this judicial review is not one of “true” jurisdiction.

Expertise of the Board

[27] The Board is clearly a specialized tribunal with expertise in matters of labour relations in the public sector. The composition of the Board is however different than usual when reaching an arbitral award under the Act. Sections 47 and 48 of the Act indeed provide that in addition to a

member of the Board, two other persons are selected to carry out the arbitration, of which one is selected from a panel of persons representative of the interests of the employers and the other is selected from a panel of persons representative of the interests of the employees. These two additional persons are deemed to be members of the Board for the period of the arbitration proceedings in respect of which they are selected.

[28] The PSCA argues that these additional temporary members diminish the expertise of the Board when it sits for the purposes of binding arbitration under the Act, and consequently this Court should apply a lower standard of deference to decisions resulting from such a process. I disagree.

[29] Subsection 47(3) of the Act requires that the two additional members must be eligible as members of the Board, with the consequential requirement that these persons must have knowledge of or experience in labour relations as a condition of eligibility pursuant to paragraph 18(1)(*e*) of the *Public Service Labour Relations Act*. Consequently, all persons carrying out binding arbitrations under the Act must have knowledge of or experience in labour relations.

[30] It is common practice in many employee grievance processes to add employer and union assessors to assist an arbitrator in reaching a decision, and I am aware of no authority which has held that such a practice somehow reduces the expertise of the arbitrator or otherwise detrimentally taints the process. In my view, on the contrary, the addition of persons representing the interests of the employers and of the employees may well improve the process and add expertise. I see no reasons to find differently in the case of a binding arbitral award under the Act.

Conclusion of the standard of review

[31] Based on the above factors, I therefore conclude that the applicable standard of review is reasonableness. This standard has been described as follows in *Dunsmuir* at para. 47:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Is the Board's decision reasonable?

[32] A requirement to post bargaining unit vacancies when they occur appears *prima facie* to be a requirement dealing with procedures or processes governing the appointment, promotion or transfer of employees. The PSAC however asserts that such a requirement would be purely informational in scope, and would not affect any management prerogative; consequently it should not be contemplated by the exclusions set out in subsection 55(2) of the Act. In light of the current policies of the Senate, this assertion does not stand up to close scrutiny.

[33] The Senate's policies provide that a position may be staffed through either an advertised or non-advertised appointment process. Consequently, whether or not a notice of a vacant position is given will depend on which form of appointment the Senate's managing staff chooses to apply. The

requirement to post bargaining unit vacancies when they occur would negate the current Senate's hiring policy allowing for appointments to proceed without any advertisement in appropriate circumstances.

[34] Though the Senate may indeed be currently informing employees of positions available under a non-advertised appointment process, this is a matter of employer discretion and courtesy which can be suspended or abandoned altogether. Including in an arbitral award a requirement to post bargaining unit vacancies when they occur would make this discretionary practice compulsory. There is a major difference between a discretionary employer practice and a compulsory and binding legal obligation set out in a collective agreement or in an arbitral award.

[35] I therefore find that the Board acted reasonably in concluding that it did not have jurisdiction under subsection 55(2) of the Act to consider a proposal to post bargaining unit vacancies when they occur. This outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[36] The PSAC however adds that even if the outcome is found to be reasonable, the Board's award should nevertheless be quashed since it lacks intelligibility in that no reasons are set out in the award explaining how this conclusion was reached. Here again, I cannot accept the PSAC's argument. The lack of detailed reasons is the result of the Act and of the peculiarities associated with binding arbitral awards. Subsection 56(1) of the Act specifically provides that no report or observations are to be made by the two members appointed from the panels representative of

employer and employee interests, while subsection 56(4) adds that the award itself is to be made in a form susceptible of being read and interpreted with, or annexed to and published with any collective agreement dealing with the other terms and conditions of employment. These provisions clearly limit the extent of the reasons required in drafting arbitral awards.

[37] Subsections 56(1) and (4) of the Act read as follows:

56. (1) An arbitral award shall be signed by the member of the Board who is not a member selected from a panel appointed under section 47 and copies thereof shall be transmitted to the parties to the dispute and no report or observations thereon shall be made or given by either of the members selected from a panel appointed under section 47.	**56.** (1) La décision arbitrale est signée par le commissaire attitré visé à l'article 47; des exemplaires en sont transmis aux parties au différend et les deux commissaires choisis au sein de chacun des groupes constitués en vertu de l'article 47 ne peuvent faire, ni communiquer, de rapport ou d'observation à son sujet.
(4) An arbitral award shall, wherever possible, be made in such form	(4) La décision arbitrale est rédigée, dans la mesure possible, de façon à :
(*a*) as will be susceptible of being read and interpreted with, or annexed to and published with, any collective agreement dealing with other terms and conditions of employment of the employees in the bargaining unit in respect of which the arbitral award applies; and	*a*) pouvoir être lue et interprétée par rapport à une convention collective statuant sur d'autres conditions d'emploi des employés de l'unité de négociation à laquelle elle s'applique, ou être jointe à une telle convention et publiée en même temps;
(*b*) as will enable its incorporation into and implementation by regulations, by-laws, directives or other instruments that may be required to be made or issued by the employer or the relevant bargaining agent in respect thereof.	*b*) permettre son incorporation dans les règlements d'application, les règlements administratifs, les instructions ou autres actes que l'employeur ou l'agent négociateur compétent peuvent être tenus de prendre en l'espèce, ainsi que sa mise en oeuvre au moyen de tous ces

documents officiels.

[38] The existence of justification, transparency and intelligibility within the decision-making process is to be determined in light of the particular circumstances of each case. Here, the Board has focussed on the relevant factors and evidence, has considered the representations of the parties, and has not impeded an intelligent judicial review of its decision. The Board accepted the Senate's submissions on the scope of subsection 55(2) of the Act, and its decision, though brief, is both clear and cogent. The parties have had no difficulties whatsoever in articulating their arguments in this judicial review, and the reasons sustaining the Board's decision are clearly intelligible in the circumstances of this case.

[39] I would therefore dismiss this application for judicial review, with costs in favour of the respondent.

"Robert M. Mainville"
J.A.

"I agree
Pierre Blais C.J."

"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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