Federal Court of Appeal | Cour d'appel fédérale

Date: 20190624

Docket: A-287-17

Citation: 2019 FCA 190

CORAM: **NADON J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

LORETTA BEMISTER, RICHARD FERGUSSON, PETER KERR, OREST TORSKY, NANCY WILSON AND THE NATIONAL ASSOCIATION OF FEDERAL RETIREES

Appellants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 18, 2018.

Judgment delivered at Ottawa, Ontario, on June 24, 2019.

REASONS FOR JUDGMENT BY: WOODS J.A.

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

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REASONS FOR JUDGMENT

WOODS J.A.

[1] This appeal concerns changes to the Public Service Health Care Plan (the Plan) that were announced in 2014. The appellants, which include retirees of the federal public service and an association that represents federal public service retirees (the Association), submit that the

changes to the Plan, and the process by which these changes were implemented, violated contractual rights and their freedom of association under paragraph 2(*d*) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter).

[2] The appellants sought declaratory relief by way of an application for judicial review in the Federal Court. The Federal Court (*per* McDonald J.) dismissed the application by judgment dated August 1, 2017 (2017 FC 749) and the appellants appealed to this Court.

[3] By way of overview, the Plan that is relevant to this appeal was established by the Treasury Board in 1991 pursuant to subsection 7.1(1) of the *Financial Administration Act*, R.S.C. 1985, c. F-11. Under this provision, the Treasury Board, which is a committee of Cabinet, is authorized to establish or modify benefit plans and to set their terms and conditions.

7.1 (1) The Treasury Board may establish or modify any group insurance or other benefit programs for employees of the federal public administration and any other persons or classes of persons it may designate to be members of those programs, may take any measure necessary for that purpose, including contracting for services, may set any terms and conditions in respect of those programs, including those relating to premiums, contributions, benefits, management, control and expenditures and may audit and make payments in respect of those programs, including payments relating to premiums, contributions, benefits and other expenditures.	7.1 (1) Le Conseil du Trésor peut établir ou modifier des programmes d'assurances collectives ou des programmes accordant d'autres avantages pour les employés de l'administration publique fédérale et les autres personnes qu'il désigne comme cotisants, individuellement ou au titre de leur appartenance à telle catégorie de personnes, prendre toute mesure nécessaire à cette fin, notamment conclure des contrats pour la prestation de services, fixer les conditions et modalités qui sont applicables aux programmes, notamment en ce qui concerne les primes et cotisations à verser, les prestations et les dépenses à effectuer ainsi que la gestion, le contrôle et la vérification des programmes, et faire

> des paiements, notamment à l'égard des primes, cotisations, prestations et autres dépenses y afférentes.

[4] During the period at issue, the Plan provided supplementary health care benefits primarily for active employees of the federal public service and for retirees who chose to participate. The Plan is non-contributory for active employees and contributory for retirees. The Plan is funded on a current basis and is described as a pay-as-you-go arrangement.

[5] In 2014, amendments to the Plan were announced to increase the proportion of the contributions that were borne by retirees. For many years, retirees and the government bore the costs in a sharing ratio of 25% for retirees and 75% for the government. In 2014, this was to be changed to a 50-50 sharing ratio. The increase in the retirees' rate of contribution was to be phased in over a period of four years, and was not to affect retirees with low incomes. This change, and the process which led to it, is the subject of this appeal.

I. Issues

[6] The appellants raise two issues:

(a) Did the Federal Court err in concluding that the Plan amendments did not breach vested contractual rights?

(b) Did the Federal Court err in finding that the Treasury Board did not violate the appellants' freedom of association under paragraph 2(*d*) of the Charter?

II. Factual background

A. *The framework*

[7] As mentioned, the *Financial Administration Act* provides the Treasury Board with the authority to modify the Plan. In this case, the Treasury Board received input from representatives of active and retired employees prior to amending the Plan.

[8] The process governing employee and retiree input concerning the 2014 amendments is set out in two agreements, both dated January 13, 2006. In general, the process provides that representatives of active and retired employees are to collaborate with the Treasury Board Secretariat, an administrative arm of the Treasury Board, to make joint recommendations to the Treasury Board for amendments to the Plan to be effective on April 1, 2011, which was when the existing arrangement was due to expire.

[9] The first agreement governing the process is a memorandum of understanding which sets out the general framework (Framework MOU). The parties to the agreement are the Treasury Board, the Certified Bargaining Agents of the National Joint Council, which represent active employees, and the Federal Superannuates National Association (whose name was later changed to the National Association of Federal Retirees), which represents retirees.

[10] In the Framework MOU, the parties agreed to the establishment of two new bodies, a corporation responsible for the administration of the Plan, and a committee (the Partners Committee) that would consider and make joint recommendations on changes to the Plan. The

Partners Committee is to be comprised of representatives of the parties to the Framework MOU and is "mandated to develop recommendations for approval by the Treasury Board on changes to the terms of the [Plan] to deal with cost pressures and other matters" (appeal book at p. 188).

[11] The second agreement is also a memorandum of understanding (Renewal MOU). It provides a process for the Partners Committee to recommend the changes to the Plan which were scheduled to be implemented on April 1, 2011. The parties to the Renewal MOU are the same as in the Framework MOU except that the employer is represented by the Treasury Board Secretariat instead of the Treasury Board.

[12] Under the Renewal MOU, if the parties reach an impasse and are unable to agree to a joint recommendation to refer to the Treasury Board, a dispute resolution process is to be followed. This process could include hearings by a dispute resolution panel, in which event the decision of the panel is to form part of the joint recommendation. This dispute resolution process could be triggered by representatives of any party to the agreement, including the representative of the retirees.

[13] In addition to these agreements, the President of the Treasury Board established the Partners Committee and set out its Terms of Reference (appeal book at p. 519). In the event of an inconsistency between the terms of reference and the Framework MOU or the Renewal MOU, the memoranda of understanding are to govern.

[14] Under the Terms of Reference:

(a) The Partners Committee is to have seven representatives, three representing the employer, three representing the active employees and one representing the retirees.

(b) Joint recommendations of the Partners Committee are to be presented to the Treasury Board for approval.

(c) If a joint recommendation is returned to the Partners Committee by the Treasury Board, the Committee is to reconsider and reformulate its recommendations, any party may initiate a dispute resolution process, or the Committee may consider alternate next steps.

B. *Events leading up to the 2014 amendments*

[15] During the process leading up to the 2014 amendments, an impasse developed over the 75-25 cost-sharing ratio between the President of the Treasury Board (the President) and the employee/retiree representatives on the Partners Committee. After significant pressure, in 2014 the employee/retiree representatives reluctantly agreed to move to a 50-50 sharing ratio that had been proposed to the Partners Committee by the President. The events leading up to this agreement are relevant to this appeal and are described below.

[16] Although the Partners Committee was to have a joint recommendation for amendments to the Plan to be effective April 1, 2011, the Committee informed the President in February 2012 that this deadline was not feasible and it sought a further two year extension to complete "full-scale negotiations". The Partners Committee recommended that the 75-25 cost-sharing ratio be maintained for the balance of the extension period (appeal book at p. 257-259).

[17] The President did not respond to this request until June 2013, approximately 16 months later, at which point the recommendation of the Partners Committee to temporarily maintain the 75-25 sharing ratio was rejected. At this time, the President "brought forward" a 50-50 cost-sharing ratio, without providing any reasons (appeal book at p. 945).

[18] At a subsequent Partners Committee meeting, the representatives of the active employees and retirees expressed frustration with the response of the President, in particular, the delay in responding to their request for an extension and the proposal for a new cost-sharing ratio. They stated that usually such changes are directed only to new hires.

[19] The President provided a detailed response in a letter dated October 8, 2013. He expressed concern that the Plan may be out of step with other plans and set out terms that he would be prepared to present to the Treasury Board for approval, which included a 50-50 cost-sharing ratio with possible relief for low-income retirees. He also stated that he may consider "[o]ther possible areas of interest to the Partners Committee". The President requested that a reformulated joint recommendation be submitted by December 16, 2013 (appeal book at p. 988-990).

[20] At a subsequent meeting of the Partners Committee, the retirees' representative stated that the proposed cost-sharing ratio would have a significant impact on current retirees and he requested a meeting with the President (appeal book at p. 269). The meeting never took place (appeal book at p. 98).

[21] Instead of reformulating a joint recommendation as requested by the President, the representatives of the active employees and retirees responded to the President by email on December 11, 2013. They explained in some detail the difficulty in agreeing to a 50-50 cost-sharing ratio. They proposed that they would submit minor amendments to the Plan by the deadline of December 16, 2013, and afterwards they would have a broad discussion about the plan provisions, including cost-sharing (appeal book at p. 1022-1023).

[22] The President replied by email dated December 24, 2013. The representatives were encouraged by the President once again to include cost-sharing in their current discussions and to reach a joint recommendation by January 24, 2014. He added, "[i]t is most desirable that a solution be reached in the forum of the Partners Committee, as this would provide the parties with the best opportunity to reach a mutually beneficial solution. […] Given the current economic environment, it is timely that a reformulated Joint Recommendation which is fair to [Plan] members and to Canadian taxpayers be developed" (appeal book at p. 1024).

[23] At a Partners Committee meeting held on January 23, 2014, a representative of the Treasury Board Secretariat stated that "the President may be open to more discussions, however at some point it was possible that a resolution could be imposed." It was agreed by the Committee that more discussions would be held (appeal book at p. 1028).

[24] In the federal budget presented on February 12, 2014, the government proposed a plan to transition to a 50-50 cost-sharing ratio for retirees.

[25] After further discussions, on March 21, 2014 the Partners Committee made a joint recommendation which was accepted by the Treasury Board. There were concessions on both sides. Most importantly, the Partners Committee agreed to a 50-50 sharing ratio to be phased in over four years, with low-income retirees being exempt from the new formula.

III. Decision of the Federal Court

[26] The Federal Court found in favour of the respondent on the two issues that are raised in this appeal. The Court's decision was based on a reasonableness standard of review.

[27] The Court first considered whether there was a breach of vested contractual rights, either by the Treasury Board unilaterally imposing a new cost-sharing ratio, or by its obtaining the retirees' consent by coercion or duress.

[28] As for whether the Treasury Board unilaterally imposed the change, the Federal Court described the essence of the appellants' argument as being that the retirees' contribution rates were frozen. This submission was rejected by the Court on the basis that there was no evidence "that the rates were locked in perpetuity and that they were not subject to future adjustment" (Federal Court reasons at para. 64).

[29] As for coercion or duress, the Federal Court rejected the appellants' submission that the retirees' consent was obtained by coercion or duress.

[30] The second issue is whether the Treasury Board's actions violated the appellants' freedom of association under paragraph 2(*d*) of the Charter. Two arguments were addressed by the Federal Court.

[31] The Court first considered whether the appellants' freedom of association included the right to "benefits recognized in the collective bargaining process" (Federal Court reasons at para. 86). The Court was not satisfied that the appellants "can bring themselves within the collective bargaining context with respect to their rights as part of the Partners Committee" (Federal Court reasons at para. 87).

[32] In the alternative, the Court found that, if the appellants were within the collective bargaining sphere, there was no evidence that the Treasury Board substantially interfered with the appellants' freedom of association. The Court mentioned in particular that the retirees had the opportunity to make representations, there were multiple meetings with the Partners Committee in which various options were considered, and the retirees operated independently of the Treasury Board and the government.

IV. Appellate standard of review

[33] Generally, when reviewing a discretionary decision of an administrative decision-maker, this Court must step into the shoes of the Federal Court, determine the appropriate standard of review and apply that standard of review (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-48). In other words, this Court must focus on the administrative decision itself, as opposed to potential errors made by the

Federal Court (*Chen v. Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 170 at para. 23).

[34] However, there are exceptions to the application of the *Agraira* standard of review, as discussed in *Apotex Inc. v. Canada (Health)*, 2018 FCA 147, 154 C.P.R. (4th) 397 at para. 57. *Apotex* involved a judicial review of a decision of Health Canada in which it was necessary for the Court to make a factual determination as to the motivation of the decision-maker. This Court held that the issue of motivation should not be reviewed on the *Agraira* standard of review, but instead on the usual appellate standard of review as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 25, 36-37. The Court in *Apotex* stated:

> [58] Here, the finding of the application judge as to what motivated Health Canada was an original finding of fact, not a finding made at first instance by the regulator. In making this finding the application judge was performing functions the same in substance as those performed by trial judges. He was thus better placed to make this finding than an appellate court, and the rationales for application of the *Housen* standard apply […] .

[35] With respect to the Charter, administrative decisions that engage the Charter are to be reviewed based on the administrative law framework articulated in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 (*Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293 at para. 57).

V. Did the Federal Court err in concluding that the Plan amendments did not breach vested contractual rights?

[36] The appellants submit that the Federal Court erred in concluding that there was no breach of vested contractual rights. The appellants allege that two errors were made. First, the appellants suggest that the Federal Court erred in not recognizing that the appellants had vested contractual rights. Second, the appellants submit that the Court erred in concluding that the agreement of the retirees was not obtained by coercion or duress. While it is not entirely clear that an application for judicial review is the appropriate vehicle to raise these issues, as they seem to relate not to an exercise of public power but to the private law of contracts (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 96-97, 105-106), it is not necessary to make a determination in this regard here as I find, for the reasons that follow, that this ground of appeal should fail.

[37] As for vested contractual rights, the Federal Court understood the appellants to argue that they had a guaranteed right to the 75-25 cost-sharing ratio. In this Court, the appellants clarified their position as follows:

> […] The Appellants never made [the guaranteed right] argument. Rather, as the Appellants consistently argued, the retirees had a vested right to either the 75/25 cost-sharing ratio, or, in the event of a disagreement on the terms of the renewal, access to a binding dispute resolution mechanism.
>
> […] any subsequent changes to their benefits required acceptance from the retirees, as occurs when the Partners Committee consents to a unanimous joint recommendation that is ratified by the President […] .
>
> (appellants' memorandum at paras. 63, 78)

[38] In this case, the retirees did consent to an unanimous joint recommendation that was ratified by the President. Accordingly, there is no breach of contractual rights as long as the retirees' consent was valid and binding.

[39] I turn then to the appellants' submission that the Federal Court erred in finding that the retirees' consent was not obtained by coercion or duress. In this regard, the Federal Court determined:

> [78] Despite the circumstances under which the agreement was reached, it ultimately remains that the Applicants signed on to the agreement. Furthermore, concessions were made to the Applicants in the form of increased services and the elimination of deductibles as well as a staged phasing-in of the increase in premiums.
>
> [79] Finally, the retirees had a dispute resolution process available to them if they felt the negotiations had reached an impasse. They chose not go that route. Presumably, that was a calculated decision which the Applicants must accept.
>
> […]
>
> [82] I also conclude that there was no evidence of duress with respect to the process leading to the [Plan] changes announced in 2014.

[40] In reviewing this finding, in my view it is appropriate to apply the *Housen* standard of review based on the principles articulated in *Apotex*, above. The question of duress is similar to the issue to which the *Housen* standard of review applied in *Apotex*. There is nothing in this case to suggest that the Treasury Board considered whether the appellants' agreement to the changes to the Plan was the result of duress. Rather, the Federal Court's findings on the issue of duress were findings at first instance, as opposed to a review of the Treasury Board's decision. The *Housen* standard of review should accordingly apply for the reasons articulated in paragraph 58 of *Apotex*, reproduced above.

[41] As the question of duress is one of mixed fact and law, the palpable and overriding error standard of review should be applied to the determination of the Federal Court.

[42] As noted in *A. (S.) v. A. (A.)*, 2017 ONCA 243, 412 D.L.R. (4th) 470 at paras. 27-29, the party alleging duress must demonstrate that pressure was exerted to the point of coercing their will and that there was no "realistic alternative".

[43] In my view, there is no reviewable error on this issue. The evidence before the Federal Court falls far short of establishing duress. The retirees' representative on the Partners Committee had a senior position in an association whose mandate was to advocate for their members. The appellants have not pointed to any evidence that the representative was taken advantage of or did not understand the consequences of agreeing to the joint recommendation. The retirees chose to negotiate some concessions in return for agreeing to the new cost-sharing ratio and they chose not to engage the dispute resolution mechanism contemplated in the Renewal MOU.

[44] In this Court, the appellants also submit that the President threatened to legislate the change if they did not agree, and stated that the legislation would not include mitigation measures for low-income retirees. According to the appellants, its only options were to "suffer the consequences of the legislative changes […] or capitulate to mitigate the consequences […]. [G]iven its concern for its most vulnerable members, the Appellant Association only had [the option to capitulate], which it took under duress" (appellants' memorandum at paras. 84-87).

[45] The difficulty with this submission is that the retirees had another option available – to invoke the dispute resolution mechanism. It is not known what the outcome would have been if the retirees had chosen to institute this procedure.

[46] Accordingly, the Federal Court did not err in concluding that the agreement of the retirees was not obtained by coercion or duress.

VI. Did the Federal Court err in finding that Treasury Board did not violate the appellants' freedom of association under paragraph 2(*d*) of the Charter?

[47] Paragraph 2(*d*) of the Charter declares that "Everyone has … freedom of association." The appellants submit that the Federal Court erred in not finding a violation of this fundamental freedom.

[48] Freedom of association has been interpreted generally to apply to a broad range of activities and encompasses "the right to join with others to meet on more equal terms the power and strength of other groups or entities." In the particular context of collective bargaining, paragraph 2(*d*) has been held to also encompass "the employees' rights to join together, to make collective representations to the employer, and to have those representations considered in good faith" (*Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 at paras. 45, 60, 66 (MPAO)).

[49] The appellants suggest that paragraph 2(*d*) was violated in two ways. They argue that the composition of the Partners Committee violates their freedom of association. They also submit

that the process that was followed leading up to the change in the retirees' contribution rate in 2014 violated the appellants' freedom of association.

[50] I turn first to the argument that the Treasury Board failed to establish the Partners Committee in a way that adequately protected the rights of retirees (appellants' memorandum at para. 108). The appellants submit that they were denied a meaningful right to be heard because (1) the retirees only had one representative on the Partners Committee compared with seven representatives in total and three for active employees, and (2) the Association did not have the right to select its own representative. With respect to the latter point, I would comment that the Association was given the opportunity to recommend a representative for the retirees and its recommendation was accepted.

[51] The appellants also submit that the President negotiated in bad faith by presenting a "'take it or leave it' position without considering, in good faith, the representations of the Association and other Partners" (appellants' memorandum at para. 110).

[52] These issues should be reviewed based on the framework articulated in *Doré*, *Loyola*, and *Trinity Western*. Under this framework, it is necessary to first consider whether the administrative decision engages the Charter by limiting its protections (*Loyola* at para. 39). If so, the decision will be reasonable if it proportionately balances the relevant Charter values with the decision-maker's legislative objectives (*Doré* at paras. 6, 57-58). This requires that "Charter protections are affected as little as reasonably possible in light of the state's particular

objectives" (*Loyola* at para. 40). Nevertheless, deference should be given to the decision-maker's approach to balancing the Charter values with the statutory mandate (*Doré* at para. 54).

[53] Accordingly, this Court is to consider whether the appellants' freedom of association was engaged, and if so whether the Treasury Board proportionately balanced the appellants' freedom of association against the Treasury Board's statutory objectives.

[54] As for whether the retirees' freedom of association was engaged, the respondent submits that it was not engaged because the right to collective bargaining is only available to "current employees" (respondent's memorandum at para. 68). The respondent also submits that the retirees were not restricted in their ability to form an association with the goal of pursuing objectives and therefore their freedom of association was not engaged.

[55] If the retirees' freedom of association is limited to the ability to form an association with the goal of pursing common objectives, then their freedom of association would not be engaged. However, if the retirees' freedom of association also includes those rights recognized in a collective bargaining context, namely, the right to make collective representations and having those representations considered in good faith, these rights may have been interfered with in the case at bar.

[56] For the purposes of this appeal, it is not necessary to decide whether the retirees' freedom of association includes the rights recognized in a collective bargaining context. Accordingly, I

will assume for purposes of this analysis, without deciding, that the Charter rights recognized in a collective bargaining context apply and that the retirees' freedom of association is engaged.

[57] It remains to be considered whether the Treasury Board's conduct and its decision to move to a 50-50 cost-sharing ratio appropriately balances the retirees' freedom of association and the Treasury Board's statutory objectives. I conclude that there was an appropriate balance.

[58] The appellants submit that their freedom of association was interfered with because they had only one of seven representatives on the Partners Committee. In essence, it is suggested that the retirees' voices were drowned out. The appellants also suggest that the President took a 'take or leave it' approach and did not consider their representations in good faith.

[59] As for the retirees' limited representation on the Partners Committee, this could potentially limit their ability to make representations directly to the Treasury Board. Nevertheless, the Association's representative, as a member of the Partners Committee, was able to make representations to the Partners Committee, with the goal of achieving a joint recommendation for Treasury Board approval. They also had the ability to unilaterally invoke the dispute resolution process contemplated in the Renewal MOU. Accordingly, the retirees, through their designated representative, had the ability to have their voices heard and there was a remedy available that could have been used if they felt as though their voices were being drowned out.

[60] As such, the appellants have failed to demonstrate that the composition of the Partners Committee unreasonably limited the retirees' ability to make representations and have those representations considered in good faith.

[61] As for the appellants' assertion that the President did not consider the retirees' representations in good faith, the evidence falls far short of establishing this. The President forcefully expressed the view to the Partners Committee that the Plan should move to a 50-50 contribution model, but the Partners Committee was able to make representations in reply on several occasions. There is no evidence that these representations were not considered seriously by the President.

[62] As for the statutory objectives of the Treasury Board, the Treasury Board derives its authority to make amendments to the Plan by section 7.1 of the *Financial Administration Act*. This statute generally entrusts the Treasury Board with broad authority over public administration matters, including financial matters (section 7 of the *Financial Administration Act*).

[63] The Treasury Board's objective in moving to a 50-50 cost-sharing ratio is apparent in a letter from the President to the Partners Committee dated October 8, 2013. Importantly, the President stated:

> [T]he Government of Canada has made it a priority to ensure that public sector compensation and pensioner benefits, including the [Plan], remain affordable and comparable to that of other employers' in both the private and public sectors. […]
>
> [I]t is important to note the majority of Canadians do not have access to post-employment supplementary health benefits. Moreover, a number of public

> and private employers have put in place 50% to 100% pensioner-paid cost-sharing models. […]
>
> (appeal book at p. 988)

[64] It is not questioned by the parties, and nor could it be, that the fiscal considerations taken into account by the Treasury Board, as described in the letter above, are within the Treasury Board's statutory mandate.

[65] The question to be decided is whether the Treasury Board appropriately balanced the retirees' freedom of association with its statutory objectives. In this regard, it is important that the retirees ended up agreeing to a joint recommendation to move to the 50-50 cost-sharing ratio. Viewed in this context, I conclude that the Treasury Board appropriately balanced the retirees' freedom of association with the Treasury Board's statutory objectives, and that the Treasury Board's conduct and decision is reasonable from this perspective.

VII. Conclusion

[66] For the reasons above, I would dismiss the appeal. The respondent is entitled to costs.

"Judith M. Woods"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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