Federal Court of Appeal | Cour d'appel fédérale

Date: 20190725

Dockets: A-175-17
A-315-17
A-323-17

Citation: 2019 FCA 211

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
RIVOALEN J.A.

BETWEEN:

KEN INSCH, LAWRENCE FONG and PETER LEUNG

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Intervener

Heard at Calgary, Alberta, on May 8, 2019.

Judgment delivered at Ottawa, Ontario, on July 25, 2019.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: GAUTHIER J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The principal issue raised on this consolidated application for judicial review is whether union members, formerly represented by their union at the grievance and adjudication phases, have standing to maintain an application for judicial review challenging a negative decision of an adjudicator in circumstances where the grievance relates to the interpretation of a provision of the collective agreement and their union no longer represents them, but purports to authorize the continuation of the application.

[2] This issue arises in the following factual context.

A. The facts

[3] At all material times, the applicants were employed by the Canada Revenue Agency as large-file appeals officers at the AU-04 level in the Tax Services Office in Calgary, Alberta. The applicants were all members of the Professional Institute of the Public Service of Canada and a collective agreement existed between the Canada Revenue Agency and the Institute.

[4] The applicants, and others, filed grievances alleging that their employer had violated clause 45.07 of the collective agreement. This clause requires the payment of acting pay to an employee when the employee is required by the employer to substantially perform the duties of a higher classification level on an acting basis for three consecutive working days. The applicants alleged that for a lengthy period they had been performing the duties associated with the positions classified at the AU-05 and AU-06 group and levels.

[5] The grievances were consolidated and referred to adjudication pursuant to subsection 209(1) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (FPSLR Act or Act). Because the grievance related to "the interpretation or application in respect of the employee of a provision of a collective agreement", the applicants obtained, as they were required to obtain, the approval of the Institute to represent them in the adjudication proceedings (subsection 209(2) of the Act).

[6] The adjudicator found that she was without jurisdiction to consider the grievances because the issues raised were issues of classification — not issues of acting pay. The adjudicator went on to hold that if she was incorrect in that finding, the Institute had failed to meet the burden of showing that the grievors were assigned work outside the scope of the job description for their AU-04 large-file appeals officer positions (2017 PSLREB 45).

[7] The Institute retained counsel to commence an application for judicial review of the adjudicator's decision, and counsel filed an application on behalf of each of the three applicants. After privileged discussions between the Institute and the applicants, it was decided that the applicants would represent themselves on the application for judicial review. Thereafter the applicants have represented themselves.

[8] In response, the respondent Attorney General argues that the applicants lack standing to pursue their application.

[9] The Institute was granted intervenor status in the application on the issue of whether the applicants have standing to pursue the application for judicial review in circumstances where they are no longer represented by the Institute's counsel. The Institute's General Counsel and Chief of Labour Relations Services has filed an affidavit in which she swears that the "Institute continues to authorize, support and approve the continuation" of the application.

[10] By order dated August 29, 2018, the application for judicial review was consolidated with other applications later filed by the applicants Mr. Fong and Mr. Leung after they were removed as parties from the original application for procedural reasons. A copy of these reasons shall be placed in each file.

B. The issues

[11] I would frame the issues raised by the applicants on this consolidated application to be:

1. Do the applicants have standing to pursue the application for judicial review?
2. Did the adjudicator commit a reviewable error in finding that she lacked jurisdiction to adjudicate on the grievances?
3. Did the adjudicator breach the applicants' rights to procedural fairness or act in a manner that gives rise to a reasonable apprehension of bias?
4. Did the adjudicator rely upon perjured evidence?

C. Do the applicants have standing to pursue the application for judicial review?

[12] Counsel for the Attorney General argues that the applicants are not persons directly affected by the decision of the adjudicator as required by subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, because they seek a benefit under the collective agreement. However, they are not parties to this contract which is exclusively between the Institute and the Canada Revenue Agency. Counsel further argues that exclusivity between an employer and a union is a key principle in labour relations, and under this principle only the union can pursue a grievance.

[13] The applicant Ken Insch argues that he has both statutory and common law standing because the FPSLR Act contemplates judicial review in subsection 209(2), he signed the grievance and the Institute supports this application. He further argues that he is directly affected by the adjudicator's decision that denied him acting pay. Further, he argues he is directly affected by the fraud, perjury and egregious conduct that took place before the adjudicator and that the "government" owed him a duty of fairness. The other applicants adopt these submissions.

[14] The Institute responds to the submissions of the Attorney General by acknowledging that the Institute must support any judicial review application relating to the interpretation or administration of the collective agreement. Citing cases such as *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207 at paragraph 62 and *Migneault v. New Brunswick (Board of Management)*, 2016 NBCA 52, 452 N.B.R. (2d) 223, the Institute submits that it is the

union alone that has carriage of disputes before the Federal Public Sector Labour Relations and Employment Board (Board) that concern the interpretation and application of the governing collective agreement. This requirement ensures that individual union members cannot advance an argument about the interpretation or application of a collective agreement that is not supported by the union as representative of all of the members of the relevant bargaining unit.

[15] This said, the Institute submits that the grievance and adjudication scheme under the FPSLR Act and its predecessor is structured differently than in most other jurisdictions: under the Act it is the individual grievor who files the grievance in their name. Under this scheme it is the grievor who then becomes the applicant or respondent in an application for judicial review of a decision of an adjudicator.

[16] The Institute submits, however, that it must continue to support any judicial review application relating to the interpretation or administration of the collective agreement, as it has in this case. Otherwise, its autonomy in policing the collective agreement would be undermined.

[17] Before beginning consideration of this issue it is helpful to first refer to the relevant provisions of the collective agreement and the FPSLR Act.

1. *The collective agreement*

[18] The collective agreement is between the Canada Revenue Agency and the Institute.

[19] In article 25 of the collective agreement the employer recognized "the Institute as the exclusive bargaining agent for all employees described in the certificate issued by the Public Service Staff Relations Board on December 12, 2001, covering employees of the Audit, Financial and Scientific bargaining unit currently classified in accordance with" specified classification standards. The applicants were employees described in this certificate.

[20] No provision of the collective agreement grants to an individual employee the unfettered right to pursue a grievance at any level if the grievance relates to the interpretation or application of a provision of the collective agreement.

[21] Rather, article 34 of the agreement deals with the grievance procedure. An important limitation is found in article 34.07, which prevents an employee from presenting "an individual grievance relating to the interpretation or application … of a provision of a collective agreement … unless the employee has the approval of and is represented by the Institute."

[22] Similarly, article 34.22 precludes an employee from referring to adjudication an individual grievance relating to "the interpretation or application … of a provision of a collective agreement" without the approval of the Institute.

[23] It will be seen from the following review of the relevant provisions of the FPSLR Act that the provisions of article 34 of the collective agreement in large measure reflect legislated requirements.

2. *The FPSLR Act*

[24] The preamble to the Act recognizes that a "commitment from the employer and bargaining agents to mutual respect and harmonious labour-management relations is essential to a productive and effective public service". The preamble also recognizes that "public service bargaining agents represent the interests of employees in collective bargaining and participate in the resolution of workplace issues and rights disputes".

[25] Subsection 2(1) defines a "collective agreement" to be an agreement in writing "between the employer and a bargaining agent, containing provisions respecting terms and conditions of employment and related matters."

[26] Part 1 of the Act, dealing with "Labour Relations", defines "parties", in relation to collective bargaining, arbitration, conciliation or a dispute, to mean "the employer and the bargaining agent." (subsection 4(1)). Part 2 of the Act, dealing with "Grievances", contains no definition of "parties".

[27] Subsection 208(1) of the Act states that "an employee is entitled to present an individual grievance" if the employee feels aggrieved "by the interpretation or application … of … a provision of a collective agreement". The employee may only present the grievance if the

employee “has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement” applies (subsection 208(4)).

[28] Subsection 209(1) similarly permits an employee to refer to adjudication an individual grievance relating to “the interpretation or application … of a provision of a collective agreement”. Prior to referring the grievance, the employee must obtain “the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.” (subsection 209(2)).

[29] These provisions are reflected in the *Federal Public Sector Labour Relations Regulations*, SOR/2005-79. Section 67 of the Regulations permits an employee to present an individual grievance, while subsection 69(1) requires that a grievor who presents an individual grievance relating to the interpretation or application of a collective agreement must provide a declaration from the authorized representative of the appropriate bargaining agent indicating that the grievor, in presenting the grievance, has the approval of and is represented by the bargaining agent. Subsection 89(1) of the Regulations provides that a notice of reference to adjudication for individual grievances relating to the interpretation or application of a provision of the collective agreement shall be filed in Form 20 of the schedule. Form 20 collects information about the grievor and concludes with a declaration, in accordance with subsection 89(3), by an authorized representative of the applicable bargaining agent indicating that the bargaining agent is willing to represent the grievor in the adjudication proceedings.

3. *Analysis*

[30] The above review of the relevant provisions of the Act, Regulations and the collective agreement shows that adjudication rights in the federal public sector arise directly from the legislation and not the collective agreement: subject to the limitations described above, subsection 208(1) of the Act entitles an employee to present an individual grievance and subsection 209(1) entitles employees such as the applicants to refer individual grievances to adjudication.

[31] Consistent with this legislation, the parties to an adjudication of an individual grievance before the Board are the individual grievors and the employer. The union is not a party but instead approves of and represents the employee at the grievance and adjudication stages. Therefore, contrary to the submissions of the Attorney General, the applicants are not exercising adjudication rights under the collective agreement between the Institute and the Canada Revenue Agency.

[32] This legislative scheme, at least in respect of adjudication rights for individual grievances, ousts the requirement of contractual privity relied on by the Attorney General.

[33] Subsection 18.1(1) of the *Federal Courts Act* permits anyone "directly affected by the matter in respect of which relief is sought" to apply for judicial review. The Attorney General has not demonstrated how as parties to an adjudication brought by the applicants under this statutory scheme, the applicants are not "directly affected" by the decision they seek to review.

As parties to the adjudicator's decision, the applicants have standing to commence and pursue this application.

[34] This said, I acknowledge the difficulty posed by this legislative scheme to the proper role of a union at the judicial review stage.

[35] The Board and its predecessors have consistently held that when a grievance relates to the interpretation or application of a collective agreement the grievor may only proceed if represented by his or her bargaining agent (see, for example, *Cavanagh v. Canada Revenue Agency*, 2014 PSLRB 21, [2014] C.P.S.L.R.B. No. 21; *Boivin v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 98, [2009] C.P.S.L.R.B. No. 98). In such cases, if a bargaining agent subsequently withdraws its support, the grievance is no longer adjudicable (*Yarney v. Deputy Head (Department of Health)*, 2011 PSLRB 112, [2011] C.P.S.L.R.B. No. 111).

[36] However, as the above review of the legislative regime and the collective agreement demonstrates, no similar statutory requirement exists when an employee pursues an application for judicial review of a negative decision of an adjudicator.

[37] In a judicial review of a decision involving the interpretation or application of a provision of a collective agreement, the rights of all of a union's members are at issue. At the grievance and adjudication stages the rights of all of the union's members are protected by the requirement that the union represent grievors. This reflects the imperative that the union be involved in any

grievance or adjudication that would interpret or apply the collective agreement so as to ensure that the interests of the bargaining unit as a whole are protected. In my view it makes little sense for the protection provided by union representation at the grievance and adjudication stages to be surrendered on judicial review — a proceeding that carries greater precedential value than grievance or adjudication proceedings. However, the legislation provides no solution for the relatively rare situations when a union member wishes to pursue judicial review but the union does not.

[38] The Institute submits that in this circumstance the union maintains ultimate control of the grievance because if this Court remits the matter back to adjudication, the union will represent the grievors at adjudication. This, however, overlooks the potential for this Court to issue binding directions to an adjudicator or, in an exceptional case, to direct the outcome.

[39] Further, in the present case while counsel for the Institute did draft the notice of application seeking judicial review, in the consolidated application the applicants argue issues not raised by counsel in the application: that the applicants were inadequately represented by the Institute and that the employer, through specifically named employees, presented perjured evidence. Such a serious, unfiltered allegation of perjury made against co-workers cannot promote harmonious labour-management relations. Yet, it is a consequence that may flow from the absence of union representation on judicial review.

[40] There is, perhaps, one way to recognize and respect on judicial review a union's responsibility to ensure that the interests of the bargaining unit as a whole are protected when issues concerning the application or interpretation of a collective agreement are raised.

[41] Rule 303(1) of the *Federal Courts Rules*, in subpart (a), requires an applicant to name as a respondent every person "directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought". It may be that applicants who are no longer represented by their union on judicial review are required by this Rule to name the union as respondent in their notice of application and to serve their notice of application upon the union. Compliance with Rule 303(1) would ensure that an affected union receives notice of such an application and would permit the union to choose to participate in the proceeding to ensure that in matters that implicate the interpretation or application of the collective agreement the interests of the bargaining unit as a whole are represented and protected.

[42] I now turn to the substantive issues raised by the applicants.

D. Did the adjudicator commit a reviewable error in finding that she lacked jurisdiction to adjudicate on the grievances?

[43] There is no merit in the applicants' submission that the standard of review of correctness should be applied to the adjudicator's finding that she lacked jurisdiction to consider the grievances (applicants' memorandum of fact and law, paragraph 60). The adjudicator's decision that she lacked jurisdiction is properly reviewed for reasonableness: *Nadeau v. Canada (Attorney*

General), 2018 FCA 203, [2018] F.C.J. No. 1133, paragraph 16; *Klos v. Canada (Attorney General)*, 2018 FCA 160, [2018] F.C.J. No. 916, paragraphs 1-3.

[44] There is equally no merit to the applicants' submission that by misconstruing the grievances to raise an issue of classification the adjudicator committed an error of law that rose to the level of an abuse of discretion and an error of jurisdiction.

[45] The applicants made few if any submissions directly addressing the adjudicator's finding that she lacked jurisdiction; the applicants do not point to any clear errors in the adjudicator's reasoning. Rather, the bulk of the applicants' submissions focus on arguing their case *de novo* and on the issue of fraudulent concealment, a matter not determined by the Board in view of its finding that it lacked jurisdiction.

[46] After considering the critical distinction between acting pay and classification grievances, the adjudicator referred to the decision of *Bungay v. Treasury Board (Department of Public Works and Government Services)*, 2005 PSLRB 40, [2005] C.P.S.L.R.B. No. 42, where, at paragraph 59, the Board provided a non-exhaustive description of the characteristics that distinguish a classification grievance from an acting pay grievance.

[47] The adjudicator found that the applicants' concerns related to the entirety of their duties since their respective appointments to the AU-04 large-file appeals officer positions and that their duties had been consistent over time. This suggested that the applicants' concern was that their work had been chronically undervalued.

[48] The adjudicator further considered that the applicants' grievances were in part based on a comparison with the work of their counterparts in another appeals office. The adjudicator then looked at the essence of the applicants' complaint and found that the issues they raised related to classification (reasons, paragraph 224). This was a heavily factually-suffused determination, based on the adjudicator's appreciation of the evidence. It is a determination that is entitled to deference. The applicants have not demonstrated that the finding was unreasonable.

E. Did the adjudicator breach the applicants' rights to procedural fairness or act in a manner that gives rise to a reasonable apprehension of bias?

[49] The applicants submit that the adjudicator breached their right to procedural fairness by failing to admit some of their evidence, while allowing all of their employer's evidence. This is said to have resulted in a biased procedure. The applicants further submit that the adjudicator demonstrated a reasonable apprehension of bias since she used the employer's "representatives' testimony almost exclusively as the basis for the Decision even though the Applicants were found to be equally credible." (applicants' memorandum of fact and law, paragraph 95).

[50] The applicants argue that their evidence was excluded on the basis that it was from "outside the grievance period." (applicants' memorandum of fact and law, paragraph 79). There is no transcript of the hearing before the adjudicator, which makes this Court reliant on affidavit evidence.

[51] From the affidavit evidence, it appears that the adjudicator excluded evidence for a number of reasons. For example, with respect to a memorandum dated June 2, 2005 – relating to

ratings for files in the Audit Division – the affidavit of a representative of the employer is to the effect that neither the sender nor the contact person indicated on the document testified and the bargaining agent did not call any witness who had received the document. Further, the document only spoke about the Audit Division; the applicants were employed in the Appeals Division. These facts would justify exclusion of the memorandum and the employer's representative was not challenged in cross-examination on her evidence.

[52] A second example relates to the exclusion of a memorandum dated March 21, 2003. The same affidavit of a representative of the employer states that the document was excluded because the bargaining agent could not connect it to the witness, the applicant Mr. Fong. Neither the sender nor the recipient of the memorandum or the purported author testified at the hearing. These facts would also justify exclusion of this memorandum.

[53] Similar examples exist.

[54] Therefore, while the applicants suggest that the adjudicator dismissed evidence on the basis that it was from outside the grievance period, the adjudicator appears to have dismissed the evidence for other reasons as well. Courts generally should not substitute their view of the relevance of evidence for that of the decision-maker except when the rejection of relevant evidence has such an impact on the fairness of the proceeding that it unavoidably leads to the conclusion that there is been a breach of natural justice (*Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, at page 491).

[55] In the absence of better evidence from the applicants I see no basis to find that documents were improperly excluded in a fashion that demonstrates any breach of natural justice or any reasonable apprehension of bias.

[56] Similarly, the adjudicator's reliance upon evidence adduced by representatives of the employer cannot support the applicants' allegation of bias. Bias is a serious allegation. The applicants have not brought any evidence or argument that would demonstrate to a reasonable, fully informed person, thinking the matter through, that it is more likely than not that the adjudicator would not decide the matter before her fairly (*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at page 394). Mere disagreement with the way in which the adjudicator assessed conflicting evidence does not give rise to a valid claim of bias.

F. Did the adjudicator rely upon perjured evidence?

[57] The applicants submit that the Canada Revenue Agency, through its employees, submitted perjured evidence. Perjury is also a serious allegation that must be supported by more than mere assertion (*Rafizadeh v. Toronto-Dominion Bank*, 2014 FCA 144, 461 N.R. 318, paragraph 8).

[58] In the present case, the applicants' submissions are to the effect that since fraud has been perpetrated against them by their management team, every contradiction in the evidence is an apparent continuation of the fraud. However, the alleged lies or instances of perjury are best characterized as disagreements with the evidence adduced on behalf of the Canada Revenue

Agency, and many of the applicants' submissions on this issue amount to a request to reweigh the evidence that was before the adjudicator. The applicants have fallen well short of demonstrating perjury.

G. Conclusion

[59] For these reasons, I would dismiss the application for judicial review on the basis that the decision of the adjudicator that the Board lacked jurisdiction was reasonable, and the applicants have failed to demonstrate that this conclusion was tainted by bias or other impropriety.

[60] As success on the issues before the Court was divided I would not make any order as to costs.

"Eleanor R. Dawson"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-175-17 A-315-17 A-323-17
STYLE OF CAUSE:	KEN INSCH, LAWRENCE FONG AND PETER LEUNG v. ATTORNEY GENERAL OF CANADA AND PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MAY 8, 2019
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	GAUTHIER J.A. RIVOALEN J.A.
DATED:	JULY 25, 2019

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