Federal Court of Appeal | Cour d'appel fédérale

Date: 20211022

Docket: A-148-19

Citation: 2021 FCA 205

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

BETWEEN:

CONSEIL DES ATIKAMEKW DE WEMOTACI

Applicant

and

THE ASSOCIATION OF EMPLOYEES OF NORTHERN QUEBEC (CSQ)

Respondent

Heard by online videoconference hosted by the registry

on October 13, 2021.

Judgment delivered at Ottawa, Ontario, on October 22, 2021.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

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

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] This is an application for judicial review of a decision rendered by the Canada Industrial Relations Board (the Board) on March 14, 2019, in which the Board allowed an unfair labour practice complaint filed by the respondent against the applicant, the Conseil des Atikamekw de

Wemotaci (2019 CIRB LD 4114). The respondent filed the complaint on January 16, 2017, pursuant to subsection 97(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code) on behalf of the teaching staff of Nikanik secondary school, of whom the applicant is the employer.

[2] The applicant is a band council established under the *Indian Act*, R.S.C. 1985, c. I-5. Nikanik secondary school is governed by a department of education established by the applicant, and not by the province of Quebec's Ministère de l'Éducation et de l'Enseignement supérieur. Therefore, the applicant does not receive any funding from the provincial government for its schools.

[3] The respondent is a duly certified union that specializes in representing employees who work in the education sector in Indigenous communities.

[4] Prior to May 2016, the teachers at Nikanik secondary school (the teachers) were paid in accordance with the provincial grid for the 2014–2015 school year and at the rates effective as of April 1, 2014, as confirmed by the resolution adopted by the applicant on April 22, 2014. Some teachers also received a $5,000 annual housing allowance.

[5] When the 2015–2016 school year started, the teachers noticed that they had not received a salary increase and asked Mr. Hervé Ottawa, the applicant's director of education, for an explanation. Mr. Ottawa replied that the applicant had decided to freeze the teachers' salaries and that, as a result, they would not be entitled to a one-step increase for the experience that they had acquired during the previous year.

[6] In the spring of 2016, the teachers learned through the newspapers that all teachers in Quebec were going to enter into a new collective agreement with a 2.5% salary increase. Therefore, the teachers wrote to Mr. Ottawa, on April 25, 2016, to ask for the same salary increase.

[7] On May 3, 2016, the applicant adopted a resolution to adjust the teachers' salaries. The next day, Mr. Ottawa met with the teachers to inform them of this news. However, at the start of the 2016–2017 school year, the teachers still had not received a salary increase.

[8] That is why, on September 9, 2016, the respondent filed an application for certification with the Board, on behalf of the teachers. The certification order was made on September 27, 2016.

[9] On October 24, 2016, the teachers met with Mr. Ottawa, and according to the evidence submitted by the respondent, Mr. Ottawa notified them at that time that there would be no salary increase because everything was [TRANSLATION] "frozen because of the union".

[10] Following this meeting, the respondent filed the complaint that is the subject of the application for judicial review that is now before this Court.

[11] In this complaint, the respondent alleged that the employer had violated subsection 24(4) of the Code by altering the teachers' terms and conditions of employment by refusing to adjust their salaries according to the salary grid of the Ministère de l'Éducation, du Loisir et du Sport

(now the Ministère de l'Éducation et de l'Enseignement supérieur) adopted on June 22, 2016 (the provincial salary grid), despite the employer's resolution adopted on May 3, 2016.

II. The Board's decision

[12] The Board held hearings over four days and heard several witnesses. It determined that it was appropriate to render a summary decision given that the parties were negotiating an initial collective agreement and that the decision could affect bargaining. The Board specified that it had considered the oral evidence during the hearing as well as all the submissions and documents entered into evidence by the parties.

[13] It is helpful to provide a more detailed description of certain key documents entered into evidence with the Board, in chronological order:

A. Article from the newspaper *La Presse* dated December 16, 2015, entitled [TRANSLATION] "Pay Increase of 2.5% for all Teachers" (Applicant's Record at pp. 190–92, Affidavit of Hervé Ottawa, Exhibit A-13). This article announces that, at the main bargaining table, the Treasury Board agreed to improve the offer made to the roughly 100,000 teachers regarding salary relativity. Therefore, all teachers, regardless of where they were on the salary grid, were to receive a 2.5% increase;

B. Joint letter from the teachers of Nikanik school dated April 25, 2016, addressed to Hervé Ottawa, the Conseil des Atikamekw de Wemotaci's director of education (Respondent's Record at pp. 14–17, Affidavit of Emma Dallas, Exhibit D-3). In this letter, the teachers

asked for salaries to be adjusted to reflect the new provincial salary grid. In addition, the teachers requested that salaries for the 2015–2016 school year be adjusted based on their actual salary step and increased by the percentage provided for in the new provincial salary grid, namely, 2.5%;

C. Recommendation form dated May 3, 2016, completed by Mr. Ottawa for his employer, the applicant (Applicant's Record at pp. 72–73, Affidavit of Hervé Ottawa, Exhibit A-3). This form does not mention a percentage increase in salary but recommends, among other things, that the provincial salary grid be used for the schools' teaching staff, principals and vice-principals and that salaries be adjusted starting on the date that the next employment contracts were to be signed (August 2016). In addition, Mr. Ottawa recommends that the housing allowances provided to staff members residing off the reserve be frozen (the three-year period that was initially recommended was struck out by the band council clerk before the resolution mentioned in item D below was adopted) in order to maintain a balanced budget;

D. Applicant's resolution dated May 3, 2016 (Applicant's Record at pp. 80–82, Affidavit of Hervé Ottawa, Exhibit A-6) accepting Mr. Ottawa's recommendation to adjust the salaries of the schools' teaching staff and principals and to put an end to the $5,000 housing allowances in order to comply with budget planning. This document does not mention a 2.5% salary increase or salary grid steps; and

E. Calculation table prepared by the respondent and submitted during the hearings before the Board (Respondent's Record at pp. 25–26, Affidavit of Emma Dallas, Exhibit D-5).

> This document lists the salaries of the teachers at Nikanik secondary school and shows that most would have their salaries reduced when the $5,000 annual housing allowance was eliminated, notwithstanding a 2.5% salary increase.

[14] The Board determined that the interpretation of the May 3, 2016 resolution was at the heart of the dispute. According to the Board, the evidence clearly indicated that, as of May 3, 2016, the employer had adopted a resolution to amend the teachers' salary conditions. This amendment, although presented to the teachers at Nikanik secondary school on May 4, 2016, had not yet been implemented when the respondent submitted its application for certification with the Board on September 9, 2016. As a result, the teachers would have received a salary increase even before negotiations for a collective agreement began. In October 2016, the teachers asserted that Mr. Ottawa had told them that there would not be any salary increase since [TRANSLATION] "everything was frozen because of the union". In light of the evidence and the applicable law, the Board found that the employer could not further alter the salary conditions by ignoring the May 3, 2016 resolution without violating the conditions set out in subsection 24(4) of the Code.

[15] The Board allowed the complaint, concluding that the employer was required to pay all the teachers at Nikanik secondary school the 2.5% salary increase set out in the provincial salary grid for the 2016–2017 school year. However, the Board determined that the May 3, 2016 resolution could not be applied to subsequent years.

[16] The applicant is asking this Court to set aside the Board's decision and declare the 2.5% salary increase void. It submits that the Board made an unreasonable decision in interpreting the May 3, 2016 resolution.

III. Standard of review

[17] The parties agreed, and rightly so, that the Board's decision must be reviewed on a standard of reasonableness (*Canadian Helicopters Limited v. Office and Professional Employees International Union*, 2020 FCA 37 at paras. 22–26).

IV. Issue

[18] The only issue before us is the following: Was the Board's decision to allow the respondent's unfair practice complaint, regarding the employer's refusal to grant the Nikanik secondary school teaching staff the 2.5% salary increase provided for in the provincial salary grid for the 2016–2017 school year, reasonable?

V. Analysis

A. *Was the Board's decision to allow the respondent's unfair practice complaint reasonable?*

[19] The applicant makes several criticisms of the Board's decision.

[20] First, the applicant asserts that the Board erred in law in interpreting its May 3, 2016 resolution. More specifically, the applicant alleges that the Board does not have the jurisdiction

to invalidate the resolution of another federal body, in this case, an Indian band recognized under the *Indian Act*.

[21] I disagree. In this case, the applicant's actions can be reviewed by the Board even if the decision was made by way of a resolution because, in this case, the applicant acted as the employer, which puts us in the context of labour law rules (*Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29; *Public Service Alliance of Canada v. Francis et al.*, [1982] 2 S.C.R. 72, 139 D.L.R. (3d) 9 at para. 18, p. 78).

[22] Similarly, the applicant argues that the May 3, 2016 resolution was for a simple step increase on the 2014–2015 provincial salary grid and not for a salary adjustment. However, the documentary evidence in the record shows that in the resolutions previously adopted by the applicant relating to salary increases for the teachers, the applicant did indeed use the specific terms [TRANSLATION] "one-step increase" or [TRANSLATION] "two-step increase" when it wanted to refer to step increases. The Board considered the consistency of these previous resolutions in its decision. However, in this case, it is clear that the May 3, 2016 resolution did not refer to [TRANSLATION] "steps", but indeed to a [TRANSLATION] "salary adjustment". Therefore, even if the decision was summary, the Board's interpretation was sufficiently justified given the special circumstances in this case.

[23] Next, the applicant criticizes the Board's assessment of the evidence by alleging that it failed to consider the testimony of certain key witnesses.

[24] It is clear that this Court's role on judicial review is not to reassess the evidence and the importance of each testimony. The Board is in an advantageous position to assess the documentary evidence in light of the testimony heard and the credibility of the witnesses. Indeed, the Board held hearings over four days, heard all the witnesses and confirmed in its decision that it had considered all the testimony and documentary evidence in the record before reaching its conclusion. Not explicitly mentioning the name of each witness in the text of the decision does not make that decision unreasonable. This Court must "refrain from 'reweighing and reassessing the evidence considered by the decision maker'", but the decision maker must consider the evidence in the record. Absent exceptional circumstances, the Court should not intervene in the decision maker's factual findings (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 125 [*Vavilov*]). I do not see any exceptional circumstances here that would permit our intervention.

[25] Finally, the applicant claims that the decision is unreasonable because it is based on a provincial salary grid that did not exist when the May 3, 2016 resolution was adopted. First, the grid in question was not officially put in place until June 22, 2016, more than a month after the May 3, 2016 resolution was adopted. Second, the preamble of the resolution, which refers to the provincial salary grid, is not part of the resolution. In short, the applicant submits that it never ratified this provincial salary grid and that, therefore, it is illogical that it could have drawn on it.

[26] In my view, this is an interesting argument, but it cannot be accepted. As I pointed out in paragraph [12] above, the Board held hearings over four days, heard several witnesses and considered the documentary evidence submitted by the parties. The descriptions of the essential

documents at paragraph [13] above show that the provincial salary grid and the 2.5% salary increase for teachers across the province, negotiated between the province and the union, were publicly announced in the newspapers and were therefore on the minds of the teachers at Nikanik secondary school even before the resolution was adopted. In addition, the teachers pointed to this request for a 2.5% salary increase in the April 25, 2016 letter to Mr. Ottawa. I further note that, before the resolution was adopted, Mr. Ottawa discussed the contents of this letter and more specifically the request for a 2.5% salary increase with the applicant's senior management (Applicant's Record at p. 197, Affidavit of Hervé Ottawa at paras. 34–35). Finally, even ignoring the preamble, the resolution specifically endorses the recommendation that clearly refers to the provincial salary grid. Therefore, it was reasonable for the Board to find that the applicant approved the application of this grid and that the parties were aware of the 2.5% salary increase when the resolution was adopted.

VI. Conclusion

[27] In conclusion, despite Mr. Denis's able submissions at the hearing, the applicant has not persuaded me that the Board made an unreasonable decision by ignoring the evidence or drawing illogical conclusions. The issue is not whether this Court would have come to the same conclusion as the Board, but rather whether the Board's decision is, as a whole, transparent, intelligible and justified (*Vavilov* at para. 15) and whether it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Vavilov* at paras. 83, 86). After having carefully reviewed the record and the parties' submissions, I am of the view that this is the case.

[28] For all these reasons, I would dismiss the application for judicial review, with costs.

"Marianne Rivoalen"

J.A.

"I agree.
Johanne Gauthier J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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