Federal Court of Appeal | Cour d'appel fédérale

Date: 20230531

Docket: A-183-20

Citation: 2023 FCA 118

CORAM: **STRATAS J.A.**
RENNIE J.A.
MACTAVISH J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

ALYM RUSHWAN

Respondent

Heard at Ottawa, Ontario, on January 13, 2022.

Judgment delivered at Ottawa, Ontario, on May 31, 2023.

REASONS FOR JUDGMENT BY: THE COURT

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REASONS FOR JUDGMENT BY THE COURT

[1] This is an application for judicial review of a decision of the Federal Public Sector Labour Relations and Employment Board (2020 FPSLREB 66) allowing a grievance brought by the respondent employee, Alym Rushwan, against his employer, Transport Canada. After his employer denied his request to be designated for standby duties, the respondent filed the grievance before the Board under paragraph 209(1)(*a*) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the Act). The Board found that, based on its understanding

of the collective agreement's relevant clauses, the employer had failed to equitably distribute the standby duties requested by the respondent as required by the agreement.

[2] The interpretation of collective agreements is "the heartland of [the Board's] expertise", and its decisions on such matters are owed deference on an application for judicial review (*Canada (Attorney General) v. Fehr*, 2018 FCA 159, 296 A.C.W.S. (3d) 170 at para. 4). The Board's decision accordingly attracts reasonableness review, in which this Court will only intervene where it encounters a fatal flaw that is central to the merits of the decision (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 100 [*Vavilov*]).

[3] A reasonable decision is based on an internally coherent and rational chain of analysis that is justified in relation to the relevant facts and law (*Vavilov* at para. 85). This standard signals two types of fundamental flaws that may show a decision to be unreasonable: the absence of reasoning that is both rational and logical, or the lack of a justifying constellation of law and facts relevant to the decision (*Vavilov* at paras. 102 and 105). Put simply, to characterize a decision as unreasonable, a reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, transparency and intelligibility (*Vavilov* at para. 100). Two such shortcomings are present in the Board's decision.

[4] The first shortcoming, in which the Board adopted an incorrect approach to reviewing the employer's decision, is not fatal to the decision. What is fatal, however, is the failure of the

Board to explain how clause 30.02 of the collective agreement imposes an obligation on the employer to provide training to unqualified employees so that they may become qualified to join a particular standby list. Specifically, the Board found that the respondent was not qualified for the standby duties that he requested, but that the employer was nevertheless obligated to take positive measures to provide him the training necessary to become qualified. This conclusion effectively imposes a new duty on the employer under the collective agreement to distribute standby duties equitably among both qualified and unqualified employees. This interpretation is unsupported by the Board's reasons and the text of the collective agreement.

[5] The circumstances that led to the respondent's filing of a grievance may be briefly stated.

[6] The respondent was a TI-07 Marine Safety Inspector in the Compliance and Enforcement Unit with Transport Canada. In this role, the respondent facilitated the docking of ships at the Port of Vancouver. Before certain organizational changes, which are described below, the Vancouver office of Transport Canada consisted of five units: Compliance and Enforcement, Cargo Services, Technical Services, Inspection Services, and Office of Boating Safety. Each unit had a different mandate and was led by a different manager.

[7] In the respondent's unit, the Compliance and Enforcement Unit, marine safety inspectors were responsible for regulatory compliance, responding to marine emergencies, and performing pollution investigations. The Cargo Services Unit, in contrast, consisted of port wardens responsible for ship cargo services and loading. Port wardens issue certifications for cargo loading and for fitness to proceed to sea, and are qualified to inspect different types of cargo

including grain, concentrate and timber. They also investigate complaints and work stoppages under the *Canada Labour Code*, R.S.C., 1985, c. L-2.

[8] Prior to 2012, Transport Canada's Pacific Region had two separate standby lists, distinguished by different training and certification requirements, to address specific port-related after-hours work. These included the Port Warden Standby List, assigned to the Cargo Services Unit, and the Second Standby List, assigned to the Compliance and Enforcement Unit. As a marine safety inspector, the respondent was listed on the Second Standby List. On July 10, 2012, Transport Canada announced its plan to eliminate the Second Standby List and proceed with only one standby system in the Pacific Region, namely, the Port Warden Standby List.

[9] At the time that the Second Standby List for the Compliance and Enforcement Unit was eliminated, the respondent was not authorized to carry out cargo inspections as required for the port warden position; he lacked both the requisite training as well as the required formal recognition of competence by the employer. The respondent was therefore not eligible to be added to the Port Warden Standby List. This fact is uncontested.

[10] The respondent nevertheless emailed the manager of the Cargo Services Unit seeking to be included on that unit's Port Warden Standby List, which by then was the only standby list in the Pacific Region. In a responding email, the manager refused the respondent's request, stating that the unit already had sufficient staff on its standby list based on the unit's operational requirements. The substance of this response figures prominently in the Board's reasoning, a point to which we will return.

[11] Six months later, on December 17, 2012, the former Compliance and Enforcement Unit and the former Cargo Services Unit integrated into one division called the Compliance, Enforcement and Cargo Services Division. That same day, the manager of the new Compliance, Enforcement and Cargo Services Division emailed all staff in the division indicating that training for port warden positions would begin the next day.

[12] The respondent began the training required to become qualified as a port warden, and was added to the Port Warden Standby List on April 29, 2013. The respondent's grievance was therefore a confined claim for retroactive pay for the period of time during which he was unqualified to be on the Port Warden Standby List.

[13] We turn now to the Board's decision.

[14] The Board reviewed Transport Canada's evidence with respect to the department's new budgetary constraints, noting that Transport Canada was required to reduce its spending by 10.7 percent over three years and that abolishing the Second Standby List had been considered an "important cost-saving measure" within the department (Reasons at para. 69). The Board also observed that budget cuts had motivated the merger of the two units that created the new Compliance, Enforcement and Cargo Services Division (Reasons at para. 70).

[15] The Board then considered whether the employer had breached clause 30.02 of the collective agreement by not placing the respondent on the Port Warden Standby List. Article 30 of the collective agreements reads as follows:

ARTICLE 30

STANDBY

30.01 Where the Employer requires an employee to be available on standby during off-duty hours, such employee shall be compensated at the rate of one-half (1/2) hour for each four (4) hour period or part thereof for which the employee has been designated as being on standby duty.

30.02 An employee designated by letter or by list for standby duty shall be available during his or her period of standby at a known telephone number and be available for return to work as quickly as possible if called. In designating employees for standby, the Employer will endeavour to provide for the equitable distribution of standby duties.

30.03 No standby payment shall be granted if an employee is unable to report for work when required.

30.04 An employee on standby who is required to report for work shall be compensated in accordance with clause 29.01.

30.05 Other than when required by the Employer to use a vehicle of the Employer for transportation to a work location other than the employee's normal place of work, time spent by the employee reporting to work or returning to his or her residence shall not constitute time worked.

30.06

(a) Payments referred to in clauses 30.01 and 30.04 shall be compensated in cash except where, upon request of an employee and with the approval of the Employer, or at the request of the Employer and the concurrence of the employee, the payment may be compensated in equivalent leave with pay.

(b) Compensatory leave with pay not used by the end of a twelve (12) month period to be determined by the Employer will be paid for in cash at the employee's hourly rate of pay as calculated from the classification prescribed in the certificate of appointment of his or her substantive position at the end of the twelve (12) month period.

[16] The Board concluded that, although the respondent was ineligible for inclusion on the Port Warden Standby List due to his insufficient qualifications, the employer was nevertheless obligated to strive for an equitable distribution of standby duties by "address[ing] and possibly overcom[ing]" the respondent's ineligibility (Reasons at para. 178). Relying on clause 30.02 of

the collective agreement—and highlighting the clause's specification that the employer "will endeavour" to provide for an equitable distribution of standby duties—the Board determined that the employer was obligated to take positive action and provide the approximately four months of training required to secure the respondent's spot on the Port Warden Standby List (Reasons at paras. 179, 183, and 194).

[17] Although it accepted that the budgeting pressures that drove Transport Canada's reorganization were genuine (Reasons at para. 167), the Board based its conclusion on the employer's email response to the respondent's request to be added to the Port Warden Standby List. The employer's initial reason for rejecting the respondent's request was not based on the economic pressures at the time, nor was it based on the fact that the respondent was not authorized to inspect cargo; rather, the employer's reason was based on the Cargo Services Unit's operational needs. The Board found that this justification did not represent a legitimate operational objective (Reasons at para. 181).

[18] The Board also noted that the employer's decision to refuse to add someone to the Port Warden Standby List would not have saved Transport Canada any money (Reasons at para. 182). The Board reasoned that the standby duties had to be performed and the cost incurred in any event; the number of people on the list would not affect the department's overall expenditures (Reasons at para. 182). In the Board's view, the employer did not provide a reasonable and credible explanation for its refusal to add the respondent to the list; the Board went on to hold that, in denying the respondent's request to be designated for standby duty because there was no

operational need for his labour, the employer had not made the necessary effort to provide for an equitable distribution of standby duties as required by clause 30.02 (Reasons at para. 193).

[19] This led to the first shortcoming.

[20] The Board focused on the initial reasons offered by the employer for its decision to deny the respondent's request. Indeed, the Board expressly considered itself as sitting in review of the employer's decision as opposed to conducting a *de novo* hearing (Reasons at para. 174).

[21] A hearing before an adjudicator of a grievance must, however, proceed as a *de novo* hearing (*Patanguli v. Canada (Citizenship and Immigration)*, 2015 FCA 291, 486 N.R. 308 at para. 38). The Board's task was therefore to interpret and apply the collective agreement to assess the employer's decision; instead, the Board examined the reasons originally offered by the employer in denying the respondent's request via email. The Board's role on adjudication under paragraph 209(1)(*a*) of Act is not to assess the substantive reasonableness of an employer's initial justification or explanation for its decision as if the Board were sitting in a judicial review capacity. The Board's mandate under this provision, rather, is to determine whether the employer breached the collective agreement based on a *de novo* assessment of the relevant facts, law and argument.

[22] This principle is well established in the Board's jurisprudence. In *Scanlon and Christianson v. Canada Revenue Agency*, 2009 PSLRB 42, 97 C.L.A.S. 297 [*Scanlon*], the

Board held that it would not consider whether an employer had sufficiently justified its decision to the affected employees (*Scanlon* at para. 49):

> Ultimately, as a legal matter, an employer is required to prove the reasonableness of its decision to an adjudicator and not the employees at the worksite. An explanation to employees about the reasons for a change may be important for the morale of a workplace, but it is not something that involves the Board.

[23] Accordingly, the Board misunderstood its role on adjudication as one that required it to consider the legitimacy of the employer's justification for refusing to add the respondent to the Port Warden Standby List.

[24] Although the Board's focus was misplaced, "[i]t would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep" (*Vavilov* at para. 100). As previously noted, any flaws or shortcomings capable of rendering the decision unreasonable must be sufficiently central to the merits of the decision (*Vavilov* at para. 100). Here, the Board's reliance on the employer's email does not strike at the core of the outcome, and does not, on its own, warrant setting aside the decision.

[25] We turn to the second shortcoming in the Board's reasons. It is far more significant and strikes at the core of the outcome.

[26] This grievance was referred to adjudication under paragraph 209(1)(*a*) of the Act for the interpretation or application of a provision of the collective agreement. The Board's role in this case was therefore limited to considering the terms of the collective agreement and their application. Specifically, the Board was required to determine whether the employer's refusal to

add the respondent to the Port Warden Standby List constituted a violation of the collective agreement.

[27] The Board misconstrued the collective agreement by failing to consider, interpret and apply the whole of clause 30.02, which applies to employees designated “by letter or by list” for standby duty. The Board improperly based its reasoning on the last sentence in the clause, which states that when designating employees for standby, the employer must endeavour to provide for an equitable distribution of standby duties.

[28] In so doing, the Board omitted the first step of the legal analysis, which required it to determine whether the respondent had been designated “by letter or by list” for the Port Warden Standby List. The Board’s failure to examine the first part of the clause led to an unreasonable interpretation of the latter portion of the clause. Again, it is uncontested that the respondent could not have been placed on the Port Warden Standby List at the time of his request.

[29] During the period of time for which the respondent sought retroactive pay due to his allegedly wrongful exclusion from the Port Warden Standby List, the respondent was not qualified for port warden standby periods. As a result, the employer cannot have been required to equitably distribute standby duties to him pursuant to clause 30.02. Under the Board’s interpretation of the clause, management’s discretion to designate employees by letter or by list becomes redundant, because the employer would have no choice but to “endeavour” to distribute standby duties equitably to all employees, qualified or not.

[30] Consequently, the Board rendered a decision that effectively amended the collective agreement. The Board imposed an obligation on the employer to provide training to qualify the respondent for duties that he was not otherwise required to perform in his position.

[31] We reiterate that paragraph 209(1)(*a*) of the Act limits the Board's jurisdiction to the interpretation or application of a provision of the collective agreement. The Act does not authorize the Board to create new terms and obligations when interpreting or applying a collective agreement. Here, nothing in the collective agreement can be read as imposing an obligation on the employer to train employees to qualify them for duties that they are not required to perform in the position they hold. The Board nevertheless introduced such an obligation into the agreement.

[32] The Board reached this conclusion having considered its earlier decision in *Scanlon*, in which an adjudicator interpreted a provision identical to clause 30.02. In that case, the adjudicator held that the employer was required to make considerable effort to achieve the objective of the equitable distribution of standby duties (Reasons at paras. 163-164, citing *Scanlon* at para. 32). The Board concluded that, according to the adjudicator's conclusion in *Scanlon*, Transport Canada must also have had a positive obligation to provide for an equitable distribution of standby duties under clause 30.02 by ensuring the respondent's inclusion on the Port Warden Standby List.

[33] This was the extent of the Board's interpretation of clause 30.02. The Board did not consider whether any positive obligation under the clause applied to unqualified employees, and

instead simply assumed that the employer's obligation extended to the respondent (Reasons at paras. 119-125). This assumption is not one that can be made without explanation, as it is unsupported by either the text of the collective agreement or the decision in *Scanlon*.

[34] The question that had been before the Board in *Scanlon* asked whether removing senior employees from a standby list, while leaving junior employees who were paid at lower rates on the list, violated the applicable collective agreement. There was no doubt in *Scanlon* that the provision applied to the grievors involved in the matter. The same cannot be said here. By relying almost exclusively on the adjudicator's interpretation of clause 30.02 in that case, the Board failed to consider whether the clause applied to an employee who was not qualified to be on a standby list at the time in issue.

[35] The Board's unquestioning reliance on *Scanlon*, combined with its failure to consider whether clause 30.02 applied to both qualified and unqualified employees, renders the decision unreasonable. The Board failed to respond to the employer's central argument that the clause could not apply to employees who were not qualified to be placed on the Port Warden Standby List. This omission constitutes a gap in a determinative point of the analysis. Responsive reasons, free of such gaps, are necessary to show that the decision maker actually listened to the parties and took into account the key issues or central arguments. Although decision makers are not expected to respond to every possible argument, the failure to consider key issues or central arguments raised by the parties may call into question whether the decision maker was alert to the matter before it (*Vavilov* at paras. 127-128).

[36] A principled approach to reasonableness review puts reasons first (*Vavilov* at para. 84). Although administrative decisions need not be faultless in order to be upheld on judicial review, they must nevertheless be justified, intelligible and transparent (*Vavilov* at para. 95). In this case, it is impossible to discern a chain of analysis supporting the conclusion that clause 30.02 required the employer to assign standby duties to the respondent while he was not qualified to perform those duties. This amounts to a fatal flaw in the Board's logic on a critical point of its analysis, rendering its decision unreasonable.

[37] This application for judicial review will be allowed. The decision of the Board will be set aside. The matter will be remitted to the Board for redetermination.

"David Stratas"
J.A.

"Donald J. Rennie"
J.A.

"Anne L. Mactavish"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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