Federal Court of Appeal | Cour d'appel fédérale

**Date: 20150504**

**Docket: A-508-14**

**Citation: 2015 FCA 117**

**CORAM:** **STRATAS J.A.**
**SCOTT J.A.**
**BOIVIN J.A.**

**BETWEEN:**

**STEPHANIE DELIOS**

**Appellant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on April 29, 2015.

Judgment delivered at Ottawa, Ontario, on May 4, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: SCOTT J.A.
BOIVIN J.A.

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## REASONS FOR JUDGMENT

**STRATAS J.A.**

[1] Ms. Delios appeals from the judgment dated November 5, 2014 of the Federal Court (*per* Justice Brown): 2014 FC 1042. The Federal Court ruled that a labour adjudicator's order was unreasonable and quashed it.

[2] The adjudicator (David P. Olsen) upheld Ms. Delios' grievance, accepting her interpretation of a provision in a collective agreement, and awarded her one day's pay: 2013 PSLRB 133. The Attorney General applied for judicial review to quash the adjudicator's order.

[3] In allowing the Attorney General's application, the Federal Court disagreed with the adjudicator's interpretation of the collective agreement. Ms. Delios now appeals to this Court.

[4] In my view, in assessing the reasonableness of the adjudicator's order, the Federal Court was insufficiently deferential. The Federal Court should not have set it aside. The arbitrator's order was reasonable. Therefore, I would allow Ms. Delios' appeal and restore the adjudicator's order, with costs.

## A. The basic facts

[5] At all material times, Ms Delios worked at the Canada Revenue Agency. Many who work there are unionized. Roughly 28,000 belong to a bargaining unit represented by the Public Service Alliance of Canada and are covered by a collective agreement. Roughly 12,000 belong to a bargaining unit represented by the Professional Institute of the Public Service of Canada and are covered by another collective agreement.

[6] Both collective agreements allow for employees to take 7.5 hours of personal leave, which amounts to one working day, every fiscal year.

[7] The facts giving rise to this appeal arose at the start of 2008. At that time, Ms. Delios worked in a position covered by the PSAC collective agreement. In January 2008, she took a day of personal leave, exhausting her entitlement under the PSAC collective agreement to one day of personal leave.

[8] At the end of January, she took a new position within the Agency. That position was covered by the PIPSC collective agreement, not the PSAC collective agreement. A couple of months later, still within the same fiscal year, she asked for a day of personal leave under the PIPSC collective agreement. Her manager refused. She grieved the refusal.

[9] In Ms. Delios' view, after she changed positions she was governed by the personal leave provision in the PIPSC collective agreement. She had not taken any leave under that provision during the fiscal year. Thus, her request for personal leave under the PIPSC collective agreement should have been granted.

[10] In the Agency's view, having taken her personal leave for the fiscal year under the PSAC collective agreement, Ms. Delios could not take personal leave under the PIPSC collective agreement.

[11] The personal leave provision in the PIPSC collective agreement does not explicitly address the situation of employees in Ms. Delios' situation, *i.e.*, those who transfer from the bargaining unit governed by the PSAC collective agreement – or for that matter a bargaining unit governed by a collective agreement elsewhere in the public service – into the bargaining unit

covered by the PIPSC collective agreement. The personal leave provision in the PIPSC collective agreement reads as follows:

> 17.21 Personal Leave
>
> (a) Subject to operational requirements as determined by the Employer, and with an advance notice of at least five (5) working days, the employee shall be granted in each fiscal year, up to seven decimal five (7.5) hours of leave with pay for reasons of a personal nature.
>
> (b) The leave will be scheduled at times convenient to both the employee and the Employer. Nevertheless the Employer shall make every reasonable effort to grant the leaves at such times as the employee may request.

[12] Following denials of Ms. Delios' grievance at various levels within the Agency, her grievance was referred to adjudication under the *Public Service Labour Relations Act*, S.C. 2003, c. 22.

[13] The adjudicator upheld Ms. Delios' grievance. He interpreted article 17.21 of the PIPSC collective agreement and found that it supported Ms. Delios' view of the matter. He ordered that the Agency pay Ms. Delios one day of salary at the rate existing at the time of her grievance. Below, I shall examine the adjudicator's reasoning in much more detail.

[14] The Attorney General applied to the Federal Court for judicial review of the adjudicator's order. The Federal Court purported to apply the reasonableness standard of review to the order and found it unreasonable for two reasons. First, the Federal Court disagreed with the adjudicator's interpretation of the collective agreement. Second, it admitted a new affidavit tendered by the Agency and then relied on part of it to find that the adjudicator's interpretation of the collective agreement would result in significant additional cost and so it was unreasonable.

As a result, the Federal Court set aside the adjudicator's order and remitted the matter to a different adjudicator for re-determination. Below, I shall examine the Federal Court's reasoning in much more detail.

[15] Ms. Delios appeals to this Court, seeking reinstatement of the adjudicator's order.

**B. Analysis**

[16] Our task on appeal from an application for judicial review is to assess whether the Federal Court correctly selected the standard of review and then to determine whether it properly applied that standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47.

[17] The parties agree that the Federal Court correctly selected the standard of review of reasonableness. However, the agreement of the parties on the standard of review does not bind us: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 at paragraph 6. We must assess the matter for ourselves.

[18] Here, I agree with the parties. In determining the standard of review, the first step is to assess what is really in issue in the judicial review. In this case, we are concerned with the adjudicator's interpretation of article 17.21 of the PIPSC collective agreement.

[19] For decades now, the standard of review of adjudicators' interpretations of collective agreement provisions has been the deferential standard of reasonableness or, under earlier law, the deferential standard of patent unreasonableness: *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, 102 D.L.R. (4th) 402; *British Columbia Teachers' Federation v. BC Public School Employees' Association*, 2014 SCC 70, [2014] 3 S.C.R. 492; *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45, [2014] 2 S.C.R. 323; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; and many, many others. Even before we had patent unreasonableness as a standard, reviewing courts were urged to defer to adjudicators' interpretations of collective agreement provisions: see, *e.g.*, *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245 at page 275, 99 D.L.R. (3d) 385.

[20] This makes sense. For one thing, labour adjudicators' decisions are often protected by privative clauses. Here, we have one: the *Public Service Labour Relations Act*, above, section 233, adopting subsections 34(1) and (3) of the *Public Service Labour Relations and Employment Board Act*, S.C. 2013, c. 40. And interpretations of collective agreement provisions involve elements of factual appreciation, specialization and expertise concerning collective agreements, the disputes that arise under them, the negotiations that lead up to them and, more broadly, how the management-labour dynamic swirling around them plays out in various circumstances. These elements all point to the standard of reasonableness, not correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 52-55.

[21] These elements of factual appreciation, specialization and expertise also affect the manner in which reviewing courts should conduct reasonableness review of a labour adjudicator's decision. When conducting reasonableness review, reviewing courts assess whether the adjudicator's interpretation of the collective agreement falls within a range of acceptability or defensibility or, put another way, whether a decision is within the decision-maker's margin of appreciation: *Dunsmuir*, above at paragraph 47. But that range or margin can be narrow or wide depending on the nature of the question and the circumstances: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paragraphs 37-41. In a case like this, the elements that go into interpreting collective agreement provisions – matters of factual appreciation and specialized expertise outside of the ken of the courts – entitle labour adjudicators to a wide margin of appreciation: *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, 455 N.R. 157 at paragraphs 90-99.

[22] Ms. Delios submits that although the Federal Court said it was conducting reasonableness review, it did not. In her view, the Federal Court substituted its own interpretation of article 17.21 of the PIPSC collective agreement for that of the adjudicator.

[23] Ms. Delios points to various things the Federal Court did, including enunciating and imposing a "correct" interpretive test (at paragraphs 48 and 52), deploying its own interpretation of the collective agreement provisions (at paragraphs 49, 53 and 70), reproaching the adjudicator

for reading words out of the collective agreement or rewriting it when he did no such thing (at paragraphs 51 and 54-55), referring to the intentions of the parties outside of the words they used in the collective agreement (at paragraphs 54 and 62), using words of correctness review (*e.g.*, heading B, the "true construction of the terms of the collective agreement" [my emphasis]), making its own assessment whether a labour relations result was "absurd" (at paragraph 62), admitting new evidence to show why its own interpretation of the collective agreement was superior to that of the adjudicator (at paragraphs 63-66), finding that the language of article 17.21 was plain and clear when even the Agency suggested it was not (at paragraphs 47 and 50), finding that another adjudicator's decision was perfectly clear and completely on point when even the Agency suggested it was only similar (at paragraph 69), and using that decision (that was not binding on the adjudicator) to conclude that the adjudicator was wrong (at paragraph 69).

[24] The Attorney General supports the Federal Court's decision. He asserts many of the same points set out in the preceding paragraph.

[25] I agree with Ms. Delios' submissions. Although the Federal Court correctly identified reasonableness as the standard of review, it actually performed correctness review.

[26] The Supreme Court has told us that reasonableness review involves, among other things, a respectful attention to the decision and reasons of the administrative decision-maker: *Dunsmuir*, above at paragraphs 48 and 56. This means that we begin by identifying the precise issue that was before the administrative decision-maker, noting any legislative methodologies or

authorizing provisions that must be followed. To the extent the administrator interpreted those methodologies or authorizing provisions, the reasonableness of those interpretations also falls to be considered. Then we proceed to the core of reasonableness review. Bearing in mind the margin of appreciation that the administrator should be given – a margin that can be narrow, moderate or wide according to the circumstances – we examine the administrator's decision in light of the evidentiary record and the law, to examine whether the decision is acceptable and defensible on the facts and the law.

[27] The evidentiary record, legislation and case law bearing on the problem, judicial understandings of the rule of law and constitutional standards help to inform acceptability and defensibility. Here, certain indicators, sometimes called "badges of unreasonableness," may assist: *Farwaha*, above at paragraph 100. For example, a decision whose effects appear to conflict with the purpose of the provision under which the administrator is operating may well raise an apprehension of unreasonableness: *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at paragraphs 42 and 47. In that sort of case, the quality of the explanations given by the administrator in its reasons on that point may matter a great deal. Another badge of unreasonableness is the making of key factual findings with no rational basis or entirely at odds with the evidence. But care must be taken not to allow acceptability and defensibility in the administrative law sense to reduce itself to the application of rules founded upon badges. Acceptability and defensibility is a nuanced concept informed by the real-life problems and solutions recounted in the administrative law cases, not a jumble of rough-and-ready, hard-and-fast rules.

[28] Under the reasonableness standard, we do not develop our own view of the matter and then apply it to the administrator's decision, finding any inconsistency to be unreasonable. In other words, as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did, finding any inconsistency to be unreasonable. That is nothing more than the court developing, asserting and enforcing its own view of the matter – correctness review.

[29] Here, applying the proper approach to reasonableness, the adjudicator's decision must be held to be reasonable.

[30] First, the adjudicator identified the precise issue before him: whether article 17.21 of the PIPSC collective agreement addressed the situation of employees in Ms. Delios' situation. The adjudicator asked whether the provision imports "a notion of 'public-service-wide' application as the [Agency] contends that they do" (at paragraph 16).

[31] Next, the adjudicator found that Ms. Delios' entitlement to the personal leave benefit stemmed from Article 17.21 of the PIPSC collective agreement and not elsewhere (at paragraph 18). So the task was to interpret the article (at paragraphs 16 and 18). And the words "in each fiscal year" did not themselves resolve the task (at paragraph 18).

[32] Next, the adjudicator looked to other provisions of the collective agreement to assist in the interpretation of article 17.21. This is the sort of thing that adjudicators experienced in the interpretation of collective agreements do: D.J.M. Brown & D.M. Beatty, *Canadian Labour*

*Arbitration*, 4th ed., looseleaf (Toronto: Carswell, 2006) at chapter 4. The adjudicator noted that where restrictions on leaves were present, the collective agreement provided for them in other provisions (at paragraphs 19-21). He concluded from the existence of these other provisions that "where the parties…have agreed to place a temporal or other limitation on a leave entitlement arising under the collective agreement, they have done so explicitly" (at paragraph 22).

[33] In its submissions to the adjudicator, the Agency urged the adjudicator to follow another adjudicator's decision. The adjudicator considered the decision and concluded that "the outcome of that case rested on factors considered by the adjudicator that are not present in the instant case" (at paragraph 23). In addition to distinguishing the decision, the adjudicator could have added that it was not binding on him, but he did not.

[34] The adjudicator, obeying the prohibition set out in section 229 of the *Public Service Labour Relations Act*, declined to modify the text of article 17.21.

[35] Lastly, the adjudicator dealt with a particular controversy placed before him. In her submissions to the adjudicator, Ms. Delios suggested that her interpretation of article 17.21 would not result in any hardship because relatively few people transfer between bargaining units. The Agency responded that in fact the cost would be "quite serious" and "costly." The Agency did not provide any facts or figures to support this. On this state of this evidence, the adjudicator declined to make any factual finding on this. Instead, he concluded that "[a]ny perceived unfairness or inequity resulting from the application of the collective agreement [as he interpreted it] should be resolved at the bargaining table" (at paragraph 24).

[36] Behind this finding is the adjudicator's specialized and expert appreciation that in any collective agreement – often a document of considerable length and complexity – there will be issues left on the table, unresolved. Collective bargaining can be tough, each side must make difficult compromises, and so there are any number of things in the final deal that can seem unfair or inequitable to the parties. As the adjudicator noted, it is not for him to modify the text of the agreement to address those issues. Rather, as the adjudicator held, it is for the next round of bargaining.

[37] Overall, all of the above observations and findings of the adjudicator are rooted within his factual appreciation and labour relations specialization and expertise. To use the language of reasonableness review, they are within his margin of appreciation. To the extent there is any unfairness, inequity or additional cost resulting from his interpretation of the collective agreement, it is an artifact of the collective bargaining process. The overall result reached by the adjudicator is acceptable and defensible on the facts and the law and, thus, reasonable.

[38] One last issue remains. In support of its application for judicial review in the Federal Court, the Attorney General filed an affidavit containing evidence of the cost associated with the adjudicator's interpretation. The Federal Court relied upon paragraphs 20-21 of this affidavit to find that the adjudicator's interpretation of article 17.21 of the PIPSC collective agreement would cost the Agency roughly an extra one million dollars a year. The Federal Court considered that result to be "absurd" in a freestanding policy sense and used it to find that the adjudicator's interpretation was unreasonable.

[39] As explained above, this was an instance of correctness review, not reasonableness review. And, as a matter of law, in conducting reasonableness review and assessing whether an administrative decision is outside the margin of appreciation we give to the administrator, we consider the evidentiary record, the legislation and case law bearing on the problem, judicial understandings of the rule of law and constitutional standards – not freestanding policy divorced from those considerations. We all have freestanding policy views. But judicial review is about applying legal standards, not our views.

[40] Further, the Federal Court should have disregarded paragraphs 20-21 of the affidavit filed before it. They were inadmissible.

[41] In administrative regimes such as this, Parliament has given the administrative decision-maker, not the reviewing court, the job of finding the facts. Because of this demarcation of roles, the reviewing court cannot allow itself to become a forum for fact-finding on the merits of the matter. See generally *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paragraph 17.

[42] Accordingly, as a general rule, the evidentiary record before the Federal Court on judicial review is restricted to the evidentiary record that was before the administrative decision-maker. In other words, as a general rule, evidence that was not before the administrative decision-maker and that goes to the merits of the matter before the Board is not admissible on judicial review. As a result, most affidavits filed on judicial review only attach the record that was before the administrative decision-maker, without commentary. This is proper. See generally *Connolly v.*

*Canada (Attorney General)*, 2014 FCA 294, 466 N.R. 44 at paragraph 7, citing *Access Copyright*, above at paragraphs 19-20.

[43] There are narrow, principled exceptions to the general rule against filing evidence on judicial review that was not before the administrative decision-maker: *Access Copyright*, above at paragraph 20. In the case before us, the Federal Court invoked one of the exceptions, the "general background" exception. The discussion that follows is limited to this exception.

[44] Under this exception, a party can file an affidavit providing "general background in circumstances where that information might assist [the review court to understand] the issues relevant to the judicial review": *Access Copyright*, above at paragraph 20(a).

[45] The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy – that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule.

[46] But "[c]are must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20(a).

[47] In this case, the first 18 paragraphs of the Agency's affidavit filed before the Federal Court are helpful and orienting. In the relatively simple record we have here, it was not necessary for the affidavit to do that, but no objection can be taken to it. Those paragraphs are permissible under the general background exception.

[48] But paragraphs 19-21 of the affidavit cross the line. Paragraph 19 is argumentative, much like a paragraph in a memorandum of fact and law, urging a particular result upon the reviewing court. And paragraphs 20 and 21 speak further on the factual merits of the matter, something that was for the adjudicator, not the Federal Court.

[49] The Federal Court should not have relied upon the facts and figures contained in paragraphs 20-21 of the affidavit to make a finding of fact about the financial hardship that would be visited upon the Agency as a result of the adjudicator's interpretation of article 17.21 of the PIPSC collective agreement. The adjudicator, as the fact-finder on the merits, declined to make such a factual finding. It was not for the Federal Court, restricted to its role as a reviewing court, to make it.

[50] Even if the adjudicator had made a factual finding on that point, in the absence of another recognized exception to the general rule of inadmissibility applying, the Federal Court could not entertain evidence varying or supplementing it.

[51] The Federal Court considered the evidence in paragraphs 20-21 of the affidavit to be familiar to the parties, accurate, disclosed in a timely way, and not prejudicial (at paragraph 41). All that may be so, but that does not make the evidence admissible. To the extent that *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 (T.D.), relied upon by the Federal Court, says otherwise, it should not be followed.

[52] The test set out at paragraphs 44-46, above, was not met here. Paragraphs 20-21 of the affidavit do not supply general background information designed to assist the reviewing court in understanding the issues. Rather, they offer additional evidence on the factual merits designed to encourage the reviewing court to form its own views on the factual merits contrary to the demarcation of roles between it and the adjudicator. That evidence should have been placed before the adjudicator for his assessment as the fact-finder, not before the Federal Court on review.

[53] Even though no formal motion was brought against paragraphs 20-21 of the affidavit, Ms. Delios did not accept they could be used in the way the Federal Court used them. In those circumstances, the Federal Court should have regarded them as improper and should not have considered them.

[54] Overall, I conclude that the adjudicator's decision passes muster under reasonableness review.

## C. Proposed disposition

[55] I would allow the appeal, set aside the judgment of the Federal Court dated November 5, 2014 in file T-1957-13, dismiss the application for judicial review and restore the order dated November 1, 2013 of the adjudicator in file 566-34-3487.

[56] In the event of this disposition, counsel helpfully agreed on the issue of costs. In accordance with their agreement, I would award Ms. Delios her costs of this appeal and the application in the Federal Court in the total amount of $5,000, all inclusive.

"David Stratas"
J.A.

"I agree
A.F. Scott J.A."

"I agree
Richard Boivin J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-508-14 |
| **APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BROWN DATED NOVEMBER 5, 2014, NO. T-1957-13** | |
| **STYLE OF CAUSE:** | STEPHANIE DELIOS v. THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | APRIL 29, 2015 |
| **REASONS FOR JUDGMENT BY:** | STRATAS J.A. |
| **CONCURRED IN BY:** | SCOTT J.A.<br>BOIVIN J.A. |
| **DATED:** | MAY 4, 2015 |

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