Federal Court Cour fédérale

Date: 20100527

Docket: T-1191-09

Citation: 2010 FC 578

Ottawa, Ontario, May 27, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

ATTORNEY-GENERAL OF CANADA

Applicant

and

THE PROFESSIONAL INSTITUTE
OF THE PUBLIC SERVICE OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by the Attorney General of Canada on behalf of the Treasury Board pursuant to Section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and Rule 300(a) of the *Federal Courts Rules*, SOR/98-106, for judicial review of a decision by an arbitration board (the "Arbitrator") established pursuant to the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the "*PSLRA*"). The application is aimed specifically at a portion of the Arbitrator's award, which the Applicant considers

not to be in compliance with the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 (the "*ERA*").

BACKGROUND FACTS

[2] The Respondent is the certified bargaining agent representing employees of the Canadian Nuclear Safety Commission ("CNSC") belonging to the NUREG Group. After a collective agreement between the CNSC and the Respondent expired on March 31, 2008, they engaged in collective bargaining to renew it. On November 26, 2008, they reached a tentative agreement.

[3] Nonetheless, the Respondent requested that a collective agreement be imposed by arbitration. The CNSC and the Respondent accordingly made submissions as to the contents of the new collective agreement. Though separate, these submissions were in fact identical to each other and to the tentative agreement reached on November 26, 2008. The Chairperson of the Public Service Labour Relations Board (the "Chairperson") annexed these submissions to the terms of reference pursuant to which the Arbitrator was to render an award.

[4] An oral hearing took place, lasting less than an hour. At that hearing, the CNSC's lawyer advised the Arbitrator that the Treasury Board Secretariat objected to article XX.02 of the proposed collective agreement (the "Registration Fees Article"), which stipulated that:

[w]here the reimbursement of professional fees is not a requirement for the

[l]orsque le remboursement de la cotisation professionnelle n'est pas indispensable à

continuation of the performance of the duties of his/her position the employer may reimburse an employee for his/her membership fee paid to an association relevant to the employee's profession or the profession's governing regulatory body to a maximum of $300.

l'exercice continu des fonctions de l'employé, l'employeur peut rembourser à l'employé les frais d'adhésion à une association pertinente à la profession de l'employé ou à l'organisme de réglementation régissant la profession, jusqu'à un maximum de 300$.

The Treasury Board Secretariat had earlier advised the CNSC that it objected to this clause because, in its opinion, it contravened the *ERA*. Before the Arbitrator, both the CNSC and the Respondent took the position that the *ERA* did not prohibit the Registration Fees Article. Nevertheless, the CNSC asked that the award address this issue.

[5] The Arbitrator, however, refused to do so, being of the view that his mandate was limited by the terms of reference, which said nothing of the issue whether the *ERA* applied. On June 30, 2009, the Arbitrator rendered his award, replicating the tentative agreement of November 26, 2008, including the Registration Fees Article. The award did not address the applicability of the *ERA*.

[6] The applicant now seeks judicial review of the award insofar as it incorporates the Registration Fees Article in the collective agreement between the CNSC and the Respondent. He argues that the Arbitrator had a duty to consider the applicability of the *ERA*, and that the Registration Fees Article is prohibited by section 27 of that enactment. According to that provision,

[n]o collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force

[a]ucune convention collective conclue — ou décision arbitrale rendue — après la date d'entrée en vigueur de la présente loi

may provide, for any period that begins during the restraint period, for any additional remuneration that is new in relation to the additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the collective agreement or the arbitral award, as the case may be, becomes effective.

ne peut, à l'égard de toute période commençant au cours de la période de contrôle, prévoir de rémunération additionnelle qui est nouvelle par rapport à celle applicable, avant la prise d'effet de la convention ou de la décision, aux employés régis par celle-ci.

The applicant contends that that portion of the Arbitrator's award must be quashed.

STANDARD OF REVIEW

[7] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at par. 62, the Supreme Court concluded that in determining the applicable standard of review, the reviewing court must engage in a two-step analysis:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[8] The jurisprudence has indeed determined that pure questions of law relating to PSLRA tribunals' jurisdiction attract review on the standard of correctness (see *Shneidman v. Canada (Attorney General)*, 2007 FCA 192, 58 C.C.E.L. (3d) 186; *Canada (Attorney General) v. Amos*, 2009 FC 1181).

[9] The question in the present case is whether the Board could, as it did, refuse to consider the applicability of the *ERA* to the award it was going to render. This is a true

question of jurisdiction “in the narrow sense of whether or not the tribunal had the authority to make the inquiry.” (*Dunsmuir*, above, at par. 59.) As the Supreme Court explains, *ibid*., “true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.”

[10] At the hearing, counsel for the Respondent argued that the Arbitrator was correct not to consider the impact of the *ERA* on its award. He submitted that the Arbitrator cannot consider jurisdictional issues, because that power is reserved to the Chairperson. Indeed, the terms of reference which the Chairperson provided to the Arbitrator state that, pursuant to subsection 144(1) of the *PSLRA*, “[s]hould any jurisdictional question arise during the course of the hearing *as to the inclusion of a matter in the terms of reference*, that question must be submitted without delay to the Chairperson” (my emphasis).

[11] However, the jurisdictional question in this application is not about “the inclusion of a matter in the terms of reference.” The Registration Fees Article was included in the parties’ submissions annexed to the terms of reference. The Arbitrator was therefore asked to rule on whether it would form part of his award. To make that determination, he had of course to consider the parties’ positions on this issue, but also any peremptory legislative provisions which the parties cannot contract out of, even by consent.

[12] Section 27 of the *ERA* is such a provision, and by refusing to consider its applicability, the Arbitrator wrongfully declined to exercise his jurisdiction. It was not open to him simply to decide not to apply mandatory legislative provisions. Neither subsection 144(1) of the *PSLRA*, which simply provides that the Chairperson refers matters in dispute to an arbitrator (and is the decision-maker responsible for establishing the terms of reference), nor any other provision, prevented the Arbitrator from ensuring that his award would comply with an Act of Parliament which applies to it.

[13] Section 27 of the *ERA*, cited above, clearly provides that "[n]o … arbitral award that is made, after the day on which this Act comes into force may provide" for certain types of remuneration. By failing to consider whether the award he was about to make provided for such types of remuneration, the Arbitrator blinded himself to the possibility that his award would be inconsistent with an Act of Parliament and therefore "of no effect" pursuant to section 56 of the *ERA* as well as *ultra vires* at common law.

[14] Finally, as counsel for the Applicant pointed out at the hearing, other arbitrators exercising jurisdiction under the *PSLRA* or similar legislation have considered the impact of the *ERA* on their awards (see *Public Service Alliance of Canada v. House of Commons*, 2010 PSLRB 14 at par. 8 and *Association of Justice Counsel v. Treasury Board*, 2009 CanLII 58615 (P.S.S.R.B.) at par. 5). The arbitrator in *Association of Justice Counsel* explained, correctly in my view, the impact of the *ERA* on his jurisdiction:

> The *ERA* … does not limit this board's power to rule on matters other than salary increases and performance pay plans, *although it does prohibit the board from introducing new forms of 'additional remuneration'* and from

> compensating employees for amounts they did not receive as a result of the restraint measures.
> (Emphasis mine)

[15] Having concluded that the Arbitrator erred in failing to consider the impact of the *ERA*, I turn now to the question whether the proper recourse is to remit the matter back to him so that he exercise his jurisdiction or for this Court to reach its own decision. Counsel for the Respondent argued in favour of the latter course of action on the basis that the Arbitrator's expertise in labour relations means that he would be in a better position than this Court to interpret the relevant provisions of the *ERA*. I disagree.

[16] The *ERA* is not the Arbitrator's "home statute," and the rule that a labour arbitrator's interpretation of outside legislation will warrant deference "where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result" (*Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487) does not apply here. The definition of "additional remuneration" is not a matter "intimately connected" with the arbitrator's mandate, because – as both written and oral argument in this case demonstrated – it depends more on dictionary definitions than on any specialised knowledge of labour relations. Accordingly, I am of the view that the Arbitrator has no expertise superior to that of this Court with respect to this question.

[17] The Court is in as good a position as the Arbitrator to determine the issue at bar. As I had the benefit of a full argument on the issue, it would serve no useful purpose and

merely waste the parties’ resources to order a new hearing on this matter, so as to allow the exact same arguments to be made.

ANALYSIS

Is the Registration Fees Article Prohibited by the ERA*?*

[18] As mentioned above, section 27 of the *ERA* prohibits any new “additional remuneration” in arbitral awards or collective agreements made after its entry into force. There is no dispute that the Registration Fees Article is “new” within the meaning of that provision; that is, it did not apply in the predecessor collective agreement. The dispute between the parties is as to whether the payments stipulated under the Registration Fees Article constitute “additional remuneration” within the meaning of section 2 of the ERA:

“additional remuneration” means any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments.	« rémunération additionnelle » Allocation, boni, prime ou autre paiement semblable à l’un ou l’autre de ceux-ci versés aux employés.

[19] On the one hand, the Applicant submits that the reimbursement of professional registration fees is “a ‘bonus’ or a payment ‘similar to a bonus’, as it represents a payment made in addition to the employee’s salary or wages.” He notes that the Registration Fees Article applies to those employees for whom the payment of professional registration fees is not a requirement of employment, and thus “confer[s] a benefit or advantage to the employee.” Thus considering a reimbursement of such a

payment as "additional remuneration" is consistent with the intent of Parliament and the legislative scheme of the *ERA*.

[20] On the other hand, the Respondent argues that the reimbursement at issue is not similar to an "allowance, bonus, differential or premium" because, unlike such payments, it is not "a form of gratuitous addition to one's basic pay." Furthermore, "[t]he fact that the reimbursement at issue … applies to membership fees where such membership is not a condition of employment is irrelevant. This type of provision does not necessarily evidence a benefit to the employee." Indeed, the Treasury Board recognized in the past that it benefits the employer. Finally, insofar as the statutory language is ambiguous, it should be interpreted in favour of the employees.

[21] I agree with the Respondent that the Registration Fees Clause provides employees with a reimbursement rather than a bonus or a similar payment. In my view, it is not prohibited by the *ERA* for the following reasons.

[22] The definition of "additional remuneration" in that statute is not closed and extends not only to specific categories of payments but also to payments "*similar to*" (my emphasis) these categories. Both the word "similar" and the *ejusdem generis* maxim of interpretation suggest that to constitute "additional remuneration" within the meaning of section 2 of the *ERA*, a payment "must be of the same <u>general</u> nature or character as" those enumerated in that provision (*Gurniak v. Nordquist*, 2003 SCC 59, [2003] 2 S.C.R. 652 at par. 31 (emphasis in the original); Ruth Sullivan, *Sullivan on the construction of*

Statutes, 5th ed. (Markham, Ont.: LexisNexis, 2008) at 231). In my opinion, the payment stipulated by the Registration Fees Article is not of the same general nature or character as an allowance, bonus, differential or premium.

[23] It is not similar to an "allowance." The Canadian Oxford Dictionary defines this term broadly, as "an amount or sum given to a person, esp[ecially] for a stated purpose." However, its well known legal meaning is somewhat narrower; an allowance is a payment the amount of which is arbitrarily predetermined and for the use of which the recipient need not account (*Canada (Attorney General) v. MacDonald* (1994), 94 D.T.C. 6262 (F.C.A.)). To receive a payment under the Registration Fees Article, an employee does in fact need to account for the registration fees paid, and cannot receive more than what he or she has paid out.

[24] The payment pursuant to the Registration Fees Article is also not similar to a "bonus," which, according to the *Canadian Oxford Dictionary*, is either "an unsought or unexpected extra benefit," or "an amount of money given in addition to normal pay, in recognition of exceptional performance or as a supplement at Christmas etc." The first definition is not relevant in the context of this case: a benefit stipulated in a collective agreement is obviously not "unsought or unexpected." The second definition is also inapplicable here. The payment by the employer of an employee's professional membership fees has nothing to do with the employee's performance (all the more so when the professional membership is not seen as necessary to the employer), and yet is not a mere gift such as a "Christmas bonus."

[25] Further, the payment pursuant to the Registration Fees Article is in no way similar to a differential, which the *Canadian Oxford Dictionary* defines as “a difference in wage or salary between industries or categories of employees in the same industry.”

[26] Nor is it, finally, similar to a premium, which is, according to the same source, “a sum added to … wages, … a bonus” or “a reward or prize.” As explained above, the Registration Fees Article does not create a bonus; nor does constitute a reward for anything.

[27] The payment pursuant to the Registration Fees Article is, rather, a reimbursement. A reimbursement is different from the classes of payment discussed above, which all represent additions to an employee’s basic pay. It is, according to the *Canadian Oxford Dictionary*, a “repay[ment]” of expenses incurred by a person. The fact that the Registration Fees Article uses the terms “reimbursement” and “reimburse,” while not determinative, suggests that an employee will have to demonstrate that he or she has in fact paid professional fees before being compensated for such a payment; and compensation is a repayment of the amount paid out by the employee on account of such fees, albeit it only up to a stipulated maximum. A reimbursement is a well-known and distinct type of payment, and had Parliament intended it to be covered by the Registration Fees Article, it could easily have said so. It did not.

[28] I conclude that the Registration Fees Clause is not prohibited by the *ERA*. For these reasons, the application for judicial review will be dismissed, with costs.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed, with costs.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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