Federal Court		Cour fédérale

Date: 2010100712

Docket: T-1267-09

Citation: 2010 FC 1007

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

GEORGE CHURCHER

Respondent

REASONS FOR JUDGMENT

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of a decision of an adjudicator of the Public Service Labour Relations Board, allowing in part a grievance by George Churcher (the respondent) and ordering the Department of Fisheries and Oceans (DFO) to reimburse him $2,868.93.

[2] The applicant requests that the adjudicator's decision be set aside to the extent that it orders DFO to reimburse the respondent and that the Court confirm that the respondent was overpaid by $11,957.41. In the alternative, the applicant requests that the matter be remitted to the adjudicator

with direction that the amount of overpayment was $11,957.41 and that the respondent must repay it in its entirety. The applicant also requests the costs of the application.

[3] The respondent requests that the application be dismissed with costs. In the alternative, he requests that the matter be remitted to the adjudicator to hear submissions as to the amount of overpayment that DFO is entitled to recover from the respondent.

[4] The question underpinning this case is whether an employee must reimburse a net or a gross amount of overpayment to the employer.

Background

[5] The respondent is an engineer with DFO. Over the course of several years, he had received overpayments of vacation pay for reasons that are not material to this application. It is agreed that the gross total of those overpayments was $11,957.41. It is also not disputed that, after deductions of income tax, employment insurance, and other amounts, the net amount received and cashed by the respondent was $9,088.48.

[6] When DFO discovered the overpayments, it notified the respondent that it would withhold from him $11,957.41. The respondent submitted a grievance. He argued that the collective agreement as well as the doctrine of estoppel prevented DFO from recovering such overpayments

and demanded reimbursement of the amounts recovered. He summarized the remedies he requested as follows:

> (1) That the employer cease and desist with any and all recovery actions; (2) that no further recovery actions be pursued; (3) that any monies collected as a result of these inappropriate recovery actions be restored to me; and (4) that I be made whole in every way.

[7] This grievance, along with another one, was heard by the adjudicator from March 3 to March 6, 2009. The adjudicator found that DFO was entitled to recover its overpayments from the respondent. This finding is not challenged in the present application.

[8] As the adjudicator noted at paragraph 7 of his reasons, the parties had agreed ". . . that the amounts reflected in Exhibit E-22 would be considered factual." Exhibit E-22, reproduced by the adjudicator following paragraph 7 of his reasons, put the "Gross $ value of Overpayment" [*sic*] at $11,957.41. The issue of the amount of overpayment which DFO was entitled to recover was not otherwise raised before the adjudicator. The debate was rather on the question whether DFO could recover at all. Concluding his analysis on this issue, the adjudicator wrote, at paragraph 132 of his reasons:

> I concur with the employer's argument that the $11,957.41 in overpayment is a debt to the Crown and that […] the recovery of this debt is not prohibited [*sic*] clause 14.03 of the collective agreement. I note that the net amount of the cheques cashed by the grievor from 2001 to 2005 was $9088.48 based on Exhibits E-17 to E-20. Therefore, I order the employer to reimburse the grievor $2863.93.

[9] The applicant is now challenging the validity of this order.

Issues

[10] The issues are as follows:

1. What is the standard of review?

2. Did the adjudicator have jurisdiction to determine the amount of overpayment that DFO could recover?

3. Did the adjudicator err in his determination of the amount of overpayment which DFO was entitled to recover, and if so, what is the appropriate remedy?

Applicant's Written Submissions

[11] The applicant submits that the Court owes the adjudicator no deference on issues of fairness and jurisdiction. The issue of the amount of overpayment that may be recovered is one of mixed fact and law and the standard of review is reasonableness.

[12] The applicant submits that the adjudicator has no jurisdiction to rule on issues other than those raised by the grievance as filed or those on which both parties agree. In this case, the grievance raised the issue whether the collective agreement prevented DFO from recovering amounts overpaid to the respondent, but not that of the amount of overpayment that could be recovered. That issue was neither raised at the hearing nor consented to by the parties. Furthermore, the respondent expressly agreed on the amount of the overpayment. Having decided the issue raised

by the grievance in favour of DFO, the adjudicator exhausted his jurisdiction and ought not to have proceeded to consider any further issues.

[13] By failing to conclude his decision at that time, the adjudicator breached the rules of natural justice and procedural fairness because he did not give the parties an opportunity to address the new issue he raised. The Federal Court of Appeal, this Court, as well as other courts, have all found that an adjudicator who raises an issue of his own volition, without giving the parties a chance to make submissions, breaches his duty of fairness and commits a reviewable error. In addition, in this case, the applicant could not know that the amount of overpayment that could properly be recovered would be at issue because the "grievance does not question the amount of the overpayment", the parties agreed on this amount and the adjudicator did not raise the issue.

[14] The adjudicator erred in fact on this issue by ignoring a statement of fact agreed by the parties. The parties agreed that the amount of the overpayment was $11,957.41 and it was unreasonable to find otherwise.

[15] The adjudicator also erred in law because ordering the respondent to pay back anything less than the full amount of the overpayment he received puts him in a better position than that which he would have been in but for the overpayment. The respondent received $11,957.41 despite the fact that part of this amount was deducted to his credit for income tax, employment insurance, etc.

[16] The applicant submits that the adjudicator's order that DFO reimburse the respondent $2,868.93 must be quashed. Furthermore, it is not necessary to remit the matter to the adjudicator. The parties are agreed that the amount of the overpayment was $11,957.41 and the Court should merely ratify this agreement. In the alternative, the matter should be remitted but with direction that the amount of overpayment is $11,957.41 and DFO was entitled to recover it all.

Respondent's Written Submissions

[17] The respondent submits that the real issue in this application is simply whether the remedy chosen by the adjudicator was rationally connected to the entitlements of the parties and that the applicable standard of review is reasonableness.

[18] The issue before the adjudicator was whether DFO could recover $11,957.41 from the respondent. The adjudicator did not fully accept either party's position and held that DFO could recover some of its overpayment, but no more than the respondent actually received. All the relevant evidence was before the adjudicator. The parties were agreed on the gross amount of overpayment to the respondent. There was also no dispute on the amounts actually received by the respondent and DFO submitted cheques evidencing these amounts. However, the parties did not agree on the amount which DFO was entitled to recover.

[19] The parties had an opportunity to be heard; there were four days of hearings. While the parties made no submissions on the amount of overpayment recoverable, they could have done so. It

was their counsels' decision not to and DFO having chosen not to argue the point, the applicant cannot now complain that the adjudicator made a decision on it.

[20] Subsection 228(2) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, (the PSLRA) authorizes an adjudicator to "make the order that he or she considers appropriate in the circumstances." The adjudicator did just that. He was not bound, in crafting a remedy, by the submissions of either party.

[21] The remedy chosen by the adjudicator is reasonable and consistent with labour law practice. The PSLRA grants adjudicators a broad discretion as to the choice of a remedy and this discretion should not be fettered simply because neither party suggested a particular remedy.

[22] The application for judicial review should be dismissed. If it is not, the Court should remit the matter back to the adjudicator to hear submissions on the issue of the amount of overpayment that DFO is entitled to recover. If the problem with the adjudicator's decision is that he failed to give the parties an opportunity to be heard, the logical remedy is to make sure that the parties have such an opportunity.

Analysis and Decision

[23] **Issue 1**

What is the standard of review?

Administrative decisions on true questions of jurisdiction, that is questions of whether or not the tribunal had the authority to make the inquiry, are subject to review on the standard of correctness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 59). In reviewing such decisions, a court will not show deference to the decision maker's reasoning process. It will rather undertake its own analysis of the question. Similarly, on issues of procedural fairness, a reviewing court will not defer to the administrative decision maker, because "[i]t is for the courts … to provide the legal answer to procedural fairness questions" (see *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at paragraph 100).

[24] As for the substantive issue raised by the present application, it is one of mixed fact and law and the applicable standard of review is that of reasonableness (see *Dunsmuir* above, at paragraph 53).

[25] **Issue 2**

Did the adjudicator have jurisdiction to determine the amount of overpayment that DFO could recover?

I cannot agree with the applicant's argument that the issue of the amount of overpayment recoverable was not raised by the grievance and that the adjudicator was acting beyond his

jurisdiction in deciding it. The grievance demanded that the respondent “be made whole.” In order to make the respondent whole, the adjudicator had to determine what injury, if any, he had suffered. The adjudicator was not limited to deciding, as an abstract proposition, whether DFO could recover its overpayment. Such a general ruling would have been of limited use to the parties. The adjudicator was obliged to decide how much DFO could recover from the respondent. It follows that the grievance conferred on him the jurisdiction to answer that question.

[26] Had the parties agreed on the amount of overpayment recoverable, this agreement would have limited the scope of the adjudicator’s jurisdiction. However, I do not see the adjudicator’s reasons as indicating that they so agreed. I agree with the respondent that while the parties agreed on the gross amount of overpayment made by DFO and did not dispute the net amount received by the respondent, they did not agree. Indeed, they appear not to have asked themselves which of these two amounts DFO could recover if it could recover anything.

[27] I am also of the view that the adjudicator did not breach his duty of fairness in answering that question despite not having received submissions from the parties. Having decided that DFO could recover the amount it overpaid to the respondent, the adjudicator inevitably had to determine what that amount was. The parties had to anticipate that this question would arise and since all the necessary evidence was already before the adjudicator, their failure to do so or to present any arguments on the question, did not prevent him from making this determination.

[28] The cases on which the applicant relied do not assist him. I note that none of the cases deals with an adjudicator's power to ascertain the quantum of the remedy the entitlement to which was the principal object of the dispute between the parties. The general proposition they support, that an adjudicator cannot of his own volition raise a new or distinct issue not raised by the parties, is not disputed. But the issue of the amount of the overpayment recoverable was not distinct from those raised by the parties themselves. The parties disputed, in effect, whether DFO had a remedy against the respondent. It follows, absent any stipulation by the parties to the contrary, that they also disputed what that remedy was.

[29] **Issue 3**

Did the adjudicator err in his determination of the amount of overpayment which DFO was entitled to recover, and if so, what is the appropriate remedy?

The above discussion disposes of the applicant's contention that the adjudicator made an error of fact by ignoring a statement of fact agreed by the parties. The amount of overpayment recoverable which he chose was the total of the amounts received by the respondent, as it appeared from the cheques put into evidence by the applicant. This choice was not unreasonable, in that it was not "an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before [the adjudicator]." (see *Federal Courts Act*, R.S.C. 1985, c. F-7, paragraph 18.1(4)(d)).

[30] I do, however, find the adjudicator's decision unreasonable because it lacks the requisite transparency, intelligibility and justification. The adjudicator found that "the $11,957.41 in

overpayment is a debt to the Crown and that … the recovery of this debt is not prohibited" (reasons for decision, paragraph 132). He does not explain why the full amount of this debt could not be recovered. While the adjudicator "note[d] that the net amount of the cheques cashed by [the respondent] from 2001 to 2005 was $9,088.48," and thus, seems to have applied the principle *nemo dat quod non habet*.

[31] I cannot, from the decision of the adjudicator, determine why he ordered the amount of $2,868.93 to be reimbursed to the respondent by DFO. Although I believe that the respondent should not have to repay the $2,868.93 if he did not receive a benefit from the payment, it is unclear from the decision whether this was the case. There was no analysis, for example, about whether this amount was set off against the respondent's tax liability or his deductions for benefits. I simply cannot tell from the decision whether the applicant received a benefit from the funds.

[32] As the adjudicator's decision is unreasonable only with respect to remedy relating to the order for payment of the amount of $2,868.93, that portion of the decision must be set aside. I am of the view that this matter should be referred back to the same adjudicator to hear submissions and evidence, if necessary, with respect to the status of the amount of $2,868.93. The adjudicator would then make a decision with respect to whether DFO should reimburse the respondent in the amount of $2,868.93.

[33] There shall be no order as to costs because of the nature of the issue in this case. Neither party can be said to have caused the problem.

"John A. O'Keefe"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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