Federal Court  Cour fédérale

Date: 20141201

Docket: T-268-14

Citation: 2014 FC 1152

Ottawa, Ontario, December 1, 2014

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Background and Nature of the Proceeding

[1] The Applicant represents employees working at Veterans Affairs Canada [VAC] and the Veterans Review and Appeal Board. Among those employees are client service agents [CSAs], who counsel veterans and their families seeking benefits administered by VAC.

[2] The CSAs' responsibilities for the Veterans Independence Program [VIP] and for Health-Related Travel [HRT] claims were significantly reduced in 2012. The contract for service between Medavie Blue Cross Inc. [Medavie] and Public Works and Government Services Canada [PWGSC] was amended to include the payment of claims for housekeeping and grounds maintenance under the VIP and the reimbursement of claims under the HRT program. The prior system, whereby veterans would send in receipts and be reimbursed under the VIP, was replaced with a grant system; changes were also made in the processing of the annual form mailing to veterans.

[3] As a result, the role of CSAs became less proactive and more reactive, especially since VAC also transferred some of the remaining responsibilities for administering the VIP and HRT to Medavie. About 50 CSA positions were eliminated and 37 CSAs were selected for lay-off. Most of the laid-off CSAs found other positions, but 15 CSAs did not.

[4] By letter dated August 2, 2012, the Applicant filed a policy grievance pursuant to section 220 of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [the PSLRA] on behalf of its Union of Veterans' Affairs Employees component [the UVAE] . The grievance alleged that, by virtue of the changes to the VIP and HRT and the consequent reduction in the number of CSAs, VAC had violated clause 1.1.27 of Appendix D (Workforce Adjustment) of the Program and Administrative Services collective agreement. That clause provides as follows:

> **1.1.27** Departments or organizations shall review the use of private temporary agency personnel, consultants, contractors, employees appointed for a specified period (terms) and all other non-indeterminate employees. Where practicable, departments or organizations shall refrain from re-engaging such temporary agency personnel, consultants or contractors or renewing the

> employment of such employees referred to above where this will facilitate the appointment of surplus employees or laid-off persons.

[5] The grievance was referred to adjudication in accordance with section 221 of the PSLRA. Following a hearing in October 2013, the Applicant's grievance was dismissed by an adjudicator of the Public Service Labour Relations Board (see: 2013 PSLRB 165).

[6] The Applicant now applies for judicial review of the adjudicator's decision under subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, seeking an order to set aside that decision and remit the matter to a different adjudicator. The Attorney General of Canada [the Respondent] opposes this application, and both parties ask for their costs.

II. The Adjudicator's Decision

[7] After comprehensively summarizing the evidence and both parties' arguments, the adjudicator observed that clause 1.1.27 would not be engaged unless four requirements were met: (1) Medavie was a contractor; (2) the amendment to the contract constituted a re-engagement; (3) the affected employees were "surplus employees" or "laid-off persons"; and (4) refraining from engaging Medavie could have facilitated the appointment of the affected employees. Only if those requirements were met would the onus then shift to the employer to show that it would not have been practicable to refrain from engaging Medavie. Ultimately, the adjudicator found against the Applicant on each of these issues. .

[8] First, the adjudicator was not convinced that Medavie was a "contractor" within the meaning of clause 1.1.27. In making this determination, the adjudicator observed that

clause 1.1.27 was worded differently and quite distinct from a somewhat similar clause 5.1.2 considered in *Canada (AG) v Public Service Alliance of Canada*, [1993] 1 SCR 941 at 947-948, 101 DLR (4th) 673 [*PSAC* (SCC)], aff'g (1990), [1991] 1 FCR 428, 124 NR 379 (CA) [*PSAC* (FCA)], aff'g *Public Service Alliance of Canada v Treasury Board*, [1990] CPSSRB No 51 (QL) (PSLRB) [*PSAC* (Board)] (collectively, the *PSAC* decisions).

[9] Clause 5.1.2 provided that departments had to " … review … their use of contracted services and should terminate them" where such action would facilitate the redeployment of affected or surplus employees or laid-off persons. In contrast, the adjudicator found that clause 1.1.27 was narrower in scope than the clause 5.1.2 considered in the PSAC decisions, in that clause 1.127 did not refer to "contracted services" but rather used the word "contractors", a word whose otherwise broad definition was narrowed by the other terms with which it was grouped: i.e., "private temporary agency personnel", "consultants", "employees appointed for a specified period (terms)", and "all other non-indeterminate employees". Since each such term refers to individuals in the workplace, the adjudicator reasoned that "contractors" should likewise be limited to those in the workplace. Furthermore, clause 1.1.28 of Appendix D confirmed this interpretation in the adjudicator's mind, since that clause gives priority to surplus and laid-off persons for short-term work opportunities. The adjudicator concluded that Medavie was not such a contractor.

[10] Second, the adjudicator found that Medavie had not been "re-engaged" even if it was a contractor. The work transferred to Medavie was entirely consistent with the claims processing work Medavie had been doing for PWGSC and, to some extent, for VAC for many years. This

transfer of work amounted to an amendment to an existing contract and, thus, was not a re-engagement or a rehiring of Medavie within the meaning of clause 1.1.27.

[11] Third, the adjudicator rejected the Applicant's argument that clause 1.1.27 should be construed so as to prohibit the employer from rehiring or re-engaging a contractor if it would result in the creation of surplus employees or laid-off persons. This argument, the adjudicator noted, would be to interpret and apply clause 1.1.27 in a manner that would have the effect of amending the collective agreement contrary to section 229 of the PSLRA. The adjudicator determined that clause 1.1.27 was directed to a consideration of surplus employees or laid-off persons in existence at the time of contracting out the VIP work to Medavie. The adjudicator thus reasoned that the existence of "surplus employees or laid-off persons" at the time the Medavie contract was amended was necessary before clause 1.1.27 would be engaged. Since the uncontradicted evidence of all witnesses was that there were no such employees, clause 1.1.27 had not been violated.

[12] Fourth, the adjudicator concluded that there was no evidence led by either party that the work contracted out to Medavie was work that the CSAs could have done. Unlike the situation in *PSAC* (SCC), where the government set out to terminate indeterminate employees and simply contracted out their identical jobs, here the jobs of CSAs were fundamentally changed by the strategic shift to a grant system and the new regime for processing annual questionnaires.

[13] Lastly, the adjudicator found that even if clause 1.1.27 had been engaged, the employer had provided evidence that it was not practicable to refrain from contracting out the work to Medavie and also that VAC had saved a lot of money.

[14] The adjudicator therefore dismissed the grievance.

III. Issues

[15] The Applicant states that there are only two issues:

1. What is the standard of review?
2. Was the Adjudicator's interpretation of Clause 1.1.27 reasonable?

[16] The Respondent divides the second issue above into four issues which can be rephrased, along with the Applicant's argument that the adjudicator failed to consider the purpose or objectives of clause 1.1.27, as follows:

1. What is the standard of review?
2. Did the adjudicator fail to consider the purpose of clause 1.1.27?
3. Did the adjudicator err in her interpretation of "contractors"?
4. Did the adjudicator err in her interpretation of "re-engaging"?
5. Did the adjudicator err by requiring pre-existing "surplus employees or laid-off persons"?
6. Did the adjudicator err by finding that it was impracticable not to contract with Medavie?

IV. Applicant's Position

[17] The Applicant accepts that the standard of review is reasonableness, but submits that the range of acceptable outcomes is narrow because of the legal nature of the questions at issue and the language of the collective agreement (citing *Canada (AG) v Abraham*, 2012 FCA 266 at paras 42-43, 45, 440 NR 201 [*Abraham*]; *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2013 FCA 75 at paras 13-15, 444 NR 120 [*First Nations*]).

[18] The Applicant argues that the purpose of Appendix D is to shield indeterminate employees from the consequences of major changes to the federal public service. At the hearing of this matter, the Applicant's counsel called this Appendix and, in particular, clause 1.1.27 "a lifeline" for job security protection. The same type of clause was in issue in *PSAC* (Board) at 10, 13-14, i.e., clause 5.1.2, and the board there held that such a clause exists so that employees, particularly those who are indeterminate, can rely on the termination of contracts to protect their jobs. The Applicant submits that the purpose of clause 1.1.27 is the same as the former clause 5.1.2, and that the adjudicator in the present case unreasonably failed to interpret clause 1.1.27 in a manner consistent with that purpose. The Applicant asserts that the adjudicator stripped away any meaningful protection for the job security of indeterminate employees in contracting out cases.

[19] The Applicant argues that this error tainted every part of the adjudicator's analysis, including her unreasonable definition of the term "contractors". The term "contractors", the Applicant submits, is not general or ambiguous, so there is no reason to restrict it to the same

class of persons as the surrounding words (*National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029 at 1040, 74 DLR (4th) 197). Moreover, the Applicant argues that limiting "contractors" to those in the workplace fails to give effect to the plain and ordinary meaning of that word.

[20] The Applicant further contends that the adjudicator's interpretation of "re-engaging" or "renewing" was unreasonable, in that the adjudicator considered only the method by which the Medavie contract was changed and not the substantive effect of the changes.

[21] The Applicant also states that the adjudicator's interpretation of clause 1.1.27 imposes a requirement for there to be pre-existing surplus employees or laid-off persons. The Applicant argues that such a requirement defeats the purpose of clause 1.1.27 since it would allow a department to unilaterally avoid the application of the clause simply by controlling the timing of surplus and lay-off decisions so that they happen after contracting-out has been completed.

[22] Moreover, the Applicant submitted that the adjudicator erred in determining that it was not practicable to refrain from contracting out in this case. According to the Applicant, the adjudicator's finding that the mere fact the work was contracted out is proof enough that it would have been impracticable to have kept the work in-house, is an inappropriate, subjective standard. As well, the Applicant says that the adjudicator erred by accepting the employer's evidence of savings without proof that the employer had considered other ways to realize those savings.

V. Respondent's Position

[23] The Respondent agrees that the standard of review is reasonableness and emphasizes the high degree of deference typically accorded to a labour arbitrator's interpretation of a collective agreement because it is the "heartland" of their jurisdiction. In particular, the Respondent argues that: adjudicators are not strictly bound by the common law and equitable doctrines of the courts (*Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at paras 42, 45-51, 60, [2011] 3 SCR 616 [*Nor-Man*]); adjudicators need not consider or discuss every issue raised by the parties (*Construction Labour Relations Inc v Driver Iron Inc*, 2012 SCC 65 at para 3, [2012] 3 SCR 405); and an adjudicator's decision cannot be unreasonable for failing to consider an issue that was not argued (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-28, [2011] 3 SCR 654 [*Alberta Teachers*]).

[24] In the present case, the Respondent states that each of the adjudicator's primary findings in respect of the first part of clause 1.1.27 was dispositive of the grievance, so the onus is upon the Applicant to show that each of those findings was unreasonable. In the Respondent's view, the Applicant has not done that. The adjudicator summarized all of the evidence and arguments in her decision and justified each of her conclusions transparently and intelligibly. Furthermore, the Respondent states, the outcome also falls within the acceptable range of outcomes and the adjudicator's reasons for dismissing the grievance are reasonable.

[25] The Respondent emphasizes that adjudicators must respect provisions that are clear, even if they might seem unfair (*Chafe v Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112 at paras 50-51, [2010] CPSLRB No 116 (QL)). The adjudicator in this case observed that the terms with which "contractors" were grouped all referred to individuals used by an employer to meet short-term non-recurring requirements, and the Respondent argues that it was reasonable to narrow the term "contractors" to that class in a manner consistent with the limited class rule. In addition, the adjudicator's reference to clause 1.1.28 in interpreting the meaning of clause 1.1.27 was reasonable since it confirms that surplus employees and laid-off persons should have priority even for short-term work opportunities.

[26] Furthermore, it was reasonable, the Respondent contends, for the adjudicator to depart from the meaning ascribed to clause 5.1.2 in the *PSAC* decisions since clause 1.1.27 was subsequently negotiated to employ different language. In any event, the Respondent submits, some clauses can bear more than one reasonable interpretation and adjudicators do not necessarily act unreasonably by choosing an interpretation different from one that has received prior judicial approval (*Alberta Health Services v Alberta Union of Provincial Employees*, 2013 ABCA 243 at para 17, 556 AR 102).

[27] The Respondent also points out that because the words "review", "re-engaging", and "renewing" all share the prefix "re", which means to do again, this confirms that it was reasonable for the adjudicator to find that the obligation created by clause 1.1.27 does not preclude a department or organization from engaging a new contract or expanding the scope of an existing one. Had the parties intended to do that, the Respondent states, the parties would

have used words like "engaging" and "appointing" instead of "re-engaging" and "renewing the employment of".

[28] The Respondent defends the adjudicator's finding that clause 1.1.27 cannot be triggered and cannot be violated unless the "surplus employees" or "laid-off persons" already exist. Both of these terms are defined in the past tense in Appendix D and, according to the Respondent, Appendix D is about securing new employment for such individuals. Had prospective obligations been intended by the parties, the Respondent states that prospective language would have been used in clause 1.1.27.

[29] Although the adjudicator may not have explicitly identified the specific purpose of clause 1.1.27, the Respondent argues that she did not have to do so. The adjudicator acknowledged the Applicant's argument about the objectives of clause 1.1.27, but she disagreed, and the Respondent says that the adjudicator's interpretation of clause 1.1.27 was consistent with the purpose she assigned to Appendix D.

[30] Finally, the Respondent contends that the adjudicator reasonably construed "practicable" to mean economically practical. The adjudicator had before her uncontradicted evidence that the VIP was changed to better serve veterans and that the costs of administering it were substantially reduced, and the Respondent submits that the adjudicator's assessment of that evidence should not be disturbed by this Court (*Hughes v Canada (Department of Human Resources and Skills Development)*, 2014 FCA 43 at paras 11-12 (available on CanLII)).

VI. Analysis

1. *What is the standard of review?*

[31] Both parties acknowledged that the standard of review is reasonableness, since every issue "turn[s] on the interpretation and application of the collective agreement, an exercise with which adjudicators have particular familiarity" (*Nitschmann v Canada (Treasury Board)*, 2009 FCA 263 at para 8, 394 NR 126; see also: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 16, [2013] 2 SCR 458; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 68, [2008] 1 SCR 190 [*Dunsmuir*]).

[32] Applying this standard to the decision under review means that this Court should not disturb the adjudicator's decision if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 [*Newfoundland Nurses*]).

[33] There may be some cases where the acceptable outcomes are few, especially when the issues are tightly governed by the law (*First Nations* at paras 13-15; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 38, [2013] 3 SCR 895 [*McLean*]). However, this case is not one of them. The thrust of the Applicant's submission that the range of acceptable outcomes in this case is narrow and constrained is premised on what the Applicant asserts is "the undisputed purpose of [the] contracting out provisions" within Appendix D. That purpose,

however, is anything but undisputed, if only because the parties now find themselves before this Court.

[34] In this case, the adjudicator was interpreting a collective agreement, something which is clearly a matter of contractual interpretation. The view that contractual interpretation is a pure question of law has recently been abandoned by the Supreme Court of Canada in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 50, 373 DLR (4th) 393 [*Sattva*]. Mr. Justice Rothstein observed at paragraph 50 that contractual interpretation "involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix".

[35] I therefore reject the Applicant's submission that the range of acceptable outcomes is narrow and constrained given the legal nature of the questions before the adjudicator. The essential question before the arbitrator was one of contractual interpretation, and not one of statutory interpretation as was the case in *First Nations* and also in *McLean*.

[36] In any event, reasonableness review is a contextual inquiry (*Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 18, [2012] 1 SCR 5). It is generally more useful to ask only whether the actual outcome is defensible in respect of the facts and the law and not, as the Applicant contends, place a limit on how many possible outcomes there could have been.

2. *Did the adjudicator fail to consider the purpose of clause 1.1.27?*

[37] The Applicant's main argument rests primarily on the interpretation given to a provision similar to clause 1.1.27 over two decades ago. In *PSAC* (Board), the purpose of the Workforce Adjustment Policy [the WAP] considered in that decision was determined to be to "protect, to the extent of the Policy, indeterminate employees from the consequences of major changes to the structure of the federal public service" (*PSAC* (Board) at 13). The specific clause in question in the *PSAC* decisions was intended to ensure that "indeterminate employees can rely on the termination of contracting out in order to protect their jobs" (*PSAC* (Board) at 14). The Supreme Court agreed with the Board's conclusion in this regard and emphasized that it "certainly cannot be said that the Board's interpretation was patently unreasonable" (*PSAC* (SCC) at 972).

[38] The adjudicator in this case did not construe the purpose of Appendix D (Workforce Adjustment) as broadly as the WAP in the *PSAC* decisions. On the contrary, the adjudicator stated at paragraph 76 of her decision that the purpose of the policy in Appendix D was only to assist indeterminate employees who have lost their jobs by ensuring that alternative employment opportunities were provided to such employees. The adjudicator clearly considered the *PSAC* decisions, yet she distinguished them from the present case since the wording in clause 1.1.27 was narrower in scope than that in clause 5.1.2. Furthermore, the language used to state the purpose of the WAP in the *PSAC* decisions and that used in Appendix D is different:

***PSAC* (SCC)**	**Current**
1.3 The purpose of this policy is to minimize the impact of WORK FORCE ADJUSTMENT situations on indeterminate employees and	***Objectives*** It is the policy of the Employer to maximize employment opportunities for indeterminate

to ensure that, wherever possible, alternate employment opportunities are provided TO AFFECTED EMPLOYEES. (see: *PSAC* (SCC) at 970)	employees affected by workforce adjustment situations, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to them. This should not be construed as the continuation of a specific position or job but rather as continued employment.

[39] These differences are substantial. Rather than minimizing the impact of work force adjustments generally, the policy that applies to the present dispute is about maximizing the employment opportunities for employees affected by a workforce adjustment. In my view, the adjudicator did not act unreasonably by assigning significance to the new language by which the policy in Appendix D is stated.

[40] As well, in interpreting clause 1.1.27, the adjudicator was not obliged to adopt the same purpose that had been assigned to clause 5.1.2 in *PSAC* (SCC). Those clauses are also quite different:

5.1 Departments shall: […] **5.1.2** review their use of employees appointed for specified periods (term employees) and their use of contracted services and should terminate them where such action would facilitate the REDEPLOYMENT of AFFECTED EMPLOYEES, SURPLUS EMPLOYEES, OR LAID-OFF PERSONS;	**1.1.27** Departments or organizations shall review the use of private temporary agency personnel, consultants, contractors, employees appointed for a specified period (terms) and all other non-indeterminate employees. Where practicable, departments or organizations shall refrain from re-engaging such temporary agency personnel, consultants or contractors or renewing the employment of such

> employees referred to above where this will facilitate the appointment of surplus employees or laid-off persons
>
> **1.1.28** Nothing in the foregoing shall restrict the Employer's right to engage or appoint persons to meet short-term, non-recurring requirements. Surplus and laid-off persons shall be given priority even for these short-term work opportunities.

[41] The Applicant criticizes the adjudicator for not expressly and precisely identifying the purpose of clause 1.1.27, but this does not mean that she never considered such purpose. Indeed, the adjudicator was clearly aware of the Applicant's arguments in this regard, in that she summarized them at paragraphs 29-30 and 42-45 of her decision.

[42] As stated in *Newfoundland Nurses* at para 16: "[a] decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion". For the reasons stated below, the failure to ascribe an explicit or precise purpose to clause 1.1.27 does not make the adjudicator's decision unreasonable or impossible to understand. It is at least implicit in the adjudicator's decision that the purpose of clause 1.1.27 was to create employment opportunities for persons already affected by workforce adjustments, not to prevent legitimate workforce adjustments from happening.

3. *Did the adjudicator err in her interpretation of "contractors"?*

[43] At paragraph 72 of her decision, the adjudicator decided that the term "contractors", as referred to in clause 1.1.27, "should be read to mean contractors in the workplace". During the hearing of this matter, the Applicant said that that was nonsense and that the adjudicator failed to give effect to the plain and ordinary meaning of the word "contractors". The Applicant also argued that it was inappropriate to apply the limited class rule to the interpretation of the term "contractors" since the word is neither general nor vague in a labour relations context. For its part, the Respondent noted that the adjudicator observed that each of the terms with which "contractors" was grouped were individuals employed to meet short-term non-recurring requirements and, so the Respondent argued, it was reasonable to narrow the term to that class in a manner consistent with the limited class rule.

[44] An adjudicator's interpretation of a term in a collective agreement can be reasonable even if the Court does not agree with it. As noted in *Nor-Man* at para 45, arbitrators are not necessarily bound by legal rules, and they can "adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity". Whether the adjudicator did or did not correctly apply the limited class rule as it exists at common law does not make the decision under review unreasonable provided the Court is able to understand the adjudicator's reasons (*Newfoundland Nurses* at para 16). In any event, the limited class rule is more flexible in labour arbitration than it is at common law, and it provides simply that "all the items included in a list are presumed to have some common features and to be part of the same class" (Michael Bendel,

"Interpretation of the Collective Agreement" in Ronald M. Snyder, ed, *Collective Agreement Arbitration in Canada*, 5th ed (Markham, ON: LexisNexis, 2013) at para 2.25).

[45] In my view, the adjudicator's interpretation of "contractors" in the context of clause 1.1.27 was reasonable. The previous *PSAC* decisions involved the same parties and were about a situation where "the contract employees did the same work, on the same equipment, in the same premises as had the union employees" (see: *PSAC* (SCC) at 969; *PSAC* (Board) at 11). That is the type of situation that would likely have been in the minds of the parties when clause 1.1.27 was negotiated to employ different language, notably, "contractors" in lieu of "contracted services".

4. *Did the adjudicator err in her interpretation of "re-engaging"?*

[46] At paragraph 74 of her decision, the adjudicator found that Medavie was not re-engaged because the duties transferred to it "were consistent with those already contracted for and in my opinion amounted to an amendment to an existing contract" (emphasis added). The adjudicator's use of the words "amounted to" suggests that she viewed the changes effected by the amendment to the Medavie contract in substance as well as in form, and that the changes merely supplemented the duties Medavie already performed. Indeed, the adjudicator observed at paragraph 80 of her decision that "[t]here was no evidence led by either party that the work contracted out to Medavie was work that the CSAs could have done".

[47] The Applicant's proposed interpretation of clause 1.1.27 ignores the prefix "re-" in both "re-engage" and "renew". A decision to create a new function with the implementation of the

grant system and contract that work out is not re-engaging a contractor; it is engaging a contractor, either by a new contract or by expanding the scope of an existing one. The parties must have negotiated the "re-engaging" and "renewing" language for a reason, and it is consistent with the adjudicator's interpretation of the purpose of Appendix D. The adjudicator's conclusion that Medavie was not re-engaged or rehired contrary to clause 1.1.27 was not only reasonable but also was understandable in view of her reasoning.

5. *Did the adjudicator err by requiring pre-existing "surplus employees or laid-off persons"?*

[48] The WAP at issue in *PSAC* (FCA) provided that departments "should terminate" their use of "contracted services" if that would facilitate the redeployment of affected employees. At page 442, Mr. Justice Mahoney said the following for the majority of the Federal Court of Appeal:

> The entire thrust of the Workforce Adjustment Policy is that, in a workforce adjustment situation, indeterminate employees whose services would no longer be required would, as far as practicable, be redeployed and, if necessary, retrained. The Policy does not prohibit contracting out but it does contemplate that, to facilitate redeployment of "affected", "surplus" or "laid-off" personnel, the employer will, *inter alia*, review and terminate its use of contracted services. That requirement is utterly inconsistent with an intention to permit the creation of "affected", "surplus" or "laid-off" personnel by contracting out the very jobs that they have been doing.

The Supreme Court of Canada endorsed the foregoing passage in *PSAC* (SCC) at 975.

[49] The adjudicator was not bound by the interpretation the Supreme Court or the Federal Court of Appeal assigned to the WAP in the *PSAC* decisions. Unlike clause 5.1.2, clause 1.1.27

does not apply to "affected" personnel. Rather, clause 1.1.27 applies only to "surplus employees" and "laid-off persons", both of which terms are defined in the past tense:

> **Laid-off person** (*personne mise en disponibilité*)—is a person who has been laid-off pursuant to subsection 64(1) of the PSEA and who still retains an appointment priority under subsection 41(4) and section 64 of PSEA.
>
> […]
>
> **Surplus employee** (*employé-e excédentaire*)—is an indeterminate employee who has been formally declared surplus, in writing, by his or her deputy head.
>
> [Emphasis added]

[50] It was reasonable for the adjudicator to consider the use of the past tense in these definitions as being significant, especially since she did not assign to Appendix D the same purpose that the Supreme Court did with respect to the WAP in 1993. On the contrary, the adjudicator stated at paragraph 76 of her decision that the purpose of the workforce adjustment directive in Appendix D was "to assist indeterminate employees 'whose services are no longer required because of a workforce adjustment situation' and to ensure, 'wherever possible, alternative employment opportunities are provided to them'. The objectives go on to say that this should not be construed as the continuation of a specific position or job".

[51] Under the arbitrator's view, clause 1.1.27 exists to generate further employment opportunities for surplus employees or laid-off persons by requiring the employer to review the use and work of temporary or contracted personnel and consider whether such work could be done by the indeterminate employees instead. It is understandable why the adjudicator found that there is no need to review the employer's existing contractual engagements unless and until there

are such surplus employees or laid-off persons in existence. Although this interpretation of clause 1.1.27 may not produce as favourable a result to the Applicant as clause 5.1.2 did in the *PSAC* decisions, it is nonetheless a reasonable one to which this Court should defer.

[52] It deserves note that, in *PSAC* (FCA), Mr. Justice Mahoney also said the following at page 442:

> By definition, a "Work Force Adjustment" occurs when management decides that one or more indeterminate employees will no longer be required because of "lack of work" or "a discontinuance of a function". It cannot, in my view, be said that the services of an employee whose job has been contracted out are not required because of lack of work or the discontinuance of a function. That employee is not required only because the job has been contracted out.

[53] Significantly, the adjudicator decided that the present case was dissimilar, stating at paragraph 82 of her decision as follows:

> This is not a situation such as that in *PSAC v. Canada*, where the employer set out to reduce the number of indeterminate employees and contracted out the identical jobs being performed by the employees in order to do so. (*PSAC v. Canada*, FCA, at page 7; *The Attorney General of Canada v. PSAC*, [1993] 1 SCR 941 at para 67). This is a situation where a strategic decision was made to move to a system that utilized grants rather than claims authorization that changed the very nature of the work done by the employees (the CSAs) in the VIP program and also resulted in a reduction of the work to be done.

In my view, it was reasonable for the adjudicator to find that clause 1.1.27 does not, in and of itself, prevent the government from making workforce adjustments.

6. *Did the adjudicator err by finding that it was impracticable not to contract with Medavie?*

[54] The adjudicator stated the following at paragraphs 80-81 of her decision:

> **80** There was no evidence led by either party that the work contracted out to Medavie was work that the CSAs could have done. The grievor [Applicant] argues that there is a direct relationship between the work transferred and the reduction of CSA positions and that refraining from amending the contract with Medavie would have allowed the CSA employees to keep their jobs. This submission misses the important strategic change that had taken place. Why then was it contracted out to a third-party service provider? It was done because it was no longer practicable in the employer's mind to continue to have the work performed in-house. The fact of the matter is that the jobs of the CSAs were changed due to the transformation to a grant system and due as well to the changes to how annual questionnaires were mailed out, received and processed. This meant that the CSAs would be engaged in follow up that might be flagged after canvassing whether there was a change in circumstances. As Ms. Burdett testified, the CSAs role was significantly reduced because, rather than determine veterans' needs, there [*sic*] role focussed more on any follow up concerning the grant payment and changes to the payment. It is also important to note that the role of canvassing, which had been part of the role in claims processing in the past, had also changed even before the 2012 Budget. The limitation in this case was whether it was practicable for the employer to refrain from contracting out these services in favour of maintaining the number of CSAs in its employ. The UVAE did not provide any proof of whether it would have been practicable, relying instead on a shifting of the burden of proof to the employer to prove that it was not practicable to do so. Given my findings above, I do not find that the employer was limited from contracting out these services. However, even if there was a limitation, I find that the employer provided evidence that demonstrated that it was not practicable to refrain from contracting out. The employer led evidence that following the Deficit Reduction Action Plan and the budget, Parliament ordered the amendment of the VIP to better serve veterans. The employer also established the considerable savings the VAC realized as a result of the contracting out. The employer argued that that established that it was not practicable to continue with the CSAs performing the work.

> **81** Practicable does not mean possible. (See *Brannick*, at 8). What is practicable must be construed to mean practical, business-wise or economically practical, as well as physically practical. (See *The Council of Postal Unions*, at 25). Clearly, in the current economic climate the Government of Canada has determined that spending in the public service must be reduced and that steps must be taken to ensure the overall reduction of costs. The overall savings realized by the employer as a result of the contracting out to Medavie was economically practical as well as business-wise, albeit with unfortunate results.

[55] In my view it was not reasonable or, for that matter, even necessary for the adjudicator to address or interpret what the words "where practicable" mean in clause 1.1.27. That aspect of the clause, as the Respondent argues, was not "triggered" in view of the adjudicator's determination that there were no contractors, no rehiring or re-engagement of a contractor, and no surplus employees or laid-off persons at the time the Medavie contract was amended. The adjudicator's comments as quoted above were, to say the least, superfluous. Such comments do not, however, render the other aspects of her decision unreasonable or make the decision as a whole one which is not understandable or not reasonable.

VII. Conclusion

[56] In the result, I find the adjudicator's reasons for dismissing the policy grievance justifiable and understandable and, notwithstanding her comments concerning the words "where practicable" in the context of clause 1.1.27, reasonable. The adjudicator was alive to the issues before her and her decision is within the range of acceptable outcomes, especially given an adjudicator's particular familiarity with the interpretation and application of collective agreements.

[57] The Applicant's application for judicial review is dismissed.

[58] The Respondent has requested its costs and, as the parties agreed at the hearing of this matter, I see no reason to depart from the general practice that costs will follow the result. Accordingly, the Respondent shall have its costs of this application as assessed in accordance with column III of the table to Tariff B.

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicant's application for judicial review is dismissed and the Respondent shall have its costs assessed in accordance with column III of the table to Tariff B.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Andrew Raven	FOR THE APPLICANT
Sean F. Kelly	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT