Federal Court of Appeal | Cour d'appel fédérale

Date: 20110308

Docket: A-205-10

Citation: 2011 FCA 84

CORAM: **SHARLOW J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

SHELLEY APPLEBY-OSTROFF

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on February 16, 2011.

Judgment delivered at Ottawa, Ontario, on March 8, 2011.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: SHARLOW J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from a judgment of the Federal Court reported as 2010 FC 479 ("Reasons") which dismissed the appellant's judicial review application seeking to set aside a decision of the Chair of the Canadian Transportation Agency ("CTA") rejecting the grievance she submitted following the termination of her position as assistant general counsel and director of the legal services directorate of the CTA.

[2] The fundamental argument raised by the appellant in her grievance, before the Federal Court, and now in this appeal, is that the working conditions which apply to her are set out in the

Work Force Adjustment Directive ("WFA directive") rather than in the Executive Employment Transition Policy ("EET policy" or "EETP").

[3] Though recognizing that Treasury Board policy documents indicate that the EET policy is no longer in effect, the respondent asserts that the Treasury Board adopted a transition measure under which the EET policy was made to apply to the appellant. However, the respondent has not produced a copy of this Treasury Board decision, claiming that cabinet confidence impedes it from doing so. Yet no certification under section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 has been submitted to justify the cabinet confidence claim. The respondent nevertheless argues that it is under no obligation to provide a copy of the Treasury Board decision adopting the transition measure, and that it can rather rely on an affidavit from a Treasury Board employee.

[4] As further set out below, the respondent's position is contrary to the applicable provisions of the *Canada Evidence Act* and to principles of administrative law governing government decisions affecting individual rights. Consequently, in light of the unusual circumstances of this case, the appeal will be allowed and the matter will be returned to the Chair of the CTA for a fresh determination of the grievance on the basis of the WFA directive.

Background and context

[5] The appellant was employed by the CTA for approximately 18 years, and she last occupied a senior position classified at the LA-3A level. Her position was not part of a collective bargaining unit, and her working conditions were not subject to a binding collective agreement. There is no

evidence in the record of any misconduct by the appellant or dissatisfaction with her work performance. Rather, following a report from an external consulting firm, it was recommended that her position be abolished as part of a corporate reorganization. The CTA decided to act on this recommendation.

[6] As the applications judge found, the appellant's treatment following the decision to abolish her position "was not handled very smoothly" (Reasons at para. 76). On October 15, 2008, the appellant was informed by letter that her position was "surplus to requirements due to the discontinuance of your function, effective at the close of business on April 15, 2009" (Appeal Record at p. 66). It was later determined that the April 15, 2009 effective date of surplus was in error, and that the appellant's position was in fact to be declared in surplus as of November 5, 2008, or 21 days after receipt of the initial letter notifying her of the decision.

[7] In addition, the October 15, 2008 letter attached the EET policy and set out various options available to the appellant under that policy. Yet the attached EET policy document contained at the outset the following notice: "**Notice to the reader:** This document is no longer in effect. It has been archived online and is kept for historical purposes" (Appeal Record at p. 68).

[8] Exchanges ensued between the appellant and officials of the CTA and of Treasury Board concerning the various options available to her. The appellant sought an extension of time to consider her options, but this was denied. These exchanges culminated on November 5, 2008 with a

written ultimatum from the employer instructing the appellant to choose within a few hours one of the options offered under the EET policy (Appeal Record at p. 90):

> Therefore, consistent with the EETP, please be advised that if by close of business day, on Wednesday November 5, 2008, you have not waived option 1, you will be considered having accepted to be redeployed in the Public Service and you will no longer be entitled to Option 2 or 3 as described in the letter of October, 15, 2008.

[9] It should be noted that under option 1 of the EET policy, the appellant was being offered six months (until April 15, 2009) to seek continuing employment in the core public administration, followed by a lay off "with no other benefits under this Policy" should she be unsuccessful in her relocation efforts (Appeal Record at p. 66). Options 2 and 3 concerned individual compensation settlements requiring a resignation from the public service and a waiver of priority referral rights.

[10] The appellant answered the November 5, 2008 written ultimatum that same day by waiving option 1 on a without prejudice basis (Appeal Record at p. 93):

> This is to advise that I waive option 1 set out in your letter to me of October 15, 2008. Nothing in this e-mail communication is to be taken as a waiver of any of my rights, including, without limitation, my grievance rights. Nor is it to be taken as an acceptance, express or implied, of the unilateral deadline imposed in your October 15th letter. This communication is being sent on a completely without prejudice basis.

[11] On November 7, 2008, the appellant was locked out of her office and a letter was issued to her that day advising her that she had "resigned from the Public Service on November 5, 2008." So ended the appellant's eighteen year career with the CTA.

[12] The appellant sought legal advice and filed a grievance pursuant to section 208 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, submitting that the WFA directive applied to

her rather than the rescinded EET policy. Under the WFA directive, the appellant would be entitled to additional guarantees and benefits not provided under the EET policy, notably a guarantee of a reasonable job offer, failing which she would be entitled to a 120-day window to consider alternative options, including the option of a twelve month surplus priority period in which to secure a reasonable job offer.

The grievance decision

[13] In a letter-decision dated February 6, 2009, the Chair of the CTA denied the grievance. The Chair relied entirely on the advice provided by Treasury Board analysts and employees of the Canada Public Service Agency, and did not carry out any independent legal research or analysis in order to ascertain which working conditions applied to the appellant. Based on this advice, he concluded that the EET policy applied to the appellant as a "transition measure" (Appeal Record at pp. 208 to 210).

The Federal Court proceedings

[14] The appellant challenged this grievance adjudication decision through a judicial review application before the Federal Court. The respondent chose not to submit a copy of the Treasury Board decision allegedly extending on a transition basis the application of the EET policy to the appellant's position. The respondent rather relied on an affidavit from Mr. Marc Thibodeau, a Director, Collective Bargaining, with the Treasury Board. In his affidavit, Mr. Thibodeau affirmed that the "Notice to the reader" on the published EET policy notifying that this policy was no longer in effect was "incomplete". Mr. Thibodeau added that "the Treasury Board's decision extended the

EETP during the period for which the LA group negotiated its first collective agreement, a process that is ongoing at the time of the swearing of this affidavit. As a result, the EETP continues to apply to employees in the LA group who are classified at the LA-3A level and above." (Appeal Record at pp. 959-60).

[15] When pressed to provide an authoritative copy of this alleged Treasury Board decision, the attorney representing the respondent refused to do so on the basis of an alleged cabinet confidence. The following exchange between opposing counsel during the cross-examination of Mr. Thibodeau on his affidavit is instructive (Appeal Record at pp 225-226):

> Q. [MR. BROWN appellant's counsel]: You are telling me that, but you can't today show me or point me to any Treasury Board decision or any published document on the website that indicates that?
> MR. FADER [respondent's counsel]: Just to step in - - The Treasury Board document itself is a Cabinet confidence. Unfortunately, we cannot release the actual Decision.
> MR. BROWN: So the answer to my question is no, you cannot point me to a specific decision or a specific document.
> MR. FADER: There is a distinction between what exists and not being able to provide it to you or summarize its contents because of Cabinet confidence. It is a Cabinet confidence. That is the position we are taking – that the Treasury Board Decision itself which is described a little bit in Mr. Thibodeau's Affidavit of both the Decision, Decision letter and its contents are Cabinet confidence thereby engaging Section 39 of the Canada Evidence Act.

[16] Yet no certification under section 39 of the *Canada Evidence Act* was at any time submitted to the Federal Court.

[17] The applications judge nevertheless found that the evidentiary burden was on the appellant to prove that the EET policy was not part of her terms of employment even though the published

version of that policy indicated it was no longer in effect (Reasons at paras. 62 and 73). The applications judge also found that the Treasury Board was under no obligation to "make available its policies" (Reasons at para. 67), was not bound by the policies it posts on the internet (Reasons at para. 68), need not publish and make available the terms and conditions of the appellant's working conditions (Reasons at para. 71), and that the affidavit evidence of Mr. Thibodeau supported the notion that the EET policy applied to the appellant (Reasons at para. 69).

[18] The applications judge found that once the respondent had informed the appellant of the working conditions which applied to her, it had discharged its burden and was under no further obligation to provide authoritative evidence of the Treasury Board decision extending the EET policy to the appellant. It was rather the appellant who had the burden of disproving the respondent's bald assertions concerning the applicable working conditions, and in this case, "[o]ther than the website which was never relied on by the applicant, there is no evidence that the Treasury Board did not intend the EET policy to apply" (Reasons at para. 70). Consequently, the appellant had "not brought forth enough evidence to demonstrate that the CTA Chair was incorrect when he affirmed that the EET policy did apply to the applicant" (Reasons at para. 73). The application for judicial review was consequently dismissed.

The issue in appeal

[19] Though the appellant has set out nine grounds of appeal, they all relate in varying degrees to one central question: did the applications judge err in finding that the Chair of the CTA correctly

determined that the EET policy applied to the appellant? For the reasons further set out below, and in light of the record before me, I answer “yes” to this question.

The Standard of Review

[20] In appeal of a judgment concerning a judicial review application, the role of this Court is to determine whether the applications judge identified and applied the correct standard of review, and in the event he has not, to assess the impugned decision in light of the correct standard of review; the applications judge’s selection of the appropriate standard of review is a question of law subject to review on appeal on the standard of correctness: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 43; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at paragraph 35; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610 at paragraphs 13-14.

[21] Both the appellant and the respondent agree in their respective memoranda of fact and law that the applicable standard is correctness. The applications judge also found that the applicable standard of review in this case is that of correctness. I agree, substantially for the reasons stated by the applications judge at paragraphs 30 to 56 of his Reasons.

[22] In this case, the issue is the identification of the working conditions which apply to the appellant, either the EET policy or the WFA directive. This is an issue of law falling outside the expertise of the Chair of the CTA acting as a grievance adjudicator under sections 207 and 208 of

the *Public Service Labour Relations Act*. In this case, the Chair of the CTA recognized that he had no expertise to ascertain the applicable working conditions and he therefore relied entirely on the advice of employees of the Treasury Board and of the Canada Public Service Agency to reach his decision. In such circumstances, no deference is owed to the grievance adjudicator.

[23] Moreover, the grievance adjudicator in this case is not an independent adjudicator, but rather a senior representative of the employer. Deference on questions of law in the circumstances raised in this appeal should not be extended to a person who is not independent from the employer: *Canada (Attorney General) v. Assh*, 2006 FCA 358, 2007 4 F.C.R. 46 at paras. 50 to 52.

Analysis

[24] It is not disputed that the publicly available working conditions documents indicate that the EET policy "is no longer in effect." This is clearly set out in the publicly available version of this policy (Appeal Record p. 68) as well as in the publicly available *Policy on the Management of Executives* which took effect on July 16, 2007 and which clearly states in section 1.2 that it replaces the EET policy as of that date (Appeal Book at p. 132). The publicly available *Directive on Career Transition for Executives* issued under the authority of the Treasury Board of Canada Secretariat effective as of July 16, 2007 also states that it replaces the EET policy as of that date (Appeal Record p. 119).

[25] This new policy and new directive apply as of July 16, 2007 to various executive groups of the core public administration, but not to the excluded members of the Law group, including those

at level LA-3A, which had been previously covered by the EET policy. The record shows that most of the employees of the LA group were then in the process of negotiating a first collective agreement, and that the existing working conditions thus continued to apply to those LAs covered by the bargaining unit pursuant to the operation of section 107 of the *Public Service Labour Relations Act*.

[26] It is not disputed that the appellant is not a member of the LA group covered by the LA bargaining unit. It is moreover agreed that she was an excluded member of the Law group level LA-3A who was appointed to her position on an indeterminate basis. It is also not disputed that the WFA directive applies to those employees who are appointed on an indeterminate basis and who are excluded or unrepresented, and to whom the EET policy or another directive on work force adjustment does not apply. This result flows from the clear provisions of the WFA directive concerning the scope of its application (Appeal Record at p. 144).

[27] However, the respondent asserts that a decision of the Treasury Board extended the EET policy to the appellant, thus excluding the operation of the WFA directive. The grievance adjudication decision of the Chair of the CTA dated February 6, 2009 sets out the respondent's position as follows (Appeal Record at p. 44):

> The officials provided clarification regarding the application of the policy in light of the notice on the electronic version that the EETP document is no longer in effect and has been archived online. This was explained as a transition measure to ensure that excluded LAs continue to be covered by their existing Terms and Conditions of employment while the first LA collective agreement is negotiated. For this reason, the Workforce Adjustment Directive (WFAD) referenced in the grievance does not apply to Ms. Appleby-Ostroff. [Emphasis added]

[28] Though no mention is made here of a Treasury Board decision formally adopting such a transition measure, the respondent later took the position that a Treasury Board decision had indeed been adopted for this purpose, but that it was a “secret” decision subject to cabinet confidence.

[29] The applications judge found that notwithstanding the terms of the publicly available working conditions documents stating the contrary, and notwithstanding the refusal of the respondent to submit an authoritative version of the Treasury Board decision extending the EET policy to the appellant as a transition measure, it was nevertheless incumbent on the appellant to prove that the EET policy did not apply to her. I respectfully disagree.

[30] Pursuant to paragraph 7(1)(e) of the *Financial Administration Act*, R.S.C. 1985, c. F-11, the Treasury Board may determine the terms and conditions of employment of persons employed in the federal public administration. In the exercise of these responsibilities, the Treasury Board is extended considerable authority under subsection 11.1(1) of the *Financial Administration Act*, including the authority to provide for terms and conditions of employment that it considers necessary for effective human resources management in the public service. In the absence of specific legislation to the contrary, because these terms and conditions of employment established by the Treasury Board become part of the employee’s contract of employment, it would be inconsistent with principles of fairness and good faith to empower the Treasury Board to determine these terms and conditions without disclosing them to the concerned employee, particularly in the event of a dispute as to the scope of their application.

[31] Here, the respondent asserts that these terms and conditions were disclosed to the appellant with the letter of October 15, 2008 informing her of the discontinuance of her functions, and that consequently her appeal must fail. The applications judge agreed with this approach. With respect, this is not the issue raised by the appellant. The issue here is whether the Treasury Board actually adopted the transition measure extending the EET policy to the applicant. Where the very existence of the decision is being questioned, it is incumbent on the respondent to prove its existence through cogent and authoritative evidence. It is not for the appellant to disprove something over which she has no control and of which she has no direct knowledge.

[32] The fact that the publicly available working conditions documents specifically indicate that the EET policy is no longer in effect also raises a *prima facie* presumption that these documents accurately reflect the binding expression of the Treasury Board's intention. If these publicly available documents are wrong or incomplete, it is incumbent on the respondent to submit the proper evidence required to contradict their terms.

[33] Section 21 of the *Canada Evidence Act* sets out the appropriate method by which evidence of a federal proclamation, order or regulation may be given. For those proclamations, orders or regulations which are not published in the *Canada Gazette*, paragraphs 21(d) and (e) instruct that they may be evidenced by the production of a copy or extract certified to be true by the clerk or assistant or acting clerk of the Privy Council, or by the concerned minister, deputy or acting deputy or by the secretary or acting secretary of the concerned department:

21. Evidence of any proclamation, order, regulation or appointment,	**21.** La preuve de toute proclamation, de tout décret ou règlement pris, ou de

made or issued by the Governor General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada and evidence of a treaty to which Canada is a party, may be given in all or any of the following ways: […]	toute nomination faite par le gouverneur général ou par le gouverneur en conseil, ou par un ministre ou chef de tout ministère du gouvernement du Canada, ou sous leur autorité, de même que la preuve d'un traité auquel le Canada est partie, peut être faite par les moyens ou l'un des moyens suivants : […]
(*d*) by the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk or assistant or acting clerk of the Queen's Privy Council for Canada; and	*d*) s'il s'agit d'une proclamation, d'un décret ou règlement pris par le gouverneur général ou le gouverneur en conseil, ou d'une nomination faite par lui, la production d'une expédition ou d'un extrait présenté comme certifié conforme par le greffier, le greffier adjoint ou le greffier suppléant du Conseil privé de la Reine pour le Canada;
(*e*) by the production, in the case of any order, regulation or appointment made or issued by or under the authority of any minister or head of a department of the Government of Canada, of a copy or extract purporting to be certified to be true by the minister, by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides.	*e*) s'il s'agit d'un décret ou d'un règlement pris, ou d'une nomination faite par l'autorité ou sous l'autorité d'un tel ministre ou chef de ministère, la production d'une expédition ou d'un extrait donné comme certifié conforme par le ministre, ou son sous-ministre ou sous-ministre suppléant, ou par le secrétaire ou le secrétaire suppléant du ministère qu'il préside.

[34] The respondent however asserts that it is impeded from disclosing an authoritative copy of the Treasury Board decision by the operation of section 39 of the *Canada Evidence Act*. This section empowers a federal minister or the Clerk of the Privy Council to object to the disclosure of information by certifying in writing that the information constitutes a confidence of the Queen's

Privy Council for Canada. However, in this case no certification has been provided under section 39. Without such certification, the respondent's argument must fail.

[35] As noted by Chief Justice McLachlin in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 (*Babcock*) at para. 22, section 39 of the *Canada Evidence Act* "is only triggered when there is a valid certification." Moreover, a certification is valid "if (1) it is done by the Clerk or minister; (2) it relates to information within s. 39(2); (3) it is done in a *bona fide* exercise of delegated power; (4) it is done to prevent disclosure of hitherto confidential information" (*Babcock* at para. 27). The respondent meets none of these conditions. The reference to or use of section 39 of the *Canada Evidence Act* in order to gain a tactical advantage in litigation is especially frowned upon: *Babcock* at para. 25.

[36] In this case, the respondent refuses to provide any authoritative evidence of the Treasury Board decision. An adverse inference may be drawn from such a refusal. This adverse inference can be drawn even where a valid certification is made under section 39 of the *Canada Evidence Act*: *Babcock* at para. 36. The adverse inference is moreover strengthened in this case where no such certification exists.

[37] Finally, the affidavit from Mr. Thibodeau is not a cure to the refusal of the respondent to provide an authoritative copy of the Treasury Board decision. There are several reasons for this:

a. First, the affidavit is clearly not a substitute for the best evidence which should have been provided pursuant to the *Canada Evidence Act*.

b. Second, the assertions in the affidavit are hearsay, since Mr. Thibodeau is not a member of the Treasury Board, nor does he purport as an employee to attend meetings of the Treasury Board. He moreover never explains from which source he obtained the information he sets out in his affidavit.

c. Third, the use of this affidavit undermines the very object of the judicial review: the Chair of the CTA relied on the say-so of Treasury Board officials, and now the Court is asked to do the same. This approach negates the purpose of judicial review as it impedes the courts from accessing and interpreting government decisions by instituting a bureaucratic filter between these decisions and the judiciary.

d. In addition, the affidavit is ambiguous: it does not state that the EET policy was extended to the appellant's position, referring instead to the extension of this policy within the context of the negotiations of a collective agreement for the LA group, a negotiations process which does not involve the appellant's position.

e. Moreover, the affidavit uses imprecise language, stating that the "the EETP continues to apply to employees in the LA group who are classified at the LA-3A level and above" which can be read as to mean that it extends to "some" employees. This affidavit can thus easily be understood as simply confirming an extension of the EET policy to those employees at the LA-3A level who are covered by the bargaining unit, an extension which in any event flows from section 107 of the *Public Service Labour Relations Act*.

f. In the absence of the actual decision from Treasury Board, it is simply not possible to conclude with confidence from this affidavit that the EET policy was also extended to those LA-3A employees who are not included in the LA bargaining unit.

[38] Transparency and accountability are important principles that apply to government actions, particularly where such actions affect individual rights. As recently noted by Binnie J., "[t]he transparency and accountability of government are issues of enormous public importance" (*R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 at para. 70). These principles are not promoted by allowing government officials to claim "secret" undisclosed exceptions to publicly available policies and rules affecting individual rights in the absence of clear statutory authority to do so.

[39] I would consequently grant this appeal, set aside the judgment of the applications judge, quash the decision of the Chair of the CTA denying the appellant's grievance, and return the matter to the Chair of the CTA for a new determination of the appellant's grievance with the direction to apply to the appellant the Work Force Adjustment Directive. I would also grant the appellant her costs in this appeal and in the Federal Court.

"Robert M. Mainville"
J.A.

"I agree
K. Sharlow J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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