Federal Court of Appeal  Cour d'appel fédérale

Date: 20200205

Docket: A-393-18

Citation: 2020 FCA 37

CORAM: **WEBB J.A.**
NEAR J.A.
LASKIN J.A.

BETWEEN:

CANADIAN HELICOPTERS LIMITED doing business as CANADIAN HELICOPTERS OFFSHORE

Applicant

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION

Respondent

Heard at Halifax, Nova Scotia, on October 31, 2019.

Judgment delivered at Ottawa, Ontario, on February 5, 2020.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Introduction

[1] Canadian Helicopters Limited seeks judicial review of a decision of the Canada Industrial Relations Board (2018 CIRB 891). In the portion of the decision CHL challenges, the Board granted a declaration, as sought by the respondent union, that CHL violated the freeze provisions

of subsection 24(4) of the *Canada Labour Code*, R.S.C. 1985, c. L-2. It did so, the Board concluded, by implementing a schedule and a wage structure for newly hired pilots that were less favourable than those of pilots employed by CHL at the time the union applied for certification.

[2] For the reasons set out below, I would dismiss the application. Based on the facts which the Board found and was entitled to find on the record before it, I cannot say that its decision was unreasonable.

II. Background

[3] CHL provides a ferry service by helicopter from Halifax to offshore oil operations. In 2017 it had two clients, Exxon and Encana, and employed 12 pilots to service them. These pilots all worked on what is known as a 1:1 schedule or the "Shell model" – for each day worked, they were entitled to one day off. For any overtime, they received 1.5 times their regular rate.

[4] In the spring of 2017, CHL became aware of an opportunity to bid to provide services to a third client, BP, for a six-month period from April to September 2018. It submitted a bid in July 2017. In October 2017, it learned that it was the successful bidder.

[5] In early December 2017, CHL began recruiting for six temporary pilots to provide service to BP. CHL hired the six temporary pilots in January and February 2018. Unlike the 12 pilots hired earlier, they were hired to work on a 2:1 schedule – for every two days worked they were entitled to one day off. They also had no entitlement to overtime pay at a higher rate for days worked beyond their normal schedule.

[6] In the meantime, on January 12, 2018, the union applied to the Board for certification. The Board granted certification in February 2018.

[7] Shortly before certification was granted, the union filed a complaint with the Board, alleging that CHL had violated the freeze provisions of subsection 24(4) of the Code by hiring the six temporary pilots on terms as to work schedule and wage structure that differed from those applicable on January 12, 2018, when the union applied for certification. Subsection 24(4) reads as follows:

> **(4)** Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay, any other term or condition of employment or any right or privilege of such employees until
>
> > **(a)** the application has been withdrawn by the trade union or dismissed by the Board, or
> >
> > **(b)** thirty days have elapsed after the day on which the Board certifies the trade union as the bargaining agent for the unit,
>
> except pursuant to a collective agreement or with the consent of the Board.
>
> **(4)** Après notification de la demande d'accréditation, l'employeur ne peut modifier ni les taux des salaires, ni les autres conditions d'emploi, ni les droits ou avantages des employés de l'unité visée, sauf si les modifications se font conformément à une convention collective ou sont approuvées par le Conseil. Cette interdiction s'applique, selon le cas :
>
> > **a)** jusqu'au retrait de la demande par le syndicat ou au rejet de celle-ci par le Conseil;
> >
> > **b)** jusqu'à l'expiration des trente jours suivant l'accréditation du syndicat.

[8] In a portion of its decision that CHL does not challenge, the Board determined that the newly hired temporary pilots were included in the bargaining unit. The Board proceeded to find

that CHL had violated subsection 24(4) by unilaterally introducing different terms and conditions of employment without the union's consent, and granted a declaration to that effect.

III. The Board's findings and reasons

[9] In framing the subsection 24(4) issue, the Board observed that the parties were not disputing that the terms and conditions of employment of the pilots hired after the date of the application for certification were different from those of the pilots who were employed as of January 12, 2018. It stated that the evidence was "clear and undisputed that the newly hired temporary pilots work more and earn less than the pilots hired prior to the date of the application for certification." It noted that CHL had "decided to implement a costing model when bidding for the BP contract that differed from […] the Shell model, which was based on equal-time work schedules and overtime at a higher rate of pay than straight time" (paras. 66-67).

[10] What was disputed, it stated, was "whether the change to the pilots' terms and conditions of employment regarding wages and scheduling was already planned on the date of the application for certification such that it could be considered part of the continuity of the employer's 'business as before'" (para. 68, emphasis added).

[11] The Board found that in June 2017, CHL's management team discussed its intention to bid on the BP contract with its existing pilots. Management asked the pilot group to "think outside the box" to develop ideas for a competitive bid (para. 78). The discussions included the option of hiring new pilots and using a different shift schedule (para. 79).

[12] However, the Board found that the evidence "[failed] to establish that the discussion of a 2:1 schedule included any potential change to the overtime rate being paid to pilots." It also found no evidence that during the discussions CHL "ever suggested that it intended to use a 2:1 schedule and pay a different overtime rate" (para. 80).

[13] The Board accepted the evidence that, after June 2017, the development of the BP bid continued solely at the management level. The Board found no evidence that, during this period, management discussed with the existing pilots the possibility of modifying the 1:1 schedule and paying a different overtime rate (para. 81).

[14] The Board found that none of the options explored in the discussions with the existing pilots in June 2017 were "implemented [or] announced by [CHL] before or on January 12, 2018" (para. 82). It found the evidence to be clear that before that date, the pilots always worked on a 1:1 basis, and were compensated for overtime at 1.5 times their normal rate (para. 83). It relied in part on CHL documents in coming to this conclusion (paras. 84-88).

[15] The Board then turned to consider Board case law on the requirements of subsection 24(4) of the Code (paras. 90-91). It was settled, the Board stated, both that the union was not required to prove anti-union animus, and that any legitimate business reasons the employer may have had for making the changes were irrelevant and did not excuse a breach of the provision.

[16] The Board explained (paras. 93-95) that subsection 24(4) places an initial burden on the union to show that the condition of employment in issue existed on the date the application for

certification was filed, and that the term or condition was changed without its consent or that of the Board. Where the Board finds changes to the status quo were made by the employer, the employer has the burden of proving, if it does not have consent of the union or the Board, that the changes amount to the continuation of business based on what was in effect before the certification application was filed.

[17] The Board went on to state, again referring to Board case law, that subsection 24(4) "[does] not necessarily freeze wages and conditions of employment, but rather [imposes] a 'business as before' approach during the statutory freeze period" (para. 96). Citing *BHP Billiton Diamonds Inc.*, 2006 CIRB 353, [2006] CIRB no. 353 at paras. 50, 54, it stated (para. 98) that in undertaking the "business as before" inquiry, the Board

> will be influenced by the fact that an employer made attempts to advise, consult or inform the union of the process it was undertaking to implement a change […]. Where an employer's actions are planned or formulated, decided and communicated to employees, and effectively implemented prior to the filing of the application for certification, these actions will not be subject to the statutory freeze provisions, even if the actual start date follows the filing of the application […].

[18] Here, the Board stated, CHL's actions were "distinguishable from that scenario" (para. 99). It stated that there was no evidence that CHL consulted or advised the union or any existing pilots of its decision to hire new pilots at a different wage structure and work schedule. It went on:

> Moreover, looking at the overall circumstances of the employer's operations, the Board finds no evidence of a customary or established practice regarding the implementation of a different wage structure and work schedule. The evidence of brainstorming in early June 2017 to come up with creative ideas for staffing the

> aircraft needed for the BP contract did not include the idea of extra work with a different overtime rate.

[19] The Board stated that, on the evidence, it was only after the pilots opted to unionize that CHL decided to incorporate for newly hired pilots a 2:1 schedule with a different overtime rate for extra work (para. 100). It found that until January 12, 2018, the terms and conditions of employment of pilots at CHL did not include working on a 2:1 schedule and payment for overtime at straight time. Consequently, it stated, "unless the employer's initiative constituted 'business as before,' the employer could not unilaterally change these pre-existing terms and conditions of employment without the consent of the union" (para. 101).

[20] In coming to its conclusion on this issue, the Board stated that it "[appreciated] the imperatives" that led to the development of a new wage structure and schedule for pilots hired after the certification application. However, it found, "no evidence was provided to support the contention that the introduction of that different set of terms and conditions of employment constituted 'business as before.'" While there was evidence that CHL planned to hire temporary pilots to help with the contract with BP, and that it considered the option of a modified work schedule for the purpose of the BP contract, there was "no evidence to suggest that [CHL] had ever required a pilot to work on a 2:1 schedule without being paid for overtime at a rate of 1.5 times the daily rate of pay prior to the date of the application." It also found "no evidence that the employer's new wage structure and schedule were formulated, decided and communicated to employees, and effectively implemented prior to the date of the application for certification" (para. 102).

[21] The Board accordingly found that the new schedule and wage structure put in place for pilots hired after January 12, 2018, was not "business as before," and that CHL was therefore required to obtain the union's consent before implementing it. Since it had not done so, it had violated subsection 24(2) (para. 102).

IV. Standard of review

[22] The parties agree that the deferential standard of reasonableness applies in reviewing the Board's decision.

[23] Following the hearing of this application, the Supreme Court released two decisions providing new guidance for conducting reasonableness review: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, and *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67.

[24] These decisions establish, in brief, that in a case like this, where the administrative decision maker has given reasons for its decision, the court's role is "to review the reasons […] and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints": *Canada Post* at para. 2. Where reasons are required, judicial review thus "considers not only the outcome, but also the justification for the result […]": *Canada Post* at para. 29. "[W]here reasons are provided but they fail to provide a transparent and intelligible justification […], the decision will be unreasonable": *Vavilov* at para. 136.

[25] The recent decisions also confirm that, absent exceptional circumstances, a reviewing court should not interfere with the decision maker's factual findings. The reviewing court "must refrain from 'reweighing and reassessing the evidence considered by the decision maker'": *Vavilov* at para. 125. The decision maker must nonetheless "take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them": *Vavilov* at para. 126.

[26] The Court invited and received written submissions from the parties addressing the impact on this application of the framework set out and applied in *Vavilov* and *Canada Post*. I have considered those submissions in the analysis that follows.

V. Submissions and analysis

[27] CHL submits that neither the outcome nor the Board's reasoning process leading to the conclusion that there was a violation of the statutory freeze was reasonable. The evidence establishes, it submits, that the new work schedule included in the contracts of the temporary pilots hired to carry out the BP contract was part of the company's business planning well before the certification application was filed in January 2018. It points to, among other things, the Board's findings that the possibility of adopting a different work schedule was raised with the existing pilots in June 2017; that the company decided to implement a costing model that differed from the Shell model when it bid for the BP contract in July 2017; and that recruitment for the temporary pilots began in December 2017, though they were not actually hired until after the certification application was filed.

[28] CHL further argues that at no time did it intend to enter into a contract with BP based on a 1:1 schedule, and that there is no rational chain of analysis that could lead to a finding that it breached subsection 24(2) of the Code. The Board's reasoning, it submits, discloses a failure of rationality on the central issue before the Board, of a kind that, under the new framework for reasonableness review, renders its decision unreasonable. It further submits that the outcome is out of keeping with authorities confirming that freeze provisions are not to be used to prevent employers from attempting to adapt to changing circumstances, and that this and other factors render the Board's decision untenable.

[29] For its part, the union emphasizes the deference owed to the Board's findings of fact. It characterizes CHL's attack on the Board's decision as fundamentally not a challenge to its reasoning, but a disagreement with its factual findings. It submits that the Board's reasoning is unassailable: that because it found no evidence that the different terms and conditions for the temporary pilots constituted a continuation of business based on what was in effect before the certification application was filed, it properly found that there was a change in terms and conditions of employment inconsistent with "business as before," with the result that the employer violated the statutory freeze.

[30] I agree that the Board's factual findings are dispositive in this case. As the union submits, the Board's factual findings lead directly to the conclusion that the change in terms and conditions of employment went beyond "business as before." On the record before the Board, I do not find that an unreasonable conclusion.

[31] In my view, it might have been open to the Board, in the absence of direct evidence, to draw inferences on the record before it that were more supportive of CHL's position. It might have inferred that the costing model on which CHL's BP bid in July 2017 was based not only differed from the Shell model, but assumed both a 1:1 work schedule and overtime at the regular rate – the terms ultimately adopted for the temporary pilots. Similarly, it might have inferred that recruitment of temporary pilots was carried out on the same basis, and that the changed costing model was communicated to potential hires before the certification application was filed. These two inferences might themselves have been sufficient for the Board to come to a different conclusion on "business as before."

[32] But as set out in the passage from *Vavilov* quoted above, it is not the Court's role to reweigh and reassess the evidence considered by the decision maker. On the evidence before it, the Board chose not to draw inferences in the absence of direct evidence of these matters, and I cannot say that it was wrong in failing to do so.

[33] That is especially so when CHL could have put before the Board clear evidence of the costing model that it adopted, rather than leaving it as a matter of possible inference. It apparently chose not to do so; we were directed to no evidence of this kind. Similarly, CHL could also have put before the Board clear evidence of what was communicated to prospective hires about work schedules and overtime in the recruitment process that began in December 2017, rather than leaving it as a matter of possible inference. Again, we were directed to no evidence of this kind. Particularly in light of these evidentiary choices, I see no basis for interfering with the Board's decision.

VI. Proposed disposition

[34] For these reasons, I would dismiss the application. In accordance with the parties' agreement, I would order costs in favour of the union fixed at $5,000.00, all-inclusive.

VII. Postscript

[35] Before concluding, I should make it clear that in coming to a view as to the proper disposition of this application, I have not considered a possible argument that was raised by the Court with the parties during the hearing, and that might have been open to CHL based on the Supreme Court's decision in the *Wal-Mart* case, *United Food and Commercial Workers, Local 503 v. Wal‑Mart Canada Corp.*, 2014 SCC 45, [2014] 2 S.C.R. 323. There the Court stated (at para. 57) that

> a change can be found to be consistent with the employer's "normal management policy" if (1) it is consistent with the employer's past management practices or, failing that, (2) it is consistent with the decision that a reasonable employer would have made in the same circumstances.

[36] The parties agree that the second ground referred to in *Wal-Mart* was not argued before the Board. It therefore cannot provide a proper basis to set aside the Board's decision, even if it might have resulted in a different outcome before the Board if it had been raised.

"J.B. Laskin"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-393-18
(APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE CANADA INDUSTRIAL RELATIONS BOARD DATED NOVEMBER 1, 2018 FILE NUMBER 32455-C)	
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PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
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CONCURRED IN BY:	WEBB J.A. NEAR J.A.
DATED:	FEBRUARY 5, 2020

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