Federal Court of Appeal | Cour d'appel fédérale

Date: 20241202

Docket: A-168-23

Citation: 2024 FCA 207

CORAM: **STRATAS J.A.**
MONAGHAN J.A.
HECKMAN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

VÉRONIQUE ST-ONGE

Respondent

Heard at Ottawa, Ontario, on April 24, 2024.

Judgment delivered at Ottawa, Ontario, on December 2, 2024.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: STRATAS J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] The applicant, the Attorney General of Canada, seeks judicial review of a decision of the Federal Public Sector Labour Relations and Employment Board (Board) allowing a grievance by Véronique St-Onge, the respondent: 2023 FPSLREB 57.

[2] The grievance arose because the respondent's employer, the National Research Council of Canada, sought to recover amounts it mistakenly paid to the respondent between April 17, 2019 and June 12, 2019, while she was on leave without pay. On March 10, 2022, the respondent's employer notified the respondent that it would begin recovering the overpayment by withholding a portion of her salary. The respondent grieved.

[3] Before the Board, the parties agreed that section 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, applied to the employer's action to collect the overpayment, but disagreed as to how it applied.

[4] Section 32 provides as follows:

Provincial laws applicable	**Règles applicables**
32 Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	**32** Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

[5] In her grievance, the respondent argued that Ontario's two-year limitation period applied because the cause of action arose in Ontario and the employer's claim to the overpayment was therefore statute-barred. In contrast, the applicant argued that the federal six-year limitation

period applied because the cause of action arose “otherwise than in a province”. In support of its position, the applicant relied principally on *Markevich v. Canada*, 2003 SCC 9 [*Markevich*] and *Dansou v. Canada Revenue Agency*, 2020 FPSLREB 100 [*Dansou*].

[6] *Markevich* concerned proceedings to collect taxes owing under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). In that case, after finding that section 32 of the *Crown Liability and Proceedings Act* was sufficiently broad to apply to statutory collection procedures under the *Income Tax Act*, the Supreme Court had to determine whether the cause of action on the federal tax debt arose in a province or otherwise than in a province.

[7] The Supreme Court observed that tax debts arise under federal legislation, create rights and duties between the federal Crown and residents of Canada or those who earn income within Canada, and are owed to the federal Crown which is not located in any particular province and does not assume a provincial locale in its assessment of taxes: *Markevich* at paras. 39-40. In its view, “on a plain reading of s. 32, the cause of action in [*Markevich*] arose ‘otherwise than in a province’” and “[a] purposive reading of s. 32 support[ed] this finding” because Parliament “intended for limitation provisions to apply uniformly throughout the country with regard to proceedings of the kind at issue in [that] appeal”: *Markevich* at paras. 39-40. The Supreme Court thus decided that an action to collect tax debts under the *Income Tax Act* arose otherwise than in a province so the provincial limitation period did not apply: *Markevich* at para. 41.

[8] *Dansou* concerned an overpayment to a unionized employee. There, too, the Board sought “to locate the ‘cause of action’” and determined that it arose otherwise than in Quebec,

where the grievor lived and worked: *Dansou* at para. 30. The Board characterized the cause of action as "involv[ing] pay and the calculation of the salary level", observing that "[t]he calculation is performed by the CRA, which conducts its operations across Canada…[and] is headquartered in Ottawa. The pay calculation is carried out based on the collective agreement, which applies across the country": *Dansou* at para. 30.

[9] Notwithstanding those decisions, the Board agreed with the respondent in this case, allowed her grievance, and ordered the employer to stop payroll deductions to recover the overpayment and to repay the respondent amounts previously deducted. The applicant now seeks judicial review of that decision.

[10] I agree with the parties that the reasonableness standard applies to this Court's review of the merits of the Board's decision: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 16, 85 [*Vavilov*]; *Kenny v. Canada (Attorney General)*, 2022 FCA 212 at para. 5; *Andrews v. Public Service Alliance of Canada*, 2022 FCA 159 at para. 25, leave to appeal to SCC refused, 40451 (16 February 2023).

[11] Here, citing *Vavilov* at paragraphs 101, 194, the applicant submits that the Board's decision is unreasonable in light of the relevant factual and legal constraints that bear upon it. In particular, the applicant asserts the Board's decision suffers from three "major shortcomings that, both individually and collectively, irremediably affect the reasonableness of the [Board's] decision": Applicant's Memorandum of Fact and Law at para. 14.

[12] The first is that the Board failed to apply the modern principle of statutory interpretation when it interpreted section 32, and specifically failed to examine the context and purpose of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2, and subsection 155(3) of the *Financial Administration Act*, R.S.C. 1985, c. F-11. (The latter provision grants the federal Crown the authority to recover overpayments made "on account of salary, wages, pay or pay and allowances out of any sum of money that may be due or payable… to the person to whom the over-payment was made".) This, the applicant says, renders the Board's decision unreasonable.

[13] I disagree with this proposition. The Board's task was to apply, not interpret, section 32 of the *Crown Liability and Proceedings Act*. Because that provision is of general application, it was not unreasonable for the Board to consider the purpose and context of the other two Acts as irrelevant to its interpretation. Section 32 has been interpreted previously, including by the Supreme Court of Canada in *Markevich*, as the Board expressly recognized: reasons at para. 32. The Board said its task was to analyze the facts to determine whether the cause of action arose "otherwise than in a province", as section 32 requires. It noted that in *Markevich* the Supreme Court defined a "cause of action" as "a set of facts that provides the basis for an action in court": reasons at para. 62, citing *Markevich* at para. 27.

[14] The second shortcoming, the applicant submits, is that a decision allowing different limitation periods to apply to federal public servants governed by the same national collective agreement is *per se* an outcome outside the range of possible, acceptable outcomes, and thus is unreasonable: Applicant's Memorandum of Fact and Law at para. 38.

[15] Again, I disagree. The dispute before the Board was not whether section 32 of the *Crown Liability and Proceedings Act* applied, but *how* it applied to the facts of this case. The Board decided the analysis turned on where the cause of action arose, and not the national scope of the collective agreement or the national nature of the Crown. This was reasonable notwithstanding the Board's description of section 32 as providing a presumption that provincial limitation periods apply, a statement about which I have considerable doubt.

[16] Finally, the applicant submits, the Board failed to reasonably justify its departure from its own decision in *Dansou* and from *Markevich* when it concluded the cause of action arose "otherwise than in a province": Applicant's Memorandum of Fact and Law at para. 25.

[17] Over several paragraphs in its reasons, the Board discussed both cases and explained why it considered them distinguishable and not determinative of the question before it: see reasons at paras. 76-89. I am not persuaded that those distinctions are *per se* unreasonable.

[18] That said, I agree the Board's decision is unreasonable.

[19] A cause of action arises in a province only where all the relevant elements of that cause of action occurred in the same province: *Canada v. Maritime Group (Canada) Inc.*, [1995] 3 F.C. 124, 185 N.R. 104 (F.C.A.) at 129; *Apotex Inc. v. Astrazeneca Canada Inc*., 2017 FCA 9 at para. 114, leave to appeal to SCC refused, 37478 (1 June 2017) [*Apotex*]; *Sanofi-Aventis v. Apotex Inc.*, 2013 FCA 186 at para. 105; *Canada (Attorney General) v. Liang*, 2018 FCA 39 at para. 19.

[20] Here, the Board failed to identify the relevant cause of action, despite the parties' written submissions to the Board on this point.

[21] In particular, the respondent submitted that there were two possible causes of action to recover the overpayment—breach of contract or unjust enrichment—but regardless, all of the essential facts occurred in Ontario, so the cause of action arose in Ontario: Written Submissions of the Grievors (Limitations Period Issue) at para. 22, Applicant's Record at 174.

[22] Although the applicant did not use the phrase "cause of action", it analogized the circumstances in this case to those in *Markevich*, submitting that a salary overpayment that is made contrary to the terms of a national collective agreement gave rise to a federal debt that can be collected under a federal statutory procedure—subsection 155(3) of the *Financial Administration Act*.

[23] While we must review the Board's reasons in light of the history and context of the proceedings giving rise to those reasons, the reasons must also "meaningfully grapple with [the] key issues": *Vavilov* at paras. 94, 128. Here, the Board concluded that where the cause of action in question arose was determinative, but it made no effort to identify the precise cause of action, and thus proceeded otherwise than as required by the very jurisprudence it cited, including *Markevich* and *Apotex*.

[24] In light of this, at the hearing of the application, we asked the parties to identify the cause of action, suggesting that a claim for breach of contract against the respondent seemed inapt

since the respondent does not appear to have breached the collective agreement. We sought supplementary written submissions regarding the cause of action and the operation of subsection 155(3) of the *Financial Administration Act*.

[25] The parties agree that subsection 155(3) provides the Receiver General with a mechanism to recover an overpayment, but disagree as to its effect.

[26] The respondent says there can be no overpayment without a cause of action—"[s]omething must make the overpayment an overpayment": Respondent's Further Written Submissions at 3. She submits that the cause of action is the common law claim of restitution for money paid under a mistake of fact, and that all of the elements of that cause of action arose in Ontario.

[27] The applicant's submission regarding the cause of action is not as clear as it might be. On the one hand, it describes subsection 155(3) as "not a cause of action in itself" and instead the cause of action is the set of facts referred to in subsection 155(3) as needed for its exercise: Applicant's Further Written Submissions at paras. 11, 14.

[28] On the other hand, the applicant suggests that subsection 155(3) authorizes the federal Crown to recover the overpayment, such that the elements of a cause of action for restitution in common law are neither relevant nor engaged: Applicant's Further Written Submissions at para. 16. Specifically, the applicant asserts that "none of the relevant facts underlying the exercise of ss. 155(3) of the [*Financial Administration Act*] were in any way affected by the province in

which the [r]espondent worked". Rather, "[t]he overpayment…was a misapplication of the [c]ollective [a]greement" which "comprehensively defines the [r]espondent's pay and provides the very basis for determining the existence of the overpayment": Applicant's Further Written Submissions at para. 18; Applicant's Reply at para. 1. That appears to be an argument that the exercise of the right under subsection 155(3) is the cause of action.

[29] Put another way, or as I understand the applicant's position, absent subsection 155(3), the applicant would have been required to initiate an action to establish that the respondent was indebted to her employer. However, the federal Crown's authority to exercise its right under that provision depends only on there being an overpayment, and no common law cause of action is necessary to establish it.

[30] Courts should generally respect Parliament's intention that administrative decision-makers decide the matters entrusted to them: *Vavilov* at para. 142. That principle applies here. Each party takes a different position on the nature of the cause of action—a common law action for restitution or an action to enforce the exercise of a statutory right to recover an overpayment. I have not been persuaded that only one is possible such that the result before the Board is inevitable.

[31] Accordingly, I would grant the application for judicial review, and remit the matter to the Board for redetermination. To apply section 32 of the *Crown Liability and Proceedings Act*, the Board must decide on the relevant cause of action, identify its constituent elements and decide whether they all arise in a province. As the applicant did not seek costs, I would award none.

"K.A. Siobhan Monaghan"
J.A.

"I agree.
David Stratas J.A."

"I agree.
Gerald Heckman J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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