Federal Court of Appeal  Cour d'appel fédérale

Date: 20131008

Docket: A-119-13

Citation: 2013 FCA 237

CORAM: **NOËL J.A.**
DAWSON J.A.
MAINVILLE J.A.

BETWEEN:

LIBRARY OF PARLIAMENT

Applicant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Respondent

Heard at Ottawa, Ontario, on September 18, 2013.

Judgment delivered at Ottawa, Ontario, on October 8, 2013.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NOËL J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] These reasons concern an application for judicial review brought by the Library of Parliament (Library) under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 with respect to a decision dated February 26, 2013 bearing citation 2013 PSLRB 18 (Decision) rendered by a panel of the Public Service Labour Relations Board (Board) declaring that the Library had violated section 39 of the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.) (Act) by implementing a new Workforce Adjustment Policy (WFA policy) after a notice to bargain

collectively had been given (June 28, 2011) and before an arbitral award establishing terms and conditions of employment had been made (February 1, 2013).

Factual Background

[2] The facts are not in dispute. These are set out in a long agreed statement of facts reproduced at paragraph 3 of the Board's Decision. For the purposes of this judicial review application, the salient facts may be briefly set out as follows.

[3] The Library of Parliament offers information, reference and research services to Parliamentarians. It is an 'employer' under the meaning of the Act. Some of its employees are represented for collective bargaining purposes by the respondent Canadian Association of Professional Employees (CAPE).

[4] The collective agreement negotiated between the Library and CAPE has contained for many years the following article 38:

> **ARTICLE 38**
> JOB SECURITY
> 38.01 The employer shall make every reasonable effort not to lay off employees during the term of this Agreement and to ensure that reductions in the work force are accomplished through attrition. This is subject to the willingness and capacity of individual employees, who would otherwise be laid off, to undergo retraining and accept reassignment.

[5] The Library also adopted guidelines known as the *Redeployment of Human Resources Surplus Employees* ("Guidelines"), for the purpose of minimizing the impact of surplus situations on indeterminate employees. Under the Guidelines, this purpose was to be achieved "primarily through ensuring that other employment opportunities are provided to employees who have been

declared surplus": Guidelines, purpose provision, reproduced at p. 115 of the Application Record ("AR").

[6] However, starting in January 2011, internal work was carried out by the management of the Library to develop a new policy concerning employee layoffs.

[7] The collective agreement between the Library and CAPE expired on June 15, 2011, and CAPE submitted a notice to bargain collectively on June 28, 2011. At the end of August, 2011, the Library and CAPE exchanged bargaining proposals. None of these proposals addressed any issues related to work force adjustment or job security. Collective bargaining ensued until April 4, 2012, when CAPE filed a notice of request for arbitration pursuant to section 50 of the Act.

[8] On December 2, 2011, in light of possible lay-offs in the public service, a CAPE representative inquired whether the Library had any mechanisms to address budgetary constraints. In response, the Library provided a copy of the Guidelines, but with the caveat that it was in the process of developing a new WFA policy. For the first time on April 26, 2012, the Library forwarded to CAPE a copy of the draft WFA policy, and requested consultations with CAPE on its content.

[9] CAPE refused to discuss the draft WFA policy on the grounds that notice to bargain collectively had been issued, the issue of workforce adjustment had not been raised by either party in collective bargaining, and that a "statutory freeze" applied.

[10] The new WFA policy was nevertheless approved by the Library on May 29, 2012. On June 21, 2012 a reduction of 2.5% in the Library's budget was also approved by the Speakers of the House of Commons and of the Senate. Some 36 positions at the Library would eventually be affected by this budgetary measure.

[11] On August 3, 2012, CAPE brought a reference to the Board under section 70 of the Act alleging that by implementing the WFA policy, the Library had violated section 39 of the Act known as the "statutory freeze" provision.

[12] It later turned out that no employee covered by CAPE's bargaining certificate was in fact affected by the budgetary measure, and consequently the WFA policy was not applied by the Library to positions held by CAPE members. The Library nevertheless maintains that the WFA policy is in force and that it applies to the employees forming part of CAPE's bargaining unit.

The Legislative Framework

[13] In light of the exceptional constitutional position of the House of Commons and the Senate, the Act provides for a special regime governing labour relations for employees who work in these institutions and in closely related institutions, such as the Library.

[14] The collective bargaining process within the Library is based on a system of good faith negotiation and conciliation. In the event of a deadlock in negotiations, recourse to binding arbitration by the Board may be sought, since the employees are precluded from striking.

[15] The Act governs the collective bargaining process by setting out a framework in which bargaining occurs. Notice to bargain may be provided within specific timelines: section 37. Once notice is given, the parties are compelled to "meet and commence to bargain collectively in good faith and make every reasonable effort to conclude a collective agreement": section 38. Where notice to bargain collectively has been given, the terms or condition of employment applicable to the employees that may be embodied in a collective agreement, and that are then in force, must remain in force until the bargaining or arbitration process has run its course: section 39 of the Act.

[16] The precise terms of section 39 of the Act are as follows:

39. Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given shall remain in force and shall be observed by the employer affected, the bargaining agent for the bargaining unit and the employees in the bargaining unit, except as otherwise provided by any agreement in that behalf that may be entered into by the employer and the bargaining agent, until such time as	**39.** Sauf entente à l'effet contraire entre l'employeur et l'agent négociateur, toute condition d'emploi pouvant figurer dans une convention collective et encore en vigueur au moment où l'avis de négocier a été donné continue de lier les parties aux négociations, y compris les employés de l'unité de négociation :
(*a*) a collective agreement has been entered into by the parties and no request for arbitration in respect of that term or condition of employment, or in respect of any term or condition of employment proposed to be substituted therefor, has been made in the manner and within the time prescribed therefor by this Part; or	*a*) soit jusqu'à la conclusion d'une convention collective, si cette condition d'emploi ou une autre condition proposée à sa place n'a pas fait l'objet d'une demande d'arbitrage dans les conditions prévues par la présente partie;

(*b*) a request for arbitration in respect of that term or condition of employment, or in respect of any term or condition of employment proposed to be substituted therefor, has been made in accordance with this Part and a collective agreement has been entered into or an arbitral award has been rendered in respect thereof.	*b*) soit, si cette condition d'emploi ou une autre proposée à sa place fait l'objet d'une demande d'arbitrage dans les conditions prévues par la présente partie, jusqu'au règlement de la question par une convention collective ou une décision arbitrale.

[17] Though the drafting of this provision is somewhat deficient, both litigants agree that the contemplated duration of the "statutory freeze" required by section 39 runs from the time the notice to bargain collectively has been given until the time a new collective agreement, or an arbitration award in lieu thereof, has come into force. I agree that this is the correct reading.

The Decision of the Board

[18] The Board found that even though the Guidelines and the WFA policy were not embodied in the collective agreement, both nevertheless pertained to terms and conditions of employment which could be embodied therein. It noted that "the fact that arbitral awards cannot deal with layoff procedures or processes under section 55 of the [Act] does not mean that layoff issues may not be embodied by the parties in a collective agreement", adding that "[i]n fact, it is quite common to find similar WFA policies incorporated into collective agreements in the public sector": Decision at para. 14. The Board consequently concluded that the terms and conditions set out in the Guidelines were contemplated by section 39 of the Act.

[19] The Board also found that the WFA policy substantially and fundamentally changed the terms and conditions of employment set out in the Guidelines: Decision at para. 15. It reached that

conclusion through a review of the terms of both documents. It also found support for this in an internal memo from the Library's Chief of Employment Relations and Classification which recommended that the Library's Guidelines be reviewed and modified in light of the fact that they practically made the concept of layoff inexistent.

[20] The Board also concluded that the introduction of the WFA policy was not the result of normal business practice or business as usual by the Library, but rather amounted to a unilateral change in its employees' terms and conditions of employment in a manner prohibited by section 39 of the Act: Decision at para. 16. Moreover, the Board did not accept the Library's submission that the absence of the WFA policy would paralyze its operations: Decision at para. 17.

[21] The Board refused to consider the Library's *bona fide* business reasons for introducing the WFA policy on the ground that this was not material to its determination. The Board justified this refusal as follows (Decision at para. 18): "No matter how valid the reasons for introducing the WFA policy may have been, it still amounted to a violation of section 39 that could not be saved by the 'business as usual' or by the 'reasonable expectation' exception. In these circumstances, it was simply not practical to infer that the concerned employees or their bargaining agent should reasonably have expected the implementation of a new WFA policy during the freeze."

[22] The Board noted that by the time its decision was made, the "statutory freeze" provided by section 39 of the Act had expired. It also noted that none of the employees represented by CAPE were affected by the introduction of the WFA policy. It therefore concluded that "there are no practical consequences that resulted from this violation": Decision at para. 21. It consequently

limited the available remedy to a declaration that the Library violated section 39 of the Act when it implemented its WFA policy during the statutory freeze period contemplated by that section, namely from June 28, 2011 (the date of the notice to bargain collectively) to February 1, 2013 (the date of the arbitral award). The Board added that its reasons "do not propose to address the issue of whether or not the employer could or should reintroduce its WFA policy at a later date, now that the statutory freeze is no longer in effect": Decision para. 22.

The Issues raised by the Library's application

[23] The Library's principal submission is that the Board erred in finding that the Guidelines and the WFA policy were terms and conditions of employment that may be embodied in a collective agreement as contemplated by section 39 of the Act. It relies for this purpose on subsections 5(3) and 55(2) of the Act. Subsection 5(3) seeks to preserve the management rights of the Library, while subsection 55(2) restricts the Board from dealing in arbitration with the lay-off or release of employees. These subsections read as follows:

5. (3) Nothing in this Part shall be construed to affect the right or authority of an employer to determine the organization of the employer and to assign duties and classify positions of employment.	**5.** (3) La présente partie n'a pas pour effet de porter atteinte au droit ou à l'autorité de l'employeur quant à l'organisation de ses services, à l'attribution des fonctions aux postes et à la classification de ces derniers.
55. (2) No arbitral award shall deal with the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees, or with any term or condition of employment of employees that was not a subject of negotiation between the parties during the period before arbitration was requested in respect thereof.	**55.** (2) Sont exclues du champ des décisions arbitrales les normes, procédures ou méthodes régissant la nomination, l'évaluation, l'avancement, la rétrogradation, la mutation, la mise en disponibilité ou le renvoi d'employés, ainsi que toute condition d'emploi n'ayant pas fait l'objet de négociations entre les parties avant que ne soit demandé l'arbitrage à son sujet.

[24] As subsidiary arguments, the Library first submits that the Board unreasonably interpreted the Guidelines as being substantially different from the WFA Policy; it should have rather found that the WFA policy was simply "an enhanced and re-packaged version of the pre-existing guidelines": Library's memorandum at para. 65. Somewhat in contradiction with this first submission, the Library also adds that the Board acted unreasonably and erred in law in the application of the business as usual test by refusing to consider the special economic circumstances that prompted the introduction of its new WFA policy and its *bona fide* business reasons for doing so.

Standard of Review

[25] The issues raised by the Library involve the interpretation and application by the Board of the provisions of the Act, notably subsections 5(3) and 55(2) and section 39, as well as the Board's assessment of the contents of the Guidelines and of the WFA policy.

[26] In *Public Service Alliance v. Senate of Canada*, 2011 FCA 214, 336 D.L.R. (4th) 540 at paras. 18 to 31, this Court carried out a full standard of review analysis with respect to the Board's interpretation and application of subsection 55(2) of the Act, and concluded that the applicable standard of review was that of reasonableness. That same analysis applies to the Board's interpretation and application of subsection 5(3) and section 39 of the Act. I will therefore apply that standard to all the issues raised by the Library in its application.

Analysis

First Issue: Are the Guidelines and the WFA policy contemplated by section 39 of the Act?

[27] The Guidelines deal with the principles and processes the Library is to apply when dealing with surplus employee situations. They notably set out the principle that "[e]very surplus employee will be guaranteed an employment offer in the Library of Parliament to a position where their skills, abilities and potential will be used productively": Guidelines s. 1.4. They also provide a range of options that are available to the Library where a surplus employee does not voluntarily leave, including redeployment, retraining, referrals, salary protection, and other measures. The WFA policy deals with substantially the same issues as the Guidelines, but provides for different principles and options to deal with surplus employee situations.

[28] I have no reservation finding that both the Guidelines and the WFA policy include terms or conditions of employment. The question raised by the Library is whether these terms or conditions of employment are precluded from ever forming part of a collective agreement by the operation of subsections 5(3) or 55(2) of the Act? In my view, the Board properly held that the answer is no.

[29] Subsection 5(3) sets out that the provisions of the Act dealing with staff relations do not affect the right or authority of the Library to determine its organization, to assign duties and to classify positions of employment. These management prerogatives are thus unaffected by the Act. However, nothing precludes the Library from voluntarily restricting its management rights over these matters by agreeing to include provisions in the collective agreement which will have this effect. This is precisely what the Library did when it agreed to include in the collective agreement Article 38 (reproduced above) which deals with job security.

[30] As for subsection 55(2) of the Act, though it precludes the Board from including in an arbitral award provisions relating to the lay-off or release of employees, that statutory restriction does not extend to the terms of a collective agreement freely negotiated by the Library.

[31] Moreover, to be captured by section 39 of the Act, the terms or conditions of employment themselves need not necessarily be embodied in a collective agreement. Section 39 itself refers to terms or conditions of employment that "may" be embodied in a collective agreement. As noted by Justice Urie in *The Queen v. Canadian Air Traffic Control Association*, [1982] 2 F.C. 80 at p. 89 when dealing with a similar statutory provision:

> There is no doubt that the policy of permitting air traffic controllers to refuse to work overtime is one which might have been or "may be" in the future, embodied in a collective agreement. I take it that the words "may be embodied" as they appear in section 51 mean that the term or condition of employment is "capable of being embodied" in the agreement. There is equally no question, as I see it, that the policy, so long as it subsisted, constituted, or resulted in, a term or condition of employment. Undoubtedly during the term of the agreement that policy which was, in effect, an unwritten amendment to article 15 could have been rescinded by the employer. (I leave aside the question of whether the bargaining agent or the employees must be consulted before such rescission.) However, at the time that notice to bargain was given no such rescission had been made and the policy, which, as I have said, effectively provided one of the terms or conditions of employment, was "in force" at that time.

[32] Since subsections 5(3) and 55(2) of the Act do not preclude the terms or conditions of employment set out in the Guidelines from being embodied in a collective agreement, these terms or conditions of employment are consequently contemplated by section 39 of the Act.

[33] The Library also submits that the Board's reasons were inadequate in that they failed to specifically address subsection 5(3) of the Act. The Library's submissions on the inadequacy of the Board's reasons rest entirely on this Court's decision in *Vancouver International Airport Authority*

v. P.S.A.C., 2010 FCA 158, 320 D.L.R. (4th) 733. However, since that decision was released, the Supreme Court of Canada has provided guidance as to the adequacy of the reasons issued by administrative tribunals, most notably in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708. As noted by a unanimous Supreme Court of Canada in *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405 at para. 3: "This Court has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable." This approach was again recently reiterated in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 53.

[34] In this case, the Board implicitly dealt with subsection 5(3) of the Act in its reasons by finding that the terms or conditions of employment set out in the Guidelines could be embodied in a collective agreement. The Board's decision in that respect, when viewed as a whole, is reasonable even though it did not explicitly refer to subsection 5(3).

Second Issue: Are the Guidelines substantially different from the WFA Policy?

[35] I have no hesitation in finding that the Board reasonably concluded that the WFA policy was substantially and fundamentally different from the Guidelines. The differences in both documents are abundant. I need only note the following examples to illustrate that these differences are also fundamental.

[36] As noted above, the Guidelines set out the principle that every surplus employee will be guaranteed an employment offer in the Library to a position where their skills, abilities and potential will be used productively. This undertaking has not been reiterated in the WFA policy. Moreover, under the Guidelines, the onus is on the Library to actively seek employment opportunities for surplus employees, while under the WFA policy, the onus is placed on the surplus employee. These are substantial and fundamental differences.

Third Issue: Did the Board err by refusing to consider special economic circumstances?

[37] The obligation for the employer to maintain the terms and conditions of employment for the period during which negotiations to renew a collective labour agreement must take place is a common statutory requirement: *Canada Labour Code*, R.S.C. 1985, c. L-2 at s. 50; *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, at s. 107. This legislated requirement does not however impede the employer from continuing to make changes to the working conditions which are not set out in a collective agreement when it is its customary or established practice to do so. This is known as the "business as usual" exception: see, *inter alia*, *Public Service Alliance of Canada v. BHP Billion Diamonds Inc.*, 2006 CIRB 353.

[38] In this case, the Board found that the introduction of the WFA policy "was not the result of normal business practice or business as usual on the employer's part": Decision at para. 16. This was a reasonable finding of fact by the Board which is amply supported by the evidence.

[39] The Library however submits that the Board should have considered the new and unforeseen circumstances resulting from the decision to reduce its budget by 2.5%, which was in

the Library's view a *bona fide* business reason for introducing the WFA policy: Library's memorandum at paras. 68 to 71.

[40] Though I would not necessarily exclude the possibility for an employer to make changes to the terms and conditions of employment during a "statutory freeze" period where very exceptional and extraordinary circumstances beyond its control arise, I need not decide this issue in this case. Indeed, it is abundantly clear from the evidence that no position subject to the bargaining unit was affected by the budgetary reductions. In these circumstances, the Library's submissions lack a factual foundation with respect to the employees in CAPE's bargaining unit.

Conclusion

[41] For the reasons set out above, I conclude that the Board's decision was reasonable. I would therefore dismiss the judicial review application with costs in favour of the respondent.

"Robert M. Mainville"
J.A.

"I agree
Marc Noël J.A."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-119-13

APPLICATION FOR JUDICIAL REVIEW WITH RESPECT TO A DECISION OF THE PUBLIC SERVICE LABOUR RELATIONS BOARD CITED AS 2013 PSLRB 18

STYLE OF CAUSE:	LIBRARY OF PARLIAMENT v. CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 18, 2013
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	NOËL J.A. DAWSON J.A.
DATED:	OCTOBER 8, 2013

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