Federal Court of Appeal  Cour d'appel fédérale

Date: 20141113

Docket: A-104-14

Citation: 2014 FCA 264

CORAM: **NADON J.A.**
SCOTT J.A.
BOIVIN J.A.

BETWEEN:

CONSEIL DE LA NATION HURONNE-WENDAT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Québec, Quebec, on October 20, 2014.

Judgment delivered at Ottawa, Ontario, on November 13, 2014.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: NADON J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] This is an appeal from a decision of the Honourable Madam Justice Gagné of the Federal Court (the judge), dated January 27, 2014. The judge dismissed an action in damages whereby the Conseil de la Nation Huronne-Wendat (the appellant) sought damages from the Department of Indian Affairs and Northern Development (Department) following its decision to cap its contribution to the funding of the defined benefit pension plan of the appellant's employees.

[2] For the reasons that follow, it is my opinion that the appeal should be dismissed.

I. Background

[3] Neither the background of the dispute nor the facts are in issue, and none of the judge's findings in this respect are being challenged.

[4] In the late 1970s, the Department decided to transfer to the various Indian band councils the responsibility of providing various government services to their members with the objective of creating an Aboriginal public service. To do so, the Department decided to fund the employers' contribution to the various pension plans, including those of band council employees.

[5] In 1979, the Native Benefits Plan, a defined benefit pension plan, was established, and the appellant joined it in 1985.

[6] In 1991, the Treasury Board, at the Department's request, approved new terms and conditions and additional funds for band employee pension plans. At the time, all employers chose a defined contribution pension plan, with the exception of four employers, including the appellant, which opted for a defined benefit pension plan.

[7] A defined benefit pension plan guarantees participating employees the pension they will receive when they retire. In order to guarantee the amount of the pension at retirement, the contributions paid by the employer and the employee vary over the years. In contrast, a defined

contribution pension plan fixes the amount of the contribution to be paid by the employer and employee until the participating employee's retirement age.

[8] In its 1991 decision, the Treasury Board set the upper limit for departmental funding at 5.5% of eligible employee payroll and determined that the employee's share of the cost had to be at least equal to the employer's share. However, the Treasury Board exempted the four defined benefit plans. In other words, the Department's funding of the actual costs of the employer's contribution was upheld for defined benefit plans. (Treasury Board decision (1991), A.B., tab 25, at pp. 350 and 419).

[9] This did not change until 2005. That year, the Treasury Board approved a new policy: the Band Employee Benefits Program (BEBP). The BEBP policy also capped the Department's funding at 5.5%, but maintained the 1991 exemption for the defined benefit pension plans.

[10] In 2007, the Department's regional office was informed by the Department's headquarters that no further funds would be transferred to fund the actual cost of the employers' contribution to defined benefit plans. In the light of this situation, the Department's regional office decided to cap the funding of the employers' contribution to defined benefit pension plans. In making this decision on April 1, 2008, the Department, therefore, stopped funding the actual cost of the appellant's defined benefit plan and capped funding in accordance with the payroll.

[11] This decision of the Department's regional office caused shortfalls for the appellant in subsequent years. Even though the 2008 and 2009 shortfalls were relatively small, they became

greater in 2010, 2011 and 2012. The appellant therefore filed an action in damages before the Federal Court in order to recover the amount corresponding to the 2008 to 2013 shortfalls.

II. Reasons of the trial judge

[12] In her reasons, the judge first rejected the preliminary argument raised by the Department, according to which the appellant should have first brought an application for judicial review within the time limits provided for in subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Citing, among other things, the decision of the Supreme Court of Canada in *Canada (Attorney General v. Telezone Inc.*, 2010 SCC 62, [2010] 3 SCR 585, the judge rejected the Department's argument and held that, in the context of an action in damages based primarily on a breach of contract, the appellant was not required to bring an application for judicial review.

[13] Continuing her analysis with respect to the issue of the Department's breach of contract, the judge refused to conclude that the Treasury Board authorization and the BEBP policy were sources of contractual obligations. More specifically, according to the judge, the BEBP policy approved by Treasury Board did not reflect a "meeting of the minds with respect to the essential elements of the contract" (judge's reasons at paragraph 37), nor did it reflect a unilateral undertaking by the Department (judge's reasons at paragraph 42). On the basis of her interpretation of the contents of the BEBP policy, the judge rejected the appellant's argument that the failure to respect the undertaking contained in the policy triggered the Department's extracontractual liability (judge's reasons at paragraph 53).

[14] Turning to the Comprehensive Funding Arrangements (CFAs), through which all of the funding granted to the appellant by the Department was transferred, the judge noted that the BEBP policy was implemented through these arrangements. The judge concluded that the CFAs in question did not reflect an undertaking on the part of the Department to cover the appellant's share of its employees' pension plan and that they contained none of the features of a unilateral contract or a contract of adhesion (articles 1372, 1380 and 1435 to 1437 of the *Code Civil du Québec*).

[15] Before this Court, the legal dispute has changed in that some of the issues before the trial judge are no longer raised and some arguments have been abandoned. For instance, the Department is not appealing from the judge's conclusion that the appellant was not required to bring an application for judicial review. In turn, the appellant informed this Court in oral argument that it was abandoning its argument based on an extracontractual fault on the part of the Department.

III. Issues

[16] This appeal therefore raises the following two issues:

1. Did the judge err in concluding that neither the Treasury Board decision authorizing the BEBP policy nor the Comprehensive Funding Arrangements between the two parties created a contractual undertaking for the Department to cover the actual cost of the appellant's contribution to its employees' defined benefit pension plan?

2. Did the judge err in failing to conclude that the Department made a formal undertaking to adopt any future recommendation from the actuary regarding the variation in the employer's contribution rate?

IV. Analysis

A. *Did the judge err in concluding that neither the Treasury Board decision authorizing the BEBP policy nor the Comprehensive Funding Arrangements between the two parties created a contractual undertaking for the Department to cover the actual cost of the appellant's contribution to its employees' defined benefit pension plan?*

[17] The standard of review to be applied to the judge's conclusions of law is that of correctness. Her findings of fact and conclusions of mixed fact and law are reviewable on the standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[18] Before this Court, the appellant essentially submits that the Department had a contractual duty under the Treasury Board decision authorizing the BEBP policy to continue to cover the actual cost, namely, all of the employer's contribution to the defined benefit pension plan. The Department therefore committed a breach of contract by capping the funding of the employer's contribution to the defined benefit pension plan since the Treasury Board's intention is reflected in the BEBP policy.

[19] Since the BEBP policy was authorized by the Treasury Board decision under the *Financial Administration Act*, R.S.C., 1985, c. F-11, in order to answer the first question, it is important, in my opinion, to determine whether the BEBP policy is a source of contractual obligations.

[20] A careful reading of the BEBP policy is sufficient to convince me that it defines and establishes a framework for the discretion conferred on the Department, nothing more. The words used in the sections entitled "Program Overview" and in Annex-3, such as "may contribute" and "may be funded", show that the BEBP policy cannot be characterized as a unilateral contract or contractual undertaking, as alleged by the appellant. Arguing the opposite would give the language a meaning that it does not bear.

[21] More specifically, if the wording of the BEBP policy authorizes the Department to pay a maximum contribution of 5.5% to an eligible employer, I cannot say that it requires it to do so, and I agree with the judge that "there is nothing to prevent [the Department] from paying a lower amount" (judge's reasons at paragraph 42). In fact, the *status quo ante* maintained by the 1991 and 2005 Treasury Board decisions, to which the appellant refers, allowed the defined benefit plans to continue in their existing form and cannot be interpreted as an obligation on the part of the Department to fund the actual cost of the appellant's contribution.

[22] Consequently, it is my view that the judge did not err in her interpretation of the Treasury Board decision and the BEBP policy.

[23] The contractual relationship alleged by the appellant exists, but its source is rather in the CFAs (A.B., tabs 29 and 30). Indeed, the BEBP policy is implemented through the CFAs for a specific period. But it is the CFAs that give effect to the transfer of the funding granted to the appellant by the Department. While the appellant does not submit that the Department breached

the CFAs, it does submit that the CFAs are contracts of adhesion and do not abide by the spirit of the Treasury Board decision in this matter. With respect, I cannot agree.

[24] As noted by the judge, the stakeholders knowingly entered into and signed the CFAs in question, and I agree with the judge that they do not have the characteristics of a contract of adhesion (judge's reasons at paragraph 44). Moreover, the judge observed that "[i]n the CFAs signed after April 1, 2008, the funding amounts for the BEBP reflect the cap, as interpreted by the Department, and are therefore set at about 90% of eligible employee payroll" (judge's reasons at paragraph 41). As I stated previously, there is no undertaking regarding the level of funding of the actual cost of the defined benefit plan in the Treasury Board decision or the BEBP policy. The appellant did not convince me that the judge erred when she concluded that the parties were bound by the CFAs and that these arrangements were not contrary to the spirit of the Treasury Board decision or the BEBP policy.

B. *Did the judge err in failing to conclude that the Department made a formal undertaking to adopt any future recommendation from the actuary regarding the variation in the employer's contribution rate?*

[25] Even though the appellant is no longer arguing on appeal that the Department breached its contract, it is alleging that the Department is at fault for failing to amend the level of its contribution upon the actuary's recommendation (appellant's memorandum at paragraph 41). The judge addressed this issue only briefly in her reasons, at paragraph 54:

> However, as mentioned above, because the Department is not the employer and because it has no control over the total payroll or any reductive measures that could be taken to cover an operational or solvency deficit with respect to the pension regime, deciding to cap its funding, as it did in 2008, particularly given that it is covering any variation in the employer's contribution rate recommended

> by the actuary, is a reasonable decision that constitutes sound stewardship of public funds.

[26] The Department explains that the reason for the brevity of the reasons on this point is that this aspect was argued only in part before the judge. In any event, the documents reveal that the Department was willing to consider the adjustments proposed by the actuary and not that it would follow them to the letter (A.B., vol. 1, tabs 6, 17, 18, and vol. 3, tab 44). The words used in the documents, together with the fragmentary evidence on the record regarding this issue, do not support the interpretation put forward by the appellant. It is my opinion therefore that there is no formal undertaking by the Department to adopt any future recommendation made by the actuary.

[27] For all these reasons, I would dismiss the appeal, with costs to the respondent.

"Richard Boivin"

J.A.

"I agree.
M. Nadon J.A."

"I agree.
A.F. Scott J.A."

Translation

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-104-14
STYLE OF CAUSE:	CONSEIL DE LA NATION HURONNE-WENDAT v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	OCTOBER 20, 2014
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	NADON J.A. SCOTT J.A.
DATED:	NOVEMBER 13, 2014

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