Date: 20060403

Docket: T-754-05

Citation: 2006 FC 428

Ottawa, Ontario, April 3, 2006

PRESENT: THE HONOURABLE MR. JUSTICE BLAIS

BETWEEN:

IAN HODGSON and JOHN KNIGHTON

Applicants

and

CANADA (ATTORNEY GENERAL)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, C. F-7 (the Act) of a decision rendered March 31, 2005, by Ian R. Mackenzie, a member of the Public Service Staff Relations Board (the Board) which dismissed two individual grievances and a policy grievance regarding the interpretation of a collective agreement.

RELEVANT FACTS

[2] Regional Safety Inspectors (RSIs) are federal public service employees with Transport Canada who are responsible for safety and security at airports, railways and harbours. Ian Hodgson and John Knighton (the applicants) are RSIs based at the airports in Edmonton and Vancouver respectively.

[3] The Public Service Alliance of Canada (PSAC) is the certified bargaining agent for RSIs pursuant to the *Public Service Staff Relations Act* (PSSRA). The work of RSIs is governed by the Technical Services Group collective agreement (the collective agreement) between the PSAC and the Treasury Board of Canada.

[4] Prior to September 11, 2001, RSIs were considered “day workers” and worked 7.5 hours per day between 6:00 am and 6:00 pm, Monday to Friday. Occasionally, RSIs were also scheduled to work on weekends or evenings, for which they were paid overtime.

[5] Shortly after the tragic events of September 11, 2001, Transport Canada implemented shift work for the RSIs in order to meet the needs for greater security and increased hours of operation. Representatives of Transport Canada and PSAC met to discuss these changes on numerous occasions.

[6] The union took the position that new employees could be hired as shift workers and that current employees could choose to become shift workers. However, the union was adamant that current employees who did not want to do shift work must not be required to do so without the agreement of the union.

[7] Transport Canada was of the opinion that it was under an obligation to consult with the union but that an agreement on the changes was not a requirement for implementing the shift work for all employees.

[8] The applicants Hodgson and Knighton were among approximately 14 RSIs who filed grievances regarding the imposition of shift work. The Knighton and Hodgson grievances, filed on March 27, 2002 and April 9, 2002 respectively, alleged that the employer changed the hours of work in violation of clause 25.04 of the collective agreement. The grievances also claimed for overtime and an end to the unilateral imposition of shift work.

[9] On June 10, 2003, the PSAC filed a reference under section 99 of the *PSSRA* alleging that the employer failed to reach an agreement with the union, as per the obligation found in clause 25.04(a) of the collective agreement.

DECISION OF THE BOARD

[10] The Board concluded that based on sections 7 and 11 of the *Financial Administration Act*, "… the Treasury Board may do that which is not specifically or by inference prohibited by the statute or the collective agreement." Since the PSAC was unable to persuade the adjudicator that the collective agreement constrained the employer's broad power to schedule hours of work, the grievances and section 99 reference were dismissed.

ISSUES

[11] 1. What is the appropriate standard of review in the present matter?

2. Did the Board commit a reviewable error in determining that Transport Canada could change day workers into shift workers without the consent of the bargaining agent?

ANALYSIS

[12] Counsel for the applicants raised a preliminary issue; given that one of the grievances is in regard to the interpretation of a collective agreement, the adjudicator is acting as the Board and the judicial review application should go directly to the Court of Appeal.

[13] As a result, both parties have agreed that the PSAC be removed as an applicant in this case. Therefore, this Court allows PSAC to be removed as an applicant and the style of cause is amended to reflect this change.

1. What is the appropriate standard of review in the present matter?

[14] In *Public Service Alliance of Canada v. Canada (Canadian Food Inspection Agency)* 2005 FCA 366, [2005] F.C.J. No 1849, the Federal Court of Appeal stated the following regarding the standard of review for the decisions of the Board:

> It is generally accepted that the interpretation and application of a collective agreement, including references under the PSSRA alleging its violation fall within the purview of the PSSRB's expertise and call for the highest degree of deference known as patent unreasonableness (see for instance, Barry v. Treasury Board (1997), 221 N.R. 237 (F.C.A.); Connors v. Canada (Revenue B Taxation), [2000] F.C.J. No. 477 (T.D.), (Q.L.); Attorney General of Canada v. Social Science Employees Assn. et al. 240 D.L.R. (4th) 335; White v. Canada (Treasury Board), [2004] F.C.J. No. 1231, 2004 FC 1017).

[15] In *Ryan v. Canada (Attorney General)* [2005] F.C.J. No. 110 (2005) FC 65 at paragraph 15, Justice Konrad von Finckenstein commented on the purpose of the Board:

> The purpose of the PSSRB is to allow effective collective bargaining in the public service. Issues resolved before the Board affect the entire public service and can have ripple effects for all unions. The resolution of public service disputes, thus by their very nature, are polycentric rather than bi-polar and warrant a greater degree of deference.

[16] The applicants argue, however, that the Supreme Court's decision in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609 has been interpreted by the Federal Court as calling for a lower standard of review for decisions made by PSSRA adjudicators (see *Oliver v. Canada (Customs and Revenue Agency)*, [2004] F.C.J. No. 1769 at paragraphs 7-9).

[17] I disagree with the applicants' position in light of the Federal Court of Appeal's reasoning in *Public Service Alliance of Canada v. Canada (Canadian Food Inspection Agency)*, above. The Federal Court of Appeal took issue with the assertion that the Supreme Court in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, above, changed the standard of review applicable in labour disputes to one that was less deferential. The Court said the following at paragraphs 20-23:

> The two decisions relied upon have not been construed as the applicant suggests. Indeed, the Ontario Court of Appeal specifically refused to adopt the approach proposed by the applicant in Lakeport Beverages v. Teamsters Local Union 938 (2005), [2005] O.J. No. 3488, as did the Federal Court in Currie et al. v. the Queen (CCRA), [2005] F.C.J. No. 922, 2005 FC 733. I am aware of no decision in which the pronouncement of the Supreme Court in Voice Construction and in Lethbridge Community College has been applied as the applicant proposes.
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> In addition, unlike the arbitrator in the Voice Construction decision, the Chairperson of the PSSRB is not an ad hoc adjudicator appointed by the parties. The PSSRB is a statutory tribunal created by Parliament by virtue of the PSSRA. In my view, this institutional expertise favours a more deferential standard of review, which is in stark contrast to the nature of the standard applied in Voice Construction.
>
> Furthermore, the question of whether the provisions of the collective agreement were triggered on the facts of this case is one of mixed fact and law. This again distinguishes the present application from the issue which arose in Voice Construction.

[18] The present matter deals with the complaints of two individuals, but it is a test case and as such it will have repercussions with the 12 or more other employees involved. I am also informed that the hearing of the case including witnesses and argument lasted for at least seven days.

[19] I cannot conclude that what is at issue in the case at bar is a pure question of law. The present matter deals with how the collective agreement is to be interpreted in light of a particular factual situation. Such a determination is one of mixed-fact and law. In light of the findings of the Court of Appeal and considering that the present matter deals with the interpretation and application of a collective agreement, including references under the PSSRA alleging its violation, I find that standard of review to be patent unreasonableness.

2. Did the Board commit a reviewable error in determining that Transport Canada could change day workers into shift workers without the consent of the bargaining agent?

[20] The applicants were of the opinion that clause 25.04(a) should be interpreted to mean that the respondent could not change day workers into shift workers without the agreement of the union. The respondent was of the opinion that clause 25.02 governed the transition from day work to shift work and that such changes only needed to be discussed, as opposed to being agreed to, before they could be implemented. The Board disagreed with both the applicants and the respondent.

[21] Clauses 25.04(a) and 25.02 state as follows:

25.04(a) Except as provided for in clause 25.09, the normal work week shall be thirty-seven and one-half (37 1/2) hours exclusive of lunch periods, comprising five (5) days of seven and one-half (7 1/2) hours each, Monday to Friday. The work day shall be	25.04a) Sous réserve du paragraphe 25.09, la semaine de travail normale est de trente-sept heures et demie (37 1/2), à l'exclusion des périodes de repas, réparties sur cinq (5) jours de sept heures et demie (7 1/2) chacun, du lundi au vendredi. La journée de travail

scheduled to fall within a nine (9)-hour period between the hours of 6:00 a.m. and 6:00 p.m., unless otherwise agreed in consultation between the Alliance and the Employer at the appropriate level.	est prévue à l'horaire au cours d'une période de neuf (9) heures située entre 6 h 00 et 18 h 00, à moins qu'il n'en ait été convenu autrement au cours de consultations au niveau approprié entre l'Alliance et l'Employeur.
25.02 The Employer agrees that, before a schedule of working hours is changed, the changes will be discussed with the appropriate steward of the Alliance if the change will affect a majority of the employees governed by the schedule.	25.02 L'Employeur convient, avant de modifier l'horaire des heures de travail, de discuter des modifications avec le représentant approprié de l'Alliance si la modification touche la majorité des employé-e-s assujettis à cet horaire.

[22] The applicants submit that the Board’s decision is unreasonable because it dismissed the competing understandings of the two parties who negotiated, drafted and signed the collective agreement. The applicants allege that by constructing a meaning that was not intended by either party, the Board departed from one of the basic goals of contract interpretation, namely, determining the true intentions of the parties. Further, the applicants contend that the Board’s decision is unreasonable because its interpretation of the collective agreement renders clause 25.04(a) meaningless.

[23] With regards to clause 25.04(a), the Board concluded the following:

> Clause 25.04(a) is subject to the broad exception of clause 25.09, the clause that establishes the hours of work for employees who work on an “irregular or rotating” basis. The clause goes on to establish a “normal” work week of Monday to Friday, 7.5 hours per day. The next sentence refers to core hours of work within a nine-hour period between the hours of 6:00 a.m. and 6:00 p.m. with the important proviso that these core hours can be changed on the agreement of the bargaining agent and the employer, at the appropriate level. This requirement to agree refers solely to the core hours of work, and not the average hours of work or the days of work. This would allow for an earlier start time or a later finishing time, if the bargaining agent agreed. However, it does not govern a change of hours of work that has the effect of changing a day worker into a shift worker.

[24] With regards to clause 25.02, the Board concluded the following:

> This clause does not refer to hours of work, but “a schedule of working hours.” A schedule is the way that hours and days of work are organized. As stated in *Tornblom (supra)*, a schedule is a written document. The *Concise Oxford Dictionary* (10th ed.) defines “schedule” as “a usually written plan…for future procedure typically indicating the objectives proposed, the time and sequence of each operation…” In French, the collective agreement refers to “l’horaire du travail” as “répartition des heures de travail à l’intérieur d’une période donnée: journée, semaine ou mois." A schedule can therefore be regarded as a distribution of hours of work within a fixed period. The collective agreement elsewhere reinforces this interpretation of a schedule as a fixed period by referring to the “life of a schedule" (clause 25.12(b)). I conclude, therefore, that this clause applies solely to proposed changes in the allocation of hours and days of work over a fixed period. In other words, discussion is required when the employer proposes to change a schedule of shifts or days of rest. It does not cover the situation where employees are transformed from “day workers” to “rotating or irregular” workers.

[25] I find nothing wrong with the reasoning of the Board in rejecting the parties’ interpretations of the collective agreement. After dismissing such positions, the Board went through a series of its past judgments dealing with an employer being permitted to change day workers into shift workers. The Board emphasized that the jurisprudence illustrated that the practice was allowed, however, it noted that it was unclear as to where the employer received the authority to make such a change. As

such, the jurisprudence had only a limited use. Having disagreed with the parties' interpretations of the collective agreement in terms of granting the authority to change day workers into shift workers, the Board had to look elsewhere to find where such a power was conferred. The Board found the answer by making reference to the Federal Court's findings in *Brescia v. Canada (Treasury Board)*, 2004 FC 277, [2004] F.C.J. No. 418, regarding the scope of management rights under the PSSRA:

> The *Zirpdji (supra)* decision and subsequent decisions under the *PSSRA* have not clearly articulated the source of managements' authority to change hours of work from day work to shift work. The scope of management rights under the *PSSRA* regime has been outlined by the Federal Court as follows: The Treasury Board may do that which is not specifically or by inference prohibited by the statute or the collective agreement (*Brescia v. Canada (Treasury Board)*, 2004 FC 277).

[26] The Board further mentions that the scope of management rights under the PSSRA are outlined in subsection 11(2) of the *Financial Administrations Act* (FAA):

> I find subsection 11(2) of the *FAA* to be more specific in its application to this case:
>
> (2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,
>
> (a) determine the requirements of the public service with respect to human resources and provide for the allocation and effective utilization of human resources within the public service;
>
> […]

> (d) determine and regulate the pay to which persons employed in the public service are entitled for services rendered, the hours of work and leave of those persons and any matters related thereto;

[27] The Board has a special role and expertise in the resolution of differences arising in labour relations in the public sector. It does not, therefore, have to agree with either the applicants or the respondent regarding their interpretation of the collective agreement. I am convinced that the adjudicator considered the appropriate provisions of the collective agreement and interpreted those in accordance with normal principles of interpretation. The Board made use of jurisprudence and interpretative provisions of other statutes to understand the scope of managerial power with regards to changing day workers to shift workers. The applicants have failed to demonstrate that the Board's interpretation was patently unreasonable.

JUDGMENT

THIS COURT ORDERS that

The application for judicial review be dismissed.

"Pierre Blais"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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