

Date: 20070605

Docket: T-1062-06

Citation: 2007 FC 570

Ottawa, Ontario, the 5th day of June 2007

PRESENT: THE HONOURABLE MR. JUSTICE BEAUDRY

BETWEEN:

**TREASURY BOARD
(SOLICITOR GENERAL OF CANADA –
CORRECTIONAL SERVICE OF CANADA)**

Applicant

and

**ROBERT HUPPÉE, PAUL MAILLOUX
and PIERRE MAUGER**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for a judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a decision dated May 26, 2006, by Sylvie Matteau, Adjudicator (the adjudicator), pursuant to section 92 of the former *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (the PSSR Act). The adjudicator allowed the respondents' grievances and ordered the applicant to pay them the monthly allowance provided for in clause 6.01 of Appendix C of the collective agreement between the Treasury Board of Canada and the Public Service Alliance of Canada for the Operational Services Group.

I. ISSUE

[2] Is the adjudicator's decision reasonable?

[3] For the following reasons, the answer to this question is yes. Consequently, this application for judicial review will be dismissed.

II. FACTUAL CONTEXT

[4] Grievances were filed by three employees of the Correctional Service of Canada (CSC) at Leclerc Institution in Laval, Quebec. As handler/drivers, they are required to transport dangerous goods.

[5] At the employer's request, the respondents participated in the training on the transportation of dangerous goods offered by Transport Canada, and have a valid training certificate pursuant to the *Transportation of Dangerous Goods Act of 1992*, S.C., c. 34 (the Act).

[6] On August 4, 2003, the respondents informed their immediate supervisor that they had been certified to ship dangerous goods and requested payment of the monthly allowance provided for in clause 6.01.

[7] On August 6, 2003, the respondents were informed by their immediate supervisor that they were not entitled to the monthly allowance because they had no responsibility for the packaging and labelling of dangerous goods.

[8] The respondents filed grievances against this decision on August 11, 2003, and on September 2, 2003, in the case of respondent Pierre Mauger. All of the grievances were dismissed at each of the three levels on the grounds that the respondents had no responsibility for the packaging and labelling of dangerous goods for shipping.

[9] On March 16, 2005, the three grievances were referred to adjudication before the Public Service Staff Relations Board (PSSRB), which allowed the grievances. It is this decision which is the subject of this application for judicial review.

III. IMPUGNED DECISION

[10] In her decision, the adjudicator determined that two conditions are necessary for the allowance to be paid:

- (a) certification pursuant to the Act; and
- (b) being assigned responsibility for packaging and labelling dangerous goods for shipping in accordance with the Act.

[11] Only the second condition is in dispute. Since clause 6.01 of Appendix C of the collective agreement is clear, the adjudicator limited herself to determining whether the allowance was to be paid in the specific circumstances of these grievances. On the basis of the evidence adduced, the adjudicator came to the conclusion that the respondents were handling and shipping dangerous goods within the meaning of the Act, such as corrosive, explosive or infectious substances.

[12] In addition, the adjudicator noted that the employer had acknowledged in the work description for handler/drivers that their primary activities consisted in [TRANSLATION] “packaging, preparing and completing documents relating to the items, for storage or shipping to users”. The employer acknowledged that employees like the respondents are required to [TRANSLATION] “handle chemicals and dangerous goods”. They must also have knowledge of the regulations pertaining to dangerous goods in order to handle them with care.

[13] The adjudicator made reference to the *Transportation of Dangerous Goods Regulations*, SOR/2001-286 (Regulations) and determined that the respondents were required to label the goods for the purposes of transportation pursuant to the Act.

[14] Referring to the evidence adduced, the adjudicator found that the respondents were already performing these duties before they received their certificate and that, consequently, they were entitled to payment of the allowance referred to in clause 6.01, since they held the certificate in question and the employer assigned to them responsibility for the packaging and labelling of dangerous goods for shipping, pursuant to the Act.

[15] In allowing the grievances, the adjudicator ordered the employer to pay the allowance to the respondent Mr. Mailloux for the period from June 18, 2003, to February 26, 2005, the date of his retirement. Payment of the allowance was also ordered for the two other respondents retroactively to June 18, 2003.

IV. RELEVANT LEGISLATIVE PROVISIONS

[16] Clause 6.01 of Appendix C of the collective agreement reads as follows:

An employee certified pursuant to the <i>Transportation of Dangerous Goods Act</i> and who is assigned the responsibility for packaging and labelling of Dangerous Goods for shipping in accordance with the Act shall receive a monthly allowance of seventy-five dollars (\$75) in a month where the employee maintains such certification.	Un employé certifié aux termes de la <i>Loi sur le transport des marchandises dangereuses</i> à qui est confiée la responsabilité d'emballer et d'étiqueter des marchandises dangereuses pour le transport conformément à la Loi, doit recevoir une indemnité mensuelle de soixante-quinze dollars (75\$) pour chaque mois au cours duquel il ou elle conserve cette certification.
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[17] Section 2 of the Regulations provides the following definition of “handling”:

“handling” « manutention » “ handling ” means loading, unloading, packing or unpacking dangerous goods in a means of containment for the purposes of, in the course of or following transportation and includes storing them in the course of transportation;	« manutention » “ handling ” « manutention » Toute opération de chargement, de déchargement, d'emballage ou de déballage de marchandises dangereuses effectuée en vue de leur transport, au cours de celui-ci ou par après. Les opérations d'entreposage effectuées au cours du transport sont incluses dans la présente définition.
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V. ANALYSIS

Is the tribunal's decision reasonable?

Standard of review

[18] The standard of review that applies to this case must first be determined. The four factors set out in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 are analyzed in order to determine the standard that must be used by the Court in similar situations.

(i) *Privative clause/right of appeal*

[19] The Act does not contain a privative clause or a right of appeal. This factor is therefore neutral.

(ii) *The expertise of the tribunal*

[20] A grievance adjudicator has expertise in federal public service labour law. As the respondents point out, this is an exclusive jurisdiction. In this case, the adjudicator's role was not to interpret clause 6.01, since it is clear and unequivocal. Instead, the adjudicator's task was to apply clause 6.01 to the circumstances (the facts) giving rise to the grievances and to determine whether the allowance was to be paid. This task requires a certain competence in adjudicating grievances and a specialization in the analysis of employment contracts and prescribed standards. This factor therefore calls for a significant amount of curial deference.

(iii) *The purpose of the legislation*

[21] The purpose of clause 6.01 is to recognize the responsibility of employees regarding the risks in handling hazardous goods and substances. The allowance in question is therefore intended to compensate these employees by means of a monthly payment. In this context, the adjudicator must determine whether the conditions have been met for the allowance to be paid. This factor calls for less deference.

(iv) *The nature of the question*

[22] This is a question of mixed fact and law, and not a question of law alone, as the applicant claims. Nor is it a purely factual question, as suggested by the respondents. The adjudicator must consider or determine, on the basis of the facts, whether the conditions have been met for the allowance to be paid. To do so, she must verify whether there is legislation that may apply to the collective agreement and if it applies to the specific circumstances of the grievances filed. The caselaw supports the position that, in a case of mixed law and fact, less deference will be shown.

[23] The applicant maintains that the Court should adopt two standards of review, that of correctness for the question of interpreting the Act and the Regulations, and that of reasonableness *simpliciter* for the question of applying the facts to the Regulations (*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] S.C.J. No. 14, at paragraph 19 (QL)).

[24] However, the Court believes that, further to a pragmatic and functional analysis, the appropriate standard of review is reasonableness *simpliciter*.

[25] Having considered all of the evidence before the adjudicator as well as the impugned decision, the Court is satisfied that the decision is reasonable. After hearing the testimony, the adjudicator analyzed the work descriptions and the responsibilities assigned by the employer, and she found that the grievors were entitled to the allowance in question. According to the evidence, a witness for the employer acknowledged that the employees shipped bodily substances such as blood and urine on a daily basis. He also acknowledged that spills were possible and that products could

be damaged when they arrived at the store and that the employees had to pour them out and label them.

[26] In arriving at her conclusion, the adjudicator was not required to interpret the Act or the Regulations (*Reibin v. Canada (Treasury Board)*, [1996] F.C.J. No. 794 (F.C. Trial Division) (QL)). She mentioned them in order to retrieve the definitions and apply them to the work descriptions. This case is different from *Lévis, supra*, which basically dealt with conflicts between the *Cities and Towns Act* and the *Police Act*.

[27] The Court considers that the adjudicator asked herself the right question when she stated the following at paragraph 47 of the decision:

I therefore must determine whether or not the employer assigned responsibility to the grievors for packaging and labelling dangerous goods. The employer is correct in stating that the clause of the collective agreement is clear and that I am not required to interpret it. Rather, my role is to apply this provision to the situation before me and to determine whether or not this allowance will need to be paid.

[28] The applicant also submits that the adjudicator made a reviewable error in that her decision adversely affects its management powers. The Court does not share this view. The adjudicator did not in any way take away the employer's power to manage its business. The Court does not find unreasonable the following passage at paragraph 53 of the adjudicator's decision:

. . . Loading, unloading, packing or unpacking dangerous goods in a means of containment for the purposes of, in the course of or following transportation are activities included in the grievors' duties. Thus, transportation includes handling of the products.

[29] These observations are based on and supported by the evidence, both testimonial and documentary.

[30] The Court does not find that there is cause for intervention.

JUDGMENT

THE COURT ORDERS that:

1. The application for judicial review be dismissed. Without costs as agreed between the parties.

“Michel Beaudry”

Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1062-06

STYLE OF CAUSE: TREASURY BOARD
(SOLICITOR GENERAL OF CANADA –
CORRECTIONAL SERVICE OF CANADA)
v. ROBERT HUPPÉE, PAUL MAILLOUX AND
PIERRE MAUGER

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 16, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** The Honourable Mr. Justice Beaudry

DATED: June 5, 2007

APPEARANCES:

Simon Kamel FOR THE APPLICANT

James Cameron FOR THE RESPONDENTS

SOLICITORS OF RECORD:

John H. Sims, Q.C. FOR THE APPLICANT
Deputy Attorney General of Canada
Ottawa, Ontario

RAVEN, CAMERON, BALLANTYNE FOR THE RESPONDENTS
& YAZBECK LLP/s.r.l.
Ottawa, Ontario