Federal Court  Cour fédérale

Date: 20100219

Docket: T-797-09

Citation: 2010 FC 158

Ottawa, Ontario, February 19, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MARCELINE NEMOURS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Marceline Nemours (the applicant) seeks judicial review of a decision of Michèle A. Pineau (the adjudicator) dated April 15, 2009, rendered pursuant to the *Public Service Labour Relations Act*, S.C. 2003, c. 22, section 2 (the Act). The adjudicator found that the applicant is not an "employee" within the meaning of the Act and therefore declined jurisdiction.

Facts

[2] The applicant has been working for the Department of Veterans Affairs as a nurse at Ste. Anne's Hospital since May 25, 1992. She was initially hired to work on a full-time basis for a three-month term. She then worked part time for another term, this time from September 7 to November 15, 1992. She kept working for the hospital on a continuous basis until her employment was terminated on November 17, 2005. Her employment at the hospital amounted to a series of successive term appointments, either in part-time positions for a fixed period or on an on-call basis. During that entire time, except for the initial term, she was registered with an agency and worked for the hospital through that agency.

[3] The applicant's employment was terminated on November 17, 2005. At that time, she was a so-called on-call employee, and her letter of offer (which she never signed) states that her period of employment was from November 1, 2005, to January 30, 2006.

[4] On December 23, 2005, the applicant filed a grievance contesting her termination. Throughout the entire grievance process, the hospital submitted that the applicant is not an employee within the meaning of the Act and that the grievance is therefore barred. The grievance was referred to an adjudicator. The adjudicator's decision is now the subject of this application for judicial review.

Impugned decision

[5] The adjudicator summarized the facts, the evidence and the parties' arguments. For the purposes of this decision, there is no need to list them all, since they are uncontested. The first issue addressed by the adjudicator was whether the applicant is an employee within the meaning of the Act. That issue determined whether the adjudicator should continue to hear the grievance.

[6] The adjudicator stated that employee status cannot be inferred from a situation of fact, as this status is defined by the Act (see *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 [*Econosult*]). She noted that the wording of the definition of "employee" at subsection 2(1) of the Act is very specific. In her view, the issue is whether the applicant's status must be determined on the basis of her last period of employment alone, or all of her periods of employment since 1992.

[7] The adjudicator noted that the applicant had worked either part time or on an on-call basis and that her periods of employment had been successive. The applicant had never claimed employee status before.

[8] The adjudicator determined that when the applicant's employment was terminated, she did not meet the definition of an employee under the Act, that is, she was not ordinarily required to work more than one third of the normal period for persons doing similar work. The fact that she worked more than that at certain times of the year before her termination was irrelevant because she had not worked those hours during the period immediately preceding the termination

of her employment. The adjudicator was of the opinion that she should consider the applicant's status as it was at the precise moment of her termination, since that was the period that mattered.

[9] The applicant's status was that of an on-call employee not ordinarily required to work more than one third of the normal period for persons doing similar work. She was not included under subsection 206(1) of the Act because she was not an employee at the time of her termination.

[10] The adjudicator considered whether she could alter the scope of the definition at subsection 206(1) by exercising remedial powers in equity. After comparing her remedial powers with those granted to adjudicators under the *Canada Labour Code*, R.S.C. 1985, c. L-2, she concluded that they were not the same. In her opinion, although she had the power to decide a grievance and "make the order that . . . she considers appropriate", that provision was limited by the proviso that the order be in compliance with the Act. Considering the presumption of harmony and consistency between statutes, she took the view that the power under the Act was more limited and that she did not have jurisdiction to expand the scope of the definition set out at subsection 206(1).

[11] Regarding the case law, she explained that *Econosult* was still good law. She noted that employees of the federal public administration make up a special category of employees whose positions are established by the Treasury Board, and the Public Service Commission has the exclusive right to appoint them to the public service. The creation of a special class of employees

to account for the applicant's situation is therefore inconsistent with the purpose of the Act. The adjudicator also relied on *Canada (Attorney General) v. Marinos*, [2000] 4 F.C. 98 (F.C.A.) (*Marinos*), which deals with the principle that an adjudicator must refer to employment legislation when applying legal standards.

[12] The adjudicator distinguished the facts in this case from those in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015. Finally, she found that the findings in *B.C. Health Services* (*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391) were not relevant, since there was no evidence the applicant's termination infringed her freedom of association or equality rights.

Issues

[13] The issues in this case are as follows:

a. What is the applicable standard of review in the case at bar?

b. Is the adjudicator's decision to the effect that the applicant is not an employee within the meaning of paragraph 2(1)(*c*) and subsection 206(1) of the Act reasonable?

Relevant legislation

[14] The relevant excerpts are reproduced in the Annex to these reasons.

What is the applicable standard of review in the case at bar?

[15] The parties do not agree on the standard of review to be applied. The applicant submits that the correctness standard should apply, while the respondent argues that the appropriate standard is reasonableness.

[16] According to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Court may rely on case law if it is satisfied that the applicable standard has already been clearly determined. The respondent notes that *Marinos*, cited by the applicant, was decided on the basis of the former act (*Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, repealed), which did not have a privative clause. An analysis is therefore required to determine the applicable standard.

[17] The Supreme Court stated the following in *Dunsmuir* at paragraph 55:

> A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> · A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> · A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> · The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[18] In the case at bar, the adjudicator is subject to a privative clause, which indicates that Parliament saw a need for considerable deference.

[19] The Commission has an expertise in the areas within its jurisdiction. However, *Marinos* reminds us that an adjudicator can claim no expertise in the interpretation of the Act where the question at issue requires the adjudicator to define the limits of his or her own jurisdiction.

[20] As for the nature of the question, although the adjudicator treated it as a jurisdictional one, I do not think that it is one in the same sense of "jurisdiction" as the Supreme Court defines it in *Dunsmuir* at paragraph 59. I agree with the respondent's argument to the effect that this is rather a question of mixed fact and law, since the evidence must be assessed to determine whether the applicant complies with the Act's provisions concerning the word "employee" (*Eswick v. Canada (Attorney General)*, 2007 FC 894, 319 F.T.R. 290 at paragraphs 79 and 80).

[21] I also cannot agree that this question is of central importance to the legal system and outside the specialized area of expertise of the tribunal. Questions of mixed fact and law are subject to the reasonableness standard (*Dunsmuir* at paragraph 53).

[22] I would therefore apply the reasonableness standard.

Is the adjudicator's decision to the effect that the applicant is not an employee within the meaning of paragraph 2(1)(c) and subsection 206(1) of the Act reasonable?

Applicant's submissions

[23] The applicant notes that the analysis of whether a person is "ordinarily required to work more than one third of the normal period for persons doing similar work" cannot be limited to the first two weeks of the most recent employment contract in a case where the person has 13 years of uninterrupted service.

[24] The applicant objects to the approach used by the adjudicator and suggests that if we looked no further than the language and form of the employment contract, it would allow the employer to impose employment contracts that do not reflect the actual hours assigned, thus depriving employees of their remedies. In her view, the hospital cannot rely on the contract to circumvent the Act, and the form of the contract is not determinative at all. She adds that the hospital's characterization of her employment status cannot be allowed to stand because "on-call" status does not exist under the legislation governing employment in the public service.

[25] The applicant argues that if the adjudicator had analyzed the evidence on the record, she would have been forced to conclude that the applicant is an employee within the meaning of the Act. She notes that the documents on the record clearly show that she worked more than 90 days, this being one third of the normal period for persons doing similar work, in the continuous and cumulative period preceding her termination.

[26] The applicant relies on a table, prepared by the adjudicator, summarizing her employment contracts since 1992 (Adjudicator's Decision at paragraph 9). She also submits her own tables showing her part-time and on-call hours for the fiscal years since 1999 (Applicant's Record page 474 at paragraphs 15 and 16). She claims that these tables show that during her last four years of employment, she worked more than 90 days a year. She notes that the facts demonstrate that throughout her entire period of employment, she worked at the hospital every week, performing the same work as the nurses with indeterminate status and following the same protocols and directives applicable to other employees.

[27] The applicant further submits that the fact that there is no such thing as "on-call" employee status under the relevant legislative scheme speaks in favour of an in-depth assessment of the circumstances surrounding her conditions of employment. She argues that even when she was "on-call", she ordinarily worked more than a third of the normal number of hours.

[28] The applicant notes that there are only three types of appointments: indeterminate, term and casual (period not exceeding 90 working days in one calendar year in any particular department). She states that she is not a casual employee, nor is she a term employee appointed for a term of less than three months, since some of her contracts over the years had on-call terms exceeding 90 days.

[29] Since the term "on-call" is not defined anywhere in the Act, the applicant submits that her periods of on-call employment were actually term appointments. She refers to the *Term*

Employment Policy (Treasury Board, *Term Employment Policy*, on-line: http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12584&section=text (April 1, 2003) (the Policy), which requires that where a person who has been employed in the same department/agency as a term employee for a cumulative working period of three years, without a break in service longer than 60 consecutive calendar days, the department/agency must appoint the employee indeterminately at the level of his/her substantive position.

[30] The applicant submits that when the period of employment is calculated as part of the analysis of whether she is an employee within the meaning of the Act, that calculation must take into account her entire period of employment, since that constitutes a cumulative working period within the meaning of the Policy. The adjudicator should have considered a period of at least three years leading up to her termination.

[31] The applicant also points out that when determining employee status under the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.), a period of one year must be taken into consideration. She therefore asks why the adjudicator only considered her last employment contract.

[32] Finally, the applicant submits that the expression “a person not ordinarily required to work more than one third of the normal period for persons doing similar work” is clear and unequivocal and should be given its ordinary meaning. In her view, the analysis necessarily involves a comparison between the hours she normally worked and those worked by other nurses

in the same bargaining unit. She proposes that such an interpretation is consistent with the principle that social legislation ought to be interpreted in a broad and generous manner. Such an interpretation is also in keeping with objectives in the Act's preamble, which states that "the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment". She also refers to *BC Health Services*, in which the Supreme Court of Canada recognized a constitutionally protected right to collective bargaining. She suggests that the adjudicator's interpretation infringes that right and is contrary to the principle of interpretation to the effect that legislation is presumed to be in conformity with the Charter.

[33] In conclusion, the applicant submits that the adjudicator's decision does not stand up to the standard of review, be it correctness or reasonableness, since it is based on an erroneous finding of fact to the effect that the applicant was an on-call employee. She also argues that the adjudicator's interpretation is inconsistent with well-established principles.

Respondent's submissions

[34] In response, the respondent submits that the adjudicator reasonably concluded that the applicant was not ordinarily required to work more than one third of the normal period for persons doing similar work and therefore is not an employee within the meaning of the Act. The respondent proposes that the decision is based on an interpretation consistent with both the language of the Act and the rules of interpretation.

[35] The respondent notes that according to the rules of interpretation, the Act is deemed to have been drafted in accordance with the rules of language in common use (P.-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000 at page 261). He cites the definitions of the words “normal” and “ordinarily” in support of his argument that the wording of the Act indicates that Parliament intended that the definition of “employee” should exclude employees who sometimes, on rare occasions, are required to work more than one third of the normal period for persons doing similar work. He also calls attention to Parliament’s decision to precede the word “required” with the word “ordinarily” and reiterates the principle of interpretation that Parliament does not speak in vain.

[36] The respondent notes that when the applicant’s employment was terminated, her offer of employment, which took effect on November 1, 2005, stipulated that she would not usually have to work more than one third of the normal period, so she could not be considered to be an employee within the meaning of the Act. On her last day of work, that is November 14, 2005, she had worked only 3 days (22.5 hours).

[37] The respondent argues that the periods of employment prior to the November 1, 2005, contract are not relevant to establishing whether the applicant could be considered to be an employee.

[38] Regarding the Policy, the respondent suggests that it was not submitted to the adjudicator. Even if the adjudicator had to consider the Policy, she was not bound by it (*Spencer*

v. Canada (Attorney General), 2008 FC 1395, [2008] F.C.J. No. 1840 (QL); *Spencer v. Canada (Attorney General)*, 2010 FC 33, [2010] F.C.J. No. 29 (QL) [*Spencer*]).

[39] Finally the respondent submits that the adjudicator's decision was not only reasonable, but correct.

Analysis

[40] The issue before the Court is whether it was reasonable for the adjudicator to conclude that the applicant did not meet the definition of an employee under paragraph 2(1)(*c*) and subsection 206(1) of the Act. I am of the opinion that the Supreme Court's decision in *Econosult*, above, applies in this case.

[41] As Justice Sopinka wrote, "there is just no place for a species of *de facto* public servant who is neither fish nor fowl" (*Econosult*, above, at paragraph 25). The adjudicator defined the issue correctly when she considered whether she should take into account the applicant's last period of employment or the period since 1992 to determine whether the applicant meets the definition of an employee.

[42] Under the Act, any person employed in the public service "not ordinarily required to work more than one third of the normal period for persons doing similar work" is excluded from the definition of an employee (paragraph 2(1)(*c*)). The adjudicator concluded that the fact that the applicant had worked more than that during certain periods in the years leading up to

termination was irrelevant because she had not worked those hours during the period of employment immediately preceding her termination. The adjudicator was of the opinion that she should take into account the applicant's status at the precise moment she was terminated, as the period at the time of her termination was the one that was relevant to the case.

[43] Each contract offered to and signed, or not, by the applicant before the period beginning November 1, 2005, gave her a different status and, consequently, certain rights. However, in the case at hand, I am of the opinion that the adjudicator did not err in considering the contract that was in force at the time of the applicant's termination to determine her status. Nothing in the Act required the adjudicator to analyze a three-year or one-year period before the termination to determine whether the applicant met the definition of an employee. The employment contract is clear, and the adjudicator correctly directed herself in law.

[44] As regards the policy, this document was not filed in evidence, so the adjudicator could not consider it in her analysis. Even if it had been, I agree with the recent decisions in *Spencer*, above, that the policy does not have force of law.

[45] The applicant correctly pointed out that "on-call" status does not exist in the legislation. However, this is not the first time that the respondent has characterized certain of its employees as such (see *Marino*s, above). What is important here in defining the applicant's status is the contract at issue (page 422, Applicant's Record), which clearly states, [TRANSLATION] ". . . Given that you will not be required to work more than one third of the normal hours of work, you are

not governed by the Canadian *Public Service Employment Act*. For this reason, you cannot be considered to be an employee within the meaning of that Act . . .".

[46] The adjudicator rendered a decision that was reasonable and, I would even say, correct in excluding the applicant from the definition of an employee under paragraph 2(1)(*c*) and subsection 206(1) of the Act.

[47] By agreement of the parties, I award a lump sum for costs.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. The applicant shall pay costs in a lump sum in the amount of $3,000. This sum includes disbursements and GST.

"Michel Beaudry"
Judge

Certified true translation
Michael Palles

Appendix

Public Service Employment Act, S.C. 2003, c. 22, section 2.

2. (1) The following definitions apply in this Act.	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
"employee" « fonctionnaire »	
"employee", except in Part 2, means a person employed in the public service, other than	« fonctionnaire » Sauf à la partie 2, personne employée dans la fonction publique, à l'exclusion de toute personne :
(*a*) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;	a) nommée par le gouverneur en conseil, en vertu d'une loi fédérale, à un poste prévu par cette loi;
(*b*) a person locally engaged outside Canada;	b) recrutée sur place à l'étranger;
(*c*) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;	c) qui n'est pas ordinairement astreinte à travailler plus du tiers du temps normalement exigé des personnes exécutant des tâches semblables;
(*d*) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members;	d) qui est membre ou gendarme auxiliaire de la Gendarmerie royale du Canada, ou y est employée sensiblement aux mêmes conditions que ses membres;
(*e*) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;	e) employée par le Service canadien du renseignement de sécurité et n'exerçant pas des fonctions de commis ou de secrétaire;
(*f*) a person employed on a casual basis;	f) employée à titre occasionnel;
(*g*) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;	g) employée pour une durée déterminée de moins de trois mois ou ayant travaillé à ce titre pendant moins de trois mois;
(*h*) a person employed by the Board;	h) employée par la Commission;

(*i*) a person who occupies a managerial or confidential position; or

i) occupant un poste de direction ou de confiance;

(*j*) a person who is employed under a program designated by the employer as a student employment program.

j) employée dans le cadre d'un programme désigné par l'employeur comme un programme d'embauche des étudiants.

206. (1) The following definitions apply in this Part.

206. (1) Les définitions qui suivent s'appliquent à la présente partie.

"employee"
« fonctionnaire »

« fonctionnaire »
"employee"

"employee" has the meaning that would be assigned by the definition "employee" in subsection 2(1) if that definition were read without reference to paragraphs (*e*) and (*i*) and without reference to the words "except in Part 2".

« fonctionnaire » S'entend au sens de la définition de ce terme au paragraphe 2(1), compte non tenu des exceptions prévues aux alinéas e) et i) de celle-ci et des mots « sauf à la partie 2 ».

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

(*c*) in the case of an employee in the core public administration,

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la Loi sur la gestion des finances publiques pour rendement insuffisant, soit de l'alinéa 12(1)e)

paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(ii) la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;

(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

228. (1) If a grievance is referred to adjudication, the adjudicator must give both parties to the grievance an opportunity to be heard.

228. (1) L'arbitre de grief donne à chaque partie au grief l'occasion de se faire entendre.

(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. The adjudicator must then

(2) Après étude du grief, il tranche celui-ci par l'ordonnance qu'il juge indiquée. Il transmet copie de l'ordonnance et, le cas échéant, des motifs de sa décision :

(*a*) send a copy of the order and, if there are written reasons for the decision, a copy of the reasons, to each party, to the representative of each party and to the bargaining agent, if any, for the bargaining unit to which the employee whose grievance it is belongs; and

a) à chaque partie et à son représentant ainsi que, s'il y a lieu, à l'agent négociateur de l'unité de négociation à laquelle appartient le fonctionnaire qui a présenté le grief;

(*b*) deposit a copy of the order and, if there are written reasons for the decision, a copy of the reasons, with the Executive Director of the Board.

b) au directeur général de la Commission.

(3) In the case of a board of adjudication, a decision of a majority of the members on a grievance is deemed to be a decision of the board in respect of the grievance, and the decision must be signed by the chairperson of the board.

(3) La décision de la majorité des membres d'un conseil d'arbitrage de grief au sujet d'un grief constitue la décision du conseil. Elle est signée par le président du conseil.

(4) If a majority of members of the board of adjudication cannot agree on the making of a decision, the decision of the chairperson of the board is deemed to be the decision of the board.

(4) Lorsqu’il n’y a pas de majorité, la décision du président du conseil constitue la décision du conseil.

FEDERAL COURT

SOLICITORS OF RECORD

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